COURT OF APPEAL FOR ONTARIO

CITATION: CM Callow Inc. v. Zollinger, 2018 ONCA 896
DATE: 20181109
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Lauwers, Huscroft and Trotter JJ.A.

BETWEEN

CM Callow Inc.

Plaintiff (Respondent)

and

Tammy Zollinger, Condominium Management Group, Carleton Condominium Corporation No. 703, Carleton Condominium Corporation No. 726, Carleton Condominium Corporation No. 742, Carleton Condominium Corporation No. 765, Carleton Condominium Corporation No. 783, Carleton Condominium Corporation No. 791, Carleton Condominium Corporation No. 806, Carleton Condominium Corporation No. 826, Carleton Condominium Corporation No. 839, and Carleton Condominium Corporation No. 877

Defendants (Appellants)

Anne Tardif, Jocelyn Duquette and Rodrigue Escayola, for the appellants

Miriam Vale Peters, for the respondent

Heard: October 29, 2018

On appeal from the judgment of Justice Michelle O'Bonsawin of the Superior Court of Justice, dated November 27, 2017, with reasons reported at 2017 ONSC 7095.

REASONS FOR DECISION

[1] The respondent provided maintenance services to ten condominium corporations managed by Condominium Management Group (CMG) and a designated property manager. The appellant corporations formed a Joint Use

Committee (JUC) to make decisions regarding joint and shared assets of the corporations and, in April 2012, entered into two two-year maintenance contracts with the respondent through its principal, Mr. Callow. One contract covered summer maintenance work and the other covered winter maintenance. The winter contract, which ran from November 2012 to April 2014, contained a provision allowing for early termination by the appellants on 10 days' notice.

[2] In March or April of 2013, the JUC decided to terminate the winter contract, but did not provide the respondent with notice of termination of the agreement until September 12, 2013.

[3] The respondent sued for breach of contract.

[4] The issue at trial was not whether the appellants had the right to unilaterally terminate the contract. Instead, the issue concerned the timing of the communication of the termination decision to the respondent. The appellants delayed informing the respondent that they were terminating the contract in order to avoid jeopardizing completion of the respondent's work under the summer contract, which ran from May 2012 to October 2013.

[5] During the summer of 2013, Mr. Callow of his own initiative performed extra "freebie" landscaping work in the hope that this would act as an incentive for the appellants to renew the contracts when their terms expired. Directors of two of the condominium corporations and members of the JUC were aware that Mr. Callow

was performing “freebie” work, and knew he was under the impression that the contracts were likely to be renewed.

[6] The trial judge concluded that the appellants breached their contractual duty of honest performance by acting in bad faith, in particular 1) by withholding the fact that they intended to terminate the winter contract to ensure that the respondent performed the summer contract, and 2) by continuing to represent to Mr. Callow that the winter contract was not in danger of non-renewal. She held that meeting the minimum standard of honesty would have required the appellants to address the alleged performance issues with the respondent, provide prompt notice, or refrain from any representations in anticipation of the notice period.

[7] The trial judge awarded damages based on the profit the respondent would have made from performing the remaining period of the winter contract. In addition, she awarded the respondent expenses it incurred in leasing machinery to perform the winter contract, as well as the value of an unpaid invoice.

[8] The appellants argue that the trial judge erred by improperly expanding the duty of honest performance in a manner that went beyond the terms of the winter contract. They argue, further, that the trial judge erred in calculating damages.

[9] We agree. Given our conclusion that the contract was not breached, it is not necessary to address the damages issue.

The duty of good faith and honest performance

[10] The Supreme Court held in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 33, that good faith contractual performance "is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance." In addition, the Court held that there is a duty of honest performance "which requires the parties to be honest with each other in relation to the performance of their contractual obligations": at para. 93.

[11] The Court was at pains to emphasize that the concept of good faith was not to be applied so as to undermine longstanding contract law principles, thereby creating commercial uncertainty. Cromwell J. explained at para. 70:

> The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at para. 31. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing

> principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

[12] The same is true of the new duty the Court recognized as flowing from the good faith organizing principle, the duty of honesty in contractual performance. As Cromwell J. explained, at para. 73:

> [The duty] means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance.

[13] This, he emphasized at para. 73, was a "modest, incremental step" in the development of the law of contract.

The appellants' right to terminate

[14] It is important to note that the meaning of the winter contract, and in particular the ability of the appellants to exercise the termination clause, was not in dispute at trial. Moreover, in its factum, the respondent acknowledged that the appellants were not contractually required to disclose that they had decided to terminate the contract prior to the 10-day formal notice period specified in the winter contract, and that the failure to provide notice on a more timely basis was not in and of itself evidence of bad faith.

[15] Putting the case for the respondent at its highest, then, the appellants decided to terminate the winter contract and chose not to inform the respondent

until some months later, in order not to jeopardize the respondent's performance of the summer contract. Not only did the appellants fail to inform the respondent of their decision to terminate, but they actively deceived Callow as to their intentions and accepted the "freebie" work he performed, in the knowledge that this extra work was performed with the intention/hope of persuading them to award the respondent additional contracts once the present contracts expired.

[16] In our view, these findings may well suggest a failure to act honourably, but they do not rise to the high level required to establish a breach of the duty of honest performance.

[17] It is clear from *Bhasin* that there is no unilateral duty to disclose information relevant to termination: at para. 73. Unlike *Bhasin*, this was not a case in which the contract would renew automatically, nor were the parties required to maintain an ongoing relationship. The appellants were free to terminate the winter contract with the respondent provided only that they informed him of their intention to do so and gave the required notice. That is all that the respondent bargained for, and all that he was entitled to.

[18] The duty of honest performance in this case required that the parties be honest with each other concerning matters "directly linked to the performance of the contract" (*Bhasin,* at para. 73) – that is, linked to the winter contract then in effect. It did not limit the appellants' freedom concerning future contracts not yet

negotiated or entered into. Communications between the parties may have led Mr. Callow to believe that there would be a new contract, but those communications did not preclude the appellants from exercising their right to terminate the winter contract then in effect.

[19] The trial judge's decision that the minimum standard of honesty included a requirement to address performance issues, provide prompt notice, or to refrain from representations in anticipation of the notice period had the effect of substantially modifying the appellant's right to terminate the contract – a key term of the contract. This goes beyond what the duty of honest performance requires or permits.

[20] This court's recent decision in *Mohamed v. Information Systems Architects Inc.,* 2018 ONCA 428, 423 D.L.R. (4th) 174, does not alter this analysis. That case concerned a decision to terminate a consulting contract on the basis that the contractor had a criminal record, even though the contractor had disclosed that record and complied with all the requirements of the security check prior to entering into the contract. Further, the defendant in that case made no attempt to redress the problem, nor did it offer the plaintiff any other consulting project. These were the circumstances in which this court concluded that the contract, including the termination clause, had not been performed in good faith. The circumstances of the present case are very different.

[21] The appeal is allowed.

[22] The appellants are entitled to costs on the appeal, which we fix in the amount of $10,000, inclusive of taxes and disbursements.

[23] The appellants are also entitled to costs at trial. If the parties cannot agree on trial costs, the appellants may make brief submissions to the Registrar of this court, no longer than 3 pages, within 10 days of these Reasons for Decision. The respondent's brief submissions in response shall be delivered to the Registrar within 10 days thereafter.

"P. Lauwers J.A."
"Grant Huscroft J.A."
"Gary T. Trotter J.A."