Claim No: 281958

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Lynch v. 2014 Halifax Commonwealth Games Candidate City Society, 2007 NSSM 42

BETWEEN:

KERRY LYNCH

Claimant

- and -

2014 HALIFAX COMMONWEALTH GAMES CANDIDATE CITY SOCIETY

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on July 26, 2007

Decision rendered on August 8, 2007

APPEARANCES

For the Claimant - Kenneth MacLean, counsel

For the Defendant - Sara Knight, counsel

Introduction

[1] The 2014 Halifax Commonwealth Games Candidate City Society ("the Society") is the entity that was responsible for preparing Halifax's bid to host the 2014 Commonwealth Games. That bid was famously stopped in its tracks in March 2007 when the Province of Nova Scotia and City of Halifax withdrew their financial support over budgetary concerns. This event impacted on the staff who were doing the work to prepare the bid. The Claimant was one such person.

[2] The Claimant signed a contract to be the project's Graphics and Web Officer for a fixed term beginning January 8, 2007 to November 15, 2007, which was basically timed to end at the time that the bid would have been submitted and the winning entry decided. Had Halifax been successful, a new organization would have been created to prepare for the Games, and further employment for the Claimant was possible, but not promised.

[3] Shortly after the bid was summarily preempted by the political decision to withdraw financial support, the Claimant was given two months' working notice of the early termination of his employment. It is his claim advanced in this action that he should be paid the balance of his contract, subject only to whatever he might be able to earn in mitigation.

[4] The Society claims that it acted within the permitted terms of the contract, which has a provision dealing with "Not for Cause" terminations. In the alternative it claims that the contract was frustrated, in law, by the outside decision to pull the plug on the bid, thus relieving itself from any obligations under the contract.

The Facts

[5] The Claimant is an obviously talented graphic and web designed who had been operating his one-man business when this job opportunity came to his attention. What attracted him to the job was, among other things, the possibility of ongoing employment in service of the Games, assuming the bid had succeeded. Since there was no guarantee of any of that happening, however, he was still convinced that taking the job would be a good career move. The salary of $64,000 was as good as, or better, than he had been making on his own.

[6] He also negotiated for himself the ability to complete his ongoing projects and take on selected freelance work, so long as it did not prevent him from performing his duties. He did complete a few small outside projects while actively working for the Society, but he had to turn down offers of work because they would have made unacceptable demands on his time. He essentially put his business into a state of suspended animation in January of 2007.

[7] There is no issue of the Claimant's job performance, which was clearly satisfactory or better. His main job for the Society was to do the graphics work on the "bid book," the physical document (described as about the size of a telephone directory) that the international body would have reviewed in deciding which country would host the Games.

[8] The primary issue in this case is whether or not the Claimant could be terminated before the end of the contract on a "Not for Cause" basis on two months' notice, based upon the language of the contract. The case largely turns

on this issue of interpretation. As stated earlier, the fallback defence is frustration.

The terms of the contract

[9] The contract includes the following provisions:

> **2. Term**
>
> This agreement shall terminate on November 15, 2007, unless terminated earlier pursuant to any of paragraphs 11/12 (a), (b), or (c) *(sic)* of this agreement or extended by mutual agreement in writing.

[10] It is agreed that the reference to 11/12 is a typographical error, and should be to paragraph 8.

> **8. TERMINATION OF EMPLOYMENT:**
>
> **Performance expectations**
>
> The very nature of this project and the short time frame associated with both the project and deadlines within the project as a whole require that all employees of the bid perform at a superior level. Experienced, extremely competent individuals have been recruited to fill positions on the understanding that a superior level of performance is what is required and expected. There will be insufficient time to undertake lengthy performance management processes should an individual's performance not meet these expectations. Should performance not meet these expectations and it be clear that performance will not improve immediately upon becoming aware of the performance issue, employment will be terminated on a without cause basis entirely at the discretion of the CEO.
>
> (a) Resignation. You may terminate this Agreement and your employment with HALIFAX 2014 at any time upon the provision of not less than two month's written notice delivered to the CEO and Director. On the giving of any such notice, HALIFAX 2014 will have the right to waive the notice period (or part of it), have you cease your employment immediately or at a specified time prior to the end of the notice period, and pay you for the notice period or remainder of it. In this case, your resignation and the termination of your

> employment will be effective on the date HALIFAX 2014 waives the notice period (or remainder).
>
> (b) Termination for Cause. HALIFAX 2014 may terminate this Agreement and your employment at any time for just cause or for any material breach of the terms of the Additional Agreements referred to in this letter, in each case without notice or pay or damages in lieu of notice.
>
> (c) Termination Not for Cause. HALIFAX 2014 may terminate your employment at any time without cause by providing you with two months notice or pay in lieu of notice plus one additional month per half year of services completed following your first year anniversary date to a maximum of nine months notice or pay in lieu of notice,
>
> (d) Effect of Termination. Immediately upon the termination of your active employment with HALIFAX 2014, for any reason, you will return to HALIFAX 2014 any HALIFAX 2014 property that is within your possession or control, including without limitation, access cards, blackberry devices, and laptop computers.

