

Ontario Superior Court of Justice  
Small Claims Court - Toronto, Ontario  
J.C.F. Hunt Deputy J.  
Heard: August 11, 2014.  
Judgment: September 2, 2014.  
Court File No. SC-12-773700-0000

**[2014] O.J. No. 4015**

Between Mandarin Restaurant Franchise Corporation, Plaintiff, and Figtree Construction Ltd.,  
Defendant

(57 paras.)

**Counsel**

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W. Jaskiewicz, counsel for the plaintiff.

T.B. Rotenberg, counsel for the defendant.

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**REASONS FOR JUDGMENT**

**J.C.F. HUNT DEPUTY J.**

**1** The plaintiff, Mandarin Restaurant Franchise Corporation (Mandarin), is a tenant in a property owned by the defendant, Figtree Construction Ltd. (Figtree). The tenancy arises pursuant to a commercial lease agreement<sup>1</sup> (the lease). The lease was entered into with Figtree's predecessor in title to the property on July 1, 1997. The initial term of the lease was ten years, commencing February 27, 1998 and running until February 26, 2008. Schedule D to the lease contains two options to renew for a further ten years. The option was exercised and Mandarin remains a tenant in the property.

**2** The property is located at 1255 The Queensway, in the City of Toronto. It is described by Figtree, in its pleading, as a ". . . free-standing building located in a Shopping Centre".<sup>2</sup> There are five heating, ventilating and air conditioning (HVAC) units located on the roof of this building. These roof-top units connect to circulation ducts and fans located inside the building.

**3** The parties have agreed to certain facts,<sup>3</sup> several of which are reflected in the first two

paragraphs of these reasons. They have also agreed that Mandarin replaced two of the five HVAC units at a cost in excess of \$25,000.00.<sup>4</sup>

### **The Issue**

4 Who bears the responsibility for the replacement cost of the two HVAC units, Mandarin or Figtree, the tenant or the landlord? That is the issue at its simplest.

### **The Position of the Plaintiff**

5 Mandarin is specifically relying on certain articles in the lease to assert that it bears responsibility for the replacement cost of the units if, and only if their replacement has been rendered necessary ". . . *as a result of damage or destruction*". There is agreement between the parties that the two HVAC units in this case were replaced because their useful life had come to an end. They were neither damaged nor destroyed.

6 The plaintiff further takes the position that its maintenance obligations, pursuant to the lease, require it to maintain the interior of the leased premises ". . . *in good order, condition and repair . . . acting reasonably*". Mandarin argues that replacement of the roof-top units in this instance is the responsibility of Figtree. It is argued that this is an implied term of the lease and that Figtree is in breach of the lease because of its refusal to indemnify Mandarin for the replacement cost of the units.

7 The plaintiff also holds this view based on the opinion of its accountant, Terence Chan. Mr. Chan has determined that, in accordance with generally accepted accounting principles (GAAP), the replacement cost of the two HVAC units is to be treated as a capital expenditure and not as a current expense.

8 In reliance on this opinion, Mandarin points to the lease and has taken the position that the replacement cost of the HVAC units is excluded from the common area costs precisely because that cost is a capital expenditure.

### **The Position of the Defendant**

9 It is Figtree's position that the lease is ". . . *absolutely net to the Landlord*" and, further, that the lease requires the tenant to pay for both maintenance and replacement of the HVAC units under all circumstances.

10 The whole lease must be viewed in order to determine the parties' intent and to conclude that it must be interpreted as "*net*" to the benefit of the landlord. This interpretation is required in order to give commercial efficacy to the contractual relationship between the landlord and the tenant.

11 Whether an expenditure for ". . . *the cost of repairs and replacement to and maintenance of the Common Areas and Facilities . . .*" is a capital expense or a current expense is to be ". . .

*determined by the Landlord's auditors".* Replacement cost must be allocated to the tenant unless the landlord "capitalizes" that expense. The replacement cost of the two units is properly categorized as a current expense.

**12** Figtree also based its position on the opinion of its accountant, Howard Render. Mr. Render, like Mr. Chan, expressed his opinion and explained his analysis in terms of GAAP and came to the opposite conclusion. The replacement cost of the two HVAC units is to be treated as a current expense and not as a capital expense.

