CITATION: Peoples Trust Company v. PSP Services Inc., 2025 ONSC 2627
COURT FILE NO.: CV-22-00715739-0000
DATE: 20250425

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Peoples Trust Company — Plaintiff

AND:

PSP Services Inc. — Defendant

BEFORE: Justice Chalmers

COUNSEL: *I. Matthews, L. Thistle, M. Kozycz, and B. Brooksbank* for the Plaintiff

G. Gryguc, for the Defendant

HEARD: March 19, 2025, in person

ENDORSEMENT

Overview

[1] By endorsement dated January 9, 2025, I found PSP Services Inc. (PSP) in contempt of court. I scheduled the penalty phase hearing for Wednesday, March 19, 2025. This provided PSP with an additional two months to purge its contempt.

[2] The Plaintiff, Peoples Trust Company (PTC) argues that PSP continues to be in contempt. PTC relies on the affidavit of Steve Whitla of Ernst & Young (EY) affirmed March 4, 2025, in which he deposes that "multiple data requests remain outstanding, and the progress of the PSP audit continues to be delayed due to PSP's incomplete responses". EY's evidence is that its appointment as an investigative receiver (IR) would expedite the completion of the PSP audit and address the issues of outstanding information requests.

[3] PSP states that it has continued to make best efforts to comply with all requests for information it receives from EY. It states that the documentation requests are changing and that it is difficult to keep up with the moving targets. It argues that the current audit process should be allowed to play out before an IR is appointed.

Factual Background

[4] The contempt motion arises out of PTC's attempt to conduct an audit that is permitted under the Acquiring Services and Sponsorship Agreement dated August 28, 2019 (the Agreement). The Agreement provides that PTC may perform an on-site inspection of PSP at any time during the term of the contract to *inter alia,* verify PSP's compliance with the terms of the Agreement. PSP is required to "reasonably cooperate" with PTC and other persons authorized by PTC to conduct an audit including giving them access to officers and the independent auditors of PSP.

[5] On February 5, 2024, PSP gave notice that it was terminating the Agreement. This invoked the deconversion process. PTC invoked its right to conduct an audit. Mr. Gurizzan, the principal of PSP, took the position that PTC did not have the right to conduct the audit because PSP had terminated the Agreement. In fact, the Agreement provides that the terms of the Agreement continue to apply during the de-conversion period.

[6] PTC commenced this action and brought an urgent motion to enforce its right to a contractual audit. The matter came before Justice Myers. On May 6, 2024, he made an interlocutory mandatory order enforcing PTC's audit right. PSP did not allow the audit to proceed. PTC commenced the contempt motion. The day before the motion was to be heard, PSP agreed to permit the audit. The contempt motion was adjourned.

[7] PTC states that it attempted to conduct the audit, but its requests for certain documentation were refused by PSP. There were several case conferences before me to facilitate the audit process. I made a series of interlocutory orders compelling PSP to co-operate with the audit and deconversion process.

[8] PTC argues that there continued to be a failure on the part of PSP to comply with the order of Justice Myers, and my orders to co-operate with the audit. The contempt motion was renewed. By endorsement dated January 2, 2025, I found PSP in contempt of court for failing to reasonably co-operate with the audit conducted by EY and with the deconversion process winding up the commercial relationship between the parties. The penalty phase was scheduled for March 19, 2025. I advised PSP that the extent to which it complies with the reasonable audit requests from EY will be a factor at the penalty stage of the contempt hearing.

[9] PTC states that following the liability phase of the contempt motion, PSP continued to fail to co-operate with EY. Mr. Whitla states that the audit remains unfinished because of PSP's failure to respond to EY's request for information.

[10] Mr. Whitla deposes that the information requested from PSP is required to complete the audit and that PSP's failure to comply is "atypical". He attached to his affidavit the EY report dated February 14, 2025, which provides a status on the PSP audit and sets out the information that is outstanding. He states that there continue to be significant variances in the merchant settlement bank accounts. The CDN DJS Settlement Bank Account balance was approximately $43,200,000 less than expected. The USD DJS Settlement Bank Account balance was approximately $4,500,000 less than expected. The EY report provides the following summary:

> The progress of the PSP Vendor Audit has been delayed due to PSP's incomplete responses to requests for information, including the refusal of requests for data beyond the Deconversion Date. This has limited our ability to perform certain analyses that are integral to the PSP Vendor Audit, thus inhibiting our work.
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> […]
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> In addition, significant variances amounting to millions of dollars were identified when comparing the expected balances in the Settlement Bank Accounts at the Deconversion Date compared to actual balances at August 6, 2024.

