COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ghag v. 0820632 B.C. Ltd.,*
2023 BCCA 102

Date: 20230302
Docket: CA47902

Between:

Dharminder Happy Singh Ghag dba Happy Orthodontics

Appellant
(Defendant)

And

0820632 B.C. Ltd.

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Griffin
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated October 19, 2021 (*0820632 B.C. Ltd. v. Ghag*, 2021 BCSC 2035, New Westminster Docket 227177).

Counsel for the Appellant:	H.S. Nirwan
The Respondent and Representative for the Respondent, appearing in person:	L. Ghag D. Ghag (Representative)
Place and Date of Hearing:	Vancouver, British Columbia January 30, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 2, 2023

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Justice Griffin

Summary:

In a commercial tenancy dispute involving members of an extended family, the judge ordered the appellant to vacate the premises owned by the respondent and pay damages for unpaid rent including operating expenses. The appellant challenges this decision on the basis that the award for operating expenses was unsupported by the evidence. In particular, the appellant submits the expert opinion of a property appraiser as to the amount of operating expenses was based on a statement of expenses the respondent provided, which is inadmissible hearsay. Held: Appeal dismissed. The judge did not err by admitting and giving weight to the evidence of the property appraiser concerning the amount of operating expenses. It was open to the judge, given all of the evidence, to agree with the property appraiser's assessment of operating expenses in determining what he considered a fair amount to be assessed for the expenses in question.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] This appeal arises from an order pronounced after a four-day trial which related to a commercial tenancy dispute involving members of an extended family. The judge ordered that the appellant vacate premises owned by the respondent and pay damages for unpaid rent including operating expenses (also referred to as "Additional Rent") in the amount of $135,383.

[2] The only issue on appeal is the component of the award pertaining to the operating expenses which the appellant submits was unsupported by the evidence.

[3] For the reasons that follow, I would dismiss the appeal.

Background

[4] The respondent company, 0820632 B.C. Ltd., is held equally by Lily and Charmaine Ghag, the appellant's aunts by marriage. The Company owns a six-unit building in Abbotsford, B.C. where the appellant operated a branch of his orthodontics practice. Having made certain renovations, the appellant commenced occupancy of his unit in July 2016.

[5] As of the trial in September and October 2021, the appellant remained in possession of the unit and had not paid rent other than one payment of $2,500 in 2017 and $4,200 pursuant to an interim order made pending the trial.

[6] One of the issues at the trial was whether the parties had entered into an enforceable lease agreement. By the commencement of the trial the Company had abandoned its contractual claim and sought damages based on the principles of unjust enrichment.

The Trial Judgment

[7] The reasons for judgment are indexed as 2021 BCSC 2035.

[8] While the Company had abandoned its argument that there was an enforceable rental agreement, Justice Dley concluded that there was no agreement: at para. 27. This was because there was no convincing evidence to indicate that there was an agreement as to the amount of rent to be paid or when payment was to commence: at para. 29. Based on evidence of the parties' communications, the trial judge concluded that the appellant would not be obliged to pay anything for his occupancy of the premises until his clinic was "up and running", which he found to be the case as of October 1, 2017: at paras. 36, 39–40.

[9] The judge found that the appellant was unjustly enriched: he benefitted by using the unit to operate his orthodontics practice; the Company suffered a corresponding detriment since the appellant used its space without appropriate compensation; and there was no juristic reason, such as a contract or other such agreement, for the enrichment: at paras. 41–45. Accordingly, the judge held the Company was entitled to an award for damages for unjust enrichment for the period of October 1, 2017 to April 30, 2022 with the premises to be vacated as of the latter date.

[10] The judge next proceeded to assess the value of the benefit to the appellant of using commercial space to operate his orthodontics practice, measured as base rent plus his share of the operating expenses: at paras. 46–73. He considered

reports from two property appraisers, Mr. Peter Figures for the appellant and Mr. Eugene Steckley for the respondent, both of whom were also cross-examined at the trial. He preferred the opinion of Mr. Steckley: at para. 51.

[11] Mr. Steckley had set out market values for rent as of May 1 of each year, commencing May 1, 2016. The judge noted that an award of damages in the circumstances of a claim for unjust enrichment was an assessment, not a specific calculation. As such, he took the market values as set out in Mr. Steckley's report to be the values for the relevant calendar years and applied those values to the unit's square footage per month from 2017–2022. The judge did not accept the appellant's submission that he should receive credit for improvements he made to the premises: at para. 56.

