SUPREME COURT OF NOVA SCOTIA

Citation: *Innotech Aviation v. Skylink Express Inc*., 2018 NSSC 93

Date: 20180416
Docket: Hfx No. 454660
Registry: Halifax

Between:

Innotech Aviation, a division of IMP Group Limited

Applicant

v.

Skylink Express Inc.

Respondent

Judge: The Honourable Justice D. Timothy Gabriel

Heard: January 15, 2018, in Halifax, Nova Scotia

Counsel: John Shanks, for the Applicant
Gary A. Richard, for the Respondent

By the Court:

Introduction

[1] This is part two of a bifurcated hearing. In a decision reported as *Innotech Aviation ("IMP") v. Skylink Express Inc.("Skylink")*, 2017 NSSC 176 ("*IMP no. 1*"), I rendered a decision on liability in this matter, concluding, among other things, that:

> 59. … the Respondent breached its contractual obligations to the Applicant when it stopped paying the full rental amount (in November, 2015) required of it pursuant to the 2014 Addendum.

[2] At para. 60, I continued:

> The parties have requested, in the event that such were to be my decision, that I allow them to make further submissions on the issue of IMP's damages. This results from a request by the Applicant to update and correct an error in the quantification of its damages that surfaced during counsel's submissions with respect to same, and the Respondent's corresponding request that it be permitted to respond to the corrected information when it is available.

[3] On January 15, 2018, I heard further argument from the parties with respect to the quantification of the Applicant's damages as a result of the breach. What follows is my decision with respect to this specific issue. Before dealing with it, some additional background is necessary.

More Background

[4] Here is what Schedule 1 of the 2014 Addendum (the last written document reflecting agreements between the parties) had to say about the rent payable:

SCHEDULE 1
(effective July 15, 2014 to July 14, 2015)

TERMS AND SERVICES AGREEMENT

IMP HALIFAX HELIPORT

1.	Office	$845.13 Monthly
	Maintenance Office	1,147.55 Monthly
2.	Ramp Parking (as required, as available)	105.00 Daily per Aircraft
3.	Hangarage (1 Beachcraft 1900 Aircraft)	4,403.70 Monthly
	Hangarage (4 Caravan Aircraft)	11,482.44 Monthly
4.	Storage Space	448.84 Monthly
5.	Parking (8 spaces)	504.00 Monthly
6.	Aviation Fuel	

All purchasing of Aviation Fuel, oil, greases at Halifax must be purchased at IMP Aviation Services and must be on a Shell credit card.

Any fuel price escalation will be passed on to customer with one day's written notice.

All amounts mentioned above are exclusive of H.S.T. unless otherwise stated. In the event of any increases to the H.S.T., P.A.F.T., Airport Fee, Federal Excise Tax or the implementation of any new tax or charges applicable to aviation fuels levied by any level of Government will be passed on to Lessee. IMP will give one day written notice or one days telex notice to Lessee for any such increases.

[5] The 2014 Addendum, and all of the Addenda which preceded it, refer to the original lease executed by the parties dated July 19, 1998 (referred to in the extract below as "the lease" but otherwise herein as "the original lease") in the following manner:

> All other terms and conditions of the lease shall be as set forth therein except as specifically amended by this Addendum to Lease.

[6] These rent payments are subject to a 3% escalation each year pursuant to clause 2 of the Addendum. At present, Skylink continues to pay monthly rent for office space, maintenance space and parking space in the amount of $3,387.50 per month, leaving a deficiency (in the current year of the term) of $19,563.54 per month. This deficiency results from the fact that Skylink does not pay any of the remaining rental amounts specified in the 2014 Addendum for hangarage space. The last time that it did so was in October, 2015.

[7] Damages calculated on that basis for outstanding rent due as of January 15, 2018, renders a total of $531,138.90. Skylink does not dispute this quantification, as its counsel points out at paras. 2 - 3 of its prehearing brief:

> In accordance with this Honourable Court's finding regarding liability, the hangarage rates *per se* are of an immediate understanding.
>
> Skylink cannot practically argue contrary to the position of Innotech respecting the base hangarage payments accrued to date, to the extent that it is a mathematical extract from the plain terms of the hangarage agreement, and the straight forward payment schedule derived therefrom.

[8] Skylink does, however, dispute the interest on past rental amounts sought by IMP, and the award of costs (on a solicitor-client basis) which it also seeks. Innotech (on the other hand) argues that the terms of the contract itself provide the basis for its position with respect to interest and costs.

[9] Before consideration is given to these two bones of contention, it is important to bear in mind what else is uncontested. I have just mentioned that the mathematical calculation of the gross amount of rental arrears in the amount noted above is not in dispute. Neither is the fact that the lease itself is still extant. It has not been terminated or repudiated, notwithstanding my finding in *IMP no. 1* that Skylink is in breach of it. I agree with the parties' joint position in this respect, and will proceed to briefly explain why this is so.

What is the status of the lease?

[10] IMP states at para. 11 of its brief:

> IMP seeks to hold Skylink to its bargain and to continue the Lease until the expiration of the Lease term. It was confirmed at the Application Hearing that neither IMP not Skylink wanted to terminate the Lease. In any event, IMP submits that the remedies it seeks are available under the Lease as of right, and that the

> award of unpaid future rent for the unexpired term is not available on the facts of this case given that the Lease has not been terminated.

