IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pakistan-Canada Association. Inc. No. S0007016 v. Great Light Healing Ministries Int'l: City of Faith,* 2024 BCSC 1711

Date: 20240916
Docket: S237910
Registry: Vancouver

2024 BCSC 1711 (CanLII)

Between:

Pakistan-Canada Association. Inc. No. S0007016

Petitioner

And

Great Light Healing Ministries Int'l: City of Faith

Respondent

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Petitioner:	R. Clark, K.C.
Counsel for the Respondent:	F.O. Muñoz-Job
Place and Date of Hearing:	Vancouver, B.C. August 28, 2024
Place and Date of Judgment:	Vancouver, B.C. September 16, 2024

2024 BCSC 1711 (CanLII)

Table of Contents

INTRODUCTION **3**
BACKGROUND **4**
POSITIONS OF THE PARTIES **13**
ANALYSIS **14**
The Implied Term 14
Legal Principles: Fundamental Breach and Breach of Condition 14
Fundamental Breach 18
Breach of Condition 20
A Potential Breach of Condition 21
CONCLUSION **22**

2024 BCSC 1711 (CanLII)

Introduction

[1] The petitioner, Pakistan-Canada Association. Inc. ("PCA"), seeks a writ of possession for the land and premises located at 12057 88 Avenue, Surrey, B.C. (the "Property"). PCA is the owner of the Property and leased it to the respondent, Great Light Healing Ministries Int'l ("Great Light") starting in July 2013. PCA argues Great Light committed a fundamental breach of an implied term of the lease by renovating the premises without obtaining necessary building permits and authorizations from the City of Surrey. It also extended the building across the property line such that it now encroaches on the neighbouring railway right of way, thus exposing PCA to a potential trespass claim by the right of way owner.

[2] By letter from its counsel dated June 8, 2023, PCA advised Great Light that it considered these to be fundamental breaches that have resulted in a repudiation of the lease. It demanded that Great Light give up vacant possession of the Property by July 13, 2023 but Great Light has refused to do so. It maintains there has been no breach of the lease and denies the implied term suggested by PCA. It says PCA consented to the renovations knowing that permits had not been obtained. It also argues PCA told Great Light where it could build the expansion such that PCA is to blame for the encroachment on the railway right of way.

[3] Great Light also claims that PCA is in breach of an agreement to sell the Property to Great Light and it has commenced an action seeking specific performance of that alleged agreement. That matter is set for trial next year. In the meantime, PCA has brought this petition seeking the writ of possession under the *Commercial Tenancy Act*, R.S.B.C. 1996, c. 57.

[4] For the reasons that follow, I find that if Great Light breached an implied term of the lease agreement, that breach, while serious, is neither fundamental nor a breach of a true condition that would allow PCA to terminate the lease. I would therefore dismiss PCA's petition seeking a writ of possession but PCA remains free to pursue other remedies against Great Light.

2024 BCSC 1711 (CanLII)

Background

[5] Both PCA and Great Light are societies incorporated under the *Societies Act*, S.B.C. 2015, c. 18. By lease agreement dated July 8, 2013 (the "Lease"), PCA leased the Property to Great Light for a five-year term at a monthly rent of $5,400.00 plus GST of $270.00. The Lease was renewable at Great Light's option for a further five-year period at a rate to be agreed by the parties. By Addendum dated January 1, 2014, the parties extended the Lease to July 14, 2023.

[6] The Lease requires that Great Light obtain PCA's written approval for any leasehold improvements. Clause 14 of the Lease reads:

> 14. **TENANT'S LEASEHOLD IMPROVEMENTS AND RENOVATIONS**
>
> The Tenant must receive prior written approval for any leasehold improvements from the Landlord, such approval not be unreasonably withheld and to be granted in a timely manner.

[7] Pastor Barry Jones of Great Light deposes that around February 2020, he spoke with Liaqat Ali Khan, a director of PCA, about renovations Great Light wished to make to the Property. Mr. Khan was assigned responsibility by PCA to deal with the Lease and with Great Light. Pastor Jones says he and Mr. Khan agreed that Great Light would be permitted to renovate and expand the premises. He says they also agreed that PCA would eventually sell the Property to Great Light and, pending that decision to sell, Great Light would be permitted to continue leasing the Property for as long as it wished.

