# COURT OF APPEAL FOR ONTARIO

CITATION: 1284225 Ontario Limited v. Don Valley Business Park Corporation, 2024 ONCA 247
DATE: 20240404
DOCKET: COA-23-CV-1259

Roberts, George and Monahan JJ.A.

BETWEEN

1284225 Ontario Limited

Applicant
(Respondent)

and

Don Valley Business Park Corporation, Amexon Realty Corporation and 200 Ferrand Realty Limited

Respondents
(Appellants)

Brian Radnoff and Vanessa Ford, for the appellants

Chris E. Reed, for the respondent

Heard: March 28, 2024

On appeal from the order of Justice M. Sharma of the Superior Court of Ontario, dated October 6, 2023.

## REASONS FOR DECISION

[1] This appeal involves the application judge's interpretation of s. 4 of the parties' May 19, 1972, parking agreement ("Parking Agreement") and the

calculation of the new parking rate that the appellants should be required to pay to the respondent.

[2] Upon the conclusion of oral submissions, we advised the parties that the appeal was allowed, and the order below set aside, with reasons to follow. These are our reasons.

[3] Section 4 of the Parking Agreement provides as follows:[1]

> [Appellants] agree[s] to pay parking rates to [respondent] with respect to the parking spaces which [respondent] shall be required to make available to [appellants] from time to time, in accordance with the provisions of this agreement. The rates to be paid by [appellants] to [respondent] for each such parking space, shall be the average of commercial, *bona fide*, arm's length parking rates being charged from time to time to the public using parking facilities located within one-half mile from the Project Lands and which parking facilities are serving office buildings.

[4] Absent error, the application judge's interpretation of the parties' Parking Agreement is owed considerable appellate deference and is reviewable on a standard of "palpable and overriding error": *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 21. However a correctness standard applies if the appeal involves the incorrect application of a legal principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor: *Heritage Capital*, at para. 22.

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[1] Note that the current parties are successors in interest to the original parties to the Parking Agreement. We have therefore substituted "appellants" and "respondents" as appropriate in place of the names of the original parties.

[5] Respectfully, no deference is owed here. The application judge's analysis proceeded on the basis of the incorrect application of a relevant legal principle. In particular, the application judge found that s. 4 of the Parking Agreement was unambiguous even though fundamental terms material to the calculation of the new parking rate were undefined and unclear.

[6] The relevant terms included "commercial, *bona fide*, arm's length parking rates" being charged to "the public" using parking facilities "serving office buildings". A key ambiguity arising from these terms was whether the relevant "parking rates" should be based on hourly, daily, weekly, or monthly rates. It was also unclear from the terms of s. 4 whether parking facilities used by tenants of an office building could be included within the calculation of average rates or whether such parking facilities should be excluded, notwithstanding the fact that the appellants were themselves tenants of the office building being served by the respondent's parking lot.

[7] Moreover, notwithstanding his finding that s. 4 of the Parking Agreement was clear and unambiguous, the application judge proceeded to resolve the ambiguities identified above by relying on contested, hearsay evidence offered by the principal of the respondent, which the application judge had found to be inadmissible as expert evidence. The application judge appeared to take judicial notice of the fact that it was "commonly known" that landlords charge tenants a lower parking rate and thus such rates cannot be considered to be "commercial,

*bona fide*, arm's length" parking rates charged to members of "the public". In making this finding, the application judge incorrectly relied in part on the lay opinion of the respondent's affiant who was not independent and, as the application judge acknowledged, could not be treated as an expert. This caused the application judge to reject out of hand, erroneously in our view, the appellants' expert evidence that took into account rates charged by landlords to tenants, and to conclude that expert evidence on this issue was unnecessary and irrelevant. This also led him to ignore the fact that the parking rate to be charged to the appellants was a monthly rate, in accordance with the parties' historical practice. This formed part of the factual matrix that should have been taken into account.

[8] As a result of these analytical errors, the application judge's decision must be set aside and the interpretation of s. 4 of the Parking Agreement be considered afresh. We have a sufficient evidentiary record to allow us to make the following findings:

a) The parking rates to be used for the calculation of average rates should be monthly rates for parking in the relevant area. This follows from the application judge's findings that the purpose of the agreement was to provide monthly parking for those who worked from Monday to Friday in the office buildings served by the parking facilities, and that persons who require monthly parking would opt for a more economical monthly rate, rather than a more expensive daily or hourly rate.

b) Given the nature of the neighbourhood comparators implicated here, it may very well be that the only comparable commercial monthly rates within the relevant geographic area are those charged by landlords to tenants, whether tenants of the adjacent office buildings or tenants of the parking spaces alone. Section 4 does not exclude those comparators. In the context of the entirety of s. 4, “the public” may include tenants (who are members of the public) or other members of the public. “Public” cannot be viewed in isolation; it has to be construed in conjunction with the other modifiers in that sentence, in particular, “commercial, *bona fide*, arm’s length parking rates being charged from time to time to the public using parking facilities…serving office building.” In other words, the appropriate comparators are monthly rates charged to parties who are at “arm’s length” that are “commercial” and “*bona fide*”, using parking facilities serving office buildings. This could include tenants.

c) The only admissible evidence regarding monthly rates was that provided by the appellants’ expert. The respondent’s evidence on comparable parking rates, on the other hand, consisted of inadmissible hearsay from an employee that focused primarily on daily or hourly rates rather than monthly rates.

d) The appellants’ expert calculated the average monthly parking rate for comparable parking lots serving office buildings in the relevant geographic

area as $57.22 per stall in December 2019 and $71.36 per stall in April 2022. The appellants' obligation under s. 4 of the Parking Agreement is to pay the monthly parking rates being charged "from time to time" to users of parking lots in the relevant area. Accordingly, given that the average monthly rate in December 2019 was $57.22 per stall, and the average monthly rate as of April 2022 was $71.36 per stall, these are the rates that the appellants are obliged to pay pursuant to s. 4 of the Parking Agreement.

e) Since the respondent first requested an updated parking rate on June 1, 2019, the appellants accept that the updated parking rate should apply from June 1, 2019, onward. This commencement date for the revised parking rate is not a *nunc pro tunc* order, as the appellants had argued in their factum. Rather it is merely giving effect to the appellants' existing legal obligations to pay the average monthly rate being charged "from time to time" by comparable parking lots, for the parking services the appellants received from the respondent from June 1, 2019, until the present.

[9] The appeal is therefore allowed, and the order below is set aside. We further find the monthly parking rate to be paid by the appellants pursuant to s. 4 of the Parking Agreement to be $57.22 per stall from June 1, 2019, until April 30, 2022, and $71.36 per stall from May 1, 2022, to the present.

[10] The appellants are entitled to their costs of the appeal in the agreed all-inclusive amount of $25,000. They are also entitled to their costs of the application.

If the parties are unable to agree on the quantum of the latter, they may make brief written submissions of no more than three (3) pages, not including Bills of Costs, with the appellants' submissions to be served and filed within 10 days and the respondent's submissions to be served and filed within five (5) days thereafter.

"L.B. Roberts J.A."

"J. George J.A."

"P.J. Monahan J.A."