COURT OF APPEAL FOR ONTARIO

CITATION: Niagara Falls Shopping Centre Inc. v. LAF Canada Company, 2023 ONCA 159
DATE: 20230308
DOCKET: C70676

Gillese, Tulloch and Roberts JJ.A.

BETWEEN

Niagara Falls Shopping Centre Inc.

Plaintiff (Respondent)

and

LAF Canada Company and Fitness International, LLC

Defendants (Appellants)

Jeffrey Haylock and Emily Young, for the appellants

Harvin Pitch and Adam Brunswick, for the respondent

Heard: December 16, 2022

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice, dated April 19, 2022, with reasons reported at 2022 ONSC 2377, 161 O.R. (3d) 531.

Gillese J.A.:

I. OVERVIEW

[1] The Ontario government required non-essential workplaces to close at various periods during the global COVID-19 pandemic. What rights and obligations did the landlord and tenant have during those closures? On this appeal, the answer

to that question depends on the interpretation of the force majeure clause in the parties' lease agreement (the "Force Majeure Clause").

[2] The judge below interpreted the Force Majeure Clause as exempting the landlord from performing its obligation to provide the tenant with the leased premises during the closure periods but requiring the tenant to pay rent throughout those periods.

[3] The Force Majeure Clause reads as follows:

> 22.3 FORCE MAJEURE. If either party is delayed or hindered in or prevented from the performance of any act required hereunder because of strikes, lockouts, inability to procure labour or materials, retraction by an Governmental Authority of the Building Permit once it has already been issued, failure of power, restrictive laws, riots, insurrection, war, fire, inclement weather or other casualty or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability excepted (each, a "Force Majeure Event"), subject to any limitations expressly set forth elsewhere in this Lease, performance of such act shall be excused for the period of delay caused by the Force Majeure Event and the period for the performance of such act shall be extended for an equivalent period (including delays caused by damage and destruction caused by such Force Majeure Event). Delays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events. Force Majeure Events shall also include, as applied to performance of Tenant's acts, hindrance and/or delays in the performance of Tenant's Work or Tenant's obtaining certificates of occupancy (or their equivalent) or compliance for the Premises by reason of any of the following: (i) any work performed by Landlord in or about the Project from and after Delivery

> (including, but not limited to, the completion of any items of Landlord's Work remaining to be completed); and/or (ii) the existence of Hazardous Substances in, on or under the Premises not introduced by Tenant. [Emphasis added.]

[4] The tenant appeals.

[5] For the reasons that follow, I would allow the appeal in part and declare that the Landlord shall perform its obligation to provide the Tenant with the leased premises for a period equivalent to the closure periods (the “Extension Period”) and that the tenant is not obliged to pay rent during the Extension Period.

II. BACKGROUND

[6] Niagara Falls Shopping Centre Inc. (the “Landlord”) is an Ontario corporation that owns a shopping plaza in Niagara Falls, Ontario. It purchased the property in 2019 from Riocan Holdings Inc. (“Riocan”).

[7] LAF Canada Company (the “Tenant) is a Nova Scotia company that owns and operates 31 fitness centres in Canada: 28 in Ontario and 3 in Alberta. On April 18, 2013, it entered into a retail lease with Riocan (the “Lease”) to use a building located in the shopping plaza (the “Premises”) as an indoor health club and fitness facility (the “Club”).

[8] Under the Lease, the Tenant is required to pay a monthly minimum rent together with its share of common area expenses, including property taxes and an administration fee. As of January 2021, the total monthly rent exceeded $101,000.

Fitness International LLC (the "Indemnifier") is the Tenant's California-based parent company; it agreed to indemnify the Tenant's rent obligations.

[9] In 2019 when Riocan sold the shopping plaza to the Landlord, on notice to the Tenant and the Indemnifier, Riocan assigned its interest in the Lease to the Landlord.

[10] On March 17, 2020, the Ontario government declared a provincial state of emergency due to the COVID-19 pandemic. On March 24, 2020, the government mandated the closure of all non-essential workplaces, including fitness facilities.[1] For the rest of 2020 and throughout 2021, the Tenant's business – like so many other businesses across Ontario – was disrupted by government-ordered restrictions relating to the pandemic. Those restrictions either prevented the Tenant from opening the Club or allowed it to open subject to capacity limits.

