IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *UPG Property Group Inc. v. Access China Tours, Inc.*, 2023 BCSC 2303

Date: 20231006
Docket: S2011509
Registry: Vancouver

Between:

UPG Property Group Inc.

Plaintiff

And:

Access China Tours, Inc. and Mark Xiaodong Huang

Defendants

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	N. Lapper C. Yan, Articled Student
Appearing as a self-represented litigant and on behalf of Access China Tours, Inc.:	M.X. Huang
Place and Date of Hearing:	Vancouver, B.C. October 6, 2023
Place and Date of Judgment:	Vancouver, B.C. October 6, 2023

[1] **THE COURT:** This is a summary trial application brought by the plaintiff, which is a commercial landlord. It seeks damages for breach of a lease. The defendants are represented by Mark Huang. He is representing himself in his personal capacity, and he is also speaking on behalf of his business, Access China Tours, Inc. ("Access China").

[2] Before turning to the legal issues, I will address a procedural issue. As I said, Mr. Huang is representing himself. He was appropriately served with the material. He did not file a response or any evidence. Counsel for the landlord did not object to Mr. Huang being able to present his case and did not object to anything that Mr. Huang said to me, even though the statements were not in affidavit evidence. That is appropriate because the court has a duty to ensure a fair hearing, and that duty is heightened when someone is not represented by legal counsel.

[3] I also believe that Mr. Huang not filing a response was only due to him not being a lawyer and not being familiar with the requirements. He appeared today, cooperated fully, and has been reasonable throughout. It is for that reason that I exercised the court's inherent jurisdiction to allow him to appear to object to the notice of application notwithstanding the lack of a filed response. With some qualifications that I will mention later, that is also why I am content to rely on Mr. Huang told me, notwithstanding that his statements were not presented in an affidavit. I am comfortable doing so largely because there are few disputed facts. I thank Mr. Huang for reasonably being candid about those facts.

Facts

[4] The facts are set out in the notice of application, and I will review them very briefly. This application concerns a 10-year commercial lease that started in February 2017 (the "Lease"). It is not disputed that Access China has been a tenant of the plaintiff for about 10 years before this particular lease, albeit in a different space in the same building. In the past, Access China expanded its business and moved into larger space in the same building.

[5] I will not review the details of the Lease, but it is in evidence.

[6] It is important to point out that Mr. Huang's business, Access China, was a company that specialized in travel from North America to China. It is without dispute that the COVID-19 pandemic had a devastating impact on travel businesses, and in particular for a business that specialized in travel to China. That became apparent in February 2020. There is communication in the record where Mr. Huang raised the potential devastating impact of the pandemic with the plaintiff, and it appears the parties had some dealings, in part, to try to address those impacts.

[7] The parties took advantage of government subsidies, and the plaintiff deferred some rent. Despite those measures, Mr. Huang communicated to the plaintiff that the impact of the pandemic was simply too dramatic, and he was unable to continue to pay rent. He left the premises in October 2020; he had given the plaintiff specific notice of leaving in mid-September. He also points out that he first raised the possibility of his inability to continue to meet the obligations of the Lease six months before that. None of those facts are in dispute.

[8] The other important fact is that Mr. Huang does not contest that leaving the premises in October 2020 was, in fact, a breach of the Lease.

Issue

[9] Thus, the issue in this application is the amount of damages. The plaintiff seeks damages of over $100,000 as well as contractual interest and costs on a solicitor-and-client basis.

[10] Mr. Huang submits the plaintiff should not be awarded that amount of money, notwithstanding his acknowledgment that there was a breach of the Lease.

[11] His reasons for saying he should not have to pay that amount of money fall under two main categories. The first was what he termed “humanitarian” or common sense reasons. He explained the difficult financial position he is in personally.

[12] The second basis upon which he seeks relief is what he called “*force majeure*”. He explained to me how his business was affected much more drastically

by the COVID-19 pandemic than the other businesses in that particular building, and perhaps more than most businesses in general. He said the other businesses were local, while his business relied on people wanting to, and being able to, travel to China, which was precluded throughout most of the pandemic.

[13] Although he provided no evidence or submissions specifically in relation to the response to civil claim, I did canvass with him the issues identified in that pleading; I will address those issues later.

Suitability for Summary Trial

[14] The first issue is whether this matter is suitable for summary trial. The test for whether it is suitable is well known and set out in the cases of *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.); and *Gichuru v. Pallai*, 2013 BCCA 60.

