Court of King's Bench of Alberta

Citation: Suri Holdings Inc v Jung, 2022 ABKB 714

Date: 20221027
Docket: 2101 02252
Registry: Calgary

Between:

Suri Holdings Inc.

Appellant

- and -

Hyumin Jung

Respondent

Reasons for Judgment
of the
Honourable Justice N.E. Devlin

Overview

[1] This an appeal from the Provincial Court Civil Division over a commercial lease dispute. After a two-day trial, the Court found that the appellant lessor Suri Holdings Inc. ("Suri") unreasonably withheld consent to a sub-lease proffered by the respondent head-lessee, Hyumin Jung ("Jung"). Jung walked away from the premises prematurely after the refusal to sub-let. Suri sued for the unpaid rent and Jung counterclaimed for the lost sub-tenancy income. The trial judge awarded the net difference to Suri, amounting to $5,025.76, inclusive of offsetting cost awards.

[2] Suri appeals this decision on the basis that the trial judge disregarded the evidence of a witness, miscalculated the damages owing, and improperly failed to give effect to an indemnity for legal expenses contained in the lease. For the reasons that follow, the appeal is allowed to the extent that Suri's damages under the head lease are increased by $871. The balance of the appeal is dismissed.

Facts

[3] Suri owns a commercial premises in Southwest Calgary. Jung rented the second floor to operate a Tae Kwon Do studio. The monthly rent was $4,400, with the lease running to the end of July 2019. Jung wished to sub-lease the premises from the fall of 2018 through to the end of his tenancy. The lease allowed for subletting in the following terms:

> 11.2 The Tenant shall not… sublet the whole or any part of the premises unless it shall have first requested and obtained the consent in writing of the Landlord thereto. The Landlord shall not unreasonably withhold its consent to a… sublease… Any request for such consent shall be in writing and shall be accompanied by a true copy of any offer to take a… sublease which the Tenant may have received as well as a copy of the proposed… sublease and the Tenant shall furnish to the Landlord all information available to the Tenant or requested by the Landlord as to the business and financial responsibility and standing of the proposed… subtenant…

[4] Jung had abortive sub-lease negotiations with a daycare already operating in the building. Ultimately, Jung presented Siri with an executed sub-lease with RK Fight Lab ("RK"), dated September 10, 2018. The proposed sub-lease stated that RK would use the space for a "martial arts gym". Suri refused the sublease on October 1, 2018. It ultimately justified this decision on the basis that it had noise concerns related to RK's proposed use.

[5] Jung paid rent to the end of October 2018 and gave vacant possession by returning the keys on November 1, 2018. Suri sued for breach of the lease and unpaid rent for the balance of the term. Jung counter-claimed for its loss of revenue under the refused sub-lease. The premises lay fallow until after the lease's expiry. No issue of mitigation of damages arose at trial.

The trial judge's findings

[6] In oral reasons, the trial judge found that:

i. Jung moved out of the premises in the fall of 2018;

ii. Jung was liable for unpaid rent of $40,871, reduced to $40,000, which was the amount of damages pled by Siri on its Civil Claim form;

iii. Suri had no actual knowledge as to the difference between Jung's use of the property for Tae Kwon Do instruction and RK's proposed use;

iv. Suri made no request for information about RK before refusing the sublease, including asking no questions about RK's proposed use of the space;

v. Suri's refusal of the sublease was unreasonable;

vi. the refusal to sublease constituted a breach of the lease by Suri, effective October 1, 2018;

vii. Suri was liable to Jung for $31,000 in lost rent under the refused sub-lease; and

viii. the offset amount between the parties was $9,000 payable to Suri by Jung.

[7] The trial judge also disposed of a number of side issues between the parties that are not germane to the grounds of appeal before me. The trial judge awarded offsetting schedule costs,

rejecting Suri's request for solicitor-client costs, advanced on the basis of a legal expense indemnity in the lease.

