2015 ONSC 6772
Ontario Superior Court of Justice [Commercial List]

1079268 Ontario Inc. v. Goodlife Fitness Centres Inc.

2015 CarswellOnt 16683, 2015 ONSC 6772, 260 A.C.W.S. (3d) 359

1079268 Ontario Inc., Applicant and Goodlife Fitness Centres Inc., Respondent

Mesbur J.

Heard: October 5, 2015
Judgment: November 2, 2015
Docket: CV-10206-00CL

Counsel: Kevin Sherkin, Carmine Scalzi, for Applicant
John Downing, for Respondent

Subject: Civil Practice and Procedure; Contracts; Evidence; Insolvency; Property

Headnote

Real property --- Landlord and tenant — Premises — Inclusions in demise — Miscellaneous

Landlord and tenant entered into lease in 2006 for premises for fitness facility — Lease indicated premises were 24,110 square feet based on tenant's measurements, and rent was calculated on basis of square footage — Around 2007, tenant started occupying basement, renovated it, and used it for its business — In 2013, tenant sought protection under Companies' Creditors Arrangement Act — Landlord took issue with tenant's use of basement, which it argued was not covered by lease — Assignee ultimately took over lease — Assignment was subject to resolution of dispute regarding basement — Landlord reached settlement with tenant for past rent — Landlord brought application against assignee, in part for declaration that basement was not included in lease and for additional rent for basement — Application granted in part — Lease was internally inconsistent since it described property as both "whole property" and also "portion" comprising certain specified elements — Lease also required tenant to pay all utilities for building rather than proportionate share — When read as whole, lease did not include basement — Lease described "Premises" as three floors plus mezzanine and included floor plans that did not cover basement — Measurements given for three floors plus mezzanine did not include square footage of basement — Parties had negotiated about additional space in another building, which would not have been necessary if lease included basement — Estoppel certificate provided by landlord in 2011 could not operate to bring assignee's illegal use of non-leased premises into ambit of lease — Lease was based on square footage, so assignee had to pay rent for basement since March 27, 2013.

Real property --- Landlord and tenant — Nature and elements of lease — Rectification — Miscellaneous

Landlord and tenant entered into lease in 2006 for premises for fitness facility — Lease indicated premises were 24,110 square feet according to tenant's measurements, and rent was calculated on basis of square footage — Landlord waived entitlement to take its own measurements — Around time that lease was taken over by assignee in 2013, landlord discovered measurements were wrong — Landlord brought application against assignee, in part for rectification of lease to reflect actual square footage — Application granted in part, on other grounds — Landlord had expressly given up right to measure premises and to have lease adjusted to reflect actual square footage — Having expressly given up that right, landlord could not now try to assert that very right.

Table of Authorities

Cases considered by *Mesbur J.*:

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, *(*sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — considered

Rossiter v. Swartz (2013), 2013 ONSC 159, 2013 CarswellOnt 301 (Ont. S.C.J.) — considered

Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust (2007), 2007 CarswellOnt 1705, 222 O.A.C. 102, 2007 ONCA 205, 29 B.L.R. (4th) 312, 56 R.P.R. (4th) 163, 85 O.R. (3d) 254 (Ont. C.A.) — followed

269893 Alberta Ltd. v. Petersen (2015), 2015 BCSC 184, 2015 CarswellBC 298, 52 R.P.R. (5th) 99 (B.C. S.C.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
Generally — referred to

Real Property Limitations Act, R.S.O. 1990, c. L.15
Generally — referred to

s. 2 — considered

s. 17(1) — considered

APPLICATION by landlord for declaration that basement was not included in lease and for rectification of lease to reflect actual square footage.

***Mesbur J.*:**

Nature of the application:

1 This application arises out of the parties' disagreement concerning the proper interpretation of a commercial lease. The

applicant ("107") owns a commercial building at 635 Danforth Avenue in Toronto. In 2006 it entered into a lease with Extreme Fitness Inc. regarding the building. Both parties retained lawyers to negotiate the lease. The lease went through numerous iterations before 107 and Extreme finally executed it on October 30, 2006.

2 Extreme and 107 also had negotiations about Extreme's renting additional space in a building next door at 637 Danforth Avenue. 107's principal also owned that property, through another numbered company. Although the parties entered into a letter of intent regarding 637 Danforth, they never concluded their negotiations, and never entered into a lease regarding 637 Danforth.

3 In 2013, as a result of financial difficulties, Extreme tried to restructure under the *Companies' Creditors Arrangement Act (CCAA)*. In the course of those proceedings, the respondent, GoodLife Fitness Centres Inc. (GoodLife) entered into an Asset Purchase Agreement in which, among other things, GoodLife would take an assignment of Extreme's interest in the lease with 107 for 635 Danforth. The transaction required court approval.

4 On the sale approval motion, 107 opposed the sale, alleging Extreme was in breach of its obligations under the lease. First, 107 took the position that the lease did not extend to the basement portion of the building, and since Extreme had taken over occupation of the basement, renovated it and used it for its business, Extreme owed additional rent in relation to the basement. Second, 107 also took the position that the actual square footage of the premises was significantly greater than the figure of 24,110 square feet referred to in the lease. 107 said Extreme had misled it as to the actual size of the premises, and therefore the lease should be rectified to reflect larger premises and the rental should be increased accordingly.

5 The court approved the asset purchase agreement, but ordered that $430,000 be held pending the outcome of a motion which 107 was to bring against Extreme to determine if Extreme owed any back rent, and whether the lease should be rectified on a going forward basis between 107 and GoodLife, and to determine if GoodLife would owe additional rent for the basement and for more overall square footage.

