

**CITATION:** Spot Coffee Park Place Inc. v. Concord Adex Investments Limited, 2021 ONSC 6629  
**COURT FILE NO.:** CV-15-00520873-0000  
**DATE:** 20211005

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
SPOT COFFEE PARK PLACE INC.	)	<i>G. Sidlofsky and P. Neufeld, for the Plaintiff</i>
	)	
Plaintiff/Defendant by Counterclaim	)	
	)	
<b>– and –</b>	)	
	)	
CONCORD ADEX INVESTMENTS	)	<i>G. Low, for the Defendant</i>
LIMITED	)	
	)	
Defendant/Plaintiff by Counterclaim	)	
	)	
	)	
	)	
	)	<b>HEARD: MARCH 1-5, 2021</b>

**VELLA J.**

**REASONS FOR JUDGMENT**

[1] Spot Coffee Park Place Inc. (“Spot Coffee”) operated a “high end” “European style” café that was part of a chain of cafés (operated by Spot Coffee’s parent company, Spot Coffee (Canada) Ltd. or “Spot Canada”). The café chain was largely based in the United States. Each of the two individual cafés in Canada were operated by separately incorporated entities. As of the date of this trial, Spot Canada no longer had any cafés operating in Canada.

[2] Concord Adex Investments Limited (“Concord Adex”) is the developer and builder of residential condominium communities, which include commercial/retail elements under a master planned community. It is the developer and builder of such a project in North York, known as Concord Park Place. Concord Adex is part of a group of real estate development companies based in Canada and, more recently, in the United Kingdom.

[3] Spot Coffee entered into a 10-year fixed term lease executed on October 29, 2010 (the “Lease”). Spot Coffee took possession of the subject unit at Park Place on or about July 5, 2012 and the fixed term lease was to have expired in or around July 4, 2022.

[4] The Lease was terminated on June 1, 2013 by Concord Adex after Spot Coffee, on notice, abandoned the leased premises.

## **I. ISSUES**

[5] The main issues to be decided in this proceeding are:

- a) Did Concord make negligent misrepresentations to induce Spot Coffee to enter into a fixed term lease agreement?
- b) If so, what are Spot Coffee’s damages?
- c) Does the entire agreement clause found in the Lease preclude pre-contractual tort liability?
- d) If not, what are Concord Adex’s damages arising from Spot Coffee’s abandonment of the leased premises in breach of a fixed term lease?
- e) Did Concord Adex discharge its duty to mitigate damages?

## II. PRELIMINARY MATTERS

[6] The parties agreed that the documents contained in the Plaintiff's Book of Documents and the Defendant's Book of Documents would be entered into evidence as both authentic and for the truth of their contents. Accordingly, the Plaintiff's Book of Documents was entered as Exhibit 1 and the Defendant's Book of Documents was entered as Exhibit 2, on consent.

[7] Thereafter, documents within Exhibit 1 and Exhibit 2 were referenced by tab number, reflecting the order of each document's appearance within the respective Books of Documents.

[8] Furthermore, it was agreed that I would only review and refer to those documents, within Exhibits 1 and 2, that were specifically referenced during the course of trial through witnesses.

[9] Spot Coffee called as witnesses John Lorenzo, Anton Ayoub, and Laura Lee Lawrence. Concord Adex called as witnesses Joanne Vacheresse, Mitchell Kowalski, Matthew Gisini and Andrea McKittrick. All were fact witnesses.

[10] This trial was conducted virtually on the Zoom platform. From time to time, there were challenges posed by intermittent weak internet connection. The lawyers and their witnesses sometimes had to repeat their questions and/or answers. However, overall, I was able to hear the witnesses' testimony adequately.

[11] The use of CaseLines and share screen by the lawyers enabled the court and the witnesses to view documents without difficulty.

### **III. ADMITTED FACTS**

[12] The following background facts were uncontested at trial and are taken from Spot Coffee's Response to Concord Adex's Request to Admit.

[13] In early 2010, Concord Adex began discussing with the principals of Spot Canada the possibility of the latter, through a subsidiary or otherwise, leasing a retail unit at Concord Park Place. Another subsidiary of Spot Canada was already operating a similar café at premises located in downtown Toronto, which was leased from a company related to Concord called Concord City Place.

[14] On or about September 3, 2010, Concord Adex and Spot Coffee entered into a written offer to lease ("Offer to Lease").

[15] The Offer to Lease contained the following entire agreement clause:

This Offer to Lease contains all of the terms and conditions of the agreement between the parties relating to the lease of the Premises and supersedes all previous agreements or representations of any kind, written or verbal. There are no covenants, representations, agreements, warranties or conditions in any way relating to the subject matter of this Offer to Lease, expressed or implied, collateral or otherwise, except as expressly set out herein.

[16] Subsequently, by an agreement dated October 29, 2010, Concord Adex and Spot Coffee entered into a lease for the premises described as Unit A, in Building D, of Discovery Piazza (or

Discovery II) at Concord Park Place in North York (the “leased premises”). Discovery Piazza consisted of five buildings named Buildings A to E.

[17] The Lease contained the following entire agreement clause:

#### ARTICLE 19 – GENERAL PROVISIONS

##### 19.1 Entire Agreement

This Lease contains all of the terms and conditions of the agreement between the parties relating to the matters herein provided and supersedes all previous agreements or representations of any kind, written or verbal, made by anyone in reference thereto, with the exception of any written and executed offer to lease or agreement to lease (“Offer to Lease”) which may exist between the parties and pursuant to which this Lease was entered into. There are no covenants, representations, agreements, warranties or conditions in any way relating to the subject matter of this Agreement expressed or implied, collateral or otherwise, except as expressly set out herein or in the Offer to Lease, if any. In the event of any inconsistency or contradiction between the provisions of any Offer to Lease and the terms and conditions of this Lease, this Lease shall prevail.

There shall be no amendment hereto unless in writing and signed by the party to be bound.

[18] Spot Coffee took possession of the leased premises on July 5, 2012 and began operating its business after completing the 90-day fixturing period for the build out of this unit.

[19] Spot Coffee ceased carrying on business and abandoned the leased premises on May 29, 2013.

[20] Concord Adex terminated the lease by way of Notice of Termination on June 1, 2013.

[21] In addition to the above admissions, by way of its Response to the Request to Admit, Spot Coffee agreed that:

- a) Spot Coffee's allegations relating to parking, as set out in paragraphs 20 and 21 of its Statement of Claim, was that the landlord "assured the plaintiff that its customers would have the benefit of free underground parking and access to approximately 150 parking spots." Spot Coffee alleges that Concord assured Spot Coffee that its customers would have "sufficient free, close and accessible parking."
- b) Spot Coffee takes issues with the ease of access and other problems with the customer parking.
- c) Spot Coffee alleges that access to the underground parking was complicated and required patrons intending to use the underground parking facilities to make their way to a concierge office to gain access to the garage entrance.
- d) Spot Coffee is alleging that it was an, in part, implied representation that the underground parking would be accessible, barrier free, and easy to access.
- e) Spot Coffee alleges (at paragraphs 22 and 23 of its Statement of Claim) that representations were made that "several hundred units at the development would be sold and ready for occupancy in 2013." The further allegation is that the

construction of such units was significantly delayed and in fact only near completion in the winter of 2015.

[22] While not the subject of admissions under the Request to Admit, it is clear that neither the Offer to Lease nor the Lease makes any reference to projected occupancy levels with respect to Concord Park Place's twenty building, largely residential, complex. Further, neither of these agreements make any express reference to customer retail parking.

[23] Furthermore, it is clear on the evidence that the leased premises were located at Unit A, 77 Provost Drive (identified at the time of the lease as 67 Provost Drive), in what was identified on the various plans and brochures as Building D in the Discovery complex of five buildings identified as A through E within the broader development. The size of the leased premises was 3,786 square feet and the basic rent (net of additional rent defined in the Lease as all sums of money other than the basic rent) started at \$23.00 per square foot per year (years 1 and 2) and increased to \$38.00 per square foot by years 8 to 10. There was a three-month rent-free period in year one of the Lease.

#### **IV. ANALYSIS**

[24] In this case, Spot Coffee is relying on oral representations that it claims were made to it by Concord Adex prior to its entry into an Offer to Lease, followed by entry into the Lease.

[25] Concord Adex, in addition to denying that it made any negligent misrepresentations, relies on an entire agreement clause in the Lease, which it says precludes any action based on negligent misrepresentation.

