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WHAT SHOULD A BUSINESS CONSIDER WHEN NEGOTIATING AN ALTERNATIVE FEE ARRANGEMENT FOR LEGAL SERVICES?

P. Brickman, LexisNexis Canada Inc.

Years ago, there were few alternatives to the billable hour when retaining counsel for corporate and commercial matters; however, as in-house legal departments seek to ensure that the bills they receive are predictable and reasonable, and reflect the level of success achieved and the level of quality and service provided, there is increasing interest in alternative fee arrangements ("AFAs") for legal services.

Types of AFAs

AFAs can be categorized into several types, including:

- time-based billing (but deviating from the standard billable hour);
- success-based fees;
- task- or service-based rates; and
- hybrid arrangements (based on a combination of two or more of time, the level of success, the task performed, the level of service, and other factors).

Time-Based Billing

Included in this category are discounted rates (e.g., a client negotiates an hourly rate that is 10 per cent less than the lawyer may charge other clients), blended rates (e.g., a client pays a single rate of $400 per hour regardless of whether the normal billable rate of the lawyer who performed the service is $250 per hour or $750 per hour), and the volume discount (e.g., the client pays a lower billable rate as long as the client contracts for a certain volume of work).

While these arrangements are designed to, and in many cases may, result in lower overall bills for the client, they may also have unintended consequences. For example, in the case of the blended rate, might the firm be more inclined to assign junior or less experienced counsel to the file than they would if there were no blended rate? In the case of a discounted rate, might counsel be more reluctant to "write off" amounts, such that bills are not materially different than they otherwise would have been? And where a firm charges less per hour in consideration of a given volume of work, might the client feel constrained to continue the retainer even if not fully satisfied with the results or level of service?

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Success-Based Fees

Success-based fees include the contingency fee and reverse contingency fee. The former is relatively common for plaintiff's counsel in certain types of litigation (e.g., personal injury and class proceedings). In a contingency fee arrangement, the lawyer is primarily compensated based on the amount of the award or settlement (e.g., a pre-determined percentage), although the client may be charged for disbursements. A reverse contingency fee is also theoretically possible: it would apply to defendant's counsel and would be determined based on notional "savings" from an originally estimated result. For example, if defence counsel negotiates a settlement that is lower than that originally estimated, or the plaintiff is awarded less at trial than originally estimated, counsel would receive a percentage of that "savings" as its fee.[1]

While success-based fees can seem very appealing to a client (there is no upfront payment of legal fees and there is an apparent alignment of interests between the client and counsel), such rates can ultimately result in a higher overall cost for the client, as the lawyer is taking on risk, sometimes in the absence of information that could ultimately prove material to the outcome. Also, despite the apparent initial alignment of interests, counsel's interests and the client's interests may diverge as a matter proceeds (e.g., counsel believes a settlement offer is reasonable, while the client wishes to proceed to trial), such that several alternatives and potential scenarios may need to be considered and agreed upon from the outset.

Task- or Service-Based Rates

Task- or service-based rates include flat fees. Flat fees may be charged in situations where the amount of time needed to complete the matter tends to be fairly predictable: the flat fee may apply to an entire matter or a part thereof.

Flat fees may be offered by the lawyer for certain standard types of matters, or may result from a request by the client to perform a specified task for a set fee. In some cases, by raising the issue of a flat fee at the outset, the client has the opportunity to let counsel know the value that the client ascribes to the task, thus potentially avoiding a situation where the legal costs ultimately outweigh the value of the matter to the client.

However, certain matters may not lend themselves easily to flat fees. For example, where a matter entails a complex negotiation with multiple parties, it will be very difficult to anticipate in advance how much time it will take for the lawyer to see the matter through to completion, and the lawyer may not want to assume the risk of a flat fee in such a scenario. A flat fee may also not be in a client's best interests where the nature of the matter is such that increased time and effort will tend to yield a better result for the business, but the flat fee charged is too low to incentivize same.

