COURT OF APPEAL FOR ONTARIO

CITATION: 100 Bloor Street West Corporation v. Barry's BootCamp Canada Inc., 2023 ONCA 247
DATE: 20230411
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Lauwers, Paciocco and Thorburn JJ.A.

BETWEEN

100 Bloor Street West Corporation

Applicant (Respondent)

and

Barry’s Bootcamp Canada Inc. operating as Barry’s Bootcamp and BBC Holdings, LLC

Respondent (Appellant)

Mark Dunn and Kirby Cohen, for the appellant

Howard Wolch, Stephen Thiele and Stephen Longo, for the respondent

Heard: March 29, 2023

On appeal from the order of Justice Markus Koehnen of the Superior Court of Justice, dated September 6, 2022.

REASONS FOR DECISION

OVERVIEW

[1] The appellant, Barry's Bootcamp Canada Inc. ("Barry's"), appeals the order of an application judge declaring that the respondent, 100 Bloor Street West Corporation ("100 Bloor"), reasonably exercised its discretion under their commercial lease agreement to allocate realty taxes to Barry's using a "Proportionate Share" calculation. This is a calculation based on the percentage that Barry's space comprises of the total retail space in the building, an 11.878% share. Barry's argues that the application judge committed an extricable legal error in coming to that conclusion. For the following reasons, we dismiss Barry's appeal.

MATERIAL FACTS

[2] Barry's negotiated a commercial leasehold agreement with 100 Bloor to rent a "standard unit" premises (the "rental premises") at 100 Bloor Street West in Toronto. Standard unit premises carry a lower square-foot rent than the "superior unit" premises, which have ground floor frontage on Bloor Street.

[3] The lease is a "triple net lease" under which Barry's agrees to pay "base rent" as well as "operating expenses" and "realty taxes". Barry's drafted the "Realty Taxes" calculation clause, which provides alternative methods of calculating the realty taxes that Barry's must pay, depending upon whether the "Taxing Authority" assesses the rental premises separately. If the Taxing Authority does so, then that separate assessment is to be used. But if the Taxing Authority does not assess

the rental premises separately, and instead provides a single tax bill for the entire building, then the lease provides that “the Landlord shall determine, in its sole and unfettered discretion, the portion of the Realty Taxes attributable to the Leased Premises using such method of determination which the Landlord shall choose” (what we will call the “discretionary attribution subclause”).

[4] The City of Toronto, which is the Taxing Authority, issued a global realty tax bill to 100 Bloor, using a “Current Value” assessment of 100 Bloor Street determined by the Municipal Property Assessment Corporation (“MPAC”). Working papers MPAC produced reveal that it determined the Current Value assessment of 100 Bloor Street by aggregating the Current Value assessments that MPAC prepared for each rental unit, including Barry’s. Since the City of Toronto did not ultimately impose taxes separately for Barry’s rental premises, the parties agree that 100 Bloor was entitled to determine Barry’s share of realty taxes using the discretionary attribution subclause.

[5] As noted, 100 Bloor attributed realty taxes to Barry’s using the Proportionate Share calculation which it based on the percentage that Barry’s space comprises of the total retail space in the building, an 11.878% share. Given that the leased space Barry’s occupied is less valuable than many other leased units, if 100 Bloor had used the Current Value assessment of Barry’s rental premises identified in MPAC’s working papers, Barry’s would be liable to pay a lower share of the realty

taxes, between a 4.06 and 5.06% share. Barry's disputed 100 Bloor's realty tax attribution.

[6] The parties agreed to a temporary accommodation in their disagreement over the realty tax attribution, pending an appeal by 100 Bloor of the overall tax assessment and the end of COVID-19 lockdowns. But 100 Bloor ultimately demanded that Barry's pay its share of realty taxes based on the Proportionate Share calculation and made the demand on short notice. This and related disputes resulted in the parties bringing opposing court applications. Barry's largely prevailed in the litigation, but not in its challenge to 100 Bloor's realty tax allocation. The application judge held that, even if the MPAC Current Value assessment for Barry's leased premises may have been better, 100 Bloor's Proportionate Share method of ascribing realty tax is one that the lease reasonably permitted.

