COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Amacon Alaska Development Partnership v. ARC Digital Canada Corp.,* 2023 BCCA 34

Date: 20230120
Docket: CA47757

Between:

Amacon Alaska Development Partnership

Appellant
(Defendant)

And

ARC Digital Canada Corp.

Respondent
(Plaintiff)

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Frankel
The Honourable Madam Justice MacKenzie

On appeal from: An order of the Supreme Court of British Columbia, dated August 17, 2021 (*ARC Digital Canada Corp. v. Amacon Alaska Development Partnership*, 2021 BCSC 1612, Vancouver Docket S194760).

Counsel for the Appellant:	S.A. Griffin C. Bildfell
Counsel for the Respondent:	D.A. Garner
Place and Date of Hearing:	Vancouver, British Columbia October 25, 2022
Place and Date of Judgment:	Vancouver, British Columbia January 20, 2023

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Madam Justice MacKenzie

Summary:

The appellant landlord appeals from a summary trial decision finding that it breached its duty of honest performance to its tenant in an agreement to modify a lease. The appellant argues that the trial judge failed to apply ordinary principles of contract law, made several factual errors, and erred in proceeding by way of summary trial. Held: The appeal is dismissed. The judge appropriately and correctly applied principles of contract law, including the law of good faith and the corresponding duty to perform contracts honestly. Her factual findings, including credibility inferences, were available to her and do not disclose palpable and overriding error, nor did she err in deciding the case at a summary trial.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. Introduction

[1] This appeal arises from a commercial landlord and tenant dispute regarding the performance of an agreement to modify a lease to provide for its early termination.

[2] After a summary trial, a procedure to which the appellant agreed, it now assails the trial judge's many findings of fact adverse to the credibility of the appellant's officer and, with considerable chutzpah, even impugns the judge's decision to proceed under the summary trial rule.

[3] The appeal lacks merit and I would dismiss it for the reasons that follow.

II. Background

[4] I will briefly outline the background facts in the chronology to give context to the judge's findings of fact detailed in the next section.

[5] ARC Digital Canada Corp. ("ARC") was a tenant of commercial premises (the "Premises") under a lease (the "Lease") with a term expiring 30 November 2020 but with an option to renew for a further five-year term.

[6] Amacon Alaska Development Partnership ("Amacon") purchased the Premises in September 2017 for redevelopment purposes. This would necessitate an early termination of the Lease, and Amacon approached ARC to this end.

[7] Negotiations ensued. As will appear, ARC had two business concerns in the negotiations. First, it wished to continue in business, and finding suitable, alternate premises was critical to surrendering its security of tenure under the Lease.

[8] Second, the relocation would require funds, and that called for compensation from Amacon as consideration for the early termination of the Lease.

[9] In January 2019, the parties orally agreed to lease amendments. On 14 January 2019 Amacon, through its Vice-President of Real Estate Management, Randy Baker, provided ARC with an unsigned "Lease Modification Agreement" or "Agreement". It substituted a new termination date of 30 June 2019, deleted the option to renew, and provided for compensation to ARC from Amacon. The compensation included an initial payment of $290,000 to be paid "upon the execution of this agreement by the Tenant and the delivery of the executed copy of the Agreement to the Landlord" and a second payment of $290,000 upon vacancy of the Premises. The second payment was conditional on ARC vacating the Premises by 11:59 pm on 30 June 2019 (the "New Termination Date").

[10] On 18 January 2019, ARC advised Amacon that the Lease Modification Agreement was acceptable, but that it would not sign until it had secured new premises. On 13 February 2019, the same day ARC signed a lease for new premises (the "New Lease"), it forwarded to Amacon the signed Lease Modification Agreement.

[11] One week later, Amacon informed ARC that it would not sign the Lease Modification Agreement. Amacon did not at that time elaborate on its reasons for not signing, nor did it pay the first installment of $290,000.

[12] On 27 February 2019, corporate counsel for ARC wrote to Amacon's counsel affirming the parties' contract relating to the Lease Modification Agreement and demanding that Amacon perform its obligations therein. On 1 March 2019, Amacon responded that there was "no deal" until both parties signed the Lease Modification Agreement and that it would not be signing due to "market conditions." On 28 March

2019, ARC's counsel again demanded execution of the Lease Modification Agreement and payment of $290,000.

