

Court of King's Bench of Alberta

Citation: Kensington Park Capital Ltd v Franjon Excavating & Trucking Ltd, 2024 ABKB 508

Date:
Docket: 2401 06479
Registry: Calgary

Between:

Kensington Park Capital Ltd

Applicant

- and -

Franjon Excavating & Trucking Ltd

Respondent

**Reasons for Decision
of the
Honourable Justice J.R. Ashcroft**

Introduction

[1] The Applicant seeks, by way of an urgent chamber's application, a stay of enforcement of an order by an Applications Judge made on July 16th, 2024. The Applications Judge discharged a caveat (the "Caveat") which had been registered against a property located at 9600 114 Ave SE, Calgary, AB, T3S 0A5 (the "Premises").

[2] The Respondent, Franjon Excavating and Trucking Ltd. ("Franjon") owns the Premises. The Applicant, Kensington Park Capital Ltd. ("Kensington"), purchased the business operating on the Premises and was assigned the lease on or about November 30th, 2023. The terms of the Lease Agreement (the "Lease") contain an Option to Purchase and a Right of First Refusal ("ROFR").

[3] Franjon listed the property for sale in December 2023 at a listing price of \$1.7 million. This price was reduced to \$1.49 million in March 2024. Kensington submitted an offer to

purchase the Premises for \$1.2 million on or about March 25th, 2024. It is Kensington's position that it was unaware of and uninformed of any other offers for the Premises. On or about March 27th, 2024, Kensington alleges that it became aware that Franjon had accepted a third-party offer for the Premises on or about March 27th, 2024. Kensington now alleges that Franjon did not give Kensington an opportunity to match the third-party offer(s), and as such, Franjon denied it the option to exercise the ROFR.

[4] Kensington then registered the Caveat on the title to the Premises relying on the ROFR provision.

[5] The facts are not really in dispute, excepting only that Franjon set out the offers on the Premises in their brief as occurring on or about March 26th, 2024.

The Decision of the Applications Judge

[6] On July 16th, 2024, the parties appeared before an Applications Judge seeking a discharge of the Caveat. Franjon's position was that the ROFR only entitled Kensington to be made aware that it was selling the property so that Kensington could have the opportunity to put forward an offer. Franjon submitted that it had met its obligations under the provision.

[7] The wording of the ROFR clause says:

In the event that the Property is offered for sale during the term of this Lease, the Tenant will be notified as soon as possible and given first right of refusal to purchase the property as noted above. ...

[8] Kensington argued that Franjon had violated the terms of the Lease and ROFR provision by failing to inform Kensington of the competing offer(s) and failing to give Kensington a meaningful opportunity to match or counter the offer(s).

[9] The Applications Judge, upon review of the materials and parties' submissions, determined that the ROFR clause was ambiguous and failed to clearly set out how the right was to be exercised. She held that it would be improper to read in terms as to how typical rights of first refusals would operate, partly because contracts relating to land are meant to be in writing and clear. Although the clause was imperfectly drafted, it was her determination that the landlord, Franjon, had complied with the ROFR. She granted Franjon's application to discharge the Caveat on the title to the Premises.

[10] Kensington has appealed the decision of the Application's Judge but the scheduling and timing of the appeal, which is not in the immediate future, gives rise to this stay application.

Issue

[11] Should a stay be granted of the decision of the Applications Judge to discharge the Caveat?

Analysis and Decision

[12] As identified by Beetz J in *Manitoba (AG) v Metropolitan Stores Ltd*, 1987 CanLII 79 (SCC), [1987] 1 SCR 110 at para 30:

A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient

characteristics in common to be governed by the same rules and courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions. ...

[13] The correct test to apply in this appeal is the tripartite test for interlocutory injunctions from *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 at para 48:

...First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. ...

[14] In the modern day, the *RJR-MacDonald* test need not be an “inflexible straitjacket”, but rather, a guiding framework to determine whether injunctive relief should be provided: *Potash Corp of Saskatchewan Inc v Mosaic Potash Esterhazy Ltd Partnership*, 2011 SKCA at para 26. Although the test is flexible and it is not necessary to analyze each step consecutively, for organizational and clarity purposes, I have followed the order described in *RJR-MacDonald* at para 48.

i. Serious issue to be tried

[15] The first part of the test is an assessment of whether the Court believes that there is a serious question to be tried. The threshold for this is a “low one”: *RJR-MacDonald* at para 54. Typically, this will be met if the party can satisfy the court that “the claim is not frivolous or vexatious”: *RJR-MacDonald* at para 51; *Polansky Electronics Ltd v AGT Limited*, 2000 ABCA 46 at para 11.

[16] This appeal of the decision of an Applications Judge is subject to a standard of correctness, but the record may be amplified by new evidence: *Steer v Chicago Title Insurance Company*, 2019 ABQB 318 at paras 6-10. The standard, combined with the appropriate level of scrutiny of the merits of the decision in this interim application, persuades me that there is a serious issue to be tried.

