Court of King's Bench of Alberta

Citation: Axis Real Estate Investment Corporation v Fort Saskatchewan (City), 2023 ABKB 395

Date: 20230629
Docket: 0903 10780
Registry: Edmonton

Between:

Axis Real Estate Investment Corporation

Plaintiff

- and -

City of Fort Saskatchewan

Defendant

Reasons for Judgment
of the
Honourable Justice Peter Michalyshyn

I. Introduction

[1] The plaintiff Axis Real Estate Investment Corporation claims against the defendant City of Fort Saskatchewan in defamation and for lease-related damages. The City in turn claims its own damages. For reasons which follow, while its claim in defamation fails, the Plaintiff is entitled to certain damages under the Lease. The City's claims are dismissed.

II. Background

[2] The Statement of Claim filed July 14, 2009 named a number of individuals against whom the claim was discontinued prior to the trial. As against the City, the Plaintiff claims in its pleadings that

a) The City was a tenant of the Plaintiff's property in the city of Fort Saskatchewan at "Plan 583HW, Parcel A+B+C" otherwise described as 10213 and 10211-100th Avenue (the First Building) and 10211-100th Avenue (the Second Building).

b) The City first leased the main floor of the First Building on May 1, 1985 from a prior owner. The premises was used for municipal offices. The lease was renewed from time to time. The last lease was dated May 4, 2006. On August 30, 2006 the Plaintiff took ownership of the premises and, by way of assignment, became the City's landlord.

c) On August 30, 2006 the City executed an Estoppel Certificate over the leased space in question that confirmed the premises were satisfactory for occupancy, and that the landlord was not in default of any of its obligations under the Lease.

d) On February 6, 2008 the City vacated the premises. In doing so, the Plaintiff alleges the City's following public statements were defamatory:

- February 7, 2008 (in the Fort Saskatchewan Record)"

  "The relocation of staff is a proactive measure based on concerns about the comfort and quality of the leased space for those who worked there".

- February 12, 2008 (also in the Fort Saskatchewan Record):

  "City council moved Community and Protective Services (CPS) staff out of their ground floor 100th Avenue location last week due to health concerns with the downtown space, a spokesman for the city said Friday."

- On February 13, 2008 (in the Sturgeon Creek Post):

  Community Services staff moved out off their rented space on 100th Avenue Wednesday following a special closed door meeting of City Council Tuesday Feb 5. The decision came after staff noticed a strange smell and asked Capital Health to investigate, Fort Saskatchewan Communications and Marketing Director Curt Boechler said Thursday. Boechler would not say what Capital Health found, but said the move was a 'proactive measure based on concerns about the comfort and quality of the leased space".

- On April 30, 2008 (in the Sturgeon Creek Post):

> "Council has received privileged information that caused us to vacate the building in the first place" City Manager replied. That information cannot be made public, and if Kachur or other council members wish to discuss it again, Council will have to go in camera", Rosen said.

- On May 7, 2008 (in the Sturgeon Creek Post):

  > "Community Services staff had to leave rented space this February for reasons of health"

- On the same May 7, 2008 (in a lengthy letter in the Sturgeon Creek Post):

  > ... The City also reviewed an assessment of the leased space prepared by a preeminent expert in the field of indoor air quality and environmental site assessment. Based on careful consideration of all the information available, and with due consideration of the City's obligations under the OH&S Act which requires the City to protect its workers from hazards or potential hazards, City Council made the decision to relocate the staff from the Teddon Building."

[3] Soon after these publications, the Plaintiff learned of and in due course was provided with a copy of an engineering report prepared for the City by Focus Corporation. The City commissioned the Focus Report on November 15, 2007 to inquire into indoor air quality of the First and Second buildings.

[4] The Focus Report was provided to the City on January 11, 2008. The Plaintiff pleads in its Statement of Claim that while a mould condition may have existed in the Second building, it did not in the First building, part of which was occupied by the City.

[5] Just under a month later, as noted on February 6, 2008, the City vacated the Plaintiff's leased space.

[6] The Plaintiff alleges in its Statement of Claim that the quoted statements set out above were "false, wrongful and malicious statements". It alleges the statements, or any of them, were "maliciously caused to be published or were caused to be published under such circumstances that they were calculated to produce and did produce an injurious effect upon [the Plaintiff's] business reputation including the reputation of the building".

[7] The Plaintiff originally claimed damages as follows:

- Judgment in the sum of $113,324.86 for lease-related claims, plus lease interest at 18 per cent; the Plaintiff changed its claim at trial to $72,993.24);
- Damages in the sum of $2 million;
- Additional damages of $201,645.54.

[8] The City counterclaimed in the amount of $71,200.55, agreed to as to quantum, subject to the determination of liability.

III. Further evidence at trial

[9] On November 15, 2007 the City gave notice of an odour in its leased premises; the Plaintiff agreed to the City's proposed air quality testing in its leased premises.

[10] The City retained Focus Corporation to conduct air quality testing in the lease premises between November 15-December 20, 2007. The Focus report found nothing that posed an "occupational exposure issue".