[13] On 23 April 2019, ARC commenced the action in which this appeal is brought, seeking a declaration of validity of the Lease Modification Agreement, a declaration of breach of the agreement, specific performance of the agreement, and damages for breach of contract.

[14] The New Termination Date of 30 June 2019 passed and ARC remained in occupation of the Premises with no indication from Amacon that it agreed to be bound by the Agreement. ARC was also incurring costs under the New Lease, the term of which commenced 1 April 2019.

[15] On 2 July 2019, in an unannounced reversal of its position, Amacon's new counsel delivered to ARC's counsel the fully signed Lease Modification Agreement, a cheque for $290,000, and a letter stating the agreement was binding on the parties and that ARC was not entitled to the second payment, as it had not vacated the premises by the New Termination Date of 30 June 2019. Amacon also took the position that ARC was liable for double rent for the overholding period from 1 July 2019.

[16] ARC paid only the ordinary rent amount under the Lease to Amacon. On 30 September 2019, ARC gave Amacon notice of its intention to vacate the Premises on 31 October 2019, which it did.

[17] Amacon advanced a counter-claim in this proceeding seeking double rent from ARC – an additional $36,336.40 – and legal fees on a full indemnity basis.

[18] With respect to Amacon's change of heart being "unannounced", I note that Amacon's Mr. Baker did testify that in early May 2019, he had instructed Amacon's litigation counsel to communicate Amacon's acknowledgement of the Lease Modification Agreement and offer payment of the first installment of $290,000 to ARC. No evidence to this effect was led from Amacon's litigation counsel and the trial judge dealt with this evidence in her reasons, as I will expand upon below.

III. Summary Trial Judgment 2021 BCSC 1612

[19] The judge began her reasons noting that both parties agreed that a summary trial was "a proper basis upon which to resolve their respective claims": at para. 4.

[20] The judge proceeded to expressly find the facts that I have summarized above (paras. 5 and following). The judge at para. 15 noted ARC's uncontradicted evidence through its officers to this effect:

> 10. One of the factors I paid particular attention to on behalf of [ARC] was the need for sufficient lead time to allow [ARC] to wrap up its operations at the Premises by the proposed new end of term, June 30, 2019, and find new space for [ARC] to set up in and resume operations. The move would entail more than simply packing up and moving personnel and office materials, but would include the moving of the equipment, raw materials and projects in process which constituted the business of [ARC]. I made Mr. Baker aware of [ARC's] need for lead time to find new space and to effect the move out of the Premises. [ARC] began looking for new space once these negotiations began.
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> 11. Another important factor for [ARC] was funding to effect the early move of its business. It was the intention of [ARC] to negotiate for funding from [Amacon] to cover as much of the moving costs as possible.

[21] The judge found that Amacon's Mr. Baker "was well aware of ARC's fundamental objective and requirements in terms of relocating its business operations, as above": at para. 16.

[22] The judge related that Mr. Baker in his affidavit expressed "some surprise" that ARC would not sign the Lease Modification Agreement until it had secured the new premises. The judge at para. 23 said this was "disingenuous" on Mr. Baker's part:

> In his Affidavit #1 sworn January 17, 2020, Mr. Baker expressed some surprise that ARC would not sign the Lease Modification Agreement until it had secured the New Premises. In my view, this statement is disingenuous to say the least, given that Amacon was well aware that ARC was negotiating with a new landlord in order to ensure that it had new premises in place so that it could continue its operations. By any measure, this makes perfect commercial sense from ARC's point of view and would have been well understood by Amacon. In fact, Mr. Baker confirms in his Affidavit #1 at paragraph 25 that, by mid-January 2019, Mr. Barnicoat had told him that ARC

> required a written agreement showing the bargain as soon as possible as "ARC wished to have it executed contemporaneously with the signing of a new lease."

[23] The judge noted Amacon's initial lack of elaboration on its reasons for refusing to sign the Lease Modification Agreement and continued:

> [31] Mr. Baker now states in his Affidavit #1 that Amacon's refusal to sign arose from its "frustration" with ARC in "changing the goal line, so to speak" and by "false starts and delays" in signing the Lease Modification Agreement, including by treating the Lease Modification Agreement as conditional on securing the New Lease.
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> [32] Again, I find Mr. Baker's evidence – and only recent purported rationale for Amacon's refusal to sign – to be highly suspect and not credible.
> ...
>
> [33] I find as a fact that Mr. Baker was well aware that the two transactions were linked. ARC did not advise Amacon that its new lease was in place when the Lease Modification Agreement was forwarded to ARC on January 14, 2019.

