SUPREME COURT OF NOVA SCOTIA
Citation: *Soup Pot Ideas Inc. v. Urban Spaces Ltd.*, 2015 NSSC 317

Date: 20151106
Docket: Hfx No. 439800
Registry: Halifax

Between:

Soup Pot Ideas Inc.

Applicant

v.

Urban Spaces Limited

Respondent

Judge: The Honourable Justice Joshua Arnold

Heard: September 10 and 28, 2015, in Halifax, Nova Scotia

Counsel: Michael P. Scott and Adam Crane, for the Applicant

Craig Arsenault, for the Respondent

By the Court:

Introduction

[1] On September 20, 2010, Soup Pot Ideas Inc. ("Soup Pot"), the lessee, entered into a five-year agreement with Morris Strug ("Mr. Strug"), the lessor, to lease a unit in the northeast corner of the ground floor of 1598 Barrington Street ("the building"). The lease was set to expire May 31, 2015, and was subject to an option to renew.

[2] Just prior to July 23, 2013, Soup Pot received verbal permission from Mr. Strug to make physical changes to the building to benefit their leased premises. Such upgrades would include installing an access door between the basement utility room and Soup Pot's leased premises.

[3] On July 23, 2013, three years into the five-year lease term, Urban Spaces Limited ("Urban Spaces") purchased the building from Mr. Strug. Ownership was transferred by August 2, 2013. On that date, Mr. Strug assigned the lease to Urban Spaces by way of an Assignment of Leases dated August 1, 2013.

[4] On September 1, 2013, Urban Spaces wrote to all tenants of the building claiming additional rent. On October 22, 2013, Soup Pot provided notice objecting

to the calculation of additional rent. In response, counsel for Urban Spaces sent a demand letter requesting payment of the additional rent claimed. Soup Pot disagreed with the calculation of additional rent and a number of letters were exchanged by lawyers for each party on this topic.

[5] On November 15, 2013, Soup Pot constructed a door from the demised premises to a utility room in the basement of the building. The door provided Soup Pot with access to an area of the building that is not part of the leased premises. Urban Spaces complained that Soup Pot did not have permission to build the door and later prohibited Soup Pot from using the door.

[6] On June 6, 2014, Soup Pot wrote to Urban Spaces requesting the return of its $5000.00 deposit in accordance with 3.05 of the lease. Urban Spaces did not return the $5,000.00 deposit.

[7] On February 16, 2015, Soup Pot sent Urban Spaces a notice of option to renew the lease. On March 30, 2015, Urban Spaces wrote to Soup Pot advising that they were in a continuing breach of the lease and claimed that their right to renew was void. Urban Spaces offered to allow Soup Pot to enter into a new lease with terms more financially favourable to Urban Spaces. Soup Pot refused and brought this application for a declaration that:

a) Soup Pot sent a valid option to renew the lease and that the option to renew is enforceable;

b) the lease is, in fact, renewed as contemplated by the terms of the lease; and

c) Soup Pot is not in default of its obligations under the lease.

[8] Urban Spaces agreed to allow Soup Pot to remain in the demised premises until such time as a court could make a determination on the option to renew. Urban Spaces subsequently also provided written consent for Soup Pot to create outdoor patio seating pending determination of the renewal issue.

Issues

[9] I define the issues as follows:

Issue 1: Did Soup Pot execute a valid option to renew the lease?

Issue 2: Are Morris Strug's comments to Christian Rankin regarding the installation of the door hearsay?

Issue 3: Was Soup Pot's right of renewal forfeited as a consequence of their having installed an interior door?

A fourth issue, regarding Soup Pot's refusal to pay additional rent in the manner demanded by Urban Spaces, was conceded by Urban Spaces as no longer being an issue at the conclusion of the hearing. Therefore, the impact of the installation of the door became the focus of this application.

The Lease

[10] The relevant portions of the lease include:

> 2.02 Subject to the terms and conditions of this Lease as set out herein, the Lessee shall have and hold the Demised Premises for and during a term of five (5) years (the "Term") commencing on the 1st day of June, 2010 and ending on the 31st day of May, 2015, to be occupied continuously for the whole of the said Term for the purpose of operating a wine bar/café and solely used for the purpose of the Lessee's business. The Lessee shall not do or permit to be done upon the Demised Premises anything which shall cause the rate of insurance of the Property to be increased or the insurance cancelled.
>
> …
>
> 3.05 DEPOSIT The Landlord acknowledges that the tenant has paid a deposit of Five Thousand Dollars ($5,000.00) being held in trust in an interest bearing account by Blois, Nickerson & Bryson LLP. It is understood and agreed that this deposit shall be credited toward tent for the final two months of the Lease. The deposit is to be held in an interest-bearing trust account until the end of the fourth year of the Term at which time it will be returned to the tenant with interest, provided that if the tenant breaches any covenant or agreement of this Lease, or if the lease is terminated prior to the date of the return of the deposit, the deposit shall be applied to pay rent arrears or damages sustained by the landlord as a result of the breach.
>
> …

4.01 OPTION TO RENEW The Lessee shall have two options to renew the lease exercisable by written notice to be given to the Lessor not later than Three (3) months prior to the expiration of each Term, and provided that the Lessee shall at the date upon which such notice is given, have complied with all the covenants and conditions of this Lease, and shall not be in arrears as to the payment of rent or any money due and owing hereunder. Each option to renew this Lease shall be for a further term of Five (5) years commencing on the expiration of the preceding term subject to all covenants, provisos and agreements herein contained saving:

(a) except as to renewal after the second option has been exercised;

(b) except as to rent payable which is to be Three Thousand Dollars ($3,000.00) plus Harmonized Sales Tax per month for the first renewal Term of Five (5) years, and then rent to be negotiated and agreed upon at least one month prior to the commencement of the second renewal Term of five years, but in no event shall the rent be less than paid during the term which has expired.

