IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sea House Restaurant Ltd. v. One West Holdings Ltd.,* 2023 BCSC 1993

Date: 20231106
Docket: S236047
Registry: Vancouver

Between:

Sea House Restaurant Ltd.

Petitioner

And

One West Holdings Ltd.

Respondent

Before: The Honourable Mr. Justice Coval

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	B. Ahmadian
Counsel for the Respondent:	S. Griffin D. Siracusa R. Abrahams
Place and Dates of Hearing:	Vancouver, B.C. November 1–3, 2023
Place and Date of Judgment:	Vancouver, B.C. November 6, 2023

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Introduction

[1] **THE COURT:** In this petition hearing, Sea House seeks a declaration that its commercial lease of restaurant premises from the landlord, One West, remains in full force and effect. Alternatively, Sea House seeks relief from forfeiture to reinstate the lease.

[2] This has been a hard-fought campaign by Sea House to maintain its lease, Over the past few months, the parties have exchanged dozens of affidavits and been to court many times. There is urgency to this decision because the parties need to know whether Sea House can re-enter and recommence operations, or whether One West can proceed with its new tenant who took possession on November 1. For that reason, I have expedited this decision.

[3] For the reasons that follow, I find that the lease was validly terminated by One West and it would not be equitable to grant Sea House relief from forfeiture.

[4] Sea House's petition is therefore dismissed.

The parties

[5] Since 2020, Sea House has operated a seafood restaurant in One West’s high-rise mixed-use building on Marinaside Crescent in Yaletown, downtown Vancouver.

[6] One West developed Marinaside. It sold the residential lots and kept the three commercial lots which it leases out.

Facts

[7] In June 2020, Sea House purchased for $300,000 the previous restaurant business that operated in these premises. The prior tenant was a gelateria and pizza restaurant.

[8] Sea House and One West then entered into a commercial lease, dated for reference October 1, 2020, with a ten-year term, commencing January 1, 2021. The

base rent was approximately $9,500 for the first three years, plus additional triple net rent.

[9] The two principals of Sea House, Messrs. Arash Firouzhranjbar and Abolfazi Pouriaei, are indemnifiers under the lease. They are obliged to indemnify One West for default by Sea House and for due payment of anything payable under the lease. Mr. Firouzhranjbar has been Sea House's main deponent in these proceedings.

[10] For present purposes, the important lease terms include the covenant to pay rent in s. 2.1 and the default provisions in s. 15, which include the right to terminate the lease and re-enter if the failure to pay rent is not cured within five days of receiving written notice. On default by Sea House, One West's entitlement to payment of its legal fees on a solicitor/client basis is in s. 15.4.

[11] Other important clauses include: compliance with municipal laws in s. 7.11, and the obligation to maintain insurance in s. 10.2, including the tenant’s obligation to maintain commercial general liability insurance. There is also an obligation in s. 10.7, which is an increased risk clause, that the tenant not store or permit anything to be stored in the premises that is dangerous, inflammable, or of an explosive nature.

[12] Sea House's evidence is that it applied for its business licence in July 2020 but was advised by the City that processing was delayed due to COVID-19. An important issue between the parties is the uncontested evidence that Sea House never obtained a business licence from the City.

[13] In November 2020, Sea House applied for a building permit to renovate the premises. This was consented to by One West and issued in May 2021. The renovations were to upgrade and change the floor plan of the kitchen, and included relocation of appliances, changes to the ventilation and fire suppression system, and removal of some of the ice cream equipment and improvements.

[14] Sea House's evidence is that, from May 2021 to March 2023, it spent approximately $450,000 on these renovations and other costs of marketing and operating the premises.

[15] Throughout the tenancy, Sea House was frequently and significantly delinquent in terms of rent, submitted “NSF” cheques, and failed to respond to demands for rent, all of which I will come back to. This evidence has been submitted in detail by One West’s director of commercial leasing. It culminated on August 10, 2023 when, following the default provisions in the lease, One West delivered a notice of default for arrears of $67,000, being unpaid rent for the past four months.

[16] As explained in the covering letter, under the default clause in the lease, if Sea House did not cure this default within five days of the written notice, this constituted an event of default entitling the landlord to terminate the lease and take back possession.

[17] On August 14, 2023, Sea House delivered a bank draft for one month's rent. On either August 15 or 16, the five-day notice expired and Sea House remained in arrears of $49,698.66. On August 17, 2023, One West terminated the lease and re-took possession of the premises by changing the locks. It has remained in possession ever since.

[18] On August 17 and 18, Sea House delivered further bank drafts representing the full amount of its arrears. One West retained these drafts but did not deposit them, which I will return to later.

