COURT OF APPEAL FOR ONTARIO

CITATION: Wesbell Networks Inc. v. Bell Canada, 2015 ONCA 33
DATE: 20150123
DOCKET: C57303

Strathy C.J.O., Rouleau and Hourigan JJ.A.

BETWEEN

BDO Dunwoody Limited
as Receiver for Wesbell Networks Inc.

Plaintiff/Appellant

and

Bell Canada

Defendant/Respondent

Micheal Simaan, for the plaintiff/appellant

Jennifer Teskey and Guy White, for the defendant/respondent

Heard: October 8, 2014

On appeal from the judgment of Justice R.E. Mesbur of the Superior Court of Justice, dated June 3, 2013, with reasons reported at [2013] O.J. 4267 and from the order on costs dated July 30, 2013, with reasons reported at [2013] O.J. No. 3582.

By the Court:

[1] The principal issue on this appeal is the interpretation of a Master Supply Agreement ("MSA") between Wesbell Networks Inc. ("Wesbell") and Bell Canada

("Bell"), whereby Wesbell agreed to build and run a Voice over Internet Protocol ("VoIP") for Bell.

[2] The appellant submits the trial judge failed to give effect to the parties' intentions in interpreting the MSA.

[3] Wesbell leased the equipment used to construct the VoIP system from a third party. Bell guaranteed Wesbell's performance of the lease by way of a "put" agreement, whereby Bell could be required to assume the lease if Wesbell defaulted. The lease had a five-year term. The MSA had an initial three-year term, but Bell had an option to extend the agreement for a fourth year. After that, the MSA would automatically renew for one-year terms, unless terminated.

[4] Bell owed Wesbell approximately $3.5 million at the end of the third year of the MSA. It gave notice to Wesbell, renewing the MSA for the optional fourth year. Wesbell then issued an invoice for the amount Bell owed. Four days later, Wesbell declared itself insolvent and made an assignment in bankruptcy. This triggered default under both the MSA and the lease.

[5] Bell exercised its contractual right to terminate the MSA for material breach. As it was contractually required to do under the MSA, Bell assumed Wesbell's rights and obligations under the lease. It paid the lessor approximately $2 million, being the amount owing under the lease for the remainder of the term.

In its defence of the claim brought by Wesbell's receiver, Bell sought to set-off this sum against the balance it owed to Wesbell.

[6] The relevant provision of the MSA was as follows:

> 11.3 Material Breach by [Wesbell] If BELL terminates this Agreement due to a Material Breach by [Wesbell] […] BELL shall assume all of [Wesbell]'s rights and obligations under the Equipment Leases and shall purchase from [Wesbell] all of the Associated Property. […] Any assumption by BELL of the Equipment Leases and the Associated Property, whether pursuant to this or any other Section, shall be on a fully paid-up basis free and clear of all encumbrances and BELL shall have no liability for, and [Wesbell] shall be fully responsible for and indemnify BELL against, all outstanding debts, defaults, encumbrances or obligations of or pertaining to [Wesbell] with respect to the Equipment Lease and the Associated Property existing at the time of such purchase […]

[7] Wesbell admitted that this clause gave rise to a contractual right of set-off against the amount Bell owed to it. The issue at trial was whether Bell was entitled to set-off *all* the amount it paid to the lessor after its assumption of the lease or only the lease payments owing by Wesbell to the lessor at the time of the termination of the MSA.

[8] Wesbell argued, relying on previous drafts of the MSA as well as evidence of the pre-contractual negotiations between Bell and Wesbell, that it was the parties' intention that Bell would have no recourse against Wesbell for the

balance of the lease payments in the event of a material breach of the MSA by Wesbell.

[9] The trial judge acknowledged that she was required to consider the factual matrix of the MSA. Both the equipment lease and the put agreement with the lessor were attached to the MSA and informed its meaning. However, she declined to consider the parties' subjective intentions in interpreting the MSA. She found that an "entire agreement" clause in the MSA precluded her from considering prior drafts of the MSA and that she could consider only the wording of the final agreement.