4.02 EXERCISE OF OPTION

The options to renew shall be exercised by the Lessee giving to the Lessor Three (3) months written notice prior to the expiration of the term of its intention to exercise the option to renew.

…

9.01 The following shall be considered events of default by the Lessee and shall permit the Lessor to terminate this Lease upon Fifteen (15) days written notice and it shall be lawful for the Lessor in any such event to enter into and upon the demised premises or any part thereof, to re-enter and the same to have again, repossess and enjoy as if these presents had never been executed, and the Lessor may re-enter and take possession of the premises by force or otherwise as it may deem fit as though the Lessee or the Lessee's servants or other occupant(s) of the said premises were holding over after the expiration of the said term, without any right whatever, and the term shall be forfeited and void, and the Lessor may thereupon re-let the premises, but the Lessee shall remain liable to the Lessor for any and all loss occasioned, by reason of such re-letting as hereinafter provided:

(a) The failure of the Lessee to take possession of the premises within a reasonable time after the date of commencement of this Lease or the abandonment thereof;

(b) The adjudication of the Lessee as a bankrupt, or the completion by the Lessee of a general assignment for the benefit of its creditors, or the

commencement of proceedings under winding-up acts, or the subjection of the Lessee to other insolvency legislation;

(c) If the Lessee should permit execution of any judgment against the moveable effects furnishing the premises or permit a receiver or trustee to be appointed for its property;

(d) Failure of the Lessee to pay the rent hereby reserved, or any part thereof, or additional rental hereunder within Fifteen (15) days from the date when due;

(e) The violation or default of the Lessee to fulfill any covenant, agreement or condition under this Lease or the rules or regulations established hereunder and the continuation thereof for fifteen (15) days after notice of such violation or default;

…

11.03 The Lessee shall not make any alterations or repairs to the premises or any part of the building nor install any fixed or immovable partitions, doors, fixed counters, additional plumbing facilities or piping or other services to be run into the building without first obtaining the consent in writing of the Lessor not to be unreasonably withheld. Upon giving any such consent in writing the Lessor may elect to have the work supervised and performed by its architects, contractors and workmen at the cost of the Lessee, which costs shall be competitive, and may also establish rules and regulations for the completion of such work and the time and manner of its execution.

…

11.09 The Lessee shall comply with all statues, laws, by-laws and regulations enacted by any Federal, Provincial or Municipal authority in force at any time during the Term which affect the use or occupation of the Demised Premises.

…

19.00 Waiver, Modification of Lease:

19.01 Failure of either party to insist upon strict performance of any covenant or condition of this Lease or to exercise any right to option hereunder shall not be construed as a waiver or relinquishment for the future of any such covenant, conditions, right or option. No assent or consent to any variation of any covenant

> or condition of this Lease shall be valid unless in writing and identified with this Lease. The payment of any rent or the performance of any obligation hereunder by a person other than the Lessee shall not be construed as an admission by the Lessor of any right, title or interest of such person as sublessee, assignee, transferee or otherwise in the place and stead of the Lessee.

The Evidence

[11] Soup Pot filed an affidavit and rebuttal affidavit sworn by Christian Rankin. Mr. Rankin was also cross-examined on his affidavits during the course of this hearing.

[12] Urban Spaces filed an affidavit and rebuttal affidavit sworn by Richard Khoury. Mr. Khoury was also cross-examined on his affidavits during the course of this hearing.

Christian Rankin

[13] In his initial affidavit sworn May 28, 2015, Christian Rankin confirms Soup Pot carries on business as "Obladee, A Wine Bar", in the building. Mr. Rankin says that he and his sister, Heather Rankin, are the owners/managers of Obladee. He confirms that Soup Pot entered into the lease in question on September 20, 2010 (effective June 1, 2010), and that the lease expired May 31, 2015, subject to an option to renew. The remainder of Mr. Rankin's initial affidavit deals with the issue of the additional rent calculations.

[14] In his rebuttal affidavit Mr. Rankin addresses the installation of a door in the basement of the building. The door allowed access from the demised premises being rented by Soup Pot to a basement utility room that was not part of Soup Pot's premises. Mr. Rankin stated in his affidavit:

> 5. Just prior to Urban Spaces taking over ownership of 1598 Barrington Street, I had a conversation with Morris Strug, the building owner at the time ("Mr. Strug"). The conversation related to possible upgrades to our unit.
>
> 6. I had conversations with Mr. Strug about establishing a set of stairs coming into the building, then a small hallway into the mechanical room in the basement where the door in dispute is currently located.
>
> 7. I further understood that we had permission to install an entrance into the basement of 1598 Barrington Street from the exterior of the building and were encouraged to do so.
>
> 8. The upgrade at issue in the current matter is an access door from the basement to our unit. An access door was needed as the only other access was an antique spiral staircase in the main dining area which, while attractive, is not very practical for moving supplies. It is also somewhat of a safety concern for those regularly going up and down.
>
> 9. With regard to the upgrades, Soup Pot engaged David Garrett Architects to prepare the plans. Attached as Exhibit "A" is a copy of the architectural drawing from David Garrett Architects.
>
> 10. In reliance on my conversations with the landlord at the time, I understood that we had clear and unambiguous permission, and were in fact encouraged, to make the above upgrades, including the access door.
>
> 11. Given the cost and complexity of the undertaking, we chose to put the improvements aside – save the interior access door in the basement which was both inexpensive and badly needed.
>
> 12. The door was subsequently installed on or about November 15, 2013.
>
> 13. Soup Pot did not seek formal written permission from the landlord. Instead, and in good faith, Soup Pot relied on the meaningful permission it had obtained from the landlord and sought no further formalities as a direct result.
>
> 14. The access door was installed on a partition wall between the Demised Premises and the mechanical room in the basement of 1598 Barrington Street. It was and is my understanding that the wall is not load bearing. The source of my understanding is David Garrett, the architect that was retained for the work.