[11] In May 2020, the Landlord and the Tenant entered into a rent deferral agreement that provided limited rent relief from April to June 2020. Pursuant to that agreement, 50% of the base rent was forgiven and 25% was deferred. After the rent deferral agreement expired, the Tenant paid rent until the end of 2020, even though the Club was permitted to re-open only with limited capacity.

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[1] O. Reg. 82/20.

[12] When the Ontario government reimposed the lockdown, effective December 26, 2020,[2] the Tenant refused to continue paying rent. The Landlord responded by bringing an action for all unpaid rent and various associated charges. The Tenant defended, contending that it was under no legal obligation to pay rent during the government-mandated closures. Its defence rested on the common law doctrines of frustration and unjust enrichment, abatement at common law and under the terms of the Lease, and the Force Majeure Clause. The Tenant also counterclaimed for a declaration that: (1) during periods of government-mandated closure of the Club, it was relieved of the obligation to pay rent; and (2) during periods of government-mandated capacity limits for the Club, its obligation to pay rent was reduced in proportion to those restrictions. It claimed damages from the Landlord of "at least" $618,824.

[13] The Landlord moved for summary judgment and the Tenant cross-moved for summary judgment on its counterclaim. From the start of the pandemic to November 8, 2021, when the motions were heard, the Club had been fully closed for approximately nine months.

[14] The motion judge rejected the Tenant's defences. Because this appeal is based solely on the Force Majeure Clause, I will summarize only her reasons relating to that matter (the "Reasons").

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[2] O. Reg. 363/20, O. Reg. 82/20.

[15] The motion judge accepted the Landlord's submission that the government lockdowns were "restrictive laws" within the meaning of the Force Majeure Clause and, thus, the Landlord was exempted from its obligation under the Lease to provide the Tenant with quiet enjoyment of the Premises, for use as a fitness club, during periods of government-mandated closure (Reasons, at para. 26). She did not accept the Tenant's submission that the Force Majeure Clause required the term of the Lease to be extended for a period equivalent to the closures. She said that such a result was "commercially absurd" and the extension provision in the Force Majeure Clause was intended to deal with only a time limited event in the Lease, such as a maintenance repair (Reasons, para. 38).

[16] The motion judge also accepted the Landlord's submission that, as a result of the "Curative Provision" in the Force Majeure Clause, the Tenant was not relieved of its obligation to pay rent during those same periods. The Curative Provision is that part of the Force Majeure Clause which provides "failures to perform … which can be cured by the payment of money shall not be Force Majeure Events." The motion judge said that because the Tenant's failure to pay rent could be "cured by the payment [of money]", it was not a Force Majeure Event. Consequently, she concluded that the Force Majeure Clause did not operate to excuse the Tenant from its obligation to pay rent during the closure periods.

[17] By judgment dated April 19, 2022 (the "Judgment"), among other things, the Landlord's motion for summary judgment was granted, the Tenant was ordered to

pay the unpaid rent and all associated costs, and the Tenant's counterclaim for summary judgment was dismissed.

III. THE ISSUE ON APPEAL

[18] On this appeal, the Tenant asks the court to find that the motion judge erred in her interpretation of the Force Majeure Clause and find that clause either: (1) delayed both party's obligations to perform for the duration of the government mandated closures and extended the term of the Lease for the duration of those closures; or (2) obliged the Tenant to pay rent during the closures but extended the Lease for the period of the closures, during which period the Tenant is not obliged to pay rent.[3]

IV. THE STANDARD OF REVIEW

The Parties' Positions

[19] The parties disagree on the standard this court is to apply when reviewing the motion judge's interpretation of the Force Majeure Clause.

[20] Relying on *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, the Tenant submits that the standard of review is correctness. It contends that the Lease is a standard form contract and there is "no meaningful factual matrix" specific to the parties that is engaged in the

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[3] The latter alternative is not contained in the Tenant's factum. However, it was advanced in its Oral Hearing Compendium and argued at the oral hearing of the appeal.

interpretation of the Force Majeure Clause. In support of its argument that the Lease is a standard form contract, the Tenant says that "most of" its leases in other Canadian fitness facilities have similar terms to those of the Lease, "with only minor modifications".

