

CANADA / JUDGMENT

Fairchild Developments Ltd. v. 575476 B.C. Ltd.

2020 BCCA 123

COURT

British Columbia Court of Appeal

DECIDED

30 April 2020

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2020 BCCA 123 Fairchild Developments Ltd. v. 575476 B.C. Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Fairchild Developments Ltd. v. 575476 B.C. Ltd.,

2020 BCCA 123

Date: 20200430

Dockets: CA45643; CA45642

Docket: CA45643

Between:

Fairchild Developments Ltd.

Appellant

(Plaintiff)

And

575476 B.C. Ltd. and 0861930 B.C. Ltd. carrying on business as

Northern Delicacy, the said 575476 B.C. Ltd. and 0861930 B.C. Ltd., and

Wing Ning Kong also known as Louis W.N. Kong

Respondents

(Defendants)

- and -

Docket: CA45642

Between:

Fairchild Developments Ltd.

Appellant

(Plaintiff)

And

676835 B.C. Ltd. carrying on business as Tropika, the said 676835 B.C. Ltd., and Wing Ning Kong
also known as Louis W.N. Kong

Respondents

(Defendants)

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Dickson

The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated September 11, 2018
(Fairchild Developments Ltd. v. 575476 B.C. Ltd.,

2018 BCSC 1550, Vancouver Dockets S137642 and S137643).

Counsel for the Appellant:

R. Basham, Q.C.

Y. D'Costa, Articled Student

Counsel for the Respondent

Wing Ning Kong:

T.G. Kornfeld

Place and Date of Hearing:

Vancouver, British Columbia

February 7, 2020

Place and Date of Judgment:

Vancouver, British Columbia

April 30, 2020

Written Reasons by:

The Honourable Chief Justice Bauman

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Madam Justice Griffin

Summary:

The parties executed lease amendment letters in which the personal respondent, Mr. Kong, agreed to indemnify Fairchild under the lease obligations of the corporate respondents. The trial judge concluded that the parties had not reached consensus on the start date of the indemnities such that upon execution of the letter agreements, Mr. Kong would become immediately and personally liable for the outstanding arrears of the corporate respondents. She held that the letter agreements were unenforceable, or in the alternative, unconscionable. Fairchild appeals on the basis that the judge erred by failing to consider the express terms of the letter agreements, by finding that the time periods of the indemnities had not been resolved, and in holding that the letter agreements were unconscionable.

Held: Appeal dismissed. The judge did not fail to consider the express terms of the letter agreements in her interpretation of the objective intentions of the parties, nor did she commit a palpable and overriding error in concluding that the parties were not ad idem. This finding was open to her on the evidence and supported by the record.

Reasons for Judgment of the Honourable Chief Justice Bauman:

Overview

- [1] On the morning of 4 February 2013, businessperson Louis W. N. Kong ("Mr. Kong") had no obligations as an indemnitor to Fairchild Developments Ltd. ("Fairchild") under the leases of 676835 B.C. Ltd. (carrying on business as "Tropika"), or 575476 B.C. Ltd. together with 0861930 B.C. Ltd. (carrying on business as "New Delicacy"). By then, Tropika and New Delicacy owed Fairchild over \$300,000 in arrears of rent and other charges.
- [2] During the afternoon of 4 February 2013, the parties executed two lease amendment letters. On the face of the letters, Mr. Kong agreed to indemnify Fairchild for the financial obligations of Tropika and New Delicacy under their respective leases for a period of one year: from 15 April 2012 to 14 April 2013 for Tropika, and from 1 April 2012 to 31 March 2013 for New Delicacy. In exchange, Fairchild agreed to provide the tenants with credits against their rent otherwise payable under the leases in the form of renovation allowances.

- [3] Almost immediately after the parties executed the letter agreements, Fairchild applied the renovation allowances against the overdue accounts of Tropika and New Delicacy. By the evening of 4 February 2013, it had hand delivered notices of default to Mr. Kong as indemnitor for the outstanding arrears, totalling \$230,045.89.
- [4] Two weeks later, Fairchild initiated distraint proceedings on the premises of Tropika and Northern Delicacy. By 10 April 2013, it had terminated their leases. On 17 October 2013, Fairchild commenced parallel suits against the corporate respondents, naming Mr. Kong as a personal defendant in each action.
- [5] The primary issue at trial was whether Mr. Kong faced liability as indemnitor to Fairchild pursuant to the terms of the two letter agreements. In reasons indexed at 2018 BCSC 1550, Justice Loo dismissed both actions. She could not conclude that Fairchild and Mr. Kong had intended the indemnities to operate retroactively, such that upon execution of the letter agreements on 4 February 2013, Mr. Kong would become immediately and personally liable for the arrears of Tropika and New Delicacy dating back to 2012. She accepted Mr. Kong's evidence that he understood the indemnities to operate on a going-forward basis only.
- [6] Having found that the parties were not *ad idem* on an essential term of the letter agreements, Justice Loo concluded that they were unenforceable. In the alternative, she considered them to be unconscionable. Finally, she held that Fairchild had breached its duty of good faith and honest performance in its dealings with Mr. Kong.
- [7] Fairchild attacks all three findings on appeal. It also alleges the judge erred in principle by failing to consider the express terms of the letter agreements in her interpretation of the objective intentions of the parties.
- [8] For the reasons that follow, I would dismiss the appeal.

