ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-24-00720622-00CL **DATE: NOVEMBER 22, 2024**

NO. ON LIST:

TITLE OF PROCEEDING:

EASTERN MEAT SOLUTION INC., et al vs. PNC VENDOR FINANCE CORPORATION CANADA, et al

BEFORE: JUSTICE PENNY

PARTICIPANT INFORMATION

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REASONS OF JUSTICE PENNY:

Overview

[1] In a brief endorsement of November 21, 2024, I granted an interim interlocutory injunction to prohibit the Bank of Montreal from paying out a draw on a letter of credit issued by the Bank to the applicants. I also granted an order for production by the Bank of all communications between the Bank and the purported beneficiary of the LoC, Woolsey Equities Inc., concerning the requested draw.

[2] I made those orders with written reasons to follow. These are my reasons.

Background

[3] Sierra Winds Business Park Inc. ("SWBP") entered into a lease agreement on March 10, 2023, with Sierra Realty (Calgary) Corporation ("Sierra Realty"). The lease agreement contemplated that SWBP would, in the future, lease a building to Sierra Realty that was not yet built.

[4] Sierra Realty is part of a group of companies that sought protection under the *Companies' Creditors Arrangement Act*. The initial order was granted in this proceeding on May 21, 2024.

[5] The evidence before me on this motion is that the lease agreement was terminated by mutual consent of the parties on or before February 28, 2024. No building was ever or has ever been built.

[6] In any event, in the course of the CCAA proceeding, Sierra Realty disclaimed the lease agreement with SWBP effective July 5, 2024. SWBP did not file any objection to this disclaimer within the time period prescribed under the CCAA, or at all.

[7] After entering into the lease agreement, but prior to terminating and disclaiming the lease agreement, Sierra Realty's and its related party, Eastern Meat Solutions Inc., applied for and obtained from the Bank a standby letter of credit No. BMTO697221OS for $1,5

million issued on November 20, 2023 (the "LoC") on behalf of Sierra Realty. This LoC was contemplated by the lease agreement in order to secure a security deposit based on two months' rent.

[8] The evidence before me is that the LoC was never delivered to, requested or drawn on by SWBP prior to the recent events giving rise to this motion, which are described below. On the basis of this evidence, it is also a reasonable inference that SWBP was, until these recent events, unaware of the existence of the LoC.

[9] The expiry date of the LOC was November 19, 2024, though it was subject to automatic renewal. On the basis that the underlying obligations had been terminated, the applicants asked the Bank to cancel or not renew the LoC. The Bank issued a notice of non-renewal to SWBP on October 9, 2024, to advise it of the pending non-renewal of the LoC. The notice advised SWBP that the LoC would expire on November 19, 2024 and would not be renewed. Among other things, the notice advised that if SWBP consented to cancellation, it must return *the original* of the LoC to the Bank. The notice also indicated that if SWBP was going to claim under the LoC, it must do so before November 19, 2024.

[10] The evidence supports the inference that the Bank provided SWBP with a copy of the LoC, albeit contrary to the applicants' instructions, on or sometime before November 19, 2024.

[11] Two attempts to draw on the LoC were made by Woolsey. The first attempt was on November 13, 2024; it did not include a copy of the LoC. The second attempt was made on November 19, 2024 (the date the LoC was due to expire). The second purported draw included a copy of the "original" LoC. Both draw requests sought to draw $1,495,000 on the LoC, i.e., $5,000 less than the full amount of the LoC. The evidence, from the applicants' perspective, is that Woolsey claims to be a successor in title to the named beneficiary of the LoC, SWBP. There is no evidence of what, if any, support for this claim was provided to the Bank or why the Bank was prepared to accept a demand from someone other than the named beneficiary.

[12] On the morning of November 20, 2024, BMO advised the applicants of its intention to honour the draw request and to pay out on the LoC "within 48 hours". It was the last minute draw request on November 19, and the Bank's advice on November 20, that necessitated the applicants' urgent motion.

[13] I note these latter facts because, with the motion being brought on such short notice, the record was incomplete. The Bank filed some material on the morning of the hearing. Woolsey/SWBP filed no material. Their counsel, Ms. Mageau, appeared at the hearing, having been advised to attend approximately one hour before the hearing began. The point is that the urgency was created by Woolsey's last minute attempt to draw virtually the full amount of the LoC and the Bank's last minute advice that it intended to pay out on the LoC. To the extent this left Woolsey and the Bank at somewhat of a disadvantage, it is a problem, at least in part, of their own making.

[14] However, the relief sought recognizes the less than perfect circumstances in which the motion has been brought. What is sought by the applicants is only an *interim* interlocutory order, to preserve the funds pending full argument on a proper record.

