CITATION: SpaceBridge Inc. v. Baylin Technologies Inc., 2023 ONSC 4146
COURT FILE NO.: CV-22-00689420-00CL
DATE: 20230713

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: SPACEBRIDGE INC. (formerly ADVANTECH WIRELESS INC.), ADVANTECH AMT CORP., ADVANTECH WIRELESS DO BRASIL PRODUTOS DE TELECOMUNICAÇÕES LTDA. and ADVANTECH WIRELESS (EMEA) LTD., Applicants

AND:

BAYLIN TECHNOLOGIES INC., ADVANTECH WIRELESS TECHNOLOGIES INC. (formerly BAYLIN TECHNOLOGIES HOLDINGS CANADA INC.), ADVANTECH WIRELESS TECHNOLOGIES (USA) INC. (formerly BAYLIN TECHNOLOGIES (USA) INC.), and ADVANTECH WIRELESS TECHNOLOGIES (EMEA) LIMITED (formerly BAYLIN TECHNOLOGIES (EMEA) LIMITED), Respondents

BEFORE: KIMMEL J.

COUNSEL: *Todd J. Burke and James Plotkin*, for the Applicants

Steve J. Tenai and Simon Dugas, for the Respondents

HEARD: May 29, 2023

ENDORSEMENT – SUPPLIER INDEMNIFICATION CLAIM ESCROW DISPUTE

[1] The applicants (collectively, "SpaceBridge") seek various alternative declarations. Granting any declaration would mean that Davies Ward Phillips & Vineberg LLP ("Davies") should not have paid out $1,826,512 (the "Indemnity Claim Amount") to the respondents (collectively, "Baylin") while acting as escrow agent (the "Escrow Agent"). Davies paid out the Indemnity Claim Amount in respect of an indemnity claim dated August 27, 2018 relating to alleged misrepresentations about suppliers (the "Supplier Indemnity Claim") that Baylin made under the parties' asset purchase agreement dated January 17, 2018 (the "APA") and related escrow agreement also dated January 17, 2018 (the "Escrow Agreement"). The applicants seek an order, predicated on the court granting one of the requested declarations, for the return of the Indemnity Claim Amount to the current escrow agent.

[2] Baylin contends that the Indemnity Claim Amount was properly paid out of escrow after SpaceBridge failed to deliver a timely notice of objection to Baylin's Supplier Indemnity Claim under the Escrow Agreement.

[3] This application turns upon the interpretation of the contractual notice provisions in the APA and the Escrow Agreement.

[4] For the reasons that follow, the application is granted on the terms outlined at the end of this endorsement.

Factual Context

[5] There are some basic and uncontroverted facts.

The APA and Escrow Agreement

[6] The APA involved the sale of SpaceBridge's radio frequency, terrestrial microwave and antenna equipment and services business to Baylin for $49 million, subject to post-closing adjustments.

[7] Under s. 8 of the APA, the parties contractually agreed to indemnify one another for, among other things, all damages relating to inaccuracies in representations made in the APA. The APA sets out a procedure for making indemnification claims.

[8] The APA provided that the Escrow Agent would hold $5.9 million of the purchase price in trust (the "Escrow Fund"). $1 million was to cover any working capital adjustments, if in Baylin's favour. The remaining $4.9 million was earmarked for damages arising from Indemnity Claims (as defined in the APA) related to, among other things, breaches of representations and warranties under the APA.

The Specific Contractual Provisions at Issue

[9] Section 8 of the APA sets out a procedure for making indemnification claims. Pursuant to s. 8.4, an Indemnity Claim (as defined therein) is to be made by way of written notice setting out the facts and the provisions allegedly breached:

> If the Purchaser Indemnified Parties or the Vendor Indemnified Parties, as the case may be, (the "Indemnified Party") claim that the Indemnified Party has suffered Damages for which it is entitled to indemnification hereunder, it will deliver to the other Party or Parties (the "Indemnifying Party") a written notice (an "Indemnity Claim") describing the facts alleged as the basis for such claim and the section or sections of this Agreement alleged to have been violated and the estimated total dollar amount of the Damages claimed. Where the Indemnity Claim arises as a result of a Third Party Claim made against the Indemnified Party, the provisions of Section 8.7 hereof shall apply.

[10] Section 8 of the APA contains various other provisions, including limitations on indemnities (s. 8.6.), the procedure for third party claims (s. 8.7) and set off rights (s. 8.8).

[11] The APA contains a provision setting out how notice is to be given, and when it is deemed effective (s. 10.3):

> 10.3 Notices
>
> (a) Any notice, designation, communication, request, demand or other document, required or permitted to be given or sent or delivered hereunder to any party hereto shall be in writing and shall be sufficiently given or sent or delivered if it is:
>
> (i) delivered personally to an officer or director of such party;
>
> (ii) sent to the party entitled to receive it by registered mail, postage prepaid, mailed in Canada; or
>
> (iii) sent by electronic mail.
>
> …
>
> (c) Any notice, designation, communication, request, demand or other document given or sent or delivered as aforesaid shall:
>
> (i) if delivered as aforesaid, be deemed to have been given, sent, delivered and received on the date of delivery;
>
> (ii) if sent by mail as aforesaid, be deemed to have been given, sent, delivered and received on the fifth (5^{th}) Business Day following the date of mailing, unless at any time between the date of mailing and the fifth (5^{th}) Business Day thereafter there is a discontinuance or interruption of regular postal service, whether due to strike or lockout or work slowdown, affecting postal service at the point of dispatch or delivery or any intermediate point, in which case the same shall be deemed to have been given, sent, delivered and received in the ordinary course of the mails, allowing for such discontinuance or interruption of regular postal service, and
>
> (iii) if sent by electronic mail, be deemed to have been given, sent, delivered and received on the day the sender has or receives confirmation of receipt by return electronic mail from the recipient.

