**CITATION:** PEOPLES TRUST COMPANY v. PSP SERVICES INC., 2024 ONSC 2616
**COURT FILE NO.:** CV-24-00715739-0000
**DATE:** 20240506

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**ONTARIO SUPERIOR COURT OF JUSTICE**

**RE:** PEOPLES TRUST COMPANY,
Plaintiff

-and-

PSP SERVICES INC.,
Defendant

**BEFORE:** FL Myers J

**COUNSEL:** *Ian C. Matthews, Bevan R. Brooksbank, and Laura Thistle*, for the Plaintiff

*Danny Gurizzan*, for the Defendant

**HEARD:** April 30, 2024

## ENDORSEMENT

### Background – The Parties

[1] PTC stands above PSP in the chain of commerce by which credit card companies, like Visa and Mastercard, allow retailers to access their credit granting services and payment settlement services. This lets the retailers allow their customers to pay for goods and services with their credit cards.

[2] PTC is said to be an “acquirer”. It is a bank that has the right to provide access to and settlement services on the Visa system.

[3] Acquirers contract with “operators” who bring in and manage relations with retailers who want to be able to offer their customers the ability to pay for goods and services with a Visa brand credit card.

[4] PTC and PSP entered into a detailed contract governing their relationship as an acquirer and operator respectively.

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[5] It is not surprising that the credit card companies, i.e. the Visa's of the world, impose detailed and strict rules on those below them in the chain down to and including the retailers. The lower one is on the ladder, the more bound one is in Visa's contractual limitations, reporting obligations, rules, and regulations.

**The Risk of Chargebacks**

[6] It seems that a major issue in the industry involves how to deal with chargebacks, refunds, or returns. When a customer returns something she bought, Visa has to refund the money already received from the customer. Ultimately the funds are supposed to come from the retailer that Visa has already paid. But what happens when there is a fraud committed by the retailer or if the retailer fails?

[7] Again, it is not surprising that everyone in the chain from Visa down to the retailer is indemnified by the people below them in the chain. Visa is indemnified by acquirer banks like the applicant PTC. Acquirers are indemnified by operators below them – in this case PSP. Everyone looks to the retailer. But this issue only really arises when the retailer has failed or cannot pay.

[8] Looked at from the bottom up, it means that operators like PSP will feel the first burden of a retail failure. PTC will only be liable to Visa if both the retailer and PSP fail to pay it. But ultimately, if the retailer and PSP fail, PTC will be obliged to indemnify Visa for the funds refunded to a customer that cannot be recouped from the retailer.

[9] Most retailers sell goods or services in a simple transaction involving a contemporaneous exchange of goods or services for money or a promise to pay. Someone goes to the store and buys a tshatshke, or a simple piece of goods. They take the thing home and perhaps return it for a refund later. If the retailer fails, only a finite number of refund requests are likely to come from people who may want to return goods over the next six months.

[10] But there are retail businesses that can fail and cause a huge number of refund requests all at the same time. The paradigm example is an airline. They sell tickets for future flights to people on their credit cards. If the airline fails, every single passenger on every single future flight sold by that airline will make a refund request against their credit cards. Even in the case of a small airline, like PSP's customer Flair Airlines Ltd., that can involve potential claims of $30 million or more all landing on PSP, PTC, and Visa at one time.

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### PTC Holds Two Types of Reserve Funds

[11] To protect themselves from the risk of retail customer failure, the credit card companies require the acquirers to hold reserve funds. Reserves vary depending on the risk assessment made for the retailer. Airlines, for example, are considered very high-risk customers for the reason already mentioned. In the case of Flair, PTC requires a reserve of 100% of the price of all airline tickets sold by Flair on Visa. Ticket payments (net of fees) are released to Flair only when each flight lands.

[12] Retailer reserve funds operate as security to protect the credit card operator and those between it and the retailer from the financial risk of chargebacks on the failure of the retailer.

