

COURT OF APPEAL FOR ONTARIO

CITATION: Sigma Capital Management Group Inc. v. Benzer Limited, 2023
ONCA 65
DATE: 20230126
DOCKET: C70959

MacPherson, Hoy and Coroza JJ.A.

BETWEEN

Sigma Capital Management Group Inc.

Applicant (Respondent)

and

Benzer Limited, Rajneesh Mathur and
Friedman Law Professional Corporation

Respondents (Appellants)

Michael Doyle and Sarah Jamshidimoghadam, for the appellants

Christopher Statham, for the respondent

Heard: January 24, 2023

On appeal from the judgment of Justice Marie-Andrée Vermette of the Superior Court of Justice, dated June 30, 2022, with reasons reported at 2022 ONSC 3926.

REASONS FOR DECISION

[1] The appellants, Benzer Ltd. (“Benzer”) and its controlling shareholder, Rajneesh Mathur, appeal the judgment of the application judge, ordering how funds held in trust by Friedman Law Professional Corporation (“Friedman”) following the settlement of two actions are to be distributed.

[2] They assert that the application judge erred in her interpretation of the relevant agreements and that Benzer is entitled to a greater share of the funds held by Friedman than determined by the application judge.

Background

[3] The funds in question were paid to Freidman following the settlement of two related actions against KPMG for professional negligence: one commenced by the appellants (the “Benzer Action”), and the second by Komtech Inc. (“Komtech” and the “Komtech Action”). The two actions were consolidated.

[4] Shortly before commencing the Komtech Action, Komtech had filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. In connection with its insolvency, Komtech entered into an asset purchase agreement with 2279591 Ontario Inc. (“227”) with respect to Komtech’s assets, including the Komtech Action. 227 subsequently assigned the Komtech Action to Sigma Capital Management Group Inc. (“Sigma”) in trust for the shareholders of Komtech and Sigma agreed “to assume all of the costs and expenses pertaining to [the Komtech Action] except for \$200,000 of such costs and expenses, which shall be paid for by [227]” pursuant to s. 2 of an agreement dated April 26, 2011 (the “Assignment Agreement”).

[5] Section 2 of the Assignment Agreement further provided that, “[f]or greater certainty at no time shall [227] have any liability for payment of any costs and

expenses including legal fees and disbursements exceeding the sum of \$200,000, Plus Taxes, if any.”

[6] The Assignment Agreement also provided, in s. 3, how 227 was to be compensated for undertaking this funding obligation:

3. So long as [227] is not in default of its obligation to fund up to a maximum of \$200,000 of costs and expenses as provided for in Paragraph 2 above, [Sigma] hereby agrees from the amounts recovered from, in connection with or out of, the [Komtech] Action, (i) to reimburse [227] for all amounts paid by [227] in connection with or on account of costs and expenses pertaining to the [Komtech] Action including, without limitation, such part of the \$200,000 referred to in Paragraph 2 above as may have been paid by [227], to a maximum of the amount of the legal costs awarded, if any, and (ii) in addition to the amount referred to in paragraph 3(i), to pay to [227] 15% of the net amounts recovered from, in connection with or out of, the [Komtech] Action, minus the legal costs awarded to [Sigma]. [Emphasis added.]

[7] In the second agreement at issue (the “Assumption Agreement”), Benzer assumed 227’s funding obligation under the Assignment Agreement in consideration of the assignment to it of 227’s rights under s. 3 of the Assignment Agreement.

[8] In October 2016, KPMG moved for security for costs against Sigma and Sigma was ordered to pay, and paid, \$250,000 into court in respect of the Komtech Action. It raised this amount from its shareholders. The appellants were not ordered to pay security for costs in respect of the Benzer Action; however, Benzer

is a shareholder of Sigma and paid its proportionate share of the security for costs Sigma was ordered to pay.

[9] In 2019, the appellants and Sigma accepted KPMG's offer to settle the Benzer Action and the Komtech Action. The offer was as follows:

- a. KPMG would pay to the plaintiffs the all-inclusive sum of \$130,000 and consent to an order in the Komtech Action releasing the monies posted as security for costs to the plaintiffs; and
- b. The actions would be dismissed on a without costs basis and the parties would exchange full and final releases.

[10] On May 24, 2019, the appellants, Sigma, and KPMG signed a Mutual Full and Final Release and the sum of \$130,000 (the "Settlement Funds") was paid to Friedman.

[11] The monies that had been posted as security for costs in respect of the Komtech Action, plus accrued interest (the "Security Funds"), were paid out of court and deposited in trust by Friedman.

[12] No agreement was ever reached by the parties as to how the funds were to be apportioned. Friedman was paid \$44,780.10 on account of unpaid legal fees with respect to the Benzer Action and the Komtech Action and Sigma brought the application for an order as to the distribution of the remaining funds.

The application judge's reasons

[13] The application judge rejected Benzer's argument that s. 3(i) of the Assignment Agreement applied and that Benzer, through the operation of the Assumption Agreement, was entitled to be reimbursed for the costs and expenses pertaining to the Komtech Action that it had paid, even though a costs award had not been made.

[14] As noted above, the reimbursement obligation in s. 3(i) was "to a maximum of the amount of the legal costs awarded, if any" (emphasis added) and the settlement expressly provided for the dismissal of the actions on a without costs basis.

[15] In brief, the application judge concluded that the words "if any", could not be ignored. Further, giving effect to those words would not result in an absurdity: it would have been within the contemplation of the parties that a substantial payment might have to be made under s. 3(ii) of the Assignment Agreement, which provides for payment to Benzer of 15% of the "net amounts recovered from, in connection with or out of" the Komtech Action, minus the legal costs awarded. It was open to the parties to negotiate the allocation of part of the settlement amount to costs, but they did not do so.

