COURT OF APPEAL FOR ONTARIO

CITATION: Kemeny v. Callidus Capital Corporation, 2023 ONCA 76
DATE: 20230203
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Zarnett, Thorburn and Copeland JJ.A.

BETWEEN

George Leslie Kemeny

Plaintiff (Respondent)

and

Callidus Capital Corporation

Defendant (Appellant)

John Leslie and Mordy Mednick, for the appellant

Michael P. Farace, for the respondent

Heard: January 9, 2023

On appeal from the judgment of Justice Elizabeth M. Stewart of the Superior Court of Justice, dated December 15, 2021.

Copeland J.A.:

[1] The respondent helped arrange a loan between the appellant and Esco Marine Inc. ("Esco"). Esco agreed to pay the respondent a consulting fee for his services in arranging the loan. The appellant agreed to an Irrevocable Direction (the "Irrevocable Direction") directing it to pay the respondent's fee directly to him from the first advance of the loan to Esco. The loan proceeds were advanced, but

the appellant did not pay the respondent his fee out of the first advance. The respondent claimed damages from the appellant for breach of contract, breach of fiduciary duty, and breach of trust. The appellant appeals the judgment of the trial judge in favour of the respondent.

[2] There is no dispute between the parties that Esco would be liable to pay the respondent's fee. But Esco is no longer in business, having been placed into insolvency in the courts of Texas sometime after the loan advances were made by the appellant. The issues raised in this appeal concern whether the appellant was liable for failing to pay the respondent's fee from the first advance of the loan, pursuant to the Irrevocable Direction.

[3] For the reasons that follow, I would dismiss the appeal.

Factual Background

[4] Until 2010, the respondent was the Chief Financial Officer of Esco. At the time of the events giving rise to this appeal, he was an independent professional financial advisor and consultant. Esco was a Texas corporation engaged in ship and rig dismantling for scrap metal. The appellant is an Ontario corporation engaged in lending to businesses that cannot obtain financing from traditional funding sources. It was not unusual for businesses seeking loans from the appellant to be in some financial distress, as Esco was at the time it engaged with the appellant.

[5] As a result of discussions with Mark Wilk, the Vice-President of the appellant, the respondent believed that Esco's financial needs were of a type suitable to be addressed by financing from the appellant.

[6] The respondent contacted Mr. Wilk in late April 2014 to discuss the appellant providing financing to Esco. The respondent spent time on these arrangements, including travelling to Texas to pursue negotiation of the loan. Negotiations between Esco and the appellant, carried out with the respondent's participation, advanced swiftly and appeared destined to result in a loan agreement between Esco and the appellant.

[7] The Irrevocable Direction was prepared to ensure the respondent's compensation for his efforts in bringing Esco and the appellant together and facilitating the negotiations.

[8] A draft of the Irrevocable Direction was prepared by the respondent's lawyer and provided to Mr. Wilk for review and editing prior to its execution by any party. Mr. Wilk suggested changes to the wording of the Irrevocable Direction, and the respondent's lawyer revised it to adopt those suggestions.

[9] The Irrevocable Direction was given by Esco, as "Borrower", and was addressed to the appellant as "Lender" and the respondent as "Consultant". It stated that it pertained to the credit facility to be granted by the appellant to Esco. The central term of the Irrevocable Direction was as follows:

> For $1.00 and other good and valuable consideration, the receipt from each of you and sufficiency of which is hereby acknowledged, the undersigned Borrower hereby irrevocably directs the Lender to pay to the Consultant, upon the closing of the Facility directly from the proceeds of the first drawdown made by the Borrower in connection with the Facility (and without further authorization from the Borrower) the sum of two per cent (2%) of the authorized amount of the Facility (regardless of whether a lesser amount is actually drawn down on closing or not), and such amount shall be held in trust for, and the property of, the Consultant, and this shall be your good and sufficient authority to do so. This Irrevocable Direction shall be governed and construed in accordance with the laws of the Province of Ontario Canada and the parties attorn to the exclusive jurisdiction of the Court of the Province of Ontario. This Irrevocable Direction may be executed in counterparts.

[10] The Irrevocable Direction was signed by the Chairman of Esco on May 1, 2014, and by Mr. Wilk on behalf of the appellant on May 4, 2014. The signature on behalf of the appellant appears under the heading “Lender Acknowledgement”.

[11] Subsequent to the signing of the Irrevocable Direction, the terms of the loan from the appellant to Esco were finalized. The loan agreement was executed on June 30, 2014. The loan agreement provided for the appellant to provide Esco with a number of credit facilities totalling approximately US$33,990,000.

[12] The first advance from the appellant to Esco under the loan agreement was made on June 30, 2014. The appellant did not pay the fee to the respondent out of the first advance of the loan.

