SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: **500-17-050830-093**

DATE: October 6, 2011

IN THE PRESENCE OF THE HONOURABLE PAUL MAYER, J.S.C.

DORVAL PROPERTY CORPORATION
PLAINTIFF

v.

PROVIGO DISTRIBUTION INC.
DEFENDANT

JUDGEMENT

---

1. INTRODUCTION

[1] The central issue of this case is to determine what is a tenant's share of the real estate taxes of a shopping centre.

[2] A landlord believes that the wording of his lease enables him to nearly double it. The tenant insists that there exists no contractual basis to do so.

[3] The issue is of some importance to the parties given the significant amount in play and because there remains some 18 years on the term of the lease if all of the options to renew are exercised.

2. THE FACTS

2.1 The parties

[4] Dorval Property Corporation (**"Dorval Property"**) has been the owner of the Jardins Dorval Shopping Centre (the **"Shopping Centre"**) since December 2006.[1] This regional center has some 375,000 square feet of rentable area occupied by approximately 75 tenants. It is anchored by a *Zellers* department store and a *Maxi* supermarket.

[5] Provigo Distribution Inc. (**"Provigo"**) operates the supermarket in premises measuring approximately 50,000 square feet (the **"Premises"**) pursuant to a lease assignment agreement (the **"Lease"**)[2] with the previous tenant of the Premises (*Steinberg Inc.* (**"Steinberg"**)).[3] The Lease has a term ending in 2015. It contains several options to renew that end in December 2029. In 2006, it renovates the Premises.

[6] Gestion Immobilière Edgecombe (**"Edgecombe"**) is the manager of the Shopping Centre.

2.2 The City issues new tax bills in December 2007

[7] In December 2007, the City of Montreal (the **"City"**) re-assesses the Shopping Centre and sends out new tax bills for the years 2006 and 2007 totalling some $118,000.[4]

[8] Edgecombe's Financial Controller, Mr. Robert Toupin (**"Toupin"**), contacts the City to determine why these new invoices have been issued.

[9] He speaks with Mr. Christian Guay (**"Guay"**), a Chartered Evaluator, employed by the City's Commercial Real Estate Assessment Division, who informs him that the re-assessment of the Shopping Centre has been provoked by the renovations carried out by *Maxi* and another tenant, *Scores*.

[10] Guay faxes his working papers to Toupin. They illustrate the assumptions and opinions he has used to mathematically arrive at an increased rental value for the

---

1 Exhibit P-1.

2 Entered into in June 1992.

3 Pursuant to that assignment agreement, Steinberg ceded and assigned to Provigo all of its rights, title and interests in the Lease being constituted of the following documents:
(a) lease agreement dated June 15, 1987 – Exhibit P-3;
(b) amended agreement dated March 13, 1990 - Exhibit P-4;
(c) amended agreement dated April 1, 1990 - Exhibit P-5;
(d) amended agreement dated September 10, 1990 - Exhibit P-6; and
(e) amended agreement dated June 7, 1992 - Exhibit P-7.

4 Exhibit P-11 – As of July 12, 2006 - $935,13 and $39,509.51; as of January 1, 2007 - $77,445.98.

Premises of $2.5M for the 2004-2006 property assessment roll and $3M for the 2007 property assessment roll.[5]

[11] Provigo has made an objection to the filling into evidence of this documentation. The Court took it under reserve during the trial. It will be dealt with later.

2.3 Dorval Property Invoices Provigo

[12] On the basis of the information obtained, Toupin determines that some 78% of the new 2006 tax bill and 81% of the new 2007 tax bill has been caused by Provigo's improvements to the Premises. He concludes that Provigo should pay these respective percentages of the two tax bills.

[13] He prepares and sends an invoice to Provigo claiming the sum of $106,544.15 (GST and QST included).[6]

[14] In response, Provigo notifies him that the invoice is unjustified pursuant to their contractual agreement.[7] Provigo indicates its willingness to continue to pay its proportionate share.

[15] This response incites Toupin to examine the Lease carefully.

[16] He notes that the real estate tax clause has what he believes to be specific language that provides Dorval Property with the opportunity to recover taxes on another basis than the current calculation, if Dorval Property can obtain a separate assessment (*une valeur distincte*) for the Premises from the taxing authority (Section 8.(4)(a)).

