COURT OF APPEAL FOR ONTARIO

CITATION: The Innkeepers S.R.L. v. Enthusiast Gamining Holdings Inc., 2025 ONCA 853
DATE: 20251205
DOCKET: M56464 (COA-25-CV-1465)

Paciocco J.A. (Motion Judge)

BETWEEN

The Innkeepers S.R.L., Damien Thivolle and Vlad-Matei Mladin

Applicants
(Respondents/Moving Parties)

and

Enthusiast Gaming Holdings Inc.

Respondent
(Appellant/Responding Party)

Stephen Brown-Okruhlik, for the moving parties

Miranda Spence and Roula Khairalla, for the responding party

Heard: November 27, 2025

REASONS FOR DECISION

I. OVERVIEW

[1] The moving parties, Damien Thivolle and Vlad-Matei Mladin (the "Vendors"),[1] sold their video game company (Vedatis SAS) to the responding party, Enthusiast Gaming Holdings Inc. (the "Purchaser") in May 2021. The purchase price included an earn-out component (the "Earn-Out Payment") payable to the Vendors after a four-year earn-out period (the "Earn-Out Period"). The Share Purchase Agreement (the "SPA") provided terms to calculate the quantum of the Earn-Out Payment.

[2] The parties fell into serious disagreement in calculating the Earn-Out Payment after the Earn-Out Period ended, and litigation ensued. The Vendors initiated an application on June 17, 2025 (the "Application"), seeking various declarations and orders to advance the computation process. On November 3, 2025, in circumstances I am about to describe, Myers J. ordered an adjournment of the application hearing scheduled for that date. However, he also ordered that the Purchaser pay the Vendors €855,155 within one week, failing which the Vendors could move to strike the Purchaser's evidence and proceed to an unopposed hearing (the "November 3 Endorsement").

[1] The Innkeepers S.R.L. ("Innkeepers") is also a moving party to this motion, together with Mr. Thivolle and Mr. Mladin. Innkeepers is a professional corporation wholly owned by the Vendors, and is the vehicle through which the Vendors provide oversight and assistance with the operation of various online gaming platforms which they sold to the Purchaser, pursuant to the terms of a Services Agreement. For simplicity, I refer to the moving parties collectively as the "Vendors" in these reasons.

[3] The Purchaser filed an appeal of the November 3 Endorsement to this court, which triggered an automatic stay of the order pursuant to r. 63.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. In the motion before me, the Vendors brought a motion to aside the stay, pursuant to r. 63.01(5).

[4] For the reasons that follow, that motion is granted, and the stay of the order under appeal is lifted, on the conditions described below.

II. MATERIAL FACTS

[5] The SPA sets out complex terms for the computation of the Earn-Out Payment and permits the Purchaser to elect to pay up to half of the Earn-Out Payment in shares rather than cash. It is agreed that the SPA requires the Purchaser to prepare and deliver a statement setting out its computation of the Earn-Out Payment (the "Earn-Out Computation Statement") within 30 days following the end of the Earn-Out Period. The Vendors are deemed to have accepted the Purchaser's computation if no notice of objection is delivered within 30 days. If a notice of objection is delivered, the parties must engage in good-faith settlement discussions for a period of 15 days. If settlement is not reached, the computation of the Earn-Out Payment is submitted to an agreed-upon "Earn-Out Expert" to render an independent report on the computation according to the terms of the SPA.

[6] The Vendors' Application alleged, among other things, that the Earn-Out Period expired on May 1, 2025, and that the Purchaser breached the SPA by not providing a computation. They sought an injunction requiring the Purchaser to deliver the Earn-Out Computation Statement and associated documentation, or, in the alternative, an order requiring the Purchaser to pay a specific Earn Out Payment amount. At a July 2, 2025 appearance presided by Black J., a hearing for the Application was scheduled for August 11, 2025 and a timetable was set for the exchange of materials and cross-examinations.

