SUPERIOR COURT OF JUSTICE **69959/10**

OSHAWA SMALL CLAIMS COURT

BETWEEN

1299746 ONTARIO INC.

PLAINTIFF

AND

784481 ONTARIO INC.

DEFENDANT

REASONS FOR JUDGMENT

Plaintiff's Representative: Alan Bodimeade
Defendants' Representative: John Montgomery, Counsel

Pleadings :

Claim :

This is an action claiming an outstanding balance for monies owed for the return of a security deposit (the "Security Deposit") placed pursuant to the obligations under the Lease. The Plaintiff leased space (the "Premises") at 1655 Feldspar Court, Pickering, Ontario (the "Building") from INVAR Building Corporation (the "Former Landlord") during the period April, 2007 through April, 2010 (the "Term"), pursuant to a written lease (the "Lease"). The Building was sold by the Former Landlord to the Defendant in December, 2008, and the Lease simply continued "as is".

Upon the termination of the Term, March 31, 2010, (the "Termination Date"), the Plaintiff vacated the Premises after completion of a "deficiency walk through" with the Defendant. Necessary repairs and restoration were completed by the Plaintiff. The Defendant, however, retained $27,774.53 of the Security Deposit. The Plaintiff pleads that it had rented space from the Former Landlord since 2002 and had never experienced any monies held back and has always left its occupancy in good condition. The Plaintiff also notes that carpeting within the Premises had been installed for a previous tenant in March, 2004 and was 6 years old.

Defence :

The Defendants deny the allegations contained within the Claim and the entitlement to the relief sought within this action. The Defendant purchased the Building from the Former Landlord in December, 2008 and the Premises were then subject to the terms of the Lease. Both the interest of the Former Landlord and the Security Deposit, in the amount of $10,820.48, were assigned to the Defendant. The Lease contains various provisions governing the occupation maintenance and condition of the Premises both during the term of the Lease as well as at the time of the surrender of the Premises. In contemplation of the expiry of the Lease, the Defendant inspected the Premises and advised the Plaintiff that certain repairs were required in order to bring the Premises into good condition in compliance with the obligations under paragraph 5 (g) of the Lease. The Defendant received quotes in respect of the cost of the repairs. The Plaintiff suggested that some of the repairs were within the reasonable wear and tear exception in the Lease; the Defendant feels that none of the damage to the Premises that remained outstanding is within the scope of reasonable wear and tear. The Plaintiff did complete some repairs and vacated the Premises as of the Termination Date.

The Defendant found damages within the Premises such as rips, burns, indelible stains in the carpet, broken, stained and missing ceiling tiles, poorly patched holes in the drywall; chipping and bubbling of painted surfaces; improper sanding and painting of drywall repairs. The Defendant was required to undertake further repairs in order to bring the condition of the Premises to the standard of repair provided in the Lease. The Defendant expended a total of $19,279.81 to replace carpet, patch the walls and repaint the Premises as well as to replace broken and stained ceiling tiles. There was a reimbursement to the Plaintiff based upon CAM/Taxes/Security Deposit less the cost of repairs, however the Defendant asserts it made a mathematical error and there was an overpayment by $2,719.49.

The Defendant feels the Plaintiff was obligated to leave the Premises in good repair and in such condition as a careful owner would do, subject to reasonable wear and tear, but the Plaintiff failed to comply with that obligation; the nature of the repairs undertaken by the Defendant do not constitute mere reasonable wear and tear, and the Premises required complete painting. The Defendant pleads a breach of paragraphs 5(e) and 5 (g) of the Lease. The Defendant also referenced paragraphs 6 (a) “Cost of Maintenance” and 10 (I) “Repair Where Tenant at Fault” within the Lease.

Trial:

The Plaintiff was represented by Gary Bodimeade, principal of the Plaintiff. He advised that the current Lease was the fourth (4th) with the former owner of the Building; the Premises were originally taken on an "as is " basis, including the state of repair of the carpet therein. The Plaintiff had completed various improvements to the Premises and generally improved its amenities, including building an upstairs office. At the time of the transfer of the Building, the Defendant had completed a walk through inspection and had not noted any deficiencies. Upon the Termination Date, there was a deficiency list prepared and the Plaintiff undertook all repairs, including clean up of t he carpeting. The Defendant failed to return the Security Deposit but claimed various deductions.

On cross examination, Mr. Bodimeade indicated he had never been advised of a deficiency list by the Defendant. When originally taking possession, the Plaintiff assumed the Premises on an as is basis and did not require the former landlord to make any repairs or improvements. All holes in the walls were patched with paint being blended into the existing walls. The carpets were steamed cleaned and, while holes did develop, the Plaintiff considers this as reasonable wear and tear. The Plaintiff completed all items on the deficiency list provided by the Defendant and had not received any further notification of any issues outstanding. The Plaintiff is of the opinion that it maintained a standard in the Premises as historically determined by the original landlord.

It is noted that neither of the parties provided the Court with any deficiency list or notes that may have been made at the time of the inspection of the Premises by the Defendant concurrent with the transfer of the Building. Similarly, there are no notes of the state of the Premises at the time of the original move in by the Plaintiff under the former owner.

Mr. Kevin Van Sickle, an officer of the Defendant, indicated that the Building was purchased on or about December 18, 2008 (the "Date of Purchase"). Plaintiff was already in possession. At that time, the Defendant did conduct an inspection (the "Initial Inspection") and, while he has a general recollection of the Premises, he was not really there for that purpose. Upon the Termination Date, an inspection was conducted; the Defendant found excessive tears in the carpet and holes, frayed areas, stains and cigarette burns. (Emphasis added)

After the Plaintiff completed its repairs, the Defendant noted remaining stains in the carpet, holes

caused by bolts into the floor, a hole in the wall, paint on the wall was not applied evenly and was cracking, plastering was not sanded or professionally completed, doors had holes, cables in the walls: all repaired by the Defendant. The Defendant paid a third party contractor to undertake all necessary repairs.

On cross examination, Mr. Van Sickle indicated that he did not have any proof the stains and burn marks in the carpet being present when the Plaintiff originally took possession of the Premises. He was not aware if the terms of the Lease allowed for or required replacement of the "stained carpet"; however it was replaced with a medium grade product. He could not definitively confirm that the Lease provided an obligation on the Plaintiff to paint the Premises from top to bottom or that prior approval by the Defendant was mandated. He did not record the Initial Inspection or document the results in any fashion whatsoever to the Plaintiff or otherwise.