Grounds of appeal and standard of review

[8] Suri advances three grounds of appeal, arguing that the trial judge erred by:

i. disregarding the evidence of a witness who established other breaches of the lease by Jung that ought to have negated his claim for damages;

ii. miscalculating the damages owing for breach of the lease; and

iii. refusing to award solicitor-client costs as provided for by the lease.

[9] The parties agree that the first and second grounds, on their face, attract review only for palpable and overriding error. As will be discussed, however, the second ground is actually an umbrella for four discrete sub-grounds, some of which involve questions of mixed fact and law. The parties disagree regarding the standard of review on the costs appeal, with Suri characterizing the failure to enforce the lease as an error of law and Jung responding that costs are discretionary and thus attract deferential review.

[10] Much of this appeal focused on challenging the trial judge's rejection of one witness' evidence. The decision to believe or disbelieve evidence is a pure question of fact, reviewed only for palpable and overriding error. The proper approach to be taken when reviewing the trial judge's factual treatment of evidence is laid out in ***Housen*** at paras 22-23, where the Supreme Court provided the following guidance:

> … Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
>
> We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. […] [emphasis added]

[11] On questions of mixed fact and law, such as most contractual interpretation, appellate courts must accord a high degree of deference to the trial judge's interpretation of a contract. Reviewing these findings of mixed fact and law is done to the standard of reasonableness.

However, where contractual interpretation involves an extricable question of law, the trial judge's legal conclusions will be reviewed for correctness: ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 57; ***Housen v Nikolaisen,*** 2002 SCC 33 at paras 26-37.

Ground of appeal #1: Did the trial judge 'ignore' Ms. Van Ginnekin's evidence?

[12] Jung brought the daycare he had been in negotiations with into this action by Third Party Notice. The daycare called one of its employees, Ms. Van Ginnekin, as a witness. In a surprising turn, she testified that she recalled seeing signage on the premises that said "RK Fight Club or Fight Lab or whatever it was called." She also testified that she had encountered groups of individuals trying to access the premises who had approached her for keys, leading her to believe that they were a different group than Jung's students. Her recollection was that these events took place somewhere between May and the fall of 2018.

[13] As a result of this unanticipated evidence, Suri argued that Jung had further breached the lease by permitting an unapproved sub-let to commence and by vacating the premises prematurely, both of which were proscribed by terms of the lease. These allegations were new and had not formed part of the original claim. Thus, Suri had led no evidence in support of these contentions and no questions on these issues had been put to Jung in cross-examination.

[14] Van Ginnekin's evidence was an awkward fit in the evidentiary landscape of the trial. The owner of the daycare had testified personally and made no reference to anyone other than Jung occupying the premises above her business. Similarly, Mr. Amol Suri, the plaintiff's principal, testified that, as of early October 2018, Jung had *not* vacated the space and continued to operate his business in it. Jung himself appeared to admit that he had vacated the premises sometime in September. However, he said nothing about RK moving in and this suggestion was never put to him. Nothing about Van Ginnekin's evidence was agreed.

[15] The trial judge did not accept Van Ginnekin's evidence. She referred to repeated statements by this witness that her memory had faded and found that her testimony "as a whole contained a number of inconsistencies". She went on to quote Van Ginnekin's testimony to the effect that, "maybe I am mixing up the years". As a result, the trial judge found this witness' evidence to be well-intentioned but unreliable.

[16] Suri complains that the trial judge "simply ignored" Van Ginnekin's evidence and that this was a palpable and overriding error. In argument, counsel refined this submission to formulate the error as being that Van Ginnekin's reliability problems were insufficient to justify total rejection of her substantively unchallenged testimony: ***McCallum v Edmonton Frame and Suspension (2002) Ltd***, 2016 ABQB 271 at para 50.

[17] No independent remedy is sought for this alleged error. Rather, Suri relies on it to support its second ground of appeal, namely that the trial judge erred in permitting Jung's counterclaim when he was himself already in breach of the lease.

[18] In some rare instances, a trial judge's choice to reject certain evidence may be unreasonable or lack a sufficient explanation: ***R. v. Dinardo***, 2008 SCC 24 at para 26. That is not the case here.

