# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *SCP 173 Realty Limited v. Costa Del Sol Holdings Ltd.,* 2023 BCCA 312

Date: 20230802
Docket: CA48590

Between:

**SCP 173 Realty Limited, SCP 173 Investment Limited, SCP 173 Dining Limited, and SPC 173 Management Limited**

Appellants
(Plaintiffs and Defendants by way of counterclaim)

And

**Costa Del Sol Holdings Ltd.**

Respondent
(Defendant)

Before: The Honourable Justice Dickson
The Honourable Mr. Justice Butler
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated September 29, 2022 (*SCP 173 Dining Limited v. Costa Del Sol Holdings Ltd.*, 2022 BCSC 1703, Vancouver Docket S209244).

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| Counsel for the Appellants: | G.P. Forrester |
| Counsel for the Respondent: | C.E. Chisholm |
| Place and Date of Hearing: | Vancouver, British Columbia<br>June 23, 2023 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>August 2, 2023 |

**Written Reasons by:**
The Honourable Justice Skolrood

**Concurred in by:**
The Honourable Justice Dickson
The Honourable Mr. Justice Butler

***Summary:***

*The appellant landlords purchased the premises at issue from the respondent tenant and leased the premises back to the respondent for an initial five-year term with an option to renew. The respondent purported to exercise the option to renew. However, the parties disagreed on the amount of additional rent, as defined in the lease, owing by the respondent. As a result, the appellant served the respondent with a notice of termination and filed a notice of civil claim, alleging that the respondent was in breach of the lease. The respondent counterclaimed, asserting it had validly exercised its option to renew and seeking to set the minimum rent for the renewal term at $27,500 per month. The judge found that the respondent's exercise of the renewal option was valid but declined to decide the issue of minimum rent owing. The appellants then sought production of the respondent's financial statements, which was dismissed by the judge. After receiving further submissions on the minimum rent issue, the judge issued a further decision, setting the minimum rent for the renewal term at $27,500 per month. The appellants appeal both the document production decision and the minimum rent decision.*

*Held: Appeal dismissed. The judge did not err in dismissing the document production application or in her interpretation of the formula for determining the minimum rent. She did not err in her application of the principles of contractual interpretation or in finding that the calculation for minimum rent was to be determined based on similar premises in similar vicinities. Her decision is entitled to deference and the appellants have not identified a palpable and overriding error in her interpretation. In addition, the judge did not err in failing to reject the respondent's expert report. The weight she assigned to the expert reports is owed considerable deference and again, the appellants have not demonstrated an error that would warrant appellant intervention.*

**Reasons for Judgment of the Honourable Justice Skolrood:**

## Introduction

[1] This appeal arises in the context of a long-running dispute between the appellant landlords and the respondent tenant concerning commercial premises (the "Premises") located in Sechelt, British Columbia. The respondent operates a restaurant, pub, and marina on the Premises.

[2] The appellants appeal two decisions of the chambers judge: the first, dismissing their application for further document production, and the second, setting the minimum rent owing by the respondent under the lease in issue.

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

## Background

[4] The background facts to the dispute are described in some detail in the reasons of the chambers judge, indexed at 2022 BCSC 1703 [Minimum Rent Decision], in support of the principal order under appeal, as well as in two other sets of reasons issued in the litigation that I will return to below. Accordingly, I will only provide a brief summary of the facts relevant to the issues on appeal.

[5] In December 2015, the appellants purchased the Premises from the respondent, however the parties entered into a lease dated December 29, 2015 (the "Lease"), pursuant to which the appellants leased the premises back to the respondent for an initial five-year term, ending December 29, 2020, with an option to renew for a further five years. The respondent purported to exercise the option to renew on January 6, 2020 by delivering a renewal notice dated December 27, 2019.

[6] During the initial five-year term, the parties disagreed about the amount of "Additional Rent" (as defined in the Lease) owing by the respondent to the appellants. As a result of this dispute, the appellants served the respondent with a notice of termination on May 26, 2020, and on September 14, 2020, the appellants filed a notice of civil claim alleging that the respondent was in breach of the Lease

and seeking vacant possession and payment of the Additional Rent alleged to be owing.

[7] The respondent filed a response to civil claim and counterclaim on October 6, 2020, asserting that it had validly exercised the option to renew and seeking to set the minimum rent under the Lease for the Renewal Term at $27,500 per month.

[8] The appellants brought a summary trial application, which was heard for three days on April 6–7 and 9, 2021. On June 25, 2021, the judge rendered her decision finding that the respondent's exercise of the renewal option was valid and confirming that the Lease was renewed for a second term (the "Renewal Term"). The judge further found that the respondent owed Additional Rent for the period of 2016–2020 with the amount to be determined by a reference to the Registrar. The judge's reasons on the summary trial are indexed at 2021 BCSC 1252 [Summary Trial Decision].