[13] As an acquirer, PTC is also at risk because it provides credit card services for customers brought to it by operators like PSP. Operators are the primary contact with the retailers. They are supposed to use Visa-approved contracts and get proper credit approvals for retailers that they bring onstream. But there are risks that the operators do not perform as required or that they could defraud or fail. So Visa requires its acquirers to hold another reserve fund to protect them against the risk of operator failure.

[14] So there are two reserve funds being held by PTC under its agreement with PSP (and the multitude of Visa rules incorporated into the agreement) that are relevant to these motions. PTC holds a reserve fund related to Flair. It holds another related to PSP itself.

### PTC's Audit Right

[15] The agreement between PTC and PSP also provides PTC with a right to attend at PSP's premises to audit the books and business of PSP as often as every three months. This is a business fraught with risk of money moving in the wrong direction. Tight controls are imposed.

### PSP Terminates the Agreement and Invokes De-Conversion

[16] PTC says that it became concerned with conduct of PSP. It was experiencing a higher-than-normal level of chargebacks. PTC was also concerned about issues with the high-risk airline customer Flair and how PSP was (or was not) reporting on the reserves needed in relation to Flair.

[17] On February 1, 2024, PTC required PSP to increase its PSP reserve. This is the reserve that relates to PSP itself as distinct from reserves related to customers. PSP responded by terminating the agreement between the parties and invoking a mechanism for the businesses to disentangle their affairs over a number of months.

[18] The wind-down process set out in the contract that PSP invoked is referred to as “De-Conversion”.

[19] With relations torn and the agreement among the parties terminated, PTC then gave notice that it was exercising its right to audit PSP. It sent its audit people to PSP at the duly appointed time. PSP refused to allow them in to conduct their audit.

[20] In addition, PTC took steps to protect its position by moving funds from settlement accounts to reserve accounts as discussed below.

**The Cross-Motions**

[21] PTC seeks an interlocutory mandatory injunction requiring PSP to allow it to conduct an audit of PSP under the agreement between them.

[22] PSP moves for an interlocutory mandatory injunction requiring PTC to account for and release funds PSP says PTC improperly moved to reserve accounts as self-help and in breach of trust.

[23] For the reasons that follow, the motion made by PTC is granted. The motion made by PSP is dismissed.

**The Test for a Mandatory Injunction Before the Trial**

[24] Both parties agree that the usual three-part test applies to the interlocutory injunctions sought by each of them under Rule 40 of the *Rules of Civil Procedure*, RRO 1990, Reg 194. *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC).

[25] To obtain an injunction before a trial has been held, a plaintiff needs to show:

a. there is serious or non-frivolous issue to be tried between the parties;

b. if forced to wait for a remedy until it wins a trial some years in future, the plaintiff will suffer irreparable harm i.e. harm that cannot be fairly compensated by an award of money damages after trial; and

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c. that the balance of convenience favours the plaintiff. That means that the plaintiff must show that the harm that it will suffer by making it wait for relief until it succeeds at trial will outweigh any harm inflicted on the defendant by granting the injunction now.

[26] Injunctions usually just prohibit a party from continuing some wrongful conduct. It is usually fairly simple for the court to order, “Stop”. But here, both sides ask the court to make more complicated orders. They want the court to order the other side to actively do something it does not want to do. This is more intrusive than just telling someone to stop doing something that it should not be doing. It can involve a need for complicated terms to govern the process and a need for ongoing supervision by the court.

[27] As a result, for a party to obtain a mandatory interlocutory injunction that requires someone to positively do something, it needs to show that it is very likely to win the case at trial. Because mandatory orders, like those sought here, are more intrusive and more difficult to impose, they are also more difficult to obtain. All counsel agreed that to obtain an interlocutory mandatory injunction, a party needs to show that it has more than just a case that is not frivolous. Rather, to obtain an interlocutory mandatory injunction, a party must establish that it has a “strong *prima facie* case.” *R. v. Canadian Broadcasting Corp*., 2018 SCC 5 (CanLII),at para. 11.