[11] Nonetheless, in evidence (Exh 1, Tab 19) is an email of January 23, 2008 between Capital Health officials noting a complaint from the City that:

> ...employees have been complaining of watery eyes, sore throats, runny noses and general discomfort when they are at work. The symptoms disappear when they are away from the building.

The message goes on to say there were signs of water damage and mould in the building, although the message does not identify water damage or mould in the City's leased space as such.

[12] Also, in evidence (Exh 1, Tab 20) is a January 25, 2008 email from the City indicating concerns expressed by staff in the leased space for sore throat, headaches, watery eyes, drowsy (sic) smells, etc." The email notes the City was already working with a consultant, Dr. David Ho.

[13] The Plaintiff received a letter from Capital Health on January 25, 2008. The Plaintiff had no notice of Capital Health's involvement prior to that time.

[14] The Capital Health letter noted no issues with regard to the City's leased premises other some apparent damage to ceiling tiles. Concerns were with regard to a separate area of the building only part of which the City leased.

[15] The City moved out of the leased premises on February 6, 2008. The City continued to pay rent under the lease until it expired on April 30, 2008.

[16] The move out of the building was precipitated by the opinion of expert Dr David Ho. Dr. Ho had been retained by the City to review existing reports and to tour the building. He then made a presentation to an *in camera* meeting of City Council on February 4, 2008. In the *in camera* meeting, Dr. Ho recommended that City staff immediately vacate the building on account of health concerns.

[17] In evidence (Exh 1, Tab 34) is a Client Contact Report from Alberta Workplace Health and Safety written following a site inspection on February 8, 2008. Amongst other things the Report notes the City's decision to vacate the leased premises "based on information they have received and the condition expressed by the staff in that office space". The Report's author notes:

> The City of Fort Saskatchewan acted appropriately in removing their staff from the office environment where staff felt their adverse symptoms were originating from.

The Report's author "commended" the City for employing a proactive approach in ensuring staff safety.

[18] In response to the Capital Health letter of January 25, 2008 the Plaintiff retained Cascade Environmental Consulting Ltd, and thereafter Advanced Remediation who completed its work

by February 14, 2008. Cascade Environmental Consulting gave the building a clean bill of health in a report dated March 10, 2008. In turn, in a letter of April 30, 2008 Capital Health weighed in to confirm the Plaintiff's building now complied with the Public Health Act.

[19] In evidence (Exh 1, Tab 60) is news media coverage dated March 26, 2008 confirming the building's clean bill of health.

[20] Former City Manager Lorna Rosen testified at trial. She confirmed that based on advice from Dr. Ho, she directed City staff leave the building. That decision was brought to an *in camera* meeting of the City's Council, on February 4, 2008 – not for a decision as such, as Ms. Rosen had all the authority she needed for the decision – but rather for information.

[21] Granted, there was some inconsistency in her evidence given at trial and during questioning, with regard to complaints about smells in the City's space in the months leading up to early February, 2008. Those inconsistencies do not diminish Ms. Rosen's central point – that she relied on Dr. Ho's advice and directed City staff leave the building.

[22] Nor is Ms. Rosen's central point diminished by her agreement that no other expert or investigator advised her to direct staff to leave the building.

[23] Exhibited at trial (Exh 10, Tab 48) is email correspondence between City council member Gale Katchur and Ms. Rosen immediately coming after the *in-camera* meeting of February 5, 2008. In the email Ms. Katchur expressed misgivings that Dr. Ho may have "overstated the problem in the leased building as he is very passionate about mould..." In response, Ms. Rosen passed on Dr. Ho's CV and noted that in addition to being passionate, in her view Dr. Ho was "eminently qualified". Ms. Rosen went on to say that:

> Based on the expert legal and environmental advice that we have received, the situation at the CPS building did stand out as a risk and a potential liability situation."

[24] Former City Major Jim Sheasgreen testified at the trial. He spoke to the decision to issue a news release on February 7, 2008, to inform the community about the staff move and whereabouts. He approved the impugned wording that "The relocation of staff is a pro-active measure based on concerns about the comfort and quality of the leased space for those working there."

[25] City administrator Ward Antoniuk testified at the trial as the officer of the Defendant. Mr. Antoniuk stated that when he started with the City in 2007 he was located in the Teddon building. He testified that he had no personal health concerns about the building. He was aware of one, maybe two staff expressing fatigue and congestion at the end of a workday, but he did nothing about these concerns. He received no complaints in 2008 before staff left the building in early February of that year. He was aware of a smell about the building, of mildew he called it, but did not feel the need to do anything about it. Like Ms. Rosen, he reviewed the Focus report and confirmed he knew it did not recommend staff vacate the leased premises.

[26] Mr. Antoniuk testified that the morning after the meeting of City Council, staff were advised of the decision to vacate the building. Staff were told the information was meant to be confidential, and included – consistent with information provided at the Council meeting – that mould had been found in the area of the leased space.

[27] Before the City vacated the space or at any time before the lease expiry, Mr. Antoniuk confirmed he was unaware the carpets in the leased space had been cleaned, or that repairs were done to any of the lease space floors or walls. He confirmed that during his time in the space since 2007, parts of the carpet were threadbare and worn and cuts had been made in various places to accommodate pieces of furniture or computers and wiring.

