# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Icon Marketing Inc. v. RPG Revenue Property Group Ltd.*, 2025 BCSC 120

Date: 20250128
Docket: S229926
Registry: Vancouver

Between:

**Icon Marketing Inc.**

Plaintiff

And

**RPG Revenue Property Group Ltd.**

Respondent

Before: The Honourable Justice Chan

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiff: | O.J. Kowarsky |
| Counsel for the Respondent: | T.M. Hanson |
| Place and Date of Hearing: | Vancouver, B.C.<br>December 13, 2024 |
| Place and Date of Judgment: | Vancouver, B.C.<br>January 28, 2025 |

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## Introduction

[1] In 2015, the plaintiff Icon Marketing Inc. ("Icon") rented a commercial premise from the landlord, RPG Revenue Property Group Ltd. ("RPG"), the defendant in this action. The lease was renewed in 2020 for a further four years. In March 2022, Icon discovered the square footage of the premise was less than stated in the lease. Icon claims it has been overpaying rent since the start of the lease, as rent is based on square footage. Icon brought this action to recover the amount it alleges it has overpaid.

[2] RPG argues the lease is clear as to how much rent is to be paid and argues there has been no overpayment. Icon moved out of the rental space two months before the end of the lease and did not pay the final two rent payments. RPG counterclaims for the amount of rent arrears owing from the remaining two months.

[3] The dispute between the parties is over the square footage of the premises. Icon submits it is the actual square footage which should be used to calculate rent. However, RPG submits rent is calculated on a grossed-up square footage, which includes some common areas in the building.

[4] Icon brings this application for summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules* [*SCCR*].

## Factual Background

[5] Icon is a commercial and residential real estate sales and marketing agency. Crystal Hung is the director and CEO of Icon.

[6] RPG is the owner of a commercial building at 1151 W. 8th Avenue in Vancouver. It is a four-storey heritage building. David Kaplan is the managing director of RPG.

[7] On November 13, 2014, Ms. Hung, on behalf of Icon, completed an Offer to Lease Unit 3 of 1151 West 8th Avenue (the "Unit"). Ms. Hung deposed that the Offer to Lease was provided to her by Mr. Kaplan as a template, with most of the form

already completed. She had to fill out some basic information, such as the name of her company and current address. In the Offer to Lease, the premises to be rented is described as:

> "the third (3rd) floor of the Building situated at 1158 West 8th Avenue, having a Rentable Area of One Thousand Five Hundred and Eighteen (1,518) square feet, measured in accordance with BOMA 1996 standards.

Ms. Hung deposed Mr. Kaplan never discussed with her the meaning of "BOMA 1996 standards". The floor plan for the third floor was attached to the Offer to Lease. However, in this floor plan, the stairwell was not blacked out as being excluded.

[8] On January 28, 2015, the parties entered into a lease for the Unit for a five-year term, starting February 1, 2015, and expiring on January 31, 2020 (the "Lease"). Pursuant to the Lease, Icon was to pay an Annual Basic Rent, which was a stipulated amount. Icon was also to pay Additional Rent, calculated at a fixed percentage (22.04%) of its share of the operating expenses, taking into consideration the "Area of the Premises" and the "Rentable Area". The relevant provisions of the Lease are the following:

> 1.1 (b) "Annual Basic Rent" shall mean the amount specified as such in the Lease Summary;
>
> (c) "Area of the Premises" shall means (*sic*) approximately the area specified in the Lease Summary, which may be determined by the Tenant in accordance with Section 4.9 of this Lease;
>
> (t) "Premises" shall mean the portion of the Building described in the attached Schedule A, with any exclusion as indicated on Schedule A, together with the Leasehold Improvements;
>
> (y) "Rentable Area" shall mean the total area expressed in square feet or its metric equivalent of space set aside by the Landlord for leasing to tenants of the Building, as may be amended by the Landlord from time to time;
>
> 16.2 The Tenant acknowledges and agrees that no representations, warranties, agreements, or conditions have been made other than those expressed herein, and that no agreement collateral hereto shall be binding upon the Landlord unless it be made in writing and duly executed on behalf of the Landlord.
>
> 17.1 This Agreement contains the entire agreement between the parties respecting the subject matter, and supersedes all other agreements whether written, or oral between the parties, it being expressly understood that there are no other representations, terms, warranties, conditions, guarantees, promises, agreements, collateral contracts or collateral agreements express or

> implied, or statutory, other than those contained in this Agreement and that this Agreement represents the whole of the Agreement between the parties.

