

CANADA / JUDGMENT

SBA Canada ULC v. Telephone Navigata-Westel Communication Inc.

2021 BCSC 1907

COURT

Supreme Court of British Columbia

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2021 BCSC 1907 SBA Canada ULC v. Telephone Navigata-Westel Communication Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

SBA Canada ULC v. Telephone Navigata-Westel Communication Inc.,

2021 BCSC 1907

Date: 20210929

Docket: S1510588

Registry: Vancouver

Between:

SBA Canada ULC

Plaintiff

And:

Telephone Navigata-Westel Communication Inc., Navigata Communications Ltd., and Cascade Divide Enterprises Inc.

Defendants

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

January 27-29, 2021

Place and Date of Judgment:

Vancouver, B.C.

September 29, 2021

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I. Introduction

- [1] The plaintiff, SBA Canada ULC ("SBA") seeks judgment in this summary trial against the defendant Cascade Divide Enterprises Inc. ("Cascade") for the sum of \$9,620,643.80, plus contractual interest and costs.
- [2] In 2011, SBA purchased 28 antenna sites in British Columbia from Cascade. On various closing dates in 2011, SBA then entered into 33 licence agreements with Cascade and Navigata Communication Ltd. ("Navigata"). The licences provided for Cascade's occupancy and use of the antenna sites to operate its telecommunications network; in return, SBA received rent and utility fees ("Antenna Tower Agreements" or "Agreements"). The Antenna Tower Agreements are ten years in duration and each contain an assignment clause ("Assignment Clause"). The Assignment Clause provides that "[i]n no event will Tenant [Cascade] be relieved of any obligations or liabilities thereunder."
- [3] In 2012, Cascade sold substantially all of its telecommunications network and business undertakings in Canada, including its interests in the Antenna Tower Agreements, to the defendant Teliphone Navigata-Westel Communications Ltd., now known as 8640025 Canada Inc. ("864"). The following year 864 defaulted on its payments to SBA. SBA claims that Cascade remains liable for unpaid rent and utility fees under the Antenna Tower Agreements.
- [4] The central issues before the Court are:
- (a) Is the interpretation of the Assignment Clause in the Antenna Tower Agreements suitable for summary trial disposition? If so, does the Assignment Clause require Cascade to meet its contractual payment obligations after the assignments to 864?
 - (b) Are the defences of waiver, estoppel and novation suitable for summary trial disposition? If so, do they apply?
 - (c) Is the issue of whether SBA has a duty to mitigate suitable for summary disposition? If so, does SBA have a duty to mitigate?
 - (d) If Cascade is liable to SBA under the Assignment Clause, is the quantum owed to SBA under the Antenna Tower Agreements suitable for summary disposition?

- [5] SBA does not argue the assignments to 864 were invalid, only that they did not extinguish Cascade's obligations under the Antenna Tower Agreements. It further asserts that there are no valid defences to Cascade's contractual obligations and that the issues before the Court are appropriate for summary disposition.

II. Background facts

- [6] SBA is an owner and operator of wireless communications infrastructure across Canada and leases space on its towers to wireless service providers. Cascade is a provider of telecommunication services.
- [7] Cascade took possession of the antenna sites as tenants on each of the completion dates of the various Antenna Tower Agreements. Cascade pre-paid the first 48 months of its rent under these Agreements, which were for a term of ten years, in the amount of approximately \$5.3 million ("Rent Pre-payment").
- [8] Effective June 26, 2012 and November 2, 2012, four of these Agreements were amended to increase the monthly rent ("Amended Rent"). The Amended Rent was not included in the Rent Pre-Payment and was due monthly.
- [9] On or about April 8, 2011, SBA and Cascade entered maintenance agreements, some of which were later amended. Under these agreements, SBA engaged Cascade to perform maintenance services for the antenna sites. SBA acknowledges that monies due and owing to Cascade for the performance of these maintenance services ought to be set-off from the amounts due and owing to SBA under the Antenna Tower Agreements.
- [10] When Cascade sold its assets and business interests to 864 on November 20, 2012, it also sold and assigned the Antenna Tower Agreements to 864. Cascade also assigned, and 864 assumed, Cascade's obligations under the maintenance agreements. The balance of the Rent Pre-Payment retained by SBA in connection with the 31 Antenna Agreements was also assigned to 864. 864 took possession of the antenna sites and equipment located on those sites and commenced making payments to SBA under the Antenna Tower Agreements. It also began performing maintenance services on the sites which Cascade had previously been obliged to perform under the Agreements.
- [11] Cascade retained its interest in two of the 33 antenna sites, which were subsequently transferred to an affiliated company known as Rhicom Networks Inc., a small independent local networks provider located in Kamloops.
- [12] Around December 4, 2012, Cascade vacated the antenna sites and granted sole occupancy, use and possession to 864.

A. Assignment of Antenna Tower Agreements

- [13] SBA did not receive a request to consent to the assignment of the Antenna Tower Agreements prior to the sale of Cascade's business interests to 864, as contemplated by section 6 of those Agreements. Cascade requested SBA's consent to the assignment of the Antenna Tower Agreements to 864 in June 2013; SBA refused. Specifically, SBA did not consent to these assignments because Cascade's "Request to Consent" included language which purported to release Cascade from its obligations under the Antenna Tower Agreements, contrary to the express language of the Assignment Clause.
- [14] Following the assignments to 864, SBA accepted rent payments from 864. From December 2012 onward, 864 undertook the maintenance services and issued invoices to SBA from time to time for this work. During that time period until 864 defaulted on rent payments, SBA and 864 carried on their relationship without any involvement from Cascade. While there appears to have been some controversy regarding when 864 ceased to provide its maintenance services, 864 performed the maintenance services until at least July 2016.

