

**CITATION:** 1201466 Ontario Inc. v 1799144 Ontario Inc., 2024 ONSC 1511  
**COURT FILE NO.:** CV-23-1376-0000  
**DATE:** 2024 03 12

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:** )  
)  
1201466 Ontario Inc. ) I. Andriessen, A. Dorfman  
c.o.b. “Georgetown Toyota” ) for the Applicant  
Applicant )  
)  
**- and -** )  
)  
1799144 Ontario Inc. ) L. Vittas  
Respondent ) for the Respondent  
)  
) **HEARD** March 5, 2024 (in-person)

2024 ONSC 1511 (CanLII)

**REASONS FOR JUDGMENT**

**C. Chang J.**

[1] The applicant brings this application for declaratory and other relief related to the exercise of an option to renew contained in a commercial lease between it and the respondent.

[2] The respondent does not dispute the form, manner or timing of exercise of the option, but argues that the applicant was in material default of the lease at the material time, thereby vitiating that exercise. It also argues that, in any event, the lease requires the parties to execute a renewal agreement and/or a new lease before any renewal can take effect. No such renewal agreement or new lease having been executed, the respondent submits that the subject lease expired on June 30, 2023.

**FACTS**

[3] The facts relevant to this application are undisputed and can be summarized as follows:

- a. the respondent is the owner of the lands and premises located at 312 Guelph Street (previously 100 Sinclair Avenue) in Georgetown (the “Property”);

- b. the applicant operates a Toyota motor vehicle dealership at the Property, including providing vehicle maintenance services;
- c. pursuant to a written lease agreement dated May 16, 2013 (the “Lease”), the respondent leased the Property to the applicant during the applicable term;
- d. clauses 1.1(6) and 2.2 of the Lease define that term as being the period commencing “on the 1<sup>st</sup> day of July, 2013...and [continuing] to and including the 30<sup>th</sup> day of June, 2023”;
- e. clause 15.1(1) of the Lease gives to the applicant an option to renew the term of the Lease (the “Option to Renew”) as follows,

*Provided that the Tenant is not then in material default under this Lease, the Tenant shall have an option to renew the Term for two (2) further terms of five (5) years each (each a “Renewal Term”) and, subject to Subclause (3) below, all the terms, covenants and provisos of the Lease shall apply to each such Renewal Term, with the exception, however, that the Tenant shall not have any further option to renew the Term following the exercise of the option to renew for the second Renewal Term.;*

- f. clause 15.1(2) sets out the applicable requirements for the exercise of the Option to Renew and clause 15.1(3) sets out the manner of determining the minimum rent payable during the renewal terms;
- g. on November 15, 2022, the applicant sent a “Notice of Exercise of Option to Renew” dated November 9, 2022 to the respondent by registered mail, which the respondent confirms it received on November 28, 2022;
- h. further to the respondent’s receipt of that notice, the parties engaged in the negotiations mandated by clause 15.1(3) of the Lease respecting the minimum rent payable during the first renewal term;
- i. those negotiations were hard fought (unfortunately, including *ad hominem* attacks) and, on March 31, 2023, the respondent took the position that the applicant had not properly exercised the Option to Renew because it was in material default of the Lease;
- j. the rent negotiations ultimately failed, the parties were unable to agree on the prescribed property valuator and, on April 12, 2023, they began the mandated process of appointing arbitrators to determine the applicable rent;

- k. the applicant appointed David Alderson as its arbitrator and the respondent appointed Barry Lebow as its arbitrator, with David Alderson confirming his appointment on May 9, 2023;
- l. with the respondent maintaining that the exercise of the Option to Renew was invalid, the applicant commenced this application on May 9, 2023;
- m. by consent order dated June 15, 2023, on a without prejudice basis, the respondent was restrained from terminating the Lease or evicting the applicant until the hearing of this application on the condition that the applicant continue paying monthly rent of \$41,358.43 (the “Interim Injunction Order”); and
- n. both parties have complied with the Interim Injunction Order and, with their consent, I continued it on March 5, 2024 pending further court order.

## ISSUES

[4] The respondent does not dispute the form, manner or timing of the applicant’s exercise of the Option to Renew.