[17] He goes to the City and obtains access to the real estate assessment file of the Shopping Centre.

[18] In the City's working papers, he finds the method used by the assessor to arrive at the global value of the Shopping Centre. He sees that it is calculated on the basis of the capitalization of the deemed revenues generated from the Shopping Centre. He observes that the City has determined that the Premises have a rental value of $4.7M as of January 1, 2004, $7.3M as of July 12, 2006 and $8M as of January 1, 2007 and the Shopping Centre has a market value of $29.7M as of January 1, 2004, $32.9M as of July 12, 2006 and $37.3M as of January 1, 2007.

[19] Toupin, thus, determines that Provigo's proportionate share of real estate taxes should be 16.2% from January 1, 2004 to July 12, 2006, 22.31% from July 12, 2006 to December 31, 2006 and 21.56% from January 1, 2007 instead of the 12.38% that it has been paying.

---

5 Exhibit P-12.
6 Exhibit P-14.
7 Exhibit P-16.

[20] He drafts a chart[8] that establishes Provigo's share on the basis of the information he has noted in the City's assessment file and forwards it to Mrs. France McCutcheon (**"McCutcheon"**), a Chartered Evaluator with the City's Commercial Real Estate Assessment Division. He asks her to confirm that the information contained in the chart is accurate.

[21] Provigo has formulated an objection to the filling into evidence of this chart. It also objects to Toupin's, Guay's and McCutcheon's testimonies in respect to this document. These have been taken under reserve and will be dealt with hereinafter.

[22] On April 9, 2008, McCutcheon e-mails Toupin to confirm that she reviewed his chart and advises him that it appears to be correct. She notes that it is her understanding that Provigo's proportionate share is being calculated by Toupin on the basis of the rental value of the Premises instead of using the superficial area of the Premises. Finally, she underlines her concern, previously discussed with him, that the City does not want to be involved in any dispute between a landlord and a tenant.[9]

[23] Edgecombe writes to Provigo to inform it that the City's real estate assessment file has been examined, a distinct value for the Premises has been obtained and that its share of taxes has been recalculated. It includes five invoices to recuperate the difference between what Provigo has paid and the amount that should be paid for the years 2004 through to 2008, totalling $712,285.14.[10]

[24] Provigo insists that it is not contractually bound to pay more than 12.38% of realty taxes.[11] The parties exchange a series of letters culminating in a demand letter in November 2008.[12]

2.4 The legal proceedings

[25] In June 2009, Dorval Property files a motion to institute an action that claims the sum of $678,887.38 in respect to the unpaid portion of the taxes for the years 2004 to 2009, inclusively.

[26] In July 2011, Dorval Property amends its motion to seek a total of $1,007,329,96 (including the years 2010 and 2011).

[27] In September 2011, undoubtedly concerned by the pending issue of prescription raised by Provigo, Dorval Property re-amends its motion to limit its demand to the taxes owing after June 2006.

---

8 Exhibit P-18.
9 Exhibit D-7.
10 Exhibit P-19.
11 Exhibit P-21.
12 Exhibits P-23, P-24, P-25 and P-26.

[28] Pursuant to an admission made by the parties during the trial, Dorval Property reduces its claim further to the sum of $785,219.35.

3. THE POSITION OF THE PARTIES

[29] Dorval Property argues that this is a simple case. It says that it consists of enforcing a contract that is clear and unambiguous (*limpide et sans ambiguïté*). It notes that pursuant to the rules of interpretation of contracts, a clause has to be accorded a meaning that gives it some effect rather than no effect.[13]

[30] It insists that it is acting equitably for the other tenants of the Shopping Centre in allocating to Provigo all of the real estate taxes levied on the improvements made to its Premises.

[31] Provigo argues that the working papers of the City do not constitute a separate assessment of the Premises obtained by Dorval Property from the taxing authority in respect to the Premises, as contemplated by the Lease.

[32] It advances that Provigo's claim is contrary to the interpretation that the parties have given to the Lease over the years.

[33] Finally, it asserts that the wording of the Lease is not sufficiently determinate or determinable to establish an enforceable obligation to pay real estate taxes on the basis being claimed.

4. THE ISSUE

[34] What is Provigo's share of the real estate taxes?