15. I hold an honest belief that the door is fully compliant with any applicable laws and regulations. The basis of my belief is that the door was planned by an architect and was installed on a non-loadbearing, interior partition wall. The door is not structural, does not affect the integrity of the building or its foundation and does not interfere with any function or use of the building as a whole.

16. At no point have I ever received any information that would suggest there is any issue with the door, its position, the manner of its construction or its effect on the building. The only issue I am aware of is Urban Spaces' allegation that proper permission was not obtained from them.

17. On the same day the door was installed – November 15, 2013 – Richard Khoury ("Mr. Khoury") contacted me by telephone. We primarily discussed an ongoing disagreement over the amount of Additional Rent payable but he also raised the subject of the new basement door.

18. In that conversation Mr. Khoury did in fact advise me that he was not happy about our having installed the door "without his permission". He said words to the effect of "You can't just go around putting in doors and changing things without telling me, I own the building now, you have to get permission from me."

19. I explained to Mr. Khoury that we, in good faith, understood that we had permission and I assumed that Mr. Khoury was both aware and similarly supportive to what was clearly an improvement to the building.

20. At the conclusion of our conversation, Mr. Khoury said words to the effect of

> "Listen, you should have talked to me first but I don't care about the door. What I do care about is the money – so when are you going to get me my money?"

21. From the above conversation, I understood that:

a) Mr. Khoury was aware of the door's installation from the day it was installed, November 15, 2015;

b) Mr. Khoury had no issue with the door as installed, its type, construction or purpose;

c) He had no issue with our leaving the door as it was and using it as intended;

d) His singular concern as regards the door was that we had not discussed with him;

e) The door issue was resolved – there were no outstanding issues as regards the door;

f) That in the future, we were to speak with him directly about any similar improvements;

g) He was very upset that we had not yet provided "[his] money" – and that "his money" referred to the Additional Rent quantification that was in dispute at the time.

22. We did not make the Additional Rent payment as demanded in the November 15, 2013 telephone conversation with Mr. Khoury. Instead, our corporate counsel, Michael K. Kennedy, wrote a letter (dated November 19, 2013) to counsel disputing the amount of Additional Rent claimed by Urban Spaces, a copy of which is attached as Exhibit "E" of my affidavit sworn on May 28, 2015. No response was received to my knowledge.

23. There was no discussion regarding the door after our November 15, 2013 conversation. We continued to use the basement door in accordance with my conversation with Mr. Khoury.

24. Seven months later we received correspondence from counsel for Urban Spaces, Stephen Ling, dated June 9, 2014, indicating that Soup Pot was in default of the Lease for not paying the Additional Rent previously demanded. The "door issue" was also raised at that time.

25. I was genuinely surprised by Urban Spaces' allegation regarding the door as Mr. Khoury himself had previously acknowledged that he did not care about the door and nothing was heard about it in the intervening seven months. We had relied on Mr. Khoury's representations that he was fine with the door and there was not further issue.

26. In the June 9, 2014 letter, we were directed to cure the alleged default by not using the door anymore. Soup Pot understood that this was the only action required to cure the alleged default. No other request was ever made as regards the door.

27. Notwithstanding that I believe the door issue was revived after seven months in retaliation for our position on Additional Rent, Soup Pot complied rather than risk inflaming the situation.

28. To the best of my knowledge, the door has only ever been opened three times since:

a) On one occasion, I arrived at the building on a Sunday, when Obladee was closed, and discovered that there was about six inches of water in the lower level of the Demised Premises at the bottom of our stair case. I looked around the Demised Premises to discover where the water was coming from, and went downstairs. I could not find the source of the water leak so I opened the access door to look further. As a result, I discovered the water leak was coming from the mechanical room and the issue was resolved without further damage to the building.

b) Once to move a walk-in refrigerator as there was no other access; and

c) Once to move the extension cord that provides power from the Demised Premises to our exterior patio seating.

[15] During cross-examination Mr. Rankin agreed that the architect's plans do not capture the access door in question:

Mr. Arsenault: You mentioned that you hired an architect. I see here we can just slide down this page to paragraph 9. So in this paragraph you state that with regards to the updates that you involved David Garrett an architect to prepare plans for updates to the building?

Mr. Rankin: That's correct.

Mr. Arsenault: Ok. And now am I right to state that the access door was part of these planned upgrades? And again, the access door being the one in the basement.

Mr. Rankin: That's correct.

Mr. Arsenault: Ok. So, if we could now refer to the access plans that were submitted. It's the last page of Exhibit 2 the rebuttal affidavit.

Mr. Rankin: I see it.

Mr. Arsenault: Is the access door captured in these plans?

Mr. Rankin: No. The access door is not explicitly captured. What is captured is the entrance from the main building into the mechanical room area from which we would access.

Mr. Arsenault: Ok. So this is, this is a separate access. My understanding is that this is on Sackville Street, this is the side, the plans look like they're building stairs down the side and a door from the outside and that's what this door shows. Is that?

Mr. Rankin: That's correct.

Mr. Arsenault: So nowhere on this plan does it show the access door?

Mr. Rankin: No, it doesn't.

Mr. Arsenault: Ok. So do we have anything before us with respect to plans prepared by the architect relative to the access door?

Mr. Rankin: There are no plans per se on the access door. No.

…

Mr. Arsenault: So in the absence of plans it seems to state here that 15, I hold the honest belief the door is fully compliant with any applicable laws and regulations. My belief is that the door was planned by an architect and was installed on a non-load bearing wall. So this says it was planned by an architect, but we don't have plans before us to suggest that it was planned by an architect.

