IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1008718 B.C. Ltd. v. Osiria Welding & Fabrication Ltd.,* 2023 BCSC 2001

Date: 20231103
Docket: S245363
Registry: New Westminster

Between:

1008718 B.C. Ltd.

Petitioner

And

Osiria Welding & Fabrication Ltd., Darshan Singh Saini, and Saif Canada Import and Export Ltd.

Respondents

Before: The Honourable Justice Marzari

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	M.B. Funt J.V. Murray
Counsel for the Respondents Osiria Welding & Fabrication Ltd. and Darshan Singh Saini:	J. Singh
Place and Date of Trial/Hearing:	Vancouver, B.C. November 1–2, 2023
Place and Date of Judgment:	Vancouver, B.C. November 3, 2023

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Introduction

[1] The petitioner, 1008718 B.C. Ltd. (the "Landlord") seeks possession of a property and overholding rent pursuant to the *Commercial Tenancy Act*, R.S.B.C. 1996, c. 57 [*CTA*] and the terms of a commercial lease dated June 2021 (the "Lease"). The Lease is between the Landlord and the respondent Osiria Welding and Fabrication Ltd. ("Osiria") and relates to property located at 10870 Scott Road, Surrey, BC (the "Premises"). The Premises consists of light industrial land with a warehouse.

[2] Muneet Pal Singh Kapoor ("Mr. Kapoor") is the principal and sole shareholder of the Landlord.

[3] The respondent Mr. Darshan Saini is the sole director of Osiria, and also provided an indemnity with respect to Osiria's obligations under the Lease. I will refer to Mr. Saini and Osiria together as the Respondents.

[4] Saif Canada Import and Export Ltd. ("Saif") holds a sublease over a portion of the Premises granted by Osiria. Majid Abood ("Mr. Abood") is the sole director of Saif. Saif has not responded to the Petition, though duly served.

[5] The Landlord alleges three breaches of the Lease as follows:

a) The continued use of the Premises in a manner that is explicitly contrary to the lease, in breach of Clause 7.1;

b) The unauthorized sublease of the Premises in breach of Clause 11.1; and

c) The continuing lack of a business license in breach of the lease requiring compliance with City of Surrey Bylaws in breach of Clause 7.2.

[6] The Landlord says that each of these violations, on their own, is sufficient to justify the issuance of a Writ of Possession pursuant to s. 21 of the *CTA*. They say that Osiria has continued to occupy the Premises in breach of the Lease since June 2022, when the Landlord served a Notice to Quit on the basis of the first two listed

breaches. The Landlord seeks double rent since that date pursuant to s. 15 of the *CTA* and Clause 16.6 of the Lease.

[7] At the hearing of this petition, the Respondents generally acknowledge the breaches, but argue that the Landlord irrevocably waived these breaches. They seek relief from forfeiture pursuant to a number of grounds, including allegations of bad faith by the Landlord.

The Lease

[8] Pursuant to the Lease, Osiria leased the Premises from the Landlord commencing July 15, 2021, for a period of five (5) years.

[9] The Lease explicitly sets out the uses and prohibitions for which the Premises may be used for in Clause 7.1 as follows:

> 7.1 Use of Premises
>
> The Tenant will use the Premises for running business of welding, fabrication and auto sales. The Tenant will not use the Premises or allow the Premises to be used for any other purpose, or in any manner inconsistent with such use and occupation, and the Tenant will not, at any time during the Term or any renewal of it, commit or permit to be used, exercised, or carried on, in or on the Premises, or any part of it, any noxious, noisome, or offensive art, trade, business, or occupation, or keep, sell, use, handle, or dispose of any merchandise, goods, or things that are objectionable or by which the Premises or the Land or any part of them may be damaged or injuriously affected, and no act, matter, or thing whatsoever will, at any time during the Term or any renewal of it, be done in or on the Premises or the Land or any part of it that may result in annoyance, nuisance, grievance, damage, or disturbance to other tenants or occupiers of the Building or to occupiers or owners of any other lands or premises or other encumbrance charging the whole or part of the Land or the Building. The tenant shall not do nor allow any other person to do any automotive or mechanical work or repair, including without limitation, oil changes, or the refueling of motor vehicles. There shall not be parked or stored upon the Premises at any time vehicles which do not belong to the Tenant or its employees and customers.
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> [Emphasis added]

[10] Clause 7.2 of the Lease requires the Tenant to comply with all applicable bylaws, as follows:

> 7.2 Compliance with Laws
>
> The Tenant will do, observe, and perform all of its obligations and all matters and things necessary or expedient to be done, observed, or performed by the Tenant by virtue of any law, statute, bylaw , ordinance, regulation, or lawful requirements of any government authority or any public utility lawfully acting under statutory authority, and all demands and notices in pursuance of them whether given to the Tenant or the Landlord and in any manner or degree affecting the exercise or fulfilment of any right or obligation arising under or as a result of this Lease and affecting the Premises and the use of them by the Tenant.

[11] Clause 11.1 sets out the requirements for assignment and subletting:

> 11.1 Assignment and Subletting
>
> (a) The Tenant will not make, grant, execute, enter into, consent to, or permit any Transfer without the prior written consent of the Landlord, such consent not to be unreasonably withheld. In the event that the Tenant desires to make, grant, execute, enter into, consent to, or permit any Transfer then the Tenant will give prior written notice to the Landlord of such desire, specifying in the notice of the proposed Transferee and providing to the Landlord such information on the nature of the business of the proposed Transferee, together with its financial responsibility and standing, as the Landlord may reasonably require, together with the terms and conditions of the proposed Transfer. The Tenant will also deliver to the Landlord a copy of the Transfer intended to be executed by the Tenant and the Transferee, together with the Landlord's required administration fee.
>
> [Emphasis added]

[12] I note that "Transfer" is defined in the Lease to include a sublease. The Lease also has several more provisions with respect to potential transfers and subletting. In essence, the Lease permits subletting where certain processes are met as follows:

a. Osiria must provide prior written notice of the desire to sublet, including providing the Landlord with the nature of the business of the proposed transferee, and including the financial information of the proposed transferee as the Landlord may require, together with the terms and conditions of the proposed transfer or sublease;

b. Osiria must provide a copy of the sublease intended to be executed by Osiria and the transferee; and

c. Osiria must provide the Landlord with the required administration fee.

