COURT OF APPEAL FOR ONTARIO

CITATION: AIM Health Group Inc. v. 40 Finchgate Limited Partnership, 2012 ONCA 795
DATE: 20121120
DOCKET: C54997

Feldman, Gillese and Epstein JJ.A.

BETWEEN

AIM Health Group Inc. (formerly known as CPM Health Centre Inc.)

Applicant (Respondent)

and

40 Finchgate Limited Partnership

Respondent (Appellant)

V. Ross Morrison and Natalie Schernitzki, for the appellant

John Russo and Marc D. Whiteley, for the respondent

Heard: June 22, 2012

On appeal from the order of Justice Joseph M. Fragomeni of the Superior Court of Justice, dated January 6, 2012, with reasons reported at 2012 ONSC 169.

Gillese J.A. (dissenting):

[1] This appeal raises interesting questions about the interpretation of a lease. In particular, the court must decide whether a lease gave the tenant the right to stay in occupation on the expiration of the initial term of the lease.

[2] At first instance, the judge found in favour of the tenant and held that the landlord acted wrongfully when it locked out the tenant from the leased premises.

[3] In my view, the decision below is correct. As a result, I would dismiss the landlord's appeal.

BACKGROUND

[4] AIM Health Group Inc. (the "Tenant" or "AIM Health") operated a chronic pain management facility (the "Clinic") from leased premises located at unit 224A, 40 Finchgate Blvd. in Brampton, Ontario (the "Property"). William J. Danis was AIM Health's Senior Vice President of Operations and Finance at the relevant times.

[5] 40 Finchgate Limited Partnership (the "Landlord") is a limited partnership registered in the province of Ontario under the *Limited Partnerships Act*, R.S.O. 1990 c. L.16, as amended. It owns the Property and is the landlord. Susanne Gilbert represented the property manager that the Landlord had engaged to manage the Property.

[6] The Landlord and AIM Health entered into a commercial lease agreement in February of 2007 (the "Lease"). The term of the Lease was for 5 years, beginning on January 1, 2007. The term was to expire on December 31, 2011, but there was an option to renew for an additional 5 years.

[7] The Clinic was staffed with four physicians and seven full and part-time staff and technicians. It facilitated approximately 700 patient care visits per month.

[8] In the spring of 2010, the Ontario government enacted legislation requiring certain medical facilities to comply with premise inspection standards published by the College of Physicians and Surgeons of Ontario (the “College”).

[9] In February of 2011, the College’s inspection team attended at the leased premises to conduct an inspection.

[10] In the spring of 2011, Mr. Danis told Ms. Gilbert that AIM Health would not renew the Lease because the Clinic was going to relocate. However, he let her know that it was likely that the Clinic would need to stay in the leased premises for a few weeks or months after the term expired at the end of 2011. He was unable to be more definite about how long the Clinic would need to stay after the term ended because it was not clear when the College’s inspection process would be completed. Before the Clinic could be relocated, it had to pass the College’s inspection regime. By law, it could not operate from another location prior to receiving a passing designation.

[11] In light of AIM Health’s decision that it would not exercise the option to renew, the Landlord took steps to locate a new tenant.

[12] Ms. Gilbert and Mr. Danis had a number of conversations in the spring, summer and fall of 2011 about the delays involved in relocating the Clinic and AIM Health’s need for an extension at the end of the term.

[13] In October of 2011, AIM Health advised the Landlord, through Ms. Gilbert, that it would likely need an extension of the Lease until mid or late February of 2012 because of delays with the inspection. AIM Health was given no indication that such an extension would be problematic.

[14] In mid-December of 2011, Mr. Danis communicated again with Ms. Gilbert, making it clear that AIM Health had been further delayed in relocating due to the inspection process, and that it would require a longer extension of the Lease.

[15] By letter dated December 19, 2011, the Landlord advised AIM Health that it required vacant possession of the leased premises by December 31, 2011, because it had secured a new tenant for January 1, 2012.

[16] On December 21, 2011, the Landlord entered into a new lease agreement with a new tenant. The new lease was to begin on January 1, 2012, and run for a term of four years.

[17] Also on December 21, 2011, AIM Health made a written request for a three-month extension of the Lease. The Landlord refused because it had secured the new tenant. While the Landlord offered AIM Health alternative space in the Property from which to run the Clinic, this was not a viable alternative due to the inspection regime.

[18] The term of the Lease expired on December 31, 2011. AIM Health continued to occupy the leased premises.

[19] On January 1, 2012, the Landlord changed the locks on the leased premises. On January 3 and 4, 2012, it removed the Tenant's property from them.

[20] AIM Health brought an emergency application in which it sought, among other things, a declaration that it was entitled to re-enter the leased premises. It claimed to be an overholding tenant pursuant to s. 3.05 of the Lease. As such, it maintained that the Lease had become a month to month tenancy, which the Landlord had not given notice to terminate.

[21] Section 3.05 is the overholding provision in the Lease. It sets out the conditions that apply when the Tenant stays in occupation after the expiration of the term of the Lease. It reads as follows:

> **3.05 Overholding**
>
> **If, at the expiration of the initial Term** or any subsequent Term or any subsequent renewal or extension thereof, **the Tenant shall continue to occupy the Leased Premises without further written agreement**, there shall be no tacit renewal of this Lease, and **the tenancy of the Tenant thereafter shall be from month to month only and may be terminated by either party on one month's notice**. Rent shall be payable in advance on the first day of each month equal to the sum of 150% of the monthly instalment of Basic Rent payable during the last year of the Term and one twelfth (1/12) of all Additional Rent charges herein provided for, determined in the same manner as if the Lease had been renewed and all terms and conditions of this Lease shall, so far as applicable, apply to such monthly tenancy. [Emphasis added.]