[7] The Purchaser takes the position that the contractual deadline for providing its computation was July 30, 2025. It delivered its Earn Out Computation Statement on that date, less than two weeks in advance of the August 11, 2025 hearing date. In its computation, the Purchaser included several deductions to its EBITDA, which directly influences the Earn-Out Payment amount, that it submits are provided for in the SPA. The Vendors dispute those deductions are permitted under the terms of the SPA (the "Legal Issues"). The Vendors also disagree with the Purchaser's Earn-Out Computation Statement (the "Computation Issues") and seek disclosure ostensibly relating to the Earn-Out Payment amount, as provided for in the SPA.

[8] When the matter came before Black J., on the scheduled hearing date, he directed that the issues would proceed on parallel tracks, with the Legal Issues to be resolved by the court via the Vendors' Application, and the Computation Issues to be resolved pursuant to the terms of the SPA. He directed that any Legal Issues

requiring interpretation that could not be resolved by the parties would be put before the court in a half-day hearing on November 3, 2025. He set out a 15-day timeline for the completion of materials on the Earn-Out Payment computation, during which resolution was to be discussed. Failing agreement, he ordered that the Computation Issues would be submitted to the Earn-Out Expert for its position, "including for competing scenarios to the extent the parties take competing positions on underlying interpretation issues."

[9] The Purchaser continued to provide computations, ultimately delivering a sixth version of its Earn Out Computation Statement on September 26, 2025, reflecting an Earn-Out Payment amount of €855,155. This amount is still significantly below the amount claimed by the Vendors. The Vendors demanded disclosure of several documents they claimed were required to understand and respond to the Purchaser's computation, and they claim they were entitled to pursuant to the terms of the SPA. A motion to compel this disclosure was heard by Black J. on October 17, 2025. In his endorsement, Black J. characterized the Vendors' approach and demands as "somewhat scattergun". By the date of the October 17 motion hearing, some of the demanded disclosure had been made. Black J. ordered disclosure of some of the outstanding requested documents but denied the motion for others. He noted that it was unclear whether the hearing of the Application could proceed on November 3, 2025 as scheduled given the short timeline and remaining steps required, calling it "a problem largely of the parties'

own making". He gave directions crafted to save the Application's scheduled hearing date, stating that he would be loath to adjourn it without a compelling reason to do so.

[10] Materials and emails were exchanged. The Vendors delivered their factum and application record on October 27, 2025. The Purchaser provided its responding affidavits on October 30, 2025. The Vendors requested cross-examinations on those affidavits be scheduled for the weekend. The Purchaser declined and delivered its factum on November 2, 2025, the day before the scheduled hearing.

[11] By way of further background, I would note that the parties agree that the Purchaser was at this time, and currently is, subject to two forbearance agreements with its senior lender (a bank) and Beedie Investments Ltd., which expire on December 31, 2025 and March 31, 2026, respectively, or sooner in the case of a defaulting/terminating event.

[12] The parties attended the scheduled November 3, 2025 application hearing, presided by Myers J. The Purchaser sought an adjournment. Myers J. rendered a decision on the adjournment request which is the subject of the appeal to this court. I reproduce the salient paragraphs of the November 3 Endorsement here:

> [1] There are two competing factors affecting the hearing of this application. First, the topic of the interpretive issues is complex. There are numerous factual disputes. That does not mean that the interpretations necessarily

need facts found on any or all issues. But I am not sure that I can know that until I have the issues properly fleshed out.

[2] The competing issue is that it is in the [Purchaser's] interest to delay. It is subject to a forbearance agreement with its secured lender. The current forbearance period expires at year-end. It has liquidated one aspect of its business already. […]

[3] The [Purchaser's] position has changed over time on more than one issue. It has waived and then re-asserted one particular issue. Its document production has been slow, leading the [Vendors] to bring a motion. The [Vendors] turned an affidavit over the weekend once it received the documents ordered by Black J. and the other production wrested from the [Purchaser] prior to the hearing date before the judge. […]

[4] The [Vendors] produced a substantial affidavit on October 20, 2025. The [Purchaser] delivered two responding affidavits in the early evening on October 30, 2025. Counsel suggested cross-examinations the next day. But the [Vendors] delivered a responding affidavit on the 31st and asked for cross examination on the weekend. [Counsel for the Purchaser] declined on the basis that there was just insufficient time left to conduct examinations, prepare factums and attend for the full hearing today.