[13] The Landlord may then consent to a proposed sublease, not consent to the sublease providing reasons, or may terminate the Lease altogether. Osiria may only sublet with the prior written consent of the Landlord. Clause 16.17 of the Lease

requires all consents to be in writing and that every approval or consent given by the landlord will be in writing.

[14] The Lease also contains a No Waiver clause at Clause 16.3 which states:

> 16.3 No Waiver
>
> (a) The failure of the Landlord to exercise any right or option in connection with any breach or violation of any term, covenant, or condition to this Lease will not be deemed to be a waiver or relinquishment of such term, covenant, or condition nor of any subsequent breach of it or any other term, covenant, or condition in this Lease. The subsequent acceptance of the Rent or any portion under this Lease by the Landlord will not be deemed to be a waiver of a preceding breach by the Tenant of any term, covenant, or condition of this Lease.

[15] Clause 12.2 of the Lease allows re-entry upon default of the Lease as follows:

> 12.2 Re-entry on Default
>
> The Tenant further covenants with the Landlord that in the event of the breach, non-observance, or non-performance of any covenant, agreement, stipulation, proviso, condition, rule, or regulation required by the Tenant to be kept, performed, or observed under this Lease, and any such breach, non-observance, or non performance continues for seven days after written notice of it to the Tenant by the Landlord, or, notwithstanding the foregoing, if any payments of the Rent or any part of them, whether they are demanded or not, are not paid when they become due, or in case the Term will be taken in execution or attachment for any cause whatsoever, then and in any such case the Landlord, in addition to any other remedy now or hereafter provided, may re-enter and take possession immediately of the Premises or any part of them in the name of the whole, and may use such reasonable force and assistance in making such removal as the Landlord may deem advisable to recover at once full and exclusive possession of the Premises; and such re-entry will not operate as a waiver or satisfaction in whole or in part of any right, claim, or demand arising out of or connected with any breach, non-observance, or non-performance of any covenant or agreement of the Tenant.

[16] Clause 12.5, “Termination”, sets out that the Landlord, upon becoming entitled to re-enter the Premises under any of the provisions of the Lease, will have the right to immediately terminate the lease and Osiria will immediately deliver up possession of the Premises without limitation to the Landlord’s right to claim damages.

[17] The Lease contains a provision in relation to overholding by Osiria providing in part:

> ***16.6 Holding Over***
>
> … if the Tenant remains in possession without the Landlord's written consent, the monthly instalments of Annual Basic Rent will be two times the monthly instalments of Annual Basic Rent … and in addition the Tenant will be liable for all costs, expenses, losses and damages result in or arising from the failure of the Tenant to deliver up possession of the premises to the Landlord.

[18] Finally, pursuant to Clause 12.7 of the Lease, the Landlord is entitled to recover all costs of enforcing any of its rights under the Lease, including all legal fees and disbursements on a solicitor-and-own-client basis in the event that legal proceedings are commenced.

The *CTA* Process

[19] The *CTA* sets out a two-stage process for an order for vacant possession, which was summarized by the Court of Appeal in *The Owners, Strata Plan VIS2030 v. Ocean Park Towers Ltd*., 2016 BCCA 222 as follows:

> [15] The *Act* contemplates a two-stage summary procedure for obtaining the relief requested. The first stage is outlined in ss. 18(1) and 19 of the *Act*; the second stage is covered in s. 21. Those sections provide:
>
> > **Landlord may apply to Supreme Court**
> >
> > 18 (1) In case a tenant, after the lease or right of occupation, whether created in writing or verbally, has expired, or been determined, either by the landlord or by the tenant, by a notice to quit or notice under the lease or agreement, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, on written demand, to go out of possession of the leased land, or the land that the tenant has been permitted to occupy, the landlord may apply to the Supreme Court
> >
> > > (a) setting out in an affidavit the terms of the lease or right of occupation, if verbal;
> > >
> > > (b) annexing a copy of the instrument creating or containing the lease or right of occupation, if in writing;
> > >
> > > (c) if a copy cannot be annexed by reason of it being mislaid, lost or destroyed, or of being in possession of the tenant, or from any other cause, then annexing a statement setting forth the terms of the lease or occupation, and the reason why a copy cannot be annexed;
> > >
> > > (d) annexing a copy of the demand made for delivering possession, stating the refusal of the tenant to go out of possession, and the reasons given for the refusal, if any; and
> > >
> > > (e) any explanation in regard to the refusal.

> **Court to appoint time and place of inquiry, etc.**
>
> 19 If after reading the affidavit it appears to the court that the tenant wrongfully holds and that the landlord is entitled to possession, the court shall appoint a time and place to inquire and determine whether the person complained of was a tenant of the complainant for a term or period which has expired, or has been determined by a notice to quit or otherwise, whether the tenant holds possession against the right of the landlord and whether the tenant has wrongfully refused to go out of possession, having no right to continue in possession.
>
> **Court to issue writ of possession**
>
> 21 (1) If at the time and place appointed under section 19 the tenant, having been notified as provided, fails to appear, the court, if it appears to it that the tenant wrongfully holds, may order a writ to issue to the sheriff, commanding him or her to place the landlord in possession of the premises in question.
>
> (2) If the tenant appears at the time and place, the court shall, in a summary manner, hear the parties, examine the matter, administer an oath or affirmation to the witnesses adduced by either party, and examine them.
>
> (3) If after the hearing and examination it appears to the court that the case is clearly one coming under the true intent and meaning of section 18, and that the tenant wrongfully holds against the right of the landlord, then it shall order the issue of the writ under subsection (1) which may be in the words or to the effect of the form in the Schedule; otherwise it shall dismiss the case, and the proceedings shall form part of the records of the Supreme Court.

[16] At the first stage of the proceeding the function of the judge is to determine if the landlord has established a *prima facie* right to an inquiry into the landlord's application for an order of possession. See *W. Hanley & Co. v. Yehia* (27 November 1990), Vancouver C903767 (B.C.S.C.), citing *Melanson v. Cavolo* (1980), 25 B.C.L.R. 110 (Co. Ct.). The court's jurisdiction is limited to determining if the applicant has demonstrated a triable issue. The court should not weigh the evidence or resolve questions of credibility except in determining if the applicant has complied with the procedural requirements of the proceeding (*Yehia* at 3). At this stage, the order applied for is "in the nature of an interlocutory order which does not determine the legal rights of the parties" (*Melanson* at para. 17). It is simply to grant or not to grant an inquiry into the landlord's application.