[22] AIM Health contended that in light of s. 3.05, the Landlord's entry into the premises and removal of its property was a breach of the terms of the Lease.

[23] Section 7.08 of the Lease provides that the Tenant must surrender the leased premises at the expiration or sooner termination of the Lease. It reads as follows:

> **7.08 Surrender of Leased Premises**
>
> At the expiration or sooner termination of this Lease, the Tenant shall peaceably surrender and give up unto the Landlord vacant possession of the Leased Premises in the same condition and state of repair as the Tenant is required to maintain the Leased Premises throughout the Term and in accordance with its obligations in Section 7.07 hereof.

[24] The Landlord argued that pursuant to s. 7.08 of the Lease, the Tenant was required to surrender the leased premises on December 31, 2011, when the term expired. As AIM Health had not delivered up vacant possession by January 1, 2012, the Landlord said that it had no alternative but to retake possession so that it could comply with its obligation to the new tenant.

[25] The application judge found in favour of the Tenant. He held, among other things, that the Tenant was validly overholding pursuant to s. 3.05 of the Lease. Consequently, he declared, the Tenant was entitled to re-enter the leased premises.

[26] The Landlord appeals. The essence of its position is that s. 7.08 of the Lease applies, rather than s. 3.05, and accordingly, at the expiration of the term of the Lease, AIM Health was required to give up vacant possession of the leased premises.

[27] By the time the appeal was heard, the live dispute between the parties had disappeared. The Landlord had given AIM Health one month's notice to vacate and AIM Health had done so. As well, AIM Health had tendered, and the Landlord had accepted, payment on account of AIM Health's overholding. The Tenant submitted that as the dispute between the parties was moot, the court should decline to hear the appeal.

[28] The issues decided by this appeal are significant to many more than just these parties. Moreover, they are likely to arise again. For those reasons, the court acceded to the Landlord's request and exercised its discretion to hear and decide the appeal.

THE RELEVANT LEASE PROVISIONS

[29] The relevant Lease provisions are set out below.

> **1.01 Summary of Basic Terms**
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> | | | | |
> |---|---|---|---|
> | (g) | (i) | **Term**: | Five (5) Years, subject to Section 3.04. |

(ii)	**Commencement Date**:	January 1, 2007, subject to Section 3.04.
(iii)	**End of Term**:	December 31, 2011, subject to Sections 3.03 and 3.04.

...

(m)	**Special Provisions**:	Set out in Schedule “D”.

...

2.01 Definitions

...

(q) **“Term”** means the period specified in Subsection 1.01(g)(i) and any additional period during which the Landlord shall accept rent as provided in this Lease.

...

3.03 Term

The Term shall commence on the Commencement Date, run for the period set out in Subsection 1.01(g)(i) and end on the date set out in Subsection 1.01(g)(iii) unless terminated earlier pursuant to this Lease.

...

3.05 Overholding

If, at the expiration of the initial Term or any subsequent Term or any subsequent renewal or extension thereof, the Tenant shall continue to occupy the Leased Premises without further written agreement, there shall be no tacit renewal of this Lease, and the tenancy of the Tenant thereafter shall be from month to month only and may be terminated by either party on one month’s

notice. Rent shall be payable in advance on the first day of each month equal to the sum of 150% of the monthly instalment of Basic Rent payable during the last year of the Term and one twelfth (1/12) of all Additional Rent charges herein provided for, determined in the same manner as if the Lease had been renewed and all terms and conditions of this Lease shall, so far as applicable, apply to such monthly tenancy.

...

7.08 Surrender of Leased Premises

At the expiration or sooner termination of this Lease, the Tenant shall peaceably surrender and give up unto the Landlord vacant possession of the Leased Premises in the same condition and state of repair as the Tenant is required to maintain the Leased Premises throughout the Term and in accordance with its obligations in Section 7.07 hereof.

...

13.04 Notices

Any notice, delivery, payment, or tender of money or documents to the Landlord hereunder may be delivered personally or sent by prepaid registered or certified mail to it addressed at the address set out in Section 1.01(a)(i) hereof, with copy to the Property Manager as the address set out in Section 1.01(a)(ii) hereof, or to such other address as the Landlord may in writing direct, and any such notice, delivery or payment so delivered or sent shall be deemed to have been well and sufficiently given or made and received upon delivery of the same or on the next business day following such mailing of same as the case may be.

Any notice, delivery, payment, or tender of money or documents to the Tenant hereunder may be delivered personally or sent by prepaid registered or certified mail to the Tenant at the Leased Premises, or to such other address as the Tenant may in writing direct, and any

> such notice, delivery or payment so delivered or sent shall be deemed to have been well and sufficiently given, made and received upon delivery of the same on the second business day following such mailing of same, as the case may be.
>
> …
>
> **SCHEDULE "D": SPECIAL PROVISIONS**
>
> **4. OPTION TO EXTEND**
>
> Provided the Tenant is then in good standing under the terms and conditions of this Lease, the Tenant shall have the option to extend the Term of the lease for one (1) additional five (5) year period on the same terms and conditions except for the amount of Basic Rent, any rent-free period, leasehold improvements, allowance or other tenant inducements and except that there shall be no further option to extend. The Tenant may exercise this option to extend by giving the Landlord notice in writing at least six (6) months prior to the expiry of the Term herein. If the Tenant exercises this option to extend, the basic rent payable on a per square foot per annum basis during such extension period shall be negotiated between the Landlord and the Tenant....