[21] The Landlord argues the Tenant has not established that the Lease is a standard form contract. It maintains that the Tenant has not demonstrated that an identical form of language is used in its other leases. Rather, the Tenant acknowledges there are minor variations in its various leases – without describing what those variations are. Consequently, the Landlord contends, the court cannot know if the various leases and the force majeure clauses in them are the same in all material respects. Further, the Landlord argues, there is no evidence that the Lease was a standard printed form offered by one party to the other on a "take it or leave it" basis, a characteristic of standard form contracts. Nor was there evidence to show that leases or force majeure clauses with similar wording have been, or will be, repeatedly entered into.

[22] Accordingly, the Landlord submits, *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, [2014] 2 S.C.R. 633, applies and this court must review the motion judge's interpretation of the Force Majeure Clause on a standard of palpable and overriding error.

Analysis

[23] I accept the Landlord's submission that the Tenant has not established that the Lease is a standard form contract, for the reasons it gave in support of that submission. I also accept the Landlord's submission that the principles set out in *Sattva* govern this court's review of the motion judge's contractual interpretation of the Force Majeure Clause. However, I do not accept that, in this case, the review standard is palpable and overriding error.

[24] The interpretation of a (non-standard form) contract is a question of mixed fact and law, and ordinarily attracts a deferential standard of appellate review: *Sattva*, at para. 52. Absent an extricable legal error – which courts should be cautious in identifying – or a palpable and overriding error, appellate intervention is not warranted: at paras. 53-54. Extricable 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, and the failure to consider a relevant factor: at para. 53. Failure to construe a contract as a whole and disregarding relevant provisions are also extricable errors of law: at paras. 63-64.

[25] As I explain below, the motion judge made extricable legal errors in her interpretation of the Force Majeure Clause. Consequently, appellate deference to her interpretation is not warranted and it falls to this court to interpret the Force Majeure Clause.

V. INTERPRETING THE FORCE MAJEURE CLAUSE

[26] After identifying the motion judge's errors in interpreting the Force Majeure Clause, I will apply that clause to determine each party's obligations during the closure periods. Before doing so, for ease of reference, I set out again the Force Majeure Clause:

> 22.3 FORCE MAJEURE. If either party is delayed or hindered in or prevented from the performance of any act required hereunder because of strikes, lockouts, inability to procure labour or materials, retraction by an Governmental Authority of the Building Permit once it has already been issued, failure of power, restrictive laws, riots, insurrection, war, fire, inclement weather or other casualty or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed, financial inability excepted (each, a "Force Majeure Event"), subject to any limitations expressly set forth elsewhere in this Lease, performance of such act shall be excused for the period of delay caused by the Force Majeure Event and the period for the performance of such act shall be extended for an equivalent period (including delays caused by damage and destruction caused by such Force Majeure Event). Delays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events. Force Majeure Events shall also include, as applied to performance of Tenant's acts, hindrance and/or delays in the performance of Tenant's Work or Tenant's obtaining certificates of occupancy (or their equivalent) or compliance for the Premises by reason of any of the following: (i) any work performed by Landlord in or about the Project from and after Delivery (including, but not limited to, the completion of any items of Landlord's Work remaining to be completed); and/or (ii) the existence of Hazardous Substances in, on or under the Premises not introduced by Tenant. [Emphasis added.]

(1) Legal Errors in the Motion Judge's Interpretation of the Force Majeure Clause

[27] Force majeure clauses are contractual provisions designed to discharge a contracting party when an event beyond the control of either party makes performance impossible: *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Company Limited,* [1976] 1 S.C.R. 580, at p. 583. The term itself has no set or specialized meaning and whether an event triggers the operation of a force majeure clause depends on the nature of the event and the wording of the clause.

[28] There was no dispute below that the government-ordered closure of the Premises was a force majeure event triggering the operation of the Force Majeure Clause for the Landlord, and the motion judge made no error in so finding. The government's "restrictive laws" prevented the Landlord from performing its obligation under the Lease to provide the Premises for use as a fitness facility (Reasons, at para. 26). See also *Windsor-Essex Catholic District School Board v. 2313846 Ontario Limited o/a Central Park Athletics,* 2022 ONCA 235, 27 B.L.R. (6th) 163, at para. 3, in which this court ratified the first instance decision that government lock-downs due to COVID-19 were a force majeure event within the meaning of the lease in question.

[29] The motion judge concluded that the Force Majeure Clause exempted the Landlord from performance for the periods of delay caused by the closures. The

Tenant accepted that the delays in performance by the Landlord were excused for the delay periods but contended that the Force Majeure Clause required the Lease to be extended for an equivalent period. The Tenant based its position on these words in the Force Majeure Clause: “performance of such act shall be excused for the period of delay caused by the Force Majeure Event and the period for the performance of such act shall be extended for an equivalent period” (the “Excusing Provision”) (emphasis added).

