

Court of King's Bench of Alberta

**Citation: Plastk Financial and Rewards Inc v Digital Commerce Bank,
2023 ABKB 272**



**Date: 20230504
Docket: 2301 00820
Registry: Calgary**

Between:

Plastk Financial & Rewards Inc.

Applicant
(Plaintiff/Defendant by Counterclaim)

- and -

Digital Commerce Bank

Response
(Defendant/Plaintiff by Counterclaim)

**Endorsement As To Costs
of the
Honourable Justice Douglas R. Mah**

A. Background

[1] This costs decision is a consequence of my ruling on March 23, 2023 in which I granted, on an emergency basis, a confirmation of Justice Sullivan's Injunction Order of January 19, 2023. This confirmation permits Plastk Financial and Rewards Inc (Plastk) to continue operating its credit card program on the digital platform provided by Digital Commerce Bank (DCB) until a platform migration to another provider is completed.

[2] Plastk operates a credit card program for financially challenged individuals seeking to rehabilitate their credit status. Each credit card holder places a security deposit with Plastk that is equivalent to the credit card limit. By late 2022, Plastk and DCB had agreed that Plastk would change digital platform providers but in early 2023, DCB found Plastk to be in breach of certain financial obligations and began setting off the amounts claimed against cardholder deposits. The set-off left Plastk unable to operate, and resulted in an interim interim injunction application that was granted by Justice Johnston on January 16, 2023. That hearing was followed by a comeback hearing before Justice Sullivan on January 19, 2023.

[3] On the latter date, Justice Sullivan, after hearing full argument, ordered as follows:

- That DCB shall not engage in set-off;
- That Plastk's cardholder accounts would be unfrozen; and
- That Plastk's accounts would operate in the ordinary course of business with no changes by DCB.

[4] Justice Sullivan's Injunction Order continued the previous provision that the Order was made without prejudice to the rights of the parties. In this regard, DCB's counsel advised me that DCB had already communicated to Plastk that it was terminating its agreement with Plastk on March 1, 2023 and this fact was part of the background before the court on both January 16 and 19, 2023. The termination date was later extended to March 14, 2023.

[5] DCB interpreted Justice Sullivan's Order to mean that it could terminate its services (and effectively shut down Plastk's operations) as of March 14, 2023. It did so, which prompted Plastk to bring the application before me to enforce Justice Sullivan's Order.

[6] For reasons given in my oral decision of March 23, 2023, I concluded that DCB's interpretation of Justice Sullivan's Injunction Order was "just wrong" and I confirmed Justice Sullivan's previous Order so as to enable Plastk to continue its program on the DCB platform until such time as the migration to the new provider is completed. In particular, I made this observation in my reasons:

He [Justice Sullivan] was acutely concerned about the rights and interests of the cardholders, and, in particular, how this dispute should not affect their ability to use their credit cards when the cardholders had already secured payment by deposit. Plastk has by estimation some 7000 customers in the high-risk category for whom it would be particularly important to use their Plastk credit card in order to re-establish their credit rating. I think it fair to say that Justice Sullivan viewed the 7000 cardholders as a vulnerable group.

....

In short, the whole purpose of the Sullivan injunction was to keep the cardholders whole while the migration process was brought to a conclusion. After that, the parties could sort out what was still in issue between them.

B. Position of the Parties on Costs

[7] Plastk seeks elevated costs as follows:

- \$35,1000, plus disbursements and GST, being Column 5 costs for 2 counsel on a contested application requiring briefs, with a multiplier of 4X;
- Alternatively, \$26,325, plus disbursements and GST, being Column 5 costs for 2 counsel on a contested application requiring briefs, with a multiplier of 3X;

- *McAllister* costs equal to 45-50% of full indemnity are insufficient in light of the factors found in Rule 10.33(2), referring to *McAllister v Calgary (City)*, 2021 ABCA 25;
- The key factors here are complexity of the matters (as found by Justice Sullivan) and DCB's conduct;
- DCB wilfully ignored Justice Sullivan's Injunction Order and put forward an untenable interpretation to justify that conduct;
- DCB acted unilaterally by refusing to put the termination issue before the Court; and
- DCB prejudiced the interests of some 7000 innocent parties, whom the Court had tried to protect.

