CITATION: 1732076 Ontario Limited v. 1806701 Ontario Inc., 2025
COURT FILE NO.: CV-23-1108-0000
DATE: 20250616

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
1732076 ONTARIO LIMITED Applicant	Vladimira Ivanov, for the Applicant
– and –	
1806701 ONTARIO INC. Respondent	Lianne Armstrong, for the Respondent
	HEARD: December 9, 2024

HOWIE J.

Overview

1) A ruling is required with regard to the interpretation of the commercial lease. The lease provides for “basic” and “additional” rent. The additional rent is set out in the lease at $1.66 per square foot.

2) The question is whether the amount of $1.66 is a fixed or a fluctuating amount.[1]

3) The tenant urges this court to find that the sum of $1.66 is fixed.

4) The landlord, on the other hand, argues that this is a “net lease”; the amount of $1.66 is a prepayment only on an estimate and that the tenant is responsible for its share of those additional costs. The tenant describes this position as an attempt to renegotiate, and rewrite, the lease.

5) Both parties take the position that their respective interpretation of the lease can be found within the four corners of the lease and that no other additional evidence is needed.

6) Alternatively, both parties take a position that if the disputed portions of the lease are open to interpretation, this court may consider extrinsic evidence, including the negotiations

[1] I should point out that there was a dispute as to the amount of space that the tenant, in fact, was leasing. That issue did not require argument as the order sought was unopposed.

that took place up to the execution of the lease and the conduct of the parties following the execution of the lease.

Background

7) The Tenant is a plastic injection mould assembly business. It supplies parts on a "just in time" model to the automobile industry. The general manager is Mr. Van Alphen. The business employs approximately 30 full-time people.

8) In 2019, the tenant needed a new place to operate its business.

9) The tenant became interested in an area inside a commercial condominium building, located at 540 Park Ave. E., Chatham, Ontario ("the building"). The landlord's principal was Mr. Mahmood.

10) The parties entered into a five-year lease on March 25, 2019, with an occupancy date of March 1, 2019.

Issues

Issue #1: In reviewing the language of the lease, can it be determined if the additional rent was intended to be fixed or variable?

a. The Terms

11) The starting point to interpreting a contract, naturally enough, is the text of the agreement itself: *Resolute F. P. Canada Inc. v. Ontario (Attorney General),* 2019 SCC 60, para. 76. Commercial contracts are to be interpreted on the basis that the parties have "intended what they said" in the agreement: *2249778 Ontario Inc. v. Smith (Fratburger),* 2014 ONCA 788, para. 19.

12) When interpreting contracts, this court should adopt a practical, common-sense approach, to ascertain the "objective intentions" of the parties: *Resolute*, para. 74.

13) With that in mind, the first task is to review the actual terms of the lease.

14) Under the lease, rent is defined as follows:

> 1.1 "**Additional Rent**" means all other amounts set out hereunder plus the applicable *Harmonized Sales Tax* (HST) payable by the Tenant to the Landlord or to be discharged as rent under this Lease… Changes to Additional Rent shall require amendments to the amount said out hereunder.

Year of Term	Aggregate Annual Additional Rent	Monthly Additional Rent
Year 1	$41,666.00	$3.472.17
Year 2	$41,666.00	$3.472.17

Year 3	$41,666.00	$3.472.17
Year 4	$41,666.00	$3.472.17
Year 5	$41,666.00	$3.472.17

…

"**Minimum Ren**t" means for each Lease Year, the amounts set out hereunder plus the applicable *Harmonized Sales Tax* (HST)… The Tenant shall pay the Landlord before taking possession the first and last month's Rent under the Lease which shall bear no interest:

Year of Term	**Aggregate Annual Additional Rent**	**Monthly Minimum Rent**
Year 1	$75,300.00	$6,275.00
Year 2	$75,300.00	$6,275.00
Year 3	$75,300.00	$6,275.00
Year 4	$75,300.00	$6,275.00
Year 5	$75,300.00	$6,275.00

…

"**Rent**" means the aggregate of all amounts payable by the Tenant to the Landlord under this Lease"

…

4.1 **<u>Rent.</u>** The Tenant shall pay to the Landlord as Rent for the Leased Premises the aggregate of:

(a) Minimum Rent in respect of each year of the Term…; and

(b) Additional Rent at the times and in the manner provided in this Lease or, if not so provided, as reasonably required by the Landlord.