[28] Dr. Ho did not testify at trial but was questioned in pre-trial proceeding on November 13, 2019. Dr. Ho was not questioned or presented as an expert witness. Relevant however was his CV and own evidence with regard to his considerable experience generally – as told to the City and its counsel – as an expert in mould.

[29] Dr. Ho confirmed that he prepared no formal report for the City but rather presented a lengthy series of powerpoint slides to an in-camera meeting of the City Council. He confirmed that he expressed an urgent need for the City's staff to vacate the premises and to clean up the City's remaining personal property. His views as expressed to the City were based on examining what he called chronically water-stained ceiling tiles in the City's leased space, as well as elements of the HVAC system which he concluded were capable of carrying possible mould within the building. He advised the City that it should worry about exposure to mould contaminants. He was quite convinced that:

> ...whatever mould contamination problem or indoor air contamination problem at least within the City-occupied space now is everywhere...seeing how the HVAC system is set up for that building, I was quite convinced and actually concerned for the City staff.

IV. Issues

[30] The issues to be determined are as follows:

- Were the statements attributed to the City in all of the circumstances defamatory of the Plaintiff?
- Has the Plaintiff proven damages for the alleged defamation?
- What amounts are owing under the Lease?

Were the statements attributed to the City in all of the circumstances defamatory of the Plaintiff?

[31] It is not in dispute that nowhere in the alleged defamatory publications is "mould" referred to.

[32] The City also notes that in none of the publications noted in the pleadings is the Plaintiff Axis actually named.

[33] The City relies on ***Chohan v Cadsky***, 2009 ABCA 334 and the general statement at paras 88-89, that:

> *Defamation Defined*
>
> [88] It is common ground that the correct definition of a defamatory statement is as set out in Brown at 1-31:

> A publication is considered defamatory if it has the tendency to lower that reputation in the estimation of reasonable persons in the community. In order to recover in an action for defamation, the plaintiff must show:
>
> > (1) That the words about which the plaintiff complains are defamatory;
> >
> > (2) That they referred to the plaintiff; and
> >
> > (3) That they were published to a third person. [footnotes omitted]

[89] A similar definition is found in the Supreme Court decision *Botiuk v. Toronto Free Press Publications Ltd.*, 1995 CanLII 60 (SCC), [1995] 3 S.C.R. 3 at para. 62, 126 D.L.R. (4th) 609:

> For the purposes of these reasons, it is sufficient to observe that a publication which tends to lower a person in the estimation of right-thinking members of society, or to expose a person to hatred, contempt or ridicule, is defamatory and will attract liability. See *Cherneskey v. Armadale Publishers Ltd.*, 1978 CanLII 20 (SCC), [1979] 1 S.C.R. 1067, at p. 1079. What is defamatory may be determined from the ordinary meaning of the published words themselves or from the surrounding circumstances. In *The Law of Defamation in Canada* (2nd ed. 1994), R. E. Brown stated the following at p. 1-15:
>
> > [A publication] may be defamatory in its plain and ordinary meaning or by virtue of extrinsic facts or circumstances, known to the listener or reader, which give it a defamatory meaning by way of innuendo different from that in which it ordinarily would be understood.

[34] For reasons which follow, I agree with the City that no defamation can be found in the statements regarding health concerns, comfort and quality of City staff in the leased premises, or hazards or potential hazards.

[35] I agree with the City that even if defamatory, the statements at issue were substantially true, and in one instance, was protected by the defences of fair comment and/or qualified privilege. For these points, the City relies generally on ***Huff v Zuk***, 2021 ABCA 60, at paras 43, 46 and 52:

> [43] To make out the defence of justification, the defendant must establish that the whole of the defamatory matter is substantially true. “This includes the specific charges that are made and any inferences of fact flowing from those charges”: Hall v Kyburz, 2006 ABQB 294 at para 26; aff’d 2007 ABCA 228.
>
> ...
>
> [46] The test for fair comment requires: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it

> can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and (e) even though the comment satisfies the objective test, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice: WIC Radio Ltd v Simpson, 2008 SCC 40 at para 28, [2008] 2 SCR 420.
>
> ...
>
> [52] Qualified privilege attaches to an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential: *Hill v Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130 at para 143.

[36] The five alleged defamatory statements as pleaded are set out earlier in these reasons. They are repeated in what follows, now my findings in italics.

- February 7, 2008 (in the Fort Saskatchewan Record)"

  "The relocation of staff is a proactive measure based on concerns about the comfort and quality of the leased space for those who worked there".

  Finding: there is nothing defamatory in this statement, or indeed in the news release also dated February 7, 2008 from which it was drawn. There were indeed concerns expressed; there is nothing in the ordinary use and meaning of the words used that was defamatory. What's more, the comments were fair and truthful regarding the concerns that were being expressed.

- February 12, 2008 (also in the Fort Saskatchewan Record):

  "City council moved Community and Protective Services (CPS) staff out of their ground floor 100th Avenue location last week due to health concerns with the downtown space, a spokesman for the city said Friday."