THE ISSUES

[30] The Landlord submits that the application judge erred in:

1. finding that the Lease did not contain a renewal term;

2. concluding that the Landlord had to give notice in accordance with s. 13.04 of the Lease; and,

3. concluding that the Tenant was overholding pursuant to s. 3.05 of the Lease.

ANALYSIS

Did the Lease contain a renewal term?

[31] At para. 12 of his reasons, the application judge states that the Lease "does not contain a renewal term". This is not correct. Section 4 of Schedule "D" to the Lease, set out above, is a renewal option pursuant to which the Tenant had the right to extend the term of the Lease for one additional five year period on the same terms and conditions (except for the amount of basic rent) by giving the Landlord notice in writing at least six months prior to the expiry of the term of the lease.

[32] Despite para. 12, however, at para. 2(c) of the reasons the application judge recites that the Lease contained an option to renew for an additional five years.

[33] In any event, if the application judge did erroneously find that there was no renewal option, the error is of no significance to the decision below. The presence or absence of the renewal clause does not materially bear on the interpretation of ss. 3.05 and 7.08 of the Lease, the provisions upon which the application was decided.

Did the Landlord have to give notice in accordance with s. 13.04 of the Lease?

[34] In para. 17 of his reasons, the application judge states:

> In the case at bar there was no further written agreement as set out in s. 3.05. Further, **the correspondence sent to Danis indicating that AIM must vacate the premises by December 31, 2011 is not proper notice in accordance with 13.04**. [Emphasis added.]

[35] The second sentence in para. 17, which has been emphasized (the "impugned statement"), is the basis for this ground of appeal.

[36] The Landlord submits that the impugned statement is wrong in law. It says that the Tenant was obliged to comply with s. 7.08 without notice. Therefore, contrary to the impugned statement, it was not required to give notice to the Tenant, in accordance with s. 13.04, that it had to vacate the leased premises.

[37] I agree with the Landlord that – absent a provision in the Lease to contrary – when the tenancy by the terms of the lease comes to an end, no notice to quit is necessary to terminate it: see, for example, *Imperial Oil Ltd. v. Robertson* [1959] O.R. 655 (C.A.), at para. 4, a case considered more fully below.

[38] However, while the impugned statement is somewhat ambiguous, I do not share the Landlord's view as to its meaning. I do not understand the impugned statement as saying that the Landlord had to give notice, in accordance with s. 13.04, for the purposes of s. 7.08. Rather, I understand it to say that the

Landlord had not given notice pursuant to s. 3.05, a notice that would have had to have complied with the requirements of s. 13.04 to be valid.

[39] My view of the impugned sentence flows from a reading of the reasons as a whole, particularly paras. 13 to 17.

[40] In para. 13 of his reasons, the application judge states that ss. 3.05 and 7.08 are the Lease provisions that dealt with what was to happen at the expiration of the initial term.

[41] In para. 14, the application judge holds that s. 3.05 – the overholding provision – governs. He notes that although the Lease term had ended, AIM Health continued to occupy the leased premises and the Lease became a month to month tenancy that "[might] be terminated by either party on one month's notice".

[42] In paras. 15 and 16, the application judge considers jurisprudence dealing with overholding clauses in lease agreements.

[43] Paragraph 17 consists of two sentences. The first sentence expressly refers to s. 3.05, noting that there was no further written agreement between the parties. The second sentence is the impugned statement.

[44] In short, after recognizing that either s. 3. 05 or s. 7.08 governed, the application judge held that s. 3. 05 applied. Thereafter, until the impugned statement, he deals either with the specific overholding provision in the Lease or

the caselaw on overholding. In the first sentence of para. 17 (i.e. immediately before the impugned statement), the application judge again refers to s. 3. 05. Accordingly, when the application judge makes the impugned statement, I do not understand him to be referring to s. 7.08. Rather, it appears that he is referring to the notice required by s. 3.05. It will be recalled that s. 3.05 provides for termination of the month to month tenancy by one month's notice by either party.

[45] On this view of the impugned statement, the application judge was correct. At the time of the application, the Landlord had not given the notice required by s. 3.05. By its terms, s. 13.04 applies to any notice that the Landlord is to give to the Tenant. Therefore, for a notice given pursuant to s. 3.05 to be proper, it would have to comply with the requirements of s. 13.04.

[46] However, even if I have misunderstood the impugned statement, given my interpretation of the lease provisions below, the result on appeal remains.

Was the Tenant overholding pursuant to s. 3.05 of the Lease?

[47] The Landlord submits that the application judge wrongly interpreted the Lease when he concluded that AIM Health was lawfully overholding pursuant to s. 3.05 of the Lease. Its many arguments in support of this submission can be summarised as follows.

[48] First, interpreting s. 3.05 as giving the Tenant the option to occupy after the end of the term is inconsistent with the renewal option provision and renders

meaningless s. 7.08, which required the Tenant to give up vacant possession of the premises. A proper interpretation should give effect to all of the relevant Lease provisions.