[8] This purported agreement was reduced to writing in a document dated April 12, 2020 signed by Mr. Khan. The April 12, 2020 document was later replaced by another document, also dated April 12, 2020, and signed by Mr. Khan. The revised and expanded April 12, 2020 agreement reads in part:

> Date: 12th day of April 2020
>
> **Memo: Request for extensive Property Renovation/Extension**
>
> 1. We your tenant with the above name and address hereby request for permission to renovate/extend property with the above mentioned address

> 2. The property will be renovated to accommodate our religious and community purposes.
> 3. Renovation shall commence with your permission
>
> Furthermore, should the property owner/landlord choose to sell the above property on the address 12057 88th Avenue, Surrey, BC V3W 3J3 the following will be observed by the Landlord:
>
> 1. Landlord will sell to Tenant (Great Light)

[9] This is followed by clauses 2 to 7 which provide that the sale will be for the market value at the time of sale with credit given to Great Light for any increase in value due to the renovations. Clauses 7 and 8 then purport to extend the term of the Lease until PCL is ready to sell:

> 7. Landlord agrees that tenant is free to stay for as long as tenant wishes, provided that tenant pays her rent as arranged with the landlord
> 8. Landlord agrees to renew lease agreement with tenant until such time that landlord is ready to sell property to tenant

[10] The original April 12, 2020 document contains a heading, "Permission to Renovate". Everything up to clause 6 in the expanded agreement is substantially the same as the original agreement. Clauses 7 to 10 were added in the new version. Mr. Khan signed both versions. The amended version specifically identifies that he is signing as the landlord and his signature was witnessed by Pastor Jones' wife. No other signatures appear on the document. I treat the amended version of the April 12, 2020 agreement as the one that was in force between the parties since it replaced the original.

[11] Great Light argues the April 12, 2020 agreement constitutes PCA's written consent to the renovations in accordance with clause 14 of the Lease. PCA disputes that interpretation, arguing the wording of the permission clause – "Renovation shall commence with your permission" – contemplates some future act by which PCA was expected to give its permission. It asserts that Great Light was still required to provide PCA with details of the planned renovation, including drawings and proof of municipal authorizations, before PCA would grant final permission.

2024 BCSC 1711 (CanLII)

2024 BCSC 1711 (CanLII)

[12] I am not asked to resolve that disagreement on this application since PCA does not rely on a breach of clause 14 to support its termination. Rather, PCA relies on what it submits is an implied term in the Lease that, regardless of PCA's permission for tenant's leasehold improvements, it is the tenant's obligation to ensure those renovations comply with the law.

[13] Great Light started the renovations and expansion of the existing building in April 2020, shortly after concluding the first version of the April 12, 2020 agreement. Pastor Jones deposes that before they started the renovations, Mr. Khan told him that an official with the City of Surrey had advised him that permits would not be needed to renovate and extend the premises. Mr. Khan denies this. Pastor Jones also says that he contacted the Surrey himself to double-check the information he received from Mr. Khan and was also told that Great Light would not require a permit for the renovation. I agree with counsel for PCA that it seems highly improbable that any representative of the City of Surrey would give this advice to either Mr. Khan or Pastor Jones. Regardless, this is a factual dispute I am not asked to determine on this application. Nor could I determine it on the conflicting affidavit evidence.

[14] Pastor Jones also deposes that before the start of renovations, he and Mr. Khan walked the Property together on two occasions during which Mr. Khan pointed out the property boundaries and told Pastor Jones how far Great Light could extend the premises. Specifically, Pastor Jones claims Mr. Khan told him they could build out to the location of a chain-link fence that appeared to separate the Property from the neighbouring railway right-of-way. PCA had built that fence before Great Light started leasing the Property.

[15] Mr. Khan denies that he walked the property with Pastor Jones or that he relayed any of this information to him. He deposes:

> I don't know a great deal about property lines, but I understand there is usually a set back or a distance back from the property line which cannot have buildings constructed on it.
>
> Not only did I not tell the Pastor that, but I personally did also not have the slightest idea where the property line actually was.

> We erected the fence referred to in the Pastor's affidavit for safety reasons arising from the proximity to the railway. We had no idea whether the fence was on the property line or not.

2024 BCSC 1711 (CanLII)

[16] The renovations and expansion completed in June 2021. Great Light nearly doubled the existing footprint of the building. It added a computer room, extended the lobby, added a hallway, extended the building from the southeast to northeast corners to add a music room, and added offices at the northwest corner of the Property. The work was done by volunteers from the church membership, not by a contractor. Great Light spent in excess of $300,000 on building materials. The renovations and expansion included both electrical and plumbing work. Great Life obtained no permits or authorizations from the City of Surrey to do the work. It is not disputed that permits were required for this work but Pastor Jones claims Great Light only learned this after the renovations were done. He says at the time of the renovations he believed permits were not necessary.