[26] The Supreme Court of Canada set out the test for negligent misrepresentation in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, at p. 110:

- (a) Is there a duty of care based on a “special relationship” between the representor and the representee?
- (b) Was the representation untrue, inaccurate, or misleading?
- (c) Did the representor act negligently in making the alleged misrepresentation?
- (d) Did the representee rely on the negligent misrepresentation and was that reliance reasonable?
- (e) Was the reliance detrimental to the representee in the sense that damages have resulted?

i. **Is there a special relationship of proximity between Spot Coffee and Concord Adex?**

[27] In *Deloitte & Touche v. Livent Inc.*, 2017 SCC 63, [2017] 2 S.C.R. 855, at paras. 47-48, the Supreme Court of Canada reviewed the duty of care analysis for cases involving negligent misrepresentation. A duty of care will be recognized based on the proximity of the relationship between the alleged tortfeasor and the injured party and the reasonable foreseeability of injury as a consequence of the wrongdoing: *Deloitte*, at paras. 25 and 32.

[28] The proximity analysis entails asking whether the parties are in such a “close and direct” relationship that it would be “just and fair having regard to that relationship to impose a duty of care in law”: *Deloitte*, at para. 25.



[29] In cases of negligent misrepresentation, reasonable foreseeability exists “where (1) the defendant should reasonably foresee that the plaintiff will rely on his or her representation ; and (2) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable”:  
*Deloitte* at para. 55.

[30] The relationship of landlord and (proposed) tenant is well recognized to give rise to the requisite proximity of relationship. In *Country Style Food Services Inc. v. 1304271 Ontario Ltd.*, 2003 CanLII 13614 (Ont. S.C.), at para. 57, aff’d 2005 CanLII 23214 (Ont. CA.) at para. 52, a special relationship of proximity was found to exist between a landlord and a franchisee who entered into a sublease. Similarly, the requisite special relationship was found to exist between a landlord and tenant in *Quality Cheese Produce Co. v. Dev-West Properties Inc.*, 1998 CarswellOnt 825 (Ct. J), at paras. 12 and 14.

[31] The evidence is uncontested that Spot Coffee and Concord Adex had a pre-existing landlord and tenant relationship since 2007 when Spot Coffee City Place Inc. opened a café at the Concord City Place development in downtown Toronto. This relationship was ongoing as of the date the discussions commenced regarding the possible opening of a Spot Coffee café at the Concord Adex Park Place development in 2010.

[32] In this case, it was reasonably foreseeable to Concord Adex that Spot Coffee would rely on its representations in making the decision of whether to enter into a fixed term lease agreement:  
*Quality Cheese*, at para. 12.

[33] There was no suggestion made at trial that there were any policy reasons that would militate against finding that Concord Adex owed a duty of care to Spot Coffee in the circumstances of this case.

**ii. What are the alleged misrepresentations?**

[34] At trial, Spot Coffee relied on two broad representations to underpin its claim. First, it alleged that at a meeting held in or around early July 2010 at Concord Adex's presentation office (the "presentation meeting"), it was told that the estimated occupancy dates for the buildings immediately surrounding the proposed location of its café would be 2012 for Discovery I and II (consisting of four predominantly residential condominium and townhouse buildings). The estimated occupancy date for a nearby condominium building called Tango was 2013. Spot Coffee was also told that the building for its proposed café would be somewhat pre-populated by the time of any opening by Spot Coffee.

[35] Secondly, Spot Coffee claimed it was told at the presentation meeting, which was reinforced at a site visit of the underground parking lot shortly thereafter, that its customers would have free parking in the planned underground parking facility located in its building. They claim that they were also told there would be elevator access from the parking facility (called P1, meaning parking level 1) to the main floor, right across from the entrance of the unit proposed to Spot Coffee, and the elevator would be reserved for retail customer use. Spot Coffee stated that it was implicit in this free customer parking representation that the parking would be easily accessible by customers, and that at no time prior to the entry into the Lease did Concord Adex suggest there would be any restrictions or impediments to customers seeking to park in P1.

[36] Spot Coffee says that, but for these representations, it would not have entered into the Offer to Lease or the Lease.

[37] Spot Coffee also claims that it agreed to take a larger unit than it would otherwise have taken due to these representations.

[38] Concord Adex replies that it made no such misrepresentations. While it did provide estimates of the occupancy dates for the three buildings in question, they were just that - estimates, not guarantees. Also, Concord Adex replies that it did provide the requisite free customer parking in P1 and that there were no elevator problems. However, it made no representation concerning how the customers would be required to gain entry to P1. Concord Adex also claims that it reduced the basic rent it was originally seeking for Unit A so that the rent would fall within Spot Coffee's budget in light of the fact Spot Coffee would normally have taken a smaller unit. Concord Adex also made available for Spot Coffee's use an outdoor patio adjacent to Unit A that Spot Coffee valued.

[39] At the time of the presentation meeting, Park Place was in the early construction and planning stage and it was anticipated that construction regarding the whole complex (beyond Discovery I and II and Tango) would be over many years - possibly exceeding 10 years. On the other hand, the condominium and townhouse units in the Discovery buildings were already approximately 95% sold.

[40] While there was some uncertainty as to all of the people who attended the presentation meeting, at minimum John Lorenzo, President and CEO of Spot Canada; Anton Ayoub, President of Spot Coffee; John Corrente, Operations Manager of Spot Coffee; and Joanne Vacheresse,

Commercial Leasing Manager for Concord Adex were in attendance. It is likely that a technical person, such as an architect, also attended on behalf of Concord Adex. Ms. Vacheresse admitted that she would have invited Spot Coffee representatives to attend, and she was the leasing representative of Concord Adex.

[41] Unfortunately, no minutes or other written record of this meeting was made so the three witnesses were testifying from their respective memories of this meeting.

[42] It became obvious in the course of Ms. Vacheresse's testimony that she had little, if any, independent recollection of this matter. She was reconstructing her memory based on what was written in documents, particularly email correspondence, which she either drafted or received. In the course of cross-examination, Ms. Vacheresse was repeatedly impeached and routinely adopted her answer from her examination for discovery where it contradicted her testimony at trial. She admitted she had little or no independent recollection of the events which are the subject of this proceeding.

[43] At times, Ms. Vacheresse was combative during her cross-examination. For example, when it was suggested to her that Concord Adex reduced the base rent from the asking price to induce Spot Coffee to take the larger unit at the same cost as it would have cost to take a smaller unit, Ms. Vacheresse denied this and remarked that tenants never pay the asking price. However, when she was shown her own email in which Concord Adex offered to reduce the per square foot basic rent to induce Spot Coffee to take the larger unit as a "landmark" for the development, she reversed her answer.

[44] Ms. Vacheresse's testimony was unreliable except where corroborated by documents. I also found Ms. Vacheresse to be lacking in credibility.

[45] In stark contrast, the testimony of Mr. Lorenzo and Mr. Ayoub was based on their independent recollection of the matters in issue, with the benefit of documents to refresh their respective memories from time to time. Where Ms. Vacheresse's evidence conflicts with Mr. Lorenzo and/or Mr. Ayoub, I prefer the evidence of Mr. Lorenzo and Mr. Ayoub.

[46] Mr. Lorenzo and Mr. Ayoub testified that they were handed a brochure at the presentation meeting, entitled "Retail Leasing Concord Park Place" (the "2010 Retail Leasing Brochure"). The 2010 Retail Leasing Brochure provided details of opportunities for retail businesses like Spot Coffee's to lease at Park Place. They testified that they relied on the contents of this brochure as being true and accurate for purposes of making the decision to enter into the Lease.

[47] Mr. Lorenzo testified that Ms. Vacheresse told them at this meeting that by 2012 and 2013 the buildings immediately around the proposed café location, namely the Discovery and Tango buildings, would be completed, sold and occupied. He testified that Spot Coffee relied on the future timely occupation of these five buildings in making its decision to enter into the Lease and that this was a fundamental factor as it informed Spot Coffee's assessment of the potential size of the customer base that would be available at Park Place by the time it opened.

[48] Mr. Lorenzo acknowledged that none of the other buildings planned for Park Place had any estimated occupancy dates listed in the 2010 Retail Leasing Brochure.

[49] Mr. Lorenzo admitted that he was aware that the occupancy dates were estimates, but he said that these were the "developer's own estimates," which were more reliable than "marketing

estimates,” which he knew were not very reliable. He based this distinction on his experience in the real estate industry, where he has assessed retail leasing opportunities for Spot Canada. Mr. Lorenzo explained that his understanding of “occupancy” was that residents would actually be living in the units by the estimated dates.

[50] Mr. Lorenzo testified under cross-examination that no representations were made to him at the presentation meeting concerning retail customer parking.

[51] Mr. Ayoub had a more detailed recollection of the presentation meeting. This makes sense as he was responsible for making recommendations to Mr. Lorenzo concerning leasing decisions, including overseeing the lease negotiations, and he oversaw the selection, construction and operation of new Spot Coffee cafés.

