CITATION:TARGET PARK INC. v. CROWN PROPERTY MANAGEMENT INC., 2026 ONSC 1474
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SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: TARGET PARK INC.

v.

CROWN PROPERTY MANAGEMENT INC.

BEFORE: Justice J. Dietrich

COUNSEL: *James Zibarras, for Target Park Inc.*

Matthew B. Lerner, Devon R. Kapoor for Crown Property Management Inc

HEARD: March 2, 2026

REASONS FOR DECISION

Introduction

[1] By order dated October 14, 2025, pursuant to s. 45(1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "***Arbitration Act***") Justice Steele granted Target Park Inc. ("**Target**") leave to appeal an arbitration award of Ms. Megan Keenberg (the "**Arbitrator**") dated February 26, 2025 (the "**Award**"). The Award ordered Target to pay the respondent Crown Property Management Inc. ("**Crown**") damages of $201,243.34.

[2] Target now seeks to appeal the Award on the basis that (i) the Arbitrator made an error of law in failing to consider or apply recognized principles of contractual interpretation to a *force majeure* clause under which Target claims it was entitled to reduce the rent payable by Target to Crown during the Covid-19 pandemic; and (ii) the Arbitrator made an error of law in failing to apply the correct test in considering Target's defence of equitable set off.

[3] To the extent that Target is successful in appealing all or a portion of the Award, Target also seeks modifications to the corresponding cost award issued by the Arbitrator.

[4] For the reasons set out below, Target's application is dismissed.

Background

The Parties and the Contract

[5] Crown is a commercial real estate investment and property management firm that specializes in acquiring, leasing, managing, and redeveloping commercial real estate assets across Canada.

[6] Target is an owner-operated parking management company. Target's business involves operating commercial parking lots for property owners and landlords.

[7] In April 2019, Crown issued a request for proposal ("**RFP**") for companies to operate the parking lot at Crown's 15-storey office building located at 5255 Yonge Street, Toronto, Ontario (the "**Parking Lot**").

[8] Target submitted a response to the RFP on June 8, 2019, and on June 28, 2019, Crown selected Target as the successful applicant to manage and operate the Parking Lot.

[9] On August 1, 2019, Target started managing the Parking Lot pursuant to the terms of a contract between the parties dated September 27, 2019 (the "**Contract**"). Although the Contract was never signed by Crown, it is not disputed that the Contract governed the relationship between the parties.

[10] Pursuant to the terms of the Contract, Target was required to monitor and operate the Parking Lot and collect all parking revenues. In turn, Target was required to pay Crown: (a) a guaranteed minimum rent of $35,671 plus HST, and (b) a profit-sharing component being 65% of all "Net Revenue" collected in excess of the minimum rent. The Contract had a three-year term, commencing on August 1, 2019, with an option to renew for two more years.

[11] The Contract contained a *force majeure* clause (the "**Force Majeure Clause**") which stated:

> If [Target] is prevented from operating or the parking sales are interrupted by reasons beyond the reasonable control of [Target] for a period of time exceeding 5 days in any 30-day period, then the rent shall be reduced on a pro-rata basis as against the period of interruption. Circumstances constituting a Force Majeure include but are not limited to natural causes, such as Acts of God, fire, earthquakes, riot, war, and/or pandemics. Moreover, government interference which results in road closure or closure of the parking facility due to licensing requirements to operate a commercial parking facility is covered by this clause.

[12] From April 2020 to April 2022, Target submitted reduced monthly payments to Crown.

The Arbitration & the Award

[13] On June 19, 2023, Crown commenced the arbitration claiming that Target breached the Contract by failing to pay Crown the full stipulated monthly minimum rent and profit sharing amounts. The claimed shortfall totaled over $326,492.71.