### **The Relevant Terms of the Lease**

**13** Article 3.7 of the lease purports to set out the intent of the parties and describes the lease as "absolutely net":

*It is the intent of the parties that this Lease be absolutely net to the Landlord, free and clear of all payments, charges or obligations whatsoever, **except as expressly herein set out.*** (My emphasis)

I do not consider the statement to be incorporating a term of art but as descriptive of its intent and the word "absolutely" does not make the lease more "net" than it would otherwise be.<sup>5</sup> What is clear is that the landlord does retain certain contractual obligations.

**14** Article 1.4 addresses common area costs:

*The term "Common Area Costs" shall mean all of the repairing, administering and supervising the Shopping Centre, including without limitation and without duplication of expense the following:*

*(i) the cost of repairs and replacement to and maintenance and operation of the Common Areas and Facilities including gardening and landscaping maintenance and equipment, repairs to and replacement of parking lot pavement and curbs and including repairs and replacement to the roof membrane, not normally chargeable to capital account under generally accepted accounting practice as determined by the Landlord's auditors;*

*(j) depreciation or cost, including interest payable thereon, if any, of all fixtures and equipment which, by their nature, require periodic replacement or substantial replacement, but excluding buildings or structures and permanent parts thereof;*

But common area costs shall exclude:

*(i) all costs and expenses which are considered to be capital expenses in accordance with generally accepted accounting principles . . .*

The exclusion of capital expenses from the common area costs clearly indicates the parties' intention that such expenses are to be borne by the landlord.

**15** Article 9 of the lease addresses utilities, heating, ventilating and air-conditioning. Article 9.2 contains the tenant's covenant to heat the premises:

*Where separate heating facilities for portions of the Leased Premises are provided therefore, the Tenant covenants at its expense to heat such portions at all times to a*

*reasonable temperature for the reasonable use thereof, so that a comfortable level of temperature is maintained, and no part of the Leased Premises is damaged by frost.*

*The Tenant further covenants to maintain in good operating condition, to the satisfaction of the Landlord, the heating, air-conditioning and ventilating apparatus and equipment used in effecting the heating, air-conditioning and ventilation of the Leased Premises, and to keep same in good working order.*

*The Tenant further covenants to repair or replace any of the said apparatus and equipment if all or any part thereof at any time become incapable of heating, air-conditioning or ventilating portions of the Leased Premises as a result of damage or destruction.*

And Article 9.6 requires the tenant to enter into a general service contract arranged by the landlord:

*The Tenant hereby agrees, together with the other tenants in the Shopping Centre, to enter into any reasonable general servicing and maintenance contract arranged by the Landlord on behalf of all tenants (including the Tenant) of the Shopping Centre for the periodic inspections, maintenance, repair and replacement of the heating, air-conditioning and ventilating tenants' premises (including the Leased Premises) in the Shopping Centre and to pay such charges therefor. **With respect to periodic inspection and changing of filters, the cost of same shall form a portion of its Proportionate Share of Common Area Costs.** (emphasis in the original)*

**16** It should be noted, however, that there was no evidence that the landlord had arranged a general servicing and maintenance contract. The most that can be said is that the defendant produced a proposal<sup>6</sup> which purported to illustrate what a service contract dealing with HVAC might look like. Given the fact that there was not such a contract in evidence, little or nothing turns on this.

**17** Article 10.1 deals with the tenant's maintenance obligations:

*The Tenant shall at all times keep the **interior of the** Leased Premises (including maintenance of entrances, all glass, show window moldings and store fronts) and all partitions, doors, fixtures, equipment and appurtenances thereof and improvements thereto (including lighting, heating, ventilation and plumbing fixtures and equipment and refrigeration equipment and wiring and its air-conditioning system within the Leased Premises), and any loading and receiving areas exclusively serving the Leased Premises, in good order, condition and repair (including periodic painting and re-decoration), **acting reasonably.** (emphasis in the original)*

*The Tenant shall in addition keep the Leased Premises in a clean and sanitary condition and in accordance with the laws, by-laws, rules and regulations of any governmental authority having jurisdiction and shall not permit, suffer or commit any act or omission on the Leased Premises which shall cause any breach of such laws, by-laws, orders, rules and regulations.*

[18] Mandarin has both pleaded<sup>7</sup> and argued that Article 9.2 provides that the only circumstance

under which the tenant is responsible for the replacement cost of the HVAC units is if those units are damaged or destroyed. The plaintiff argues that this is an implied term in the lease. In a sense, this question is moot because it is common ground that the units were neither damaged nor destroyed; they simply wore out. In any case, the lease and its import must be read as a whole and one sub-article will not be determinative of the outcome to this dispute.