5. ANALYSIS

[35] For the three principal reasons set out below, the Court concludes that Provigo's proportionate share of realty taxes is 12.38%. Accordingly, Dorval Property's claim is to be dismissed.

[36] Given the Court's conclusion, it is not necessary to deal with the objections formulated by Provigo with respect Exhibits P-12 and P-18 nor to the testimony of Toupin, Guay and McCutcheon in respect to those documents.

5.1 Dorval Property did not obtain a separate value for the Premises from the City as contemplated by the provisions of the Lease

[37] In order to succeed in its request, Dorval Property must prove that it obtained a separate assessment ("*valeur distincte*") for the Premises from the taxing authority.[14]

---

[13] Article 1428 C.C.Q.

[14] Exhibit P-6 – See language of Section 8.(4)(a).

[38] Otherwise, Provigo is to pay 12.38% of the real estate taxes imposed on the Shopping Centre, that is, a fraction, the numerator being the gross leasable area of the Premises and the denominator being the gross leasable area of the Shopping Centre.[15]

[39] Many of the provisions of the Lease were consolidated and modified in September 1990.[16] Article VIII thereof outlines the obligation of the parties to pay real estate taxes. The pertinent provisions are as follows:

> "*ARTICLE VIII – TAXES ET FRAIS D'EXPLOITATION*
>
> *TAXES DU LOCATAIRE*
>
> *8.(1) À compter de la Date d'entrée en vigueur, le Locataire doit payer les taxes et frais d'exploitation suivants au moins 5 jours ouvrables avant leur date d'échéance totale ou partielle ou, si cette date est plus tardive, 30 jours après la réception par le Locataire de copies de tous les comptes de taxe, avis de cotisation et autres renseignements pertinents:*
>
> *(a) la totalité des taxes foncières, impositions, taxes d'améliorations locales, droits et cotisations levés ou imposés sur les Locaux loués par l'administration fiscale compétente, ou qui leur sont attribués aux termes du paragraphe 8(4);*
>
> *(b) les taxes et droits de permis applicables au commerce exploité dans l'Immeuble ou à partir de celui-ci ou à l'égard de son occupation par le Locataire incluant, sans restriction, les taxes d'affaires, contributions, taxes d'eau et d'enlèvement des ordures, cotisations et droits de permis; et*
>
> *(c) tous les frais d'exploitation relatifs à l'approvisionnement de l'Immeuble en eau, en gaz, en électricité et autres services d'utilité publique calculés, le cas échéant, à l'aide de compteurs séparés.*"
>
> […]
>
> *TAXES DU BAILLEUR*
>
> *8.(3) Sous réserve du paragraphe 8(1), le Bailleur doit payer ou faire payer, au plus tard à leur date d'échéance totale ou partielle, la totalité des taxes foncières, impositions, taxes d'améliorations locales, droits et cotisations levés ou imposés sur le Centre commercial.*

---

[15] Exhibit P-6 – See language of Section 8.(4)(b) and definition of "*Quote Part du Locataire*" in Section 1.(1) of Schedule 2.

[16] Exhibit P-6.

ÉTABLISSEMENT DE L'ÉVALUATION

8.(4) Si les Locaux loués ne sont pas évalués séparément par l'administration fiscale compétente de la manière prévue au paragraphe 8(1)(a), les taxes foncières, impositions, taxes d'améliorations locales, droits et cotisations levés ou imposés sur le Centre commercial doivent être calculés proportionnellement en attribuant aux Locaux loués:

(a) si on peut obtenir de l'administration fiscale une valeur distincte pour l'Immeuble ou le terrain sous-jacent, ou pour les deux, une part des taxes mentionnées ci-dessus incluses dans l'unité d'évaluation et égale à cette ou ces valeurs distinctes multipliées par le taux du millième;

(b) si on ne peut obtenir de l'administration fiscale aucune valeur distincte pour l'Immeuble ou le terrain sous-jacent, une part des taxes mentionnées ci-dessus égale à la Quote-part du Locataire.

