aIN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kingsgate Property Ltd. v. Vancouver School District No. 39,* 2024 BCSC 2325

Date: 20241220
Docket: S240563
Registry: Vancouver

Between:

Kingsgate Property Ltd. and Beedie Development LP

Appellants

And

The Board of Education of School District No. 39 (Vancouver), formerly known as The Board of School Trustees of School District No. 39 (Vancouver)

Respondent

Corrected Judgment: The text of the Judgement at paragraphs 9, 13, 14, 30, 44 and 67 were corrected on January 6, 2025.

Before: The Honourable Justice Chan

Reasons for Judgment

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Place and Date of Trial/Hearing:	Vancouver, B.C. October 7–9, 2024
Place and Date of Judgment:	Vancouver, B.C. December 20, 2024

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Introduction

[1] The parties have a long-term lease of the lands at Kingsgate Mall in Vancouver. The lease allows for multiple renewal options, with rent based on market value at set dates. The appellants Kingsgate Property Ltd. and Beedie Development LP ("Beedie") appeal from an arbitration award in 2022 determining the market value of Kingsgate Mall for the purpose of setting rent for the next renewal period in the lease. Beedie as the tenant argues the arbitration panel in 2022 mischaracterized an earlier arbitration award which determined how market value for the property should be assessed, resulting in a market value almost six times higher than it ought to have been if the proper interpretation had been applied.

[2] Under the lease, the lands are to be valued based on potential use. The lease provides that rent is a fixed percentage of the value of the lands based on a use that is "immediate". Depending on how "immediate" use is interpreted, the difference in the market value of the lands, and thus the rent, is significant.

Factual Background

[3] The respondent is the Board of Education of School District No. 39 ("VSB"), the owner of the lands at the southeast corner of Kingsway and East Broadway in Vancouver. VSB leased the lands to Royal Oak Holdings Ltd. ("Royal Oak") in 1972. Pursuant to the terms of the lease dated November 20, 1972, Royal Oak constructed a shopping centre, which became known as Kingsgate Mall. The lease precludes any other use of the lands unless VSB agrees to it.

[4] The 99-year lease consists of an initial 25-year term and renewal options for periods of 10 years, with the last renewal option for a term of four years. Rent was agreed to between the parties for the initial 25-year term. The lease under s. 29.09 provided how rent was to be determined for each renewal period if the parties could

not agree. The rent is set at 8.25% of the market value of the lands, to be determined as set out below:

> Section 29.09 Determination of Renewal Lease Rent
>
> If the LESSOR and the LESSEE do not agree in writing upon the BASIC RENT for any of the renewal leases at least six (6) months before the expiration of the TERM or the renewal term next preceding the renewal term in respect of which the BASIC RENT has not been agreed upon, the BASIC RENT for each year of the last mentioned renewal term shall be an annual amount computed on the basis of eight and one-quarter (8-1/4%) percent of the market value of the SAID LANDS at the date which shall be six (6) months before the expiration of the TERM or the renewal term next preceding the renewal term in respect of which the BASIC RENT has not been agreed upon, as the SAID LANDS would be valued at that time if vacant and ready for immediate development to their highest and best lawful use by a person or persons ready, willing and able to purchase and develop the SAID LANDS for that immediate use and such market value of the SAID LANDS shall be determined by arbitration as provided in Article XXIV…
>
> (Emphasis added.)

[5] The first renewal term started on November 20, 1997. Royal Oak exercised its option to renew. The parties could not agree on rent and proceeded to arbitration. The arbitration hearing was held in 1999 to determine the market value of the lands as it was at May 20, 1997. The panel consisted of three arbitrators, as set out in the lease, and the panel issued a majority award (the "1999 Majority") with a dissenting opinion (the "1999 Dissent").

The 1999 Tribunal

[6] The question to be determined by the arbitration panel was "…what is the market value of the lands leased thereby as at May 20, 1997, valued if vacant and ready for immediate development to their highest and best lawful use by a person or persons ready, willing and able to purchase and develop the said lands for that immediate use?": 1999 Majority at 3.

[7] The 1999 Majority set out two steps: "…firstly, how to interpret the relevant provisions of the Lease and, secondly, having done so, to fix the market value based on that interpretation": 1999 Majority at 4. The 1999 Majority found the wording in the lease to be unique, and noted the panel was not referred to any authorities with similar

language: 1999 Majority at 4. The 1999 Majority focused on the word “immediate”, which appeared twice, and held the panel “must decide which of two different zoning categories of the City of Vancouver fall within the meaning of the words “immediate” in section 29.09”: 1999 Majority at 5.

[8] The lands were zoned C-3A under the city’s Zoning and Development Bylaw, and this zoning provided for “an outright approval use, which is a legal entitlement, and a conditional approval use, which involves the exercise of discretion by the City’s Development Permit Board”: 1999 Majority at 5. The outright approval use included a broad range of retail uses to a maximum development density floor space ratio (“FSR”) of 1.0: 1999 Majority at 5. A development permit for an outright use could be obtained within seven to 12 weeks. The conditional approval use allowed a range of other uses, such as manufacturing and residential, to a maximum permitted density of 3.0 FSR. Approval of a conditional use is discretionary, takes substantially longer to obtain, and the process is subject to public notification. One of the expert witnesses advised the fastest time he had obtained a conditional use permit was 60 weeks: 1999 Majority at 5.