**18** What will be determinative is whether the replacement cost was a capital expense or a current expense in accordance with GAAP.

### **Capital Expense or Current Expense?**

**19** Earlier in these reasons reference was made to Mandarin's accountant, Terence Chan.<sup>8</sup> Mr. Chan gave evidence and his written opinion was also provided. Figtree's accountant, Howard Render also gave evidence as well as his written opinion<sup>9</sup>.

**20** Mr. Chan is a partner in C.C.L., A firm of Chartered Professional Accountants. The firm are the accountants for the plaintiff and have been for over twenty years. He set out the mandate of C.C.L. in a letter of opinion dated June 24, 2014:

*We were requested to comment on the accounting treatment for the replacement of the two HVAC units in March 2011, in accordance with the Canadian General Accepted Accounting Principles (GAAP).<sup>10</sup>*

[22] In support of his opinion, Mr. Chan referred to the Canadian Chartered Professional Accountants Standards and Guidance, Part II, Accounting Standards for Private Enterprises: Section 3061, Property, Plant, and Equipment<sup>11</sup>, paragraph 03:

*The following terms are used in this Section with the meanings specified:*

*(a) Property, plant and equipment are identifiable tangible assets that meet all of the following criteria:*

*(i) are held for use in the production or supply of goods and services, for rental to others, for administrative purposes, or for the development, construction, maintenance or repair of other property, plant and equipment;*

*(ii) have been acquired, constructed or developed with the intention of being used on a continuing basis; and*

*(iii) are not intended for sale in the ordinary course of business.*

**21** It is Mr. Chan's opinion that the HVAC units met the definition called for in the foregoing paragraph, and that Mandarin ". . . should and did capitalize the cost of the HVAC units and their installation costs . . ."

**22** Mr. Chan also noted "*Mandarin's policy to amortize the capitalized cost at 20% on a declining basis . . .*" and considered this to be consistent with paragraphs 16 and 17 of Section 3061.<sup>12</sup> Paragraph 16,<sup>13</sup> in particular reads, in part, as follows:

*Property, plant and equipment is acquired to earn income or supply a service over its useful life. . . Its useful life is normally the shortest of its physical, technological,*

*commercial and legal life. Amortization is the charge to income that recognizes that life is finite and that the cost less salvage value or residual value of an item of property, plant and equipment is allocated to the periods of service provided by the asset. Amortization may also be termed depreciation or depletion.*

**23** Mr. Chan's written view concluded with this: "*In our opinion, Mandarin's accounting for the HVAC units is consistent with the Canadian GAAP for Private Enterprises*".<sup>14</sup>

**24** It is clear that Mr. Chan satisfied himself that the two units were "*identifiable tangible assets*" and that the GAAP test requiring that each of the necessary criteria set out in paragraph 03<sup>15</sup> of Section 3061 had been met.

**25** This was confirmed in his *viva voce* testimony. In addition Mr. Chan elaborated on his analytic methodology. The specific GAAP guideline produced, Section 3061, is five pages in length and is comprised of two paragraphs setting out its **purpose and scope**; twelve paragraphs of **definitions**, four paragraphs detailing **cost measurement**; six paragraphs dealing with **acquisition, construction, or development over time**; two paragraphs regarding **betterment**; five paragraphs which address **amortization and the review of amortization**; and six paragraphs dealing with **asset retirement obligations** and **disclosure**.