B. Defaults of Antenna Tower Agreements

- [15] 864 failed to make payments, including Amended Rent and utility fees, under the Antenna Tower Agreements on November 1, 2013. Notably, the Rent Pre-Payment made by Cascade at the commencement of each of the Antenna Tower Agreements related to monthly rent but did not include Amended Rent and utility fees due under the Antenna Tower Agreements.
- [16] SBA issued demand letters to 864 on or about May 8, 2014, notifying 864 of their defaults and demanding 864 cure the defaults by paying the amounts due and owing under the Antenna Tower Agreements. SBA's lawyer subsequently sent another demand letter to 864 on May 21, 2014, explaining that SBA "may pursue any remedies available to it including the right to terminate the Agreements." This letter also stated that "SBA may accelerate and declare the entire unpaid rent for the balance of the existing terms to be immediately due and payable." The letter from SBA's legal counsel also indicated that they had been "asked by SBA to outline the remedies available to it and to take aggressive steps to protect its interests" and that whatever action SBA elected to take would "proceed without further notice." Finally, this letter specified that "SBA [would] still accept payment of arrears to reinstate the Agreements."
- [17] SBA's legal counsel also wrote a letter to Cascade on May 21, 2014, stating that:
- (a) 864 was in default of payments under the Antenna Tower Agreements (also enclosing SBA's May 8 and May 21, 2014 letters to 864);
 - (b) the consent sought on June 19, 2013 by Cascade had not been given by SBA; and

- (c) Cascade was "still liable for the payments required under the Agreements" and that if Cascade "[was] required to take action to collect the amounts owing under the Agreements, it [would] look to Cascade Divide for Payment."
- [18] Defaults in payment due under the Agreements continued in 2015. Demand letters were also sent on September 15, 2015 demanding that the amounts owing under the Antenna Tower Agreements be paid within 10 days. The defaults were not cured.

C. Notices of Civil Claim filed by SBA against 864 and Cascade

- [19] After demanding payment, SBA filed a Notice of Civil Claim against Cascade and 864 in July 2014. SBA claimed the outstanding arrears of rent, utility fees and other amounts due under the Antenna Tower Agreements for the period November 1, 2013 until July 2014 in the amount of "\$189,645.45 plus Interest, Costs and other amounts" owing under these Agreements.
- [20] On December 21, 2015, SBA filed another Notice of Civil Claim against 864 and Cascade, claiming the outstanding arrears, less unpaid maintenance fees, due under the Antenna Tower Agreements for the period August 1, 2014 to September 30, 2015, in the amount of \$703,156.99, plus interest, costs and other amounts owing under these agreements. This claim of monies owed to SBA was in addition to the 2014 arrears alleged.
- [21] Default judgment was entered in the 2014 action against Cascade by SBA on August 15, 2014 but was subsequently set aside by order of Justice Gropper on October 14, 2014. Judgment after summary trial was entered against 864 only in the 2014 action on May 25, 2016 for the amount of \$45,788.87. Judgment after summary trial was entered against 864 and Navigata in the instant case on May 25, 2016 for the amount of \$318,980.81. However, these summary judgments against 864 and Navigata were also set aside by the order of Master Baker on August 3, 2016.
- [22] Responses and a counterclaim were filed by 864 and Cascade disputing, among other things, the amounts alleged to be owing and also claiming set-off amounts for the maintenance services on the antenna towers provided by 864.
- [23] Thereafter, payments due under the Antenna Tower Agreements continued to accrue.

D. Termination Notices and 864's CCAA Proceedings

- [24] SBA sent a termination notice to Cascade on November 8, 2016, and another to 864 on November 23, 2016, terminating the Antenna Tower Agreements. SBA also reserved the right to proceed against 864 and Cascade for all arrears of rent, additional rent and other accrued loss, damage and costs, including legal costs, as well as all prospective losses or prospective damages suffered by SBA arising from the defaults including the loss of all revenue to be derived by SBA for the unexpired portion of the terms of the Antenna Tower Agreements. SBA did not take steps to retake possession of the antenna sites and continued to demand

payment.

- [25] On November 18, 2016 ("Filing Date"), 864 filed a Notice of Intention ("NOI") to make a proposal pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA]. On application by 864 and a related company, Telephone Data Centres Inc. ("Data Centres"), the NOI proceedings were continued under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [CCAA]; the order was granted and issued on November 25, 2016.
- [26] On November 30, 2016, an amended and restated initial order ("ARIO") was issued, appointing a monitor in the CCAA proceedings and establishing a stay of proceedings until a scheduled return-back date of December 21, 2016. The stay of proceedings was subsequently amended on numerous occasions and remained in effect on the date this application was filed.
- [27] Both Cascade and SBA actively participated in the CCAA proceedings as creditors and interested parties. On December 21, 2016, an application was brought by the secured creditors, including Cascade, to replace the monitor with another, for the purposes of implementing what became known as the "solicitation and sale process." An application to appoint a receiver over 864, Data Centres, and two related entities, was filed by the secured creditors on March 7, 2017 ("Receivership Application"). The Receivership Application was heard before Mr. Justice Bowden who disposed of the matter by, inter alia, amending the ARIO to grant the new monitor extraordinary powers akin to a receiver-manager with effective control over the assets, operations and undertakings of 864, Data Centres, and the two related entities.
- [28] The CCAA proceedings have involved dozens of lengthy appearances in this Court and the Court of Appeal. Many of these proceedings related to disputes regarding the solicitation and sale process of substantially all of 864's assets to a medium-size Canadian, independent telecommunications interest known as Distributel.
- [29] In November 2016, SBA applied under the CCAA proceedings to compel payment of 864's post-NOI arrears (e.g., rent, amended rent and utility fees) that had accrued to the date of the filing, and an order compelling the payment of all rents and charges on a going forward basis thereafter. Also, this Notice of Application sought an order compelling 864 to pay post-filing rent and specified that if 864 defaulted on the payment of this rent, SBA would terminate the Antenna Tower Agreements.
- [30] The application was opposed, principally by the monitor, who filed a response for itself and 864 on May 19, 2017. The Court declined to grant the order sought by SBA so that the sale between 864 and Distributel would not be compromised: see 8640025 Canada Inc. (Re), 2017 BCSC 1167 at para. 26.