[49] Second, the application judge's interpretation is not commercially reasonable because it gave the Tenant the unilateral option to convert the Lease into a month to month tenancy on the expiration of the term, thereby frustrating the Landlord's efforts to move a new tenant into the lease premises. In order to interpret the Lease provisions in a way that avoids commercial absurdity, s. 3.05 must be interpreted as requiring the consent of the Landlord. Because the Landlord did not expressly or impliedly permit the Tenant to continue to occupy the leased premises after December 31, 2011, s. 3.05 does not apply. Therefore, s. 7.08 dictates that the Tenant was obliged to give up possession at the end of the term on December 31, 2011.

[50] Third, overholding arises when a landlord accepts rent, after the termination of the lease, in circumstances that permit the inference to be drawn that a new tenancy has been created. Here, the Landlord gave two notices in December 2011 that the Tenant was required to deliver up vacant possession on the expiry of the term. As the Tenant remained in occupation after permission had been revoked and the Landlord had not accepted payment of rent, there could be no inference that a new tenancy had been created. Therefore, the Tenant's occupation amounted to trespass, not justified by s. 3.05.

[51] Fourth, in *Imperial Oil*, there was no requirement for landlord consent in the overholding clause but this court held the clause was of no effect because the parties had not agreed to a new tenancy. Based on *Imperial Oil*, s. 3.05 should be of no effect as the Landlord had not agreed to a new tenancy.

[52] As I will explain, I do not accept these arguments. In my view the application judge correctly concluded that s. 3.05 of the Lease governed the situation when, on January 1, 2012, the Tenant remained in occupation of the leased premises. Having found that s. 3. 05 applied, its terms governed: the Tenant was in lawful occupation on January 1, 2012, on the basis of a month to month tenancy.

The Governing Principles

[53] There is no dispute over the principles to be followed when interpreting the Lease provisions. Each provision is to be read in the context of the Lease as a whole and with regard to the surrounding circumstances. Where there are apparent inconsistencies between different provisions, the court should attempt to find an interpretation that can reasonably give meaning to each of the provisions in question. See *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12, at para. 9.

[54] Moreover, as the Supreme Court has cautioned, the court should not interpret a contract so as to bring about an unrealistic result or one that would not

be contemplated in the commercial atmosphere in which it was contracted: see *Consolidated-Bathurst Export Ltd. v. Mutual Boiler Machinery Insurance Co.* (1979), 112 D.L.R. (3d) 49 (S.C.C.), at p. 901.

Interpreting the Relevant Lease Provisions

[55] For ease of reference, ss. 3.05 and 7.08 of the Lease are set out again now.

> **3.05 Overholding**
>
> **If, at the expiration of the initial Term** or any subsequent Term or any subsequent renewal or extension thereof, **the Tenant shall continue to occupy the Leased Premises without further written agreement**, there shall be no tacit renewal of this Lease, and **the tenancy of the Tenant thereafter shall be from month to month only and may be terminated by either party on one month's notice**. Rent shall be payable in advance on the first day of each month equal to the sum of 150% of the monthly instalment of Basic Rent payable during the last year of the Term and one twelfth (1/12) of all Additional Rent charges herein provided for, determined in the same manner as if the Lease had been renewed and all terms and conditions of this Lease shall, so far as applicable, apply to such monthly tenancy. [Emphasis added.]
>
> **7.08 Surrender of Leased Premises**
>
> At the expiration or sooner termination of this Lease, the Tenant shall peaceably surrender and give up unto the Landlord vacant possession of the Leased Premises in the same condition and state of repair as the Tenant is required to maintain the Leased Premises throughout the Term and in accordance with its obligations in Section 7.07 hereof.

[56] By its terms, s. 3.05 applies if (i) at the expiration of the initial term, (ii) the Tenant continues to occupy the leased premises, (iii) without further written agreement.

[57] That is precisely what occurred. The initial term expired on December 31, 2011, and the Tenant continued to occupy the leased premises without further written agreement.

[58] At the time the parties entered into the Lease, by means of s. 3.05 they agreed on their respective rights and obligations in the event that the Tenant remained in occupation, after the expiration of the initial term and without the benefit of a further written agreement. They agreed that the Tenant's occupation would be a month to month tenancy, that the tenancy might be terminated by either party on one month's notice, and that the Tenant would pay rent at the increased sum of 150% of the monthly Basic Rent payable during the last year on the term, as well as one twelfth of all additional rent charges.

[59] There is no reason not to enforce the terms of their agreement.

[60] If the Landlord's consent was to be a necessary precondition to the Tenant's remaining in occupation, it would have been a simple matter to have included that requirement. It was not.

[61] Contrary to the Landlord's assertion, this interpretation of s. 3.05 does not render either s. 7.08 or the renewal option provision meaningless. These three

provisions can be read harmoniously and with effect. They each apply in different circumstances. Had the Tenant wished to renew the Lease, s. 4 of Schedule “D” governed. Had the Tenant given up occupation at the end of the initial term, s. 7.08 governed. By its terms, the Tenant would have had to deliver up vacant possession of the leased premises in the same condition and state of repair as was required throughout the term. If, however, as was the case, the Tenant remained in occupation after the expiration of the initial term, s. 3. 05 governed, unless the parties entered into a further written agreement in which case that further agreement would have governed.

[62] This interpretation of the Lease provisions is reinforced by a close consideration of the wording of s. 7.08. Section 7.08 does not require AIM Health to give up occupation at the expiration of the initial term. Section 7.08 provides that “at the expiration or sooner termination of this Lease”, the Tenant shall give up vacant possession. If the drafters of the lease had intended that s. 7.08 should apply at the expiration of the initial term they could easily have said so. Instead, by its terms, s. 7.08 applies to the expiration **of the Lease**. The Lease did not expire on December 31, 2011. Because the Tenant stayed in occupation pursuant to s. 3.05, the Lease remained operative. Thus, the Lease did not expire on December 31, 2011, although the initial term did.