The trial judge's reasons in this case analyze, in relatively comprehensive fashion for a short and summary proceeding of this nature, why she did not accept or place weight upon Van Ginnekin's evidence. Her reasoning is factually supported by the record. The evidence was not ignored.

[19] Giving evidence its proper weight and meaning is the trial judge's most closely guarded function and findings in this realm attract the highest level of deference: ***Canlanka Ventures Ltd v Dugan***, 2020 ABCA 107 at para 9. She was entitled to believe some, all, or none of Van Ginnekin's evidence about the occupation and use of the premises: ***Kretschmer v Terrigno***, 2012 ABCA 345 at para 55. As counsel for Jung points out, this witness' brief evidence was replete with acknowledgments of uncertainty. The trial judge was entitled to base her rejection of the evidence on these internal expressions of unreliability.

[20] The trial judge's treatment of Van Ginnekin's evidence was rational and well within the range of reasonable conclusions on the record before her. There is no basis for appellate intervention: ***R v CAD***, 2020 ABCA 140 at para 7.

Ground of appeal #2 – Did the trial judge err in the quantum of damages awarded?

[21] This umbrella ground comprises four separate alleged errors. Specifically, Suri complains that the trial judge:

i. wrongly applied a $40,000 cap to Suri's gross loss;

ii. erred in awarding any damages for the lost sub-lease when Jung twice breached the lease beforehand, first by abandoning the premises and second by allowing the sub-let to commence in an unauthorized manner;

iii. reversed the informational burden on approval of the sublease; and

iv. erred in finding that the rejection of the sub-lease was unreasonable.

[22] Despite Suri's concession that Ground #2 attracts review only for palpable and overriding error, these sub-grounds appears to raise or contain discrete questions of law that must be examined for correctness.

(i) <u>Did specifying $40,000 as the amount of the claim cap Suri's recovery?</u>

[23] The total amount lost by Suri in unpaid rent subsequent to Jung's unilateral termination in November 2018 was $40,871. The trial judge reduced this to $40,000 at the outset of her damage's calculation, on the basis that the Civil Claim filed by Suri to initiate the litigation pled this as the amount sought. Her reasoning on this issue was as follows:

> While $40,871 was the Plaintiff's calculation in this regard, as set out in Exhibit 2, the Civil Claim sought damages of $40,000 and that is the maximum Judgement it can obtain, there having been no amendment application regarding quantum of damages claimed.

> Thus, the net amount of rent owing in this case is $9,000 ($40,000-$31,000) payable by the Defendant to the Plaintiff.[1]

[24] Suri argues that, even if the amount it entered on the Civil Claim may have capped its net possible judgment, this pleading should not have reduced the gross loss of rent against which the trial judge subsequently set-off Jung's countervailing damages for the lost sub-lease. There is merit to this submission.

[25] The issue reduces to two legal questions. First, does the Civil Claim listing $40,000 as the amount sought hard cap Suri's damages in any way? Second, was the trial judge correct in quantifying the claim and counterclaim separately, each within their pleading caps, before performing the set-off, or should she have found the real gross damages owing to each party and then set-off these figures, resulting in a net award?

a. Do the amounts pled on the Civil Claim and Dispute Note cap gross damages?

[26] The financial jurisdiction of the Provincial Court is capped at $50,000 by section 9(1)(i) of the *Provincial Court Act*. This is a hard jurisdictional ceiling on the judgments the Court may award. That limit is not engaged in this case. Rather, the question is whether the parties' pleadings in a civil action under the *Provincial Court Act* create an equally hard limit. There appears to be no binding law directly on point.