[24] The judge concluded that Amacon had not presented "any reasonable or intelligible commercial rationale" for not signing the Lease Modification Agreement. This left "the court to consider what inferences might be taken from Amacon's position…": at para. 35.

[25] Amacon's refusal to sign the Lease Modification Agreement led to "significant and negative consequences to ARC". These included, as detailed by the judge: the new lease commitments undertaken by ARC leaving it with two landlords and a lack of budgeted funds, without the initial payment of $290,000 to pay for its move to new premises – "without this funding, ARC did not have funds readily available for a move to new premises": at para. 36.

[26] The judge proceeded to deal with the evidence of Mr. Baker as to the instructions he purportedly gave his litigation counsel in May 2019 that I alluded to above. I reproduce these paragraphs from the judge's reasons:

> [45] Mr. Baker then states that, in early May 2019, he instructed Mr. Georgetti to communicate Amacon's acceptance of the Lease Modification Agreement to ARC and "offer" payment of $290,000 in satisfaction of ARC's claims of specific performance. Mr. Baker states that he believes Mr. Georgetti communicated that position in a telephone call on May

> 17, 2019. He also states that Amacon was unwilling to agree to any further renegotiation of the Lease Modification Agreement or any extension of the Possession Date.
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> [46] In my view, Mr. Baker's statement does not bear scrutiny. If that was Amacon's position, it is difficult to understand why Mr. Baker or Mr. Georgetti did not simply immediately deliver to ARC a copy of the Lease Modification Agreement signed by Amacon together with a $290,000 cheque toward confirming what Mr. Baker was seemingly referring to as the oral agreement between the parties. If nothing else, this would have cemented the agreement between the parties, particularly as to the New Termination Date that Amacon was keen to enforce.
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> [47] In addition, there is no evidence at this trial of any communication to ARC or ARC's counsel of Amacon's agreement to be bound by the Lease Modification Agreement around this time. Amacon's reference to Mr. Baker's evidence as to what Mr. Georgetti did or said to ARC's counsel is hearsay and inadmissible at this trial. Mr. Georgetti has not provided any evidence at this trial that he in fact communicated anything to ARC's counsel. ARC's evidence does not confirm any such communication, although I acknowledge that ARC's counsel's response to Mr. Georgetti in late May 2019 would indicate that Mr. Georgetti did propose some "resolution".

[27] Indeed, the judge expressly found that Amacon's lawyer's letter to ARC of 2 July 2019 now purporting to honour the Lease Modification Agreement was the "first indication by Amacon to ARC that Amacon agreed that it was bound by the Lease Modification Agreement" (at para. 52, emphasis that of the judge).

[28] The judge turned to outline the legal positions adopted by the parties in final submissions. She characterized Amacon's position as being "based on ordinary contract principles".

[29] The judge summarized what effectively she took to be the tenor of the parties' submissions:

> [79] By the delivery of the signed agreement and cheque on July 2, 2019, Amacon sought to essentially rewrite the Lease Modification Agreement to allow it to pay the first installment of $290,000 after the New Termination Date with the *ex post facto* result that ARC's performance in moving out by the New Termination Date was impossible.
>
> [80] ARC's later position, from a contractual point of view, sought a similar result in terms of rewriting the Lease Modification Agreement. ARC essentially sought to amend ARC's performance date in the Lease Modification Agreement to accord with Amacon's actual performance date. Hence, ARC then took the position that, upon payment of the first installment on July 2, 2019, the New Termination Date was delayed by that same period

> (3-4 months) and after ARC had vacated by that later date, Amacon was required to pay the second installment.
>
> [81] These unique and unusual circumstances could easily stand as a template for a challenging law school examination question, given the thorny issues that arise.

[30] The judge noted that the real thrust of ARC's submissions was not "tied to ordinary contract principles" but rather relied on broader principles of contract law – concluding that Amacon's performance of the Lease Modification Agreement was in breach of its duty of good faith: at para. 82.