That being an annual rent of $4.66 per square foot of the Rentable Area…

15) There are several reasons to conclude that the plain language of the lease provided that the additional rent was fixed, not flexible.

16) There is nothing in this language that suggests that the amount set out for additional rent is an estimated pre-payment, and subject to accounting. The wording is not there. Nowhere are the words "estimated" or "prepayment".

17) There are no procedures set out as to how the annual adjustments would be negotiated. Furthermore, there is no guidance as to how the additional rent would be calculated. The leased premises was a portion of a larger building. If the tenant was responsible for a share of certain common expenses on a "flexible" basis, one would have expected to find, in the lease, a definition of how the proportions were calculated. Even if it is assumed that

the numerator in the calculation was 25,100 square feet (see definition of "lease premises"), what is the denominator?

18) Furthermore, the chart follows the following phrase directly above: *"Changes to Additional Rent require amendments to the amount set out hereunder."* [emphasis mine]. There were no such amendments.

19) The provisions set out above are consistent only with an interpretation that the additional rent was a fixed amount, not a fluctuating amount. These are the very paragraphs that specifically define how much the rent is.

20) The landlord relies on the following paragraph in support of a fluctuating rate interpretation of additional rent:

> 4.2 **<u>Net Lease.</u>** It is the intent of the Landlord and the Tenant that this Lease shall be fully net to the Landlord, provided that the Tenant shall not be responsible for costs and expenses expressly excluded by the terms of this Lease, including but not limited to the following:
>
> (a) mortgage payments…;
>
> (b) any income taxes of the Landlord…;
>
> (c) any ground rental;
>
> (d) any expenditures with respect to the Leased Premises which are of a capital nature.

21) Firstly, I am not persuaded that this provision is inconsistent with the fixed rate definition of additional rent. A lease can be "net" to the landlord either with a fixed or fluctuating amount.

22) Secondly, when interpreting a contract, the more specific terms qualify more general terms: *Pickering Square Inc. v. Trillium College Inc.,*2014 ONSC 2629, at para. 44, aff'd 2016 ONCA 179. Here, the more general term is the intent of the parties; the more specific term relates to how that intent is achieved.

23) Thirdly, I agree with the submission of the tenant on this point: the parties are free to specify *what* they want to achieve (a net lease) <u>and</u> they are free to specify *how* (fixed additional rent) to achieve that goal.

24) Additionally, the landlord argues that the additional rent is subject to change for the expenses listed at section 7.1. Section 7.1 of the lease reads as follows:

> 7.1 **<u>Tenant's Obligations.</u>** In connection with the Leased Premises, the Tenant hereby agrees that it shall be responsible for the following throughout the term:

…

> (b) **Utilities** - to promptly pay and discharge all charges, rates, assessments and levies for Hydro, water, and all other utility supplied or to be consumed in the Leased Premises, as determined by the sub-meter to be installed by the Landlord, or in the case of bulk-metered utilities, the Tenant's proportionate share of the cost of bulk-metered utility;
>
> (c) **Taxes** – The tenant shall pay proportional realty taxes…

…

> **(e) Repairs** – To perform all repairs to and make all replacements of fixtures, systems, facilities, equipment, machinery, leasehold improvements and plate glass in the Leased Premises as may be necessary;
>
> **(f) Condominium Fees** – The Tenant shall pay proportional Condominium fees, levies and assessments imposed or assessed against the Leased Premises.

25) On one hand, the inclusion of s. 7.1 of the lease is unnecessary if the additional rent is fixed. Why list out what the tenant is responsible for if all the charges are contained in a fixed amount?

26) On the other hand, read literally, and in combination with section 1.1, is the tenant required to pay the additional rent <u>and</u> these additional expenses? That is inconsistent with the direction from the Supreme Court to interpret contracts using common sense.

