COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Centurion Apartment Properties (Scott Road 1) Inc. v. Piquancy Enterprises, Ltd.,* 2024 BCCA 387

Date: 20241121
Docket: CA49693

Between:

Centurion Apartment Properties (Scott Road 1) Inc.

Appellant
(Defendant and Plaintiff by Counterclaim)

And

Piquancy Enterprises Ltd., Harwinder Kaur Bannu, Rupinder Kaur Dhillon, and Gurnirvair Singh

Respondents
(Plaintiffs and Defendants by Counterclaim)

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Grauer
The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated January 26, 2024 (*Piquancy Enterprises Ltd. v. Centurion Apartment Properties (Scott Road 1) Inc.*, 2024 BCSC 204, Vancouver Docket S224387).

Counsel for the Appellant:	J. Cytrynbaum L. Rogers
Counsel for the Respondents:	A. Paranagama
Place and Date of Hearing:	Vancouver, British Columbia October 29, 2024
Written Submissions Received:	November 4, 2024
Place and Date of Judgment:	Vancouver, British Columbia November 21, 2024

Written Reasons by:
The Honourable Mr. Justice Grauer

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Justice Donegan

Summary:

The appellant challenges the trial judge's reduction of losses claimed for the breach of a commercial lease, arguing that the landlord was not required to accept the tenant's repudiation of the lease earlier than he did, and that the onus to prove failure to mitigate damages lies with the respondent, not the appellant as the trial judge found. Held: Appeal allowed. The trial judge erred in law by placing the onus to prove failure to mitigate on the appellant, and by reducing damages on the ground that the appellant acted unreasonably in not terminating the lease earlier. Full damages awarded.

Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

[1] This case is about a landlord's obligations when it affirms a lease its tenant has repudiated, and then, later, accepts the tenant's ongoing repudiation. Here, the respondent tenant ("Piquancy") refused to occupy the premises and paid no rent after it discovered that the premises could not practicably be used for its intended purpose of operating a fast food franchise. It had not exercised due diligence in this regard prior to entering into the lease.

[2] The appellant landlord ("Centurion") claimed for unpaid rent during the period between the tenant's repudiation and the landlord's eventual acceptance of that repudiation. It also claimed for damages thereafter. The judge awarded compensation but (1) reduced the amount for unpaid rent on the basis that Centurion had acted unreasonably in waiting as long as it did to accept Piquancy's repudiation, and (2) reduced the damages on the ground that Centurion had failed to mitigate its damages adequately following its acceptance of Piquancy's repudiation. The question is whether the judge was correct in doing so.

[3] For the reasons that follow, I respectfully conclude that the judge erred in reducing the awards. As I shall explain, where a landlord affirms the lease after the tenant repudiates it, its claim is for rent owing under the lease, not for damages. The law imposes no duty on the landlord to mitigate or otherwise act to reduce that claim. It is entitled to the rent as a matter of contract. After a landlord accepts the repudiation, then the contract is at an end and the landlord is entitled to claim

damages for its breach. In this event, following termination of the contract, a duty to mitigate indeed arises but the law imposes on the tenant the onus of demonstrating that the landlord has failed to mitigate. The judge placed the onus instead on the landlord, but the tenant bore the onus and did not meet it in this case. Accordingly, I would allow the appeal.

2. BACKGROUND

[4] Piquancy entered into a 10-year lease of commercial premises with Centurion on February 15, 2022. Piquancy proposed to operate a fast food franchise. The lease provided for a two-month fixturing period commencing May 1, 2022, with the lease to commence on July 1, 2022, at a monthly rent of $5,184.75 for the first two years.

[5] There was a problem. The premises were not equipped with venting for grease-laden vapours, which the tenant would require. By Schedule D to the lease, the tenant acknowledged that "there is no venting provision in the Premises for grease laden vapours and […] an ecologizer or similar equipment may be required to satisfy the City of Surrey's requirements." The tenant later discovered that, due to the nature of the building, the premises could not practicably accommodate the venting required by the City of Surrey's bylaws.

[6] Before that discovery, however, Piquancy had waived a number of conditions precedent that were for its benefit, including these:

- being satisfied with the landlord's form of lease;
- being satisfied with the "as-is, where-is" condition of the premises;
- being satisfied that the City of Surrey will approve the tenant's use of the premises; and
- being satisfied that the space and services available on the premises are suitable for its use.