[11] This contention is premised upon the caselaw that has followed in the wake of the Supreme Court of Canada's decision in *Highway Properties Limited v. Kelly, Douglas and Company*, [1971] S.C.R. 562. Therein, at para. 14, Chief Justice Laskin described the remedies available to a landlord where the tenant had breached the lease (in that case, it involved an abandonment of the premises):

> The developed case law has recognized three mutually exclusive courses that a landlord may take where a tenant is in fundamental breach of the lease or has repudiated it entirely, as was the case here. He may do nothing to alter the relationship of landlord and tenant, but simply insist on performance of the terms and sue for rent or damages on the footing that the lease remains in force. Second, he may elect to terminate the lease, retaining of course the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of covenant. Third, he may advise the tenant that he proposes to re-let the property on the tenant's account and enter into possession on that basis. Counsel for the appellant, in effect, suggests a fourth alternative, namely, that the landlord may elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term. One element of such damages would be, of course, the present value of the unpaid future rent for the unexpired period of the lease less the actual rental value of the premises for that period. Another element would be the loss, so far as provable, resulting from the repudiation of clause 9. I say no more about the elements of damages here in view of what has been agreed to in that connection by the parties.

[12] Cases involving a landlord electing to proceed pursuant to the first option as noted above are comparatively rare. This is for the obvious reason that a tenant who has defaulted on its rent is generally impecunious and, in such cases, it will often make little practical sense to take this route. But precedents do exist.

[13] For example, in *7Marli Limited v. Pet Valu Canada Inc.*, 2017 ONSC 1796, Justice Perell dealt with a situation in which a landlord had elected to keep the lease alive and sue for rent from time to time. As noted in para. 18:

> The landlord's first choice of remedy is to sue or to distrain for arrears of rent. This choice treats the lease and the tenant's property interest as continuing and the landlord as having an ongoing claim for rent. Under this choice, since the lease is still alive, there is no claim for damages for loss of the benefit of the bargain and no duty to mitigate: *B.G. Preeco 3 Ltd. v. Universal Explorations. Ltd.*, [1987] 6 W.W.R. 127 (Alta. Q.B.).

> [Emphasis added]

[14] Then, continued at paras. 28 – 29:

> I agree that it may be inefficient to have sequential partial summary judgment motions, but it is an inefficiency that the law permits under the exclusive choices provided by the *Highway Properties* case under which the landlord may keep the lease alive and sue for rent and damages without any obligation to mitigate its loss.
>
> Moreover, in the case at bar, the inefficiency is somewhat speculative because, the landlord may change its mind and terminate the Lease or, the Lease being alive, Pet Valu might sublease (even at a higher rent) and this would end the accrual of arrears of rent.

[15] I extract from the authorities that the following courses of action were open to IMP in this case:

i. To do nothing to alter the relationship.

ii. To elect to terminate the lease, retaining of course the right to sue for rent accrued due, or for damages to the date of termination for previous breaches of covenant.

iii. To advise the tenant that he proposes to re-let the property on the tenant's account and enter into possession on that basis, or

iv. To elect to terminate the lease but with notice to the defaulting tenant that damages will be claimed on the footing of a present recovery of damages for losing the benefit of the lease over its unexpired term.

[16] IMP has chosen the first option. It has pointed out that Skylink is a sophisticated, financially well-off company. None of the impecuniosity concerns that it might otherwise have with a defaulting commercial tenant exist here. Skylink has not abandoned the premises, and IMP has not sub-let the hangarage space for which the Respondent has refused to pay.

[17] On the authority of *Highway Properties*, and despite the relative paucity of circumstances in which specific performance is available to an aggrieved party to a contract, both parties have acknowledged that such a remedy is available to the Applicant, IMP, in the circumstances of this case. As I said earlier, I agree.

Issues

[18] As a consequence, the issues that arise with respect to the calculation of IMP's damages are as follows:

a. Does the issue of mitigation arise in this context?

b. Is Innotech entitled to insist upon the rate of interest (18% per annum, 1.5% per month) stipulated in the original lease?

c. Is Innotech able to claim solicitor/client costs in this proceeding on the basis of clause xii(c) of the original lease?

Analysis

a. Does the issue of mitigation arise in this context?

[19] The short answer to this question is that it does not. I have already referred in passing to *Pet Value*, which makes this specific point at para. 18. Also, in *AFG Flat Glass North American Ltd. v. CCP Atlantic Speciality Products Inc.*, 2010 NSSC 108, Bryson J. (as he was then) elaborated:

> 31. *Highway Properties* is important for landlords because it allows a contractual termination and damages, whereas property law held that all the landlord's remedies merged in recovery of possession of the premises. Despite adverse comment that it is anomalous to excuse a landlord from the duty to mitigate if it chooses not to terminate, *Highway Properties* remains the law: *607190 Ontario Inc. v. First Consolidated Holdings Corp.* [1992] O.J. No. 2074. And the answer to the critics on this point is that a departing tenant can effectively force mitigation on a landlord by subletting, providing that the landlord cannot reasonably object.
>
> 32. But if a landlord in fact mitigates, the court will take that into account when determining the landlord's loss, if any: *Toronto Housing Co. Ltd. v. Postal Promotions Ltd.* (1982), 140 D.L.R. (3d) 117 (Ont. C.A.); and *Apeco of Canada, Ltd. v. Windmill Place*, [1978] 2 S.C.R. 385. In deciding whether the landlord has a duty to mitigate, it is important to distinguish between repudiation and termination. The latter triggers a duty to mitigate; the former does not (*B.G. Preeco 3 Ltd. v. Universal Explorations Ltd.*, (1987), 42 D.L.R. (4th) 673 (Alta. Q.B.). This matters here because AFG did not terminate the lease upon CCP's repudiation. Thus, the first option in *Highway Properties* is at play.
>
> [Emphasis added]

[20] True, Skylink did not (unlike the tenant in *AFG Glass*) abandon the premises. It has, however, breached the lease by paying IMP only a fraction of the rent due to it, on a monthly basis, since October, 2015.

[21] Even if I had concluded otherwise, there is no evidence to suggest that what IMP has done in the wake of Skylink's breach falls short of what is reasonable in attempting to mitigate its loss. It has simply been unable to do so.

[22] For example, and as described in the (amended) affidavit of Joel Bédard dated February 21, 2017, in the aftermath of Skylink's breach, IMP has attempted to negotiate with existing customers to augment their lease space. It has also attempted to bring in new customers, including some non aviation companies, all to no avail.