[63] Moreover, giving effect to s. 3.05 according to its terms does not bring about a commercially unrealistic result. Section 3.05 does give the Tenant the

power to convert the Lease into a month to month tenancy on the expiration of the initial term, absent the parties coming to a further written agreement. However, three points need to be made in relation to this. First, given that the Landlord agreed to this provision at the time the parties entered into the Lease, it ought not now to complain about it. Second, s. 3.05 benefits both parties, not just the Tenant. The Landlord receives a benefit in the form of increased rent of 150% of the base rent. Third, s. 3.05 did not expose the Landlord to a lengthy month to month tenancy as it could be brought to an end by either party on one month's notice.

[64] Thus, s. 3.05 appears to be a commercially realistic bargain for both parties. Under its terms, the Landlord would receive a significantly enhanced rent, and it faced exposure to only one additional month's occupation by the Tenant. The Tenant had the peace of mind of knowing it could stay in occupation at the end of the initial term, albeit at a significantly enhanced rent.

[65] On a related point, the Landlord argued that once Aim Health advised that it would not exercise the renewal option, it had to find a new tenant to take up the leased premises at the end of the initial term. The findings of the application judge meet this point.

[66] The application judge recognized that the Landlord relied on AIM Health's representation that it would not exercise the renewal option. However, he found

that the Landlord was aware that AIM Health was delayed in its plans to relocate and that at the time it entered into the new tenancy agreement, the Landlord knew that AIM Health could not relocate by December 31, 2011. Despite that, the Landlord went ahead and entered into a new lease which required occupancy on January 1, 2012.

[67] While the Landlord was free to look for a new tenant, it had to honour its obligations under the Lease. Those obligations constrained the Landlord's ability when choosing the start date for the new tenancy. Given the findings of the application judge, it could have come as no surprise to the Landlord that the Tenant intended to stay in occupation past December 31, 2011.

[68] The Landlord's third argument, it will be recalled, is that historically the purpose of an overholding clause was to protect the landlord in the event that a tenant continued to occupy the leased premises after the lease expired without a further written agreement. It is inserted for the benefit of the landlord. See *Medalist Holding Ltd. (c.o.b. as Harvester Executive Part) v. General Electric Capital Equipment Finance Inc.* [1997] O.J. No. 1995, at para. 58. Consequently the Landlord argued, it was for the Tenant to prove that it remained in occupation only with the permission of the Landlord.

[69] The answer to this argument is simple: s. 3.05. By its terms, s. 3. 05 "pre-authorized" the Tenant's continued occupation after the expiration of the initial

term. That is, s. 3.05 amounts to the Landlord's permission that the Tenant could remain in occupation. There is nothing in the purpose of an overholding clause that would inhibit the parties from crafting their own terms of any continued occupation.

Imperial Oil Considered

[70] The Landlord's fourth argument, it will be recalled, is based on *Imperial Oil*.

[71] In *Imperial Oil*, the parties entered into a lease dated July 1, 1958, for a term of 12 months to expire on June 30, 1959. The lease contained an overholding clause, which read as follows:

> If the lessee shall hold over after the term hereby demised, the resulting tenancy shall be a tenancy from month to month and not a tenancy from year to year, subject to all the terms, conditions and agreements herein contained insofar as the same may be applicable to a tenancy from month to month.

[72] In a notice dated May 28, 1959, the landlord advised the tenant that he was required to deliver up vacant possession on the expiry of the lease.

[73] On June 28 and 30, 1959, representatives of the landlord attended at the leased premises and asked the tenant what he intended to do on the expiration of the lease. On the first occasion, the tenant would not disclose his position. On the second, he said that he would not be leaving the premises "peacefully". At around that time, the tenant sent a cheque dated July 1, 1959, to the landlord,

for the usual amount of the rent. On the face of the cheque were the words “July rent”.

[74] Although instructions had been given that personnel of the landlord company were not to accept rent for the month of July from the tenant, the cheque was endorsed and deposited in the landlord’s bank. Shortly thereafter the landlord wrote to the tenant, advising him that a clerk had accepted the cheque through inadvertence and contrary to the landlord’s instructions. Included with the letter was a cheque for the amount of the July rent.

[75] The tenant brought proceedings under the then-prevailing landlord and tenant legislation.

[76] At first instance, the court found in favour of the landlord on the basis that it intended neither to accept rent for July nor create a new tenancy.

[77] The tenant appealed to this court.

[78] The question for the court was whether a new tenancy had been created by virtue of the landlord’s receipt of the July rent cheque.

[79] Justice Morden, writing for the court, observed that by the terms of the lease, the tenancy came to an end on June 30, 1959, and that no notice to quit was required to terminate it. At para. 8, he explains that because the tenancy had ended, the burden was on the tenant to demonstrate that a new tenancy had been created. Acceptance of rent was “an important factor” in meeting that

burden. However, as the landlord had made it “very plain” to the tenant that he was to vacate at the expiry of the lease, the court held that the tenant had failed to show that the July rent cheque had been accepted with the mutual intention that a new tenancy should be created at the expiration of the old tenancy. That is, the tenant had failed to discharge his burden of showing that a new tenancy had been created.

[80] Accordingly, the court dismissed the tenant’s appeal.