E. Sale Process

- [31] The sale process was undertaken by the monitor in the CCAA proceeding and was approved by the Court. On September 15, 2017, the Court granted an order in the CCAA proceeding approving the execution of a revised asset purchase agreement ("Revised Distributel Agreement") between Distributel's subsidiary and 864.

F. Post-Filing Arrears

- [32] In addition, SBA asserts that neither 864 nor Cascade have made any payments for the amounts due and owing under the Antenna Tower Agreements, which have accrued since the Filing Date. SBA claims that, because 864 has not provided any maintenance services since the Filing Date, there are no maintenance fees to be set-off against the amounts due and owing to SBA after the Filing Date.
- [33] On or about July 10, 2018, and in accordance with the terms of the Antenna Tower Agreements, SBA issued a further demand letter ("2018 Demand") notifying Cascade of the ongoing defaults and demanding that it cure the defaults and pay the amounts due and owing under the Agreements.
- [34] SBA claims that 864 and Cascade are indebted to it in the total amount of \$4,446,919.67 for the total pre-filing arrears and the post-filing arrears up to and including December 31, 2017. In addition, SBA asserts that the amounts due and owing to SBA under the Antenna Tower Agreements have continued to accrue since that date.
- [35] Twenty-five new antenna tower agreements were executed on January 1, 2018 between Distributel (through its subsidiary 10276375 Canada Inc.) and SBA ("New Antenna Tower Agreements"). The provisions of the New Antenna Tower Agreements are similar to those contained in the original Antenna Tower Agreements, except the monthly rent and utility charges are less than what was agreed upon in the original Antenna Tower Agreements executed in 2011.
- [36] The CCAA proceedings remained ongoing and unresolved at the time of the hearing before me. Cascade asserts there has been no final resolution to the issue of distribution to the creditors arising from the sale proceeds payable under the Revised Distributel Agreement. The proceeds are payable in tranches, a significant portion of which are variable and dependent on the financial performance of the acquired business assets and operations over a period of three years from the closing dates.
- [37] Cascade underscores that SBA has submitted a proof of claim in the CCAA proceedings in the amount of \$2,760,000 for pre-NOI and post-NOI liabilities. The new monitor has accepted SBA's claim for that sum.

[38] Cascade submitted a proof of claim in the CCAA proceedings as a secured creditor in the amount of \$5,298,652. The new monitor has accepted Cascade's secured claim for the amount of \$4,000,000.

[39] Navigata and 864 are no longer parties to these proceedings.

III. Legal Analysis and discussion

[40] I have concluded that the interpretation of the Assignment Clauses in the Antenna Tower Agreements is a suitable question for summary trial disposition. Under the Assignment Clauses, Cascade must pay the outstanding arrears to SBA, notwithstanding the assignments to 864. The language of the Assignment Clause clearly provides that the tenant's obligations continue even after an assignment.

[41] I have also concluded that the defences of waiver, estoppel, novation, and failure to mitigate are suitable for summary trial disposition. There is sufficient evidence before this Court to properly adjudicate each of these issues. Furthermore, I have concluded that the legal tests for each of these defences have not been satisfied.

[42] However, I am unable to determine the amount owed to SBA as a result of the defaults in payments under the Antenna Tower Agreements. This issue is not appropriate for summary disposition because insufficient evidence has been tendered regarding, for example, substantiating the unpaid Amended Rent and utilities owed under the Antenna Tower Agreements or the amounts owing by SBA for maintenance services. Given the evidentiary matrix before me, I am unable to find the facts necessary to decide this issue.

[43] However, the quantum owed to SBA under the Agreements is an appropriate issue for a hearing before the Registrar. Accordingly, this question will be referred to the Registrar for determination and certification.

[44] I will address each of the issues and conclusion below in their respective order.

A. Is the interpretation of the Assignment Clause in the Antenna Site Agreements suitable for summary trial disposition?

If so, does the Assignment Clause require Cascade to continue to meet its contractual payment obligations, after the assignments to 864?

[45] Rule 9-7(15) of the Supreme Court Civil Rules provides that this Court may grant judgment in a summary trial application in favour of any party, either on an issue or generally, unless: a) the evidentiary record is insufficient for the court to find the facts necessary to decide the issues; or b) it would be unjust to decide the issues summarily: see also *D2 Contracting Ltd. v. The Bank of Nova Scotia*, 2015 BCSC 1634 at paras. 32-33. As noted earlier in these reasons, on the issue of the proper interpretation of the Assignment Clause, I am satisfied that there is indeed a sufficient evidentiary basis to decide this issue. I am also satisfied that it would not be unjust to decide this issue summarily, and that it would be in the interest of the

proper administration of justice to do so.