[9] Schedule A includes a floor plan of the third floor excluding the stairwell. The floor plan includes measurements.

[10] Placed at the front and forming part of the Lease is the two-page Lease Summary. The Lease Summary sets out the following information:

- the "Area of the Premises" is 1,518 square feet;
- the term of the Lease is 60 months;
- the start date of the Lease is February 1, 2015;
- the expiry date is January 31, 2020; and
- the amount of the Annual Basic Rent is provided yearly and also monthly, with an annual square foot rate.

[11] From February 1, 2015 to January 31, 2017, the Annual Basic Rent was $42,504 per year plus taxes. From February 1, 2017 to January 31, 2020, the Annual Basic Rent is $45,540 per year plus taxes.

[12] At the time of the signing of the Lease, Mr. Kaplan explained in an email to Ms. Hung that he had deleted s. 4.9 of the Lease, referenced in the definition of "Area of the Premises" at s. 1.1(c) of the Lease. Section 4.9 was the section which allowed the tenant to determine the square footage of the premises. Mr. Kaplan set out the explanation of the square footage calculation:

> The square footage of the space was measured twice, once by our architect and once by the bank's appraiser. As you can see from the below screen shots the architect measured the space at 1,576 sq ft and the appraiser measured it as 1,518 sq ft. We have used the appraiser's numbers for the entire building. All our estimates and correspondences with the bank refer to these figures.

[13] Mr. Kaplan included two screenshots in his email. One was from the architect which provided the "gross" square footage of each floor of the building. The third floor was listed at 1,576 square feet. The second screenshot appears to be from an appraisal report, and provided the rental area of each floor "grossed up". In this screenshot, the third floor was listed at 1,518 square feet.

[14] The parties renewed the Lease in January 2020 for a further four years, commencing February 1, 2020 and expiring January 31, 2024 (the "Renewal Lease"). The terms of the Renewal Lease and the Lease are the same, except the amount of Annual Basic Rent has increased.

[15] In March 2020, RPG leased back two offices on the third floor from Icon (the "Sublease"). An employee of Icon calculated the area to be leased back as 265.76 square feet, and the rent paid by Icon was reduced accordingly.

[16] This Sublease was terminated by RPG on June 30, 2022.

[17] In March 2022, Icon was considering subletting another portion of the third floor. Ms. Hung discovered at this time that the third floor was actually 1,321 square feet, and not 1,518 square feet. She advised Mr. Kaplan about this by email on April 5, 2022.

[18] On April 7, 2022, Mr. Kaplan responded. His explanation for the different square footage was as follows:

> Thank you once again for your email. I spent some time studying it yesterday and I believe that I am in a position now to explain what is going on.
>
> Using the original architect's drawing, which is in your lease, you have calculated what I believe is called the Net Usable Area which is the area of an office measured from the inside walls that is exclusive and usable by tenants of that floor. In BC and western Canada in general it is common, possibly standard, to charge rent on what is called the Gross Rentable Area (GRA) which is measured from the outside walls and includes some common area. I have pasted an article below by an Edmonton based real estate company describing this…

[19] Mr. Kaplan noted that he may have been underpaying for the Sublease, if the percentage of space was calculated using the net area, and not the gross area. Mr. Kaplan offered to redo the calculations of the rent for the Sublease.

[20] In May 2022, both Icon and RPG obtained professional building measurement companies to measure the square footage of the third floor, as shown in the floor plan at Schedule A of the Lease. The company contracted by Icon concluded the floor

space was 1,362 square feet, and the other company contracted by RPG found it was 1,363.47 square feet.

[21] Ms. Hung then sent emails to RPG requesting her rent be adjusted based on this lower square footage. In this action, she also seeks adjustments to the Additional Rent. RPG does not agree with Icon that rent has been overpaid and opposes the proposed adjustments.

**Suitability for Summary Trial**

[22] Icon applies pursuant to R. 9-7 of the *SCCR* for judgment for the amounts of Annual Basic Rent and Additional Rent it maintains it has overpaid since the start of the Lease in February 2015 until the end of the Renewal Lease in January 2024. Icon attributes these amounts to the discrepancy in the actual floor space on the third floor. The plaintiff estimates it has overpaid approximately $44,000 in Annual Basic Rent and $16,000 in Additional Rent.