[9] The 1999 Majority at p. 7 held the use of “immediate” twice in the section was significant:

> …But we have to look at the addition of the word "immediate", qualifying not only "development" but also "use". It is only the Respondent's position, in our determination, that acknowledges this dual use of the adjective. We already know from both experts that an outright use can be secured far more quickly than a conditional one, thus being more "immediate" in terms of time. But it is the additional fact of certainty in being able to develop for the outright use that tells the "person or persons ready, willing and able to purchase and develop the SAID LANDS" what the "immediate use" is. The phrase "that immediate use" distinguishes it from uses that are not immediate.
>
> We are not prepared to construe section 29.09 without giving the use of the word "immediate" twice in the clause the natural meaning attributed to that word…

[10] The 1999 Majority concluded at p. 8 that the outright approval 1.0 FSR use was the proper use to be applied to the determination of market value:

> We do not consider that any proper review of the facts, the comment and the evidence that was agreed on by both experts would lead one to the conclusion that the more lengthy process to achieve the discretionary conditional use was a use that was "forthwith", "without any delay" or "next adjacent". Rather, these descriptions apply to the outright approval use of Schedule C3A of the Zoning and Development By-Law.
>
> In addition, the very fact that the conditional use is discretionary, and not a legal entitlement, defeats coming within the concept of "immediate development" or "that immediate use". In exercising its discretion to approve such a conditional use, the City's Development Permit Board must consider the intent of the zoning schedule, the policies of City Council and the submissions of property owners, advisory groups and tenants. Therefore, we are of the view that, of the applicable zoning uses under City of Vancouver bylaws, the outright approval 1.0 FSR use in the C-3A zoning schedule is the proper use to be applied to the valuation arising from the proper construction of section 29.09…

[11] Using the outright approval use, the 1999 Majority determined the market value of the lands in May 1997 was $6,241,275. Rent for the first renewal period was $514,905 per year as 8.25% of the market value (the "1999 Award").

[12] The dissenting opinion found the market value ought to be based on the conditional use permit of 3.0 FSR, which market value was found to be $11,320,000. The dissent construed s. 29.09 using the intentions of the parties, including that VSB intended the lands as an investment vehicle.

Application for Leave to Appeal the 1999 Award

[13] VSB sought leave from this Court to appeal the 1999 Award: *Vancouver District No. 39 v. Royal Oak Holdings Ltd.*, 1999 CanLII 5699 (BCSC). Justice Melnick described the reasoning of the 1999 Majority:

> [15] Mr. Mitchell and Mr. Allen concluded that in using the natural meaning of immediate, s. 29.09 was referring to a development process that would use the outright approval scheme of Schedule C-3A of the Vancouver Zoning Bylaw, not the discretionary conditional use to 3.0 FSR. As I read the reasons of the majority, the latter process would be at odds with the concept of immediacy inherent in the wording of s. 29.09. They rejected the suggestion of the School Board that, for the purposes of valuation, they should assume that the property would be notionally ready for immediate development with a development permit to the denser 3.0 FSR use (in other words, assume that all of the negotiation with City planning officials, advertising and consultation with owners of neighbouring properties, etc., had all been accomplished prior to the purchaser being ready, willing and able to purchase the property).

[14] Justice Melnick dismissed the leave application as he found the 1999 Majority's interpretation of s. 29.09 was not obviously wrong:

> [34] In this case, there is logic in the reasoning of both the majority and Mr. Locke. It is not my function at this level, of course, to determine the proper interpretation of Clause 29.09 and the effect upon it of the word "immediate". However, I conclude that the interpretation of Mr. Mitchell and Mr. Allen is not obviously wrong. In fact, pragmatically, it has much to commend it. It has a certain logic seen against the background of the environment in which it is to be interpreted.

The 2022 Arbitration

[15] In 2005, Royal Oak assigned the lease to Beedie. In September 2006, Beedie exercised its right to renew the lease for a second renewal term, from 2007 to 2017. The parties agreed to rent based on a market value using the outright approval use of 1.0 FSR. Rent was set at $750,000 per year for the first five years of the second renewal term, and at $760,000 from 2012 to 2017.

[16] In September 2015, Beedie again exercised its right to renew the lease. The parties could not agree on rent for the third renewal term (2017 to 2027) and the matter proceeded to arbitration. The lands were to be valued as of May 20, 2017. As in 1997, the C-3A zoning permitted development for outright uses to 1.0 FSR and for certain conditional uses to 3.0 FSR. There was potential to build to a maximum of 5.0 FSR if rezoning was approved. VSB argued market value for the purpose of s. 29.09 should be determined on the potential for increased density due to rezoning, or alternatively to the maximum FSR of 3.0 for conditional uses under the current zoning. Beedie argued issue estoppel applied to the interpretation of s. 29.09, and that using the interpretation decided by the 1999 Majority, the market value was to be based on outright use to a maximum density of 1.0 FSR.