[19] On August 25, One West entered into a binding offer to lease with the new tenant, Small Victory Bakery (Yaletown) Ltd. This offer to lease provided for possession of the premises on November 1, 2023, and a commencement date of February 1, 2024, subject to conditions.

[20] By letters of August 25 and 28, One West required Sea House to remove its trade fixtures by September 1, which One West was entitled to do under s. 3.5(b) of the lease:

> The Landlord may, by notice to the Tenant prior to or promptly after the expiration or other termination of this Lease, require the removal forthwith, at the expense of the Tenant, of any or all of the Tenant's trade fixtures, shelving, racking, equipment, inventory and/or other personal …

[21] On August 30, Sea House filed its injunction application and obtained *ex parte* short leave for the hearing. In granting short leave, Master Keim said:

> I am hoping what will happen, at least, is when you serve the documents the two of you will agree to extend the timeline by which your client would get his equipment out so that it is not necessary having to go ahead tomorrow, as long as the belongings stay safe until the injunction can be heard.

[22] Counsel for One West criticizes counsel for Sea House, who was not Sea House counsel on the hearing of this petition, for not advising either him or the court of these comments when the injunction application came on August 31. Counsel points out that One West, in its letter of August 30, 2023, offered to standstill, as contemplated by Master Keim, until September 11, to allow the injunction application to be better prepared and presented.

[23] On August 31, Sea House's injunction application came on but was adjourned, on terms, to September 7 or 8 because One West had not had the opportunity to prepare its evidence. The terms were that, until the injunction was heard, One West was not to remove Sea House's tenant improvements or take further steps towards leasing the premises to a new tenant, and Sea House was to provide copies of its contractual commitments made with any such tenants so far.

[24] As One West counsel pointed out, this restrained it from proceeding with its new tenancy but without any undertaking for damages for that restraint.

[25] On September 1, One West provided Sea House with a redacted copy of its offer to lease with Small Victory. It was for a ten-year lease, with a possession date of November 1, 2023 and a 120-day fixturing period. Payment of rent was to begin on the earlier of 20 days after possession or when the tenant opened for business.

[26] The new lease was subject to the landlord's senior management approving the offer to lease, the tenant's financial strength, and obtaining vacant possession.

These subjects were open for five business days. It contained similar tenant subjects. The offer to lease said that it constituted a binding and enforceable contract and was not an agreement to agree.

[27] On September 1, in an effort of persuade One West to reinstate its lease, or alternatively, bolster its relief from forfeiture arguments, Sea House offered to match the rent payable in Small Victory's offer to lease, but with rent paid beginning in September 2023, as opposed to February 2024. It also offered to pay the landlord's legal fees.

[28] On September 5, Sea House filed and served its petition. The next day, it sent a copy to Small Victory.

[29] On September 5, in preparation for the injunction hearing, One West delivered five affidavits of its own, including two from its senior management regarding Sea House's repeated failure to pay rent when due under the lease.

[30] Its evidence also included an affidavit from a mechanical engineer that some of Sea House's kitchen ventilation renovations were non-compliant with the building permit and that the vat deep-fryer did not meet code, was a fire hazard, and should be disconnected and removed from the building as soon as possible.

[31] When the injunction hearing came back on September 8, there was insufficient time and so it was adjourned to September 27.

[32] One West then filed an affidavit from Ms. Thornley, its senior director of commercial leasing, about her discussions with the city inspector responsible for the location of the restaurant. Her evidence was that the inspector told her he was familiar with the Sea House file, was frustrated with the Sea House building permit remaining open for so long without a final inspection, and that he had been trying in vain to get in contact with Sea House for some time and left many messages. This contradicted Mr. Firouzhranjbar's evidence that the renovations had not been inspected because the City kept telling him they were too short-staffed.

[33] Ms. Thornley met the inspector at the restaurant on September 13, 2023. Her evidence was that he advised that, if Sea House tried to reopen for business, he would order it closed for failure to comply with city codes, including for the renovated circulation canopy and the deep-fryer.

[34] On September 14, 2023, Ms. Thornley met at the restaurant with a fire inspector from Vancouver Fire Rescue Services. Her evidence was that the inspector said she had previously requested Sea House to remove the two propane tanks at the front entrance, but this was not done. She told Ms. Thornley that the deep-fryer was not in compliance with city code and would need to be removed or a proper fire suppression installed. The inspector issued a fire rescue notice of violation, which is in evidence, and advised that if Sea House reopened she would order it to shut down.