Reasons of the trial judge

[13] The appellant took the position before the trial judge, maintained on appeal, that it was not liable under the Irrevocable Direction to pay the respondent's fee. It took the position that the loan agreement provided for advances under the loan to be used to pay off all secured creditors of Esco so as to place the appellant in sole first priority secured position, and that having done so, there was no availability of loan funds to pay the respondent's fee out of the first advance of the loan. The appellant argues that Esco agreed to pay the respondent his fee, and only Esco is liable for the fee.

[14] The trial judge rejected the appellant's submissions. She found that the appellant was liable to the respondent for the amount of his fee as set out in the Irrevocable Direction both in contract and as a trustee. There was no dispute that the amount of the respondent's fee as set out in the Irrevocable Direction, 2% of the authorized amount of the loan, was US$679,800. The trial judge awarded judgment to the respondent in an amount equivalent to US$679,800.

[15] The trial judge found that the plain language of the Irrevocable Direction and the factual matrix in which it was negotiated supported the interpretation that the appellant had a contractual duty to pay the respondent's fee out of the first advance of the loan to Esco. All parties knew that Esco was in financial difficulty, and that is why it was seeking loans from the appellant. The trial judge found that although Esco remained liable for payment of the respondent's fee, it was commercially

reasonable for the respondent to seek firm contractual assurance from the appellant that his fee would be paid promptly out of the first advance of the loan proceeds by the appellant to Esco. She found that there was no qualification in the Irrevocable Direction that there be sufficient "availability" of loan proceeds after other disbursements were made before the respondent could receive payment for his services. She found that the appellant breached its obligations under the Irrevocable Direction in failing to pay the respondent's fee out of the first advances of the loan to Esco, and was therefore liable to pay damages to the respondent for breach of contract.

[16] The trial judge further found that the Irrevocable Direction required the appellant to hold the respondent's fee in trust for him. As such, it imposed on the appellant the obligations of a trustee for the respondent with respect to the amount of his fee. The appellant was obliged to ensure that the funds were paid to and received by the respondent out of the first advance of the loan.

Analysis

(1) The trial judge did not err in finding that the Irrevocable Direction created a contractual obligation on the part of the appellant

[17] The appellant argues that the trial judge erred in finding that the Irrevocable Direction created a contractual obligation on it to pay the respondent's fee out of the first advances of the loan to Esco. This argument has two branches. First, the

appellant argues that the trial judge erred by treating the Irrevocable Direction as a guarantee by the appellant that it would pay the respondent's fee. Second, it argues that the trial judge erred by failing to consider the broader factual matrix underlying the Irrevocable Direction when interpreting it. I am not persuaded by these arguments.

[18] These arguments raise issues of the interpretation of the Irrevocable Direction. To succeed, the appellant must establish either a palpable and overriding error of fact or an extricable error of law: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50-55.

[19] I do not agree that the trial judge treated the Irrevocable Direction as a guarantee by the appellant that it would pay the respondent's fee. The trial judge interpreted the Irrevocable Direction, and found that it placed a contractual obligation on the appellant to pay the respondent's fee out of the first advance of loan funds to Esco. She did not find it to be a guarantee by the appellant of the respondent's fee.

[20] The appellant relies on the decision of *Bridgepoint Financial Services Limited Partnership I v. Galamini*, 2021 ONSC 6979, in support of its argument that the trial judge treated the Irrevocable Direction as a guarantee by the appellant of the respondent's fee. *Bridgepoint* involved a covenant by a lawyer to abide by an irrevocable direction to pay proceeds of any settlement received by the lawyer

on behalf of a particular client to the plaintiff in order to repay a loan by the plaintiff to the lawyer's client.

[21] The appellant relies on paragraph 15 of *Bridgepoint*, which draws a distinction between a direction and a guarantee:

> It is true that there are circumstances in which Mr. Grillone might have been unable to comply with the direction. He might, for example, have seen his retainer terminated. The direction did not bind Mr. Grillone to pay the claimed sum from his own pocket. It was no guarantee. It merely obliged him to cause the settlement funds to be so directed. If he ceased to represent the Borrower, then the direction would have no further object. That prospect does not make the direction given void or unenforceable – it merely recognizes the potential for future events to occur which might, were they to occur, have rendered it without object. As a matter of fact, the Plaintiff Loan Agreement specifically provided for the sequence of events that would unfold in the event of an abandonment of the claim or a change of counsel.