[17] A panel of three arbitrators proceeded with a hearing in September 2021 (the "2022 Tribunal"). The panel released its award on January 19, 2022 (the "2022 Award"), consisting of a majority opinion (the "2022 Majority") with one dissenting opinion (the "2022 Dissent"). The 2022 Majority found the 1999 Majority's interpretation of s. 29.09 of the lease to be a question of mixed fact and law which

could give rise to issue estoppel, subject to the panel's discretion not to apply it: 2022 Majority at paras. 108, 129, 133. The 2022 Majority analyzed the 1999 Majority, to identify what it decided about the interpretation of the lease. The 2022 Majority at para. 127 summarized its views of the findings made by the 1999 Majority:

> In summary, the findings necessarily made, either expressly or implicitly, by the 1999 Tribunal (1999 Findings) were that:
>
> > (a) "immediate" as used in s.29.09 means "present" or "next adjacent" or "taking effect without delay or lapse of time";
> >
> > (b) an "immediate use" as that phrase is used in s.29.09 is a use for which a development permit can, with certainty, be obtained without delay;
> >
> > (c) the word "use" in the phrase "if vacant and ready for immediate development to their highest and best lawful use" refers to an "immediate use";
> >
> > (d) based on the evidence, a conditional use was not an "immediate use" because a development permit for a conditional use could not be obtained without delay (it would take 60 weeks) and because the entitlement to a development permit was conditional;
> >
> > (e) based on the evidence, an outright use was an "immediate use" because a development permit could be obtained without delay (it would take 7-12 weeks) and because the issuance of a development permit was a legal entitlement;
> >
> > (f) as a result, the "highest and best lawful (immediate) use" of the Lands on the relevant valuation date was an outright use under the existing zoning; and
> >
> > (g) accordingly, the rent for the renewal term should be based on the market value of the Lands as of the valuation date, if vacant and ready for immediate development for an outright use.

[18] The 2022 Majority did not agree the 1999 Majority decided that s. 29.09 was to be construed by reference to which use the lands could be put "most expeditiously" or the lawful use that is "most immediate": 2022 Majority at para. 130. The 2022 Majority interpreted the 1999 Majority to hold that market value is to be based on an "immediate use", being a use for which a development permit can be obtained without delay and not as a matter of discretion: 2022 Majority at para. 133.

[19] In considering whether the 2022 Tribunal ought to exercise its discretion not to apply issue estoppel, the 2022 Majority found that in 2017, there were longer delays in obtaining permits than in 1999. The evidence before the 2022 Tribunal was the

following: it took six to eight months to obtain an outright use permit in 2017 while the same process took seven to 12 weeks in 1999; it took 18 to 24 months to obtain a conditional use permit in 2017, while this took 12 months in 1999; it would take three years to achieve a rezoning and development permit to a maximum FSR of 5.0. The 2022 Majority concluded none of these proposed uses could be considered "immediate", and there was no lawful use for which approval could be obtained without delay. The 2022 Majority found, applying the interpretation from the 1999 Majority, no market value could be determined: 2022 Majority at paras. 169–174.

[20] The 2022 Majority therefore declined to apply issue estoppel, concluding that it would lead to an unworkable interpretation of the lease. Instead, the 2022 Majority applied its own interpretation of s. 29.09 and found that market value is the conditional use to a 3.0 FSR. The 2022 Majority found the market value of the lands is $116,500,000 pursuant to conditional use: 2022 Majority at paras. 84–85, 244. The 2022 Majority found the market value of the lands if determined on outright use to 1.0 FSR would have been $20,000,000: 2022 Majority at para. 235. Thus, rent was to be set at 8.25% of $116,500,000.

[21] The 2022 Dissent found the market value ought to be assessed based on outright use to 1.0 FSR. The 2022 Dissent found that "market value" under s. 29.09 is "based on the zoning in effect at the valuation date for the renewal term without taking into account the potential for rezoning or discretionary approvals": 2022 Dissent at para. 45. The 2022 Dissent agreed market value based on outright use to 1.0 FSR was $20,000,000. The 2022 Dissent did not agree with the 2022 Majority that longer delays in 2017 at city hall to approve permits made the 1999 Majority's interpretation unworkable, as the length of the delays was not "material nor relevant": 2022 Dissent at para. 68. The 2022 Dissent's opinion was if there was a strike on May 20, 2017 at city hall, or staff were unable to work expeditiously on that date due to a natural disaster or pandemic, there would be no change to the "immediate" use allowed under the zoning bylaw: 2022 Dissent at para. 69.

Application for Leave to Appeal

[22] Beedie applied pursuant to s. 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55, for leave to appeal the 2022 Award. Leave to appeal was granted on two questions of law related to issue estoppel: 2023 BCSC 560 (“Leave Application”). Justice Stephens granted leave on the questions of whether the 2022 Tribunal erred in its interpretation of the 1999 Award and identification of the issue to which estoppel applied, and whether the 2022 Tribunal considered irrelevant factors in declining to apply issue estoppel.