Raymond Leitch is the chief financial officer of the Defendant. He indicated that the Defendant was entitled to hold back and retain a reserve for major repairs pursuant to the terms of the Lease, referring to paragraph 6(a) therein.

Daniel Fleming, a home renovator, is experienced in the application of dry wall. He attended at the Premises at the request of the Defendant. He noticed the walls had been patched and painted, but was of the opinion that the paint was applied prior to proper preparation; in fact, the attempted repairs showed through the paint when exposed to sunlight . Plastered holes had not been primed or sanded properly and had to be redone. Paint was not applied to the surface of the entire wall but stopped prior to the ceiling. The walls required sanding, re patching and the application of two (2) coats of paint. He noted that the carpet within the Premises was "worn pretty bad", with some holes; he was told it was being replaced.

There was no witness called by the Defendant who could provide evidence as to the physical state of the Premises as of the Date of Purchase, or who was employed at that site at that same time and had personally conducted an inspection as of that date. Mr. Van Sickle said he was not there for that purpose. The only evidence is that of the Plaintiff, which is uncontradicted as of that date and the fact that it took over the Premises with the carpet at least six (6) years old.

Closing Submissions :

Plaintiff :

The Plaintiff presents the suggestion that the evidence supports a finding of fact that the Premises were surrendered in a “fair” condition. It was not aware that the repairs it conducted were not satisfactory to the Defendant, and there was no request to re attend and conduct any further repairs. The major repair fund was deducted twice, originally as part of the ongoing TMI during the term of the Lease and the Defendant has now deducted the same amount from the rental deposit.

Defendant :

The Defendant submitted that the deduction for the major repair fund was not part of the (annual) TMI and it had not been previously deducted or held back. The nature of the repairs completed by the Defendant after the Termination Date reflect damages that are beyond reasonable wear and tear. When the Plaintiff initially took possession of the Premises there were not any holes in the walls and everything was in good order; on vacating, there now were holes in the walls, tears in the carpets and a need for patches and painting. The deduction for the cost of the repairs (together with the contracted administration fee) was appropriate to correct the attempts by the Plaintiff to do its own repair work, attempts not done properly and were completed in accordance with the Lease as a reasonable landlord would undertake for its property.

The carpet was replaced due to tears, rips and holes created by the Plaintiff. When originally taking possession, the carpet had been three (3) years old but now needed replacement; this is not reasonable wear and tear. As a result, the deductions were appropriately taken including the reserve for major repairs.

As previously noted, there is absolutely no evidence to support these arguments with respect to the state of the Premises when the Plaintiff initially took possession or even at the inspection on the Date of Purchase.

Analysis :

This litigation was prompted by differences of opinion between the parties over the issues of in the condition required by paragraph 5(g) of the Lease. The Lease specifically exempts reasonable wear and tear; the court accepts the concept of "reasonable wear and tear" as in *Aylward (Property) Ltd. v Oshawa Holdings Ltd.* [1990] N.J. No. 382 :

> "that in considering what reasonable wear and tear is, reasonable regard must of course be had for the age and nature or use of the building, the duration of the tenancy and the nature of the use for which it is intended, and to which it was put during the tenancy. The law of course hardly contemplates that a leased premises, particularly a commercial structure, occupied for a considerable period of time and subjected even in normal usage to relatively hard wear and tear will be left by a tenant in the same decorative repair and with its mechanical doors, locks, communication system etcetera in precisely the same condition as when it took it."

This accords with the directions of the Ontario Court of Appeal in *Kentucky Fried Chicken*, *infra*. para. 27:

> "Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity. Rather, the document should be construed in accordance with sound commercial principles and good business sense. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other. "

It would not make objective business sense for the Defendants to enter into an agreement that would permit the Landlord to claim for the cost of restoring the Property " in good and substantial repair and condition" without some form of recognition of the length of the term of the Lease, as extended. Nor does such an interpretation correspond with the intrinsic nature of an active application of the Property over such an extended period of time. The Court is satisfied, in accordance with the principles of (commercial) contract interpretation, as hereinafter set forth, and on the basis of sound business sense, that there can be implied an understanding that the obligations to repair the Premises upon vacating, and the condition in which it will be returned to the Plaintiff, will be subject to the contracted exception for reasonable wear and tear.

Lease:

The Lease between the parties contains, inter alia, the following provisions of relevance to these proceedings (and which have, to some extent, been relied upon by the Defendant):

3(b) "Security Deposit" The Tenant has also deposited with the Landlord the sum of ...$10,820.48 (the "Security Deposit")...The Security Deposit shall be held by the Landlord, without liability for interest, as security for the faithful performance by the Tenant of all of the terms, covenants and conditions of this lease by the Tenant to be kept, observed and performed.

3(c) If at any time during the term the rent or other sums payable by the Tenant to the Landlord hereunder are overdue and unpaid, of if the Tenant fails to keep and perform any of the terms, covenants and conditions of this lease to be kept, observed and performed by the Tenant, then the Landlord at its option may, in addition to any and all other rights and remedies provided for in this lease or by law, appropriate and apply the entire security deposit, or so much thereof as is necessary to compensate the Landlord, for the loss or damage sustained or suffered by the Landlord due to such breach on the part of the Tenant. If the entire security deposit, or any portion thereof is appropriated and applied by the Landlord for the payment of overdue rent or other sums due and payable to the Landlord by the Tenant hereunder, then the Tenant, shall, upon written demand of the Landlord, forthwith remit to the Landlord a sufficient amount in cash to restore the security deposit to the original sum deposited...If the Tenant complies with all the terms, covenants and conditions and promptly pays all of the rent and other sums herein provided and payable by the Tenant to the Landlord, the security deposit shall be returned in full to the Tenant without interest within sixty (60) days after the end of the term, or within sixty (60) days after the Landlord has determined the actual costs and expenses for taxes and common area expenses including insurance for that calendar year.