[17] The parties entered into a contract to form a landlord-tenant relationship. One of the components of this relationship was the ROFR that was added to the Lease and signed by both parties on November 16th, 2023. The Applications Judge has found that the ROFR terms were ambiguous. The wording is quite broad and does lack specificity in terms of how the right of first refusal operates; however, another interpretation is available. While it may mean that Franjon has fulfilled the terms by allowing Kensington to simply put in an offer on the property, it may also mean that Franjon must give Kensington an opportunity to match the offer. In *Municipal Savings and Loan Corp v Oswenda Investments Ltd (HCJ)*, 1989 CanLII 4168 (ONSC) at 9:

A right of first refusal is in essence a negative covenant wherein an owner agrees not to part with the title to his property to a third party until he gives the party holding the right the opportunity of meeting the terms of the offer to purchase submitted by the third party...such a right can be converted into an option to purchase and create an interest in land when the owner receives a bona fide offer

to purchase the property: *McFarland v Hauser* (1978), 88 D.L.R. (3d) 449, [1979] 1 S.C.R. 337, 7 Alta. L.R. (2d) 204 (S.C.C.); *Kopec v Pyret*, supra, at p. 252.

[18] As argued by Kensington, interpreting the ROFR as meaning that the Applicant tenant may place an offer on the property, like any other purchaser, may render the ROFR meaningless. I acknowledge the Respondent's arguments that as per *Municipal Savings* at 12, "...The court cannot and should not write their option for them". However, given the standard of review, and the potential for several interpretations with respect to the clause, it cannot be said that the appeal is vexatious or frivolous or has no probability of success.

[19] Similar to *McAdam v Johnson*, 2016 NBQB 162 at para 9, the issue of whether or not the clause was clear and properly followed is a serious one with significant consequences, financially and otherwise, for both parties.

[20] I find that the appeal involves a serious question to be tried. The Applicant has met the first part of the *RJR-MacDonald* test.

ii. Irreparable harm

[21] The second part of the test is a determination of "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": *RJR-MacDonald* at para 63.

[22] "Irreparable" harm is that which either cannot be quantified monetarily or cannot be cured, often because one party cannot collect damages from the other party: *RJR-MacDonald* at para 64. The focus is on the nature of the harm suffered rather than the magnitude: *RJR-MacDonald* at para 64.

[23] The Applicant argues that it will suffer irreparable harm if this stay is not granted because Kensington may lose the rights to its tenancy because the Lease expires in May 2026. In the affidavit of Mr. Sivia, Kensington's representative, he states that if the sale goes ahead, the third-party buyer may make decisions, such as terminating the lease, that negatively impact Kensington. At the expiry of the Lease, the third-party buyer does have the authority to take certain actions which may negatively affect Kensington. The third-party may decide not to extend Kensington's lease or choose to sell the Premises. In both these circumstances, Kensington may be required to vacate the premises and move its business.

[24] Kensington operates a storage facility business. The Applicant emphasizes that Kensington, when it purchased the business, assumed the prior tenant's loyal customers and indicates that it will suffer irreparable damages if the premises are sold to a third-party. If this occurs, there will be no mechanism to measure the harm and damages suffered as a result of loss of clientele and loss of goodwill. I am prepared to accept that one of the reasons for the success of a storage facility business is its proximity to its clientele. If Kensington were required to vacate the Premises and move its business, it would likely suffer significant harm in the loss of its customers if they choose not to follow Kensington to another location. Although the Premises may not have "unique characteristics" or sentimental value to the Applicant, as in *McAdam* at para 12, it is designed in a manner to facilitate the Applicant's business. It is difficult to say whether Kensington would be able to find another appropriate location or facility, rebuild its customer base and how long either of these would take. There is significant potential for irreparable harm in the form of damages which could not be properly quantified.

[25] I acknowledge that even if the sale goes through to a third-party, the Lease will continue until May 2026 and the ROFR clause will remain in effect since the Respondent will assign the Lease to the third-party purchaser. However, if the third-party purchaser chooses not to continue the Lease or Kensington is unsuccessful in exercising its ROFR at the time of a potential future sale, then it will likely suffer the same irreparable harm, just at a future date.

[26] The Applicant has met the second component of the *RJR-MacDonald* test.

iii. Balance of convenience

[27] The third and final part of the test is a determination of the balance of convenience. As per *RJR-MacDonald* at para 67, citing *Metropolitan Stores* at para 36, the balance of convenience is:

...a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits. ...

[28] There are no specific factors that must be taken into consideration at this stage of the analysis; they will vary from case to case. As per *McAdam* at para 17, although I need not strictly address the balance of convenience since I have found the Applicant to have met the other two parts of the test, I find that the balance of convenience clearly favours the Applicant.

