SUPREME COURT OF NOVA SCOTIA
Citation: *Second Cup Ltd. v. OPB Realty Inc.,* 2019 NSSC 287

Date: 20190924
Docket: Hfx No. 487985
Registry: Halifax

Between:

The Second Cup Ltd.

Applicant

v.

OPB Realty Inc., Cushman & Wakefield Asset Services ULC

Respondents

Decision

Judge:	The Honourable Justice John P. Bodurtha
Heard:	July 24, 2019 in Halifax, Nova Scotia
Oral Decision:	September 24, 2019
Written Release:	November 12, 2019
Counsel:	Michael O'Hara, for the Applicant Jeff Aucoin, for the Respondents

I. Background

[1] The Applicant, The Second Cup Ltd. ("Second Cup"), seeks an order allowing them to sell frozen yogurt in their Halifax Shopping Centre ("HSC") franchise location. The Respondents, OPB Realty Inc. ("OPB") and Cushman & Wakefield Asset Services ULC ("Cushman"), oppose the application and seek to have it dismissed. The parties are governed by, *inter alia*, a lease agreement containing a "Use Clause". The parties' dispute is whether the Use Clause permits Second Cup to sell frozen yogurt, including Pinkberry Frozen Yogurt and Yogurt parfait at the HSC location.

II. Facts

[2] Second Cup is a publicly traded company, listed on the Toronto Stock Exchange and is incorporated under the laws of the Province of Ontario. It carries on business across Canada primarily as a franchisor of cafés offering for sale a wide selection of coffees, espresso-based beverages, iced and blended beverages, frozen beverages, frozen yogurt, bakery products, sandwiches, and complementary food items.

[3] OPB owns shopping centres across Canada, including HSC which is a large retail mall.

[4] Cushman is the agent and manager for OPB. Cushman manages assets for OPB across Canada, including HSC.

[5] The Second Cup as tenant and OPB as landlord are parties to a Retail Space Lease dated August 7, 2012 for premises in HSC. The leased premises operate under the name "Second Cup" and are used for a retail coffee store and café.

[6] Since May 2017, Second Cup has been offering to sell frozen yogurt under the name Pinkberry Frozen Yogurt. This is currently sold in approximately 92 stores across Canada.

[7] The product is made by mixing yogurt with a flavouring mix in a specialized soft serve dispensing freezer. The yogurt is frozen and stored in the freezer unit until it is dispensed to the customer at the time of sale.

[8] Second Cup wishes to sell frozen yogurt, including Pinkberry Frozen Yogurt at the HSC. The Respondents' position is that the sale of Pinkberry Frozen Yogurt is not permitted under the terms of the lease and the Use Clause.

III. Issue

[9] Whether frozen yogurt is permitted to be sold under the Use Clause of the lease between Second Cup and OPB.

IV. Lease Agreement

[10] The Use Clause reads as follows:

> **5. USE** Tenant shall use the Store only for the sale at retail of specialty coffees, coffee, espresso based beverages, teas, other hot, cold and blended beverages, gourmet coffee products, coffee in bean or bulk form and as ancillary thereto the sale of non-perishable food products, including, but not limited to, desserts, pastries, baked goods, dessert squares, muffins, croissants, danishes, scones, tarts, rolls, cakes, donuts, biscotti, bagels, cookies and premade specialty sandwiches all for on or off premises consumption. It is further understood that no one ancillary item can take precedence in the assortment of offerings so as to create the illusion to the consumer that the Store is for instance a "muffin store" or a "doughnut shop". Further as ancillary thereto, the sale at retail of giftware, novelties and other merchandise that may be sold from time to time in the majority of the Tenant's other retail locations provided such items do not conflict with any exclusive covenants in other tenant's executed lease agreements already in existence as of the date hereof.

There are no other provisions contained in the lease agreement that affect this clause for this issue.

V. Law & Analysis

[11] The parties correctly cite *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, [2014] 2 SCR 633, as the leading Canadian case on contractual interpretation. This case confirms that "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction" (para 47).

[12] Contractual interpretation is an exercise in determining and giving effect to the parties' objective intentions at the time the contract was formed. The Court in *Sattva* discusses this as follows:

> [47] …To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)
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> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
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> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]
> >
> > …
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> [50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[13] The Court cautioned against overly relying on the "factual matrix":

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (*Hall*, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court

> effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (King, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (Investors Compensation Scheme, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[14] G.H.L. Fridman, *The Law of Contract in Canada*, 6th Ed. (Toronto: Thomson Reuters, 2011) at pp. 437-438 writes:

> The golden rule is that the literal meaning must be given to the language of the contract, unless this would result in absurdity. Words of ordinary use in a contract must be construed in their ordinary and natural sense. The paramount test of the meaning of words in a contract is the intention of the parties. That is to be determined in the operative sense by reference to the surrounding circumstances at the time of signing the contract, in other words, the content of the factual matrix in which the contract exists. But evidence of the commercial context surrounding the making of an agreement may be admitted only to show the purpose for which the various contractual provisions were included, not to vary the meaning of the words in a written contract. [citations omitted]

[15] Therefore, while the starting position for contractual interpretation is reading the words in their plain and ordinary meaning, the analysis does not stop there. This reading must be consistent with the contract as a whole. The decision maker must also consider the “factual matrix”, or the context surrounding the contract. However, considering context should not have the effect of modifying or deviating too far from the words in the contract. Importantly, this exercise does not require strict adherence to the dictionary definition of the words; the contract as a whole and the surrounding circumstances are always relevant in contractual interpretation analysis.

a) Ordinary, grammatical meaning

[16] *The Oxford English Dictionary*, 8th ed., does not define "non-perishable", but defines "perishable" as:

> - adj. liable to perish; subject to decay. – n. a thing, esp. a foodstuff subject to speedy decay.

[17] "Non-perishable" would generally mean the opposite, i.e. a foodstuff that is not subject to speedy decay. The dictionary does not assist us in assessing how "speedy" a foodstuff must decay to be considered "non-perishable".

[18] *Merriam-Webster's* online dictionary defines "nonperishable" as: "processed or packaged to withstand prolonged storage: not perishable".[1] This definition accounts for efforts of preservation.

[19] I agree with the Applicant that "non-perishable" must be considered on a spectrum. There are few foods which, in their natural state, do not decay over time (for instance, honey and salt come to mind). The Respondents are not arguing Second Cup may only sell honey, however. Conventionally, non-perishable foods are foods which do not decay when unrefrigerated even over years, including canned or dried goods. These foods have generally been preserved in some way, often with special storage (e.g. vacuum-sealed tin can). Therefore, even the Respondents' definition of "non-perishable" must account for some degree of perishability and some form of preservation.

[20] The *Oxford English Dictionary*, 8th ed, defines "dessert" as:

> *n*. 1. the sweet course of a meal, served at or near the end. 2. *Brit*. a course of fruit, nuts, etc., served after a meal.

[21] Dessert is a broad category of foods that range in degree of perishability. "Dessert" appears in the Use Clause as one term in a long list of items Second Cup is permitted to sell. These items also range in terms of perishability.

[22] Whether or not frozen yogurt is "non-perishable" under the dictionary definition does not decide the issue. What matters is whether frozen yogurt is "non-perishable" under the Use Clause, or at least as non-perishable as the other

[1] < https://www.merriam-webster.com/dictionary/nonperishable#other-words>.

items listed. These dictionary definitions may assist in this analysis, but they are not conclusive.

b) As a whole

[23] The contract must be read as a whole, such that any ambiguity or inconsistency may be harmonized when read together. Contracts frequently include terms that do not have precise meanings, such as "non-perishable" and "dessert" in this case. The surrounding words can be used to shed light on the parties' intentions and meaning can be gleaned from these ambiguous terms.

[24] The Ontario Court of Appeal in *Glimmer Resources Inc v Exall Resources Ltd*, 119 OAC 78, 1999 CarswellOnt 1084 considered this as follows:

> 17 That is not to say that each word in an agreement must be placed under the interpretative microscope in isolation and given a meaning without regard to the entire document and the nature of the relationship created by the agreement. Context can elucidate and assist in revealing the plain meaning of words used in a contract. One part of an agreement may enlighten as to the meaning to be given to words used in another part of the agreement. Similarly, the relationship created by the agreement and its overall purpose as indicated in the agreement may assist in giving meaning to particular words or phrases within the agreement. Context in this sense does not, however, refer to extrinsic evidence of the conduct of the parties or expert evidence as to the meaning of words used in the agreement.

[25] Furthermore, the parties may intentionally signal to the reader that certain words or phrases assist in defining other parts of the contract. One way of doing this is using a list of examples; another way is qualifying general terms with specific terms. These both arise in the Use Clause between the parties.

[26] This follows the Supreme Court of Canada's decision in *BG Checo International Ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12, 1993 CarswellBC 10, where La Forest J. writes:

> 9 It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole: K. Lewison, *The Interpretation of Contracts* (1989), at p. 124; *Chitty on Contracts* , vol. 1, 26th ed. (1989), at p. 520. Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective: *Chitty on Contracts* , at p. 526; Lewison, at p. 206; *Forbes v. Git* (1921), 62 S.C.R. 1, 59 D.L.R. 155 , per Duff J. (as he then was),

> dissenting, at p. 10 [S.C.R.], reversed [1922] 1 A.C. 256, [1922] 1 W.W.R. 250, 61 D.L.R. 353 (P.C.) ; *Hassard v. Peace River Co-operative Seed Growers Association Ltd.*, [1954] 2 D.L.R. 50 (S.C.C.) , at p. 54. In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term: *Forbes v. Git*, [1922] 1 A.C. 256; *Cotter v. General Petroleums Ltd.*, [1951] S.C.R. 154, [1950] 4 D.L.R. 609. A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms — or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.