[5] Therefore, the only issues to be decided on this application are as follows:

- a. Was the applicant in material default under the Lease when it exercised the Option to Renew such that the exercise was vitiated?
- b. Upon the applicant’s exercise of the Option to Renew, were the parties required to enter into a new agreement as a condition of the renewal?

## ANALYSIS

**Issue: Was the applicant in material default under the Lease when it exercised the Option to Renew such that the exercise was vitiated?**

### Parties’ Positions

[6] The applicant submits that it validly exercised the Option to Renew and there were no applicable material defaults that vitiated that exercise. Therefore, it submits, the term of the Lease was renewed for five years commencing on July 1, 2023.

[7] The respondent submits that the applicant was in default of various provisions of the Lease at the time that it exercised the Option to Renew such that the exercise was invalid. Therefore, it submits, there was no proper renewal and the Lease expired in accordance with its terms at the end June 30, 2023.

## Law

[8] A material default under a lease agreement is a significant failure to perform an obligation under it and must be more than minor or technical (see: *DocuPartners, Inc. v Keele Copy Centre Inc.*, 2009 CanLII 51185 (ON SC), at para. 13; *Lviv Ltd. v 2240574 Ontario Inc.*, 2021 ONSC 183, at para. 16).

[9] Where performance of lease covenants is a precondition to renewal, the tenant bears the burden of proving that it was not in default at the relevant time (see: *1383421 Ontario Inc. v Ole Miss Place Inc.* (2003), 67 O.R. (3d) 161, at para. 54; *Mapleview-Veterans Drive Investments Inc. v Papa Kerollus VI Inc. (Mr. Sub)*, 2016 ONCA 93, at para. 38).

## Decision

[10] I find that the applicant was not in material default under the Lease when it exercised the Option to Renew. That exercise was valid and renewed the term of the Lease for five years commencing July 1, 2023.

[11] In my view, the applicant has discharged its burden to demonstrate that there was no significant failure to perform its obligations under the Lease when it exercised the Option to Renew.

[12] I do not accept the respondent's arguments respecting the applicant's alleged defaults under the Lease as to insurance coverage, maintenance/repair of the parking surface, waste or contamination.

### *Alleged Insufficiency of Insurance Coverage*

[13] The respondent alleges that the applicant failed to maintain sufficient insurance coverage against fire and extended perils as required by clause 8.1(1)(a) of the Lease. During the application hearing, the respondent confirmed that, despite the contents of its written materials, it is only asserting the applicant's breach of this clause as the sole applicable default.

[14] Specifically, the respondent argues that the applicant is required to maintain "[i]nsurance upon the Premises against damage by fire and extended perils in an amount not less than the full replacement cost thereof", but the \$6,200,000.00 coverage under the applicant's applicable policy is insufficient. The respondent does not deny the \$6,200,000.00 of coverage, but submits that it is well below the full replacement cost of the Property.

[15] I do not accept the respondent's arguments.

[16] The respondent adduced no evidence to support its allegation that the applicable \$6,200,000.00 of applicable insurance coverage is insufficient. It instead relies on a combination of: 1) a reference in the applicant's insurance policy from May 13, 2014; 2) inadmissible hearsay evidence from a March 15, 2023 market rent appraisal report; and 3) inadmissible opinion evidence from its principal. Its counsel confirmed that there is no other evidence of the building's "full replacement cost".

[17] I accept the applicant's undisputed evidence that it provided to the respondent a copy of the complete insurance policy at the commencement of the term of the Lease and numerous certificates of insurance over the course of almost the entire ten-year term. Among those documents was the May 13, 2014 insurance policy, which set the applicable coverage amount at \$4,600,000.00, but expressly provided that the "limit of insurance [is] to be determined once renovation works are completed". Given that the applicable limit was subsequently increased to \$6,200,000.00 by, at the latest, the issuance of the April 21, 2022 certificate of insurance, I am satisfied that that limit increase was intended to, and does, cover the full replacement cost as required by clause 8.1(1)(a) of the Lease.

[18] In addition, further to receiving those insurance documents over the course of the Lease, the respondent took no issue with the applicable insurance coverage. It was only well into the rent negotiations for the first renewal term of the Lease (and, in particular, when the applicable discussion turned particularly unpleasant) that the respondent took issue with the insurance coverage. In my view, this conduct puts into serious doubt the veracity of the respondent's stated concerns about the applicable insurance coverage.