27) The lease is to be interpreted as a whole document. Therefore, I interpret this section as an explanation as to how the additional rent amounts were arrived at. Taken on the whole, I cannot read this section as an invitation to turn the additional rent into a fluctuating amount, especially absent any provision setting out the mechanism and methodology to do so.

28) Therefore, I conclude that the wording of the lease itself adequately sets out the obligations of the parties. It is not possible to "read into" this contract the interpretation sought by the landlord. In order to do so, I would have to find language that adds the term "variable" to the additional rent and that the amount of $1.66 is not the amount owing under the lease, but a mere estimate of future expenses. Such an interpretation would represent a rewriting of the contract.

Issue #2: Is there evidence, extrinsic to the lease itself, which assists in the interpretation on the lease?

29) I will review the other evidence with regard to the negotiation of the lease, the commercial reasonableness of the lease, and the conduct of the parties after the lease was signed (the factual matrix). While there was other evidence lead, I will focus on these facts that were the most instructive.

30) Such analysis is necessary only if there is ambiguity in the wording of the lease. There is no ambiguity. However, I conduct this analysis for the sake of completeness.

a. *Negotiations*

31) At the outset, the landlord submits that in other leases that the landlord entered into, those leases were "triple net lease." That may well be the case, but other leases do not inform me of the terms of this particular lease between these two parties.

32) On March 15, 2019, the tenant (Mr. Van Alphen) sent the landlord (Mr. Mahmood) a draft lease, electronically. The landlord was familiar with commercial leases. The evidence of both parties is that the lease would represent their final and binding agreement. That makes complete sense. Why else have a lease if the lease did not represent the final bargain?

33) Over the course of negotiations, the additional rent was increased from $1.58 per square foot to $1.66.

34) The landlord alleges that a "bullet point" list, dated February 20, 2019, represented the final terms of the lease. This submission, however, is an attempt to "cherry pick" the negotiation process, a process that continued for another month. I do not accept this list as the final word.

35) The landlord asked for a copy of the draft lease in Word format so that he could make changes. The landlord proceeded to make extensive changes. On March 25, 2019, these changes included changes to section 1.1 of the lease **and the addition of the minimum rent chart found in the lease**. In other words, the landlord was the party that added the chart to the lease.

b. *Commercial reasonableness*

36) The landlord submits that a fixed additional rent provision is not commercially reasonable. In essence, he argues that it is unreasonable for him to assume the risk of increases in the costs of the items covered in the fixed additional rent provisions.

37) Firstly, this argument disregards the convenience of a fixed additional rent provision. Under a fixed rent provision, the landlord does not have to track and account for the expenses, and then engage with the tenant to arrive at some sort of agreement.

38) In this particular case, it is clear that the landlord had difficulty calculating these expenses. For example:

i. the landlord admitted that there are "issues" with regard to how the condo corporation "divvies up" bulk-supplied hydro costs, despite the fact that Mr. Mahmood is on the board of directors of the condo corporation;

ii. The landlord was unable to explain why the condo fees demanded were double the amount set out in his evidence;

iii. The landlord could not rationalize the apportionment of utilities.

39) Therefore, it makes commercial sense that the landlord would want the certainty of fixed additional rent. At a minimum, such provision, on its face, is not unreasonable, *per se.*

40) The landlord submits that it makes no sense that the additional rent be fixed in an amount far less than the actual expenses incurred. In essence, he says that a fixed additional rent provision does not compensate him for the actual cost of certain expenses.

41) This conclusion, however, is not borne out in the evidence. The landlord has never provided evidence to establish that the expenses he is incurring are greater than the amount that he is collecting. In his affidavit sworn November 10, 2023, he stated that an accounting would be provided *in the future*: see para. 23.

42) The fact that a party assumed certain risks in a contract does not make the contract unreasonable.