As noted by LexSage Professional Corporation, a boutique international trade and sales tax law firm, on its website, a "fixed fee arrangement requires a scope of work to be defined with a degree of specificity and detail at the beginning of the relationship … [f]or fixed fee arrangements to work, the client must manage its demands during the course of the retainer."[2]

Hybrid Arrangements

Hybrid arrangements combine two or more aspects of the above AFAs. Some examples include:

- a lower billing rate coupled with a success or bonus fee (e.g., counsel agrees to a lower initial billing rate but receives a bonus or percentage of the award or settlement in the event of success);
- a success or bonus fee if an agreed efficiency measure is achieved (e.g., timely resolution of a matter, fewer hours billed than originally estimated);
- a declining billing rate as total billings increase (e.g., as billing on a given matter hits pre-determined billing milestones, counsel's rate declines by a specified percentage for each set increment above the original estimate, subject to pre-determined exceptions); and
- a flat fee for a defined scope of work, subject to potential additional fees for contingencies that may arise.

[1] A success-based fee could also apply to a commercial transaction.

[2] See lexsage.com/alternative-fee-arrangements.

Hybrid arrangements offer flexibility to both counsel and their clients, in that they can negotiate to find a billing approach that meets their mutual interests to the greatest extent. It is worth noting, however, that hybrid arrangements may take additional time in advance to negotiate, may create certain accounting challenges, and could suffer from some of the same risks or disadvantages associated with the elements of the more standard AFAs of which they are comprised.

Novel Approaches

Some law firms are creating their own approaches to billing for legal services. For example, Cognition LLP, which sees itself as an "alternative to retaining a traditional law firm or hiring in-house counsel", recently attracted attention when it announced it was implementing "Value-Based Billing", whereby a client has the ability to affect the amount of the invoice (plus or minus ten per cent) depending on their level of satisfaction with the service provided, utilizing a scorecard created to reflect criteria such as expertise and effectiveness. According to Shari Zinman, Director of Client Happiness, Cognition is also "amenable to fixed fee pricing for scope-able projects and matters ... [utilizing] change orders to ensure there are no surprises".

Cyndee Todgham Cherniak, the principal of LexSage, has found one of her innovative offerings, the pre-paid credit, to be especially appreciated by clients. The pre-paid credit allows the client to purchase a pre-paid block or package of credits at a discounted hourly rate. Typical of an AFA, this offering seeks to benefit both client and counsel: in this case, the client benefits from a rate that is between 14 and 20 per cent less than the usual rate, and counsel benefits because collection risk is reduced.

Conclusion

The extent to which AFAs are possible or appropriate for a given matter depends on a number of factors. For example, the given jurisdiction's rules of professional conduct, legislation, or regulations may prohibit, or prescribe certain terms of, some forms of AFA;[3] the nature of the matter may be such that it is difficult to anticipate the matter's complexity and the necessary resources at the outset; the time that would be necessary to negotiate the details of the AFA may be excessive; or there may be insufficient potential upside to incentivize counsel or the client to take the risk of deviating from the more traditional hourly billing.

However, as novel approaches to AFAs continue to develop, AFAs may continue to be attractive to businesses seeking to improve their ability to budget accurately for legal costs, reward success, and create a stronger sense of alignment of interests with counsel.

LEGISLATIVE UPDATE

Manitoba

Home Improvement

On June 30, 2015, *The Consumer Protection Amendment Act (Home Improvement Contracts)*, SM 2015, c. 8 (the "Act", formerly Bill 14), received royal assent.

The Act amends *The Consumer Protection Act*, CCSM c. C200, by, among other things, adding a new Part XXVII (the "Part") applicable to home improvement contracts. The new provisions:

- define relevant terms, including "home", "home improvement contract", "home improvement project", and "home improvement services";
- set out certain activities that are not included in the definition of "home improvement services";

[3] For example, rule 3.6-1 of Ontario's *Rules of Professional Conduct* provides that "[a] lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion", and rule 3.6-2 addresses contingency fee arrangements. Section 28.1 of the *Solicitors Act*, RSO 1990, c. S.15, also addresses contingency fee arrangements. Case law may also address issues related to AFAs.