[23] The Applicant's only success (post breach) has been to persuade Exploits Valley Air Service to store a Beechcraft 1900 at the facility. There are 30,010 square feet of usable hangar space at the Heliport. Of that total, 12,712 is leased to other tenants (see Bédard supplementary affidavit). This leaves 5,933 square feet (over and above the 11,365 square feet that Skylink leased) available to house the Exploits Beechcraft, and others. IMP continues to have 11,365 of floor space open at all times to service its obligation to Skylink under the lease.

[24] Therefore, the deal with Exploits Valley Air was an independent transaction which did not arise from Skylink's breach, in the sense intended in *Apeco of Canada Ltd. v. Windmill Pace,* [1978] 2 SCR 385. At pp. 388-389 of *Apeco*, the Court noted:

> It is apparent from the above account that the vacancy created by the appellant's breach did not have any bearing on the new tenant's decision to rent 17,000 square feet of accommodation in the new building. <u>If the premises formerly reserved for Apeco had been the only available space suitable to the new tenant's needs, different considerations would have applied</u>, but the building was more than half empty and the Goodboy's company was at first not interested in renting the Apeco space at all and it was only after some persuasion on the part of the respondent that it was induced to do so.
>
> It follows, in my view, that the February 1976 transaction could have been concluded even if the appellant had not breached the original agreement and that it was an independent transaction which in no way arose out of the consequences of the breach by the appellant.
>
> [Emphasis added]

b. Is Innotech entitled to insist upon the contractually stipulated rate of interest (18% per annum, 1.5% per month) stipulated in the original lease?

The Authorities

[25] There is a distinction between a clause in a contract which provides for payment upon the happening of a stipulated event (albeit, a non breach) and one which provides for what is due to a party from the other as a result of an act which does constitute a breach of that contract. Payments due upon "non breach" events are not penalty clauses. They are simply agreements to pay a specified sum upon the happening of a specified occurrence, one other than a contractual breach.

[26] For example, in *Lappin v. Homburg Management Inc.,* 2009 NSSC 346, the issue was the failure by a tenant to remain open during regular business hours. The contract specified a $100.00 per diem charge whenever this occurred. The Court concluded that failure to remain open during business hours would not (in and of itself) have constituted a breach of the contract. However, since the lease provided for a monetary consequence in the event that the event occurred, the parties had contracted the consequences of such a failure. The clause was upheld.

[27] In the case at bar, I have already determined that the actions of Skylink, in failing to pay the required rent for the hangarage space, did breach the contract. As such, the question to be determined is different from that in *Lappin*.

[28] In these circumstances, I must consider whether the interest rate is, in effect, a penalty clause. If so, it cannot stand. On the other hand, should interest at the contractually stipulated rate be viewed as a genuine pre-estimate by the parties of IMP's damages in the event of breach, it can stand and is enforceable.

[29] The relevant time frames which must be examined when considering if an interest provision is extravagant and unreasonable (and therefore a penalty) would be both when the contract was made, and also at the time of breach. The overarching or foundational consideration is the equitable concept of "unconscionability".

[30] As was stated in *Nguyen v. Tran* (2012) ONSC 2418 at para. 60:

> While the parties expressly employed the term "penalty" or "fine" (depending upon which translation of the written addendum is accepted), this translated language is not conclusive of the issue. In every case, the court is still required to determine whether the stipulated payment is, in truth, an unenforceable penalty or an

> enforceable estimate of liquidated damages. To make this determination, the court will interpret the terms of the contract and its inherent circumstances, judged at the time of the making of the contract. The stipulated payment is properly viewed as an unenforceable penalty if it is an extravagant, extortionate, unconscionable or unreasonable amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach of contract. The essence of an unenforceable penalty is the required payment of a stipulated sum that is oppressive to the party breaching the contract. The essence of enforceable liquidated damages, on the other hand, is a genuine advance estimate of the damage that would flow from a breach of the contract. In this assessment, it is important to recall that the jurisdiction to strike down penalty clauses is an exception to the general principle that parties have the freedom to contract as they wish. See: S.M. Waddams, *The Law of Contracts* (6th ed., 2010) at s.452-465; J. Swan, *Canadian Contract Law* (2006) at pp. 714-720; *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*, [1915] A.C. 79 (H.L.) at pp. 86-87; *Elsley Estate v. J.G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916, at pp. 937-938; *Prudential Insurance Company of America v. Cedar Hills Properties Ltd.*, [1994] B.C.J. 3055 (C.A.) at para. 37; *869163 Ontario Ltd. v. Torrey Springs II Association Ltd. Partnership* (2005), 76 O.R. (3d) 362 (C.A.) at para. 22-36; *Leave denied*: [2005] S.C.C.A. No. 420; *Birch v. Union of Taxation Employees, Local 70030*, [2008] O.J. No. 4856 (C.A.) at para. 34, 37-46; *Action Auto Leasing v. Boulding et al.*, 2011 ONSC 7253 (S.C.J.) at para. 8-11.
>
> [Emphasis added]

[31] In *Peachtree II Associates v. 857486 Ontario Ltd.* 2005 CanLII 23216 (ONCA), the Court was chiefly concerned with a relief from forfeiture remedy sought in relation to a commercial contract. Justice Sharpe's following comments relate to the issue under discussion herein:

> 24. ... The common law penalty rule involves an assessment of the stipulated remedy clause only at the time the contract is formed. If the stipulated remedy represents a genuine attempt to estimate the damages the innocent party would suffer in the event of a breach, it will be enforced. On the other hand, again to quote Lord Dunedin from *Dunlop, supra*, "[i]t will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could be conceivably be proved to have followed from the breach." Laskin C.J.C. adopted a virtually identical formulation (taken from Snell's Principles of Equity (27th ed. 1973) at p. 535) in *H.F. Clarke Ltd. v. Thermidore Corp. Ltd.*, [1976] 1 S.C.R. 319 at 338. Although the common law defined penalties in terms of unconscionability, that assessment is to be made at the time the contract was formed. The common law doctrine did not include any discretion to be exercised in the light of circumstances that may exist at the time of breach.