[35] One West also submitted an affidavit from Mr. York, the owner of Pacific Coast Sheet Metals, who had previously met Mr. Pouriaei at the restaurant to discuss construction of the new kitchen. Mr. York had brought with him an electrical engineer, a mechanical consultant, and an architect who would have to submit drawings and certifications in respect to the work to apply and obtain city of Vancouver permits. His evidence was that Mr. Pouriaei said Sea House did not want to get City permits for the work. Mr. York's evidence is that he told him that permits were required, the work would need to be inspected and approved, and he would not do the work without permits. Mr. York's evidence is that Mr. Pouriaei asked whether Mr. York could do the job on the side, which Mr. York refused.

[36] Around September 18 or 19, One West learned that Sea House had never obtained a business licence to operate its restaurant.

[37] On September 27-28, Sea House's injunction was heard by Justice Thomas, seeking repossession of the restaurant and entitlement to operate pending the hearing of its petition.

[38] On October 3, 2023, Justice Thomas dismissed the injunction application on the basis that Sea House failed to satisfy any of the three aspects of the interlocutory injunction test.

[39] The Court found that, on the uncontested evidence, Sea House was delinquent in paying rent throughout much of 2021, 2022, and into 2023, at times running up arrears of over $190,000:

> [11] In 2021, Sea House was delinquent in paying rent as required by the lease in eight out of 12 months, bouncing cheques and promising to provide payment but failing to do so. By August 2021, Sea House owed One West over $60,000 in arrears.
>
> [12] This trend continued in 2022. By February, Sea House owed One West over $132,000 in arrears. This amount remained outstanding up to the end of the year.
>
> [13] In 2023, Sea House did not pay rent for the first two months of the year, running up their arrears to $174,000. One West met with Sea House in February, at which point One West advised Sea House that their failure to pay rent, pursuant to the lease, was unacceptable and the arrears must be paid immediately.
>
> [14] Sea House did not pay rent in March, increasing their arrears to $194,000. One West met with Sea House again and provided them with a demand letter for payment and notice of default under the lease. Sea House paid the rent in response to the notice of default.
>
> [15] In April, Sea House failed to pay rent according to the lease. One West sent another demand letter and notice of default. Sea House paid its rent and paid off the arrears in response to the notice of default.

[40] The Court found that, after Sea House paid off its arrears in April 2023, it immediately resumed defaulting under the lease by failing to pay rent in May, June and July. One West sent Sea House a written demand for payment in July 2023 which did not result in payment or even a response. On August 1, 2023, Sea House did not pay August rent. On August 10, 2023, One West issued the default notice by email, in accordance with the lease:

> [16] In May, June, and July, Sea House did not pay its rent, creating an arrears of $48,000. One West met with Sea House in July and sent a written demand for payment of rent and arrears. Sea House knew that the arrears had to be paid off quickly after the meeting.
>
> [17] On August 1, Sea House did not pay their rent, nor had they responded to One West's written demand for payment. On August 10, One

> West sent a notice of default to Sea House requiring payment of $67,563.61 in five days, pursuant to the lease. This was sent by email which was a primary method by which the parties communicated and the method by which the other notice of defaults had been sent. This was done in accordance with the lease.
>
> [18] Sea House says that although the notice was delivered by email, the email was not actually opened until August 14. On August 14, Sea House provided payment of $17,864.95. Sea House was advised that full payment was required by August 15. Sea House responded, acknowledging receipt of the notice of default, but noted that 1) five days was a really short time; 2) they needed two weeks to pay off the amount owed; and 3) they were only three months behind in rent, totalling $67,563.61. There is no indication that the email had not been received or opened on August 10 in this correspondence.
>
> [19] One West advised that the full amount had to be paid according to the terms of the lease by the end of the day on August 15. On August 17, One West provided Sea House with notice of termination of the lease and that they would repossess the premises effective immediately. One West changed the locks and took possession.

[41] The Court found that Sea House had committed other breaches of the lease, including having its building permit remain open because renovations were not inspected by the City, creating safety hazards that could result in the restaurant being shut down were it to try to reopen, not having a business licence, and operating without such a licence unlawfully and in violation of the lease, and that its insurance policy (which had not been produced) may be void as a result of these violations:

> [3] Sea House obtained a building permit to renovate the premises and undertook a number of renovations. The building permit remains open as Sea House has not had the renovations inspected by the city. Due to the lack of inspections, the renovations have deficiencies which have created a fire and health hazard. Recent evidence indicates these deficiencies would result in the restaurant being shut down and would take at least a week to remedy.
>
> [4] In addition, due to the lack of inspection of the renovations and perhaps due to a failure to apply, Sea House has not been able to obtain a business licence. There is no timeline for when Sea House would be provided with a business licence if they applied for one after the city had inspected and verified that the deficiencies had been remedied.
>
> [5] Due to the lack of a business licence, Sea House has been operating a restaurant unlawfully in the premises since 2021. Sea House did not disclose to One West that they had not obtained a business licence and were operating their restaurant unlawfully and not in accord with the lease.