[17] Pastor Jones deposes that Mr. Khan attended the Property on at least two occasions while the renovations were ongoing and did not raise any concern. In a recorded conversation between Pastor Jones and Mr. Khan in August 2021, the two briefly discussed the renovations (which were completed by then) and Mr. Khan told Pastor Jones "whenever I go by there, not very often, I'm happy for you, and for your church". PCA does not deny this August 2021 conversation or the accuracy of the transcription of the conversation.

[18] During the August 2021 conversation, Pastor Jones and Mr. Khan also discussed the potential sale of the Property to Great Light. According to Pastor Jones, around February 2021, he and Mr. Khan came to terms on the sale of the Property for $2.2 million. Pastor Jones then drew up an agreement to this effect and gave it to Mr. Khan but, as of the August 2021 conversation, that agreement remained unsigned. The conversation suggests Pastor Jones had concerns that PCA was not going to follow through with the sale on the terms set out in the unsigned agreement. Mr. Khan indicated that he was personally committed to the sale of the Property to Great Light and told Pastor Jones that they would "get over

2024 BCSC 1711 (CanLII)

the finish line" but that the president (presumably of PCA) needed to sign the agreement. It is apparent from what Mr. Khan said in the conversation that there was doubt as to whether the PCA board would approve the sale, even though Mr. Khan was personally committed to it.

[19] On October 7, 2021, with the sale agreement still unsigned, Great Light commenced an action in British Columbia Supreme Court against PCA claiming a binding agreement to sell the Property to Great Light for $2.2 million and seeking specific performance of that agreement (the "Great Light Action"). That matter is now set for trial in September 2025.

[20] On April 25, 2022, PCA wrote to counsel for Great Light purportedly revoking the April 12, 2020 agreement, though not the lease itself. It will be recalled that the April 12, 2020 agreement purports to allow Great Light to lease the Property indefinitely as long as it pays the rent. PCA maintains in its response to civil claim in the Great Light Action that the indefinite lease is unenforceable as it offends the rule against perpetuities. It also asserts the agreement is without consideration and thus revocable at will. Those are issues for determination in the Great Light Action and I am not asked to decide them here. Were it not for the April 12, 2020 agreement, the Lease as extended to 2023 would now have expired. Thus, should the court find in the Great Light Action that PCA's purported revocation of the April 12, 2020 agreement was legally effective, the Lease will have come to an end regardless of what I find in this proceeding.

[21] On June 2, 2022, the City of Surrey issued a "Stop Work Order" in respect of the Property. Since the renovations and expansion had long finished, there was no longer any work to stop. However, the order identified that the work had been done without a permit, that it had been done "in right of way", and that it covered a manhole.

[22] On August 9, 2022, Surrey issued an invoice to PCA for $214 as a "site visit fee". The invoice states the fee is levied under the *Surrey Building Bylaw, 2012* No.

17850 (the "Building Bylaw") and the fees were incurred for attendance at the Property to determine compliance with the bylaw. Mr. Khan deposes in his Affidavit #1 (October 12, 2023) that he had not seen the Stop Work Order when PCA received the invoice. He says he attended the Property after receiving the invoice and "it appeared to me as if an extension to the building on it had been constructed that encroached on the neighbouring property, owned by the CPR." Insofar as Mr. Khan is suggesting that he only became aware of the extent of the expansion after receiving the August 9, 2022 invoice from Surrey, I have difficulty reconciling this with the August 2021 telephone conversation in which he states he has driven by the Property and is happy for the Great Light congregation. It seems inconceivable that Mr. Khan would have driven by the Property and not taken notice of a renovation that almost doubled the building footprint.

[23] I also have trouble reconciling Mr. Khan's statement in his Affidavit #1 that it appeared the expansion encroached on the neighbouring right of way with his statement in his Affidavit #2 (February 9, 2024) where he says he "personally did not have the slightest idea where the property line actually was".

[24] Again, though, it is not for me to resolve these factual disputes in this proceeding.