> 25. Equity, on the other hand, considers the enforceability of forfeitures at the time of breach rather than at the time the contract was entered. Equity also looks beyond the question of whether or not the stipulated remedy has penal consequences to consider whether it is unconscionable for the innocent party to retain the right, property, or money forfeited. As explained by Denning L.J. in *Stockloser v. Johnson*, [1954] 1 All E.R. 630 (C.A.) at 638: "Two things are necessary: first, the forfeiture clause must be of a penal nature, in the sense that the sum forfeited must be out of all proportion to the damage; and, secondly, it must be unconscionable for the seller to retain the money."
>
> [Emphasis added]

[32] At para. 32 of *Peachtree*, it was further observed:

> … I agree with Professor Waddams' observation in *The Law of Damages*, looseleaf (Aurora: Canada Law Book Inc., 1991) at para. 8.310 that as there is often little to distinguish between the two types of clauses and that there is much to be said for assimilating both under unconscionability. The effect of assimilation would be "to provide a more rational framework for the decisions of both forfeitures and penalties." Unconscionability is also the direction suggested by the dictum of *Dickson J. in Elsley et al. v. J.G. Collins Insurance Agencies Ltd*., [1978] 2 S.C.R. 916 at 937: "It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum." As pointed out by the appeal judge, this would also appear to be the direction of s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43: "A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise, as are considered just." All of this suggests to me that courts should, whenever possible, favour analysis on the basis of equitable principles and unconscionability over the strict common law rule pertaining to penalty clauses.
>
> [Emphasis added]

[33] At para. 34, Sharpe J.A. continued:

> ... Judicial enthusiasm for the refusal to enforce penalty clauses has waned in the face of a rising recognition of the advantages of allowing parties to define for themselves the consequences of breach. As I have already noted, in Elsley, supra, Dickson J. labeled the penalty clause doctrine as "a blatant interference with freedom of contract," a sentiment echoed by the English Court of Appeal in Else. The arguments favouring the enforcement of stipulated remedy clauses on this score are recognized by Fridman, The Law of Contract in Canada, 4th ed. (Toronto: Carswell, 1999) at 817 and are especially well put by Waddams, supra, at para. 8.330:

> It is useful to remember that the jurisdiction to strike down penalty clauses represents an exception to a general principle of freedom of contract. The force of the general principle should not be underestimated. There are strong arguments for enabling parties to set their own value on performance. The power to do so gives flexibility to the contracting process; it enables the promisor to offer an assurance of performance while limiting liability for consequential damages and thereby making the cost of breach predictable. It enables the promisee to avoid the cost of securing compensation by litigation and the risks of undercompensation that may be caused by the legal restrictions on damages, such as remoteness, certainty of proof, mitigation, and failure to recognize intangible losses; it reduces the cost to the parties and to the state of settling a dispute after breach; it enables the promisee to purchase insurance against default from the party in the best position to provide it at the lowest cost. A further point is that the striking down of the clause may represent an injustice to the promisee for the price of performance will have been agreed in the light of all the promisor's obligations, including the promise to pay an agreed sum on breach; if that promise is struck down, the promisee does not receive what has been paid for. (Footnote omitted.)

Analysis

[34] In this case, the relevant clause of the original lease says:

> XVI(B) All payments of rent or other amounts owing by the occupant to owner under this Agreement shall bear interest at the rate of one and one-half per centum per month in arrears from the due date to the date of payment.

[35] The original lease also says, in clause XVI(P):

> This Agreement constitutes the entire agreement between the owner [IMP] and the occupant [Skylink] and neither party shall amend this agreement unless in writing properly executed by the parties hereto.

[36] Finally, the 2014 Addendum stipulates that:

> All other teams and conditions of the [original] lease shall be as set forth therein except as specifically amended by this addendum to lease.

[37] Given that the provision for interest in the lease is clearly stated and without ambiguity, there would be a corresponding onus upon the party disputing it (in this

case, the Respondent, Skylink) to lead evidence upon which the Court could conclude that it would be unconscionable to give effect to it.

[38] In this case, the Respondent has lead no such evidence. For example, there is no evidence before me as to what the Bank of Canada's prime lending rate was in 1998, or at any time thereafter. Further, I have been provided with no basis upon which the true economic loss sustained by IMP (as a result of not having received the funds due to it pursuant to the terms of the lease) could be calculated or even estimated. I do have, however, the method of calculation to which the parties had agreed when the original lease was contracted.

[39] Instead of giving effect to it, the Respondent argues that the Court should proceed in another fashion:

> This Honourable Court is privy to the communications between the parties that resulted in the July 2014 addendum that effectively revived the expired original hangarage lease. That history reveals clearly that neither party raised, nor apparently put its mind to, the rate of interest chargeable on overdue rent. It is simply foreseeable, that given the state of the credit market at the relevant times, had the parties considered a rate, it would have been significantly less than 18% per annum. This rate may not have seemed usurious in 1998; but it certainly would have had the parties put their minds to it in April of 2015. This Honourable Court ought to impute a currently realistic rate of interest on overdue hangarage. (Brief, p. 1)

[40] I observe that the original lease underwent many written revisions since 1998, in the form of addenda, to which prior reference has been made. The most that may be said is that in none of these addenda was the interest rate specified in the original lease revisited or varied. The Respondent argues that this was a consequence of the parties' failure to have addressed their minds to it. Even if I were to accept this contention (and I do not), it still does not shed any light upon whether the parties would have changed it if they had addressed their minds to it. It is speculative.