5.(e) "Repairs" That the Tenant shall, at its sole cost and expense and at all times, keep and maintain the whole of the leased premises and every part thereof (including, without limitation, all entrances, glass, doors, fixtures, signs, equipment and appurtenances thereof and improvements thereto) in good order and first class condition ans shall promptly make all needed repairs and replacements thereto (reasonable wear and tear and damage by fire, lightning and tempest only excepted) and without limiting the generality of the foregoing, the Tenant shall keep the demised premises well painted, clean and in such condition as a careful owner would do.

5 (g) "Leave Premises in Good Repair" That the Tenant, will, at the expiration or sooner termination of the Term, peaceably surrender and yield up unto the Landlord the premises with all improvements, erections and appurtenances which at any time or times during the Term shall be made, placed or erected therein or thereon, in good and substantial repair and condition, reasonable wear and tear and damage by fire, lightning and tempest only excepted, and the Tenant shall surrender all keys for the premises to

the Landlord at the place fixed for payment of rent and shall inform the Landlord of all combinations on locks, safes and vaults, if any, in the premises. The Tenant, shall, however, if requested by the Landlord remove all improvements, erections, alterations, fixtures or other appurtenances made, placed or erected at any time or times during the Term in or on the premises, at the sole cost and expense of the Tenant, and shall repair all damage to the leased premises caused by their installation and/or removal. The Tenant's obligation to observe and perform this covenant shall survive the expiration or sooner determination of the Term or any renewal thereof.

6(a) "Cost of Maintenance" In each year of the Term, the Tenant will pay to the Landlord...(iii) the total cost of operating, maintaining, lighting, cleaning (including snow and ice removal and/or clearance) supervising, policing, landscaping, repairing and replacing all common areas and facilities, including without limitation, a reserve set up by the Landlord or its manager for major repairs to cover expenses not included in the annual operating costs, all monies paid to persons, firms or corporations employed by the Landlord to perform same....(vi)an administrative fee of 15% of such annual cost and expenses aforesaid.

10(I) "Repair where Tenant at Fault" That in the event the Building, the common areas and facilities thereof, the leased premises, or any equipment machinery or facilities contained therein, or, any other structural portions require repair or become damaged or destroyed through the negligence, carelessness or misuse of the tenant, its servants, agents, employees, contractors, or through it or them in any way, stopping up or injuring the heating apparatus, water pipes, drainage pipes or other equipment or facilities or parts of the Building, the expense of all such necessary repairs, replacements or alterations, plus a further 15% of the costs thereof, shall be borne by the Tenant who will pay the some to the Landlord forthwith, upon presentation of an account of such expenses incurred by the Landlord as aforesaid.

Credibility :

The determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. The Court must assess credibility, weigh the evidence and find on the facts. One of the most enlightened guides on this aspect of a trial Judge's functions appears in a judgment of the late O'Halloran, J.A., delivered in the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354.

The following extract from his reasons appears at pp. 356-8:

‘If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. Raymond v. Bosanquet (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295.

A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case. Mr. Justice Stephen put it another way: He said (General View of the Criminal Law, 2nd ed., p. 191) "that the utmost result that can in any case be produced by judicial evidence is a very high degree of probability ... The highest probability at which a court of justice can, under ordinary circumstances, arrive is the probability that a witness or a set of witnesses tell the truth when they affirm the existence of a fact".”

Determination of Credibility :

In assessing credibility, the court considers the following relevant factors:

(a) the witness's appearance and demeanour;

(b) the witness's opportunity to observe;

(c) the witness's capacity to remember;

(d) the probability or reasonability of the evidence;

(e) the internal consistency or inconsistency of the evidence;

(f) the external consistency of the evidence; and

(g) the witness's interest on the outcome of the case.

The Court finds the evidence of the Mr. Bodimeade clear, concise and acceptable in preference to that of the evidence of the witnesses for the Defendants where such evidence is in conflict. Mr. Bodimede attended the Premises upon the original date of occupancy and advised that he accepted the Premises on an "as is" basis; he conducted the inspection. There is no inspection report presented by the Defendant completed as of the Date of Purchase; as a result there is no "objective" standard of comparison that would allow the Court to find a deterioration of the state of repair and condition while the Premises were occupied by the Plaintiff.

The evidence of the Plaintiff, when viewed in totality, is endorsed by the witnesses for the Defendant that certain repairs were completed by the Plaintiff upon or prior to the Termination Date. The evidence of Mr. Van Sickle was vague and unsupported. While there is an email sent by him, dated February 10, 2010, to Mr. Bodimeade, appearing within the Defence book of materials, referring to the results of an on site inspection of the Premises, it is noted that there is no suggestion the inspection was conducted with the attendance of a representative of the Plaintiff, how it was conducted, by whom and how the results show a degradation from the time of the Date of the Purchase. It is completely subjective and was not acknowledged or confirmed by the Plaintiff at that time. In fact, it does not offer a comparative to the condition and repair of the Premises at the inception of the Lease to demonstrate a violation of paragraph 5 (g).

Mr. Van Sickle reversed the onus under the Lease by indicating that he did not have any proof the stains and burn marks in the carpet being present when the Plaintiff originally took possession of the Premises. He did not advise the Court that he had not been given an original inspection report by the Former Landlord. He did not indicate that he had not noticed burns or holes in the carpet at the time of the Initial Inspection. He was not aware if the terms of the Lease allowed for or required replacement of the "stained carpet" however it was replaced anyways. He could not definitively confirm that the Lease provided an obligation on the Plaintiff to paint the Premises from top to bottom or that prior approval by the Defendant was mandated. His comments were clearly unsupported in any documentary fashion, placing an inappropriate and unrealistic onus on the Plaintiff while admitting his own lack of familiarity with the specific obligations in applying the Lease or what had pre existed the Date of Purchase..

Daniel Fleming provided his observations as to the repairs completed by the Plaintiff, confirming that the Plaintiff did undertake compliance with obligations within the Lease. He did not advise the Court of the standard he utilized in his assessment of the repairs by the Plaintiff or if that standard was appropriately applied pursuant to the requirements of the Lease. He advised as to what he felt was deficient in the manner of the application of paint and plaster to the Premises but is not in a position to opine as to what was the expected condition or standard to apply under the Lease. The Court finds it was his subjective standard and opinion, which is not necessarily the criterion required by the Lease. There is no evidence of any other or third party, independent assessment.

In addition, there was no evidence called that provided an opinion as to the status of the Premises on or immediately prior to the Termination Date, and the Defendant did not call for a final inspection as of the Termination Date, while the Plaintiff was still in possession.