[8] DCB's position is summarized as follows:

- Costs should be in the cause, or at most for this application, on Column 1 of Schedule C with no multiplier;
- the Court must balance the interests of the successful (and non-blameworthy) party and the chilling effect of costs on the unsuccessful party who has a right to defend;
- DCB's interpretation of the Sullivan Order was reasonable; later amendments to the statement of claim indicate that Plastk shared that interpretation;
- DCB acted reasonably in extending the termination date by 14 days;
- Plastk's counsel failed to respond to an invitation by DCB's counsel in January 2023 to seek a further Court date to hear the balance of the injunction application;
- Overall, the litigation has been necessitated by Plastk's contractual breaches, the merits of which have not been adjudicated.

C. Ruling

[9] The discretion to award costs must be exercised judicially and in line with the factors in Rule 10.33: *Weatherford Canada Partnership v Artemis Kautschuk und Kunststoff-Technik GmbH*, 2019 ABCA 92 at paras 11 & 12.

[10] The Court of Appeal notes in *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16 at para 178:

Costs awards are designed to partially indemnify the successful party for the legal expenses incurred during the litigation. Party and party costs awards are deliberately set so that they do not fully indemnify the successful party. This discourages unwarranted litigation, it promotes proportionality in litigation that is commenced, and it creates an incentive on all litigants to litigate economically.

[11] Further, at para 179, the Court observes that “misconduct arising from the conduct of litigation” might be basis for solicitor and client costs.

[12] It is not my intention to relitigate the reasonableness of DCB’s interpretation of the Sullivan Injunction. I made my finding that it was both incorrect and failed to take into account the context in which the Order was made (the protection of the cardholders). I would not describe DCB’s conduct as contemptuous but rather that its interpretation of the Sullivan Order was overly literal and self-serving. And while Plastk’s counsel may have failed to respond to the January 2023 invitation to attend, surely by March 2023 with the Sullivan Injunction Order in place, it should have occurred to DCB that a further Court attendance was required before the totality of Plastk’s credit card program was shut down.

[13] My conclusion is that Plastk’s application, in the scheme of things, was unnecessary. Justice Sullivan’s Order was in place. If there was ambiguity (and I suggest there was not), the onus was on DCB to seek clarification from the Court before ploughing ahead, rather than force Plastk to enforce the Order.

[14] Further, lack of merit in a position can affect the level of costs: *Earth Drilling Co Ltd v Keystone Drilling Corp*, 2023 ABKB 17 at para 6 and the cases cited therein.


[15] For these reasons, I find that Plastk is entitled to an elevated award of costs for the application before me. I am confining the costs question here to the costs of the appearance before me. Plastk’s counsel advised me in her letter: *Plastk’s actual legal expenses in obtaining the prior injunction Orders from Justices Johnston and Sullivan, and bringing the Application pursuant to Rule 9.14 before Justice Mah, total approximately \$34,000*. I do not wish to over-indemnify for the one application. Overall, I find that costs for this application only on Column 5, with a multiplier of 3X, adequately addresses the concerns expressed here. The Column selected has less to do with the value of the action than the circumstances in which the application before me was brought. The use of Column 5, along with the multiplier, reflects those circumstances.

[16] I am aware that the commencement document in this action is a statement of claim and therefore a claim under Item 1(1), as well as Item 8(1), in respect of a special chambers application is duplicative: *Orbis Engineering Field Services v Taifa Engineering Ltd*, 2019 ABQB 592 at paras 27-30 and the cases cited therein. Plastk is allowed to claim Item 8(1) but not Item 1(1). Further, I acknowledge that second counsel appeared for Plastk but I have not made a provision for second counsel as there was no argument that a second counsel fee was necessary: *Bruen v University of Calgary*, 2018 ABQB 650 at para 52.

[17] Reasonable disbursements and GST are allowed

Heard by way of written submissions on the 6th day of April, 2023.

Dated at the City of Edmonton, Alberta this 3rd day of May, 2023.



Douglas R. Mah
J.C.K.B.A.

Appearances:

Sharon Roberts & Bohdan Kruk, Roberts O'Kelly Law
for the For Plastk Financial & Rewards Inc

David Pope, Jensen Shawa Solomon Duguid Hawkes LLP
for the For Digital Commerce Bank