[27] On the one hand, pleadings "define the parameters of the dispute and ultimately the court's jurisdiction": ***Shreem Holdings Inc v Barr Picard***, 2014 ABQB 112 at para 43. On the other hand, Stevenson and Côté in the *Alberta Civil Procedure Handbook* (Edmonton: Juriliber, 2017) state in their commentary on page 13-26 that:

> [t]he prayer for relief sets a ceiling on the damages which the court may allow, only if the court cannot or will not amend the prayer, and an award of more may be an implicit amendment. [emphasis added]

[28] The nearest guidance from the Court of Appeal appears to be in ***Jones v Trans America Life Insurance Co of Canada***, 1996 ABCA 165 at para 6, where the Court stated that: "[t]he prayer for relief has little legal status and is not really much of a ceiling".

[29] Consistent with this approach, the Supreme Court of Canada in ***Whiten v Pilot Insurance Co***, 2002 SCC 18 at paras 87-88, articulated a contextual rule of fairness on this issue, rather than enforcing pleadings as a strict jurisdictional limit:

> One of the purposes of a statement of claim is to alert the Defendant to the case it has to meet, and if at the end of the day the Defendant is surprised by an award against it that is a multiple of what it thought was the amount in issue, there is an obvious unfairness.

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[1] Trial counsel for Suri (not counsel on the appeal) appeared to agree with this approach in argument.

> ...
> Whether or not a Defendant has in fact been taken by surprise by a weak or defective pleading will have to be decided in the circumstances of a particular case.

[30] In ***Roberts v Safadi***, 2018 ABQB 165 at paras 24-34, Mandziuk J. considered these authorities and concluded that this Court has jurisdiction to grant general damages exceeding those pled in the Statement of Claim. I agree. This should be even more so in the Provincial Court, whose express mandate is to provide "expeditious and inexpensive" resolution to small-scale disputes: *Provincial Court Act*, s 8(2). Insisting on a formal amendment to the pleadings to reach an accurate result would be burdensome and inconsistent with the core principles underlying the proceeding.

[31] The Civil Claim in this case particularized the loss as flowing from unpaid rent "in the approximate amount of $40,000". The exact amount of rent that Jung refused to pay was easily ascertainable from the lease documents themselves. There is no issue of prejudice to Jung. An amendment would have been allowed. I find that, as a matter of law, the $40,000 amount pled in the Civil Claim did not create a cap constraining the trial judge's calculation of damages.

b. Were these two competing claims or one dispute with a net result?

[32] The specific facts of this case suggest that any cap should have been applied only to the final judgment, not to the calculation of Suri's gross loss under the lease. This dispute is over a single contract and the net result of the parties' mutual defaults under it. This makes Jung's counterclaim more of a true defence of equitable set-off and not a procedural set-off: ***Collins Industries Limited v Aqua Iron Inc***, 2002 ABQB 220 at para 2; see also ***Cam-Net Communications v Vancouver Telephone Co***, 1999 BCCA 751.

[33] Thus, the Court's task was best understood as assessing the net liabilities between the parties, rather than quantifying two separate claims to their respective amounts and then netting them out as a matter of convenience in the final order. This conception of the trial issue supports applying any pleadings cap only to the ultimate net judgment.

[34] Finally, Jung's Dispute Note suffered the exact same defect as the Civil Claim, in that it quantified the Counterclaim/set-off at $28,550, which was less than the $31,000 proven at trial. This shortcoming seems to have gone unnoticed. Otherwise, the trial judge would likely have limited Jung's set-off to this amount to maintain consistency of approach.

[35] To summarize, I find that pleadings in the Provincial Court Civil Division do not create a hard cap on damages, claims, or counterclaims, so long as those amounts remain within the Court's statutory jurisdiction. Where the amount proven, or sought in submissions, exceeds the figures stated in the pleadings, the Court should approach the issue pragmatically, with an eye on potential prejudice and accurate compensation as the ultimate goal. Where there is no prejudice, amounts exceeding the amounts pled may be awarded. The time and expense of formal amendments may be saved where an amendment would have been fair and reasonable. As with most questions before that Court, the touchstones are fairness to the parties and efficiency of dispute resolution.

[36] Where the claim is one of equitable set-off under a single contract, any cap should only be applied to the ultimate net damages in any event.