[9] On the issue of minimum rent owing for the Renewal Term, the judge declined to decide that question because the respondent had not brought a cross-application seeking such a determination. However, she indicated that if the parties were unable to agree on the minimum rent payable, she would make a determination after receiving additional submissions from the parties.

[10] On July 30, 2021, the appellants filed an application pursuant to R. 7-1(11) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 seeking production of the respondent's financial statements for the years 2016–2020. That application was dismissed by Master Elwood, as he then was, on August 9, 2021, although he granted the appellants leave to bring the application before the judge. They did so but the judge dismissed the application on October 13, 2021, in reasons indexed at 2021 BCSC 2076 [Document Application Decision].

[11] The appellants sought leave to appeal the judge's order to this Court, however their application for leave was dismissed by Justice Harris in chambers on March 10, 2022, in reasons indexed at 2022 BCCA 93 [CA Leave Decision].

[12] In March and April 2022, the parties provided written submissions to the judge on the minimum rent issue. On September 29, 2022, the judge issued the Minimum Rent Decision, setting the minimum rent for the Renewal Term at $27,500 per month plus GST.

[13] The appellants have appealed both the Document Application Decision and the Minimum Rent Decision.

## Material Terms of the Lease

[14] Both orders under appeal concern the provisions of the Lease dealing with the setting of the Minimum Rent for the Renewal Term as set out in Article 20.1(g):

> (g) the Minimum Rent shall be the then current fair market rental for the Premises based on similar premises in similar vicinities and shall be agreed upon between the parties by no later that three months prior to the expiry of the initial Term and failing agreement by that date, then, at the Landlord's option, either:
>
> (i) the option to renew shall be null and void; or
>
> In no event, however, shall the annual Minimum Rent payable during the Renewal Term be less that the Minimum Rent payable during the first year of the initial Term. There shall be no further right of renewal…

[15] "Premises" is defined in Article 17.1(i) to mean:

> …all the property, and buildings as described on 'Schedule A' , including the foreshore leases, foreshore being that part of the land adjacent to the sea which is alternately covered and left dry by the ordinary flow of the tides…The two foreshore leases on the Premises are referred to as the marina/commercial foreshore…and the residential foreshore…

[16] Also relevant is the description of what is covered by the Lease, found in Article 3.1:

> The Landlord, being the owner of the Lands, the Building and the Premises, and the equipment used in the businesses operated on the Premises, including but not limited to the Fuel Tanks and Dispensers, described in Section 17.1(g) does hereby lease to the Tenant the Premises and the

> Leasehold Improvements and the equipment used in the businesses operated on the Premises…

## The Judge's Reasons

### The Document Application Decision

[17] As noted, the appellants sought production of the respondent's financial statements. In her reasons, the judge noted that in order to succeed on the application, the appellants had to establish that the documents sought related to a matter in issue in the action (at para. 17). That question turned on the interpretation of the Lease and the method prescribed for calculating the Minimum Rent for the Renewal Term.

[18] The appellants submitted that the method for doing so involved consideration of the aggregate of the fair market rental rate for the Premises based on similar premises in similar vicinities and the fair market lease rate for the businesses' assets based on a valuation of the businesses located in the Premises (at para. 22). The appellants argued that the latter element reflects the fact that they were leasing to the respondent both the Premises and the equipment used in the businesses and that the respondent's financial statements were relevant to determining the value of the assets. They relied on the wording of Article 3.1, which describes what is covered by the Lease, and which includes leasehold improvements and equipment.

[19] The judge disagreed. She noted that Article 3.1 of the Lease covers a broader category of property (including the Premises, leasehold improvements, and equipment) than Article 20.1(g), which again sets out the mechanism for determining Minimum Rent (at para. 26). Neither that provision nor the definition of "Premises" in Article 17.1(i) includes assets or equipment. Rather, Article 20.1(g) clearly provides that Minimum Rent for the Renewal Term will be calculated based on similar premises in similar vicinities. The judge found that the respondent's financial statements have no bearing on that calculation, thus, there was no basis upon which to order production of the statements (at para. 30).

**The Minimum Rent Decision**

[20] Based upon the governing provisions of the Lease, the judge identified the constituent elements of the formula for determining the Minimum Rent as follows (at para. 16):

- The current fair market rental;
- For the Premises;
- Based on similar premises;
- In similar vicinities; and
- No less than the Minimum Rent payable during the first year of the initial term, or $27,500 plus GST per month.

[21] The judge then summarized the arguments advanced by each of the parties and the evidence they relied on. That evidence included expert reports submitted by the parties. The appellants' expert evidence was set out in an initial appraisal report dated August 18, 2021 and an addendum letter dated November 25, 2021, both prepared by Philip Law of L.W. Property Advisors. The respondent's expert report was dated June 2, 2020 and was authored by Adam Major of Holywell Properties.