[46] In reaching this conclusion I have also considered the seminal decision of the Court of Appeal in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), where the Court identified a number of factors that inform the assessment of whether it would be unjust to decide the issues before it on a summary trial application. The Court reasons that the chambers judge is entitled to consider, among other things:

[215] . . . the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[47] In *Gichuru v. Pallai*, 2013 BCCA 60 the Court notes, at para. 31, that additional factors must also be considered, including "the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices": see also *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, *aff'd* 2006 BCCA 369.

[48] The Court in *Gichuru* underscores, at para. 32, that the both parties must come to a summary trial hearing prepared to prove their claim, or defence, because:

. . . judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner.

[49] The facts which inform the legal effect of the Assignment Clause in the Antenna Tower Agreements are not complex and are sufficient to decide this issue. There are no credibility issues that inform this question or that ought to be decided following cross-examination at trial or otherwise. The summary trial hearing process presents a sensible and efficient use of the parties' resources and those of the Court. Furthermore, the issue regarding the proper construction of the Assignment Clause is the central issue here; as a result, its determination will significantly simplify the resolution of the disputes in this case. In this light, and having considered the arguments of both parties, I find the application before me is suitable for summary disposition.

(a) Does the Assignment Clause of the Antenna Tower Agreements require Cascade to continue to meet their payment obligations after the assignments to 864?

[50] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47, the Court reasoned that "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction," underscoring that the "overriding concern" is to determine "the intent of the parties and the scope of their understanding." The Court further reasoned, also at para. 47, that the decision-maker ought to "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."

- [51] As regards the role of the contextual "surrounding circumstances", the Court in *Sattva* expressed the following caution:
- [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement . . . The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract . . . While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement . . . [Citations omitted.]
- [52] In addition, the parol evidence rule "precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing"; this "includes evidence of the subjective intentions of the parties": *Sattva* at para. 59.
- [53] I am also guided also by the court's reasons in *Group Eight Investments v. Taddei*, 2005 BCCA 489 at paras. 19-22. The Court of Appeal reasoned that "plain and ordinary meaning must be given to words in a contract unless to do so would result in an absurdity": at para. 20. The Court also provides more specific guidance regarding principles of contractual interpretation in the commercial context, citing the following passage in *Scanlon v. Castlepoint Development Corp.* (1992), 99 D.L.R. (4th) 153 (Ont. C.A.), where Robins J.A. reasons, at 179:

The agreement with which we are concerned is a negotiated commercial document which should be construed in accordance with sound commercial principles and good business sense. To the extent that it is possible to do so, it should be construed as a whole and effect should be given to all of its provisions. The provisions should be read, not as standing alone, but in light of the agreement as a whole and the other provisions thereof . . . [Citation omitted.]

- [54] The Court's reasons in *Gilchrist v. Western Star Truck Inc.*, 2000 BCCA 70 at paras. 17-18 (cited with approval in *Group Eight Investments* at para. 22), are consistent with this analytic approach. Saunders J.A. held that the "most significant tool" in objectively discerning the parties' intentions, at the time the contract is made, is the language of the agreement itself, such that the words of the contract "must be looked at in their ordinary and natural sense" and should not be "distorted beyond their actual meaning."
- [55] In light of this case law, I have considered the Antenna Tower Agreements within their commercial context, including the language of these Agreements as a whole. I have concluded that the clear contractual language of the Assignment Clause continues to be the best indication of the parties' intentions. The language of the Agreements, read in their

ordinary and natural sense, coupled with contextual considerations, support the conclusion that Cascade remains liable under these Agreements for default of rent and other payments owed under them, even after the Agreements were assigned to 864.

- [56] The Assignment Clause in the Antenna Tower Agreements is replicated in each of the Agreements at section 6 and states:

Tenant [Cascade] may not assign or transfer this Agreement without the prior written consent of the Owner [SBA], which consent will not be unreasonably withheld, delayed or conditioned. However, Tenant may assign without the Owner's prior written consent to any party controlling, controlled by or under common control with Tenant provided that the assuming party has comparable credit quality to that of Tenant. Tenant may not sublicense this Agreement. In no event will Tenant be relieved of any obligation or liability hereunder.

[Emphasis added.]

- [57] The language of the Assignment Clause is categorical and clear: Cascade will "in no event be relieved of any obligation or liability" in regard to the subject matters "hereunder". This language expressly deals not only with circumstances involving transfers or sublicences, but also with assignments such as those at issue in this case.
- [58] The Assignment Clause contains agreed upon language that reduces commercial risks for SBA. SBA as the owner of the antenna towers received the agreement of Cascade, as the tenant, to reduce SBA's associated commercial risks by only permitting assignments under certain conditions (i.e., prior consent or comparable credit worthiness) and also by barring any sublicences. Moreover, the clause concludes with the broadest stipulation regarding the allocation of commercial risk, providing that "in no event" will Cascade be relieved of any obligation or liability.
- [59] I also note that not only is the contractual language clear but Cascade is, and was at the time these Agreements were made, a sophisticated corporate party; the scope of its understanding is not of concern in this case.
- [60] SBA relies on the decision of the Court Of Appeal in *Transco Mills Ltd. v. Percan Enterprises* (1993), 100 D.L.R. (4th) 359 (B.C.C.A.), in advancing its case on the proper interpretation of the Assignment Clause. The reasoning in *Transco Mills* also supports my conclusion that Cascade remains liable following the assignment to 864.
- [61] In that case, the tenants assigned their rights under leases and the landlord consented to the assignment "on terms preserving the tenant's obligations to make all payments provided for in the leases." The assignee went into bankruptcy and did not pay the rent. The Court upheld the right of the landlord, notwithstanding its consent to the assignment of the leases, to look to the original tenant for the amounts due to the landlord for the balance of the terms of the lease. The Court's reasoning at 362-363 is instructive:

There is nothing, in my view, in the dealings between these parties which could be said to have created the assignee sole principal debtor, or, indeed, to have changed in any way the nature of the obligation of the tenants to pay rent under the leases. To find otherwise would, it seems to me, be to fly in the face of the contractual arrangements between these parties.

