

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
Edwards RSJ, Myers, and MacNeil JJ

BETWEEN:)
)
DR. FRANK FOWLIE and) *A. Marin*, for the Plaintiffs/Respondents
63215941 CANADA LIMITED)
)
Plaintiffs (Respondents))
)
- and -)
)
WRESTLING CANADA LUTTE,) *J. Goldblatt*, for the Defendant/
TAMARA MEDWIDSKY and) Appellant, Wrestling Canada Lutte
LEE MACKAY)
)
Defendant (Appellant))
)
) **HEARD at Ottawa (by**
) **videoconference):** September 10, 2024

REASONS FOR DECISION

The Court:

Introduction

1. This is an appeal by the defendant/appellant, Wrestling Canada Lutte (“WCL”), of the Order of Jensen J. (“the motion judge”) dated May 2, 2023 (“the Order”). WCL appeals from the decision declining to strike one cause of action pleaded in the statement of claim of the plaintiffs/respondents, Dr. Frank Fowlie and 63215941 Canada Limited (collectively “Fowlie”). The motion judge allowed Fowlie to make a claim that WCL had breached the contract between the parties by failing to engage in dispute resolution. WCL seeks to have the Order set aside and the statement of claim struck in its entirety.

2. After hearing submissions and considering the matter, we advised the parties that the appeal was granted with written reasons to follow. These are our reasons.

Background

3. WCL is the national governing body for Olympic Style Wrestling in Canada.

4. In his career, the individual plaintiff, Dr. Frank Fowlie (“Dr. Fowlie”), worked as a sports dispute resolution expert in Canada. He alleges that he was recruited by WCL to be its dispute resolution officer.

5. WCL entered into an independent contractor services agreement, dated September 30, 2020, with the corporate plaintiff, 63215941 Canada Limited (“63215941”), a corporation under the control of Dr. Fowlie, whereby it would serve as WCL’s Complaints and Appeal Officer for a three-year term (the “Contract”). In this regard, 63215941’s role was to screen complaints made by persons under WCL’s jurisdiction respecting alleged breaches of WCL rules and determine if they were frivolous; complaints that were deemed not frivolous were forwarded on for investigation.

6. Section 8 of the Contract deals with termination of the agreement. We are primarily concerned with s. 8.3 on this appeal. Section 8 reads:

- 8.1 WCL may terminate this agreement immediately if the Contractor is unable or unwilling to:
 - (a) Implement the project;
 - (b) Fulfil the scope of work of the project as outlined in Appendix A;
 - (c) Provide the reports set out in this agreement; or
 - (d) Comply with the terms, conditions and obligations of this Agreement.
 - (e) Act in a matter [*sic*] that aligns with the WCL Code of Ethics Policy.
- 8.2 If the Contractor or WCL fails to comply with this agreement, either Party may terminate it immediately on giving written notice of termination to the other Party.
- 8.3 If WCL or the Contractor needs to terminate the Agreement for any other reason, either Party may do so by giving at least 30 days’ written notice of termination to the other Party.

7. Section 9.6 of the Contract is a survival provision (“the Survival Clause”). It reads:

- 9.6 SURVIVAL: The Contractor’s obligations contained in this agreement shall survive the termination of this Agreement for any reason.

8. Section 9.8 of the Contract provides for dispute resolution (“the Dispute Resolution Clause”). It reads:

9.8 DISPUTE RESOLUTION: If a dispute arises, WCL and Contractor shall meet on a without prejudice basis (as quickly as reasonably practical having regard to the nature, complexity and impact of the dispute) to attempt to resolve the dispute or to negotiate for an adjustment to any provision of this agreement. Each party acknowledges that it is in its interest to have all matters resolved by mutual agreement an[d] each agrees to expeditiously, reasonably, and not in bad faith, to resolve such dispute. If WCL and the Contractor are not able to resolve any dispute referred to them within five (5) business days after the dispute was referred to them, then the dispute may be resolved under the Arbitration Act.

9. On September 16, 2021, WCL gave Fowlie 30 days’ written notice and terminated the Contract without cause, in accordance with s. 8.3 of the Contract.

10. On April 8, 2022, Fowlie commenced the within action against WCL for breach of contract.

11. In the statement of claim, Fowlie alleges, among other things, that prior to the termination, a campaign had been undertaken by a number of people “to denigrate Dr. Fowlie and destroy his career in sports dispute resolution”, and that when he complained to WCL about the harassment, it refused to help. Instead, WCL gave in to the pressure from the campaign, terminated the Contract without cause, and refused to discuss the reasons why.