It is also imperative to recall that the obligations under paragraph 5(g) of the Lease must be assessed in comparison to the status of the Premises when the Plaintiff took original possession, not as of the Date of Purchase. The Defendant has not produced that evidence.

There was an assignment of the Lease to the Defendant by the Former Landlord. Tranferors can only transfer the interest that they have in an asset being transferred and the transferors can receive no more than the transferor had to transfer. If the transferor's right, title and interest are limited in scope then the right, title and interest of the transferee receiving it are also limited in scope. The Defendant cannot exert a higher standard in requiring compliance with the Lease, and its obligations, than that of the Former Landlord; as such, any violation of paragraph 5 (g) of

the Lease must reflect the condition as of the original date of occupancy with the Former Landlord. The Plaintiff has indicated the carpet was already six (6) years old; it was not new.

Burden of Proof :

As Sopinka J. states in *Snell v. Farrell* (1990), 72 D.L.R. (4th) 289 at pp. 294-5, [1990] 2 S.C.R. 311, 4 C.C.L.T. (2d) 229:

> In a civil case, the two broad principles are:
>
> 1. that the onus is on the party who asserts a proposition, usually the plaintiff;
>
> 2. that where the subject-matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

The paragraphs quoted above contain the basic proposition that it is the obligation of the party who submits any particular argument to affirmatively prove that contention. In *Caterpillar Tractor Co. v. Babcock Allatt Ltd.* (1982), 67 C.P.R. (2d) 135, [1983] 1 F.C. 487 (F.C.T.D.), appeal to the Federal Court of Appeal dismissed 72 C.P.R. (2d) 286n, Addy J. stated at pp. 138-9:

> "A court proceeding is not a speculative exercise and actions are not to be launched or continued nor are defences to be allowed to stand where it is clear that the person making the allegation has no evidence to support it and where the onus of proof rests on that person."

Steele J. in *Robertson v. Can. Canners Ltd.* (1978), 4 B.L.R. 290 (Ont. H.C.) where he said at pp. 292-93:

> "The onus of proof is to impose an onus upon any party to adduce evidence establishing, by a balance of probabilities, the correctness of any contention upon which he relies..."

The onus is upon a party who asserts a proposition to establish it on a balance of probabilities and to adduce a sufficiency of evidence to do so if necessary. This will be the applicable standard to be applied with respect to the allegations presented by both the Plaintiff and the Defendant .

Since the Defendant called no evidence in support of, or any circumstances relating to, the standard to be applied as to the difference between the substantial repair and condition expected

(based upon a deterioration from the initial inspection on the Date of Transfer) and reasonable wear and tear exemption, that position is rejected.

General Principles of Interpretation: the Lease :

A commercial agreement is not negotiated or concluded in a vacuum. It is written, and implemented, in the context of a matrix of surrounding circumstances, which may be relevant to its interpretation. The factual matrix clearly extends to the genesis of the agreement, its purpose and the commercial context in which it was made: *Dumbrell v. Regional Group of Companies Inc.*, [2007] O.J. No. 298 (C.A.), para. 55. Doherty J.A. in *Dumbrell* at paragraphs 47 to 56 discusses the interpretation of contracts. The following propositions from his analysis apply, in my view, to the contract under consideration in this case:

> ...when interpreting written contracts, at least in the context of commercial relationships, it is not helpful to frame the analysis in terms of the subjective intention of the parties at the time the contract was drawn. This is so for at least two reasons. First, emphasis on subjective intention denudes the contractual arrangement of the certainty that reducing an arrangement to writing was intended to achieve. This is particularly important where, as it often the case, strangers to the contract must rely on its terms. They have no way of discerning the actual intention of the parties, but must rely on the intent expressed in the written words. Second, many contractual disputes involve issues on which there is no common subjective intention between the parties. Quite simply, the answer to what the parties intended at the time they entered into the contract will often be that they never gave it a moment's thought until it became a problem: see Kim Lewison, The Interpretation of Contracts, 3rd ed (London: Sweet & Maxwell, 2004) at 18-31".

Paragraph 50

> Eli Lilly [*Eli Lilly & Co. v. Novopharm Ltd.* 1998 CanLII 791 (SCC), [1998] 2 S.C.R.129(S.C.C.)], instructs that the words of the contact drawn between the parties must be the focal point of the interpretative exercise. The inquiry must be into the meaning of the words and not the subjective intentions of the parties. In this sense, my approach is textualist. However, the meaning of the written agreement must be distinguished from the dictionary and syntactical meaning of the words used in the agreement. Lord Hoffmann observed in Investors Compensation Scheme Ltd., *supra*, at 115:
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as to 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.

Paragraph 51

> I would adopt the description of the interpretative process provided by Lord Justice Steyn, "The Intracticable Problem of the Interpretation of Legal Texts", *supra*, at 8:
>
> > In sharp contrast with civil legal systems the common law adopts a largely objective theory to the interpretation of contracts. The purpose of the interpretation of a contract is not to discover how the parties understood the language of the text, which they adopted. The aim is to determine the meaning of the contract against its objective contextual scene. By and large the objective approach to the question of construction serves the needs of commerce.

Paragraph 56

Of necessity, the Court must be informed about the commercial circumstances under which a contract is made, in order to give context to the dispute. As Blair J.A. stated in *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* 2007 ONCA 205 (CanLII), (2007), 85 O.R. (3d) 254 (C.A.), at para. 45:

> "Contracts are not made in a vacuum, and there is no dispute that the surrounding circumstances in which a contract is negotiated are relevant considerations in interpreting contracts. As this court noted in *Kentucky Fried Chicken*, *supra*, at para. 25: "[w]hile the task of interpretation must begin with the words of the document and their ordinary meaning, the general context that gave birth to the document or its "factual matrix" will also provide the court with useful assistance."

In order to give effect to the underlying intention and purpose of a contract, it is also necessary to appreciate the market in which the parties operate, and their subsequent conduct: *General Refractories Co. of Canada v. Venturedyne, Ltd.*, [2002] O.J. No. 54 at paras. 58, 59, and 64-68 (Sup. Ct.), Himel J.; *Ajax (Town) v. St. Paul Fire & Marine Insurance Co.*, [2008] O.J. No. 3660 at paras. 19 and 22 (Sup. Ct.), D.A. Wilson J.; *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3D) 97 at paras. 24 and 25 (C.A.).

