IN THE SUPREME COURT OF NOVA SCOTIA

Citation: AFM Management Ltd. v. Liverpool Fire Fighters Association 2004NSSC159

Date: 2004 08 11
Docket: SCBW 210632
Registry: Bridgewater

Between:

AFM Management Limited

Appellant

and

Liverpool Fire Fighters Association

Respondent

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Date Heard: 10 June 2004

Counsel: J. C. Reddy for the Appellant

Allen C. Fownes for the Respondent

Moir, J.:

[1] Trading under “Red Fox Cleaning Services”, the appellant agreed to provide cleaning services at the respondent’s Liverpool Fire Fighters hall for one year starting in May 2003. The agreement was terminable on three months notice. The contract was terminated without notice. Red Fox Cleaning sued in Small Claims Court for its lost profits. Adjudicator W. Michael Cooke, CD, QC, dismissed the claim. Red Fox appealed.

[2] Red Fox had agreed in writing to clean the Liverpool Fire Hall for one year, until April 2004. The contract provided for various tasks to be done weekly or after “every event”. Other tasks were to be done monthly. And, the contract provided for an annual service: “Floors to be stripped and waxed in April.” In exchange the Liverpool Fire Fighters agreed to pay $1,728 per month plus GST. The parties also agreed, “either party hereto may terminate this agreement by giving three (3) clear months notice in writing to the other party”.

[3] For some reason, the only annual task, stripping and waxing the hall floor, was undertaken in October 2003 instead of at the end of the contract in April 2004. It was this effort that lead to termination.

[4] The Learned Adjudicator's order contained these findings:

> About the end of October, 2003 the Claimant was in the process of doing the Defendant's hall, that is, stripping and waxing it. There was some contrary evidence as to when the work was to be done. However, under the circumstances as I have found them I find that it was not relevant.
>
> After the work had been done by the Claimant the Defendant's officers attended at the fire hall where the work was to be done and upon examining the work found it to be unsatisfactory. The Claimant's workers were called back and a somewhat heated argument ensued, including, and I so find, some profane language directed to the Defendant's officers by the Claimant's employees or one of them. At this point the agent for the Claimant indicated that they quit the job and the contract. I find that he, Mr. Jeffery Fraser, did in fact give the Defendant's officers this notice.
>
> Subsequent to these events, the Defendant engaged ... commercial cleaning company, All in 1 Commercial Cleaning and Floor Restoration of Halifax to examine the floor and write a report on it which was done. The report was very critical of the work that the Claimant had done and from it one can only conclude that the work was done in an unworkmanlike manner.
>
> In his testimony upon cross examination, Mr. Fraser agreed with the contents of the report which was exhibit C-7.
>
> Based on the foregoing by itself I am obliged to dismiss the claim. There were issues raised of insubordination and theft of employees but I find that I need not deal with them as they have no direct bearing on the issue before me.

The Learned Adjudicator supplemented these findings in his Summary Report of Findings. He responded briefly to each of the six grounds of appeal. Only the first three need to be considered for this appeal. These grounds of appeal concern the Learned Adjudicator's implicit determination that the Fire Fighters Association

had the right to terminate the contract despite the termination clause and the requirement in it for three months notice. As to the first and second grounds of appeal the Learned Adjudicator said,

> I found that the Appellant had breached the contract through the insubordination of its employees. Under the circumstances as found I did not feel that notice was required.

As to the third ground, he said "I found that the question [of] notice was not relevant considering the findings that the contract was breached or terminated by the Appellant."

[5] This shows two bases for dismissing the appellant's claim. Firstly, the Learned Adjudicator considered that Red Fox was in breach of its performance obligations. He treated any breach as giving rise to a right of immediate termination. His reasoning is flawed because he failed to consider whether the breach was so serious as to give rise to a right of termination or the breach was of the common variety which gives rise to a right to damages only. This failure is an error in law requiring intervention on appeal. Secondly, the Learned Adjudicator considered that Red Fox had itself wrongly terminated the contract ("*they quit the*

job and the *contract* ... Mr. Jeffery Fraser, did in fact give the Defendant's officers this notice." and "the contract was breached *or terminated* by the Appellant", emphasis added.), which would give rise to a right of the party not in breach to treat the contract as at an end. This second point involves a finding of fact beyond the review of this Court except that the finding is overcast by the error on the first point and the finding is presented in a manner that confuses the two bases ("give the Defendant's officers this *notice*" and "breached or terminated"). An unlawful termination by Red Fox would not necessarily involved any "notice". On the findings, brief as they are, the basis for the finding of unlawful termination appears to have been the heated argument, profane language, a statement by some employees that "they quit" and some sort of "insubordination". Without knowing the specifics, it is impossible to determine what "notice" the Learned Adjudicator referred to. The difficulty is greater because among the exhibits is a three month notice given in writing by Red Fox after the heated argument. Respectfully, the Learned Adjudicator seems to have treated as sides of a coin, termination without notice for fundamental breach in performance and acceptance of unlawful termination as ending the contract. These are separate subjects requiring independent findings. So, although the second point involves a finding of fact, the

erroneous treatment of the first point may have affected the Learned Adjudicator's reasoning on the second. This justifies interference.

[6] For those reasons I will allow the appeal. The Court is in no position to assess whether Red Fox was in breach, whether the breach was fundamental if there was one, whether Red Fox itself unlawfully terminated the contract or what damages Red Fox suffered if the Association is liable. Therefore, I must order a new trial. At such a trial, the adjudicator should determine, independent of each other, whether Red Fox itself wrongly terminated the contract and whether Red Fox was in fundamental breach of its performance obligations. On the latter point, the Small Claims Court should have regard to *Guarantee Co. of North America* v. *Gordon Capital Corp.*, [1999] S.C.J. 60, [1999] 3 S.C.R. 423, particularly at para. 50. As I see it, the Supreme Court of Canada, through Iacobucci J. and Bastarache J. writing jointly for the Court, has adopted the restrictive view of fundamental breach developed in the minority reasons of Wilson J. in *Hunter Engineering Co.* v. *Syncrude Canada Ltd.*, [1989] S.C.J. 23, [1989] 1 S.C.R. 426. The Court has now made it clear that the distinction between ordinary breach and fundamental breach is in the consequence. The latter gives rise to a right of termination, which could (see para. 51) override the termination clause in the cleaning contract here.

The former does not. It only gives rise to a right to damages. The remedy of termination is limited to those circumstances where the entire foundation of the contract has been undermined.

[7] I pay respect to the Learned Adjudicator, who is an experienced Small Claims Court judge. However, I have concluded that he erred in law in finding a right of termination without finding fundamental breach. That error clouded the Learned Adjudicator's reasoning on the second issue. Thus, this Court must interfere. There will be a new trial. Costs of $50 to the appellant.

J.