[11] Reduced to its simplest terms, the issue is whether the Society could terminate "Not For Cause" under paragraph 8(c) for something other than an issue related to "performance expectations." In other words, does 8(c) stand on its own as a term of the contract, or is it subordinate to the sub-heading "performance expectations" and the language of the first paragraph which explains why the Society cannot afford to wait for an under-performing employee to improve with the help of performance management.

[12] It is important to note at the outset that the issue is not really whether the Society could dismiss without cause, because it would always have had that ability so long as it was willing to pay out the balance of the contract. Fixed term contracts are bought out all the time. The real issue is whether the Society can take advantage of the right to do so by only giving (or paying) two months' notice.

Arguments

[13] The Claimant says that the Society has no right to invoke the two-months clause. Counsel for the Claimant argues that the contract was drafted by the Society, and although the Claimant had some input into other paragraphs, paragraph 8 was entirely the Society's clause. The Claimant does not contend that the clause is ambiguous, but if it is, it should be read *contra proferentum* and any ambiguity resolved in favour of the Claimant.

[14] The Society argues that the contract allows for a without cause termination on two months' notice, without precondition, and that performance problems would have been only one reason why that type of termination might have been used. It also argues that the contract was frustrated, in the sense that the outside action of the political entities undermined the entire raison d'etre of the Society, rendering the employment contract voidable at its instance.

[15] The Claimant's argument against frustration is that there is no evidence that the decision to withdraw the bid was an entirely "outside" process, and that if any of the Society's principals were involved in the decision to withdraw the bid, then it is not a *force majeure* that the Society can rely upon. Moreover, the Claimant says that the Society had the necessary funding to complete the bid and did not necessarily have to lay off the staff.

Contract interpretation

[16] It is axiomatic that every contract is to be read as a whole and, if possible, given its ordinary meaning. The Canadian Encyclopedic Digest title *Contracts* expresses the law clearly:

> §492 The objective sought in interpreting contracts is the discovery of the intention of the parties as determined in accordance with the plain or ordinary and popular meaning of the words used by them. In the absence of ambiguity, the natural or literal meaning of the words set out in the contract should be adopted. Contract interpretation thus becomes an exercise in searching for the objective meaning of language, unless it can be proven that both parties mutually interpreted the contract in a manner that might not have been apparent to an ordinary person. There is an increasing tendency to interpret contractual language in accordance with the reasonable understanding and expectation of the parties but such reasonable expectations must be determined on an objective basis. (Footnotes omitted)

[17] Another interpretive maxim that I must follow is that the placement of contractual terms within a particular context signals that the language is to be read with that context in mind. In the oft-cited case of *Toronto (City) v. Toronto Railway* (1906) 37 S.C.R. 430, Sedgewick J. put it thus:

> 11 In my opinion it is the legitimate rule of construction to construe words in an instrument in writing with reference to the words found in immediate connection with them. See *Robertson v. Day*, at page 69; also as explained in *Inglis v. Robertson*, at page 630. The headings must be read in connection with the groups to which they belong and interpreted by the light of them. (Cites omitted)

[18] Reading the contract in light of these principles, it is inescapable that the termination provisions fall within a paragraph that expresses an overriding concern with performance issues, to the point of demanding not just satisfactory performance, but excellence. After emphasizing that the Society does not have the time to performance manage employees, the clause goes on to enumerate the various ways that employment might be terminated.

[19] In my reading, each of the three ways that the employment might end - resignation, termination for cause and termination without cause - must be understood in the context in which it appears.

[20] The resignation clause is an important clue, because at first blush it might be seen as something unrelated to performance.

> Resignation. You may terminate this Agreement and your employment with HALIFAX 2014 at any time upon the provision of not less than two month's written notice delivered to the CEO and Director. On the giving of any such notice, HALIFAX 2014 will have the right to waive the notice period (or part of it), have you cease your employment immediately or at a specified time prior to the end of the notice period, and pay you for the notice period or remainder of it. In this case, your resignation and the termination of your employment will be effective on the date HALIFAX 2014 waives the notice period (or remainder).

