

CITATION: FCP (BOPC) Ltd. v. Callian Capital Partners Inc., 2023 ONSC 1730
COURT FILE NO.: CV-21-00663554-0000
DATE: 202304406

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: FCP (BOPC) LTD., ARI FCP HOLDINGS INC., and CPPIB FCP HOLDING INC., Applicants

– and –

CALLIAN CAPITAL PARTNERS INC., CALLIAN CAPITAL PRIVATE WEALTH MANAGEMENT INC. and CERIECO CANADA CORP.,
Respondents

BEFORE: Justice E.M. Morgan

COUNSEL: *Brendan Jones*, for the Applicants

Brendan Monahan, for the Respondent, Cerieco Canada Corp.

HEARD: March 15, 2023

AMENDED ENDORSEMENT¹

[1] The Plaintiff moves for payment owed to it under two indemnity agreements, one signed by the Respondent, Callian Capital Private Wealth Management Inc. (the “Callian”), dated October 30, 2017 (the First Indemnity”), and the second signed by the Respondent, Cerieco Canada Corp. (“Cerieco”), dated March 29, 2021 (the “Second Indemnity”). Both agreements provided indemnity obligations in the event of default by the Respondent, Callian Capital Partners (the “Tenant”) under a commercial lease.

¹ This Endorsement was amended on April 6th, 2023 to correct and add to a quote in paragraph 17.

[2] Cerieco is the only one of the Respondents that has filed material in response to this motion and had counsel appear at the hearing. Neither Callian nor the Tenant has responded in writing, and neither of them made an appearance at the hearing despite being properly served.

[3] The Tenant has defaulted under its lease dated October 30, 2017 for office premises located in First Canadian Place in Toronto (the “Lease”). Judgment against the Respondents was rendered by Stewart J. on November 10, 2021. Justice Stewart awarded the Applicants \$467,156.13, reflecting unpaid rent, plus costs and interest, up to the date of judgment.

[4] Her Honour held that the Tenant, Callian, and Cerieco are jointly and severally liable for the Tenant’s obligations under the Lease and a related Relief From Forfeiture Agreement dated March 30, 2021, and that neither have any defence to the claim by the Applicant for amounts payable thereunder. Paragraph 7 of Justice Stewart’s judgment permits the Applicant to apply to court seeking damages against any or all of the Respondents in respect of rent and other charges that would otherwise be payable for the balance of the term of the Lease.

[5] The Sheriff of the Regional Municipality of York has seized \$478,170.90 from Cerieco’s bank account and is holding those funds to the Applicant’s credit under a Notice of Garnishment dated April 8, 2022, Garnishment Number 48704CV22AO2366649 (the “Garnishment”). That amount reflects the amount referenced in Justice Stewart’s judgment plus interest to the date of seizure.

[6] The Respondents appealed Justice Stewart’s decision, but failed to perfect the appeal. On March 9, 2022, the Court of Appeal dismissed the Respondents’ motion to extend the time for perfecting the appeal.

[7] On April 27, 2022, Cerieco served a notice of motion seeking to set aside Justice Stewart’s judgment and seeking to prohibit the Sheriff from paying the sum it received to the Applicant. Nothing further has been done in respect of that motion. Counsel for Cerieco appeared in Civil Practice Court when the present motion was scheduled, and sought to have the Applicant’s motion and its own motion to set aside Justice Stewart’s judgment set down at the same time.

[8] In his endorsement, Myers J. ordered the present motion to proceed and set a date for the hearing of the motion. He did not set a motion date for Cerieco’s motion but rather let that proceed on its own course. Cerieco has still not set a date for its motion; it remains unclear when that motion will proceed, if at all.

[9] The Applicant seeks an order that the monies held by the Sheriff in respect of this matter be paid out to the Applicants. Those monies are due and owing to the Applicants pursuant to the judgment of Stewart J., and there is no reason for the Sheriff to continue holding them.

[10] The rent payable under the Lease was \$42,162.86 per month. The Applicant has entered into a replacement lease with a new tenant, commencing December 1, 2022. From the date of Justice Stewart’s judgment until November 30, 2022, another 12 months passed. The total rent

outstanding for those 12 months comes to \$505,954.32. The Applicants seek payment of that amount as monies that continue to be owed in accordance with the liability ruling contained in Justice Stewart's judgment.

[11] The rental rates in the new lease are higher than those in the original Lease. Counsel for the Applicants submits that despite the entrance of a new tenant and a new lease, Cerieco and Callian continue to be liable for the original monthly rental amount as it comes due each month under their respective indemnity agreements. Applicants' counsel submits that if the Applicants ultimately receive more money than they would have received under the Lease with the Tenant, that amount has to be reconciled in the future and reimbursed to whichever of the two indemnifiers paid it.