[19] I am therefore satisfied that, on the evidence, the applicant was not in default of clause 8.1(1)(a) of the Lease when it exercised the Option to Renew.

*Alleged Failure to Maintain/Repair Parking Areas*

[20] The respondent alleges that the applicant failed to properly maintain the parking areas of the Property as required by clause 4.1(1) of the Lease.

[21] Specifically, the respondent argues that the asphalt surface of the parking areas contains extensive cracking and potholes, which constitute potential hazards to attendees of the Property and their vehicles.

[22] I do not accept the respondent's arguments.

[23] Clause 4.1(1) of the Lease requires the applicant to maintain the Property "in such good order and condition as would be kept by a careful and reasonable owner...to a standard consistent with the condition thereof at the Commencement Date, reasonable wear and tear which does not materially affect the operation of the Premises excepted".

[24] The only evidence adduced by the respondent in support of its allegation of the applicant's breach of clause 4.1(1) of the Lease is: 1) as referred to in the respondent's affidavit, "photographs of the parking lot when the Premises was occupied by the previous tenant Metro Ontario Inc."; 2) as also referred to in that affidavit, "photographs of the parking lot", which is presumably at the Property; 3) an "Inspection Report", including more photographs, conducted by AmeriSpec Inspection Services, a home inspection company; and 4) inadmissible hearsay and opinion evidence from its principal.

[25] There is no evidence respecting specifically when the photographs exhibited to the respondent's affidavit were taken, by whom they were taken or specifically where they were taken. Similarly, there is no evidence respecting when the photographs in the AmeriSpec report were taken other than the fact that the report is dated June 1, 2023. Furthermore, the two sets of the respondent's photographs and those in the AmeriSpec report were clearly taken from different angles and at different distances from the asphalt surface. Although the respondent asserts that all of the photographs were taken of the same areas of the Property at the material time, there is no evidence to support this assertion.

[26] In short, there is no satisfactory evidence of sufficiently adverse conditions of the asphalt surface of the parking areas when the applicant exercised the Option to Renew as compared to at the commencement date of the Lease. In my view therefore, there is no evidence to support the respondent's allegation that the applicant was in breach of clause 4.1(1) of the Lease at the material time.

[27] In addition, I accept the uncontested evidence of the applicant that it regularly monitors the parking areas of the Property for wear and tear and effects repairs to the asphalt as and when necessary. Accordingly, in my view, the condition of the asphalt surface as alleged by the respondent is transient in nature and I am not satisfied that it constituted a default under clause 4.1(1) of the Lease at the material time.

[28] I am therefore satisfied that, on the evidence, the applicant was not in default of clause 4.1(1) of the Lease when it exercised the Option to Renew.

*Alleged Waste*

[29] The respondent alleges that the applicant committed waste on the Property in breach of clause 6.1 of the Lease.

[30] Specifically, the respondent argues that various stains (which it says are from motor oil) identified in the AmeriSpec report constitute "waste" and put the applicant in default of clause 6.1 of the Lease.

[31] I do not accept the respondent's arguments.

[32] Clause 6.1 of the Lease prohibits the applicant from committing or permitting to be committed waste on the Property.

[33] The only evidence adduced by the respondent in support of its allegation of the applicant's breach of clause 6.1 of the Lease is: 1) photographs of "stains" included in the AmeriSpec report; and 2) inadmissible hearsay and opinion evidence from the respondent's principal. The photographs were either (presumably) taken by the inspector or provided to the inspector by the respondent (specifically being labelled as having been "provided by owner"; presumably the respondent's representative).

[34] For both sets of photographs, there is no evidence respecting when they were taken, by whom they were taken (although it may be safe to assume that the first set was taken by the inspector) and what the subject substance(s) is/are. Respecting the second set of photographs, there is no evidence respecting where they were taken and they, in any event, constitute inadmissible hearsay; being found only in the AmeriSpec report. There is also no evidence that those stains were in existence when the applicant exercised the Option to Renew. On this issue, the respondent offers nothing more than the uncorroborated assertions in its affidavit.

