IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *670152 B.C. Ltd. v. Premium Granite Works Inc.*, 2025 BCSC 284

Date: 20240224
Docket: S130940
Registry: Kelowna

Between:

670152 B.C. Ltd.

Plaintiff

And

Premium Granite Works Inc. and William Pat Baril

Defendants

Before: The Honourable Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:	D. Horvath
Counsel for the Defendants:	R.O. Levin
Place and Dates of Trial/Hearing:	Kelowna, B.C. January 23 and 24, 2025
Place and Date of Judgment:	Kelowna, B.C. February 24, 2025

[1] This is a commercial lease dispute about a blocked drain. The defendant Premium Granite Works Inc. ("Premium") was a tenant at premises owned by the plaintiff, 670152 B.C. Ltd. There was a drain at the front of the building that became blocked and as a result water would pool at the entrance to the premises making it difficult and inconvenient for customers and employees alike. In the winter the pooled water would freeze.

[2] The parties could not agree who was responsible to fix the drain, so neither did so. Three years after the parties were aware the drain was blocked, Premium was told by its insurer that it was no longer willing to provide insurance. Premium argues that it was entitled to treat the lease at an end. It moved out of the property and found alternative space elsewhere.

[3] The plaintiff claims that Premium breached the lease and brings this claim for damages. The property sat vacant for approximately six months before the plaintiff found another tenant. The rent paid by the other tenant was less than the amount provided in Premium's lease. The rent payable over the unexpired portion of the lease, less the amount paid by the new tenant plus GST equals $89,144.76.

[4] The balance of the plaintiff's claim is for costs it says it incurred to repair the property after Premium left. The total amount of the plaintiff's claim is $129,971.16. Of this additional amount, approximately $3,000 was the cost of repairing the drain.

The leased premises

[5] The property is in an industrial area of West Kelowna. The structures on the property include a warehouse that Premium used to cut and finish granite slabs, and an office building that Premium used for administration and as a showroom. The warehouse contained a linear drain that was sloped towards the rear of the property where the slurry from the cutting and finishing of granite slabs would go.

[6] At the front of the property was a large parking lot. The parking lot was fenced and was accessed by way of a gate that could be locked. Whether or not the parking

lot formed part of the leased premises is one of the matters that is in dispute. It is not disputed that Premium had a key to the gate.

[7] Premium used the parking lot not only for parking for its customers and employees, but also for storing granite slabs. Aerial photographs depicted a large number of granite slabs all around the perimeter.

The documents

[8] The plaintiff and Premium entered into a written contract whereby the plaintiff would lease property at 1130 Stevens Road, West Kelowna (the "Property") to Premium for a period of two years for a monthly sum of $5,000, for a total sum of $120,000 for a two year period (the "Lease"). Premium was in the granite business. The defendant, Mr. William Pat Baril, is the principal of Premium and guaranteed Premium's obligations under the Lease.

[9] On November 1, 2013, the parties entered into a modification agreement. The term was extended to a five year term, and Premium agreed to rent an additional 1,500 square feet that it intended to use for its showroom. This was in addition to the 2,800 square feet of warehouse space and 1,500 square feet of office space covered under the Lease. In the modification, the parties increased the rent to $6,000 per month.

[10] Finally, in August 2018, the parties entered into an extension agreement, pursuant to which the Lease was extended for a further five years to August 31, 2023, and the rent increased to $8,604.16 per month.

[11] Although the subsequent modifications extended the term, changed the rent and added some square footage to the leased premises, the remaining terms of the Lease did not change, and therefore continued to apply to the parties' arrangement.

The litigation

[12] The notice of civil claim was filed on April 30, 2021, and a response to civil claim and counterclaim filed on June 4, 2021. The counterclaim includes a claim for

a return of the initial deposit of $10,500. The counterclaim also included a claim for an overpayment of rent, premised on an argument that the square footage of the leased premises was less than as set out in the Lease, plus damages associated with moving, including painting, moving costs and loss of revenue.

