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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

CAPITOL STEEL CORPORATION,	)	Appearances:
	)	
	)	Scott Hammel, Darin
plaintiff,	)	Hannaford and Adrienne
- and -	)	Funk
	)	for the plaintiff
WHITE OWL PROPERTIES LIMITED,	)	
	)	Richard Schwartz and
defendant.	)	Chris Wullum
	)	for the defendant
	)	
	)	
	)	JUDGMENT DELIVERED:
	)	August 19, 2022

TOEWS J.

Introduction

[1] This dispute concerns the interpretation of a commercial lease agreement, dated October 28, 2016 (the "Lease"), between the tenant (and plaintiff in this action), Capitol Steel Corporation ("Capitol"), and the landlord (and defendant in this action), White Owl Properties Limited ("White Owl").

[2] White Owl is the successor/assignee landlord to RS Harris Ltd. ("RS Harris") under the Lease, which has a 20-year term and concerns a 161,900 square foot industrial

building, some portions of which are more than 100 years old. It is located at 1500 Dublin Avenue, Winnipeg (the "Leased Premises" or the "Capitol Building").

[3] Broadly speaking, there are three categories of issues requiring resolution under the Lease. Those issues are summarized by Capitol Steel in the following manner:

(a) The contractual obligation to perform or pay for building system capital and structural repairs and replacements;

(b) The valuation and liability for utilities payable under the Lease and obligations for sub-metering; and

(c) The valuation and liability for property taxes payable under the Lease.

[4] Capitol seeks the following relief:

(a) A declaration that:

(i) The Lease was not validly forfeited by White Owl on September 25, 2019 and remains in force to date;

(ii) The Lease obligates White Owl to promptly perform the structural, capital and building system repair and replacement work that is, or may become, necessary at the Leased Premises for the remainder of the term of the Lease.

(b) Damages in favour of Capitol in the amount of $718,825.73 plus interest, calculated as follows:

(i) Capitol's Structural/Capital Repair Cost Claim from April 1, 2018: $1,086,925.48;

(ii) Capitol's Utility Credit Claim: $71,450;

(iii) Capitol's Pre-Paid Property Tax Claim: $98,437.50;

(iv) Reduction in Capitol's Share of Property Tax (based upon White Owl's overpayment for Site leading to tax reassessment): $193,580.98;

(v) White Owl's Arrears Claim: ($731,568.23);

(vi) Damage Award to Capitol: $718,825.73;

(c) A permanent injunction prohibiting White Owl from terminating the Lease for any reason, event or other circumstance that exists as of the date of the trial; and

(d) An order that White Owl pay Capitol costs of this Action.

[5] In the alternative, if White Owl's forfeiture of the Lease is found to have been valid, then Capitol seeks relief against forfeiture and a permanent injunction prohibiting White Owl from terminating the Lease for any reason, event or other circumstance that exists as of the date of the trial of this Action, subject to the payment of any damages by Capitol.

[6] While taking a contrary position to Capitol in respect of the issues identified, White Owl sets out the issues in its material in the following language:

(a) The primary issue is most properly characterized as to whether the repairs and costs claimed by Capitol are the responsibility of the landlord or the tenant under the terms of the Lease.

(b) A second issue to be determined is what should be ordered in respect of calculating utility consumption.

(c) The third issue raised by Capitol in its pleadings concerns the payment of property taxes.

(d) A fourth issue is whether Capitol is entitled to relief against forfeiture even if the Lease does not oblige White Owl to make or pay for the repairs claimed.

[7] During the trial of this action, White Owl and Capitol were able to agree upon certain stipulations regarding the costs claimed by Capitol. Namely, the parties agreed that the costs claimed by Capitol, as identified in the report of Isaac Gwendo dated March 21, 2022 ("Gwendo Report"), were:

(a) Incurred and paid by Capitol;

(b) Reasonable for the work performed;

(c) For the purposes as described in the Gwendo Report; and

(d) Necessarily incurred for the work performed (the "Stipulation").

[8] The Stipulation narrowed the issues in dispute between the parties regarding the structural and capital repairs and replacements required at the Leased Premises. The only remaining issue in this regard is whether the Lease makes White Owl or Capitol responsible for carrying out these structural, capital or building system replacements and repairs at the Leased Premises. If White Owl is responsible for such costs under the Lease, then Capitol's damages have been proven by the Gwendo Report and pursuant to the Stipulation. If Capitol is responsible for these costs, then Capitol seeks relief against forfeiture of the Lease.

[9] With respect to utilities, the remaining issues are:

(a) Whether White Owl is bound to the $8,400 per month credit or reduction to the total monthly gas and electricity billings until June 2020; and

(b) Whether a reconciliation can be ordered with respect to the utility credit given to Capitol relative to its actual consumption.

[10] With respect to property taxes, the remaining issues are:

(a) Whether White Owl must bear a portion of the increased property taxes assessed against the site following its acquisition and failure to appeal the assessment; and

(b) Whether White Owl must credit Capitol for the pre-payment of property taxes it made to RS Harris under the Lease.

The Facts

[11] The defendant agrees with the plaintiff that many of the basic facts from trial are not in dispute. In that respect, White Owl states at page 8 of its written closing argument that:

> 8. Many of the basic facts from trial are not in dispute and are outlined in Capitol's Argument and so will not be repeated in any detail in this section. There are, however, several key factual issues that are pertinent to White Owl's position that have been overlooked by Capitol or are contested, and so will be addressed in more detail herein. In White Owl's submissions, there are also significant credibility issues with Ganczar's [the president and sole shareholder of Capitol] evidence that will be further discussed herein.

[12] To the extent that there are any factual disagreements between the parties relevant to these reasons, and it is necessary to do so, I will identify those disagreements in the course of these reasons. I have altered some of the language of the statement of facts prepared by Capitol in order to minimize the inclusion of contested matters,

argument and opinion. In addition, I have not included the sources cited by Capitol in its summary of the facts, as those sources are set out in the written brief of the plaintiff. At this point, without accepting any contested matters, arguments or opinion included in the recitation of the facts by Capitol in its brief, those facts include:

(a) Capitol is a Manitoba corporation, founded by its sole director and officer, Jefferson Ganczar ("Ganczar"), in 1998. Its head office and fabrication plant have always been located in Winnipeg. Capitol is a large-scale fabricator, transporter and erector of structural steel for use in public infrastructure, commercial construction and heavy industrial projects, most recently for bridges across Canada. Capitol employs approximately 150 people at its Winnipeg plant and office, with a roughly $9 million payroll, and projected annual revenues exceeding $35 million for 2022.

(b) White Owl is an extra-provincially registered corporation in Manitoba, with its head office located in the City of Markham, Ontario. White Owl is a real estate holding company.

(c) The Leased Premises that are the subject of this action are comprised of a 161,900 square foot industrial building, portions of which are over 100-years old, located at 1500 Dublin Avenue, Winnipeg. The Leased Premises are situated on the northwest corner of an approximately 27-acre site, which is also comprised of:

(i) An 18,890 square foot industrial warehouse and office space on the northeast corner of the site, bearing a street address of 1460 Dublin Avenue

and currently being leased by a pallet manufacturer called River City ("1460" or the "River City Building");

(ii) A 24,000 square foot industrial warehouse and office space on the southeast portion of the site, bearing a street address of 1355 Saskatchewan Avenue that currently sits vacant ("1355" or the "Vacant Building"); and

(iii) Approximately 13 acres of vacant land;

(d) Collectively, the premises and property, including the Leased Premises, described in the preceding paragraph are referred to as the "Site". The Site was originally owned, and the buildings thereon originally constructed, by Dominion Bridge, which operated at the Site for nearly a century prior to its bankruptcy in the late 1990s. The Site is bounded to the south by Saskatchewan Avenue, to the west by Omand's Creek, to the north by Dublin Avenue and to the east by other industrial buildings along Midland Street that are now separately owned.

(e) Capitol has been a continuous tenant of increasingly larger portions of the Leased Premises since late 1999. Between 1999 and late 2008, Capitol's first landlord was a numbered company that managed the Site through Shelter Canadian Properties Limited ("Shelter"). Thereafter, the City of Winnipeg (the "City") acquired the Site after a tax seizure, and managed it through Shindico Realty Inc. ("Shindico") until December of 2016.

(f) For the first 17 years of its tenancy of the Leased Premises, under both Shelter and Shindico management, Capitol states that it was not responsible for

performing structural repairs or replacements to the Capitol Building or separately paying for utilities (aside from gas) and property taxes.

(g) After acquiring the Site through a tax seizure, the City commenced efforts to sell the Site. The City entered into a purchase agreement in or around 2013 with RS Harris, the owner and controlling mind of which - Mr. Bob Harris ("Harris") – who Capitol states was a close friend of Ganczar and a local developer in the Winnipeg area. The RS Harris' purchase from the City took roughly three years to close, with RS Harris formally taking title in December 2016.

(h) In the three years prior to RS Harris' formal acquisition of the Site, Harris and Ganczar frequently discussed RS Harris' plans for acquiring, redeveloping and modernizing the Site, and Capitol's involvement in that redevelopment. Harris's vision and intention was to transform the Site in much the same way that he had previously revitalized the former Roger Sugar Beet plant site, where Harris subsequently housed his transport business and built a thriving and modern multi-tenant rental facility.

(i) Despite a lengthy and leisurely negotiation history between RS Harris and Capitol regarding the Site plans and the terms of Capitol's continued lease of the Capitol Building, the written lease agreement formalizing those discussions was very quickly drafted and concluded over the span of just a few days in late October 2016. The written lease was drafted by RS Harris and presented to Capitol around October 25, 2016. The terms were negotiated exclusively between Harris and Ganczar in a number of in-person meetings prior to its execution.

(j) Capitol states that the need for haste, and the reason the written lease was executed prior to RS Harris taking formal title to the Site in December 2016, was because RS Harris needed a written lease in order to fulfill a condition of its financing deal with the bank.

(k) It disagrees with White Owl's assertion at trial that the Lease was foisted upon Capitol, stating that this Lease was, in fact, negotiated for years leading up to it actually being put to paper, and the written form of agreement was subject to negotiated revisions before execution. It states that Capitol and RS Harris negotiated a rental rate premium (relative to the rental rates Capitol had been paying under Shelter and Shindico in years prior) in exchange for RS Harris's undertaking of major, and much needed, replacements to the structural or building system elements of the Leased Premises, including to the roof, lighting system, emergency sprinklers and other base building elements.

(l) Capitol states that the factual matrix evidence underlying the agreed upon rental rates confirms the parties' mutual agreement to allocate structural and capital building repair/replacement costs to the landlord (and tenant improvements to the tenant), as reflected in the plain reading of other terms of the Lease.

(m) With respect to property taxes, Ganczar's evidence was that he understood property taxes were to be factored into the negotiated, premium rental rate, as they had always been under his prior leases. However, that understanding was not ultimately reflected in the written terms of the Lease.

(n) For the first time in its occupation of the Leased Premises, Capitol also agreed to be responsible for its utility consumption under RS Harris's ownership. Under previous leases, Capitol had only paid for gas consumption. As such, RS Harris also agreed to install utility (gas and electricity) sub-meters as between the Capitol Building and the River City Building, as those two buildings were jointly serviced and the monthly Manitoba Hydro bills account for utility consumption at both of those buildings without delineation of each buildings' portion of the total consumption. Without such sub-metering, RS Harris would be unable to bill Capitol based on its actual utility consumption at the Capitol Building. Sub-metering would allow RS Harris to accurately allocate the monthly, joint utility bill among the tenants at these two buildings based on their actual usage.

(o) Capitol states that prior to the installation and effective use of sub-metering, RS Harris agreed to credit Capitol with $96,000 plus GST per year (divided and applied equally across the 12 months of Hydro invoices) as an estimate of the River City Building's share of the jointly serviced utilities. Capitol would pay the entire monthly utility bill for both its and the River City Building's usage, less an $8,000 plus GST per month credit or deduction until the sub-meters were installed and effectively utilized to allocate the joint utility bill among the two buildings based on their respective, measured consumptions (the "Utility Credit").

(p) Unfortunately, Harris's health began declining soon after RS Harris acquired the Site, causing him to abandon his redevelopment plans and resulting in Capitol undertaking much of the planned and immediately necessary building system

replacement and repair work at the Capitol Building on RS Harris's behalf. Harris also broached the possibility of Capitol acquiring the Leased Premises or the entire Site from RS Harris as a result of Harris's ailing health and inability to carry out his conceived vision for the Site.

(q) Ganczar testified that Capitol undertook the building system repairs at the Leased Premises after RS Harris took over as owner with the mutual understanding of RS Harris that Capitol would be credited for the cost of those repairs in some manner – either through rent setoff or as a credit against the eventual purchase price for the Building/Site.

(r) RS Harris also did not install sub-meters at the River City Building so as to delineate consumption at the River City Building from that at Capitol's Building. Hence, the $8,400 per month Utility Credit was consistently applied from December 2016 until March 2018, when the Site was transferred to White Owl. Although RS Harris's controller attempted to unilaterally reduce the Utility Credit to $5,000 in the winter of 2017, despite the lack of installation of sub-meters at that time and contrary to the terms of the Utility Credit agreement between Capitol and RS Harris, Capitol refused this unilateral reduction. In the result, in each of the 15 months RS Harris was landlord, Capitol consistently received or paid an $8,400 reduction on the joint monthly utility bill on account of the estimated usage at the neighbouring building.

(s) Notwithstanding Ganczar's testimony that it was his understanding that property taxes were not to be paid separately, Capitol did make payments to RS

Harris, throughout its ownership of the Site, ostensibly on account of Capitol's "proportionate share" of the Site's property taxes in the total amount of $98,437.50 even though RS Harris was never assessed property taxes by the City during its ownership of the Site.

(t) RS Harris entered into a purchase agreement to sell the entire Site to White Owl in December 2017. This was not known by Ganczar, as shown by the fact that Capitol was concurrently obtaining appraisals of the Site for the purposes of negotiating a purchase price with RS Harris. It appears that Ganczar only learned about the sale when Kyle Harris was sent to advise them of the news in January 2018.