  Finding: there is nothing defamatory in this statement either. Again there is reference of the move being "due to health concerns"; as noted above, indeed concerns were expressed. The article from which the quotation was drawn also quotes a City official stating "We are not going to leave people in there if we don't think it is safe". Again, in the circumstances the comment was not defamatory, but was rather based on what the City knew at the time. What's more, the comments were fair and truthful regarding the concerns that were being expressed.

- On February 13, 2008 (in the Sturgeon Creek Post):

  Community Services staff moved out off their rented space on 100th Avenue Wednesday following a special closed door meeting of City

> Council Tuesday Feb 5. The decision came after staff noticed a strange smell and asked Capital Health to investigate, Fort Saskatchewan Communications and Marketing Director Curt Boechler said Thursday. Boechler would not say what Capital Health found, but said the move was a 'proactive measure based on concerns about the comfort and quality of the leased space".
>
> *Finding: for the same reasons stated above, there is no defamation in these comments. Other elements of the newspaper's publication are not attributed to the City or to anyone connected with it. The newspaper is not a party to the within action.*

- On April 30, 2008 (in the Sturgeon Creek Post):

  "Council has received privileged information that caused us to vacate the building in the first place" City Manager replied. That information cannot be made public, and if Kachur or other council members wish to discuss it again, Council will have to go in camera", Rosen said.

  Finding: there is nothing defamatory here about the statement attributed to the City.

- On May 7, 2008 (in the Sturgeon Creek Post):

  "Community Services staff had to leave rented space this February for reasons of health"

- On the same May 7, 2008 (in a lengthy letter in the Sturgeon Creek Post):

  ... The City also reviewed an assessment of the leased space prepared by a preeminent expert in the field of indoor air quality and environmental site assessment. Based on careful consideration of all the information available, and with due consideration of the City's obligations under the OH&S Act which requires the City to protect its workers from hazards or potential hazards, City Council made the decision to relocate the staff from the Teddon Building.

  Finding: there is nothing defamatory in these statements. They are factual and true regarding the City's consideration of information then available to it, and regarding the decision taken to leave the building. The City also quite properly raises defences not only of truth, but also of fair comment.

[37] The Plaintiff says it is not just the words referred to in the pleadings, but also the surrounding circumstances: ***Cherneskey***. These surrounding circumstances include the following:

a. the actions of the City and its representatives and/or contractors – for example that the City hastily and with little initial explanation vacated the premises months before the April 30, 2008 lease expiry;

b. the explanation that was eventually given, though cloaked in privilege and confidentiality, that drew attention to concerns for the "comfort and quality of

the leased space", noted "health concerns with the downtown space", and that the move occurred "for reasons of health",

c. the City's stated reliance on a "preeminent expert in the field of indoor air quality and environmental site assessment", and that it gave careful consideration to its obligations to staff working at the leased premises: "We are not going to leave people in there if we don't think it is safe"; and

d. acting again on advice, that the City engaged an environmental services company to re-enter the leased space to remove personal items and furniture from the leased premises "in the full view of the citizens of the City of Fort Saskatchewan", as argued by the Plaintiff.

[38] It is true that all these things happened. But I disagree that the Plaintiff's cause for the words published being defamatory is strengthened by these many surrounding circumstances.

[39] I disagree that these actions of the City and its representatives and/or contractors "influenced the meaning of the words" – as the Plaintiff put it through counsel, to render the statements published defamatory in nature. This is so because the *actions* complained of were – certainly at the time – based on information available to the City as to complaints, and on what they believed in good faith was competent advice.

[40] While misgivings may arise in hindsight regarding the competence of that advice, the question is not whether the City made the ultimately correct decision to vacate the leased space on the basis of those complaints and advice. The question is whether the City made the correct decision in the moment. There is no serious suggestion that the City was acting for any improper purpose. Nor does the Plaintiff claim the City had no legal right to vacate the premises. The question is whether the words used by the City, in conjunction with the actions taken, amount to defamation. For the reasons stated, in my view they do not.

Has the Plaintiff proven damages for the alleged defamation?

[41] If I am wrong on the question of defamation, in the alternative I find that the Plaintiff has failed to prove its economic loss claim for damages coming after the City's departure from the leased premises.

[42] The evidence in support of the claim for loss of income is that of Jacquie Millante, part-owner of the Plaintiff, and the other part-owner and Plaintiff's officer, Mr. Jaehn.

[43] The evidence is also at Exh 7, Tab 2 which is a series of graphs and other calculations undertaken by one or both of Mr. Jaehn and Ms. Millante. One such untitled graph purports to show reduced occupancy between February, 2008 and November, 2009, after which the occupancy appeared to pick up, then generally exceed the February, 2008 and earlier period.

[44] Another claim-related document, again prepared by one or both of Mr. Jaehn and Ms. Millante, was at Exh 7, Tab 2(d). It is a series of four pages entitled "Vacancy Costs" and purports to show some 24 tenants and rents – "lost rents" and "undermarket rents" – after February, 2008 and through until the end of 2011. The calculation of lost and undermarket come to $393,592.05 + $169,816.04 for a total loss calculated at $563,408.09.