[81] *Imperial Oil*, it can be seen, is very different from the present case.

[82] In *Imperial Oil*, the question for the court was whether the landlord had agreed to a new tenancy by the inadvertent acceptance of a rent cheque after the expiration of the initial term of the lease. The focus in *Imperial Oil* was on the actions and conduct of the parties – questions of fact. The case turned on whether the tenant had, on the facts, met his burden of demonstrating that a new tenancy was created. The result in *Imperial Oil* was not based on the overholding provision in the lease, or any other provision for that matter. It was based on the conduct of the parties.

[83] Unlike *Imperial Oil*, this is not a case about whether a new tenancy had been created based on the conduct of the parties. This case turns on the proper interpretation of the Lease provisions, particularly ss. 3.05 and 7.08.

[84] Accordingly, *Imperial Oil* does not assist the Landlord. There is nothing in *Imperial Oil* that speaks to the interpretation of s. 3.05 of the Lease, which is the central issue in this case.

DISPOSITION

[85] For these reasons, I would dismiss the appeal with costs to the respondent fixed at $5,000, inclusive of disbursements and all applicable taxes.

"E.E. Gillese J.A."

Feldman J.A.:

[86] Having had the benefit of reading the reasons of my colleague, Gillese J.A., I respectfully disagree with her on the legal issue of the meaning and effect of the overholding clause, and therefore, on the proper outcome of this appeal.

[87] The factual circumstances are fully set out in the reasons of my colleague. The issue before the court is a question of law: the proper interpretation of the provisions of a lease. Neither party seeks to rely on extrinsic evidence.

[88] The parties entered into a written lease of commercial premises, the appellant as landlord and the respondent as tenant. The term of the Lease was five years commencing on January 1, 2007 and ending on December 31, 2011: ss. 1.01(g)(i)-(iii). Section 3.03 of the Lease provides that the term runs for the five-year period from January 1, 2007 to December 31, 2011, unless terminated earlier under the Lease.

[89] Section 7.08 is the "Surrender" clause. I quote it here for ease of reference:

> **7.08 Surrender of Leased Premises**
>
> At the expiration or sooner termination of this Lease, the Tenant shall peaceably surrender and give up unto the Landlord vacant possession of the Leased Premises in the same condition and state of repair as the Tenant is required to maintain the Leased Premises throughout the Term and in accordance with its obligations in Section 7.07 hereof.

[90] Although this type of surrender clause is often found in leases, the co-authors of *Williams & Rhodes Canadian Law of Landlord and Tenant*, loose-leaf (2012-Rel. 1), 6th ed., (Toronto: Carswell 1988), at para. 13:1:1, explain that this covenant is not necessary because there is an implied obligation on the tenant to deliver up the premises to the landlord upon the expiration or earlier termination of the tenancy:

> The covenant often found in leases binding the lessee to yield up possession at the end of the term is not strictly necessary, since there is an implied obligation on the tenant not only to give up possession, but also to restore the absolute possession to the landlord: *Henderson v. Squire* (1869), L.R. 4 Q.B. 170; *Doe d. Miller v. Tiffany* (1848), 5 U.C.Q.B. 79 (C.A.); *Harrison v. Pinkney* (1881), 6 O.A.R. 225; *Hyatt v. Griffiths* (1851), 17 Q.B. 505, 117 E.R. 1375; *Toronto v. Ward* (1909), 18 O.L.R. 214 (C.A.).

[91] The landlord gave the tenant written notice that it required the premises on January 1, 2012. The question that arises in this case is, what are the obligations of the parties when the tenant does not leave at the end of the lease term?

[92] At common law, if a tenant remains in possession following the expiry of the term of the lease, there are four possible legal relationships that can then be created between the tenant and the landlord: 1) a tenancy at sufferance; 2) a tenancy at will; 3) a deemed new periodic tenancy, referred to as a holdover tenancy; and 4) a trespass.

[93] A tenancy at sufferance arises when a person remains without consent after the person's right to be in possession has ended but where no demand for possession has been made: *Re Lyons and McVeity* (1919), 46 O.L.R. 148 (C.A.), at pp. 150-51; *Gasner v. Bellak Brothers Ltd.*, [1945] O.R. 499 (C.A.), at p. 516. Once the former landlord demands possession, the former tenant is no longer there at sufferance and becomes a trespasser: see Richard Olson, *A Commercial Tenancy Handbook*, loose-leaf (2012-Rel. 1), (Toronto: Carswell, 2004), at pp. 12-1, 12-5.

[94] In a tenancy at will, the tenant remains in possession with the consent of the landlord after the lease has expired, most often when they are negotiating a new lease. The tenancy at will lasts "until some other interest is created, either by express grant or by implication by the payment and acceptance of rent": *Halsbury's Laws of England*, vol. 27(1), 4th ed. (Reissue) (London, U.K.: Butterworths, 2006), at para. 201. A tenancy at will is determinable by either party indicating that it wishes the tenancy at will to end: see Olson, at p. 12-2.

[95] Where a tenant remains in possession following the termination of a lease, or holds over, and where the landlord accepts rent from the tenant or otherwise consents, a new periodic tenancy arises at common law by implication on the same terms as the expired lease, subject to any evidence that the parties reached a different arrangement or understanding. If the original lease term was less than one year, the new tenancy is deemed to be month to month, whereas if

the original lease term was for more than one year, the new tenancy is deemed to be year to year. The payment and acceptance of rent is considered evidence of the parties' intent to enter into a new tenancy arrangement. Without agreeing on other terms, it would be on the same terms as the old lease: see Olson, at pp. 3-72.1, 12-3; *Halsbury's*, at para. 212.