[7] Following the removal of these subjects, the lease became unconditional. Piquancy's directors signed the lease as indemnifiers. Piquancy was required to,

and did, pay a security deposit of $17,992.02. Default conditions included breach by the tenant of any of its obligations in the lease that it failed to remedy within 10 days of written notice, and abandoning the premises or leaving them vacant for more than seven days.

[8] In late March 2022, after waiving the conditions precedent but before the commencement of the fixturing period, Piquancy inquired of Centurion about the premises' capacity to vent grease-laden vapours through the existing kitchen exhaust shaft. Centurion advised Piquancy that this was not possible, as set out in Schedule D, so the tenant may need to install an ecologizer or similar equipment. This would be Piquancy's responsibility. The tenant did investigate, but as noted, the installation of appropriate ventilation proved to be impracticable.

[9] On April 29, 2022, Centurion sent Piquancy a notice of possession for the start of the fixturing period on May 1, 2022. Piquancy refused, however, to take possession of the premises, and paid no rent (which became due beginning July 1, 2022). In short, Piquancy repudiated the lease and commenced action against Centurion on May 31, 2022, seeking rescission or termination of the lease and damages.

[10] Centurion did not accept this repudiation, and affirmed the lease. In December 2022, it applied the security deposit toward the overdue rent.

[11] On February 3, 2023, Centurion accepted Piquancy's continuing repudiation and terminated the lease. It re-let the premises to a new tenant with a fixturing period starting May 1, 2023, and lease payments beginning September 1, 2023, at a rent about 10% less than what was payable under Piquancy's lease. It issued a counterclaim against Piquancy.

3. THE PROCEEDINGS BELOW

[12] Centurion applied by way of summary trial for judgment against Piquancy and its principals on its counterclaim, and for a dismissal of the tenant's action. That

application was heard on January 16, 2024. The judge gave oral reasons for judgment on January 26, 2024, which are indexed at 2024 BCSC 204.

[13] The judge found that the matter was suitable for resolution by summary trial (para 34). He then turned to the question of whether Piquancy had breached the lease. He noted that defences raised by Piquancy were not applicable. He found no misrepresentation concerning the state of the premises, concluding that the landlord had been transparent in that regard (para 46), whereas Piquancy had failed to perform due diligence before waiving the tenant conditions (para 47). He found that the defence of mistake was not applicable (para 48), and that the lease was not frustrated (para 49). He concluded that Piquancy was in breach of the lease (para 50), and that its directors were liable as indemnifiers (para 57). He dismissed Piquancy's action. There is no cross-appeal and none of these findings is contested.

[14] The judge then turned to the question of damages, observing that Centurion asserted entitlement to the sum of $105,679, based on (1) the unpaid rents to the time it entered into the new lease (through April 1, 2023), and (2) the rent it lost from May 1, 2023, by virtue of signing the second lease agreement at lower monthly lease payments (para 64).

[15] After noting that, by May 12, 2022, both parties knew the premises could not be used for the purpose of operating a restaurant without major structural changes to the whole building, the judge said this:

> [68] In my view, it was unreasonable in these circumstances for Centurion to wait until February 2023 to terminate the lease. It should have taken this step no later than October 1, 2022, three months after the date on which Piquancy was required to make its first lease payment and five months after the fixturing period commenced. This is because as of May 12, 2022, Centurion knew that Piquancy could not use the premises for the restaurant.

[16] In Centurion's submission, this statement is wrong in law. Having elected to affirm the contract in the face of the tenant's refusal to take possession and pay rent, the landlord was under no legal obligation to terminate the lease within the time period cited by the judge, or any other. This raises a question of law, reviewable on a standard of correctness.

[17] The judge went on to discuss mitigation:

> [69] Centurion did not lead any evidence on its efforts to mitigate its losses, aside from providing a second lease agreement. Specifically, it did not provide evidence of its efforts to re-let the premises to other parties, the lease terms available at the relevant time, or the general market conditions. It relies solely on the second lease agreement as evidence of its mitigation efforts.
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> [70] In my view, this is insufficient to support its claim for $54,475.68 in damages arising from the purported difference in the lease payments it expected to receive pursuant to the lease and those contemplated in the second lease agreement.