[45] A different version of the four-page Vacancy Costs document was entered at trial as Exh 12. Owing to a series of different inputs or assumptions, Exh 12 results in a claim calculation of $330,510.58 + $126,123.77 for a total loss now calculated at $456,634.35.

[46] There is no Plaintiff evidence of an expert or other person experienced in leasing and/or marketing or in market conditions at any material time to the action.

[47] The calculation of the claim is thus based on Mr. Jaehn and Ms. Millante, including elements of hearsay evidence and speculation frankly with regard to what each of them say they were told by individuals in the community from time to time.

[48] An example is Exh 7 Tab 2(e) which is an undated list of 21 Fort Saskatchewan businesses that moved but never called the Plaintiff to inquire about available space. The list is described by Mr. Jaehn as tenant prospects who considered leasing space in the Plaintiff's building between late 2007 and the end of 2012. Mr. Jaehn acknowledged he had no documentation or concrete information from any prospective tenant that says exactly or at all why they chose not to be tenants in the building.

[49] At trial Mr. Jaehn testified that with regard to the Vacancy Costs document, it was based on his own (or with Ms Millante's involvement, *their* own) assessment of market comparables, and discounts, if need be, "to close the deal with the tenant".

[50] Mr. Jaehn testified as to efforts to market the space through brochures, the intranet, XLS publications, local newspapers and with realtors.

[51] On the basis of all of this evidence, through counsel the Plaintiff argues that:

> There is no doubt that persons who heard about the pull out of the City of Fort Saskatchewan's staff from the north building did not wish to lease with the Plaintiff.

[52] I find however that there is considerable doubt for this assertion.

[53] As noted, in its report dated March 10, 2008 Cascade Environmental Consulting Ltd. concluded that post-remediation all results in the Plaintiff's building were "below acceptable limits" for moulds – in other words, the Plaintiff's building had a clear-cut clean bill of health within a month of the City's departure. The strongly-held beliefs of Mr. Jaehn and Ms Millante notwithstanding, there was no other evidence at trial of the stigma they said held back prospects looking to lease space in the building.

[54] As noted, no evidence was before the court from an expert of individual experienced in leasing and/or marketing, or as to market conditions at any material time.

[55] Mr. Jaehn was cross-examined effectively by counsel for the City on the following points:

a. From the time the Plaintiff acquired its building in 2006 until *before* the mould "stigma" in February, 2008, the Plaintiff signed only one new tenant to a 1,379 sq ft lease; Mr. Jaehn was unable to explain why more tenants were not signed up, notwithstanding the existence of available tenantable space; he could not recall what prospects were telling him about their lack of interest in the building *before* February, 2008;

b. Mr. Jaehn confirmed that notwithstanding the inability to lease to more than one new tenant for the first 18 months of his ownership of the Teddon Building, he was claiming against the City for the entire unleased building space from February, 2008 and going forward; it was also in evidence that

when the Plaintiff acquired the building in 2006, fully one-third of the 18,000 sq ft was vacant;

c. After the alleged mould stigma, Mr. Jaehn confirmed that in 2008 he signed up three new tenants for a total of 2,703 sq ft;

d. In 2009 Mr. Jaehn signed up a further six new tenants for a total of 3,780 sq ft;

e. In 2010 he signed up another six new tenants for a total of 8,272 sq ft; and

f. In 2011 he signed up another five new tenants for a total of 5,155 sq ft;

g. No loss of rents/economic loss is claimed from 2012 or later;

h. Mr. Jaehn acknowledged he had little to add to the face of the claim documentation as it touched on "under-market rents" – indicating that the documentation was prepared by Mr. Millante;

i. Interestingly, Mr. Jaehn acknowledged that his own company, Acumen, was listed in the claim documentation as paying "under-market rent" in the Plaintiff's building rather than the $22 sq ft the Plaintiff asked the court to accept as market rent for claim purposes.

[56] Ms. Millante was examined with regard to a $22 sq ft (main floor space) rate she used in the Plaintiff's Vacancy Costs claim calculation. She testified that in coming to the $22 sq ft rate she reviewed documents, looked at appraisals, market listings, and spoke with her landlord friends as to what lease rates they had at that time. However, the only documents in evidence were simply advertisements for similar rates rather than leases in fact entered into. No other details of appraisals or listings or inquiries were in evidence at trial.

[57] As indicated during argument, I agree with the position of the City that the $22 sq ft foundation for the Plaintiff's economic loss claim is not supported by any acceptable evidence, including expert or experienced independent commercial realtor evidence. The loss of that foundation in the Plaintiff's non-expert analysis does serious damage to its claim for economic loss damages.

[58] Other fault-lines in the Plaintiff's Vacancy Costs analysis emerge from the fact it fails to account for the fact the City continued to pay rent until April 30, 2008; it fails to take into account at all the reality of lost rents during re-fixturing/leasehold improvements; it is based on speculation as to why prospective tenants declined to express interest; and it unreasonably assumes all 18,000 sq feet of Teddon Building space was experiencing lost rents or reduced rents from February 6, 2008 (including the Plaintiff's own Acumen space), when for 18 months before that almost a third of the Plaintiff's space had already been vacant.

[59] For these reasons, I agree with the City that I can have no confidence that the Plaintiff has proven its case for economic loss damages even if there was defamation, which of course I have also concluded is not proven.