[96] In order to avoid the deemed creation of a yearly tenancy when the tenant holds over and the landlord accepts rent, the overholding clause is frequently inserted into commercial leases, providing that the tenancy that is created is a month to month tenancy: see Olson, at p. 3-72.2; Harvey M. Haber, *The Commercial Lease: A Practical Guide*, 4th ed. (Aurora: Canada Law Book, 2004), at p. 329. Such clauses often provide for higher rent than was paid during the original term of the lease.

[97] But if the tenant remains without paying rent, then at common law, the tenant is there at the sufferance of the landlord and is subject to ejectment: see *Doe dem. Burritt v. Dunham* (1847), 4 U.C.Q.B. 99 (Upper Canada Court of the Queen's Bench).

[98] In this case, s. 3.05 of the Lease, titled the "Overholding" clause, reads as follows:

3.05 Overholding

> If, at the expiration of the initial Term or any subsequent renewal or extension thereof, the Tenant shall continue to occupy the Leased Premises without further written agreement, there shall be no tacit renewal of this Lease, and the tenancy of the Tenant thereafter shall be from month to month only and may be terminated by either party on one month's notice. Rent shall be payable in advance on the first day of each month equal to the sum of 150% of the monthly instalment of Basic Rent payable during the last year of the Term and one twelfth (1/12) of all Additional Rent charges herein provided for, determined in the same manner as if the Lease had been renewed and all terms and conditions of this Lease shall, so far as applicable, apply to such monthly tenancy.

[99] The tenant's position is that the overholding clause in this lease has a different meaning and effect than the common law meaning and effect of overholding, because it does not say that a month to month tenancy is created only on the payment and acceptance of rent or on the consent of the landlord. Because those words are not there, the tenant says that the meaning and effect of the clause is to give the tenant the unilateral option not to vacate the premises at the end of the lease, as required by the surrender clause, but to remain in possession, creating a new month to month tenancy without the landlord having accepted rent or otherwise given consent.

[100] Two Ontario decisions have considered the operation and meaning of similarly-worded overholding clauses in two commercial leases, one a decision of the Court of Appeal and the other a decision of Gale C.J.H.C. when he was Chief

Justice of the High Court and before he became Chief Justice of Ontario. As in the present case, the overholding clause in these cases did not refer to the landlord's acceptance of rent. Nonetheless, the courts required the landlord to have accepted rent after the term of the lease had expired as a precondition for finding that a new tenancy had arisen.

[101] In *Re Imperial Oil Ltd. & Robertson*, [1959] O.R. 655 (C.A.), the overholding clause was quoted in the reasons for judgment as follows:

> [I]f the lessee shall hold over after the term hereby demised, the resulting tenancy shall be a tenancy from month to month and not a tenancy from year to year, subject to all terms, conditions and agreements herein contained insofar as the same may be applicable to a tenancy from month to month.

[102] The lease term was for one year, ending June 30, 1959. The landlord sent the tenant a notice dated May 28, 1959 advising that it required the tenant to deliver vacant possession upon expiry of the lease. Then on June 28th and June 30th, representatives of the landlord attended the premises to ask what the tenant intended to do on expiry of the lease. On the 30th, the tenant said that he would not be leaving peacefully on that date. The tenant also sent the landlord a rent cheque for $275, which was the monthly rent under the lease. Although the landlord had instructed its personnel not to accept a rent cheque for July from the tenant, someone mistakenly accepted and deposited it. On July 2nd, the landlord served a demand for possession on the tenant. On July 8th, the landlord advised

the tenant that the acceptance of the cheque was inadvertent and contrary to instructions and returned the cheque. The tenant responded in kind by returning the cheque. On July 10th, the landlord instituted the proceedings for possession of the premises.

[103] The court referred to the service of the notice to quit and held that, the term having come to an end, no notice to quit was necessary to terminate the tenancy (at p. 658). The issue in the case, as described by both the County Court judge and the Court of Appeal, was whether the landlord had intended to accept the rent cheque from the tenant following the termination of the written lease, and whether the landlord intended to create a new tenancy. The payment and intentional acceptance of rent would be very strong evidence of an agreement to create a new tenancy. The Court of Appeal set out the law as follows, at p. 662:

> [W]hen a lease has terminated either by its terms or by the operation of a valid notice to quit, the tenancy is at an end and if the tenant is thereafter to retain possession he must show that there was a new tenancy: *McIntyre v. Bird*, [1946] O.W.N. 905 (C.A.). The payment by him and the receipt by the landlord of the money equivalent of rent is a very important factor in determining whether there was, in fact, a new tenancy. If this were the only evidence on the issue, a Court or jury would be entitled to find a new tenancy. The evidence in the case at bar goes beyond that. By notices before and after the expiration of the lease, by personal interviews prior to its expiration, the landlord, by its representatives, made it very plain to the tenant that he was to vacate at the expiry of the lease. The only contrary factor was the receipt and deposit of the tenant's cheque for the July rent. In the circumstances,

> which I will now review, the appellant in my view has failed to show that this money was received with the mutual intention that a new tenancy should be created upon the expiration of the old tenancy.