[11] Mr. Whitla's most recent affidavit was affirmed March 4, 2025. In cross-examination, he states that "multiple data requests remain outstanding, and the progress of the PSP Audit continues to be delayed due to PSP's incomplete responses." He states that he "continued to encounter issues with both the availability and quality of documentation, which has led to additional requests for information on multiple occasions."

[12] PSP relies on the affidavit of Mr. Fazzari, a chartered professional accountant. Mr. Fazzari's affidavit is not sworn Although Mr. Fazzari provides opinion evidence, he was not qualified as an expert and did not provide an acknowledgement of expert's duty. He states that he has experience in forensic accounting investigations. He states that PSP's responses are not "atypical" as the complexity of the audit and the increasing number of requests would naturally increase the time taken by PSP to provide responses. Mr. Fazzari states that PSP's responses to the request for information have been prompt considering the circumstances.

[13] PSP also relies on a series of statutory declarations sworn by Chris Marchese, an articling student. He sets out the EY requests that are in the process of being addressed. The statutory declarations claim that PSP is making "best efforts." PSP refused to allow Mr. Marchese to be cross-examined on the statutory declarations.

[14] PTC argues that PSP is required to pay for the audit. EY issued 16 invoices covering the period up to February 28, 2025, totaling $1,998,612.07. PTC also claims that PSP is required to pay the deconversion invoice in the amount of $584,838.71.

The Issue

[15] The issue to be determined on this motion, is the appropriate penalty and sanction for PSP's contempt of court.

Analysis

General Principles

[16] The enforcement of court orders is fundamental to the rule of law. Contempt undermines the authority of the court. Serious sanctions are warranted for contempt because it is an attack on our social order: *Thrive Capital Management Ltd. v. Noble 1324 Queen Inc*., 2022 ONSC 4081, (*Thrive Capital*), at para. 46.

[17] Sanctions for civil contempt serve two key purposes: (1) specific deterrence and coercion, by ensuring that the person who breached the court orders complies with them in the future; and (2) general deterrence, by sending a message to the public that the court's processes must be respected: *Borer v. Nelson*, 2020 ONSC 4259, at para. 4, citing *Boily v. Carleton Condominium Corp. 145*, 2014 ONCA 574, at para. 79.

[18] On the penalty phase of a contempt hearing, courts have a wide discretion to impose a penalty that is just in all the circumstances: *Perley-Robertson, Hill & McDougall LLP v. Eureka 93 Inc.*, 2025 ONCA 95, at para. 20. The factors relevant to the determination of the appropriate penalty for civil contempt include:

a) The proportionality of the sentence to the wrongdoing;
b) The presence of aggravating and mitigating factors;
c) Deterrence and denunciation;
d) The similarity of sentences in like circumstances; and
e) The reasonableness of a fine or incarceration: *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic*, 2009 CanLII 9423 (ON SC) at para. 10, see also *Astley v. Verdun*, 2013 ONSC 6734, at paras. 13 and 16.

Proportionality

[19] The sanction for civil contempt must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *Chiang (Trustee of) v. Chiang,* (2007) CanLII 82789, at para. 26, partially reversed on other grounds, 2009 ONCA 3. Any contempt is serious, but the conduct is to be evaluated based on whether the contempt was "motivated by personal gain, vengeance or any other reason that they felt they knew best": *Devathasan v. Ablacksingh*, 2018 ONSC 7557, (*Devathasan*) at para. 23.

[20] Here, there have been repeated acts of contempt over a prolonged period of time. PSP refused to permit the audit notwithstanding the entitlement to the audit is set out in the Agreement. Justice Myers first made his order compelling PSP to co-operate with the audit process in May 2024. Initially PSP refused to participate and did not agree to the audit until the day before the contempt hearing was to be argued.

[21] Multiple orders of the court were made to compel compliance. On each occasion the court stated that the extent of PSP's compliance would be a factor on the penalty phase of the contempt motion. Despite the multiple opportunities, PSP failed to purge the contempt.

[22] There is evidence that PSP has financially gained from its failure to comply with the audit and deconversion process. Mr. Gurizzan acknowledged that more than $500,000 CDN and $144,000 USD is owing to PTC. However, no payments have been made to date.

Aggravating and Mitigating Factors

[23] The onus is on the contemnor to establish mitigating factors on a balance of probabilities: *Astley v. Verdun*, 2013 ONSC 6734, (*Astley*) at para. 23. The mitigating factors that may apply in this case include whether PSP has purged the contempt and whether PSP has made a sincere apology.