[37] For these reasons, I respectfully conclude that the trial judge's approach to damages amounted to a misdirection on the Court's jurisdiction and was thus an error of law. This ground of appeal is allowed and Suri's damages are increased by $871, to their true amount.

(ii) Did the alleged occupation breaches by Jung disentitle him to counterclaim for the lost sub-lease?

[38] Suri contends that Jung cannot, in law, recover damages for unrealized rent from RK because he had prematurely vacated the premises and surreptitiously allowed RK to move in prior to receiving approval from Suri. Both Jung's untimely departure and any unauthorized occupation by RK would have breached the terms of the lease.

[39] Part of this ground fails factually because the trial judge declined to find that RK had occupied of the premises. The entirety of the ground fails because a contractual wrong does not invariably preclude the offending party from exercising its related contractual rights, nor does it relieve the counterparty from covenants to act reasonably where the contractual relationship continues: see, for example, ***968703 Ontario Ltd v Vernon*** (2002) 58 OR (3d) 215 at para 15.

[40] In this case Suri never relied on these alleged breaches as a basis for refusing the sublease. Indeed, it purported to be willing to entertain subleases that met its criteria well after these breaches are said to have occurred.

[41] In argument, counsel for Suri took the position that, even if Suri did not know or rely on Jung having vacated the premises or permitted RK to occupy them, these defaults retrospectively justified its refusal of the sublease. None of the cases Suri cited support that proposition. The assessment of whether refusal of a sublease was reasonable is based on the lessor's state of knowledge at the time of the decision. The law in this regard was correctly summarized by Cullity J. in ***1455202 Ontario Inc v Welbow Holdings Ltd*** (2003), 2003 CanLII 10572 (ON SC), 33 BLR (3d) 163 at para 9:

> (2) In determining the reasonableness of a refusal to consent, it is the information available to - and the reasons given by - the Landlord at the time of the refusal - and not any additional, or different, facts or reasons provided subsequently to the court - that is material: ***Bromley Park Garden Estates Ltd. v. Moss***, [1982] 2 All E.R. 890 (C.A.), at page 901-2 per Slade L.J.

[42] The trial judge correctly performed her analysis on this basis. This ground of appeal discloses no error.

(iii) Did the trial judge reverse the informational burden on the sublease?

[43] Suri alleges that the trial judge effectively reversed the informational burden on facts justifying acceptance or rejection of the sublease. It argues that, in doing so, she misapplied the language of Article 11.2 of the lease which provides that:

> … the tenant shall furnish to the landlord all information available to the tenant or requested by the landlord as to the business and financial responsibility and standing of the proposed assigning or subtenant.

[44] Suri contends that the trial judge mistakenly focussed on its failure to ask questions and take steps to investigate or substantiate its concerns about RK's proposed use of the space, rather than asking whether the minimal information provided by Jung satisfied his onus to justify the sublease.

[45] This argument is answered by the specific facts and context of the case. Contractual interpretation is a question of mixed fact and law that involves the application of interpretative principles to the words of the written contract, considered in light of the factual matrix in the instant case: ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para 50. Context matters when reviewing contractual interpretation: ***Vallieres v Voziak***, 2014 ABCA 290 at para 12.

[46] In this case, the business of the proposed sub-tenant was, on its face, virtually identical to what Jung was already doing in the premises, namely running a martial arts instruction facility. While it is incumbent upon a tenant to provide a much more detailed package of information under a clause such as 11.2 where the proposed sub-tenant operates in a different field of endeavour than the head lessor, that is not the case here. Rather, the trial judge accepted that there was no obvious reason why one martial arts instruction business would not be suitable to replace another.

[47] Suri's position at trial buttressed this inference as it attempted to justify rejection of the sublease on the basis that a "martial arts gym" is different than a "martial arts studio". The trial judge was unimpressed with this semantic distinction. Rather than constituting a reversal of the onus on information, her approach on this issue started from the common-sense proposition that the new business sounded virtually identical to the old business and then testing Suri's protestations to the contrary against its actions and state of knowledge.