[17] The ultimate determination of the landlord's application rests with the judge at the second stage of the proceeding. At that stage the function of the judge is to determine in a summary manner the substantive issues including the reasons for the notice of termination and whether they support the granting of the landlord's application for an order for possession (*0723922 B.C. Ltd. v. Karma Management Systems Ltd.*, 2008 BCSC 492 at para. 36; and *Rossmore Enterprises Ltd. v. Ingram*, 2013 BCSC 894 at para. 41).

[Emphasis added]

[20] At the hearing of the petition at the second stage of the *CTA* process pursuant to s. 21 of the *CTA*, the burden is upon the tenant to show cause why it ought not to be compelled to vacate the property: *Broadway – Heb Property Inc. v. Renegade Productions Inc.*, 2019 BCSC 1693 at para. 35.

Procedural History and Rulings

[21] As contemplated by the British Columbia *Supreme Court Civil Rules,* B.C. Reg. 168/2009, the Landlord brought these proceedings under the *CTA* by Petition.

[22] The first stage (required by ss. 18 and 19 of the *CTA*) was heard before Justice Norrell on October 25, 2022, and an order was entered by consent for the court to inquire into the rights of the parties pursuant to s. 21 of the *CTA* and the balance of the relief sought.

[23] The second stage of the inquiry under s. 21 of the *CTA* for the Writ of Possession was initially heard before Justice Groves on December 14, 2022. Justice Groves found that he could not reconcile the contradictory affidavit evidence and that the matter was therefore not suitable for summary determination. He dismissed the application with leave to reapply after discoveries took place.

[24] The Landlord appealed this order, and the appeal was heard and decided on March 23, 2023. The appeal was allowed in part, and the matter was remitted back to this Court for inquiry as contemplated by s. 21(2) of the *CTA.* In so doing, the Court of Appeal found that it was an error to require discoveries in what is supposed to be a summary proceeding, and that cross-examination upon affidavits would have been the appropriate remedy: *1008718 B.C. Ltd. v. Osiria Welding & Fabrication Ltd.,* 2023 BCCA 149 at para. 19. The Court of Appeal went on to say:

> [18] The judge should have directed cross-examination on the affidavits as he was entitled to do: *Illingworth v. Evergreen Medicinal Supply Inc.*, 2019 BCCA 471. Indeed, the examination and cross-examination should have ideally taken place before the inquiry judge; they are directed by s. 21 to "examine" the "witnesses adduced by either party", although I would not hold that in appropriate circumstances the judge could not adjourn the matter for cross-examination before a court reporter at the convenience of the parties.

[25] I take from the Court of Appeal's reasons that I must hear the parties in this petition in the "summary manner" contemplated by s. 21 of the *CTA*, and I may direct cross-examination on affidavits as part of this process. While I may adjourn such cross-examinations on affidavit to be done before a court reporter, it may also be preferable for me to hear the cross-examinations on affidavit as part of the s. 21 hearing and petition itself.

[26] Before me on this petition are 6 affidavits filed by the Petitioner (primarily by Mr. Kapoor) and 5 affidavits filed by Mr. Saini on behalf of the Respondents. At the hearing of the petition, the Respondents sought to file a sixth affidavit of Mr. Saini sworn the previous day, and I allowed this in the absence of any objection by the Petitioner.

[27] At the hearing of this petition, the Respondents sought to cross examine Mr. Kapoor on his sworn affidavits in this proceeding (as I believe was contemplated by the Court of Appeal). They also sought to have the Petitioner produce Mr. Kapoor's father ("Mr. Kapoor Sr.") for examination by them, despite Mr. Kapoor Sr. not having sworn any affidavit in this proceeding (i.e., he was not one of "the witnesses adduced by either party" under s. 21 of the *CTA*). The Landlord did not object to this process on the basis that it would avoid further delays in the hearing of its petition, and produced Mr. Kapoor Sr. for examination by the Respondents at the hearing of their petition. The Respondents then cross-examined Mr. Kapoor, and examined his father.

[28] For the most part, Mr. Kapoor's evidence did not vary under cross-examination from his evidence in his affidavits. He denied attending at the Premises after he signed the Lease and before May, 2022. He denied that he still had materials on the Premises after Osiria was given the keys in June 2021 (with the exception of an empty container Osiria wanted to purchase). He denied that employees of the Landlord company continued to attend at the Premises for any reason after this date.

[29] It was put to Mr. Kapoor senior that he had been present on the Premises at various times and had discussed the sale of a container on the Premises with Mr. Saini, and the sale of the Premises themselves with Mr. Saini. Mr. Kapoor Sr. agreed to having opened the door to let Mr. Saini and a realtor onto the Premises in 2021 before the Lease was signed, and later to dropping off a water bill to Mr. Saini at the Premises at an unknown time. He denied spending additional time at the Premises, or negotiating the sale of the Premises, stating that the Premises belongs to his son's company, and that he is "nothing" in relation to that company.

[30] At the close of these examinations, the Respondents sought to call Mr. Saini "to provide more details" beyond what is already in Mr. Saini's six affidavits. When pressed as to the scope of this proposed examination, counsel stated it would be with respect to providing more details as to Mr. Saini's interactions with Mr. Kapoor Sr. in particular. They argued this was necessary and appropriate on the basis that Mr. Kapoor Sr. contradicted Mr. Saini's existing sworn affidavit evidence on these points.

[31] The Petitioners objected to new direct *viva voce* evidence being tendered by the Respondents on the basis that it would be unfair to allow Mr. Saini to bolster his sworn evidence after the Petitioner had completed its submissions and without knowing what Mr. Saini might now add.