[13] No trial date has been scheduled, and neither party has conducted examinations for discovery. I initially heard the plaintiff's summary trial application in October 2024, but it was adjourned when it became apparent that the court would benefit from further evidence regarding the drain. In particular, it was not apparent as to whether the drain that was subsequently repaired was connected to the grate at the front of the building where the water pooled, and whether there were any other potential sources of material that could have contributed to the blockage, other than through the grate at the front.

[14] Since the previous hearing, the parties have obtained further evidence with regard to the blocking of the drain that led to the pooling of water at the front of the building. As a result of those investigations, it is now apparent that the grate at the front of the building led to a four inch pipe that ran beneath the building and towards a ravine. The blocked drain that the plaintiff repaired or replaced was the same one that connected to the grate at the front. Based upon the additional evidence of a plumber, Mr. Graham, who was retained by the plaintiff, I am also satisfied that:

a) the only reason that water was pooling at the front of the building was because the drain was blocked;

b) there are no other sources or points of entry for either water or material, so the material that blocked the drain must have gone through the grate; and

c) any of the granite slurry that was generated from cutting granite inside the warehouse portion of the premises would not have entered the drain and therefore could not have contributed to the blockage of the pipe.

The relief sought

[15] The plaintiff seeks the following orders:

a) an order for general damages in the amount of $129,971.16;

b) interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 as amended; and

c) costs on a solicitor-client basis.

Summary trial

[16] Rule 9-7 of the *Supreme Court Civil Rules* permits a party to apply for a final determination of a dispute summarily, and without the need for a full trial. While a summary trial is still a trial process, the evidence is generally tendered by way of affidavits, rather than with the witnesses testifying in person in the courtroom.

[17] Rule 9-7(15) permits the court to grant judgment in summary trial applications unless:

a) the issues raised by the summary trial application are not suitable for disposition under the Rule; or

b) the summary trial application will not assist in the efficient resolution of the proceedings.

[18] Whether a proceeding can be decided by summary trial will frequently depend on whether the court is in a position to make the factual determinations necessary in order to resolve the dispute. The fact that there is contradictory evidence does not necessarily mean that the court cannot make the necessary factual findings.

[19] Even if the chambers judge can find the necessary facts, the court must still consider whether or not it is in the interests of justice to decide the matter summarily. Factors considered at this stage were set out in the leading authority on summary

trials in this province, *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), and include:

a) the amount involved;

b) the complexity of the matter;

c) the urgency of the prejudice likely to arise by reason of delay;

d) the cost of taking the case forward in relation to the amount involved;

e) the course of the proceedings;

f) whether credibility is an issue;

g) whether the application would result in litigating in slices; and

h) any other factor appropriate in the circumstances (*Cadwell v. Martin*, 2020 BCSC 2091 at para. 33).

[20] Circumstances where the evidence is directly conflicting such that the court will need to make findings of credibility are generally not suitable for summary trial. However, the mere fact of a conflict in the evidence does not automatically render the matter unsuitable. The court may consider the surrounding circumstances and events, including contemporaneous documents, communications between the parties and other factors in determining whether or not it is possible to resolve the evidentiary conflicts. In other circumstances, it may not be possible to resolve an evidentiary conflict, but the conflict may not be material to the matters that need to be decided.

[21] There are certain factual matters that I cannot resolve, but I conclude that it is not necessary for me to do so in order to decide this case. First, there is contradictory evidence about whether Premium cut granite at the front of the property, such that granite slurry could in fact have entered the drain and blocked the pipe. I note from the photographs that it appears that some of the material that

was found in the pipe when it was ultimately replaced appears to be of a slurry like texture; however, the vast majority of the material in the pipe appears to be natural material, such as sticks and twigs.