**There is a Strong *Prima Facie* Case that PTC’s Audit Right Applies During De-Conversion**

[28] PSP submits that once it terminated its agreement with PTC, PTC no longer had the right to audit its business.

[29] PSP submits that the audit right terminated when PSP terminated the agreement. There is a detailed survival clause in the agreement between PTC and PSP. The parties clearly turned their minds to which parts of the agreement survived termination and which do not. The audit right is not found in a section that survives the termination of the agreement.

[30] This is not a valid legal argument, however. Article 10.6 of the agreement provides expressly that, “the terms and conditions of this Agreement shall apply during such De-Conversion period.”

[31] De-Conversion is only available after the agreement has been terminated. De-Conversion allows for a controlled separation of the businesses rather than a hard and potentially catastrophic shut down of PSP’s customers’ access to Visa.

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[32] By definition De-Conversion keeps the terms of the agreement alive despite termination. The provisions of the agreement allowing for ongoing credit granting and settlement operations are not listed in the survival clause. Article 10.6 prevents the survival clause from kicking in immediately and shutting down ongoing credit granting and settlement services for PSP's retailers and their customers.

[33] The survival clause keeps some clauses alive after the parties are no longer carrying on active business together when the agreement is terminated without a De-Conversion. Where, as here, when PSP invokes a De-Conversion process, the survival clause is effective after the De-Conversion wind down period ends and article 10.6 no longer keeps all agreement terms operative.

[34] PSP invoked De-Conversion for good reason. It preserves going concern business operations and minimizes disruption to the parties, retailers, and the consuming retail public despite the termination fo the agreement between PTC and PSP.

[35] It is perfectly clear that the survival clause applies only after De-Conversion no longer keeps the terms of the whole agreement operative. This is not an implied term argument. This is not a *contra preferentum* or a fancy interpretive exercise. The plain words of the agreement are clear and precise. The full agreement remains applicable during De-Conversion.

[36] Therefore, the applicant has a very strong *prima facie* case that it continues to have its audit rights.

**Absent Relief Now, PTC Will Suffer Irreparable Harm**

[37] It is also not difficult to find that the loss of an audit right is a form of irreparable harm or harm that cannot be compensated in damages after a trial or for which trying to hold a party to monetary damages after trial is an inadequate remedy.

[38] The whole point of an audit right is to provide real time access to a business to prevent harm from arising or to catch problems earlier than would otherwise be the case. As noted above, the financial services business is fraught with risk when the parties are still in business together. The existence of a right to audit four times per year makes the concern plain. PSP's witness acknowledged this in cross-examination. And that is when the parties are still in business together with parallel or common economic incentives to make the enterprise succeed.

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[39] PTC is now in a dispute with PSP. PTC knows that it is exposed to the risk of indemnifying Visa if PSP has an undisclosed problem or if it organizes its affairs in a way to leave PTC high and dry on the occurrence of an untoward event. It is not speculative to observe that once the agreement between them has been terminated, there is no longer a joint enterprise being advanced in the common interest. Each side has the economic incentive to realize as much value as it can for itself on the way out. Especially with communication and reporting between the parties strained as they are, exercise of an audit is a very important mechanism for PTC to have some control of its exposure to risk of loss while operations continue during De-Conversion.

[40] Rightly or wrongly, PTC has voiced concerns with the reserve accounts, with PSP's technology recently going down for a few days, and with communication problems between the parties. There is no way to value the loss of an audit right later after PTC has been left holding the proverbial bag. *Nichols v. Cackleberries Entertainment Inc.*, 2013 BCSC 1194 (CanLII). Moreover, the goal of an audit is to prevent or limit losses before they arise. Monetary damages after trial do not compensate for the loss of an audit right therefore.