[12] Pursuant to s. 8.9 of the APA, amounts payable by SpaceBridge for an Indemnity Claim under the APA are first to be paid from the Escrow Fund to the extent there are available funds sufficient to pay the amount of any such claim.

[13] The Escrow Agreement governs any payment out of the Escrow Fund in respect of an Indemnity Claim. Specifically, pursuant to s. 4.1(c)(1), a party seeking indemnification is required to deliver a certificate (the "Claim Certificate") to the Escrow Agent and simultaneously to the party against whom the claim is made setting out the particulars of the claim.

[14] The Indemnifying Party (as defined in s. 8 of the APA) against whom the Indemnity Claim is made must then deliver a certificate to the Escrow Agent setting out the amount disputed and the nature and basis for objecting to the claim pursuant to s. 4.1(c)(2)(i) of the Escrow Agreement (the "Objection Certificate"). If the Indemnifying Party fails to deliver an Objection Certificate to the Escrow Agent within 30 days after the delivery of a Claim Certificate in accordance with the Escrow Agreement's notice provision (set out below), then the Indemnifying Party is deemed to have accepted the correctness of the indemnification claim and the Escrow Agent must release the amount claimed: see Escrow Agreement, s. 4.1(c)(3)(i).

[15] The Escrow Agreement contains a provision setting out how notice is to be given and when it is deemed effective:

7.9 Notices

> All notices, requests, demands or other communications required or permitted to be given by any party to another under this Agreement shall be given in writing and delivered by personal delivery or delivery by recognized national courier or sent by email addressed as follows:
>
> …
>
> or at such other address or email of which the addressee may from time to time may notify the addressor. Any notice delivered by personal delivery or by courier to the party to whom it is addressed as provided above shall be deemed to have been given and received on the day it is so delivered at such address. Any notice transmitted by email shall be deemed to have been given and received on the day in which it is sent. If such day is not a business day or if the email is sent after normal business hours, it will be deemed to have been given or received on the first business day following its transmission. [Emphasis added.]

Indemnity Claims

[16] Since the APA closed, Baylin has made several Indemnity Claims. Davies is not only the appointed Escrow Agent, but was, at closing and thereafter, acting as counsel to SpaceBridge. Davies represented SpaceBridge in connection with post-closing matters, including the Indemnity Claims made by Baylin. The first two of such claims were made on July 27, 2018 (regarding receivables) and August 9, 2018 (regarding claims in excess of $7 million in respect of inventory, pay equity and software representations).

[17] The Claim Certificates for these first two Indemnity Claims were delivered to both the Escrow Agent and to SpaceBridge by email. SpaceBridge's Objection Certificates to both claims were delivered within the 30-day response period under the Escrow Agreement.

[18] Baylin sent the Claim Certificate in respect of the Supplier Indemnity Claim (its third Indemnity Claim under the APA) to both the Escrow Agent and SpaceBridge by registered mail overnight on August 29, 2018. I was not directed to any evidence that explained why the Claim Certificate for the Supplier Indemnity Claim was not delivered by email like the Claim Certificates for the previous Indemnity Claims and instead delivered by registered mail.

[19] This Supplier Indemnity Claim alleges that SpaceBridge ceased or delayed making full payments to numerous suppliers prior to the APA closing. Specifically, Baylin claims that SpaceBridge's decision to stretch payments to key suppliers well beyond their payment terms resulted in post-closing delays, onerous payment terms, threatened litigation by suppliers and corresponding production delays that necessitated cash injections totaling $1,826,512 (the Indemnity Claim Amount). Baylin sought payment from the Escrow Fund for the Indemnity Claim Amount.

[20] Davies forwarded the Claim Certificate for the Supplier Indemnity Claim to SpaceBridge on August 31, 2018. During a brief discussion between SpaceBridge representatives and Davies that afternoon, Spacebridge instructed Davies to prepare an objection to the Supplier Indemnity Claim. SpaceBridge's Chief Financial Officer followed up on September 12, 2018 with a detailed email and attachments setting out the basis for the objection, including that the suppliers had been paid prior to closing in a manner consistent with past practice. Davies drafted an Objection Certificate for SpaceBridge but did not send the draft to SpaceBridge for its sign off and certification by an authorized signatory.

[21] Davies and SpaceBridge met numerous times between September 12, 2018 and October 1, 2018 about other disputes arising from the APA, but not about the Supplier Indemnity Claim and not about SpaceBridge's intended objection to it. SpaceBridge was familiar with the 30-day objection period having dealt with prior Indemnity Claims.

[22] Davies had a brief call with counsel for Baylin on Tuesday, September 18, 2018 during which it was communicated that SpaceBridge was objecting to the Supplier Indemnity Claim. However, the Objection Certificate was not delivered until two weeks later.

[23] On October 2, 2018, counsel for Baylin wrote to the Escrow Agent indicating that, having not objected within the 30 days following the delivery of the Claim Certificate in respect of the Supplier Indemnity Claim, SpaceBridge was deemed to have accepted that claim. Accordingly, Baylin requested that the Indemnity Claim Amount be paid out of the Escrow Fund.

