

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Dabanxiong Trading Corporation v.*
0733849 B.C. Ltd.,
2025 BCCA 96

Date: 20250314
Docket: CA49589

Between:

Dabanxiong Trading Corporation

Appellant
(Plaintiff)

And

0733849 B.C. Ltd.

Respondent
(Defendant)

Before: The Honourable Justice Griffin
The Honourable Madam Justice Horsman
The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated
December 12, 2023 (*Dabanxiong Trading Corporation v. 0733849 B.C. Ltd.*,
Vancouver Docket S238215).

Oral Reasons for Judgment

Counsel for the Appellant: R. Lo

Counsel for the Respondent: C.E. Chisholm
R.A. Wollenberg

Place and Date of Hearing: Vancouver, British Columbia
March 14, 2025

Place and Date of Judgment: Vancouver, British Columbia
March 14, 2025

Summary:

The appellant appeals the order of a chambers judge issued in December 2023 refusing its application for relief from forfeiture. Held: Appeal dismissed as moot. Since the order under appeal, the appellant has vacated the property, made no effort to preserve its interest in possession, and has paid no rent. In the underlying proceeding, the appellant has filed a pleading alleging that the respondent landlord is in breach of its duty to mitigate damages. The respondent had now leased the property to a new tenant. There is no genuine issue remaining, and it would not be in the interests of justice for this Court to exercise discretion to hear a moot appeal.

[1] **HORSMAN J.A.:** This is an appeal from the decision of a chambers judge dismissing the appellant’s application for relief from forfeiture in the context of a commercial lease dispute. The respondent has brought a preliminary application to dismiss the appeal on the ground that it is moot.

Factual background

[2] In August 2021, the parties entered a five-year lease for premises located in Richmond, B.C. (the “Lease”). On November 17, 2023, the respondent terminated the lease due to the appellant’s failure to pay rent. On December 1, 2023, the appellant filed a notice of civil claim seeking various relief, including a declaration that the terms of the Lease are unconscionable, and damages. In the alternative, the appellant sought an order that it be granted relief from forfeiture pursuant to s. 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

[3] The appellant subsequently filed an application for relief from forfeiture, which was heard and dismissed by the chambers judge on December 12, 2023.

[4] The appellant filed a notice of appeal on January 11, 2024. It did not apply for any interim relief pending the hearing of the appeal, such as an order preventing the respondent from taking possession of the premises pending hearing of the appeal. Instead, the appellant vacated the premises.

[5] On March 27, 2024, the respondent filed a response to civil claim and counterclaim seeking damages for breach of the Lease. On May 8, 2024, the

appellant filed a counterclaim. The counterclaim alleges, among other things, that the respondent failed to mitigate its damages.

[6] The parties' claims, other than relief from forfeiture, remain outstanding.

[7] The evidence of Aaron Burry, a principal of the respondent's property manager, is that in November 2024, the appellant entered into a new lease for the premises with a new tenant. Mr. Burry deposes that the new tenant has taken possession of the premises, and is actively engaged in the construction of fixtures with a view to opening their business on April 1, 2025.

[8] It should be noted that the appellant's preferred remedy on appeal is an order that the application be remitted to the Supreme Court to be re-determined in accordance with what it says are the proper principles.

Analysis

The doctrine of mootness

[9] The doctrine of mootness is an aspect of the general practice of the courts to decline to decide a case that raises only hypothetical or abstract issues. If the decision of the court will have no effect on resolving a controversy that affects or may affect the rights of the parties, the court will generally decline to hear the case. Further, a live controversy must be present not only when the proceeding is commenced, but also when the court must make its decision. If, subsequent to the initiation of the proceeding, events occur such that there is no present live controversy affecting the rights of the parties, the case is said to be moot: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 1989 CanLII 123; *Mead v. Mead*, 2022 BCCA 161 at para. 27.

[10] The court does have a discretion to hear a case despite the absence of a live controversy. This discretion is exercised where the interests of justice require a hearing, the law is unsettled, or where an issue of general importance arises. The considerations relevant to the exercise of discretion are whether: there is an appropriate adversarial context for the proceeding; the case constitutes an

appropriate use of judicial resources; and the court would be acting within its proper adjudicative role in deciding the case: *Mead* at paras. 28–29.

The parties' positions

The respondent

[11] The respondent argues that the appeal is now moot. It says that even if the appellant were successful on appeal, relief from forfeiture and possession of the premises is no longer practically available to the appellant. The respondent points to the following circumstances:

- a) More than a year has passed since the order under appeal was granted and the appellant vacated the premises;
- b) While filing a notice of appeal, the appellant took no steps to preserve its request for relief from forfeiture until the appeal is determined;
- c) There is no indication that the appellant has any interest in, or ability to, return to the premises and re-start its business, which the chambers judge described as “not viable”;
- d) The appellant has not, since the order under appeal, paid rent under the Lease or sought to occupy the premises;
- e) In its response to counterclaim filed after the notice of appeal, the appellant alleges that the respondent failed to mitigate its losses arising from the appellant’s breach of the Lease, which is inconsistent with any assertion that the appellant is entitled to obtain possession of the premises; and
- f) The respondent has now, in fact, taken steps to mitigate its losses by entering into a new lease for the premises, and the new tenant has taken possession and is in the midst of completing work.

[12] As a result of these circumstances, the respondent says that the tangible and concrete dispute giving rise to the appeal has disappeared. The respondent says that because the only relief sought on the application leading to the order under appeal is now a practical impossibility, there is no live issue left on this appeal, and the parties should be left to litigate the outstanding issues in the proceeding in Supreme Court.

[13] The respondent argues that this is not one of the rare and exceptional cases in which it is in the interests of justice for the court to exercise its discretion to entertain a moot appeal.