[52] His recollection is that the presentation meeting took place in July 2010. Mr. Ayoub stressed the fact of the pre-existing relationship between Spot Coffee and Concord Adex (regarding the Spot Coffee City Place location) as an important factor in the respective companies’ developing a commercial strategic alliance.

[53] He recalled that a Master Plan was also provided at the presentation meeting and that Ms. Vacheresse provided an overview of the Park Place development with reference to the 2010 Retail Leasing Brochure, which she gave to them. She offered Spot Coffee an opportunity to use a patio space at no charge, which was a coveted asset for Spot Coffee’s café. He recalls that she showed them the floor plan for an underground parking facility that was labelled “retail parking.” She also reviewed the occupancy rates, demographic information, architectural models of the complex and stated that there was a high median income of the immediate surrounding neighbourhood (beyond

Park Place) of \$95,220. These were all key factors informing Mr. Ayoub's assessment of a retail leasing opportunity for Spot Coffee since the population base and the median income of that base had to meet minimum standards in order to make a Spot Coffee café economically viable. Mr. Ayoub based his calculations on the experience of other Spot Coffee cafés, including those in the United States.

[54] With respect to the retail customer parking, Mr. Ayoub testified that Ms. Vacheresse stated at the presentation meeting that there would be more than 150 retail parking spots and showed them a blueprint depicting the retail customer parking lot called "P1." No restrictions were raised by Ms. Vacheresse about access to, or Concord Adex's control over, the underground parking lot reserved for customers.

[55] Mr. Ayoub said a key consideration was Concord Adex's representation that there would be ample free customer parking at the underground parking lot in building D for Spot Coffee's customer base. This was key because in order to be economically viable, Spot Coffee had to attract substantial business from the densely populated surrounding neighbourhood.

[56] Mr. Ayoub testified that he made his recommendation to enter into the Offer to Lease, and ultimately the Lease, based on these representations, which were reflected in the 2010 Retail Leasing Brochure and reiterated by Ms. Vacheresse at the presentation meeting and the following site visit to the underground parking lot. A review of this brochure reflects the estimated occupancy dates of 2011 for Buildings A, B, and C and 2012 for Buildings D and E. The total residential units for those buildings was listed as 1131. For the nearby Tango building, the occupancy date is listed as 2013, and the number of residential units is 384.

[57] According to the 2010 Retail Leasing Brochure, the demographics for a 5 kilometre radius surrounding Park Place showed a neighbourhood population of 294,236 with a daytime population (including commuters) of 331,090. The average household income is listed as \$95,220 and the proportion of the population with a university degree is 49.2%. The number of businesses in the neighbourhood is listed at 11,920. Mr. Ayoub testified that this data met Spot Coffee targets for suitable locations.

[58] The brochure also shows the leased premises. It is listed as being 3,786 square feet and shows a patio of 3,393 square feet right next to the proposed location. The asking basic rent is \$38 net per square foot, and it is one of four retail units in this building. On this same page there is a TMI (consisting of property taxes, maintenance, and insurance) of \$15.00 per square foot. As well, on this same page is a reference that reads “Parking” and “P1 Retail and Visitors Parking” as available in this building.

[59] The brochure clearly states that the occupancy targets are “estimated.” However, no details are provided in the brochure concerning retail and visiting parking.

[60] Ms. Vacheresse had no recollection of what she told the Spot Coffee representatives at the presentation meeting. Her testimony was based on her standard practice of what she generally said at these types of meetings with prospective tenants. Her job was to solicit new tenants for Park Place. Based on her standard practice she testified that she likely discussed occupancy targets with Spot Coffee but emphasized these were estimates only. She also agreed that she was aware at that meeting that Spot Coffee needed “convenient” customer parking. To attract customers from the broader surrounding neighbourhood, Spot Coffee needed parking close by. She agreed with statements where they appeared in email correspondence.



[61] She acknowledged that Concord Adex was in the best position to advise as to when the buildings would be completed.

[62] Mr. Ayoub testified that he attended at a site visit of the underground parking lot with Ms. Vacheresse in or around August 20, 2010, shortly after the presentation meeting and before the Offer to Lease was prepared and signed. Approximately eight people attended this site visit. John Corrente and Laura Lee Lawrence attended with Mr. Ayoub and the rest were from Concord Adex. The parking lot was still under construction.

[63] Mr. Ayoub testified that Ms. Vacheresse stretched out her hands and said everything you can see is the retail parking. Further, she reportedly said that Spot Coffee's customers would have easy access to P1 via an elevator that would open to the outdoors at Spot Coffee's intended patio location. She further told Mr. Ayoub that only ten retail units, including Spot Coffee, would share these parking spots, and that Spot Coffee's was the largest of the retail units. Mr. Ayoub was clear that Ms. Vacheresse told him during this site visit that retail customers would have easy and convenient access to P1 parking. They walked over to the elevator, and to emphasize her point about easy and convenient, she showed him that it would lead to the outdoors right at the patio.

[64] Mr. Ayoub testified that Ms. Vacheresse also said to him that Concord Adex knew how important parking is to retail businesses in the suburbs both at the presentation meeting and at this site visit.

[65] Mr. Ayoub said that after this site visit, he was satisfied that the parking spaces would be available and that this was a good fit for Spot Coffee. He said that, based on their pre-existing relationship, there was a "relationship of collaboration and trust" between Spot Coffee and

Concord Adex. Shortly after the site visit, the Offer to Lease was drafted by Concord Adex, negotiated with Spot Coffee, the revisions were incorporated, and the lease was signed.

[66] Under cross-examination, Mr. Ayoub admitted that Ms. Vacheresse never said anything about whether the parking access to P1 would be controlled by Concord Adex only, nor did she mention anything about access being subject to shared control between Concord Adex and the condominium corporation that represented the residential tenants in Discovery I and II. It later became clear that P1 was a shared common facility, meaning that it was controlled by a committee with two representatives from Concord Adex and two representatives from the condominium corporation, as will be further discussed later in these reasons.

[67] Ms. Vacheresse testified about the P1 site visit as well. She acknowledged that the purpose of this site visit was to show the parking area to Mr. Ayoub. She acknowledged that the parking garage was under construction and in rough shape. She attended with her property manager. She agreed that there were no impediments to their entry into the parking garage from the Singer Court ramp, i.e., there was no garage door. She could not recall what was discussed during this site visit. However, her purpose was to show Spot Coffee where the parking lot was located and the sheer size of the parking lot so Spot Coffee would be assured that ample parking would be available. She confirmed there was parking on one side for retail customers and for residents' visitors on the other side of the garage.

[68] She denied holding out her arms and telling Mr. Ayoub that the whole area was for retail parking because she knew that part of the area was dedicated to residential tenant visitors. However, she said that she told Mr. Ayoub what area was for customer parking. She did tell Spot Coffee that there would be ample parking on P1 for everyone on the commercial side and

acknowledged that parking was a necessity in order for Spot Coffee to attract customers from the neighbourhood beyond Park Place. She agreed with her answer on her examination for discovery that there were just over 200 parking spots available for residential and commercial visitors. She initially testified that she did not tell Spot Coffee that there would be any restrictions on accessing the parking, but then backtracked and said she did not remember. Then when confronted with her examination for discovery, Ms. Vacheresse adopted her answer from discovery that she most likely did not talk about any restrictions attached to the retail parking because she would not have been aware of any at the time of the site visit.

[69] Ms. Vacheresse confirmed that she showed Mr. Ayoub the elevator and advised that it was dedicated for retail customer use only and would give easy access to customers going to Spot Coffee's café.

[70] Mr. Ayoub testified that the key components driving Spot Coffee's decision to lease at Park Place were the occupation estimates for the Discovery and Tango buildings, the demographics (including density and median income of the population) of the surrounding neighbourhood, and the availability of accessible convenient free customer parking for Spot Coffee customers.

[71] In *Cognos*, at p. 125, Iacobucci J. described the duty of care for representations during pre-contractual negotiations as “over and above a duty to be honest in making those representations. It requires ... that the representor exercise such reasonable care as the circumstances require to ensure that the representations made are accurate and not misleading.”

[72] Furthermore, in some circumstances a failure to divulge necessary information can constitute a misrepresentation: *Salvatore Fuda v Jim McIntosh Petroleum Engineering Ltd.*, 2013 ONSC 2122, at para. 69. For example, a claim for negligent misrepresentation can arise from silence “if the silence renders inaccurate or incomplete an express or implied representation that was previously made by a party to another party in circumstances in which the first party owes a duty of care to the second party”: *Salvatore Fuda* at para. 69.