[18] Next, the judge turned to the part of the claim relating to unpaid rent up to the time of termination. This comprised the rent owing for the months from July 1, 2022, to the termination date of February 3, 2023. Having found that the landlord acted unreasonably in delaying termination after October 1, 2022, the judge allowed the claim for unpaid rent only for July, August, and September 2022:

> [71] Had Centurion terminated the lease by October 1, 2022, and made efforts to mitigate its losses accordingly, its losses probably would have been lower. I am satisfied that Piquancy is liable for its failure to pay rent for July, August, and September 2022. Based on Centurion's records, Piquancy owed Centurion $20,770.57 as of October 1, 2023. Applying the security deposit of $17,992.02 to this amount yields net rent owing by Piquancy for this period of $2,778.55.

[19] The judge said nothing about the rent unpaid in October–December 2022 and January–April 2023. Instead, he turned to the claim for damages resulting from the lower rent under the new lease from May 1, 2023 over the remainder of the term, reducing that part of the claim by 50%:

> [72] I am not satisfied, based on the evidence adduced by Centurion, that it adequately mitigated its losses in respect of the difference between the lease payments it expected under the lease and the payments it expects to receive pursuant to the second lease agreement. I am therefore discounting the claimed amount, $54,475.68 by 50 percent.
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> **Disposition**
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> [73] Centurion is entitled to damages of $2,778.55 plus $27,237.84, for a total of $30,016.39. These damages are payable by Piquancy and the directors.

[20] The way in which the judge analysed the damages claim resulted in no compensation at all for outstanding rent over the period from October 2022 through

April 2023, although losses due to the differential in rent in the period after April 2023 were compensated with a discount of 50%.

[21] Centurion submits that the judge wrongly placed the onus on it to demonstrate that it took reasonable steps to mitigate its losses, rather than on Piquancy to show that Centurion did not act reasonably.

[22] This, too, raises a question of law reviewable on a standard of correctness.

4. DISCUSSION

4.1 Reducing the claim for unpaid rent pre-termination

[23] In my respectful view, as Centurion submits, the judge erred in law in applying mitigation principles to its claim for unpaid rent during the time that the lease remained in force (until its termination on February 3, 2023). This Court reviewed the law in this regard in *Anthem Crestpoint Tillicum Holdings Ltd v Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI*, 2022 BCCA 166:

> [76] What is referred to as the duty to mitigate is not a duty at all. It is simply shorthand for the principle that a plaintiff cannot recover damages that could have been avoided by taking reasonable steps available at the time. If, upon HBC's failure to pay the rent required under the Lease, Anthem had elected to terminate the Lease and sue for damages, Anthem's recovery would have been limited by this principle. Anthem could not have recovered for any reasonably avoidable loss, and in that sense, would have had a practical obligation to mitigate its loss.
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> [77] Because Anthem elected to disregard HBC's repudiation of the Lease and keep the Lease in effect, it was under no obligation to mitigate its loss. This principle was stated by this Court in *Transco Mills Ltd. v. Percan Enterprises Ltd*. (1993), 100 D.L.R. (4th) 359 [*Transco Mills*], where Taylor J.A. stated (at 370):
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> > There is in my view no basis on which a landlord of commercial premises can be required to mitigate its loss where it maintains the lease in existence and claims for rent due.
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> [78] The principle that there is no duty on a landlord to mitigate loss when the lease is maintained in effect has been accepted by courts throughout Canada: *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2018 BCSC 66 at para. 349 ("the landlord's duty to mitigate arises only upon termination of the lease"); *7Marli Limited v. Pet Valu Canada Inc.*, 2017 ONSC 1796 at para. 27 ("there is no duty to mitigate if the landlord chooses to keep the lease alive"); *3709303 Manitoba Ltd. v. Maxer Ltd.*, 2008 MBQB 219 at para. 35 ("if the landlord/tenant relationship survives, namely that the lease

> has not been terminated whether in fact or by operation of law, there is no duty to mitigate"); *Innotech Aviation v. Skylink Express Inc*., 2018 NSSC 93 at para. 19, aff'd 2018 NSCA 32, citing *AGC Flat Glass North American Ltd. v. CCP Atlantic Speciality Products Inc.*, 2010 NSSC 108 at para. 32 ("In deciding whether the landlord has a duty to mitigate, it is important to distinguish between repudiation and termination. The latter triggers a duty to mitigate; the former does not."); *B.G. Preeco 3 Ltd. v. Universal Explorations Ltd*. (1987), 42 D.L.R. (4th) 673 (Alta. Q.B.) at 673 ("so long as [the action] is a suit for rent as such, there is no duty to mitigate, that duty being concomitant to an action for damages").
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> [Emphasis added.]