43) There is every reason to believe that the parties accepted the inherent advantages and disadvantages of the fixed rent provision. After all, at the time the lease was signed, the leased premises was vacant; an agreement had to be stuck. The deal reached is not outside the scope of commercial reasonableness. Parties are free to make a deal that is atypical.

c. *Post-lease conduct*

i. The landlord's lack of an accounting is inconsistent with variable additional rent

44) Subsequent conduct evidence should be approached with caution. The reliability of conduct subsequent to the execution of a contract depends on a number of factors including whether the conduct was shared, intentional, consistent over time, unequivocal and closer to the time of the execution of the contract: *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, at para. 46. That caution is particularly applicable in this case: after negotiating the terms of the lease, *both parties* conducted themselves in a manner that was inconsistent with their interpretation of the lease.

45) The landlord did not provide regular, or even annual, accountings of the additional rent calculation that would be expected to follow in a variable lease provision. Quite to the contrary; there is amble evidence in the record that reflected the landlord's intention to charge the fixed additional rent. In his cross-examination, the landlord answered as follows in relation to property taxes:

> Q136: You didn't feel you had to [provide the property tax invoices], right?
>
> A: I didn't feel I had to….I didn't feel that I had to log anything…I'm not going to play that game."

46) The landlord considered the accounting for expenses, a critical element of a variable rent lease, a "game" he wanted to avoid.

47) This position, that the additional rent did not have to be verified, was consistent. For example, when discussing condo fees, the landlord sent an email in June 2020 which stated, in part: "*This is my cost and it's in the agreement when you signed it. No explanation is necessary"* [emphasis mine].

48) In December 2020, another email from the landlord stated: "*Rent you agreed to is not up for discussion and any amount lower than what's in the agreement will be considered a breach"[emphasis mine].*

49) The refusal to consider any justification requirement, or proof of the expense incurred, with regard to additional rent is entirely inconsistent with a variable additional rent lease provision. The landlord's position is an attempt to "have his cake and eat it too."

50) The landlord argues that it was his intention that the tenant pay its proportionate share of expenses, subject to change, and that the $1.66 per square foot charge was a prepayment. If that was the case, then surely the landlord would have credited the tenant and demanded only the difference. It is not clear that this took place. Instead, it appears that the landlord demanded the payment of condo fees, utilities and taxes without consideration of a credit for the payment of additional rent.

51) All of this leads to the conclusion that the parties intended the additional rent to be a fixed amount, not a variable amount.

ii. The tenant's payment of utility bills above the additional rent

52) On the other hand, during the course of the lease, for a period of some two years, the tenant paid certain utility invoices directly to the utility company. The landlord posits the following: if the $1.66 amount was fixed and designed to cover all additional expenses, why did the tenant pay anything else?

53) The landlord points out that the tenant paid utility bills, over and above additional rent, as evidence that the parties intended the additional rent to fluctuate. However, the tenant has provided a reasonable and plausible explanation for these utility payments. Simply put, he made a mistake.

54) On April 19, 2019, the tenant was copied on an email that directed the Condominium Corporation to send copies of utility bills to the tenant. The tenant then paid those utility bills from July 2019 to June 2021. He ceased paying the utility bills after he refreshed his memory of the terms of the lease in January 2021.

55) In 2019, Mr. Van Alphen was in the middle of moving the "just in time" business to a new location. The move was described as "highly intensive". I accept the evidence of Mr. Van Alphen that the process of stockpiling parts and completing orders took up virtually all of his attention.

56) To further complicate matters, it came to the attention of the tenant, in August 2019, that part of the leased area was not owned by the landlord. The landlord had 23,115 square feet available, not 25,100. Despite meetings and emails, and the hiring of professionals to measure, the landlord continued to invoice the tenant utilizing the original, and incorrect, measurement.

57) It is also important to note that throughout this time, as emphasized above, the landlord did not provide an accounting that was to be used to change the amount of the additional rent.

58) Therefore, it makes sense and I accept the tenant's evidence, that the payment of the utility bills was an error. Those payments do not displace the language of the lease and the intention of the parties as reflected in the lease.

iii. Conclusion re: post-contract conduct

59) I repeat the test in *Shewchuck:* the reliability of conduct subsequent to the execution of a contract depends on a number of factors including whether the conduct was shared, intentional, consistent over time, unequivocal and closer to the time of the execution of the contract. In my view, the conduct of the tenant was not intentional or unequivocal. The payment of the utilities started with the receipt of a "c.c. ed" email during a very busy time. On the other hand, the conduct of the landlord was very consistent and demonstrably intentional.