[48] In the context of a lease provision such as this, sufficiency of information is a two-way street. While the onus is on the tenant to provide satisfactory information about the sub-lessee, a landlord will be hard pressed to discharge its obligation to reasonably consider a proposed sub-lease without communicating the specific concerns and questions driving its doubts about approving the arrangement. Properly read, clause 11.2 requires the tenant to disclose fully what it knows and to answer the questions asked by the landlord. It reciprocally expects a landlord to speak up about its concerns, rather than sit silently and let the tenant guess what further facts the landlord might rely on in making its decision. That is the interpretation the trial judge implicitly applied.

[49] The trial judge's approach to the informational component of the sub-lease dispute makes sense in the specific context of this case. The implicit finding that Jung satisfied his informational burden under the lease by presenting a sub-tenant in a seemingly identical business was reasonable. While it is true that Jung provided relatively sparse information to Suri, this was never advanced as the basis for refusal at the time. Indeed, the communications between the parties about the sublease was consistent with the tenor and substance of the communication throughout the relationship, as demonstrated by the trial record.

[50] The trial judge's conclusion that Suri acted unreasonably by summarily rejecting the sublease without asking the pertinent questions was reasonable and in accordance with the terms of the contract in this specific factual context.

(iv) Was the refusal to agree to the sub-lease unreasonable?

[51] The core question at trial was whether Suri's refusal of the sub-lease to RK was unreasonable. This was quintessentially a question of mixed fact and law. On the legal side, the trial judge correctly determined that Jung, as the tenant, bore the burden of demonstrating that consent was unreasonably withheld. She concluded that this burden had been met, based on a combination of the facts found, namely that the proposed sub-tenant's business was of the same type as that conducted by the head lessee and that Suri's refusal was almost immediate, deliberately uninformed, and based on a factually unsupported assumption.

[52] The trial judge placed the available factual weights on the correct legal scale and reached a reasoned and readily understandable conclusion. This ground of appeal is dismissed.

Costs

[53] Suri sought $28,713.28 in costs, backed by its solicitors' bill. The trial judge declined to award this amount, noting that it almost equaled the gross claim and counterclaim and significantly exceeded the final judgment. She instead awarded the parties their respective costs under the Provincial Court's tariff of fees. Suri's tariff costs amounted to $5,250 and Jung's costs on his successful counterclaim amounted to $3,980. The reciprocal costs were then set off against one another resulting in a net costs award of $1,345 in favour of Suri, with filing costs included.

[54] As is commonplace in commercial lease agreements, the lease in this case contained an indemnity clause providing that the landlord would be entitled to "all costs and charges lawfully and reasonably incurred, including legal fees and a solicitor in her own client basis, in enforcing payment of net rent…" On appeal, Suri argues that this contractual term should have been enforced and that the trial judge erred in law in declining to do so.

[55] In support of its costs appeal, Suri relies on the decision of Master Funduk in ***Arbutus Leasing Ltd v Deghati***, 2000 ABQB 831 at para 30, where the learned Master stated as follows:

> Here the lease provides for solicitor and client costs to the Plaintiff (if it wins): para. 26. That overrides any tariff of costs in Provincial Court so the only additional expense is the difference between the filing fees payable to the respective courts.

[56] Suri strenuously submits that shifting the financial risk and burden of collecting unpaid rent to the landlord undermines the contractual relationship between the parties, is unfair, and promotes a retrograde policy that would encourage refusals to pay rent. Suri also highlights that, notwithstanding the finding against it regarding the sublease, Jung knew all along that he would owe further rent even if the sublease were approved but never took any steps to pay those amounts. Suri submits that Jung leveraged the economics of litigation to delay paying his undisputed debt for years, demonstrating why the indemnity clause in the lease is salutary. Finally, Suri also points out that Jung's involvement of the third parties was found to be entirely unjustified and lengthened the proceedings needlessly.

[57] Jung responds that Suri's unreasonableness has been the root of the problem in this litigation, taking this case outside the ordinary principles governing contractual cost recovery.