[31] The judge then proceeded to discuss the "organizing principle of good faith" in contract law in the context of the leading cases: *Bhasin v. Hrynew*, 2014 SCC 71, and *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45.

[32] This brings me to the judge's extensive findings of fact in the context of her consideration of good faith contract performance. That consideration led to a damning conclusion:

> …the circumstances of this case overwhelmingly establish that Amacon acted dishonestly towards ARC in relation to Amacon's performance under the Lease Modification Agreement.
>
> [para. 90]

[33] It is necessary to set out the judge's detailed findings of fact:

> [90] In my view, the circumstances of this case overwhelmingly establish that Amacon acted dishonestly towards ARC in relation to Amacon's performance under the Lease Modification Agreement. In particular, I find as a fact:
>
> a) ARC and Amacon, as parties to the Lease Modification Agreement, expressly contemplated and agreed that the execution of that agreement would be first made by ARC and that such execution and delivery of the executed form to Amacon would trigger the initial payment obligation;
>
> b) The express terms of the Lease Modification Agreement at paragraph 2(a) provided for the initial payment of $290,000 to be made by Amacon "upon execution of this Agreement by [ARC] and the delivery of the executed copy of this Agreement to [Amacon]", and no part of the Lease Modification Agreement required the execution of the agreement by Amacon beforehand. Amacon knew that ARC would not

commence the process of moving to the New Premises until then;

c) The parties agreed that ARC was entitled to execute and deliver the Lease Modification Agreement after ARC had entered into the New Lease, which leasing process ARC fully disclosed to Amacon;

d) ARC only executed the New Lease in reasonable reliance upon the representations of Amacon set out in the negotiations and in the Lease Modification Agreement, which confirmed the agreement, as was well-known to Amacon;

e) After the parties had agreed upon the terms of the Lease Modification Agreement, and before ARC signed the New Lease, Amacon formed the intention to not sign the Lease Modification Agreement;

f) At no time prior to ARC's entry into the New Lease and ARC's later execution of the Lease Modification Agreement did Amacon ever advise ARC that Amacon would not proceed with the agreement, despite Amacon knowingly misleading ARC into understanding and reasonably expecting that Amacon would sign and then perform: *Callow* at paras. 81-83 and 90;

g) In fact, Amacon did not initially, by either its words or its conduct, purport to resile from the Lease Modification Agreement until after ARC had, in reasonable yet detrimental reliance upon that agreement, negotiated and entered into the New Lease and executed the Lease Modification Agreement;

h) If ARC had been advised by Amacon of its intention to refuse to sign the Lease Modification Agreement and comply with its terms before the execution of the New Lease, ARC would not have executed the New Lease or Lease Modification Agreement. In that event, Amacon and ARC would then have continued to be governed by the Lease and would have been able to engage in further negotiations toward an early termination date;

i) It is nonsensical for Amacon to suggest that they were refusing to sign the Lease Modification for any legitimate business reason, particularly when Amacon clearly wished to have ARC vacate the Premises by June 2019. I do not accept that Amacon has advanced any legitimate business reason — whether the President's refusal for unspecified reasons, vague references to a change of "market conditions" or the most recent explanation of "frustration". The lack of a legitimate business rationale gives rise to the reasonable inference that Amacon very much saw an opportunity to take advantage of ARC through its own breach of the Lease Modification Agreement. Mr. Baker essentially admitted as much in his

letter of March 1, 2019 when he invited Mr. Barnicoat to discuss another agreement or "potential solution";

j) At all times, Amacon was well aware that ARC had negotiated the Lease Modification with two clear objectives in mind: securing the initial funds to effect the move to new premises and allowing sufficient time (four months) to do so;

k) While Amacon refused to execute the Lease Modification Agreement and pay the first installment, it was well aware that ARC had then lost any bargaining power, given that it was then a tenant under two subsisting leases — the Lease with 21 months remaining and an overlapping seven year New Lease;