The appellant

[14] The appellant raises, as a preliminary point, that the respondent's evidence regarding the new lease for the premises is hearsay, and should not be accepted without direct evidence from the new tenant. The appellant also submits that it had no opportunity to test this evidence.

[15] In the event that the evidence is accepted, the appellant says that the existence of an intervening third-party tenant does not, on its own, render the appeal moot. While the appellant acknowledges that the existence of such third-party rights may make it more difficult to obtain relief from forfeiture, it says that relief is not impossible to obtain in such circumstances. The appellant says that if its appeal is allowed and the case is remitted to the Supreme Court for reconsideration, the chambers judge on the re-hearing can grapple with whether there remains a tangible and concrete dispute.

[16] If this Court finds the appeal is moot, the appellant says it ought to exercise discretion to hear the appeal nonetheless. The appellant says the appeal raises an important issue about the test to be applied for relief from forfeiture in relation to a commercial lease where the only breach alleged is non-payment of rent. The appellant says there is a full adversarial context for deciding the issue, there are no concerns about judicial economy, and the court would be acting in its proper adjudicative role.

Discussion

[17] I will address, first, the appellant’s argument about the quality of the respondent’s evidence. I see no difficulty in relying on Mr. Burry’s evidence. Mr. Burry states that he has personal knowledge of the matters deposed to in his affidavit. The facts set out in the affidavit—the existence and timing of the new lease and the work being carried out by the new tenant—are matters that would be known to him as the principal of the respondent’s property manager. The appellant offers no grounds to infer that Mr. Burry would perjure himself. Indeed, the facts he deposes to appear uncontentious. It is not surprising that the respondent has taken steps to re-lease the premises, particularly given the appellant’s pleading that the respondent’s damages should be reduced due to its failure to mitigate.

[18] The appellant’s remaining arguments as to whether the appeal is moot presumes that the only basis for the respondent’s submissions on mootness is the intervening existence of third-party rights. However, as I have set out, the respondent’s arguments are not restricted to that one circumstance. The respondent’s argument is that the events that have occurred since the issuance of the judge’s order on December 12, 2023, demonstrate that the appellant has no real interest in, and no practical ability to, re-take possession of the premises. The appellant’s conduct since filing the notice of appeal provides no indication that the relief they seek on appeal will be of any practical utility. The appellant vacated the premises over a year ago, without taking steps to secure an interim remedy to preserve its interests in possession. In the meantime, the appellant has not paid rent, and has no apparent ability to do so. In accordance with its obligation to mitigate, as pleaded by the appellant, the respondent has now leased the premises to new tenants.

[19] These circumstances, in my view, raise a further concern for the court process in the inconsistent positions advanced by the appellant: on the one hand continuing to pursue a claim for relief from forfeiture, while at the same time pleading that the respondent had a duty to mitigate its losses. This raises a concern with the potential abuse of court process if the appellant is permitted to simultaneously

maintain these inconsistent positions. In pleading a failure to mitigate, the appellant must be taken to have elected not to pursue its claim for relief from forfeiture. This is another reason why this appeal raises issues that are only hypothetical and not concrete.

[20] Accordingly, I agree with the respondent that in these circumstances, there is no remaining tangible and concrete controversy between the parties as it relates to relief from forfeiture. The resolution of the appeal, even if it resolved in the appellant's favour, will have no practical effect on the rights of the parties. The appeal is moot.

[21] I am also not persuaded that this is an exceptional case in which this Court should exercise discretion to entertain an otherwise moot appeal. The appellant's submission as to why the Court should hear the appeal is premised on two primary assertions.

[22] First, the appellant says that because the award of costs in the court below may be affected if its appeal is successful, there is a sufficiently adversarial context to warrant this Court exercising discretion to hear the appeal. I do not agree. The award of costs is not directly challenged on appeal. The fact that the outcome of this appeal may have an indirect impact on an otherwise unchallenged cost award does not persuade me that this is an appropriate case to exercise discretion to hear an otherwise moot appeal in light of the circumstances I have highlighted.

[23] Second, the appellant says that there is an issue of general importance that arises in this case: the test for relief from forfeiture involving a commercial lease where the sole breach is non-payment of rent. I note the respondent disputes that this argument was made to the chambers judge. In any event, I am not persuaded that there is any uncertainty in the law that calls out for clarification by this Court. Relief from forfeiture is a purely discretionary remedy. The cases have set out a list of criteria that may be relevant to the exercise of discretion: *Sechelt Golf & Country Club Ltd. v. District of Sechelt*, 2012 BCSC 1105 at paras. 138–139; *Airside Event Spaces Inc. v. Langley (Township)*, 2021 BCCA 306 at paras. 21–22. The

appellant’s argument really comes down to a disagreement over how the chambers judge weighed the various criteria in light of the factual circumstances. There is no issue of general law that arises, quite apart from the respondent’s objection that this is a new issue.

[24] I also do not agree that there are no concerns with judicial economy in these circumstances. The appellant has offered no compelling reason why the resources of this Court should be used to hear the substantive appeal. The appellant’s argument that the issue of mootness could simply be deferred to the Supreme Court if its appeal is successful illustrates a further difficulty. The appellant does not only ask this Court to engage in a hearing process where there is no concrete and tangible dispute, but also seeks a remedy that would require a further hearing in the Supreme Court. All in pursuit of an outcome that have no practical utility at this stage.

[25] For these reasons, I do not consider this to be an appropriate case in which to entertain a moot appeal.

Disposition

[26] I would dismiss the appeal as moot.

[27] **GRIFFIN J.A.:** I agree.

[28] **EDELMANN J.A.:** I agree

[29] **GRIFFIN J.A.:** The appeal is dismissed as moot.

“The Honourable Madam Justice Horsman”