[…]"

[our underlining]

[40] Pursuant to *An Act respecting Municipal taxation* (the **"*ARMT*"**), municipalities in the Province of Quebec have the power to assess and inscribe on its property assessment roll units of assessments for the purposes of taxing them.[17]

[41] A unit of assessment is defined as a parcel of land or contiguous parcel of land owned by the same owner, used for a single primary purpose that can normally and in the short term only be transferred as a whole and not in part, taking into account the most probable use that may be made of it.[18]

[42] The value entered on the municipal assessment roll consists of the actual value (or as more commonly expressed, market value) of all the components of a particular assessment unit.

[43] In the case at hand, the Shopping Centre consists of two units listed on the real estate assessment roll of the City:

a) a first unit consisting of the Shopping Centre building and the parking lot; and

b) a second unit consisting of a small bordering parcel of land.

---

[17] Articles 33, 34 and 35 *ARMT*, R.S.Q. c. F-2.1.
[18] Article 34 *ARMT*.

[44] Unlike what was done in the Province of Ontario prior to 1998, the Quebec taxation system does not assess premises occupied by tenants distinctly.[19]

[45] Until 1998, in Ontario, the municipal real estate assessment system obliged municipal assessors to separately assess each place of business for the purposes of real estate taxes.

[46] This separate assessment (*évaluation distincte*) system was described in the Court of Appeal case of *Zellers Inc.* v. *Orlando Corporation*[20] as follows:

> "*[10] It is significant that prior to the 1997 repeal of the provisions requiring separate tax assessments for each tenant, the landlord received a list of each of the tenants in the shopping mall with a separate assessment for each tenant. Unlike the document Zellers now relies on, it was called a "notice of property assessment", listed each occupant of the shopping mall separately, and attributed an "assessed value" both for each tenant's business and its parking facilities.*"

[47] Guay explains, during his testimony, that a shopping centre in the Province of Quebec is typically valued utilizing the income approach, that is, by capitalizing its net operating income.

[48] One of the steps in establishing its value is to determine the fair market rent for each of the premises or leasable areas. Anchor tenants, such as Provigo, often have a fair market rent derived from comparable premises in other shopping centres.

[49] An assessor will apply an economic rent that is not necessarily the contractual rent. He will seek to estimate the potential income that a landlord is expected to receive from the real estate, including the amortized value of leasehold improvements. This deemed income is then multiplied by a cap rate.

[50] The value determined can also take into consideration a number of other elements such as the physical state and condition of a property. It is not a simple process. It requires the use of judicious human judgement and much experience.

[51] In the case of a shopping centre, a municipal assessor's sole duty is to determine the market value of the shopping centre and to generate the inscription that will appear on the assessment roll.

[52] Only the owner of a property receives the notice of assessment and the real estate tax bill with respect to each assessment unit. A tenant does not obtain a separate assessment for his premises.[21]

---

[19] Articles 42, 43 and 57.1.1 *ARMT*.
[20] 2003 CanLII 57435 (Ont.C.A.).
[21] Articles 34, 81 and 124 *ARMT*.

[53] Only those inscriptions (the global market value of a unit of assessment) benefit from a presumption of validity.[22]

[54] There exist two instances in the Province of Quebec where there can be a distinct assessment of leased premises:

a) when a municipality decides to establish a roll of rental values for the purposes of imposing a business tax; and

b) pursuant to the now defunct surtax of non-residential immovables.

[55] Yet, the City has not imposed a business tax on tenants for many years and the provisions relating to the surtax on non-residential immovables were repealed from the *ARMT* in 2004.[23]

[56] The Court is satisfied that Exhibits P-12 and P-18 do not constitute proof of a separate assessment of the Premises by the taxing authorities for a number of reasons.

[57] Exhibit P-12 merely indicates the contributing value of the renovations carried out by Provigo. The document is entitled "*Réaménagement du Maxi* […] *valeur économique plus value des modifications*". It concludes that the "*valeur contributive*" of the improvements are $2,515,000 for the 2004 assessment roll and $2,992,000 for the 2007 assessment roll. It does not, therefore, establish a distinct assessment for the Premises as such.

[58] Toupin concedes that the chart (Exhibit P-18) was drafted by him on the basis of his own notes from the information contained in the municipal assessment file. He is not a municipal assessor.