[23] The defendant agrees this matter is suitable to be determined by summary trial. RPG counterclaims for the amount of rental arrears owing due to Icon not paying the final two rental payments. RPG seeks approximately $2,173 as well as contractual interest.

[24] The parties have both filed affidavits. Neither party requested any cross-examination on any of the affidavits.

[25] Before embarking on a summary trial, the court must determine suitability. I do not understand the parties to argue that this claim and counterclaim are not suitable to be determined on a summary trial application. In my view, the court is able on the whole of the evidence to find the facts, and it would not be unjust to decide the issues at a summary trial: *SCCR*, R. 9-7(15). Considering the factors set out in *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), in particular the modest amount of the claim as compared to the cost of a conventional trial, I find this claim and counterclaim are appropriate to be decided by way of summary trial.

**Interpretation and Rectification of the Lease**

[26] The proper approach to interpretation of contracts is set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*]:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, 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:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line* [*Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).] at p. 574, *per* Lord Wilberforce)

[27] The role and nature of surrounding circumstances in contractual interpretation was also set out in *Sattva*:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services* [*Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31] at para. 14; and [G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012)] at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the

> background facts at the time of the execution of the contract (*King* [*v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80] at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme* [*Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.)] at p. 114). 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.

[28] Both parties agree these principles govern the interpretation of the Lease. Icon argues properly construed, the rent is intended to reflect actual square footage, and since the actual square footage is incorrect in the Lease, Icon ought to have paid a reduced rent.

[29] In the alternative, Icon seeks the relief of rectification, arguing that there was a mutual mistake in the square footage recorded in the Lease. Icon relies on *Canada (Attorney General) v. Fairmont Hotels Inc*., 2016 SCC 56:

> [38] To summarize, rectification is an equitable remedy designed to correct errors in the recording of terms in written legal instruments. Where the error is said to result from a mistake common to both or all parties to the agreement, rectification is available upon the court being satisfied that, on a balance of probabilities, there was a prior agreement whose terms are definite and ascertainable; that the agreement was still in effect at the time the instrument was executed; that the instrument fails to accurately record the agreement; and that the instrument, if rectified, would carry out the parties' prior agreement. In the case of a unilateral mistake, the party seeking rectification must also show that the other party knew or ought to have known about the mistake and that permitting the defendant to take advantage of the erroneously drafted agreement would amount to fraud or the equivalent of fraud.

[30] Icon argues there was a fundamental mistake by both parties as to the square footage that resulted in Icon overpaying rent. While the Lease specified 1,518 square feet, actual measurement shows the third floor was 1,363 square feet. Icon claims that since rent was determined by square footage, it had overpaid every month since the start of the Lease for 155 square feet.

[31] In contrast, RPG argues that, properly construed, the rent charged to Icon was correctly reflected in the Lease. In addition, RPG argues there has been no mistake

in the square footage. RPG maintains it was clear to Icon before the Lease was signed that 1,518 square feet was the gross square footage of the third-floor unit, which included a proportionate share of some common areas in the building. Mr. Kaplan has deposed it is RPG's usual practice to calculate rent based on gross square footage.



**Analysis of Lease**

[32] Icon argues the square footage in the Lease is incorrect such that the Court ought to rectify it, and adjust the rent payments accordingly.

[33] Icon argues that the term "Premises" is defined in the Lease by reference to Schedule A, which is the floor plan showing the inside space of the third floor excluding the stairwell. I understand the measurements shown on this floor plan show it is 1,321 square feet. However, the "Area of the Premises" states it is 1,518 square feet. Icon argues 1,518 square feet is an incorrect figure, and the Lease must be corrected to reflect a lower square footage. As I understand its argument, Icon's position is that "Area of the Premises" must refer to the area shown in Schedule A, which has been defined to be the "Premises". That is, Icon argues "Area of the Premises" must refer to the area of the "Premises", which is 1,321 square feet and not 1,518 square feet.

[34] With respect, I am not persuaded by this argument. "Premises" and "Area of the Premises" are two separate, defined terms in the Lease. It follows that "Area of the Premises" is not simply a function of the area of the "Premises". The term "Premises" refers to the floor plan in Schedule A, and "Area of the Premises" is defined as approximately the area specified in the Lease Summary, which states it is 1,518 square feet.