(u) Thomas Jones ("Jones"), White Owl's property manager, testified that he was tasked with finding a suitable site in Winnipeg for White Owl to acquire. It was a condition of a City of Winnipeg waste management contract that was out for tender and for which White Owl was bidding that the proponent actually own suitable land in Winnipeg for the project in question. The bid submission deadline for this contract was March 2018.

(v) Jones's evidence was that White Owl had been pursuing the acquisition of a different piece of land in Winnipeg that fell through in 2017. Thus, White Owl was under pressure in the fall of 2017 to quickly find a suitable parcel of land to acquire by the bid submission deadline. In early November 2017, White Owl began considering RS Harris's Site as a possible acquisition for the purposes of their bid. Originally, White Owl was only considering acquiring the south 13.5 acres of the

Site from RS Harris, which excluded the Capitol and River City Buildings. Given the age of the vacant building on the south half of the Site that it was considering acquiring, Jones instructed another White Owl representative, Gus Kalnins ("Kalnins"), together with an engineer from Ernst Hansch ("Hansch") and an electrician, to inspect the south half of the Site and report back on its condition. RS Harris initially offered the 13.5-acre south portion of the Site for a purchase price of $8.5 million.

(w) At some point near the end of November 2017, RS Harris offered to sell the entire 27-acre Site to White Owl for $13.75 million. According to Jones, White Owl was required to acquire the entire Site, as subdividing the parcel would have taken longer than the time White Owl had available to meet the bid conditions of the City of Winnipeg waste contract.

(x) On November 27, 2017, White Owl made a formal, conditional offer to purchase the entire Site (not just the south 13.5 acres they were originally contemplating and inspecting) from RS Harris for a price of $12.5 million. RS Harris made a counter-offer on November 29, 2017; one of his revisions being to stipulate that the sale of the Site (and the buildings thereon) would be on an "as is" basis. Just two days later, on December 1, 2017, White Owl countered at $12.75 million, which was accepted by RS Harris and the conditional sale agreement was ultimately finalized.

(y) White Owl never sent anyone to physically inspect the Capitol or River City Buildings, nor did it speak with any representatives of Capitol or the tenant in the

River City Building at that time, prior to offering to purchase the full Site. Jones testified that this was not White Owl's normal practice when acquiring buildings. White Owl never conducted any due diligence into the factual matrix or practical operation of the lease agreements for the buildings on the north half of the Site, nor did it investigate the financial wherewithal of the tenants, before agreeing to assume the leases. Although White Owl did request copies of the lease agreements concerning the Capitol and River City Buildings after the RS Harris counter-offer required the sale to be on an "as is basis", it received those leases only one day prior to finalizing the purchase agreement. The only evidence is that White Owl relied upon Jones (as a lay person without legal training), to review the lease terms prior to agreeing to the sale.

(z) Jones further testified that although it was a condition of the purchase agreement that White Owl have a right to inspect the buildings on the Site, White Owl declined to inspect the buildings or speak with the existing tenants on the north half of the Site, even when it had the opportunity to do so. Jones's evidence was clear that the real reason White Owl acquired the Site with such haste and an unusual lack of due diligence is because it simply had no time; White Owl was eager to close on the sale prior to the bid submission deadline at the end of March 2018. White Owl's obvious first priority was taking title to the Site in time for the purpose of submitting a compliant bid in the hopes of winning the City of Winnipeg contract. There appears to have been little concern evidenced on the part of White Owl about the leases it was assuming and the tenants on the Site.

(aa) Around March 15, 2018, White Owl closed the sale with RS Harris, took possession of the Site, and was assigned the Lease with Capitol. The sale closing documents were executed by Kyle Harris on behalf of RS Harris. One of the adjustments made on the close of the sale was for RS Harris's solicitor to holdback $350,000 of the purchase price paid by White Owl to RS Harris in trust on account of 2016-2017 property taxes that had not been assessed by the City as against RS Harris during its ownership of the Site. The property tax holdback was ultimately disbursed to RS Harris in January 2020, after White Owl's solicitors confirmed that property tax had only been assessed against White Owl after it had acquired the Site. White Owl was ultimately unsuccessful in securing the bid for the City of Winnipeg waste contract, which was the sole reason they acquired the Site.

(bb) After White Owl took possession of the Site, Capitol sought to continue its purchase negotiations with White Owl that it was previously engaged in with RS Harris before its sale to White Owl. In this regard, Capitol argues that if it was to continue down the path of conducting the necessary building system replacements – particularly the roof replacements - to the Leased Premises, it wanted to own the asset to which it was making major capital improvements and investments, particularly since the useful life of those repairs and replacements would extend far beyond the term of its current Lease. Alternatively, if White Owl was not interested in selling the Leased Premises to Capitol, Capitol states that it was its expectation that White Owl take responsibility for the building system replacements in accordance with the Lease, either by conducting/paying for them

itself, or by providing Capitol with an appropriate rent reduction on account of the cost of the work Capitol was undertaking on its behalf, and for its clear benefit.

(cc) The evidence is that shortly after White Owl took ownership of the Site – in early April 2018 - Capitol began communicating with White Owl (in particular, with Jones) about:

(i) the state of the Capitol Building (including encouraging White Owl representatives to conduct an inspection to appreciate the scale, urgency and cost of the necessary rehabilitation work);

(ii) the rehabilitation work that had been undertaken since RS Harris acquired the Site and that was ongoing through White Owl's acquisition; and

(iii) Capitol's position that it could not continue to conduct the necessary work at the Leased Premises unless White Owl sold the Capitol Building to them or took responsibility for the cost of the work per the Lease.

(dd) As a result of these initial communications between White Owl and Capitol representatives, Jones sent White Owl representatives to the Site for a tour of the Capitol Building and in order to gain an appreciation of the deficiencies. Prior to White Owl's first Site visit, Capitol also obtained, and supplied White Owl with, a detailed report from MJ Roofing, dated June 7, 2018, that described the roof repair and replacement work they were recommending for the Capitol Building, together with a cost estimate for that work.

(ee) In mid-July 2018, White Owl representatives finally attended in Winnipeg to inspect the Capitol Building. This was the first time White Owl representatives had set foot in their own building. Kalnins and a roofing expert took a tour on July 18, 2018, and a day later, a representative of Hansch (Mike Kopansky) toured the Capitol Building on behalf of White Owl (the "July 2018 Inspection"). On these tours, Capitol representatives pointed out the numerous structural and building system issues and deficiencies at the Leased Premises, and discussed the repairs already underway by Capitol, and those that were still urgently required. In particular, and consistent with the MJ Roofing Report previously supplied to White Owl, Capitol emphasized to White Owl's representatives that the most pressing and significant issue was with the roof, two sections of which had already been completely replaced by Capitol's own employees, and the remainder required similar replacement because water frequently drained into the Capitol Building, affecting employees, equipment and steel products inside the building.

(ff) The White Owl representatives who participated in this July 2018 Inspection, all agreed that the existing roofing system at the Capitol Building was "beyond repair", "at the end of [its] life", and in need of replacement. Jones's testimony confirmed that this was the consensus of all parties involved following the July 2018 Inspection. Capitol states that the testimony of Ganczar and Jones made it abundantly clear that:

(i) it was interested in purchasing the Capitol Building if it was going to continue carrying out these costly capital repairs and roof replacements itself, or

(ii) if White Owl refused to sell the Capitol Building, Capitol expected White Owl to bear responsibility for the cost of the necessary roof replacement and other building rehabilitation work, either directly or through rent set-off.

(gg) In November 2018, White Owl representatives (Jones and Kalnins) travelled to Winnipeg again to meet with Capitol at the Leased Premises, and discuss the ongoing roof issues identified. Jones acknowledged Capitol's patience regarding White Owl's non-responsiveness to its concerns and interests and advised that White Owl was still assessing its "future goals for this site". At this November Site visit, White Owl still did not provide any clarity to Capitol about whether or how it would be taking responsibility for the necessary structural repairs, despite the fact that it had already taken the position internally that Capitol should bear responsibility for all repairs by this time. Jones testified that he did not communicate White Owl's position in this regard to Capitol at this in-person meeting because he was not specifically instructed to do so.

(hh) In February 2019, White Owl discovered that Capitol was delinquent on its rent and utility payments by approximately five months. Capitol states that this was as a result of inadvertence, not intentional disregard. It states that its former

COO, Kris Overwater, was in charge of payments under the Lease and he had recently been terminated for other issues.

(ii) Capitol's arrears, the lack of separate utility metering on the buildings sharing services, and the continuing issue of responsibility for building repairs and replacements led to the organization of an in-person meeting between Capitol and White Owl management in Markham, Ontario. The meeting in Markham occurred on March 15, 2019 (the "Markham Meeting") and the key items on the agenda for discussion included: the five months of rent and utility payments that Capitol had missed during the first year of White Owl's ownership of the Site, responsibility for property taxes, the apportionment of the joint monthly utility bill pending installation of separate metering as between the Capitol and River City Buildings, and cost responsibility for the Capitol Building's upgrade and replacement costs Capitol had incurred to date and that would continue.

(jj) At the Markham Meeting, Capitol made a presentation to concretely outline to White Owl the various structural deficiencies it was addressing at the Capitol Building and the associated costs with making those repairs. From Ganzcar's perspective, Capitol had been clearly communicating to White Owl, since April 2018, that it expected White Owl to bear financial responsibility for these major structural repairs by crediting or accounting to Capitol for the costs it incurred in this respect, and this position was maintained at the Markham Meeting. In response, White Owl agreed to commission its own building inspection to get a

better sense of the condition of the Leased Premises and the work that would be required to bring it up to modern standards.

(kk) The Markham Meeting also resulted in the following additional agreements between the parties:

(i) Capitol would pay the utility arrears less the Utility Credit that had been negotiated and applied by RS Harris, and, pending White Owl's installation of separate metering for the Leased Premises, Capitol would continue to receive the Utility Credit agreed upon and applied by RS Harris;

(ii) Capitol would resume payment of rent pending a resolution of Capitol's set-off claim for the cost of past and future structural repairs and capital improvements it had incurred, and would continue to incur, at the Leased Premises;

(iii) White Owl would conduct a building inspection of the Leased Premises to identify the type and extent of repairs and improvements required at the Capitol Building and cost of same; and

(iv) Capitol would disclose its financial statements to White Owl in exchange for White Owl's execution of a non-disclosure agreement concerning same.

(ll) Capitol states that while it fulfilled all of its undertakings stemming from the Markham Meeting, White Owl either failed or refused to comply with any of its promises, or was belated in fulfilling them. A building inspection was not undertaken until January 2020, and the report was only provided to Capitol as part

of this litigation. Further, White Owl continued to simply ignore the Capitol Building deficiencies and the need for urgent repairs that Capitol continued to undertake. Instead, White Owl repeatedly requested proposals from Capitol on the repayment plan for its arrears, without any consideration or regard to Capitol's claim for credit or set-off for the substantial investment it had been making, and continued to make, towards the structure and capital value of the Leased Premises. Additionally, White Owl expressed increasing concern about Capitol's financial wherewithal after receipt of Capitol's financial statements. Finally, White Owl unilaterally reduced the Utility Credit to $1,000 during the summer of 2019, and eventually did away with the credit entirely despite separate meters still not being functional at the Site, contrary to the arrangement with RS Harris and the discussion at the Markham Meeting.

(mm) It was not until June 5, 2019, that White Owl finally informed Capitol, for the first time, of its position that it would not be responsible for any of the repair and replacement work for which Capitol was claiming compensation or an accounting. Despite White Owl's repeated acknowledgment that the Capitol Building was in need of major repair/replacement work, it refused to commit to the building system replacement and repair work itself or contribute to Capitol for its cost in any way, either directly or through rent set-off.

(nn) On August 8, 2019, Capitol proposed a plan to settle its arrears and, in turn, receive credit over time for the structural and capital repairs done during the currency of White Owl's ownership. White Owl rejected this proposal and, in a

notice sent to Capitol on September 25, 2019, purported to terminate the Lease and declare the remainder of its 20-year term forfeited. White Owl cited Capitol's rental, utilities and property tax arrears in support of its right to terminate the Lease immediately. Capitol denied the validity of White Owl's Notice of Forfeiture on the basis that, among other things, Capitol's arrears were more than extinguished by the value of structural repairs and building system replacements Capitol had conducted at the Leased Premises to White Owl's benefit.

(oo) Capitol continued to make payments of rent and utilities under the Lease after the Markham Meeting and despite the Notice of Forfeiture until April 2020, which marked the onset of the global COVID-19 pandemic. At the end of March 2020, Capitol repeatedly requested rent relief as a result of the pandemic, or alternatively, for its ongoing structural repair costs to be recognized by White Owl and credited against its rent payments on a go-forward basis.

(pp) White Owl refused any such rent relief and continued insisting on better financial disclosure from Capitol. One of the main reasons White Owl cited for its refusal to grant pandemic rent relief to Capitol and its unwillingness to consider investing in the necessary repairs to the Leased Premises was Capitol's financial security. More specifically, White Owl's counsel stated that Capitol has "refused to establish its credit worthiness or that it is otherwise financially secure enough to justify the landlord (or anyone else) spending the money necessary to repair the building …".

(qq) Capitol's external counsel responded on Capitol's behalf and took the formal position that Capitol would be setting off its structural repair costs against payments owing to White Owl under the Lease going forward. White Owl purported to evict Capitol, effective September 1, 2020, which eviction was ultimately prohibited by an interlocutory injunction pending trial secured by Capitol in the fall of 2020. Since the injunction was granted, Capitol has remained current on rent and utilities under the Lease.

(rr) The evidence about the condition of the Leased Premises is not in dispute, including Capitol's position that the repair and replacement work carried out by Capitol to date, and that still needs to be performed, was and is necessary and emergent, and of a capital or structural nature, or related to essential, base building systems. Further, some of the replacement/repair work Capitol was compelled to undertake was to certain infrastructure/building systems that also service other buildings on the Site that Capitol does not lease, and was not just to White Owl's benefit, but also to the benefit of other tenants.