[15] There are two issues:

(1) should the Bank be enjoined from paying out on the LoC until a motion can be scheduled to argue the matter on a proper record; and

(2) should a production order be made requiring the Bank to produce all communications with Woolsey/SWBP concerning the LoC and Woolsey's exercise of the purported draw right under the LoC?

[16] With this background, I will turn to my reasons for granting relief on both these issues.

The Interim Interlocutory Injunction

[17] The central characteristic of a letter of credit is its autonomous nature. Letters of credit are autonomous from and independent of the underlying transaction which exists between the person at whose instance the credit is issued and the beneficiary of the credit. They constitute a separate contract between the issuing bank and the beneficiary. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade.

[18] One exception to the general rule that an issuing bank is obliged to honor a claim under a letter of credit where the tender documents appear on their face to be regular and in conformity with the terms and conditions of the credit, has been recognized in the case of fraud by the beneficiary of the credit which has been demonstrated to a court called on by the customer of the bank to issue an interlocutory injunction to restrain the bank from honoring the draft: *Bank of Nova Scotia v Angelica-Whitewear Ltd.*, [1987]1 SCR 59 at pp. 71-72. The "fraud" in issue is not confined to the tendered documents but includes fraud in the underlying transaction as well. In other words, it extends to any act of the beneficiary of a letter of credit, the effect of which would be to permit the beneficiary to obtain the benefit of the credit in circumstances where the beneficiary must be taken to have known it was not entitled to do so: *Eurobank Ergasias S.A. v. Bombardier Inc.*, 2024 SCC 11 at paras 112 - 114. See also *430872 BC Ltd v. KPMG Inc*., 2004 BCCA 186. In that decision, the majority of the British Columbia Court of Appeal decided that it could be fraudulent to draw upon a documentary credit where there is no right to obtain the credit. In that case, the documentary credit was issued to guarantee a breach of warranty and it was clear that there had not been such a breach, therefore the majority of the Court concluded that to draw on the credit before any breach occurs would be an "abuse of the principle of autonomy within the concept of fraud". The beneficiary under a letter of credit is not entitled to make a demand for payment under a letter of credit where there is no right to

make such demand as between the beneficiary and the applicant under the terms of the underlying contract: McGuinness, at §17.338. The fraud exception does not encompass a demand for payment made in the face of a legitimate contractual dispute; it requires some impropriety, dishonesty or deceit, which would include instances where the demand can be said to be untrue or false, without justification, or made where it is apparent that there is no right of payment: *Royal Bank v. Gentra Canada Investments Inc.* (2001), 2001 CanLII 6996 (ON CA), 147 O.A.C. 96 (C.A.), at para. 8; *Cineplex Odeon Corp. v. 100 Bloor West General Partner Inc.*, [1993] O.J. No. 112 (Gen. Div.), at paras. 31-32; McGuinness, at §17.343.

[19] The threshold on an injunction to prohibit payment is the higher standard under the *RJR Macdonald* test: a strong *prima facie* case. Strong *prima facie* case means more likely than not to succeed at trial. This single criterion, in the highly specialized field of documentary credit, subsumes all three normal criteria for the issuance of an interlocutory injunction. If a strong prima facie case of fraud is made out by the applicant: 1) there is a prima facie right to obtain an injunction; 2) there is irreparable harm (as the credit is drawn upon by what appears to be a fraudulent act on the part of the beneficiary, hence the recovery of the sum from such party is certainly problematic) and 3) the balance of inconvenience in such a situation favors the issuance of the injunction: *SNC-Lavalin Polska SP. Zoo c. BNP Paris Canada*, 2017 QCCS 3694 at paras. 23-24.

[20] I am satisfied on the evidence that, for the purposes of an *interim* interlocutory order, the fraud exception has been met.

[21] The LoC authorized a draw upon presentation of the following two documents:

1. BENEFICIARY'S CERTIFICATE ON ITS LETTERHEAD, COMPLETED, DATED AND PURPORTEDLY SIGNED BY AN AUTHORIZED INDIVIDUAL STATING: "THE TENANT SIERRA REALTY CALGARY CORPORATION HAS FAILED TO FULFILL ITS OBLIGATIONS PURSUANT TO THE LEASE AGREEMENT ENTERED INTO BETWEEN SIERRA REALTY CALGARY CORPORATION AS TENANT AND SIERRA WINDS BUSINESS PARK INC., AS LANDLORD FOR THE LEASE PREMISES DESCRIBED AS PLAN 1910413 BLOCK 1 LOT 1 DATED MARCH 10, 2023, AS MAY BE AMENDED, SUPPLEMENTED OR RESTATED FROM TIME TO TIME. THEREFORE, WE ARE DRAWING FOR CAD……., UNDER LETTER OF CREDIT NO BMTO697221OS. PLEASE WIRE PROCEEDS TO: ……"

2. THE ORIGINAL OF THIS STANDBY LETTER OF CREDIT FOR OUR ENDORSEMENT AND WILL BE RETURNED TO YOU UNLESS FULLY EXHAUSTED.

[22] The applicants say that both of these requirements are manifestly not met in this case, and that Woolsey's purported demand for payment of just under $1.5 million is an abuse of the

principle of letter of credit autonomy that falls within the ambit of fraud (as described in the case law cited above).

