COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1008718 B.C. Ltd. v. Osiria Welding & Fabrication Ltd.,* 2023 BCCA 149

Date: 20230323
Docket: CA48795

Between:

1008718 B.C. Ltd.

Appellant
(Petitioner)

And

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

Respondents
(Respondents)

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated December 14, 2022 (*1008718 B.C. Ltd. v. Osiria Welding & Fabrication Ltd.*, New Westminster Docket S245363).

Oral Reasons for Judgment

Counsel for the Appellant:	M. Funt J. Murray
Counsel for the Respondents:	J. Singh
Place and Date of Hearing:	Vancouver, British Columbia March 23, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 23, 2023

Summary:

The appellant landlord applied under s. 18 of the Commercial Tenancy Act [*CTA*]*, for a writ of possession as against the respondent tenant, alleging several breaches of the lease. The chambers judge who conducted the inquiry stated he could not find the facts necessary to decide the matter on a summary basis, declined to grant the relief sought, awarded costs to the respondent, and directed that the parties were at liberty to conduct examinations for discovery and re-apply. The appellant asks this Court to grant the relief denied below.*

Held: Appeal allowed in part. The language of s. 21 of the CTA provides a summary procedure for the determination of such matters. The judge erred in declining to exercise the express jurisdiction mandated by the statute to decide the matter summarily or dismiss the case. The judge should have directed cross-examination on the affidavits as he was entitled to do; pre-trial processes like discovery compromise the expedition promoted by the statute. The order below is vacated and the matter remitted to the Supreme Court generally for the inquiry contemplated by s. 21(2) of the CTA.

[1] **BAUMAN C.J.B.C.**: This appeal arises out of proceedings brought to summarily terminate a commercial tenancy agreement under the provisions of the *Commercial Tenancy Act*, R.S.B.C. 1996, c. 57 [*CTA*]. The landlord appellant alleges chiefly that the tenant respondent breached the lease by subletting a portion of the premises without the written consent of the appellant and to a concern conducting a business operation in contravention of the terms of the lease. Other breaches of the lease are further alleged.

[2] The appellant alleges it properly determined the lease and sought relief in Supreme Court in accordance with the provisions of s. 18 of the *CTA*.

[3] Section 19 of the *CTA* provides:

> 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.

[4] On 25 October 2022, by consent, the application was directed to an inquiry pursuant to s. 21 of the *CTA*.

[5] That section provides:

> 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.

[6] The inquiry came on before a judge of the Supreme Court on 14 December 2022 and it is from the order made at that time that this appeal is taken.

[7] In oral reasons for his decision (New Westminster S245363, 14 December 2022), the judge made a number of observations that touched on the merits of the appellant's position, but the judge at various points stated that he could not reach a definitive conclusion thereon "on the evidence that is before me in this case" (for example, see paras. 6, 10 and 12).

[8] In the result, the judge stated (at paras. 13 and 14):

> [13] I cannot find the facts necessary to grant the application sought by the landlord on a summary basis.
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> [14] The parties are at liberty to conduct discoveries on this issue and are at liberty to re-apply once those discoveries have taken place, but I am not granting the relief sought on a summary basis. The tenant is entitled to his costs of this application on the usual scale.

[9] Paragraph 14 essentially mirrors the terms of the order eventually entered in this matter.

[10] The appellant seeks this relief on appeal:

> 99. The appellant seeks that the chambers judgement [*sic*] be set aside, the petition be allowed, and an order for costs, including on a solicitor-and-own-client basis.

[11] That gives sufficient context to the preliminary objection taken by the respondents, to the effect that the petition has not been decided on its merits in Supreme Court; that, at most, leave has been given to conduct discoveries and reapply to the Supreme Court thereafter. It is said that no reviewable "order" has been made and that this Court is without jurisdiction to hear the appeal.