[…]

[8] The need for speed here is the fear that the [Purchaser] is ragging the puck until a day when the secured lender takes its entire business undertaking beyond the reach of the [Vendors]. To that end, the [Purchaser] has told that [Vendors] that its lender will not allow it to make payments including the amount of the earnout that it does not contest. That is not an appropriate response. Legal obligations admitted are to be paid. If that triggers steps by priority lenders to

preclude the payment by seizures or insolvency proceedings, then that is the legal order of things. Stalling litigation to wait for a secured lender to implement its realization strategy while delaying payments to creditors (in cash or by shares) is not a fair litigation stance

[…]

[10] An adjournment alone will prejudice the [Vendors]. As each day goes by, the [Purchaser's] ability to pay a judgment is increasingly in jeopardy. In my view, having caused and sought an adjournment - particularly by its slow document production, its flip-flopping on issues, its late affidavit raising new issues on October 30, and refusing to be available for cross-examinations on the weekend - it is unfair to adjourn without taking steps to protect the [Vendors] from prejudice. In my view it is fair and just to add a term to the adjournment ordered that the [Purchaser] shall pay the [Vendors] the amount the [Purchaser] admits to be the minimum earnout calculation in its 6th spreadsheet version of €855,155 in the equivalent amount of Canadian dollars calculated in accordance with the *Courts of Justice Act*.

[11] Payment is to be made before the commencement of a case management conference one week from today, on November 10, 2025 at 2:00 p.m. EST by Zoom before me. At the case conference counsel are to be prepared with submissions about the steps to get to a hybrid hearing of this application for two or three days. Counsel should speak in advance to try to agree on any new evidence required and which witnesses will be cross-examined in open court.

[12] In the event that the payment of €855,155 is not received before the commencement of the case conference on November 10, 2025, the [Vendors] may move to strike the [Purchaser's] evidence and proceed to an unopposed hearing.

[13] Myers J.'s order for the Purchaser to pay the Vendors €855,155 despite granting the adjournment was designed to alleviate the financial risks to the Vendors which he found the delay in adjudicating the Application was causing. This is the order which is currently subject to the automatic stay as the result of the Purchaser's appeal. As indicated, the Vendors initiated the motion that is now before me to lift that stay.

III. TEST FOR LIFTING A STAY

[14] Rule 63.01(5) of the *Rules of Civil Procedure* allows a judge of the Court of Appeal to lift an automatic stay of an order for the payment of money triggered by r. 63.01(1) on "such terms as are just". It is clear from our caselaw that lifting an automatic stay is intended to be an exceptional and discretionary remedy, based on the circumstances of the case and the interests of justice: see *SFC Litigation Trust v. Chan*, 2018 ONCA 710, at para. 9; *Mortimer v. Cameron*, [1993] O.J. No. 4169, at para. 2; and *Waxman v. Waxman*, 2002 CanLII 45101 (Ont. C.A.), at para. 9. As Weiler J.A. said in *Kagal v. Tessler*, 2003 CarswellOnt 6830 (C.A.), at para. 3, "[i]n determining whether and on what terms it would be just to lift the stay the court has adopted a flexible approach consistent with a consideration of the circumstances of the particular case."

[15] In deciding whether to lift the automatic stay, motion judges typically consider three factors:

(a) The financial hardship of the respondent if the stay is not lifted;

(b) The ability of the respondent to repay or provide security for the amount paid; and

(c) The merits of the appeal.

See *SA Horeca Financial Services v. Light*, 2014 ONCA 811, 123 O.R. (3d) 542, at para. 13; *Lang-Newlands v. Newlands*, 2025 ONCA 328, at para. 24.