[22] The respondent challenged the admissibility of the appellants' expert report on the basis that it did not comply with the requirements of R. 11-6(1)(f) of the *Supreme Court Civil Rules* in that it failed to include a description of the factual assumptions on which the opinion was based, a description of any research conducted by the expert that led him to form his opinion, and a list of every document relied on by the expert in forming the opinion (at paras. 25, 27).

[23] The judge identified a further issue of "greater concern" about the instructions provided to the expert (at para. 28). In the report, the expert stated under "Terms of Reference":

> This report was requested by SCP 173 Realty Limited (the "Client") to assist with negotiations relating to agreement on the Fair Market Annual Rent for

> the Subject Building. This report was prepared for the Client and for the specific use stated. Any other use is unintended…".

[24] The judge observed:

> [28] …I do not take from that term of reference that the appraisal was intended as an objective opinion of the fair market rental for the Premises in order to assist the Court.

[25] Despite this concern, the judge admitted the appellants' expert report into evidence, noting that she would assess the weight to be attributed to each report (at para. 29).

[26] She then noted that the two experts did not differ significantly on the fair market rental for the restaurant/pub, office/retail, and patio portions of the Premises (at para. 30). The appellants' expert suggested $25,520 per month whereas the respondent's expert said $21,745.50. The judge preferred the appraisal opinion of the respondent's expert because it was written "by an appraiser with greater knowledge of the subject area and is based on similar premises in similar vicinities" (at para. 30).

[27] The parties' experts did, however, differ significantly on the current fair market rental for the foreshore portion of the Premises (at para. 31). The respondent's expert opined that the market rent for the dock and foreshore was $4,200 per month, using a rate of $3.00 per linear foot. When added to the $21,745.50 rent payable on the rest of the Premises, the total was $25,945.50. Since Article 20.1(g) of the Lease stipulates that the Minimum Rent payable for the Renewal Term shall not be less than what was payable during the original term, the Minimum Rent should be set at $27,500 per month.

[28] In terms of the appellants' expert reports, the judge noted a discrepancy between the original report and the addendum (at para. 32). In the addendum, the appellants' expert opined that the appropriate rent for the marina and dock, located on the foreshore, was $1.00 per square foot, applicable to a total area of 96,600 square feet. This would result in annual rent of $96,600, or monthly rent of

$8,050 per month, which, when added to his estimated rent for the rest of the Premises of $25,945.50 would total $33,575 per month (at paras. 21, 32). However, in the original report, which did not include an estimate rent for the foreshore portion (i.e., for the dock and marina), the appraiser referred to the dock and marina totalling 6,052 square feet. The judge noted that, at $1.00 per square foot, that would result in annual rent of $6,052 and monthly rent of $504.33. Using those figures would result in a total monthly rent of $26,024.33. The judge noted that this would thus require Minimum Rent of $27,500 in accordance with Article 20.1(g) of the Lease.

[29] The judge preferred the opinion of the respondent's expert for a number of reasons, including the following which she set out at para. 33:

- The respondent's expert had more experience on the Sunshine Coast where the Premises are located;
- The respondent's expert used comparables that were similar premises in similar vicinities whereas the appellants' expert used comparables from further afield;
- There was, as noted, an unexplained inconsistency in the methodology of calculating the square footage of the marina and dock between the appellants' expert's original report and the addendum; and
- The appellants' expert reports were not obtained for court purposes but rather for use in negotiations.

[30] The judge therefore set the Minimum Rent for the Renewal Term at $27,500 per month (at para. 35).

## Issues on Appeal

[31] While the appellants set out a number of alleged errors, I agree with the respondent that the issues on appeal are:

(a) whether the judge erred in dismissing the appellants' document production application;

(b) whether the judge erred in her interpretation of the formula for determining the Minimum Rent payable for the Renewal Term; and

(c) whether the judge erred in preferring the respondent's expert evidence to that of the appellants.

## Analysis

### Issues No. 1 and 2: The Document Production Application and the Judge's Interpretation of Article 20.1(g)

[32] I will address the first two grounds of appeal together, as both turn on the central question of whether the judge erred in her interpretation of the formula for determining Minimum Rent under Article 20.1(g) of the Lease.

[33] The appellants submit that the judge erred in summarily determining the proper interpretation on the Document Production Application. They say that in doing so, she adopted an overly narrow construction which, in turn, led her to mistakenly conclude that the respondent's financial statements were not relevant and therefore not producible.

[34] The decision as to whether to order further production of documents involves the exercise of discretion and is accordingly entitled to deference. Generally, such decisions will not be interfered with by an appellate court unless the judge erred in principle, ignored or misapplied a relevant factor, or was clearly wrong so as to amount to a serious injustice: *British Columbia (Minister of Health) v. Eastside Pharmacy Ltd.*, 2022 BCCA 259 at para. 41, leave to appeal to SCC ref'd, 40397

(11 May 2023); *British Columbia (Director of Civil Forfeiture) v. Day*, 2019 BCCA 160 at para. 10 (Chambers).