[24] In its capacity as counsel for SpaceBridge, Davies forwarded the finalized Objection Certificate to SpaceBridge within two and a half hours of receiving the demand on the Escrow Fund. The Objection Certificate was signed by a duly authorized representative of SpaceBridge and sent by email to Davies, as Escrow Agent, less than an hour later, at 5:23 p.m. on Tuesday, October 2, 2018. A copy was sent to Baylin by email.

[25] Baylin did not accept that the Objection Certificate had been delivered within the required 30-day period under the Escrow Agreement. On October 4, 2018, Baylin demanded that the Escrow Agent release the full Indemnity Claim Amount.

[26] On October 10, 2018, in its capacity as the Escrow Agent, Davies released the Indemnity Claim Amount to Baylin. Davies, in its capacity as counsel to SpaceBridge, sent an email to Baylin's counsel the following day, on October 11, 2018, to advise that the Indemnity Claim Amount was paid "without prejudice to any and all rights of [SpaceBridge] in respect of same, including their rights to reclaim such amounts from [Baylin]." In the context of this dispute, this has been characterized as a reservation of rights on behalf of SpaceBridge.

[27] Baylin's response to this was that SpaceBridge had no rights to reserve, among other things.

[28] Baylin claims that it did not understand the reservation of rights to be a threat of legal action. Baylin was not told specifically that SpaceBridge intended to commence a proceeding to reclaim the Indemnity Claim Amount.

[29] Baylin released its quarterly financial statements for the period ending September 30, 2018 in late October. Those financial statements reflect that the Indemnity Claim Amount was received and applied against Baylin's general and administrative costs in that quarter. Baylin's 2018 year-end financial statements released in 2019 referred to SpaceBridge's reservation of rights in respect of the Indemnity Claim Amount; however, it did not refer to the application itself, which had been issued already, as described in the next section of this endorsement.

The Application

[30] This application was commenced on December 6, 2018 seeking the return of the Indemnity Claim Amount to the Escrow Agent and two declarations, that SpaceBridge: (i) was entitled to relief from forfeiture in respect of same; and (ii) had substantially complied with the notice requirement under the Escrow Agreement when the Objection Certificate was delivered.

[31] Davies was initially representing SpaceBridge in this application. However, Davies is no longer acting. SpaceBridge commenced a separate proceeding in the Superior Court of Québec for damages against Davies resulting from Davies' "failure to properly advise the [Applicants] in respect of a claim by Baylin and failure to act on their behalf in a timely manner with respect to the dispute of an indemnity claim made by Baylin, which resulted in a loss incurred by [the Applicants] in the amount of $1,826,512". That Québec action has been stayed.

[32] The notice of application in this matter (the "Notice of Application") was subsequently amended on June 15, 2022 (the "Amended Notice of Application") after new counsel (the current counsel) went on record for SpaceBridge. The Amended Notice of Application seeks the same two declarations as originally pleaded and the same ancillary relief for the return of the Indemnity Claim Amount to a new escrow agent (who replaced Davies), but also seeks a third declaration that Baylin failed to comply with the notice requirements under the Escrow Agreement when it

delivered the Claim Certificate in respect of the Supplier Indemnity Claim, such that the Supplier Indemnity Claim is invalid.

Claim and Objection Timeline

[33] It is uncontroverted that:

a. The Claim Certificate and written notice of the Supplier Indemnity Claim were sent by Baylin by overnight registered mail to the Escrow Agent and to SpaceBridge on Wednesday, August 29, 2018.

b. Notice by registered mail is expressly provided for under the APA, which deems the receipt of notice given by that means to be five days. Five days after Wednesday, August 29, 2018 was Monday, September 3, 2018.

c. The Claim Certificate and Supplier Indemnity Claim were actually received by the Escrow Agent and SpaceBridge on Thursday, August 30, 2018.

d. Copies of the Claim Certificate and Supplier Indemnity Claim were also forwarded to SpaceBridge by email from Davies on August 31, 2018.

e. SpaceBridge's Objection Certificate was sent by email to Baylin on Tuesday, October 2, 2018 at 5:23 p.m.

f. Thirty days after Wednesday August 29, 2018 (the date of mailing of the Claim Certificate to SpaceBridge) was Friday, September 28, 2018.

g. Thirty days after Thursday, August 30, 2018 (the first date of actual receipt of the Claim Certificate by SpaceBridge) was Saturday, September 29, 2018.

h. Baylin's counsel advised SpaceBridge's counsel that the 30-day response period had lapsed on Tuesday, October 2, 2018.

i. SpaceBridge delivered its Objection Certificate on Tuesday, October 2, 2018.

j. Thirty days after Monday, September 3, 2018 (the date of deemed receipt under the APA notice provisions) was Wednesday, October 3, 2018.

Issues and Analysis

The Issues to be Decided

[34] The following issues are raised:

a. Did Baylin validly deliver its notice of indemnity and Claim Certificate in respect of the Supplier Indemnity Claim?

i. Is SpaceBridge barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B from arguing that the Claim Certificate in respect of the Supplier Indemnity Claim was not validly delivered under the Escrow Agreement?

ii. Is SpaceBridge estopped from arguing that the Claim Certificate in respect of the Supplier Indemnity Claim was not validly delivered under the Escrow Agreement?

iii. If the Claim Certificate was not validly delivered under the Escrow Agreement, can Baylin still pursue a claim for indemnification in respect of the Supplier Indemnity Claim under the APA?

b. If Baylin did validly deliver the Claim Certificate in respect of the Supplier Indemnity Claim, was SpaceBridge's Objection Certificate timely?

c. If Baylin's Claim Certificate in respect of the Supplier Indemnity Claim was validly delivered and SpaceBridge's Objection Certificate was not timely, should SpaceBridge nonetheless be granted relief from forfeiture?