**26** Mr. Chan was quite clear in stating that if the asset in question meets the criteria set out in paragraph 03, it is unnecessary to go any further into Section 3061. When asked if he had considered paragraph 14, which deals with **betterment**, Mr. Chan described that paragraph as "*a catch all*" and that he would have recourse to it only if the asset ". . . *doesn't fit the definition*". A consideration of paragraph 14 did not form part of Mr. Chan's reasoning nor part of his conclusion that the plaintiff's expenditure on the HVAC units was a capital expense. Paragraph 14 reads as follows:

*The cost incurred to enhance the service potential of an item of property, plant and equipment is a betterment. Service potential may be enhanced when there is an increase in the previously assessed physical output or service capacity, associated operating costs are lowered, the life or useful life is extended, or the quality of output is improved. **The cost incurred in the maintenance of the service potential of an item of property, plant and equipment is a repair, not a betterment. If a cost has the attributes of both a repair and a betterment, the portion considered to be a betterment is included in the cost of the asset.*** (my emphasis)

**27** A document produced by the Canada Revenue Agency (CRA) was also put into evidence.<sup>16</sup> This document identifies a current expense as one that ". . . *generally reoccurs after a short period.*" A capital expense "*generally gives a lasting benefit or advantage.*" There is a slight elaboration:

*Renovations and expenses that extend the useful life of your property or improve it beyond its original condition are usually capital expenses. However, an increase in a property's market value because of an expense is not a major factor in deciding whether the expense is capital or current.*

**28** Other criteria and examples are also contained in the CRA document and Mr. Chan was asked if he could comment on them and those set out in the preceding paragraph and he replied that ". . . *tax law is often different from GAAP.*"

**29** Mr. Render gave evidence on behalf of Figtree.<sup>17</sup> He also provided a written opinion, dated July 16, 2014, to counsel for the defendant.<sup>18</sup> Mr. Render is the partner at Render & Partners LLP in charge of the defendant's file. He has been a chartered accountant since 1983 and his firm has been in existence since 1990.

**30** Mr. Render's reasoning and approach differed significantly from that of Mr. Chan. So, too, did his opinion expressing his conclusion that ". . . *Figtree is entitled to expense this cost of the 2 HVAC units and it can do so in accordance with GAAP . . .*"

**31** Mr. Render clearly disagreed with Mr. Chan on a number of points. He felt that a consideration of the definition section of Section 3061, in isolation, was an insufficient analysis and emphasized that the whole of the Section must be read, in particular section 14, dealing with betterment. ". . . *generally, if there is no betterment, it's not capital.*"

**32** He also expressed the view that it was the building, the leased premises, which was the asset whereas Mr. Chan stated that each of the replacement HVAC units was a "stand alone" asset. Mr. Chan did not directly assess betterment. Mr. Render did and believed that the building was simply restored to its original condition by replacing two of the five roof-top units.

**33** Mr. Chan suggested that the cost of the two replacement units was a factor in his concluding that the expenditure was a capital expense. In reply, he did not address the value of the building, but, inferentially the revenue of the plaintiff. If the expenditure was ". . . *less than 1% of total revenue, that's a deviation, but immaterial.*" His decision, he said, ". . . *was based totally on GAAP.*"

**34** Mr. Render's opinion was not. He also stated that the Income Tax Act ". . . *closely parallels GAAP . . . but for some policy considerations.*" His opinion, expressed in writing, reads, in part, as follows:

*The CRA handbook is the "rule book" that Chartered Professional Accountants use for guidance while adhering to GAAP. The specific section we have relied upon is Section 3061 paragraph 14. This section specifies that costs incurred in the maintenance of the service potential of an item of property, plant and equipment is a repair not, a betterment . . . This company, like most other private corporations, follows Accounting Standards for Private Corporations ("ASPE"). Under ASPE (should this addition be determined to be capital as opposed to an expense) the replacement of such a component is part of the structure of the building, not an asset on its own.*

*The real question here is whether the service potential of this asset (i.e. the building) has been enhanced. Pursuant to the attached section of the Handbook "Service potential may be enhanced when there is an increase in the previously assessed physical output or service capacity, associated operating costs are lowered, the life or useful life is*

*extended, or the quality of output is improved." The asset in question is the building, not the HVAC unit. The HVAC unit is part of the building. Accordingly, there will be no increase in the previous physical output or service capacity, the operating costs should not naturally change, the useful life of the building will remain exactly the same and the quality of output will remain unchanged . . .CRA generally bases their policies on GAAP. Based upon the definitions of current expense, it seems clear to us that this cost is an expense as opposed to an item of a Capital nature . . ."*

**35** Following this review of the evidence of the two accountants, it is apparent that there is a great deal of interpretive flexibility in applying generally accepted accounting principles. As Mr. Render stated ". . . you just try and do the best you can for your client - within GAAP." During his submissions, Mr. Rotenberg simply made the point that interpretations of GAAP have the sole requirement of not being unreasonable. There is scope for disagreement.