Background

- [9] To provide context to the issues on appeal, I will set out the background facts in some detail.
- [10] In the early 2000s, Fairchild invited Mr. Kong to open a restaurant in one of its new shopping malls, the Aberdeen Centre. Mr. Kong accepted.
- [11] On 10 September 2003, Tropika entered into a five-year lease with Fairchild. Mr. Kong signed as a personal indemnitor. While the form of the lease originally provided that he would be the indemnitor for the term of the lease and any renewal, Mr. Kong negotiated the length of the indemnity down to three years.
- [12] A little more than one month later, New Delicacy entered into a five-year lease with Fairchild at the same shopping mall. Mr. Kong pledged a personal indemnity on like terms.

- [13] In the ensuing five years, business was not good. Tropika and New Delicacy were constantly in arrears of rent. Mr. Kong expressed concerns to the then vice-president and general manager of Fairchild's development division, Mr. Leung, about the amount of rent and the lack of traffic in the shopping mall.
- [14] As the leases approached their expiry, Fairchild and Mr. Kong discussed whether they would be renewed. Given the limited occupancy of businesses in the mall, Mr. Kong asked for a reduction in rent. Mr. Leung declined, but advised Mr. Kong that Fairchild could provide "renovation allowances" to each tenant as an indirect means of reducing rental arrears. My use of quotation marks becomes apparent below.
- [15] The parties eventually settled on terms. By letter agreement dated 10 April 2009, the Tropika lease was renewed for three more years, commencing 15 April 2009 and ending 14 April 2012. The Northern Delicacy lease was renewed for a further period of two years--from 1 May 2009 to 30 April 2011. Mr. Kong provided indemnities under both renewals.
- [16] By letter dated 25 May 2009, Fairchild confirmed that it would provide Northern Delicacy with a renovation allowance of \$120,000. The funds would be paid in four equal installments of \$30,000, provided that Northern Delicacy was not in default under the terms of its lease. A similar letter was sent to Tropika on the same date.
- [17] Northern Delicacy and Tropika continued to generate arrears. Notwithstanding their default, Fairchild paid the renovation allowances by giving credit to the tenants on the dates that the renovation allowances were due. Mr. Kong understood the allowances to be free rent--hence the quotation marks above.
- [18] Throughout the tenancies, Fairchild sent monthly statements to Tropika and Northern Delicacy detailing the amounts owing and in arrears. These demand notices, together with notices of default, were also sent to Mr. Kong as indemnitor.
- [19] The renewal of the Northern Delicacy lease expired on 30 April 2011, and the renewal of the Tropika lease expired on 14 April 2012. The tenancies continued on a month-to-month basis thereafter. Mr. Kong's obligations as a personal indemnitor were at an end.
- [20] Despite this, Fairchild continued to issue final notices to both tenants and to Mr. Kong as indemnitor. For example, a notice of default regarding Northern Delicacy's arrears, totalling \$195,662.48, was sent to Northern Delicacy and to Mr. Kong on 28 December 2012. A similar notice alleging arrears in the amount of \$106,476.65 was sent to Tropika on the same day. Again, each notice referred to a lease and an indemnity that had ended.
- [21] By January 2013, no leases had been executed. Efforts to execute Offers to Lease proved fruitless. Northern Delicacy was operating on a month-to-month tenancy, as it had been since May 2011, and Tropika was doing the same. Mr. Kong had no obligations as an indemnitor under either of the tenancies.

- [22] Around this time, Fairchild's marketing officer, Ms. Law, had a discussion with the tenants' accountant, Mr. Chan. She understood that the tenants were willing to go "straight to lease." She prepared two draft lease agreements, one for Tropika, and the other for Northern Delicacy, and sent them by email to Mr. Chan on 30 January 2013. Like the Offers to Lease, both were dated 28 March 2012 and for a three-year term. The Tropika lease had a back-dated commencement date of 15 April 2012, and the Northern Delicacy lease had a back-dated commencement date of 1 April 2012.
- [23] The draft agreements also included renovation allowances for each tenant, the terms of which were set out in "Schedule E - Special Clauses." For reference, I have reproduced Schedule E for the Tropika lease:

SCHEDULE E

SPECIAL CLAUSES

Upon the execution of the Lease by both parties and provided that the Tenant has duly performed without default all of the covenants, provisos, stipulations and terms of the Lease, the Landlord agrees to provide to the Tenant with a Tenant Renovation Allowance of \$94,474.98 payable in six (6) equal payments of \$15,745.83 during the Term of the Lease on the following dates:

- May 15, 2012
- November 15, 2012
- May 15, 2013
- November 15, 2013
- May 15, 2014
- November 15, 2014

- [24] The terms in Schedule E for the New Delicacy lease mirrored those above, save for the amount and schedule of payment.
- [25] As of 30 January 2013, the date Ms. Law emailed Mr. Chan the two draft lease agreements, notices sent by Fairchild indicated that Tropika and New Delicacy owed a combined total of \$313,073.61. This amount included outstanding arrears from 2005-2007.
- [26] The two lease agreements were returned to Fairchild the following day and reviewed by Ms. Law. Although initialled and signed in part, some initials were missing, and the signature space of the indemnitor had been left blank on both leases.