In *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* [2007] O.J. No. 908 Justice Peppal quoted from the decision of Goudge J.A. in *Kentucky Fried Chicken Canada v. Scott's Food* [1998] O.J. No. 4368 at para. 33 as follows:

> "The Court of Appeal addressed the issue of surrounding circumstances or the "factual matrix" in *Kentucky Fried Chicken v. Scott's Food Services Inc*. as follows:

> "While the task of interpretation must begin with the words of the document and their ordinary meaning, the general context that gave birth to the document or its "factual matrix" will also provide the court with useful assistance. In the famous passage in *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen*, [1976] 1 W.L.R. 989 at 995-96 (H.L.) Lord Wilberforce said this:
>
> > 'No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated by hardly defined. 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.'

The scope of the surrounding circumstances to be considered will vary from case to case but generally will encompass those factors which assist the court "… to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of the entry into the contract": *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.,* 1979 CanLII 10 (S.C.C.), [1980] 1 S.C.R. 888 at 901.

Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity: *City of Toronto v. W.H. Hotel Ltd.* (1966), 56 D.L.R. (2d) 539 at 548 (S.C.C.). Rather, the document should be construed in accordance with sound commercial principles and good business sense: *Scanlon v. Castlepoint Development Corporation et al.* , (1992), 11 O.R. (3d) 744 at 770 (Ont. C.A.). Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other. In the result, except in narrow circumstances, evidence of subjective intention is neither admissible nor helpful and is not to be taken into account: *Eli Lilly & Co. v. Novopharm Ltd*., 1998 CanLII 791 (S.C.C.), [1998] 2 S.C.R. 129, per Iacobucci J. at para. 54-55. Evidence of that sort denudes the written contract of its effect. Once reduced to writing, the parties are entitled to a high degree of certainty that its terms will govern.

Furthermore, evidence of subjective intention will often conflict, as here, and it is not unusual that both parties will approach the negotiations with different intentions or expectations.

The Ontario Court of Appeal upheld the judgment of Justice Peppal in *Ventas* in the judgment of Blair J.A. at 2007 ONCA 205 (CanLII), [2007] 85 O.R. (3d) 254 at para. 24 where he stated the following:

> "Counsel accept that the application judge correctly outlined the principles of contractual interpretation applicable in the circumstances of this case. I agree. Broadly stated -- without reproducing in full the relevant passages from her reasons (paras. 29-34) in full -- she held that a commercial contract is to be interpreted,
>
> (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
>
> (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, (what *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, [1998] O.J. No. 4368 at para. 25 (C.A.) refers to as "the general context that gave birth to the document") but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),
>
> (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity."

To the extent there is ambiguity after applying principles 1 through 3 above, the court is also entitled to consider the subsequent conduct of the parties as evidence of their intention at the time that the contract was executed: *Re Canadian National Railways and Canadian Pacific Ltd.*, [1979] 1 W.W.R. 358 (B.C.C.A.) at para.48; affirmed 105 D.L.R. (3d) 170 (S.C.C.). *Truscan Property Corp. v. Beyond IT Solutions Inc.*, [2007] B.C.J. No. 316 in the British Columbia Supreme Court, relied on *Prenn v. Simmonds*, [1971] 1 W.L.R. 1381. *Prenn* further considered the decision in *Deslisle v. Bulman Group Limited*, 1991 CanLII 295 (BC S.C.), [1991] 4 W.W.R. 637; 54 B.C.L.R. (2d) 343 which stated when understanding and interpreting agreements,

> "… a court must inquire beyond the language and see what the circumstances were with reference to which the words were used and the object appearing from those circumstances which the person using them had in view."

When all other rules of construction fail to enable the court to ascertain the meaning of a document, the language of the contract will be construed against its author in accordance with the *contra proferentem* rule. The *contra proferentem* rule applies where the other party had no opportunity to modify its wording. See: *Scanlon v. Castlepoint Development Corp.* reflex, (1993), 11 O.R. (3d) 744 (C.A.); *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, 1979 CanLII 10 (S.C.C.), [1980] 1 S.C.R. 888, at p. 901; and *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.*, 1986 CanLII 44 (S.C.C.), [1986] 1 S.C.R. 57.

See *Commercial Alcohols Inc. v. Bruce Power, L.P.*, [2006] O.J. No. 322, para. 37, aff'd [2006] O.J. No. 3637 (C.A.).

A commercial contract is to be interpreted as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective. An interpretation should be preferred that is in accordance with the language the parties have used in the document, and based upon the cardinal presumption that they have intended what they have said: see *Ventas Inc., supra,* at para. 24; and *3869130 Canada Inc. (c.o.b. I.C.B. Distribution 2001) v. I.C.B. Distribution Inc.*, [2008] O.J. No. 1947 (C.A.), at para. 31. Thus, the words of the document must be construed cohesively, harmoniously and individual provisions must be construed in the context of the whole document and along with the other provisions of the document: *McClelland & Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, 1981 CanLII 53 (S.C.C.), [1981] 2 S.C.R. 6; *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.* 1986 CanLII 44 (S.C.C.), [1986] 1 S.C.R. 57; *Glimmer Resources Inc. v. Exall Resources Ltd.*, [1999] O.J. No. 1357 (C.A.); *Manitoba Hydro Electric v. John Inglis* Co. 1999 CanLII 18647 (MB C.A.), (1999), 181 D.L.R. (4th) 470 (Man. C.A.); *Canada Deposit Insurance Corp. (CDIC) v. Canadian Commercial Bank,* [1991] 4 W.W.R. 418 (Alta. C.A.).

The advice of Justice L'Heureux-Dubé in *Manulife Bank of Canada v. Conlin*, 1996 CanLII 182 (S.C.C.), [1996] 3 S.C.R. 415, at par 41, is relevant :

> "[T]he "modern contextual approach" for statutory interpretation with appropriate adaptations, is equally applicable to contractual interpretation. Statutory interpretation and contractual interpretation are but two species of the general category of judicial interpretation. In the instant case, the methodological reference provided by R. Sullivan in Drieger on the Construction of Statutes (3rd ed. 1994) at p. 131, applies equally to contractual interpretation:
>
> > 'There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of [that which is to be judicially determined] in its total context, having regard to [its] purpose …., the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of … meaning' "

The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Where the words are clear and unambiguous on their face, it is unnecessary to consider any extrinsic evidence. If the contract is ambiguous, the conduct of the

parties may be relied upon to assist in resolving the ambiguity. 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.