[58] The trial judge provided written reasons for her costs ruling and this discretionary decision is accorded a high degree of deference in the absence of an error in principle or palpable and overriding error: ***Horizon Resource Management Ltd v Blaze Energy Ltd***, 2013 ABCA 139 at para 15. The reviewing Court will interfere only where it finds a "misdirection as to the applicable law, a palpable error in the assessment of the facts, or an unreasonable exercise of the discretion": ***McAllister v Calgary (City)***, 2021 ABCA 25 at para 18.

[59] Trial courts have wide discretion in choosing how costs are awarded in any given case. They are not bound by any contractual arrangement between the parties. The existence of a contractual term governing costs is a significant relevant consideration but does not oust the Court's discretionary control over the award of costs after litigation: ***Grillone v Bekiaris***, 2022 ONSC 4321 at para 10. In ***Bossé v Mastercraft Group Inc*** (1995) 123 DLR (4th) 161 (ONCA), the Court aptly summarized the law as follows at para 65:

> As a general proposition, where there is a contractual right to costs the court will exercise its discretion so as to reflect that right. However, the agreement of the parties cannot exclude the court's discretion; it is open to the court to exercise its discretion contrary to the agreement. The court may refuse to enforce the contractual right where there is good reason for so doing - where, for instance, the successful mortgagee has engaged in inequitable conduct or where the case presents special circumstances which renders the imposition of solicitor and client costs unfair or unduly onerous in the particular circumstances. [emphasis added]

[60] This is also the law in Alberta. In ***Manufacturers Life Insurance Company v Toronto-Dominion Bank***, [1988] 92 AR 92 (CA) at para 17, Côté JA awarded solicitor-client costs on a lease-related appeal, stating that: "[u]sually express covenants for solicitor-client costs will be enforced, unless there is misconduct or harshness". [emphasis added]

[61] The concerns animating the exceptions to contractual cost indemnities have particular force in the small claims context, which exists to provide accessible and efficient justice. The trial judge identified the salient issue in this case, namely that solicitor and client costs are grossly disproportionate to the outcome, especially in light of her finding that the "successful" party's breach of the lease precipitated the entire litigation.

[62] Ordering solicitor and client costs in Suri's favour would have made its decision to unreasonably withhold consent to the sublease economically immune to challenge. Courts may well exercise their discretion not to enforce contractual costs provisions where to do so would render enforcement of other rights under that contract nugatory.

[63] Since this trial was about the outcome of a single contractual relationship, and Suri was successful in recovering an undisputed debt flowing from it, the trial judge would have been justified in not awarding offsetting costs to Jung for his counterclaim. However, at the end of the day, she was best positioned to assess the conduct and equities of the case and how the legal principles of costs applied to that factual matrix. Her decision and analysis demonstrate no error in principle, are not unreasonable, and provide no basis for appellate interference.

Conclusion

[64] The appeal is allowed to the extent that Suri's judgment is increased by $871 to $5,896.76. The appeal is otherwise dismissed.

Costs of this appeal

[65] Section 53(1) of the *Provincial Court Act* gives this Court authority to award costs for the entirety of the proceedings, including the appeal. I read this provision as permitting this Court to make a final costs award on a broadly holistic view of the entire proceeding.

[66] Suri has been nominally successful, but the lion's share of its appeal has been dismissed. This inclines the Court to award Jung its tariff costs. On the other hand, the costs indemnity under the lease persists and Jung enjoyed something of a windfall savings in being awarded offsetting costs at trial.

[67] Balancing these factors, and in view of the fact that Suri and Jung have mutually been the architects of their misfortune in this dispute, I decline to award any costs of this appeal to either party.

Heard on the 21st day of October, 2022.
Dated at the City of Calgary, Alberta this 27th day of October, 2022.

N.E. Devlin
J.C.Q.B.A.

Appearances:

Glen Hickerson, K.C.
for the Appellant

Johnny Pak
for the Respondent