[41] There is no basis upon which to conclude that Article xvi(b) produces an unconscionable or oppressive result. On the contrary, two well established, sophisticated commercial entities contracted for this particular result in the event of a breach.

[42] As a consequence, the Applicant is entitled to a liquidated amount calculated on the basis of 1.5% per month with respect to each hangarage rental payment which was not made by Skylink after October, 2015.

b. *Is Innotech able to claim solicitor/client costs in this proceeding on the basis of clause xii(c)?*

[43] Clause xii(c) of the original lease stipulates as follows:

> XII. DEFAULT
>
> C. If the Occupant continues in default of any covenant (except the covenant to pay rent) for ten days the Owner may perform the same for the account of the Occupant and may enter upon the Premises for the purpose and shall not be liable to the Occupant for any loss or damage to the Occupant's supplies, equipment or business caused by acts of the Owner. If the Owner is compelled or elects to pay any sum of money to do any acts which would require the payment of any sum of money by reason of the failure of the Occupant to comply with any provisions of this Agreement, or if the Owner is compelled or elects to incur any expense, including legal fees, in instituting, prosecuting or defending any action of proceeding instituted by reason of any default of the Occupant hereunder, the sums so paid by the Owner to the extent that same is reasonable, with all interest, costs and damages, shall be deemed to be additional rent hereunder and shall be paid by the Occupant to the Owner upon demand.
>
> [Emphasis added]

[44] The Respondent points out that nowhere in the above paragraph are the words "solicitor-client costs" used. This is true. However, the legal lexicon is both rich and varied. There are many cases which could be cited in support of the proposition that particular or precise words are not to be treated as requiring slavish adherence or repetition. The failure to use a particular phraseology, as though it were a magical formula, is not pre-determinative of the issue.

[45] The first matter to be addressed, therefore, is the effect of the language which the parties used in this context upon the overall issue of costs. The second is whether the Court's ultimate discretion with respect to costs ought to be invoked to override or modify the parties' agreement as expressed in clause X11(C).

i) *How have the authorities interpreted other similarly worded clauses?*

[46] Many (although not all) of the authorities have arisen within the context of foreclosures. For example, in *Bank of Nova Scotia v. Romaine*, 1988 CanLII 3867 (ABQB) at paras. 8 -16, the Court noted as follows:

The mortgage provides in part:

> "AND I also covenant and agree to pay any liens, taxes, rates, charges or encumbrances upon the said lands and if I fail to do so the Bank may pay the same, or any part thereof, and the amount so paid, together with all costs, charges and expenses which may be incurred in the taking, recovering and keeping possession of said lands, or in inspecting the same and generally in any other proceeding taken to realize the said indebtedness, interest or other moneys hereby secured or in instituting, prosecuting or defending any suits, actions or proceedings or in doing any matter or thing necessary or expedient for the protection of the Bank or for the purpose of perfecting the title to said lands, shall be a charge on the said lands in favour of the Bank and shall be payable forthwith by me to the Bank with interest at the rate hereinbefore reserved in respect of the said indebtedness until paid, and in default the mortgagee's power of sale shall be exercisable in addition to all other remedies. In the event of the money advanced under this provision or any part thereof, being applied to the payment of any charge or encumbrance, the Bank shall stand in the position of and be entitled to all the equities of the person or persons so paid off."
>
> (emphasis mine)

…

The parties reduced their contract to a document. The intention of the parties is to be gathered from the words they used. In other words, from what they said in the document: *Anderson v. Chaba*, 1977 ALTASCAD 294 (CanLII), [1978] 1 W.W.R. 631; 7 A.R. 469 (Alta C.A.).

In my view, all reasonable costs, charges and expenses incurred by the plaintiff in prosecuting this action are a charge on the land. That is what the mortgage plainly says.

The limitation of "reasonable" costs, charges and expenses is what the court finds is an implied term on the ground both sides contemplated that when the mortgage was entered into.

I find the plaintiff is entitled to all reasonable costs, charges and expenses in enforcing its security.

[Emphasis added]

[47] In the context of a commercial lease, in *Saskatoon Square Ltd. v. Dunwoody & Co.,* 1993 CanLII 8852 (SKQB), the Court noted at para. 69 -70:

> Saskatoon Square claims costs on a solicitor-client basis. They rely on paragraph 5.11 of the lease which provides:

> "5.11 The Tenant shall pay and indemnify the Landlord against all legal costs and charges, including Counsel fees, lawfully and reasonably incurred in enforcing payment thereof and in obtaining possession of the Leased Premises after default of the Tenant or upon expiration or earlier termination of the Term of this Lease or in enforcing any covenant, proviso or agreement of the Tenant herein contained."

On the basis of the agreement I find Saskatoon Square is entitled to solicitor-client costs.

[48] Then, in *Danforth-Woodbine Theatre Ltd. v. Loblaws Inc.*, [2000] O.J. No. 4385 (also dealing with a commercial lease) we find at paras. 3 – 4:

> Paragraph 15 of the lease provides as follows:
>
> > THE LESSEE shall indemnify and save harmless the Lessor from any and all costs ... growing out of:
> >
> > > (a) any breach, violation or non-performance of any covenant, condition or agreement in this lease set forth and contained on the part of the Lessee, to be fulfilled, kept observed and performed.
>
> Language such as this has been found to create a contractual right to solicitor and client costs. See *Canada Trustco Mortgage Co. v. Mundet Industries Ltd*., [1996] O.J. No. 3746 (Ont. Gen. Div.).
>
> [Emphasis added]

[49] In *Ackerman v. Deckman Trust*., 2014 NSSC 335, the Court dealt with a foreclosure proceeding and a mortgage which stipulated, *inter alia*, that:

> "all solicitor's charges or commissions for or in respect the collection of any overdue interest, principal, insurance premiums or any other monies whatsoever payable by the mortgage hereunder, as between solicitor and client, whether any action or any judicial proceeding to enforce such payment has been taken or not…[shall be paid by the mortgagor].