[15] Counsel for the plaintiff addressed that issue. Although Mr. Huang did not file a response, I explained to him the difference between a summary trial and a trial. I briefly explained some of the factors in favour of counsel for the plaintiff's position that this matter was suitable for a summary trial. I thank Mr. Huang for being cooperative, and he said he agreed that this case is suitable for summary trial.

[16] Mr. Huang does not dispute the existence of the Lease, the events that led to the breach, and that he did breach the Lease by vacating the premises. His response to the notice of civil claim raises an issue of reliance on representations. He explained that he was referring to the fact that he had given notice to the plaintiff of the possibility of his inability to pay the rent six months before the actual breach. Those facts are not disputed.

[17] On the basis that there are, in fact, no material facts at issue between the parties, this matter is suitable for summary trial.

Damages

[18] I turn to the grounds upon which Mr. Huang says the court should not order the amount of damages that are being sought.

Humanitarian Concerns

[19] Firstly, he raised the issue of, what he called, “humanitarian concerns”.

[20] I accept and acknowledge Mr. Huang's financial difficulties, and I appreciate his explanation of his personal circumstances. I also appreciate his explanation of how his business operates and the impact of the pandemic on his business. Those specifics highlighted how and why the pandemic was so difficult for travel businesses.

[21] Unfortunately, none of those constitute a legal basis upon which I can grant any relief. Even if those factors did fall under an acceptable legal basis to not to order damages, there was no evidence filed by Mr. Huang. I have no doubt that he was truthful in everything that he said, but it would have been inappropriate for me to rely on his statements to deny judgment absent sworn evidence. In any event, I am not satisfied any of those reasons he raised amount to a basis in law to deny the plaintiff relief.

Force Majeure

[22] Secondly, Mr. Huang used the term “*force majeure”*, which does not appear in his response to civil claim. He explained his understanding of the term. He said the fact that the COVID-19 pandemic had a devastating impact on international travel, and therefore on his business, was completely beyond anybody's control. He pointed out that he had been a tenant with the same landlord since 2007, and he says he had always been in good standing.

[23] The plaintiff submits the Lease itself addresses "*force majeure*". Under the definition section, subsection (j), includes a definition for "event of delay”:

> “Event of Delay” means an event or cause beyond the reasonable control of the Landlord or the Tenant, as the case may be, including acts of God, labour

> or industrial disturbances, civil disturbances, wars, interruptions by Government Body or court orders, transportation disruptions, or shortages of materials, but excluding lack of funds or financial resources.

[24] The landlord's position is that regardless of whether COVID-19 qualifies as an "event of delay", or can be described as *force majeure*, relief is not available to the defendants. The landlord relies on clause 12.1 of the Lease. Its position is that clause 12.1 restricts the applicability of any relief that could arise from an "event of delay" to the interruptions to the provision of service, utility work, or repairs.

> **12.1 Events of Delay**
>
> If either the Landlord or the Tenant is unable to provide any service, utility, work, or repair by reason of an Event of Delay, the time for performing the obligation will be extended by that period of time which is equal to the length of the delay, and the Landlord or the Tenant, as the case may be, will use all reasonable efforts to overcome any such Event of Delay. Neither the Landlord nor the Tenant will be entitled to compensation for any inconvenience, nuisance, or discomfort caused by such an Event of Delay, or to cancel this Lease.

[25] In this case, the breach was leaving the premises and not paying rent. In the correspondence filed by the plaintiff, I see that Mr. Huang wanted the plaintiff to agree to terminate the Lease, but the plaintiff did not do so. Regardless, by operation of clause 12.1, even if the COVID-19 pandemic was an event of delay, it would not have entitled either party to cancel the Lease.

[26] In the alternative, the plaintiff also argues that clause 12.1 is not relevant because it does not capture the act of not paying rent: rent is not a service, utility work, or repair.

[27] The plaintiff relies on clause 7.12, which addresses rent abatement. It states, in part, that where the premises "are not reasonably capable of use and occupancy by the Tenant for its business for more than 10 days as a result of any damage, rent will abate, from the date of the damage … until the Premises are again reasonably capable of such use and occupancy". In other words, it is only where the premises are unusable that rent can be abated. The plaintiff says that clause does not apply. I agree.