12. The defendants made a motion to strike the statement of claim under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, on the basis that the claim could not succeed because WCL had complied with the notice provision for termination of the Contract, and it was not obliged to offer a without prejudice meeting before said termination. The defendants further argued on the motion that, even if Dr. Fowlie should have been offered dispute resolution before the Contract was terminated, it was plain and obvious that there are no compensable damages to be awarded. Finally, the defendants argued, in the alternative, that if the entirety of the claim was not to be struck, then portions of it should be struck, including the causes of action against the individual defendants.

13. In her endorsement, dated May 2, 2023, the motion judge found that it was plain and obvious that the claim for breach of contract for termination of the Contract and as against the two individual defendants could not succeed and, therefore, must be struck. However, she held that the claim for breach of contract for failure to engage in dispute resolution could proceed with “substantial modifications”, including amendments to plead the appropriate elements of the revised claim and facts in support of aggravated and punitive damages. The motion judge’s reasoning was set out in paragraph 29 of her endorsement, which reads:

I find that the Plaintiffs have alleged sufficient facts to make out a claim of breach of contract for failure to engage in dispute resolution. The Contract does not stipulate that the dispute resolution process must be conducted before termination. However,

that is not fatal to the claim, in my view. The Plaintiffs have alleged that the Defendants' failure to deal with Dr. Fowlie's complaints resulted in the loss of the opportunity to clear his name. Thus, the Plaintiffs' claim for the breach of section 9.8 of the Contract is capable of standing on its own, without the termination claim.

Grounds of appeal

14. In its appeal to this court, WCL submits:
 - (a) that the motion judge erred in law by failing to analyze the Dispute Resolution Clause within the context of the Contract itself and, instead, elevating that clause into its own separate contract; and
 - (b) that the motion judge erred in finding that a breach of a dispute resolution clause could yield a claim for aggravated and punitive damages, especially where compensatory damages were nominal at best.

Standard of Review

15. Neither party formally addressed the standard of review in their arguments. However, both parties agreed that the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, applies.

16. In *Sattva*, at paras. 50-54, the Supreme Court held that, generally speaking, contractual interpretation "involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix". Accordingly, the interpretation of a contract is typically subject to a deferential standard of review unless an extricable question of law is identified, which is reviewable on the correctness standard. Extrinsic questions of law include legal errors involving "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor". Courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation.

17. Where deference is owed on an issue of mixed fact and law, the applicable standard of review is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 21.

18. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case: *Benhaim v. St-Germain*, 2016 SCC 48, at para. 38 (citing *South Yukon Forest Corp. v. R.*, 2012 FCA 165, at para. 46).

19. The issues raised in WCL's appeal will be considered in light of this standard and scope of review.

Issues

20. The following issues are to be determined on this appeal:

- (a) Did the motion judge err in finding that Fowlie could maintain a claim for breach of the Dispute Resolution Clause?
- (b) Did the motion judge err in granting Fowlie leave to amend the claim to plead aggravated and punitive damages arising from a breach of the Dispute Resolution Clause?

Analysis

- (a) *Did the motion judge err in finding that Fowlie could maintain a claim for breach of the Dispute Resolution Clause?*

Position of WCL

21. WCL submits that the motion judge erred in law by elevating the Dispute Resolution Clause to a form of stand-alone agreement, and by failing to consider that the Survival Clause made it clear that the Dispute Resolution Clause did not survive the Contract's termination. The motion judge's finding that it was plain and obvious that there was no cause of action for breach of contract for termination of the Contract, because it was properly terminated, should have ended all possible claims for breach of contract. WCL further submits that Fowlie never pursued a resolution under s. 9.8 of the Contract but, instead, commenced the action. WCL asserts that it is too late for Fowlie to argue that this matter should have been resolved through arbitration. Regardless, a lawful termination is not a "dispute" to be resolved under the Dispute Resolution Clause.

Position of Fowlie

22. Fowlie argues that the Dispute Resolution Clause gave Dr. Fowlie a valuable and substantial "contractual right" in that it provided "a venue to put his case to an arbitrator before termination and have a decision from that arbitrator that could remediate the reputational damage done" to him by the termination of the Contract. The Contract was drafted by WCL; accordingly, any ambiguity in the meaning of the Dispute Resolution Clause should be interpreted for the benefit of Fowlie, pursuant to the principle of *contra proferentem*. The motion judge properly rejected WCL's argument that the Dispute Resolution Clause does not apply post-dismissal and that a "dispute" is a precondition to any dispute resolution. WCL did not respect this clause before it dismissed Fowlie, and WCL did not offer dispute resolution after termination. Fowlie contends that "an arbitration process and a reported decision" would have provided him the opportunity to clear his name.

Discussion

23. WCL's ground of appeal raises contractual interpretation issues given its allegation that the motion judge failed to analyze the Dispute Resolution Clause within the context of the Contract as a whole and, instead, effectively treated the clause as a separate contract on its own.