[22] I conclude that I do not need to resolve the issue of whether any granite slurry could have entered the grate and contributed to the blockage. The plaintiff's submission is that the Premium was responsible to repair the drain, whereas the Premium argues it was the plaintiff's responsibility, regardless of what had caused it to become blocked.

[23] I am satisfied that this matter can be resolved by way of summary trial. The amounts involved are modest (around $130,000) and the cost of a conventional trial would be significant. Moreover, while there are disputes on the facts, I do not find them to be sufficiently material so as to preclude proceeding summarily.

Discussion

[24] I will start with the question of which party was responsible for repairing the drain. The grate that leads to the drain is in the parking lot area, but is not a part of the either the warehouse or the office building. The plaintiff argues that the parking lot is included as part of the leased premises, whereas Premium says it was not.

[25] The starting place regarding the parties' responsibilities is the Lease.

Was the parking lot part of the premises leased by Premium?

[26] The relevant covenants of Premium under the Lease are as follows:

> **THE LESSEE [PREMIUM] COVENANTS WITH THE LESSOR [THE PLAINTIFF]:**
>
> 4.05) To repair, save and except only structural repairs, damage by fire, lightning, tempest, or other casualty against which the Lessor is insured; to permit the Lessor, its agents or employees to enter and view the state of repair; to repair according to notice in writing, and to leave the Premises in good repair, all repairs to be made in a first class workmanlike manner and to the approval of the Lessor.
>
> 4.14) If any part of the Premises including, without limiting the generality of the foregoing, water pipes, drainage pipes, electric equipment, and any other apparatus or equipment which may be used for the purpose of heating or

> air-conditioning the building or the roof, stairways, passageways, entrance halls or outside walls, get out of repair or become damaged or destroyed through the negligence, carelessness or misuse of the Lessee, its servants, agents, employees, or anyone permitted by it to be in the Premises, or through it or them in any way stopping up or injuring any of the aforesaid, the expense of the necessary repairs, replacements and alterations shall be borne by the Lessee which shall pay the same to the Lessor, or if the Lessor shall not wish to utilize its agents or employees for carrying out such repairs, maintenance and cleaning or any of them, to obtain the prior written approval of the Lessor to the contractors which the Lessee shall employ for such purpose.
>
> 4.16) Not to permit the Premises to become untidy, unsightly or hazardous or to permit unreasonable quantities of waste or refuse to accumulate therein, and at the end of each business day to leave the Premises in a clean and tidy condition.

[27] The plaintiff's obligations were set out in Article 5 as follows:

> **THE LESSOR COVENANTS WITH THE LESSEE:**
>
> 5.03) Repairs - To maintain the foundation, bearing structure and outside walls in a good and reasonable state of repair; subject to the provisions of this Lease concerning destruction or partial destruction by fire or the elements.

[28] The Lease defines the leased premises as follows:

> 1.01) The premises hereby leased comprise a portion of the premises located at 1130 Stevens Road, Kelowna, British Columbia of approximately 4,300 square feet being the warehouse area of 2,800 square feet and downstairs offices of approximately 1,500 square feet as set out in Schedule "A" (the "Premises").

[29] Unhelpfully, there was no Schedule "A" attached to the Lease.

[30] The Lease did not contain an "entire agreement" clause commonly found in leases.

[31] If the leased premises includes the parking area, the obligation to repair would be Premium's because repair of the drain would fall under Premium's general duty to repair under para. 4.05 of the Lease. The question is whether the parking lot is included within the premises leased by Premium.

[32] The plaintiff argues Premium had exclusive use of the parking area in front of the Property, which it used for various aspects of its business including for parking and the storage of granite slabs. The plaintiff argues that it is an inferred term of the Lease that the parking area formed a part of the leased premises.

[33] I accept that Premium exercised sole control over the parking area. It used the area for storage and had a key to the gate. I also accept that it is necessary to infer that Premium at least had some rights of ingress and egress over the parking area because there would otherwise have been no access to the warehouse and office buildings at all.