[Emphasis added.]

[62] Similarly, in the instant case, there is nothing in the dealings between the parties which would lead to the conclusion that: a) 864 became the sole and principal debtor following the assignment; or b) there was a change in the nature of Cascade's contractual obligations under the Antenna Tower Agreements following the assignments. Indeed, when Cascade sought the consent of SBA for the assignments approximately 6 months after the assignments were made, SBA expressly refused to grant its consent on the basis that Cascade was seeking at that time to be relieved of its liabilities under the Antenna Tower Agreements. The evidence of SBA is uncontroverted on this point. SBA's representative, Mr. Hachey, deposed that he rejected Cascade's request for consent to the assignments to 864 because the consents included releases of Cascade's obligations under the Agreements, contrary to the language of the Assignment Clauses.

[63] SBA also relies on the reasoning of the Supreme Court of Canada in *Crystalline Investments Ltd. v. DomGroup Ltd.*, 2004 SCC 3 at paras. 29-30, and the subsequent decision of this Court in *Coon v. Port Sidney Development Corp.*, 2007 BCSC 580 at paras. 9-11. These cases also support the conclusion that the contractual liabilities of the original tenant survive assignment to another tenant, subject of course to the language of the contract.

[64] In *Crystalline Investments*, Domgroup was the original tenant and assigned the leases to Coastal Foods Limited, a wholly owned subsidiary. The consent of the landlords was not required. Domgroup subsequently sold Coastal Foods which amalgamated to form Food Group Inc. Food Group later became insolvent and attempted to reorganize under the BIA. The question arose as to whether the terms of the reorganization by the insolvent assignee through its trustee, where it purported to repudiate the lease under s. 65.2 of the BIA, affected the obligations between the landlords and the original tenants. The Court, at para. 29, reasoned that subject to the terms of the lease and the agreement between the parties, the original tenant "remains liable should his assignee not pay rent." It concluded at para. 31:

From the time a lease is completed, the original tenant is bound by all the conditions, including the term. Despite the hardship that may later develop, the covenant is fully enforceable even if it has been assigned.

[65] In *Coon*, this Court applied *Crystalline Investments* to licence agreements and found, at para. 9, that, absent a contractual right, a licensee cannot transfer its obligations under an agreement even if it can transfer its rights:

A contractual license is assignable according to its terms. A licensee may only assign that which the contract allows. A party to a contract cannot transfer his or her liability without the other party's consent. Without such consent, the original contracting party is not discharged from its liability even though a third party may agree to be bound by the contractual obligations . . .

[Emphasis added. Citations omitted.]

[66] Notwithstanding these authorities, Cascade argues that it does not remain liable for its contractual obligations to SBA following the assignments to 864. It argues that sections 6, 15 and 18 of Antenna Tower Agreements suggest commercially reasonable contractual interpretations that provide flexibility in changes to controlling ownership structures, given the "extended term" of these Agreements and also "the nature of the business and the overall complexity of the interests and relationships necessary for the operation of a telecommunications network and business." This contextual approach, Cascade submits, would permit the assignment of the Agreements without Cascade's continued liability. I am not persuaded by Cascade's arguments in this regard.

[67] I have already addressed the language, and corresponding intent, of the parties subsumed within the Assignment Clause. I have also carefully considered sections 15 and 18 of the Agreements and I am not persuaded that these provisions support the conclusion that Cascade should be relieved of its obligations under the Agreements following the assignments to 864.

[68] Section 15 of the Antenna Tower Agreements deals with termination of the Agreement by the Tenant:

15. Termination by Tenant. Tenant may terminate this Agreement at any time by notice to Owner without further liability if (i) Owner fails to have proper possession of the Site or authority to enter into this Agreement; or (ii) Tenant does not obtain, after making diligent efforts, all permits or other approvals...required from any governmental authority or any easements required from any third party to operate the telecommunications systems facility, or if any such approval is canceled, expires, is withdrawn or terminated by such governmental authority or third party following Tenant's diligent efforts to maintain such approval.

[69] This provision does not alter the clear language and contractual intent found in the Assignment Clause. The conditions of termination contemplated under section 15 do not apply here. No evidence was tendered by Cascade to support the conclusion that section 15 applies, although it had the opportunity to do so. I find that section 15 does not modify or inform the language of the Assignment Clause such that Cascade is relieved of its contractual obligations under that Clause upon assignment.