l) When Amacon's efforts to renegotiate the Lease Modification Agreement failed, Mr. Baker now states, without any supporting evidence, that in May 2019 he instructed Amacon's counsel to indicate Amacon's acceptance of the Lease Modification Agreement and that the initial payment might be made at some unspecified time. There is some evidence on ARC's counsel's part to suggest that some suggested resolution was communicated by Amacon. However, I reject Mr. Baker's recent evidence on this point as false and disingenuous. Common sense would suggest that, if Amacon truly intended to abide by the Lease Modification Agreement, Mr. Baker need only have sent ARC a signed copy of the agreement along with the initial payment of $290,000. The fact that Amacon did not do this is telling. Effectively, Amacon was continuing with its intention to blithely mislead ARC as to whether Amacon accepted that it was bound by the Lease Modification Agreement and Amacon's intentions to abide by it: *Callow* at paras. 95 and 100; and

m) In reliance on Amacon's vague suggestion that it would at some later point abide by the Lease Modification Agreement, ARC reasonably withheld acting under the Lease Modification itself.

[91] In addition, I find that the circumstances of Amacon's strategically timed and late attempt to "perform" its obligations under the Lease Modification Agreement on July 2, 2019 amounted to further dishonest conduct towards ARC. In particular, I find as a fact:

a) In the months leading to June 2019, Amacon misled ARC by staying silent regarding its intentions under the Lease Modification Agreement, including whether it acknowledged that the Lease Modification Agreement was binding on it and whether Amacon would pay the agreed upon compensation to ARC. During this time, Amacon formed a plan to acknowledge the Lease Modification Agreement and pay the first installment only after the New Termination Date. This was done in an attempt to, *ex post facto*, declare ARC in breach of the Lease,

as amended by the terms of the Lease Modification Agreement;

b) On July 2, 2019, Amacon proceeded with its bad faith plan. Taking advantage of its own silence in the prior months, it strategically timed its purported cure of its own breach of the Lease Modification Agreement — by delivering the executed Lease Modification Agreement and $290,000 only *after* the New Termination Date — so as to position itself to declare ARC in breach of the Lease Modification Agreement and, most importantly, claim that ARC had forfeited its right to require that Amacon pay the second installment;

c) Amacon was well aware that only after delivery of this first installment would ARC have the necessary funds to move to the New Premises and that it would require time to do so. Even in the face of this knowledge, Amacon's aggressive and objectionable behavior continued in its July 2, 2019 demand that ARC then start paying double rent under the Lease;

d) Amacon's egregious and sharp business practice was used as a weapon to disadvantage ARC and benefit itself through Amacon's misconduct and bad faith performance under the Lease Modification Agreement; and

e) If ARC had known that Amacon would continue to delay payment of the first installment as the New Termination Date approached and that Amacon would still insist on ARC vacating the Premises by the New Termination Date, ARC could have taken steps to protect itself. ARC could have possibly found the funds for the move from elsewhere, moved by the New Termination Date, and demanded that Amacon pay both installments on the basis that ARC had fulfilled its obligations. Further, in the face of Amacon's continued repudiation of the contract, ARC could have declared that Amacon had fundamentally breached the Lease Modification Agreement and claimed consequential damages, including costs in relation to the New Lease.

[34] In the result, the judge found Amacon in breach of the Lease Modification Agreement and its "duty of good faith in its performance of the Lease Modification Agreement": para. 92. The judge concluded that "the interests of justice and fairness in the context of these contractual arrangements demand that ARC have a remedy": at para. 93. That remedy included payment by Amacon of the second $290,000 and the rent ($79,260) ARC was forced to pay Amacon after 30 June 2019 in respect of the Premises. Amacon's counter-claim was dismissed.

IV. Errors Alleged on Appeal

[35] Amacon in its factum alleges three errors by the judge below:

a. making erroneous factual findings, including that Amacon's late payment of the first instalment under the Lease Modification Agreement meant ARC lacked the funds to vacate the Leased Premises by June 30, 2019;

b. expressly declining to apply "ordinary contract principles" and instead allowing the law of good faith to overwhelm contract law, and as a result erroneously excusing ARC from its contractual duties despite ARC's own election to affirm the Lease Modification Agreement and sue for specific performance;

c. alternatively, abdicating her judicial responsibility to decide for herself whether the matter was suitable for summary trial, and erroneously taking for granted — without any independent analysis — that it was.