[73] Misrepresentations must relate to a matter of existing fact: *Cognos* at p. 129; *Datile Financial Corp. v. Royal Trust Corp. of Canada*, 1991 CarswellOnt 726 (Ont. Gen. Div.), at para. 54. A statement of intention about the future is not a statement of existing fact, and therefore cannot constitute a negligent misrepresentation: *Datile*, at para. 54). In *Hembruff v. Ontario Municipal Employees Retirement Board*, 78 O.R. (3d) 561 (C.A.), at para. 76, the Court of Appeal stated that “a representation must be a matter of ascertainable fact, as distinguished from an opinion or expectation.”

[74] However, in *Quality Cheese*, at para. 19, the court distinguished between a representation regarding a future occurrence and a statement of present opinion. In that case, the landlord’s representation that a supermarket was moving into the mall was characterized as a statement of present opinion. The tenant reasonably relied on the landlord’s knowledge of zoning regulations when it made the decision to enter into a lease.

[75] Based on my assessment of the evidence and my finding that Ms. Vacheresse, the only witness called by Concord Adex to give evidence on the pre-contractual discussions, was not credible, I find that Concord Adex made representations to Spot Coffee through Ms. Vacheresse and the 2010 Retail Leasing Brochure and Master Plan that:

- (a) The Discovery Buildings would be built and occupied by 2011 and 2012 (representing a total of 1131 units), and Tango would be built and occupied by 2013 (representing a total of 384 units);
- (b) Spot Coffee's customers would have convenient access to free customer retail parking without restrictions on P1, and there would be 150 parking spots available to all retail customers; and
- (c) Spot Coffee's customers would be able to access Spot Coffee from P1 retail parking by way of an elevator dedicated to the retail customers, and that would open into the retail lobby next to Spot Coffee's premises.

[76] I further find that the statements reflected present opinion in the case of the estimated occupancy dates because they were based on Concord Adex's existing Master Plan. Additionally, the parking lot and elevator were based in existing fact, since they were already under construction and dedicated to retail customers. The development at Park Place was already under construction at the time of the statements, including most notably the Discovery buildings (including Building D) and the underground parking lot known as P1. Even though Tango was not yet under construction as of the date of the representations, it was slated to be the next building to be built and was part of the section of the development that was under construction. Therefore, the representations related to an existing state of affairs: see *PD Management Ltd. v. Chemposite Inc.*, 2006 BCCA 489, 58 B.C.L.R. (4th) 197, at para. 14, citing *MacMillan v. Kaiser Equipment Ltd.*, 2003 BCSC 672, aff'd 2004 BCCA 270, 33 B.C.L.R. (4th) 44.

iii. **Were the representation(s) untrue, inaccurate, or misleading?**

*Occupancy related representation*

[77] Tango's construction was delayed from the beginning of the project. Tango was not ready for occupation as of the end of 2013. This meant that Spot Coffee did not have the benefit of a customer base from the anticipated 384 units.

[78] In his letter dated April 23, 2013 to Mr. Au-Yeung (President of Concord Adex), Mr. Ayoub complains that only 1100 units have been built (referencing the Discovery buildings) and the third building (Tango) is just being constructed. He references the fact that Spot Coffee understood that 20 residential buildings would be ultimately constructed, but only a sixth building (after the four Discovery buildings, and the still in progress Tango building) was in the early construction stage. Mr. Ayoub stated that Spot Coffee is dependent on the additional residential population from the yet to be constructed units. However, this does not help Spot Coffee's present claim, which is based on the representation of the targeted occupation dates for Discovery and Tango I.

[79] Mr. Ayoub also speculated that based on his visual observation of the Discovery buildings at night, it appeared to him that not many of the units were actually occupied, meaning the units were not being lived in. However, this is not a reasonable interpretation of the occupancy targets set by Concord Adex and relied upon by Spot Coffee. Concord Adex delivered with respect to the estimated occupancy dates set for the Discovery Buildings insofar as these units were sold and vacant possession delivered to the purchasers. Concord Adex had no ability to compel owners to actually live in the units, and Spot Coffee, as a sophisticated entity, would have known this.

Furthermore, and in any event, Mr. Ayoub's visual observations of the buildings are not a sufficient basis to establish Spot Coffee's claim that the Discovery buildings were less than 50% occupied in 2012.

[80] Andrea McKittrick testified on behalf of Concord Adex. She was the Leasing Coordinator in 2016 and later took over from Ms. Vacheresse as the Manager of Commercial Leasing. She had no direct knowledge of the events leading to the termination of Spot Coffee's Lease. She presented in a straightforward and credible manner.

[81] Based on the evidence of Ms. McKittrick, which I accept, approximately 1100 of the 1131 units of the Discovery buildings were occupied as of 2012.

[82] This means approximately 75% of the estimated occupancy was achieved by Concord Adex as of 2012.

[83] Ms. McKittrick also testified that 1120 residential units had been sold by October 31, 2012, including 245 of 428 units in Tango. However, the fact that some of the Tango units had been sold was not sufficient to meet the representation that Tango would be occupied in 2013. I find that the commercially reasonable interpretation of the term "occupancy," as used by Concord Adex in its pre-contractual discussions with Spot Coffee, meant that units were ready for vacant possession to the purchasers.

[84] This interpretation is supported by Ms. McKittrick's testimony regarding answers to undertakings she provided. In her answers to undertakings, Ms. McKittrick distinguishes between units sold and units occupied. This reflected the fact that 1121 of the Discovery units were occupied as of November 20, 2012, and 1126 of 1131 units were occupied by May 31, 2012. For

Tango, however, the units occupied for the same time frames is listed as “N/A” meaning there were no units that were occupied. Furthermore, with respect to Tango’s occupancy rate as of May 31, 2014, the answer is again “N/A.” The date listed for the commencement of occupancy for Tango I is November 17, 2014, and for Tango II is September 17, 2015.

[85] Concord Adex entirely missed its 2013 estimated occupancy date for Tango I due to construction delays. This was approximately 25% of the projected “in house” residential population that it represented would be available to Spot Coffee as a customer base. This is a significant percentage, and it is not a question of a near miss.

[86] Accordingly, the representation made by Concord relating to occupancy targets was inaccurate.

*Retail customer parking representation*

[87] Difficulties with respect to convenient access to free P1 retail parking by Spot Coffee customers developed from the outset of its tenancy.

[88] As testified by Mr. Ayoub and Ms. Lawrence, Spot Coffee struggled to obtain information from Concord Adex concerning how its customers would access the free P1 parking spots as it prepared to open its doors. The urgency was marked by the fact that Spot Coffee was ready to open on November 15, 2012. The plan was to have a “soft opening” on November 15, 2012, which would be followed by the grand opening on December 6, 2012. Spot Coffee was anxious to produce marketing materials for distribution to the surrounding neighbourhood and the Discovery residents, and it needed to insert instructions on how to access P1.



[89] When the parking directions were not forthcoming from Concord Adex, a series of emails were exchanged between Mr. Ayoub and Ms. Vacheresse between October 29, 2012 and January 17, 2013. In these emails, Mr. Ayoub was crystal clear that free and convenient customer parking was a fundamental issue for Spot Coffee's business. Mr. Ayoub wrote that both prior to and during their lease discussions, Spot Coffee was told that the customers of the retail tenants would "have ample spaces" and reminded Ms. Vacheresse of the underground parking lot site visit.

[90] The responses from Concord Adex were entirely unsatisfactory. First, Ms. Vacheresse and her assistant advised that the customers could simply park on the street. At the time, street parking was not permitted outside Spot Coffee's café. Later, Ms. Vacheresse announced that they had convinced the municipality to install parking metres so that Spot Coffee customers could pay for parking.

[91] Spot Coffee delayed its soft opening to November 29, 2012 in the hopes the underground parking issue would be resolved. It was not.

[92] The underground parking issue was not resolved in time for the December 6<sup>th</sup>, 2012 grand opening either.

[93] As a result of the lack of access to P1 parking, Spot Coffee's marketing materials, representing their introduction of the café to the surrounding neighbourhood, lacked any reference to free, convenient parking.

[94] Rather, Spot Coffee learned for the first time from Ms. Vacheresse's email of November 1, 2012 to Mr. Ayoub that the underground parking lot at P1 was in fact a shared residential visitors' and retail parking lot. Furthermore, in that email, Ms. Vacheresse raises for the first time that

access to P1 will be complicated by the fact that Concord Adex is concerned that unauthorized members from the public may try to park on P1, and that Concord Adex is in the process of implementing a security system to ensure that only authorized residential visitors and retail customers will have access to P1.

[95] In her email of November 20, 2012 to Mr. Ayoub, Ms. Vacheresse suggested that because Spot Coffee's lease does not provide for any number of retail parking spots to be made available, Spot Coffee's customers are not entitled to free customer parking. She goes on to write that notwithstanding this omission, Concord Adex will provide two parking spots for one year at no cost, after which the "usual parking fees" will apply. This is in stark contrast with the pre-contractual representations made. It also contradicts Ms. Vacheresse's own evidence under cross-examination that free retail customer parking would not normally be addressed in (Concord Adex's) leases because the tenant does not pay any rent for customer parking.

