COURT OF APPEAL FOR ONTARIO

CITATION: C.C. Tatham & Associates Ltd. v. 2057870 Ontario Inc., 2012 ONCA 824
DATE: 20121126
DOCKET: C55292

Blair, Rouleau and Tulloch JJ.A.

BETWEEN

C.C. Tatham & Associates Ltd.

Applicant (Respondent in Appeal)

and

2057870 Ontario Inc.

Respondent (Appellant)

D. Gordon Bent, for the appellant

M. A. Dummings, for the respondent

Heard: November 23, 2012

On appeal from the judgment of Justice M.P. Eberhard of the Superior Court of Justice, dated March 27, 2012.

APPEAL BOOK ENDORSEMENT

[1] The parties have been engaged in a hotly contested dispute over the question of "Additional Rent" to be paid under a lease of commercial premises. There were two essential aspects to the dispute: (1) was the tenant required to pay a proportion of what the application judge referred to as "standardized management or administrative fees" incurred regarding the property and (2) what

amounts should be paid if the tenant was required to pay anything? These issues were all in play at the first hearing at which the application judge ruled that the lease as properly interpreted did not require the tenant to pay standardized management and administrative fees. Mr. Bent does not contest that interpretation on appeal.

[2] The issues on appeal arise out of a second hearing ordered by the application judge. In spite of her foregoing ruling, she recognized that it might work on unfairness on the landlord. She therefore gave the landlord a second chance to prove, on proper documentation, that there were expenses “properly chargeable” to the tenant. She also recognized that because of its approach to Additional Rent in the past, the landlord might have difficulty providing an exact accounting and that much of the backward-oriented accounting would have to involve estimates and be accorded some flexibility.

[3] After some further delay and demands for further reconciliations, the matter came on for a second hearing. The application judge concluded that – even allowing for the need for flexibility – the purported accounting presented by the landlord was not sufficiently informative. She ruled that the tenant had overpaid by $128,712.31. It is agreed by the parties that there has been a payment on account of that amount of $58,088 earlier paid out to the tenant by order of the application judge, leaving a balance of $70,652.31

[4] The appellant argues essentially that there were some records of some expenses somewhere in the materials that would support a management fee in some amounts and that the application judge made a palpable and overriding error in not awarding the landlord at least something.

[5] We do not agree. The application judge did allow certain specific claims but not others. She gave lengthy reasons, including a list of six specific reasons why the materials provided by the landlord were insufficient to permit her to come to any conclusion in this regard. Her reasons are supported on the record. It was not for her to speculate or, as she said, write another contract for the parties. We see no basis for interfering with her decision on the merits.

[6] Nor would we interfere with her decision as to costs. While we do not accept that there is a separate category of “enhanced partial indemnity” costs, if that is what she intended, we are satisfied that the quantum of costs she awarded was amply justified on the record, given an application judge’s wide discretion with respect to costs. We refer specifically to the landlord’s apparently adamant decision not to respond to any offer of settlement advanced by the tenant (offers that were beaten by the tenant in the result) notwithstanding those offers may not have complied formally with the rules, as well as to the landlord’s costs in prolonging the proceeding, as noted by the application judge.

[7] The appeal is therefore dismissed.

[8] Costs to the respondent fixed in the amount of $15,000 inclusive of disbursements and all applicable taxes.