[12] The judge ordered that the appellant pay the market rent for the period of October 1, 2017 to April 30, 2022 in the amount of $219,783, less the amounts already paid: at para. 72.

[13] With respect to the issue on appeal, the judge stated:

> [59] In addition to the market rent, Dr. Ghag must pay his share of the building's operating costs so that the rent results in a triple net total.
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> [60] Mr. Steckley was provided with operating costs for 2019. Dr. Ghag says that those numbers are not reliable because they were supplied by Charmaine and she did not testify about any of those costs. He also questions the items claimed because one such expense is for security and he is not aware of any building security.
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> [61] Dr. Ghag is correct in arguing that the Company carries the burden of proving what the operating costs were.
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> [62] There is no proof of security being supplied – that cost ($637.63) is disallowed.
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> [63] Both appraisers referred to the 2019 tax assessment which showed gross property taxes of $26,533.30. That is consistent with the data supplied by Charmaine to Mr. Steckley and lends credence to the reliability of the other costs that would typically be expected for commercial property.
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> [64] The operating expenses for 2019 (rounded off), as set out by Mr. Steckley, are as follows:

a)	BC Hydro:	$7,535
b)	Garbage:	$824
c)	Maintenance:	$4,265
d)	Insurance:	$3,016
e)	Water:	$425
f)	Fortis gas:	$2,273
	Subtotal:	**$18,338**
g)	Property taxes:	$26,533

[65] Without proof of the actual costs, there must be a reduction in the costs claimed to ensure that Dr. Ghag does not overpay. Accordingly, I will deduct 10% from the operating expenses, save and except for the property taxes. The taxes have been proven. A 10% reduction reduces the other operating expenses to $16,504 which, combined with the taxes, total $43,037.

[66] The building is 6,283 square feet, consisting of 5,117 square feet of leasable space and 1,166 square feet of common space with seating and washrooms. In calculating Dr. Ghag's share of the operating expenses, I have taken his proportion of the building's leasable space on the basis that each tenant leasing a unit in the building has access to and benefits from the common area, and pays a portion of the operating cost for that space as part of its lease. Dr. Ghag has benefitted from this common space, using it as a waiting area for his patients.

[67] The price per leasable square foot is $8.41. Dr. Ghag's share of the operating expenses (for 1,917 square feet) amounts to $16,122 annually or $1,344 monthly.

[68] The result is that for 2019, the total monthly rent on a triple net basis was $3,900.

[69] A 5% increase from year-to-year is a reasonable number to use for increases in annual operating costs based on the increases in annual market rental values. The monthly result is as follows:

a) 2017 – $1,213;

b) 2018 – $1,277;

c) 2019 – $1,344;

d) 2020 – $1,411;

e) 2021 – $1,482.

[70] The result is that the total monthly rental obligations of Dr. Ghag on a triple net basis amount to the following:

a) 2017 – $3,369;

b) 2018 – $3,593;

c) 2019 – $3,900;

d) 2020 – $4,206;

e) 2021 – $4,277.

[71] Dr. Ghag has indicated that he requires six months for an orderly transition to new premises. The Company takes no issue with his request for time to vacate the premises. Accordingly, there will be an order that Dr. Ghag vacate the premises no later than April 30, 2022. Dr. Ghag shall pay rent for the balance of this year at $4,277 per month. He shall pay an increase of 5% in 2022 for a monthly payment of $4,491.

[72] The plaintiff is owed $219,783 in rent for the period of October 1, 2017 to April 30, 2022, minus the amounts that Dr. Ghag has already paid. Dr. Ghag is credited with the $2,500 payment in 2017 and for the payments that have been made since Justice MacNaughton's order in February 2020. The Company shall be granted judgement for the balance.

On Appeal

[14] The appellant submits that the judge erred in law by ordering payment of damages for unjust enrichment based on an amount for "Additional Rent" in the absence of supporting evidence and that this error is reviewable on a standard of correctness.

[15] He submits there was no evidence of Additional Rent other than the "statement of expenses" Ms. Charmaine Ghag provided to Mr. Steckley for use in his report and a property tax assessment obtained from the City of Abbotsford. He says that Ms. Ghag did not otherwise testify about the Additional Rent or tender documentary evidence in support of the figures she provided to Mr. Steckley. Further, Mr. Steckley testified that he had not reviewed any documents to support the amounts for additional rent submitted by Ms. Ghag.