- provide that the Part applies to one or more home improvement services when the total or estimated amount to be charged to the consumer is more than the prescribed amount or, if no amount is prescribed, $500;
- provide that the Part does not apply to new home construction, home improvement services provided primarily for the business purposes of the owner or occupier of the home, or an agreement to provide home improvement services between a general contractor and a subcontractor;
- require that a home improvement contract be in writing and contain specified information, such as name and contact information, a statement about whether the contractor has workers compensation coverage and insurance coverage, details of the project, the amount to be charged (described as set out in the Act), dates and the estimated duration of the project, and signatures;
- require that the contractor provide the consumer with a copy of the signed contract within the timelines specified;
- if prescribed, require the contractor to provide to the consumer a copy of the Consumer Protection Office's pamphlet about the consumer's rights and responsibilities and to include a statement in the contract in respect of the provision thereof to the consumer;
- set out requirements where a contractor is also a direct seller or where a home improvement contract meets the criteria of another type of contract to which the Act applies; and
- provide for the making of regulations.

The Act also sets out certain transitional and consequential amendments and comes into force on a day to be fixed by proclamation.

Consumer Protection

On June 30, 2015, *The Consumer Protection Amendment Act (Gift Card Inactivity Fees)*, SM 2015, c. 22 (the "Act", formerly Bill 212), received royal assent.

The Act amends *The Consumer Protection Act*, CCSM, c. C200, by adding section 173(2), which provides that a regulation governing the fees that may be charged in relation to prepaid purchase cards may not authorize an inactivity fee in respect of a prepaid card that was issued or sold for cash or other consideration.

The Act comes into force on a day to be fixed by proclamation.

Ontario

Private Security

On July 16, 2015, O. Reg. 208/15, *Training and Testing*, made under the *Private Security and Investigative Services Act, 2005*, SO 2005, c. 34 (the "Regulation"), was filed. The Regulation amends O. Reg. 26/10 by, among other things:

- providing that a licence to act as a security guard shall not be issued to an applicant unless the applicant:
  - has successfully completed a training program that complies with the Training Syllabus for Security Guards published by the Ministry dated January 20, 2015; and
  - before taking the licensing test, has provided the person administering the test has a valid St. John Ambulance Emergency First Aid Certificate or its equivalent;
- providing that a licence to act as a private investigator shall not be issued to an applicant unless the applicant has successfully completed a training program that complies with the Training Syllabus for Private Investigators published by the Ministry dated January 20, 2015; and
- providing that it is a condition of every licence held by a business entity that, if the entity provides a training program required by section 2(1)(*a*) or 2(2)(*a*) of the Regulation, the business entity shall provide a training certificate to every individual who successfully completes the training program, with such certificate to contain the specified information.

The Regulation also sets out certain transitional provisions and will come into force on October 1, 2015.

Securities

The *Building Ontario Up Act (Budget Measures), 2015*, SO 2015, c. 20 (formerly Bill 91), received royal assent on June 4, 2015. Among other things, the Act amends the *Securities Act* by:

- re-enacting section 19(1) to include a requirement that market participants keep such books, records, and other documents as may reasonably be required to demonstrate compliance with Ontario securities law;
- amending sections 76 and 134 to extend the application of the insider trading provisions from reporting issuers to issuers; and
- amending section 127 to allow cease trade orders to be made without giving the person or company that is subject to the order an opportunity to be heard if the person or company fails to file a record as required under the *Securities Act*.

The amendments to the *Securities Act* were effective June 4, 2015.

ON THE CASE

Employment

Placing Employee on Temporary Leave Pending Further Medical Information Did Not Amount to Constructive Dismissal

Federal Court of Appeal, March 4, 2015

Donaldson, a 20-year employee of Western Grain By-Products Storage Ltd. ("Western Grain"), left work ill and was hospitalized for 10 days. He filed a claim with the Workplace Safety and Insurance Board ("WSIB"), claiming that the symptoms he experienced were the result of a toxic allergic reaction to grain dust. He informed Western Grain that his doctor had advised him not to return to work. After the WSIB determined that the evidence did not establish an occupational disease, Donaldson provided Western Grain with a doctor's note indicating that he could return to work. Western Grain requested a more detailed medical note. Not long afterward, Donaldson was advised that he was being placed on temporary layoff; seasonal layoffs occurred annually and four other employees were also laid off temporarily that year. Donaldson's unjust dismissal claim was upheld by the adjudicator, but an application for judicial review was allowed. Donaldson appealed.