24. The motion judge’s interpretation of the terms of the Contract involves findings of mixed fact and law and, pursuant to *Sattva* (paras. 50-54), those findings are reviewable on a standard of palpable and overriding error.
25. The aim of contractual interpretation is to determine the intent of the parties and the scope of their understanding, giving the words used by the parties their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract: *Sattva*, at para. 47.
26. It is well-established that a contract should be interpreted in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective or would result in a commercial absurdity: *2249778 Ontario Inc. v. Smith*, 2014 ONCA 788, at para. 19; and *Toronto Dominion Bank v Leigh Instruments Ltd. (Trustee of)*, 1998 CarswellOnt 2565 (Ont. Gen. Div. [Commercial List]), at para. 409, affirmed 1999 CarswellOnt 2812 (Ont. C.A.), leave to appeal refused 2000 CarswellOnt 2983 (S.C.C.).
27. One cannot focus only on specific clauses, or parts of clauses, without considering the contract as a whole: *ATCO Electric Limited v. Alberta (Energy and Utilities Board)*, 2004 ABCA 215, at para. 77.
28. The motion judge found that the s. 8.3 notice condition had been met based on Fowlie’s admission, in its statement of claim, that WCL gave 30 days’ notice when it terminated the Contract. As a result, the motion judge held that there was no cause of action for breach of contract for termination of the Contract. Neither party appealed the motion judge’s finding in this regard. Therefore, we are left with the finding that the termination was lawful.
29. The motion judge’s interpretation of the Dispute Resolution Clause is inconsistent with her finding that the Contract was validly terminated.
30. The Dispute Resolution Clause, by its clear language, applies only when there is a “dispute” that “arises” and that has been “referred” by the parties.
31. A valid “without cause” termination of the Contract cannot be a dispute; therefore, the Dispute Resolution Clause cannot apply. It was a palpable and overriding error for the motion judge to conclude that there is a cause of action for a failure to engage in dispute resolution in the absence of a dispute.
32. In finding that Fowlie had alleged sufficient facts to make out a claim of breach of contract for failure to engage in dispute resolution, the motion judge reasoned that Fowlie had alleged that WCL’s failure to engage in dispute resolution with Dr. Fowlie resulted in “the loss of the opportunity to clear his name”. However, there is no term of the Contract that gives Dr. Fowlie the right to “clear his name” in the absence of a justiciable dispute. (Nor is that a recognized right such that its alleged violation gives rise to an independent cause of action).
33. While Fowlie alleges in the statement of claim that WCL would not engage with them respecting their concerns about the purported campaign being mounted against Dr. Fowlie, Fowlie did not plead that they had referred the matter (or any breach under the Contract) to arbitration

under the Dispute Resolution Clause. Counsel for Fowlie confirmed that he had not done so. Therefore, any rights that Fowlie may have had under the Dispute Resolution Clause had not been triggered prior to the lawful termination of the Contract by WCL. Such rights cannot be triggered months after said termination. It is noted, as well, that Fowlie decided to commence the within action rather than invoke an arbitration process under s. 9.8, or otherwise engage the *Arbitration Act, 1991*, S.O. 1991, c. 17 (“the *Arbitration Act*”).

34. Fowlie argues that the Dispute Resolution Clause operates independent of the rest of the Contract and, therefore, it survives termination of the Contract. The decisions relied upon by Fowlie in support of this position, however, are all distinguishable from the case before us. In *Electek Power Services Inc. v. Greenfield Energy Centre Limited Partnership*, 2022 ONSC 894, the applicant brought an application pursuant to s. 17(8) of the *Arbitration Act* seeking an order setting aside a decision made by a panel of arbitrators that they had jurisdiction to decide the dispute between the parties. In *Ismail v. First York Holdings Inc.*, 2023 ONCA 332, Ismail sued for an oppression remedy and misrepresentation, among other claims. First York Holdings Inc. made a motion under s. 7(1) of the *Arbitration Act* to stay the claims on the basis that they were subject to an arbitration clause. In *Krutov v. Vancouver Hockey Club Ltd.*, 1991 CarswellBC 2412, [1991] B.C.J. No. 3464 (B.C.S.C.), the defendant had sent the parties’ contract dispute for arbitration, pursuant to an arbitration clause, and so applied for a stay of proceedings of the action. There is no doubt that these cases confirm the general principle of law that an arbitration clause is not brought to an end by the termination of the contract in which it is situate absent specific wording to do so, but that does not assist Fowlie in this case. This is because, unlike the parties in *Electek Power*, *Ismail*, and *Krutov*, here, Fowlie never referred or submitted to arbitration a dispute between the parties, and neither Fowlie nor WCL engaged the *Arbitration Act*.