(ss) Again, it is not disputed that two very significant building system or Site deficiencies affecting the Capitol Building are the roof and grading/drainage systems. The uncontradicted evidence is that these deficiencies and issues both contribute to substantial and continuous water ingress into the Leased Premises. This includes undisputed evidence that:

(i) Rain and snow melt drains in the building from holes and cracks in the roof, floods in from outside under doorways and entrance ways and,

during particularly heavy precipitation events, penetrates through the floor slab from the building's foundational system. Some roof penetrations are large enough to see through. As such, during any period of rain or snow melt, water pours in the Capitol Building from above and at ground level, accumulating on the plant and office floors and forcing Capitol to spend hours or days of otherwise productive time trying to mitigate or address the water issues.

(ii) Shop vacuums and water pumps are set up around multiple areas of the building and run constantly to collect the accumulated water. During particularly heavy precipitations, vacuum trucks have been hired to remove the water in the building.

(iii) Makeshift wooden roofs are constructed over major electrical panels or pieces of equipment to prevent water damage.

(iv) Large industrial blue tarps are suspended under the ceiling in the second story of the office with a weight and hole in the center of the tarp to collect and redirect water into several 45-gallon drums beneath the tarp. The drums are continuously emptied by a sump pump and hose system that pumps the water outside the building. 65 Capitol employees are tasked with checking the water collection system (i.e., ensuring the tarp and pump collection system is working) every few hours, around the clock, because a failure of this system would cause significant damage to the first-floor offices below.

(v) Sand bags are placed at outside doors and entrance ways of the shop to reduce water flows into the building and flooding the floor. These impede the points of ingress and egress into the building, and must be moved in order to transport girders through the shop. During particularly heavy precipitation events, the sand bags are so critical for preventing the water from flowing into the building that Capitol is precluded from utilizing the doors and must change its production program/transport schedule to work around the lack of entry/exit points.

(vi) The water leaks cause damage to Capitol's equipment, frequently render the overhead crane inoperable, rust the steel girders being fabricated, create safety hazards given the electrical panels, systems and heavy equipment throughout the shop, and greatly disrupt Capitol's personnel and operations. For example, water leaking has caused an electric circuit breaker to explode and cut off power to parts of the Capitol Building.

(vii) Considerable time must be spent removing water and rust from the untreated steel products before production work can continue.

(viii) During the rain storm over the weekend of April 22, 2022, water accumulation on the floor of the shop from roof leaks, inflow through the doors and the sewer system, and entering up through the floor, was so significant that the main distribution cabinet, that houses power for the Capitol Building and River City Building, was sitting in six to eight inches of

pooled water. This understandably creates poor and unsafe working conditions in the building.

(tt) The Capitol Building has over 50 roof systems. Several roof sections have already been replaced by Capitol because they were threatening to collapse. The remainder of the roofs are in a similar condition, with portions of the roof sagging under their own weight and threatening the safety and integrity of the emergency sprinkler system and utility lines running immediately below. Very recently sections of the roof have fallen in and are resting on the sprinkler lines beneath the ceiling.

(uu) The June 7, 2018 MJ Roofing Report, commissioned by Capitol and presented to White Owl prior to the July 2018 Inspection, makes 21 recommendations for various roof system replacements at the Capitol Building, together with cost estimates for such work. Following the July 2018 Inspection, White Owl and its expert consultants all agreed that the roof of the Capitol Building had reached the end of its useful life, was beyond repair and required wholesale replacement. The deficiencies in the roofing system are not capable of being "band-aided" or patched any longer, and the issue is not simply with the roof membrane or overlay, alone. Rather, the core structural components of the roof have rotted or rusted beyond repair and the structural integrity of this base building system is at risk. In short, the entire roofing system is failing and requires wholesale replacement, and all of the parties' experts and consultants are in agreement on this fact.

(vv) The condition of the roofing systems and the need to replace those systems is not only established by Capitol's own evidence, but is confirmed and acknowledged by White Owl, both in its representatives' testimony and in the building inspection reports of Hansch, which were commissioned by, and prepared for, White Owl.

(ww) In short, both the MJ Roofing and Hansch Reports clearly confirm the state of the Leased Premises and the substantial investment that is required to keep it functional for the term of the Lease.

(xx) The grading of the Site and the sewer system that services the Capitol Building are also major issues. Ganczar testified that after RS Harris took ownership of the Site, RS Harris conducted excavation on the south half of the Site and removed swales that previously acted to channel and divert water away from Capitol's Building. This excavation, coupled with the aging and inadequate sewer system servicing the Leased Premises, cause serious drainage issues and water inflow into Capitol's shop. Mitigation efforts by Capitol in respect of the effects of the inadequate sewer and draining systems include acquiring and laying limestone on areas around the perimeter of the Lease Premise to create a function working surface, and by placing sandbags around the base of its Leased Premises to try and minimize the inflow of water into its shop. Ultimately, the entire Site requires re-grading and the sewer system requires major upgrades. Such work will impact the common areas, River City's Building, the south half of the Site and the neighboring properties.

(yy) Jones testified that this grading and sewer work is clearly the responsibility of the landlord, because it impacts the entire Site beyond Capitol's Leased Premises, and must also be undertaken in conjunction with the City and neighboring property owners. He further testified that the outdated sewer system and the poor grading of the Site are matters of which White Owl is aware and are issues for which he would never expect a tenant to bear responsibility. Capitol has no ability to re-grade a Site that it does not own or have a leasehold interest in. Although Jones acknowledged that the grading and drainage issues are within White Owl's scope of responsibility, and are "on his list", these issues have not been addressed by White Owl to date.

(zz) In May 2019, one of the main 240V transformers in the main electrical distribution cabinet, which provides power to the Capitol Building and other buildings on Site, failed. This failure eliminated one of the three power phases to the main shop of the Leased Premises, and has impacted Capitol's work program and the equipment it can utilize within the shop. Capitol notified White Owl of the issue and asked them to pay for the replacement transformer and its installation, given that it was part of the main distribution system and related to power supply at other buildings on the Site.

(aaa) White Owl refused, taking the position that the failed transformer was located after what it viewed to be the main distribution system and was related to power distribution within the Capitol Building, hence falling outside of its scope of responsibility under the Lease. White Owl took the position that the "main

distribution system" for which it was responsible was comprised only of the Manitoba Hydro-owned transformers where all power is delivered to the Site (from the central utility provider), prior to being transmitted through the main busbar and the major transformers in the electrical cabinet, which, in turn, distribute that power to other buildings on the Site (not just the Capitol Building). Capitol disagrees with that position, taking the position that this is the responsibility of White Owl since the transformers in the electrical cabinet, while located inside the Capitol Building, actually comprise the main distribution system and supply power to other buildings and tenants on the Site, not solely to the Capitol Building.

(bbb) Given the age of the transformers and the distribution infrastructure, the transformer had to be custom built and must be installed by a specialized contractor in order for it to properly interface with the existing infrastructure – all of which came with an elevated price tag. However, since this transformer was crucial for power supply in Capitol's shop and specialized operations, and given White Owl's position that it would not pay for its replacement, Capitol incurred the cost of procuring a replacement custom transformer for this main distribution system. Its very costly and time-consuming installation is still required. In the interim, Capitol is required to work with limited phases of power, which impacts its productivity.

(ccc) Further, the main busbar exploded and required replacement. The main busbar is the conduit that connects the Manitoba Hydro transformers (which receive electricity from the utility provider) to the transformers in the main

distribution cabinet inside the Capitol Building. Power comes to the Site through the Manitoba Hydro transformers, transmits through the busbar, enters the transformers in the main distribution cabinet inside the Capitol Building and is then distributed to other buildings on Site.

(ddd) Due to an accumulation of dust and debris in the busbar, it exploded during one of Capitol's night shifts and cut power to almost the entire Site. Power was shut off to Capitol's shop for weeks while Capitol worked to replace the main busbar and clean the entire electrical system to ensure a similar explosion would not happen again. This busbar is the central conduit through which power is transmitted to multiple buildings on the Site, not just Capitol's Building.

(eee) Capitol has also had to retain Acon Electrical to repair and upgrade the transformers and various other components of the electrical distribution system given their age. This work benefits other buildings and tenants on the Site.

(fff) During the course of White Owl's ownership, Capitol was required to remove and conduct a wholesale replacement of portions of the entire lighting system, including the hangers affixing the lighting system to the roof, wiring, electrical systems, ballasts and bulbs. The lighting system was so old that replacement bulbs and constituent parts were no longer available. The work Capitol undertook was not simply "replacing light bulbs", but replacing the wiring, electrical switch gear, fixtures and hangers that suspend the lights from the ceiling. The undisputed evidence is that Capitol conducted "band-aid" repairs for as long as it

could with the old lighting system until repairs were simply impossible and replacements became inevitable.

(ggg) Capitol's evidence also established major issues and deficiencies with other building systems, including:

(i) The faulty emergency sprinkler system;

(ii) The non-functional and irreparable heating units and overhead doors;

(iii) The non-functional clerestories (windows) and rotted wood frames that cause heat to escape from the building;

(iv) The crumbling masonry and cracked exterior walls; and

(iv) The cracked concrete slab floor and damaged rail track.

(hhh) The failing roof, non-functioning grading and drainage systems, inadequate clerestories, and faulty heating units contribute to substantial heat loss from the Leased Premises, which is especially problematic to Capitol's plant operations, as minimum temperatures are required to meet contract and coating specifications for the steel products produced by.

(iii) Capitol retained contractors to replace masonry that had crumbled or deteriorated, and to repoint the existing masonry around the entire exterior perimeter of the Leased Premises to prevent further failures and water penetration. Capitol also replaced entire segments of the exterior wall of the galvanizing shop. These repairs and replacements were to the exterior and envelope of the building.

(jjj) Ganczar testified that portions of the main shop's floor slab were crumbling and sinking as a result of subsurface settling. In those problem areas, Capitol was required to remove the concrete, excavate, install compacted gravel and rebar that tied into the surrounding slab, and pour new concrete floor sections. In areas where the floor slab was badly cracked, Capitol conducted epoxy floor repairs. Capitol also performed major repairs and replacements to the rail track that runs through its shop and formed part of the concrete slab. This is work that relates to the foundation and essential structural elements of the building qua building.

(kkk) As a result of the Stipulation reached between Capitol and White Owl, there is no dispute in this action that the building work costs claimed by Capitol (as quantified in the Gwendo Report) are:

(i) Incurred and paid by Capitol;

(ii) Reasonable for the work performed;

(iii) For the purposes as described in the Gwendo Report; and

(iv) Necessarily incurred for the work performed.

(lll) On that basis, the plaintiff states that if this court finds that the work Capitol performed was on account of replacement of whole building systems, was capital or structural in nature, and is properly the responsibility of the landlord, Capitol's damages have been established by the Gwendo Report. This total amounts to $771,069.43 and includes the following:

(i) Acon Electrical - Repair and replace electrical systems and transformers - $226,027.90

(ii) Alpha Masonry – Repair and replace caving in exterior walls and unstable masonry - $35,452.52

(iii) Egan Construction – Repair and replace unstable masonry - $28,576.28

(iv) MJ Roofing – Seal holes and cracks in roofs; remove and replace roofs - $241,777.89

(v) Omar Environmental – Cost of roll-bins for disposal of old roof materials being replaced - $32,091.27

(vi) Reimer Overhead Doors – Replace driveway/overhead doors - $2,908.29

(vii) Southwest Fire Protection – Repair emergency sprinkler system (or replace components thereof) - $143,127.58

(viii) Thor Plumbing & Heating – Repair heating systems - $18,488.11

(ix) Waring Enterprises Landscape Supply – Cost of limestone to mitigate site drainage and sewer issues - $42,619.57

(mmm) The value of Capitol's self-performed work rectifying deficiencies at the Capitol Building since White Owl acquired the Site, together with the loss of overhead contribution as a result of the self-performance of that work, are also quantified in the Gwendo Report. The total value of Capitol's claim for repair costs and associated lost productivity, as set out in the Gwendo report is $1,086,925.48.

[13] A suggestion was made at trial that the reason the Leased Premises are in need of major repairs, renewals and replacements is because of a lack of, or deficient,

maintenance and repair by Capitol and/or past owners over time. There is simply no evidence upon which this court can make a finding that the cause of the necessary building system replacements at the Leased Premises is a lack of repair and maintenance efforts on Capitol's behalf.

[14] In my opinion, and without attributing the legal and financial responsibility for carrying out these replacements pursuant to the Lease at this point, the evidence is unequivocal that most of the systems Capitol has replaced, or proposes to replace, are the original systems that have simply reached the end of their useful life despite the efforts of Capitol to repair, maintain and prolong the functionality of those systems.

The Position of the plaintiff

[15] As stated in the preceding paragraph, upon my review of the evidence and the submissions by the parties, I accept that there is no evidence to suggest that the reason the Leased Premises are in need of major repairs, renewals and replacements is because of a lack of, or deficient, maintenance and repair by Capitol. The evidence establishes that the original systems have simply reached the end of their useful life despite the best efforts of Capitol to repair, maintain and prolong the functionality of those systems. Accordingly, that is not an argument that I will discuss any further in these reasons subject to references being made to the condition of the Leased Premises in the context of the other matters at issue here.

[16] Moving on to the other matters at issue here, it is the plaintiff's position that a proper interpretation of the Lease makes the defendant responsible for the necessary building system repairs and replacements and that to the extent that the plaintiff has

incurred costs in this respect, that cost is a set off against any arrears it owes under the Lease.

[17] The plaintiff states that while every day or operating maintenance and repair costs are the responsibility of Capitol, capital or structural repairs to the base building elements and replacements of entire building systems to keep the building standing and operational are the responsibility of White Owl, the defendant. The plaintiff states that this interpretation is supported by:

(a) a plain reading of the terms considered in the context of the entire agreement;

(b) the factual matrix evidence of the Lease;

(c) a commercially sensible and efficacious reading of the Lease, considering expert evidence of industry norms and reasonable commercial expectations; and

(d) the case law interpreting "repair covenants", which distinguishes work that is truly in the nature of a "repair" and that which is a wholesale replacement or improvement of the Leased Premises.