[35] In short, there is no satisfactory evidence that the applicant had, at the material time, committed waste on the Property or permitted it to be committed. In my view therefore, there is no evidence to support the respondent's allegation that the applicant was in breach of clause 6.1 of the Lease at the material time.

[36] In addition, I accept the applicant's undisputed evidence that: 1) incidental to its normal and usual operations, some oil does occasionally get spilled onto the surface of the Property; and 2) as part of its normal and usual operations, it retains a professional service, Safety-Kleen Systems, to regularly clean-up and dispose of such spillage. Accordingly, in my view, the applicable spillage is transient in nature and I am not satisfied that it constituted a default under clause 6.1 of the Lease at the material time.

[37] I am therefore satisfied that, on the evidence, the applicant was not in default of clause 6.1 of the Lease when it exercised the Option to Renew.

*Alleged Hazardous Materials Contamination*

[38] The respondent alleges that the applicant breached clause 6.2(2) of the Lease by failing to remediate the alleged motor oil stains outlined above.

[39] Specifically, the respondent alleges that those stains constitute contamination of the Property by a hazardous material.

[40] I do not accept the respondent's arguments.

[41] Clause 6.2(2) of the Lease provides that the applicant shall be responsible for all hazardous materials “affecting the Premises caused by or resulting from any act or omission of the Tenant or Tenant Parties” and it must “diligently complete, at Tenant’s cost, such remedial action as shall be necessary so as to ensure there are no levels of Hazardous Materials...that exceed the site condition standards applicable for the Premises”.

[42] Although it is undisputed that motor oil is a “Hazardous Material” as defined in clause 6.2 of the Lease, as outlined above, there is no evidence that the substance depicted in the photographs is, in fact, motor oil. As also outlined above, there is no evidence of where the photographs were taken, by whom they were taken, when they were taken or that they show the Property’s condition when the Option to Renew was exercised. Although the respondent self-servingly asserts that all of the photographs show motor oil contamination at the material time, there is no evidence to support this assertion. There is also no evidence of the applicable site condition standard to which any hazardous materials remediation must adhere.

[43] In short, there is no satisfactory evidence that there was applicably unremediated hazardous material contamination on the Property at the material time. In my view therefore, there is no evidence to support the respondent’s allegation that the applicant was in breach of clause 6.2(2) of the Lease at the material time.

[44] In addition, as outlined above, some occasional oil spillage is incidental to the applicant’s normal and usual operations and, as part of those operations, the applicant retains and pays for a professional service to regularly remediate such spillage. Accordingly, in my view, the applicable spillage is transient in nature and I am not satisfied that it constituted a default under clause 6.2(2) of the Lease at the material time.

[45] I am therefore satisfied that, on the evidence, the applicant was not in default of clause 6.2(2) of the Lease when it exercised the Option to Renew.

*Even if Defaults, Not Material*

[46] If I am incorrect respecting the applicant’s discharge of its burden of proof respecting the alleged Lease defaults reviewed above, I would still find that it was not in material default such that its exercise of the Option to Renew was vitiated.

[47] Respecting the insurance coverage issue, as outlined above, despite being provided with all applicable insurance documentation over the course of the Lease’s ten-year term, the respondent raised no issue with any of the coverages until it became dissatisfied with the renewal rent negotiations in 2023.

[48] This “lie in the weeds” strategy strikes at the heart of fairness (see: *Matiu Dentistry v Canadiana Towers*, 2022 ONSC 2242, at para. 16) and, in my view, the fruits of such a strategy form no proper or legitimate basis to find a material default under a commercial lease. This also applies equally to the other Lease defaults alleged by the respondent in the case-at-bar.

[49] Respecting the parking area asphalt, even were I to accept that its condition at the material time was as set out in the AmeriSpec report, I would find there to be no material default.

[50] Contrary to the respondent’s argument, there is no evidence that the asphalt surface condition poses a hazard to persons or vehicles at the Property or that it would materially affect the applicant’s operations. Indeed, the repair recommendations set out in the AmeriSpec report are expressly to, among other things, “limit further deterioration”, “deter further deterioration”, “prolong useful life of the surface” and “preserve the remaining life of the asphalt”. In addition, the applicant’s evidence that it regularly engages and pays professionals to fill the potholes as part of its maintenance of the Property, which I accept, is not disputed by the respondent. In my view therefore, the condition of the asphalt does not constitute a significant failure by the applicant to perform the applicable Lease covenant. It is not a material default.