Analysis

a) Was Baylin's Claim Certificate in Respect of the Supplier Indemnity Claim Validly Delivered?

[35] The notice provisions under the APA and the Escrow Agreement are not identical. Most significant for purposes of this application is the fact that, under the APA, registered mail was one of the specified modes of giving notice whereas registered mail was not expressly specified as a mode of giving notice under the Escrow Agreement. The Supplier Indemnity Claim was delivered by registered mail sent on Wednesday, August 29, 2018.

[36] The APA and the Escrow Agreement were signed at the same time, along with various other interrelated agreements. The applicants contend that the court must give meaning and effect to the different notice provisions contained in these contemporaneously signed and related contracts. Related contracts should be read together. Where parties conclude multiple agreements pertaining to one complex transaction, the different agreements' terms inform the overall interpretation exercise: see *Salah v. Timothy's Coffees of the World Inc*., 2010 ONCA 673, 74 B.L.R. (4th) 161, at para. 16. The Escrow Agreement and the APA are contemporaneous, intimately related agreements.

[37] The Escrow Agreement's notice provision states that any notice "shall be given in writing and delivered by personal delivery or delivery by recognized national courier or email." It does not contemplate delivery by mail (registered or otherwise).

[38] In contrast, the APA does contemplate notice delivered by registered mail: "[a]ny notice … delivered hereunder to any party hereto shall be in writing and shall be sufficiently given or sent or

delivered if it is: (i) delivered personally to an officer or director …; (ii) sent … by registered mail …; or (iii) sent by electronic mail" (emphasis added).

[39] In *Ross v. T. Eaton Co*. (1992), 11 O.R. (3d) 115 (C.A.), at paras. 26-29, the Court of Appeal for Ontario held that where the words "sufficiently given" precede a list of notice modalities, the list is non-exhaustive. Relying in part on *Ross*, the Alberta Court of Queen's Bench found that a notice provision that omitted this language exhaustively listed the permitted notice modalities: see *Brewster v. 994620 Alberta Ltd.*, 2007 ABQB 264, at paras. 16-20.

[40] The applicants argue that the absence of any mention of delivery by registered mail in the Escrow Agreement, and the absence of the words "sufficiently given" foreclose registered mail as an acceptable mode of delivery of notice under the Escrow Agreement. They say this difference of wording between the notice provisions in the APA (which, in contrast, contain the words "shall be sufficiently given" and do include registered mail as one of the notice modalities) and the Escrow Agreement drafted by lawyers representing sophisticated parties, is material.

[41] The applicants argue that the notice provision in the Escrow Agreement, a contract related to but separate from the APA, would be wholly redundant if the parties could simply rely on the APA's notice provisions, and further argue that this could not have been the parties' intent. Where the parties intended the APA notice provisions to apply in another related agreement, they expressly said so. For example, the Transition Services Agreement (the "TSA"), another agreement signed in connection with this transaction, states in s. 14.2, entitled "Notices", that any notice is "sufficiently given if delivered or transmitted in accordance with Section 10.3" of the APA.

[42] I agree with the applicants that the parties' decision to incorporate the APA's notice provision into the TSA, but not the Escrow Agreement, demonstrates an objective intent to deal with notice differently for purposes of the delivery of a Claim Certificate under the Escrow Agreement. Since the delivery of a Claim Certificate in respect of an Indemnity Claim is what triggers a 30-day response period under the Escrow Agreement and there can be serious consequences for not responding within that period, the requirement in the Escrow Agreement that the notices be delivered by modalities that are considered to be reliable and efficient makes good commercial sense.

[43] Only Canada Post delivers registered mail. Canada Post is not a courier, which the Court of Appeal for Ontario and other courts have recognized: see *Cathcart Inspection Services Ltd. v. Purolator Courier Ltd*. (1982), 39 O.R. (2d) 656 (C.A.). Even though the factual context was different in *Cathcart*, I find that registered mail is not, on any commercially reasonable and objective reading of the Escrow Agreement, equivalent to or an example of a recognized national courier service.

[44] Further, even if the Escrow Agreement's three specified delivery modalities are not exhaustive, registered mail is still excluded. Where a contract provides a non-exhaustive list of delivery modalities, another method is acceptable only when it is "no less advantageous" as the listed modalities and notice is actually received: *Ross*, at para. 21, citing *Manchester Diocesan*

Council for Education v. Commercial & General Investments Ltd., [1970] 1 W.L.R. 241 (E.W. H.C.), at p. 245. The court in *Ross* was clear that actual receipt alone is insufficient to satisfy a notice requirement by a modality that is not specified in the agreement. The analysis of the relative advantages of the delivery modalities is an assessment of the objective qualities of the speed, security and reliability of the delivery service, and is not based on the timing of actual receipt in the particular case.