[25] Mr. Khan retained Elevate Land Surveys to do a survey of the Property and the expanded building. That survey, which is dated November 22, 2022, shows that the expanded building encroaches more than five metres into the neighbouring railway right of way which Mr. Khan says is owned by Canadian Pacific Railway.

[26] On January 4, 2023, Surrey wrote to PCA stating that the June 2, 2022 inspection of the Property indicated the addition was constructed without a valid building permit and was being occupied without a valid occupancy permit, both in contravention of the Building Bylaw. The letter states that if PCA wishes to keep the addition to the building, it must submit a building permit application along with all required documents and information as required by the Building Bylaw by no later

2024 BCSC 1711 (CanLII)

than February 8, 2023. If PCA does not wish to keep the addition, it must apply for a demolition permit by the same date. The letter goes on to state that failure to comply with these orders is a violation of s. 96 of the Building Bylaw and may result in further action including legal proceedings.

2024 BCSC 1711 (CanLII)

[27] PCA did not share this letter with Great Light until March 14, 2023 when it was included in PCA's document production in the Great Light Action. This was more than two months after PCA received the letter and long past the February 8, 2023 deadline.

[28] On June 8, 2023, counsel for PCA wrote to Great Light asserting that constructing the extension without a permit and encroaching on the railway right of way is a fundamental breach of the Lease. It characterized this as a repudiation of the Lease which PCA accepted. It demanded that Great Light give up vacant possession of the Property by July 13, 2023. Great Light has refused to comply with this direction claiming it is not lawful and is contrary to PCA's commitment to sell the Property to New Light. It has continued to pay rent pursuant to the Lease. PCA has not accepted that rent but has paid it into a trust account pending the resolution of this dispute.

[29] On June 15, 2023, counsel for Great Light wrote to Surrey asking for an extension to the February 8, 2023 deadline as set out in Surrey's January 4, 2023 letter to PCA. Great Light itself wrote to Surrey on June 29, 2023 also seeking an extension. There is no evidence of a response from Surrey to either of these letters. On December 4, 2023, Great Light wrote again to Surrey asking for a response.

[30] On March 26, 2024, counsel for Great Light wrote to Surrey again asking for an extension to the February 8, 2023 deadline. This time Surrey responded by email the next day stating, "due to the length of time without an application being submitted, as well as it being longer than a year from the deadline, an extension cannot be granted." Despite this, the email goes on to ask Great Light to "submit a complete application as soon as possible to have the property align with the City's

bylaws." In short, it seems Surrey is unwilling to formally extend the deadline but it is still willing to receive the application.

[31] On April 1, 2024, counsel for Great Light wrote to counsel for PCA asking it to complete an "Agent Authorization Form" that would allow Great Light to apply for building permits on behalf of PCA as landowner. PCA, through its counsel, declined this request because it had already purported to terminate the Lease. Earlier, PCA's legal counsel had also suggested it would oppose Surrey granting any permits for the renovations that might sanction the encroachment on to the railway right of way. PCA is (understandably) concerned about its liability as landowner for any encroachment or trespass on the railway property.

[32] On November 23, 2023, PCA commenced this proceeding seeking a writ of possession. Meanwhile, the trial of the Great Light Action is set to commence on September 22, 2025 in New Westminster.

[33] As I have outlined, there are factual disputes between the parties as to what PCA might have known or said to Great Light about the renovations, the requirement for permits, the location of the property line, and the location to which Great Light could extend the building. Some of the facts asserted on both sides seem improbable while others less so. Regardless, it is clear these cannot be resolved on a summary application like this petition. However, based on what is not disputed, this is where matters presently stand:

a) The renovations and expansion have long completed but they are illegal as they were done without necessary building permits (or plumbing and electrical permits which also appear necessary) and there is no occupancy permit.

b) The renovations expanded the premises into the neighbouring railway right of way.

2024 BCSC 1711 (CanLII)

c) Surrey has demanded that PCA, as landowner, apply for the appropriate permits or apply for a permit to demolish the expansion by February 8, 2023.

d) Despite its February 8, 2023 deadline and its refusal to extend that deadline, Surrey appears willing to receive the required applications that would bring the renovation into alignment with Surrey's bylaws. To date, Surrey has taken no action to compel the demolition of the expansion.

e) Great Light is prepared to apply for the necessary permits from Surrey but requires PCA's consent. PCA has refused to provide that consent.

f) The owner of the adjacent railway right of way (Canadian Pacific, according to Mr. Khan) has not taken steps to compel PCA or Great Light to remove the encroachment. It is not even known if that owner is aware of the encroachment.