**36** I can safely infer, and I do, that HVAC units were part of the building when the lease was entered into and that HVAC units will still be part of the building when the plaintiff's occupancy of the leased premises comes to an end.

**37** I have found it helpful, in interpreting the lease and in assessing the opinion evidence, briefly to review the law regarding the property in fixtures and in chattels and the distinction, if any, insofar as that law relates to leased premises. Van Camp, J., in *Pezzack v. Irving Bank Canada*,<sup>19</sup> wrote this:

*In **Cormier v. Federal Business Development Bank**, (1983), 25 B.L.R. 194; 3 P.P.S.A.C. 161, (Co. Ct.) Salhany, J. reviewed when a chattel becomes a fixture, in light of the five rules set out in **Stack v. T. Eaton Co.**, (1902), 4 O.L.R. 335 (Div. Ct.).<sup>20</sup> I agree with his view that the word "fixtures" was intended to cover all chattels attached to the land whether they are removable or not. There is also the decision of Middleton, J.A. in **Fess Oil Burners Ltd. v. Mutual Investments Ltd.**, [1932] O.R. 203 at 204:*

\* *The degree and object of the annexation are to be considered and where the object of annexation is the beneficial use of the land and buildings, the article in question is to be regarded as a fixture even though the degree of annexation may be of the slightest.*<sup>21</sup>

**38** I find that, upon installation, the two replacement HVAC roof-top units became affixed to the leased premises and formed part of the building. I find, further, that they were not "stand-alone" chattels and had neither value nor utility until installed. I find, as well, that Mandarin had no property interest in the units. Its property interest was, and is, in the lease.

**39** The broader question is whether the value of the building was enhanced by the replacement of two HVAC units. The plaintiff has submitted that it was and has referred to *Carmine Di Fruscia and Her Majesty the Queen*.<sup>22</sup> This case was an appeal from the Minister's assessment of capital gains. The appeal was allowed, in part, and the Tax Court ruled that the cost of acquisition of a new furnace during extensive renovation of a building which had been used as a garage was the acquisition of a capital asset. There was no substantive analysis of "betterment"

simply the observation that ". . . *without a new furnace the use and enjoyment of the building would be affected.*"<sup>23</sup>

**40** G.J. Rip, A.C.J., applied the results from *Canada Steamship Lines Ltd. v. Minister of National Revenue*,<sup>24</sup> a decision of Jockett, P. in the Exchequer Court of Canada, and from *Minister of National Revenue v. Haddon Hall Realty Inc.*,<sup>25</sup> a decision of the Supreme Court of Canada.<sup>26</sup>

**41** In *Canada Steamship*, the Court had to determine whether certain expenditures were capital outlays or whether they were expenditures made to repair existing capital assets. If they were found to be capital outlays, no deduction from income would be allowed because of the prohibition found in Section 12(1)(b) of the then current *Income Tax Act*.<sup>27</sup>

**42** The expenditures were of two types; one involved the effective replacement of floors and walls of the holds of cargo carrying ships necessitated by wear and tear arising out of the very purpose for which the ships were designed, the carrying of cargo. The other expenditure was the cost of replacing the boilers in one ship.<sup>28</sup>

**43** The former expenses were found to be current expenses, incurred in the repair of capital assets and thus deductible under the *Act*.<sup>29</sup> The latter expense was not:<sup>30</sup>

*Things used in a business to earn the income - land, buildings, plant, machinery, motor vehicles, ships - are capital assets. Money laid out to acquire such assets constitutes an outlay of capital. By the same token, money laid out to upgrade such an asset - to make it something different in kind from what it was - is an outlay of capital. On the other hand, an expenditure for the purpose of repairing the physical effects of use of such an asset in the business - whether resulting from wear and tear or accident - is not an outlay of capital. It is a current expense.*