[22] This paragraph of *Bridgepoint* is simply an acknowledgment that, in some cases, the event which would trigger a party's obligation under an irrevocable direction may not come to pass. In *Bridgepoint*, the lawyer's obligation was to direct any settlement funds received by him to the plaintiff. If the lawyer were discharged before receiving any settlement funds, the obligation would not be triggered because the lawyer would not receive settlement funds.

[23] However, the appellant's reliance on *Bridgepoint* founders on the very next paragraph of the decision, where the motion judge held that the lawyer was bound

to follow the direction he had accepted, and liable for not directing settlement funds he received as he had agreed:

> There can be no question that Mr. Grillone was bound by the covenant he gave to honour the irrevocable direction of his client. There can be no question that he received the referenced Settlement Funds on November 13, 2012 and failed to honour that covenant in fact. That such failure was the result of oversight or carelessness on his part is of no moment. Mr. Grillone is liable to the plaintiff for breach of his covenant.

[24] Similarly, in this case, the appellant agreed in the Irrevocable Direction to follow the direction from Esco and pay the amount of the respondent's fee to him from the first advance of its loan to Esco. The trial judge found that the Irrevocable Direction was an agreement that the appellant would pay the respondent's fee to him from the first advance of loan funds to Esco. As the trial judge found, the appellant's obligation under the Irrevocable Direction was that if loan proceeds were advanced, it was obliged to pay the respondent's fee directly to him out of the first advance of funds. The Irrevocable Direction was not a guarantee by the appellant of the respondent's fee. The appellant was not required to pay the respondent's fee out of its own pocket. The funds were part of the loan to Esco. Had loan funds not been advanced, the appellant would not have had any obligation. But as loan funds were advanced, the appellant was obliged to comply with its agreement in the Irrevocable Direction to pay the respondent his fee directly from the first advance of the loan funds.

[25] Nor am I persuaded that the trial judge failed to consider the factual matrix surrounding the Irrevocable Direction. At the outset of her analysis, the trial judge correctly instructed herself that in addition to considering the text, a contract should be interpreted in accordance with sound commercial principles and in the context of the factual matrix at the time the contract is executed.

[26] Further, the trial judge's reasons show that she considered the factual matrix in interpreting the Irrevocable Direction, including the loan agreement between Esco and the appellant. Her reasons consider in some detail the negotiations leading up to the signing of the Irrevocable Direction, as well as subsequent negotiations in relation to the respondent offering to accept a reduced fee (the latter issue is discussed further in relation to the appellant's ground of appeal based on the respondent being estopped from enforcing the Irrevocable Direction).

[27] The appellant argues that the trial judge did not consider the terms of the later-finalized loan agreement between itself and Esco in interpreting the Irrevocable Direction. But the trial judge's reasons show that the appellant is incorrect in this assertion. The trial judge considered the appellant's argument that the full amount of the loan funds advanced had been designated to pay off all of Esco's secured creditors in order to place the appellant in sole first-priority secured position. However, she rejected the appellant's argument that the subsequently negotiated terms of the loan agreement between Esco and the appellant relieved the appellant of its obligation to direct the payment of the respondent's fee to him

out of the first loan funds advanced to Esco. I am not persuaded by the appellant's argument that the trial judge failed to consider the factual matrix in her interpretation of the Irrevocable Direction.

[28] The substance of the appellant's argument is that the loan agreement between Esco and itself, executed after the Irrevocable Direction and to which the respondent was not a party, effectively altered the agreement contained in the Irrevocable Direction. The trial judge rejected that proposition. I see no error in that conclusion.

(2) The trial judge did not err in finding that the appellant breached its trust obligations to the respondent

[29] The appellant next argues that it did not breach its trust obligations under the Irrevocable Direction because no proceeds were available from the first drawdown of the loan to Esco after Esco's secured creditors were paid from the loan proceeds. As explained above, in my view, the trial judge did not err in her interpretation of the Irrevocable Direction. This includes her finding that the Irrevocable Direction did not place a qualification of sufficient "availability" of loan proceeds after other disbursements were made before the respondent could receive payment for his services. The appellant's argument that it complied with its trust obligations under the Irrevocable Direction is dependent on this court accepting that the Irrevocable Direction must be interpreted as making the

payment of the respondent's fee from the first advance of the loan subject to availability of funds after proceeds of the loan were directed to paying Esco's secured creditors. As I find no error in the trial judge's conclusion that no such qualification was contained in the Irrevocable Direction, this argument must fail.

(3) The trial judge did not err in rejecting the submission that the respondent was estopped from receiving his fee by his conduct subsequent to the signing of the Irrevocable Direction

[30] The appellant further argues that even if the Irrevocable Direction bound it to pay the respondent's fee from the first advance of the loan to Esco, the respondent's subsequent conduct estopped him from receiving his fee. The appellant bases this argument on the assertion that the respondent agreed that the Irrevocable Direction was of no force and effect during negotiations among Esco, the appellant, and the respondent conducted between June 27 and 30, 2014.