[96] In fact, the Lease does provide for two parking spots, but these are in the visitors' parking and were to be used only by Spot Coffee's staff. Spot Coffee is charged an additional cost for the use of these unreserved spots.

[97] This exchange illustrates the lack of attention paid by Concord Adex to the issue of free and convenient customer parking and its paramount importance to Spot Coffee. It suggests that Concord Adex did not have a good grasp of its own parking facility either.

[98] In her email of January 17, 2013, Ms. Vacheresse notifies Mr. Ayoub, for the first time, that there has been a recently executed Shared Facilities Agreement (it is dated April 18, 2012)

and that a commercial shared facilities committee will have to be set up. This committee will have control over the use and operation of P1.

[99] The problem was that, as Spot Coffee discovered, control over access to P1 was vested in the concierges who worked for the residents' condominium corporation, and not Concord Adex. Retail customers were supposed to push a buzzer located on a pedestal on the ramp leading to P1 and then the concierge was supposed to open the parking garage door.

[100] According to Spot Coffee's witnesses, its customers initially received no free parking whatsoever (over the course of its openings), and later never received convenient access to the free retail parking spots in P1. Ms. Lawrence testified that customers complained to her that the concierge would refuse to open the garage door after they used the buzzer. Rather, the customers were required to drive around the corner to the residential lobby where the concierge was stationed. From there, the customers would have to identify their purpose for the visit, provide their license plate number, get back into their vehicle, and drive back to the ramp, at which point the concierge would let them into the garage by lifting the ramp blocking entry.

[101] In addition, Ms. Lawrence testified that customers reported being locked in the retail parking elevator vestibule. When this happened, the customers would have to go back down to P1 and call on the intercom to the concierge to unlock the elevator vestibule so they could exit at the ground floor level.

[102] The elevator issue was ongoing and reflected in email correspondence. Ms. Vacheresse wrote in response to one of these emails that the elevator should never be locked, and she would speak to the property manager about it.

[103] All in all, Ms. Lawrence and Mr. Ayoub testified about the increasing frustration of Spot Coffee's customers concerning the lack of access to free customer retail parking and the elevator problems.

[104] Mr. Gisini was a witness for Concord Adex. Mr. Gisini was (and is) the property manager in charge of the retailers in Building D, including Spot Coffee.

[105] According to Mr. Gisini, P1 was available for use by Spot Coffee's customers by December 2012. He further testified that access to P1 was easy and convenient. All that a customer had to do was pull up to the buzzer pedestal on the ramp leading into P1, buzz the concierge, identify themselves, and the garage door would be lifted, allowing access.

[106] Mr. Gisini based his view on his own experience in accessing P1 and the fact that he received no direct complaints from Spot Coffee.

[107] Mr. Gisini said that he would be at Park Place in late 2012 and 2013 multiple times a week. He frequently used the buzzer system to get into P1. He testified that he simply identified himself as the property manager or a retail customer, and he would be let into P1 by the concierge. However, Mr. Gisini admitted that he formed relationships with the concierges and would go and talk to them frequently at their post in the residential lobby. It is a reasonable inference, based on Mr. Gisini's stated frequency of his interactions with the concierge at Building D and attendance at Park Place, that the concierges would have come to recognize his voice through the buzzer system. Concord Adex did not call any of the concierges who worked in Discovery during the tenure of Spot Coffee's tenancy.

[108] Mr. Gisini confirmed that the concierge worked for the condominium corporation in the residential lobby of Building D, and that he had no control over how the concierge was to do their job. He testified that he was unaware of any standing orders being given to the concierges regarding procedures to follow when a retail customer requested access to P1 and that he had no authority over the concierges. The best Mr. Gisini could say was that whenever he buzzed in, the concierge let him in.

[109] Mr. Gisini testified that he also would visit the concierge from time to time and never noticed any access difficulties by retail customers to P1.

[110] However, under cross-examination, Mr. Gisini admitted regarding P1 that offering free parking was new for Concord Adex and that there were no procedures set up for accessing P1. Furthermore, he said that “[i]t was a new development, a new building, a new [share facilities] committee. So it was ... it was something we were learning at that time on how to manage. Nothing was really set as far as protocols were concerned. It was closed door, buzz for access.”

[111] Mr. Gisini testified that he had no basis to contradict the evidence from Spot Coffee that the parking procedures would often change. He also testified that at the Shared Facilities Committee meetings, in which he and Ms. Vacheresse were Concord Adex’s representatives (the other two positions belonged to the condominium corporation), Concord Adex never raised retail customer parking access concerns. He said that was because, as far as he knew, it was not an issue. Ms. Vacheresse never told him of Spot Coffee’s complaints.

[112] It appears that Mr. Gisini had little, if any, interaction with Spot Coffee. Rather, Concord Adex communicated with Spot Coffee on the parking access issue through Ms. Vacheresse only.

[113] I am satisfied on the evidence that Spot Coffee customers who buzzed in during the December 2012 to May 2013 timeframe were not always given access to P1 by the concierge without having to present themselves physically to the concierge. This was a serious impediment to free parking and was contrary to Concord Adex's representation.

[114] Ms. Vacheresse did not try to access parking on P1 herself. Ms. Vacheresse also initially denied that she ever received complaints from Spot Coffee about customer access to P1. She specifically denied receiving any concerns from either Mr. Ayoub or Ms. Lawrence with respect to customers using the underground parking. In light of the emails between Mr. Ayoub and Ms. Vacheresse, which reflect complaints raised by Mr. Ayoub to her about parking issues, this assertion is simply not credible.

[115] Ms. Vacheresse admitted under cross-examination that Concord Adex knew that Spot Coffee needed convenient parking for its customers in order to be successful. She confirmed that she told Spot Coffee at the site visit that there would be "ample" parking on P1 for everyone on the commercial side and that there were just over 200 parking spots available for residential visitor and commercial customer use. She could not recall if she told Spot Coffee that there would be any restrictions on accessing the parking. However, when directed to her examination for discovery she agreed that she likely did not talk about any restrictions being attached to accessing the parking because, she said, she would not have been aware of any such restrictions. She also believed, at the time of the site visit and up until the shared facilities committee was formed, that Concord Adex controlled the P1 parking facility. She did not recall ever telling Spot Coffee that the shared common facilities committee had been formed and had been given control over the P1 parking facility.

[116] Furthermore, even though Ms. Vacheresse and Mr. Gisini testified that the parking problem should have been relayed to Mr. Gisini, the evidence shows that Ms. Vacheresse never directed Spot Coffee to Mr. Gisini nor did she relay Spot Coffee's complaints to Mr. Gisini.

[117] Concord Adex knew or ought to have known, based on its experience in developing these types of communities, that it could not have complete control over common shared facilities, such as a shared resident visitors' and retail customer parking lot, and yet it was silent on this point during the course of the pre-contractual negotiations.

[118] While Concord Adex had a sort of veto because all decisions of the shared facilities committee had to be unanimous, it never exercised it during the 2012 – May 2013 time frame to ensure that concierges automatically allowed retail customers access once they identified their business on the intercom. As Mr. Gisini testified, access was to be automatic upon buzzing.

[119] By way of answer to undertaking, Concord Adex admitted that the parking problem at P1, concerning the residents' issue that unauthorized members of the public not park in P1, had never been resolved.

[120] Concord Adex did not call any of the concierges from Building D from the 2012 – 2013 timeframe and called no evidence on retail customer experiences using P1 during the time frame Spot Coffee operated its café.

[121] Concord Adex also did not call Mr. Au-Yeung, or any employee present at the P1 site visit other than Ms. Vacheresse, to address what statements were and were not made to Spot Coffee in pre-contractual discussions. Concord Adex rested on Ms. Vacheresse's evidence in this regard.

[122] Spot Coffee's version of the difficulties faced by its customers attempting to use the concierge controlled buzzer system is supported by its evidence concerning the difficulties its customers faced attempting to use the retail elevator, which would be locked at the ground floor vestibule from time to time likely by the concierge, when, Concord Adex admitted, it should never be locked.

[123] I am satisfied that Concord Adex failed to advise Spot Coffee that it did not have complete control over the P1 retail customer parking facility, including how that parking would be accessed. Concord Adex also failed to advise that the retail customer parking was part of a shared common facility to be governed by a shared common facilities committee comprised of four members and that it would hold two of the positions.

[124] I find that Spot Coffee has proven that the verbal representations made by Concord Adex concerning access to free customer retail parking in P1, and access to the dedicated elevator at P1 for retail customer use, were inaccurate and/or misleading.