**44** In *Haddon Hall*, the deductibility of an expense under the *Income Tax Act* was also in issue.<sup>31</sup> The expenditures in question were incurred:

*. . . for the purpose of gaining or producing income. The sole matter in issue here is whether such expenditures were an income expense incurred to earn the income of the year 1955 and allowable as a deduction from gross income in that year. . . or a capital outlay to be amortized or written off . . .*

*Expenditures to replace capital assets which have become worn out or obsolete are something quite different from those ordinary annual expenditures for repairs which fall naturally into the category of income disbursements.*<sup>32</sup>

**45** *Marklib Investments II-A Ltd. v. Canada*<sup>33</sup> is a very helpful decision and provides a thorough review of the law as well. Brulé T.C.J., referred to the Canada Revenue Agency Interpretation Bulletin IT-128R-Capital Cost Allowance-Depreciable Property, which lists a number of factors to be examined in determining whether an expenditure is a capital expense or a current expense incurred for repair or maintenance. The guidelines highlight the following:<sup>34</sup>

\* Enduring Benefit

- \* Maintenance or Betterment
- \* Integral Part or Separate Asset
- \* Relative Value

**46** The following observations were also made by Brulé T.C.J.:

*It is the purpose, rather than the result, of an expenditure that determines whether it is characterized as a capital outlay or a current expense; and the focus of the test is on whether or not the expenditure brings into existence an asset of enduring value, rather than on the determination of the frequency or recurrence of the expenditure. The cases seem to promote the idea that as long as the repairs were done to preserve or conserve the asset and not to create a new asset then the repairs will be considered current expenses.<sup>35</sup>*

And:

*An expenditure that merely maintains an asset or restores it to its original condition is a deductible current expense . . . there is a lot of grey area in between the capital outlay and current expense distinction . . . the magnitude of the expense must be examined in the context of the value of the building.<sup>36</sup>*

**47** It is notable that each of these decisions involves the tax question as to whether an expenditure is to be treated as an outlay for the repair and maintenance of an income generating capital asset or as the replacement or acquisition of a capital asset. *Riocan Holdings Inc. v. Metro Ontario Real Estate Ltd.*,<sup>37</sup> however, is not a tax case. It is a decision involving the interpretation of a commercial lease. *Metro* was an anchor tenant in a shopping plaza. *Riocan* was the successor landlord.

**48** The plaintiff in *Riocan* resurfaced and extensively rebuilt the parking lot in the plaza at a cost of \$431,000.00. The issue was whether *Metro* as tenant was required to pay its proportionate share of services for common areas pursuant to a clause in the lease. The cost was apportioned over twenty years. Each party in this action had an expert accountant give evidence.

*The terms of reference from the CICA Handbook (Canadian Institute of Chartered Accountants) and authoritative texts relied upon by both accountants provide that the determination of whether an expenditure should be treated as betterment or repair is based on whether or not the "service potential" of the asset at issue was "enhanced" by the expenditure (betterment) or just "maintained" (repair).<sup>38</sup>*

**49** This decision was clearly fact driven. The conclusion that the re-building significantly extended the life of the parking lot and would have the effect of reducing ongoing operating costs was clearly a factor in Morowetz J.'s conclusion that the expenditure was a capital expense and not a current expense; that, and the fact that the expense was amortized over twenty years. As was pointed out, this ". . . was a significant project. It was not simply fixing potholes. It was not painting lines."<sup>39</sup>

**50** The lease between Mandarin and Figtree is a contract. As the trier of fact, it is part of my task to ascertain the objective intent of the parties to that contract. In a very recent decision of

the Supreme Court of Canada,<sup>40</sup> Rothstein J. has clarified the fact that contractual interpretation is now to be seen as a question of mixed fact and law and an appellate review of the conclusions of the trier of fact is no longer a question of law to be assessed against a standard of "correctness".

*Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law . . . This rule originated in England at a time when there were frequent civil jury trials and widespread illiteracy . . . the interpretation of written contracts had to be considered questions of law because only the judge could be assured to be literate and therefore capable of reading the contract . . .*<sup>41</sup>

*This historical rationale no longer applies . . .*<sup>42</sup>

*This shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances - often referred to as the factual matrix - when interpreting a written contract*<sup>43</sup>

*Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding". . . 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.*<sup>44</sup>

*The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement . . .*<sup>45</sup>

*As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law . . .*<sup>46</sup>

*With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.*<sup>47</sup> (references and authorities referred to in these quotes have been omitted)

## **Conclusions**

**51** I do not accept the plaintiff's submission that the lease contains an implied term that the tenant will only be responsible for the cost of the replacement of the HVAC units if they are damaged or destroyed. In order to give commercial efficacy to the contractual relationship between landlord and tenant, I conclude that the tenant is responsible for the maintenance, repair and replacement of the units. Damage or destruction are merely two instances when replacement would be required. Article 3.7 of the lease clearly states the intent of the parties to be that the lease is to be "net" to the landlord.

**52** Article 9.6 of the lease is also reflective of intent. At the time the lease was entered into by Mandarin, it must be taken to have been understood and accepted by the plaintiff that it was to

be responsible for the *"periodic inspections, maintenance, repair and replacement of the heating, air-conditioning and ventilating tenants' premises (including the Leased Premises) in the Shopping Centre and to pay such charges therefor."* The fact that no General Service Contract, as contemplated by the Article, appears not to have been proffered to the tenants by the landlord is not a material consideration. A General Service Contract is not the subject matter of this litigation. It would, if it existed, merely be the mechanism for implementing the stated intent of the parties.

**53** An accountant is not an auditor, although an auditor may be an accountant. Article 1.4(i) of the lease purports to give decisions as to what might be chargeable to a capital account to the landlord's auditors. No auditor and no auditor's reports were in evidence. I will not speculate as to what that evidence might have been. Given my other findings of fact there is no need to do so in any case.

**54** I find that the HVAC units were not stand alone assets; they were not capital assets. I find that, after installation, they had become affixed to the building. They formed part of the building. The fact that they were new did not enhance the value of the building. Their installation did not constitute betterment. Their installation caused the building to be returned to its original condition. Their acquisition and installation was maintenance of the interior of the building and reflected the parties' intent that the repair and maintenance be the responsibility of the tenant. Even though they were roof-top units, their effect was on the inside of the building where the result of heating, ventilating and air conditioning actually took place.

**55** It will be apparent that I have preferred the evidence of Mr. Render to that of Mr. Chan and I adopt his conclusions as my own. I find that the expense incurred by Mandarin was a current expense and not a capital expense.

**56** This conclusion is not to be misread as a comment on Mr. Chan's integrity or his professionalism. It is not. I simply do not accept Mr. Chan's conclusions and find them to be inconsistent with and contrary to the law which I have reviewed.

**57** In the result, the plaintiff's claim is dismissed with costs to the defendant. Given the obvious cooperation between counsel and the commendable manner in which the materials, presentation and argument proceeded at trial, I am confident that counsel will agree to a suitable sum for costs. If not, I will accept written submissions no later than 5 pm, September 16, 2014, mutually exchanged and delivered to the trial scheduling office by fax, to my attention. The plaintiff may reply, in the same manner no later than September 23, 2014.

J.C.F. HUNT DEPUTY J.

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**1** The parties have cooperated in producing a "Joint Document Brief". It was entered as Exhibit 1. The lease is located at tab 1.