[31] The trial judge rejected this argument. I see no basis to interfere with her finding that nothing in the documentary record or the respondent's conduct should operate as an estoppel preventing him from recovering his fee for services successfully performed. In particular, the record of the June 27 to 30, 2014 negotiations does not support the appellant's position that the respondent agreed

that the Irrevocable Direction was of no force and effect. The negotiations were conducted by email, and thus, are documented.

[32] The negotiations in late June 2014 were triggered by the appellant taking the position that paying the respondent's fee out of the first advance of the loan presented a threat to the loan agreement closing. In the appellant's view, the amount calculated to be the first advance of the loan to Esco would not leave sufficient funds to pay the respondent's fee after Esco's secured creditors were paid out.

[33] In the negotiations, Mr. Wilk, on behalf of the appellant, requested written confirmation from Esco and the respondent that the Irrevocable Direction "is now null and void." As the trial judge noted, the appellant wanted an agreement that the Irrevocable Direction was null and void, because it was concerned about its liability if it did not comply with the Direction. In an email to Esco raising concerns about the respondent's fee, Mr. Wilk, on behalf of the appellant, wrote: "We have consulted with our solicitors on the matter and they are of the opinion that Callidus may be subject to a lawsuit if the full amount of the funds are not sent to Les [the respondent] at close."

[34] During the negotiations, although the respondent was willing to consider reducing his fee, or accepting payment in installments, in order to resolve the issue raised by the appellant, at no point did the respondent accept the appellant's

demand for confirmation that the Irrevocable Direction was null and void. The negotiations culminated with the respondent sending to the appellant and Esco an acknowledgment of his willingness to accept a reduced fee of US$400,000, if it was paid in full as part of the closing disbursement of the loans to Esco. The acknowledgment, which was sent on June 30, 2014 provided as follows:

> The undersigned, George Leslie Kemeny (the "Undersigned") confirms that upon receipt of the sum of $400,000 wired directly from Callidus to the undersigned's solicitors (wire instructions attached as Schedule "A") as part of the closing disbursements in connection with the closing of various loans made by Callidus to Esco that:
>
> > 1. Notwithstanding anything contained in the Irrevocable Direction, the terms of the Irrevocable Direction shall be deemed to have been complied with in full; and
> >
> > 2. Esco and the undersigned shall be deemed to have released each other of all claims in respect of the Irrevocable Directions and payments made in connection therewith.
>
> Failure to pay the amount of USD$400,000 as set out above shall result in the Irrevocable Direction remaining in full force and effect, unamended.

[35] Given the clear wording of the acknowledgment and the respondent's position throughout the negotiations, including that the email record of the negotiations does not show the respondent having agreed at any point that the Irrevocable Direction was null and void, I see no palpable an overriding error in the trial judge's finding that the June 30 acknowledgment showed that the respondent "was prepared to accept the reduced amount if paid to him immediately at closing in accordance with the terms of the [June 30, 2014 acknowledgment]. If not, the

full terms of the Irrevocable Direction would remain in effect." In other words, the respondent was prepared to accept a reduced fee in fulfillment of the obligations under the Irrevocable Direction, but only if it was paid to him as part of the closing disbursements of the loan from the appellant to Esco.

[36] In the event, the loan agreement closed, and the appellant made the first advance on the loan on June 30, 2014. The appellant did not pay the reduced fee of US$400,000 to the respondent from the first advance of the loan. As a result, the respondent was entitled to the payment of his full fee as agreed to in the Irrevocable Direction.

[37] The appellant also argues that the trial judge's reasons for finding that the respondent was not estopped from enforcing Irrevocable Direction are inadequate. This argument is without merit. The appellant focuses on one paragraph of the trial judge's reasons, where she states her conclusion that there was no estoppel. The appellant ignores the trial judge's factual findings made earlier in the reasons in support of that conclusion. Reasons for judgment must be read as a whole. Read as a whole, the trial judge's reasons are sufficient to show why she reached her decision on the estoppel issue, and are sufficient to fulfil the purposes of reasons for judgment, including permitting meaningful appellate review: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *Farej v. Fellows*, 2022 ONCA 254, at paras. 41-45.

Disposition

[38] For these reasons, I would dismiss the appeal. Based on the agreement of the parties, the appellant shall pay costs of the appeal to the respondent in the amount of $13,526.10, inclusive of disbursements and applicable taxes.

Released: February 3, 2023 “B.Z.”

“J. Copeland J.A.”
“I agree. B. Zarnett J.A.”
“I agree. Thorburn J.A.”