In *British Columbia Hydro and Power Authority v. BG Checo International Ltd.,* 1993 CanLII 145 (S.C.C.), (1993), 99 D.L.R. (4th) 577 (S.C.C.), a case about contract interpretation but which recites the general principles of interpretation, La Forest and McLachlin, JJ. stated at pp. 581-2:

> "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. 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. In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term. 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."

In addition to the commercial backdrop to the agreement itself, in the case of ambiguity regard may sometimes be had to the conduct of the parties subsequent to the making of the contract: see S.M. Waddams, The Law of Contracts, (5th ed.) (Canada Law Book Inc., 2005) at pages 225-227. At p. 226, the author quotes the following, as the modern Canadian position, from the judgment of Lambert J.A. of the British Columbia Court of Appeal in *Re Canadian National Railway and Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 242, (B.C.C.A.), at p. 262:

> "In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretation is the correct one. It certainly makes no difference to the law in this respect if the continuing existence of two reasonable alternative interpretations after an examination of the agreement as a whole is described as doubt or as ambiguity or as uncertainty or as difficulty of construction."

The Court is entitled to consider the background and factual matrix of the Lease. As applied to this case, the contextual factors are that both parties are experienced corporate entities actively carrying on businesses. The Defendant raised concerns about the current charges after vacating the Premises, when the Plaintiff undertook to comply with its obligations to leave the Premises in good and substantial repair.

The Defendant relied upon the obligations contained within paragraph 5(e) of the Lease. The Court finds it has no application to this current matter or the rights of the Defendant after the Termination Date. 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 (26th ed. 1989), vol. 1, at p. 520.

As Doherty J.A. observed in *Glimmer Resources Inc. v. Exall Resources Ltd.* 1999 CanLII 1102 (ON C.A.), (1999), 119 O.A.C. 78 (Ont. C.A.), at para. 17, each word in an agreement is not to 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." Courts should not strain to dissect a written agreement into isolated components and then interpret them in a way that - while apparently logical at one level- does not make sense given the overall wording of the document and the relationship of the parties.

In interpreting a contract, provisions should not be read in isolation but in harmony with the agreement as a whole: *McClelland and Stewart Ltd.* v. *Mutual Life Assurance Co. of Canada*, 1981 CanLII 53 (S.C.C.), [1981] 2 S.C.R. 6; *Hillis Oil and Sales Limited* v. *Wynn's Canada*, 1986 CanLII 44 (S.C.C.), [1986] 1 S.C.R. 57; *Scanlon* v. *Castlepoint Dev. Corp.* (1993), 11 O.R. (3d) 744 (C.A.). Generally, words should be given their ordinary and literal meaning: *Indian Molybdenum Ltd.* v. *The King*, [1951] 3 D.L.R. 497 (S.C.C.). However, if there are alternatives, the court should reject an interpretation or a literal meaning that would make the provision or the agreement ineffective, superfluous, absurd, unjust, commercially unreasonable, or destructive of the commercial objective of the agreement: *Consolidated-Bathurst Export Ltd.* v. *Mutual Boiler & Machinery Insurance Co.*, 1979 CanLII 10 (S.C.C.), [1980] 1 S.C.R. 888; *Scanlon* v. *Castlepoint Dev. Corp.* (1993), 11 O.R. (3d) 744 (C.A.); *Thompson* v. *City of North Battleford*, [1924] 1 D.L.R. 159 (Sask. C.A.); *Aita* v. *Siverstone Towers Ltd.* (1978), 19 O.R. (2d) 681 (C.A.).

In *Consolidated-Bathurst Export Ltd.* which relied on general principles of contract interpretation, Justice Estey stated at p. 901:

> . . . the normal rules of construction lead a Court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

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, supra, at p. 526; Lewison, supra, at p. 206; Git v. Forbes 1921 CanLII 3 (S.C.C.), (1921), 62 S.C.R. 1, per Duff J. (as he then was), dissenting, at p. 10, rev'd [1922] 1 A.C. 256; 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., 1950 CanLII 50 (S.C.C.), [1951] S.C.R. 154. 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**.

As a result, the Court finds the provisions of paragraph 5(g) of the Lease determines the obligations of the Plaintiff to the Defendant upon the vacating of the Premises as the specific term that overrides the general application of paragraph 5(e). The Court is satisfied this latter paragraph is applicable during the currency of the Lease but not upon its expiry or termination. Paragraph 5(g) specifically is applicable “at the expiration or sooner termination of the Term”

Findings of Fact: Good and Substantial Repair : paragraph 5(g) of the Lease:

In *Levesque v. J. Clark & Son Ltd.*, [1972] N.B.J. No. 206 (Q.B.), the lessee covenanted in a lease to maintain the leased premises in good condition and to return the leased premises on termination of the lease in the same condition in which they were leased, "reasonable wear and tear only excepted". The lessee relied on the reasonable wear and tear exception at trial to deny any liability to the landlord for proven deficiencies in the condition of the premises at the end of the lease. In rejecting this position, Dickson J. stated at para. 12:

> *Similarly, little evidence was adduced by the defendant to show that individual items claimed were due to reasonable wear and tear. In this regard I think it is well established in law that where proof is given that premises are not in good repair and condition on the termination of a tenancy the onus is then on the tenant to prove that the matters complained of result from the reasonable wear and tear excepted*. See Halsbury (3d ed) Vol. 23, at page 581, where it is also pointed out that the tenant, if reasonable wear and tear is excepted, still "must take care his premises do not suffer more than the operation of time and nature would effect and he is bound by reasonable applications of labour to keep the (premises) as nearly as possible in the same condition as when it was demised." [emphasis added]

With respect to a tenant's obligation to keep leased premises in a state of good repair that: "If any want of repair is alleged and proved in fact, it lies on the tenant to show that it comes within the [reasonable wear and tear] exception" (at p. 59). See, *Dunlop Construction Products Inc. (Receiver of) v. Flavelle Holdings Inc.* 1996 CanLII 2199 (ON C.A.), (1996), 31 O.R. (3d) 58 at 64, footnote 1, (C.A.).