[34] However, that does not necessarily answer the question, because the question is not whether Premium in fact was the sole occupier of the parking area, but whether it had the exclusive right to do so.

[35] At para. 20 of his Affidavit number 1, Mr. Baril states the following:

> 20. The Lessor during the term of the lease informed me that the Lessor was going to build a new warehouse in that same area directly in front of the customer entrance to the leased Premises, to which I objected that this would cut off access by our customers to the business. The Lessor's reply was that I don't pay rent for the area in front of the entrance, so construction of the warehouse was going ahead. As it turned out, the Lessor did not proceed with the plan to construct the new warehouse for other reasons.

[36] At para. 5 from his Affidavit number 2, he states:

> 5. Contrary to the allegation in paragraph 3 of the Arcand affidavit #2 that Premium Granite had sole access to the parking area in front of the building, the landlord 670152 B.C. Ltd. had full access to the parking area in front of the building. In fact, as stated by me in paragraph 20 of my previous affidavit dated February 13, 2024, when I objected to the plans stated by Marc Arcand to me that they were going to build a new building for rent in that location, my objection on the basis that it would block my customers' access to the premises, his reply to me was that we don't pay rent for that area, it is not part of the lease, and so he could do whatever he wanted with it,

[37] At para. 19 of his Affidavit number 3, he states:

> 19. Mr. Arcand replied at that time saying that the drain was not his responsibility and he was not paying for it. This was the first time he changed his mind and told me the drain was my problem. Previously he had said he

> would deal with it, but never did. I replied that the area was not part of our leased premises, and I reminded him of an earlier conversation when he had informed me that they were going to build a new warehouse in that same area directly in front of our customer entrance, and when I objected that this would cut off access by our customers to the business, his reply was that we didn't pay rent for that area so he could do whatever they wanted. That was the end of the conversation.

[38] As such, Mr. Baril in all three of his affidavits has referred to a prior conversation in which he says the plaintiff indicated that it was going to build a warehouse in the front parking lot. The plaintiff has not denied these conversations.

[39] No new warehouse was ever built in the parking lot, and the Premium's ability to use the parking lot was never impacted. However, the significance of the conversation is not so much what happened, but what might be inferred from it. If the plaintiff was of the view that it was entitled to build a warehouse in the parking lot, this would be inconsistent with his position now that the parking lot is part of the premises that were leased by Premium.

[40] Premium clearly would be in a position to object if access to the leased buildings would be hindered or prevented, but construction of a warehouse would not necessarily lead to this result.

[41] First, the warehouse may not occupy the entire parking lot.

[42] Second, the plaintiff also owns the property next door. There was nothing to prevent the plaintiff from removing the fence between the subject Property and its adjacent property and permitting parking for those visiting both properties on the adjacent parcel, no different to other commercial premises such as strip malls where parking is shared amongst a community of businesses.

[43] It is a term of the Lease, as is customary, that the tenant is entitled to quiet enjoyment of the leased premises. If the parking lot had been a part of the leased premises, the plaintiff would not have been in a position to contemplate building a warehouse on the premises during the term of the Lease.

[44] I find that the parking lot is not a part of the leased premises, and therefore repair of the drain was the plaintiff's responsibility.

[45] The next question is whether the plaintiff's breach entitled Premium to take the position that its obligations under the Lease were at an end.

Fundamental breach

[46] Premium's position is that it was entitled to terminate the Lease because the unresolved flooding issue rendered the premises unfit for occupation. It says the plaintiff fundamentally breached the Lease, and Premium accepted this breach.

[47] Although the plaintiff's primary position was that repairing the drain was Premium's responsibility under the Lease, it says that it does not matter because the blocked drain, which had been an issue for three years, was not of such significance that it would entitle Premium to treat the Lease at an end. The plaintiff points out that the entire cost to investigate and subsequently repair and replace the blocked drain, which included replacing a portion of the pipe, cost slightly in excess of $3,000. To provide some context for the cost, Premium's monthly rent at the time was $8,604.16.