[34] To this I would add some observations. First, even if PCA cooperated with Great Light's application to Surrey, there is no assurance that Surrey would issue the required permits. It is not known whether the work done on the expansion, including the plumbing and electrical work, accord with the required standards. It is also not known what amount of work might be necessary to bring the building in compliance with the Building Bylaws or other municipal or provincial laws or regulations.

[35] Second, it seems inconceivable that Surrey would grant an occupancy permit for a building that encroaches on the neighbouring property. Even if it did grant an occupancy permit, that would not resolve the trespass on the railway right of way. In short, it is highly unlikely that this matter can be resolved without at least some deconstruction of the expansion.

[36] With that background and based only on facts that are not in dispute, I must determine whether Great Life has breached an implied term of the Lease and

2024 BCSC 1711 (CanLII)

whether that implied term or the nature of the breach entitles PCA to terminate the Lease.

Positions of the Parties

[37] PCA argues it is an implied term of the Lease that any tenant improvements done under clause 14 of the Lease would be "…conducted lawfully, with all necessary permits, rather than illegally or in such a fashion as to create liability on the part of the landlord to third parties." It argues the expansion was constructed in breach of this implied term thus creating potential liability for PCA as landowner. That liability includes the potential that PCA will have to demolish the expansion at its own cost, that it is exposed to an action for damages by the owner of the railway right of way, and it may be exposed to some sanctions by the City of Surrey. It argues this is a fundamental breach that gives it the right to terminate the Lease.

[38] Great Light argues there is no implied term in the Lease because such a term is not necessary to give legal effect the parties' presumed intention as expressed in the Lease or to give it business efficacy. It also argues an entire agreement clause in the contract excludes the potential for an implied term.

[39] However, if there is such an implied term, Great Light argues it did not breach that term because PCA gave written permission for the renovation knowing permits had not been issued, acquiesced in those renovations being done without permits, and misrepresented the location of the property line in telling Great Light that it can build out to the chain-link fence. It argues PCA is the one who encroached on the railway right of way by building the chain-link fence in its present location and Great Light simply built its expansion within that fenced area.

[40] Further, even if Great Light breached the implied term, it argues this is not a fundamental breach because it does not deprive PCA of the substantial benefit of the Lease.

2024 BCSC 1711 (CanLII)

2024 BCSC 1711 (CanLII)

Analysis

The Implied Term

[41] I accept it is an implied term of the Lease that any improvements contemplated by clause 14 are to be done lawfully with required permits. It seems axiomatic that parties to a contract expect that rights and obligations under the contract will be performed lawfully. To the extent such a term is necessary, I am persuaded it is an implied term of this Lease since the lawful performance of rights and obligations under any contract is essential to give it business efficacy.

[42] I am not persuaded that an implied term that the renovations will not expose the landlord to liability from third parties is necessarily implied. Where a tenant lawfully performs improvements to the premises with the landlord's written consent, I am not convinced that business efficacy demands that the tenant will effectively indemnify the landlord against claims that a third party might make. It may be a reasonable term to include in a lease but I am not convinced it is a necessary one.

[43] With that I turn to the question of whether this implied term of the Lease is a true condition, the breach of which permits PCA to terminate the contract and whether Great Light's breach is fundamental.

Legal Principles: Fundamental Breach and Breach of Condition

[44] PCA argues the implied term that renovations will be lawfully performed amounts to a true condition of the contract, the breach of which is a fundamental breach that permits PCA to terminate the contract. It relies on *Jorian Properties Ltd. v. Zellenrath*, 1984 CanLII 2178 (O.N.C.A.) where Justice Blair (in dissent) discussed the "dichotomy of condition and warranty".

[45] PCA's submission somewhat conflates "fundamental breach" with breach of a condition. In *Zynik Capital Corp. v. Faris*, 2007 BCSC 527 at para. 98, Justice Tysoe discussed the difference between the two concepts with reference to Professor Fridman's *The Law of Contract in Canada*:

