IN THE SUPREME COURT OF NOVA SCOTIA

Citation: BMO Capital Corporation v. Clear Picture Corporation Ltd., 2008 NSSC 230

Date: 2008/07/18
Docket: S.H. No. 292447
Registry: Halifax

Between:

BMO Capital Corporation

Plaintiff

and

Clear Picture Corporation Limited

Defendant

and

ACF Equity Atlantic Inc.

Intervenor

Judge: Justice N. M. Scaravelli

Heard: June 24, 2008, in Halifax, Nova Scotia

Counsel: Brian P. Casey, for the Plaintiff
John P. Merrick, Q.C. for the Defendant, Clear Picture Corporation Limited
S. Bruce Outhouse, Q.C. for ACF Equity Atlantic Inc.

By the Court:

[1] This matter arises out of an Application by the Plaintiff, BMO Capital Corporation, (BMOCC) for an Order construing an Unanimous Shareholders' Agreement and a Declaration that the Defendant, Clear Picture Corporation Limited (Clear Picture) was not entitled to extend the date for repayment of a certain loan without prior written approval of BMOCC. By Order of this Court, ACF Equity Atlantic Inc. (ACF) was granted leave to intervene in this proceeding.

[2] The Application is made pursuant to *Civil Procedure Rule 9* which provides in part:

> 9.02. A proceeding, ...
>
> > (a) in which the sole or principal question at issue is, or is likely to be, a question of law, or one of construction of an enactment, will, contract or other document;
> >
> > ...
>
> shall be commenced by filing an originating notice (application inter partes) in Form 9.02A in a proceeding between parties and by an originating notice (ex parte application) in Form 9.02B in an ex parte proceeding.

Background

[3] That Plaintiff BMOCC is the owner of preferred shares of Clear Picture. At all relevant times herein BMOCC had a representative on the Board of Directors of Clear Picture. Other shareholders include ACF. All shareholders entered into an Amended Shareholders Agreement dated November 30, 2001 (the Agreement). The relevant provision of the Agreement provides:

> **5.2 <u>Corporate Acts Requiring Special Approval</u>**
>
> Notwithstanding any provision to the contrary in the Articles of Association or this Agreement, the company will not, without the prior written approval of ACF and BMOCC acting reasonably:
>
> (f) issue or allot any Securities or purchase for cancellation or redemption any Securities ...
>
> (j) issue or repay any loans, advances or guarantees to a person or persons other than in the ordinary course of business and as approved by the board of directors.

[4] On November 22, 2002 ACF made a loan to Clear Picture pursuant to a Debenture Purchase Agreement, secured by a General Security Agreement. The Debenture included a provision that defined the maturity date as being November 22, 2005 or such later date as is agreed in writing by ACF.

[5] At or near the expiry date Clear Picture and ACF agreed to extend the maturity of the loan for a further year to November 2006. No expressed consent or approval was sought from BMOCC pursuant to Clause 5 of the Agreement.

[6] In November 2006 the Debenture was further extended to November 2007 without the consent or approval of BMOCC.

[7] Early in 2007 BMOCC notified Clear Picture that it was objecting to any further renewal of the Debenture. In November 2007 Clear Picture extended the maturity date under the Debenture to November 2008.

Issue

[8] Do the provisions of Clause 5.2(f) (j) of the Shareholders Agreement require the written approval of BMOCC for the extension of the maturity date of the Debenture Loan Agreement?

Analysis

[9] It is generally accepted that commercial contracts are to be interpreted in accordance with sound commercial principles to the extent the wording used permits such an interpretation. *Group Eight Investments v. Taddei* [2005] B.C.J. No. 2134 (C.A.) states:

> 21 ... A helpful review of the principles of contract interpretation in the commercial context is found in the decision of *Scanlon v. Castlepoint Development Corp.* (1992), 99 D.L.R. (4th) 153 (Ont. C.A.); leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 62 Robins J.A. stated at 179:
>
> > The agreement with which we are concerned is a negotiated commercial document which should be construed in accordance with sound commercial principles and good business sense. To the extent that it is possible to do so, it should be construed as a whole and effect should be given to all of its provisions. The provisions should be read, not as standing alone, but in light of the agreement as a whole and the other provisions thereof: Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd. (1986), 25 D.L.R. (4th) 649 at p. 655, [1986] 1 S.C.R. 57, 71 N.S.R. (2d) 353.
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> 22 More recently, this Court summarized the principles of contract interpretation in *Gilchrist v. Western Star Trucks Inc.* (2000), 73 B.C.L.R. (3d) 102, at paras. 17-18:
>
> > The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made. The most significant tool is the language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations, may the court consider other matters such as the post-contracting conduct of the parties: Delisle v. Bulman Group Ltd. (1991), 54 B.C.L.R. (2d) 343 (B.C.S.C.), approved by Chief Justice

> McEachern in Bramalea Ltd. v. Vancouver School Board No. 39 (1992), 65 B.C.L.R. (2d) 334 (B.C.C.A.); Prenn v. Simmonds, [1971] 3 All E.R, 237 (U.K.H.L.); Eli Lilly and Co. v. Novopharm Ltd. (1998), 161 D.L.R. (4th) 1, (S.C.C.).
>
> The first inquiry, then, is to determine whether there is only one reasonable meaning to the words of the contract, or more than one. In this search one must look to the surrounding circumstances and the whole of the contract. The words of the contract must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning: MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority (1992), 72 B.C.L.R. (2d) 273 (B.C.C.A.); Melanesian Mission Trust Board v. Australian Mutual Provident Society, [1997] 1 N.Z.L.R. 391 (New Zealand P.C.).

[10] BMOCC submits the intention of Clause 5.2 is to protect its position as a preferred shareholder by enabling it to refuse consent where it determines the intended actions of Clear Picture, including borrowing, create an unacceptable risk. Accordingly, it argues the extension of the maturity date of the loan creates an extension or change of risk that requires the consent of BMOCC.

[11] In opposition, Clear Picture and ACF submit there is no express wording in Clause 5.2 requiring consent for the extension of existing loans, nor can these words be implied in construing the Agreement. Further, BMOCC actually consented to the extension of the loan maturity dates by consenting to the terms of the original Debenture Loan Agreement.

[12] I find the extension of the maturity date of the Debenture Loan does not fall within Clause 5.2. There is no express language contained in the Clause to this effect. The Clause clearly refers to the issuance of securities or loans which is clearly distinct from the extension of the maturity date of an existing loan. BMOCC is a sophisticated commercial entity. If it determined that extensions of issued loans would create a change in its risk, it could have insisted in the inclusion of this event when negotiating the Shareholders Agreement.

[13] Even where in the commercial context the Clause could be interpreted to include the extension of loans, I find that BMOCC consented to extension of maturity date of the Debenture Loan in this instance. There is no dispute that BMOCC was aware of and consented to the terms of the original Debenture Loan Agreement which contemplated and provided for the possible extension of the maturity date of the loan. Specifically, BMOCC consented to the maturity date being "November 22, 2005 or such later date as is agreed in writing by the Debenture holder" (ACF).

[14] Accordingly the Application is dismissed with costs to Clear Picture and ACF in the amount of $350.00 each.

J.