- [27] Ms. Law took the incomplete documents to Mr. Kong at the Grand Dynasty Seafood Restaurant in Burnaby. They discussed the terms of the leases in Cantonese. Mr. Kong advised Ms. Law more than once that he would not provide an indemnity. Since Fairchild had instructed Ms. Law that no renovation allowances would be granted without an indemnity, she struck out the spaces in the leases where the indemnitor signature belonged, as well as the references to Schedule E. Mr. Kong initialed the changes.
- [28] Ms. Law returned with the two signed lease agreements to Fairchild's office the next day. Mr. Leung signed the agreements on behalf of Fairchild.
- [29] During the morning of 4 February 2013, Mr. Leung and Mr. Kong had a telephone conversation. The precise content of this call was in dispute at trial. According to Mr. Leung's recollection, Mr. Kong wanted renovation allowances for Tropika and New Delicacy, and was willing to indemnify Fairchild under their leases for a term of one year.
- [30] After the telephone conversation ended, Mr. Leung instructed Ms. Law to prepare lease amendment letters which would provide Mr. Kong with renovation allowances in exchange for his personal indemnity. Ms. Law complied, and prepared two forms of letter agreements dated 28 March 2012 reflecting the amendments. When asked at trial about the use of this date, Mr. Leung testified "because the lease was start at the time; so I honour his request. I go back to the original lease sign if I recall, that's why I changed the date."
- [31] For clarity, I have reproduced a portion of the Tropika letter agreement below:

We write to inform you that the Landlord agrees to provide to the Tenant a Renovation Allowance of \$94,474.98 payable in six (6) equal payments of \$15,745.83 during the Term of the Lease on the following dates:

- May 15, 2012
- November 15, 2012
- May 15, 2013
- November 15, 2013
- May 15, 2014
- November 15, 2014

Provided that:

- i) the Tenant has duly performed without default all of the covenants, provisos, stipulations and terms of the Lease; and
- ii) Mr. Kong Louis Wing Ning shall be Indemnitor of the Lease from the 15th of April, 2012, to the 14th of April, 2013.

- [32] The letter agreement pertaining to Northern Delicacy is, in substance, identical. Only the terms of the renovation allowance and the dates of the indemnity differ. Both letter agreements are annexed to this judgment in full as appendices.
- [33] That same day, 4 February 2013, Ms. Law took the letter agreements to Mr. Kong at the Grand Dynasty Seafood Restaurant. In her evidence, she "pointed out where the payments and the amounts were and that the indemnity was for one year." Mr. Kong asked her why the year on the letter agreements was 2012 when it was 4 February 2013, to which Ms. Law responded "it's to match with the date of the lease," and also so that he could receive the renovation allowances.
- [34] Ms. Law left the restaurant but returned after realizing that the first page had not been initialed. Mr. Kong provided his initials.
- [35] Once Ms. Law was back at Fairchild's office in Richmond, Mr. Leung advised her that the accounting department would not be okay with the 28 March 2012 date on the letter agreements and that the date should reflect when they were signed. Ms. Law adjusted the date on the second page of each letter agreement to 4 February 2013. She subsequently telephoned Mr. Chan, informed him about the missing initials, and emailed the documents for signature. Mr. Chan obtained Mr. Kong's initials and returned the letter agreements to Ms. Law.
- [36] To recall, prior to these dealings between the parties on 4 February 2013, Mr. Kong's obligations as indemnitor had long expired, and Fairchild had no recourse against him personally under either tenancy. When the fresh leases were executed just three days earlier, he was, in Ms. Law's own words, "adamant about not providing an indemnity." Meanwhile, Tropika and New Delicacy together owed Fairchild \$313,073.61 as of 30 January 2013, attributable in part to outstanding arrears from 2005--2007.
- [37] Once Fairchild received the signed letter agreements from Mr. Chan, still on 4 February 2013, it applied the renovation allowances against the arrears owed by Tropika and New Delicacy, despite their default. The amounts credited reflected the terms of the 28 March 2012 letter agreements, with the only exception being \$30,000 credited to Tropika pursuant to one of the 25 May 2009 letters.
- [38] Thereafter, on the same day, Fairchild hand delivered final notices of default to the tenants and to Mr. Kong as indemnitor under the two leases. The notice with respect to Northern Delicacy sought payment in the amount of \$178,185.45; the notice with respect to Tropika sought payment in the amount \$51,860.44. Unlike previous notices of default, these stated that Fairchild's remedies included turning over the past due accounts to a "Bailiff/Collection Agency"--not just to a collection agency.
- [39] Mr. Kong did not respond to the final notices, nor did he make any payments to Fairchild.
- [40] Fairchild retained a bailiff to commence distraint proceedings.

- [41] On 19 February 2013, the bailiff posted distraint notices on the premises of Tropika and Northern Delicacy. The restaurants were forced to discontinue operation.
- [42] On 8 March 2013, Fairchild sent two letters to Mr. Kong informing him that, pursuant to his indemnities, Fairchild would proceed against him personally for any losses, damages, costs, and other amounts arising from the tenants' breaches of their respective leases.
- [43] On 4 April 2013, Fairchild notified the tenants that the distraint proceedings had been completed. Further notices of default were issued to the tenants and to Mr. Kong with respect to the remaining arrears.
- [44] On 10 April 2013, Fairchild delivered notices of termination to Tropika and Northern Delicacy.
- [45] Relying on the indemnities contained in the letter agreements, Fairchild commenced parallel proceedings against Tropika and Northern Delicacy on 17 October 2013, with Mr. Kong named as a personal defendant in each action.

Procedural History

Summary Trial

- [46] Mr. Kong applied for judgment by summary trial in both actions. At this stage, he was represented by counsel.
- [47] The applications were heard together by Justice Leask over the course of two days, with reasons delivered 31 December 2015 and indexed at 2015 BCSC 2462. After thoroughly canvassing the background facts and positions of the parties, Justice Leask held that the matter was not suitable for disposition by summary trial. He could not, on the evidence before him, find the facts necessary to decide the issues of fact and law, noting:
- [94] In particular I am unable to determine "the events and circumstances surrounding the transaction as a whole". Did either the landlord or the indemnitor enter willingly and knowingly into a contract that is patently an act of folly? Or, when all the facts are known, is there some explanation that makes business sense for both parties? I believe a trial court will need to hear the direct and cross-examination of the witnesses in order to arrive at a just result in this dispute.
- [48] The parties proceeded to trial.