[14] There was no dispute about the amounts paid (or not paid) by Target to Crown. Rather, at the arbitration, Target argued (i) reduced rent was paid for the period affected by the Covid-19 pandemic in accordance with the Force Majeure Clause in the Contract; (ii) certain of the claimed amounts were statute barred under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B. (the "***Limitations Act***"), ss. 4 and 5; and (iii) Crown's own conduct undermined Target's ability to take various steps to increase revenue, which were central to the relationship between the parties, and therefore amounted to a defence of set off.

[15] The arbitration took place on September 17, 18 and 20, 2024.

[16] The Award, which is 220 paragraphs, was dated February 26, 2025.

[17] In the Award, the Arbitrator (i) rejected Target's argument that the Force Majeure Clause was engaged; (ii) accepted Target's argument that a portion of the amounts claimed were barred pursuant to the *Limitations Act*; and (iii) rejected Target's defence of set off. In the result she ordered Target to pay Crown $201,243.34 in damages for breach of contract.

[18] A costs award was also delivered by the Arbitrator dated May 3, 2025, in which she found Target liable to pay costs in the amount of $148,628.55 (the "**Costs Award**").

Leave to Appeal

[19] In her endorsement dated October 14, 2025 (the "**Leave Endorsement**"), Justice Steele granted leave to Target to appeal the Award. As she noted in para. 15 of the Leave Endorsement, to grant leave to appeal, the Court must be satisfied that:

a. there are one or more arguable errors of law;

b. the importance to the parties of the matters at stake in the arbitration justify the appeal; and

c. the identified question of law must significantly affect the rights of the parties.

See *Toronto District School Board et al v. Ontario School Boards' Insurance Exchange*, 2023 ONSC 2117, 34 C.C.L.I (6th) 324, at para. 16.

[20] Justice Steele found that she was satisfied that Target's submissions identified at least one arguable error of law – that the Arbitrator had not applied proper contractual law principles

in interpreting the Force Majeure Clause. She did not address the claim that the Arbitrator also made an error of law in her analysis of the principles of equitable set off.

[21] In the conclusion, Justice Steele was also satisfied that the other parts of the leave test were met and granted leave to appeal the Award.

Issues

[22] There are three issues to be decided by the Court.

a. Did the Arbitrator commit an error of law in finding that the Force Majeure Clause was not engaged;

b. Did the Arbitrator commit an error of law in finding that the defence of equitable set off was not established; and

c. If the answer to a or b is yes, what is the appropriate remedy.

Analysis

[23] Section 45(1) of the *Arbitration Act* provides "If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the Court <u>on a question of law</u>, with leave…" (emphasis added).

[24] Appeals to the Court on a question of fact or a question of mixed fact and law are addressed in s. 45(3) of the *Arbitration Act* which provides for such appeal rights only if the arbitration agreement so provides. As noted in para. 12 of the Award, the parties agreed to waive all appeal rights except as provided for under s. 45(1) of the Act. As such, this Court is only to entertain appeals on questions of law alone.

[25] Target alleges two errors of law. First, that Arbitrator failed to apply proper principles of contractual interpretation in respect of her finding that the Force Majeure Clause was not engaged. Second, that the Arbitrator failed to apply the proper test for equitable set off in respect of her finding that Target failed to establish such a defence.

[26] Both parties have agreed that if an error of law is found (which is disputed), the proper standard of review for this Court to engage is one of correctness.

<u>Force Majeure Clause</u>

[27] Target's argument is that the Arbitrator did not apply recognizable principles of contractual interpretation in respect of the Force Majeure Clause.

[28] Specifically, Target argues that the principles set out in *Sattva Capital Corp. v Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, [***Sattva***] were not referred to or applied in the Award.

[29] In summary, those principles, as set out in paras. 47, 57-59 of *Sattva* are that:

a. When interpreting a contract, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract;

b. While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract;

c. The surrounding circumstances cannot be used to effectively create a new agreement;

d. The surrounding circumstances should consist only of objective evidence of the background facts at the time of the execution of the contract;

e. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing; and

f. The parol evidence rule precludes evidence of the subjective intentions of the parties.