Issue#3: Is the landlord entitled to the remedy of severance or rectification?

60) The landlord asks that the additional rent provisions of the lease be severed. However, the remedy of severance is available for terms of a contract that are unenforceable or illegal: *KRG Insurance Brokers (Western) Inc. v. Shafron,* 2009 SCC 6, paras. 29 and 30. This contract is not either.

61) In terms of the landlord's counter-application for rectification, there must be clear, cogent and convincing evidence to support a finding of <u>mutual</u> mistake: *Canada (Attorney General) v. Fairmont Hotels Inc.,* 2016 SCC 56, para. 29 and 36. That is far, far from the case here. The tenant's evidence is that he understood that the effect of section 1.1 of the lease was to create fixed additional rent. This evidence was not undermined on cross-examination. In addition, typically, rectification is available in applications where there are no material facts in dispute: *Enticor Properties Inc. v. Quik-Run Courier Ltd,* 2005 CanLii 3363 (ONCA).

Summary

62) The landlord and tenant, experienced business people, after negotiations, entered into a lease. That lease set out the final terms of the agreement. In clear and unambiguous language, the provision dealing with additional rent established a fixed price of $1.66 per square foot.

63) Even if the language is not clear and unambiguous, the evidence of the negotiations (it was the landlord that inserted the additional rent chart) and the post-contract actions of the landlord (who has never provided an accounting that one would expect in a variable additional rent provision) are consistent with the intention of the parties to fix the amount of additional rent. That provision has advantages, and disadvantages, to both parties. The fact that the tenant, in response to a "c.c. ed" email received during a highly stressful time, accidentally paid utilities does not displace the lease.

64) The landlord is not entitled to the relief of severance or rectification on the facts in this case.

Order

65) This Court, on an unopposed basis:

a) Declares that 117 Ontario is the owner of the land depicted as Unit 3 in the survey attached as Schedule "B" to the Amended Notice of Application, and as legally described at paragraph (k1) to the Amended Notice of Application.

b) Orders that the Landlord is to repay the Tenant for all rent paid on account of the the1,985 ft2 area that the Landlord does not own pursuant to the declaration above, retroactively to the start of the Lease, which is anticipated to total $48,778.80 as of January 2024, with interest at a rate of prime plus 1%, within 30 days.

c) Declares that the true square footage of the Leased Premises is 23,115 ft2, and that the aggregate Minimum Rent and Additional Rent payable under Sections 1.1 and 4.1 of the Lease totals $8,976.33 per month plus HST, or $10,143.25 per month.

66) This court orders:

a) That the Landlord is to repay the $49,442.76 payment made in January 2021 to forestall threatened enforcement action, plus interest at a rate of prime plus 1%, within 30 days.

b) That the additional rent portion of the lease entered into between the parties shall be deemed to be fixed and declaration shall issue that the Landlord is not entitled to demand that the Tenant make payments beyond Minimum Rent and Additional Rent as set out in the Lease.

c) That the Landlord is to repay payments of expenses not properly due and owing under the Lease, which are anticipated to total $76,005.40 as of January 2024, with interest at a rate of prime plus 1%, within 30 days.

d) An order that the Landlord is to pay all utility bills for the Leased Premises, on time and in full, and to take all reasonable steps to maintain the supply of utilities to the Leased Premises.

e) That the counter-application seeking severance and rectification is dismissed.

67) My presumptive view is that the tenant has been successful and is entitled to its costs. The parties are encouraged to resolve that issue. In the event that resolution cannot be reached:

a) The tenant shall deliver written submissions, not to exceed three pages plus a bill of costs and supporting documentation, within 30 days;

b) The landlord shall deliver written submissions, not to exceed three pages plus a bill of costs and supporting documentation, within 60 days; and

c) The tenant shall deliver any reply written submissions, within 75 days.

68) I am indebted to counsel for their written submissions and oral advocacy.

Justice J. P. Howie

Released: June 16, 2025