[23] VSB appealed this granting of leave. Its appeal was dismissed: *Vancouver School District No. 39 v. Kingsgate Property Ltd.*, 2024 BCCA 54.

Issues on Appeal

[24] There are two questions of law at issue in this appeal:

1. Did the majority of the 2022 tribunal err in their interpretation of the 1999 Award and identification of the issue to which issue estoppel applied?

2. Did the majority of the 2022 tribunal err by considering irrelevant factors in determining not to apply issue estoppel, in particular, by finding that there is:

    a) a diminished public interest in the finality of commercial arbitration; and

    b) a "public interest in enforcing private contracts to reflect the true intentions of the parties"?

Standard of Review

[25] Both parties submit that the question of the appropriate standard of review for commercial arbitration is unsettled in British Columbia. Prior to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the standard of review for commercial arbitration decisions was “almost always” reasonableness: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 75. In commercial arbitrations, where appeals are restricted to questions of law, the standard of review will be

reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 106; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at paras. 74–75. It is unclear if *Vavilov* changed the standard of review for appeals from arbitration decisions: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at para. 46. Our Court of Appeal has not yet decided the issue, finding so far it has been unnecessary to do so: *Mann v. Grewal*, 2023 BCCA 88 at paras. 34–37.

[26] Both parties argue the appeal will be resolved in their favour regardless of whether the standard of review is reasonableness or correctness. As such, this Court is not asked to determine the appropriate standard of review. VSB's position is that the standard is reasonableness, but that even on the correctness standard, the decision of the 2022 Majority ought to be upheld. On a reasonableness review, the Court is to assess whether the arbitration decision falls within a range of possible, acceptable outcomes which were defensible in respect of the facts and law, and was justified, transparent, intelligible, and defensible: *Teal* at para. 84; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47. On the correctness standard, VSB argues the interpretation of the 1999 Award by the 2022 Majority was the only interpretation that was consistent with the language of the 1999 Award and the context in which it was made. Beedie argues that, on either standard, the decision of the 2022 Majority cannot stand.

Issue One: Did the 2022 Majority Err in its Interpretation of the 1999 Award and the Identification of the Issue to which Issue Estoppel Applied?

[27] The 2022 Majority interpreted the 1999 Majority as holding that market value is to be based on an "immediate use", being a use for which a development permit can be obtained without delay and not as a matter of discretion: 2022 Majority at para. 133. As the evidence showed longer wait times to obtain a permit, the 2022 Majority found no use was immediate, and that applying the 1999 Majority's interpretation would lead to no determination of market value.

[28] Beedie argues this interpretation of the 1999 Majority is incorrect and unreasonable. Beedie contends that, properly interpreted, the 1999 Majority found immediate use was based on which use was the fastest and certain. The 1999 Majority did not base its award on the fact that in 1999 outright use approval took seven to 12 weeks, but on the use that was the quickest to obtain and a use with legal entitlement, for example, where no discretionary approval was required. Beedie argues issue estoppel applies to this interpretation of s. 29.09, and the 2022 Majority ought to have applied it.

[29] VSB makes several arguments in response. As I understand it, VSB argues the 1999 Majority did not decide what Beedie contends it did—i.e. the 1999 Majority did not decide that immediate use meant fastest and certain. This interpretation of the 1999 Majority was not subject to issue estoppel, as the 1999 Majority did not decide it was the most expeditious use that was to be considered for immediate use. Further, VSB argues Beedie never properly pleaded the proper interpretation of s. 29.09 was "most expeditious" or "certain and fastest" on its leave to appeal application or before the Court of Appeal, and as such, this was not the basis on which leave to appeal was granted. This branch of the argument is related to VSB's various complaints about Beedie changing its position throughout the course of the arbitration and court applications.

Application of Issue Estoppel in Commercial Arbitrations

[30] The preconditions to the operation of issue estoppel are set out in *Angle v. M.N.R.*, [1975] 2 S.C.R. 248 at 254:

> … (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised their privies….

[31] Issue estoppel may arise from prior proceedings before a tribunal as well as from prior court proceedings. The same question test has been broadened to include the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings:

Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44 at para. 24. The estoppel extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding: *Danyluk* at para. 54; *Fortinet Technologies (Canada) ULC v. Bell Canada*, 2018 BCCA 277 at para. 32; *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at para. 32.

[32] VSB argues for issue estoppel to apply, the issue must have been clearly and unequivocally determined in the prior proceeding, relying on criminal decisions for this proposition: *R. v. Punko*, 2011 BCCA 55 at para. 74; *R. v. Mahalingan*, 2008 SCC 63 at paras. 121–122; *R. v. Duhamel*, 1981 ABCA 295 at 277. However, the doctrine of issue estoppel operates differently in criminal law than in the civil context: *United States v. Lim*, 2023 BCCA 304 at para. 66. In criminal law, there is no mutuality between the parties as only the accused can raise issue estoppel to preclude the Crown from relitigating issues decided in favour of the accused: *Mahalingan* at para. 57. The principle of finality in litigation must give way to the presumption of innocence and the burden on the Crown to prove the accused's guilt beyond a reasonable doubt*: U.S.A. v. Lim* at paras. 66–67. I find it is more appropriate in these circumstances to look to the test for application of issue estoppel in the civil context.