[70] Cascade also relies on section 18 to advance its defence. That section provides:

18. Indemnity. Owner and Tenant each indemnifies the other against and holds the other harmless from any and all costs (including reasonable attorneys' fees and costs) and claims of liability or loss which arise out of the use and/or occupancy of the Site by the indemnifying party including, without limitation, any damages occurring outside of the Site in connection with Tenant's installation of Equipment. This indemnity does not apply to claims arising from the gross negligence or intentional misconduct of the indemnified party. Except for its own acts of gross negligence or intentional misconduct, Owner will have no liability for any loss or damage, due to personal injury or death, property damage, loss of revenues due to discontinuance of operations at the Site, libel or slander, or imperfect or unsatisfactory communications experienced by the Tenant for any reason whatsoever. Neither Party shall be liable for any indirect, special, incidental or consequential damages, whether related to a claim under this Section or otherwise.
- [71] Cascade relies particularly on the last sentence in this indemnity provision to support its submission that it is not "liable for any indirect, special, incidental or consequential damages" arising from the indemnity section "or otherwise." It argues that the penultimate sentence in section 18 above precludes SBA from claiming any damages against it under the Assignment Clauses, notwithstanding the language in that clause that expressly states the tenant is not relieved from liability should the Agreement be assigned.
- [72] I am unable to accept Cascade's proposed interpretation. It would effectively render the concluding words of the Assignment Clauses meaningless. This interpretation would not be consistent with the clear and specific language of the Assignment Clause. As reasoned by the Supreme Court of Canada in *National Trust Co. v. Mead* (1990), 71 D.L.R. (4th) 488 at 499 (and cited in *Group Eight Investments* at para. 20), in construing contracts, the court assumes the words in a contract are there for a purpose and ought to reject an interpretation that would render one of the contract's terms ineffective. Yet, that is the result Cascade urges in this case. That is, Cascade is seeking release from liability upon assignment, which would "fly in the face" of the express words of the Assignment Clause: see *Transco Mills* at 362-363.
- [73] I find it is not consistent with sound commercial principles, contractual certainty and good business sense to apply an interpretation of the Agreements that ignores the specific language of the Assignment Clause, rendering it meaningless following an assignment. Significantly, meaning and effect could be still given to the concluding sentence in section 18, in other circumstances where Cascade is seeking relief from liability from other types of claims: see *Scanlon* at para. 21.
- [74] I also find that the specific language of the Assignment Clause overrides the more general language of sections 15 and 18 of the Antenna Tower Agreements. This approach to contractual interpretation was affirmed by the Supreme Court of Canada in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 at 23-24:

It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole . . . Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective . . . In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term . . . A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms -- or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.

[Emphasis added. Citations omitted.]

[75] This principle was recently applied in our Court by Justice Adair in *Chung v. Quay Pacific Property Management Ltd.*, 2020 BCSC 714, where she cites the above-quoted passage to bolster her interpretation of a contract (at paras. 167-169).

(b) Did SBA unreasonably withhold its consent?

[76] Cascade claims that SBA unreasonably withheld its consent to the transfer of Cascade's obligations under the Antenna Tower Agreements to 864, in breach of the terms of the Assignment Clause.

[77] I agree with SBA that whether it withheld its consent to the assignment is of little consequence. First, the language of the Assignment Clause expressly provides that consent must be sought prior to the assignment, which Cascade did not do: see *American Eco Corp., Re*, [2001] O.J. No 873 at para. 9 (S.C.J.). Second, even if Cascade had sought SBA's prior written approval to the assignment, and SBA had consented to the assignment, Cascade would still be liable for its obligations under the Assignment Clause, by virtue of the last sentence in that clause, as discussed above.

[78] The authorities provide that even where a contract requires the prior written consent of the owner and that consent is in fact sought by the tenant before the assignment, that fact does not have the necessary effect of releasing the tenant of its obligation under the contract with the owner. The only way the tenant is released from its obligation to pay rent is if the owner consents, as provided for in the contract: see *Athan Holdings Ltd. v. Merchants Holdings Ltd.* (1982), [1983] 40 A.R. 199 at paras. 13-15 (Alta. Q.B.); *Transco Mills* at 362-363. Again, the uncontroverted evidence before me is that SBA declined to release Cascade from its contractual obligations after Cascade requested it do so, some months after Cascade executed the assignments with 864.

(c) Did the insolvency of 864 relieve Cascade of its contractual obligations to SBA under the Antenna Tower Agreements?

[79] The insolvency of 864 does not relieve Cascade of its obligations under its Agreements with SBA. SBA remains entitled to recover the outstanding amounts due to it under the Antenna Tower Agreements. As the Court found in *Crystalline Investments* at para. 8, absent a contractual release from the owner, the assignor tenant remains liable on the covenant to the owner to pay rent, notwithstanding the subsequent insolvency of the assignee. Accordingly, the insolvency of the assignee and related court orders do not undermine the owner's entitlement to continue to look to the original tenant, in this case Cascade, for the enforcement of the obligations under the Agreements: see also *Athan Holdings* at paras. 18-19.

B. Are the defences of waiver, estoppel and novation suitable for summary trial disposition? If so, do they apply?

[80] I find that these defences are suitable for summary judgment. These issues were raised by Cascade and there is a clear and sufficient factual foundation to assess these defences; furthermore, it would not be unjust to decide these issues summarily.

[81] I am unable to accept Cascade's assertion that viva voce evidence is necessary for it to make out its defence of waiver and estoppel more fully. I have carefully considered this argument but am unable to accept it. The material facts that inform these defences are clear and on the record. I also note that Cascade had the option of either cross-examining SBA's deponent or scheduling a discovery prior to this summary trial but chose not to do so: see *Gichuru* at para. 30.