[27] The issue with the Use Clause is that "non-perishable" must be reconciled with the list of food products that are subject to some degree of perishability.

[28] Reading the Use Clause as a whole clarifies what "non-perishable" means in this lease agreement. Immediately following the term "non-perishable" is a non-exhaustive list of foods, many of which are conventionally considered perishable. For instance, "premade specialty sandwiches" presumably contain various parts that would normally be considered perishable, including meat or fish, dairy, and eggs. Therefore, "non-perishable" means "food that is at least as non-perishable as these other food items", which all require some form of preservation, notably refrigeration.

[29] The Respondents' interpretation of "non-perishable" removes it from the context in which it is found and therefore must fail. Frozen yogurt is at least as non-perishable as the other items listed, thanks to its method of preservation. It may therefore be considered "non-perishable" for the purposes of this Use Clause. This is further demonstrated by the word "dessert".

[30] The word "dessert" is more general than the specific types of items that are listed after it. Therefore, "dessert" must mean something other than "pastries, baked goods, dessert squares, muffins, croissants, danishes, scones, tarts, rolls, cakes, donuts, biscotti… [and] cookies" (being the other sweet items that may otherwise be considered "dessert" in the list). All these various baked desserts are removed from the category of "dessert" by virtue of the list, yet "dessert" must refer to something (i.e., some food item) if it is at least as non-perishable as the other items listed. Frozen yogurt would fall into this category.

[31] The Respondents argue that had the parties envisioned frozen yogurt being sold in the Applicant's store at the time of drafting the agreement, they would have

included words to make that clear. They argue that the fact they did not use those words makes it clear that the offer to sell frozen yogurt was never intended by the parties.

[32] I disagree and find the contrary. The parties would not have used the word "dessert" if they did not intend some unlisted, uncontemplated sweet items might eventually be sold by Second Cup. The parties to the contract could have used narrower language but did not. Reading the Use Clause as a whole, frozen yogurt is not excluded.

c) Factual matrix

[33] As discussed in the case law above, the factual matrix may consider various factors external to the contract itself. One of these is the purpose of the contract. In this case, we may assume the parties intended a mutually beneficial contract with a commercial purpose. The corollary of this is they intended to avoid commercial absurdity *(Toronto (City) v WH Hotel Ltd*, [1966] SCR 434 at p 440).

[34] La Forest, J.A, (as he then was), in *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 (NBCA) wrote at p. 248:

> [I]n determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were actually contracting about.

[35] Presumably, the contract serves to facilitate Second Cup in selling its products at HSC and restrict Second Cup from engaging in certain activities that may harm the HSC's operations. This is consistent with the reading that harmonizes the terms in the Use Clause.

[36] The Respondents submit that, if the Court finds the Applicant's argument that, "Frozen Yogurt is non-perishable because it does not decay or spoil when refrigerated/frozen and it is sold and eaten in this form" is valid, this will lead to commercial absurdity and eliminate the restrictions in almost any food business use clause. I do not agree with this submission.

[37] The above interpretation would not result in commercial absurdity. The Use Clause is not so open-ended that Second Cup could sell any frozen food. The foods must be at least similar to the enumerated foods and be ancillary to beverage sales.

[38] Furthermore, I must assume that the parties contemplated food would be preserved by refrigeration when the contract was formed. Paul Kieley, the President and part-owner of 3294627 Nova Scotia Limited, the franchisee of the Second Cup store in HSC, states in his affidavit that many of the foods require refrigeration (para16).

Applicant's location within HSC

[39] The Respondents argued that "courts have recognized that use clauses imposed on tenants of shopping centres should be construed liberally." The Respondents relied on a passage from *The Owners, Strata Plan LMS 1590 v. Yip*, 2018 BCSC 2185, where the Court stated at para. 81:

> As noted by Tysoe J. in *Kok*, use clauses in shopping mall leases have been regularly enforced by the courts. While not expressly referenced in *Kok*, the relevant cases include the decision of the Supreme Court of Canada in *Russo v. Field*, [1973] S.C.R. 466 (S.C.C.) [*Russo*]. In *Russo*, the Court observed that shopping malls are often planned on the basis that shops within the mall are not to be competitive with each other as a means of ensuring the mall's overall success. The public policy which favours restrictively construing such clauses in other contexts is of limited importance in this context: *Russo*, at p. 487. See also: *F.W. Woolworth Co. v. Hudson's Bay Co.* (1985), 61 N.B.R. (2d) 403 (N.B. C.A.) at paras. 35-40.