[24] The purging or attempts to purge the contempt may be a mitigating factor: *Astley*, at paras. 23 and 25 and *Chiang (Re),* 2009 ONCA 3 (CanLII), paras. 50-52. The evidence of EY establishes that PSP continues to be in breach of the court orders to co-operate in the audit process.

[25] Mr. Whitla deposes that the audit remains unfinished due to PSP's incomplete responses to requests for information. Mr. Whitla testified that the information requested by EY is required to complete the audit. He states that PSP's behaviour with respect to the document requests is "atypical." He also states that the progress of the audit has been delayed because of PSP's incomplete responses to requests for information.

[26] In response, PSP relies on the affidavit of Mr. Fazzari. His affidavit is not sworn or affirmed. He purports to provide opinion evidence, but he failed to provide the acknowledgement of expert's duty. In cross-examination, Mr. Fazzari conceded that he was not involved with the audit, had not read the court's decisions or orders made in connection with the audit, or had spoken with Mr. Whitla. Mr. Fazzari states that EY's ability conduct the audit efficiently may have been affected by staff attrition and availability. He later conceded on cross-examination that he lacked any evidence to support the allegation.

[27] I prefer the evidence of Mr. Whitla over Mr. Fazzari. Mr. Whitla has been involved in the audit since the very beginning. He has firsthand knowledge of the information required for the audit and PSP's responses. I am also of the view that the evidence of Mr. Marchese is not persuasive. In his statutory declarations, he claims that PSP is making "best efforts" to respond to EY's requests. He did not provide any detail. PSP did not permit cross-examination to allow PTC to test his claims of "best efforts."

[28] As of the date of the penalty phase hearing, there were eight open document requests including settlement account variances, VISA and Mastercard settlement fund requests, and WCLIK settlement adjustments. PSP argues that the fact there continues to be outstanding requests for the audit that was initiated approximately one year ago, is evidence of a failure to comply with the court orders that required PSP to co-operate with the audit.

[29] A sincere apology may be a mitigating factor: *Re Chiang,* 2009 ONCA 3, at para. 87. Here there is no apology from PSP. Mr. Gurizzan was specifically asked on his cross-examination whether he expressed any remorse for the breach of the court orders. He refused to answer the question. In fact, Mr. Gurizzan was not prepared to concede that PSP had done anything wrong or incorrect. Instead of taking responsibility, Mr. Gurizzan blamed the prolonged audit on EY.

Deterrence and denunciation

[30] The primary objective of a civil contempt order is to compel compliance with a court order. Where efforts to compel the contemnor to comply with the orders have been unsuccessful, the matter may have gone beyond compliance and moved to the deterrence and denunciation stage. As stated in *Thrive Capital*:

> [55] While the court's primary objective of compelling compliance with the *Mareva* and Disclosure Order, the deterrence objective cannot be ignored. The court not only must show the Developer Defendants but also must show the public at large, that eventually the chances will run out. Even if there is a tendency to show some leniency in cases of civil contempt, every case has a breaking point, and it has been reached in this case.

[31] The Ontario Court of Appeal recently confirmed that punishment has been added as a secondary purpose of sentencing for contempt: *Castillo v. Xela Enterprises Ltd*., 2024 ONCA 141, at para. 89.

[32] It is my view that there has been chronic failure on the part of PSP to comply with the court orders despite being given ample opportunity to do so. I am satisfied that the matter has gone beyond compliance and that the sentencing principles of general deterrence and denunciation are paramount.

The Similarity of Sentence

[33] The range of penalties for contempt can "vary greatly with the facts of the case": *Greenberg v. Nowack*, [2018] O.J. No. 366, aff'd [2020] O.J. No. 2370 (ONCA), at para. 43. The sentence should be similar to sentences imposed on similar contemnors for similar contempt committed in similar circumstances: *Criminal Code*, s. 718.2(b).

[34] The Plaintiff seeks the appointment of an IR as the appropriate sanction for the contempt. In *Boutin v. Boutin*, 2022 ONSC 4776, the defendant failed to make complete and accurate financial disclosure. In finding that the appointment of an IR was the appropriate sanction for the finding of contempt, the court stated as follows:

> [79] The foundation for this contempt finding is anchored in Mr. Boutin's failure to make complete and accurate financial disclosure. In my view, a penalty of appointing a non-possessory Investigative Receiver with all the powers and rights that Mr. Boutin has, including his rights as owner, shareholder, director, officer, tax payer, debtor, and creditor, to seek, request, and obtain possession of all relevant financial documentation and information relating to the financial issues in this case for the purpose of preparing a report to this court regarding Mr. Boutin's assets, properties, financial transactions, and income from November 1, 2019, until the Receiver is discharged, is appropriate and necessary in the circumstances of this case (the "Investigative Receiver"). As stated in *Paulpillai Estate*, para. 20:
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> > A receiver with investigative powers is often appointed to gather information and determine the true state of affairs about the parties.
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> [80] This will, in essence, permit the Investigative Receiver to put before the court what Mr. Boutin could have done, should have done, but failed to do.