[32] I denied the Respondents' request to call Mr. Saini to provide "additional details" in direct as to his interactions with Mr. Kapoor and Mr. Kapoor Sr. Ordinarily, petition proceedings are based on affidavit evidence sworn and served with the petition and response, and there are limits under R. 16 to supplementing these affidavits with further affidavit evidence without leave of the court. Generally, petitions do not contemplate unforeseen evidence, and require both parties to provide all of their evidence to the other party well in advance of hearing. While cross-examination on affidavits (and other trial-like procedures) may be ordered pursuant to R. 16-1(18), in my view the use of these procedures is inappropriate for the purposes of bolstering already existing affidavit evidence in direct. I was also not

satisfied that the anticipated additional *viva voce* evidence would add anything relevant not already in Mr. Saini's sworn affidavits, and the petitioners were not seeking cross-examination of Mr. Saini on any of those affidavits.

FACTUAL FINDINGS

[33] I turn then to my factual findings on the evidence before me, including the evidence elicited by the Respondents' cross-examination of Mr. Kapoor and examination of his father.

The Lease

[34] The Landlord and Osiria entered the Lease sometime in June 2021.

[35] I find on the uncontroverted evidence that Mr. Kapoor Sr. was present when Mr. Saini first viewed the Premises, but that he had no part in negotiating the terms of the Lease, which was negotiated by his son, Mr. Kapoor.

[36] At the time of signing the Lease, the evidence of both Mr. Saini and Mr. Kapoor confirms that the possibility of a sublease of some or all of the Premises was discussed. The evidence on this point is that at the time of signing the Lease, Mr. Kapoor understood Mr. Saini had a family member involved in auto sales that might want to sublet, and agreed to including a provision in the Lease allowing for a sub-lease with prior written consent of the Landlord. Mr. Kapoor told Mr. Saini that written approval would be required prior to any subleasing. That evidence was unchallenged in cross-examination.

The Sublease

[37] Mr. Saini's evidence is that he entered into a sublease with Saif (who is apparently not the family member initially discussed with Mr. Kapoor) in July 2021, approximately a month after signing the Lease (the "Sublease"). It is undisputed that Mr. Saini did not follow the notice and approval requirements under the Lease before entering into the Sublease with Saif. This breach was acknowledged by counsel for the Respondents in an August 2022 letter, and again before me in this hearing.

[38] The Sublease provides that Saif shall use the premises for "the purpose of operating an auto recycling business, including the purchase and storing of scrap metal, wrecking scrap cars, the sale of car parts and purposes ancillary or incidental to the same."

[39] Clause 2 of the Sublease specifically provides that:

> The sublandlord further acknowledges that due to the nature of the Subtenant's business, drippings of oil, antifreeze and similar substances may occur on or around the Subleased Premises.

[40] I agree with the Landlord that the stated use of the Premises in the Sublease for an auto recycling business, wrecking scrap cars, and involving the dripping of oil, anti-freeze or other substances, are uses not permitted by the Lease itself, which specifically provides that Osiria "shall not do nor allow any other person to do any automotive or mechanical work or repair, including without limitation, oil changes, or the refueling of motor vehicles. There shall not be parked or stored upon the Premises at any time vehicles which do not belong to the Tenant or its employees and customers."

[41] Although Mr. Saini originally deposed that no such work was being performed on the Premises in his affidavit of August 2022, despite the terms of the Sublease, he later deposed that he had directed Saif to cease doing this work, and required Saif to remove the car hoist and other equipment used to do this work. His later affidavits make it clear that Mr. Saini was aware, or at least became aware, that Saif was performing automotive work on the Premises, contrary to the Lease (though in conformity with the Sublease).

[42] Despite Mr. Saini's own denial that he was aware of any such work on the Premises he was subletting before May 2022, he argues that Mr. Kapoor should have been aware of the Sublease and the non-permitted work. Indeed, he argues that the Court should find that Mr. Kapoor did have this knowledge prior to May 2022, and that he acquiesced to the Sublease and the non-permitted automotive work on the Premises prior to May 2022.

[43] The foundation for this argument in the evidence is weak, consisting primarily of Mr. Saini's affidavit evidence as follows:

a) In his Affidavit of August 2022, Mr. Saini avers: "I believe Mr. Kapoor may have visited the property prior to May 2022 and after July 2021 in which he would have been aware of Saif and Mr. Abood's work on the property" [emphasis added]. It is also in this affidavit that Mr. Saini denies knowledge of automotive work being performed on the premises himself during this time; and

b) In his affidavit sworn in May 2023, after the hearing of the appeal in this matter, Mr. Saini avers "To the best of my knowledge and belief, [Mr. Kapoor], along with his father…. and their employees, continued to enter the premises to pick up their stock." He avers that after selling him the container on the Premises in October 2021, both Kapoors senior and junior "proceeded to take numerous trips to remove the stock from the container. This process… continued through the month of November 2021." He states that the Landlord still has machinery and stock on the Premises. He also avers that Mr. Kapoor Sr. "would visit the premises and talk in general terms about how well my business was doing."

[44] The latter evidence was put to both Mr. Kapoor and his father and was flatly denied. At best, Mr. Saini's evidence might support an inference that persons attending the Premises would or should have noted the presence of an unauthorized additional subtenant and/or a non-permitted use. However, I do not consider the evidence is sufficient to support such an inference in the absence of evidence of where the stock was kept on the Premises in relation to the portion of the Premises subleased to Saif.

[45] Notably, this inference was not put to Mr. Kapoor or his father.

[46] It was never put to Mr. Kapoor's father that he had actual knowledge that there was a subtenant occupying a portion of the Premises, the nature of their use,

or whether he knew if that was consistent with the Lease entered into by his son on behalf of the corporate Landlord. Nor was it put to him that he shared this information with his son.

[47] Nor was it put to Mr. Kapoor himself that he had specific knowledge of the Sublease agreement, the use of the premises by Saif, or the lack of business license. The only question put to him was whether in around October 2021, he knew that Saif occupied the premises. After some clarification of the question, Mr. Kapoor denied that he had any such knowledge until after May 2022.

[48] Furthermore, there is no evidence in any of Mr. Saini's affidavits of any communication or conversation with Mr. Kapoor (or anyone else related to the Landlord) where the existence of the Sublease or Saif's use of the Premises was brought to the Landlord's attention or discussed.

[49] On the evidence before me, both in affidavit form and after cross-examination, I am unable to find that Mr. Kapoor (directly or through his father) had knowledge of the Sublease to Saif or of the non-permitted automotive recycling operations on the Premises conducted by Saif prior to May 19, 2022.