[18] In placing the proper interpretation on the Lease, the plaintiff states that the Supreme Court of Canada and the Manitoba Court of Appeal have held that the requirement to consider surrounding circumstance evidence when interpreting contracts does not conflict with the parol evidence rule, as factual matrix evidence is used as an interpretive aid and to contextualize the words chosen by the parties.

[19] However, the plaintiff states that while the subjective intentions of the parties are not relevant to the interpretation of the contract, evidence of the surrounding circumstances used as an interpretive aid for determining the meaning of the written words chosen by the parties is not precluded by the parol evidence rule. At the same time, the plaintiff states that a trial judge may not use factual matrix evidence to overwhelm the words of the contract or to effectively create a new or collateral agreement.

[20] The plaintiff argues that that the provisions of the Lease are entirely consistent with the opening line of the Recital to the Lease, which states: "Whereas the Lessor is desirous to lease the Demised Premises under a Triple Net Lease wherein the Lessee is responsible for all operating expenses of the Demised Premises, including repair, maintenance and utilities".

[21] Although the phrase "Triple Net Lease" is capitalized in the Lease, there is no separate definition of this phrase aside from its definition within the rest of the sentence of the Recital. Thus, the plaintiff states, its meaning must be discerned in context of the entire Lease, its factual matrix, industry standards and dictionary meanings. Accordingly, the plaintiff states that reading the phrase "Triple Net Lease" in harmony with the rest of the Lease, and even the Recital itself, leads to the conclusion that the parties intended to divide liability for repairs and replacements depending on their nature, with the landlord/owner taking responsibility for the types of repairs that go to the base building components, building systems and structural or foundational elements of the building.

[22] Furthermore, the plaintiff argues that the factual matrix and the surrounding circumstances of the Lease supports its interpretation of the lease, as well as the expert evidence about industry standards, as set out in the evidence of Gwendo.

[23] In summary, and without setting out these arguments which are detailed in its brief, the plaintiff acknowledges that it must carry out, and pay for, daily operational maintenance and upkeep (such as security, fencing, snow clearing, and changing burnt out light bulbs) and for any tenant improvements or optional tenant modifications it seeks to make to the Leased Premises to accommodate its operations therein. However, it states that it is not responsible, either under the Lease, common law, industry standards or commercial efficacy, to undertake or bear cost responsibility for the nature of replacement and rehabilitation work it has been conducting, and that is still required, in order to maintain the structural integrity of the building and keep its building systems operational.

[24] Further arguments set out in the plaintiff's brief in respect of the obligations of the parties pursuant to the Lease include:

> (a) The jurisprudence makes an important distinction between work that constitutes a "repair" and work that constitutes a "replacement or improvement" at, or to, a leased premise. Here the tenant, Capitol, has the obligation to "repair and maintain" the leased Premises, and that obligation does not extend to work that is better characterized as a "replacement, improvement, or renewal" of the property. If it was going to be a tenant obligation to improve and make wholesale

replacements to the Leased Premises, the Lease would have expressly and clearly stated as much.

(b) White Owl has an obligation to conduct structural, building system and capital repairs/replacements to the building, and Capitol cannot reasonably be expected to carry on its business in a building that is constantly under water and structurally unsound. Capitol cannot "peaceably possess" or "enjoy" the Leased Premises, or have continuous access thereto, when for significant periods of time, it cannot use large portions of the building for its steel fabrication operations. Therefore, the failure by White Owl to carry out the required replacements constitutes a breach of the duty to provide Capitol with peaceful enjoyment of, and continuous access to, the Leased Premises.

[25] It is further the position of the plaintiff that while it is obligated to pay for the utilities it consumes at the Leased Premises, it is not obligated to pay for utilities consumed at other buildings on the Site that it does not lease. This is why RS Harris (now White Owl) covenanted to provide separate metering for the buildings on Site receiving commonly serviced utilities through the Capitol Building under the Lease. As a result of White Owl's failure to install separate metering or to credit the plaintiff with the agreed upon $8,400 monthly utility credit on a consistent basis, Capitol claims as damages, or seeks to reduce any utility arrears it may owe to White Owl, the total utility credits that White Owl failed to consistently apply to its monthly utility invoices up until June of 2020. The total value of Capitol's unaccounted for utility credit claim is $71,450.

This calculation of unaccounted for credits was confirmed as accurate by White Owl's witness, Daniel Fiore.

[26] Regarding the issue of Capitol's responsibility for a share of property taxes under the Lease, Capitol acknowledges that it owes its proportionate share of property taxes under the Lease. It also does not take issue with White Owl's computation of its proportionate share of taxes, which Mr. Fiore testified is calculated by dividing Capitol's surveyed leased area (9.89 acres) into the total Site area (26.70 acres) to arrive at 37.04% of the total Site. The only issues with respect to property taxes are whether White Owl should bear a greater portion of the property taxes because its own actions led to a much higher tax assessment than was merited, and whether Capitol's prepayment of $98,437.50 in property taxes to Harris under the Lease ought to be credited to its account with White Owl.

[27] Furthermore, Capitol argues that Capitol's proportionate share of property taxes from 2018-2021 ought to have been $120,988.12, which is $193,580.98 less than what White Owl has invoiced it for in respect of its share of property taxes. Thus, Capitol submits that White Owl's arrears claim ought to be reduced by $193,580.98 (or this amount be credited against its property tax arrears) as a result of the revised calculation of Capitol's proportionate share of taxes following the City's reassessment of taxes after White Owl acquired the Site.

[28] Capitol does not dispute that it owes White Owl $731,568.23 in arrears of property taxes, utilities and rent minus credits and with respect to the computation of utilities and property tax arrears. In the result, Capitol claims damages against White Owl, and set-

off of those damages against White Owl's arrears claim, in the amount of $1,450,393.96. This claim is comprised of $1,086,925.48 in structural, capital and building system replacement costs, $71,450 in unaccounted for utility credits, $98,437.50 in pre-paid property taxes under RS Harris and $193,580.98 in unaccounted for reduction in Capitol's share of property taxes after the City's reassessment following White Owl's overpayment for the Site.

[29] The plaintiff argues, in the alternative, and in the context of relief against forfeiture should it be held that it has breached the terms of the Lease, that it has demonstrated that it has acted reasonably in the circumstances throughout this dispute with White Owl. It states that given the terms of the Lease, properly construed in light of its factual matrix, industry standards and principles of commercial reasonableness, Capitol's consistent position that it bears no responsibility for the major structural repairs and building system replacements is eminently reasonable.

[30] Capitol argues that it undertook the emergent and necessary repairs and replacements promptly, as opposed to simply letting the Capitol Building collapse on itself and abandoning the Site and that this is ultimately to White Owl's benefit, as owner of this facility. Moreover, it states that it was transparent and prompt in its communication with White Owl about the work it was doing and the costs it expected to be compensated for.

[31] Capitol states that the evidence demonstrates that Capitol was constantly informing White Owl – through Mr. Jones in particular – of the recurring and serious issues encountered at the Leased Premises and requesting that White Owl perform, or

pay for, this work. Additionally, Capitol did not begin setting off its costs against amounts it owed under the Lease until about a year after White Owl took over the Site and tried to convey to White Owl the fundamental nature, severity and urgency of the required replacement and repair work at the Leased Premises. It states Capitol tried, in good faith, to negotiate a compromise with White Owl that would settle the missed rent and utility payments in 2018 and the mounting and substantial capital investments it was making into White Owl's building. It was only after White Owl finally conveyed its position to Capitol that it would not be expending any money whatsoever to remedy the conditions at the Leased Premises, Capitol formalized its legal position and began setting off amounts it owed under the Lease with amounts White Owl owed it on account of structural and system replacements to the Leased Premises. It argues that this was a legitimate and good faith dispute and the positions Capitol took were in a good faith attempt to protect its interests under the Lease, while still maintaining a habitable building in which to operate.

[32] Second, Capitol argues, the gravity of Capitol's alleged breach – namely, the setting off of building remediation costs against amounts owing to White Owl under the Lease – is minimized when one considers the circumstances Capitol was contending with at the Leased Premises and the reason it was compelled to begin setting off those expenses, namely:

(a) White Owl was taking the extreme position that it would not be investing into its own asset, notwithstanding that the structural integrity, safety and basic functionality of its building was at stake.

(b) White Owl was unwilling to extend any sort of pandemic relief to it, despite such relief being extremely common place and reasonable in the circumstances. Further, in order to keep operating in the space and ensure its 150 employees remained employed and its contracts were performed, Capitol was compelled to carry out nearly $1 million in structural and capital repairs and replacements at the Leased Premises.

(c) Having to self-perform and/or pay for this significant building work greatly impacted Capitol's productivity and general operations, exacerbating the effects of White Owl's position under the Lease.

(d) Capitol's alleged breach can be remedied by a payment of the outstanding arrears. The value of arrears owed to White Owl is roughly half a million dollars less than the value of improvements Capitol made to the Leased Premises.

[33] Third, Capitol submits that relief from forfeiture requires a proportionality analysis, which weighs the value of the property forfeited against the value of the damages occasioned by the breach. This requires an analysis of which party suffers the greater harm in the event relief from forfeiture is either granted or denied.

[34] In this respect, Capitol states it is by far the more disproportionately affected party. If relief from forfeiture is not granted, and Capitol is evicted, this will result in the demise of Capitol, the loss of 150 skilled jobs from the Winnipeg workforce, and default on Capitol's contracts. In contrast, if relief from forfeiture is granted, White Owl will be paid its arrears (which is the value of damages occasioned by Capitol's breach) and will receive

an inevitable gain or windfall in the form of significant multi-million-dollar investments into its Leased Premises made by Capitol.

[35] In conclusion, Capitol argues that forfeiture should not be granted and that the evidence establishes its set-off claim extinguishes and exceeds White Owl's arrears claim, and results in a net damage award to Capitol of $718,825.73 plus interest based on the following:

(a) Capitol's Structural Repair Cost Claim (see Gwendo Report, Exhibit 12, from April 1, 2018 onwards) - $1,086,925.48;

(b) Capitol's Utility Credit Claim - $71,450;

(c) Capitol's Pre-Paid Property Tax Claim - $98,437.50;

(d) Reduction in Property Tax (based upon overpayment for Site) - $193,580.98;

(e) Minus White Owl's Arrears Claim - ($731,568.23);

(f) Net Damage Award to Capitol - $718,825.73.

Position of the defendant

[36] White Owl identifies two initial concerns which it states need to be considered in evaluating and interpreting the Lease.

[37] First, White Owl points out that Capitol has been a continuous tenant of increasingly larger portions of the Leased Premises since late 1999. Capitol has been aware of the condition of the Leased Premises throughout those years and was certainly aware of the age of the building at 1500 Dublin Avenue since it began occupying portions of it.

[38] Second, it states that Ganczar's evidence demonstrates a number of instances inconsistent with the evidence of Aaron London (London) who was produced on behalf of Capitol at discovery. White Owl states that the area of the greatest discrepancy in evidence and which demonstrated significant issues of credibility and reliability with the evidence of Ganczar concerns the dealings with property taxes under the ownership by RS Harris. It says that while this may not technically constitute an impeachment of Ganczar's evidence, it should still be considered as seriously affecting its weight, reliability, and overall credibility.

[39] White Owl notes that Capitol did not call London as a witness to explain any of these inconsistencies and Ganczar confirmed that London would have restrictions under his employment agreement from speaking with opposing counsel. Whenever a discrepancy in evidence exists as between London's discovery evidence as put to Ganczar, and Ganczar's evidence at trial, an adverse inference should be drawn against Capitol for its failure to call London as a witness.

[40] Like Capitol, White Owl deals extensively with the evidence concerning background issues leading up to execution of the Lease between RS Harris and Capitol as well as the course of conduct between not only RS Harris and Capitol, but also between White Owl and Capitol when White Owl stepped into the shoes of RS Harris as landlord when it took over the Lease with its purchase of the Site.

[41] In this context, I would mention that during the course of the trial I raised the issue of the relevance of the broad scope of the evidence led in order to interpret the respective obligations of the parties under the Lease. The reply to my question in this

regard from counsel for White Owl was in essence that this background evidence was being tendered in order to respond to the evidence being led by the plaintiff's counsel. I understand that there would be concern on the part of White Owl's counsel not to leave unaddressed allegations which might ultimately be relevant to the determination of this matter. However, and I will deal with this later in my analysis of the issues, in my opinion, a significant portion of the evidence that was lead in this case by both parties was often beyond the scope of what is relevant for the determination of the substantive matters in dispute here. In the result, the trial was unnecessarily protracted.

[42] Perhaps I should bear the responsibility for this for allowing into evidence what now appears to me to be extraneous, but it is often difficult for the trial judge to properly understand the relevance of a particular portion of evidence until after the evidence has been led and the arguments have been made. Cutting short the introduction of evidence in this case might have caused more damage to the trial process than by allowing the evidence. However, at this point it is my responsibility to ensure that only evidence that is relevant in arriving at my conclusions in respect of the issues is considered.

[43] In any event, the brief of the defendant contains an extensive review of the communications between the parties from pages 12 to 21 of its written argument. Argument aside, these communications set out the various communications between White Owl and Capitol commencing in early April 2018 by e-mail and telephone and culminating in the meeting between the parties in Markham, Ontario on March 15, 2019, when White Owl invited Capitol's representatives for a face-to-face meeting at their offices in Ontario. The so-called "Markham Meeting" involved the parties putting forward

various concerns and appears to me to be an attempt to negotiate some sort of mutually satisfactory business arrangement in respect of the various concerns arising out of their relationship.

[44] In this regard, at paragraph 45 of its written argument, the defendant characterizes that meeting in the following manner:

> Jones and McLeod, [both representatives of White Owl and] both of whom attended the Markham Meeting, did not describe any formal "agreements" that came from it. In fact, Jones stated quite simply in evidence that he "didn't think anything was resolved from the Markham Meeting". The Markham Meeting was simply a further continuation of the dialogue between the parties about the issues they were facing and a further attempt to find solutions and agreements on how those issues would be addressed.