[35] Icon argues RPG had deleted s. 4.9 from the Lease prior to the agreement being finalized, which would have allowed the tenant to determine the "Area of the Premises". I find RPG clearly advised Icon of this deletion before the Lease was signed. Mr. Kaplan explained the unit had been measured twice, and included screenshots from the architect and the appraiser setting out the "gross" square footage. If Ms. Hung was not satisfied with how the "Area of the Premises" was determined, she ought not to have accepted the measurement.

[36] I note that the Offer to Lease indicated that the third floor had a rentable area of 1,518 square feet, "measured in accordance with BOMA 1996 standards". Mr. Kaplan has deposed that "BOMA" is the Building Owners and Managers Association, and the BOMA 1996 Standards stipulate the rentable area of a premise is calculated with the "usable area" plus "its associated share of floor common area and building common areas". Ms. Hung argues she was never provided with any BOMA manual prior to the signing of the Lease, and that she was not aware of the meaning of BOMA standards. Further, she argues that as the Lease has an entire agreement clause, BOMA standards are not incorporated into the Lease.

[37] In my view, it is not necessary that any industry standards including BOMA be included in the Lease. There are no terms in the Lease that set out how the "Area of the Premises" was to be calculated, or how the "Annual Basic Rent" is to be calculated. The "Area of the Premises" is set out as 1,518 square feet and the "Annual Basic Rent" is set out in a dollar amount, with a specified percentage for Icon's proportionate share of the operating expenses. In my view, the Lease is clear and unambiguous on the amount of rent to be paid.

[38] Further, the Lease does not contain any language indicating that the rent is to be calculated on usable space or net space only, without including any share of common property. As such, Icon's discovery of the actual usable floor space is irrelevant to the rental amounts, as rent was not to be determined on any formula that restricted it to usable floor space.

[39] Icon argues RPG has always considered actual floor space to be relevant to the determination of rental amounts. Icon cites the Sublease between the parties as an example of this understanding on the part of RPG. However, the calculation of the rent for the Sublease was done by an employee of Icon, and not by RPG. If the employee of Icon calculated rent based on actual floor space, and not on a grossed-up basis, that does not reflect any understanding on the part of RPG. Moreover, when the discrepancy in actual floor space arose and was brought to the attention of

Mr. Kaplan, he offered to adjust the amount paid under the Sublease to reflect a grossed-up figure.

[40] Icon argues the fact that RPG hired its own professional building measurement company lends credence to the argument that RPG mistakenly believed the actual floor space was 1,518 square feet. I do not agree that is a fair inference to be drawn. It is noted that prior to the hiring of the professional measurer, Mr. Kaplan had already advised Ms. Hung that 1,518 square feet was the grossed-up figure. Furthermore, Icon was insistent on hiring its own company to measure, and RPG may have wanted a second opinion.

[41] I do not find there has been a fundamental error in the Lease. I do not find there has been a mutual mistake made by both parties as to the square footage of the third floor unit, and the rent payable. The fact that a grossed-up square footage was used in the Lease was made known to Icon before the Lease was signed, through the Offer to Lease as well as the email from Mr. Kaplan explaining the calculation. I do not understand Icon to argue a unilateral mistake by Ms. Hung ought to entitle it to the remedy of rectification. In any event, if Ms. Hung made a unilateral mistake and believed the figure in the Lease was the actual floor space, there is no evidence that Mr. Kaplan was made aware of this wrong assumption prior to the signing of the Lease such that allowing the Lease to stand would violate the principle of fairness in either equity or contract law.

[42] I find, reading the Lease as a whole, Icon agreed to pay the rent stipulated for the Unit.

[43] Alternatively, I find the limitation period has expired to litigate the Lease, as the actual square footage was discoverable by Icon in February 2015 after it took possession. Only the Renewal Lease can be litigated as not being statute-barred. In any event, since the terms of the Renewal Lease are identical to those of the Lease, I find there is no error in the Renewal Lease which requires rectification.

[44] In the result, Icon's claim is dismissed. RPG is awarded judgment on its counterclaim.

## Conclusion

[45] Icon's claim is dismissed.

[46] RPG is awarded $2,173.04 for the rental arrears, with contractual interest at the rate of prime plus 3% per annum. As the successful party, RPG is awarded costs at the ordinary scale.

"Chan J."