> [6] Sea House did not produce their insurance policy. Given the concerns raised in One West's materials, I infer Sea House's insurance is possibly void. In any event, I infer the insurance would not provide fire coverage while the deficiencies remain. The lease requires valid insurance.
>
> ...
>
> [26] I reject Sea House's assertion that within this context lack of a business licence is of no import and should not prevent them from operating a restaurant should an injunction be granted. In my view, failure to have a business licence results in Sea House's operation of their restaurant being unlawful. See Wu v. Vo, 2018 BCSC 2537. In my view, equitable relief cannot be obtained to facilitate unlawful activity. I do note that Sea House's alternative position is that they will not open the restaurant or operate it without a business licence.

[42] On the merits, Justice Thomas found that Sea House lacked even an arguable case that the lease was not validly terminated or that it should be granted relief from forfeiture:

> [31] Sea House says that under the contract, deemed delivery of service of the notice of default did not occur on the day the email was delivered but on the day they opened the email. In my view, the plain reading of the contract does not support this interpretation, nor is it consistent with the factual findings I have cited. Deemed delivery by email would occur on the day the email was delivered or the day after the email was delivered.
>
> [32] Sea House's position on the breach of contract does not raise a serious issue to be tried, let alone a strong prima facie case.
>
> [33] The test for relief from forfeiture is set out in Sechelt Golf & Country Club Ltd. V. District of Sechelt, 2012 BCSC 1105 [Sechelt Golf & Country Club], at para. 139. The principles to be considered are as follows:
>
> > (a) whether the sum forfeited is out of all proportion to the loss suffered;
> >
> > (b) whether it would be unconscionable in the traditional equitable sense for relief not to be granted;
> >
> > (c) the applicant’s conduct, the gravity of the breaches and the disparity between the value of the property forfeited and the damage caused by the breach;
> >
> > (d) whether there are any collateral equitable grounds which exist including the party coming to court with “unclean hands”;
> >
> > (e) whether the applicant is “prepared now to do what is right and fair, but must also show his past record in the transaction is clean.”
>
> [34] In this case, Sea House claims that they have invested $450,000 in fixtures that would be essentially valueless should the lease be forfeited. However, a significant component of these claimed fixtures, according to the

> affidavit evidence, is a large pizza oven that cannot be removed. It is apparent from photographs that this is not a fixture that belongs to Sea House.
>
> [35] In addition, the building permit indicates that Sea House renovations would cost $50,000.
>
> [36] I have concerns about the accuracy of the amounts that Sea House deposed it invested in the fixtures.
>
> [37] Sea House is in significant arrears and has a protracted history of avoiding payment of rent over a three-year period on a ten-year lease.
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> [38] Sea House operated the restaurant unlawfully, in contravention of the lease. Its operation of the restaurant constituted a fire hazard and a health hazard.
>
> [39] Sea House says that they are willing now to do what is right by paying rent for blocks of months in advance, remedy the deficiencies, and obtain a business licence. However, their record prior to the termination of the contract is far from clean.
>
> [40] One West has entered into a contractual relationship with a third party to take over the tenancy of the premises. Considering *the Sechelt Golf & Country Club* factors as a whole, Sea House has not met the serious test to be tried standard, let alone a strong prima facie case for the relief from forfeiture.

[43] On irreparable harm, he found Sea House did not establish that it would be able to open its restaurant during the interim injunction period because of its lack of business licence and building permit and safety issues.

[44] On the balance of convenience, he found at paras. 44–45:

> [44] Sea House says that closing the restaurant will cause harm to their employees as they will lose their jobs. However, it is speculative that they would be able to open within the time of the injunction.
>
> [45] One West has contracted with a third party and intends to hire a similar number of people. When I consider this, the facts summarized under the other two parts of this test, and the fact that in my view there were intentional material misrepresentations with respect to Sea House's ability to lawfully operate a restaurant during the first two court applications and possible misrepresentations about the amount of money invested by Sea House into the fixtures, I conclude that Sea House is unable to satisfy the balance of convenience test.

[45] By email of October 8, 2023, One West's counsel provided Sea House with further opportunity to remove its personal property from the premises during the week of October 10–13, 2023. The letter said that, if Sea House failed or refused,

then its personal property would become the property of One West in accordance with the terms of the termination of the lease. Sea House did not respond.

[46] In mid-October, in preparation for the beginning of Small Victory's tenancy on November 1, 2023, One West began removing equipment, furniture, and other personal property from the premises and readying it for Small Victory. Since then, One West and its bailiff have removed that property and organized it for sale by auction.

[47] On October 13, 2023, One West’s bailiffs discovered that a personal property lien was registered against Sea House as a business debtor on March 13, 2023, in the form of a Crown charge filed pursuant to the *Provincial Sales Tax Act*, S.B.C. 2012, c. 35, in favour of the British Columbia Ministry of Finance.