V. Discussion

[36] I will deal with each of the alleged errors in turn, but in a different order.

i. The Disposition by Summary Trial

[37] As I have noted, the parties agreed that a summary trial was an appropriate vehicle by which to resolve their disputes. The incongruity of Amacon's position before this Court is stark in that light, and starker still when one appreciates that Amacon actually filed its own summary trial application seeking dismissal of ARC's claim and judgment on its counter-claim. It seeks that relief primarily on appeal as well.

[38] Amacon says that its position on the suitability of a summary trial did not relieve the trial judge from her duty to conduct a suitability analysis independent of the entreaties of the parties. Rule 9-7(15) of the *Supreme Court Civil Rules* does cast duties on the application judge to determine that they are able to find the necessary facts on the evidence before them and that it would not be unjust to proceed by summary trial. But it is trite to observe that there is nothing in the record to suggest that this judge did not undertake any such duty cast upon her by the Rule. The presumption in the circumstances must be that she did.

[39] Amacon argues that since credibility was a critical factor in the determination of the dispute, the judge was required to exercise caution before proceeding via summary trial absent cross-examination. Amacon says that if the judge was going to base her decision on findings of dishonesty and disingenuousness, she needed to order a full trial.

[40] This is not the case. In appropriate circumstances, it is perfectly acceptable for a summary trial judge to make credibility findings on affidavit evidence alone: *Orangeville Raceway Ltd. v. Wood Gundy Inc.,* [1995] 6 B.C.L.R. (3d) 391 (C.A.). In *Newhouse v. Garland*, 2022 BCCA 276, this Court upheld a judge's decision to proceed by summary trial despite the fact that credibility was the critical factor upon which judgment rested. The majority stated that the judge's decision was entitled to deference, particularly in the context of a case in which both parties wanted to have the matter resolved by way of summary trial, did so knowing credibility was a live issue, and had sufficient opportunity to put their best cases forward: at para. 131.

[41] The majority found that the judge was entitled to draw a negative credibility inference from the implausibility and vagueness of the affidavit evidence before her, and further found that the judge had drawn a reasonable inference from a circumstantial piece of evidence that supported her credibility finding: at para. 130.

[42] Here, the judge's credibility findings were made not only on the basis of affidavits, but on accompanying evidence of the Lease Modification Agreement itself and correspondence between the parties during the relevant timeframe. It was open to her to draw a negative inference from Mr. Baker's affidavit after assessing it alongside the other evidence and finding it to be disingenuous. Amacon's actions spoke louder than its words.

[43] There is no merit to Amacon's submission on this point and I say respectfully that it should not have been advanced in the circumstances.

ii. Erroneous Factual Findings

[44] While “erroneous” is the word chosen by Amacon, it bears observation that the standard of review for findings of fact is “palpable and overriding error” for which no citation to authority is needed.

[45] Other jurists have soundly emphasized how high the palpable and overriding error standard is. As Morrisette J.A. said in *J.G. v. Nadeau*, 2016 QCCA 167 at para. 77 [translation], as adopted by the majority in *Benhaim v. St.-Germain*, 2016 SCC 48 at para. 39:

> [A] palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions.

[46] Or as described in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at para. 46 [translation]:

> “Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[47] The primary errors alleged in respect of the judge’s findings of fact are characterized by Amacon as:

1. No Evidence that ARC Lacked the Funds to Vacate the Premises and
2. Failure to Properly Consider Mr. Baker’s Evidence.

I will deal with each in turn.

1. Funds to Vacate

[48] Here Amacon stresses the judge’s statement to the effect that “ARC’s performance in moving out by the new termination date was impossible” because Amacon did not pay the first installment of compensation in a timely manner under the Lease Modification Agreement.

[49] It then argues that there was financial evidence of the significant wherewithal of ARC's parent and related companies that belied such an "impossibility". It is purely speculative to say whether such funds could ever cross the corporate veil to assist ARC in Canada. That aside, one must read the judge's reasons as a whole. First here is the full context of what the judge said at para. 79 of her reasons:

> By the delivery of the signed agreement and cheque on July 2, 2019, Amacon sought to essentially rewrite the Lease Modification Agreement to allow it to pay the first installment of $290,000 *after* the New Termination Date with the *ex post facto* result that ARC's performance in moving out by the New Termination Date was impossible.

[50] This must be read in the context of what the judge said earlier at para. 36(d):

> If ARC was to move to the New Premises immediately, it had not budgeted for such a move and was relying on the initial payment of $290,000 by Amacon for that purpose. Without this funding, ARC did not have funds readily available for a move to the New Premises.