[48] Not every breach of contract is a fundamental breach. In some cases, the breach is considered a minor breach and may afford the innocent party a remedy such as damages. The remedies for a minor breach do not include termination of the contract. Premium acknowledges that in order to succeed with an argument of fundamental breach, the breach must be of such a nature that it goes to the root of the contract.

[49] Premium refers to the Court of Appeal's decision in *Shun Cheong Holdings B.C. Ltd. v. Gold Ocean City Supermarket Ltd.*, 2002 BCCA 451, with reference to the governing principles. In that case, the tenant operated a grocery store, and there was periodic seepage of foul-smelling greasy fluids from a restaurant, also a tenant of the same landlord, immediately above the tenant's store over a four-month period. The question was whether the tenant was entitled to treat the lease at an end

because it had been fundamentally breached. The Court summarized the legal principles at para. 9 as follows:

> [9] . . . This court has stated that to establish a breach of the covenant of quiet enjoyment, the plaintiff must show its enjoyment of the demised premises was "substantially interfered with" by the lessor or someone acting under its authority. In *Firth v. B.D. Management Ltd.* (1990) 73 D.L.R. (4th) 375, a tenant sought a declaration that the right of quiet enjoyment was breached, or alternatively, that the lease was fundamentally breached, when the landlord granted a third party an easement to use various parking stalls previously available to customers of the tenant. Wallace J.A. for the Court affirmed the dismissal of the tenant's action. In his analysis:
>
> > Mere temporary inconvenience is not enough - the interference must be of a grave and permanent nature. It must be a serious interference with the tenant's proper freedom of action in exercising its right of possession. See *Kenny v. Preen* [1963] 1 Q.B. 499 (C.A.).
> >
> > Similarly, when one considers whether a landlord's acts can be construed as a derogation from its grant, the appellant must demonstrate that there has been some act which renders the premises substantially less fit for the purposes for which they were let. [at 379-80; emphasis added.]
>
> With respect to the question of fundamental breach, Wallace J.A. continued:
>
> > To constitute fundamental breach the landlord's conduct must be such as to go to the very root of the contract - not merely to part of it - so that it makes further performance impossible or it deprives the tenant of substantially the whole benefit which it was the intention of the parties to the lease that the tenant should obtain as consideration for the rentals it was obliged to pay. Unless the alleged breach is of this character the tenant's remedy lies in damages for breach of its contract - not in rescission of the lease agreement. . . .
> >
> > The evidence in this case does not demonstrate a breach of the lease by the landlord which could be properly characterized as "fundamental." [at 380; emphasis added.]

[50] The Court of Appeal upheld the trial judge's finding that the tenancy had been undermined in a fundamental way, and that termination by the tenant was therefore justified.

[51] In *Bhullar v. Dhanani*, 2008 BCSC 1202, Justice Gerow summarized the question in a claim for fundamental breach succinctly at para. 27:

> [27] The question to be answered in determining whether there has been a fundamental breach of the contract is: does the breach go to the root of the contract such that it makes further commercial performance of the contract impossible? In other words, has the failure of one party to perform his

> contractual obligation destroyed the commercial purpose of the contract? The breach must be so severe as to deprive the innocent party of substantially the whole benefit which the parties intended should be obtained from the contract: *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. – Canada* (2007), 65 B.C.L.R. (4th) 1 (C.A.) at ¶ 89-92; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at pp. 499-500.

Was there a fundamental breach of the Lease?

[52] Premium concedes that the flooding at the front of the Property did not constitute a fundamental breach for the entirety of the three years that the problem persisted. For example, it acknowledges that it continued to operate its business for those three years, even though the circumstances were not ideal, and placed concrete blocks through the puddle so that customers could get to the front door. Rather, Premium argues that the breach became fundamental in nature when Premium's insurer advised Premium that it would not renew Premium's insurance, on or about July 13, 2020.