Mr. Rankin: We don't have plans of the door that was installed, but we did have Mr. Garrett on site more than once and we had HRM onsite more than once and I'm fairly certain, in fact I am certain, that that wall is not load bearing and the door itself was not a problem.

Mr. Arsenault: Ok. Do you have any documentation to support that it's not a load-bearing wall beyond your understanding from what Mr. Rankin, or Mr. Garrett told you.

Mr. Rankin: I do not.

…

Mr. Arsenault: So in paragraph 16, or 15, where you say the door was planned by an architect, are you referring to written plans or oral communications with Mr. Garrett?

Mr. Rankin: Oral communications.

[16] Mr. Rankin agreed that the architect's plans only show an exterior door that was planned. Mr. Rankin testified that the interior basement door plans were discussed orally with Mr. Garrett but were not included in the architect's plans. Mr. Rankin also agreed that he did not obtain a building permit or fire marshal's approval for the door and did not communicate with the building's insurer in relation to the new door.

[17] Mr. Rankin answered all questions during the hearing in a straightforward, consistent and low-key manner. Despite the issue raised regarding the architect's

plans, I found Mr. Rankin's evidence to be straightforward, consistent and believable.

Richard Khoury

[18] Richard Khoury stated in his affidavit:

> 13. At some point between November, 2013 and June, 2014, I became aware that Soup Pot caused for the construction of an entranceway to the basement of the Demised Premises, without the written consent of Urban Spaces, and without acquiring building permits or fire code approval from the Halifax Regional Municipality or other body. Attached as Exhibit "K" are digital images taken by me of the constructed entranceway.
>
> 14. On or about June 9, 2014, Mr. Ling sent a letter to Mr. Kennedy indicating that the construction of the entranceway was in breach of the Lease, and that Soup Pot was to cease using the entranceway immediately. Attached as Exhibit "L" is the letter from Mr. Ling.
>
> 15. On or about June 18, 2014, Mr. Kennedy sent a letter to Mr. Ling indicating that the installation of the door occurred in November, 2013, and that Mr. Strug had consented to its construction. A written consent from Mr. Strug to Soup Pot was not provided at that time, or since. Attached as Exhibit "M" is the letter from Mr. Kennedy.

[19] In his rebuttal affidavit Mr. Khoury said:

> 5. In July 2013 I purchased the Building, accepting an assignment of the current leases of the Building's occupants, including the lease between Soup Pot and my company Urban Spaces, and I took on the role as Landlord of the Building. During my tenure as Landlord of the Building Soup Pot has never expressed a safety concern with respect to its use of the staircase in the main dining area of the Demised Premises.
>
> 6. Upon being informed that Soup Pot installed a door in the Basement of my Building, I immediately informed Soup Pot that said installation was not permissible and to immediately refrain from using the door.
>
> 7. To this day I have maintained the position in all communication with Soup Pot regarding the door, that the use of the door was not permitted. Furthermore, have never expressed that the existence of the door was or is acceptable.

> 8. The door was and continues to be an ongoing concern to me as the owner of the Building.

[20] Mr. Khoury also provided *viva voce* evidence. While on the witness stand he was flippant and argumentative. He would not answer all cross-examination questions posed to him. His failure to take the court process seriously while testifying impacted negatively on my assessment of his credibility. For example:

> Mr. Scott: And this is the lease that your company assumed upon taking over ownership of the building?
>
> Mr. Khoury: That's correct.
>
> Mr. Scott: And you are not aware of any other leases, contracts or agreements that they are on in relation to Urban Spaces and Soup Pot?
>
> Mr. Khoury: I'm not sure what you are trying to get at.
>
> Mr. Scott: I'm asking you are there any other contracts beyond this lease, leases, contracts, any other written agreements…
>
> Mr. Khoury: You mean is there a second lease?
>
> Mr. Scott: Yes.
>
> Mr. Khoury: Why would there be a second lease?
>
> Mr. Scott: I'm asking you…
>
> Mr. Khoury: Not to my knowledge.
>
> Mr. Scott: Any other contracts?
>
> Mr. Khoury: Binding me and Obladee Wine Bar?
>
> Mr. Scott: Yes.
>
> Mr. Khoury: No, there is not.
>
> Mr. Scott: Or Soup Pot Ideas?
>
> Mr. Khoury: What do you mean?
>
> Mr. Scott: Soup Pot Ideas is the…
>
> Mr. Khoury: Ok, the wine bar, yes, Soup Pot Ideas. Is there any binding agreement other than the lease that's in front of me? Not to my knowledge. Unless you have a second one.

…

Mr. Scott: $2,500 is what you would refer to as the base rent, correct?

Mr. Khoury: The base rent, that's current rent, which is right now. Proportionate share additional to what the current rent is. You want to call it, you can call it whatever you like. The additional rent is the proportionate share is the 10% of what is currently paying.

Mr. Scott: And what you're demanding here is 10% of all operating expenses. Correct?

Mr. Khoury: Of operating expenses of the property itself, yes.

Mr. Scott: And then there's a breakdown here….

Mr. Khoury: It's called triple net lease, I think you are aware of what a commercial lease looks like?

…

Mr. Scott: The quantification here in your September 1st letter has nothing to do with calculating increases over base year amounts, does it? Base year being 2010.

Mr. Khoury: Do you have the base year in front you to show me what the expenses were?

Mr. Scott: Certainly. Sorry, the base year expenses?

Mr. Khoury: Yes

Mr. Scott: No, I don't. Do you?

Mr. Khoury: No, I am asking you that question.

Mr. Scott: To be fair, Mr. Khoury, I'm not here to answer your questions. You are here to answer mine.

…

Mr. Scott: That wasn't my question. My question was, this is not a calculation of increases over base year amount expenses?

Mr. Khoury: I don't know what those figures are.