[45] Courts have concluded when interpreting other contracts that a courier was considered to be a more reliable and secure delivery modality than registered mail: see *Cathcart*, at para. 7; *Nova Scotia, Province of v. Weymouth Sea Products Limited (Defendants) and Commercial Credit Corporation Limited (Third Party Intervenor)* (1983), 59 N.S.R. (2d) 181 (S.C.), at para. 31; *Trendsetter Developments Ltd. v. Sharpley*, 1990 CarswellOnt 2189 (H.C.), at para. 23.

[46] What is objectively more reliable (or no less advantageous) in a given case must be determined based on its particular contract and circumstances. The parties' own assessment of registered mail as an inferior modality of service in this case is reflected in the APA's deeming provisions regarding notice by mail, deemed to be received five business days after mailing in the normal course, which period is extended indefinitely in the case of a "discontinuance, or interruption of regular postal service, whether due to strike, or lockout or work slowdown": APA, s. 10.3(d)(ii). These caveats are not contained in either of the prescribed notice modalities under the Escrow Agreement. This recognized potential for delays, or for discontinuance or interruption in the delivery service altogether due to labour disputes, is an objective manifestation of the assessment that registered mail was considered by the parties to be an inferior modality for delivery of notice in this case.

[47] Baylin suggests that couriers could unionize and be subject to the same potential for delays, discontinuances and/or interruptions in service. However, that theoretical concern was not reflected in the agreement in this case. The notice provisions in the APA, Escrow Agreement and TSA can be reconciled and objectively understood as distinguishing between delivery by registered mail and courier, with registered mail being considered to be an inferior modality of delivery in this case.

[48] If the parties had intended for the same notice provisions to apply under both the APA and the Escrow Agreement, they would have said so. I find that delivery of notice by registered mail was not a permitted modality of delivery under the Escrow Agreement under either approach, whether it was a closed list that did not provide for delivery by registered mail, or an open list but registered mail being " less advantageous" than the listed modalities.

[49] This contract interpretation analysis must be approached from an objective perspective. The fact that the Claim Certificate and Supplier Indemnity Claim in fact did come to the attention of SpaceBridge and the Escrow Agent more than 30 days prior to the delivery of the Objection Certificate is not the determinative consideration in the objective exercise of interpreting the APA and Escrow Agreement notice provisions in this case.

[50] Actual receipt of the Claim Certificate in respect of the Supplier Indemnity Claim might have been relevant to the relief from forfeiture analysis if the court had been required to engage in such an analysis. However, the decision on the contract interpretation point has dictated the outcome in this case rendering it unnecessary to go through the complete relief from forfeiture analysis, as discussed later in this endorsement.

[51] I find that Baylin's Claim Certificate in respect of the Supplier Indemnity Claim was not validly delivered under the Escrow Agreement when sent by registered mail on Wednesday, August 29, 2018. That means that the Objection Certificate was not late because the 30-day objection period under the Escrow Agreement was never triggered. Without having delivered a valid Claim Certificate, Baylin had no right to demand that the Indemnity Claim Amount be paid out to it by the Escrow Agent. Therefore, Baylin must repay the Indemnity Claim Amount to the new escrow agent.

[52] I do not consider this to be a harsh or unfair outcome for Baylin, if that is even a relevant consideration. I was not presented with a cogent reason for why the Claim Certificate in respect of the Supplier Indemnity Claim was delivered by registered mail instead of by email as Baylin's two previous Indemnity Claims were. At the very least, the choice of this delivery method created ambiguity about the effective delivery date, which is exactly what commercial parties dealing with post-closing claims would be seeking to avoid. This outcome simply holds Baylin to what they are contending for in this application, namely, strict adherence to the contractual notice provisions under the Escrow Agreement.

i) Is SpaceBridge Barred by the Limitations Act from Arguing that the Claim Certificate in Respect of the Supplier Indemnity Claim Was Not Validly Delivered?

[53] The declaration sought by the applicants, that the Supplier Indemnity Claim was not validly delivered, was added to the Amended Notice of Application in June 2022.

[54] Baylin complains that, for more than three and a half years, SpaceBridge never challenged that delivery as being contrary to the Escrow Agreement. It contends that it is now too late to raise a new claim of invalidity as the two-year limitation period for asserting consequential declaratory relief has lapsed.

[55] Section 16(1)(a) of the *Limitation Act, 2002*, provides that there is no limitation period in respect of a proceeding for a declaration if no consequential relief is sought. The only amendment to the Notice of Application was to add a new declaration.

[56] Insofar as consequential relief is being sought (requiring Baylin to repay the Indemnity Claim Amount to the current escrow agent), it has not changed since the application was issued (well within the two-year limitation period). Repayment of the Indemnity Claim Amount was always part of the relief sought in the Notice of Application since it was issued in December 2018. The facts upon which it is based have also remained the same, in support of all three declarations now sought in the Amended Notice of Application. All that changed when the Notice of Application was amended is that a new declaration was sought that supported the same outcome based on the same facts, just based on an alternative legal theory.

[57] An amendment to a notice of application is not statute-barred if the new grounds flow from facts contained in "affidavit materials" filed within the limitation period: *1100997 Ontario Limited v. North Elgin Centre Inc.*, 2016 ONCA 848, 409 D.L.R. (4th) 382, at paras. 15-17, citing *Energy Probe v. Canada (Attorney General)* (1989), 68 O.R. (2d) 449 (C.A.), leave to appeal refused, 37 O.A.C. 160 (S.C.C.A.). All facts SpaceBridge relies upon to argue the invalidity of the Claim Certificate for the Supplier Indemnity Claim, which are the same facts relied upon to argue that the Objection Certificate was timely, are in the grounds for the application as originally stated and are contained in the original affidavit materials sworn in November 2018 in support of this application.