**iv. Did Concord Adex act negligently in making the misrepresentations?**

[125] It is not enough for a party to prove that a representation was made and was inaccurate or misleading. The representee must also show that the representation was made negligently in the sense that the representation did not exercise due diligence or reasonable care in making the representation: *Cognos*, pp. 110, 122.

[126] For example, in *Country Style*, a landlord was liable to a franchisee subtenant for damages arising from negligent misrepresentation. The Court of Appeal, at para. 55, noted that a representation can take many forms. The misrepresentation in this case was in the form of a site



plan of a development that had been partly constructed at the time the headlease was entered into (between the franchisor/head tenant and the developer/landlord). The site plan, which illustrated the planned mall, was attached to the headlease. To the landlord's knowledge, the site plan was also attached to the sublease.

[127] However, before the headlease and sublease were executed, the landlord decided to redesign the unconstructed part of the mall, altering it from what was depicted in the site plan. The landlord did not tell the franchisor or franchisee of its intention to alter the site plan.

[128] In these circumstances, the landlord was found to have acted negligently in making its representation because the landlord knew it was altering the site plan (which had a more favourable configuration to the subtenant's drive-through service) but did not disclose that alteration at a time when it was completing the negotiation of the headlease. Since the landlord was aware that this same site plan had been attached to the sublease with the franchisee, it was also liable to the subtenant/franchisee for negligent misrepresentation as well.

[129] The Court, at para. 53, affirmed the trial judge's findings that the information contained in the Site Plan was "inaccurate, untrue and misleading" and by failing to disclose its intention to revise the plan, "the landlord acted both carelessly and in a negligent manner."

*Representation re occupancy*

[130] I have found that only the representation as to the estimated occupancy of Tango was inaccurate. However, was the representation negligent in the sense that Concord Adex knew or ought to have known that its estimate was unrealistic at the time of the presentation meeting through to the execution of the Lease in October 2010?

[131] Very little evidence was led in relation to this branch of the test. The fact that Concord Adex missed its target, in and of itself, does not automatically lead to the conclusion that the representation was negligent.

[132] However, Concord Adex's own evidence at trial was that it was a "very large and experienced" developer with similar multi-building projects all over Canada. Concord Adex was in the business of developing Master Plan communities, consisting of multiple buildings with large scale developments.

[133] No evidence was led to suggest that, in the context of a large scale, multi-building development in its early stages of construction like Park Place, delays of one year are outside the reasonable range when projecting estimated completion dates.

[134] Accordingly, I find that Spot Coffee has not discharged its burden of proof in establishing that this representation was negligently made.

*Representation re parking access by retail customers*

[135] By the time of the shared facilities committee's first meeting, held on April 18, 2013, it had been determined that a concierge would control the entry into P1. As stated, the concierge was an employee of the condominium corporation, and not of Concord Adex. Concord Adex did not control the concierges or how they did their job in terms of dealing with retail customers and their requested access to P1. Nor did Concord Adex exercise proper control over the improper locking of the retail elevator vestibule to the ground floor from P1.

[136] Concord Adex acted negligently when it failed to disclose that the condominium corporation would have some control over access to customer retail parking and access to the elevator vestibule.

[137] Concord Adex, through its ownership of the retail parking spots (as admitted by Ms. Vacheresse) and the exercise of its voting power on the shared facilities committee, could have ensured that Spot Coffee customers (and all retail customers) would have easy access to P1 through a properly and consistently operated system, which did not require the customers to drive around to the residential lobby, justify their position as legitimate customers, and then drive back to P1 to be let into the parking lot. If this was to be the intended procedure by Concord Adex (and there is no evidence to that effect), then Concord Adex had an obligation to disclose this inconvenient access to Spot Coffee.

[138] While Concord Adex lacked direct control over how the concierge would allow access to P1 by retail customers, Concord Adex, through its role on the shared common facilities committee, could have requested written protocols to be followed by the concierges. These protocols could ensure that upon verbal identification by a customer of their purpose through the intercom system, they would be allowed access to the parking lot. Concord Adex could have also pursued the request to a dispute resolution mechanism provided for in the shared facilities agreement if the decision was not unanimous. This did not happen. In any event, implicit in this representation was that Concord Adex, not the condominium corporation, would exercise control over access to P1 customer retail parking. Also implicit in this representation was that retail customers would have convenient access to P1. Requiring customers to use a buzzer from the parking ramp to access the parking garage is reasonable. However, requiring customers to drive to a different location and

then drive back to the parking garage in order to be allowed access is not. If this was Concord Adex's intention, then it should have told Spot Coffee before the Lease was entered into. At minimum, Concord Adex had to advise Spot Coffee that there would be some uncertainty in fashioning acceptable procedures for access to P1 by retail customers because this would be subject to the decisions of the shared facilities committee.

[139] Concord Adex should have anticipated that it would have to deal with the condominium corporation, once established, in relation to the common shared facilities. It was known to Concord Adex, as the developer with control over the Master Plan for the development, that P1 would be part of the shared common facilities. By failing to disclose to Spot Coffee that it would not have complete control over access to P1 once the condominium corporation was incorporated, it acted negligently.

[140] The same rationale applies with respect to the sometimes-locked elevator vestibule, the responsibility for which was attributed by Concord Adex to the condominium corporation. The retail elevator was wholly controlled by Concord Adex according to Mr. Gisini. If the concierge or someone else on behalf of the condominium corporation was locking the vestibule, without authority from Concord Adex, then Concord Adex still bears responsibility for that barrier to access to Spot Coffee.

[141] The evidence from Concord Adex is that neither of these issues were ever raised by Concord Adex at the committee meetings. Mr. Gisini said this was because he was not even aware of Spot Coffee's complaints. In other words, Ms. Vacheresse never told him.

v. **Did Spot Coffee rely on the misrepresentation, and was that reliance reasonable?**

*Occupancy of Tango*

[142] While Spot Coffee may have relied on Concord Adex's estimated dates for completion of the Discovery and Tango complexes, its reliance on Concord Adex's estimated date for completion regarding Tango was not reasonable.

[143] In *Country Style*, at para. 93, the Court of Appeal stated that the court will intervene where "the tenant enters into a lease in reliance on the developer's representation as to the nature of the proposed development, the developer alone possesses information material to the tenant's investment and leasing decisions that could not be obtained on a reasonable inquiry by the tenant, and the developer deliberately withholds that information to advance its own commercial interests."

[144] Spot Coffee's targeted population included, in the short term, the combined population of the residential condominium and townhouse units in Discovery I and II in 2012, and Tango in 2013. Tango's capacity was about one-quarter of Discovery I and II combined. In addition, a very important focus of its targeted customer base was also the much more populated surrounding neighbourhood.

[145] Spot Coffee's evidence was that it understood that the occupancy target dates were estimates and not guarantees.

[146] In my view, the evidence fell short of establishing that Concord Adex deliberately withheld any information regarding the estimated progress of Tango prior to entry into the Lease or acted

recklessly in relaying its targets for occupancy. These targets were expressly held out as estimates only, and not guarantees.

[147] Spot Coffee has not persuaded me that but for the representation made in relation to the occupancy target for Tango, it would not have entered into the Lease. Its reliance on the occupancy target for Tango in and of itself was not reasonable in a development that was under construction, with the majority of the residential buildings not estimated to be built until well after 2013, and where the bigger buildings in the Discovery complex were built and largely occupied by 2012 when Spot Coffee opened its doors for business.

*Access to free retail customer parking*

[148] The necessity of having free and convenient customer parking was so that Spot Coffee could successfully attract customers from the much larger populated surrounding neighbourhood. This was admitted to be understood by Concord Adex in the course of making its representations to Spot Coffee prior to Spot Coffee's entry into the Offer to Lease and the Lease.

[149] Concord Adex submitted that, after representing to Spot Coffee that it would have ample, free customer parking, and showing Spot Coffee the parking area that was devoted to all of the retail units, the obstacle course that was subsequently put into place by the concierges of the condominium units at Building D was not a violation of its representation. It further submitted that because Spot Coffee did not put access to free and convenient retail customer parking into the Lease, that this was not a fundamental factor inducing Spot Coffee to enter the Lease. It denied that its representation of ample, free customer parking in P1 implicitly included "convenient" access to this parking by the customers.

[150] These assertions fly in the face of Concord Adex's own evidence at trial that it knew access to free customer parking was important to Spot Coffee and its business because it had to attract customers from beyond Park Place in the surrounding neighbourhood in order to be successful in this location.

[151] Mitchell Kowalski was Concord Adex's lawyer involved in drafting and finalizing the Offer to Lease and the Lease. Mr. Kowalski was called as a fact witness. His area of practice is real estate law, he has been practicing since 1991, and he has been Concord Adex's external real estate lawyer since 2010.

[152] Mr. Kowalski confirmed that the draft Offer to Lease and Lease used in this transaction were Concord Adex's standard form document containing the standard terms. Some of the terms were altered through negotiation at Spot Coffee's request.