[50] The Court proceeded to discuss the two lines of authority on the subject:

> 15. In *CIBC Mortgage Corp v. Mann* [1987] 82 N.S.R. (2d) 181 *[Mann]* a mortgagee sought a deficiency order after foreclosure and sale, including solicitor and client costs based on language similar to that in the present case. Richard, J. observed that the Nova Scotia practice was to exercise the courts discretion to award solicitor and client costs only in "very exceptional circumstances" citing, *Inter Alia, Craig*, and *Theoharopoulos* noting that those cases ought to have been

sufficient to put to rest the argument that solicitor and client costs award was contractual. Ordering that costs be taxed on a party and party basis, he stated:

> 7. Costs are clearly in the discretion of the court. I am of the view that this discretion cannot and should not be usurped by a clause in a contract. Therefore, such clauses should be given no weight and the court ought deal with the question of costs quite apart from any contractual provisions.
>
> 8. To find otherwise would be to expose a mortgagor (or others in similar contractual situations) to liability for costs over which he could exercise no control and would place him in the insidious position of being totally at the mercy of the other party and its solicitor. This is the sort of thing that could lend itself readily to excess and abuse.
>
> …
>
> 17. Davison, J. [in *Homburg*] distinguished *Craig* on the basis of the language of the mortgage provision. Whereas the provision in *Craig* did not address what happened after crystallization of the debt and the commencement of foreclosure proceeding, the *Homburg* clause clearly stated that "after default, the mortgagor shall pay the mortgagees legal expenses on a solicitor and client basis with respect to collecting money payable under the mortgage". The issue was the effect of a judge's judicial discretion in light of this clause. Davison, J. noted that the question of discretion had not been of concern in *Craig*, where the court's reasoning was based on the language of the mortgage. He concluded with the following summary of the law:
>
> > 40. In my view, the law in Nova Scotia is that where a mortgage stipulates the mortgagor pays to the mortgagee costs on a solicitor and client basis, costs should be awarded on that basis except in special circumstances. The court has an overall discretion as to costs, but that discretion should not deprive the parties to that which they have agreed, except when those special circumstances exist.
> >
> > [Emphasis added]

[51] In *R. v. Innocente* [2003] N.S.J. No. 174, two mortgagees sought solicitor/client costs. The property was subject to a *Criminal Code* restraint order. The Clarica mortgage provided:

> 10(h). The mortgagor will pay to the mortgagee on demand, all expenses and costs incurred by the mortgagee in enforcing this mortgage. These expenses and costs include the mortgagee's cost of taking and keeping possession of the land, the cost of the time and services of the mortgagee or the mortgagee's employees for so doing, the cost of appraisal, the mortgagee's legal fees and disbursements on a solicitor and client basis, unless the court allows legal fees and disbursements to be paid on a different basis, and all other costs and expenses incurred by the mortgagee

> to protect the mortgagee's interest under this mortgage. These expenses and costs will be added to the principal amount, be payable on demand and bear interest until they are fully paid.

[52] The Citifinancial mortgage provided:

> 9. That the Mortgagee may pay the amount of any taxes, liens, claims, charges or encumbrances now or hereafter existing or to arise or be claimed upon the said lands, having or which the Mortgagee may bona fide consider to have priority over this Mortgagee, and all costs, charges and expenses (as between solicitor and client) which may be incurred in negotiating this loan, investigating title and registering this mortgage along with any other necessary deeds or documents, or in negotiating and/or effecting a renewal of this mortgage / or in securing or retaining or realizing or attempting to procure possession of the said lands, or in any proceeding judicial or otherwise to protect or to realize upon this security....

[53] Justice LeBlanc reviewed the two lines of authority. As noted, the first flows from *Craig v. de Oliveria E Sousa* [1984] N.S.J. No. 387 (C.A.), and the line of cases decided pursuant to it. These are generally cited in support of the argument that "solicitor-client costs" clauses such as that should be given little or no weight by the Court.

[54] The other line of authority is *Canada Trust Co. Mortgage Company v. Homburg*, 1999 CanLII 1978 (NSSC). This was to the effect that while the Court has an overall discretion as to costs, it is a discretion which ought not to be invoked to take away from a party that to which they have agreed contractually (i.e. solicitor – client costs) unless "special circumstances" exist.

[55] Justice LeBlanc concluded at paras. 37 and 38 of *Innocente*:

> As to the Clarica mortgage, I conclude that Homburg No.1 can be distinguished. The mortgage at issue in that case did not contain an express provision recognizing the Court's discretion to award costs on a different basis from that contemplated by the mortgage document. Clarica's mortgage does contain such a provision. While there may be a presumption in favour of allowing solicitor-client costs when a mortgage contract calls for them to be awarded, solicitor-client costs remain unusual and discretionary. The language of the contract must be clear and unequivocal. The mortgage under consideration in Homburg used the phrase "solicitor and client costs", unadorned by any such additional words as appear in the Clarica mortgage (see Homburg No. 1 at paragraph 4).
>
> As to the Citifinancial mortgage, I conclude that the phrase "as between solicitor and client" ought to be taken to have the meaning ascribed to it by the authorities

> cited by Orkin, that is, as a less liberal scale than solicitor-client costs. I further note that clause 2 of the mortgage uses the phrase "solicitor and client costs". The two phrases use different wording; I prefer that of clause 12, which is a specialized clause dealing with legal costs. In any event, where the mortgage contains inconsistent provisions, it should be interpreted against the drafter: see G.H.L. Fridman, *The Law of Contract in Canada*, 4th edn.(1999) at 495-497.
>
> [Emphasis added]

[56] In Justice Scaravelli's decision *Ackerman* (at para. 25) he determined that only a contrary decision of the Court of Appeal or the Supreme Court of Canada could usurp what *Craig, supra.* had to say, and observed no such authority had been provided. He concluded that "the Defendant is not contractually obliged to pay costs on an elevated scale between solicitor and client in these proceedings". This is to be considered in tandem with his comment at para. 13 that:

> The court [in Craig] appeared to find that the phrase "whether any action or other judicial proceeding to enforce such payment has been taken or not", did not draw in legal costs arising from a foreclosure proceeding.