6 107 settled its claims against Extreme. The court then ordered that the going forward claims against GoodLife as assignee should be adjudicated in a separate application within the *CCAA* proceeding. This is that application. 107's claims on this application relate only to GoodLife's occupation of the building since it took the assignment of the lease on March 27, 2013.

The parties' positions and the relevant legal principles

7 Simply put, 107's position is what I have set out above. It wants GoodLife to pay additional rent for both the basement and the actual square footage of the balance of the building.

8 GoodLife takes the position that first, the basement of the building always formed part of the leased premises. Second, GoodLife says the actual square footage of the building is irrelevant, since the rental was never based on a price per square foot, but rather, was a global figure without reference to the actual size of the premises. Not only that, GoodLife says since 107 specifically gave up its right in the lease to re-measure the premises and have the rent adjusted, it cannot now assert that claim.

9 GoodLife goes further, and says even if 107's position is correct, it is statute barred from its action, or alternatively, is precluded from obtaining any relief, based on principles of promissory estoppel, estoppel, acquiescence and delay.

10 As to the law, both parties essentially agree on the governing legal principles in this case. Both rely on the Supreme Court of Canada's decision in *Creston Moly Corp. v. Sattva Capital Corp.*[1] which, as the parties put it in their factums, says a commercial contract must be interpreted as a whole, in a way that gives meaning to all its terms, and avoids interpreting it in a way that would render one or more of its terms ineffective.

11 GoodLife says the Ontario Court of Appeal summarized the general principles for interpreting commercial contracts in *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*[2] where the court said a commercial contract is to be interpreted:

a) As a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;

b) By determining the intention of the parties in accordance with the language they have used in the written document and based on the 'cardinal presumption' that they have intended what they have said;

c) With regard to the objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties, and

d) In a fashion that accords with sound commercial principles and good business sense; and that avoids a commercial absurdity.[3]

12 107 does not disagree with this statement of the law. It goes on to say interpreting a written contractual provision must first be grounded in the text, and read in light of the entire contract. Although the court can rely on surrounding circumstances in the "interpretive" process, the court cannot use the surrounding circumstances to deviate from the actual text so that the court is essentially creating a new contract.[4]

13 *Sattva* goes on to say the court will not use the parol evidence rule to preclude evidence of the surrounding circumstances. Those surrounding circumstances can be used as an interpretive aid to determine the meaning of the written words.

14 The parties essentially agree that it is "trite law" that where a term of a contract is unclear, the court may indeed look to evidence outside the contract in order to resolve the ambiguity.

15 Here, the landlord, 107, submits the wording of the lease "clearly and unequivocally" excludes the basement of the property as part of the leased premises. It relies on the following factors to support its position:[5]

a) Section 1.1(d) of the Lease describes the premises as consisting of three floors plus mezzanine. The square footage of each is set out specifically, and those figures total 24,110 square feet;

b) The basement, which is 4,458 square feet is not part of the premises as defined above. If it were to be added to the "Rentable Area of Premises", the total area would have been 28,568 square feet, not the 24,110 referred to in the lease;

c) The definition of "Premises" refers to Schedule A, which includes floorplans of the ground floor, second floor, third floor, platform area and mezzanine. The Schedule does not include a floorplan of the basement. Extreme prepared Schedule A; and

d) The term Premises is defined again in the lease at 1.2(p), as that *portion* of the property identified in section 1.1(d) and having Rentable Area as set out in section 1.1(e). The landlord therefore submits that the Premises is described as a "portion" of the Property, as opposed to the "entire property", because the basement was not included in the lease.

16 GoodLife takes the position that the lease clearly includes basement of the building. GoodLife says the history of the negotiations of the lease clearly shows the rent was not to be based on a per square foot amount, and the entire building was being leased for the global monthly sum. It relies on some of the following to support its position:[6]

a) "premises" are first defined as "the entire property";

b) "Property" is defined as the legal description of the building;

c) The basic rent in the lease is in round numbers, on a monthly and yearly basis. The per square foot figure is expressed to a third decimal point;

d) The deletion of the provision whereby the tenant would pay only a portion of the operating costs suggests the tenant

was leasing the basement as well;

e) During negotiations the tenant's lawyer suggested to the landlord's lawyer that the landlord no longer required the use of the kitchen in the basement and the space would therefore become part of the leased premises. Since the landlord's lawyer did not specifically respond to this comment, but rather noted the kitchen is in the basement of the building, the tenant suggests this supports the view the basement was part of the leased premises; and,

f) The measurement clause was deleted from the lease. The tenant suggests a measurement provision would only be needed if rent was based on a per square foot amount. Since the provision was deleted, the tenant takes the position the rent was a global amount, unrelated to the actual square footage of the building.

17 GoodLife goes further, and says 107 consented in writing to the tenant's occupation of the basement, and is therefore estopped from asserting that claim now. It also takes the position 107's claim is time barred, or alternatively, 107's delay and acquiescence to Extreme's occupation of the basement should operate to deny its claims.