[48] On October 16, Sea House unilaterally scheduled a hearing of its petition for November 1.

[49] On October 25, Sea House threatened to apply again for short leave, this time for an injunction to prevent the removal and sale of its tenant improvements, despite its failure to respond to the letters offering for them to remove their goods.

[50] On October 26, Sea House sought short leave for an application to prevent this removal. In this hearing of petition, counsel for Sea House advised that short leave was declined because of the imminent hearing date for the petition. This was the first that One West counsel heard that short leave was actually sought and declined.

Analysis

Should Sea House's late evidence be admitted?

[51] Sea House sought to rely on two affidavits from Mr. Firouzhranjbar that were sworn October 31, the day before this hearing of petition commenced.

[52] The affidavits attempted to address some of the problems in the evidence that were prominent in Justice Thomas's decision. They provided support for

Mr. Firouzhranjbar's claim that he spent $300,000 purchasing the prior business, $280,000 buying out Mr. Pouriaei as a partner, and approximately $450,000 on tenant improvements and other costs to market and run the restaurant.

[53] His affidavits also provide evidence that he can cure the deficiencies, reinstall his equipment, close the restaurant's building permit, and obtain its business licence within a few weeks. Finally, they explain why he says he was under the impression throughout that a business licence was not required while he was operating under the City's building permit.

[54] Rule 16-1(7) of the *Supreme Court Civil Rules* permits the admission of late affidavits by leave of the court. The goal is to ensure each party has a fair opportunity to present its case and to respond to the case put forward by the other party. The court's discretion under R. 16-1(7) is to be exercised "sparingly and only in meritorious cases where to exclude the evidence would result in a substantial injustice": *Muller v. Muller*, 2015 BCSC 370 at para. 15 citing *Ivarson v. Lloyd's M.J. Oppenheim Attorney In Fact In Canada for Lloyd's Underwriters*, 2002 BCSC 1627. See also *First National Financial GP Corporation v. 0734763 B.C. Ltd.*, 2020 BCSC 1349 at para. 59.

[55] *Ivarson*, at para. 25, provides a helpful summary of the principles that should guide the court's discretion when considering such an application:

> [25] ….
>
> In *Mandzuk* v. *Vieira* (1983), 43 B.C.L.R. 347 at para. 6 (S.C.) Madam Justice McLachlin, as she then was, set out the principles that ought to guide the exercise of the discretion conferred by this rule. In summary, she held that the rule ought to be used sparingly, and then only in clearly meritorious cases, where to exclude the evidence would result in a substantial injustice. Further, the rule is not intended and should not be used to allow a party to split its case. It should not be used to permit the introduction of a substantial amount of new evidence. In determining whether to permit the introduction of new evidence, the court should consider the reasons for the failure to include it initially in order to avoid the potential abuses to which the rule is susceptible.

[56] I gave Sea House the option of adjourning the hearing of its petition so that One West would have time to respond to the late affidavits. Sea House, however,

wished to proceed because of the urgency of having the matter decided, at the risk that their late evidence would not be admitted.

[57] In my view, Sea House's two late affidavits should not be admitted under R. 16-1(7). None of the information therein was new evidence, in that it did not relate to events that occurred after the injunction decision. Importantly, there was no explanation in the affidavits for why the evidence was not provided until the very last minute, thereby giving One West no opportunity to deal with it before the hearing.

[58] I hasten to add, however, that for the reasons explained below even if this evidence were admitted it would not change the outcome of this petition.

Does the petition fail by *res judicata*?

[59] One West argues that the finding in the injunction application that Sea House had no arguable case on the merits is *res judicata* and the petition should be dismissed on that basis.

[60] Sea House responds that those findings were for purposes of the interlocutory application only and were not final holdings.

[61] I decline to decide whether *res judicata* applies. There is complexity because of the new evidence that Sea House tendered that was not before Justice Thomas, designed to respond to his decision, and there appear to be cases going both ways on the *res judicata* issue. In my view, the better approach is to decide the petition on the evidence and submissions which I heard.

[62] In support of not finding *res judicata*, Sea House relied on *Canada (Human Rights Institute) v. Canada*, Vancouver registry docket no. A992161, September 21, 1999, paras. 20-21, and *Revolution Infrastructure Inc. v. Lytton First Nation*, 2016 BCSC 2586, paras. 10-11.