[45] White Owl states in its written closing argument that the Markham Meeting did not result in any specific agreements being reached and points to London's e-mail of March 15, 2019 in which he states:

> [W]e hope that our proposal this morning will continue to resolve itself into a mutually beneficial long term arrangement.

[46] White Owl refers to an e-mail that outlines what was discussed at the meeting. This e-mail dated March 21, 2019, is that of Ms. McLeod, an inhouse counsel for the related group of companies of which White Owl is a part. She stated as follows:

> With respect to our discussions of last week, it would be prudent to establish a term sheet listing your commitments, including performance deadlines, on which we can base a formal forbearance agreement. We see those terms as follows:
>
> 1. Capitol undertakes to provide the financial statements, commercial plans, and other financial or business disclosures as may be reasonably requested, within a short, mutually agreed upon period of time.
>
> 2. White Owl will immediately email an invoice to Capitol each time we receive a utilities bill. Capital will be credited $8000/mo as an interim

> adjustment until we have better information on which to calculate White Owl's apportionment.
>
> 3. White Owl will send invoice for taxes forthwith upon receipt of the bill; as well as a monthly invoice for rents.
>
> 4. Within 24 hours of receipt of the invoice, Capitol will initiate a wire transfer of funds within 24 hours of the receipt of any invoice, and confirm having done so to Christine and Barrie.
>
> 5. We will need to reach agreement on consequences in the event of default. We would suggest:
>
> a. a 24 hour grace period for payments of rents, utilities or taxes; 48 hours for anything else.
>
> b. Any default not rectified after the grace period would be grounds for White Owl to terminate the forbearance.
>
> c. Any recurring pattern of default, even where cured within the grace period, would be grounds to terminate. We would propose that threshold be 3 events of default in any 30 day period.
>
> Of course, our agreement to forbear would be contingent upon Capitol's performance of the commitments.
>
> Please let me know if these are terms you can agree to, and how soon you can reasonably commit to providing us the documents that you offered to provide in Friday's meeting. We'll then move quickly to get a formal agreement in place based on those terms.

[47] It is White Owl's position that the communications establish that there was no specific agreement from the Markham Meeting on how rent arears would be paid or the structural repair costs would be handled.

[48] White Owl points out that Capitol eventually put forward a proposal in a letter from London dated August 8, 2019, in which it proposed a method to deal with rent arears, but denied any obligation to pay for property taxes which at that point stood at $154,731.40.26.

[49] The proposal also sought a credit for past structural repairs, which White Owl has denied is its obligation under the Lease. White Owl rejected Capitol's proposal and a demand was made for payment of the amounts then owed. According to White Owl, those amounts totaled $365,750.06.

[50] A Notice of Forfeiture was provided to Capitol through an e-mail sent by White Owl's counsel dated September 25, 2019. That e-mail advised that Capitol could continue to occupy the Leased Premises on a month-to-month basis so as to allow it an opportunity to relocate. While Capitol's counsel set out its disagreement to the Notice of Forfeiture in a letter, Capitol took no other formal steps to set it aside or seek relief from forfeiture.

[51] Given the failure of Capitol to meet its financial obligations under the Lease, White Owl states it is unwilling to provide further accommodation to Capitol.

[52] In his April 30, 2020, letter, counsel for Capitol stated that Capitol would not be making further rental payments to White Owl until all amounts it claimed were owing had been set-off. Accordingly, Capitol did not pay any amounts for rent, utilities, or property taxes from March 2, 2020, until September 17, 2020, when it was required to do so under the terms of the consent interim injunction. As a result of the lack of any payments from Capitol, White Owl gave notice on July 23, 2020, of its intention to evict Capitol as of September 1, 2020.

[53] Before setting out White Owl's position on the interpretation of the Lease, it should be noted that White Owl does not deny that the Leased Premises require repairs of a structural nature. However, it is White Owl's position that those repairs, whether

structural or otherwise, are not the responsibility of the landlord under the terms of Lease and that the need for some or all of those repairs well predated the Lease.

[54] White Owl points out that while it agreed to a Stipulation, which was marked as Exhibit 7, it does not extend to the characterization of the costs as capital repair expenditures. The Stipulation acknowledges agreement that the costs claimed were:

(a) incurred and paid by Capitol;

(b) reasonable for the work performed;

(c) for the purpose as described in the Gwendo Report; and

(d) necessarily incurred for the work performed (also referred to as structural costs by Capitol).

[55] Moreover, White Owl states that even if the court is prepared to find that all of the costs claimed are capital or structural in nature, that does not automatically mean that White Owl is responsible under the Lease for any or all of those costs.

[56] White Owl notes in its closing argument that Capitol has argued that evidence of specific negotiations between Harris and Ganczar in the period of 2013 to 2016 should be considered surrounding circumstances or factual matrix that is admissible as part of the interpretation of the Lease. White Owl takes issue with that and instead submits that this is exactly the type of evidence which is not permitted because of the parol evidence rule.

[57] Furthermore, White Owl argues that such evidence would violate the requirements of surrounding circumstances in that it should not overwhelm the words of the contract or be used in a manner to effectively create a new or collateral agreement. In this case,

the purported use of negotiations is just an attempt by Capitol to rewrite the terms of the Lease to include the language of what was supposedly discussed and that this evidence should be characterized and considered as the negotiations and subjective intentions of the parties.

[58] White Owl submits that where the contract has been assigned, as in this case, the party to which the contract was assigned would not have immediate knowledge of or access to the surrounding circumstances/factual matrix. The wording of the contract itself thus becomes even more important and is in keeping with and supports the principles of contractual finality and certainty.

[59] Furthermore, White Owl take issues with Capitol's reliance on Gwendo's evidence of "industry standards" to interpret the Lease. White Owl states Gwendo's opinion, as described in his Report at page 3, is that in his experience the landlord is typically responsible for the maintenance of the base building elements including the structure of the building, while the tenant is typically responsible for tenant improvements which are basically the interior fit-up work or modifications to the building that a tenant requires in order to run their business in the space. White Owl points out that Gwendo admits in his evidence, that is not the case under every lease, and ultimately the terms of the Lease would govern any relationship.

[60] White Owl argues that in essence what Capitol is asking the court to find through Gwendo's opinion evidence is that it is more likely under a lease for the landlord to be found responsible for structural repairs than the tenant. To then use that opinion to draw the conclusion that the parties in this case must have had the same intention is simply

not logically probative, and in fact is prejudicial to the exercise for the court of interpreting the actual language of the Lease.

[61] White Owl also submits that the Gwendo Report does not offer any opinion evidence on the commercial efficacy of the Lease, the relationship between the parties, or any industry meaning of triple-net or fully net. The only definitions offered of triple-net by Capitol are hearsay definitions found online without any evidence as to their authority or authenticity. Accordingly, it is the submission of White Owl that this evidence is not probative for the interpretation of the Lease.

[62] It is the further submission of the defendant that Capitol took occupancy of the Leased Premises "as is" under Paragraph 12 of the Lease, and was clearly aware of the need for structural repairs at the time. It states that in the absence of any language placing the obligation on the landlord to repair, the existing language of the Lease that places all obligations to repair on the lessee is the better and more accurate reflection of the intention of the parties. To go further would require a rewriting of the terms of the Lease and would be a deviation from its current plain language.

[63] White Owl argues that commercial efficacy supports its position that it is the tenant's responsibility to cover any structural repairs or replacements. It states that since the Lease provides for rent significantly below market rates, limited escalation, and no separate provision for a landlord to recover any amounts for structural repairs, imposing the responsibility for them on the landlord would therefore not be commercially reasonable, and in fact would be entirely the opposite. It submits that the commercial intent of the Lease is inconsistent with the landlord having the obligation of paying for

structural repairs and that this is especially so where the Lease is of a very long term and where the contracting parties were both well aware of the age and poor condition of the structure.

[64] In respect of utilities, White Owl states that what seems to be agreed to by both parties, is that they would use an informal temporary ad hoc monthly adjustment until separate metering was put in place and then a retroactive reconciliation or "measured mile" would occur based on data collected from the separate metering. It notes that while such a reconciliation will have its challenges, it is a process that was agreed upon and one that the parties can endeavour to complete.

[65] It is White Owl's position that any agreement for an adjustment in respect of utilities was an informal "ad hoc" monthly adjustment as was stated by London in his e-mail of March 6, 2019. Coming out of the Markham Meeting, the utility adjustment was a continuous topic of discussion with each party suggesting a figure that was intended to reflect a reasonable amount based on the circumstances at the time.

[66] In respect of Capitol's position on property taxes, White Owl states that Capitol is not questioning White Owl's methodology of calculating its proportionate share. However, it is arguing that a discount should be applied for White Owl not appealing the assessments. While in the spring of 2019, Capitol initially questioned whether White Owl was appealing the assessments, after receiving explanations from White Owl as to why it was not doing so, Capitol has never raised this as a concern. It says Capitol did not lead any evidence at trial to suggest an appeal would likely have been successful or what a reasonable reduction would be.

[67] White Owl states that by virtue of the Notice of Forfeiture, the Lease was validly terminated by White Owl and a new month-to-month lease was introduced as the contractual relationship between the parties.

[68] In respect of Capitol's alternative claim for relief against forfeiture, White Owl generally agrees with the principles governing the application of whether relief should be granted, but submits that relief against forfeiture should not be granted in this case for the following reasons:

(a) significant arears of rent, utilities, and property taxes are owing from Capitol in the sum of $731,568.23 as of April 30, 2022 [Exhibit 15];

(b) while its initial non-payments of rent and utilities in the fall and winter of 2018/2019 may have been because of financial difficulties or simple oversight, by April 2020, Capitol had made a conscious decision to not pay rent, utilities, or property taxes and purported to assert a right of set-off despite being clearly prohibited under the Lease;

(c) Capitol has never paid property taxes although properly owing to White Owl which was finally admitted after evidence at trial;

(d) Capitol's owner has demonstrated arrogance and contempt towards White Owl in its position for non-payment by his various comments at trial;

(i) Capitol did not act with any diligence in seeking to challenge or set aside the Notice of Forfeiture, or seek relief from forfeiture after it was issued in September 2019, nor did it take any steps until the notice of eviction was given approximately a year later;

(ii) Capitol has made no attempts to seek out other suitable premises or consider other alternatives during this period but has only relied upon the position that the Leased Premises are its only option and would necessarily result in it being put out of business;

(iii) any prejudice related to locating and moving to other premises could be remedied by granting Capitol a further reasonable period to locate same;

(iv) the commercial reality of the situation requires an enforcement of the terms of the Lease, and a consequence and accountability for failing to abide by its terms;

(v) Capitol still has other remedies available to it under the proposal provisions of the ***Bankruptcy and Insolvency Act***, R.S.C., 1985, c. B-3, and the ***Companies' Creditors Arrangements Act***, R.S.C., 1985, c. C-36.

[69] In summary, it is White Owl's position that it is not responsible for any of the costs or repairs claimed for by Capitol and that a proper interpretation of the Lease provides that the intended relationship between the parties was to place the obligation and cost of all such repairs on the tenant. White Owl states that this is a logically sound analysis of the Lease, a commercially reasonable result, and accords with the basic factual matrix evidence that principally involves the knowledge of the parties of the structure, of each other, and of Capitol's intended use of the premises.

[70] White Owl therefore seeks the dismissal of Capitol's claim with costs and an Order lifting the current injunction.

Analysis and Conclusions

[71] My analysis and conclusions in respect of this action will be considered in the context of the following headings:

i. Does the Lease obligate the defendant White Owl to perform the structural, capital and building system repair and replacement at the Leased Premises?

ii. What should be ordered in respect of calculating utility consumption?

iii. What is the valuation and liability for property taxes payable under the Lease?

iv. Is Capitol entitled to relief against forfeiture?

i. Does the Lease obligate the defendant White Owl to perform the structural, capital and building system repair and replacement at the Leased Premises?

[72] As set out in the plaintiff's brief, the modern approach to contract interpretation involves a "practical, common-sense approach not dominated by technical rules of construction" (see ***Sattva Capital Corp***. ***v. Creston Moly Corp.***, 2014 SCC 53, [2014] 2 S.C.R. 633 (QL), at para. 47).

[73] The fundamental tasks when interpreting a contract are to ascertain "the intent of the parties and the scope of their understanding", ***Sattva***, at para. 47 and to "discern the parties' reasonable expectations with respect to the meaning of a contractual provision". (See ***Resolute FP Canada Inc. v. Ontario (Attorney General)***, 2019 SCC 60, 444 D.L.R. (4th) 77, at para. 74)

[74] 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". (See ***Sattva***, at para. 47)

[75] Words of a contract must not be read in isolation, but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context. (See ***Tercon Contractors Ltd v. British Columbia (Transportation and Highways)***, 2010 SCC 4, [2010] 1 S.C.R. 69 at para. 64)

[76] Accordingly, while the law generally restricts the use of extraneous evidence in ascertaining the meaning of provisions in a contract, extraneous evidence may be utilized in appropriate circumstances in order to make those determinations.

[77] For example, the law prevents reliance on contracting parties' conduct subsequent to the execution of a contract for the purposes of interpreting the agreement. However, 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 post-contract conduct 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 interpretations is the correct one. (See ***Shewchuk v. Blackmont Capital Inc.***, 2016 ONCA 912, 404 D.L.R. (4th) 512 (QL), at para. 46, citing ***Canadian National Railways v. Canadian Pacific Ltd.***, [1979] 2 S.C.R. 668 (S.C.C.))

[78] However, that post-contract conduct must be helpful to "support an inference concerning [the contracting parties'] intentions at the time they made their agreement". (See ***Shewchuk***, at para. 48)

[79] Accordingly, it is the court's responsibility that in ascertaining the significance of each relevant provision it does so in a manner that is mindful of the Lease as a whole and that as with all interpretive aids, extraneous evidence not be used to overwhelm the words of the contract themselves or to effectively create a new or collateral agreement. (See ***Rosenberg v. Securtek Monitoring Solutions Inc.***, 2021 MBCA 100, [2021] M.J. No. 349, at para. 112)

[80] In my opinion, the parties do not disagree with the general principles of law governing the interpretation of contracts, including leases, in Manitoba. It is the application of those principles and the effect of their application in which they differ.