Decision Under Appeal

- [49] Justice Loo issued reasons on 11 September 2018 following four days of trial in June. Mr. Kong represented himself in those proceedings.

[50] The judge began her analysis by reviewing some of the basic principles in the law of contracts. She cited this Court's decision in *Redfern Resources Ltd. (Re)*, 2012 BCCA 189 as follows:

[72] The creation of a contractual relationship is described by G.H.L. Fridman in *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 25 as follows:

the common law requires a clear manifestation of agreement. The mechanism of that agreement is contained in the notions of offer and acceptance. Without an offer and its acceptance, there is no contract. If either or both is missing, there is no proof that the parties were ever *ad idem*, that is, had reached a stage in their negotiations in respect of which it could be said that they had shown not only an intent to be bound together, but the nature, extent, and manner of their being bound so as to give rise to a legally recognizable and enforceable contract. The parties will not be bound unless they intend to be bound, nor will they be bound until they intend to be bound. Their intentions in these respects are indicated by the features of offer and acceptance.

[Footnotes omitted; emphasis in original.]

[73] In my view, no contract was formed in the circumstances of this case as the parties' interactions lacked the requisite elements of intention to be bound, offer and acceptance, and certainty of terms.

[51] She then referred extensively to another decision of this Court, *Berthin v. Berthin*, 2016 BCCA 104, in which Justice Newbury described the requirements of an enforceable contract. The extracts relied upon are reproduced here:

[46] The test, of course, is not what the parties subjectively intended but "whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15. As stated by Mr. Justice Williams in *Salminen v. Garvie* 2011 BCSC 339:

The test for determining consensus *ad idem* at the time of contract formation is objective: it is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract"; it is "whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term". The actual state of mind and personal knowledge or understanding of the promisor are not relevant in this inquiry. In short, if a reasonable person would find that the parties were in agreement as to a contract and its terms, then a contract would exist at common law. The test's focus on objectivity animates the principal purpose of the law of contracts, which is to protect reasonable expectations engendered by promises.

- [47] Of course, the terms in question must be enforceable - i.e., must have a definite as opposed to uncertain meaning such that a court can order either for damages or for specific performance in the event of breach. There is no doubt that courts will "lean heavily against finding contracts void for uncertainty". Thus Madam Justice D. Smith stated in *Frolick v. Frolick*, 2007 BCSC 84:
- [30] An effective agreement requires a meeting of the minds of the parties. An enforceable contract requires a consensus between the parties on all of the essential terms of their agreement. It is the responsibility of the parties, not the court, to clearly express those essential terms so "that their meaning can be determined with a reasonable degree of certainty": *Scammell and Nephew Ltd. v. Outston*, [1941] A.C. 251.
- [31] If the parties fail to reach a meeting of the minds on the essential terms of their agreement, or fail to express themselves in such a fashion that the meaning of the terms they agreed upon cannot be reasonably divined by the court, then the agreement will fail for lack of certainty. However, the requirement of certainty of the terms is always balanced with the reality of transactional negotiations. Parties may intentionally leave gaps in the terms of an agreement to provide for future or mutually satisfactory accommodations. In those circumstances, the court should not apply the doctrine of certainty so rigidly so that the intentions of the parties to create a binding agreement are thwarted.
- [32] Lambert J.A. observed in *Griffin v. Martens* (1988), 27 B.C.L.R. (2d) 152 (C.A.) at ¶4: "As long as the agreement is not to be constructed by the court, to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves." [At paras. 30-32; emphasis added in Berthin]
- [52] The judge then considered whether, during the telephone conversation on 4 February 2013, the parties had reached consensus regarding the start date of Mr. Kong's one-year indemnities. She concluded that they had not.
- [53] The judge noted that Mr. Kong had asked Ms. Law about the letter agreements, and in particular, why they were dated 28 March 2012 when the actual date was 4 February 2013. Ms. Law's response that 28 March 2012 reflected the date of the leases did not mean, according to the judge, that Mr. Kong had agreed to indemnify Fairchild for the first year of each lease. She remarked that "no reasonable person in the shoes of Mr. Kong would make such an agreement given the amount of arrears outstanding."
- [54] The judge compared the date the lease agreements were signed, 30 January 2013, with the amount of outstanding arrears, and held:
- [98] I have difficulty concluding on all of the evidence that both Mr. Leung and Mr. Kong intended that any personal guarantee or indemnity would be for one year and be retroactive to March 28, 2012 [sic], so that on the signing of the letter agreements Mr. Kong was immediately and personally indemnifying Fairchild for the arrears of rent from March 28, 2012 to March 28, 2013 [sic].