[51] This does not speak of an absolute "impossibility". The judge confirmed this clear conclusion later in her reasons at para. 91(e):

> If ARC had known that Amacon would continue to delay payment of the first installment as the New Termination Date approached and that Amacon would still insist on ARC vacating the Premises by the New Termination Date, ARC could have taken steps to protect itself. ARC could have possibly found the funds for the move from elsewhere, moved by the New Termination Date,…

[52] I cannot conclude that in the context of the entirety of the judge's reasons she erred palpably in the manner alleged. I would not accede to this ground of appeal.

2. Mr. Baker's Evidence

[53] The thrust of the complaint here is that the judge's adverse credibility findings against Mr. Baker were based on misapprehensions of, a failure to consider, and unwarranted criticisms of his evidence.

[54] Amacon spends considerable time in its factum quarreling with the judge's conclusion that Mr. Baker's surprise at ARC's conditional acceptance of the Lease

Modification Agreement (subject to it entering into the New Lease) was "disingenuous to say the least".

[55] Amacon in its factum states (at para. 52):

> Yet Mr. Baker testified that he was surprised not by ARC's "negotiating with a new landlord", but by the undisputed fact that "[a]t no time did Mr. Barnicoat's suggest or indicate that our deal was conditional upon ARC's negotiation and entering into a lease with a new landlord". The chambers judge thus misunderstood the true source of Mr. Baker's surprise.

[56] This overlooks the fact that while this was Mr. Baker's evidence, it clearly is not the finding of the judge. The judge expressly found as a fact:

> that Mr. Baker was well aware that the two transactions were linked. ARC did not advise Amacon that its new lease was in place when the Lease Modification Agreement was forwarded to ARC on January 14, 2019.
>
> [para. 33]

[57] Then Amacon says that the judge misrepresented Mr. Baker's evidence that Amacon did not sign the Lease Modification Agreement because its officers and directors had "frustrations with ARC's delays and false starts" and attempts to "change the goal line" in finding these reasons to be highly suspect and not credible.

[58] The fact is that none of this was advanced as a reason by Amacon at the time of its bald refusal to execute the Lease Modification Agreement. Past feelings of frustration, in the event of a subsequent oral agreement, is not a reason to refuse performance of one's obligations.

[59] The judge's detailed and exceedingly comprehensive findings of fact and inferences drawn therefrom provide more than ample support for her conclusion that Amacon had no intelligible commercial rationale for its initial decision not to sign the Lease Modification Agreement.

[60] Finally, Amacon in its factum advances this criticism of the judge's credibility assessment:

> 56. Third, the chambers judge found Mr. Baker's testimony that he instructed Amacon's litigation counsel in May 2019 "to communicate [Amacon's]

> acknowledgement of the [Lease] Modification Agreement and offer payment of the outstanding sum of $290,000 under the Lease Modification [Agreement] in full satisfaction of ARC's claim for specific performance" to be "false and disingenuous" because it was "difficult to understand why Mr. Baker or Mr. Georgetti did not simply immediately deliver to ARC a copy of the Lease Modification Agreement signed by Amacon together with a $290,000 cheque", and because there was "no evidence at this trial of any communication to ARC or ARC's counsel of Amacon's agreement to be bound by the Lease Modification Agreement around this time". Neither criticism has any basis in logic or evidence.

[61] Amacon then proceeds to argue, by reference to competing inferences, why it would not be "difficult to understand" Amacon's actions.

[62] The judge's inferences here are based on her extensive findings of fact. Choosing between competing inferences (even if Amacon's were reasonable in themselves, which I in no way concede) is not the stuff of appropriate appellate review.

[63] This whole train of submissions by Amacon suffers on an elementary level from the fact the judge heard no evidence from Amacon's counsel that he ever categorically made any offers to ARC in May 2019.

[64] In my view the judge's findings leading to her credibility assessment of Mr. Baker form a very robust basis for that assessment. I would not accede to this ground of appeal.

3. Allowing the Law of Good Faith to Overwhelm Contract Law

[65] Amacon graphically describes this alleged error of law, suggesting that the judge abandoned an analysis based on traditional principles of contract law and resorted only to "the law of good faith". Amacon says the judge was not permitted "to leap over contract law in a single bound". The judge did no such thing (empowering as the thought is).