18 I turn now to an examination of the lease itself and the claims and defences raised by each of the parties.

Discussion:

The lease itself:

19 The lease is hardly a model of clarity. Given the parties' contrary positions on what the lease "clearly" means, I must therefore consider the terms of the lease itself, in context of the overall objective evidence concerning the factual matrix underlying the lease. I must answer the following questions in this application:

a) Is the basement part of the leased premises or not?

b) If the basement is not part of the leased premises, does the tenant owe additional rent for its use of it, based on a square foot rate or *quantum meruit* basis as occupation rent, or is the rental in the lease a global figure, without any reference to the actual square footage of the building and a rate per square foot?

c) Is the landlord precluded from succeeding on its claims either because of a limitation period, or on the basis of promissory estoppel, acquiescence or delay?

d) Does the fact the building is actually larger than what the lease says entitle the landlord to rectification of the lease and a higher rental for the premises.

20 I begin with the executed lease to begin to address these issues. The lease contains a section it calls "Basic Terms" (Section 1.1) and another sections called "Definitions" (Section 1.2)

21 The Basic Terms include, among other terms, the following which are of particular importance in this proceeding: "Property", "Premises", "Rentable Area of Premises" and "Basic Rent". These "Basic Terms" are described as follows:

a) Section 1.1(c): Property: the development situate on the Lands legally described as Part Lot 7-8, Plan 200 Toronto and Part Lot 24-27, Plan 306E as in CT 82043, City of Toronto (being PIN 21062-0414 LT) and municipally known as 635 Danforth Avenue, Toronto, Ontario M4K 1R2;

b) Section 1.1 (d): Premises: the entire Property. The Premises consist of three floors plus mezzanine, and the floors have the following areas: ground floor 11,461 square feet, second floor 5,526 square feet, third floor 1,026 square feet, a platform area of 1,654 square feet and a mezzanine of 4,443 square feet, which floors are shown on the plans annexed as Schedule "A";

c) Section 1.1(e) Rentable Area of Premises: approximately 24,110 square feet, subject to Section 2.2;[7] and

d) Section 1.1(g): Basic Rent (Section 4.1):

Period	Per Sq Ft./Year	Per Year	Per Month
Term 1-2	$24.786	$597,600.00	$49,800.00
Renewal 1:3-5	$24.786	$597,600.00	$49,800.00
Renewal 2:6-10	$25.881	$624,000.00	$52,000.00
Renewal 3:11-15	$26.768	$648,000.00	$54,000.00

22 The Definitions section says "In this Lease, unless there is something in the subject matter or context inconsistent therewith, the following terms have the following respective meanings:

a) Section 1.2(p): "Premises" means the portion of the Property identified in Section 1.1(d) and having the Rentable Area as set out in Section 1.1(e);

b) Section 1.2(u): "Rentable Area of the Premises" means the Premises measured to the outside surface of the outer building wall and to the centre line of any interior walls separating the Premises from adjoining premises intended for leasing or separating the Premises from corridors or other parts of the Common Areas:

c) Section 1.2(v): "Rentable Area of the Property" means the aggregate of the rentable area of all premises in the Property that are rented, or designated or intended by the Landlord to be rented (whether actually rented or not), calculated in the same manner as the Rentable Area of the Premises

23 Originally, early drafts of the lease had a "measurement" clause, permitting the landlord, at its expense, to measure the property and have the rent adjusted if the measurements in the lease were inaccurate. The measurement clause is marked as "Intentionally Deleted" in the executed lease.

24 Similarly, an original clause headed "Proportionate Share", which would have had the tenant pay only a portion of the building's operating costs is also "Intentionally Deleted".

Is the basement included in the lease?

25 In order to decide whether the basement is included in the lease, I must first answer the question of what constitutes the "premises" that 107 has leased under the lease. First, "premises" is said to be "the entire Property". Since "Property" is described as the development situate on the land, GoodLife interprets this as meaning the entire building, and thus, GoodLife says, the lease must include the basement, since it is part of the development.

26 The problem, of course, is that the section goes on to describe "Premises" as three floors plus a mezzanine. They are further described in the floorplans attached at Schedule A, which do not include a floorplan of the basement. The given measurements for the three floors plus mezzanine in Section 1.1(d) total 24,110 square feet. This is the figure in the term "Rentable Area of Premises" at section 1.1(e). It does not include the square footage of the basement, which apparently is another roughly 4,450 square feet.

27 107 says the wording of the Lease "... clearly and unequivocally excludes the Basement ... for the following reasons"[8] :

a) Section 1.1(d) of the lease defines Premises as consisting of three floors plus mezzanine. It sets out the square footage of those floors (shown on the plans at Schedule A to the lease) as 24,100 square feet.

b) The basement is 4,458 square feet. If it were part of the Rentable Area of the Premises, to total would have been 28,568 square feet, as opposed to 24,100 square feet.

c) There is no floor plan of the basement in Schedule A. Extreme prepared the Schedules;

d) The lease describes "Premises" in s.2 (p) as "that portion of the Property identified in Section 1.1(d) and having Rentable Area as set out in Section 1.1(e)."

28 107 argues the interplay of these provisions, coupled with Schedule A, lead to the inescapable conclusion that the basement is not part of the leased premises.

29 107 goes further, and says that surrounding circumstances confirm its view. It says there were no floor plans of the basement in Schedule A because the basement was never part of the leased premises. It points to the fact that Extreme needed about 30,000 square feet for its operations, and therefore entered into the letter of intent to lease between 5,000 and 6,000 square feet in the adjacent property. That additional space, 107 argues, would have brought the total space leased to about 30,000 square feet. If the basement at 365 were included in the lease, it would have added an additional 4,443[9] square feet to the premises, bringing the total area rented to 28,558 square feet, or close to the 30,000 Extreme needed.