[28] *Force majeure* is not an independent basis at common law that can supersede the clear terms in the contract. In this Lease, the parties turned their mind to *force majeure* or acts of god and came to an agreement. It does not relieve a tenant from paying rent; nor does it allow a tenant to leave the premises early or allow termination or cancellation of the Lease. For those reasons, *force majeure* does not assist Mr. Huang in this case.

Grounds Raised in the Response to Civil Claim

[29] As I said, even though he did not file a response to the notice of application, I did canvass with Mr. Huang the grounds raised in his response to civil claim. I will briefly discuss those grounds.

[30] The term "estoppel" appears in paragraphs 1 and 2. I asked Mr. Huang to tell me what he understood that word to mean. He was candid and careful to explain that he did not purport to rely on “legalese”, but was referring to the fact that he had “given notice”.

[31] What he meant was that he had given the plaintiff notice at least six months before he breached the Lease by stating that he expected there would be difficulties in complying with his obligation to pay rent. In my view, this falls under what he said to me were the common sense or humanitarian reasons why I should not make the order sought. I have already addressed why humanitarian reasons do not constitute a legal basis to decline relief.

[32] There were no facts, other evidence, or anything said by Mr. Huang that would fall under estoppel.

[33] Paragraphs 3 and 4 fall under the category of “frustration of purpose”. Mr. Huang again did not specifically refer to that doctrine, but he did talk about the impact of the COVID-19 pandemic. I thank counsel for the plaintiff for providing the case law particularizing how that doctrine is applied.

[34] The purpose of the doctrine of frustration is to relieve a contracting party from its bargain by bringing a contract to an end.

[35] In *Wilkie v. Jeong*, 2017 BCSC 2131 at para. 18, Justice Warren sets out the elements of the test. I also rely on *Maison Development & Construction Ltd. v. Jefferson*, 2015 BCSC 1329 [*Maison Development*], which includes quotes from *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, as well as *KBK No. 138 Ventures Ltd. v. Canada Safeway Limited*, 2000 BCCA 295.

[36] There are two elements to the doctrine of frustration. One is a qualifying supervening event, which is an event for which the contract makes no provision, is not the fault of either party, was not self-induced, and was not foreseeable. The second is that the qualifying event causes a radical change in the nature of a fundamental contractual obligation.

[37] In *Wilkie* at para. 38, Justice Warren noted the lack of money to perform a contractual obligation generally cannot form the basis to invoke frustration because it normally does not alter the nature or purpose of the contractual obligations, even if it affects the party's ability to perform those obligations. In that case, a buyer wanted to rely on the doctrine to avoid liability for failing to close on the purchase of a residential property. The provincial government brought in the foreign buyer's tax, which had the effect of increasing the tax the buyer had to pay on the property from $58,000 to over $458,000. Thus, the total cost for the property rose by about 15 percent.

[38] Justice Warren held that she was satisfied that the imposition by the government of the foreign buyer's tax was a qualifying supervening event because it was out of the control of both parties, and it was neither something they had contemplated nor foreseeable. Therefore, the first part of the test was met. However, she held it did not radically change the nature of the parties' obligations because the purpose of the contract was entirely unaffected by the imposition of the tax. The purpose was to transfer title in exchange for the purchase price, and she held that was not affected by the supervening event.

[39] The law applies similarly here. The COVID-19 pandemic may very well amount to a supervening event, but even if it did, I am not persuaded it radically changed the nature of the parties' obligations or the performance of the contract so as to result in something entirely different from what they bargained for. A commercial lease is an agreement that a tenant can occupy and use property in exchange for payment. I was directed to no provision in the Lease that made payment of rent or other charges subject to the ability to operate a particular business.

[40] I also note that in *Maison Development*, the court dismissed a party's attempt to rely on the doctrine of frustration. That case too was about the sale of residential property. Just before closing, a fire destroyed the building on the property. However, there was a clause in the contract for purchase and sale that allocated the risk as between the buyer and seller as of the closing date. The court held that because of that, even if one could say that destruction of the building altered the very purpose of the contract, it was not unforeseeable since they turned their minds to the risk of destruction. Therefore, the doctrine of frustration was precluded.

[41] In this case, even if one could attribute the breach of the Lease to the COVID-19 pandemic, and I note the plaintiff does not accept this characterization, the doctrine of frustration was ousted by the fact that there were particular clauses in the contract (addressing “events of delay”) that captured the types of events at issue.

[42] For all those reasons, the doctrine of frustration would not provide relief to the defendants.