[59] The Court concludes that the opinions, assumptions and calculations contained in an assessor's file do not constitute an inscription on the municipal assessment roll even if they have been determined or calculated by a municipal assessor. They cannot, on this basis, constitute a separate assessment of the value of the Premises by the taxing authorities, as contemplated by the Lease.

[60] In this determination, the Court is guided by a number of cases decided in the Province of Ontario on this specific issue. This case law is particularly useful, since the Ontario system of separate assessment existed in 1990 when Section 8.(4)(a) of the Lease was drafted.

---

[22] Raoul P. BARBE, *Le Bureau de révision de l'évaluation foncière*, Montréal, Wilson & Lafleur, 1986, pp. 166 to 169; *Appartement Hôtel Château Royal inc.* v. *Ville de Montréal et al.*, 2000 CanLII 7171 (Q.C.A.); *Communauté urbaine de Montréal* v. *Atlantic Construction inc.*, 1998 CanLII 12474 (Q.C.A.); *Empire Cold Storage Co.* v. *Montreal Urban Community*, 1987 CanLII 525 (Q.C.A.); *Tremblay* v. *La Reine*, [1978] R.P. 55 (C.A.); *Albert C. Leduc* v. *Municipalité de Saint-George-de-Clarenceville et al.*, [2000], n° AZ-50198487 (T.A.Q.).

[23] See Articles 69.1 and following (Business Taxes) and the repealed Articles 64 and 244.11 and following *ARMT*.

[61] In the Ontario Court of Appeal case of *Zellers* v. *Orlando*[24], a tenant submitted that a municipal assessor's working papers should be used to establish its share of real estate taxes for a shopping centre. The Court found that the requirement to separately assess individual tenants imposed on municipal assessors had been repealed in the 1998 legislative amendments. It held that the document establishing a value for Zellers' premises was an informal paper. It was not "*a separate assessment*" that could be used to calculate Zellers' share of realty taxes.

[62] A similar issue was examined in the Ontario Superior Court case of *Sophisticated Investments Limited* v. *Trouncy Incorporated*[25] where the Court was asked to determine how realty taxes attributable to leased premises were to be calculated. In this case, it was the landlord who asked that the municipal assessor's working papers be used while the tenant maintained that taxes should be calculated on the basis of the space it occupied in the shopping centre.

[63] The Court accepted the finding established in the *Orlando* decision that the municipal assessor's working papers did not constitute a separate assessment. It found that these were unreliable for a number of reasons:

> "*22 I agree with the respondent. Justice Pitt's analysis of the problems inherent in using assessor's working papers as a basis for allocating realty taxes to tenants of a shopping centre is equally applicable to the present case. Those problems are as follows:*
>
> > *1. Section 17.03 of the Assessment Act provides that the parties can apply to have the tenant's premises separately assessed. They parties have not sought such separate assessment in the present case;*
> >
> > *2. While the assessment office can provide working papers showing how the value of the whole property was calculated and showing separate values for the tenant's premises, the assessment office takes the position that "this separate tenant assessment … was not established for the purpose of allocating realty taxes under lease agreements.";*
> >
> > *3. The individual figures shown in the assessor's working papers for each tenant are prepared solely for the purpose of determining one gross figure. The calculations are not intended to be reliable on an individual basis, but rather are used to come to a satisfactory gross number. The object is not to calculate correct individual figures;*
> >
> > *4. The tenant's portion of realty property assessment shown in the working papers can be altered on appeal without any alteration in the owner's assessment;*

---

[24] *Supra* note 20.
[25] 2003 CarswellOnt 3029, 13 R.P.R. (4th) 291.

> *5. The lease drafted by the parties provides an alternative where there is no "assessed value" for the leased premises. The parties have thus contemplated the possibility of no assessment existing.*
>
> […]
>
> *23 In addition to the above I note that if the assessor's working papers were to form the basis of the tenant's tax obligation, the tenant would be in a very difficult position to appeal that determination. If the amount of the tenant's assessment shown in the working papers was higher than it should be, but the assessment shown in the working papers for another tenant in the same shopping centre was low in an equal amount, the landlord would not be in a position to appeal the overall tax assessment as it would be correct. Even if the landlord proceeded with an appeal in an effort to change the allocation of the overall figure among the tenants as shown in the working papers, the tribunal may well dismiss the appeal and note that, while some of the figures in the working papers may well be high, others are low and the overall assessment is reasonable. This would be unfair to the individual tenant and, in my view, the wording of the lease does not support such an interpretation.*"

[64] A similar issue was analysed in the Ontario Superior Court case of *658425 Ontario Inc.* v. *Loeb Inc.*[26] In that case, the language of the lease provided that the tenant (a supermarket) would pay a proportionate share of realty taxes unless the premises were "*assessed or valued separately*" for tax purposes.