[51] Respecting the alleged waste, again, even were I to accept the condition of the Property at the material time to be as portrayed in the “stain” photographs, I would find there to be no material default.

[52] As outlined above, I accept the applicant’s undisputed evidence that occasional oil spillage and its regular remediation are, respectively, incidental to and part of the applicant’s normal and usual operations. Therefore, the type of condition of the Property as allegedly depicted in the respondent’s photographs is transient in nature, as it is regularly remediated by the professional service engaged and paid for by the applicant for that exact purpose. Therefore, even if the alleged staining constitutes a breach of clause 6.1 of the Lease, it is trivial and far from a significant failure by the applicant to perform the applicable Lease covenant. It is not a material default.

[53] Respecting the alleged hazardous materials contamination, again, even were I to accept that the stains depicted in the subject photographs were motor oil on the Property at the material time, I would find there to be no material default.

[54] As outlined above, I accept the applicant’s undisputed evidence respecting occasional oil spillage and its regular professional remediation. Again, the type of condition of the Property as allegedly depicted in the respondent’s photographs is transient in nature. Therefore, even if the alleged staining constitutes a breach of clause 6.2(2) of

the Lease, it is trivial and far from a significant failure by the applicant to perform the applicable Lease covenant. It is not a material default.

[55] Accordingly, even if, when it exercised the Option to Renew, the applicant was in default of the Lease in the ways alleged by the respondent, in my view, any such defaults were far from material and did not vitiate that exercise.

*Alleged Disingenuous Raising of Alleged Lease Defaults*

[56] The applicant submits that the issue of its alleged material defaults under the Lease has been raised by the respondent disingenuously and in bad faith in order to gain an unfair advantage in the rent negotiations for the first renewal term. It further argues that the respondent is also motivated by personal *animus*; specifically, directed at the applicant's counsel, Ms. Andriessen, by the respondent's principal, Angeliki Cormpilas.

[57] Based on the evidence, particularly the contents of the relevant email messages, there is indeed sufficient cause to question the motives behind the respondent's allegations of the applicant's material default.

[58] As outlined above, the parties' written communications not only evince a much higher level of acrimony and/or aggression than would normally be expected in the circumstances, but also a troubling degree of personal *animus* between the parties' representatives. As also outlined above, the nature and timing of the respondent's allegations of default are part of an impermissible "lie in the weeds" tactic.

[59] That said, I need not make the additional applicable findings sought by the applicant in order to determine the issue respecting the exercise of the Option to Renew and I decline to do so. As outlined above, I have already found that the applicant was not in material default under the Lease when it exercised that option.

**Issue: Upon the applicant's exercise of the Option to Renew, were the parties required to enter into a new agreement as a condition of the renewal?**

Parties' Positions

[60] The respondent submits that, even if the applicant properly exercised the Option to Renew, the Lease requires the execution of a renewal agreement and/or a new lease agreement as a condition of the renewal. That renewal agreement/new lease not having been executed, it argues, the term of the Lease ended on June 30, 2023.

[61] The applicant submits that the Lease does not require the execution of any new agreement or lease as a condition of the renewal of its term. It argues that, upon its exercise of the Option to Renew, the term of the Lease was renewed "on the same terms and conditions as set out in the Lease".

## Law

[62] The applicable law respecting contractual interpretation is well settled.

[63] The overriding consideration is giving effect to the parties' objective intent at the time of contract formation based on a reading of the contract as a whole; giving the words used their ordinary and grammatical meaning consistent with the surrounding circumstances that were objectively known to the parties at the time of contracting (see: *Harvey Kalles Realty Inc. v BSAR (Eglinton) LP*, 2021 ONCA 426, at para. 5).

[64] The nature of the "surrounding circumstances" evidence to be considered will depend on the specific facts of each case, but must be limited to "objective evidence of the background facts at the time of the execution of the contract" and "should never be allowed to overwhelm the words of the agreement" (see: *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, 2021 ONCA 592, at para. 46).

[65] A commercial contract is to be interpreted as a whole document, i.e., "in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective" (see: *2651171 Ontario Inc. v Brey*, 2022 ONCA 148, at para. 16). It should also be interpreted in a manner that is commercially reasonable and avoids commercial absurdity (see: *Harvey Kalles*, at para. 6).