Mr. Scott: I didn't ask you if you know what the figures are.

Mr. Khoury: That's my answer.

Mr. Scott: Well, I'm not satisfied with that answer, Mr. Khoury. My question was quite simple. Is this a calculation of increases over base year amounts?

Mr. Khoury: Was… I don't exactly know what you're trying to get at. You're asking me are these figures in front you numbers based on base year rent, no they aren't, they are expenses of that year. Is that clarification for you?

…

Mr. Scott: Mr. Khoury, you see where it says the Lessor shall deliver, you see that?

Mr. Khoury: Yep

Mr. Scott: And do you understand what that means?

Mr. Khoury: I do, yes.

Mr. Scott: What's your understanding of what that means?

Mr. Khoury: What do you exactly mean?

Court: Well, Mr. Khoury, you've been asked a pretty specific question…

…

Mr. Scott: And do you understand that that refers to, or do you understand that to be under the lease an obligation of yours to provide a statement on a certain timeline with respect to additional rent?

Mr. Khoury: So what are you trying to say, I delivered the statement too early? I don't get your question.

…

Mr. Scott: So the answer to my question is yes?

Mr. Khoury: To what question?

Mr. Scott: That this letter is intended by Urban Spaces to be a demand, a statement of additional expenses owing, as contemplated by the lease?

Mr. Khoury: Well this a breakdown of the expenses of that year, yes. You want to interpret it as being such, go ahead.

…

Mr. Scott: I just want to make sure because I think this is a critical point, Mr. Khoury, you have never calculated what the base year expenses are for the building?

Mr. Khoury: Did I own the property in 2010?

…

Mr. Khoury: We're not engineers and we sit there and look at the wall and see if the wall shifted or tilted.

Mr. Scott: You have not seen the wall shift or tilt?

Mr. Khoury: It's not my job to do so.

Mr. Scott: Whose job is it?

Mr. Khoury: Whose job is it to see if it shifted or tilted? It is the city. Had he done a proper permit the city would have inspected it correctly. It's the city's job.

Mr. Scott: Have you brought in anybody to assess whether any damage has been caused in the building?

Mr. Khoury: Was I the one who punctured the hole in the wall? Why would I take responsibility for something that I did not create? If a fire does occur tomorrow, who's responsible? And if a fire goes through that wall? Then we're back in court.

…

Mr. Scott: Are those two the same conversation?

Mr. Khoury: They appear to be, don't they?

Mr. Scott: Well I'm asking you. You're the one who had the conversation.

Mr. Khoury: I'm not sure what you're trying to ask. I don't get your question. There's an affidavit stating that I spoke to Mr. Rankin regarding the installation of the door. I don't see what you're trying to get at.

Mr. Scott: What I'm getting at is whether there was one conversation or more than one.

Mr. Khoury: There was one conversation. That's a better question.

…

Mr. Scott: Do you remember anything else?

Mr. Khoury: Specify

Mr. Scott: I'm asking you if you remember anything else from that conversation?

Mr. Khoury: I specifically told him not to use the door and why he had done something without the permission or without any permits at the time.

Mr. Scott: And that's all you recall from that conversation?

Mr. Khoury: What else do you want me to recall?

…

Mr. Scott: You read, you've read this before today?

Mr. Khoury: Yes I have, but I didn't memorize it, for your information.

…

Mr. Scott: And to be fair, Urban never gave any indication that you wanted them to take out the door?

Mr. Khoury: It was not my responsibility to figure out how to fix a breach that was not taken apart by us.

Mr. Scott: Right

Mr. Khoury: Yeah. It's not as simple…

Mr. Scott: Yeah…

Mr. Khoury: Let me continue. It's not as simple as removing a deck that you built and you said oh well it's built without a permit. Blowing a hole into a fire wall requires you, you might have to bring things

up to the current code, just for your information, you should know these things. …

…

Mr. Scott: And how does one avoid those costs once this door has been put in?

Mr. Khoury: Excuse me?

Mr. Scott: How does one avoid, surely you don't want this liability sitting out…

Mr. Khoury: Yeah, I would like the wall restored to the way it was…

Mr. Scott: Right

Mr. Khoury: If it's done through proper channels

Mr. Scott: Right

Mr. Khoury: Yeah

Mr. Scott: Did you ever ask Soup Pot to do that?

Mr. Khoury: It wasn't my responsibility…

Mr. Scott: I'm asking you…

Mr. Khoury: To figure out what to do with something that they had done.

Mr. Scott: You never, Urban Spaces never asked Soup Pot to take that door out or restore it, did they?

Mr. Khoury: We may have in one of the correspondence, you can ask my lawyer. I don't recall every correspondence between me and Soup Pot Ideas. So when you do something that's illegal you ask the other party to figure out how to correct themselves?

Mr. Scott: I think you said a moment ago that they did offer, what do you want us to do about this door?

Mr. Khoury: They didn't offer any solutions.

Mr. Scott: Right

Mr. Khoury: Yeah

Mr. Scott: And you gave..

Mr. Khoury: Excuse me?

Mr. Scott: And you gave no response to that? They're asking what do you want us to do and you were silent.

Mr. Khoury: We were not silent. They did not give any, they did not supply us with any permits or any fire marshal approvals, they had all this time to correct their problem. Did they do anything on their initiative to correct the fault? I'm not at fault. You're forgetting the whole story. You're the one, we're here today because of you guys, not because of us. That's what you're forgetting. You filed legal action when it came to the fact that we did not find a solution to the breach which you guys erected and you did not take full reliability for what you guys did.

Mr. Scott: We're talking about the door specifically?

Mr. Khoury: Yes

Mr. Scott: Why we're here has nothing to do with additional rent?

Mr. Khoury: Rent, I'm in the rental business, for your information, that's what I do for a living. Obviously, if rent is not paid that's one aspect of my business, yes.