- [55] In this regard, she preferred the evidence of Mr. Kong over that of Mr. Leung. She considered Mr. Leung's recollection of the events to be poor or non-existent.
- [56] Alternatively, Justice Loo found that the letter agreements were unconscionable.
- [57] She noted that Mr. Kong had a limited understanding of English, and a limited ability to read documents affecting his legal positions. At para. 101, she added:
- [101] It is not clear why suddenly matters were so urgent that on February 4, 2013 after Mr. Leung's phone call with Mr. Kong, Ms. Law had to drive from Richmond to Burnaby to obtain Mr. Kong's signature, when Fairchild and the tenants had no lease agreement in place since the renewal of the first lease for Northern Delicacy expired on April 30, 2011 and the renewal of the first lease for Tropika expired on April 14, 2012.
- [58] The judge considered that unlike in the present circumstances, Mr. Kong generally received independent legal advice before signing any lease agreement. Moreover, Fairchild failed to explain that it would take immediate steps to make him immediately liable for all arrears from March 2012. In her view, no reasonable person would have agreed to such a bargain if they had been aware of the consequences.
- [59] The judge then considered the landlord-tenant relationship between the parties that had lasted approximately 13 years. She juxtaposed Fairchild's prior decisions not to insist on its strict legal rights with the manner in which it conducted itself before and after Mr. Kong signed the letter agreements.
- [60] She found that Mr. Leung planned to take immediate steps to make Mr. Kong liable for the past arrears of Tropika and New Delicacy as soon as Mr. Kong asked for a renovation allowance, "given the arrears that had accumulated over the time, and Fairchild having no recourse to Mr. Kong as indemnitor." She accepted Mr. Kong's description of the events as having semblance to a "trap" or "plot":
- [107] On February 4, 2013, after Mr. Kong signed the letter agreements, Fairchild applied credit to the overdue accounts through the renovation allowances, and on the same day, issued two final notices, threatening to turn over the past accounts to the bailiff and collection agency. By February 19, 2013, the bailiff had completed seizure of the tenants' goods and chattels.
- [61] The judge then referred to the test for unconscionability, as set out by Justice Garson of this Court in *McNeill v. Vandenberg*, 2010 BCCA 583:
- [15] In order to set aside a bargain for unconscionability, a party must establish:
- (a) inequality in the position of the parties arising from the ignorance, need or distress of the weaker, which left him in the power of the stronger; and
 - (b) proof of substantial unfairness in the bargain.

- [62] Against this framework, she contrasted Mr. Kong's limited understanding of the nature of the agreement he was entering into with what she considered to be a clear plan by Fairchild. She held that "[t]he bargain that Fairchild insisted on Mr. Kong making by signing the letter agreements dated March 28, 2013 [sic] was highly unreasonable and highly unfair."
- [63] Finally, the judge found that Fairchild's conduct amounted to a breach of its duty of good faith and honest performance.

Grounds of Appeal

- [64] Fairchild contends that the trial judge erred by (1) finding that the letter agreements were not binding because the periods of the indemnities were unresolved; (2) failing to consider the express terms of the letter agreements; (3) finding that the letter agreements were unconscionable; and (4) finding that Fairchild breached a duty of good faith and honest performance.
- [65] I would frame the issues as follows:
1. Did the judge err in principle by failing to consider the express terms of the letter agreements?
 2. Did the judge err in fact by finding that the parties were not *ad idem* with respect to the start date of Mr. Kong's indemnities?
 3. Did the judge err in concluding that the letter agreements were unconscionable?
 4. Did the judge err in finding that Fairchild breached a duty of good faith and honest performance?
- [66] I propose to treat the issues in that order.

Standard of Review

- [67] Contractual interpretation is aimed at ascertaining the objective intentions of the parties. As noted by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 50, this exercise involves issues of mixed fact and law: *aff'd* in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 22. Absent palpable and overriding error, an appellate court will not intervene: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36. Different considerations apply if the interpretation at issue concerns a standard form contract: see *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 24.
- [68] As always, questions of law are reviewable on a standard of correctness. In the course of contractual interpretation, legal errors may 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": *Sattva* at para. 53, citing *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 at para. 21. However, courts should be cautious in identifying

extricable questions of law in disputes over contractual interpretation given the inherently fact specific nature of ascertaining the objective intentions of the parties: *Sattva* at paras. 54-55.

Discussion

Did the judge err in principle by failing to consider the express terms of the letter agreements?

- [69] Fairchild's submissions on this point are straightforward. The judge erred by not considering the express terms of the letter agreements in addressing whether the parties had reached consensus on the start date of Mr. Kong's indemnities: *Grace Residences Ltd. v. Whitewater Concrete Ltd.*, 2009 BCCA 144 at para. 25. Instead, she focused her assessment on the 4 February 2013 telephone conversation preceding the execution of the letter agreements, as if Fairchild had relied on an oral agreement reached in that conversation.
- [70] Fairchild submits that had the judge considered the express terms of the letter agreements, she could only have concluded that the parties resolved the time periods of the indemnities.
- [71] By alleging the judge failed to consider the written terms of the letter agreements as required by the principles of contractual interpretation, Fairchild raises an extricable question of law to which a standard of correctness applies: see *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 39.
- [72] Contractual interpretation is concerned with understanding the objective intentions of the parties. Justice Rothstein described the practical, common-sense approach of this exercise in *Sattva*:
- [47] [A] decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning.
- [73] Evidence of surrounding circumstances--or the factual matrix--offers interpretive value insofar as it deepens a decision-maker's understanding of the "mutual and objective intentions of the parties as expressed in the words of the contract": *Sattva* at para. 57.
- [74] Surrounding circumstances cannot, however, overwhelm the words of an agreement or be used to effectively create a new bargain: *Sattva* at para. 57; *Hayes Forest Services Limited v. Weyerhaeuser Company Limited*, 2008 BCCA 31 at para. 14. This principle, referred to as the "overwhelm" or "overwhelming" principle, was recently revisited by the Court in *Teal Cedar Products*. Although dealing with a commercial arbitration case, Justice Gascon offered the following guidance relevant to the present appeal:

- [55] In my view, this "overwhelming" principle is subject to two formulations, neither of which confers appellate review jurisdiction in this case, albeit for different reasons.
- [56] The first formulation of this "overwhelming" principle is that the factual matrix overwhelms the words of a contract when it is weighed excessively. This formulation fails to confer appellate review jurisdiction here because it is a mixed question [of fact and law].
- [62] The second formulation of the "overwhelming" principle is that the factual matrix overwhelms the words of a contract when it is interpreted in isolation from the words of the contract, effectively creating a new agreement between the parties. This formulation of the "overwhelming" principle raises a legal question, but it lacks arguable merit here. As a result, it also fails to confer appellate review jurisdiction in this case.
- [75] Fairchild has not couched its position in the language of the "overwhelm" principle. Nonetheless, the thrust of its submissions, in my view, implicitly aligns with the second formulation discussed by Gascon J. in *Teal Cedar Products*. I return to this below.
- [76] The nature of evidence that can and cannot be relied upon as part of a contract's surrounding circumstances is not boundless. Rather, it "should consist only of objective evidence of the background facts at the time of the execution of the contract": *Sattva* at para. 58, citing *King* at paras. 66, 70. Knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting falls within this rubric--as does "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": *Sattva* at para. 58, citing *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 at p. 114 (H.L.) (per Lord Hoffmann).
- [77] The consideration of surrounding circumstances should not be construed as a derogation from the parole evidence rule. The following comments from Rothstein J. in *Sattva* are apposite:
- [59] The parole evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and *Hall*, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (*Hall*, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129, at paras. 54-59, per Iacobucci J.). The purpose of the parole evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, 1993 CanLII 88 (SCC), [1993] 2 S.C.R. 316, at pp. 341-42, per Sopinka J.).
- [60] The parole evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words

chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

[Emphasis added.]

[78] I now turn to the arguments raised by Fairchild.

[79] In essence, it submits that Justice Loo failed to consider the express terms of the letter agreements as required by the principles of contractual interpretation. In addition, she improperly focused her analysis on the telephone conversation preceding the execution of the letter agreements as if Fairchild had relied on a separate, oral agreement. I will treat these overlapping issues discretely.

[80] First, while acknowledging certain gaps in her reasoning, I am of the view that Justice Loo did not fail to consider the express terms of the letter agreements. I base this conclusion on several observations.

[81] The judge began her reasons by framing the issue before her as follows:

[2] The primary issue is whether pursuant to the terms of two letter agreements both dated March 28, 2012, the defendant Louis Kong is liable as an indemnitor to Fairchild for more than \$750,000 representing damages and rent payable under Tropika's lease and Northern Delicacy's lease.

[82] Then, in the course of setting out the evidence, she reproduced the letter agreements in full and discussed the context in which they had been prepared and executed. She subsequently canvassed the submissions of Fairchild that, in all respects, relied principally on the language of the documents.

[83] As regards her analysis, I share Mr. Kong's view that the judge implicitly considered the terms of the letter agreements in light of the surrounding circumstances, and as part of her overall interpretation of the objective intentions of the parties. For instance, para. 96 reads:

[96] Mr. Kong cross-examined Ms. Law about the March 28, 2012 letters, including why the date on the letters was March 28, 2012 when the actual date was February 4, 2013. Ms. Law may have replied that the date of March 28, 2012 reflected the date of the lease but that does not mean that Mr. Kong agreed with Mr. Leung that he would indemnify Fairchild for the first year of the March 28, 2012 lease. No reasonable person in the shoes of Mr. Kong would make such an agreement given the amount of arrears outstanding.

[Emphasis added.]

[84] It would be illogical for the judge to conclude as she did absent any contemplation of the letter agreements and the terms contained therein.

- [85] On the basis of the foregoing references, I am satisfied that the judge did in fact consider the express terms of the letter agreements in concluding that the parties had not reached consensus on the start date of Mr. Kong's indemnities.
- [86] Additionally, it is trite law that a trial judge is under no obligation to "discuss all of the evidence on any given point, provided the reasons show that he or she grappled with the substance of the live issues on the trial": *R. v. R.E.M.*, 2008 SCC 51 at para. 64; see 8640025 Canada Inc. (Re), 2019 BCCA 473 at para. 76; see also *Coast Mountain Aviation Inc. v. M. Brooks Enterprises Ltd.*, 2014 BCCA 133 at para. 74. The primary issue at trial was whether Mr. Kong faced personal liability as an indemnitor to Fairchild vis-à-vis the letter agreements. On my reading of Justice Loo's reasons, it is evident that she indeed grappled with this issue.
- [87] I also cannot find support for Fairchild's related submission that the judge, in concluding that the parties had not reached consensus on the start date of the indemnities, relied on a separate oral agreement stemming from the telephone conversation. This submission aligns with the second formulation of the "overwhelm" principle articulated in *Teal Cedar Products*, but respectfully has no merit.
- [88] The telephone conversation of 4 February 2013 preceding the execution of the letter agreements was intimately connected to the bargain itself. By that time, the restaurants had been operating under leases entered into three days prior, and Mr. Kong had no obligations as an indemnitor. The discussion between Mr. Leung and Mr. Kong on 4 February 2013 triggered a series of events that culminated in the execution of the letter agreements that same day. Accordingly, the telephone conversation, or more precisely its content, fell squarely within the rubric of the "surrounding circumstances" of the bargain: see *Sattva* at para. 58.
- [89] Justice Loo, like the summary trial judge, was attuned to this relationship. She did not interpret the telephone conversation in isolation from the words of the contract, thereby erring under the second formulation of the "overwhelm" principle: *Teal Cedar Products* at para. 62. To the contrary, she correctly considered the evidence in her overall interpretation of the objective intentions of the parties:
- [98] I have difficulty concluding on all of the evidence that both Mr. Leung and Mr. Kong intended that any personal guarantee or indemnity would be for one year and be retroactive to March 28, 2012 [sic], so that on the signing of the letter agreements Mr. Kong was immediately and personally indemnifying Fairchild for the arrears of rent from March 28, 2012 to March 28, 2013.
- [90] I would therefore not give effect to this ground of appeal.