[153] Mr. Kowalski testified that he would have expected to see a provision in the Lease relating to guaranteed access to the free retail customer parking provided in P1. He pointed out that a clause addressing Spot Coffee's right to use the area designated for a patio was inserted into the lease (by Concord Adex).

[154] Implicit in Mr. Kowalski's answer was the assumption that absent such a provision, Spot Coffee's customers were not allowed to use the retail parking at P1 at all. Also implicit in his answer is that the other retail tenants had such a provision in their respective leases. However, no evidence was led by Concord Adex to support these propositions. To the contrary, the only evidence as to Concord Adex's practice was through the above testimony of Ms. Vacheresse, which contradicted Mr. Kowalski's testimony.

[155] With respect to the patio clause, it is important to note that, unlike the access to free retail customer parking representation, Spot Coffee was being given exclusive use of the patio area. The covenant required Spot Coffee to obtain the necessary city permits to operate a patio, and stated that Concord Adex was not guaranteeing that Spot Coffee would be able to obtain the necessary permits.

[156] I accept Spot Coffee's evidence that it was implicit in Concord Adex's representation that its customers would have access to ample free parking that would be convenient for its customers. This is consistent with a commercially viable meaning of access to free customer parking provided by the developer-landlord.

[157] I also accept Mr. Ayoub's explanation that it is not typical for a retail tenant, like Spot Coffee, to put into a lease a covenant by the landlord to provide free customer parking because it does not form part of the basic rent being charged. This answer was supported by Ms. Vacheresse in cross-examination when she indicated that Concord Adex did not address free retail customer parking in its commercial leases with retail tenants. This explanation is also consistent with the terms of the Lease itself, which provides for only two retail parking spots, which are subject to an additional rental charge by Spot Coffee. The two unreserved parking spots that Spot Coffee paid for was not for customer parking, but rather for its staff use only and were located in the residents' visitor parking area of P1.

[158] I attach no weight to Mr. Kowalski's evidence concerning his expectations as to whether a clause ought to have been inserted into the Lease regarding free retail customer parking. He was not tendered as an expert nor did he speak to Concord Adex's general practice with respect to



addressing access to free retail customer parking in leases in other developments or even at Park Place.

[159] The fact that Concord Adex required retail customers to press a buzzer on a pedestal set up on the ramp leading to P1 was reasonable. Its desire to have a process in place to ensure that non-customers did not park for free in its P1 facility was also reasonable. However, the onus was on Concord Adex to address this concern in a way that did not unreasonably interfere with access to P1 by legitimate retail parking customers of Spot Coffee. It failed to do that. Indeed, the evidence by Mr. Gisini, its property manager, and Ms. Vacheresse, is that Spot Coffee's parking concerns were not even raised by them at the shared facility committee meetings. Mr. Gisini was not even aware of these concerns and Ms. Vacheresse did not raise any of these parking concerns with him.

[160] For these reasons, Spot Coffee's reliance on the representation that its customers would have convenient access to ample free customer parking was reasonable.

**vi. Was Spot Coffee's reliance to its detriment in the sense that damages resulted?**

[161] There is ample evidence in the record demonstrating that Spot Coffee was induced to enter into a ten-year fixed term lease at an early stage of the development of Park Place based, in large part, on the representation that its customer base from outside the Park Place development would have ample, free, and convenient access to retail customer parking in an underground parking lot that Spot Coffee representatives toured before signing the Offer to Lease.

[162] As a result of this misrepresentation, Spot Coffee entered into the Lease, and undertook the complete building out of the café from a concrete shell. This included everything from installing a ceiling, flooring, tiles, an elaborate bar, two washrooms, murals; fixtures such as lights,

plumbing, and electrification; and the purchase of furniture and appliances. Spot Coffee also incurred ongoing operating losses such as staff and inventory expenses from the moment it opened its doors on November 29, 2012, until it vacated the premises at the end of May 2013.

[163] Accordingly, Spot Coffee relied on the parking-related representations (including direct access from P1 to the courtyard by an elevator) to its detriment.

**vii. What are the damages (what is the detriment)?**

[164] Spot Coffee is entitled to be put back into the position it would have been, but for the misrepresentation: *Black v. Lakefield (Village)*, 1998 CarswellOnt 4126 (Ont. C.A.), at para. 32; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, at p. 37.

[165] In *Country Style*, the Court of Appeal at para. 87, stated that a representee is entitled to damages based on an assessment of the loss actually sustained, not the loss of future anticipated profits. Spot Coffee is entitled to rescission-like remedies, meaning all of the amounts it expended in relation to the construction and operation of its failed café.

[166] Mr. Ayoub testified as to the operating losses to the end of May 2013. He testified that the operating losses were \$269,296.00 and relied on a profit and loss statement tendered as business record.

[167] In addition, Spot Coffee is entitled to a return of the monies it expended on the costs associated with designing, constructing, and fixturing the Unit. Mr. Ayoub testified that these expenditures amounted to \$757,755.34 and went through the supporting invoices.

[168] Mr. Ayoub was not challenged on cross-examination, nor did Concord Adex lead any evidence to challenge Mr. Ayoub's testimony on the damages incurred.

[169] I accept and find that Spot Coffee's operating losses were \$269,296.00.

[170] I also find that the damages with respect to Spot Coffee's cost of building out the unit is \$757,755.34, consistent with the line items identified in the Notice of Damages filed with the trial record.

**viii. Does the entire agreement clause preclude a claim based on negligent misrepresentation?**

[171] In *BG Checo*, at p. 30, the Supreme Court of Canada affirmed that a breach of a pre-contractual misrepresentation may be actionable as negligent misrepresentation: see also *Cognos* at p. 89. However, a tort claim will not be allowed if it effectively allows "the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort." (*Datile*, at para. 58, citing *Central Trust Co. v Rafuse et al.*, [1986] 2 S.C.R. 147 at p. 206.

[172] Tort liability can be limited or excluded by the terms of a contract, such as an entire agreement clause: see *Singh v. Trump*, 2016 ONCA 747, at para. 110; *BG Checo*, at p. 30. However, clear terms in the entire agreement clause are necessary to preclude tort liability (*BG Checo*, at p. 28, *Cognos*, at p. 113).

[173] In *BG Checo*, at p. 30, the Supreme Court stated that "actions in contract and tort may be concurrently pursued unless the parties by valid contractual provision indicate that they intended otherwise."

[174] Therefore, the first question is whether the pre-contractual representation at issue was expressly addressed in the Lease. If so, then Spot Coffee cannot bring this action in tort: *Cognos*, at p. 113.

[175] As recognized in *BG Checo*, there are three possible situations that may arise when contractual principles and tort are applied to the same wrongdoing. Of relevance to this case is the scenario in which a contract may preclude a tort action or impose a lower duty of care than tort law would impose. This situation occurs when the parties have included an exemption clause in a contract, such as an entire agreement clause: *BG Checo*, at p. 28.

[176] In *Tercon Contractors Ltd. v. British Columbia*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 122-23, the Supreme Court set out the follow three considerations underpinning an analysis of exclusion clauses:

- i. The court must determine if the exclusion clause applies in the circumstances;
- ii. If the clause is applicable, the court must determine if it is nevertheless unconscionable; and
- iii. The court must consider if there are overriding public policy reasons militating against enforcing the clause.

[177] In *D.L.G. & Associates Ltd. v. Minto Properties Inc.*, 2015 ONCA 705, at para. 37, the Court of Appeal described the following factors for analyzing an entire agreement clause and its impact on a pre-contractual tort claim:

- i. the language used in the entire agreement clause;

- ii. the relationship of the parties when the contract was consummated;
- iii. the sophistication of the parties;
- iv. the nature of the negotiations;
- v. the language of other terms of the contract and, specifically, the extent to which allowing or precluding a negligent misrepresentation would be inconsistent with the other terms of the agreement.

[178] The key language in the entire agreement clause in the Lease is: “there are no ... representations ... in any way *relating to the subject matter* of this Agreement, expressed or implied, collateral or otherwise except as expressly set out here” (emphasis added).

[179] Similar language was reflected in the Offer to Lease except that it makes reference to the Offer containing all of the terms and conditions “*relating to the lease of the Premises*” (emphasis added). The Lease states that where there is an inconsistency between it and the Offer to Lease the Lease prevails.

[180] The evidence establishes, and I find, that both Spot Coffee and Concord Adex were sophisticated parties and had a pre-existing commercial/retail landlord and tenant relationship.

[181] The pre-contractual negotiations addressed the existence of free, accessible and convenient customer parking and identified the location of this parking as P1 with an accessible dedicated elevator for exclusive use by retail customers.