Did the 2022 Majority Err in its interpretation of the 1999 Award?

[33] I will begin by analyzing the 2022 Majority's interpretation of the 1999 Award.

[34] The 2022 Majority began its discussion of the 1999 Award by setting out the two steps of analysis referenced in the 1999 Award: 1) how to interpret s. 29.09 of the lease; and 2) to fix the market value of the lands based on that interpretation: 2022 Majority at para. 107.

[35] The 2022 Majority found the 1999 Award turned on the proper interpretation of "immediate" within s. 29.09: 2022 Majority at para. 109. The 1999 Majority considered the two possible uses permitted under the bylaw to decide which of these two uses fall into the meaning of "immediate": 2022 Majority at para. 110. Based on the evidence, the 1999 Majority found a development permit for the 1.0 FSR outright use could be obtained in seven to 12 weeks, while obtaining a permit for a conditional use

could take as long as 60 weeks. Furthermore, the 2022 Majority found at para. 111 that a development permit for outright approval use was “a legal entitlement” while a permit for a conditional use was discretionary.

[36] The 2022 Majority concluded the 1999 Majority did not accept VSB’s submission that properly interpreted, s. 29.09 of the lease mandated the consideration of the lands’ “highest and best lawful use”, which was at that time in 1999 conditional use to a 3.0 FSR. This ignored the word “immediate” which appeared twice in s. 29.09: 2022 Majority at paras. 115–116.

[37] The 2022 Majority found the 1999 Majority accepted the tenant’s proposed interpretation, that an “immediate development is one where a development permit legally entitling the occupant to proceed with the development can be obtained without delay and there is certainty of entitlement in what the use is that can be secured”: 2022 Majority at para. 117. The 1999 Majority found “an outright use can be secured far more quickly than a conditional one” and as there was “certainty in being able to develop for the outright use”, this was the “immediate use” contemplated by s.29.09: 2022 Majority at paras. 117–118.

[38] However, the 2022 Majority found that the 1999 Majority did not hold that “immediate” meant “least delay or most expeditiously”: 2022 Majority at para. 119. The 2022 Majority was of the view the 1999 Majority found “immediate use” was a use that was certain and without delay: 2022 Majority at para. 119. The 2022 Majority found at para. 123 it was the actual time to obtain a permit which drove the 1999 Majority’s decision on what was an “immediate use” for the purpose of valuation:

> [123] The Tribunal found that because approval of the outright use was “an entitlement” and because approval could be obtained in 7-12 weeks, the outright use was an “immediate use”. The 1999 Tribunal found as a fact that, because the period of time to obtain approval for a conditional use was 60 weeks, and because approval was discretionary, it was not an “immediate use”.

[39] The 2022 Majority then extrapolated the findings from the 1999 Majority on interpretation of s. 29.09 which could be subject to issue estoppel, summarized in paras. 127 (a) to (c). However, the 2022 Majority did not agree that the 1999 Majority

decided that market value had to be based on the highest and best lawful use that the lands could be put "most expeditiously" or the lawful use that was the "most immediate": 2022 Majority at para. 130 (emphasis added). The 2022 Majority interpreted the 1999 Majority as finding that as the conditional use process required 60 weeks and was discretionary, that could not fall within an "immediate use". If the 1999 Majority had based its determination of immediate use on which of the two processes was faster, the 1999 Majority would not have needed to make the finding that 60 weeks and discretionary did not fall within immediate use: 2022 Majority at para. 131b. Further, the 2022 Majority was of the view that the parties did not intend the faster use to be determinative, as there would have been no need to refer to the "highest and best lawful use": 2022 Majority at para. 132.

[40] The 2022 Majority then considered if it should exercise its discretion not to apply issue estoppel, agreeing that its view that the 1999 Award is wrong is not a proper basis to not apply issue estoppel: 2022 Majority at paras. 149–150. The 2022 Majority had earlier in its ruling set out its view of the proper interpretation of s.29.09 of the lease: 2022 Majority at paras. 38–86. The 2022 Majority had concluded that properly interpreted, the lands should be valued based on the highest and best use, which was a conditional use, and not the outright use as found by the 1999 Majority: 2022 Majority at paras. 84–86.

[41] In deciding whether to apply issue estoppel, the 2022 Majority considered the wording of the arbitration agreement, the nature of the lease arbitrations, the availability of an appeal, procedural safeguards in the prior hearing and the expertise of the 1999 Tribunal. The 2022 Majority did not find any of these considerations militated against applying issue estoppel: 2022 Majority at paras. 151–158. In considering the circumstances giving rise to the prior proceedings, the 2022 Majority considered the evidence that delays in obtaining development permits have increased significantly, with outright use permits taking six to eight months, conditional permits taking 18 to 24 months, and a rezoning and development permit taking three years: 2022 Majority at paras. 169–170. The 2022 Majority found on the evidence, none of

these can be considered an “immediate use”, as six to eight months cannot be said to be without delay: 2022 Majority at para. 171.