[53] The question is therefore whether the refusal on the part of Premium's insurer to provide coverage on account of the blocked drain was such that the commercial purpose of the Lease was fundamentally undermined.

[54] I have difficulty with this proposition.

[55] Even if I were to assume, but without deciding, that there would be a fundamental breach if the leased premises were uninsurable, the evidence does not support such a conclusion. Premium's insurance agent, Mr. Andrew MacLeod, deposed as follows at paras. 5–7:

> 5. As a result of the danger to the public presented by the water pooling in front of the building, turning to ice in the winter months, and the cracked pavement in the same location due to water pooling and freezing over the years, I was unable to renew or place any liability insurance for the client's premises at that location.
>
> 6. I so informed the client by way of an emailed notice dated July 13, 2020, a copy of which is attached hereto as Exhibit "A".
>
> 7. The existing liability insurer at the time also cancelled their policy then in place effective as of July 16, 2020, a copy of which cancellation is attached hereto as Exhibit "B". I also provided a copy of that cancellation to the client Premium Granite Works Inc. care of its principal Mr. Bill Baril.

[56] Exhibit “A” to Mr. MacLeod's affidavit, which is his written notice to Premium, states the following:

> After my visit to your 1132 [sic] Stevens Rd, West Kelowna, BC, property I had submitted the photos with completed application to our underwriting department. My underwriting department has refused to quote this location due to property deficiencies. We can certainly look at this again once the below deficiencies have been fixed and we have updated photos.
>
> 1. Drainage issue #1 – The drain does not seem to work in front of the building. When I was on site I noticed that the entrance is being blocked by a big puddle around the drain. Drain is visibly clear of debris but still clogged.
> 2. Drainage issue #2 – Behind the building our client (the tenant) has created their own make shift drain. Water is visibly pooling inside the building and running down their make shift drain.
> 3. Cracked pavement – Due to water pooling and freezing over the years, there are a number of spots with cracked pavement. This could result in a slip and fall claim.
>
> [Emphasis added.]

[57] Mr. MacLeod did not say the Property is uninsurable. Rather, he simply says that insurance was not available until certain deficiencies had been remedied. Drainage issue #1 is the blocked drain, and issue #3 is the pavement that has cracked as a result of the drain having been blocked. Mr. MacLeod says the property needs to be repaired first before his company would consider insurance, as opposed to advising that Premium could never get insurance.

[58] The plaintiff fixed the drain issue after the Premium vacated the Property. The total cost of repairing the drain, which included digging up and replacing a portion of it, was approximately $3,000. Not an insignificant sum, but not an insurmountable hurdle either, well under half a month’s rent.

[59] I do not agree that the insurance issue undermined the commercial purpose of the contract. In considering the context, circumstances, and intended benefit of the Lease, they are mainly, subject to the terms and conditions stated, an agreement where the Plaintiff passes the exclusive use of the Property in exchange for the specified payments. It follows that the plaintiff’s failure to repair the blocked drain did not destroy the commercial purpose of the Lease because the Property could be

repaired to regain insurance. It did not, for example, render the Property forever unusable or otherwise eliminate the very thing bargained for.

[60] In fact, the evidence shows that the parties could have remedied the insurance issue with relatively little difficulty by repairing the blocked drain. The breach was not so severe that it deprived Premium the benefit of the Lease which the parties intended should be obtained from the contract. Additionally, Premium's own actions in abandoning the Property before giving the plaintiff notice of the insurance prevented the plaintiff from having an opportunity to repair the parking lot to resolve the insurance issue, as discussed further below. I conclude that the insurers unwillingness to provide coverage on account of the blocked drain did not cause the plaintiff's failure to repair the blocked drain to become a fundamental breach of the Lease.