Analysis

[57] It is obvious that this is not a foreclosure proceeding. It is also clear, at least in my view, that the parties cannot contractually oust the Court's ultimate discretion with respect to costs.

[58] To be fair to the Applicant, as I understand its argument, it is not contending that the Court has lost its overall discretion with respect to costs as a result of the contractual provision in question. Its argument is simply that the Court ought not to exercise that discretion to interfere with the bargain which the parties have struck between themselves.

[59] While the previous case authorities are not easily reconciled, in one sense they may be squared with the terms "special circumstances", "oppression" and "unconscionability" references earlier noted. Although neither party argued this, (and without attempting to be exhaustive) it would seem to me that "special circumstances" (or oppression, unconscionability, etc.) might exist where an inequality of bargaining power is present, albeit not one sufficient to void the contract itself.

[60] Such an inequality might arise (for example) in a mortgagor/mortgagee relationship. In such a case, there is not likely to be a wide divergence between the

remedies which individual lenders will require to be set out in the mortgage document itself, hence not a lot of options on the part of the mortgagor to "shop around" or negotiate. In such circumstances, a mortgagee is more than likely to be faced with a take it or leave it proposition. While the Court (as always) will scrutinize the language of the mortgage document to determine whether it is "clear and unequivocal", award of solicitor – client costs will remain "unusual and discretionary" (per *Innocente, supra*, para. 37). In my view, they must remain so in light of the Court of Appeal's decision in *Craig*.

[61] Even if tacit effect is given to a "solicitor – client costs" clause in a mortgage, in my view, the Court may often be more inclined to exercise its discretion to modify a particular award of costs calculated upon such a basis to some extent. To do otherwise will more frequently be "unconscionable" or "oppressive" to a party already facing foreclosure upon a family home than in other contexts.

[62] For example, in *Xceed Mortgage Corp. v. Jesty*, 2014 NSSC 51, Justice Wood stated at paras. 3 – 7:

> 3**.** In the *Canada Trustco* case, the plaintiff had commenced foreclosure proceedings and succeeded in obtaining an order of foreclosure and sale as a result of a summary judgment motion. Prior to the sale of the property, the mortgagor paid out the mortgage; however, the parties disagreed on whether the plaintiff was entitled to claim the actual legal expenses of the foreclosure action. The plaintiff relied on a provision in the mortgage that permitted it to recover all costs and charges (including solicitor and client costs) incurred in attempting to enforce the mortgage. The conclusion of the Court with respect to the issue is set out at pp. 16-17:
>
> > In my view, the law in Nova Scotia is that where a mortgage stipulates the mortgagor pays to the mortgagee costs on a solicitor and client basis, costs should be awarded on that basis except in special circumstances. The court has an overall discretion as to costs, but that discretion should not deprive the parties to that which they have agreed, except when those special circumstances exist.
> >
> > What are the "special circumstances"? There are situations where the mortgagee uses oppressive or vexatious conduct. They are situations which include the mortgagee causing vexatious delays or unnecessary costs. To quote the Ontario Court of Appeal, they render "the imposition of solicitor and client costs unfairly or unduly onerous in the particular circumstances". In my opinion, it should be recognized the mortgagor has no control over the quantum of costs and the court should be cautious in the amount it taxes against the mortgagor because of this lack of control

> notwithstanding that which may be viewed as an appropriate amount as between the mortgagee and its solicitor.
>
> …
>
> 5. In this case, the mortgage of Xceed Mortgage Corporation includes the following clause:
>
> > 11. **Rights on Default:** And in the event of default being made as aforesaid, the Mortgagee shall also be entitled to send an inspector or agent to inspect and report upon the value, state and condition of the Mortgaged Premises and a solicitor to examine and report upon the title the same at the Mortgagor's expense, and all expenses incurred in so doing, <u>together with all costs and charges (including solicitor and client costs) which the Mortgagee may incur or pay in collecting or attempting to collect any monies payable hereunder</u> or enforcing or attempting to enforce any of the remedies and powers herein contained for the recovery of the monies hereby secured, or any part hereof, whether the proceedings taken prove abortive or not, and in recovering and attempting to procure possession of and keeping possession of the Mortgaged Premises or any part thereof, shall form and be a charge upon the said Mortgaged Premises, and be payable forthwith to the Mortgagee by the Mortgagor, and shall bear interest at the rate aforesaid computed from the time of payment of the same as upon principal money advanced upon the security of this Mortgage.
>
> …
>
> 7. <u>In considering the proceeding and the issues involved, it appears to me that requiring Mr. Jesty to pay approximately $28,000.00 in fees, disbursements and taxes would be excessive and onerous</u>. In reviewing the detailed account provided by counsel for Xceed, it includes all of the work associated with the unsuccessful summary judgment motion, as well as regular status reports to the client. There were charges for interoffice meetings to review various issues, some of which (such as Mr. Jesty's bankruptcy status) had little to do with the issues for trial. There were also charges related to Xceed's request to call a witness at trial who was not included on their initial witness list, which ultimately required a pre-trial hearing.
>
> [Emphasis added]

[63] On the other hand, the Courts appear to be much more inclined to uphold (without intervention) clauses interpreted to call for solicitor – client costs in commercial contexts. As has been seen in commercial lease cases like *Saskatoon Square* and *Danforth v. Woodbine Theatre* (both *supra*), the Court has enforced them almost reflexively.