[66] The fact is, the judge dealt with good faith principles in the context of contract performance by reviewing in detail "The *Bhasin* / *Callow* Framework" at paras. 84 – 88 of her reasons.

[67] No issue is taken with her articulation of the guiding principles and there is no need for me to enter into that discussion here.

[68] Far from existing in a realm beyond that of basic contract law, these principles form a part of basic contract law. As *Bhasin* holds, quite simply, there is an organizing principle of good faith that in part recognizes a duty to perform a contract honestly: at para. 62. This duty means "that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily": at para. 63.

[69] Here the judge found Amacon clearly in breach of that duty. The judge did not let these principles "overwhelm" the analysis as Amacon states, she simply applied them to the conduct of Amacon in the performance of its duties under the Lease Modification Agreement.

[70] The primary thrust of Amacon's complaint here is that in her analysis the judge effectively ignored ARC's own breach of its obligation to vacate the premises by 30 June 2019. In light of its affirmation of the contract – its initial refusal to accept Amacon's repudiation of the contract – ARC continued, says Amacon, to have the contractual duty to vacate by the New Termination Date.

[71] I have reproduced the judge's entire analysis of the factual and legal effect of Amacon's breach of the duty of good faith performance above. In essence, that conduct excused ARC's performance of its agreement to vacate. In the words of the judge, at para. 90(m):

> In reliance on Amacon's vague suggestion that it would at some later point abide by the Lease Modification Agreement, ARC reasonably withheld acting under the Lease Modification itself.

[72] I see no error in this legal conclusion by the judge.

[73] Indeed applying "basic principles of contract law" one could alternatively excuse ARC's failure to perform under the contract it was said to have affirmed by considering Amacon's continuing silence and other conduct as to its intentions a

continuing repudiation of the Lease Modification Agreement. This brings into play the reasoning of this Court in *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. – Canada*, 2007 BCCA 88.

[74] At para. 109 of its reasons the majority in *Doman Forest Products Ltd.* summarized the law:

> Where a party to an agreement commits a fundamental breach of its terms, the agreement is repudiated. There has been what amounts to a refusal to perform. If the repudiation is not accepted, the agreement is affirmed. Where the breach is ongoing, as distinct from one instance of fundamental non-performance, there is a continuing repudiation which may, in the absence of subsequent affirmation, be accepted as long as the repudiation continues. What in my view is important is that, in order to establish the existence of a continuing repudiation, particularly when an extended period of time has elapsed following the affirmation of an agreement, it must be clear beyond question that there is a continued (*Elderfield**)*** or repeated (*Bridgesoft**)*** refusal to perform. The refusal may be manifest in different ways, which may include silence in response to a request for performance at the time the request is made, but the refusal must be clear for it is that refusal which is the repudiation to be accepted.

[75] Here, as found by the judge, there was a continuing and clear refusal to perform Amacon's obligations under the Lease Modification Agreement until 2 July 2019 which was the "first indication by Amacon to ARC that Amacon agreed that it was bound by the Lease Modification Agreement". That being so, until then, ARC could accept Amacon's repudiation of the agreement and stand discharged of its obligations under it, leaving it with its claim for damages for breach of contract which it has ultimately pursued.

[76] It seems to me that, if needed, this would be an additional avenue to the relief awarded to ARC by the trial judge.

[77] Turning to a minor sidebar to this particular issue, Amacon complains that the plea of breach of the duty of good faith performance was only brought by ARC at the last moment before the summary trial hearing. I do not accept this premise. Even if so, the complete absence of any complaint of being caught unawares below by Amacon robs this submission of any force.

[78] In my view, the pleadings of ARC amply bring home the good faith breach issue to a reader of ARC's Notice of Civil Claim filed 18 September 2019.

[79] ARC expressly pleads Amacon's bad faith at para. 25 of part 1 of that document and at para. 15 of part 3, in the context of the machinations of Amacon on 2 July 2019. In my view, these pleadings are wholly adequate in making it clear to Amacon that its good faith performance of the obligations under the Lease Modification Agreement was in issue.

VI. Disposition

[80] In the result, I would dismiss the appeal.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice MacKenzie"