[16] A review of our court's caselaw illuminates that these three factors are really aimed at balancing two principal concerns: (i) any demonstrable and unusual hardship that will be suffered by the respondent if the stay is not lifted pending appeal; and (ii) the risk that if the appellant is ultimately successful in their appeal, they will be unable to collect the funds that they have already advanced to the respondent. See *Mortimer*, at para. 2; *Ryan v. Laidlaw Transportation Ltd.* (1994), 19 O.R. (3d) 547 (C.A.), at pp. 549-50; *Siwick v. Dagmar Resorts Ltd.* (1996), 95 O.A.C. 188 (C.A.), at pp. 191-93; *Waxman*, at para. 9; and *SFC*, at paras. 10-12.

[17] Whether the respondent will suffer demonstrable and unusual hardship maps directly onto factor (a). The risk that a successful appellant will bear the loss if they cannot recover damages reversed on appeal is captured by both factors (b) and (c). That risk may be mitigated by evidence of the financial means of the respondent or the terms of an order which provides some form of security over the payment until the appeal is determined on its merits. A preliminary assessment of

the merits of the appeal can assist a motion judge in assessing the risk of non-recovery where the respondent cannot assure the court that the appellant's funds will otherwise be protected; a meritorious appeal will heighten that risk while a frivolous one lessens it. See *Siwick*, at pp. 192-93; *SFC*, at para. 11. As Carthy J.A. said in *Mortimer*, at para. 11, "[e]ach case must be examined on its facts to see if the respondent presents unusual hardship and if risk to the appellants can be eliminated or, if existent, can be balanced against the hardship to the respondent."

IV. APPLICATION OF THE TEST

A. Financial Hardship

[18] The respondent must demonstrate some degree of financial hardship in order to justify displacing the default rule that an order for payment is stayed pending appeal. While this burden is typically met by demonstrating that the respondent is experiencing immediate financial need (e.g., a personal injury plaintiff requiring money for medical expenses), it may also be met if the respondent can show that the stay heightens the uncertainty of payment by the appellant after the appeal is concluded: *Peoples Trust Company v. PSP Services Inc.*, 2025 ONCA 524, at para. 18; *Lang-Newlands*, at paras. 28, 31. This latter type of hardship is normally recognized in cases where there is a risk the appellant may dissipate their assets to frustrate recovery: *SFC*, at para. 12; *Waxman*, at para. 13; *Popa v. Popa*, 2018 ONCA 972, at para. 8; and *Hall-Chem Inc. v. Vulcan Packaging Inc.* (1994), 72 O.A.C. 303 (C.A.) at pp. 307-08.

[19] In the November 3 Endorsement, Myers J. found as a fact that "[a]s each day goes by, the [Purchaser's] ability to pay a judgment is increasingly in jeopardy." The Purchaser's public financial statements, which formed part of the motion record on this motion, suggest that the company is experiencing negative cash flows and has insufficient cash to fund its planned operations over the next 12 months. Moreover, Myers J. noted that his concern for urgency was "the fear that the [Purchaser] is ragging the puck until a day when the secured lender takes its entire business undertaking beyond the reach of the [Vendors]".

[20] The Purchaser disputed several of these findings by Myers J. in the motion hearing before me, and I have considered those objections, but deference is owed to Myers J.'s factual findings, and I see no basis for interfering with these findings based on the submissions made, especially given the Purchaser's public financial statements which seem to support Myers J.'s concerns.

[21] I am persuaded that in the context of this case, the concerns about the financial stability of the Purchaser are sufficient to demonstrate financial hardship to the Vendors in the form of a serious risk of non-payment if the automatic stay is not lifted. While I am not suggesting that the Purchaser is taking or will intentionally take steps to frustrate the Vendor's collection of a judgment concerning the Earn-Out Payment amount, its financial instability has the effect of creating a material risk that the funds owed to the Vendors will be unrecoverable by the time the appeal is decided. This factor favours lifting the stay. However, this factor alone is

not sufficient to justify lifting the automatic stay; the court must then go on to balance this risk to the respondent with the risk of prejudice to the appellant.