[81] The starting point for contract interpretation is the plain meaning of the words of the contract, read as a whole, as opposed to reading terms in isolation. Accordingly, for the sake of clarity it is instructive to reproduce some of the provisions of the Lease relied upon by the parties.

[82] The Recital of the Lease states:

> 2. a. To pay all business or other taxes from time to time levied in respect of the Lessee's use or occupancy of the Demised Premises including penalties for late payment thereof;
>
> b. To pay as additional rent its proportionate share of the Property Realty taxes during the currency of this Lease. Such amount to be subject to revision upon reassessment by the City of Winnipeg;
>
> c. The Lessee shall pay for electric, gas, and water utilities for the Demised Premises. All other charges, costs, and expenses of every nature and kind associated with the Leased Area including but not

limited to security, landscaping, snow and refuse removal, heating, air conditioning and ventilation, window cleaning, building insurance, parking areas, and fencing;

d. It is the stated purpose and intent of the Landlord and the Lessee that this Lease shall be fully net to the Landlord.

. . . . .

8. To perform all required building maintenance on a continuing basis to the Demised Premises including maintenance of and repairs to the ventilation system, replacement of burnt out light bulbs and the exterior doors (overhead and pedestrian).

. . .

10. To provide distribution of utilities within the Demised Premises at no cost to the Lessor.

a. In accordance with section 18(b), the Lessor shall be responsible to provide power, water, natural gas, sewer, phone and data ("Utilities") to the Lessee's main distribution point for each service within the Demised Premises;

b. For greater certainty, the Lessor shall not be responsible for the ongoing cost of the Utilities

. . .

12. To be deemed to have examined the Demised Premises before taking possession hereunder and such taking of possession shall be conclusive evidence as against the Lessee that the Lessee accepts the Demised Premises in its current condition, as is. The Lessee agrees that there is no promise, representation or undertaking by or binding upon the Lessor with respect to any alteration, remodeling or decorating of the Demised Premises or the Building or installation of equipment or otherwise except such, if any, as are expressly set forth in this Lease. In the case of any such express provisions then unless the same provides for completion of the alternation, remodeling or decorating of such installation after the Lessee's taking of possession hereunder, such taking of possession shall constitute conclusive evidence as against the lessee that the said alteration, remodeling, decorating or installation of equipment or fixtures has been satisfactorily completed.

. . . .

15. To not make or permit to be made any additions, alterations or improvements to the Demised Premises without first having submitted a plan thereof to the Lessor and having obtained its written approval thereof which approval may not be unreasonably withheld, and that any additions, alterations or improvements to the Demised Premises effected by the Lessee prior to or during the term hereby created shall be made at the sole cost and expense of the Lessee. Any such additions, alterations or improvements to the Demised Premises on the expiration of the said term or any renewal thereof shall become the property of the Lessor;

    a. For greater certainty, machinery and equipment purchased and installed by the Lessee, including bridge cranes, trolleys and hoists, but excluding runways, if any, shall remain the property of the Lessee;

    b. Equipment such as lighting added by the Lessee shall remain fixtures and become the property of the Lessor;

    c. The Lessee shall not accrue any ownership rights over pre-existing fixtures by virtue of providing on-going maintenance and repairs.

16. That the Demised Premises shall be kept in a clean and tidy condition and at the expiration of the term or sooner determination thereof will peacefully surrender and yield up unto the Lessor the Demised Premises in the same good condition as the Demised Premises are currently in reasonable wear and tear excepted and will not leave any rubbish, spillage or waste material on the Demised Premises.

. . .

18. At no cost to the Lessee during the term of the Lease and any renewal thereof:

    a. To provide Lessee with undisturbed use of the areas marked 'Temporary A' and 'Temporary B' for the first year of the Lease;

    b. To install separate metering for utilities which service the Demised Premises;

. . .

20. In the event of partial destruction (as hereinafter defined) of the Demised Premises by fire, the elements or other cause of casualty, then in such event, if the destruction is such that in the opinion of the Lessor's Architect the Demised Premises cannot be used for the lessee's business until repaired, the rent shall abate until the repair has been made. If the

> destruction such that in the opinion of the Lessor's Architect the Demised Premises may be partially used for the Lessee's business while repairs are being made, then the rent shall abate in the proportion that the part of the Demised Premises rendered unusable bears to the whole of the Demised Premises provided always that if the part rendered unusable exceeds one-half (1/2) of the total area of the Demised Premises there shall be a total abatement of rent until the repairs have been made unless the Lessee, with the permission of the Lessor, in fact used the undamaged part, in which case the Lessee shall pay proportionate rent for the part so used. "Partial destruction" shall mean any damage to the Demised Premises less than total destruction, but which renders all or any part of the Demised Premises temporarily unfit for use by the Lessee for the Lessee's business. The certificate of the Lessor's Architect as to whether the whole or a part of the Demised Premises is rendered unusable, and certifying to the extent of the part rendered unusable, shall be binding and conclusive upon both Lessor and Lessee for the purposes thereof;
>
> . . .
>
> 22. In the event of partial destruction as hereinbefore defined the Lessor covenants with the Lessee to repair and restore at its cost the Demised Premises to substantially the condition the same were in immediately before such partial destruction occurred, save as to normal wear and tear;
>
> . . . . .
>
> 32. The parties expressly acknowledge and agree that the Recitals to this Agreement are both accurate and significant and as such, are hereby incorporated into the form part of the Agreement as representations and warranties of the Parties, as applicable.

[83] It is my opinion that a plain reading all of the relevant terms of the Lease in harmony, including the specific terms reproduced herein, supports Capitol's position that the Lease obligates the defendant White Owl to perform the structural, capital and building system repair and replacement at the Leased Premises. In coming to this conclusion, I adopt the arguments advanced by Capitol in its brief and which I have reproduced or summarized as follows.

[84] The Recital clearly states that Capitol is "… responsible for all operating expenses of the Leased Premises, including repair, maintenance and utilities." Section 32 makes clear that the Recitals form part of the Agreement.

[85] Operating expenses are implicitly if not expressly, distinguished from capital expenses in the Lease itself. I agree with the plaintiff that operating costs are those expenses related to routine maintenance, day to day repairs and/or additional costs that the tenant requires in order to fit the building for its intended use and purpose. Examples of these types of costs would include landscaping, garbage removal, snow clearing, security, and changing burnt out light bulbs, which are the very types of expenses expressly enumerated as Capitol's responsibility in sections 2 and 8.

[86] Capital or structural costs are better understood as the costs associated with major repairs, renewals or replacements to the core infrastructure and building systems of a building, or those that are essential to the structural integrity of the building. These types of expenses would include repairs/replacements to the roof, masonry, floor slab, drainage and grading at the Site, and central mechanical systems.

[87] Section 2(c) of the Lease states that Capitol shall pay for "all other charges, costs, and expenses of every nature and kind associated with the Leased Area including but not limited to security, landscaping, snow and refuse removal, heating, air conditioning and ventilation, window cleaning, building insurance, parking areas, and fencing".

[88] Section 8 stipulates that Capitol is required to "perform all required building maintenance on a continuing basis … including maintenance of and repairs to the

ventilation system, replacement of burnt out light bulbs and the exterior doors (overhead and pedestrian)."

[89] If Capitol was to be responsible for structural or capital work as well as all operating costs it would not have been necessary to set out in section 2 or 8 or elsewhere specific examples of what it was responsible for. If accepted, the interpretation advanced by White Owl would make all of these specific provisions as to operational responsibilities, superfluous. The plain language in sections 2(c) and 8, which list examples of the types of repairs for which Capitol is responsible, are evidence of the parties' mutual intention that Capitol was only to be responsible for operating costs. The enumerated lists of included repair and maintenance expenses do not include the structural/capital work and building system replacements for which Capitol is claiming reimbursement.

[90] In this case, since the Lease does not mention capital expenses or list the types of expenses that would typically be regarded as capital expenses, I agree that one can infer that their exclusion was the express intention of the parties, and are therefore not the type of repair costs to be borne by Capitol.

[91] The type of enumerated repair costs in sections 2(c) and 8 are clearly routine operating expenses or minor, day to day repairs, not major structural repairs, wholesale replacements or rehabilitation of the foundational elements of the building, or regrading and drainage of the entire site. Capitol's repair and maintenance responsibility under the terms of the Lease when read in context are confined to the types of "routine operating expenses" akin or analogous to those specifically enumerated in these provisions of the Lease.

[92] Sections 2(c) and 8, or any other provisions, do not make mention of the types of building system, structural, capital or foundational repairs and replacements claimed and contemplated by Capitol. Rather than list repairs to, and replacements of, things like the roof, masonry, walls, concrete floor slab, Site grading and central mechanical systems as being part of Capitol's obligations, these provisions simply state that Capitol is only responsible for operating maintenance expenses such as security, landscaping, parking, fencing and burnt out light bulbs.

[93] If Capitol were responsible for replacing the entire lighting system (including the trusses, wiring system, ballasts and bulbs), section 8 would not have explicitly limited Capitol's maintenance obligations to "burnt out light bulbs". Section 8's enumerated maintenance expenses for which Capitol is responsible, demonstrate Capitol's limited responsibility in this respect. Why would Capitol and RS Harris specifically allocate the replacement of "light bulbs" to Capitol if they intended Capitol to be responsible for absolutely everything at the Building, including the entire lighting system, roofs, and floor slab.

[94] In my opinion, in drafting the Lease, RS Harris and Capitol mutually intended for Capitol to only be responsible for repairs of a similar nature, category or description to those enumerated in sections 2(c) and 8. This intent is completely consistent with the Recital's statement that Capitol is responsible for repairs and maintenance that fall within the category of "operating expenses".

[95] Section 16 specifies that the Leased Premises will be kept clean and tidy, but will only be returned in the same condition at the end of the term as the premises were at

the beginning of the term of the Lease with "reasonable wear and tear excepted". This section makes it clear that, at the end of the Lease term, Capitol is only responsible for returning the Leased Premises in the same condition it was in at the start of the Lease, subject to reasonable wear and tear.

[96] In my opinion, the evidence at trial demonstrates that the problems Capitol is encountering at the Leased Premises are substantially the result of building components and structures being beyond repair because they have reached the end or even beyond their useful life and are the result of reasonable wear and tear over the course of their lifetime, specifically excepted from Capitol's responsibilities under this provision of the Lease. To require Capitol to replace the entire roofing system, the concrete slab floor, and the central mechanical and electrical systems which service areas beyond the Leased Premises is inconsistent with the plain wording of section 16.

[97] Section 16 only obligates Capitol to maintain the Leased Premises in a similar condition to that at the start of the Lease. If the Lease were interpreted to require Capitol to replace these structural, foundational or essential building systems, it would be required to return the Leased Premises to White Owl in a much-improved condition.

[98] White Owl's position that Capitol must carry out these major structural repairs and replacements is fundamentally at odds with the express terms of the Lease. The nature of the work required at this time, given the age and useful life of the building elements, goes beyond an ordinary understanding of "maintenance". An interpretation that harmonizes the terms of the Lease, is that Capitol is only responsible for operational

repairs and maintenance, whereas the landlord is responsible for work once it becomes capital or structural in nature.

[99] The forgoing interpretation of the provisions of the Lease are consistent with the opening line of the Recital to the Lease, which states: "Whereas the Lessor is desirous to lease the Demised Premises under a Triple Net Lease wherein the Lessee is responsible for all operating expenses of the Demised Premises, including repair, maintenance and utilities". Although the phrase "Triple Net Lease" is capitalized in the Lease, there is no separate definition of this phrase aside from its definition within the rest of the sentence of the Recital.

[100] Reading the phrase "Triple Net Lease" in harmony with the rest of the Lease, and even the Recital itself, leads to the very reasonable conclusion that the parties intended to divide liability for repairs and replacements depending on their nature, with the landlord taking responsibility for the types of repairs that go to the base building components, building systems and structural or foundational elements of the building. The Recital must be read in its entirety, as opposed to reading and interpreting the phrase "Triple Net Lease" in isolation.

[101] The entire sentence of the Recital reads: "And WHEREAS the Lessor is desirous to lease the Demised Premises under a Triple Net Lease wherein the Lessee is responsible for all operating expenses of the Demised Premises, including repair, maintenance and utilities". The remainder of the sentence immediately after the phrase "Triple Net Lease" provides an immediate elaboration on the parties' understanding of what "triple net" meant; namely, that the tenant would be responsible for all "operating expenses",

including repair, maintenance and utilities. This implicitly excludes structural and capital costs, which are plainly understood to be distinct from operating costs, and which distinguishes everyday building operations from responsibilities in respect of capital or structural matters.

[102] The Recital and the other terms of the Lease demonstrate that "triple net" in the context of the Lease means all operating costs and therefore sets out the specific types of operating repair and maintenance costs for which Capitol is liable. If Capitol were responsible for both operating and capital or structural costs at the Leased Premises as argued by the defendant, there would be absolutely no need to specifically enumerate the types of operating expenses for which Capitol would have to pay. The phrase "triple net lease" reflects a general intention that the landlord bear no costs relating to the day-to-day operation of the leased premises, which is clearly distinct from capital costs and costs relating to ownership. Hence, routine repair and maintenance, utilities, and insurance fall to the tenant. However, major repairs, upgrades or wholesale replacements of structural elements and base building systems remain the responsibility of the landlord.

[103] White Owl argues that the landlord is essentially responsible for no costs, with respect to the Leased Premises. However, as the parties' own definition of "triple net" in the Recital illustrates, the Lease allocates responsibility for operating maintenance costs to the tenant and implicitly if not expressly assigns responsibility for structural or capital repairs to the landlord.

[104] In my opinion, the meaning to be given to the phrase "triple net lease" in this Lease must be given the meaning that the original contracting parties intended as

primarily gleaned from the terms of the contract. In this lease, RS Harris and Capitol essentially defined "Triple Net Lease" as meaning that the landlord would be free of all "operating expenses" of the Leased Premises. Whether "triple net lease" has different understandings in other leases is irrelevant to the proper construction of the Lease.