[35] Courts have appointed an IR where a party provides incomplete and misleading financial disclosure. Courts have also ordered the appointment of an IR where an audit and accounting is required to unwind a complex agreement*: G.E. Real Estate v. Liberty Assisted Living*, 2011 ONSC 4136, at paras. 92, 98-104; *Paulpillai v. Yusuf*, 2020 ONSC 851, at paras. 62-67.

The Appropriate Penalty for Contempt

Appointment of an IR

[36] I am of the view that it is imperative that the audit be completed in a timely and efficient manner. As noted by Justice Myers, the audit right set out in the Agreement is to provide "real time access to a business to prevent harm from arising." Here, the audit is not complete despite PTC starting the process more than one year ago.

[37] Mr. Whitla states in his affidavit sworn March 4, 2025, that "multiple data requests remain outstanding, and the progress of the PSP Audit continues to be delayed due to PSP's incomplete responses". He also states in the affidavit that "the appointment of EY as an investigative receiver would expedite the completion of the PSP Audit and address the issues of outstanding information requests and information and documentation availability".

[38] PSP argues that the appointment of an IR is premature. PSP states that it continues to answer the audit requests. Counsel for PSP argues that the audit process should be allowed to play out to its conclusion before an IR is appointed as a penalty for contempt. PSP also argues that if an IR is appointed, it should not be EY because they have been involved in the audit as PTC's accountant.

[39] I am of the view that the appointment of an IR is not premature. The audit process was initiated more than one year ago. PSP initially refused PTC's entitlement to an audit despite the clear words in the Agreement. Even after Justice Myers' order, PSP took the position that it was not obligated to comply with the audit. PSP failed to comply with orders that it co-operate and produce documentation in a timely manner. The audit remains incomplete.

[40] I am also of the view that the appointment of EY as the IR is appropriate in the circumstances. Mr. Whitla states in his affidavit that EY is prepared to act as a court-appointed officer. He was not cross-examined on this point. There is no evidence that EY is not independent.

[41] The appointment of EY as the IR will allow it to access the information required to complete the audit, without interference or delay. As noted in *Boutin*, the IR will obtain what should have been provided by Mr. Gurizzan. EY is familiar with the business and has already incurred a significant amount of time on the audit. To have a new forensic accountant get up to speed would result in a significant increase in costs and further delay.

[42] The appointment of the IR is ordered because PSP failed to comply with the court orders to co-operate in the audit. I am of the view that it is just and equitable that the cost of the IR be borne solely by PSP: *Boutin*, at para. 91.

Costs of the Audit to Date

[43] The invoices from EY with respect to the audit for the period up to March 1, 2025, totals $1,998,612.07. An additional $110,000 is estimated to have been incurred from March 1, 2025, to the date of the hearing on March 19, 2025.

[44] PTC argues that an order requiring PSP to pay all costs associated with the audit is an appropriate penalty. Pursuant to the Agreement, PTC has a right to indemnification for the costs incurred for the audit, where the audit reveals a breach of the Agreement or is necessitated on account of a breach of the Agreement. PTC argues that PSP's failure to co-operate with the audit is a breach of the Agreement.

[45] PSP argues that pursuant to the Agreement, PSP is required to pay the costs of the audit only if it is shown that PSP breached the Agreement. PSP argues that there is no evidence of any breaches of the Agreement to date and therefore any order to pay the costs of the audit are premature.

[46] The costs of the audit were increased because of PSP's failure to co-operate. In my view it is a just penalty to require PSP to pay the increased costs caused by its failure to co-operate.

[47] I order PSP to pay into court the total amount of the EY invoices to March 1, 2025, in the amount of $1,998,612.07. The amount shall be paid into court within 30 days of the date of this endorsement. EY shall prepare a separate invoice that sets out the portion of the account that is attributable to the failure of PSP to comply with the audit. PSP is ordered to pay the increased costs. The balance of the money will remain in court pending the completion of the audit, and further order of this court.

[48] If there is no agreement between the parties as to the amount of the increased costs of the audit that is attributed to PSP's failure to comply, the parties may request a case conference with me to explore methods to resolve the dispute.