(a) Estoppel

[82] To advance this defence, Cascade relies on the test for estoppel by convention set out in *Ryan v. Moore*, 2005 SCC 38 at para. 59:

59 After having reviewed the jurisprudence in the United Kingdom and Canada as well as academic comments on the subject, I am of the view that the following criteria form the basis of the doctrine of estoppel by convention:

- (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of silence (impliedly).
- (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
- (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

- [83] This test is not satisfied in the instant case. There is no mutually shared assumption that 864 had assumed all liabilities under the Antenna Tower Agreements. When notified of the assignments to 864, SBA declined to consent to the assignments and declined to sign Cascade's proposed Request to Consent, which purported to relieve Cascade of its liability under the Agreements.
- [84] Cascade argues that "manifestly indicative of the parties' mutually shared assumptions concerning the relationship between SBA and 864, the first formal written notice of default was sent only to 864 from SBA's in-house corporate counsel in a letter dated May 8, 2014 " However, SBA also sent a demand letter to Cascade on May 21, 2014 which stated, among other things, that Cascade "is still liable for the payments required under the Agreements" and that if SBA is required to take action to collect amounts owing under the Agreements it "will look" to Cascade for payment.
- [85] The evidence before me is clear. There is no shared assumption and no unfairness. The defence of estoppel by convention is not viable.
- (b) Waiver
- [86] Cascade relies on the decision in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 at 500, arguing that waiver occurs when one party, with full knowledge of its rights, either formally or informally, or through its conduct, demonstrates an unequivocal intention to abandon them.
- [87] Cascade argues that the facts supporting the defence of waiver in this case are:
- SBA, having knowledge of the assignments to 864, at no time asserted that the assignments constituted a default under the Antenna Agreements;
 - the original default letter was addressed and sent to 864 and demanded payment of 864;
 - SBA asserted and relied upon various rights and remedies conferred on it under the Antenna Tower Agreements as against 864; and
 - SBA applied for and obtained judgments by way of summary trial only as against 864 and Navigata in this proceeding and the 2014 action [although these judgments were subsequently set aside].
- [88] Cascade also asserts that with the benefit of viva voce evidence, facts are likely to emerge that will further support the availability of this waiver defence, and also the estoppel defence.
- [89] I am unable to find merit in these arguments. By accepting some payments from 864, and by not asserting Cascade was in default in not seeking SBA's consent prior to the assignments, SBA did not relinquish its right to rely on the express language of the Antenna Tower Agreements that provided that "in no event" would Cascade be relieved of its obligations under the Agreements. Although SBA did not provide its written consent to Cascade's

request to consent to the assignment, SBA did not dispute the validity of the assignments. Indeed, Cascade has suffered no loss, damage or expense as a result of the refusal of SBA to consent to the assignments. Whether prior consent was sought or not, Cascade's liabilities under the Antenna Tower Agreements continued. Cascade cannot use its own choice to not seek consent prior to its assignments as a way of avoiding its contractual liabilities. Cascade's liabilities under the Agreements are not predicated on the validity of the assignments to 864 or on SBA's choosing to accept payment and maintenance services from 864.

[90] Irrespective of whether the assignments were valid or not, Cascade remains liable under the Assignment Clause. Irrespective of whether SBA sought payment from Cascade or from 864, Cascade remains liable. Furthermore, SBA's demand letters, discussed earlier in these Reasons, make it clear that SBA was not waiving its rights under the Antenna Tower Agreements but continuing to hold Cascade accountable for rent and other obligations under the these Agreements for the balance of their terms. This defence must fail.

(c) Novation

[91] Cascade argues that SBA, through its conduct, words and acquiescence, must be taken to have accepted 864 as the party solely liable under the Antenna Tower Agreements and a new contract was forged to this effect. I have considered each of the submissions Cascade has made in support of its novation argument. I have no difficulty in concluding that there was no novation in this case.

[92] As Cascade asserts, a novation is a "trilateral agreement" by which an existing contract is extinguished and a new contract is brought into being in its place. *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 at 426-427 confirms the three-part test for determining whether a novation has occurred:

1. the new debtor must assume the complete liability;
2. the creditor must accept the new debtor as principal debtor and not merely as an agent or guarantor; and
3. the creditor must accept the new contract in full substitution for the old contract.

[93] It is clear on the facts before me that SBA did not accept the assignment as full substitution for the Antenna Tower Agreements. Moreover, there is no "tri-lateral agreement." Cascade proceeded without SBA's knowledge to assign the Agreements to 864 and there was no privity of contract between SBA and 864. In any event, SBA did not accept 864 as principal debtor; it expressly held Cascade to its obligations under the Antenna Tower Agreements. The defence of novation also fails.

C. Is the issue of whether SBA has a duty to mitigate suitable for summary disposition? If so, does it have a duty to mitigate and did it meet that duty?