[104] The overholding clause in *Imperial Oil*, like that in the present case, did not include language requiring the consent of the landlord or the acceptance of rent as a condition precedent to the creation of a month to month tenancy. However, the court did not suggest that that wording of the overholding clause gave the tenant the unilateral right to remain in possession after the termination of the lease without consent. Rather, the month to month tenancy would only arise if the landlord intentionally accepted rent. The only issue in the case was whether, in fact, that had occurred.

[105] *Imperial Oil* was a case that involved a similarly-worded overholding clause. The entire analysis of the Court of Appeal focused on whether there was evidence of the landlord's consent to the overholding.

[106] In *Rafael v. Crystal*, [1966] 2 O.R. 733 (H.C.J.), the lease was for 28 months from August 1, 1961. Gale C.J.H.C. observed that the lease was on a standard printed form and contained what he described as "the usual term" which read:

> AND it is hereby agreed between the parties hereto that should the Lessee remain in possession of the said premises after the determination of the term hereby granted, without other special agreement, it shall be as a monthly tenant only, at a rental of $400 per month,

> payable in advance on the first day of every month, and subject in other respects to the terms of this lease.

[107] Toward the end of the term, the parties were negotiating a renewal of the lease but had not reached any agreement by the end of the lease term. Gale C.J.H.C. stated: "when the plaintiff (tenant) *was allowed* to remain in possession following the expiration of the 28 months granted by the lease, he became an overholding monthly tenant pursuant to the printed clause which I have already quoted." [Emphasis added.]

[108] Both *Rafael* and *Imperial Oil* demonstrate an important point. An overholding clause that does not refer to the consent of the landlord has nevertheless been interpreted and applied to mean that it is only with the consent of the landlord that a month to month tenancy is created when the tenant overholds by remaining in possession following the termination of the lease.

[109] Thus, both the leading texts on commercial leasing and longstanding judicial authority make it clear that for an overholding tenancy to arise, the landlord must agree that the tenant may stay in the premises, which agreement is normally evidenced by the landlord's acceptance of rent. The judicial authority consistently interprets the overholding clause in a commercial lease that does not refer to the landlord's acceptance of rent as effectively implying that term.

[110] In my view, to interpret the overholding clause at issue in the present case in the same way that such a clause has always been interpreted and understood makes commercial sense for two reasons.

[111] First, there is no benefit for the landlord to draft a clause that limits its right to obtain vacant possession at the end of the lease term and to create uncertainty for itself as to whether or not it is going to receive vacant possession as required by the lease.

[112] Interpreting the overholding clause as giving the tenant the unilateral option to remain in the leased premises would make the clause commercially unreasonable. The landlord would then be in the position where it could not safely re-let the premises commencing on the day following the end of the lease term because it would not know whether the tenant would, in fact, vacate the premises at that time. Interpreted as my colleague suggests, the tenant need not tell the landlord whether it intends to stay or not. Therefore, at best, the landlord could only re-let the premises beginning one month following the end of the lease term. And if the tenant were to vacate at the end of the lease term, the landlord would be burdened with unrented premises for at least one month because of the uncertainty created by the tenant’s unilateral right to stay on a month to month basis.

[113] Moreover, the competing interpretation of the overholding clause affords little benefit or certainty to the tenant. If the tenant stays against the will of the landlord, then the landlord is entitled to immediately give the tenant one month's notice to terminate and the tenant must vacate the premises thereafter.

[114] Second, as a matter of contractual interpretation of the intention of the parties, clauses that are well-understood to have a particular legal meaning and consequence, such as those found in standard form contracts including insurance contracts, should be consistently interpreted in order to foster certainty and predictability in the law: see for example, *Co-Operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 27; Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed. (Markham: LexisNexis, 2012), at p. 111.

[115] In addition to being an interpretation that accords with principles of commercial efficacy and good business sense, interpreting the overholding clause in s. 3.05 of the Lease in the same way that such a clause has always been interpreted and understood by courts and commentators gives full effect to the surrender clause in s. 7.08 of the Lease. The surrender clause requires the tenant to deliver vacant possession at the expiration of the Lease. I disagree with my colleague's view that the Lease did not end on December 31, 2011 (the expiration of the lease term) and the tenant was not required to vacate the

premises on that date because the tenant chose to remain under the overholding clause.

[116] The overholding clause in s. 3.05 does not extend the Lease; it specifically provides not that the Lease continues, but that a new month to month tenancy arises. Properly interpreted, if the tenant overholds with the consent of the landlord, the landlord has effectively waived the tenant's obligation to vacate. Without such a waiver, the tenant is obliged to comply with the surrender clause.

CONCLUSION

[117] In this case, the landlord made it clear by notice to quit that it required the premises at the end of the term. The tenant remained in possession without the consent of the landlord. The landlord did not create a new tenancy with the respondent tenant. Rather, it signed a new lease with another tenant. The tenant, having refused to deliver vacant possession at the end of the term, therefore became a trespasser.

[118] I note that although the tenant refused to deliver vacant possession after the lease term ended, it did not tender the increased rent to the landlord on January 1, 2012 as specifically required by the clause that it subsequently purported to rely on.

[119] In my view, the tenant was in breach of its obligation to deliver vacant possession of the premises at the end of the term of its lease. On a proper

interpretation of the overholding clause, the tenant was not entitled to unilaterally remain in the premises under that clause absent evidence that the landlord consented.

[120] I would therefore allow the appeal, set aside the order of the application judge, and dismiss the application with costs of the appeal to the landlord fixed at $9,500 inclusive of disbursements and H.S.T.

Released: “K.F.” November 20, 2012

“K. Feldman J.A.”

“I agree Gloria Epstein J.A.”