The appeal was dismissed. The crucial issue for determination was whether Western Grain was justified in asking for a more substantive medical note prior to Donaldson's return to work. The arbitrator's finding that Western Grain sought medical evidence from Donaldson spanning 20 years was not supported by the evidence. This erroneous finding was used multiple times in the adjudicator's analysis and conclusion. Donaldson continued to have substantial health problems, as set out in the WSIB report, and the adjudicator's finding that the WSIB was conclusive about his capability to return to work was incorrect. The report did not preclude a request by Western Grain for further health information, as it was aware of Donaldson's significant health problems. The request for additional medical information did not amount to a fundamental change to the terms of Donaldson's employment, and he was not constructively dismissed.

Donaldson v. Western Grain By-Products Storage Ltd., 2015 FCA 62

Motion Judge Erred in Calculating Reasonable Notice so as to "Bridge" Notice Period to Date of Employee's Eligibility for Full Pension

Ontario Court of Appeal, February 2, 2015

Arnone, a 31-year employee of Best Theratronics and its predecessor, was terminated without cause. He was 53 years old when he was terminated and held the position of "Manager Customer Service". Arnone brought an action for wrongful

dismissal. The motion judge granted a motion for summary judgment, and ordered Best Theratronics to pay damages equal to the gross salary Arnone would have earned until he qualified for a pension. In addition, Arnone was awarded money for the present value of the loss of an unreduced pension, a retirement allowance of 30 weeks' pay, and costs. Best Theratronics appealed, and Arnone cross-appealed.

The appeal was allowed, in part, and the cross-appeal was allowed. The motion judge did not err in granting summary judgment, since there was no genuine conflict over Arnone's role prior to termination requiring a trial of the issue. Arnone conceded that he was a supervisor, not a manager, for the purposes of the summary judgment motion, and the finding that he performed supervisory functions was reasonable. The motion judge erred in calculating the reasonable notice period at 16.8 months to "bridge" the notice period to the date of Arnone's eligibility for an unreduced pension at his early retirement date. A 22-month notice period was reasonable. The motion judge erred in failing to deduct income earned by Arnone during the notice period from the damages award. The contract of employment included an implied term that if an employee was terminated without cause, he or she would be entitled to payment of the accumulated retirement allowance as set out in the contract. The motion judge's retirement allowance award was upheld. The award of compensation to replace lost pension benefits during the notice period was upheld. The cost issue was remitted back to the motion judge for determination.

Arnone v. Best Theratronics Ltd., 2015 ONCA 63

Employer's Response to Employee's Persistent and Aggressive Complaints About His Co-Workers Was Not Related to His Race, Colour, or Sex

British Columbia Human Rights Tribunal, March 26, 2015

Sebastian, who was of Indo-Canadian heritage, worked for Vancouver Coastal Health ("VCH"). On the day in question, Sebastian and another employee called a different department and allegedly spoke to a co-worker who didn't work in that department. When Sebastian inquired as to whether the co-worker had been awarded an available position in that department, he was informed by management that the co-worker was not working in the department on the day in question. Sebastian was concerned about a possible security or privacy issue, believing someone was impersonating the co-worker. VCH investigated, and was satisfied that the incident was a misunderstanding and that the matter was resolved. Sebastian continued to push, and during a further investigation, Sebastian was asked whether any co-workers had indicated to him that they were frightened by his demeanour and appearance. Sebastian subsequently sent inappropriate emails to his co-workers, questioning their "honesty and integrity", and challenging two other co-workers. When a new payroll scheduling system was introduced, some errors occurred, including an incorrect code being assigned to Sebastian's hours. Sebastian brought a grievance, believing it was a direct target at him. During a preparation meeting with the union lawyer, Sebastian allegedly commented that he had thought about "breaking legs", but decided to file a grievance instead. The union representative contacted VCH, who brought in a violence prevention specialist to assess the situation and interview Sebastian. He was suspended with pay during the investigation, and was returned to work when the psychiatric evaluation determined there was no basis to keep him out of the workplace. Recommendations were made to supervise Sebastian to ensure no threatening statements occurred in the future. Sebastian brought a human rights complaint alleging discrimination on the basis of race, colour, and sex.