This statement is also consistent with more general principles relating to the burden of proof. In *Snell v. Farrell*, supra. Sopinka J. referred with approval at para. 29 to the following statement of Lord Mansfield in *Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969 at 970:

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

In this case, the general burden of proof rested on the Defendant to prove the losses for which it claimed compensatory damages. The Plaintiff, however, claimed that they were entitled to a reduction in the damages claimed by the Defendant on account of the reasonable wear and tear exceptions in the Lease. It was therefore incumbent on them to show not only that the suggested deficiencies in the Premises at the end of the Lease term came within those exceptions.

As observed by the Supreme Court in *Snell v. Farrell*, the law is particularly alert to the opportunities of knowledge with respect to a fact to be proved: see paragraphs 16, 30 and 31.

The Defendant, as the lessor having taken possession after the Termination Date, were uniquely positioned to lead direct evidence relevant to the assessment of the damages that would not be considered reasonable wear and tear. In fact, the Defendant, as a lessor not in possession, did not offer relevant evidence concerning the nature of the wear and tear and condition occasioned to the Premises, the timing and cause of their occurrence and that they did not pre-exist the Date of Purchase; the Defendant did not evidence the deterioration in the Premises from the Initial Inspection. Those facts were within the knowledge of the Defendant and it failed to produce such evidence at trial.

In the matter of Canpaco Inc. v. CREIT Management Limited/Egestion CLEIT Limited, 2010 ONSC 1093 (CanLII) that court noted the following excerpts from the decision of Craver J. in *Norbury Sudbury Ltd. v. Noront Steel (1981) Ltd.*, [1984] O.J. No. 3310 (H.C.J.) are instructive as to the test to be applied to determine if there has been a breach of the covenant to repair and how to apply the test:

> ¶17 It is now necessary to turn to the question whether, in fact, the defendant breached any of the tenant's covenants in the lease. For all practical purposes the covenants in question are those found in subparas. (d), (g) and (j), the obligations to repair, except for reasonable wear and tear, to leave the premises in good repair, subject to the same exceptions and to keep the premises clean and surrender them at the expiration of the term of the lease in clean and good state of repair, again subject to the same exceptions. To determine whether the defendant failed to discharge its obligations under the terms of these covenants requires an understanding of the meaning in law of the language of the covenants and of the exceptions. A brief consideration of that matter is, therefore, now necessary.
>
> ¶18 To begin with, in Ontario, a tenant's covenant to repair does not require the tenant to put the premises in repair if they were not in that condition at the beginning of the term of the lease. In *Manchester et al. v. Dixie Cup Co. (Canada) Ltd.*, [1951] O.R. 686 at p. 702, [1952] 1 D.L.R. 19 at p. 31, Mr. Justice Roach, speaking for the unanimous Court of Appeal said:
>
> > A building cannot at one and the same time be in a state of good and substantial repair and also in a state of non-repair. A covenant that imposed upon a tenant the duty to put a building in a state of good and substantial repair, except the present non-repair, would be meaningless and it would make no difference how that non-

> repair had been caused. Therefore, the covenant with which we are here concerned cannot be construed as imposing on the tenant a duty to put the premises in a state of good and substantial repair. The respondent's duty under this covenant was to keep the premises in the state of repair in which they were at the commencement of the term, excepting only such non-repair as might be caused during the term by reasonable wear and tear, fire, lightning and/or tempest. ...
>
> ….I hold, then, that I am bound by [the decision in *Manchester*] and that in determining whether the defendant was in breach of the tenant's covenants to which I have referred, the comparison must be between the condition of the premises at the beginning of the term of the lease, July 1, 1960, and the condition of the premises when the defendant yielded up possession of them to the plaintiff in September and October, 1977.

¶19 … The question of repair, in the final analysis when applying the generalized language found in the authorities, is in every case one of degree: see the judgment of Buckley L.J. in *Lurcott v. Wakely & Wheeler*, [1911] 1 K.B. 905 at p. 924, for a statement of this proposition, the validity of which is unimpaired by *Manchester et al. v. Dixie Cup (Canada) Ltd.*, *supra*.

¶20 On the question of the meaning of the reasonable wear and tear exception in the tenant's covenant to repair, I agree with Mr. Vanek's view that the most useful statement of the law is found in the judgment of Talbot J. in *Haskell et al. v. Marlow et al.*, [1928] 2 K.B. 45 at pp. 58-9:

The meaning is that the tenant (for life or years) is bound to keep the house in good repair and condition, but is not liable for what is due to reasonable wear and tear. That is to say, his obligation to keep in good repair is subject to that exception. If any want of repair is alleged and proved in fact, it lies on the tenant to show that it comes within the exception. Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce.

For example, if a tile falls off the roof, the tenant is not liable for the immediate consequences; but, if he does nothing and in the result more and more water gets in, the roof and walls decay and ultimately the top floor, or the whole house, becomes uninhabitable, he cannot say that it is due to reasonable wear and tear, and that therefore he is not liable under his obligation to keep the house in good repair and condition. In such a case the want of repair is not in truth caused by wear and tear. Far the greater part of it is caused by the failure of the tenant to prevent what was originally caused by wear and tear from producing results altogether beyond what was so caused. On the other hand, take the gradual wearing away of a stone floor or staircase by ordinary use. This may in time produce a considerable defect in condition, but the whole of the defect is caused by reasonable wear and tear, and the tenant is not liable in respect of it.

Also instructive are the following remarks of Macdonald J. in *Weinberg Estate v. Intex Linen Supply Laundry Ltd.*, [1992] O.J. No. 854 (Gen. Div.):

. . . I am guided by the decision in *Norbury Sudbury Limited vs. Noront Steel (1981) Ltd.*, 1984 47 O.R. (2d) 548 Ontario High Court of Justice. I must consider in reaching my conclusion as to the appropriate quantum of damages, the condition of the premises at the outset of the lease and at the conclusion of the term, but equally the "age, nature, and character of the building, as well as the intended and actual use made thereof during the tenancy."