[65] The Court held that the assessor's working papers were informal in nature and concluded as follows:

> "*16 For the reasons that follow, I have concluded that the terms of the lease dealing with the apportionment of property taxes to be paid as additional rent by the Tenant are to be interpreted as submitted by the Respondent Tenant:*
>
> *(a) There are presently no assessments conducted to determine the value of each tenancy as was required prior to the 1998 amendments to the Assessment Act.*
>
> *(b) While property taxes levied against the owners of shopping centers presently take into consideration the nature and value of the individual tenant businesses, these calculations are informal and discretionary, and not dictated by stature or regulation.*
>
> *(c) The means by which an individual tenant can obtain, examine, assess and challenge the result of the assessor's work product cannot reasonably be seen as having been contemplated by the parties as means of determining an individual or "separate value".*

[26] 2007 CarswellOnt 9619.

(d) The present means of determining a global property tax obligation cannot reasonably be considered as accurate or reliable on an individual basis. In this connection, I am guided by the findings of Rouleau, J., as he then was, in Sophisticated Investments Ltd. v. Trouncy Inc. (2003), 13 R.P.R. (4th) 291 (Ont. S.C.J.) at paragraph 22:

> *The individual figures shown in the assessor's working papers for each tenant are prepared solely for the purpose of determining one gross figure. The calculations are not intended to be reliable on an individual basis, but rather are used to come to a satisfactory gross number. The object is not to calculate correct individual figures.*

(e) The addition, in the present lease, of the words "or valued" to the phrase "provided that if the leased premises are assessed or valued separately by the municipality for tax purposes" does not in my view provide, in sufficiently certain terms, for a reference to a particular form of valuation independent of a formal assessment.

(f) Taken to its logical conclusion, the Applicant's interpretation of the phrase "or valued" would result in a "separate value" interpretation in every case as the landlord's property tax obligation invariably has to be arrived at by examining, in some fashion or other, the nature and value of the individual tenancies. Had the parties intended such an interpretation, the lease would not have provided alternate means for determining each tenant's property tax obligation, and would not have included a "proportionate share" provision in the absence of an individual or "separate value" method."

[66] In the Ontario Superior Court case of *Indigo Books & Music Inc.* v. *The Manufacturers Life Insurance Company*[27], the Court was asked to interpret a lease to determine a tenant's contribution in respect to realty taxes. In that case, the language of the lease was quite broad. It stipulated:

"*3. <u>Separate Allocation</u>*

Landlord's Taxes shall be allocated to the Leased Premises on the basis of a separate assessment made by the relevant assessing authority. However, in the event that the Landlord is unable to obtain from the assessing authorities any separate allocation of the Landlord's Taxes or is unable to obtain from the taxing authorities any separate assessment or other information deemed sufficient by the Landlord to make the calculations of Additional Rent under this Lease, the Tenant's allocation of the Landlord's Taxes shall be the Tenant's Proportionate Share of the Landlord's Taxes."

[67] *Indigo* argued that the working papers of the municipal assessor was "*other information deemed sufficient to*" calculate "*the realty taxes*" payable.

---

[27] 2009 CanLII 11432 (Ont.S.C.).

[68] The Court determined that the said "*working papers*" were unreliable and that the realty taxes should not be allocated to the premise on the basis of the assessment of the premises contained therein:

> "*[42] Reliance solely on the specific working papers is not consistent with the finding of this Court* […]. *Working Papers are not intended to apply to individual premises. They are to demonstrate a value for the entire property. This being so, there is a systemic uncertainty as to the reliability of the working papers that could apply in any individual circumstance.*
>
> *[43] In coming to this understanding, it is important to remember that "these calculations are informal and discretionary". They are "not dictated by statute or regulation"* […]. *There is no regulatory or legislative requirement directing that working papers be prepared. The responsible authorities do not apportion assessments on a tenant-by-tenant basis* […]."

