Decisions of the Court of Appeal

Spot Coffee Park Place Inc. v. Concord Adex Investments Limited

Collection: Decisions of the Court of Appeal

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Judges: Pepall, Sarah E.; Harvison Young, Alison; George, Jonathon C.

COURT OF APPEAL FOR ONTARIO

CITATION: Spot Coffee Park Place Inc. v. Concord Adex Investments Limited, 2023 ONCA 15
DATE: 20230112
DOCKET: C69943

Pepall, Harvison Young and George JJ.A.

BETWEEN

Spot Coffee Park Place Inc.

Plaintiff/Defendant by Counterclaim
(Respondent)

and

Concord Adex Investments Limited

Defendant/Plaintiff by Counterclaim
(Appellant)

Sanj Sood and David Reiter, for the appellant

Gregory M. Sidlofsky and Peter Neufeld, for the respondent

Heard: September 19, 2022

On appeal from the judgment of Justice Susan Vella of the Superior Court of Justice, dated October 5, 2021, with reasons reported at 2021 ONSC 6629.

Pepall J.A.:

Introduction

[1] This appeal addresses a pre-contractual negligent misrepresentation and the interpretation of a commercial lease (the "Lease"). The trial judge found that the respondent tenant reasonably relied on the appellant's negligent misrepresentation on free, accessible and convenient customer parking to its detriment and that the language in the entire agreement provision in the Lease did not preclude the respondent's claim in damages. The trial judge awarded the respondent $1,027,051.34 in damages plus interest and costs.

[2] On appeal, the appellant does not challenge the trial judge's findings that the appellant owed the respondent a duty of care based on their special relationship, that the appellant made negligent misrepresentations on parking that were inaccurate and/or misleading, and that the respondent reasonably relied on the misrepresentations to its detriment. Nor does it take issue with the law relied upon by the trial judge or on her interpretation of the entire agreement provision. Rather, conceding that the trial judge made the right inquiry by asking whether customer parking was "the subject matter" of the Lease as stated in the entire agreement provision, it confines its argument to a narrow submission that the trial judge failed to consider the Lease as a whole and that this amounted to an extricable error of law. In the alternative, the appellant submits that if the trial judge did consider the Lease as a whole, she made a palpable and overriding error in finding that the Lease did not mention customer parking.

[3] For the reasons that follow, I would dismiss the appeal on the basis of the applicable standard of review.

Background Facts

[4] The appellant, Concord Adex Investments Limited ("Concord Adex"), is a residential condominium developer. It built Concord Park Place in North York, Ontario. In addition to the condominiums, the complex includes commercial/retail premises.

[5] The respondent, Spot Coffee Park Place Inc. ("Spot Coffee"), carried on business as a "high end" European style café that was part of a chain of cafés largely based in the United States.

[6] Since 2007, Concord Adex had had a pre-existing relationship with a related company of Spot Coffee arising from the operation of a café in a Concord project in downtown Toronto.

[7] In early 2010, Concord Adex began discussing the possibility of leasing a retail unit at Concord Park Place with the principals of what was to become Spot Coffee.

[8] At a presentation meeting held around early July 2010, according to Spot Coffee's representative, Mr. Ayoub, Concord Adex's representative, Ms. Vacheresse, showed the Spot Coffee representatives the floor plan for an underground parking facility that was labelled "retail parking", and showed them a blueprint depicting the retail customer parking lot called "P1". Mr. Ayoub also stated that at the presentation meeting, Ms. Vacheresse gave the Spot Coffee representatives a 2010 Retail Leasing Brochure providing details of opportunities for businesses to lease at Concord Park Place, and a Master Plan for the development.

[9] Ms. Vacheresse also took the Spot Coffee representatives on a site visit of the underground parking garage where the customer parking was going to be. At trial, she admitted that the purpose of the site visit was to show Spot Coffee the sheer size of the customer parking area, to assure Spot Coffee that ample parking would be available and that there were no impediments to customers being able to access the café. She acknowledged that parking was a necessity in order for Spot Coffee to attract customers from outside the development.

[10] Following negotiations, on September 3, 2010, the parties entered into an Offer to Lease for commercial premises in Concord Park Place. The Offer to Lease contained the following entire agreement clause:

> This Offer to Lease contains all of the terms and conditions of the agreement between the parties relating to the lease of the Premises and supersedes all previous agreements or representations of any kind, written or verbal. There are no covenants, representations, agreements, warranties or conditions in any way *relating to the subject matter of this Offer to Lease*, expressed or implied, collateral or otherwise, except as expressly set out herein. [Emphasis added.]