[23] This is not a case where the parties dispute the intricacies of a particular provision of a lease that has been governing their relationship for many years, where a landlord has been holding possession of a letter of credit to be used in the event of a default by its tenant. The circumstances here are quite to the contrary. Sierra Realty never took possession of the premises. No building was ever built. No rent ever became payable. The lease agreement, on its face, never commenced. The lease agreement provides that it does not commence *until the later of* (a) April 1, 2024; (b) the day following Substantial Completion Date for the entire Building (or the date that Substantial Completion would have occurred but for Tenant Delay(s)); and (c) the expiry of the last running Fixturing Period. None of these events have ever occurred. The "term" of the lease never commenced. This was obviously known to SWBP/Woolsey.

[24] Paragraph 6 of the lease agreement makes it clear that the LoC is in relation to a security deposit equal to two months' rent. The security deposit (or LoC) was to be provided "within 30 days following mutual execution of this lease". It is clear this was not done, nor is there any evidence that SWBP ever asked, demanded or required that it be done.

[25] Further, on the available evidence the parties agreed to terminate the lease agreement by mutual consent or before February 28, 2024. In any event, Sierra Realty disclaimed the lease agreement with SWBP effective July 5, 2024. This disclaimer was approved by the Monitor and by the Court and made effective, without objection at the time or at any time subsequently from SWBP, on July 5, 2024.

[26] The evidence also supports the conclusion that: a) SWBP did not know about the existence of the LoC until BMO issued the notice of non-renewal; and, b) SWBP never had an original of the LoC at all, and never had a copy of the LoC until one was provided to it by the Bank in October or November of this year.

[27] The conduct of the purported beneficiary also supports the conclusion that it had no right, and knew it had no right, to payment under the LoC. Assuming, for purposes of this motion, that Woolsey is the legitimate successor in right to SWBP, it waited until the expiry date of the LoC to make its amended draw request. At no time, since March 2023, when the lease agreement was signed, until it was advised of the existence of the LoC by the Bank, did it request, confirmation that there was a LoC, the original or a copy of the LoC, or payment under the LoC. The evidence shows that there was a potential claim for pre-build planning costs, but this was never, prior to the Bank issuing the notice of non-renewal, advanced as a claim covered by the security deposit mechanism of the lease agreement/LoC.

[28] There is more than sufficient evidence to conclude that a strong *prima facie* case has been made out by the applicants. An order preserving the status quo to permit the parties to

present their respective arguments on a full record before any funds are dissipated is wholly appropriate in the circumstances.

[29] Even if the requirements for irreparable harm and balance of convenience were applicable, I would have no hesitation in concluding that they are met here. The applicants are insolvent and in CCAA proceedings. Woolsey is but one of many creditors. If almost $1.5 million is removed from the assets of the applicants to pay Woolsey today, there is no assurance it will be still be available at the end of a lengthy course of litigation over entitlement after the fact. Even more importantly, the cost of recovery will necessarily be borne by the applicants' estate and will have a significant and detrimental impact on recoveries for the creditors generally. The balance of convenience, on the evidence before me, clearly favours protecting and preserving the LoC funds until relative entitlements can be determined on a proper record.

The Production Order

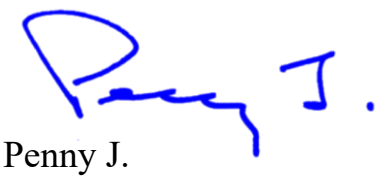
[30] The Bank has, to date, declined to produce its communications with Woolsey/SWBP. The draft order requesting production of these communications is possibly overly broad, at least in the context of this motion for an interlocutory injunction. I do agree with the applicants, however, that the Bank's communication with the purported beneficiary under the LoC, in so far as they relate to the beneficiary's knowledge and possession an original and/or copy of the LOC and the beneficiary's purported exercise of a right to draw on the LoC, are highly relevant to the present dispute and not covered by any privilege. Those communications shall be produced as part of the timetable for the scheduling of the motion for an interlocutory injunction that will take place on a date convenient to the parties and on a full record.

Conclusion

[31] For these reasons, an order shall issue prohibiting the Bank from making any payment under the LoC until further order of this court. An order shall also issue requiring the Bank to produce all communications with Woolsey/SWBP concerning the notice of non-renewal of the LoC, the LoC itself and the named beneficiary's purported exercise of a right to payment under the LoC.

Costs

[32] Costs are reserved to the hearing of the main motion.



Penny J.