[21] Normally, there would be no reason to have a resignation clause, at all, unless something unusual was required. Someone is always free to resign employment, giving reasonable notice, but this contract recognizes that special circumstances would apply because of the pressures of preparing the bid, namely that critical work might still need to be done by the departing employee, or that the more efficient way of getting the work done would be to have the employee leave earlier. Those concerns are addressed by the requirement of a full two months' notice of resignation - an abnormally long period in the employment world - and the possible need to foreshorten that period following resignation, in order to meet the demands of the project.

[22] Arguably the dismissal for cause provision is redundant, and would be so no matter where placed. There is an implied term in employment contracts that

employees can be dismissed for just cause because conduct amounting to just cause at law is invariably a fundamental breach of the employment contract.

[23] However, the clause that deals with the consequence of termination gives another clue as to the concern being addressed:

> Effect of Termination. Immediately upon the termination of your active employment with HALIFAX 2014, for any reason, you will return to HALIFAX 2014 any HALIFAX 2014 property that is within your possession or control, including without limitation, access cards, blackberry devices, and laptop computers.

[24] This clause appears designed to ensure that the employee, no matter how terminated, must pass along any equipment or work product that may urgently be needed in order for the work to be continued by a successor. This is a concern clearly referable to the need to ensure minimum disruption to the preparation of the bid in a timely and excellent manner.

[25] Read as a whole, clause 8 of the contract has an integrity about it, related to the issue of performance which the title signals. It is a code unto itself. As such, I find as a matter of contractual interpretation that the contract does not allow for a two-month termination without cause for reasons unrelated to performance. I believe that any ordinary person reading the contract before it was signed would have concluded that this was a fixed term contract, with a limited right to dismiss without just cause, upon the Employer concluding that the work of the employee did not meet the excellent standard sought. Of course, as observed the Employer would always have had the option of buying out the contract for its face value, but the right to get out of the contract with two months' notice would have been an exception to the employee's expectation of

employment for the fixed term, and as such it should be read as limited to the express purpose stated.

[26] In the event that I am incorrect in my interpretation of the ordinary meaning of the language, then I would say that there is an ambiguity and I would read it *contra proferentum* against the meaning urged by the Society, with the same result.

Frustration

[27] I will now deal with the defence of frustration.

[28] I have considered the cases cited by counsel, however, one of the more elegant statements of the law of frustration is found in *Capital Quality Homes Ltd. v. Colwyn Const. Ltd.* (1975), 9 O.R. (2d) 617, 61 D.L.R. (3d) 385 (C.A.). In that case, certain changes to planning legislation had curtailed a landowner's right to convey his property and the question was whether a contract for sale that had been signed but not closed when the change in the law occurred, had been frustrated. Writing for the Ontario Court of Appeal, Evans J.A. reviewed the law of frustration [p. 623]:

> "The legal effect of the frustration of a contract does not depend upon the intention of the parties, or their opinions or even knowledge as to the event that has brought about the frustration, but upon its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure. On the contrary, it seems that when the event occurs, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it) but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had

> made express provision as to their several rights and liabilities in the event of its occurrence: *Dahl v. Nelson et al* (1880), 6 App. Cas. 38.
>
> The supervening event must be something beyond the control of the parties and must result in a significant change in the original obligation assumed by them. The theory of the implied term has been replaced by the more realistic view that the Court imposes upon the parties the just and reasonable solution that the new situation demands."

[29] Applying that test to the current case, the questions are whether the supervening event was beyond the control of the parties and rendered the performance of the contract "inconsistent with the further prosecution of the adventure." The corollary question is what reasonable parties might have "agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

[30] I cannot find on the evidence before me that the possibility of the bid being preempted was not contemplated by the Society, nor that the actual event was entirely outside its control. The only witness called by the Society was the Claimant's direct supervisor, who was not involved at the higher, political level. There were political representatives on the Board of the Society, whose possible knowledge of and/or participation in the decision to withdraw support was not addressed in evidence. So that part of the test for frustration is not met.

[31] Turning to another part of the test, I am not satisfied that reasonable parties might not have regarded the appropriate response to such an event to be that existing employment contracts should be honoured. The Society's funding for the bid preparation was already in place, and was unrelated to the financing of the Games themselves. As it was, the withdrawal of the bid did not signal the end of work. The Society undertook its responsibility to complete the bid book to as final a state as possible, to be handed to the Commonwealth Games

Committee for archival and/or precedent purposes. This supplied the Claimant, among others, with two months or more of active employment.