[11] On October 29, 2010, the parties entered into a formal Lease. The Lease also contained an entire agreement provision at article 19.1:

> This Lease contains all of the terms and conditions of the agreement between the parties relating to the matters herein provided and supersedes all previous agreements or representations of any kind, written or verbal, made by anyone in reference thereto, with the exception of any written and executed offer to lease or agreement to lease ("Offer to Lease") which may exist between the parties and pursuant to which this Lease has been entered into. There are no covenants, representations, agreements, warranties or conditions in any way *relating to the subject matter of this Agreement* expressed or implied, collateral or otherwise, except as expressly set out herein or in the Offer to Lease, if any. In the event of any inconsistency or contradiction between the provisions of any Offer to Lease and the terms and conditions of this Lease, this Lease shall prevail.
>
> There shall be no amendment hereto unless in writing and signed by the party to be bound. [Emphasis added.]

[12] After the respondent opened its café, it encountered problems with customer parking. Often customers had to drive to a different building in the Park Place complex to present themselves and register with a concierge to gain access. In addition, the retail lobby into which the elevator to gain access to the café opened was locked from time to time.

[13] On May 29, 2013, the respondent abandoned the premises asserting that the parking challenges caused it to suffer losses. On June 1, 2013, the appellant terminated the Lease.

Reasons of Trial Judge

[14] The trial judge found that the appellant owed the respondent a duty of care and made representations to the respondent through Ms. Vacheresse and the 2010 Retail Leasing Brochure and Master Plan that: (i) the respondent's customers would have convenient access to free customer retail parking without restrictions on P1, and there would be 150 parking spots for all retail customers; and (ii) the respondent's customers would be able to access the café from P1 retail parking by way of an elevator dedicated to the retail customers that would open into the retail lobby next to the respondent's premises. She went on to find that these representations were inaccurate and/or misleading and that the appellant acted negligently in making them.

[15] The trial judge also found that the respondent reasonably relied on the appellant's representations. Specifically, she stated at para. 161 of her reasons:

> There is ample evidence in the record demonstrating that Spot Coffee was induced to enter into a ten-year fixed term lease at an early stage of the development of Park Place based, in large part, on the representation that its customer base from outside the Park Place development would have ample, free, and convenient access to retail customer parking in an underground parking lot that Spot Coffee representatives toured before signing the Offer to Lease.
>
> As a result of this representation, Spot Coffee entered into the Lease....

[16] She went on to reason that the entire agreement provision did not preclude the respondent's claim. She noted that the key language of the Lease was "there are no … representations … in any way relating to the subject matter of this Agreement" and the parking in issue was not addressed in the Lease.

[17] In her lengthy reasons, the trial judge considered the legal principles applicable to a claim of negligent misrepresentation and an entire agreement clause including the dictates from *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, and *D.L.G. & Associates Ltd. v. Minto Properties,* 2015 ONCA 705, 391

D.L.R. (4th) 505. She noted the key language in the entire agreement clause in the Lease and the Offer to Lease. She found the parties were both sophisticated and had a pre-existing commercial/retail landlord and tenant relationship. She found at para. 181 that:

> The pre-contractual negotiations addressed the existence of free, accessible and convenient customer parking and identified the location of this parking as P1 with an accessible dedicated elevator for exclusive use by retail customers.

[18] She observed that the Lease[1] only addressed the unreserved parking spots to be made available for the exclusive use of the respondent's employees, which were in an area separate from the free customer retail parking. In addition, the respondent had to pay rent for this parking. She considered the factual matrix and concluded that the respondent's claim based on negligent pre-contractual misrepresentation was not precluded by the entire agreement clause. The subject matter of the Lease did not include customer parking. Furthermore, if free, accessible and nearby customer retail parking was not intended to be available, the appellant had an obligation to correct its misrepresentations. As mentioned, she assessed the respondent's damages as amounting to $1,027,051.34 and also awarded $89,055.62 in pre-judgment interest, and $104,331.94 in costs.

Positions of the Parties

[19] The appellant submits that the trial judge failed to consider the Lease as a whole and, applying *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, this amounted to an extricable error of law reviewable on a correctness standard. Specifically, the appellant states that the trial judge failed to consider articles 3.2 and 6.6(b) of the Lease, both of which dealt with parking, and therefore formed part of the "subject matter" of the Lease.