[64] A further example is provided by *Smith v. Mexican Sol Imports Limited*, 2000 BCSC 558, at para. 4 and 5:

> On June 1, 1994, European Products Ltd., as lessor, entered into a contract of lease with the defendant Mexican Sol Imports Ltd. ("Mexican Sol"), as lessee, for space in the building. Mexican Sol is an importer, wholesaler and retailer of handmade tile and ceramic stone carrying on business in Vancouver and Toronto. The term of the lease was 3 years, expiring May 31, 1997 and the space comprised 5,792 sq. feet. At all material times, Michael McConnell was president of Mexican Sol and a shareholder.
>
> In September 1996, European Products Ltd. assigned its interest in the ground lease and sold its interest in the building to the plaintiffs as joint tenants operating as K & S Management ("K & S"). The plaintiffs are husband and wife. At all material times, the plaintiff, Kenneth Smith, was the manager and operating mind of K & S. Thus, the Smiths became successors at law to the rights, duties and obligations of European Products Ltd. with respect to the leased property. Mexican Sol continued to occupy the leased space after the purchase by the plaintiffs.

[65] The lessee (in *Smith*) then vacated the premises before the expiration of the lease period and the Court concluded that it had, in so doing, breached the terms of the lease "by failing to pay rent after the end of January 1997" and was in default under the lease.

[66] The Court concluded (as in this case) that the Plaintiffs had elected to uphold the lease (in other words, proceeded on the basis of option 1 as noted in *Highway Properties*, *supra*.). At para. 82, the Court in *Smith* noted:

> The lease provides that:
>
> > If it shall be necessary for the Landlord to retain the services of a solicitor or any other proper person for the purpose of assisting the Landlord in enforcing any of its rights hereunder in the event of default on the part of the Tenant, the Landlord shall be entitled to collect from the Tenant the cost...on a solicitor and own client basis…
>
> I order that those costs shall be taxed and the amount found to be due, and paid by the defendant.
>
> [Emphasis added]

[67] There does not appear to be any analysis in *Smith* as to why the Court elected to uphold the contractual provisions entered into between the parties, but the

rationale that I noted earlier herein would be consistent with the relative equality of bargaining strength generally encountered in a commercial context such as the present situation.

[68] I also note that (unlike *Smith*), in the case at bar, clause xii(c) of the original lease does not provide for the Landlord to collect "solicitor and own client" costs. Moreover, the use of the qualifying words "to the extent that same is reasonable" in xii(c) of the original lease here would also seem to expressly invite (upon the wording of the clause itself) a taxation of IMP's solicitor/client bill of costs.

[69] There is no evidence of any impediment on the part of either party to negotiate, and absolutely no evidence to suggest that one or the other of them was "over a barrel" (so to speak) when either the original lease or any of the subsequent addenda were negotiated. As noted, the parties had no apparent difficulty in providing for addenda encompassing increased hangarage space over the years and/or adjustments to the rent to be paid from time to time. They were successful in doing so on at least ten occasions from 1998 to present.

[70] I have not been referred to any other circumstances arising from the evidence in this matter which could amount to "special circumstances" within the meaning of the caselaw previously noted. The parties should therefore be held to their bargain. IMP shall receive its solicitor – client costs.

ii) What about the Court's ultimate discretion as to costs?

[71] In this case, as I said in *IMP no. 1* at paras. 50 and 51:

> By selecting a five-year term, the Respondent assured itself of the lowest possible rent. It traded a longer commitment to the Applicant in exchange for the lowest available (3%) annual rental increase. It also thereby secured for itself a credit note in the amount of $27,121.53 from the Applicant (more on which will be said below).
>
> Correspondingly, what the Applicant was to have received was the security of a rental of the hangar space for a longer term…

[72] As I continued in para. 58:

> Simply put, what appears to have happened here is that Skylink, after executing the 2014 Addendum and then unexpectedly losing the courier contract with the banks, has attempted to foist its own unforeseen business loss onto the Applicant. There

> was nothing in the original lease, the history of the parties' past dealings, or the 2014 Addendum which permitted them to do this. Nor was there a collateral contract which permitted such conduct.

[73] The Respondent received considerable benefit by entering into a five year term. I have noted this in the quote from my earlier decision excerpted above. The result of the Respondent's decision has to been essentially to deprive the Applicant of the principal benefit for which it had bargained. There are no circumstances to which I have been referred which ought to vitiate the cost consequences that the contract itself specifies was to follow such a breach.

[74] However, as I have just noted, the lease speaks to the recovery of:

> …the sums so paid by the Owner to the extent that same is reasonable…shall be deemed to be additional rent hereunder.
>
> [Emphasis added]

[75] According to the plain contractual language employed by the parties, in clause XII(C), the bill must be reasonable. As such, the bill will be taxed. The Court must determine whether the bill is reasonable if allowed against Skylink as presented. This is the extent of the Court's discretion (as to costs) which will or should be exercised in this case.

[76] I have not yet been provided with IMP's bill.

Conclusion

[77] In the specific constellation of circumstances encountered in this case, I have determined that it would be both appropriate and fair to hold the parties to their contractual bargain. As such, IMP shall receive interest upon each unpaid monthly hangarage rental from the date of default at a rate of 18% per annum. IMP shall also receive its costs from Skylink to be agreed, or, failing that, to be taxed on a solicitor-client basis. If the latter, the Court will determine, upon taxation and upon review of the detailed account entries, whether IMP's bill as presented is a "reasonable" amount to be recovered against Skylink.

[78] Counsel for IMP shall prepare and forward the draft form of order and the solicitor – client bill of costs which it seeks to recover from Skylink, unless the parties can agree with respect to the costs and disbursement amounts with the

assistance of this decision. If the latter, all amounts owing may be quantified, and the parties should able to consent as to form.

[79] If not, the draft order with costs and disbursements left blank shall be forwarded, together with the Applicant's bill of costs and disbursements, and written submissions (if any). These materials will be forwarded within 20 days, and the submissions of the Respondent within 10 days thereafter. I will then make the requisite determination after review of IMP's bill.

Gabriel, J.