What amounts are owing under the Lease?

[60] Quite apart from defamation, the Plaintiff claims occupancy-related damages on account of the City's leaving the leased premises at the Lease expiry on April 30, 2008.

[61] Through counsel the parties summed up their respective positions in written submissions following the trial.

[62] An issue between the parties is the Lease provision allowing the Plaintiff to charge 15 per cent on certain items. Clause 6.01(g) of the Lease allows a 15 per cent charge for "Management, administration and bookkeeping services" on all occupancy costs set forth in the Lease. All else being equal the City does not take issue with the clause 6.01(g) overhead charge.

[63] On the other hand, the City objects to further invoice charges by Acumen International Management ("Acumen") which is a division of a numbered company owned by Harvey Jaehn and Jacquie Jaehn (Millante).

[64] Another point of contention is the question of the Plaintiff's obligations under a "semi annual preventative maintenance program". The original Lease dated May 1, 1985 was renewed from time to time. In the renewal dated April 24, 1997 for the first time a new obligation was assumed by the Leasor that it would:

> ...initiate and conduct a semi-annual preventative maintenance program on all of the mechanical (including heating, ventilation and air conditioning), plumbing, electrical and other necessary systems.

[65] This wording carried on into the Lease assumed by the Plaintiff. There was little or no evidence at trial however with regard to the meaning of the new obligation, or its scope.

[66] Turning then to the claims themselves, the starting point is a claim for occupancy costs for the January 1-April 30, 2008 period at $1,440.93. This claim does not appear to be in dispute.

[67] Following however are the disputed items and what I find payable or not payable, as the case may be. All amounts include the Article 6.01(g) 15 per cent charge. The amounts stated accord with the City's written submissions, while those in parentheses reflect the Plaintiff' oqwn written submissions, which include the additional Acumen charges. I deal with those Acumen charges on a case-by-case basis.

a) Invoice 33 - $695.20 ($853.43)

   Relates to various work done by or on behalf of the Plaintiff between January 1-March 31, 2008 not including removal and replacement of ceiling tiles, and is allowed in the amount of $853.43.

b) Invoice 44 - $1,907.85 ($2,482.85)

   Relates to carpet cleaning on May 29, 2008. The City was active in the leased premises after its staff vacated in early February, 2008. Whether or not the Plaintiff was in the premises after April 30, 2008, the City was obliged to leave the carpet clean. There is no evidence that it did so. The claim of $1,907.85 is allowed, but without any additional $500 Acumen charge for "overhead and administration" and "attendance to site, project coordination, correspondence and communication" – none of which is not supported by the evidence in relation to having carpet cleaned by a third-party contractor, and would be compensated already by way of clause 6.01(g) in the Lease.

c) Invoice 45 - $7,360 ($9,085)

Relates to the replacement of approximately 800 sq feet of carpet (ie, not all of the carpet in the lease premises) on account of damages in evidence which the Plaintiff says exceed wear and tear, and include punctures, cuts or tears in relation to furniture and/or cabling.

The City relies on *Walker Office Complex Inc v BJC Architects Inc*., 2009 CarswellOnt 9665, at paras 9, 20. The Plaintiff provided no contrary authority. In *Walker*, the court was dealing with a tenancy of some six years, and the question of whether an owner would be obliged at its own expense to repaint a premises to make it tenantable going forward, notwithstanding a "wear and tear" provision in a lease, and likewise whether an owner would be obliged again at its own expense to re-carpet a premises to make it tenantable after even a six-year occupancy period.

The court found such expenses as paint and carpet replacement were the costs of being a landlord in a commercial space, in the circumstances even of a six-year tenancy.

Here the tenancy started in May, 1985 and ended on April 30, 2008. There is no evidence of carpet replacement during that lengthy period. There was some evidence from the City's officer that the carpet was "threadbare and worn". In my view, and notwithstanding that the claim is for partial replacement, and mindful of some evidence of cuts or tears in the carpet, still I find that the wear-and-tear provisions of the Lease apply and relieve the City of any liability for carpet replacement.

d) Invoice 46 - $644 ($874)

Relates to furnace duct cleaning on May 27, 2008. I agree that the City was obliged under the triple net lease to keep the ducts clean, and that there was evidence at trial that they were not. I have considered but reject that this work fell under the scope of the semi-annual maintenance program required to be performed by the Plaintiff, mindful of the lack of any definition of the scope of that provision. The claim is allowed in the amount of $644. The Acumen charge of $200 is not supported by the evidence.

e) Invoice 47 - $632.50 ($862.50)

Relates to replacement of two humidifiers undertaken in February, 2008, during the currency of the City's Lease. I agree with the Plaintiff's position that clause 6.01(b) of the Lease makes it the City's responsibility. Again, I have considered but reject that this work fell under the scope of the semi-annual maintenance program required to be performed by the Plaintiff. The claim is allowed in the amount of $632.50. The Acumen charge of $200 is not supported by the evidence.

f) Invoice 48 - $6,900 ($8,970)

Relates to apparent repairs of an HVAC system that took place in 2011, long after the lease expiry. The Plaintiff explains the work was delayed because it had no tenants for the space. The Plaintiff notes further that it was charging only a fraction of the amount new furnaces would have cost, on the basis that repairs alone to the older existing furnaces would have been $6,500.