[69] The Court is of the view that the reasoning and analysis of these cases is applicable in the present instance.

[70] To conclude, the Court notes that when a property's assessment is contested, a municipal evaluator can be asked to defend the exactitude of the market value that he has fixed. He does not, however, have to defend it on the basis of the information contained in his working file. The calculations and opinions contained in his working documents that illustrate the proportionate shares of various components of a given unit of assessment cannot be contested. The existence and determination of this information has not been established in law or regulation. It has not been generated to allocate the payment of real estate taxes between a tenant and a landlord.

5.2 Dorval Property's interpretation of the Lease goes against the interpretation given to it by the parties for over a decade

[71] The *Civil Code of Quebec* provides that when one interprets a contract, one must search for the common intention of the parties rather than adherence to the literal meaning of the words used by the parties: the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.[28]

[72] Dorval Property argues that the provisions of the *Civil Code* dealing with the interpretation of contracts do not apply to the case at hand because the words of Section8.(4)(a) are clear and concise. It insists that the words of the Section require no interpretation - they merely need to be enforced.

[73] The Court disagrees. The clause is far from clear. It appears to be a poor translation of the Steinberg standard English lease which itself reads as if it is a difficult provision of the *Income Tax Act*.

---

[28] Articles 1425 and 1426 C.C.Q.

[74] In the case at hand, the nature of the contract of lease is an economic agreement wherein two experienced and sophisticated parties agree to allocate the costs and risks of a real estate property between them.

[75] Equity for other tenants of the Shopping Centre has no role to play in the determination of the proportionate share of real estate taxes payable by Provigo.

[76] The circumstances of the signing of the agreement are unclear as no evidence was provided. What we do know, however, is that the model lease agreement originates from an English language master form document that existed at a time when the separate assessment system prevailed in the Province of Ontario.

[77] The English version of Section 8.4(a) specifically contemplates the separate assessment system of the Province of Ontario:

> "*8. (4) If the Leased Premises are not separately assessed by the relevant taxing authority in the manner contemplated by section 8(1)(a), then if the Shopping Centre is in the Province of Ontario, the Landlord shall make application to have the Leased Premises so assessed. Until the relevant taxing authority makes a separate assessment, or if the Shopping Centre is in the Province of Quebec, the real property taxes, rates, local improvement rates, duties and assessments, levied, rated, charged, or assessed against the Shopping Centre shall be apportioned so that there shall be attributed to the Leased Premises:*
>
> *(i) if a separate value is obtainable from the taxing authority for either or both of the Building and the land underneath the Building, a share of the above mentioned taxes included within the unit of assessment equal to the separate value(s) multiplied by the applicable mill rate(s);*
>
> *(ii) if no separate value is obtainable from the taxing authority for either the Building or the land underneath the Building, a share of the above taxes equal to the Tenant's Proportionate Share thereof.*
>
> […]"

[78] How have the parties interpreted the contract to date?

[79] The evidence shows that from 1996 to 2007, three different owners of the Shopping Centre[29] invoiced Provigo a portion of the real estate taxes of the Shopping Centre by using the proportionate share of 12.38%.[30] Edgecombe, who has managed the Shopping Centre since 2001, has been responsible for billing taxes in this manner for two different owners.

---

[29] *Ivanhoe Inc.*, from 1996 to 2001, *Pyxis Real Estate Equities Inc.*, from 2001 to 2006 and Dorval Property, from 2006 to 2008.

[30] Exhibits D-5 and D-8.

[80] Throughout this period, it was possible for the successive owners of the Shopping Centre and its property managers to have access to the City's assessment file. They never exercised this right. One can presume that they were satisfied with the *status quo* and with the current interpretation of the Lease.

[81] Moreover, the evidence also demonstrates that following a re-measurement done in 1997, the parties agreed in July of that year that the proportionate share for billing purposes would be 12.38% for 1996, 1997 and for subsequent years until such time that there was a substantial change in the rentable area of the Shopping Centre:

> "*Ces superficies sont confirmées tant qu'il n'y aura pas de changement substantiel à la superficie locative brute du centre commercial relatif à une amélioration ou un agrandissement.*"[31]

[82] No evidence was provided to establish any change in the rentable area of the Shopping Centre.