[58] There is no evidence that new or different witnesses with new or different information have been lost because of the passage of time. Consistent with this, I was not made aware of any objection raised at the time that the amendment was made that it should not be permitted because it was statute barred.

[59] There is no limitation bar to the added declaration in the Amended Notice of Application regarding the invalidity of the Claim Certificate in respect of the Supplier Indemnity Claim under the Escrow Agreement.

ii) Is SpaceBridge Estopped from Arguing that the Claim Certificate in Respect of the Supplier Indemnity Claim Was Not Validly Delivered?

[60] Baylin argues that it was implied by the declaratory relief originally sought and in SpaceBridge's claim against Davies before the Superior Court of Québec, which were predicated on the Objection Certificate for the Supplier Indemnity Claim having been delivered late, that SpaceBridge admitted that the Claim Certificate in respect of the Supplier Indemnity Claim had been validly delivered. SpaceBridge was represented by experienced legal counsel at two major law firms and did not raise the argument that the delivery was invalid. Baylin contends that principles of estoppel preclude the withdrawal of this admission.

[61] I am not persuaded that an assertion that the Objection Certificate in respect of the Supplier Indemnity Claim was timely is necessarily an admission that the Claim Certificate in respect of the Supplier Indemnity Claim was validly delivered. To be estopped from withdrawing an admission I would expect the admission to have been made directly and unambiguously. In this case, the admission would have to be inferred.

[62] Nor would I consider the fact that the Escrow Agent paid the Indemnity Claim Amount out on October 10, 2018 when faced with the demand from Baylin to be an "admission" by SpaceBridge that it should be estopped from withdrawing. The Escrow Agent is not tasked with the responsibility of determining whether the Claim Certificate in respect of the Supplier Indemnity Claim was valid; that is for the court to decide. The statement made by Davies on behalf of SpaceBridge that the payment of the Indemnity Claim Amount was without prejudice to SpaceBridge's right to reclaim those funds that had been paid out, while not determinative, is not consistent with the suggestion that the payment of the Indemnity Claim Amount was an admission that the Claim Certificate was valid.

[63] Further, had there been an admission of the nature now suggested, Baylin could have objected under r. 51.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to the admission being withdrawn by the amendment to the Notice of Application at the time. There are requirements that must be met to resist a withdrawal of an admission in the context of a pleading amendment. I was not made aware of any such objection having been raised at the time the Notice of Application was amended.

[64] In any event, a party raising estoppel generally must demonstrate that it has detrimentally relied on the other party's representation or conduct: see *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at paras. 67-69. Baylin does not allege detrimental reliance; it baldly asserts simple reliance with respect to the manner in which its financial statements were prepared for the last fiscal quarter and year-end of 2018, and that they would have been prepared differently.

[65] The only reliance that Baylin asserts it placed on the formulation of relief contained in the original Notice of Application was its apparent assessment that SpaceBridge's claims and the relief sought were not material and did not need to be reported in its financial statements or disclosed. Baylin had the Objection Certificate with the grounds upon which the objection was based, had been served with the Notice of Application and was aware of the reservation of rights when it prepared its year-end financial statements. Yet at that time, Baylin only disclosed that the Indemnity Claim Amount had been received and applied it to its general and administrative expenses in the last fiscal quarter of 2018 and that SpaceBridge had said it was reserving its right to demand its return.

[66] There is no evidence about how notice of the new declaration contained in the Amended Notice of Application would have changed the materiality assessment or the preparation of the financial statements. It is not apparent how the new declaration would have changed Baylin's assessment given that SpaceBridge's request for the return of the Indemnity Claim Amount remained constant throughout; in the October 11, 2018 email from Davies, in the initial Notice of Application issued in December 2018 and in the Amended Notice of Application issued in June 2022.

[67] I am not persuaded on a balance of probabilities that Baylin placed any reliance on the specific declarations sought in this application when it prepared its 2018 year-end financial statements.

[68] However, even if Baylin did rely upon its position that the Objection Certificate in respect of the Supplier Indemnity Claim was out of time and it was entitled to be paid the Indemnity Claim Amount from the Escrow Fund, and prepared its financial statements on that basis, it did so at its own peril. It had the Objection Certificate and was aware of SpaceBridge's reservation of rights when it prepared its year-end financial statements.

[69] Further, Baylin has not demonstrated that it has or will suffer any detriment as a result and even if it has to repay the Indemnity Claim Amount. There is no evidence that this amount is material to Baylin such that its financial statements would have to be restated, nor is there any

evidence that if it did have to repay the Indemnity Claim Amount it would suffer any detriment, aside from the inconvenience of having to re-do its financial statements.

[70] Regardless of the amendments to the Notice of Application, Baylin still had to respond to this application. After the amendments were made, Baylin had (and took advantage of) an opportunity to lead any additional evidence relating to the new declaration that was added. It has fully participated in the litigation of the new declaration sought by SpaceBridge.

[71] There is no basis for any estoppel against the declaration that SpaceBridge seeks regarding the invalidity of the Claim Certificate in respect of the Supplier Indemnity Claim under the Escrow Agreement, which has been granted for the reasons detailed above.

iii) If the Claim Certificate was not validly delivered under the Escrow Agreement, can Baylin still pursue a claim for indemnification in respect of the Supplier Indemnity Claim under the APA?