B. Ability to Repay or Provide Security

[22] The purpose of the second factor is to assess the risk to the appellant if they are made to pay the judgment now, and the order is ultimately reversed on appeal. This is especially relevant where money paid to the respondent could be dissipated by the time the appeal judgment is rendered. Where the respondent can assure the court that they will be able to repay the appellant if the judgemnt below is overturned on appeal, or an order can be crafted that assures the same result, this factor may favour granting the stay: *Peoples Trust Company*, at para. 19; *Gardiner Miller Arnold LLP v. Kymbo International Inc.*, 2006 CarswellOnt 9436 (C.A.), at para. 8. “Undoubtedly, a motions court judge would feel more comfortable lifting a stay if satisfied that the appellant was reasonably protected against the possibility of a successful appeal”: *Siwick*, at p. 192.

[23] There is no suggestion in this case that the Vendors lack the financial means to repay the Purchaser if Myers J.’s order is reversed on appeal. The Vendors have explicitly invited me to craft an order that would both provide for the complete satisfaction of Myers J.’s order, and provide the court with a measure of assurance that if that order is overturned, and the Vendors ultimately must refund the Purchaser, they will have sufficient funds to do so.

[24] I am persuaded that there is a measure which can be taken to ensure repayment in the event that Myers J.'s order is reversed, and therefore this factor of the test also favours lifting the stay. As outlined at the end of my reasons, the stay will be lifted and the Purchaser will pay the equivalent of €855,155 to the Vendors in compliance with Myers J.'s order. This payment will satisfy the Purchaser's obligation to the Vendors arising from that order (which is presumptively valid unless and until an appeal judgment to the contrary). Separately, to provide assurances to the Purchaser in respect of its appeal, the Vendors will pay the equivalent of €855,155 of their own funds into court. Should the Purchaser succeed in its appeal, the Purchaser could have recourse to those funds to satisfy any resulting judgment against the Vendors. If the appeal does not give rise to a judgment against the Vendors in favour of the Purchaser, the funds will be returned to the Vendors at the conclusion of the appeal.

C. Merits of the Appeal

[25] The merits of the underlying appeal are relevant insofar as they may help inform the degree of uncertainty in the appellant's recovery if the stay is lifted and the appellant is successful on appeal. It is not necessary to find that the appeal is frivolous to lift a stay: *Peper v. Peper* (1990), 1 O.R. (3d) 145, at p. 151; see e.g., *Lang-Newlands*, at para. 34. Even when an appeal on its face has merit, an order lifting the stay may be justified in the circumstances of the case: *Siwick*, at p. 193.

[26] Also relevant to the merit assessment is whether the appellant takes issue with its liability to the respondent, or merely the quantum of damages. Where the context of the case shows that the appellant will have to pay some amount of money to the respondent, but the question is just “how much”, even a meritorious appeal may not weigh against lifting the stay: *Hrvoic v. Hrvoic*, 2023 ONCA 288, at paras. 8, 16-17; *Peoples Trust Company*, at para. 14; and *Kagal*, at para. 3; see generally, *Leblanc v. Digiammatteo* (1989), 71 O.R. (2d) 130 (C.A.). This is because where at least some liability is admitted, the concern the appellant will be unable to collect against the respondent is attenuated, because less money is at issue. “If the appeal is against damages only, frequently the respondent is almost certain to recover some amount regardless of the outcome of the appeal. In these situations an order lifting a stay is easier to justify”: *Siwick*, at p. 193.

[27] The merits of the appeal in this case do not dissuade me from concluding that an order lifting the stay is in the interests of justice.

[28] Many of the grounds of appeal amount to attacks on Myers J.’s factual findings or turn on those findings. While a full and final evaluation must wait until the appeal hearing, at this stage I am not persuaded that there is merit in these challenges, including Myers J.’s finding that the Purchaser has effectively conceded that the quantum of the Earn-Out Payment is at least €855,155 by presenting this sum in its latest Earn-Out Computation Statement. This is especially true given public representations the Purchaser made in its recent

financial statements that the Earn-Out Payment has a “probable” valuation of $2.4M and is expected to be paid in cash by August 29, 2025. I recognize that this amount is in Canadian dollars and is explicitly noted to be “under negotiation”. However, in my view it is strong evidence that there is little risk the Vendors will eventually need to refund the Purchaser for a material portion of the €855,155 that Myers J. ordered on November 3, 2025.