The only evidence in support of this claim is Invoice #48 itself, which is the Plaintiff's document, together with two pages of handwritten notes which Mr. Jaehn indicated were based on conversations with various unnamed contractors. There is no independent record in support of the $6,500 estimate of the cost of repair, or indeed in support of the need for repair. Mr. Jaehn acknowledged in his evidence that no repairs were ever undertaken; rather, new furnaces were installed long after the expiry of the City's Lease. Mr. Jaehn also acknowledged in his evidence that the reduced $6,000 claim was "purely my opinion" as to what was a reasonable claim in the circumstances.

I agree with the City's position that on the evidence the claim is speculative and fails, as does the claim by Acumen for an additional $1,800.

g) Invoice 49 - $8,825.01 ($11,021.36)

Relates to the replacement of the entire ceiling in the City's former space, and on the basis of the space being rebuilt into four leasable units. The Plaintiff points to evidence of damaged ceiling tiles. However, I agree with the City's position that it was unnecessary to address any such damage by replacing the *entire* ceiling at significant cost. No alternate or reduced estimate was in evidence at trial. It was Mr. Jaehn's evidence that the entire ceiling needed to be replaced for reasons of tile uniformity. This was not supported however by any independent evidence. And elsewhere in the trial there was evidence of the satisfactory approach of only certain tiles being replaced in the premises owing to water-related damage.

All of this being said, I agree there was some evidence at trial of damaged ceiling tiles which were not obviously the result of wear and tear. On a best-evidence basis, I find that 25 per cent of the $8,825.01 claim should be allowed. I also allow 25 per cent of the Acumen claim for $900 which is itemized specifically as "waste removal, transport and disposal" and thus some minimal evidence of actual work by Acumen that was not also clearly some other party's contractual responsibility. As to the other items "overhead and administration" and "project supervision and site management" again those claims fail as I find them unsupported by the evidence and in any event covered by the 15 per cent charge pursuant to clause 6.01(g) of the Lease.

h) Invoice 51 - $805 ($1,150)

Relates to the purchase and installation of a new dishwasher. On its departure the City removed a dishwasher from built-in space; although the evidence could be clearer, if the dishwasher that was removed was the City's, it likely replaced an existing dishwasher in the space when it assumed its occupancy years earlier. Granted, no replacement dishwasher was actually purchased, but I find the claimed cost of doing so is reasonable, and award the $805 claimed. The additional Acumen claim is not supported by the evidence.

i) Invoice 52 - $24,054.49 ($31,413.49)

In support of this claim the Plaintiff points to clauses 7.04, 7.08 (a), and 7.08 (c) of the Lease. It properly notes that to be decided is the extent of the tenant's obligations under the Lease to "surrender the demised premises in the same condition as when they obtained possession...reasonable wear and tear excepted". It is Mr. Jaehn's evidence that the work done by the subcontractor was fair and reasonable and needed to be done to make the premises tenantable. That aside, and together with some photographs, the evidence comes out of a two-page "quotation" that itemizes:

- $1,625.75 for "front door recondition/reinstate. This relates to a doorway that needed to be re-opened after the City walled it over to create a boardroom;
- $5,682.32 for baseboard removal and installation. No evidence exists for the wholesale removal and replacement of these baseboards, as distinct from at least some evidence of the need for repairs/replacement where baseboards were damaged or missing;
- $13,608.91 for painting (including "minor patches as necessary" and two coats of paint.

In response to this claim the City notes it had occupied the leased premises since May 1, 1985, giving rise to a ready inference of considerable wear and tear from the condition of the premises at the beginning of the lease period: clause 7.08(a) of the Lease. The City again relies on the decision in *Walker*.

Invoice #52 includes $6,400 in charges by Acumen but again, no additional specific support for any such work is provided other than a hand-written note that simply repeats the $6,400, as divided between the now-familiar "overhead and administration, site management and supervision" and the less common claim of "labour, set-up, construction support, and clean-up".

I find the $1,625.75 claim is supported by the evidence and it is allowed. With regard to the baseboards claim, the evidence is scant but there is *some* support for the claim, which I set generously at 25 per cent of the $5,682.32 expense. The claim for painting and wall repair

> fails on the basis of the wear-and-tear finding in *Walker* with which I agree. The Acumen claims fail as they are not supported by the evidence, which includes that the contractor's quotation which specifically included labour, freight, and garbage removal. What Acumen added in the way of "labour, set-up, construction support, and clean-up" is not evident from any part of the trial evidence, including the testimony of Mr. Jaehn and Ms. Millante, who are the owners of Acumen. The remaining Acumen claims are again covered by clause 6.01(g) of the Lease.

j) Invoice 53 - $2,380.50 ($3,225)

> Relates to the replacement of an electrical panel; I agree with the City's position that on the evidence or lack thereof the need for a replacement had nothing to do with the City or any of its obligations under the Lease. Acumen's charges too are not supported by the evidence.