30 107 also suggests that while it was prepared to let Extreme use the basement or part of it for storage, it was never to be part of the leased space and used for Extreme's business operations.

31 GoodLife sees things differently. When it looks at the lease, it points as much to what is included as to what has been intentionally deleted from the lease over the negotiating process.

32 First, GoodLife points out that in the basic terms of the lease, the property constitutes the legal description of the property, and premises are first described as the "whole property".

33 GoodLife also notes that in the first drafts of the lease, the tenant was to pay a proportionate share of taxes and utilities, whereas in the final draft, that provision has been intentionally deleted, and the tenant has always paid 100% of those costs. This, it says, shows the tenant was leasing all of the building, including the basement.

34 The only thing that is clear is that the lease is internally inconsistent. It describes the property as both "the whole property" and a "portion" comprising certain specified elements. I cannot give meaning to all these terms, since some contradict others. It is therefore helpful to consider some of the features of the negotiations to inform my decision.

35 Extreme had said they needed about 30,000 square feet for their operations. 107 did not measure the property. Instead, 107 gave floorplans to Extreme, and asked it to do the measurements instead. Extreme did, and provided the measurements set out in section 1.1(d) of the lease. The "three floors plus mezzanine" were said to have a total area of 24,110 square feet. These measurements did not include the basement. Apparently, the basement has about 4,458 square feet. During the negotiations up to the execution of the lease, there was a kitchen occupying about half of the basement area. 107 initially wished to continue to have access to the kitchen and use it.

36 In the first draft lease[10] the Rentable Area of the Premises is stated to be approximately 30,000 square feet, subject to Section 2.2, which provided for the landlord to have the Rentable Area measured by an arms-length architect (the "Measurement" clause). Extreme's lawyer asked 107's lawyer to "specify if this is all at grade level or if there is an upper level and/or basement level premises. If yes, please specify the square footage on each floor."

37 In the first draft, the Basic Rent section sets out only the rent per year and per month. The figure per square foot is blank. Extreme's lawyer asks: "Is this an agreed amount or is it based upon a cost per square foot?

38 In the next draft,[11] which contains Extreme's comments, "Premises" are now described as "that portion of the Property consisting of the entire Property save and except for the kitchen area in the basement as shown outlined in hatch on the plan annexed as Schedule 'A'". There is no schedule A.

39 Again, the Rentable Area is described as "approximately 30,000 square feet ... The parties acknowledge that as of the Commencement Date the Premises shall only consist of approximately 24,000 sf, and the additional 6,000 sf shall be provided no later than the _____ day of _____ 2006. For the purpose of this Lease the 6,000 sf area is herein called the "6,000 Foot Space". Extreme asked what the tenant's remedy would be if the landlord did not provide the space by this date. Extreme also asked: Please specify if this is all at grade level or if there is upper level and/or basement level

premises. If yes, please specify the square footage on each floor."

40 This version of the lease contained a "Proportionate Share" clause. Extreme's lawyer asked: "Is the tenant leasing the entire property? There is a p/s for the 6,000 portion which is in another building. Therefore T needs to know the total GLA of the other building to determine tax increases after year one."

41 The next draft[12] described the Rentable Area of Premises as "approximately 24,011 square feet, subject to Section 2.2". Section 2.2 permits the landlord, at its sole cost, to arrange for the Rentable Area to be measured. If the measurement is different, the rent will be adjusted in accordance with the measured area.

42 By the next draft[13] , the rentable area of the premises was still described as approximately 24,011 square feet "subject to Section 2.2", but Section 2.2, the measurement clause had been intentionally deleted. The executed lease contains no measurement clause permitting the landlord to measure and readjust the rent, although it still describes the Rentable Area of the Premises as approximately 24,011 square feet "subject to Section 2.2". Section 2.2 remains "intentionally deleted".

43 On October 11, 2006 there was another draft in discussion.[14] This draft referred to the premises consisting of three floors. 107's lawyer took the position the tenant was to provide "square feet for the ground floor, second floor and third floor The parties acknowledge that after the lease was executed, the tenant paid 100% of the realty taxes and utilities for the building. In this draft, the "Proportionate Share" clause is marked as "Intentionally Deleted", but the Measurement clause in Section 2.2 is in the document. Extreme's lawyer commented "This provision is only needed if the base rent is to be based on a per square foot amount. If it is I will require my amendments. If not, it should be deleted."

44 107's lawyer responded with particulars on the cost per square foot for each year of renewal.[15] By the October 18, 20016 draft[16] both Sections 1.1(s) ("Proportionate Share") and 2.2 ("Measurement") had been deleted. They remained so through and into the executed lease.

45 After various other negotiations and amendments, the agreement was nearly ready to be signed on October 27, 2006. On that date, Extreme's lawyer sent 107's lawyer an email in which he said, among other things: "With regard to the final form I have amended this as follows: § 1.1(d) I have referenced the mezzanine of 4,443 s.f Schedule "A" will now reflect all floors. § 1/1(e): The area is now 24,110 square feet. § 1.1(f) The Commencement Date is October 30, 2006. § 1.1(g) the amount per square foot only has been adjusted to reflect this new square footage."

46 The leased premises at 365 Danforth were apparently only 24,110 square feet, (excluding the basement) so Extreme needed another 6,000 square feet to make up the 30,000 square feet it needed for its operations. The principal of 107 owned the building next door, and had 6,000 square feet available on the third floor of that building. That space could be incorporated into Extreme's facility. The parties entered into a letter of intent for Extreme to lease that additional space.