[12] If the new tenant stays in the premises and pays rent until the expiration date of the old Lease – October 31, 2028 – the Applicants will have received \$727,198.61 more in rent than they would have received had the Tenant never defaulted. That said, the evidence in the record shows that the Applicants have also incurred a substantial amount of expenses that they would not have incurred but for the Tenant's default and the need to put a new tenant into the premises.

[13] These expenses, which Applicants' counsel refers to as the "Deal Expenses", include the costs of arranging for the Sheriff and other matters involved in enforcing Justice Stewart's judgment, commission payable on the new lease, improvements made to the premises to accommodate the new tenant, and a 5-month abatement in base rent given to the new tenant as an inducement to enter the lease. In all, the Deal Expenses exceed \$500,000.

[14] Counsel for Cereico submits that in entering a new lease, the Applicants have mitigated their damages and that any order issued at this point must take account of that mitigation. Citing *Morguard Corporation v. Bramalea City Centre Equities*, 2013 ONSC 7213, Cereico's counsel observes that the point of mitigation is to place the landlord – here, the Applicants – in the position it would have been in had the original Lease been performed.

[15] The mitigation principle could therefore potentially reduce or eliminate a landlord's entitlement to damages altogether. As Cereico's counsel points out, the courts have long understood that any increase in value between a later lease and an earlier lease is to be deducted from the landlord's claim: *Toronto Housing Co v. Postal Promotions Ltd.* (1981), 1981 34 OR 2d 218, at para 29 (HCJ), appeal dismissed 1982 CarswellOnt 682 (Ont CA).

[16] Having said that, in this motion the Applicants are not seeking payment from the Tenant under the Lease. They are seeking payment from indemnifiers under the indemnity agreements. Those agreements have far stronger language and, from the indemnifier's point of view, far more strict terms, than the Lease. In the two indemnity agreements, the Applicants have no duty to mitigate; and the language makes it clear that even if there has been mitigation the indemnifier is not off the hook.

[17] The Court of Appeal confirmed this approach in *Parc Downsview Park Inc. v. Penguin Properties Inc.*, 2018 ONCA 666, which involved an indemnity agreement in the same terms as the First Indemnity and Second Indemnity signed by Callian and Cereico, respectively. The Second Indemnity, for example, provides that Cereico's obligation to make rental payments to the Applicants is "absolute and unconditional and the obligations of the Second Indemnifier [i.e. Cereico] shall not be released, discharged, mitigated, impaired, or affected by [any re-letting of the Premises]." This is a separate contractual obligation that is entirely independent of the Tenant's obligation to pay rent under the Lease. Specifically, under paragraph 2(x) of the Second Indemnity, Cereico is not released by...

(x) any act or omission of Landlord or any other person whereby the Second Indemnifier would or might otherwise be released or have its obligations hereunder discharged, mitigated, impaired or affected in any way whatsoever; nothing but payment and satisfaction in full of all Rent and the due performance and observance of all terms, covenants and conditions on the part of Tenant to be paid and performed shall release the Second Indemnifier of its obligations hereunder.

[18] The Tenant's rental obligation can as a general rule be mitigated with the entry of a new tenant; Callian's and Cereico's obligations under the First and Second Indemnity do not get mitigated with the entry of a new tenant. As Brown JA observed in *Parc Downsview*, at para 69, the similarly "onerous language of the Indemnity operated as the means by which [the landlord] could ensure that it would not be left holding the proverbial bag in the event the [tenant] defaulted".

[19] Cereico and Callian are, jointly and severally, liable to the Applicants under the First Indemnity and Second Indemnity, to pay \$505,954.32, reflecting the unpaid rent from the date of Justice Stewart's judgment to the date on which the new lease for the premises began. In accordance with art. 7.12 of the Lease, interest on this amount runs at the contractual rate of prime plus 3% from December 1, 2022.

[20] The Applicants shall also have an order that the Sherriff pay to the Applicants the \$478,170.90 held pursuant to the Garnishment. Those funds are to be forwarded by the Sherriff to the Applicants forthwith.

[21] The Applicants shall provide the Cereico and Callian with an annual reconciliation as of December 31st of each year, starting with 2023 and going up to and including 2028, showing the amount of rent collected that year from the new tenant and the difference between that amount and the amount that would have been payable under the Lease. When and if that difference exceeds the amounts owing to the Applicants, including any unpaid rent and interest thereon, as well as the Deal Expenses and interest thereon (which also runs at the contractual amount of prime plus 3%), that excess shall be reimbursed by the Applicants to Cereico and/or Callian, whichever has made the payments to the Applicants up until that time.

[22] The parties may make written submissions on costs. I would ask Applicants' counsel to send my assistant by email short submissions within two weeks of today, and for Cereico's counsel to send my assistant equally short submissions within two weeks thereafter.

Date: April 6, 2023

Morgan J.