35. In addition, Fowlie cited the decision in *Heyman v. Darwins Ltd.*, [1942] A.C. 356, [1942] 1 All E.R. 337, wherein Heyman, a selling agent, had sued Darwins Ltd., a steel manufacturer, for refusing to perform its obligations under a distribution contract made between the parties. The court had to decide if the action should be stayed pursuant to the applicable arbitration legislation so that the repudiation could be dealt with under an arbitration clause. Fowlie further referred to *MDG Kingston Inc. v. MDG Computers Canada Inc.*, 2008 ONCA 656, leave to appeal refused [2010] S.C.C.A. No. 94, wherein the respondents had rescinded one of the parties’ agreements, relying on s. 6(2) of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3, because the appellants had not delivered a required disclosure document. The key issue before the Court of Appeal in *MDG* was whether an arbitration clause remains effective when the agreement containing the clause is terminated or rescinded. In both *Heyman* and *MDG*, there had been a repudiation or rescission of the subject contract and, again, the relevant arbitration act had been engaged by one of the parties. Here, there was no repudiation or rescission of the Contract by WCL, and the *Arbitration Act* was not invoked. Accordingly, neither of these decisions assist Fowlie on this appeal.

36. There is also the question of what would be arbitrated in this situation? In light of the fact that Fowlie did not refer any issue to arbitration, that there was no term of the Contract granting Fowlie the right to have an opportunity to clear his name, and that the motion judge found the required 30 days’ notice of termination was given (which finding was not appealed), there is nothing left to resolve or arbitrate. Surely it cannot be that an arbitrator could determine that WCL was not entitled to terminate the Contract without having a sufficient reason for doing so, since

that would fly directly in the face of the language of s. 8.3 itself and result in a commercial absurdity.

37. If the interpretation proffered by Fowlie was accepted, it would make the Contract effectively interminable unless an arbitrator agreed that the agreement could be terminated. That is, every termination would become an assessment of whether WCL had cause to terminate the agreement. This would render the without cause termination right provided in s. 8.3 meaningless.

38. Section 8.3 provided each party with the right to terminate the Contract upon complying with one condition – giving at least 30 days’ written notice of termination to the other party. There were no other conditions or limitations placed on that right. The intention of the parties must be read according to the language they used. Section 8.3 is so clear and unambiguous that there can be no different interpretation of it. There is no indication in s. 8.3 that such termination is to be considered a dispute under the Dispute Resolution Clause.

39. Section 8.3 must also be read in conjunction with sections 8.1 and 8.2 of the Contract which both stipulate reasons for why the Contract could be terminated immediately. In the absence of s. 8.3, the parties would only be able to instantly terminate the Contract in accordance with sections 8.1 and 8.2 and would have to provide a reason for termination. We are satisfied that s. 8.3 was intended to permit the parties an alternate way to bring their agreement to an end. This interpretation is in harmony with the other clauses of the Contract and enables every word to be given its proper meaning.

40. There is no ambiguity in the terms of either sections 8.3 or 9.8 of the Contract. Consequently, the rule of *contra proferentem* does not need to be applied.

41. For the foregoing reasons, we conclude that the motion judge made a palpable and overriding error in finding both that the Contract was validly terminated and that the Dispute Resolution Clause survived termination. Once the Contract was validly terminated, there was no breach to dispute. The motion judge’s two findings cannot live together. This ground of appeal is allowed.

(b) Did the motion judge err in granting Fowlie leave to amend their claim to plead aggravated and punitive damages arising from a breach of the Dispute Resolution Clause?

42. Given our ruling on the first ground of appeal, there is no need for this court to address the second ground of whether the motion judge erred in granting Fowlie leave to amend their claim to plead aggravated and punitive damages arising from a breach of the Dispute Resolution Clause. So, we decline to do so.

Disposition

43. In the result, the appeal is granted. The Order of the motion judge is set aside and the entirety of the statement of claim is struck, without leave to amend.

44. The parties had agreed on the amount of costs to the successful party. Accordingly, costs of the motion for leave to appeal and of the appeal are awarded to the defendant/appellant, payable by the plaintiffs/respondents, fixed in the all-inclusive amount of \$17,000.00. Costs are payable forthwith.

M.L. Edwards RSJ

F.L. Myers J

B. MacNEIL J

Released: December 20, 2024

CITATION: Fowlie et al v. Wrestling Canada Lutte et al, 2024 ONSC 7171
DIVISIONAL COURT FILE NO.: DC-23-2828
DATE: 2024-12-20

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

R.S.J. Edwards, F. Myers and B. MacNeil JJ.

BETWEEN:

DR. FRANK FOWLIE and 63215941 CANADA
LIMITED

Plaintiff

– and –

WRESTLING CANADA LUTTE, TAMARA
MEDWIDSKY and LEE MACKAY

Defendant

REASONS FOR DECISION

M.L. EDWARDS R.S.J.

Released: December 20, 2024