[61] The fact that the plaintiff's failure to repair the drain did not give rise to a fundamental breach is dispositive of the liability aspect of this case. However, even if the plaintiff fundamentally breached the contract when its failure to repair the drain caused Premium to lose its insurance, Premium did not communicate its intention to terminate Lease in a reasonable time. There is no evidence that Premium put the plaintiff on notice of any of the cancellation of insurance and its intention to hold the plaintiff in breach. There were no physical changes to the premises on July 13, 2020, when Premium's insurer said it would not renew. Because nothing physically changed as of the date when the insurance was cancelled, the plaintiff would have no way to know the legal or contractual implications of the unresolved flooding issue had elevated, absent some form of notification.

[62] In *Zhao v. Purewal*, 2023 BCSC 1750, the Court addressed the doctrine of election. The doctrine provides that a party with the legal power to terminate the contract must communicate their intention do so within a reasonable time: *Zhao* at para. 90.

[63] Premium points to a conversation between Mr. Baril and Mr. Arcand in June 2020, in which Mr. Baril said that he told Mr. Arcand that unless the water problem

was resolved, they would need to vacate the premises in order to carry on business. Mr. Baril in his affidavit states the following:

> 18. Prior to that, in June of 2020, in an in-person conversation at the premises, I informed Marc Arcand that unless the water problem was resolved, we would need to vacate the premises in order to carry on business.

[64] The communication from Mr. McLeod on behalf of Premium's insurer regarding the requirements before a renewal could be contemplated followed in July 2020.

[65] The conversation in June 2020, and set out in paragraph 18, cannot be notice of Premium's intention to rely on a fundamental breach, because based on Premium's own evidence, the blocked drain had not yet become significant to the point where it says there was a fundamental breach. This conversation was just another instance of the parties disagreeing about who was responsible to fix the drain. At the time of the June 2020 conversation, Premium's underlying premise for its assertion that the nature of the breach had elevated to the level of being a fundamental breach, namely the cancelation of its insurance, had not yet occurred. Moreover, there was nothing about the conversation that would suggest there were intended legal consequences, or that the conversation was any different to their prior disagreements on the same topic.

[66] The first indication from Premium to the plaintiff that it had been unable to obtain insurance on account of the drain was in a letter from its lawyer on August 28, 2020, after it had already vacated the Property, and in response to a demand letter from the plaintiff's lawyer.

[67] At its essence, the doctrine of fundamental breach is a breach of contract by one party. It is difficult to foresee circumstances where a party could be found to have fundamentally breached a contract, yet be unaware of the other party's assertion of a right to claim for fundamental breach.

Frustration

[68] Premium also argues in the alternative that the contract was frustrated. Fundamental breach differs from the doctrine of frustration of contract. Frustration requires a permanent disruption to a contract that neither party anticipated and deprives one party of the benefit of the contract. Frustration was neatly summarized by Sigurdson J. in *Folia v. Trelinski* (1997), 14 R.P.R. (3d) 5, 1997 CanLII 469 (B.C.S.C.) at para. 18:

> [18] In order to find that the contract at issue has been frustrated the following criteria would have to be satisfied. The event in question must have occurred after the formation of the contract and cannot be self-induced. The contract must, as a result, be totally different from what the parties had intended. This difference must take into account the distinction between complete fruitlessness and mere inconvenience. The disruption must be permanent, not temporary or transient. The change must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as concerns either or both parties. Finally, the act or event that brought about such radical change must not have been foreseeable.

[69] The above passage was cited with approval by the Court of Appeal in *KBK No. 138 Ventures Ltd. v. Canada Safeway Limited*, 2000 BCCA 295 at para. 14.

[70] It is apparent from the above passage that frustration does not apply to these circumstances. The parties were bound by the Lease and there was nothing precluding either party from continuing to perform their obligations. The fact that repairs were needed in order to obtain insurance did not preclude performance; rather, it required one of the parties to repair the drain.