The complaint was dismissed. There was no evidence to support the claim that Sebastian's race, colour, or sex was a factor in how VCH responded to his complaints about his co-worker. The payroll incident was the result of innocent mistakes and was not discriminatory. The comment about Sebastian's demeanour and appearance related to whether any co-workers were disturbed by his aggressive approach to the issue, along with his size and aggressive appearance, rather than a comment on his skin colour. Sebastian's emails about his co-workers were persistent, unforgiving, and mean. Race, colour, and sex were not factors in VCH's response to the emails. The response by VCH to Sebastian's comment about "breaking legs" was extreme, although it was in reaction to information given to them by a union representative. An employer confronted with a threatening statement that would give an employee reasonable cause to believe that he or she was at risk of injury was required to conduct a risk assessment, which it did. Even though Sebastian had not engaged in workplace violence, VCH's recommendations for treating him going forward were reasonable. Sebastian presented as vindictive, unyielding, somewhat irrational, lacking in judgment, aggressive, and angry. The response by VCH to his alleged threats was reasonable, and was not related to his race, colour, or sex.

Sebastian v. Kerschbaumer, 2015 BCHRT 56

Commercial

Appeal of Reinstatement of Builders' Liens Dismissed

Court of Appeal of Alberta, June 3, 2015

The respondents were two companies that filed builders' liens under the *Builders' Lien Act* (the "Act") in respect of work done for the appellant developer TRG Developments Corp. ("TRG") in 2013. TRG filed an application under section 48 of the Act to discharge the liens, arguing that they were invalid. The respondents filed affidavits proving the liens. TRG then adjourned its application. The respondents applied for a determination of the validity of the liens, and the applications were adjourned at TRG's request. After the 180-day period for filing a certificate of *lis pendens* ("CLP") had expired with no CLPs filed as required under section 43 of the Act, the Registrar of Land Titles cancelled the registration of both liens at TRG's request. When determination of the liens' validity came before the Master, however, he noted that while the time limit of 180 days could not be waived by agreement in light of section 5 of the Act, the question of estoppel or waiver arose. The Master held that TRG should have applied for removal of the liens on notice to the parties and that TRG's request for adjournments should not be used as a mechanism to defeat the subject matter of the action. Under the circumstances, the Master reinstated the liens pending trial. The Court of Queen's Bench upheld the reinstatement, finding that the Master correctly concluded that TRG had impliedly but effectively waived the lienholders' obligation to file a CLP, and that the notice given by a CLP had been effectively given. Therefore, under the circumstances, it was appropriate to apply a waiver. TRG appealed.

The appeal was dismissed. The Court of Appeal held that a distinction should be drawn between sections 45 and 48 of the Act. When section 48 is engaged, the validity of the lien and any issue with respect to non-compliance with the Act is squarely before the court. There is no need to file a CLP in such a case. Given that there were no third parties adversely affected, and the only person involved in responding to the lienholders' claims was TRG, who obviously had notice of the claims, non-compliance with section 43 of the Act was not an issue. Insistence on duplicate proceedings made no sense.

TRG Developments Corp. v. Kee Installations Ltd., 2015 ABCA 187

Individual Consumer Experience With Cash Back Voucher Meant No Commonality of Experience to Support Class Action

Court of Appeal for British Columbia, June 3, 2015

The plaintiffs, Mr. Marshall and Mr. Wong, purchased furniture from two United Furniture Warehouse ("UFW") locations, receiving a voucher redeemable for an amount up to its face value if they complied with the conditions on the voucher. The voucher program, offered by The Consumers Trust ("CT"), operated on the basis that most customers would forget to submit their vouchers for redemption or would be ineligible because they failed to meet the conditions. CT filed for bankruptcy and UFW sent a notice to customers advising them that UFW was separate from CT. UFW instituted an in-store credit program for customers who had been issued vouchers as a "customer satisfaction measure". Marshall and Wong sought to certify a class action under the *Class Proceedings Act* against UFW and various other entities. They claimed breach of warranty or collateral contract, deceptive or unconscionable acts or practices under the *Business Practices and Consumer Protection* Act ("BPCPA"), negligent misrepresentation, and negligence. The judge found that there were deficiencies in the pleadings, such that the claims against certain defendants disclosed no reasonable cause of action. However, the pleadings were sufficiently particular to disclose a cause of action for misrepresentation and certain relief under the BPCPA. Nonetheless, the chambers judge found that the BPCPA claims and the claims of negligent misrepresentation required consideration of various individual documents and individual oral representations, rather than a common representation, and a determination of the few common issues would not advance the litigation. Marshall and Wong appealed, arguing, among other things, that the chambers judge erroneously found that they had relied on both written and oral representations to prove deceptive acts and practices, thus erring in concluding that the common issues required individual assessments such that a class action was not the preferable procedure.

