COURT OF APPEAL FOR ONTARIO

CITATION: International Capital Management Inc. v. Optimize Inc. (Optimize Wealth Management), 2025 ONCA 741
DATE: 20251027
DOCKET: COA-24-CV-0906

Huscroft, Coroza and Monahan JJ.A.

BETWEEN

International Capital Management Inc.

Plaintiff (Appellant)

and

Optimize Inc. o/a Optimize Wealth Management

Defendants (Respondent)

AND BETWEEN

Optimize Inc., o/a Optimize Wealth Management

Plaintiff by Counterclaim (Respondent)

and

International Capital Management Inc.*, Javier Andreas Sanchez*, John Paul Sanchez*, and T.I.P. Wealth Manager Inc.

Defendants by Counterclaim (Appellants)

William McLennan, for the appellants

Lauren Tomasich and Emilie Dillon, for the respondent

Heard: October 20, 2024

On appeal from the judgment of Justice Peter J. Cavanagh of the Superior Court of Justice, dated July 12, 2024, with reasons reported at 2024 ONSC 3960, and the costs decision dated May 16, 2025.

REASONS FOR DECISION

[1] Following the hearing, this appeal was dismissed with reasons to follow. These are our reasons.

[2] The appellants, John and Javier Sanchez founded the appellant International Capital Management Inc. ("ICM") in 1996. The respondent, Optimize Inc. ("Optimize") is a wealth manager, investment fund manager, and portfolio manager.

[3] In 2017, the Sanchez brothers met Matthew McGrath, the CEO of Optimize. They decided to sell ICM to Optimize. On July 10, 2017, ICM and Optimize entered into two agreements (the "Agreements"), whereby ICM sold its portfolio of clients to Optimize. The first was a referral agreement, and the second was a non-competition agreement. The Agreements were executed on December 15, 2017. Although they were executed on that date, the transaction was not completed until certain regulatory steps were complete, and the consent of each of ICM's clients was obtained. The transfer of assets of the clients was then initiated on a rolling basis. Those clients were referred to in the Agreements as "Referred Parties".

[4] Pursuant to the Agreements, Optimize was obligated to pay monthly non-competition Fees to ICM. These were paid on an ongoing basis between March 31, 2018, and September 15, 2018. Optimize also paid two referral fee installments as required under the contract in April and July 2018, totaling $147,094.34. However, Optimize would be entitled to a refund of these fees in the event that more than 15% of the value of the assets transferred to Optimize under the Agreements was subsequently transferred away from Optimize to entities related or associated with ICM or the Sanchez brothers.

[5] Optimize claimed that as of August 2018, the Sanchez brothers began persuading their former clients who had transferred their portfolios to Optimize to move their business to TIP Wealth Manager Inc. (“TIP”), another wealth management firm associated with the Sanchez brothers. Optimize claimed that over 15% of the value of the initial portfolios belonging to Referred Parties was transferred to TIP.

[6] Optimize subsequently sent a notice that it was terminating the agreements, and demanded repayment of the fees paid to ICM, totalling $747,094.34. ICM then initiated an action for:

(1) a declaration that the Agreements were valid and binding on Optimize;

(2) damages in the sum of $3 million for breach of the non-competition agreement; and

(3) damages in the sum of $600,000 for breach of the referral agreement.

[7] Optimize counterclaimed for the $747,094.34 of fees paid under the Agreements.

[8] On a motion for summary judgment brought by Optimize, the motion judge granted its counterclaim and dismissed the appellants' action. The motion judge concluded that there was no genuine issue for trial with respect to whether 15% or more of the total value of the initial portfolios was transferred to TIP. The motion judge accepted Optimize's evidence that the quantum of the Initial Portfolios transferred to TIP totaled 32%.

[9] The motion judge also rejected the appellants' argument that the stipulated remedy clause in the Agreements, a provision for the return of all fees paid from Optimize to ICM, was an unenforceable penalty clause. Instead, the motion judge found it to be a forfeiture clause. Applying the unconscionability analysis applicable to forfeiture clauses, he concluded that the appellants had not demonstrated that there was an inequality of bargaining power, or that the terms of the Agreements were unfair. Accordingly, the motion judge ordered that the appellants pay $747,094.34 to the respondent, plus prejudgment interest at a rate of 1.8% per year in the amount of $75,049.21.

[10] The appellants raise two issues on appeal.

[11] First, the appellants argue that the motion judge erred in finding there was no genuine issue requiring a trial with respect to whether 15% or more of the total value of the Initial Portfolio was transferred to TIP. We do not agree.

[12] The motion judge grappled with the evidence of Mr. McGrath, which was contained in affidavits and spreadsheets. The motion judge considered the appellants' submission that the evidence of Mr. McGrath revealed significant frailties but rejected this argument. We see no error in principle or any misapprehension of the evidence in the motion judge's reasons. Moreover, the motion judge's conclusion was supported by the appellants' own evidence tendered at the motion. The motion judge stated:

> [54] If I had accepted John Sanchez's evidence that the total value of ICM managed assets received by Optimize was $151,130,080, the value of the Referred Parties' Initial Portfolios that has been transferred out of Optimize to TIP expressed as a percentage of $151,130,080 is 18%, which, in any event, exceeds 15%. [Emphasis added.]

[13] Second, the appellants argue that the motion judge erred in finding that the stipulated remedy clause in the Agreements was a forfeiture clause. The appellants submit that properly construed, the clause was an unenforceable penalty.

[14] We reject this submission. The motion judge arrived at his conclusions by examining the law of stipulated remedy clauses, relief from penal forfeiture, and

unenforceable penalties. The motion judge specifically considered the decision of this court in *Peachtree II Associates - Dallas L.P. v. 857486 Ontario Ltd.* (2005), 76 O.R. (3d) 362 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 420. After accurately setting out the law, the motion judge examined the provisions in the Agreements and concluded that they did not contain unenforceable penalties because they "provide for payment of fees to ICM before it is known whether the 15% threshold was met". He went on to add that "under this contractual structure, enforcement of the remedy for default where the 15% threshold is exceeded, loss of the fees, requires ICM and the Sanchez brothers to refund the fees to Optimize". He concluded that, in substance, these were forfeiture clauses.

[15] We see no error in the motion judge's analysis, and it is entirely consistent with the approach of this court in *Peachtree*. As Sharpe J.A. suggested in that decision "courts should, whenever possible, favour analysis on the basis of equitable principles and unconscionability over the strict common law rule pertaining to penalty clauses", and "should, if at all possible, avoid classifying contractual clauses as penalties and, when faced with a choice between considering stipulated remedies as penalties or forfeitures, favour the latter": *Peachtree*, at paras. 31-32.

[16] The appellants also sought leave to appeal the costs awarded to the respondent in the court below. The appellants acknowledged that leave was

contingent on success on their appeal. In light of our conclusion on the substantive appeal there is no basis to disturb the costs below.

[17] For these reasons, the appeal is dismissed and leave to appeal costs is refused. The respondent is entitled to costs of the appeal fixed in the agreed upon amount of $25,000 all-inclusive.

“Grant Huscroft J.A.”
“S. Coroza J.A.”
“P.J. Monahan J.A.”