Personal Liability of Mr. Gurizzan

[49] Mr. Gurizzan is not a Defendant in the action. In my endorsement dated January 3, 2025, I did not make a finding of contempt as against Mr. Gurizzan personally. In the absence of a finding that Mr. Gurizzan was personally liable in contempt, I am not prepared to impose a penalty on him personally.

Costs

[50] PTC seeks its costs of the liability phase of the contempt motion on a substantial indemnity basis in the all-inclusive amount of $495,089.61. PTC also seeks its costs of the penalty phase on a substantial indemnity basis in the all-inclusive amount of $171,297.43. The total amount claimed is $666,387.04. PSP argues that the amount claimed is excessive in the circumstances. PSP filed a cost outline that provides that its costs of the liability and penalty phases of the contempt motion are $39,657.92 on a substantial indemnity basis.

[51] Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides the court with discretion in the determination of costs. The exercise of this discretion is guided by the factors set out in Rule 57.01, having regard to the overriding principles of reasonableness, fairness, and proportionality: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 6 O.R. (3d) 291 (C.A.), (*Boucher*) at para. 38.

[52] The rules and principles pertaining to the issue of costs have three principal purposes:

(i) to indemnify successful litigants for the expense of litigation;
(ii) to encourage settlement; and
(iii) to discourage and sanction inappropriate behaviour by litigants: *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.), at para. 22.

[53] In my view, the purpose of discouraging and sanctioning inappropriate behaviour is most relevant in contempt proceedings. An award of substantial indemnity costs on a motion for contempt reflects the rationale that a victim of the contempt should be indemnified for the cost of pursuing compliance by the contemnor: *Business Development Bank of Canada v. Cavalon Inc*., 2017 ONCA 663, at para. 104; and *Devathasan*, at paras. 56-57.

[54] I am satisfied that PSP repeatedly breached the orders of the court to co-operate in the audit. In failing to comply with the orders, PSP must have expected that PTC would bring the contempt motion. As noted by Justice Myers when dealing with the costs of the injunction motion, "[PSP] decided to play hardball by cutting off communication and then rejecting the audit. As a result, by advancing an untenable argument that was contradicted by the plain wording of the parties' contract, it caused PTC to incur legal costs" [….] "PSP took aggressive positions and should reasonably have expected PTC to pull out all the stops and spare no expense to defend itself."

[55] Justice Myers ordered PSP to pay PTC's costs of the *Mareva* injunction on a substantial basis in the all-inclusive amount of $100,000, and the costs of responding to PSP's motion in the all-inclusive amount of $45,000. PSP would have reasonably expected that if it failed to comply with the audit and PTC was required to bring a motion for contempt, it would face a significant cost award.

[56] I have considered the factors set out in R.57.01. The amount in issue is significant; the audit involves millions of dollars. The time docketed by counsel for the Plaintiff was 185.1 hours. The clerk docketed an additional 15.3 hours. Counsel for PSP docketed just over 110 hours. The liability and penalty phases of the contempt motion were complex. The parties filed over 5,500 pages of material on the liability phase, and over 1,250 pages on the penalty phase. The liability and penalty phases were argued over the course of two days.

[57] In fixing costs, I am not undertaking the same task as an assessment officer or fixing costs with mathematical precision. I am exercising my discretion guided by the factors set out in Rule 57.01, and having regard for the overriding principles of reasonableness, fairness, and proportionality: *Boucher*.

[58] I award costs of the liability and penalty phases of the contempt motion to PTC fixed in the amount of $500,000, inclusive of counsel fee, disbursements, and H.S.T. I am satisfied that the award of costs in this amount is proportionate, fair, and within the reasonable expectation of PSP to pay. The costs are payable within 30 days of the date of this endorsement.

Disposition

[59] For the reasons set out above, I make the following order:

(a) I order the appointment of EY as the IR to take the steps necessary to complete the audit. PSP is ordered to pay the IR's invoices to complete the audit;

(b) I order PSP to pay the increased costs of the audit that were caused by PSP's failure to comply with the orders. PSP is ordered to pay $1,998,612.07 into court for the benefit of this action. EY shall prepare a separate invoice that sets out the portion of the account that is attributable to the failure of PSP to comply with the orders to co-operate in the audit. If there is no agreement between the parties as to the amount of increased costs attributed to PSP's failure to comply, the parties may request a case conference with me to explore methods to resolve the issue; and

(c) I order PSP to pay PTC's costs of the contempt motion, fixed in the amount of $500,000. The costs are payable within 30 days of the date of this order.

Date: April 25, 2024

Chalmers J.