[63] On the other side, One West relied on D.J. Lange*, The Doctrine of Res Judicata in Canada* (Toronto: LexisNexis, 2015) 4th ed. at 458; *Chlipala v. Resurrection Credit Union Limited*, 2014 ONSC 260 at paras. 12-13; *Canstett Ltd. v.*

Keevil, [1998] O.J. No. 1630 (Ont. Gen. Div.) at paras. 17-19; *Philippon v. Levi-Lloyd* (1990), 23 A.C.W.S. (3d) 352 (B.C.S.C.) at para 18.

Was the lease termination valid?

[64] On August 10, 2023, the five-day notice was emailed to Sea House at the address for delivery in s. 1.1 of the lease. It was also emailed and couriered to Mr. Firouzhranjbar's address in s. 1.1, being the same email address that was consistently used by the parties for communication throughout their dealings. The notice was also couriered to his s. 1.1 office address on West Georgia Street. There can be no question that Sea House was properly delivered the notice pursuant to the notice provisions in the lease.

[65] By the clear words of s. 19.14(b), the five-day notice was deemed to have been validly and effectively given on the date of either: a) its email delivery, pursuant to the first sentence in that clause, or b), on the next business day, pursuant to the last sentence:

> Any notice delivered shall be deemed to have been validly and effectively given on the day of such delivery. Any notice sent by registered mail shall be deemed to have been validly and effectively given on the third Business Day following the date of mailing. Any notice sent by facsimile transmission or other means of prepaid recorded communication shall be deemed to have been validly and effectively given on the Business Day next following the day on which it was sent.

Either way, there were five days between delivery and the termination on August 17.

[66] This was the same conclusion reached by Justice Thomas when he found that Sea House's position that the termination was invalid, because termination occurred before the five days expired, did not raise a serious issue to be tried.

[67] I therefore find that the default in the payment of rent, having continued five days after notice, constituted an event of default under s. 15.1, and that, on August 17, One West terminated the lease and retook possession pursuant to clause 15.2(e):

> Upon any event of default of the Tenant, in addition to any remedy which the Landlord may have by this Lease or at law or in equity, the Landlord may, at its option:
>
> …
>
> e) terminate this Lease and re-enter and take possession of the Premises …

Should relief from forfeiture be granted?

[68] Relief from forfeiture arises from the equitable jurisdiction of the court, as set out in s. 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

[69] In *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, 1994 CanLII 100 at 504, Justice McLachlin (as she then was) identified the factors to be considered in exercising this equitable remedy:

> Relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach. …

See also *Hudson's Bay Company ULC v. Pensionfund Investment Ltd.,* 2020 BCSC 1959, paras. 53–54; *Sechelt Golf & Country Club Ltd. v. District of Sechelt*, 2012 BCSC 1105, at para. 139; and *British Columbia Development Corporation v. NAB Holdings Ltd.* (1986), 6 B.C.L.R. (2d) 145 (C.A.).

[70] I accept that the value of the property forfeited by Sea House is substantial. That is, I accept the evidence that the principals of the company and many of its employees will be seriously prejudiced by the loss of the lease and closure of the restaurant. I accept that the principals invested substantial efforts and money to buy out the previous business, pay for improvements and renovations, and run the restaurant.

[71] Nevertheless, I dismiss Sea House's application for relief from forfeiture because these considerations, although of substantial concern, are outweighed by the breaches of lease and poor conduct of Sea House as tenant and the equities involved with the new lease to Small Victory.

[72] First, is Sea House's abysmal history of failing to pay its rent, commencing in June 2021 and continuing right to the August 2023 termination, despite repeated demands as set out in detail in Ms. Grayson's affidavit #1 and in Justice Thomas' reasons in paras. 11–17.

[73] Having read the cases, I hazard to say that a tenant with a payment history as poor as Sea House's has never obtained relief from forfeiture in British Columbia. Sea House's failure to pay rent has been so egregious that One West should simply not have to put up with them as a tenant any longer. See *Triple Holdings v. Kontzamanis,* 2004 BCSC 394.

[74] The uncontested evidence is of Sea House being in significant arrears for much of the lease term, sometimes as much as $194,000, providing numerous cheques that were declined for insufficient funds, breaking numerous promises to pay, all despite repeated demands from One West.

[75] These repeated failures to pay rent and large arrears support the evidence from One West that Sea House is one of the worst tenants that One West has ever experienced. I also accept its evidence that Sea House has been the most delinquent restaurant tenant in One West's substantial western Canadian portfolio for each of 2021, 2022, and 2023. I accept the evidence that this has monopolized significant management time and costs for One West, requiring three members of its management team to try to deal with all of this tenant's problems.

[76] In some circumstances, Sea House's proposal to pay all arrears and a year's rent in advance for the rest of the lease term could overcome a poor payment history. In this case, however, it does not because of:

> a) the extreme nature of the payment breaches and the inconvenience and cost to which One West has been subject;
>
> b) if the approach were accepted, after one year One West may well have to deal with rent difficulties all over again instead of having Small Victory as their tenant, who they believe will pay rent as required without issue; and

> c) the other reasons for denying relief from forfeiture, to which I now turn.