> [98] … a fundamental breach is not the only basis upon which a contract may be properly terminated. A party to a contract is also entitled to treat the contract at an end when there has been a breach of a condition (as opposed to a warranty). The distinction between the two grounds for termination was discussed in the following passage from Fridman, *The Law of Contracts*, at pp. 584-5:
>
>> In the *Photo Production* case, Lord Diplock drew an important distinction between fundamental breach and breach of condition. A fundamental breach occurs "where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract." A breach of condition occurs:
>>
>>> …where the contracting parties have agreed, whether by express words or by implication of law, that any failure by one party to perform a particular primary obligation ("condition" in the nomenclature of the Sale of Goods Act…), irrespective of the gravity of the event that has in fact resulted from the breach, shall entitle the other party to put an end to all primary obligations of both parties remaining unperformed.
>>
>> The distinction between fundamental breach and breach of condition therefore turns upon the factual, as well as legal, consequences of each type of breach…

[46] Thus, a "fundamental breach" is one that, objectively, deprives the innocent party of substantially the whole benefit of that which the parties intended it to obtain from the contract. In this respect, fundamental breach looks at the consequences of the breach.

[47] By contrast, a breach of a condition looks to the intention of the parties when making the contract. Where the parties have expressly agreed that a particular term of the contract is a true condition as opposed to a warranty, a breach of that true condition entitles the innocent party to terminate the contract regardless of the consequences of the breach. If the parties do not stipulate expressly whether a term of the contract is a condition or warranty, it will be for the court to make that determination having regard to the intention of the parties at the time the contract was made: *Bunge Corporation v. Tradax S.A.,* [1981] 1 W.L.R. 711 (H.L.) quoted in *Penner v. Williamson,* 1993 CanLII 2080 at para 33 (B.C.C.A.). In that analysis, and unlike fundamental breach, the consequences of the particular breach are not to be

2024 BCSC 1711 (CanLII)

examined but rather the court is to determine whether the breach that has arisen is one that the parties would have said at the time they made their contract: "it goes without saying that, if that happens, the contract is at an end": *Bunge* at 717; *Penner* at para. 33.

2024 BCSC 1711 (CanLII)

[48] Counsel were not able to locate a case that considered whether renovation work done by a tenant without required permits constituted either a fundamental breach or a breach of a true condition of a tenancy. Both parties rest their arguments on first principles and leading authorities.

[49] The leading authority in Canada on fundamental breach is *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 499-500 where Justice Wilson, speaking for the majority, said the following:

> The formulation that I prefer is that given by Lord Diplock in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.), at p. 849. A fundamental breach occurs "Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of <u>substantially the whole benefit</u> which it was the intention of the parties that he should obtain from the contract" (emphasis added). This is a restrictive definition and rightly so, I believe. As Lord Diplock points out, the usual remedy for breach of a "primary" contractual obligation (the thing bargained for) is a concomitant "secondary" obligation to pay damages. The other primary obligations of both parties yet unperformed remain in place. Fundamental breach represents an exception to this rule for it gives to the innocent party an additional remedy, an election to "put an end to all primary obligations of both parties remaining unperformed" (p. 849). It seems to me that this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided.
>
> [Emphasis is Wilson J.'s]

[50] Justice Wilson went on to find there was no fundamental breach in that case in part because the defects in the goods that were sold under the contract, while serious, could be repaired albeit at some considerable expense. She observed at 501: "There are numerous cases in which serious but repairable defects in machinery of various kinds have been found not to amount to a fundamental breach."

[51] I have found Justice McDonald's decision in *Parker Cove Residents Association v. Gerow*, 2023 BCSC 1397 helpful as an illustration of a serious breach of a lease agreement that was nevertheless not "fundamental". That judgement was recently upheld on appeal: 2024 BCCA 316 [*Parker Cove,* BCCA]. The defendants in that case were sublessees of lots in a residential subdivision on reserve lands of the Okanagan Indian Band. The Band had leased the land to the plaintiff under a headlease and the plaintiff in turn sublet the residential lots to sublessees, including the defendants. It was an express term of the sublease that the defendants would observe and comply with all applicable laws in the performance of their obligations, including orders and lawful requirements of the Band. The defendants refused to leave their homes when the Band issued a lawful evacuation order because of a wildfire in the area. The evidence showed that firefighters could not drop retardant in the area while residents remained behind and thus the defendants' refusal to leave put other homes in the subdivision at risk.