[12] Arguably, the "order" is in effect a "mid trial" case management direction. It is not subject to appeal on an interlocutory basis although it may be reviewed (deferentially no doubt) in an eventual appeal from a formal disposition: *Cambie Surgeries v. British Columbia (Attorney General)*, 2017 BCCA 287; *Skyllar v. The University of British Columbia*, 2022 BCCA 138; *The Owners Strata Plan VR29 v. Kranz*, 2021 BCCA 32, among others.

[13] In my view, however, there is a more elementary concern with the state of this proceeding.

[14] This matter came before the Supreme Court under the *CTA*. Sections 18–21 create a summary procedure for the determination of a landlord's alleged right to possession.

[15] As this Court explained in the *Owners Strata Plan VIS2030 v. Ocean Park Towers Ltd.*, 2016 BCCA 222, the *CTA* "contemplates a two-stage summary proceeding for obtaining the relief requested" (at para. 15):

> [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).

[16] As I have related, stage one concluded with a consent order on 25 October 2022. Stage two, the actual inquiry, should have proceeded before the judge below as the judge was directed by s. 21(2) of the *CTA* to "… hear the parties, examine the matter, administer an oath or affirmation to the witnesses adduced by either party, and examine them". The judge did not do what the statute directed. Instead, the judge did as I have described.

[17] It was an error to so proceed in my view.

[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.

[19] The direction of the judge granting leave to the parties to conduct "discoveries" is also problematic. It misunderstands the essence of the process—it is a summary procedure, pre-trial processes like discovery compromise the expedition promoted by the *CTA*.

[20] But the essential question in matters of jurisdiction is in large measure characterizing exactly what the judge did. In matters of this Court's jurisdiction, cases like *Kranz* (at para. 51) and *Cambie Surgeries* (at para. 71 per Saunders J.A.)

direct that we look at the substance of what was done below and avoid a literal approach to what the "order" provides.

[21] If we characterize the "order" as a mid-hearing direction granting leave to gather further evidence, it would not be reviewable in this Court as I have related. But here, as I have also related, the judge in effect declined to exercise the express jurisdiction mandated by the *CTA*, and he ordered costs against the appellant, who effectively was denied its day in court. In my view, that is the true tenor of the judge's disposition. This "order" is certainly reviewable in this Court.

[22] It follows that I do not accept the appellant's assertion made in its reply factum to the effect that the judge below "substantially dismissed the appellant's application"; that "the petition was heard fully on the merits" (at para. 5). This is simply not so, as the judge was at pains to state, "I cannot find the facts necessary to grant the application sought by the landlord on a summary basis" (at para. 13). This clearly means that the merits of the matter have not been fully explored by the court and a review of the transcript of the proceedings and the judge's oral reasons make this abundantly clear.

[23] While the reasons of the judge for suggesting that further examinations were necessary in respect of some of the allegations below seem tenuous, in my view, at the very least, the issue of what the appellant knew of the subtenant's operations and when it knew any such details is worthy of further exploration. This may lead to concerns with the appellant's acquiescence in the matter of a lease's administration. It may also affect the relief from forfeiture analysis which has yet to be undertaken in any fashion.

[24] These issues alone make it inappropriate for this Court to attempt itself to resolve any of the issues before us, even where the record does not arguably admit of debate in respect of some of those issues. It is best that the entire matter be remitted to the trial court.

[25] In the circumstances, I would allow the appeal and vacate the order below. I would remit the matter to the Supreme Court generally and not to any particular judge thereof for the inquiry contemplated by s. 21(2) of the *CTA*.

[26] In the circumstances, I would order each party to bear their own costs of the appeal. I would order costs of the application in the court below to be in the discretion of the judge hearing the stage two inquiry.

[27] **SAUNDERS J.A.**: I agree.

[28] **HARRIS J.A.**: I agree

[29] **BAUMAN C.J.B.C.**: The appeal is allowed to the extent indicated and the matter is remitted.

"The Honourable Chief Justice Bauman"