[20] The appellant argues that article 3.2 created the mechanism by which the respondent's customers could be granted a non-exclusive license to use certain common facilities which definition included parking areas. In particular, section 9(a) of Schedule D to the Lease stated: "The Landlord and Condominium Corporation shall have the right: (a) to require all persons entering or leaving the Commercial Component during such hours as the Landlord or the

Condominium Corporation may reasonably determine, to identify themselves to a watchperson or security officer by registration or otherwise to establish their right to enter or leave."

[21] The appellant submits that article 6.6(b) of the Lease granted a right to use common facilities reasonably necessary for the use and enjoyment of the premises. Thus, the Lease did provide for the parking in issue. It created a mechanism by which the relevant license was granted, it set controls subject to which that license could operate, and it established a contractual right to that license, when it was reasonably necessary for the respondent's use and enjoyment of the premises.

[22] Accordingly, the Lease addressed parking and thereby brought that subject within the scope of the entire agreement provision. That clause was not unconscionable and no public policy reasons militated against its enforcement. Moreover, the Lease was negotiated by sophisticated parties and the respondent should be held to the bargain it struck.

[23] The respondent takes the position that a deferential standard of review applies. The trial judge stated the law correctly and applied that law to the facts before her. This issue of contractual interpretation raised an issue of mixed fact and law, and there was no extricable question of law at play. There was no basis to depart from the trial judge's finding that the language of the entire agreement provision did not apply to preclude recovery by the respondent.

[24] The respondent also submits that article 3.2 was not relied upon at trial and was raised for the first time on appeal. In addition, in light of the language used, the respondent submits that articles 3.2 and 6.6(b) are of no assistance to the appellant in any event.

[25] The appellant concedes that neither party directed the trial judge to the relevant articles in the Lease[2].

Analysis

[26] The key issue on this appeal is whether the trial judge failed to consider the Lease as a whole and erred in concluding that the respondent's claim was not precluded by the language of the entire agreement provision in the Lease. This requires an examination of the applicable standard of review, the entire agreement provision and articles 3.2 and 6.6(b) of the Lease.

(a) Standard of Review

[27] In *Sattva*, at para. 50, Rothstein J. reasoned that contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix. He went on to note, at para. 51, that:

> One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute.

[28] As he observed at para. 52, legal obligations arising from a contract are, in most cases, limited to the interests of the particular parties. Deference to first instance decision-makers on points of contractual interpretation promotes the goal of limiting the cost of appeals and the autonomy and integrity of trial proceedings. In *Corner Brook (City) v. Bailey,* 2021 SCC 29, 460 D.L.R. (4th) 169, Rowe J. affirmed this deferential standard of review in the face of a question of mixed fact and law involving the interpretation of a contract.

[29] In *Sattva*, Rothstein J. carved out extricable questions of law from this more limited standard of review stating that: "Legal errors made in the course of contractual interpretation include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'" (para. 53). They are reviewable on a correctness standard. He went on to caution that courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. This necessary caution was underscored by Rowe J. in *Corner Brook (City).* See also: *Ontario First Nations (2002) Limited Partnership v. Ontario Lottery Gaming Corporation*, 2021 ONCA 592.

[30] That said, ignoring a specific and relevant provision of an agreement may amount to a failure to construe a contract as a whole and constitute an extricable question of law: *Sattva*, at para. 64. See also: *Corner Brook (City)*, at para. 44.

[31] As such, if articles 3.2 and 6.6(b) were specific and relevant, ignoring them could amount to a failure to read the Lease as a whole and thus could meet the correctness standard of review threshold. In addition, if customer parking was included as part of the subject matter of the Lease, a finding to the contrary might amount to a palpable and overriding error.

(b) The Entire Agreement Provision and Articles 3.2 and 6.6(b)

[32] The trial judge specifically considered the entire agreement provision and whether the appellant's impugned representations related to the "subject matter" of the Lease. She considered:

- the evidence that the pre-contractual negotiations addressed the existence of free, accessible and convenient customer parking (as opposed to tenant parking for the respondent's employees) and identified the location of this parking as P1 with an accessible dedicated elevator for exclusive use by retail customers;
- both the Offer to Lease and the Lease addressed parking in the schedules, but only with respect to parking spots that would be leased by the respondent exclusively for its own employees, which was in a separate area from the free customer parking;
- Ms. Vacheresse's testimony that the Lease only deals with parking that is granted in exchange for rental fees, as was the case with the two parking spots leased by the respondent for its employees. This was consistent with the evidence given by Mr. Lorenzo, a representative of the respondent, who testified that it was not its business practice for a tenant to address free customer parking in a commercial lease, as opposed to dedicated parking for its own staff; and
- Mr. Lorenzo's evidence that it was not standard practice to address access to free customer parking in these types of leases was accepted over the appellant's solicitor's evidence "if indeed there is a clear conflict".