2024 BCSC 1711 (CanLII)

[52] While recognizing the very serious nature of the defendants' breach, McDonald J. found it was not "fundamental" because it did not destroy the commercial purpose of the subleases or otherwise deprive the plaintiff of substantially the whole benefit the parties intended from the subleases. She wrote:

> [50] In my view, while the Band was rightly concerned about "holdouts" remaining on its reserve lands, the analysis that is applicable requires the court to focus on the context, circumstances and intended benefit of the Subleases. In other words, the court must identify the real purpose of the contract.
>
> [51] When I consider the context, circumstances and intended benefit of the Subleases I conclude that they are mainly, subject to the terms and conditions stated, agreements where the plaintiff passes to a sublessee, the Subleased Premises and the exclusive use of common areas and common facilities, in exchange for the specified payments from the sublessee.
>
> [52] My consideration of the context, circumstances and the intended benefit of the Subleases, leads me to conclude that Mr. Gerow's failure to immediately abide by the mandatory evacuation order did not destroy the commercial purpose of the Subleases and it did not cause a fundamental breach of the Subleases. <u>Mr. Gerow's failure to abide by s. 13 cannot be said to have destroyed the commercial purpose of the Subleases because, it did not, for example, render the Subleased Premises forever unusable or otherwise eliminate the very thing bargained for.</u>

> [53] Put another way, while the Gerow defendants breached s. 13 of the Subleases when Mr. Gerow failed to evacuate Parker Cove on August 1, 2021, I do not find that the breach deprives the plaintiff of substantially the whole benefit the parties intended from the Subleases.
>
> [Emphasis added]

[53] In dismissing an appeal from this aspect of the judgment, Justice Bennett, writing for the court, said:

> [42] … Mr. Gerow's conduct in disobeying the Evacuation Order was blameworthy and offensive. Fortunately, none of the homes or belongings in Parker Cove were impacted by the White Rock Lake fire. However, the chambers judge correctly set out the correct legal principles in relation to fundamental breach, made findings of fact that are supported by the evidence, and found that his failure to obey the Evacuation Order did not deprive Parker Cove of a substantial benefit of the Sublease.
>
> [43] In my view, there is no error in her conclusion.

Fundamental Breach

[54] In my view, the same general principles outlined in *Parker Cove* apply here. I find that Great Light's breach of the implied term is a serious one because it potentially exposes PCA to liability from third parties. However, it does not deprive PCA of the substantial benefit of the Lease.

[55] The purpose of the Lease is to give to Great Light the exclusive use of the leased premises in exchange for the rent it must pay to PCA. Expanding the premises without proper permits and extending the premises into the neighbouring property is undoubtedly a breach of an implied term that any renovations or expansions would be done lawfully. The fact that Great Light failed to obtain the necessary permits and expanded the building on to the neighbouring property is a significant breach of the Lease but it is not one that destroys its commercial purpose or deprives PCA of the very thing bargained for.

[56] To use McDonald J.'s illustration in *Parker Cove*, it does not render the leased premises unusable. Great Light may be unable to use or fully use the premises since it has no occupancy permit after the renovations but that does not affect PCA's interest in the Lease. PCA's right is to receive the rental payments

2024 BCSC 1711 (CanLII)

which Great Light has continued to make. The inability to occupy the building only becomes a problem for PCA if Great Light gives up the Lease but then the question of fundamental breach becomes moot.

[57] There are also remedial options open to PCA that preserve the fundamental bargain of the parties. It could direct Great Light to apply for a demolition permit and remove the expansion at Great Light's own expense. It could also seek damages from Great Light should PCA be required to undertake that work itself. The assessment of liability and damages in either scenario would likely engage the factual disputes discussed earlier. However, neither scenario deprives PCA of the thing it bargained for, namely the payment of rent in exchange for Great Light leasing the Property.

[58] I am also not persuaded the encroachment on the railway right of way is a fundamental breach. I accept that the encroachment potentially exposes PCA to a trespass action by the owner of the railway right of way but that does not deprive PCA of the substantial benefit of the Lease.

[59] Moreover, it is unlikely that a trespass action by the adjacent owner would result in significant damages beyond an order to remove the encroachment. The chain-link fence built by PCA has encroached on the right of way for many years, apparently without attracting attention or concern from the right of way owner. That suggests the encroachment caused by PCA has not interfered with the use of the right of way by its owner. The fact that Great Light's extension of the building falls within that fenced area, again without attracting attention from the right of way owner, suggests it too does not cause ongoing damage to that owner.