[16] The appellant says that documentary evidence, including receipts and invoices for maintenance expenses, utility bills and the like, ought to have been readily available to Ms. Ghag, who was the Company's bookkeeper.

[17] The appellant submits that the portion of the judgment pertaining to the Additional Rent should be set aside or, in the alternative, that a new trial be ordered so that damages can be fairly assessed.

[18] The Company's position is that the judge had sufficient evidence to award the damages for Additional Rent. It says the majority of the expenses referenced in Mr. Steckley's report related to property taxes and that the dollar value in Ms. Ghag's statement of expenses was consistent with the Detailed Tax Report that Mr. Steckley provided according to the City of Abbotsford and B.C. Assessment Records.

[19] The Company also submits that Mr. Steckley's report provides a comprehensive examination of comparable office spaces in Abbotsford which included operating costs varying between $4.05 and $11.25 per square foot with the majority being in the range of $7–$10 per square foot. The Company adds that it was also not disputed that heat, electricity and other operating expenses were incurred for the building, since without them the appellant's clinic would not have been able to conduct its business.

Analysis

[20] Underpinning the appellant's argument that there was no evidence upon which the Additional Rent could be assessed by the judge is his submission that Mr. Steckley's calculations on this issue were based on inadmissible hearsay evidence, namely, Ms. Ghag's statement of expenses.

[21] As this Court observed in *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378:

> [459] …Trial judges are entitled to deference when they consider and weigh expert testimony: *Isbister v. Delong*, 2017 BCCA 340 at para. 19, leave to appeal ref'd [2017] S.C.C.A. No. 473. This is particularly the case where the assumptions underlying an expert report are not proven. In *Tut v. RBC General Insurance Company*, 2011 ONCA 644, the Ontario Court of Appeal held:
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> > [34] It is trite law that a court is entitled to accept all, some or none of an expert opinion. Dr. Kalant was working with an inaccurate and incomplete set of facts. Once that was established, the application judge was certainly entitled to place less weight on his opinion…
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> [460] Recently, this Court in *Bamrah v. Waterton Precious Metals Bid Corp.*, 2020 BCCA 122 stated:

> [64] A judge's findings regarding the weight to be given to expert evidence, including preferring one expert over another, is entitled to deference, absent a palpable and overriding error: *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.* (1997), 1997 CanLII 2886 (BC CA), 143 D.L.R. (4th) 635 at paras. 18–19 (B.C.C.A.), citing *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, 1994 CanLII 106 (SCC), [1994] 1 S.C.R. 114 at 121–122 (S.C.C.) …

[22] The issue of the use of hearsay evidence by expert witnesses was considered in some detail by this Court in *Mazur v. Lucas*, 2010 BCCA 473:

> [33] Madam Justice Wilson, for the majority, referred to *R. v. Abbey* concerning the hazards inherent in admitting expert testimony based on hearsay… The danger, she adverted to is that a judge or jury will accept the hearsay evidence as going to the truth of the facts stated in it. The solution is an appropriate charge to the jury or self-direction by the judge, not an effective withdrawal of the evidence.
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> [34] Madam Justice Wilson… concluded (at 896-897):
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> > In my view, as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony. The judge must, of course, warn the jury that the more the expert relies on facts not proved in evidence the less weight the jury may attribute to the opinion ...
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> [35] Mr. Justice Sopinka concurred with Wilson J. in the result in *Lavallee*, but made some clarifying remarks… [H]e drew a practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise and evidence that an expert obtains from a party to litigation touching a matter directly in issue (at 899-900):
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> > In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second- or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this Court has taken to the analysis of hearsay evidence in general, exemplified in *Ares v. Venner*, [1970] S.C.R. 608…
> >
> > Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be

> recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight.
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> [Emphasis added.]

[23] When I consider the judge's approach to the issue of the Additional Rent within this framework, I am satisfied, for several reasons, that no reviewable error has been established.

[24] First, since the appellant's liability was grounded in unjust enrichment, the judge was correct to assess damages to provide a broadly equitable result rather than engage in a precise calculation in search of mathematical exactitude: *Jostens Canada Ltd. v. Gibsons Studio Ltd.*, 1999 BCCA 273 at para. 28, citing *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577.

[25] Secondly, no challenge is taken to the judge preferring Mr. Steckley's opinion to that of Mr. Figures.