[68] With regard to interest on the damages as awarded, the City relies on ***Courtenay Lodge Ltd. v Forbidden Brew Corp***, 2017 BCSC 1850 for the proposition that on account of the Plaintiff "continuously altering and amending their invoicing, including during the trial", the payments in dispute did not actually come due as there was no certainty of amounts owing. However, the facts in ***Courtenay Lodge*** are distinguishable. After a lengthy review of the facts of the case (at paras 40-56), the summary trial judge in the case concluded as follows, at para 57:

> [57] Simply put, the landlord has withdrawn every invoice it issued to the tenant prior to the renewed Lease term, and is now claiming for payment of invoices delivered on January 31, 2017. The tenant says that all of the invoices are still not due given the landlord's failure to provide the details required to understand their basis, but in any event, no earlier invoices are due, having been withdrawn by the landlord as inaccurate, and such invoices should not be able to give rise to a default by the tenant.

[69] In the case before me, there is some variability in the claims as between $113,324.86 (as pleaded) and various amounts claimed in the trial: $118,991.10 (Exh 10, TAB 11), $74,573.59 (Exh 7, TAB 1), then $72,993.24 (Exh 8). While it is true there was some variability in these claims, in the end they are not significant. Further, the individual claims, if not their cumulative total, are likely to have been before the City for some time before trial. I have no reason to doubt that the amounts which I have allowed were known to the City soon after the dates on the documents exhibited at trial. For these reasons, I am not persuaded that I should follow ***Courtenay Lodge*** to find that Lease interest should run only from the date of this decision. It will be for the parties to calculate the interest owing under the terms of the Lease for those items I have allowed.

The City's claim against the Plaintiff

[70] As noted, the parties agreed at trial that subject to a liability finding, the City's claim against the Plaintiff is in the amount of $71,200.55. Receipts and other documents relating to that sum are at Exh 10, Tabs 33-39 in the trial evidence. A key document is the City's April 14, 2008 agreement with Advanced Remediation Solutions "in connection with the cleaning of contents"

of the leased space after City staff left the leased premises in early February, 2008. The invoice for the work was $69,690.66.

[71] The City's claim hinges not on what was *believed* at the time, but rather on what it could prove at trial in the way of a condition in need of remediation in its leased space.

[72] A great deal of expert and other evidence was heard at trial with regard to whether it was possible that mould in a part of the Plaintiff's building *not* occupied by the City could have conceivably found its way to the City's leased space.

[73] In argument the City clarified it does not say mould moved from one part of the building to another, for example by way of an HVAC system. Rather, the City points to evidence that the conditions precedent for mould growth existed in 2007 and early 2008. It says that this alone justified the City's move away from the space and remedial efforts thereafter.

[74] In my view, and for what it's worth, the evidence at trial was overwhelmingly in the Plaintiff's favour that none of the mould found in the south part of the Plaintiff's building did or could have found its way into the north part of the building occupied by the City. In making this finding, I accept the evidence of experts Albert Biel, and Chris Dawn. Mr. Biel for example produced a report and expert opinion statement dated March 6, 2021. In his opinion, the Plaintiff's building was actually two buildings with separate HVA systems and with no air flow between the north and south buildings. He commented that while he found Dr. Ho's report "very compelling" with regard to mould growth generally, Dr. Ho was not well informed with regard to HVAC systems work or how floor separations are constructed.

[75] Chris Dawn's report through Cascade Environmental Consulting dated March 1, 2021 is to a similar effect regarding the unlikelihood of mould carrying from one HVAC system in the Teddon Building into the other.

[76] With regard to the City's "condition precedent" argument, in my view it is undermined by the lack of evidence of mould ever being found within the City's leased premises. Neither of the only two experts qualified at trial gave evidence upon which I would find as a fact that even a "condition precedent" risk of mould growth existed in the City's leased space at any material time.

[77] That leaves the evidence attributed to Dr. Ho. But as noted, Dr. Ho was not a witness at trial, and was not presented as an expert witness either at trial or in his before-trial questioning. That did not stop Dr. Ho from expressing many opinions during that questioning, but none of his opinion evidence for example regarding conditions precedent for mould growth in the City's leased space in 2007/2008 is admissible or entitled to weight in the trial on the City's claim for remedial damages.

[78] It follows that I find insufficient proof of Plaintiff-caused environmental harm in the City's leased space, and no claim for set-off is sustainable against the Plaintiff for the City's decision to spend $71,200.55 resolving what it believed was a harmful situation but which, in the end, was not.

V. Conclusion

[79] The Plaintiff was not defamed by the City in its words, including a consideration of the surrounding circumstances. Further or in the alternative, the Plaintiff has proven no defamation-related damages.

[80] The Plaintiff is entitled to a portion of its claim under the Lease, including Lease interest.

[81] The Defendant's claim for set-off is dismissed.

[82] If they are unable to agree, the parties may address costs, including costs in relation to discontinuances, by way of written submissions.

Heard between June 6-16, 2022, with further written submissions received June 27 and July 12, 2022.

Dated at the City of Edmonton, Alberta this 29th day of June, 2023.

Peter Michalyshyn
J.C.K.B.A.

Appearances:

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Sharek & Co.
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