[30] The motion judge rejected this contention, saying such a result was “commercially absurd” and the extension referred to in the Excusing Provision was intended to “deal with a time limited event”, such as a repair maintenance obligation (Reasons, at para. 38).

[31] In my view, the motion judge committed two extricable legal errors in interpreting the Force Majeure Clause and, therefore, appellate intervention is warranted.

[32] Before turning to those errors, it is useful to recall the Supreme Court’s guidance in *Sattva* for conducting contractual interpretation. A court’s overriding concern in contractual interpretation is “to determine ‘the intent of the parties and the scope of their understanding’”: at para. 47. Courts must “read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation

of the contract": at para. 47. Contractual interpretation must be grounded in the text of the agreement, which expresses the "mutual and objective intentions of the parties": at para. 57.

[33] The first extricable legal error was the motion judge's failure to give effect to the Excusing Provision, a relevant legal provision. She did not give the words in the Excusing Provision their ordinary and grammatical meaning. Instead, she interpreted the word "excused" in the Excusing Provision as "exempted" and she ignored that part of the Excusing Provision which sets out how the excused performance is to be dealt with. In sum, the motion judge did not construe the Lease as a whole because she ignored a specific and relevant provision of the Lease. As *Sattva* stated, at para. 64: "This is a question of law that would be extricable from a finding of mixed law and fact".

[34] There is nothing in the Force Majeure Clause or the Excusing Provision therein that exempted the Landlord from its obligation to perform. Rather, the Excusing Provision excused the Landlord's performance obligation (to provide the Tenant with the Premises for the intended use as a fitness facility) for the period of delay caused by the Force Majeure Event (i.e. the government-mandated closures).

[35] Further, the Excusing Provision expressly provides for what is to happen if a party to the Lease is delayed, hindered in, or prevented from performing a

required act under the Lease as a result of a Force Majeure Event: “performance of such act shall be excused for the period of delay caused by the Force Majeure Event and the period for the performance of such act shall be extended for an equivalent period” (emphasis added). The motion judge could not simply ignore the emphasized words in the Excusing Provision: they are the stipulated consequence on the happening of a Force Majeure Event that resulted in an excusing of performance.

[36] The second extricable legal error occurred when the motion judge limited the operation of the Excusing Provision to “time limited events”. There is nothing in the Force Majeure Clause that supports such a limitation. On the contrary, the Force Majeure Clause begins by referring broadly to “the performance of any act required” under the Lease and the Excusing Provision refers back to that act when it says, “the performance of such act shall be excused … and extended for an equivalent period” (emphasis added). By limiting the operation of the Excusing Provision to obligations only of a time-limited nature, the motion judge both ignored the plain wording of the Force Majeure Clause and imposed a limitation contrary to the parties’ agreement as expressed therein.

[37] In my view, the motion judge’s interpretation of the Force Majeure Clause does violence to the clear language and intent of that clause and effectively rewrites the parties’ agreement on what is to happen in the case of a Force Majeure Event. Because her interpretation is flawed by extricable legal errors, as I have

already explained, *Sattva* provides that no appellate deference is owed to that interpretation.

(2) Effect of the Force Majeure Clause on the Landlord's Obligations

[38] For the reasons just given, the Force Majeure Clause operated to excuse the Landlord's failure to provide the Tenant with the Premises during the government-mandated closure periods. However, as the Force Majeure Clause also provides, the period for performance by the Landlord of that act "shall be extended for an equivalent period". Accordingly, in my view, the Lease must be extended by the Extension Period.

(3) Effect of the Force Majeure Clause on the Tenant's Obligations

[39] The Tenant submitted below that the Force Majeure Clause: (1) excused the Landlord from providing the Premises for the delay periods caused by the lockdowns; (2) extended the Lease for an equivalent period; (3) excused the Tenant from the obligation to pay rent during the delay periods; and (4) caused the Tenant's "correlative obligation" to pay rent to arise when the Landlord performed its obligation in the Lease extension period.