[50] I find that the Landlord did not have this knowledge, directly or constructively.

[51] The evidence does establish that on May 19, 2022, Mr. Kapoor visited the Premises and saw a stack of vehicles visible above the 10-foot wall to the Premises. He entered the Premises at that time, and observed partially deconstructed vehicles parked or stored on the Premises. During this visit, Mr. Kapoor discovered that the warehouse on the Premises had been converted into an automotive repair and autobody shop, and he saw mechanical work being done on vehicles inside the warehouse, including vehicles being repaired on a hydraulic lift. He testified in cross-examination to seeing patches of oil on the ground that were particularly troubling to him.

[52] Inside the warehouse, Mr. Kapoor met Mr. Abood for the first time, who said that he was the owner of Saif, that Saif was operating an automotive repair shop on the Premises, and that Saif had a sublease agreement with Osiria.

[53] Following that visit, Mr. Abood sent Mr. Kapoor a copy of the Sublease. I find that this was the first time that Mr. Kapoor saw or was made aware of the Sublease.

The Notices

[54] The evidence establishes that on May 19, 2022, after visiting the Premises and discovering the Sublease, the Landlord issued a Notice of Default of the Lease to Osiria and Mr. Saini, listing the following reasons for default:

a. doing or allowing others to do automotive or mechanical work or repair on the Premises, contrary to Section 7.1 of the Lease;

b. transferring or subletting the Premises to Saif Canada, carrying on business as Saif Canada Auto, without the Landlord's consent, contrary to Section 11.1 of the Lease; and

c. Failing to keep the Premises in clean and tidy order, contrary to section 15.2 of the Lease.

[55] The Notice of Default provided Osiria with a cure period of 7 days from the date of the notice.

[56] By June 8, 2022, the Landlord had not received a response from Osiria or Mr. Saini, and Mr. Kapoor again visited the Premises. During that visit, Mr. Kapoor determined that the condition of the Premises was unchanged since his last visit, that there were still scrap vehicles on the Premises, and that the warehouse still appeared to be being used for automotive mechanical work.

[57] On June 8, 2022, the Landlord issued a Notice of Termination of the Lease to Osiria and Mr. Saini due to Osiria's failure to remedy their default within the 7-day cure period and demanded immediate vacant possession.

[58] On June 15, 2022, the Landlord issued a Notice to Quit to Osiria and Mr. Saini, and reiterated the demand for vacant possession that was set out in the Notice of Termination sent on June 8, 2022.

[59] On the same day that the Notice to Quit was issued, the Landlord also deposited one of Osiria's post-dated rent cheques for $12,600.

[60] The evidence establishes that this was the last cheque deposited by the Landlord for rent of the Premises. After that date, the Landlord returned Osiria's remaining post-dated checks.

[61] I accept Mr. Kapoor's evidence that when he cashed the June 15, 2021 cheque, he did so unaware that this might be construed as an acceptance of Osiria's breaches. I find that Mr. Kapoor returned the remaining checks uncashed because it was his intention not to accept the breaches at that time. It was not put to Mr. Kapoor in cross-examination that he, in fact, intended to waive the breaches noted in the Notice of Default of Lease by cashing that cheque.

[62] On July 12, 2022, the Landlord sent a letter to Osiria and Mr. Saini again demanding possession of the Premises.

[63] To date, Osiria and Saif continued to occupy the Premises. This is so despite an earlier affidavit filed by Mr. Saini stating that Saif would vacate the Premises by February 28, 2023. In his affidavit sworn on the eve of this hearing, Mr. Saini avers that he has a further commitment from Saif has entered into a lease for alternative premises starting January 1, 2024, and that Saif will vacate the premises by January 31, 2024.

Allegations of Bad Faith

[64] Mr. Saini, in his 4th affidavit served in May 2023, avers that the Landlord issued the Notice of Default only after Mr. Saini refused an offer made by Mr. Kapoor's father for Mr. Saini to purchase the Premises for a price of $5 million.

The Respondents argue that the Notice of Default was made in retaliation for this refusal.

[65] Mr. Saini's evidence in this respect has not been entirely consistent, and in his earlier affidavit he suggests a different basis for the Notice of Default. The allegation that there was an exchange of offers for the purchase of the Premises was denied outright by Mr. Kapoor Sr. in his examination by the Respondents, who said he has no role in the corporate Landlord and cannot speak for his son in any event.

[66] Notably, nothing about wanting to sell the Premises was put to Mr. Kapoor himself in cross-examination, including the allegation that he served the Notice of Default in retaliation for Mr. Saini's refusal to purchase the Premises from him.

[67] I find this allegation of retaliatory conduct on Mr. Kapoor's part to be speculative. The evidence before me does not establish that the Landlord had an improper purpose in seeking to enforce the terms of the Lease, on this basis or any other basis.

Bylaw Violations

[68] In addition to the grounds set out in the May 19, 2022 Notice of Default, the Landlord argues that Osiria is in continuous breach of Clause 7.2 of the Lease, which requires Osiria to comply with all applicable bylaws.

[69] On November 15, 2022, The City of Surrey sent a letter to the Landlord stating that there was no record of a business license for Saif. As set out in the letter from the City of Surrey, s. 3 of Surrey Business License By-law, 1999, No. 13680 states that:

> "No person will carry on a business in the City without holding a valid and subsisting license for the business carried on…."

[70] I am satisfied on the evidence before me that Saif is occupying the Premises without having the required business license to operate on the Premises. The evidence establishes that Saif has been denied such a license because its business

is considered by the City to be a salvage or wrecking yard, which the City says is not permitted on the Premises.

[71] In Mr. Saini's 4th affidavit, he claims that Osiria has been issued a conditional business license, however, the document he attaches is not a conditional business license, but a request for inspection. No further evidence has been provided in support of this claim, and it was conceded by the Respondents at the hearing that no business license has been issued to either Osiria or Saif to date.

[72] On September 19, 2023, the City of Surrey Bylaw and Licensing Section wrote to the Landlord stating:

> A recent inspection of the above property has revealed that you have permitted an automotive salvage operation to be run from the property, including the nonpermitted storage of wrecked vehicles and outside storage of business materials … [t]he zoning does not permit this use on the property.
>
> You are required to stop the illegal use by October 31, 2023.