Did the judge err in fact by finding that the parties were not *ad idem* with respect to the start date of Mr. Kong's indemnities?

- [91] Fairchild submits that the time periods of Mr. Kong's personal indemnities were resolved between the parties. To the extent the judge found otherwise, she erred.
- [92] In support of its position, Fairchild relies on a myriad of evidence that it says was misapprehended or ignored by the judge. Fairchild also directs this Court's attention to several alleged inconsistencies in Mr. Kong's evidence, the thrust of which I understand to be that had the judge properly considered them, she could not have concluded that Mr. Kong did not appreciate the time periods of the indemnities.
- [93] Given the force with which Fairchild impugned Mr. Kong's credibility during oral submissions, I begin there.
- [94] First, Fairchild takes issue with para. 59 of Justice Loo's reasons:
- [95] Later that day on February 4, 2013, Ms. Law took the two forms of letter agreements to Mr. Kong at the Grant Dynasty Restaurant in Burnaby. She testified that she "pointed out where the payments and the amounts were and that the indemnity was for one year, and had him sign both agreements." Mr. Kong asked her why the year on the letter agreements was 2012 when it was February 4, 2013, and she told him "it's to match with the date of the lease", and also so that he could get the renovation allowances. She then returned to Fairchild's office in Richmond and realized the first page had not been initialled. She returned to Burnaby and had Mr. Kong initial the first page. She returned to the office and Mr. Leung told her to change the date on the second page to February 4, 2013. Ms. Law phoned Marco Chan, told him about the missing initials, scanned the documents to him which included the date on the second page changed from March 28, 2012 to February 4, 2013, and he assisted her in having Mr. Kong initial the documents and returned to her.

[Emphasis added.]

- [95] Fairchild argues that the judge failed to reconcile this finding--that Mr. Kong had signed the letter agreements dated 28 March 2012 prior to initialing their adjusted date of execution--with his testimonial evidence. It points to the following extracts from Mr. Kong's examination in chief and cross examination, respectively:

MR. KONG: I signed this document. The date is the 4th February 2013. I -- I think this is the date we start the contract for this paper. Because in my knowledge, everything you sign at that date would be start at that time.

Q So, my question was whether Ms. Law told you that the guarantee started on February 4, 2013?

A She didn't explain to me.

THE COURT: Started when?

MR. BRACKSTONE:

Q Well, I didn't finish my question, but it was February 4, 2013. And your answer is no, she didn't tell you that?

A Again. Which -- which one?

Q Did Ms. Law tell you --

A Yes.

Q -- that the guarantee started on February 4, 2013?

A No.

Q That's just something you believe?

A No. Because I -- I crossed out the date is the 28th March 2012. I put the date as the 4th February 2013. My signature on it. Okay.

[96] Without invitation, this issue became the subject of further written submissions following the conclusion of the appeal. While acknowledging receipt, I am of the view that those submissions do not affect the merits of the broader credibility issue, and I need not say more about them.

[97] Fairchild highlights other inconsistencies in Mr. Kong's evidence regarding his understanding of the letter agreements. These relate, in part, to whether he had provided personal indemnities in the past, and whether the one-year indemnity in the letter agreements had been explained to him by Ms. Law on 4 February 2013. Fairchild emphasizes that the contradictions span across not just Mr. Kong's testimony, but also across his discovery evidence and pleadings. Fairchild has not, however, identified any direct evidence on the critical issue of whether Mr. Kong understood the start date of the indemnities.

[98] After carefully reviewing the transcripts of the proceedings before Justice Loo, together with the trial record, I am unable to conclude that this Court should intervene.

[99] It is undisputed that findings of credibility are entitled to a high level of deference on appeal and will not be disturbed absent palpable and overriding error: *Housen* at para. 24. As explained by this Court in *R. v. Thla Ceu*, 2018 BCCA 480:

[37] Inconsistencies and lack of memory in a complainant's evidence can raise credibility concerns at trial. But the credibility assessment of a witness is a question of fact and is entitled to a high degree of deference by an appellate court: *R. v. Swales*, 2014 BCCA 350 at para. 46. As this Court said in [*R. v. Ceal*, 2012 BCCA 19]:

[24] It is trite law that the assessment of credibility involves not only an assessment of the inconsistencies and discrepancies of a witness's evidence but also includes an assessment of his or her demeanor in the witness stand. In other words it is not just "what was said, but how it was said": *R. v. Howe* (2005), 192 C.C.C. (3d) 480 at para. 46 (Ont. C.A.). The

opportunity to observe how a witness delivers his or testimony is the "advantage" of the trier of fact and the corresponding "disadvantage" of the appellate court: see *W.(R.)* at 131-32; *R. v. François*, [1994] 2 S.C.R. 827; *R. v. Horton*, 1999 BCCA 150; and *R. v. McLean*, 2010 BCCA 341 at para. 51.