47 The letter of intent is dated October 30, 2006 and is signed by both the owner of 367-369 Danforth Avenue and Extreme. It provides that Extreme, as Tenant, will lease "up to 6,000 square feet but not less than 5,000 square feet to be built by the Landlord on the 3rd floor of 627-629 Danforth Avenue, Toronto, with access to the Tenant's leased premises at 635 Danforth Avenue, Toronto, from the 3rd floor thereof, subject to the Landlord obtaining all necessary approvals and permits."

48 The letter sets out the fixturing the landlord will do, the period during which the work will be completed, and the rental to be paid immediately following the fixturing period. The permitted use is "primarily a gym, health, spa fitness facility and club (with liquor licence.)" This is the same permitted use as is set out in the lease for 365.

49 When I look at the lease as a whole, the square footage referred to in it, and the description and schedules describing only the upper floors and mezzanine, I conclude the basement was not included in the leased premises.

50 I say this because the approximate square footage referred to in the lease is not nearly large enough to include the basement. The schedules setting out what is leased do not include the basement floor plan. The lease itself says the premises consist of three floors plus a mezzanine. It does not refer to the basement as being part of the leased premises. While I recognize parts of the lease refer to the whole property, and require the tenant to pay all the utilities rather than a

proportionate share of them, I see the lease, taken as a whole, as excluding the basement.

51 Other factors support this conclusion as well, including the parties' continued negotiations for Extreme to take additional space next door that would bring its premises to about 30,000 square feet. Those negotiations continued over a long period of time, with Extreme continually promising 107 it was going to go ahead and lease the additional space.

52 I therefore conclude the basement is not included in the lease. The next question to consider is what, if any, rental the landlord is entitled to for the basement space.

Is it a square footage lease?

53 The landlord takes the position the tenant should have to pay for the square footage of the basement at the rental rate set out per square foot in the lease. It says it is entitled to be paid this amount on the basis of an entitlement to occupation rent, *quantum meruit*, or other equitable principles. As 107 puts it in its factum:[17]

> If a person is in occupation without a lease, although the relationship of landlord and tenant will not exist, the law will imply a contract for payment to the landlord or a reasonable amount for the use and occupation of this land.

54 I agree with the landlord's position, provided the rent in the lease is not simply a global figure, unrelated to the square footage being leased.

55 The tenant suggests that it doesn't matter if the basement is included in the leased premises or not because the lease really has a global figure for rent for whatever is being leased. I disagree.

56 The lease expressly refers to the approximate square footage being leased. It contains schedules with floorplans of three floors plus mezzanine, each with an approximate square footage. If square footage were irrelevant, there would be no need to refer to either the size of the premises, or the square footage of each of the floors.

57 Section 1.1(g) of the lease expressly sets out the rental rates for the premises based on square footage, a monthly figure and a yearly figure. I accept that the square footage figure is expressed in an amount to three decimal places. The tenant suggests that this makes the landlords position "incredulous" [sic]. The tenant can point to no case or legal principle to support this position.

58 Since the lease sets out a square footage rate, I cannot conclude the square footage of the building was immaterial, particularly since the lease sets out the square footage of the premises to be leased. If the parties intended to have a global rental figure only, there would be no reason to define the leased premises by their approximate square footage size.

59 I therefore conclude the lease is indeed based on a rental rate per square foot for the square footage leased. GoodLife will therefore have to pay for the basement, based on the rate per square foot for the 4,458 square feet that comprise the basement. That is the case unless the landlord's claim is barred on either a statutory or equitable basis.

Events in 2007

60 Although both parties had signed the letter of intent, or agreement to lease the additional space next door, they did not carry out its terms. Extreme did not take over this additional space next door, although it continued to lead the landlord to believe it would do so. Instead, Extreme began to make some alterations to the basement at 365. The landlord had already removed his kitchen, which took up about half of the basement space. Even though the lease required Extreme to obtain landlord consent before undertaking any work, Extreme did not.

61 Even though the basement was not included in the leased premises Extreme began to make changes to the basement. After the landlord removed its kitchen equipment from the basement, Extreme, then removed the sprinkler system and elevator from the basement, and created a hole through the cement floor on the ground floor level in the building.

62 When 107 discovered these changes to the basement, its lawyer wrote to Extreme on October 2, 2007, complaining about what Extreme had done in the building, without submitting plans or obtaining landlord consent. The complained specifically of the removal of the existing elevator, removal of the existing sprinkler system and making a hole in the cement floor on the ground level. 107 took the position that Extreme had breached the lease. 107 took the position it would not have leased to Extreme for less than ten years had it known of the kind of renovations Extreme planned. It raised the issue of the cost to 107 if Extreme did not exercise its option to renew the lease after its first two year term.

63 After some negotiations, the parties entered into a written agreement in which the parties agreed Extreme would immediately execute its first two renewal options, thus making the initial term of a lease a 10-year term, expiring October 30, 2016. In the written agreement, 107 withdrew "all of the alleged defaults of the Tenant" which had been outlined in the lawyer's letter of October 2, 2007, namely, those set out above.

Events in 2008

64 That was not the end of the conflict. In April of 2008 the landlord complained again to Extreme about alleged breaches of the lease. In its lawyer's letter of April 4, 2008 107 took the position:

> Extreme Fitness also made extensive alterations to the basement level and changed the basement area from a storage area to a functional area for use by the members of the fitness club. The alterations to the basement area and the change of use was not made apparent to or anticipated by my client, the Landlord. As a result of the construction alterations made by Extreme Fitness to the basement area, the usable rental area of the building has been increased by approximately 4,600 square feet.