[29] As pointed out in the case law, assessing the balance of convenience may also involve once again being mindful of the potential for irreparable harm and damages: *McAdam* at para 17. If I do not grant a stay of enforcement and the third-party sale goes ahead, then the Premises will be sold to a third-party. I accept it will then be challenging, if the Applicant is ultimately successful on appeal, to either re-transfer the Premises back to the Applicant or quantify the Applicant's damages. Although the Lease will continue until May 2026, if the third-party sells the Premises at that time, it may run into a similar issue as the one right now given the ambiguity of the ROFR.

[30] However, if I grant the stay of enforcement, then the third-party sale will be further delayed, and Franjon may also face damages for breach of contract. Currently, as per Mr. Davies' (Franjon's representative) Affidavit, Franjon is likely in breach of contract with the third-party buyer of the Premises. The Purchase Contract for the Premises was set to close on July 31st, 2024, but due to these proceedings, the parties cannot complete the sale. Franjon has requested from the third-party an extension for closing pending the outcome of this appeal. The third-party, at least at the time of the hearing, appeared to be amenable for at least some type of extension and is perhaps adopting a "wait and see" approach pending the outcome of this case.

[31] I have found that the Applicant will suffer irreparable harm that cannot be remedied by way of damages if I do not grant a stay. While accepting that the Respondent may also face damages for breach of contract, I find the Respondent's damages appear to be more easily quantified, in the form of an extension fee in the amount of monthly rent and interest on the sale price as of July 31st, 2024. As noted in *McAdam* at para 17, the "matter of delay can be compensated by an award of interest".

[32] The Respondent says that the Applicant "ought to provide an undertaking for damages in the approximate amount of \$14,638.55 per month representing of stay pending the final outcome of the appeal".

[33] The requirement for an undertaking, although not formalized in the *Alberta Rules of Court*, Alta Reg 124/2010, is commonly accepted in the case law, particularly in commercial matters: *Westcan Recyclers Ltd v Calgary (City)*, 2023 ABKB 442 at para 125. In *Bruneau v Quinn*, 2023 ABKB 719 at para 45, the Court held that:

It is a requirement for the party seeking an injunction to provide an undertaking to indemnify the opposing party's damage. This is not a formality, but an equitable requirement to seek injunctive relief and an integral part of the balance of convenience...

[citations omitted]

[34] As of August 14th, 2024, the Applicant has given its undertaking in damages to the Court.

[35] There was some discussion at the hearing as to whether the Applicant corporation should provide the undertaking for damages in the form of a personal guarantee. A personal guarantee will often give more weight to the undertaking for damages. If there is evidence that a corporation seeking an injunction would be unable to pay damages, then a personal guarantee should be required: *Bruneau* at paras 44-45. An exception to this would include circumstances where it is the Respondent's conduct that would cause the party applying for the stay to be in a position where it could not pay.

[36] In *Scozzafava v Prosperi*, 2003 ABQB 248 at para 40, the Court found that an undertaking in damages made on behalf of the corporation was insufficient because it would cause one of the parties to be responsible for its own damages and it was unclear whether the corporate entity was viable in the long run. Further, there was no evidence that one of the parties was authorized to give the corporation's undertaking for damages: *Scozzafava* at para 40.

[37] There is no evidence before me regarding the assets or balance sheet of the corporate Applicant; however, it is a business which currently operates and receives revenue through providing storage facilities on a month-to-month basis. The business appears to have sufficient financial health to make a \$1.2 million offer to buy the Premises in March of this year. From all of this, and in assessing on a very preliminary basis the Respondent's quantifiable damages, should the Applicant not be successful in its appeal, I infer the Applicant corporation would be able to meet its undertaking as to damages. Further, as per the Applicant's brief from August 14th, 2024, Mr. Sivia is authorized, on behalf of Kensington, to provide the corporation's undertaking in damages. I am satisfied that the corporate undertaking for damages by the Applicant is sufficient in this case to be considered as a factor in the Applicant's favour when assessing the balance of convenience test.

[38] Mr. Davies has sworn in his affidavit that his health is suffering due to this litigation. While I am sympathetic and understand that ongoing litigation causes upset and distress, I do not find that this evidence, without more, would tilt the balance of convenience in favour of the Respondent.

[39] The balance of convenience favours the Applicant and as such, the third part of the *RJR-MacDonald* test is met.

Conclusion

[40] The Applicant has proven all three components of the *RJR-MacDonald* test, and their application for a stay is allowed.

Heard on August 6th, 2024.

Written submissions received on August 13th, 2024

Dated at the City of Calgary, Alberta this 23rd day of August, 2024.

J.R. Ashcroft
J.C.K.B.A.

Appearances:

Mandeep Singh
for the Applicant

Christopher J. Handel
for the Respondent