[105] Furthermore, in my opinion, sections 12 and 15 affirm the parties' mutual intention that Capitol would be responsible for optional tenant alterations, remodelling, decorating, additions or improvements that it wished to make to the Leased Premises for the purposes of its operations. Optional tenant improvements or alterations to make the Leased Premises more suitable or optimal for its operations are distinct from the foundation, structure and integrity of the building.

[106] I agree with the plaintiff that reading section 12 in its entirety and in harmony with the rest of the terms of the Lease, confirms that Capitol was accepting the Leased Premises "as is" with respect to "alterations, remodeling and decorations", agreeing that the landlord would not be responsible for any tenant improvements that it sought to make at the Leased Premises to better suit its business.

[107] Section 20 and 22 of the Lease spell out the landlord's responsibility to repair and restore the building in the event of its "partial destruction". White Owl's interpretation that it is not responsible for any necessary replacement and restoration work at the Capitol Building under the Lease is not supported by these provisions.

[108] In my opinion, Sections 20 and 22 of the Lease squarely place the obligation on the defendant to repair, replace or restore any damage to the Capitol Building in the event of "partial destruction". If there is an event of "partial destruction" of the Leased

Premises by either fire, "the elements, or other cause" or casualty, then White Owl, as landlord, covenants to repair and restore the Leased Premises, at its own cost, to bring it to substantially the same condition as before the partial destruction occurred.

[109] It would be entirely inconsistent to make Capitol, as tenant, responsible for all structural, capital and/or building system repairs, restorations and replacements required to prevent the owner's building from collapsing in on itself and becoming "partially destroyed". White Owl's position that Capitol must conduct all necessary restorations at the building is inconsistent with its obligations in the event of partial destruction as it would render sections 20 and 22 superfluous.

[110] Finally, section 10(a) of the Lease states: "In accordance with section 18(b), the Lessor shall be responsible to provide power, water, natural gas, sewer, phone and data ("Utilities") to the Lessee's main distribution point for each service within the Leased Premises".

[111] In my opinion, the evidence clearly establishes that the main distribution system is comprised of the transformers and other electrical and mechanical equipment in the grey cabinets situated inside the Capitol Building. These transformers distribute utilities not just to the Capitol Building, but also to other buildings on the Site not leased by the plaintiff. Thus, the transformers therein that require replacement squarely fall within White Owl's scope of responsibility in accordance with the plain wording of section 10(a).

[112] Similarly, the sewer system servicing the Site and the Leased Premises also falls within White Owl's responsibility under this provision.

[113] I wish to address a number of concerns raised by the defendant White Owl in this context, including the testimony of Ganczar, and whether an adverse inference should be drawn against the plaintiff for not calling London as a witness and the admissibility of expert evidence in respect of industry standards.

[114] In respect of the first two concerns, White Owl states that Ganczar's evidence was in several instances inconsistent with the evidence of London who was produced on behalf of Capitol at discovery. White Owl states that these inconsistencies should be considered as seriously affecting the weight, reliability, and overall credibility of Ganczar's evidence. Furthermore, White Owl states that because Capitol also did not call London as a witness to explain any of these inconsistencies, an adverse inference should be drawn against Capitol for its failure to call London as a witness.

[115] It is my opinion that even if there are any significant inconsistencies between the evidence given by London when he was produced on behalf of Capitol to be examined for discovery, those inconsistencies in my opinion are not relevant or are otherwise unrelated to the interpretation of the Lease and the responsibilities that flow from the Lease. In this case the Lease essentially speaks for itself. To the extent that London and Ganczar through their evidence were able to bring to light the factual context related to the discussions leading up to the Lease being executed by Harris and Ganczar, or in respect of the discussions or the conduct of the parties, including the representatives of White Owl, after the Lease was executed, is neither particularly helpful or substantially relevant to the interpretation of the Lease.

[116] In summary, a plain reading all of the relevant terms of the Lease in harmony supports Capitol's interpretation that the Lease obligates the defendant White Owl to perform the structural, capital and building system repair and replacement at the Leased Premises. I fail to see how any purported inconsistencies between the evidence of Ganczar and London or even between the representatives of White Owl on the one hand and Ganczar and London on the other, have any substantive bearing on the interpretation of the Lease.

[117] For example, London's legal opinion in respect of the interpretation of the Lease or a specific provision in the Lease that he was called upon to give at the examination for discovery is no more relevant or admissible in this trial than the opinion of the defendant's lawyers who provided a legal opinion as to whether White Owl is responsible for the structural, capital or building system repair at the Leased Premises pursuant to the Lease.

[118] In respect of drawing an adverse interest against the plaintiff for failing to call London as a witness, I am prepared to deal with this concern on the very prudent and practical basis articulated by DeGraves J. in ***Vita Credit Union Ltd. v. South East Livestock Ltd***., 2000 MBQB 49, 146 Man.R. (2d) 40 (QL). In that case, DeGraves J. dealt with the situation where a key witness who had knowledge relating to the transactions being scrutinized by the court was not called by either party even though he was a competent and compellable witness. DeGraves J. held as follows when asked to make an adverse finding against one of the parties for its failure to call the witness:

> **34** No doubt, experienced and competent counsel (and the Court certainly has had the benefit of such counsel in this case) having a hard choice to make considered the strategy of their case and decided against calling Reimer. The Court should be loath to interfere with or to make any adverse inferences arising from that decision. [Sopinka, Lederman, Bryant, The Law of Evidence in Canada, 2nd

> ed. (Toronto: Butterworths, 1999) s. 6.321 (p. 297), Lambert v. Guinn (1994), 1994, 1994 CanLII 978 (ON CA), 110 D.L.R. (4th) 284 (Ont. C.A.) at 287 and 288 and Ritchie v. Thompson (1995), 1994 CanLII 17338 (NB CA), 35 C.P.C. (3d) 333 (N.B.C.A., Ryan J.A. for the Court)]
>
> **35** Accordingly in this case it would not be appropriate to impose any presumptions. The Court must make the necessary findings on the evidence as presented and the reasonable inferences to be derived from that evidence.

[119] Similarly, I have the benefit of very able counsel in this case, and based on the known circumstances here, it would not be appropriate to rely on this presumption. As in the case of ***Vita Credit Union Ltd.***, the court will make the necessary findings in the context of this issue and the other issues raised in this trial on the evidence as presented and the reasonable inferences to be derived from that evidence.

[120] In respect of the admissibility of expert evidence to assist the court in the interpretation of the Lease, I find that it is neither necessary or prudent to require the assistance of an expert to determine the meaning of the terms of the contract before me. I agree with the submission of the defendant that according to the decision of ***R. v. Mohan***, [1994] 2 S.C.R. 9 (S.C.C.), for the admission of expert evidence, under the threshold stage of analysis, the proponent of the evidence must show that:

(a) the expert's evidence is relevant; and

(b) the expert's evidence is necessary to assist the trier of fact (and therefore more even than just helpful).

[121] I find that expert evidence, including legal opinions contained in the trial evidence from either party and presented in respect of the interpretation of the Lease is neither relevant or necessary. I agree with counsel for the defendant when he states that under the case law on expert evidence, "as an expert's opinion approaches the ultimate issue

in dispute in a case (here, the interpretation of a lease) the stricter the court should be in exercising its gatekeeper function to exclude such evidence" (para. 79 of the defendant's brief). It is my opinion that in this case, expert evidence purporting to interpret the Lease itself should be given no weight and that is the approach that I have taken.

ii. What should be ordered in respect of calculating utility consumption?

[122] Capitol does not dispute that it must pay for utilities that it consumes at the Leased Premises, but states that it is not obligated to pay for utilities consumed at other buildings on the Site that it does not lease. It is Capitol's position that this is why RH Harris covenanted in the Lease to provide separate metering for the buildings on Site receiving commonly serviced utilities through the Capitol Building under section 18(b) of the Lease:

> THE LESSOR COVENANTS WITH THE LESSEE AS FOLLOWS:
>
> . . .
>
> 18. At no cost to the Lessee during the term of the Lease and any renewal thereof:
>
> . . .
>
> b. To install separate metering for utilities which service the Demised Premises;

[123] Capitol states that until separate gas and electricity meters (or entirely independent utility lines/connections are installed) at the River City Building, there is no way to delineate what portion of the utilities metered on the singular, shared line is on account of River City or Capitol's consumption. Sub-metering is required in order to accurately bill Capitol (and River City) for its independent and actual consumption in a given month.

[124] It is acknowledged that White Owl failed to install and actually effectively utilize separate meters or a separate utility connection as between the Capitol and White Owl building until June 2020. The evidence indicates that until that date, although after separate metering installations were in place, those meters were not functioning properly until the end of May. Accordingly, June 2020 was the first full month in which White Owl was able to measure the separate electricity usage by a third-party tenant, River City, and thereby accurately allocate and invoice the joint monthly electricity bill as between Capitol and River City based on their respective, metered consumption.

[125] Capitol states that it and RS Harris agreed to the Utility Credit pending RS Harris's installation of separate meters between the Capitol and River City Buildings and that there is no evidence that the utility credit was anything other than $8,000 per month plus GST.

[126] RS Harris's own accounting documents, that the actual applied utility credit was $8,400 per month throughout RS Harris' tenure as owner, notwithstanding RS Harris's attempt to invoice Capitol with only a $5,000 credit in the final few months of its ownership. Therefore, Capitol argues that the utility credit was always agreed to be $8,400 per month and that it was to be maintained until effective separate metering was utilized to bill Capitol for its actual, independent usage.

[127] White Owl acknowledges that as landlord under the Lease it was responsible to provide separate metering. However, this had not been set up by RS Harris when it entered the Lease with Capitol and so Capitol would have known that it was still required to be done when White Owl took over as its new landlord. White Owl acknowledges that

when it took over the Lease, natural gas being used at both 1500 Dublin Avenue and 1460 Dublin Avenue was being measured from a single meter at 1500 Dublin Avenue.

[128] Following some discussion between the parties and specifically following the Markham meeting, White Owl agreed to apply a $8,000 a month credit for the past 12 months' utilities and which resulted in the payment of $114,740.53 by Capitol in March 2019.

[129] On May 17, 2019, McLeod further e-mailed London on several outstanding issues from the Markham Meeting including utilities where she advised:

> As you know, we have undertaken to get the utilities separately metered. This is well underway, but taking longer than anticipated for reasons out of our control. We'd adjusted at $8000/mo, based on your suggestion that you'd had an informal agreement to that effect with the prior owners. However, there is nothing among the documentation received when we purchased the property that supports that, and that number doesn't seem to make a lot of sense now that the summer is here. As discussed, we will need to reach mutually agreeable allocation of costs until separate metering is completed. You'll see this has been addressed in the forbearance agreement, and, again, we'll discuss further in the near future.

[130] Capitol's response came in London's proposal letter of August 8, 2019:

> We are up to date based on the agreement to credit $8,000 per month. White Owl unilaterally adjusted this amount to $1,000 per month. The agreement with Mr. Harris was based on $96,000 per year, rendered at $8,000 per month. The obligation to put meters into the property is in the lease and has not yet been completed. The intention of that was to permit the parties to correct any overage/underage once meters were installed. We understood this work was in progress. At this point we recommend leaving the $8,000 per month adjustment as is until such time as the meters are in at which point monthly adjustments can be made and a measured mile can be undertaken to retroactively adjust the previous arrangement.

[131] To this, McLeod responded in her September 15, 2019, e-mail:

> White Owl had agreed to a reasonable apportionment of the utilities (sic) bills in the meantime to provide for any use attributable to our unoccupied building serviced by the same meters. With the vacant building being unheated in the

> summer months, and using no electricity, it stands to reason that our utility use this time of year would be normal. Applying a common-sense approach to the apportionment, we recently reduced the monthly utility credit from $8,000 to $1,000 on that basis. You disagree. … Albeit with some hesitation, with the metering exercise nearing completion, White Owl accepts your proposal to leave the apportionment at $8,000/month on the understanding that we will undertake a retroactive accounting once a baseline can be established.

[132] White Owl disputes that there was an agreement in which RS Harris agreed to an annual utilities credit of $96,000. This is based on Ganczar's evidence that the expectation with RS Harris was that separate metering would happen in three to four months. According to White Owl, Ganczar's explanation that it was calculated over a 12-month period does not make sense and sounds more like a statement made after the fact to try to counter White Owl's adjustment of lowering the credit during the summer months of 2019 to account for the reduced usage of gas and electricity at 1460 Dublin Avenue.

[133] White Owl argues that what does seem to be agreed to by both parties, however, is that they would use an informal temporary ad hoc monthly adjustment until separate metering was put in place and then a retroactive reconciliation or "measured mile" would occur based on data collected from the separate metering. It notes that while such a reconciliation will have its challenges, it is a process that was agreed upon and one that the parties can endeavour to complete.

[134] It would also seem that Capitol has admitted in its pleadings that any agreement on utilities included a reconciliation of past usage. Capitol's amended statement of claim and reply to amended statement of defence and counterclaim states the plaintiff is seeking a reconciliation of the amount it paid to White Owl for utilities (based on

estimated usage) with the value of its actual utilities usage (see para. 16 of the amended claim and para. 8 of the reply).

[135] White Owl accepts the various invoice amounts for utilities and the credit amounts included as summarized in the spreadsheet prepared by Capitol at Exhibit 2, Capitol's book of documents, Vol. 2, Tab 52. White Owl however does not agree with Capitol's position that a credit of $71,450.00 should be applied as a set-off to White Owl's claim for unpaid rent, utilities and property taxes given the agreement and need to reconcile these past estimates. White Owl therefore submits that there should not be any set-off of $71,450.00 from its claim and that this court should order a reconciliation of past usage which could and should be done by way of a reference to a Master.

[136] In reviewing the evidence, including the pleadings of the plaintiff in this matter, I am satisfied on a balance of probabilities that there should not be any set-off of $71,450 from White Owl's claim and as stated by the defendant, this court should order a reconciliation of past usage which should be done by way of a reference to a Master if the parties cannot otherwise agree on an appropriate credit on account of utilities.

iii. What is the valuation and liability for property taxes payable under the Lease?