Summary of the Evidence

[21] The evidence revealed that once Urban Spaces took over the lease from Mr. Strug they attempted to obtain higher operating costs than provided for in the lease. Soup Pot disputed the amount of operating costs being claimed by Urban Spaces. In conjunction with Urban Spaces' demand for additional rent, Urban Spaces complained about the new door and later prohibited Soup Pot from using the door.

[22] On November 15, 2013, Soup Pot told Urban Spaces they had permission from Mr. Strug to build the door. In a letter to Urban Spaces dated June 18, 2014, counsel for Soup Pot explain they had consent from Mr. Strug to install a door for general access to the basement of the premises. Counsel also wrote that Soup Pot

would be prepared to discuss a reasonable solution to the issue of the door satisfactory to both parties:

> With respect to the door, the previous landlord had consented to my client installing the door in order that it may use its premises in the basement for general access to that space. The access to that space is rather confined otherwise and this was installed in November 2013 and your client is only raising this issue as of now. My client is prepared to discuss a reasonable resolution to the issues surrounding the door with your client in order that both parties may be satisfied with the results.

[23] In a letter dated March 30, 2015, in which Urban Spaces claimed that Soup Pot did not exercise a valid option to renew due to monies owing, Urban Spaces also claimed Soup Pot breached 11.03 of the lease when they, without previous written permission from the landlord, installed an access door to the basement of the premises and proceeded to make use of the basement portion of the building:

> Further to our previous correspondence of June 9, 2014 on this issue, Soup Pot breached paragraph 11.03 of the Lease when they, without previous written authorization from the Landlord, altered and added an access door to the basement of the Premises. They then proceeded to make use of the basement portion of the Building for purposes not contemplated by the parties at the time of the Lease. Soup Pot continues to be in breach of this paragraph, and therefore their option to renew is void.

[24] During his *viva voce* testimony Mr. Khoury claimed that the installation of the door in the basement could have a grave impact on the entire building and might lead to serious repercussions with the city and the fire marshal. Yet, he agreed that Urban Spaces did nothing to explore any sort of remediation. If the installation of the door was of such significance, why would Urban Spaces have

done absolutely nothing regarding remediation? I do not find Mr. Khoury's claims to be credible in this regard.

[25] When Soup Pot refused to pay the increased additional expenses, Urban Spaces nevertheless allowed it to remain as a tenant. As the term of the lease neared expiry Soup Pot exercised their option to renew. Urban Spaces refused to renew in accordance with the terms of original lease agreement between Soup Pot and Mr. Strug, claiming that Soup Pot breached the lease by not paying the claimed additional expenses and by installing the door. Instead of renewing under the terms of the original lease, Urban Spaces offered Soup Pot the "opportunity" to enter into a new lease that was more financially favourable to Urban Spaces. The issue of the door appears to have been used by Urban Spaces to leverage Soup Pot into signing a new lease more financially favourable to Urban Spaces then would be the case if the option to renew was exercised.

Issue 1: Did Soup Pot execute a valid option to renew the lease?

[26] Urban Spaces argued that Soup Pot did not exercise a valid option to renew in accordance with 4.01 of the lease because they were in arrears for payment of rent or money due and owing under the lease. Urban Spaces abandoned this claim at the end of the hearing. Urban Spaces also claimed Soup Pot was not compliant

with all covenants and conditions of the lease in that they built the basement door without written permission.

[27] This aspect of Urban Spaces' argument must fail as Soup Pot did not breach any terms of the lease. Soup Pot had valid verbal permission from Mr. Strug to build the door.

Issue 2: Is part of the Applicant's evidence regarding the installation of the door hearsay?

[28] During the hearing Mr. Arsenault, counsel for Urban Spaces, argued:

> With respect to the first clause and with respect to 5, 6, 7, 10 and 13 it's all referring to communications with Morris Strug who was a previous landlord. The jist of these communications are the applicant is suggesting that the respondent made this out of court comment that they were allowed to put a door in the basement. So they're essentially using an out of court statement for the truth of its contents. Each of these paragraphs are stated the same. So the first one, uh, prior to Urban Spaces taking over I had a conversation with Morris Strug, a conversation related to possible upgrades to our unit. Um, so there's nothing else to support or corroborate that, that there were any conversations with respect to that. Again, I'll add a caveat that, from our perspective, the relevance of communications with Mr. Strug probably don't have any bearing on the result anyways, just as a duty to the court, identified hearsay and thought I'd bring that to your presence.

[29] When Mr. Arsenault was asked by the Court to elaborate on what he meant about "the relevance of the communications" and how the new landlord might eradicate the previous landlord's permission, he stated:

> Ok, sure. Maybe I shouldn't have said irrelevant, but the weight that it should be given, uh, I don't see much value in it, where the breach occurred without our consent. That's the jist of it.
>
> …
>
> No, uh, all I'm suggesting is that we don't have any evidence other than Mr. Rankin's affidavit that there was ever any permission and it's convenient that as of November 2013 it comes up at that time and never before and it's not mentioned that it was before to our client that Morris Strug had given permission. So their original affidavit was filed May 29, 2015, ample time to contact Mr. Strug and request an affidavit to suggest the same…

[30] Subsequent to the hearing, Urban Spaces filed written submissions objecting to paragraphs 10 and 13 of Mr. Rankin's rebuttal affidavit as constituting hearsay. Mr. Rankin's affidavit states:

> 10. In reliance on my conversations with the landlord at the time, I understood that we had clear and unambiguous permission, and were in fact encouraged, to make the above upgrades, including the access door.
>
> …
>
> 13. Soup Pot did not seek formal written permission from the landlord. Instead, and in good faith, Soup Pot relied on the meaningful permission it had obtained from the landlord and sought no further formalities as a direct result.