[32] For these reasons, I do not find the defence of frustration to have been established.

Damages and Mitigation

[33] The Claimant has sued for $25,000, the maximum recoverable in this Court.

[34] The proper approach to damages is well known. The Privy Council in *Wertheim v. Chicoutimi Pulp Co.* [1911] A.C. 301 at 307 (P.C.) put it thus:

> "And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed... That is a ruling principle. It is a just principle."

[35] Had the Society performed the contract, the Claimant would have earned the promised income. The measure of damages is therefore his base salary for the balance of the term, subject to whatever he has earned, or is likely to earn, in mitigation.

[36] On the evidence, he worked until the end of his notice period, and then accepted an offer to continue working past that date on a freelance basis. That lasted until about mid-June. He also received pay for an additional ten days, which was referred to in the letter of termination as 5 days of "incentive" pay for

those who worked until the end of the notice period, and five additional "appreciation" days. Counsel for the Claimant argued that these days should not figure in the calculation of his damages. I disagree. Whatever the Society has paid the Claimant, however characterized, is properly offset against his losses.

[37] By my calculation, this essentially has paid the Claimant up to the end of June 2007. What would remain on his contract would be four and a half months from July 1, 2007 to November 15, 2007, at the rate of $5,333.33/month, for a total of $24,000.00.

[38] The Claimant is not entitled to the entire $24,000.00 unless I conclude that he will not be able to earn any income in mitigation. On the evidence, he is making efforts to pitch some projects, and has been doing some small freelance assignments. However, nothing significant has yet been landed, in part because the summer months are usually slow. The projects he has worked on are small jobs that he likely could have done anyway, as permitted by his contract with the Society. I conclude that he has not earned anything in mitigation for the month of July 2007.

[39] Estimating what he is likely to earn in mitigation over the next three and a half months is inherently speculative. This is a situation that seldom arises in wrongful dismissal cases, as it is rare in most courts that the assessment of damages occurs before the term has concluded. The usual analysis is simply to look at mitigation efforts to determine what has been, or could have been earned. However, the exercise is common in other types of cases, such as cases of wrongful death where the question is what someone might have earned over their lifetime.

[40] As observed in such a case by Lord Diplock in *Mallett v. McMonagle* [1970] A.C. 166 (H.L.) At 176:

> "The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."

[41] Here, we are forced to speculate on what will happen, and apply a number of contingencies. The questions that I believe to be relevant are:

A. What is the likelihood that the Claimant will find other employment and/or obtain other freelance assignments that will substantially or completely replace his employment income?

B. What is the likelihood that the Claimant would have been prevented by other reasons from completing the contract with the Society, such as by resignation, death or other reason?

C. To what extent, if any, has the Claimant been unreasonable in his mitigation efforts to date?

[42] I would answer these questions as follows:

What is the likelihood that the Claimant will find other employment and/or obtain other freelance assignments that will substantially or completely replace his employment income?

[43] I believe it is highly probable that the Claimant will be able to earn income over the next few months that will mitigate his loss. I would estimate that he will be able to earn 65% of the income he would have earned in his position with the Society. I believe that he is a resourceful and capable person who will rebound, perhaps more successfully than he currently anticipates.

What is the likelihood that the Claimant would have been prevented by other reasons from completing the contract with the Society?

[44] I regard this contingency as too small to have any impact. He is a young, apparently healthy man who fully intended to work out his term and, if possible, vie for the ongoing position.

To what extent, if any, has the Claimant been unreasonable in his mitigation efforts to date?

[45] The Defendant made a token argument that the Claimant had failed in his duty to mitigate because he did not take up the Society's offer to attend a Resume Writing and Interview Skills Workshop, or to pursue individual career counselling.

[46] The Claimant testified that he did not think he needed the workshop and, frankly, had not even noticed the offer of individual counselling. I accept that the Claimant made the reasonable decision to crank up his business again, and that he was not really interested in applying for jobs. I am unwilling to penalize him for any of his decisions. I believe that he understands his long-term interests and is making reasonable efforts to realize his potential.

[47] As such, I assess his damages as follows:

One month (July) at 100%	$5,333.33
Three and a half months at 35%	$6,533.33
Total	$11,866.66

[48] There is no basis to allow prejudgment interest, as most of the losses are yet to be sustained. The only costs claimed are the $170.88 filing fee, which added to the $11,866.66 damages totals $12,037.54. Judgment will issue for that amount.

Eric K. Slone, Adjudicator