Cassels

Et tu Parfait? Nova Scotia Court Provides Guidance Regarding the Interpretation of “Use Clauses” in Commercial Leases

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Second Cup Ltd. v. OTB Realty Inc. 2019 NSSC 287 concerned a dispute between Second Cup and its landlord at the Halifax Shopping Centre, with respect to whether the lease in question would permit Second Cup to sell its Pinkberry Frozen Yogurt and Yogurt Parfait products from that location. Second Cup had been selling those products for more than two years at some 92 other locations across Canada. Applying a “practical, common-sense” approach to the interpretation of the lease, the Court granted Second Cup’s application to permit it to sell frozen yogurt from the premises

Background

The lease was entered into in 2012. It contained a “Use Clause” permitting Second Cup to sell “non-perishable” food products from the premises which was expressed as “including but not limited to desserts, pastries, baked goods, dessert squares, muffins, croissants, danishes, scones, tarts, rolls, cakes, donuts, biscotti, bagels, cookies and premade specialty sandwiches,” so long as those products were ancillary or secondary to Second Cup’s coffee and related hot and cold beverage product sales.

The landlord argued that the Use Clause did not permit Second Cup to sell Frozen Yogurt and Parfait at the Halifax Shopping Centre location. Relying on a dictionary definition equating “perishable” with “speedy decay”, the landlord argued that Frozen Yogurt and Parfait products could not be considered “non-perishable” items because they melt quickly when served. The landlord also relied on cases in which Courts have considered it to be a guiding principle of use clauses that those imposed on shopping centre tenants should be given a narrow and restrictive interpretation because their general intent and purpose is to allow the landlord to ensure that the tenants within a shopping centre are not competitive with each other. Accordingly, the landlord argued that Frozen Yogurt and Parfait products could have been included in the list of food products specifically permitted for sale, had the parties intended this to be the case.

Second Cup argued, among other things, that “non-perishable” should not be interpreted only according to dictionary definitions when the reference to “dessert” and other items specifically permitted for sale under the Use Clause all had some degree of perishability in that they would naturally decay over time if left unrefrigerated.

Decision

The Court noted that in recent years contractual interpretation has evolved toward a practical, common-sense approach not dominated by technical rules, as set out by the Supreme Court of Canada in *Sattva Corp. v. Creston Moly Corp*. 2014 SCC 53. By these principles, contracts are not interpreted in a vacuum and Courts now have regard more readily to the commercial purpose of the contract as well as the surrounding circumstances or "factual matrix" under which the contract was put in place. This typically includes some consideration of the genesis of the transaction, the background, the context and the market in which the parties are operating, although these contextual considerations cannot modify or deviate too far from the words used in the contract.

Applying these principles, the Court accepted Second Cup's argument that the phrase "non-perishable" must be considered on a spectrum and in the context of the Use Clause as a whole, since there are few foods which do not decay over time in their natural state. In this context, use of the term "dessert" in the Use Clause was significant because it was included in the list of permitted food items and it connotes a broad category of foods that range in their degree of perishability. Reading the term "non-perishable" in the context of the whole Use Clause provided clarity as to it intended meaning because the parties chose to include a non-exhaustive list of foods after the term "non-perishable," many of which would usually be considered perishable. For instance, "pre-made specialty sandwiches" would presumably contain various parts that would normally be considered perishable (including meat or fish, dairy and eggs) and therefore non-perishable in that context must mean "food that is at least as non-perishable as these other food items."

In this context, the Court considered that Frozen Yogurt and Parfait were at least as non-perishable as the other items listed, since they could be stored in a frozen state for a long period of time. While the parties could have turned their minds more clearly to Frozen Yogurt and Parfait by including those in the specific items listed, they must have intended to allow Second Cup to sell some future unlisted, uncontemplated sweet items from the Halifax Shopping Centre location in light of their use of the relatively general and open-ended term "dessert." The term "dessert" was expressed as one of the items within the specific list and not as a qualifier for other items following it, so it must be taken to mean something different from the remaining items in that list. The Court noted that it was open to the parties to use narrower and more precise language to exclude this possibility, but they chose not to do so. Accordingly, there was nothing in the Use Clause to preclude frozen yogurt as a "dessert" or as a continuation of the "including but not limited to" list of foods permitted for sale under the Use Clause.

With respect to the landlord's argument that use clauses must be narrowly construed to give effect to their overall purpose of allowing a landlord to restrict competition between tenants, the Court found that such a concern was not borne out by the evidence in this particular case. While the landlord argued that two other tenants sold competitive frozen yogurt products, one actually sold soft serve ice cream and the other sold

smoothies containing frozen yogurt, but was prohibited under its lease from selling frozen yogurt as an independent product. The Court found these products to be different from the products to be offered for sale by Second Cup.

The Court therefore granted Second Cup's application to permit it to sell frozen yogurt from the premises, including its Pinkberry Frozen Yogurt and Yogurt Parfait products.

Key Takeaways

Although Second Cup was ultimately successful, the decision provides a cautionary reminder to franchised businesses that the scope of permitted use under a lease is a critical aspect of the tenant's business. Such a clause may either facilitate or limit future growth prospects of franchised business if it is not carefully considered both as to the tenant's current needs and those which might evolve or expand with the business over time. This is especially so in multi-tenant retail properties, where uses commonly overlap between tenants and landlords rely on use clauses along with certain other lease terms to closely manage the diversity or overlap in their tenant offerings. Where disputes arise, the balance between a tenant's legitimate interest in the use and enjoyment of its premises for permitted purposes and the landlord's legitimate interest in managing its tenant offerings is often a fine one. Had there been stronger evidence in this case that other tenants within the Halifax Shopping Centre were already selling Frozen Yogurt and Parfait products when Second Cup decided to introduce its Pinkberry product line, the outcome might well have been different.