[182] Both the Offer to Lease and the Lease addressed parking in the schedules. However, they only addressed the unreserved parking spots to be made available for the exclusive use of Spot Coffee's employees, which were in a parking area separate from the free customer retail parking. Furthermore, Spot Coffee had to pay rent for this parking.

[183] When he was asked why access to free customer parking did not appear in the Offer to Lease or the Lease, Mr. Lorenzo testified that it was not business practice for a tenant to put free customer parking into the lease. It is understood in retail shopping mall leases that free, accessible, nearby parking was obvious and necessary to the efficacy of the retail business of the tenant. Furthermore, the customer parking was already present in P1 at the time of the representation even though it was not fully constructed. Concord Adex, through Ms. Vacheresse, made a point of showing the parking area and elevator to Spot Coffee, and the point was made that the elevator would give direct access to customers from P1 to the proposed café location. He further testified that Spot Coffee never puts free customer parking into any of its leases, but that nearby free customer parking was a bottom line for all of Spot Coffee locations. Mr. Lorenzo was not seriously challenged in this part of his testimony in cross-examination.

[184] Ms. Vacheresse's testimony was consistent with Mr. Lorenzo's. She testified that the Lease only deals with any parking that is granted in exchange for rental fees, as was the case with the two unreserved parking spots.

[185] Concord Adex added to one of the schedules to the Offer to Lease and Lease the term that Spot Coffee would receive one unreserved parking space in the residents' parking level. Spot Coffee came back with a request for two unreserved parking spots at \$150 per month. It was stipulated that these parking spots could not to be used for customer parking or storage. Mr.

Kowalski confirmed that these parking spaces were owned by Concord Adex and had not been assigned for use by the residents. As well, these parking spots were not part of the demised/leased premises.

[186] On the other hand, there was no standard clause by Concord Adex in either document relating to free retail customer parking.

[187] Mr. Kowalski maintained that if Spot Coffee had wanted something to be specified with respect to customer parking, it should have been put into the Lease.

[188] Mr. Kowalski explained that the Lease reflected standard commercial leasing terms. He also pointed out that article 6.6(c) stated that the condominium corporation would have control over the common areas.

[189] Under cross-examination, Mr. Kowalski testified that it was “customary” to include parking in a lease.

[190] However, the fact that Concord Adex’s standard form retail leases and offers to lease lacked any reference to the provision of free retail customer parking even though it is in the business of developing large scale residential developments with retail and commercial tenant components suggests that Concord Adex either does not typically offer free customer parking to its retail tenants, or it does not typically insert a covenant regarding free customer parking it does offer to its retail tenants.

[191] The evidence is consistent with a finding that Concord Adex does not typically address free customer parking in its retail leases. This is consistent with Spot Coffee's evidence that it typically does not address access to free customer parking in its retail leases either.

[192] Following the analysis set out in *Tercon*, it is my view that it was obvious that ample, free, and convenient customer parking was a fundamental factor in contemplation of both Spot Coffee and Concord Adex. If free, accessible, and nearby customer retail parking was not intended by Concord Adex to be available to Spot Coffee, it had an obligation to correct its representation through a term in the Offer to Lease and ultimately the Lease. It makes no commercial sense that Concord Adex would tell Spot Coffee that its customers, along with all other retail customers, would have access to free customer parking and to show the parking area, if it had no intention of following through on this representation in the absence of a covenant in the Offer to Lease and the Lease.

[193] I accept Mr. Lorenzo's evidence over Mr. Kowalski's evidence (if indeed there is a clear conflict) that it was not standard practice to address access to free customer parking in these types of leases. This is consistent with the fact that Concord Adex's standard offer to lease and lease for retail tenants did not contain any clause referencing free customer retail parking. The availability of free retail customer parking does not fall within the scope of the entire agreement clause. It was not mentioned anywhere in the Lease and therefore it did not relate "in any way" to the "subject matter" of the Lease.

[194] I do not consider the clause in the Lease relating to the provision of two unreserved parking spots for Spot Coffee employees to mean that parking of every type was addressed in the Lease.



These parking spots were provided on the basis of paying additional rent, were expressly dedicated to non-customer use, and were in a different area of P1.

[195] Other than Mr. Kowalski, Concord Adex offered no evidence that suggested that it was standard practice for Concord Adex to include covenants related to the availability of free retail customer parking at Park Place or any of its other developments in any of its leases. It is inconceivable that Concord Adex would place an emphasis on free customer parking to Spot Coffee at the presentation meeting and afterwards at the site visit to the parking garage, should it lease a unit at Park Place, and then neglect to include a draft covenant in its Offer to Lease or subsequent Lease with a view to depriving Spot Coffee's customers of free parking through an omission in those documents. At minimum, this would constitute trickery and bad faith if that had been Concord Adex's intention.

[196] I find that access by Spot Coffee's retail customers to free parking on P1 does not fall within the scope and ambit of the entire agreement clause.

[197] Accordingly, Spot Coffee's claim based in negligent pre-contractual misrepresentation is not precluded by the entire agreement clause contained in the Lease.

**ix. If no actionable misrepresentation, then what are Concord Adex's damages?**

[198] In light of my finding, the counterclaim is dismissed.

[199] However, in the event I had found there was no actionable misrepresentation, then I would have found that Spot Coffee breached the Lease by abandoning the Unit on May 31, 2013. The Lease was terminated by Concord Adex by notice dated June 1, 2013. These facts are uncontested.

[200] Furthermore, I would have assessed damages as the loss of future rent under the balance of the fixed term Lease, subject to mitigation.

[201] At the outset of trial, Concord Adex withdrew its claim for loss of prospective rent from and after February 28, 2021.

[202] However, in the course of trial, Concord Adex admitted that it failed to deliver a business records notice under the *Evidence Act*, R.S.O. 1990, c. E.23, with respect to the document schedule establishing the amounts claimed. Furthermore, Concord Adex did not seek to have the records tendered as exhibits under the common law exception to the hearsay rule as business records. Therefore, Concord Adex relied entirely on the testimony of Ms. McKittrick.

[203] Concord Adex did not discharge its burden of proof in relation to the additional rent (as defined in the Lease). The additional rent was comprised of the actual operating costs and property taxes related to the common expenses such as utilities, repairs and maintenance, management fees, and insurance. However, Concord Adex did satisfy me through Ms. McKittrick's evidence, including the Lease itself and the lease entered into with the successor tenant, that there was loss of the basic rent (as defined by the Lease) after mitigation.

[204] I am also satisfied that Concord Adex incurred costs in the course of mitigating its losses in the form of inducements for a successor tenant and the fee paid to its leasing broker, The Behar Group, in the sum of \$94,650 and \$21,315.18 respectively.

[205] I am also satisfied that Concord Adex discharged its duty to mitigate. It was reasonable to enter into an exclusive listing agreement with The Behar Group, which specializes in commercial leasing in this geographic area. The listing agreement extended to finding tenants for all of the

vacant units in Discovery Buildings D and E. The commission arrangement with The Behar Group was tied to the value of the lease they secured. Therefore, there was a financial incentive to secure the richest lease possible for Spot Coffee's unit. The Behar Group distributed brochures noting the units for lease, including Spot Coffee's unit. Through these efforts, Spot Coffee's unit was leased by Discovery Family Health, by lease dated June 17, 2014, albeit at lower basic rental rates than were prescribed under Spot Coffee's Lease.

[206] Therefore, had I dismissed the action, I would have granted the counterclaim and fixed damages as follows:

- a) Arrears of rent in the sum of \$56,717.57 to May 31, 2013;
- b) Loss of basic rent from June 1, 2013 to August 31, 2015 (date new tenant started paying rent) in the sum of \$200,304.44;
- c) Loss of basic rent from September 1, 2015 to February 28, 2021 in the sum of \$700,690.06;
- d) Cost of tenant inducements and real estate commission to secure the new tenant in the sum of \$115,965.18;
- e) Less rent received by way of mitigation in the sum of \$392,732.67;
- f) Together with such HST as is applicable to the above sums.

[207] Cost outlines and submissions (no longer than 3 pages double spaced) are to be exchanged with the Plaintiff's cost outline and submissions to be delivered to me within 20 days from the

release of these reasons. The Defendant's cost outline and submissions will then be delivered to me within 10 days thereafter, by email to my judicial assistant.

Vella, J.

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Justice S. Vella

**Released: October 5, 2021**

**CITATION:** Spot Coffee Park Place Inc. v. Concord Adex Investments Limited, 2021 ONSC 6629  
**COURT FILE NO.:** CV-15-00520873-0000  
**DATE:** 20211005

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

SPOT COFFEE PARK PLACE INC.

Plaintiff

– and –

CONCORD ADEX INVESTMENTS LIMITED

Defendant

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**REASONS FOR JUDGMENT**

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Vella J.

**Released: October 5, 2021**