[42] As such, the 2022 Majority found the 1999 Majority’s interpretation of s. 29.09 could not be applied and no market value could be determined: 2022 Majority at para. 172. This factor strongly militated in favour of not applying issue estoppel: 2022 Majority at para. 174. Due to potential injustice caused by the application of issue estoppel, the 2022 Majority declined to apply its interpretation of the 1999 Award and found market value to be based on conditional use at 3.0 FSR: 2022 Majority at paras. 175–177, 213.

[43] With respect, I am of the opinion that the 2022 Majority erred in its interpretation of the 1999 Award. Read as a whole, the 1999 Majority emphasized the comparative timelines between the two uses available under the bylaw: the outright use and the conditional use. The 1999 Majority throughout compared the timelines of the two uses, and did not find it was because the outright use was seven to 12 weeks to obtain a permit that it was found to be an “immediate use”. With respect, the 2022 Majority erred in interpreting the 1999 Majority as not basing its decision of immediate use on which use was the “most expeditious”, as that was what the 1999 Majority decided.

[44] The 1999 Majority made comparative references throughout the decision:

- Which of the two different zoning categories (outright approval use and a conditional approval use) fall within the meaning of “immediate” (1999 Majority at p.5)

- Approval of a conditional use is discretionary, takes substantially longer to obtain (1999 Majority at p.5)

- The 1.0 FSR outright approval use was much faster and had legal certainty in contrast to the discretionary nature of the conditional approval use (1999 Majority at p.5)

- The discretionary approval took at least five times longer to achieve than the non-discretionary (1999 Majority at p.5-6)

- Evidence from both experts was that an outright use can be secured far more quickly than a conditional one, thus being more "immediate" in terms of time (1999 Majority at p.7)

- The 1999 Majority did not consider that "any proper review of the facts, the comment and the evidence that was agreed on by both experts would lead one to the conclusion that the more lengthy process to achieve the discretionary conditional use was a use that was "forthwith", "without any delay" or "next adjacent" (1999 Majority at p.8)

(Emphasis added)

[45] The 1999 Majority found s. 29.09 ought to be interpreted such that "immediate use" is to be based on the use that was the most expeditious and certain, meaning legal entitlement to approval. In my view, the 1999 Majority did not find that an "immediate use" was one for which a development permit can be obtained without delay and not as a matter of discretion: 2022 Majority at para. 133. This interpretation of the 1999 Award ignores the comparative aspect of the uses, and focuses only on the actual timelines to obtain a development permit. As I read the 1999 Award, the 1999 Majority was not analyzing whether seven to 12 weeks was quick enough to be immediate and without delay. There is no discussion of that issue at all—whether seven to 12 weeks qualifies as immediate—which one would have expected if that is in fact what the 1999 Majority found. The 1999 Majority made no findings about whether seven to 12 weeks qualify as "without delay". Throughout, the 1999 Majority was considering which of the two uses was the most immediate and had legal certainty, as being not discretionary.

[46] The 2022 Majority explained its rationale for its view that the 1999 Majority did not find immediate use was the most expeditious. The 2022 Majority said the 1999 Majority would not have needed to make findings about the conditional use process—

taking 60 weeks and being discretionary—if it was simply a question of which use was faster: 2022 Majority at para. 131b. With respect, the 1999 Majority needed to make the findings about the conditional use process so it can be compared to the outright use process. It is precisely because the 1999 Majority needed to compare the two uses for timelines and certainty that it can be said the 1999 Majority found immediate use was the most expeditious and certain. Put another way, the fact that the 1999 Majority made the findings about the conditional use process supports the interpretation that the 1999 Majority found immediate use was the most expeditious and certain use. If the 1999 Majority was only considering whether seven to 12 weeks was fast enough to be "immediate", then there would have been no need to consider the timelines and discretionary nature of the conditional use process.

[47] With respect, the 2022 Majority erred in its identification of the issues to which estoppel applied. The 2022 Majority identified the findings of the 1999 Majority to which estoppel applied as the meaning of "immediate"; that an "immediate use" was a use for which a development permit can with certainty be obtained without delay; and the word "use" in the phrase "if vacant and ready for immediate development to their highest and best lawful use" refers to an "immediate use". In my view, the issue to which estoppel applied was the interpretation that an "immediate use" was the use that was the most expeditious and certain. This finding was implicitly bound up in the 1999 Award.

[48] In my view, the 2022 Majority's interpretation of the 1999 Award is unreasonable and incorrect. Applying the standard of reasonableness, I find the 2022 Majority's interpretation of the 1999 Award does not fall within a range of possible, acceptable outcomes that is justified, transparent, intelligible, and defensible: *Teal* at para. 84. On the correctness standard, I find the interpretation of the 1999 Award by the 2022 Majority not consistent with the language of the 1999 Award read as a whole, where timelines were referenced and compared throughout.

[49] With respect, the 2022 Majority's interpretation of the 1999 Award is both unreasonable and incorrect.