**The Balance of Convenience Favours Requiring PSP to Allow an Audit**

[41] There is no harm to PSP in recognizing PTC's audit right as it agreed in the contract between the parties. PSP can hardly complain about prejudice on being required to be transparent in its financial reporting. As Justice Brandeis famously wrote, "Sun[light] disinfects." [1]

[42] To complete the analysis of the balance of convenience, I need to turn to the cross-motion by PSP for an injunction against PTC. PSP makes the same argument for its own interlocutory mandatory injunction as it does to resist the balance of convenience analysis in relation to PTC's request for its injunction.

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[1] *Brandeis and the History of Transparency*, online: Sunlight Foundation https://sunlightfoundation.com/2009/05/26/brandeis-and-the-history-of-transparency/

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**Does PTC Come to Equity with "Clean Hands"?**

[43] PSP submits that PTC has not come to court with "clean hands." That is legal jargon for saying that PTC's own behaviour has been wrongful so that it is unjust for the court to exercise its discretion and authority to help PTC.

[44] The clean hands doctrine is one of longstanding. It usually does not even need to be argued because bad acts committed by the person seeking relief are often enough on their own to disable the person from qualifying for an injunction. A lack of clean hands can tip the balance of convenience away from a moving party's claim for equitable relief. *Toronto (City) v. Polai,* 1969 CanLII 339 (ONCA).

[45] The allegations that are said to dirty PTC's hands are the same as the allegations made by PSP to support its cross-motion for an injunction against PTC.

[46] PSP submits that PTC has wrongly reached into settlement accounts into which PTC deposits funds destined for retailers and has removed funds from those accounts to bolster the PSP reserve account and the Flair customer reserve account.

[47] The parties differ on how much money PTC recently moved into reserve funds. The amount put into the Flair reserve seems to be between $28 and $33 million. PTC moved another $4 million approximately from settlement account(s) to increase the amount it is holding in the PSP reserve.

[48] PSP submits that PTC has misappropriated trust funds from customers to unlawfully protect itself.

[49] PTC submits that the various agreements and Visa rules entitled it to move its funds to reserves as it did.

**(a) There is no Strong *Prima Facie* Case that PTC Wrongfully Moved Funds from Settlement Accounts to the PSP Reserve and the Flair Reserve**

[50] There is a serious issue to be tried as to whether PTC has a right to apply funds in its settlement accounts to the PSP reserve. The contract clearly allows PTC to hold back funds *due to PSP* to fund the PSP reserve. But Mr. Matthews and Mr. Brooksbank were not able to point to any clear contractual basis for PTC to hold back funds ultimately due to retailers for that purpose.

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[51] The parties made interpretation arguments back and forth which are not readily resolved without a much better understanding of the flow of funds and the application of Visa rules and regulations that govern the creation and use of settlement accounts.

[52] The is a flow chart of funding in evidence. But Mr. Gurizzan submits that it is not directly applicable to the relationship between the parties. While it is not open to him to give evidence on this motion, I do note that he is in-house counsel and has a detailed knowledge of the nuts and bolts of the business.

[53] A "strong *prima facie* case" is one that is very likely to succeed at trial. I do not have nearly enough facts concerning the flow of funds nor enough of an understanding of the regime of rules surrounding the use of settlement accounts to know if PTC is entitled to hold back funds in settlement accounts for the purposes of the PSP reserve.

[54] PSP raises a serious (or non-frivolous) issue that needs resolution. But at this stage I cannot find that PSP is very likely to succeed at trial on this point.

[55] I do not have the same concern for funds held back by PTC from settlement accounts to fund the Flair reserve. Under the parties' agreement and applicable rules, funds due to customers appear to be subject to being held for customer reserves.

[56] Moreover PTC and Flair have recently had separate litigation and have resolved among themselves Flair's concern that PTC was holding back too much money and PTC's competing concern with how PSP was handling reserves in relation to Flair.

[57] The customer is not here complaining that money ear-marked for it is being wrongly held in reserve by PTC.