Breach of Lease

[73] At the hearing of this Petition, the Respondents do not contest the alleged breaches of the bylaws, including the unauthorized Sublease, the unpermitted use of the Premises by Saif for automotive work, or the lack of a business license.

[74] Nor is there any issue with the notices of breach provided by the Landlord to Osiria. The evidence in this case establishes that the Landlord provided written notice of termination by way of the Notice of Default on May 19, 2022, followed with the Notice of Termination sent on June 8, 2022, and finally a Notice to Quit on June 15, 2022.

[75] It is well established that one of the options available to a landlord upon a tenant's default is to terminate the lease after giving proper notice to the tenant: *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.,* [1971] S.C.R. 562, 1971 CanLII 123 at p. 570.

[76] The Respondents' defence to this proceeding is primarily on the basis of waiver, or in the alternative, relief from forfeiture. I will address each in turn.

Waiver

[77] The law of waiver in the context of a commercial tenancy was recently summarized in *Kypriaki Taverna Ltd. v. 610428 B.C. Ltd.*, 2021 BCSC 1711 as follows:

> [15] Waiver occurs where one party to a contract takes steps which amount to foregoing reliance on a known right or defect in the performance of the other party: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 at p. 499 [*Saskatchewan River Bungalows*].
>
> [16] The intention to waive ones rights may be expressed in a formal document but it need not be. The intention to waive may also be expressed in an informal fashion or it may be inferred from the conduct of the party. However it is expressed, the party seeking to establish the existence of waiver must demonstrate that the waiving party had (*Saskatchewan River Bungalows* at p. 500):
>
> a) full knowledge of the rights being waived; and.
>
> b) a conscious and unequivocal intention to abandon those rights.
>
> [17] The Supreme Court further stated that there are no hard and fast rules for what constitutes a waiver nor would such rules be desirable. Rather, "[t]he overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party": *Saskatchewan River Bungalows* at p. 501.
>
> [18] In the circumstances of this case, the defendants must satisfy the Court that Kypriaki had knowledge of its rights under the Overholding Provision and that it consciously through words and/or conduct intended to abandon those rights for the duration of the Overholding Period.

[78] The Court of Appeal's decision in *Airside Event Spaces Inc. v. Langley (Township)*, 2021 BCCA 306 at para. 59 confirms this requirement for a clear intention to waive, cites the same passage of *Saskatchewan River Bungalows*, and distinguishes *Delilah's Restaurants Ltd. v. 8-788 Holdings Ltd.*, 92 B.C.L.R. (2d) 342, 1994 CanLII 3170 (C.A.) on the basis that there was a communicated clear intention to waive the breaches in that case. The Respondents' reliance on *Delilah's* in this case does not assist them in this context.

[79] The current state of the law is that, while acceptance of rent can constitute a waiver, it does no do so automatically, and an intention to waive and/or a communication of an intention to waive must be established: *Airside Event Spaces* at para. 59; *ARC Sports v. Delia Catering Inc.* [1997] O.J. No. 4664, 14 R.P.R. (3d) 275 (C.A.); and *Campbell v. 1493951 Ontario Inc.*, 2021 ONCA 169 at paras. 11–12.

[80] In addition, some breaches are continuous breaches, and a failure to terminate immediately does not result in an ongoing and irrevocable waiver of a continuous breach. This is true of breaches related to ongoing non-permitted use of commercial premises: *1028840 B.C. Ltd. v. The Heritage Dispensary Clinic Society,* 2018 BCSC 82 at paras. 36, 45–48; *Bridgesoft Systems Corp. v. British Columbia,* 2000 BCCA 313 at para. 87; and *1383421 Ontario Inc. v. Ole Miss Place Inc*., 67 O.R. (3d) 161, 2003 CanLII 57436 (C.A.) at para. 79.

[81] In this case, the burden is on the Respondents who seek to establish the existence of waiver. In this regard, the Respondents must demonstrate that the Landlord had:

a) full knowledge of the rights being waived; and.

b) a conscious and unequivocal intention to abandon those rights (or at least objectively communicated such a clear intention).

[82] I find that the Respondents have not met their burden in either respect.

[83] The Respondents' primary argument seems to be that that the Landlord *could* have come to know of Osiria's unauthorized sublet and use of the Premises prior to May 2022 on its own accord; perhaps by Mr. Kapoor driving by the Premises or perhaps by having his father or employees visiting the Premises prior to that date. The Respondents argue that I should infer because this is a possibility (and not one that they had any particular part in) I should infer that Mr. Kapoor *did* know of their breach earlier than May 2022, and that he intentionally waived the breach, such that the Landlord ought now to be estopped from enforcing the terms of the Lease.

[84] I have found that the evidence does not establish such knowledge. Nor does it establish an intention on the part of the directing mind of the Landlord, Mr. Kapoor, to waive or abandon those rights.

[85] The key difficulty with this position, is that Osiria took no steps to notify the Landlord of its unauthorized sublet to Saif before or after entering into it, or of the non-permitted use Saif was putting the Premises to. Mr. Saini therefore has no ability to say what was known by Mr. Kapoor as the directing mind of the Landlord in this regard, and can only hypothesize possible knowledge. The Respondent's cross-examination of Mr. Kapoor and his father might have revealed such knowledge, but it did not, and the key issues of knowledge and acquiescence were not put to Mr. Kapoor.

[86] The difficulty is the same, but more problematic, with respect to Osiria's lack of a business license for the Premises. Before me, the Respondents argue that the Landlord had the onus to ensure that Osiria obtained the proper business license (and presumably that any sublessor did as well) and that this court should therefore infer that the Landlord knew at all times that no such license existed, and thereby waived the requirement for a business license.

[87] The Respondents were unable to provide the court with any authorities where the Court inferred knowledge of a breach to the Landlord in such a situation, and I would be surprised if there was one.

[88] I am not satisfied on the evidence before me that the Landlord had knowledge of any of the 3 breaches alleged. Taken at its best, the Respondent's evidence might suggest that the Landlord ought to have suspected that Osiria had breached the Lease and had allowed an unauthorized subtenant to use the Premises for nonpermitted uses. Even if I were to find such facts (which I do not) in my view, this is not sufficient to found a claim in waiver. A waiver must be based on "full knowledge," and acquiescence must be conscious and unequivocal.