[30] As set out in para. 50 of *Sattva*, contractual interpretation typically involves issues of mixed fact and law as it is an exercise of applying the above principles to the words of the written contract in light of the factual matrix. However, there are instances, as recognized in para. 53 of *Sattva*, where contractual interpretation may be an extricable question of law, including the application of an incorrect principle, the failure to consider a required element of a legal test or the failure to consider a relevant factor.

[31] Here, Target argues that there is an extricable question of law in that the principles of contractual interpretation were simply not referred to, or in its submission, applied by the Arbitrator.

[32] Crown submits that the fact that the Arbitrator did not explicitly refer to *Sattva* or the principles of contractual interpretation is not determinative. I agree. As noted by the Court of Appeal in *Rogerson v. Grey Bruce Regional Health Centre*, 2024 ONCA 303 [***Rogerson***] at para. 12, a judge (like an arbitrator in this case) is presumed to be aware of the law. In assessing whether the correct legal principles were applied, a reviewing judge should undertake a functional and contextual reading, considering the evidence and the reasons as a whole.

[33] Target's position regarding the Force Majeure Clause was summarized in paras. 99-107 of the Award. In summary, Target submitted that there was a period of interruption in parking sales caused by the pandemic, beginning when the government ordered a shutdown in

March or April of 2020 and people stopped coming into their offices. Target stated that monthly sales dropped from $47,074.41 in January 2020 to $30,361.23 in May of 2020 and transient parking revenue declined from $12,671 in January 2020 to $1,278 in May of 2020. Target submitted that parking sales were reduced to varying degrees during a number of months from 2020-2022. Further, Target submitted that the clear language of the Force Majeure Clause in the Contract requires a *pro rata* reduction in rent if parking sales were interrupted by a pandemic. Target claimed that as a result of it's proposed *pro rata* calculations, Target actually overpaid Crown by $14,798.17.

[34] On this appeal, Target's force majeure arguments pertain only to its four underpayments from May 2021 to August 2021 (as Crown's claims for the remaining 10 underpayments were found to be time-barred by the Arbitrator). Accordingly, of the $201,243.34 in damages awarded to Crown, Target's force majeure arguments relate to only $13,351.02. Target argues the 'overpayment' which it claims of $14,798.17 should also be taken into account, however, it is not clear how that alleged overpayment relates to the months at issue and Crown takes issue with this calculation. At its highest, the amount at issue as a result of the Force Majeure Clause is less than $29,000.

[35] The Arbitrator's analysis regarding the Force Majeure Clause is contained in paras. 119 – 133 of the Award.

a. She begins by referencing the wording of the Force Majeure Clause (para. 119 of the Award);

b. She then examines certain law put before her by the parties which provide the rationale for such clauses (*Atlantic Paper Stock Ltd. v. St Anne-Nackawic Pulp and Paper Company Limited*, [1976] 1 S.C.R. 580 (S.C.C.) [***Atlantic Paper v. St. Anne-Nackawic***] at p. 583), and for the argument the Covid-19 pandemic may trigger such clauses (*Niagara Falls Shopping Centre Inc. v LAF Canada Company,* 2022 ONSC 2377, para. 5) (paras. 120-122 of the Award).

c. She then notes that a fact specific analysis is required to determine if Target was "prevented from operating" or "parking sales were interrupted" such that the Force Majeure Clause was triggered (para. 123 of the Award).

d. She finds that Target was not "prevented from operating" since it was collecting and remitting payments each month albeit in lower amounts. She then considers if "parking sales were interrupted". In this regard she acknowledges a reduction in monthly revenue, but questions if this reduction amounts to an interruption of Target's ability to meet its contractual obligations (para. 124 of the Award).

e. She then goes on to find that, regardless of whether there was an interruption in parking sales sufficient to trigger the Force Majeure Clause, she finds no evidence Target actually invoked it, or had any communications with Crown about it, which she finds are not explicitly required by the clause but are practically required for its operation (paras. 125-130 of the Award).