[31] Soup Pot says that there was an oral agreement to amend the lease regarding the installation of the door and such agreement dispensed with the need for written approval. The burden is on Soup Pot to prove the existence of the oral agreement on a balance of probabilities. Neither party tendered an affidavit from Mr. Strug and he was not called as a witness.

[32] In claiming paragraphs 10 and 13 are hearsay, Urban Spaces relies on Lederman, et al., *The Law of Evidence in Canada*, 3rd ed. (Markham, Ont:LexisNexis, 2009) at para. 6.2, where the authors state:

> Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceedings in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein.

[33] Urban Spaces also cites *R. v. Khelawon*, [2006] 2 SCR 787, 2006 SCC 57, where Charron J. stated, at para. 35:

> The fear is that untested hearsay evidence may be afforded more weight than it deserves. The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant.

[34] Urban Spaces argues that paragraph 10 of Mr. Rankin's rebuttal affidavit contains an implied assertion attributed to Mr. Strug. They argue that because express and implied assertions are indistinguishable when dealing with hearsay such evidence is inadmissible. In *R. v. Baldree*, 2013 SCC 35, Fish J. stated:

> 31 In short, hearsay evidence is presumptively inadmissible because of the difficulties inherent in testing the reliability of the declarant's assertion. Apart from the inability of the trier of fact to assess the declarant's demeanour in making the assertion, courts and commentators have identified four specific concerns. They relate to the declarant's perception, memory, narration, and sincerity: *Ibid*, at para. 2; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, at para. 159.
>
> 32 First, the declarant may have *misperceived* the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been *wrongly remembered*; third, the declarant may have narrated the relevant facts in an *unintentionally misleading manner*; and finally, the declarant may have *knowingly made a false* assertion. The opportunity to fully probe these

> potential sources of error arises only if the declarant is present in court and subject to cross-examination.

[35] As Urban Spaces points out, when an out-of-court statement made by an individual who is not available to testify is presented for the truth of its contents, the inability to test perception, memory, narration and sincerity is dangerous. In *R. v Abbey*, [1982] S.C.J. No. 59, [1982] 2 S.C.R. 24, Dickson J. (as he then was) stated at p. 41:

> The principal justification for the exclusion of hearsay evidence is the abhorrence of the common law to proof which is unsworn and has not been subjected to the trial by fire of cross-examination. Testimony under oath, and cross-examination, have been considered to be the best assurances of the truth of the statements of facts presented.

[36] Soup Pot argues that the statement at issue, respecting permission to install the door, is not tendered for the truth of its contents but merely for the fact of the statement having been made. Soup Pot says the comments of Mr. Strug themselves are the facts and were introduced only to prove that they were said by Mr. Strug. Soup Pot says the comments therefore are not hearsay and are admissible.

[37] In *The Law of Evidence in Canada*, *supra*, the authors state:

> 6.303 Where words which, when spoken, effect a legal result. The truth of the statement is immaterial, the only issue being whether the statement was made. Unfortunately, some have treated such statements as hearsay and have justified their admissibility as forming part of the *res gestae*. This, however, ignores the purpose for which the out-of-court assertion is tendered. It is only hearsay if it is

> put forth to prove the truth of the statement, but not otherwise. When the statement itself constitutes a fact in issue, any analysis of the doctrine of *res gestae* is a confusion of terms
>
> > There is obviously not only no necessity for using a shadowy phrase like *res gestae* to cover the admission of this kind of evidence but also every reason for not doing so. For example, in an action for breach of contract, the testimony of a witness as to statements he had heard which constituted the offer of acceptance or revocation is admissible under the issue. Similarly, with the words of an alleged slander in an action for defamation. Therefore it only makes for uncertainty to talk about *res gestae* in such cases.

[38] I agree with Soup Pot. The truth of Mr. Strug's statements to Mr. Rankin regarding the installation of the door is immaterial. The unrefuted evidence is that such comments were made, and that Soup Pot acted on that basis. The assertions made by Mr. Strug are not hearsay. The comments of Mr. Strug regarding the installation of the door are admissible as original evidence.

Issue 3: Was Soup Pot's right of renewal forfeited as a consequence of its having installed an interior door?

[39] Urban Spaces argues that even if the statements are not hearsay and are admissible the lease prohibits oral amendments and therefore Soup Pot was in breach when it built the door.

[40] Mr. Rankin was not cross-examined in relation to his conversation with Mr. Strug when Mr. Strug granted him permission to build the door. Urban Spaces did

not present any evidence to contradict Mr. Rankin's testimony that Mr. Strug gave him permission to build the door.

[41] Mr. Khoury also claimed that a building permit and fire marshal's approval, along with approval from the building's insurer, should have been obtained prior to installing the door. Without the permits and approvals, Urban Spaces argues that Soup Pot was in breach. Aside from Mr. Khoury's assertions, no other evidence was called in this regard.

[42] The *Building Code Regulations* made under s. 4 of the *Building Code Act*, R.S.N.S. 1989, c. 46, s.2.1.1.1(1), state:

> 2.1.1.1. Required Permits and Plans Review
>
> (1) Every owner shall obtain all required permits or approvals prior to commencing the work to which they relate.