ISSUES ON APPEAL

[7] Barry's now appeals that decision. It has constructed an elaborate argument contending that the application judge committed an extricable error of law by erroneously identifying the purpose of the discretionary attribution subclause, thereby applying a mistaken assessment of reasonableness. This argument is crafted out of the decision in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, 454 D.L.R. (4th) 1, at paras. 88, 92, which holds that the exercise of a contractual discretion is unreasonable if it is

unconnected to the purposes for which the discretion is granted. Barry's argues that the application judge erred in concluding that the purpose of the discretionary attribution subclause was to allow 100 Bloor to allocate realty taxes. Barry's argues that in coming to this conclusion the application judge committed an extricable error by describing the "function" of the clause instead of identifying its "purpose", which it would have properly identified had it asked "why" 100 Bloor was given the discretion to allocate realty taxes. Barry's argues that when the discretionary attribution subclause is read in the context of the lease as a whole, it can be seen that the purpose for giving 100 Bloor this discretion is to enable it to identify the taxes that would have been imposed *against* the premises had the City taxed according to MPAC Current Value assessment for Barry's rental premises. By contrast, the Proportionate Share allocation is based on the taxes imposed on the building as a whole, not the taxes that are imposed against the rental premises. Barry's argument is based primarily on the Definitions section of the lease, which defines "Realty Taxes" as "any … property tax … imposed … against the Leased Premises".

ANALYSIS

[8] We would dismiss Barry's appeal. This was a negotiated lease, not a standard form contract. The factual matrix of the lease is specific to the parties, and its interpretation has no precedential value. Absent an extricable error of law, the review of the application judge's interpretation of this lease must therefore be

conducted using a palpable and overriding error standard of review: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2. S.C.R. 633, at paras. 53-55; *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 21. We are not persuaded that the application judge committed an extricable error of law, or any palpable and overriding errors.

[9] The application judge accurately stated the legal test for the reasonable exercise of discretion and measured the reasonableness of 100 Bloor's exercise of discretion against the purpose he identified for the discretionary attribution subclause. Barry's argument that the application judge committed an extricable error of law by identifying the "function" of the discretionary attribution subclause instead of its "purpose" is no more than an expression of disagreement with the purpose the application judge identified. *Wastech* does not require, as a matter of law, that judges identify the reason for the function of a contractual provision beyond its facial purpose. The argument Barry's makes amounts to a claim that the application judge's stated purpose was not specific enough. To accede to this submission would be contrary to the admonition in *Sattva*, at para. 54, that appellate courts should be "cautious in identifying extricable errors of law", so that mere disagreements about proper interpretation are not framed as errors of law.

[10] Nor is the application judge's conclusion unreasonable. The discretionary attribution subclause, which Barry's negotiated and drafted, described 100 Bloor's discretion in the widest possible terms, as "sole and unfettered". Moreover, the

evidence showed that the Proportionate Share calculation is a commonly used method for sharing retail taxes in commercial leases. The language in the related clauses of the lease is anything but clear in demanding that 100 Bloor must use its discretion to attempt to identify the taxes that have been imposed *against* the premises, instead of using the commonly employed Proportionate Share calculation.

[11] First, the discretionary attribution subclause is only triggered if realty taxes for the leased premises have not been separately assessed. The idea that 100 Bloor must attempt to identify the taxes that have been imposed *against* Barry's leased premises, in cases where taxes have not been assessed against the premises, does not immediately commend itself. Put otherwise, it is not at all clear how taxes imposed *against* the premises are to be calculated where no such assessment has been made. It bears notice that it was only fortuitous that, after the lease had been negotiated, Barry's received the MPAC notes providing a figure that could be linked specifically to the leased premises.

[12] Second, the lease uses inconsistent terms in describing the relationship between realty taxes and the premises. The definition of "Realty Taxes" speaks of "property tax … imposed by any Taxing Authority … against the Leased Premises". The "Occupancy Costs" clause 5.3, speaks an obligation to pay "the Tenant's share of the Realty Taxes", and the "Realty Taxes" calculation clause requires payment of either "Realty Taxes separately assessed against the Leased

Premises" or "the portion of Realty Taxes attributable to the Leased Premises", depending on whether the leased premises has been separately assessed. Clearer language would be needed throughout the lease to sustain Barry's position that the attribution must represent an attempt to quantify the realty taxes imposed *against* the premises.

[13] Third, the fact that the "Occupancy Costs" clause 5.3 uses the term "Proportionate Share of Operating Expenses" but speaks only of the "Tenant's share of Realty Taxes" without using the modifier "proportionate", does not support an inference that realty taxes are not to be quantified by proportionate share. As indicated, there are two alternative methods provided in the lease for attributing realty taxes. If taxes have been separately assessed against the premises, that separate assessment applies, and in such cases the realty tax allocation would not be based on a proportionate assessment. Adding the modifier "proportionate" to the description of the general obligation to pay realty taxes would provide an inaccurate description of the realty taxes owed where units are separately assessed. It is little wonder the term "proportionate" was reserved in the occupancy costs clause to describing operating expenses and not included when describing the realty tax obligation. This contrast cannot be taken as indicating that realty taxes cannot be proportionate.

[14] We see no palpable or overriding errors in the application judge's decision, which was entirely reasonable.

CONCLUSION

[15] The appeal is dismissed. Costs are payable to the respondent, 100 Bloor Street West Corporation in the amount of $25,000.

"P. Lauwers J.A."

"David M. Paciocco J.A."

"J.A. Thorburn J.A."