f. Her findings are summarized in para. 131 which reads:

> 131. Target bears the onus of proving its affirmative defence. Here, Target has not established, on a balance of probabilities, the elements of its defence:
>
> a. it has not proven that the fact of the pandemic triggered the force majeure clause under the Contract for a parking lot that continued to earn parking revenue despite government orders to stay home;
>
> b. it has not proven that the force majeure clause was actually invoked contemporaneously to both parties' knowledge;
>
> c. it has not proven that Crown agreed to the reduction formula Target latterly applied in this arbitration or even that its reduction formula was fair or commercially sensible.

[36] Accordingly, she did not accept Target's arguments that it was entitled to retroactively reduce amounts owing to Crown in reliance on the Force Majeure Clause (para. 133 of the Award).

[37] In large part, Target's issues with the Arbitrator's interpretation of the Force Majeure Clause relate to her commentary in paras. 125-128 of the Award that Target never had communications with Crown about the clause and no agreement was reached or discussed regarding the period of interruption or *pro rata* formula calculations.

[38] However, Target's submission ignores the Arbitrator's clear focus on the words of the Contract, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. In this case, the focus of the Arbitrator was properly on the triggering words of the Force Majeure Clause "parking sales are interrupted" (in paras. 110-124 of the Award).

[39] The Arbitrator interpreted those words in accordance with case law existing at the time the Contract was entered into (being *Atlantic Paper v. St. Anne-Nackawic*) where she noted the purpose of such clauses was to address an event beyond control of either party that makes performance of the Contract impossible (see para 120. of the Award). She then attempted to determine if the evidence before her was sufficient to establish that 'parking sales were interrupted' such that performance of the Contract was impossible (see para. 123 of the Award). In conclusion she found that Target had failed to establish its onus in demonstrating that the Force Majeure Clause was triggered given the Parking Lot continued to earn revenue.

[40] As such, I am satisfied that in considering a functional and contextual reading of the Award, as a whole as required by *Rogerson*, the Arbitrator correctly applied the principles of contractual interpretation, and I would dismiss the appeal as an error of law on this basis.

<u>Equitable Set-Off</u>

[41] Target also submits that the Arbitrator made an error of law in not properly applying the legal test for equitable set-off when examining Target's set-off defence.

[42] Target accepts that the test was properly articulated by the Arbitrator in para. 141 of the Award where she sets out the test from *Telford v. Holt*, [1987] 2 S.C.R. 193 (S.C.C.), as cited in *1582235 Ontario Limited v. Ontario*, 2020 ONSC 1279, at para. 43.

[43] Target submits that the Arbitrator erred in law by failing to properly apply the first part of the test which requires some equitable ground for being protected against Crown's demands. Target argued the equitable grounds related to Crown's alleged failure to allow Target to make certain changes that Target had advised Crown were required for Target to maximize revenue. These changes included the installation of a parking gate system, an amendment to parking hours to include overnight parking and improved signage. Target argues that the Arbitrator failed to consider these 'equitable grounds' as she erroneously found that the alleged terms were not set out in the Contract (see para. 143 of the Award).

[44] Target's argument fails to recognize that the Arbitrator went on to consider each of the alleged grounds and found as fact that other than with respect to one small banner, Crown did not prevent Target from making the referenced changes (see. paras 146-159 of the Award).

[45] As such, I am not satisfied that an error of law was made by the Arbitrator in her treatment of Target's claimed defence of equitable set-off.

[46] Given my findings above, there is no need to address Target's requested remedy including a revision of the Costs Award.

Disposition

[47] For the reasons set out above, Target's appeal of the Award is dismissed. During the hearing the parties agreed that costs would be payable by the unsuccessful party in the amount of $22,000 inclusive of HST. Accordingly, Target is ordered to pay that amount within 30 days hereof.

The Honourable Justice J. Dietrich

Date: March 11, 2026