[24] It follows that, in law, Centurion had no obligation to mitigate any loss arising from the failure of the tenant to pay the rent owed under the lease during the time that Centurion affirmed the lease and kept it alive. Consequently, Centurion is entitled to recover the rent owing for the period from July 1, 2022, through the date of termination, February 3, 2023.

[25] Piquancy argued that this case should be distinguished from *Anthem* on the ground that Piquancy never entered into possession, and never began paying rent, because it became apparent right away that the premises were not suitable for its purpose. In this way, Piquancy argued, this case is unlike *Anthem* and other similar cases because the tenant had not simply stopped paying rent. It never started. In the circumstances of this case, Piquancy submitted, the organizing principle of good faith contractual performance explained in *Bhasin v Hrynew,* 2014 SCC 71, and *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, obliged Centurion to act reasonably by terminating the contract earlier, as the judge suggested.

[26] As I see it, the fact that Piquancy never began paying the rent it owed under the lease it entered into, as opposed to ceasing to pay it during the currency of the lease, is not a valid basis for distinguishing this case from *Anthem*. Piquancy could provide no authority to support its argument. With respect to the relevance of *Bhasin* and *Wastech*, this Court addressed the same argument in *Anthem*:

> [89] In *Bhasin*, the Court recognized that good faith contractual performance was a general organizing principle of the common law of contract. Contracting parties generally must perform their contractual duties

> honestly and reasonably and not capriciously or arbitrarily: *Bhasin* at para. 63.
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> [90] As part of the principle of good faith, there is a common law duty to act honestly in the performance of contractual obligations. Honest performance means that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract": *Bhasin* at para. 73.
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> [91] Honest performance is not an issue in the case at bar. HBC does not allege that Anthem lied or otherwise knowingly misled HBC in respect of a matter directly linked to the performance of the Lease. The issue here is the duty to exercise contractual discretion in good faith.
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> [92] In *Wastech*, the Court explained the scope of good faith contractual performance beyond the duty of honest performance. The parties in *Wastech* had entered into a long-term contract in which one party was given the contractual discretion to determine the minimum amount of waste to be transported to a particular landfill. The party with discretion exercised it in a manner that was highly disadvantageous to the other party. The question was whether this exercise of discretion breached the obligation of good faith performance. The Court held that it did not.
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> [93] The Court's analysis in *Wastech* clarifies the scope of the doctrine of good faith contractual performance in a number of ways. It is sufficient for the purposes of this appeal to note that the obligation explained in *Wastech* relates to a discretionary power conferred by a term of the contract. The duty to exercise contractual discretion in good faith is said to require the parties "to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract": at para. 63 (emphasis added).
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> …
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> [95] In my opinion, the principles set out in *Bhasin* and *Wastech* have no application to the election by Anthem to affirm the Lease and the related decision not to take any steps to relet the premises. This decision by Anthem did not engage a discretionary power conferred on a clause in the Lease. Anthem was not exercising a contractual discretionary power, but rather a remedial right conferred by the general law of contract as applied to leases.

[27] The same reasoning, in my view, applies here. Honest performance is not an issue. Piquancy's allegation of misrepresentation was rejected by the judge, and that finding is not contested on appeal. No other departure from honest performance was alleged. Similarly, this case does not involve a discretionary power conferred by a term of the contract, but rather a remedial right conferred by the general law of contract.

[28] This case is also completely unlike *Ginter v Chapman* (1967), 60 WWR 385, 1967 CanLII 810 (BCCA), upon which Piquancy relied for the proposition that ensuring that proper justice is done depends on the interpretation that ought to be placed on the conduct of the parties (at 400). That case involved an agreement for the purchase of shares where the appellants claimed damages based on the respondent's wrongful repudiation of the agreement. The problem was that the appellants had not elected to accept the repudiation and communicate that election to the respondent within a reasonable time. This Court concluded that the proper inference on the evidence was that both parties walked away from the agreement and abandoned it. The circumstances do not in any way equate with those arising here, and nothing in that case suggests a duty to act more quickly to terminate a lease once the tenant has defaulted, notwithstanding that the landlord has affirmed the lease.