[58] On the consideration of the strength of its case alone, PSP is not entitled to an interlocutory mandatory injunction requiring PTC to move money out of reserves and back into settlement accounts.

**(b) There is No Basis in the Evidence or Law to Support a Claim that PTC's Settlement Accounts are Trust Funds**

[59] PSP's submission that PTC has committed breaches of trust is the key plank in its "clean hands" argument. Trusts are creations of courts of equity. So too are injunctions. A breach of trust is a direct attack on equity or fairness and justice that could well disable a plaintiff's claim to an injunction.

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[60] The court views very seriously and dimly breaches of trust committed by trustees. Trustees are fiduciaries who are bound to handle other peoples' property selflessly.

[61] There are two major problems with PSP's position, however. First, if PSP is correct that funds held by PTC in settlement accounts are held in trust for retailers, then PSP has no standing to complain about how PTC is behaving. If the funds are trust funds, then they belong to the retailers. *Carroll v. Toronto-Dominion Bank*, 2021 ONCA 38 (CanLII) at paras. 27 and 28.

[62] If PTC is wrongly taking retailers' money and using it to fund the PSP reserve account, that would be an issue for the retailers. PSP has no right to those funds. In fact, if PTC is reaching into the wrong pocket to fund the PSP reserve, PSP may actually be receiving an unjust benefit in that its funds are not being used to fund the reserve.

[63] Similarly, if PSP is correct, that the funds in PTC's settlement accounts are held in trust for customers, then PTC's settlement with Flair resolves any ongoing concern for the Flair trust account.

[64] The second problem with PSP's position, is that I do not see how the PTC's settlement accounts can be trust funds. This is not the trial and this is not a final decision. But I see no serious issue to be tried and certainly no strong *prima facie* case that any trust fund exists.

[65] PSP relies on the *Retail Payment Activities Act,* S.C. 2021, c. 20. This statute is not yet in force. When it is in force, it will require trust funds or other prescribed or guaranteed accounts to be used in this industry to hold money destined for end-users. Does that mean that all settlement accounts are already trust funds or, perhaps, they are not trust funds and the government thinks that they should be?

[66] It is axiomatic that a statute is not in force prior to the date that it comes into force. A statute that is not in force today is not the law of the land yet. Moreover, federal legislation is deemed to be remedial i.e., that it is curing a problem. (See s. 12 of the *Interpretation Act,* RSC 1985, c I-21.) The fact that Parliament may be requiring people in this business to use trust funds does not help interpret the state of affairs today. It may be remedying a perceived problem.

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[67] In order for there to be a trust, someone has to declare or intend that he, she, or it is holding property in their name that is really owned by someone else. The trustee must be obliged to deal with the trust property on the other person's behalf alone. *Rubner v. Bistricer,* 2019 ONCA 733 (CanLII), at para. 52.

[68] The intent to create a trust is a necessary element of a trust relationship. A trustee has only legal or "paper" title to the trust property. That means that although the trustee's name is on the paper evidencing title to the property, beneficial title, the real ownership right to use and enjoy the property, belongs to someone else – the beneficiary of the trust.

[69] Holding money in a bank account that is intoned to be used to pay others is a very different thing from holding money in trust. Businesses often owe money to one another. Owing money is just commercial debt. A business, or any of us, can have bank accounts from which we intend to pay others to whom we owe money. A person who has money in the bank intending to use it to pay others still owns her own money in her own accounts.

[70] PSP submits that because funds in settlement accounts are destined to be paid to retailers, PTC holds funds in those accounts in trust. But there is no indication that PTC has ever declared that it is holding another person's property or that it has agreed or intends to do so.

