IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

B E T W E E N :

NORTH PORTAGE DEVELOPMENT CORPORATION	)	***R. L. Tapper, Q.C.*** *and* ***A. E. Verhaeghe*** *for the Appellant*
(Plaintiff) Respondent	)	
	)	***K. T. Williams*** *and* ***E. J. B. Day*** *for the Respondent*
- and -	)	
	)	*Appeal heard and Decision pronounced:* ***March 29, 2019***
CITYSCAPE RESIDENCE CORPORATION	)	
(Defendant) Appellant	)	*Written reasons:* ***April 4, 2019***

On appeal from 2018 MBQB 173

LEMAISTRE JA (for the Court):

[1] The defendant appealed the summary judgment granting the plaintiff's claim for a declaration that no rent was payable to the defendants under the terms of a sublease and dismissing the defendant's counterclaim for rent. At the conclusion of the appeal hearing, we dismissed the appeal with brief reasons to follow. These are those reasons.

[2] In 1986, the plaintiff entered into a development agreement with The Village at Portage Place Housing Ltd. (VAPP). The development

agreement contemplated the construction of apartment buildings and a two-level parkade by VAPP and included the following terms:

- the plaintiff would retain ownership of the land where the apartment buildings and parkade were to be built;
- VAPP would lease the land from the plaintiff (the ground lease);
- the plaintiff would finance the construction of the parkade by way of a separate mortgage to VAPP for each of the two levels of the parkade; and
- the plaintiff would enter into a sublease with VAPP for the use of the lower level of the parkade (the sublease).

[3] Pursuant to the terms of the sublease, the plaintiff would owe VAPP exactly the same amount annually as the interest payable by VAPP under the terms of the mortgage for the lower level (the mortgage). The principal would become due at the end of the mortgage. Both the mortgage and the sublease were to end in 2060.

[4] As explained by the motion judge, "The net effect of this arrangement was that VAPP received $2,680,000 interest free for the duration of the [ground lease]. In exchange the plaintiff was entitled to occupy the lower level of the parkade rent free. No payments were ever made by either party" (at para 6).

[5] When VAPP defaulted on its mortgage for the upper level of the parkade, the plaintiff commenced foreclosure proceedings. The motion judge described what then occurred (at paras 7-9):

> Prior to the final order of foreclosure, the plaintiff transferred the mortgage to the defendant, which at the time was a wholly owned subsidiary of the plaintiff. As a result of the foreclosure the defendant took the leasehold title, governed by the ground lease with the plaintiff.
>
> In 1998, the plaintiff sold the shares in the defendant to 3746292 Manitoba Ltd. At that point, the defendant was indebted to the plaintiff for more than $6 million, including $2.68 million owing for the lower level of the parkade. The plaintiff forgave the defendant the entire indebtedness to facilitate the sale of the shares.
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> The plaintiff has made no payments for rent under the sublease since the foreclosure.

[6] In 2016, the defendant demanded payment for rent under the sublease in the amount of $7,852,261. After receiving the demand for payment, the plaintiff filed its claim for a declaration that no rent was payable under the terms of the sublease and the defendant counterclaimed for rent owed. The plaintiff sought summary judgment allowing its claim and dismissing the defendant's counterclaim.

[7] On the motion for summary judgment, the defendant argued that article 4.01 of the sublease is ambiguous and that "a trial of the issue is required in order to understand the surrounding circumstances of the parties at the time of entering into the sublease, which is necessary to properly interpret the provision" (at para 12).

[8] Article 4.01 of the sublease states as follows:

> 4.01 Provided that the [plaintiff] receives payments of interest or principal from [VAPP] pursuant to the [mortgage], the [plaintiff] shall pay to [VAPP] at the address specified herein, rent in the

> amount of [$261,300] per annum in each and every year during the Initial Term commencing on the first day of the month immediately following the Commencement Date payable in equal quarterly installments of $65,325, in advance. If, for any reason, payments of interest or principal are not made or required to be made by [VAPP] under the [mortgage], then no rent shall be payable by the [plaintiff] to [VAPP] under this Sublease.
>
> [emphasis added]

[9] The motion judge concluded that no further evidence was required in order to determine the meaning and effect of article 4.01 of the sublease and that no triable issue had been raised. She found that "the plaintiff was required to pay rent under the sublease only if and when VAPP made payments under the mortgage" (at para 13) and that VAPP's obligation to make mortgage payments and the plaintiff's obligation to pay rent ended when the debt was extinguished.