**2** Amended Defence, at paragraph 5.

- 3 This Agreed Statement was entered as Exhibit 2.
- 4 The actual sum is identified in the Amended Claim of Mandarin as \$27,300.80 at paragraph 12. Mandarin has also waived all amounts in excess of \$25,000.00 in order to bring its claim within the jurisdiction of this Court; at paragraph 23.
- 5 This might usefully be compared to a "net-net" lease ". . . which will provide that the tenant will pay all charges, impositions and expenses of every nature and kind relating to the demised premises, and sometimes, according to the agreement between the parties, that the tenant shall assume full responsibility for repairs of all kinds without restriction." David Vanek, *The Lease in Modern Business*, Law Society of Upper Canada, Special Lectures (1965), at page 83. In addition: "Whether a lease of this kind is more aptly described as 'net' or 'net-net' will depend upon the extent to which the landlord has succeeded in immunizing himself from any outlays relating to the leased premises, so that he can relax and receive his stipulated rent, all the usual burdens of property ownership and management being shouldered by the tenant." Williams, *Canadian Law of Landlord and Tenant*, (4th ed.) at page 785. Both of these works were cited with approval in the New Brunswick Court of Queen's Bench in *E&P Holdings Limited v. Koffler Stores Limited*, [\[1980\] N.B.J. No. 157](#) at paragraphs [18] and [19]. See also *Re Kosmor Construction Inc. and Rusonik*, [\(1979\), 22 O.R. \(2d\) 814](#) at 816, per Southey, J. and *Hardwick & Hardwick Meats Ltd. v. 471477 Ontario Ltd.*, [\[1991\] O.J. No. 2057](#) per Caswell, J.
- 6 Exhibit 1, tab 2.
- 7 Paragraphs 18 and 20 of the plaintiff's amended claim.
- 8 *Supra*, at paragraph [7].
- 9 *Supra*, at paragraph [12]. Neither counsel objected to both Mr. Chan and Mr. Render testifying and providing written expert opinions, which opinions can be found at tabs 3 and 4 of Exhibit 1. In fact, exhibit 2, *supra* at footnote 3, the Agreed Statement, in paragraph 6, reads: "All of the documents in the Joint Document Book (Exhibit 1) are admissible as evidence and/or witness statements." It should also be noted that counsel agreed that neither witness was to be excluded while the other testified.
- 10 *Ibid*, tab 3.
- 11 Section 3061 is more fully set out in exhibit 1, at tab 4, following Mr. Render's written opinion.
- 12 *Supra*, at paragraph [22].
- 13 Found on page 2 of Mr. Chan's written opinion; exhibit 1, tab 3.
- 14 *Ibid*.
- 15 *Supra*, at paragraph [22].
- 16 Exhibit 1, the last two pages at tab 4.
- 17 *Supra*, at paragraph [12].
- 18 Exhibit 1, tab 4; see also, *supra*, at footnote 9.
- 19 [\(1989\), 69 O.R. \(2d\) 536](#); [\[1989\] O.J. No. 1321](#) (H.C.J.)
- 20 *Per* Meredith, C.J.
- 21 See also 859587 *Ontario Ltd. v. Starmark Property Management Ltd.*, [\(1998\), 40 O.R. \(3d\) 481](#); [\[1998\] O.J. No. 3022](#) (C.A.), Krever, Osborne and Doherty JJ.A. *per* Doherty, J.A.
- 22 [2007 TCC 310](#) *per* G.J. Rip, A.C.J.
- 23 *Ibid*, at paragraph 8.
- 24 [1966 CarswellNat 278](#)
- 25 [1961 CarswellNat 326](#)
- 26 Kerwin, P.C., C.J.C., Taschereau, Locke, Fauteux and Abbott, JJ., *per* Abbott, J.
- 27 R.S.C. 1952, c. 148
- 28 *Op cit*, footnote 24 at paragraph 2.

- 29 *Ibid*, at paragraph 3.
- 30 *Ibid*, at paragraph 8.
- 31 *Op cit*, footnote 25, at paragraph
- 32 *Ibid*, at paragraphs 5 and 7.
- 33 [\[1999\] T.C.J. No. 716](#) per Brulé T.C.J.
- 34 *Ibid*, at paragraph 37.
- 35 *Ibid*, at paragraph 35.
- 36 *Ibid*, at paragraph 36.
- 37 [2012 ONSC 1819](#), per Morowetz J.
- 38 *Ibid*, at paragraph 21.
- 39 *Ibid*, at paragraph 82.
- 40 The reasons in *Sattva Capital Corp. v. Creston Moly Corp.* were released August 1, 2014. It is reported at [\[2014\] S.C.J. No. 53](#). The panel was comprised of McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis, and Wagner JJ. The unanimous opinion was delivered by Rothstein, J.
- 41 *Ibid*, at paragraph 43.
- 42 *Ibid*, at paragraph 44.
- 43 *Ibid*, at paragraph 46.
- 44 *Ibid*, at paragraph 47.
- 45 *Ibid*, at paragraph 48.
- 46 *Ibid*, at paragraph 49.
- 47 *Ibid*, at paragraph 50.