The appeal was dismissed. There was no error in the chambers judge's findings on the issue of lack of commonality, and that alone was sufficient to uphold the decision that certification was not the preferable procedure. Based on the evidence, every customer had to deal with a salesperson when making a purchase, and different customers were provided

with different combinations of written material and oral representations. The issues of what written material was received by, and what oral representations were made to, individual plaintiffs were inextricably intertwined with the determination of the defendants' liability for a deceptive practice under the BPCPA. As a consequence, each class member would have to show that he or she fell within the BPCPA, and on that basis alone the case clearly could not be heard as a class action.

Marshall v. United Furniture Warehouse Limited Partnership, 2015 BCCA 252

Court Denies Recognition of US Bankruptcy Proceedings as Foreign Main Proceeding

Supreme Court of Nova Scotia, June 5, 2015

Wolfridge Farm Limited ("WFL") was incorporated in Nova Scotia in 2001 under the *Companies Act*, with its registered office and mailing address in Nova Scotia. Its president and vice-president, Lydia and John Early (the "Earlys"), respectively, resided in Nova Scotia. WFL had secured creditors in Canada: Gerald and Dianne Bonang (the "Bonangs") and Farm Credit Canada ("FCC"), who held secured mortgages on separate properties (the "Bedford Property" and the "Wolfville Property", respectively). WFL fell into arrears on both mortgages. A Sheriff's sale of the Bedford Property was conducted, with the successful bidder being an Early company. A deposit was paid, but the balance was not. A further sale was conducted: another Early company paid a deposit but failed to pay the balance of the purchase price. A further sale was scheduled: John Early submitted the highest bid and paid the deposit but again the balance went unpaid. Finally, the property was sold to the Bonangs in April 2015. In respect of the Wolfville Property, a sale was also ordered and Lydia Early attended on behalf of WFL, paid a deposit, but failed to pay the balance. A further sale was planned for that property. In January 2015, WFL was reorganized as a Delaware corporation, under the name of the applicant Wolfridge Farm Ltd. ("New WFL"). New WFL filed a voluntary petition under chapter 11 of the United States ("US") *Bankruptcy Code* in March 2015, in the Bankruptcy Court for the District of Connecticut where the continued corporation had its registered office. In the chapter 11 filing, New WFL reported that its principal assets were in Nova Scotia and Florida. New WFL brought an application to have its US bankruptcy proceeding recognized as a foreign main proceeding under section 270 of the *Bankruptcy and Insolvency Act* ("BIA") and to have John Early recognized as its foreign representative. The Bonangs and FCC opposed the application.

The application was dismissed. Section 268(1) of the BIA defined a "foreign main proceeding" as "a foreign proceeding in a jurisdiction where the debtor has the centre of the debtor's main interests." Section 268(2) provided for a rebuttable presumption that the centre of the main interest ("COMI") of a corporate debtor was its registered office. FCC argued that only after 13 years did WFL change its registered office from Nova Scotia to Mr. Early's part-time law office in Connecticut and that this was not sufficient to change WFL's COMI. The Court noted that in a letter to McDougall J in February 2015 (after the creation of New WFL and only four days prior to the initiation of the US bankruptcy application), Mr. Early had represented that the corporate office was still in Nova Scotia. The Court also noted that while the creditors were divided between Florida and Nova Scotia, the majority of unsecured creditors were residents of Nova Scotia who had entered into agreements with WFL when it was a Nova Scotia company. New WFL claimed that its US real property had far greater value than its Canadian property, but the Court noted that such alleged values were not based on any appraisals before it. Based on the facts, the Court concluded that the presumption that New WFL's COMI was located in Connecticut was displaced, and the COMI was Nova Scotia, such that the US proceeding should not be recognized as a foreign main proceeding.