- [100] Bearing in mind these principles, Justice Loo had a difficult task before her. Mr. Kong was self-represented, inarticulate, and required the assistance of an interpreter. It is clear from even a cursory review of the transcripts that he had a limited comprehension of the English language. On numerous occasions he misunderstood the questions asked of him. On others, the judge cautioned Fairchild's counsel to minimize their use of terms or expressions that were not elementary--let alone legal. That the parties dealt with each other in Cantonese throughout their business relationship is of no moment.
- [101] The advantages of assessing credibility first-hand become acute in circumstances such as these. The central issue at trial rested in large part on the judge's determination of the surrounding circumstances of the letter agreements. Her findings of credibility were inextricably linked to the exercise. In this regard, it was open to her to prefer, as she did, the evidence of Mr. Kong over Mr. Leung. It was similarly open to her to accept Mr. Kong's evidence that he understood the indemnities to operate on a going-forward basis only. While there are certainly aspects of the transcript that would give cause for concern when assessing credibility, to borrow the words of Doherty J.A. in *R. v. Howe* (2005), 192 C.C.C. (3d) 480 at para. 46 (Ont. C.A.), it is not just "what was said, but how it was said."
- [102] I see no palpable and overriding error in Justice Loo's assessment of credibility. To the extent Fairchild asks this Court to reweigh the evidence, I would decline to do so.
- [103] Fairchild's remaining submissions under this ground of appeal engage evidence purportedly misapprehended or ignored by the judge in concluding that the parties had not resolved the time periods of the indemnities.
- [104] First and foremost, Fairchild places significant reliance on the express terms of the letter agreements. Those terms, it says, are clear on their face and stipulate the beginning and end of the indemnities. Mr. Kong signalled his assent to the same by providing his signature.
- [105] I pause to mention that this submission is distinct from that above which alleges the judge erred in principle by failing to consider the terms of the letter agreements at all. Here the concern is with the ultimate finding of fact--not the requirements of the legal test.
- [106] The other evidence Fairchild relies upon is summarized in its factum as follows:
- (a) The original 2003 leases also contained time limited indemnities for the leases;
 - (b) The parties had previously used letter agreements (or handwritten changes) to amend or renew their lease obligations;

- (c) The parties acted on the Letter Agreements, by issuing and receiving the renovation allowances;
 - (d) Mr. Kong repeatedly provided personal indemnities for these leases and other tenant obligations;
 - (e) Mr. Kong acknowledged being told that he would not receive any renovation allowances unless he provided a personal guarantee of the 2012 Leases;
 - (f) The renovation allowance in the Letter Agreements mirrored the renovation allowances in the original schedule "E's" that were deleted from the 2012 Leases;
 - (g) Like the renovation allowances and Mr. Kong's indemnities, the commencement dates of the 2012 Leases signed a few days earlier are also retroactive.
- [107] Respectfully, I am of the view that the judge did not commit a palpable and overriding error by finding that the parties had not reached consensus regarding the start date of Mr. Kong's indemnities.
- [108] As discussed, the principal concern of contractual interpretation is to determine the objective intentions of the parties by reading "the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para. 47. Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact: *Sattva* at para. 58.
- [109] Justice Loo considered the letter agreements in light of the surrounding circumstances. She could not conclude that the terms of Mr. Kong's indemnities had been resolved during the telephone conversation immediately preceding the execution of the letter agreements. She also could not conclude from Ms. Law's discussion with Mr. Kong at the Grand Dynasty Seafood Restaurant that, although the letter agreements were dated to match the leases, Mr. Kong agreed to indemnify Fairchild retroactively.
- [110] Ultimately, the judge found that Fairchild and Mr. Kong were not *ad idem* with respect to an essential term of the letter agreements--the indemnity. Put in a different way, she found that the express terms of the letter agreements did not reflect the objective intentions of the contracting parties. This finding was open to Justice Loo and supported by the record. I disagree with Fairchild that the express terms of the letter agreements suggest otherwise and support a singular interpretation of the parties' intentions. While the time periods of the indemnities are provided for, they are back-dated to April 2012 and contemplate retroactive obligations without specifically stating so. Against the backdrop of documents dated 28 March 2012 but executed 4 February 2013, the discernible intentions of the parties are far from certain.

[111] The ambiguity occasioned by the express terms of the letter agreements in their abstraction--although not characterized by the judge explicitly as such--made resort to the surrounding circumstances not only necessary, but dispositive for ascertaining the objective intentions of the parties. To this end, Justice Loo found that the parties had not reached consensus on an essential term of the letter agreements. It is not a function of this Court to reweigh the evidentiary record and prefer a different conclusion.

[112] At this stage it is appropriate to comment briefly on what can only be characterized as an absurd bargain if one were to accept Fairchild's position. By the morning of 4 February 2013, Tropika and New Delicacy were in arrears totalling over \$300,000. Based on their patterns of business in the preceding decade, and with outstanding charges from 2005, it was unclear at best as to whether they would ever be capable of rectifying the overdue accounts. At the same time, Fairchild had no recourse against Mr. Kong as indemnitor under either lease. Accordingly, the bargain at its core would have consisted of paper credits exchanged for Mr. Kong's immediate assumption of the tenants' sizeable, pre-existing debts. Suffice it to say, the benefit flowing to Mr. Kong under this arrangement made little commercial sense. The markers of absurdity and folly were abundant.

[113] For all of these reasons, I would not accede to this ground of appeal.

Unconscionability, Good Faith, and Honest Performance

[114] Given my conclusions on the first two issues, the remainder fall away.

Conclusion

[115] I would dismiss the appeal.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice Dickson"

I agree:

"The Honourable Madam Justice Griffin"

Appendix A

(Tropika letter agreement)

Appendix B

(New Delicacy letter agreement)

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Prepared on 24 October 2026 · Esheria