[89] In the absence of evidence to establish knowledge of the breach throughout the first year of the Lease, it is not possible for the Respondents to establish waiver of that breach during that period.

[90] Nor do I consider that the cashing of the pre-authorized check on June 15, 2022, after the breach was discovered, constituted an intentional waiver of the breach, particularly in light of the Notice to Quit sent the same day.

[91] Further, the Landlord was not aware of the breach of the Surrey bylaws until September 2022, months after the acceptance of rent on June 15, 2022. There is no evidence at all of a waiver of this requirement of the Lease by the Landlord.

[92] Osiria's breach of the use restrictions under the Lease, and its inability to obtain a business license (in part because Saif's use also apparently contravenes the City of Surrey's land use bylaws) is a continuous breach, for which the defence of waiver is not available to the Respondents in any event. Osiria's continued use of the Premises contrary to Clause 7.1 is a continuous breach, that Osiria has not rectified, and the Landlord has not waived.

[93] Therefore, I am satisfied that the Landlord was entitled to terminate the Lease under its terms for the 2 breaches it provided Notice of in May 2022 relating to:

a) the unauthorized sublease, and

b) the unpermitted use of automotive repair on the Premises.

[94] I am also satisfied that the Landlord is entitled to terminate the Lease on the basis that Osiria is in breach of the requirement to comply with applicable bylaws, including by operating without a business license on the Premises.

[95] I am also satisfied, that Osiria has not cured these breaches of the Lease, and continues to occupy the Premises contrary to the June 15, 2022 Notice to Quit.

[96] I therefore find that the Landlord is generally entitled to the Writ of Possession, subject to the Respondent's request for relief against forfeiture on equitable grounds.

Overholding Rent

[97] In addition to the Writ of Possession, the Landlord seeks double rent from the date that Osiria has overheld the Premises on two bases:

a) Section 15 of the *CTA* and

b) Section 16.6 of the Lease.

[98] Section 15 of the *CTA* provides that where the demand is made, and notice in writing is given to deliver up possession, but the tenant does not give up possession and the Landlord does not directly retake the Land, the tenant shall pay double rent for the period that the tenant holds over.

[99] In *Boniventure Properties Ltd. v. Eng,* 2021 BCSC 1716, aff'd 2022 BCCA 330 the test for such an order under s. 15 was helpfully laid out in, where Justice Taylor stated:

> [52] I now turn to the issue of the double rent. The petitioner seeks double rent for withholding pursuant to s. 15 of the *Act*. I find on all the facts that the payment of double rent is not appropriate under the circumstances. In *Meadowridge School Society v. Allen*, 2018 BCSC 1707 at paras. 50–53, Madam Justice Sharma reviewed the three requirements for double rent pursuant to the *Act*:
>
> 1) that the lease be for a fixed term measured in years;
> 2) that the landlord has made a written demand for possession; and
> 3) that the tenant remains wilfully in possession.

[100] With respect to the term "wilfully", Taylor J. notes in that decision:

> [57] With respect to the third requirement, I note that the word "wilfully" has been interpreted restrictively, recognizing the punitive nature of s. 15 , to require that tenants voluntarily and intentionally overhold, as opposed to overholding out of mistake or negligence. One word that has been used in the case law is the word "contumaciously", which implies a high bar: *Kenmar Inns. Ltd. v. Letroy* (1993), 86 B.C.L.R. (2d) 167 at para. 33.

[101] In *Boniventure*, s. 15 was found not to apply, because the parties had ultimately moved to a month to month rental arrangement, and both parties shared responsibility for the failure to resolve the lease issues leading to significant ambiguity as to their compliance.

[102] In *Meadowridge School Society,* Justice Sharma found that an overholding tenant had wilfully remained in possession, where the term "willfully" means more than intention to remain, but an intention to remain despite knowing she had no right to do so: paras. 55–61. There the tenant argued duress and fraud that were not made out, as the basis for remaining on the premises. Justice Sharma found that the respondent was not "mistaken, careless, negligent, or under the impression that she did not have to leave" in that case.

[103] In this case, the Respondents argue that they may have been negligent, but were not intentionally overholding. However, they do acknowledge that Clause 16.6 of the Lease independently provides the Landlord with the right to collect double rent where the tenant remains in possession without the Landlord's written consent. The Respondents seek relief under the Law and Equity Act in relation to this provision.

[104] I find that in this case, the Landlord has established the criteria for application of s. 15 of the *CTA*. The rental term in this case is a fixed term expressed in years, and it was not converted to a monthly tenancy after breach. To the contrary, Osiria has remained in possession for more than a year despite the Landlord's refusal to accept further rent, and on the basis of an argument in waiver that I have found to be devoid of merit in more than one respect.

[105] Even if s. 15 did not strictly apply, the same result flows from the terms of s. 16.6 of the Lease itself.

[106] I therefore find that, subject to the Respondents' arguments regarding relief from forfeiture, the Landlord is entitled to the double rent it seeks since the Notice to Quit was issued on June 15, 2022.

Relief Against Forfeiture

[107] It is uncontested that Osiria did not pay rent from July 2022 to August 2023 because the Landlord would not accept that rent once it commenced these proceedings, presumably so as not to give rise to a waiver of its rights in this regard.

[108] Since then, the Landlord did accept a lump sum payment commensurate with the amount of the rent that would have been owing to August 2023, pursuant to an agreement that it might receive this payment without waiver. That agreement also provided for amounts to be paid by the Respondent commensurate with the monthly rent under the Lease for September 2023 (which was received) and October 2023 (which has not yet been received).

[109] The parties are agreed that the net amount owing on the basis of double rent, and subtracting the lump sum payment made in August 2023, the September 2023 rent payment, and the lack of any rent paid for October 2023 is: **$229,950**.

[110] This is the amount owed by the Respondents in relation to rent subject to my determination on their application for relief against forfeiture.

[111] The Respondents invoke s. 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253:

> **Relief against penalties and forfeitures**
>
> [24] The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.
>
> [Emphasis added.]