[43] Paragraph 5 under Legal Basis in the response to civil claim pleads that some portion of the claim is barred because the plaintiff may have received relief from the government under the COVID-19 measures. It was apparently not disputed between the parties that for a period of time before October, the landlord and the tenant did take advantage of that program. It is not entirely clear in the evidence, but

Mr. Huang tells me that it was done, and I have no reason to doubt him. In any event, the plaintiff is not seeking any amounts for unpaid rent before October.

[44] I have no evidence about whether programs were in existence after October 1, 2020, and counsel for the plaintiff pointed me to correspondence in which the plaintiff's representatives were very clear in telling Mr. Huang that it intended to rely on enforcement of the Lease for the full term.

[45] There is no evidence before me that the plaintiff received any government benefits after October 2020. Nor is there any evidence that such benefits were even available. Counsel submitted that I could infer from the correspondence that the plaintiff would not be eligible for benefits because benefits were only given if the tenant remained in the space and, as of October 2020, the tenant had left.

[46] I find that inference is reasonable. According to evidence that has been filed, and according to Mr. Huang's explanation, those government benefits accrued equally to the landlord and the tenant. The government program funded 50 percent of rent so long as the landlord waived 25 percent and the tenant paid 25 percent. It makes sense that the benefit would not be available where there was no tenant in the premises.

[47] In any event, there is no evidence before me regarding government benefits after October 2020, so there is no basis upon which I could give relief to that clause in the response to civil claim.

Amounts Sought by the Plaintiff

[48] I will turn to the actual relief being sought. The plaintiff seeks $131,188.80, which is comprised of:

a) unpaid rent for the period of October 1, 2020, to September 30, 2021, in the amount of $68,769.60;

b) operating costs from June 1, 2017, to October 2020 in the amount of $4,728.77;

c) the difference between the rent that was due under the Lease between the parties and what the new tenant is paying pursuant to a new lease in the amount of $10,770.83;

d) the leasehold improvements for the new tenant that took over the space in the amount of $23,600.00;

e) the commission paid to an agent to find a new tenant in the amount of $13,239.60; and,

f) the plaintiff's employee costs for re-leasing the premises in the amount of $10,080.00.

[49] I agree that the unpaid rent from October 1, 2020, to September 30, 2021, is payable by the defendants to the plaintiff in the amount of $68,769.60.

[50] The landlord also claims the difference between the rent under the defendants' Lease and the new tenant's lease. Mr. Huang says I should not award this amount because, during COVID-19, he could possibly have renegotiated to a lower rent. Unfortunately, Mr. Huang's submission is pure speculation. There is evidence filed by the plaintiff about the difficulties of getting tenants during the relevant time of the new lease. There is no evidence to the contrary.

[51] Furthermore, there was no attempt to renegotiate the rent in this case. The defendants simply left the premises. Therefore, it is appropriate to award $10,770.83 to the plaintiff.

[52] The landlord seeks the commission it paid to an agency in order to find a new tenant in the amount of $13,239.60. I find this was a reasonable amount, and it is also awarded.

[53] The landlord relies on clause 9.2 of the Lease to recover some other amounts.

9.2 Indemnification

> Except for the Landlord's gross negligence, the Tenant will indemnify and save the Landlord harmless from all claims, actions, liabilities, judgments, damage, costs, or expense which the Landlord may suffer or incur in connection with or arising from:
>
> …
>
> (b) any breach by the Tenant of its obligations under this Lease.
>
> This indemnity will survive the End of the Term.

[54] The plaintiff seeks $23,600 for improvements that the landlord made for the new tenant. I am not satisfied that I have sufficient evidence to justify awarding that amount, even under the indemnification clause. The plaintiff relies on an affidavit, but all it says is that the plaintiff had to provide an allowance to complete certain tenant improvements. However, it is not clear to me how that is related to the breach, and I am not satisfied that I have evidence that those costs were connected to the breach. I will not award this amount.

[55] The plaintiff claims wages paid to its employees. It claims that a significant amount of employee time was required to deal with the defendants leaving the premises—and that was employee time that would have been directed elsewhere. However, the deponent that makes that claim gives no other details, such as the number of hours of work claimed and whether those were outside the employees' normal working hours. Nor is there any breakdown of how that time was spent. For instance, were some of the hours spent during negotiations, and some after? It is not clear to me.