[43] The *Fire Safety Regulations* made under Section 51 of the *Fire Safety Act*, S.N.S. 2002, c. 6, s.12(1), provide:

> 12 (1) Prior to the start of construction, an owner of a building or facility containing one of the following classes of occupancies must provide building plans for the construction or alteration of the building or facility to the Fire Marshal:
>
> (a) an assembly occupancy (Group A) that
>
> (i) is more than 3 stories high including the stories below grade, or
>
> (ii) has an area greater than 600 m2, or

> (iii) is in a non-residential building that is used for a school, college or university and that has an occupant load of more than 40 persons;
>
> (b) a care or detention occupancy (Group B);
>
> (c) a residential occupancy (Group C) that is licensed or regulated under the Homes for Special Care Act; and
>
> (e) a high hazard industrial occupancy (Group F, Division 1) that is more than 2 stories high or has an area greater than 600 m2. Review by Fire Marshal of other plans

[44] Mr. Strug was the owner of the building when he granted permission to Soup Pot to install the door. The wording of the *Building Code Regulations* places the onus on every owner to obtain permits or approvals before construction and the *Fire Safety Regulations* place the onus on the owner of a building or facility to obtain permits and permission from the fire marshal. Considering the overall tenor of Soup Pot's discussions with Mr. Strug this was not a situation where Soup Pot should be penalized by their new landlord regarding the previous landlord's failure to obtain permits or his failure to tell Soup Pot he was expecting them to obtain permits. The only evidence I have before me to consider is that Mr. Strug gave Soup Pot permission to install the door, with no caveats.

[45] Mr. Rankin testified that he had "an old-school relationship with Mr. Strug". For instance when Mr. Strug wanted additional rent relating to operating costs he would show up at Obladee and say, "Here's the water bill give me $200.00". Mr. Strug never provided Soup Pot with the detailed calculations for additional rent as

outlined in the lease. Mr. Rankin's evidence suggests that this same casual approach was utilized in obtaining permission from Mr. Strug to build the basement door. During re-direct examination the following question and answer was given:

> Mr. Crane: Mr. Rankin, my friend asked you a question with respect to Clause 11.03 about not making any alterations, repairs, installing doors without obtaining permission from the lessor or landlord. What's your understanding about that clause? With respect to obtaining consent?
>
> Mr. Rankin: My understanding of the clause, we had developed a way of working, if I may characterize the relationship, it was old school. Mr. Strug would come in and say here's the water bill, uh, you owe half of it and I'd say, oh ok, um, when we wanted to establish our patio we put a door in the front of the building and there was no written permission there, uh, so my understanding was that yes this was there for our mutual protection and that's, we certainly didn't refer to it explicitly in our time.

[46] 11.03 of the lease contemplates the possibility of changes being made to the premises, however, the lease states that such changes must be made in writing. Mr. Strug gave Soup Pot oral permission to install the door. This did not change or vitiate the entire lease. Instead, Mr. Strug granted Soup Pot permission to make a change to the premises without written permission. This was a "one-off" situation.

[47] Urban Spaces argues that 19.01 of the lease precludes the defence of waiver. 19.01 of the lease simply prevents a single agreement between the landlord and tenant that does not require strict compliance with the terms of the lease from being construed as waiving compliance with other terms of the lease in the future.

[48] Soup Pot had their landlord's permission to install the door. Soup Pot did not breach 11.03 of the lease. 19.01 did not bar Mr. Strug from granting Soup Pot one-time oral permission to install the door. Urban Spaces took the lease as it was in relation to agreements made between Soup Pot and Mr. Strug.

Continued Use of the Door

[49] Urban Spaces says they eventually ordered Soup Pot not to use the door. Since Soup Pot used the door after this prohibition Urban Spaces claims they breached the lease and/or did not have "clean hands". In his rebuttal affidavit Mr. Rankin admits that Soup Pot used the door three times after being ordered not to do so:

> 28. To the best of my knowledge, the door has only ever been opened three times since:
>
> a) On one occasion, I arrived at the building on a Sunday, when Obladee was closed, and discovered that there was about six inches of water in the lower level of the Demised Premises at the bottom of our stair case. I looked around the Demised Premises to discover where the water was coming from, and went downstairs. I could not find the source of the water leak so I opened the access door to look further. As a result, I discovered the water leak was coming from the mechanical room and the issue was resolved without further damage to the building.
>
> b) Once to move a walk-in refrigerator as there was no other access; and
>
> c) Once to move the extension cord that provides power from the Demised Premises to our exterior patio seating.

[50] Because Soup Pot had permission to build the door, the issue of "clean hands" is not particularly significant. Additionally, Urban Spaces has not provided any evidence of inconvenience or financial loss resulting from Soup Pot's three brief usages of the door after the prohibition. Urban Spaces' prohibition on the use of the door was unreasonable in light of the agreement between Soup Pot and Mr. Strug. Using the door on the three insignificant occasions as described by Mr. Rankin in the face of an unreasonable prohibition by Urban Spaces is of no consequence in this case.

Conclusion

[51] The agreement with Mr. Strug may have been very informal but the evidence reveals that "informal" is precisely how Mr. Strug carried on business with Soup Pot. Urban Spaces might wish things had been handled more formally by Mr. Strug but such wishful thinking does not equate to reality in this case. The unrefuted evidence is that Soup Pot was of the understanding that Mr. Strug gave them valid permission to install the door. They installed the door on the basis that their landlord had granted them permission.

[52] Soup Pot did not breach the lease. Soup Pot is not in default of their obligations under the lease. Urban Spaces bought the building and accepted the

assignment of leases. Soup Pot's lease contained an option to renew. Soup Pot complied with all the terms of the lease. Soup Pot sent a valid notice to exercise the option to renew to Urban Spaces. There is no reason why Soup Pot should be prohibited from exercising their option to renew. I can infer from the ongoing arrangements between Urban Spaces and Soup Pot that Urban Spaces would be happy to have Soup Pot remain as a tenant as long as they enter into a lease more favourable to Urban Spaces than the original lease. Urban Spaces will continue to have Soup Pot as a tenant, but in accordance with the option to renew.

[53] The option to renew is enforceable. The lease is renewed as contemplated by the terms of the original lease between Mr. Strug and Soup Pot. Soup Pot's $5,000.00 deposit must be returned by Urban Spaces along with interest at a rate of 4% calculated from June 6, 2014.

Arnold, J.