[10] The trial judge described the MSA as "hardly a model of drafting clarity." She held that at the time of Wesbell's default under the lease, it was obliged to pay the lessor liquidated damages in an amount equal to the balance owing for the remaining term of the lease. This was an "outstanding … obligation" of Wesbell under s. 11.3 of the MSA. The amount paid by Bell to the lessor was a discharge of this outstanding obligation and Wesbell was contractually required to indemnify Bell for this payment. A contractual right of set-off was available to Bell.

[11] Alternatively, she concluded that if contractual set-off was not available, then both legal set-off and equitable set-off were available.

[12] From the decision of the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, at para. 50, makes it clear that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix." In most cases, therefore, contractual interpretation will be subject to a deferential standard of review: *Martenfeld v. Collins Barrow Toronto LLP,* 2014 ONCA 625, at paras. 39-42.

[13] The trial judge was alive to the contractual matrix. She made detailed factual findings with respect to the formation of the MSA, its performance and its breach. She correctly observed that the parties' subjective intentions were irrelevant to the construction of the agreement, referring to *Eli Lilly and Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (see also *Martenfeld*, at paras. 75, 79). She also declined to consider previous drafts of the MSA in interpreting the agreement executed by the parties. In light of the "entire agreement" clause and binding authority, this was correct: *Indian Molybdenum Ltd. v. The King*, [1951] 3 D.L.R. 497 (S.C.C.), at pp. 502-503.

[14] The trial judge's interpretation of the agreement was reasonable and is entitled to deference.

[15] Therefore, we dismiss the appeal on this issue.

[16] The appellant's second submission is that Bell's damages should have been limited to one year of lease payments. Had Wesbell not committed a material breach of contract, it would have been entitled to terminate the MSA after the fourth year and Bell would have been required to assume the remaining term of the lease. The appellant relies upon the principle that where a defendant who wrongly repudiates a contract has alternative modes of performance, the mode to be adopted in calculating damages is the one least profitable to the plaintiff and most favourable to the defaulting defendant: *Hamilton v. Open Window Bakery*, 2004 SCC 9, [2004] 1 S.C.R. 303, at paras. 11-13; *Agribrands Purina Canada Ltd. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, at para. 45.

[17] The appellant's reliance on this case law is misplaced. This is not a case of alternative methods of calculating damages. When Wesbell made its voluntary assignment in bankruptcy, it became immediately liable to the lessor for the full amount of the remaining lease payments. Wesbell was required to indemnify Bell for this amount when Bell invoked s. 11.3 of the MSA.

[18] The appellant's third submission relates to the trial judge's order that neither party should receive costs. There were no operative offers to settle and the appellant sought costs of $94,000. The respondent did not take issue with the quantum of costs claimed, but argued that there should be no costs, as there was divided success at trial.

[19] In her costs endorsement, the trial judge noted that both parties were successful on a significant issue: Bell regarding set-off and Wesbell concerning the rate of interest on the balance owing under the MSA. She concluded that as both parties were "either equally successful, or equally unsuccessful" there should be no order as to costs.

[20] The appellant submits that the trial judge made an impermissible distributive costs order, allocating costs on the basis of which party was successful on each of the two issues at trial and not on the overall result of the action. The respondent submits that it was within the trial judge's discretion to decline to award costs based on the divided success at trial.

[21] We are of the view that the costs award cannot stand. The trial judge erred in focusing on individual issues in the litigation and disregarding the overall success achieved by Wesbell. The commencement of the action resulted in the payment by Bell to Wesbell of $1.6 million in the months prior to the trial. At trial, Wesbell received judgment in excess of $1 million.

[22] The general rule is that, absent exceptional circumstances, a successful party is entitled to its costs of a proceeding. There is nothing identified by the trial judge or in our review of the case that justifies a departure from the general rule. Therefore, the appellant is entitled to its costs of the action. We fix those costs at $94,000, inclusive of fees, disbursements and applicable taxes.

[23] The appeal is therefore allowed on the issue of costs but is otherwise dismissed. In our view, the respondent was successful on the appeal, other than the costs appeal, and is entitled to its costs, which we fix in the amount of $20,000, inclusive of disbursements and applicable taxes.

Released: January 23, 2015 “G.S.”

“G.R. Strathy C.J.O.”

“Paul Rouleau J.A.”

“C.W. Hourigan J.A.”