[56] In my view, that claim is also too remote from the breach to fall within clause 9.2, given the state of the evidence. I will not award this amount.

[57] Another amount claimed is operating costs reconciliation. I thank counsel for clarifying the basis upon which that is sought. A representative of the plaintiff deposed at paragraph 46 of the affidavit that "the tenant has failed to pay for any operating costs and additional rent during the term, including after the tenant's termination of the lease". What follows is a table of the plaintiff's operating costs and reconciliations for the years 2017 to 2020.

[58] The plaintiff submits the amounts are payable because they are “Additional Rent”, which is addressed in clause 3.8. “Additional Rent” is payable upon demand. The definition of “Additional Rent” is very broad: “all money the Tenant must pay under this Lease, including indemnities, but excluding Basic Rent”.

[59] I will not award this amount. Mr. Huang tells me that he had never received any notice of the amount claimed under this category before receiving the notice of application. I have no reason to doubt him. It seems to me that where the clause says “Additional Rent” is payable "upon demand," there ought to have been a demand given to the defendants for the amounts in 2017 and each year going forward. I find that seeing the demand for those amounts for the first time in the notice of application does not satisfy the conditions in that particular clause.

[SUBMISSIONS BY THE PARTIES ON OUTSTANDING ISSUES]

[60] **THE COURT**: I asked the parties to address some other issues because I was not sure that I had given Mr. Huang an opportunity to address the other relief sought. I thank him for addressing those issues and thank counsel for reminding me of his prior submissions.

[61] The notice of application seeks contractual interest, or in the alternative, interest pursuant to the *Court Order Interest Act,* R.S.B.C. 1996, c. 79. The Lease does have a clause speaking to interest:

> **3.9 Interest on Arrears**
>
> When any Rent, or any interest accrued thereon, is in arrears, it will bear interest at the Prime Rate plus 5% per annum compounded and payable monthly, from the date such Rent became due to and including the date of payment. The Landlord will have all remedies for its collection as it has for recovering Basic Rent in arrears.

[62] Mr. Huang asks me not to award that amount. In addition to the reasons that he articulates more generally about his circumstances, he refers to what he believes to be a concern about overall fairness. He says that there is no amount stipulated as to the amount of interest being sought, and that is a reason that I should consider not awarding it.

[63] The Lease is very clear and unambiguous that interest is owing on rent in arrears. The rate is prime plus five percent per annum compounded, payable monthly. I do award interest on the unpaid rent for the period of October 2020 to September 30, 2021, because, per the stipulations in the Lease, it is appropriate to be recovered.

[64] The other issue is costs. The landlord relies on a provision in the Lease that speaks to legal costs. Clause 11.11 says that where either the landlord or the tenant "exercises any of its rights or remedies as a result of the other's defaults, the defaulting party will pay the other's reasonable costs and out-of-pocket expenses of so exercising, including complete legal costs".

[65] The plaintiff submits it does not have to rely on clause 11.11 because it also has resort to clause 9.2 (the indemnification clause). It submits in this case, its legal costs would fall under the category of a cost or expense arising from the breach by the tenant.

[66] In my view, where there is specific reference in the Lease about recovery of legal fees, recovery of those fees would not fall under the indemnity clause. I agree that the legal fees that the plaintiff can recover are the complete legal costs. I am aware of case law that states that type of phrase amounts to recovery of solicitor-and-client costs. These are considered contractual costs and therefore displace, to some degree, the tariff costs.

[67] The question in my mind is whether there was some discussion amongst the parties with respect to costs. There is also a question in my mind about the fact that this matter started in 2020 but no attempt was made to enforce that clause until much later. I appreciate that the plaintiff delayed because it wanted to find a new tenant to demonstrate mitigation.

[68] I award the plaintiff solicitor-and-client costs for this litigation.

[69] I will add one comment, which is a general comment and in no way binding. Mr. Huang came here representing himself in good faith and was very candid with

the Court. He explained his circumstances. They do not give rise to any legal basis of relief for the defendants. The plaintiff is entitled to its remedies. I would hope, though, that it would take into consideration Mr. Huang's personal circumstances in that he had been a long-term tenant. I am referring only to the amount of time for which the landlord may choose to apply interest and recover legal costs. In particular, I refer to there being some delay in the litigation. These comments are not binding in any way on the plaintiff, but simply represent the Court's acknowledgement of Mr. Huang's circumstances.

"Sharma J."