[72] Baylin submits that it could face potential prejudice if its Supplier Indemnity Claim is declared to be invalid under the APA now (or at any time more than 18 months after the closing of the APA). If such a declaration is made, Baylin could be detrimentally affected by the APA requirement that Indemnity Claims for alleged misrepresentations be asserted within 18 months.

[73] I accept that a distinction needs to be drawn and maintained between the validity of the Claim Certificate under the Escrow Agreement and the validity of the Supplier Indemnity Claim under the APA. The court only needs to conclude that the Claim Certificate in respect of the Supplier Indemnity Claim under the Escrow Agreement is invalid for the applicants to succeed on this application.

[74] The finding that Baylin's Claim Certificate in respect of the Supplier Indemnity Claim was not validly delivered under the Escrow Agreement does not invalidate the Supplier Indemnity Claim under the APA, which was properly delivered by registered mail under the APA notice provisions within 18 months of the closing. Registered mail is a permitted mode of delivery of notice under the APA, including for Indemnity Claims. Under the APA, that notice was deemed received by SpaceBridge five business days after it was sent, on Monday, September 3, 2018.

[75] There is no requirement for a response or notice of objection under the APA. The disputed Supplier Indemnity Claim can still be adjudicated under the APA and Baylin can still pursue its damages claim in court, as it is doing with its other two Indemnity Claims that SpaceBridge objected to in a timely manner.

[76] The requirement under s. 8.9 of the APA that Baylin's Supplier Indemnity Claim be paid first from the Escrow Fund if there are funds available to satisfy it can be addressed if and when the Supplier Indemnity Claim is proven, and any damages are awarded. It may be that as a result of the other Indemnity Claims there are insufficient funds to satisfy this Supplier Indemnity Claim from the Escrow Fund in any event. But if there are sufficient funds, I have not been directed to any contractual or other impediment to Baylin later seeking payment from the Escrow Fund in respect of the Supplier Indemnity Claim, if proven.

b) Was SpaceBridge's Objection to the Supplier Indemnity Claim Timely?

[77] This question is moot in light of my earlier finding that the Claim Certificate in respect of the Supplier Indemnity Claim was not validly delivered. This means that the time for objecting never started to run. There is no time limit for the Indemnifying Party to "object" under the APA, so the timeliness of the Objection Certificate is not relevant to that process which can be litigated through the courts.

[78] As a means to the same end, SpaceBridge also asked the court to import the APA deeming provisions for notices delivered by registered mail, which would have deemed the delivery of the Claim Certificate in respect of the Supplier Indemnity Claim to have occurred on Monday September 3, 2018. Under that scenario, the Objection Certificate that was delivered on Tuesday, October 2, 2018 would have been delivered within the 30-day deadline, which expired on Wednesday, October 3, 2018.

[79] Although importing the deeming provisions from the APA to the Escrow Agreement might lead to the same outcome in this case (i.e., that Baylin was not entitled to the Indemnity Claim Amount that was paid from the Escrow Fund and should be ordered to return those funds to the new escrow agent), reading the APA and the Escrow Agreement together harmoniously, as I am required to do, I do not consider that to be an objectively reasonable interpretation. My reasons for not importing the mode of delivery by registered mail provided for in the APA into the Escrow Agreement are outlined earlier in this endorsement.[1]

[80] Had I found the Claim Certificate in respect of the Supplier Indemnity Claim to have been validly delivered upon actual receipt by SpaceBridge's receptionist and the Escrow Agent on Thursday, August 30, 2018, then I would not have found that the Objection Certificate was timely since it was delivered more than 30 days after the receipt of the Claim Certificate.

[81] I would also not have been persuaded by SpaceBridge's arguments that the Escrow Agent's knowledge of the grounds upon which it intended to object to the Supplier Indemnity Claim or its lawyer's general statement to counsel for Baylin on Tuesday, September 18, 2018 that SpaceBridge would be objecting to the Supplier Indemnity Claim amounted to sufficient or timely notice of SpaceBridge's objection.

---

[1] This argument would have required the court to import the APA registered notice and deeming provisions into the Escrow Agreement, which SpaceBridge suggests there is authority for in *Queen Street Holdings Inc. v. Z-Teca Inc*., 2017 ONSC 5890, at para. 21 and in *Brewster*, at para. 19. However, *Queen Street*, at para. 21, relies on *3574423 Canada Inc. v. Baton Rouge Restaurants Inc*., 2011 ONSC 6697, at para. 227(iv) which makes it clear that a party only gets the benefit of a deemed delivery stipulation if they used the mode of delivery specified. Similarly, *Brewster* is also distinguishable on its facts because Ms. Brewster did not use a mode of delivery specified in her lease that would have allowed her to benefit from the deemed delivery stipulation in her lease. The deeming provisions do not apply to any mode of delivery other than delivery by registered mail which I have found was not an acceptable mode of delivery under the Escrow Agreement.

[82] The requirement of strict adherence to the contractual notice provisions should be applied consistently. It is the basis for the court's primary findings the Claim Certificate was not validly delivered under the Escrow Agreement which renders it unnecessary to get into the question of SpaceBridge's technical non-compliance with notice requirements for the Objection Certificate.

c) Should SpaceBridge be Granted Relief from Forfeiture if its Objection was not Timely?