## Decision

[66] Based on a fair and purposive reading of the Lease, I find that, upon the applicant's exercise of the Option to Renew, the parties were not required to enter into a renewal agreement or new lease as a condition of that renewal.

[67] Contrary to the respondent's proposed interpretation of the Lease, none of the provisions in the Lease individually or collectively with others could reasonably be interpreted as requiring the parties to enter into such a new agreement. Furthermore, in my view, the respondent's interpretation of clause 15.1(1) is not commercially reasonable. Reading the Lease as a whole document and giving effect to all of its provisions, the interpretation proposed by the respondent is inconsistent with its wording.

[68] As outlined above, the Lease is facially clear that: 1) it is the temporal term of the Lease and not the Lease itself that is renewed upon the exercise of the Option to Renew; and 2) with two specific exceptions, all of the provisions of the Lease apply to the renewal terms. In addition, there is no provision anywhere in the Lease that, as suggested by the respondent, mandates the execution of anything in the nature of a "renewal agreement", "renewal lease" or "new lease".

[69] I do not accept the respondent's argument that the heading of clause 15.1 entitled "Option to Renew" evinces the parties' intention that the Lease require a renewal agreement or new lease upon the exercise of the Option to Renew because the option is in respect of the Lease itself as opposed to its temporal term.

[70] This argument fails in the face of clause 14.3 of the Lease, which expressly provides that the "headings and captions of this Lease are inserted for convenience of reference only and **are not to be considered when interpreting this Lease**" [emphasis added]. In addition and in any event, the express contents of clauses 1.1(6), 2.2 and 15.1(1) of the Lease are dispositive of the issue. Those clauses plainly and unequivocally provide that the Option to Renew is in respect of the temporal term of the Lease and that all "terms, covenants and provisos of the Lease" shall apply to each renewal term, save and except: 1) the absence of any additional option to renew after the second renewal term; and 2) the minimum rent payable for each renewal term.

[71] Neither party adduced any evidence respecting the "surrounding circumstances" when the Lease was executed and, in my view, none is required to correctly interpret the Lease as it relates to this issue. As outlined above, the Lease is clear on its face respecting the renewal of its temporal term and the lack of any requirement for a new agreement.

[72] Therefore, in my view, the parties were not required to enter into any new agreement as a condition of the renewal of the Lease's term. In accordance with the Lease, its provisions apply to the subject renewal term (i.e., July 1, 2023 to June 30, 2028) and the minimum rent payable during that term is to be determined in accordance with clause 15.1(3), which process is already underway.

## SUMMARY AND CONCLUSION

[73] For the reasons set out above, I find that the applicant validly exercised the Option to Renew and there is no requirement for the execution of a new agreement in order to give effect to the renewal of the Lease's term.

[74] The applicant's application should therefore be granted.

[75] Given my findings above, there is no reason for the Interim Injunction Order to continue beyond the release of these reasons for judgment and same should therefore be terminated.

## COSTS

[76] Despite the express and clear direction set out in the *Notice to the Profession and Parties* in force in Central West Region: 1) the parties failed to resolve the *quantum* of costs in advance of the hearing of this application; and 2) the respondent failed to bring its

costs outline to the hearing and was otherwise unprepared to address the issue of costs at its conclusion. I therefore reluctantly agreed to receive their respective costs submissions in writing after I had released my decision on the application.

[77] However, the respondent provided its bill of costs the day after the hearing and, given the absence of any offers to settle that would impact costs, I am prepared to dispose of the issue of costs without the need for further submissions.

[78] If successful, the applicant seeks its costs on a full indemnity basis in the all-inclusive amount of \$56,383.21 or on a partial indemnity basis in the all-inclusive amount of \$34,978.07. If successful, the respondent seeks its costs on a full indemnity basis in the all-inclusive amount of \$48,375.77 or on a substantial indemnity basis in the all-inclusive amount of \$43,592.48 or on a partial indemnity basis in the all-inclusive amount of \$29,231.61.