65 107 demanded additional rent for this square footage effective January 1, 2008 at a rate of $24.786 per square foot.

66 Extreme's lawyer delivered a swift response[18] . He took the position that first, the basement was included in the lease because "Premises" in § 1.1(d) referred to the "entire property", and "Property" is defined by its entire legal description. Although he acknowledged that a "rentable area" was referenced in the lease, he took the position that was irrelevant based on the definition of Property.

67 In addition, he suggested that because both the measurement clause and proportionate payment of operating costs had been deleted from the lease, these deletions supported the conclusion that the entire property, including the basement, formed the leased premises.

68 Extreme went further, and suggested the rent was not an actual dollar amount per square foot, but rather was a lump sum figure, not based on square footage.

69 The positions Extreme took are essentially the same positions GoodLife is taking on this application.

70 GoodLife now says the consent 107 executed in 2007 operates as a consent to the work described in the lawyer's letter of April 2008. I disagree.

71 107's complaint in 2007 related only to removal of the elevator and sprinkler system, and punching a hole through the floor. Its complaint a year later was far broader and more specific.

72 From this I infer the work complained about in January of 2007 was different than the work complained of in 2008. Although GoodLife suggests all the renovations were completed by January of 2007, there is no real evidence to confirm this. The landlord was not specifically asked this question on cross-examination, nor was its lawyer, Mr. Singer, who wrote both letters alleging breaches. The only thing I could find in the volumes of material filed on the application is a statement in the affidavit of Alan Hutchens sworn April 18, 2013. This affidavit was sworn in the *CCAA* proceedings. Mr. Hutchens describes himself as the Interim Chief Financial Officer of Extreme Fitness Inc. His affidavit was filed in the *CCAA* proceedings. In it

he says, at paragraph 18:

> I am advised by Taso Pappas, the President of Extreme, and believe, that the kitchen as referenced by Mr. Westwood in his email was located in the basement of the Building prior to Extreme's occupation, and renovation, of the building, which interior alteration and renovation including the basement was completed on or around January 10, 2007.

73 This is hardly the best evidence. It was filed in support of a motion in the *CCAA* proceedings. This is an application. Affidavits filed on applications are to be based on first-hand knowledge, not information and belief, unless it is with respect to facts that are not contentious. That is not the case here. I cannot accept this evidence to support the proposition all the renovations were completed by January of 2007. It seems to me that if lockers and other equipment were already installed in a completed basement renovation in 2007, they would logically have been mentioned in the landlord's 2007 complaint, not just the elevator, sprinkler system and hole in the floor. All these items strike me as initial construction, not completion of all the renovations. I therefore conclude that the renovations were not completed by January of 2007, but continued to be constructed after that date.

74 I note GoodLife has filed no new affidavit material on this application, other than an affidavit from an associate in its lawyers' offices. It sets out some of the history of the *CCAA* proceedings and includes much of the material filed there. It has no new material. I thus have no first hand evidence from Extreme about what transpired before the *CCAA* proceedings began. GoodLife took no steps to examine anyone from Extreme under rule 39.03. That could have provided the court with first hand evidence from the tenant's point of view of what had transpired in 2007 and 2008. I can only assume that evidence would not have supported GoodLife's position.

Events in 2011:

75 By 2011 Extreme was in some financial difficulty. It needed to find a new bank. Part of its banking arrangements required an estoppel certificate from its landlord. The estoppel certificate said the lease was in full force and effect and there had been no default.

76 Extreme confronted the principal of 107 with the estoppel certificate, and he signed it. He did not seek or obtain legal advice before doing so. As he put it on cross-examination:[19]

> Yes. They came to me, they had problem with finance and they have changed banks and they begged me to sign that so they can go to another bank. National Bank of Canada. And I had two choices; or they have to go out of business, or I have to sign the comments [sic]. So I did, I signed it, to help them out.

77 He went on to say:[20]

> I act on a personal relations with couple people from the Extreme. When they came down and they said, please, you have to sign, it's better, we're going to — we'll look after you. We changed banks, and they told me they're going to change COs and I fell for it and I signed.

78 Again, GoodLife has provided no evidence to contradict these statements.

79 In any case, the lease itself was not technically in default. Since the basement did not form part of the leased premises, there was no default under the actual terms of the lease. I do not see the estoppel certificate as barring the landlord's claim.

The leased premises are larger than the lease says

80 Extreme's financial difficulties continued, notwithstanding its change in banks. Not long after, Extreme tried to restructure under the *CCAA*. In the context of the *CCAA* proceedings, the landlord finally had the building measured appropriately. It then discovered that the building was actually significantly larger than what the lease said, even without the basement.

81 Extreme had originally said the Premises were about 24,110 square feet. Schedule A to the lease contains floor plans of each of the ground, second and third floors, along with a second floor mezzanine. The total square footage of these combined floors, according to the floor plans, comes to 24,110 square feet.

82 The landlord testified it thought the square footage of the basement was about 6,000 square feet, but did not have it measured until after the *CCAA* proceedings began. Those measurements show the basement as having 4,458 square feet. Not only that, these measurements disclosed that the other floors of the building were larger than what was stated in the lease.

83 The landlord's measurements were conducted by Extreme Measures Inc., a company recognized by BOMA International as an official interpreter of the BOMA Measurements Standards.

