

CITATION: 713949 Ontario Limited v Hudson's Bay Company ULC,
2021 ONSC 621
COURT FILE NO.: CV-21-654610
DATE: 20210125

ONTARIO SUPERIOR COURT OF JUSTICE

RE: 713949 Ontario Limited, Applicant
-and-
Hudson's Bay Company ULC, Respondent

BEFORE: F.L. Myers J.

COUNSEL: Gasper Galati, for the applicant
Jonathan Lisus and James Renihan, for the respondent

HEARD: January 25, 2021

CASE CONFERENCE ENDORSEMENT

- [1] The applicant is the landlord of the Saint Laurent mall in Ottawa. The respondent is a tenant.
- [2] The applicant has for some time been negotiating a 134,000 square foot lease to a tenant who use proposes to use the space as a call centre.
- [3] The respondent asserts that it has a consent right over the proposed lease and it objects to the loss of retail space in the mall.
- [4] On January 19, 2021, counsel attended Civil Practice Court. The applicant advised that it had just entered into a lease with a conditional period expiring February 1, 2021 to allow it to deal with the respondent. The brief period was required by the applicant to let it try to obtain a court order supporting its position that the respondent has no consent right or that, even if it has a consent right, it is not exercising its right reasonably in this circumstance.
- [5] The applicant must have been preparing its material while it was negotiating as it delivered expert evidence with its application. The expert apparently gives evidence to the effect that the change of retail to call centre space will not hurt the mall's other tenants' businesses.

- [6] The respondent's counsel submitted at CPC that it had been left too little time to prepare its case.
- [7] At CPC I set an urgent tentative schedule returnable January 29, 2021. I noted that this left the judge very little time to consider and write a decision before the February 1, 2021 deadline. I included in the schedule a case conference for today to allow the court to assess the parties' state of preparedness.
- [8] This morning, counsel for the respondent advised that they expected to deliver their material for the motion, including their own expert evidence, today. However, Mr Lisus indicated that he is not available on January 29, 2021 as he is already scheduled to argue a proceeding before a different judge of this court on that day.
- [9] Mr Galati urges the court to proceed on January 29, 2021 so that his client can know its legal rights prior to the date on which it is required to exercise its condition. The court makes efforts to accommodate business transactions and recognizes real time schedules.
- [10] On the other hand, it is apparent that the applicant knew that it wanted to come to court and it was incumbent upon it to leave sufficient time for the respondent to respond and for the court to deal with the matter. True urgency will always be accommodated. Voluntarily undertaken deadlines perhaps less so.
- [11] This afternoon, I inquired if the parties were able and willing to argue the application on Saturday January 30, 2021. This would leave the judge in a very difficult situation particularly if he or she has heard conflicting expert evidence on the reasonableness of the respondent's concern about the change of use of retail premises in the mall.
- [12] Mr Galati indicated that he would make himself available. Mr. Lisus advised that arguing on the weekend was not his preferred outcome. He notes that while his firm has conducted a fair bit of work during the pandemic on weekends and evenings, they have "been encouraged to be alive to the effects of doing so on younger members of the team who have childcare commitments etc." He also advised that in light of the complexity of the matter that he was arguing the day before, he would be left with too little time to prepare for argument if it is to be heard the next day.

- [13] I raised in CPC and Mr Lisus raised again today the fact that if unsuccessful, the respondent may appeal the outcome. That is, even on its own schedule, the applicant is not assured of receiving an answer prior to the exercise date of its condition. Mr Galati advised that his client may be prepared to exercise the condition with a decision at first instance and take the risk of an adverse outcome on appeal.
- [14] I appreciate the applicant's desire to have a more definitive view on the respondent's rights prior to making its decision under the condition. However, as Mr Galati's submission laid bare, all contractual negotiations involve a balancing of risks and benefits. Apparently, the applicant is prepared to make a determination with a decision of a judge even though that decision may not be the final word. That position represents its risk tolerance. It is a perfectly appropriate balancing decision for it to make in its own self interest.
- [15] However, recognizing that there is no objective urgency but, a landlord seeking to narrow its risk profile on an upcoming decision, leaves me less concerned about prejudice to the landlord in considering granting the adjournment sought by Mr Lisus. There is nothing untoward about a commercial party seeking to lessen its risk by obtaining a ruling on its legal rights. However, absent objective urgency, it is incumbent upon it to bring a proceeding that is fair to the responding party and to the court.
- [16] The court takes very seriously issues of health and wellness of practitioners, members of the judiciary, and court staff during the pandemic in particular. While lawyers and the courts are in a service business, there has to be a brake applied to service providers' willingness to compete themselves (or their juniors) into unhealthy states in the ordinary course of business. Recognizing that young counsel and staff may have other responsibilities or just need down time does not impair access to justice provided that everyone understands the need to make personal sacrifices when truly urgent circumstances arise.
- [17] I do not know if the applicant will be able to arrange an extension of its conditional period or if it will waive the condition even without a court ruling by February 1, 2021. No doubt there will be a cost either way – either in money or increased risk. If it cannot find its way to save its deal with a short adjournment to accommodate counsel and the court, then perhaps it was not to be.

- [18] In my view, it is in the interest of justice to ensure that the respondent has counsel of its choice available for the motion and not to schedule the motion to squeeze the judge, court staff, and juniors on both sides unnecessarily. Absent urgency that was not voluntarily assumed, I find it to be in the interests of justice to grant the adjournment sought.
- [19] The application scheduled for January 29, 2021 is adjourned to February 4, 2021 for three hours.

F.L. Myers J.

Date: January 25, 2021