[40] The motion judge rejected this submission. Based on the Curative Provision, she declared that the Tenant was obliged to pay rent during the closure periods. It will be recalled that the Curative Provision is that part of the Force Majeure Clause

which reads: “Delays or failures to perform resulting from lack of funds or which can be cured by the payment of money shall not be Force Majeure Events.”

[41] I agree with the motion judge’s conclusion that the Tenant was obliged to pay rent during the closure periods but for reasons that go beyond the Curative Provision. In my view, on a reading of the Force Majeure Clause as a whole, it is clear that the Tenant could not rely on it to avoid paying rent during the closure periods.

[42] There are two components to the operation of the Force Majeure Clause. First, a party must be “delayed or hindered in or prevented from the performance” of an act required under the Lease. Second, the failure to perform must be because of a type of event amounting to a Force Majeure Event, as that term is defined in the Force Majeure Clause.

[43] In the Landlord’s case, as I explain above, both components were met. First, the Landlord was prevented from performing its obligation under the Lease to provide the Tenant with the Premises. Second, its failure to perform was by reason of the restrictive government closure orders – a matter which, as I explain above, fell within the definition of a Force Majeure Event in the Force Majeure Clause.

[44] In the case of the Tenant, the first component was met: its ability to meet its obligation to pay rent during the closures was hindered. However, the second component was not. The Tenant’s ability to meet its obligation to pay rent was not

hindered because of a Force Majeure Event within the meaning of the Force Majeure Clause.

[45] The Tenant responded to the closures of the Premises by refraining from requiring its members to pay their membership fees. As a result, the Tenant suffered financially and was hindered in its ability to pay rent. However, the Force Majeure Clause expressly excludes “financial inability” as a Force Majeure Event. Accordingly, there was no Force Majeure Event the Tenant could rely on and the Force Majeure Clause did not operate to excuse it from paying rent.

[46] The Tenant’s inability to rely on the Force Majeure Clause in this situation is reinforced by reference to the Curative Provision in the Force Majeure Clause. It will be recalled that the Curative Provision states, “Delays or failures to perform resulting from lack of funds or which can be cured by money shall not be Force Majeure Events” (emphasis added). Here, the Tenant’s failure to pay rent resulted from its lack of funds due to a lack of membership fees. As the Curative Provision states, lack of funds is not a Force Majeure Event.

[47] Thus, it can be seen, both the financial inability exclusion and the Curative Provision preclude the Tenant from relying on the Force Majeure Clause to excuse its obligation to pay rent during the closures.

[48] The Tenant urged this court to consider various American judicial decisions opining on similarly worded force majeure clauses in claims by landlords against

Fitness International Inc. Those decisions go different ways and, I understand, a number of them are under appeal. Accordingly, I see no utility in reviewing the American decisions here. To the extent that the Tenant continues to press the *Windsor-Essex* decision, I agree with the motion judge that it does not assist the Tenant in this case. As she pointed out, *Windsor-Essex* is distinguishable. The force majeure clause in *Windsor-Essex* expressly provided that, when the force majeure event prevented the landlord from enabling the tenant to make use of the leased premises, “Rent and Additional Rent” was to abate for such period.

[49] In conclusion, the Tenant could not rely on the Force Majeure Clause to excuse it from paying rent during the closure periods. However, the Tenant shall not be obligated to pay rent during the Extension Period, having already been required to pay it during the closure periods.

VI. DISPOSITION

[50] For these reasons, I would allow the appeal. I would declare that the Landlord is excused from performance of the act required under the Lease (to provide the Premises for use as a fitness facility) for the periods in which the Premises were closed due to the government-mandated closures but I would also declare that the Lease is extended by the Extension Period. I would not disturb that part of the Judgment requiring the Tenant to pay monthly rent during the

closure periods, but I would declare that the Tenant shall not be required to pay rent during the Extension Period.

[51] The relief I would order would have an impact on the Judgment. Therefore, para. 5 of the Judgment ordering costs of the motion and the action in the respondent's favour must be revisited. If the parties are unable to resolve costs of the motions below, the action, and this appeal, they may make written submissions on those matters, to a maximum of six double-spaced typewritten pages, such submissions to be filed with the court no later than 10 days from the date of release of these reasons. Any party who delivers submissions shall include costs outlines for all three matters, regardless of whether they are seeking costs or simply resisting the other's claim.

Released: March 8, 2023 "E.E.G."

"E.E. Gillese J.A."
"I agree. M. Tulloch J.A."
"I agree. L. B. Roberts J.A."