[83] A lot of the evidentiary record was dedicated to the relief from forfeiture argument upon which this application had originally been primarily based. That is a highly fact-specific analysis that requires assessments of equitable considerations.

[84] The parties disagree on the test to be applied in determining whether to grant relief from forfeiture.

[85] As Baylin points out, the existence of two different tests was recently acknowledged by the Court of Appeal for Ontario but left unresolved: see *Ching v. Pier 27 Toronto Inc.*, 2021 ONCA 551, 33 R.P.R. (6th) 117, at paras. 69-74.

[86] The first approach is that set forth in the Supreme Court of Canada's decision *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, namely, considering (a) the conduct of the applicant, (b) the gravity of the breach, and (c) the disparity between the value of the property forfeited and the damage caused by the breach.

[87] In establishing this test, the court cited, at p. 504, the House of Lords in *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691 (U.K.), at pp. 541-42. The test was applied more recently in *Hudson's Bay Company ULC Compagnie de la Bate D'Hudson SRI v. Oxford Properties Retail Holdings II Inc.*, 2022 ONCA 585, 163 O.R. (3d) 81, at paras. 36-37 and *2324702 Ontario Inc. v. 1305 Dundas W Inc.*, 2020 ONCA 353, 14 R.P.R. (6th) 177, at para. 22.

[88] The second approach is that set forth by the Court of Appeal for Ontario in *Peachtree II Associates - Dallas L.P. v. 857486 Ontario Ltd.* (2005), 76 O.R. (3d) 362 (C.A.), at para. 25 and in *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, 137 O.R. (3d) 374, at para. 15, namely, considering (a) whether the forfeiture is penal in nature in the sense of being out of all proportion to the damage suffered by the breach, and (b) whether it would be unconscionable for the seller to retain the forfeiture.

[89] In this case, there is also the added layer of complication of whether relief from forfeiture should be granted to SpaceBridge to correct a mistake allegedly made by their lawyer, in failing to draft the Objection Certificate and provide it to SpaceBridge to sign so that it could be submitted before the expiry of the 30-day period. In that area as well, there are competing authorities on whether, and if so under what circumstances, that is appropriate: see e.g., *Voortman v. SPCVC Investments Inc.*, 2018 ONSC 3602, which Baylin contends was wrongly decided.

[90] Since I have decided this case on other grounds, any relief from forfeiture analysis that the court would now embark upon would be obiter. The court should not engage in the sort of analysis that would be required (e.g., the determination of what the appropriate test is for granting

relief from forfeiture in a commercial contract context and the deep dive into contentious factual and equitable considerations that would entail, such as unconscionability and a lack of clean hands) where that entire analysis is moot in light of my earlier findings: see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 345. I therefore decline to do so.

Costs and Final Disposition

[91] The application is granted. The Claim Certificate in respect of the Supplier Indemnity Claim is declared not to have been validly delivered in accordance with the notice provisions of the Escrow Agreement. Accordingly, no Objection Certificate was required, and the Indemnity Claim Amount should not have been paid out of the Escrow Fund. Therefore, Baylin is ordered to return the Indemnity Claim Amount plus interest to the new escrow agent.

[92] No submissions were made on the appropriate interest rate to be applied. The parties can arrange a case conference before me to address that question if they are not able to agree on what it should be.

[93] Baylin's ability to pursue its Supplier Indemnity Claim under the APA is not foreclosed by this determination. I would expect that it might be incorporated into the existing litigation between the parties in respect of other disputed Indemnity Claims, or perhaps litigated on some coordinated basis with those other claims.

[94] The parties agreed that there should be some award of partial indemnity costs in favour of the winner. Baylin did not challenge the partial indemnity amount claimed by the SpaceBridge in their costs outline because it was lower than the partial indemnity amount that Baylin had specified in their costs outline. The applicants' all-inclusive partial indemnity costs are indicated to be $86,014.57. The respondents' all-inclusive partial indemnity costs are indicated to be $120,504.46. The parties advised at the conclusion of the hearing that there have been no offers exchanged that would be relevant to the determination of costs.

[95] Baylin made an important argument and distinction about the court not granting declaratory relief that could render the Supplier Indemnity Claim invalid under the APA and arguably foreclose Baylin from pursing it at all. SpaceBridge sought a broader declaration in the Amended Notice of Application that the claim (defined to be the August 27, 2018 notice of indemnity and certificate seeking indemnification) is invalid for the failure to comply with the Escrow Agreement notice requirements. SpaceBridge clarified at the hearing that it was not seeking to foreclose the Supplier Indemnity Claim entirely, but rather simply to have it adjudicated in the normal course. The declaration that has been granted by the court on this application shall be circumscribed to preserve Baylin's ability to pursue the Supplier Indemnity Claim under the APA.

[96] I have decided to partially discount the costs awarded in favour of the applicants to reflect this carve out as the broader relief sought could have resulted in prejudice to Baylin and a different outcome. In the exercise of my discretion under s. 131 of the *Court of Justice Act*, R.S.O. 1990, c. C.43 and having regard to the applicable factors under r. 57.01 of the *Rules of Civil Procedure*, I order the respondents to forthwith pay to the applicants their partial indemnity costs of this application, fixed in the amount of $65,000. This amount satisfies the principle of indemnity while at the same time reflecting the necessary clarification and restriction in the scope of the relief granted. Further, this amount objectively would have been within the reasonable contemplation of Baylin since its own partial indemnity costs were almost twice this amount.

Kimmel J.

Date: July 13, 2023