[77] Second, is Sea House's seriously irresponsible conduct as a tenant. It operated the entire time without a business licence. Even if one accepts the evidence that it did not intend to operate unlawfully but thought it could do so without a licence because of its building permit, it remains an irresponsible, undesirable tenant.

[78] Similarly, Sea House never closed off the inspection of its renovation, which the evidence shows was not to code, and allowed the deep fryer to operate as a serious fire hazard. Although the fryer is something it purchased from the previous tenant, it is still their responsibility. The restaurant sits beneath a residential apartment tower with around 1,000 occupants.

[79] Arising from these problems is One West's legitimate concern that Sea House's insurance was void in such circumstances, contrary to the lease. Sea House has never responded to that concern, which was taken into account by Justice Thomas:

> [6] Sea House did not produce their insurance policy. Given the concerns raised in One West's materials, I infer Sea House's insurance is possibly void. In any event, I infer the insurance would not provide fire coverage while the deficiencies remain. The lease requires valid insurance.
>
> …
>
> [9] The lease also requires Sea House to operate the restaurant in compliance with all applicable laws and to obtain insurance. As noted, it is likely the insurance by Sea House would have been void due to the deficiencies and failure to obtain a business licence.

[80] Third, I accept One West's evidence, from its senior vice-president, of concerns about its own commercial reputation and exposure from any ongoing association with Sea House as a tenant, given these issues of operating illegally, unsafely, and without insurance.

[81] Fourth, Sea House has treated One West in bad faith and destroyed the business relationship. See *07654673 B.C. Ltd. v. Amacon Dawson Dev. Partnership*, 2014 BCSC 930, para. 67:

> [67] The tenant's conduct in this case has also destroyed the business relationship which the lease contemplates. In other words, many of the clauses in the lease rely on the tenant's honesty, where the landlord is not in a position to police the tenants conduct. For example, the landlord would have no ready way of knowing whether the tenant had properly advised its insurers of the risk or obtained the necessary building inspections and licenses from the City. The tenant has, by its conduct, destroyed the normal business relations which exist between landlord and tenant.

[82] Since Sea House lost its injunction application, a hostile public campaign has been waged against One West around the restaurant and on the internet. There is no direct evidence of the involvement of Sea House's principals, but it is reasonable for One West to believe they are involved and that the business relationship is hostile and destructive.

[83] There is a website called "change.org", which published falsehoods about the termination of the lease, including allegations of injustice because the landlord has abruptly closed Sea House with the intention of leasing the property at an "exorbitantly higher rent." The website incorporates a petition entitled "Petition to reopen Sea House Restaurant," which it requests be signed to send "a powerful message" and "spread the word", and refers to the landlord's "cruel decisions" and calls it "heartless" and "unjust". The windows of the restaurant have been plastered with these petitions and other statements.

[84] Fifth, are the benefits to One West and Small Victory from their binding lease and the prejudice to them if it were nullified by relief from forfeiture. Such intervening third-party rights often weigh heavily in these cases, especially where the landlord has acted in accordance with the lease and reasonably throughout. See *Peninsula (Kingsway) Seafood Restaurant Inc. v. Central Park Developments Ltd.*, 2021 BCCA 93, at para. 10.

[85] In my view, after Justice Thomas denied Sea House's injunction, and particularly given that he found no arguable case on the merits, it was reasonable for One West and Small Victory to finalize their binding lease and prepare the premises for Small Victory. The inconvenience, losses, and possibly even litigation that could be caused by reinstating Sea House are important equitable considerations.

[86] I accept One West's evidence that, as a highly sophisticated landlord, it considers Small Victory to be an excellent tenant for the premises and sees risk if relief from forfeiture were granted because, with rising interest rates, there is market uncertainty for tenants in the longer term. One West sees Small Victory as an established operator in Vancouver with a ten-year track record of success and three other bakery cafe locations. It sees it as a good fit with the neighbourhood in Yaletown and points out that, in 2023, Small Victory was the winner of the Golden Plates Award, as best independent coffee house in Vancouver. Small Victory has committed to spend around $800,000 in improvements for the premises.

[87] Pursuant to the offer to lease, Small Victory has agreed not only to pay higher base rent for the premises, but also to pay One West a percentage rent of 6% of gross sales over $3 million. It expects to employ around 30 people. It has already expended time, effort, and money in assessing these new premises, negotiating a lease, and preparing for possession on November 1.

[88] I turn finally to deal with some specific arguments raised by Sea House during the hearing and explain why I give them little or no weight.