4.2 Mitigation of damages post-termination

[29] Once Centurion did terminate the lease, then the issue of reasonable mitigation was in play. Post-termination, Centurion seeks the rent owing for March and April 2023, together with damages comprising the difference in rent payments between the new lease and Piquancy's lease. (It puts the value of the rent owing through April 1, 2023, after deduction of the damage deposit, at $51,203.71; Centurion did not separate out the rent owing while the lease was kept alive from that accruing after termination and before the new lease.) It puts the value of the damages arising from the difference between the two leases at $54,475.68. There is no doubt that a claim for damages of this sort, post-termination, is subject to reduction in the event of a proven failure to mitigate the loss.

[30] As the judge noted (quoted above), Centurion "did not lead any evidence on its efforts to mitigate its losses, aside from providing a second lease agreement." Re-letting the premises does, of course, constitute an effort to mitigate the loss ensuing from Piquancy's breach; the question is whether that effort was reasonable in all of the circumstances. In this regard, as the judge observed, there was no evidence of

Centurion's "efforts to re-let the premises to other parties, the lease terms available at the relevant time, or the general market conditions" (para 69).

[31] The judge nevertheless concluded that "[h]ad Centurion terminated the lease by October 1, 2022, and made efforts to mitigate its losses accordingly, its losses probably would have been lower" (para 71). He therefore deducted 50% from Centurion's claim for the loss arising from the difference between the two leases beginning May 1, 2023. The judge did not explain on what basis or on what evidence he determined that the 50% reduction was appropriate. Nor did he deal with the unpaid rent from October 2022 to the time the new lease came into effect on May 1, 2023.

[32] It may be that the reduction of 50% was intended in part to reflect the fact that Centurion's calculation of the loss arising from the difference between the two leases ($54,475.68) had not been reduced to its present value, as it should have been. At our request, Centurion has since provided a calculation indicating that the present value of the difference between the leases comes to $50,059.05. Piquancy has not contested this calculation.

[33] But was it proper to reduce this head of damage further for failure to mitigate? In my respectful view, it was not. This is because the onus of establishing that a party failed to take reasonable steps to mitigate its loss is on the party raising that defence; here, Piquancy. And Piquancy led no evidence whatsoever in this regard, having conducted no discovery that would have assisted in exploring the issue, and submitting no expert reports.

[34] The Supreme Court of Canada dealt with this problem in *Keneric Tractor Sales Ltd v Langille*, [1987] 2 SCR 440, 1987 CanLII 29, a case involving a lease of farm equipment under which the appellant defendants had defaulted. The defendants submitted that by reselling the leased equipment instead of re-letting it, Keneric had not taken reasonable steps to mitigate its damages. The Court noted that there was no evidence about the economics of re-letting, so the burden of proof was of critical importance. On that question, the Court said this at 459–460:

> It seems quite clear that the burden of proof falls on the defendant. As Laskin J., speaking for the Court in *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, noted at p. 331:
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> > If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.
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> … The Langilles did not discharge the burden of proving that Keneric's resale constituted inadequate mitigation.
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> [Emphasis added.]

[35] Here, the burden of proof fell on Piquancy—not on Centurion, where the judge placed it. Centurion demonstrated that it did indeed re-let the premises, which, of course, reduced the losses it would otherwise sustain from Piquancy's breach of its 10-year lease. The burden then fell on Piquancy to demonstrate that this was not reasonable mitigation in the circumstances: for instance, because Centurion delayed unreasonably in going to market after terminating the lease, or that the rent payable under the new lease was below market rents for similar premises in the area.

[36] It follows, in my respectful view, that the judge erred in reducing this part of Centurion's claim by 50%—or at all—because of the failure to mitigate. There was no evidence to support the suggestion that Centurion's steps in reletting the premises did not constitute reasonable efforts to mitigate its damages. The judge erred as well in failing to address the claim for unpaid rent in March and April 2023.

[37] On the uncontested evidence of Centurion, the rent unpaid through April 2023, net of the damage deposit, amounts to $51,203.71. This includes unpaid rent to the date of termination, which is not subject to reduction for mitigation, and the unpaid rent for March and April 2023, as to which there was no evidence to support a claim of failure to mitigate. To this must be added the present value of the loss over the period from May 2023, when Centurion entered into the new lease. Once again, there was no evidence to support a claim of failure to mitigate, but the figure of $54,475.68 presented to the judge must be reduced to its present value of $50,059.05. Again, these calculations were not contested.

5. DISPOSITION

[38] For these reasons, I would allow the appeal and substitute an award of $101,262.76 for the judge's award of $30,016.39.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Justice Donegan"