[40] The Supreme Court stated in *Russo v. Field*, 1973 CarswellOnt 223, 1973 CarswellOnt 223F, [1973] S.C.R. 466, 34 D.L.R. (3d) 704 at paras 44-46:

> 44 It must therefore be determined whether under the particular circumstances in this case the leasing of the premises to the defendant Ann Field and the carrying on of the business therein of the wiggery was a breach of the covenant in the lease to the plaintiffs which covenant I have concluded above the defendant Ann Field had notice of by virtue of the operation of *The Land Titles Act*. I stress again that the circumstances are important. Both the premises of the plaintiffs and that of the defendant Ann Field were situated and in fact immediately adjoined in a small shopping centre containing only ten stores, nine stores plus one supermarket, and that shopping centre was situated in the north-eastern art[*sic*] of suburban Toronto in a residential area. The landlord had expressed in the lease to the plaintiffs and in the other leases filed at trial except that to the defendant Ann Field the intention of "the landlord and tenant that the stores in the shopping centre of which the

> demised premises formed part shall be non-competitive". That was part of the contents of the lease to the plaintiffs which, as I have said, the defendant Ann Field must be considered to have notice.
>
> 45 It has been said that covenants such as those under consideration in this action are covenants in the restraint of trade and therefore must be construed restrictively. I am quite ready to recognize that as a general proposition of law and yet I am of the opinion that it must be considered in the light of each circumstance in each individual case. The mercantile device of a small shopping centre in a residential suburban area can only be successful and is planned on the basis that the various shops therein must not be competitive. Since the shopping centre is a local one and not a regional shopping centre, the prospective purchasers at the various shops which it is planned to attract are residents in the neighbourhood. They are, of necessity, limited in number and therefore the business which they bring to the shopping centre is limited in extent. The prospective purchaser attracted to shop A in the plaza may well turn from shop A to shop B to purchase some other kind of his or her needed goods or service but if the limited number of prospective purchasers are faced in the same small shopping centre with several prospective suppliers of the same kind of goods or service then there may not be enough business to support several suppliers. They will suffer and the operator of the shopping plaza will suffer.
>
> 46 I am therefore of the opinion that the disposition as a matter of public policy to restrictively construe covenants which may be said to be in restraint of trade has but little importance in the consideration of the covenants in the particular case.

[41] I disagree with the Respondent and interpret these cases to mean that based on their unique facts, the normal rule that a restrictive covenant should be read restrictively does not apply. In both cases the restrictive covenants were intended to limit competition for the benefit of the small shopping centre.

[42] In this case, there is very little to no evidence that HSC intended to limit competition among its shop owners. The only evidence on this point came from two witnesses, James Hedrich, the Vice-President, Retail Strategy for Cushman, and Paul Kieley.

[43] James Hedrich stated in his affidavit that two other tenants within HSC, Dairy Queen and Freshly Squeezed, sold frozen yogurt. He was cross-examined on his affidavit regarding these tenants and testified that Dairy Queen sold soft serve ice cream. When pressed on the difference between soft serve ice cream and frozen yogurt, he responded that he considered them the same. Regarding Freshly Squeezed, he said they had frozen yogurt in their smoothies but agreed they did not sell it separately.

[44] Paul Kieley testified that he tried to purchase frozen yogurt from both tenants and was unable to do so.

[45] I find soft serve ice cream and smoothies are distinctly different from frozen yogurt and, in particular, the Pinkberry Frozen Yogurt offered for sale by Second Cup.

[46] There was no evidence before me as to whether these items are in direct competition, and, therefore, again, I find no reason to read the Use Clause restrictively to limit competition in the HSC.

VI. Conclusion

[47] The Respondent asks the Court to read the term "non-perishable" with strict, dictionary-definition precision. This reading cannot be reconciled with the rest of the Use Clause which sets out foods of varying degrees of perishability as "non-perishable". While the parties may not have turned their minds specifically to frozen yogurt, they clearly intended to allow Second Cup to sell food products that are somewhat perishable and ancillary to their beverage sales. There is nothing in the Use Clause to preclude frozen yogurt as a "dessert" or a continuation of the foods in the list.

[48] The Applicant's request for an order declaring the sale of frozen yogurt, including Pinkberry Frozen Yogurt and Yogurt parfait, is permitted under a certain Retail Space Lease dated August 7, 2012, between the Applicant as Tenant and the Respondent, OPB Realty Inc., as Landlord, in respect of premises in the Halifax Shopping Centre, Halifax, Nova Scotia is granted.

[49] If the parties are unable to agree on costs, I will receive written submissions within 30 calendar days of this decision.

Bodurtha, J.