[89] Sea House argued that One West gave the five-day notice knowing that the principals of Sea House would need more time because they regularly brought their money from overseas. Further, Mr. Firouzhranjbar claims he did not see the termination email until August 14. I do not accept the evidence about when the notice was seen but, even if true, it does not come close to excusing Sea House's abysmal payment history. Additionally, as mentioned, by the time the five-day notice was given, Sea House had not paid rent from May through August 2023, despite meetings about this in July 20 at the restaurant and a demand letter from One West

on July 24, 2023, describing the arrears situation as urgent and demanding payment, to which Mr. Firouzhranjbar did not respond. There was also a letter from One West to Sea House on August 14 advising that full payment must be paid and no extension would be accepted. There were also formal demands just earlier, in April 2023, threatening termination.

[90] Sea House argues that One West accepted August rent, which is inconsistent with its termination. One West did not accept such rent. Regarding the $17,864.95 payment, One West responded in writing that this payment would be applied as a partial payment to the arrears, but that the full amount outstanding had to be paid according to the terms of the lease by the end of the day on August 15.

[91] Regarding the additional bank drafts provided after termination on August 28, 2023, One West advised that it did not deposit these bank drafts. It sought Sea House's confirmation that the drafts could be applied to Sea House's debt pursuant to the termination. Sea House never responded. In the hearing, counsel for One West advised that, if Sea House would not provide that confirmation but instead demanded return of the funds, the bank drafts would be returned undeposited.

[92] As mentioned, Sea House led evidence that it can bring its renovations to code, deal with safety issues, close its building permit, and obtain its business licence, all within a few weeks of being back in possession. Even if that were so, given the history of Sea House's conduct, this would not give One West any reasonable confidence that it would then be dealing with a responsible, cooperative tenant.

[93] Sea House argues that One West’s senior vice-president gave false evidence that One West did not approve its building permit and that, once the error was shown, did not explain the error thereby suggesting it was intentional. This is not a point that could carry the day in this overwhelming case against Sea House. Also, I accept One West's position that its evidence did explain the error, by the person who would normally have been responsible for such consent giving evidence that she was away on maternity leave and so did not have it in her records.

[94] Sea House argued that One West should not be entitled to equitable relief because of Sea House's evidence that One West intentionally opened Sea House's mail, searching for evidence for the case. In this hearing, no evidence obtained in that manner was presented or relied on by One West. I make no findings about this issue. But, even if it did occur, it would not change my view on relief from forfeiture because of the overwhelming case against Sea House.

[95] Finally, I have already referred to Sea House's extensive evidence of the prejudice to its principals and employees from the loss of the lease, and I have dealt with that in the relief from forfeiture section above.

Costs

[96] One West seeks solicitor/client costs pursuant to its rights under the lease, and/or special costs for alleged abuse of process and reprehensible conduct.

[97] In my view, the lease entitles One West to its solicitor/client costs for these proceedings, which involve enforcement of its rights to terminate the lease. Our courts enforce such clauses between commercial parties where the intentions of the clause are clear. See *Epoch Press Inc. v. Sewak,* 2011 BCSC 323, and *07654673 B.C. Ltd. V. Amacon Dawson Dev. Partnership*, 2014 BCSC 930, para. 67.

[98] I quote the clear language of s. 15.4, entitling One West to its legal fees on a solicitor-and-client basis in these circumstances:

> The Tenant hereby agrees to pay to the Landlord, within five days after demand, all legal fees, on a solicitor and his own client basis, incurred by the Landlord for the enforcement of any rights of the Landlord under this Lease or in the enforcement of any of the provisions of this Lease or in the obtaining of possession of the Premises or for the collection of any monies from the Tenant or for any advice with respect to any other matter related to this Lease.

[99] I agree with One West's counsel that, generally speaking, their legal costs have been incurred responding to the steps taken by Sea House to avoid termination pursuant to the terms of the lease.

[100] Regarding special costs, I have decided to adjourn One West's application for special costs because I cannot properly assess it given the needs for this expedited decision, and the many complex credibility issues involved in that assessment. (For example, whether Sea House concealed from the court in its earlier affidavits and applications that it was operating illegally without a business licence or whether that was truly something its principals did not understand at the time.)

[101] Another consideration is that the application for special costs may be moot given One West's entitlement to solicitor/client costs. It makes sense for me to be seized of any such application in the future.

Conclusion

[102] Sea House's petition is dismissed. One West's termination of the lease, on August 17, 2023, is declared valid and effective, and Sea House is not granted relief from forfeiture.

[103] One West is entitled to its legal costs on a solicitor-and-own-client basis against Sea House Ltd. and the two personal indemnitors.

[104] One West's application for special costs is adjourned generally. I am seized of that application if it proceeds.

"Coval J."