84 In compliance with "Standard Methods of Measurement(ANSI/BOMA Z65.5-2010)" they determined the basement area was 4,458 square feet, Floor 1 was 12,064 square feet, Floor 2 was 9,984 square feet, Floor 3 was 3,356 square feet and Floor 4 was 1.279 square feet, for total gross leasable area of 31,140 square feet.

85 Thus, according to the professional measurements, the building apart from the basement, contains 26,682 square feet, rather than the 24,110 square feet stated in the lease. The landlord points to this significant discrepancy as a mistake, warranting rectification of the lease to reflect the accurate square footage.

Is the landlord entitled to rectification?

86 The landlord takes the position that because the square footage stated in the lease is clearly wrong, the lease therefore contains a mutual mistake, and should be rectified. I disagree.

87 Early drafts of the lease contained a standard measurement clause that would have permitted the landlord, at its own expense, to measure the premises and have the rent adjusted if the measurements stated in the lease were inaccurate.

88 While the actual square footage of the property without the basement is larger than the "approximately 24,110 square feet" stated in the lease, the landlord explicitly gave up the right to measure the premises and have the lease adjusted to reflect the actual square footage.

89 Having expressly given up the right to adjust the lease in this fashion, I fail to see how the landlord can now try to assert that very right. I conclude the landlord is not entitled to rectification or amendment of the lease to reflect the actual square footage.

90 This leaves me to consider GoodLife's final arguments, namely that 107's claims should be rejected because of its delay, estoppel or breach of a limitation period.

Delay

91 GoodLife says that 107 must have known about the work in the basement at least in the spring of 2008. Other than writing a demand letter, it did nothing further to assert a claim for additional rent. GoodLife therefore takes the position 107 should be estopped from asserting a claim now. I am not persuaded.

92 Throughout 2008 and long after, Extreme continued to negotiate with the landlord, promising it would take the additional space next door. The principal of the landlord said on cross-examination that he believed these promises, and relied on them until it was effectively too late. He said:

> ... we had been discussing with them constantly ... and constantly they were delaying us by saying, "We will find a solution. We will find a solution." And they lead me to believe that or they would pay me more rent or they would rent the space next door.[21]

93 The principal of 107 also said on cross-examination that he was undergoing cancer treatment over a lengthy period of time, and due to his health was in no position to pursue claims against the tenant. I have no evidence to contradict this

94 As I see it, once Extreme unilaterally took over the basement, it continued to tell the landlord it would rent additionally space, but had no intention of doing so, since it had essentially acquired additional space in the basement without paying for it. The landlord believed the tenant's representations, and relied on them to its detriment in not pursuing its claims sooner. As a result, I reject GoodLife's argument that the landlord's delay should preclude it from receiving any relief.

Is the landlord estopped?

95 As I have mentioned, GoodLife takes the position that all the work in the basement was completed by January of 2007 and therefore the landlord had seen it all when it entered into the consent in 2007 confirming 107 withdrew "all of the alleged defaults of the Tenant" which had been outlined in the lawyer's letter of October 2, 2007. That letter referenced only the elevator, sprinkler system and hole in the floor. I fail to see how the 2007 consent can extend to the additional matters complained of in April 2008. The 2007 consent does not operated as a waiver/estoppel in relation to the 2008 complaints. Similarly, I have already determined the 2011 estoppel certificate does not bar the landlord's claim to be paid for the tenant's use of the basement.

96 GoodLife also suggests 107 should be barred from its claim because of its delay. I have already addressed this issue, and have determined 107 has adequately explained its delay, both in terms of its principal's illness, and its own reliance on representations from Extreme.

97 On cross-examination, 107's principal testified Extreme continued to lead him to believe that it would go ahead with its lease of the additional space in the building next door. No one refuted this testimony.

98 It seems to me each party equally relied, to a degree, on statements from or actions of the other to some detriment. That being said, I accept that Extreme was deliberately stringing the landlord along, leading it to believe it would take over additional space, with the result the landlord did not pursue its claim against Extreme for additional rent. As a result, I give no effect to GoodLife's argument that Extreme detrimentally relied on the landlord's inaction to its detriment. To the contrary, Extreme took active steps to mislead the landlord, with the result it was the landlord who detrimentally relied on the tenant's actions, rather than the reverse.

99 Accordingly, I give no weight to GoodLife's arguments of detrimental reliance, estoppel or delay.

Is the landlord's claim time barred?

100 GoodLife also takes the position the landlord's claim is time barred. It says the landlord's claim is for rectification, which is an equitable remedy. As a result, it argues the general two year limitation period under the *Limitations Act, 2002*[22] applies. Since I have already dismissed the landlord's claim for rectification of the lease, I need not address this argument.

101 As to the landlord's claim for rent for the basement, as I see it, the *Real Property Limitations Act*[23] applies. Section 17.(1) of the Act provides:

> No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, whether it is or is not charged upon land, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress or action but within six years next after the same respectively has become due, or next after any acknowledgement in writing of the same has been given to the person entitled thereto or the person's agent, signed by the person by whom the same was payable or that person's agent.

102 This is a claim for rent. The landlord first asserted its claim for additional rent for the basement in its lawyer's letter of April 2008. It commenced this application on July 30, 2013. It is therefore well within the six year limitation period set out in the *Real Property Limitations Act*.