[26] Mr. Steckley was also cross-examined at the trial. He acknowledged that he had not performed any independent verification of the amounts listed on Ms. Ghag's statement of expenses, but had accepted the amounts listed as being correct. However, his cross-examination on the actual operating costs was limited to the cost of security:

> Q Did you observe -- when you observed the property in September of 2020, was there a security service, a security guard at the building?
>
> A No, not that I recall.
>
> Q You didn't run into any security guard? Did you see a maintenance person or property manager at the building?
>
> A No, I did not. That does not mean that there aren't maintenance costs.
>
> Q No, of course not. I'm just saying because you took everything from Charmaine Ghag and there was no supporting documents, I'm wondering if there was perhaps somebody else that you saw there that could lend support to this item. And so the -- you've tallied up the costs here and then divided by the square footage of the building, I assume, which is 5,117 square feet; is that right?
>
> A Correct.

> Q Did you measure the building?
>
> A Yes, I did.
>
> [Emphasis added.]

[27] The reference by counsel to “that could lend support to this item” was to the cost of security.

[28] Since there was no proof of that expense, it was disallowed by the judge: at para. 62

[29] On appeal, the appellant does not take the position that the Company did not incur the other items on Ms. Ghag’s statement of expenses to any extent. Instead, he argues that in the absence of proof of the actual amounts those items should also be disallowed with the exception of the property taxes for 2019. In that regard, I note that Mr. Steckley’s report also referenced the 2020 property taxes. I see no reason for there to be a material distinction between the two years.

[30] In my view, the judge was entitled to admit and give weight to Mr. Steckley’s expert opinion on the amount of Additional Rent the appellant had to pay the Company even though his opinion was based on Ms. Ghag’s statement of expenses. This is because Mr. Steckley’s opinion on this point was not founded entirely on the statement of expenses. It was also founded on evidence of Additional Rent charged by landlords in other comparable premises. Mr. Steckley clearly had the expertise to obtain and rely on this evidence. Accordingly, following *Mazur*, his opinion may be admissible and given weight because there is an independent basis for it besides the information Ms. Ghag provided.

[31] Furthermore, in my view, it was open to the judge, considering the evidence as a whole, to conclude that the operating costs for the building were $8.41 per square foot.

[32] To see this, it is helpful to consider the judge’s analysis within the context of “non-variable” operating expenses, namely, the property taxes, and “variable” operating expenses, such as BC Hydro, maintenance, Fortis Gas, etc.

[33] According to the table set out at para. 64 of the judge's reasons, the total operating expenses for the building per Ms. Ghag's statement of expenses (less the amount for security) amounted to $44,871 (which I would round up to $45,000) comprised of non-variable property taxes of $26,533 and variable expenses of $18,338. Expressed in percentage terms, this amounts to 59% non-variable costs and 41% variable costs.

[34] The judge applied a 10% reduction to the amounts in Ms. Ghag's statement of expenses, with the exception of property taxes, to account for the lack of proof of those costs and "to ensure that Dr. Ghag does not overpay": at para. 65. When the variable expenses are reduced by 10% to $16,600, the percentage calculation becomes 61.6% non-variable and 38.4% variable.

[35] At para. 67, the judge calculated the monthly amount for the Additional Rent to be $1,344, which is approximately $830 non-variable and $515 variable.

[36] The question then becomes, bearing in mind the appellant's acknowledgment that heat, electricity, maintenance etc. were provided to the building, whether $515 per month increased by 5% per year for those expenses amounts to a reviewable error by the judge in assessing the damages which resulted from the appellant's unjust enrichment.

[37] In my view, it does not. It bears remembering that Ms. Ghag was the Company's bookkeeper and that Mr. Steckley was only challenged regarding whether he had observed the presence of security during his visit. From this, it is reasonable to infer, considering the reasons contextually and as a whole, that the judge concluded that the only "suspect information" on Ms. Ghag's statement of expenses related to that specific amount. I would add that the fact Mr. Steckley did not observe the presence of security at the premises does not mean there was none, but it was certainly open to the judge to disallow that item.

[38] I would also add that the judge's finding that the Additional Rent amounted to $8.41 per square foot was well within the range for operating expenses for

comparable properties. The majority of comparable properties had operating expenses in the range of $7–$10 per square foot.

[39] There is, accordingly, no basis upon which this Court should vacate the award for Additional Rent, (with the exception of the 2019 Property Taxes), or order a new trial.

Disposition

[40] I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Justice Griffin"