[71] PSP has not pointed to anything that obliges PTC to deal with funds in its settlement accounts solely on behalf of PSP's retailer customers. Nothing in the agreement between PTC and PSP gives any hint that PTC is holding settlement accounts in trust for retailers. It is certainly true that the funds are intended to be paid to retailers in due course. But until that happens, the funds belong to PTC. PTC has sole control of its accounts. Retailers cannot go to PTC and tell PTC what to do with "their" funds in PTC's accounts. They might be able to sue PTC if PTC owes them money and does not pay. But there is no basis to find that the retailers have ownership rights in PTC's funds in settlement accounts before PTC pays the funds out. Those accounts are owned and controlled by PTC and are subject to PTC imposing reserves under the Visa rules and perhaps other uses.

[72] I do not see a basis to find that PTC is a trustee or has breached a trust so as to deny it "clean hands."

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### (c) PSP's Claim that PTC Mis-Applied Funds is Readily Calculated and is Fairly Remedied by an Award of Damages after Trial

[73] PSP's claim in relation to the funds used by PTC to fund the PSP reserve is one that is defined by a precise amount of money. There is no question at this stage that PTC is good for a judgment should PSP become entitled to a damages award against PTC. Unlike the loss of PTC's audit right, that is not readily compensable in money damages later, if PSP wins at trial, it will be compensated fully by a monetary damages award. On this basis too, PSP is not entitled to its own injunction.

[74] A claim of injury to goodwill and harm to customer loyalty can be one that is considered a form of "irreparable harm" that can suffice for pre-trial injunctive relief. But here the claim is entirely speculative and is not supported by any evidence. PSP baldly says it has lost customers. But a careful reading of the affidavit filed does say when this occurred and does not link the loss of customers to anything allegedly done by PTC.

### (d) PSP's Cross-Motion for an Interlocutory Mandatory Injunction is Dismissed

[75] With no strong *prima facie* case and no irreparable harm, PSP's request for an injunction at this stage must be dismissed.

[76] I return then to complete the consideration of the balance of convenience in relation to PTC's request for an injunction.

### Self-Help Does not Tip the Balance of Convenience in this Case

[77] PSP submits that because PTC engaged in "self-help" by unilaterally funding up its reserves, the balance of convenience weighs against granting it an injunction to enforce its right to conduct an audit of PSP. It is hard to see how the one relates to the other.

[78] There is case law that disqualifies people who take self-help remedies before coming to court from obtaining injunctive relief. *MortgageBrokers.com Holdings Inc. v. Mortgage Brokers City Inc.*, 2010 ONSC 1797; *Galrich Restoration Inc. v. 1597181 Ontario Inc.*, 2014 ONSC 1933 (MC). Self-help undermines the rule of law. *Buduchnist Credit Union Limited v. 2321197 Ontario Inc.*, 2024 ONCA 57, at para. 53.

[79] In my view PSP is overstating the applicable principle. Mr. Gurizzan agreed, for example, that a party who is enforcing a contractual right would not be

barred from equitable relief although doing so is a form of unilateral self-help. Doing things that one is entitled to do is not illicit self-help. The cases that bar from relief people who have undertaken self-help involve cases where the self-help has itself been unjust, unlawful, or improper in some way.

[80] Self-help does not *always* dirty one's hands. Rather, the issue is *always* one of fairness and justice or "doing equity". Where an act of self-help is inappropriate or improper in some way, the conduct may render it unjust for a person to then come to court and pray for the aid of equity. The court's task is to try to do justice between the parties. The issue then is whether the self-help offends the court's sense of equity and fairness.

[81] PSP also submits that PTC has breached its rights or caused it loss by cutting off the automatic flow of funds between PSP and PTC's bank. Prior to termination of the agreement, PTC had allowed PSP to settle daily accounts by sending a spreadsheet of payments to be made to customers directly to PTC's bank. When relations soured, PSP developed an undefined technical problem that interfered with its ability to provide real time account information for PTC for several days. PTC removed PSP's entitlement to deal with PTC's bank directly and instead required that the bank wait for PTC's approval before paying out funds to customers in accordance with PSP's spreadsheets. There were a couple of occasions where PTC did not give the approval until the next day. There is a debate over whose fault that was.