[35] Similarly, issues of contractual interpretation generally involve questions of mixed fact and law and, absent an extricable question of law, are reviewable on the deferential standard of palpable and overriding error: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at paras. 50, 52–53; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 34–36; *Li v. Rao*, 2019 BCCA 264 at para. 29.

[36] Dealing with the interpretation of the Lease, the appellants submit that it "flouts business common sense" to strictly and literally apply the language of Article 20.1(g) and that given the parties' intention that the respondent was leasing the businesses carried out on the Premises, the judge should have adopted a "common-sense departure from the strictures" of Article 20.1(g). They cite *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 at para. 79 for the proposition that commercial contracts must be interpreted in accordance with "sound commercial principles and good business sense".

[37] In my view, the judge did not err in her application of the principles of contractual interpretation, nor in her conclusion that the "terms of the Lease are clear and unambiguous that Minimum Rent for the Renewal Term will be calculated solely based on similar premises in similar vicinities" (Document Application Decision at para. 30).

[38] The judge was also alive to the surrounding circumstances and their role in ascertaining the parties' intentions, as reflected in her observations in the Document Application Decision:

> [28] The sale of the businesses which took place in December 2015 between the tenant as vendor and the landlord included assets of which the landlord is now the owner. At the time of the sale the landlord had access to the financial documents of the tenant vendor and the value of those assets. With that knowledge, and after negotiating the purchase price, the same parties to the documentation for the sale of the property and assets negotiated the terms of the Lease. In so doing, the Minimum Rent for the Renewal Term was fixed as set out above – without inclusion of consideration of the [businesses'] profitability, or a percentage rent provision. The parties

> could have negotiated such a term; they did not. As stated in *Sattva*, these are the "surrounding circumstances known to the parties at the time of formation of the contract." I conclude that the intention of the parties is reflected in the Lease and Minimum Rent clause, as drafted.

[39] Further, while commercial reasonableness is an interpretive aid (*Resolute FP Canada* at para. 79), it cannot overwhelm or replace the clear intentions of the parties as reflected in the language used in the contract. Moreover, the commercial reasonableness of a contractual term is to be assessed at the time the parties enter into the contract, not at a subsequent date when circumstances may have changed: *Sattva* at para. 47; *Yellowhead Petroleum Products Ltd. v. United Farmers of Alberta Co-Operative Limited*, 2004 ABQB 665 at para. 46, cited with approval in *676083 B.C. Ltd. v. Revolution Resources Recovery Inc.*, 2019 BCSC 2007 at para. 106, rev'd in part on other grounds 2021 BCCA 85.

[40] In my view, the appellants have not identified any palpable and overriding error in the judge's interpretation.

[41] Nor have the appellants established that the judge erred in interpreting the Lease and determining the formula for setting Minimum Rent on the Document Production Application. She was required to engage in that analysis in order to assess the relevance of the respondent's financial statements being sought by the appellants. Moreover, given that the judge arrived at her interpretation on an interlocutory application, it was open to the appellants to seek to have her revisit the interpretation on the Minimum Rent Application. Justice Harris made this point in the CA Leave Decision at para. 17. The appellants did not do so.

[42] Accordingly, there is no merit to this ground of appeal.

**Issue No. 3: The Expert Reports**

[43] The appellants submit that the judge erred in accepting the respondent's expert report given that it relied on incomplete information and conjecture when estimating the fair market value of the premises. In oral submissions, counsel advanced a slightly different argument, that is, that the respondent's expert report

should have been rejected because it did not use the formula set out in the Lease for determining the Minimum Rent. The appellants submit further that the judge erred in finding an unexplained inconsistency between the appellants' original appraisal and the addendum.

[44] The assessment and weighing of evidence, including expert evidence, falls squarely within the role of the trial or chambers judge and considerable deference is owed by an appellate court to the weight attached to an expert report: *Focken v. Fraser Health Authority*, 2023 BCCA 81 at para. 32 (Chambers); *Le Soleil Hospitality Inc. v. Louie*, 2011 BCCA 305 at para. 75, leave to appeal to SCC ref'd, 34486 (15 March 2012).

[45] The arguments advanced by the appellants concerning the respective merits of the competing expert reports are ones that were, or should have been, made to the judge. The appellants are essentially asking this Court to conduct its own assessment of the expert evidence and to substitute its opinion on the weight to be attached to that evidence for that of the chambers judge. Respectfully, that is not the role of this Court.

[46] The appellants have not demonstrated any error on the part of the judge that would warrant appellant intervention.

**Disposition**

[47] Accordingly, I would dismiss the appeal.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Butler"