- [94] Cascade argues in the alternative that, if it is liable to SBA, then any damages assessed in its favour ought to be reduced significantly because SBA failed to mitigate its losses, asserting that there is no evidence of any of the mitigation efforts undertaken by SBA. SBA submits that mitigation is not required when an owner seeks to recover rent from a tenant, which SBA says it has done persistently.
- [95] I find that this issue is suitable for summary judgment; there is a clear and sufficient factual foundation to assess this issue and it would not be unjust to decide this issue summarily. I would reiterate in this context, as the Court of Appeal stated in *Gichuru*, at paras. 30-32, that a defendant must come to a summary trial and be prepared to prove its defense; it may, of course, avail itself of examinations for discovery or cross-examination on affidavits, if and as needed, prior to the summary trial.
- [96] On the defense of mitigation, the burden of proof is on Cascade, who must prove that SBA has failed to make reasonable efforts to mitigate and, also, that mitigation was possible: see *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at para. 24.
- [97] Cascade submits that it should not be held liable, as SBA alleges, to pay all past, present and future unpaid rents to the end of the ten-year term of the Antenna Tower Agreements. Cascade argues that during this entire period of time, and particularly after 864 filed its NOI, it was "entirely at the mercy of SBA." Cascade underscores that SBA had the benefit of over \$5 million in pre-paid rent as security, and that it took no steps to terminate the Antenna Tower Agreements until it sent the November 2016 termination letters, after which it did not take possession of the antenna sites.
- [98] Further, Cascade argues that SBA failed to apply in a timely manner for the payment of rents within the CCAA proceedings. It argues the CCAA and the applicable case law are clear that no service provider or landlord is obliged to do business with an insolvent company under court supervised creditor protection if it is not paid for all post-filing accounts. In addition, Cascade argues that SBA at no time applied for a critical supplier charge to protect its accounts for post-NOI rents and charges. Finally, Cascade argues it has insufficient information upon which to evaluate the providence of the agreements entered into between SBA and Distributel.
- [99] In *Transco Mills*, at para. 38, our Court of Appeal reasoned that there is no basis on which a landlord of a commercial premises can be required to mitigate its loss when it maintains the lease in existence and claims for rent due. This proposition was recently affirmed in *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2018 BCSC 66 at paras. 348-349; see also *7Marli Limited v. Pet Valu Canada Inc.*, 2017 ONSC 1796, at paras. 26 and 27.
- [100] While SBA kept the Antenna Tower Agreements alive, prior to their termination in November 2016, SBA was under no duty to mitigate its losses. Cascade's ongoing monthly defaults in payment constituted a continuing repudiation of the Agreements. Although SBA refused to accept the repudiations and insisted that Cascade perform its obligations under the Agreements, it was entitled to do so. In *Highways Properties*, at p. 571, the Court

reasons that termination by the innocent party does not preclude a right to damages for prospective loss as well as accrued loss; see also *Dosanjh v. Liang*, 2015 BCCA 18 at paras. 42-43.

[101] Further, I find that after the Agreements were terminated in late 2016, SBA did not fail to mitigate its losses. It issued termination notices in November 2016, but that same month CCAA proceedings commenced and a stay order was issued in regard to 864's assets, which included 864 interests in the Antenna Tower Agreements. Once the CCAA proceeding commenced, SBA took steps to secure its financial interest. In March 2017, under the CCAA proceedings, SBA applied, albeit unsuccessfully, to compel payments by 864 on a going forward basis. On September 15, 2017, the Revised Distributel Agreement was approved by the Court under the CCAA proceedings. SBA did not sit idly by and then negotiated New Antenna Tower Agreements by January 1, 2018.

[102] As permitted by the Revised Distributel Agreement, the purchaser did not acquire the original Antenna Tower Agreements. SBA was therefore required to negotiate new agreements. I am satisfied that SBA negotiated the best terms it could with the purchaser when it executed the New Antenna Tower Agreements. It entered into the New Antenna Tower Agreements in January 2018, not long after it was able to do so, given the ongoing and complex CCAA proceedings, including the Court's approval of the Revised Distributel Agreement in mid- September 2017. Having done so, SBA reduced its losses by over \$2,000,000. The evidence before me simply does not support the conclusion that SBA failed to mitigate.

[103] Accordingly, Cascade's defence of failure to mitigate is dismissed.

IV. Quantum

[104] SBA is entitled to the outstanding payments Cascade is obliged to pay under the terms of the Antenna Tower Agreements. In *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, [1971] S.C.R. 562, the Court confirmed that the termination of a contract as a result of a defaulting tenant does not preclude the landlord's right to past and future losses of rent: at para. 574. Accordingly, SBA is entitled to the amounts due and owing under the Antenna Tower Agreements to the expiry of their ten-year terms. However, SBA readily acknowledges that it owes monies under the maintenance agreements and that these debts must be deducted from this calculation as a set-off. As well, SBA received additional revenues and reduced its losses by entering into the New Antenna Tower Agreements. Accordingly, the calculations of SBA's losses must also include a further reduction based on the additional monies SBA has received under the New Antenna Tower Agreements to the end of the ten-year terms.

- [105] I have reviewed the evidence SBA has presented in this application, relating to its losses. The evidence is far from sufficient in providing this Court with the evidence necessary to make a fair and informed assessment of the actual amount SBA is entitled to receive from Cascade. I agree with Cascade that this matter cannot be properly decided within the confines of this application.
- [106] In support of its almost \$10 million claim, SBA relies on a complex and very detailed excel spreadsheet prepared by SBA, attached to an affidavit. The authors of the spreadsheet are not identified and I have not been provided with the source documents relied upon to support the various data fields in the spreadsheet. I agree fully with Cascade that such evidence is insufficient to establish the debt alleged: see *After Six Inc. Black & Lee Formal Wear Rentals Ltd.*, 2004 BCCA 281 at para. 16.
- [107] Both parties, agreed that the calculation of amounts due to SBA could be the subject of a Registrar's hearing once the legal issues were determined by this Court. I am satisfied that is the most prudent and proper next step.

V. Disposition

- [108] For the reasons set out above, Cascade must pay SBA the amounts it is obliged to pay under the Antenna Tower Agreements to the end of their ten-year terms, less the amounts SBA owes under the maintenance agreements and less the monies SBA received under the New Antenna Tower Agreements. The quantification of these outstanding amounts is referred to a hearing before the Registrar. The Registrar is to certify the result. The parties are to schedule a pre-hearing conference before the Registrar within the next 45 days.

"MORELLATO J."

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