[29] The Purchaser also makes several arguments that Myers J. erred by effectively rewriting the SPA, such as by compelling the Purchaser to immediately pay part of the Earn-Out Payment in cash while the SPA both prescribes a process for resolving disputes related to the Earn-Out Payment and allows the Purchaser to elect to pay up to 50% of the Earn-Out Payment in shares. I am cognizant that, absent palpable and overriding error, determinations of mixed fact and law are entitled to deference on appeal. Further, I am satisfied that, even if the Purchaser ultimately meets the high standard for appellate intervention, it can be secured against by the payment orders I am making.

[30] I recognize that there may be greater merit in the ground of appeal relating to the failure of Myers J. to limit the payment to half of the conceded amount, given the Purchaser’s contractual option of paying up to 50% of the Earn-Out Payment in shares. However, if that is an error, it can be secured against by the payment orders I am making.

[31] Finally, the Vendors submitted before me that the order under appeal is interlocutory and therefore entirely void of merit because this court does not have jurisdiction to hear the appeal. As a single motion judge, I cannot make a final determination on this court's jurisdiction to hear an appeal, but I can consider whether the appeal probably should have been brought to the Divisional Court in assessing its merits: see *Fontaine v. Canada (Attorney General)*, 2021 ONCA 313, at paras. 41-43. Although the Application is ongoing, Myers J.'s order appears to finally determine the Vendors' right to €855,155. I am therefore not persuaded that this appeal was probably taken to the wrong court. Therefore, the question of jurisdiction has played no role in my assessment of the merits of the appeal.

D. Final Balancing

[32] Given the risk that enforcement delay presents to the ability of the Vendors to collect any portion of the Earn-Out Payment that they are owed and the ability to secure the interests of the Purchaser against potential loss caused by lifting the stay, it is in the interests of justice to lift the stay in this case.

[33] The stay of proceedings is designed to preserve the status quo in advance of an appeal. However, in this case leaving the stay in place would do the opposite: based on Myers J.'s factual findings, keeping the stay in place could effectively render the appeal moot. The stay could perpetuate the very outcome the Myers J. was attempting to prevent. In these unique circumstances, where there is no demonstrable prejudice to the appellant in respect of recovery following this

appeal, but where the stay itself could effectively decide the appeal, it is easier to justify the exceptional remedy of lifting the automatic stay.

V. ORDER

[34] I therefore order that the automatic stay be lifted. Subject to the variation in para. 35 of these reasons, the following order of Myers J. is enforceable:

> [T]he respondent shall pay the applicant the amount the respondent admits to be the minimum earnout calculation in its 6th spreadsheet version of €855,155 in the equivalent amount of Canadian dollars calculated in accordance with the *Courts of Justice Act*. […] Payment is to be made before the commencement of a case management conference one week from today, on November 10, 2025 at 2:00 p.m. EST by Zoom before me. […] In the event that the payment of €855,155 is not received before the commencement of the case conference on November 10, 2025, the applicant may move to strike the respondent's evidence and proceed to an unopposed hearing.

[35] Myers J.'s order reproduced above in para. 34 of these reasons is varied as follows:

a) The Vendors shall deposit security in the amount of €855,155 in the equivalent amount of Canadian dollars calculated in accordance with the Courts of Justice Act with the Accountant of the Superior Court of Justice on or before December 12, 2025. If such payment is made, the stay of Myers J.'s order is lifted pursuant to r. 63.01(5).

b) If the Vendors make this deposit on or before December 12, 2025, as described in para. 35(a), the Purchaser shall pay the equivalent amount directly to the Vendors on or before December 15, 2025, in full satisfaction of the payment condition in Myers J.'s November 3 Endorsement.

VI. COSTS

[36] I order the responding party pay the moving parties' costs of $5,000 for this motion, inclusive of applicable taxes and disbursements, as agreed to by the parties.

"David M. Paciocco J.A.