[83] It is also noted that when Dorval Property became the owner of the Shopping Centre, it undertook to execute the rights and obligations flowing from the Lease "*in the same manner*" as if it had signed the original lease.[32]

5.3 The obligation to pay real taxes in the manner established in Section 8.(4)(a) is not sufficiently determinate or determinable

[84] In order to be enforceable, an obligation must be determinate or determinable.[33]

[85] If an obligation is not determinate at the time is is created, it should be determinable when it is performed by means of criteria that are objective (not arbitrary). It ought not depend on the sole discretion of one party, even if it is exercised in a reasonable and judicious manner.[34]

[86] A commercial lease is not an open bar and a bottomless buffet for a landlord. To ensure enforceability, the obligation of a tenant to pay his proportionate share of real estate taxes should be well drafted in as precise and clear a manner as possible. It should have fixed and definite limits.

[87] Dorval Property argues that Section 8.(4)(a) is clear, concise and the obligation stipulated therein is determinable.

---

31 Exhibit D-5.

32 Exhibit D-6 - A letter agreement between the parties dated January 26, 2007, states that: "*The Landlord hereby agrees and undertakes to assume and perform each of the covenants, obligations and agreements of the Landlord under the Lease <u>in the same manner</u> and in the same capacity as if the Landlord had initially been named in the Lease.*"

[our underlining]

33 Articles 1373 and 1374 C.C.Q.

34 *Aberman* v. *Gould*, [1976] C.P. 158.

[88] With respect, the Court finds the wording of Section 8.(4)(a) to be confusing.

[89] While the Court finds that the first portion of the clause ("*si on peut obtenir de l'administration fiscale une valeur distincte pour l'Immeuble* […]") to be sufficiently clear, it struggles with the second segment ("*une part des taxes mentionnées ci-dessus incluses dans l'unité d'évaluation et égale à cette ou ces valeurs distinctes multipliées par le taux du millième*"). It is, in fact, nearly incomprehensible. It is difficult to understand exactly what the drafters had in mind.

[90] Lets examine this second portion carefully. It is written: "*une part des taxes mentionnées ci-dessus incluses dans l'unité d'évaluation*". This is a concept that does not function. Taxes are not included in a unit of assessment.

[91] An assessment unit refers to a precise definition in the *ARMT* where it is stipulated that immovables must be entered on the property assessment roll by units of assessments and that such units are comprised of an aggregate of immovables.[35] It cannot, therefore, "*include*" real estate taxes as is suggested by the clause. The terminology used does not work. Did the drafters mean real estate taxes "*attributed*" to the assessment unit? Perhaps, but this is not what was written.

[92] One gets completely lost in the wording of the clause when it goes on to say "*et égale à cette ou ces valeurs distinctes multipliées par le taux du millième*". Taxes are never equal in number to an assessment. From an assessment, one establishes the taxes payable in function of a mill rate adopted by a municipality each year.

[93] Is it possible to give a certain interpretation to this last portion of Section 8.(4)(a) that would enable the parties or a Court to determine its meaning? Perhaps. It is not, however, sufficiently determinate or determinable to be enforceable to justify the significant property tax increase being claimed from Provigo by Dorval Property.

[94] The Court concludes that Section 8.(4)(a) is so poorly drafted that it is not enforceable. It is not possible to conclude that the means of calculating the exact amount of real estate taxes applicable to Provigo have been established by the clause.

[95] Dorval Property has the burden of showing that its recalculation of real estate taxes attributable to Provigo is justified by the terms of the Lease. It has failed to meet that burden.

FOR THESE REASONS, THE COURT:

[96] **DISMISSES** the Plaintiff's Re-amended Motion to institute an action;

---

[35] Articles 32 and 33 *ARMT*.

[97] **WITH COSTS.**

_____
PAUL MAYER, J.S.C.

Mtre. **Marc Lanteigne**
De Grandpré Joli-Cœur, s.e.n.c.r.l.
Attorneys for the Plaintiff

Mtre. **Marc Beauchemin**
Mtre. **Jonathan Fecteau**
De Grandpré Chait, s.e.n.c.r.l.
Attorneys for the Defendant

Dates of the hearing: September 9 and 12, 2011