Wolfridge Farm Ltd. (Re), 2015 NSSC 168

Corporate

Attempts To "Credit-Proof" Corporation Against Judgment Creditor Constituted Oppressive Conduct

Court of Appeal of Alberta, June 15, 2015

The individual appellant Antonio Ruggieri was the sole director of the corporate appellant Ruggieri Engineering, and of the other corporate appellants. After a three-day trial in May 2011, the corporate respondent obtained a judgment of $476,498.86 against Ruggieri Engineering, the only defendant. Three days before the trial, Ruggieri Engineering had filed a

name change with the Alberta Corporate Registry, and shortly after the trial it granted general security agreements of $500,000, as well as issuing promissory notes, all in favour of Antonio Ruggieri and another of the corporate appellants. The respondent again sued Ruggieri Engineering in 2012, this time, however, adding Antonio Ruggieri and the other corporate appellants as parties. The second trial judge granted judgment in the amount of the first judgment against all of the appellants and also awarded punitive damages of $100,000 against them. In his view, Antonio Ruggieri's efforts to "credit-proof" Ruggieri Engineering in order to preclude the respondent from enforcing its judgment amounted to fraudulent conveyances, unjust enrichment, and unlawful conspiracy, in addition to constituting oppression contrary to the *Business Corporations Act*. On appeal, the appellants challenged the trial judge's conclusions on each cause of action, submitting that he erred in law throughout.

The appeal was dismissed. In order to dispose of the appeal, it was only necessary to address the oppression issue. The trial judge identified the correct test for oppression in this case. In relation to creditors, the oppression analysis must focus on whether the effect of the corporation's conduct is unfairly prejudicial to, or unfairly disregards, the interest of the creditor, having in mind the creditor's reasonable expectations (see *Builders' Floor Centre Ltd. v. Thiessen*, 2013 ABQB 23). In the present proceedings, it was to be noted that a debt action must not be routinely turned into an oppression action. That said, the appellants' conduct in this case went considerably beyond the mere failure to pay the first judgment or to appeal it. As the trial judge correctly pointed out, the appellants set out on a deliberate course of conduct to strip Ruggieri Engineering of its exigible assets by encumbering them with general security agreements and the promissory notes. They also paid off Ruggieri Engineering's other creditors, and moved its business to a corporation with a different name. This conduct amounted to oppression which justified the trial judge's findings, including those relating to the personal liability of Antonio Ruggieri, who personally benefited from the oppressive conduct. Similarly, even though punitive damages are "very much the exception" rather than the rule, and are imposed only if there has been high-handed, malicious, arbitrary, or highly reprehensible misconduct departing significantly from ordinary standards of decent behaviour, there was no reason to interfere with the trial judge's award of punitive damages in this case.

1007374 Alberta Ltd. v. Ruggieri, 2015 ABCA 205

Securities

Secondary Market Liability

Ontario Superior Court of Justice, May 20, 2015

In 2011, Open Range Energy Corp. was reorganized, via a plan of arrangement, into two stand-alone publicly traded companies. One continued the oil and gas exploration business under the name Open Range Energy, and the other, renamed Poseidon Concepts ("Poseidon"), continued the tank rental business. Following its successful public offering, Poseidon revealed in a series of corrective disclosures made between November 2012 and February 2013 that it had materially overstated revenues and accounts receivable. In April 2013, Poseidon filed for CCAA protection with more than $94 million in liabilities; it was cease-traded in February 2013 and was delisted in May 2013. Over 13 class actions were filed in three jurisdictions after Poseidon's collapse, alleging numerous misrepresentations in Poseidon's financial statements and corporate disclosure documents. Joanna Goldsmith (the "Plaintiff") commenced an action against National Bank of Canada (the "Defendant") under Part XXIII.1 of the Ontario *Securities Act*, RSO 1990, c. S.5 (the "Act"), alleging that the Defendant was liable for Poseidon's misrepresentations on the basis that the Defendant was an "influential person" as it was a promoter of Poseidon as defined in the Act and knowingly influenced the release of the impugned disclosure documents. More specifically, the Plaintiff alleged that the Defendant, acting in conjunction with others, including its capital markets subsidiary, National Bank Financial ("NBF"), directly or indirectly took the initiative in reorganizing Open Range Energy and in founding and organizing Poseidon, the activities of a "promoter". The Defendant's response was that it was not a promoter, having only provided conventional banking service, and NBF did not qualify as a promoter, having only acted as a financial adviser and later as an underwriter on the public offering. The Defendant also argued that even if it and NBF were promoters, there was no evidence that either of them "knowingly influenced" Poseidon to release the documents containing the alleged misrepresentations. The Plaintiff brought a motion for leave under Part XXIII.1 of the Act.