[10] Accordingly, the motion judge granted summary judgment, declaring that no rent was owing pursuant to article 4.01 of the sublease and dismissing the defendant's counterclaim.

[11] The defendant's grounds of appeal are that the motion judge erred by not properly interpreting the terms of the sublease; providing insufficient reasons for her decision; and failing to order a trial on the issue. At the hearing the defendant focussed on two issues: 1) the existence of contradictory clauses in the sublease; and 2) the set off it says was created by the sublease, is no longer applicable.

[12] The motion judge's decision on the motion for summary judgment is a discretionary decision reviewable on a deferential standard. Therefore,

this Court will be justified in intervening only if there is a material error regarding the law or the facts, or the decision is so clearly wrong as to result in an injustice (see *Virden Mainline Motor Products Limited v Murray et al*, 2018 MBCA 82 at para 17).

[13] Disputes as to contractual interpretation are questions of mixed fact and law which cannot be interfered with absent palpable and overriding error, unless there is an extricable question of law (see *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 50-55). As explained by Rothstein J in *Sattva* (at para 53):

> Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen* [*Housen v Nikolaisen*, 2002 SCC 33], at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King* [*King v Operating Engineers Training Institute of Manitoba Inc*, 2011 MBCA 80], at para 21).

[14] Whether the motion judge's reasons are sufficient is reviewable on the standard of correctness (see *Winnipeg (City of) v The Neighbourhood Bookstore and Café Ltd*, 2019 MBCA 3 at para 72).

[15] The defendant argues that the motion judge erred in interpreting the terms of the sublease by considering article 4.01 of the sublease in isolation and failing to give effect to the parties' true intentions.

[16] The motion judge had to determine the intent of the parties at the time of the execution of the sublease. In our view, the motion judge's interpretation reflects the ordinary and grammatical meaning of the words and

is consistent with the evidence of the surrounding circumstances at the time the sublease was executed (see *Sattva* at para 47). The subjective understanding of the defendant's sole shareholder that rent would be paid is irrelevant.

[17] Article 4.01 of the sublease provides that if interest is not paid for any reason, then rent is not payable. The plaintiff never received interest and, upon the sale of the shares to the defendant, the mortgage was forgiven. Therefore, rent never was and never will be payable. Moreover, article 29.15 binds the successors and permitted assigns of the parties to the terms of the sublease. The defendant's arguments that clauses in the sublease are contradictory and the sublease created a set off that is no longer applicable are not persuasive.

[18] Furthermore, the motion judge's reasons are not insufficient, as asserted by the defendant. In addition to affidavits and cross-examination transcripts, the motion judge had the complete development agreement, sublease and memorandum of mortgage. Read in the context of the evidentiary record and the parties' motion briefs, in our view, the reasons are functional as they focus on the issues raised, disclose an intelligible basis for the decision and permit meaningful appellate review (see *R v REM*, 2008 SCC 51 at para 53).

[19] Finally, the motion judge did not err in granting summary judgment.

[20] Pursuant to r 20 of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, as amended by Man Reg 130/2017, on summary judgment, the motion judge determined that the claim and counterclaim raised no issues requiring a trial (see *Hryniak v Mauldin*, 2014 SCC 7). The matter was not

factually or legally complex and the motion judge found that no further evidence was necessary to determine the meaning and effect of article 4.01 of the sublease. We see no material error or injustice in the motion judge's decision warranting appellate intervention.

[21] In the result, the appeal was dismissed with costs in favour of the plaintiff in accordance with the applicable tariff.

leMaistre JA

Hamilton JA

Simonsen JA