[112] This provision gives the Supreme Court "broad [remedial] powers": *AD General Partner Inc. v. Gill*, 2018 BCCA 436 at para. 47, leave ref'd, [2019] S.C.C.A. No. 20. The remedy "is equitable in nature and purely discretionary": *Airside Event Spaces* at para. 35*, citing Kozel v. Personal Insurance Co.*, 2014 ONCA 130 at para. 29.

[113] The factors a court may consider in this regard were reviewed with approval by the Court of Appeal for British Columbia in *Airside Event Spaces* as follows:

> [22] The judge looked to *Sechelt Golf & Country Club Ltd. v. District of Sechelt*, 2012 BCSC 1105, for guidance in his application of s. 24. *Sechelt* lists the following factors for consideration, in the context of a commercial lease:
>
> - proportionality between the amount forfeited by the lessee and the loss suffered by the lessor;
> - whether it would be unconscionable for relief not to be granted;
> - the conduct of the applicant who seeks relief, including the gravity of their breaches;
> - collateral equitable grounds that reasonably affect the analysis, including a party having "unclean hands"; and,
> - whether the applicant is prepared to do what is right and fair under the lease.
>
> (At para. 139, internal references omitted.)
>
> See also *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 at 504.

[114] The Respondents say that they have faithfully paid (or been ready to pay) the outstanding rent on the Lease, and that the Landlord has suffered no loss as a result of the breaches of the Lease. Therefore, the termination of the Lease through a Writ of Possession, an award of overholding rent (and costs under the lease) are disproportionate to the loss suffered by the Landlord.

[115] In this regard, the Respondents rely on a number of cases where the breach of Lease centred primarily on the late payments of rent, or other matters that could be and had been resolved by the time the matter was before the court.

[116] However, I do not find these cases particularly helpful to the Respondents in this case. In all of those cases, the applicant for relief from forfeiture came to the court no longer in default of the lease and in relation to breaches that were primarily financial and curable.

[117] I consider that the breaches of the Lease in this case are of a different nature, and are significant to the contract reached in the Lease itself. Not only did the

Respondents fail to get written (or even oral) approval to sublet to Saif, the terms of the Sublease permit uses that are expressly prohibited by the Lease. The express acknowledgement in the sublease that Saif would be leaking contaminants into the ground, something not permitted in the Lease itself, was a gross over-step by Osiria, in addition to its failure to provide and seek the necessary approvals for this Sublease. It is also a potentially costly one for the Landlord, whose evidence is that they ensured the Premises had a clear environmental assessment before purchasing the Premises, and included the prohibition on these uses to protect their investment in the Premises.

[118] Of greater concern for the relief from forfeiture analysis is that Osiria has not brought itself into compliance with the Lease (for example by terminating its Sublease with Saif), and asks for this discretionary remedy while still in continuous breach of the Lease.

[119] The Respondents say they have tried in good faith to bring themselves into compliance with the Lease, however, their efforts in this regard are clearly lacklustre and ineffective. These efforts have not included requiring Saif to quit the Premises. Presumably (and as acknowledged by the Respondents at the hearing) this would involve a financial risk to the Respondents that they have chosen not to take. Instead, the Respondents have chosen to take their chances with the Landlord in these proceedings, rather than with Saif.

[120] Osiria’s breach is not a momentary breach, but existed since within a month of the entering of the Lease, and throughout more than a year of enforcement proceedings by the Landlord.

[121] I decline to make an order relieving the Respondents from forfeiture in these circumstances.

Costs

[122] The Landlord seeks its costs on a solicitor-and-own-client basis from the Respondents, pursuant to Clause 12.7 of the Lease.

[123] Such costs have been awarded by the court in commercial tenancy cases where the lease explicitly provides for the same: *Price Security Holdings Inc. v. Klompas & Rothwell*, 2018 BCSC 129 at para. 121.

[124] Recently, in *Peace River Partnership v. Cardero Coal Ltd.,* 2023 BCCA 351 the Court of Appeal for British Columbia noted that this court retains a residual discretion with respect to rights to solicitor – client costs in a contract. However, the court cannot ignore these contractual terms in exercising that discretion, and a contractual term in this regard is "presumptively enforceable": para. 148.

[125] In this case, the Respondents acknowledge the terms of the Lease but seek relief from these conditions on the same grounds that they seek relief from forfeiture. I am unable to find any more merit in these submissions than I have with respect to the other remedies sought by the Landlord under the Lease.

[126] I am not satisfied that there is any good reason to depart from the contractual terms of the Lease with respect to the costs of these proceedings, and I would award the Landlord their costs of this proceeding on a solicitor-own-client basis.

CONCLUSION

[127] I therefore find that the Landlord is entitled to the Writ of Possession it seeks pursuant to s. 21 of the *CTA*. I order the Respondents to pay to the Landlord $229,950, and I find that they are jointly and severally liable for this amount pursuant to Mr. Saini's signed indemnity agreement.

[128] The Landlord seeks that the Writ of Possession require Osiria and its subtenant to vacate the Premises by November 14, which is roughly 2 weeks from the commencement of this hearing, and the day before the next rent installment would be due on the Premises.

[129] The Respondents seek until January 31, 2024 to give over possession of the Premises on the grounds that Saif says that it will leave by that date.

[130] Saif has not appeared on the hearing of this petition, and I therefore have no position directly from them. Presumably, the Respondents will suffer less damages if they allow Saif to move in January 2024 rather than force them to quit the Premises before that date given that, starting January 1, 2024, Saif has secured an alternate leased premise.

[131] The Landlord's primary concern in this regard is the letter from the City of Surrey requiring that the unlawful use of the Premises cease by October 31, 2023.

[132] It has been open to the City of Surrey to fine Osiria or Saif directly for operating on the premises without license, and the evidence does not go so far as to indicate that fines or legal action against the Landlord are imminent.

[133] In all of the circumstances, I am issuing the Writ of Possession to the Landlord, with the effective date of January 14, 2024. Both Osiria and Saif are ordered to fully quit the Premises by that date. The Respondents shall pay to the Landlord double the monthly lease amount for an additional two months in the amount of $52,920 in addition to the required $229,950 if they do not quit the Premises before November 15, 2023.

[134] Costs are to be paid by the Respondents to the Petitioner on a solicitor-own-client basis pursuant to the Lease.

"Marzari J."