The motion was dismissed. Under the Act, leave to commence an action for secondary market misrepresentation is granted if a court is satisfied that the action is being brought in good faith and "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff." As there was no dispute that the action was being brought in good faith, the only issue before the Court was whether there was a reasonable possibility that the Plaintiff would succeed at trial. In *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, the Supreme Court of Canada clarified that, with regard to the leave threshold, judges should undertake "a reasoned consideration of the evidence to ensure that the action has some merit". A key concern of the Court was whether the Plaintiff's argument that the Defendant was a promoter who knowingly influenced the release of the impugned documents had a reasonable possibility of success. In the Court's view, a bank does not become a promoter simply by providing traditional banking services and a professional advisor does not become a promoter simply by providing ideas, advice, and ongoing assistance. The Plaintiff would have had to show that the Defendant or NBF "took the initiative in founding or organizing" Poseidon. In reviewing the activities and the evidence, the Court could not conclude that NBF acted beyond the capacity of an investment adviser. The Court also noted that the Plaintiff had not established an agency relationship between the Defendant and NBF, and that the evidence regarding NBF did not transform it into a promoter. Finally, on the allegation that if the Defendant was a promoter it knowingly influenced the release of the impugned documents, the Court held that there was insufficient evidence of this alleged conduct. The Court found that the documents were released under the direction and authorization of the board.

Goldsmith v. National Bank of Canada, 2015 ONSC 2746

Q & A

Are Employees Who Are "On Probation" Entitled to Termination Notice?

Sometimes employment is offered on the basis that the first few months will be a trial period, during which the performance of the new employee will be closely monitored. While generally not addressing the concept of a "probationary" period, employment standards legislation in many jurisdictions provides that the minimum statutory notice requirements do not apply to those who have been employed for less than a specified period (often three months, but the amount of time varies by jurisdiction). However, merely stating that an employee is "on probation" for a specified period does not mean that the employer does not have a common law obligation to provide reasonable notice.

The employment agreement should be clear regarding the notice that applies during the probationary period (and should meet minimum legislative requirements). Moreover, the terms of the probationary period should be clearly communicated to the new employee at the outset, including the length of the period, the basis on which the assessment will be made, the standards that the employee will be expected to meet, and the assistance available to the employee during the probationary period.

As well, the employer should ensure that the probationary employee is given a fair chance to succeed. Information about potential performance issues should be passed along regularly and documented, so that the employee cannot claim surprise if the probationary period is not passed. If performance problems are noted, employees should be given a reasonable opportunity to improve and offered assistance in doing so.

WORTH NOTING

Ontario Has Launched a 10-Year Accessibility Action Plan

Ten years after the passage of the *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA"), the Government of Ontario has released a new accessibility plan, "The Path to 2025: Ontario's Accessibility Action Plan," which builds on progress made and outlines a plan to create an accessible province by 2025.

To review the plan, please see www.ontario.ca/business-and-economy/path-2025-ontarios-accessibility-action-plan.

CCCA AND OTHER EVENTS

Ethical Issues in Employment Law

September 22, 2015, 9:00 a.m. to 11:00 a.m., online only, $25, registration restricted to Law Society of Upper Canada licensees

This seminar, chaired by Janice Rubin of Rubin Thomlinson LLP, will review ethical questions that may arise in the employment law context.

Further details are available at: http://ecom.lsuc.on.ca/cpd/product.jsp?id=FINCLE15-0090600.

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For LexisNexis Canada Inc.

Peninah Brickman, JD
Content Development Lawyer
905-479-2665, ext. 557
email: peninah.brickman@lexisnexis.ca

Customer Support
Phone: 1-800-387-0899
Email: service@lexisnexis.ca
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