I am compelled to discount the plaintiffs' estimates of its cost to put the premises back into a state of repair so as to be able to re-let the property. Dr. Katzman produced voluminous records evidencing the cost put to the plaintiffs, including bank records showing payments on a regular basis to third parties engaged by the plaintiffs for purposes of completing the repairs. Summaries of the repairs were also provided to me by Dr. Katzman, and bearing in mind that I did not have sufficient documentary evidence to support all claims and that some of the work was done by Dr. Katzman's son, and the estimate of clean up costs was rounded at $10,000, I have discounted the figure by $20,000.

Even though the plaintiffs have already discounted their repair costs in advancing their claim, I am mindful of the evidence that the premises was a commercial laundry and that it was generally not in an outstanding state of repair at the beginning of the lease. For all of these reasons, I would further discount the plaintiffs' estimated cost of repairs to $48,000.00. While I have compelling evidence as to the state of the premises when the defendants abandoned it, I did not hear any evidence or see anything which indicated to me what the exact state of the premises was after the completion of what were undoubtedly extensive renovations, improvements and repairs by the landlord after the

> departure by the tenant. I cannot charge the tenant with what is in effect "betterment" of the property.

Craver J., in paragraph 20 of the *Norbury* decision, *supra*, observed that the question of repair is in every case one of degree. In paragraph 20 of that decision he mentions the remark of Lord Denning in another case where he said:

> …I have never understood that in an ordinary house a "fair wear and tear" exception reduced the burden of repairs to practically nothing at all. It exempts a tenant from liability for repairs that are decorative and for remedying parts that wear out or come adrift in the course of reasonable use, but it does not exempt him from anything else.

In paragraph 20 of that decision he mentions the remark of Lord Denning in another case where he said:

> …I have never understood that in an ordinary house a "fair wear and tear" exception reduced the burden of repairs to practically nothing at all. It exempts a tenant from liability for repairs that are decorative and for remedying parts that wear out or come adrift in the course of reasonable use, but it does not exempt him from anything else.

Taking the above sources into account, the approach to be followed in the present case is as follows:

(1) The Defendant must show that the condition of the Premises (as defined in the lease) at the surrender of the Lease was inferior to its condition at the time possession was first delivered to the Plaintiff. This determination must be made taking account that “the question of repair…is in every case one of degree”. In this case, it is important that the witness for the Defendant did not see the Premises at the inception of the Lease, but did an inspection, subsequent to the original occupation by the Plaintiff.

(2) If it is shown that the condition is inferior then the Plaintiff is liable for the cost of the repairs reasonably necessary to bring the Premises up to the required condition except to the extent that the inferior condition is attributable to “reasonable wear and tear...”.

(3) Since the Plaintiff is liable only for the cost of repairs determined on the basis set out, the Plaintiff is not liable for the cost of repairs which improve the Premises beyond the required repairs

Reasonable Wear and Tear :

It is imperative, accordingly, to assess reasonable wear and tear taking into consideration the years of occupation of the Premises. The Court cannot find on the evidence that the Premises was not maintained in good condition and repair by the Defendant during the term of the Lease. The evidence as presented cannot document damage (or that the Premises were not left in good and substantial repair) that far exceeds reasonable wear and tear. Indeed, the evidence of the Defendant does not do any more than to demonstrate a need for cosmetic or decorative matters such as painting, sanding and patching resulting from years of occupation; it does not demonstrate a need for repair or replacement as being beyond reasonable use. It does not demonstrate items, such as the carpet, were in a better condition when the Plaintiff originally accepted the Premises than on the Termination Date.

Reserve Fund - Major Repairs :

The Court finds that it is not within the reasonable interpretation of the Lease that the Plaintiff would agree to the contribution of a reserve fund, under paragraph 6 (a) of the Lease after the Termination Date. The paragraph indicates: "**In each year during the Term,** the Tenant will pay the Landlord..." (Emphasis Added). It is not within business sense to imply that obligation to continue **after** the Termination Date when the provision indicates "during the term". The hold back for that amount was inappropriate.

Deduction from Security Deposit :

The provision that sets forth the treatment of the security deposit indicates:

3(c) If at any time during the term the rent or other sums payable by the Tenant to the Landlord hereunder are overdue and unpaid, of if the Tenant fails to keep and perform any of the terms, covenants and conditions of this lease to be kept, observed and performed by the Tenant, then the Landlord at its option may, in addition to any and all other rights and remedies provided for in this lease or by law, appropriate and apply the entire security deposit, or so much thereof as is necessary to compensate the Landlord, for the loss or damage sustained or suffered by the Landlord due to such breach on the part of the Tenant. If the entire security deposit, or any portion thereof is appropriated and applied by the Landlord for the payment of overdue rent or other sums due and payable to the Landlord by the Tenant hereunder, then the Tenant, shall, upon written demand of the Landlord, forthwith remit to the Landlord a sufficient amount in cash to restore the security deposit to the original sum deposited...If the Tenant complies with all the terms, covenants and conditions and promptly pays all of the rent and other sums herein provided and payable by the Tenant to the Landlord, the security deposit shall be returned in full to the Tenant without interest within sixty (60) days after the end of the

> term, or within sixty (60) days after the Landlord has determined the actual costs and expenses for taxes and common area expenses including insurance for that calendar year. (Emphasis added)

The clause clearly indicates the security deposit is subject to compliance with the obligations of the Tenant during the "term" of the Lease; it does not subject the deposit to a deduction for any (continuing) provision applicable upon or after the Termination Date. It does not indicate applicability to the breach of a provision crystallizing upon expiration or termination. If it was intended to apply upon the vacating of the Premises, the Lease should have so indicated.

In fact, the security deposit is subject to the Tenant being required to "restore the security deposit to the original sum deposited." It evidences a continual obligation during the Lease but cannot imply the need to replace the security deposit after the Termination Date or that it is ultimately subject to forfeiture. In the interpretation of this clause, the security deposit will not be subject to a deduction or hold back if there is no evidence of a breach of a provision in the Lease applicable upon the expiration and/or termination of the Lease.

Judgment :

For the foregoing reasons, there will be a judgment in favour of the Plaintiff as against the Defendant for the amount of the Claim, $25,000.00 plus costs of $125.00 plus pre judgment interest at 4.5% per annum calculated from the Termination Date, March, 2010, post judgment interest at 6% per annum.

Dated this 6 Day of October, 2011

Abraham Davis

Deputy Judge