[60] The owner of the right of way is, of course, entitled to pursue a trespass action without proof of damage. I agree with counsel for PCA that experience tells us railway companies take their property rights or perceived property rights very seriously: see for example *Canadian Pacific Railway Co. v. Vancouver (City),* 2006 SCC 5 and *Canada (Attorney General) v. Canadian Pacific Ltd.*, 2000 BCSC 933,

2024 BCSC 1711 (CanLII)

2024 BCSC 1711 (CanLII)

aff'd 2002 BCCA 478. However, I am not persuaded that a lawsuit from the right of way owner will expose PCA to anything more than nominal damages beyond the cost of removing the encroachment and perhaps an amount that would approximate a sum that should be paid for the use of the right of way to the extent of the encroachment: *Webb v. Attewell*, 1993 CanLII 6873 at para. 20 (B.C.C.A.). Those costs can be visited upon Great Light.

Breach of Condition

[61] Nor am I persuaded the implied term is a true condition, the breach of which would entitle PCA to terminate the Lease. As I have said earlier, the focus of the inquiry for breach of condition as opposed to fundamental breach is on the intention of the parties at the time the contract was made rather than the consequences of the particular breach.

[62] There is nothing in the Lease itself, apart from clause 14, that assists in ascertaining the parties' intention with respect to an implied term that renovations are to be done lawfully. Clause 14 simply states that renovations can only be done with the landlord's permission, which Great Light obtained (or at least believed it had obtained) in the form of the April 12, 2021 agreement. There is nothing in the Lease itself to suggest what the parties would have intended if those renovations were done without proper permits. Nor is there evidence of the surrounding circumstances in which the contract was made that might shed light on the parties' intention. Almost all of the evidence on this application is of events that relate to the renovations and their aftermath.

[63] Great Light started and completed the renovations without obtaining necessary permits but they did obtain, or believed they obtained, PCA's approval for the renovation and expansion. In granting that approval or purported approval, PCA asked no questions about design particulars or permits. Nevertheless, it was Great Light that undertook the renovations without a professional contractor and with no permits. At best, it was grossly naïve for Pastor Jones, as head of Great Light, to believe that a renovation that almost doubled the footprint of the building and

involved electrical and plumbing work could be done without permits. It is perhaps less naïve, though reckless nonetheless, to assume the building could be expanded to the chain-link fence without verifying the property boundaries with a survey. On the other hand, if Mr. Khan did in fact walk the property with Pastor Jones and tell him where Great Light could build to, it may be understandable that Pastor Jones would rely on Mr. Khan's advice as he was the landlord's representative. I am not able to resolve that factual dispute on the conflicting affidavit evidence before me.

2024 BCSC 1711 (CanLII)

[64] However, none of what Great Light has done is irreparable. What has been constructed can be demolished. It is just a matter of cost. While the breach is a serious one, it does not "go without saying" that if the parties knew at the time they entered the Lease that Great Light might naïvely or foolishly do renovations without required permits or extend the building over the property line that the Lease would necessarily be terminated, particularly when some lesser form of remedy would preserve the parties' fundamental bargain. I am not able to determine on the conflicting affidavit evidence whether Great Light might have acted deliberately rather than naïvely or foolishly. To the extent that might make a difference on the question of fundamental breach or breach of a true condition, that question will require a trial.

A Potential Breach of Condition

[65] Before concluding, I would suggest that if Great Light refuses to bring the building into compliance with Surrey's bylaws or remove the trespass on the right of way (absent some agreement with the right of way owner), it may well commit at least a breach of condition, if not also a fundamental breach. It seems to me that a tenant cannot change the landlord's lawful building into an unlawful one and refuse to correct that change when called upon to do so. It "goes without saying" that the parties would have agreed, at the time of entering the Lease, that if the tenant were to refuse a direction from the landlord, a municipal authority, or the neighbouring landowner to rectify an illegality caused by the tenant's improvements, such a refusal would allow the landlord to terminate the Lease. However, matters have not

reached that point since Great Light has not refused to correct the problem it has created. It is looking for ways to comply. To the extent PCA consented to or acquiesced in the renovations, it may need to give Great Light a reasonable opportunity to correct the problem before demanding the renovations be deconstructed. However, since those matters are not before me I will leave my remarks there.

2024 BCSC 1711 (CanLII)

Conclusion

[66] For these reasons, I find that Great Light's failure to obtain the necessary permits before renovating and expanding the premises and failing to ascertain the property lines before expanding the building into the neighbouring railway right of way is a serious breach but not a fundamental one. Nor is it a breach of a true condition that entitles PCA to bring the Lease to an end.

[67] The petition is therefore dismissed with costs to Great Light at scale B.

"Kirchner J."