Conclusion on liability

[71] In all of the circumstances, I find that Premium's insurer's advice that it was not prepared to renew Premium's insurance until the drain was fixed was not a fundamental breach of the Lease on the part of the plaintiff, even though I have concluded that repairing the drain was the plaintiff's obligation. Premium was not entitled to treat the Lease at an end, and it breached the Lease when it vacated the premises and failed to pay rent after August 2020.

Plaintiff's damages

[72] The plaintiff claims for damages for its loss of rent over the remainder of the term of the Lease. The plaintiff is entitled to judgment for the amount of $89,144.76 as set out in the below table taken from counsel's submissions:

Name	Description	Amount
Unpaid Lease Payments	September 1, 2020 to March 1, 2021	$54,206.21
Unpaid Lease Payments	April 1, 2021 to October 1, 2023	$258,124.80
Rent Paid by Third Party	April 1, 2021 to October 1, 2023	($224,850)
GST	GST at 5% for difference between $258,124.80 and $33,274.80	$1,663.75
Total		**$89,144.76**

[73] The plaintiff is entitled to judgment in the same amount as against Mr. Baril, who guaranteed Premium's obligations under the Lease.

[74] The plaintiff's claim also includes various invoices for costs it incurred to remediate the property after Premium moved out totalling $13,280.56. This includes the cost of repairing the drain, which I have found was the plaintiff's responsibility. Additionally, the plaintiff sought recovery of a quote in the amount of $27,575.84 to repair the floors. As for the latter, there is no proof of payment, and it is not apparent that the work was ever done. If it were, it must have been completed before these materials were filed, because there was already a new tenant in the building.

[75] Mr. Baril's affidavit sets out that Premium painted the interior of the building, pressure washed the interior walls, and steam cleaned the carpets in order to leave the premises in good condition.

[76] While I accept that the plaintiff incurred and paid the various invoices that were included in the materials, I conclude that the plaintiff has failed to prove these additional damages are recoverable. This was not a new building when Premium

moved in, and I have no evidence as to its condition when the Lease commenced. Moreover, reasonable wear and tear is to be expected during a lease.

[77] The plaintiff's claim for additional damages is dismissed.

Premium's counterclaim

[78] Premium has a counterclaim for return of its $10,500 deposit which was paid when it entered into the Lease. The deposit needs to be accounted for in the calculation of the amount owed to the plaintiff. Since I have concluded that the plaintiff is successful, the plaintiff is entitled to the deposit which will be subtracted from its claim.

[79] Premium also counterclaims for what it says was an overpayment of rent. It says the actual square footage of the leased premises was less than was set out in the Lease, namely 2,800 square feet for the warehouse area and approximately 1,500 square feet of downstairs offices.

[80] This claim must be dismissed because the amount of rent under the Lease and the subsequent amendments is stated as a lump sum amount, not a per square foot calculation. Under the Lease, the rent was $5,000 per month and increased to $6,000 per month under the modification. When the parties extended the Lease in 2018, they increased the rent to $8,604.16 per month.

[81] Premium was aware of the space it was renting. It cannot claim to have overpaid because precise measurements suggest the space was less than is set in the definition of Premises under paragraph 1.01 of the Lease. If the square footage was important to Premium, it could have offered to pay rent on a per square foot basis, but it did not. Premium cannot recharacterize or reverse engineer its rental obligations to a per square foot calculation when there is no evidence that the parties agreed to such an arrangement. This claim must fail.

[82] The remainder of the counterclaim, which is for damages associated with moving out of the Property, is also dismissed in light of my conclusion that it was Premium that breached the Lease, and not the plaintiff.

Judgment and costs

[83] After subtracting the deposit from the amount owed to the plaintiff, the plaintiff is entitled to judgment against both defendants in the amount of $78,644.76.

[84] The parties have agreed that the issue of costs, and in particular whether the plaintiff is entitled to solicitor and client costs, be dealt with at a subsequent hearing.

"Wilson J."