103 107 goes further, and argues that since the basement is not part of the lease, GoodLife's occupation of the basement was not acquired pursuant to the assignment of the lease. 107 says since GoodLife only began to occupy the basement in March of 2013, and the application was commenced within months of that date, 107's claim against GoodLife comes well within even the two year limitation period set out in the *Limitations Act, 2002*[24]

104 But GoodLife argues that even if the *Real Property Limitations Act* applies, section 2 of the *Act* should result in the application being dismissed. That section provides: "Nothing in this Act interferes with any rule of equity in refusing relief on the ground of acquiescence or otherwise, to any person whose right to bring an action is not barred by virtue of this Act." Since I have already decided the principles of delay and detrimental reliance do not bar 107's claim, this provision has no bearing on my decision.

Conclusions:

105 For all these reasons, I conclude the basement is not included in the lease. I am also persuaded the lease is based on a rental rate per square feet, rather than on a global figure for rent.

106 Although the figure stated in the lease of 24,110 square feet for the leased premises is clearly wrong[25] , and is underestimated by about 2,572 square feet, the landlord gave up any right to measure the premises and readjust the rent. Having specifically given up that right, the landlord cannot now assert any right to readjust the rent now. The landlord's claim for rectification on that account must be dismissed.

107 The 2007 agreement did not confirm that the later renovations were acceptable. It only accepted the tenant having removed the elevator, sprinkler system and put a hole in the floor. The 2007 agreement did not, however, have the effect of suddenly including the basement in the leased premises, without payment of any additional rent. The basement was not and is not part of the leased premises.

108 The 2011 estoppel certificate properly stated the lease was not in default. It was not. Since the basement was not part of the lease, it could not form a default under the lease.

109 The tenant has been improperly occupying the basement without payment of rent. The landlord is entitled to be compensated, whether on the basis of *quantum meruit*, unjust enrichment, or occupation rent. A reasonable rental is the rate per square foot in place under section 1.1(g) of the lease for the 4,458 square feet that make up the basement.[26] GoodLife must pay this from the date of its assumption of the lease until its termination. GoodLife can be in no better position under the lease than Extreme, since, as its counsel points out, it takes both the benefits and burdens under the lease as assignee.

Disposition:

110 Read as a whole, the lease did not include the basement space. Since it was not part of the lease, the 2011 estoppel certificate cannot operate to bring the tenant's illegal use of non-leased premises into the ambit of the lease. The tenant must therefore pay rent for the basement from and after March 27, 2013. The rent will be based on the BOMA measurement for the basement, which is the most accurate. The rent payable will be the rate per square foot set out in the lease for the period or periods from and after March 27, 2013.

111 As to the landlord's claim for rectification of the lease to reflect the accurate square footage, that claim is dismissed.

112 The application is therefore allowed in part, as set out above. The parties agreed the appropriate amount of costs for the successful party on the application would be $42,500 inclusive of disbursements and taxes. Since the applicant did not succeed on its claim for rectification, it enjoyed only partial success. The applicant will therefore have its costs fixed at

$30,000 all inclusive.

Application granted in part.

Footnotes

1 [2014] 2 S.C.R. 633 (S.C.C.) ("*Sattva*")

2 (2007), 85 O.R. (3d) 254 (Ont. C.A.) ("*Ventas*")

3 *Ventas*, at paragraph 24, quoting with approval the motion judge's reasons

4 *Sattva* at paragraph 58, as quoted in applicant's factum at paragraph 53.

5 107's factum at paragraph 56

6 GoodLife's factum at pages 3 and following

7 Section 2.2 was a "Measurement" clause, which was ultimately intentionally deleted from the executed lease

8 See paragraph 56 of 107's factum

9 Until 107 had the property professionally measured, no one seemed to have a clear idea of the size of the basement. 107's principal thought at one point it was 6,000 square feet. A representative of GoodLife named Mike Meyers put the basement size at 3,839 square feet in an email dated April 17, 2013, found at Exhibit B to the affidavit of Phil Sorrell sworn 19 April, 2013. The actual measurement according to BOMA standards, is 4,458 square feet, although the parties also refer to the basement's having 4,443 square feet.

10 Tab 22, respondent's responding application record

11 Tab 23, respondent's responding application record

12 Tab 25, respondent's responding record

13 Tab 26, respondent's responding record

14 Tab 27, respondent's responding record

15 Exhibit 30, respondent's responding record.

16 Exhibit 32, respondent's responding record

17 Paragraphs 64 and following of 107's factum, referring to *Rossiter v. Swartz*, 2013 ONSC 159 (Ont. S.C.J.) and *269893 Alberta Ltd. v. Petersen*, 2015 BCSC 184 (B.C. S.C.)

18 Email from David Westwood to Michael Singer dated April 22, 2008

19 Question 776, cross-examination of Constantine Voidonicolas, July 4, 2014

20 Question 785

21 Question 728, cross-examination of Constantine Voidonicolas, 4 July 2014

22 S.O. 2002, c.24

23 R.S.O. 1990 c. L.15, section 17.(1)

24 S.O. 2002, c.24

25 The actual square footage of the building including the basement is 31,140 square feet, with the basement comprising 4,458 square feet of the total. Thus, the square footage apart from the basement is 26,662 square feet, rather than the 24,110 square feet stated in the lease. These figures are based on the measurements taken by the Extreme Measures Inc. in compliance with Retail Buildings: Standard Methods of measurement (ANSI/BOMA Z65.5-2010) found at Exhibit A to the affidavit of Constantine Voidonicolas on behalf of the applicant, sworn 2 October 2013.

26 This figure is the measurement taken by the Extreme Measures Inc. See note 25, above.

End of Document