> The trial judge found this to be "consistent with the fact that Concord Adex's standard offer to lease and lease for retail tenants did not contain any clause referencing free customer retail parking."

[33] Turning to the two provisions that the appellant alleges the trial judge ignored, I will first address article 6.6(b). It states:

> All common facilities shall be subject at all times to the exclusive control and management of the Landlord or the Condominium Corporation. The Landlord or the Condominium Corporation shall be entitled to operate and police the same, to change the area and location thereof, to employ all personnel and to make all rules and regulations necessary for the proper operation and maintenance thereof, and to do such other acts with respect thereto as the Landlord, acting reasonably, shall determine to be advisable; provided, however, that the Tenant, unless deprived by reasons beyond the Landlord's control, shall always have the use of such of the Common Facilities as are reasonably necessary for the use and enjoyment of the Premises. All costs of operation of the Common Use Equipment or any of the Common Facilities whether outside of Business Hours or otherwise, for the sole benefit of the Tenant shall be charged to the Tenant and paid as an Additional Service Cost, provided that if more than one tenant or occupant of the Commercial Component shall request that the Common Use Equipment or any of the Common Facilities be operated outside of Business Hours, the Landlord shall apportion the Additional Service Cost between or among such tenants on a reasonable basis and the Tenant shall pay the portion of the Additional Service Cost so apportioned to it.

[34] It would appear that article 6.6 was raised at the trial of the action and the trial judge considered article 6.6(c) as is evident from para. 188 of her reasons. Importantly, the remainder of article 6.6, including article 6.6(b), does not address a regime for customer parking. Rather, those provisions govern matters such as the landlord's control over the building's public utilities equipment and cost-sharing between the landlord and the tenant for service and maintenance costs. I see no extricable error of law nor any palpable and overriding error relating to article 6.6(b).

[35] Turning to article 3.2, it states:

> Subject to the provisions of the *Condominium Act* and the Condominium Documents, and to the extent permitted thereby, the

> Landlord hereby grants to the Tenant, its agents, employees, invitees, customers and other persons transacting business with it, in common with all others entitled thereto, a license to have the use of certain of the Common Facilities and the common elements of the Commercial Condominium as designated from time to time by the Landlord provided, however, that such use shall be subject to all other provisions contained in this Lease and to the Landlord's rules and regulations referred to in section 7.6, and in accordance with the *Condominium Act* and the Condominium Documents.

[36] The appellant concedes that the parties did not raise this article at trial and as such, it is raised for the first time on appeal. Leaving aside whether it is now appropriate to raise this new argument on appeal, if the provision was so specific and relevant, it defies common sense that it was not brought to the attention of the trial judge. Article 3.2 is far from clear. It does not detail what 'certain' of the Common Facilities[3] includes, what the common elements include, what was designated by the landlord, nor the purport of the documents that are included in the override provision at the close of the article. The trial judge found that the respondent leased two parking spots for the exclusive use of its employees and did not lease customer parking spots. On the basis of the materials and submissions made before her, it was reasonable for the trial judge to conclude that the Lease did not refer to customer retail parking. I am unable to conclude that article 3.2 was both specific and relevant and that the trial judge made an extricable error of law or a palpable and overriding error.

[37] Even assuming that it is legitimate for the appellant to raise this new argument on appeal, in the absence of any palpable and overriding error or error of law, deference is owed to the trial judge's interpretation that customer parking was not the "subject matter" of the Lease and that the entire agreement provision did not preclude the respondent's claim.

[38] For these reasons, the appeal is dismissed. As agreed by the parties, the appellant shall pay the respondent $20,000 in costs of the appeal on a partial indemnity scale inclusive of disbursements and applicable tax.

Released: January 12, 2023 "S.E.P."

"S.E. Pepall J.A."
"I agree. A. Harvison Young J.A."
"I agree. J. George J.A."

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[1] For ease of reference, I will refer to the Lease throughout as including the Offer to Lease.
[2] Para. 18 of the appellant's factum.
[3] The definition of the Common Facilities found in article 1.2 (p) includes parking areas that must be designated by the Landlord. Absent any evidence, this article provides little guidance on the interpretation to be given to the Lease and does not materially detract from the trial judge's interpretation.