[137] Section 2(b) of the Lease does state that Capitol is to pay "additional rent" equal to "its proportionate share of the property Realty taxes during the currency of the Lease". Capitol now concedes that it owes its proportionate share of property taxes under the Lease.

[138] Capitol also does not take issue with White Owl's computation of its proportionate share of taxes, which Mr. Fiore testified is calculated by dividing Capitol's surveyed leased area (9.89 acres) into the total Site area (26.70 acres) to arrive at 37.04% of the total Site.

[139] According to Capitol, the only remaining issues with respect to property taxes are:

(a) whether White Owl should bear a greater portion of the property taxes because its own actions led to a much higher tax assessment than was merited; and

(b) whether Capitol's payment of $98,437.50 in property taxes to Harris under the Lease ought to be credited to its account with White Owl.

[140] During the 15 months that RS Harris was owner and landlord of the Leased Premises, Capitol made payments to RS Harris for 75% of property taxes, billed on a monthly basis. However, RS Harris was never actually assessed property taxes during its ownership of the Site and the evidence suggests that RS Harris was never assessed or paid property taxes during his ownership. Accordingly, Capitol states that RS Harris's invoicing and acceptance of payment from Capitol on account of property taxes represents a pre-payment of taxes under the Lease that ought to be applied to Capitol's benefit as against White Owl, as a successor landlord. The total amount paid by Capitol to RS Harris on account of property taxes is $98,437.50, and Capitol seeks this amount be credited against its property tax arrears owing to White Owl.

[141] Capitol argues that although its structural and building system replacement cost claim was limited to the timeframe after White Owl took ownership of the Site, Capitol never agreed to any limit or concession on account of property taxes.

[142] Second, immediately after White Owl acquired the Site, the City reassessed the Site for property taxes. Capitol submits that the property taxes assessed were, and remain, unreasonably high because White Owl paid over three times what Harris paid for the Site just one year prior to their acquisition and 2.6 times more than the assessed value at the time.

[143] Moreover, Capitol states the evidence demonstrates that White Owl failed to appeal the property tax assessment and that White Owl's own actions and willingness to overpay for the Site resulted in an unreasonably high property tax assessment, which is inequitable to pass off in its entirety to tenants of the Site.

[144] The overpayment that Capitol states occurred is calculated as follows:

(a) Exhibit 2, Capitol's book of documents, Vol. 2, Tab 18 identifies an assessed value at September 12, 2017 of $4,900,000;

(b) Exhibit 4: White Owl's book of documents, Vol. 2, Tab 66 identifies that White Owl paid $12,750,000 for the Site as of December 1, 2017;

(c) Overpayment = $12,750,000/$4,900,000 = 2.6

[145] Capitol argues that if the value paid for the Site is 2.6 times higher than market value, the assessed taxes will also be 2.6 times higher. Accordingly, Capitol submits that the total taxes properly chargeable by White Owl to its tenants of the Site are overstated by 2.6 times.

[146] Capitol argues section 2(b) essentially contains an agreement by Capitol and RS Harris to agree on a revision to Capitol's proportionate share of property taxes upon reassessment by the City. Alternatively, the language of section 2(b) requires the parties to revise Capitol's appropriate share of property taxes upon the City's reassessment of tax, which justifies the court examining the reassessment and determining what revision is appropriate. At the time the Lease was executed, no property taxes were being assessed against the Site.

[147] If there was to be a revision or reassessment of property taxes levied against the Site, Capitol's share of those taxes was "subject to revision". Thus, when White Owl took ownership of the Site, after paying 2.6 times its market value and causing the City to reassess property taxes against it accordingly, Capitol's share of those reassessed taxes ought to have been "subject to revision".

[148] Capitol submits that the appropriate and equitable "revision" in these circumstances is for it to pay its proportionate share of the total assessment divided by 2.6, to reflect the fact that a major reason for the tax assessment was White Owl's lack of due diligence and overpayment for the Site. This is the revision that ought to have been made by White Owl following its reassessment of property taxes in 2018.

[149] In conclusion, Capitol argues the total revised amount of Capitol's proportionate share of property taxes from 2018-2021 ought to have been $120,988.12, which is $193,580.98 less than what White Owl has invoiced it for in respect of its share of property taxes. Thus, Capitol submits that White Owl's arrears claim ought to be reduced by $193,580.98 (or this amount be credited against its property tax arrears) as a result

of the revised calculation of Capitol's proportionate share of taxes following the City's reassessment of taxes after White Owl acquired the Site.

[150] White Owl argues that Capitol maintained the position that it was not responsible for payment of property taxes under the Lease up to and until its closing submissions. Its position was based on Ganczar's understanding that the words in section 2(b) of the Lease "… pay as additional rent its proportionate share of the Property Realty taxes during the currency of this Lease", meant it was included in the rent and that this was something negotiated and understood by Harris as part of the price per square foot.

[151] Further, White Owl states, Capitol has tried to base its argument against paying property taxes on its history of having never paid property taxes to RS Harris and that Capitol's failure to pay property taxes establishes further breaches of the terms of the Lease.

[152] White Owl points out that while Capitol initially questioned whether White Owl was appealing the assessments in the spring of 2019, after receiving explanations from White Owl as to why it was not doing so, Capitol has never raised this as a concern. It also did not lead any evidence at trial to suggest an appeal would likely have been successful or what a reasonable reduction would be.

[153] White Owl states in their argument, that Capitol's argument that the property tax bills are inflated by 2.6 times is arbitrary and without any meaningful basis in evidence. The assessed value of the property for 2018 was $7,728,000. It is noted that the previous assessment was for $6,985,100 (a difference of $742,900). Accordingly, there was not a dramatic increase in the assessed value over this period and it was reasonable for White

Owl to exercise its best judgment that it was unlikely the property tax assessment would be reduced with an appeal.

[154] White Owl accepts that Capitol paid $98,437.50 to RS Harris for property taxes prior to it taking ownership of the property. However, it is White Owl's position that Capitol should not be afforded a set-off for such amounts on the following basis:

(a) First, as is clear from the amended statement of claim and the discussions at trial, Capitol is limiting its claim for damages from April 2018 forward. All payments to RS Harris were made prior to this date. As well, the claim itself does not include any reference to a claim of overpayment or pre-payment of property taxes. Capitol should be limited to what it has claimed in its pleadings.

(b) Second, there is no limitation on the City from assessing taxes in the years prior to 2018. As such, those payments, being intended for taxes in the years 2016 and 2017 may still occur and should not be used to set-off or discount the property tax claims for payment in the years 2018 forward. The fact RS Harris has not yet been assessed for taxes is immaterial to the matters at issue in this case.

(c) Third, the payments were made to RS Harris and not White Owl and because they were made under a mistake of fact as between Capitol and RS Harris, any claim for the return of such monies should be made against RS Harris. White Owl was not the party involved in any such payment made under a mistake of fact.

[155] In respect of White Owl not appealing the property tax assessment, after hearing the evidence and reviewing the closing submissions of counsel, I agree with the defendant that Capitol did not raise this issue as a concern beyond an initial inquiry as to

whether White Owl was appealing the assessments in the spring of 2019 and did not include this as an issue in its pleadings. Nor does the evidence that Capitol did submit satisfy me that an appeal had a reasonable likelihood of being successful or what a reasonable reduction would be.

[156] I agree with the argument and position of the defendant as expressed in its brief. In my opinion, if there is a basis in law for a claim for the payment of $98,437.50 on account of property taxes mistakenly or otherwise paid to RS Harris, that claim should be made by Capitol against RS Harris. The claim against White Owl in this respect is dismissed.

[157] Furthermore, I agree with the arguments and position of the defendant as expressed in its brief, including that it was reasonable for White Owl to exercise its best judgment in the circumstances that it was unlikely the property tax assessment would be reduced with an appeal. Accordingly, I do not allow the set-off of $193,580.98 claimed by Capitol in this regard.

iv. Is Capitol entitled to relief against forfeiture?

[158] Counsel for the plaintiff pleads relief against forfeiture in the alternative. Counsel points out that this court's discretionary power to award relief against forfeiture is codified in s. 19(1) of ***The Landlord and Tenant Act***, C.C.S.M. c. L70, which provides:

> Where a lessor is proceeding by action or otherwise to enforce any right of re-entry or forfeiture, whether for non-payment of rent or for other cause, the lessee may, in the lessor's action, if any, or if there is no such action pending, then in an action or summary application to a judge of the Court of Queen's Bench brought by himself, apply to the court for relief; and the court may grant such relief, as having regard to the proceedings and conduct of the parties under section and to all the other circumstances, the court thinks fit, and on such terms as to payment of rent, costs, expenses, damages, compensation, penalty, or otherwise, including

> the granting of an injunction to restrain any like breach in the future as the court may deem just.

[159] Relief against forfeiture is also enshrined in s. 35 of ***The Court of Queen's Bench Act***, C.C.S.M. c. C280 which provides:

> The court may grant relief against penalties and forfeitures on such terms as to compensation or otherwise as are considered just.

[160] Both parties agree that the leading case on the test for awarding relief against forfeiture is found in the Supreme Court of Canada's decision in ***Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.***, [1994] 2 S.C.R. 490 (S.C.C.) (QL). At para. 32 the court set out the following test, which includes three factors that must be considered when determining whether to grant relief from forfeiture:

> 32. The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach: Shiloh Spinners Ltd. v. Harding, [1973] A.C. 691 (H.L.) ; Snell's Principles of Equity (29th ed., 1990), at pp. 541-42. 210.

[161] In ***6660894 Canada Ltd. v. 57110 Manitoba Ltd.***, 2020 MBQB 50, [2020] M.J. No. 76 (QL), at paras. 79-80 the Manitoba Court of Appeal described relief against forfeiture as follows:

> **79** … Relief from forfeiture is granted where the loss to one party is disproportionate to the breach or non-compliance.
>
> **80** Relief from forfeiture should be granted when forfeiture would result in a lessor receiving an amount out of proportion to the arrears.

[162] In my opinion, even if White Owl has demonstrated that there has been a breach of the Lease by Capitol, relief against forfeiture should be granted to Capitol after a

consideration of all three factors identified in the ***Saskatchewan Rivers Bungalow Ltd.*** case.

[163] The conduct of Capitol and in particular its president and shareholder is not such that would warrant a denial of relief against forfeiture. Capitol has demonstrated that it has acted reasonably in the circumstances throughout this dispute with White Owl. Given the terms of the Lease, Capitol's position that it bears no responsibility for the major structural repairs and building system replacements is eminently reasonable. Indeed, I have found in favour of Capitol in respect of the most significant aspect of this dispute, namely that White Owl and not Capitol bears the responsibility for the major structural repairs and building system replacements.

[164] While the Lease itself specifically precludes the set-off that Capitol purported to exercise, in the result, Capitol's position that White Owl bears the responsibility for the major structural repairs and building system replacements has resulted in a judgment in its favour in respect of Capitol's Structural Repair Cost Claim (as Identified in Expert Report of Isaac Gwendo, Exhibit 12, from April 1, 2018 onwards) in the amount of $1,086,925.48.

[165] In my opinion, the conduct of the defendant has contributed to the state of the relationship between the parties, and bears as great, if not more of, the responsibility for the prolongation of a dispute that ought to have been settled before finding its way to the court. The Markham Meeting in my opinion would have been a good basis upon which to construct a more constructive and less antagonistic relationship.

[166] In my opinion, there was a bona fide intention on the part of Capitol to make matters work on the basis of the discussions carried out at the Markham Meeting. Unfortunately, based on the evidence and the exhibits, there seemed to be a corresponding lack of interest on the part of White Owl to resolve the disputes arising out of the Lease with Capitol. Based on the evidence, it is my opinion there appears to me to be more interest on the part of White Owl in being rid of what it undoubtedly considers a very troubling leasehold interest given the length of the term of the Lease still remaining, than in trying to resolve the matters in dispute.

[167] It is my opinion that the purchase by White Owl of the Leased Premises and the Site was completed with untoward haste, as the purchase of the Site was considered necessary for the success of its attempt to close another larger business deal. The quick purchase of the Site, without any significant inspection of the Leased Premises or other due diligence normally associated with such a purchase, was a business decision made by White Owl which may have resulted in buyer's remorse after the other business venture failed to materialize. In my opinion, in the aftermath of the failure of the other business venture which necessitated the expedited purchase of the Site, the reality of the not insignificant problems associated with the newly acquired Site and the Leased Premises struck home. The saying "Act in haste; repent at leisure" comes to mind.

[168] In any event, neither the conduct of Capitol, the nature of breaches of the Lease which might have been occasioned by Capitol, and the disparity between the value of the property sought to be forfeited and the damage caused by any breach, warrant refusing

relief against forfeiture. Accordingly, I exercise my discretion in favour of granting the relief against forfeiture requested by Capitol.

Conclusion

[169] On basis of the foregoing reasons for decision I declare that:

(a) The Lease was not validly forfeited by White Owl on September 25, 2019 and remains in force to date; and

(b) The Lease obligates White Owl, and not Capitol, to perform any structural, capital and building system repair and replacement work at the Leased Premises.

[170] I order the payment by White Owl of Capitol's structural/capital repair cost claim from April 1, 2018 in the amount $1,086,925.48, plus interest at the applicable rate set by the court. This amount is reduced by the amount of $731,568.23, plus interest at the applicable rate set by the court in respect of arrears as Capitol admits these arrears are owing to White Owl pursuant to the Lease. The reduction of the award of $1,086,925.48 plus interest to Capitol by $731,568.23 plus interest is on account of arrears under the Lease and extinguishes any arrears owing by Capitol pursuant to the Lease.

[171] I further order that:

(a) in respect of Capitol's utility claim, for the reasons set out herein there be a reconciliation of past usage, which should be done by way of a reference to a Master if the parties cannot otherwise agree on an appropriate credit on account of utilities;

(b) Capitol's property tax claim in the amount of $98,437.50 is dismissed; and

(c) Capitol's claim for a reduction of its share of property tax in the amount of $193,580.98 is dismissed.

(d) White Owl shall pay Capitol costs in this action at the applicable tariff rate.

[172] I decline to order the injunction requested by the plaintiff.

_____ J.