[16] Turning to the calculation of Benzer's entitlement under s. 3(ii) of the Assignment Agreement, the application judge rejected Benzer's argument that the

Security Funds were “net amounts recovered from, in connection with or out of” the Komtech Action, and it was therefore entitled to 15% of the Security Funds.

[17] She reasoned that “net amounts” should be given its ordinary meaning, namely amounts recovered from the Komtech Action minus the expenses that were incurred in relation to the Komtech Action. The monies paid into court as security for costs were clearly a “litigation expense”. Thus, they do not constitute “net” amounts recovered from, in connection with or out of the Komtech Action.

[18] In the result, the application judge held that: the Security Funds were to be released to Sigma, except that, with Sigma’s consent, Benzer was entitled to be paid directly its contribution (\$31,778.61) as a shareholder of Sigma; after payment of Friedman’s outstanding invoices and reimbursement of other litigation expenses relating to both the Benzer Action and the Komtech Action that are not in dispute on this appeal, the balance of the Settlement Funds were to be apportioned equally between the appellants and Sigma in respect of the Benzer Action and the Komtech Action, respectively; and Sigma was to pay Benzer 15% of the amount she apportioned to Sigma on account of the Komtech Action in satisfaction of its obligation to Benzer under s. 3(ii) of the Assignment Agreement.

Issues and Arguments on Appeal

[19] The appellants make two main arguments on appeal.

[20] First, they argue that the application judge erred in concluding that Benzer was not entitled to be reimbursed for the costs and expenses pertaining to the Komtech Action that it had paid under s. 3(i) of the Assignment Agreement because no costs had been awarded.

[21] They argue that the phrase “to a maximum of the legal costs awarded, if any” only applies when legal costs are awarded. In other words, “if any” only modifies “to the maximum of the legal costs awarded” and has no application if no costs are awarded.

[22] They argue that the application judge failed to consider the wording in the Assumption Agreement and read it together with the wording in the Assignment Agreement as she was required to do. The words “if any” do not appear in the Assumption Agreement. For example, the third recital to the Assumption Agreement provides:

In consideration for [227] agreeing to pay the Costs to a maximum of \$200,000, [Sigma] agreed to reimburse [227] for all amounts paid by [227] on account of the Costs to a maximum of the legal costs incurred and to pay [227] 15% of the net amount recovered from or in connection with the [Komtech Action].

[23] They submit that, interpreting the Assignment Agreement in light of the language in the Assumption Agreement, it is clear that the parties intended Benzer to be reimbursed, whether or not there was an award of costs, subject only to the limitation as to the maximum.

[24] They argue that the application judge's interpretation works an absurdity because the 15% compensation in s. 3(ii) does not, in all cases, provide adequate compensation to a litigation funder required to advance up to \$200,000.

[25] Second, the appellants argue that the application judge erred in concluding that the Security Funds should not be included in calculating Benzer's entitlement under s. 3(ii) of the Assignment Agreement. In particular, she erred in equating the amounts paid into court as security for costs to a "litigation expense". They were simply funds impressed with a specific purpose. When KPMG consented to their release, they ceased to be security funds, and became generic funds, available for the satisfaction of the parties' obligations following the settlement; they were funds recovered from and out of the Komtech Action. Finally, the appellants argue that the application judge erred by failing to consider and apply the case of *Edelstein v. Monteleone*, 2017 ONSC 2717, which is analogous to this case and ordered reimbursement of the litigation funder.

Analysis

[26] We do not give effect to either argument advanced by the appellants. The application judge carefully instructed herself as to the applicable principles of contractual interpretation. Her interpretation is a question of mixed fact and law subject to appellate review on the deferential standard of palpable and overriding

error, unless there is an extricable error of law: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50, 52.

[27] The appellants point to neither a palpable and overriding error nor an extricable error of law.

[28] The application judge did not commit an extricable error of law by failing to consider the wording of the Assumption Agreement in concluding that Benzer was not entitled to reimbursement pursuant to s. 3(i) of the Assignment Agreement. Pursuant to the Assumption Agreement, 227 assigned to Benzer, all of 227's "rights, title and interest in and to the reimbursement of the Costs [...]". Costs are defined in the Assumption Agreement as the expenses and costs pertaining to the Komtech Action. 227's right to reimbursement of the Costs is pursuant to the Assignment Agreement between 227 and Sigma. 227 could not assign a greater right of reimbursement to Benzer under the Assumption Agreement than it had bargained for under the Assignment Agreement. Sigma is not a party to the Assumption Agreement.

[29] We agree with the application judge that the words "if any" cannot be ignored and that the resulting interpretation does not result in an "absurdity." The fact that an agreement provides for different levels of compensation to a litigation funder depending on whether costs were awarded is not an absurdity.

[30] As to the appellants' argument that the application judge erred in concluding that the Security Funds should not be included in calculating Benzer's entitlement under s. 3(ii) of the Assignment Agreement, there is no basis for this court to interfere with the application judge's characterization of the security for costs paid as analogous to a litigation expense in this context. Further, the application judge noted that she had "reviewed the cases cited by the parties, but their usefulness is very limited given that all of them are fact-specific and contract-specific. They do not provide assistance as to how the specific agreements before me should be interpreted in light of the circumstances of this case." She reviewed *Edelstein* and concluded that it was not of assistance. We agree. She committed no reviewable error.

Disposition

[31] Accordingly, the appeal is dismissed. Sigma shall be entitled to its costs of the appeal, fixed in the agreed upon amount of \$10,000, inclusive of HST and disbursements.

"J.C MacPherson J.A."
"Alexandra Hoy J.A."
"S. Coroza J.A."