[79] Given its success on the application, the applicant is entitled to its costs. However, based on the evidence filed and the litigation history in this matter, neither of the applicable triggers for an elevated scale of costs is present (see: *Davies v Clarington (Municipality)*, 2009 ONCA 722, at para. 28; *The Senac Group Incorporated v Samuda*, 2023 ONSC 3835, at para. 11). Those costs shall therefore be on a partial indemnity basis.

[80] Respecting *quantum*, I find the amounts claimed by the applicant to be excessive.

[81] Although I find the rates charged by each of the applicant's lawyers to be reasonable, I find that the claimed time and the claimed disbursements are not. Indeed, the hours claimed by those lawyers border on the concerning.

[82] Every single claimed task performed by the applicant's counsel (including purely clerical work) involved the most senior lawyer and at least one junior lawyer and, for some of those tasks, the most senior lawyer, three junior lawyers and two law clerks all claim time. Furthermore, to characterize as immoderate the amount of time spent on those tasks would be to understate the issue. By way of only a few examples, the applicant's lawyers claim 21.2 hours communicating with their client, 16.6 hours communicating with opposing counsel, 22.9 hours for "Cross-Examinations and U/T Charts" (the cross-examinations lasted a total of less than four hours and yielded a total of four undertakings, four refusals and one question taken under advisement) and 48.0 hours reviewing the file and drafting "Pleadings for Application" (the notice of application totals 14 paragraphs and the two affidavits together total 41 paragraphs).

[83] In addition, the consent order dated June 15, 2023 reserved the costs of that motion to the judge hearing the application. Two of the applicant's lawyers and a law clerk claim 20.0 hours on that motion despite the fact that the respondent provided a written consent to it on June 6, 2023, nine days before the return date.

[84] I also find the total amount of claimed disbursements to be high. Among other things, in the court's brave new digital world, I see no possible justification for a claim of \$504.65 for photocopying and binding.

[85] All of this on an exceedingly uncomplex and uncomplicated application that was limited to two discrete and straight-forward issues. It appears that the message respecting the need for a shift in counsel's and parties' approach to costs (see: *Roof Tile Management v Piernick Properties*, 2023 ONSC 5586, at paras. 52 and 55) has been received with insufficient lucidity and/or resonance. The unrestrained and disproportionate costs claims continue unabated.

[86] In assessing costs, the "overarching objective is to fix an amount...that is objectively reasonable, fair, and proportionate for the unsuccessful party to pay in the circumstances of the case, rather than to fix an amount based on the actual costs incurred by the successful litigant" (see: *Apotex Inc. v Eli Lilly Canada Inc.*, 2022 ONCA 587, at para. 61). Given the excesses in the applicant's claimed costs, its bill of costs is, in any event, not a useful barometer of what is objectively reasonable, fair or proportionate.

[87] Taking into consideration the factors set out in rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, including the low degree of complexity of the legal and factual issues in the application, the experience of counsel, the rates charged, the concerningly excessive amount of time spent and the need to alter the currently unrestrained approach to costs, I find the all-inclusive amount of \$27,500.00 to be fair, reasonable and proportionate in the circumstances.

[88] While this amount is less than the respondent's claimed partial indemnity amount, the amount that an unsuccessful party would expect to pay is but one of the factors to be considered under rule 57.01(1) and, in my view, based on all relevant factors, the appropriate *quantum* is \$27,500.00.

## **DISPOSITION**

[89] I therefore make the following orders:

- a. it is declared that the applicant duly exercised the Option to Renew for the first renewal term;
- b. it is further declared that, upon that exercise, the term of the Lease was renewed for a period of five years commencing July 1, 2023;
- c. the Interim Injunction Order is hereby terminated; and

- d. the respondent shall pay to the applicant its costs of the application on a partial indemnity basis, which are fixed in the all-inclusive amount of \$27,500.00 and payable forthwith.

C. Chang J.

**Released:** March 12, 2024

**CITATION:** 1201466 Ontario Inc. v 1799 Ontario Inc., 2024 ONSC 1511  
**COURT FILE NO.:** CV-23-1376-0000  
**DATE:** 20240312

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**1201466 Ontario Inc.  
c.o.b. "Georgetown Toyota"**

Applicant

**- and -**

**1799144 Ontario Inc.**

Respondent

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**REASONS FOR JUDGMENT**

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C. Chang J.

**Released:** March 12, 2024