Did Beedie change its Position?

[50] VSB made various arguments that Beedie has been changing its position throughout the 2022 arbitration and the subsequent court applications for leave to appeal. As I understand it, VSB argues Beedie did not assert before Justice Stephens at the leave to appeal application that the proper interpretation of the 1999 Award was that immediate use was the most expeditious and certain. Instead, VSB asserts that Beedie's position at the leave application was immediate use meant outright use, and that was the basis on which leave to appeal was granted. VSB argues Beedie was not granted leave to argue its current position, which is immediate use is the most expeditious and certain.

[51] With respect, the Court is not persuaded by these submissions. Looked at as a whole, Beedie's position on how the 1999 Award ought to be interpreted has been consistent. It's clear from reading the 2022 Majority that Beedie advanced the position at the arbitration hearing that immediate meant "most immediate" and "most expeditious", as the 2022 Majority explicitly rejected that submission: 2022 Majority at para. 130. Beedie's position on the leave application was consistent: Leave Application at paras. 99–104. While the words "outright use" may have sometimes been used in place of "most expeditious", the phrases convey the same meaning—that the 1999 Majority interpreted the lease provision to refer to the most immediate and certain use for the purpose of valuation, which is the outright use. Moreover, the issue on which leave to appeal has been granted is whether the 2022 Majority erred in its interpretation of the 1999 Award and the identification of the issue to which estoppel applied. Beedie has been granted leave to appeal its position.

[52] I do not find Beedie has changed its position on the proper interpretation of the 1999 Award.

Issue Two: Did the 2022 Majority Err by Considering Irrelevant Factors in its Decision Not to Apply Issue Estoppel?

[53] Beedie argues the 2022 Majority erred by considering irrelevant factors in determining not to apply issue estoppel. Beedie argues it was an error for the majority

to find a diminished public interest in the finality of commercial arbitration and that there was a "public interest in enforcing private contracts to reflect the true intentions of the parties" to support its decision not to apply issue estoppel. These comments are found at para. 176 of the 2022 Majority:

> We do not consider that the public interest in the finality of litigation would be materially undermined by declining to apply the doctrine of issue estoppel in this instance. The Lease represents a private commercial relationship. It provides for serial "litigation" of the question of "market value" at various points in time. The agreed process is private arbitration, not court litigation. Although this award may possibly be challenged on the grounds that the Tribunal has made an error of law, and although – if leave to appeal were granted – a court decision might establish a legal precedent with broader public implications, the award itself does not establish a legal precedent that might impact persons other than the parties to the Lease. There is also a public interest in enforcing private contracts to reflect the true intentions of the parties…

[54] It is an error of law to exercise discretion based on irrelevant factors or a wrong principle: *Barrie v. British Columbia (Forests, Lands and Natural Resource Operations),* 2021 BCCA 322 at para. 87; *Cliffs Over Maple Bay (Re),* 2011 BCCA 180 at paras. 24, 43–48. Beedie argues these two factors cited by the 2022 Majority were wrong in principle and irrelevant to the exercise of discretion to not apply issue estoppel. VSB argues these two comments were not factors considered by the 2022 Majority in its decision not to apply issue estoppel. Nevertheless, VSB argues the decision not to apply issue estoppel was reasonable and correct in the circumstances.

[55] The 2022 Majority's statement that the public interest in the finality of litigation would not be materially undermined by not applying issue estoppel is contrary to jurisprudential authority. The central aims of commercial arbitration are finality and efficiency: *Teal Cedar* at paras. 1, 45, 74. The 2022 Majority's consideration of a lesser interest in finality due to this being a private commercial relationship governed by arbitration is not a correct statement of the importance of finality in commercial arbitrations. This is reflected in a limited right of appeal of arbitral awards and the deference due to arbitrators: *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294 at para. 40, citing *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at paras. 52, 104–106; *Arbitration Act*, s. 31. In arbitrations concerning the

same lease with the same parties and the same issue, much is gained from applying issue estoppel to create certainty.

[56] Further, the 2022 Majority's statement that there is a public interest in enforcing private contracts to reflect the true intentions of the parties is in error. I find that the 2022 Majority allowed their view of the correct interpretation of s. 29.09 to overwhelm the analysis. The 2022 Majority cannot refuse to apply the interpretation of the valuation clause found by the 1999 Majority simply because they disagreed with it: *MacDougall v. Lake Country (District*), 2012 BCCA 408 at paras. 32–36. In any event, it was the 2022 Majority's erroneous interpretation of the 1999 Award that led to the 2022 Majority not being able to determine market value, thus not being able to set rent for the next term. If the 2022 Majority had not erred in their interpretation of the 1999 Award, the parties can continue with the next term of their lease.

[57] I find the 2022 Majority erred in considering irrelevant factors in the exercise of discretion in its decision not to apply issue estoppel. By finding a diminished public interest in finality in the lease arbitrations, and a public interest in enforcing private contracts to reflect the true intentions of the parties, the 2022 Majority exercised its discretion to not apply issue estoppel in an unreasonable and incorrect manner.