[82] In my view this issue is a red herring. PSP points to no contractual right for it to direct PTC's bank to release funds without PTC's approval. In fact the agreement between them provides that PTC has the last word and control of its accounts. What was likely going on in this back-and-forth is some muscle flexing and hardball between the parties.

[83] There are accounting issues between these parties no doubt. They will be worked out in the fullness of time. The audit may help to do so. But I see nothing like a breach of trust or an inequitable activity that would disqualify PTC or make it unjust for the court to exercise its discretionary authority to enforce PTC's audit right pending trial. In fact, with warring parties in a financial services business, it seems to me that transparency is necessary to do justice and to ensure that the appearance of justice is protected and enhanced.

[84] It follows that, in my view, the balance of convenience favours granting the order sought by PTC.

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### Outcome

[85] The parties agree that the three categories or factors for considering an interlocutory injunction (the strength of the case, irreparable harm, and balance of convenience) are not water-tight compartments. In considering whether to grant equitable injunctive relief, the court makes a more holistic assessment of the dictates of fairness and justice.

[86] In my view, an interlocutory mandatory injunction should be granted to require PSP to allow PTC to carry out its audit rights as set out in their agreement.

### Orders

[87] PTC's draft order dismissing the cross-motion should be finalized for signature. It is found at document A-14 in the Master Bundle on Caselines commencing at page A1244.

[88] PTC's draft order for its own injunction is very particular. This is generally helpful to avoid uncertainty and disagreement. I invite counsel to agree on terms of an order for signature. I will hear counsel briefly at a case conference if necessary to settle the terms of the order.

### Costs

[89] Usually the costs of a motion for an interlocutory injunction are reserved to the trial to ensure that granting the injunction before trial was appropriate on the merits. Neither party referred to this practice nor asked for this outcome.

[90] In this case, the audit was a discrete issue that will not be the issue at trial. The trial will involve taking accounts between the parties. In my view it is appropriate for costs to follow the event on this motion.

[91] Mr. Gurizzan was clear in his submission that the audit was of secondary importance to PSP. It really wants customer funds being held in reserve by PTC to be released to customers. It 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.

[92] PTC is entitled to be indemnified by PSP for its enforcement costs under their contract. PTC seeks full indemnity for its costs of $129,373.02. In my

view it should be entitled to substantial indemnity for its costs both due to the contract and due to the unsuccessful allegations that it committed a breach of trust. That allegation is a very serious one that is tantamount to fraud or theft of another person's money. The commercial agreement between the parties gives no hint of there being a trust mechanism imposed. Neither did anything in the parties' history of dealings.

[93] PSP took aggressive positions and should reasonably have expected PTC to pull out all the stops and spare no expense to defend itself.

[94] PSP says its costs of the audit motion were $17,742 on a partial indemnity basis. But Mr. Gurizzan is in-house counsel and a member of the family that owns PSP. His internal time is not a valid reflection of the fair market value among arms length lawyers and clients.

[95] For the cross-motion, PTC's counsel advises that their costs on a partial indemnity basis work out to $60,739.70. PSP says its costs were $12,335.24.

I have reviewed PTC's costs outline. Counsel divided principal responsibility for the motion and cross-motion among Messrs. Matthews and Brooksbank. This inevitably caused some overlap and duplication in my view. Moreover, senior counsel performed the bulk of the work on the motions at their high hourly rates. Delegation to junior counsel was limited. Some allowance should be made to reflect these concerns with the reasonableness of the amounts sought.

[96] This was a complex proceeding with competing motions with considerable evidence and cross-examinations. PSP claims that PTC misappropriated over $30 million. There was much at stake financially and reputationally. It is fair and reasonable for PSP to pay PTC its costs of the audit motion fixed on a substantial indemnity basis at $100,000 all-in and the costs of the cross-motion on a partial indemnity basis fixed in the amount of $45,000 all-in.

FL Myers J

**Date:** May 6, 2024

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