Remedy

[58] Beedie urges this Court to set aside the 2022 Award, and find the market value to be based on 1.0 FSR which is $20,000,000.

[59] VSB argues the matter should be remitted to the arbitration panel to reconsider the discretionary issue of whether to apply issue estoppel. VSB argues it would be improper for this Court to substitute its discretion for that of the arbitration panel in deciding if issue estoppel should apply: *Coastal Contacts Inc. v. Elastic Path Software Inc*., 2013 BCCA 541 at paras. 33, 36. VSB has identified a number of other factors, not argued at the arbitration, that may impact on the exercise of the discretion. These other factors include VSB's argument that the denial of leave to appeal by Justice Melnick in 1999 was based on the wrong legal test of "obviously wrong"; that the subsequent Supreme Court of Canada decision in *Earthco Soil Mixtures Inc. v.*

Pine Valley Enterprises Inc., 2024 SCC 20 has confirmed that *Sattva* represented a change in the law; and VSB argues the evidence at the arbitration hearing showed even an outright use was not "certain".

[60] In my view, it is unnecessary to remit the matter to the arbitration panel in these circumstances. The 2022 Majority considered all the factors cited in *Danyluk*. It found the 1999 Award unworkable and that it could not be applied based on an erroneous interpretation. Once that erroneous interpretation and the two irrelevant factors discussed above are set aside, there is no basis not to apply issue estoppel. The 2022 Majority did not cite any other reason not to apply issue estoppel.

[61] With respect to VSB's argument that discretionary decisions ought to be made by the arbitrators, and not the court, I note that s. 31(4)(a) of the *Arbitration Act* provides that on appeal, a court can confirm, amend or set aside the award. VSB relies on *Coastal Contacts*. However, in *Coastal Contacts*, the chambers judge identified legal error but went beyond to decide factual matters: *Coastal Contacts* at para. 33. In this case, the Court does not have to decide any factual matters. The 2022 Majority found the value using 1.0 FSR to be $20,000,000: 2022 Majority at para. 235. This was agreed to by the dissenting arbitrator: 2022 Dissent at para. 50.

[62] As to the additional arguments VSB wishes to address if the matter is remitted to the arbitration panel, I fail to see how the legal test on the denial of leave to appeal in 1999 can be relevant to the exercise of discretion to not apply issue estoppel today. With respect to VSB's argument that the law of contractual interpretation was changed so fundamentally in *Sattva* that the parties should no longer be bound by the 1999 Award, I note this argument was rejected by the 2022 Majority: 2022 Majority at para. 167. It is unclear how *Earthco* changes that analysis. With respect to VSB's argument that the evidence at the arbitration hearing showed even outright use permits were not "certain", I note the 1999 Tribunal was referencing certainty as legal entitlement: 2022 Majority at paras. 64–65. That is to say, the 1999 Tribunal found the outright use was the legally entitled use, and not discretionary.

[63] In these circumstances, the Court has the legal interpretation of the valuation clause from the 1999 Tribunal and the factual findings of the 2022 Majority. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: *Vavilov* at para. 142. I see no reason to not apply issue estoppel. As a result, the market value shall be based on the 1.0 FSR for outright use, which is $20,000,000.

Costs

[64] Beedie asks this Court to order costs of the arbitration hearing. It has adduced evidence of its costs. The parties had entered into a procedural order on consent on June 25, 2021, which states in part:

> The Parties agree that in the event an award of costs is sought in the arbitration, the Arbitrators will exercise their discretion in a summary determination of the quantum of costs to be awarded and is not bound to apply the process generally used in the courts of British Columbia in respect to the taxation of costs on any scale. In exercising their discretion, the Arbitrators shall take into account the actual amount paid by a Party for legal representation, the actual costs of the arbitration, the outcome of the arbitration, the conduct of the Parties in the arbitration and such other matter or matters as the Arbitrators consider appropriate. A Party seeking costs for all or part of the arbitration shall be entitled to make submissions with respect to costs, in a manner as the Arbitrators may direct. The Arbitrators shall deliver reasons with their costs award.

[65] Beedie argues that it had agreed to a costs order in favour of VSB at the conclusion of the arbitration hearing. The amount Beedie seeks as costs for the arbitration hearing is similar to the amount VSB sought. However, VSB has not consented to a costs order for Beedie should it be successful on appeal.

[66] In these circumstances, the matter of costs for the arbitration should be remitted to the arbitration panel. Unless VSB consents to the costs order, the amount of costs ought to be properly passed on by the arbitrators in conformity with the procedural order.

Conclusion

[67] The Court makes the following orders:

1. The 2022 Award is set aside.
2. The market value of the lands for determining rent for the third renewal period shall be based on 1.0 FSR which is $20,000,000.
3. The rent for the third renewal period shall be $1,650,000 per annum.
4. The issue of costs for the arbitration hearing shall be remitted to the tribunal.
5. The order of July 13, 2023, requiring Beedie to provide security for the disputed rent pending appeal is vacated.
6. Costs of this proceeding are awarded to Beedie.

"The Honourable Justice Chan"