

COURT OF APPEAL FOR ONTARIO

CITATION: Project Freeway Inc. v. ABC Technologies Inc., 2025 ONCA 855  
DATE: 20251208  
DOCKET: COA-25-CV-0345

Paciocco, George and Monahan JJ.A.

BETWEEN

Project Freeway Inc.

Appellant

and

ABC Technologies Inc. and ABC Technologies Holdings Inc.

Respondents

Robert B. Cohen, Ted Frankel and Hardeep Dhaliwal, for the appellant

Bradley E. Berg and Julia Schabas, for the respondents

Heard: December 1, 2025

On appeal from the judgment of Justice Jana Steele of the Superior Court of Justice, dated February 19, 2025, with reasons reported at 2025 ONSC 1048.

REASONS FOR DECISION

[1] The respondents, ABC Technologies Inc. and ABC Technologies Holdings Inc. (“ABC”), agreed to make “Earn-Out Payments” of up to US\$26,461,000 to the appellant vendor, Project Freeway Inc. (“Project Freeway”), as part of the consideration for its multi-million-dollar purchase of various companies owned by

Project Freeway (the “Target Companies”). Although the Share Purchase Agreement provided that Project Freeway would be entitled to payment at the end of each Earn-Out Period based on the performance of the Target Companies, s. 3.10(12) provided for trigger events that would require immediate payment of the entire maximum earn-out. One of three triggering provisions, s. 3.10(12)(a), provided that the accelerated payment would be triggered if ABC sells “a material portion of the assets of the Business of the Target Companies” to a non-affiliated purchaser, “without the prior written consent” of Project Freeway.

[2] Not long after the purchase, ABC sold a large percentage of the assets that were owned by the Target Companies to a non-affiliated purchaser in a sale leaseback arrangement that permitted ABC to continue to lease and operate the assets (the “Sale Leaseback”). It also factored the accounts receivable of the Target Companies, providing it with an immediate infusion of funds through the discounted sale of those receivables (the “Factoring Agreement”). It did not secure prior written consent for either transaction.

[3] Project Freeway claimed that the Sale Leaseback triggered the earn-out payments, but ABC disagreed. It sued ABC for breach of contract, ultimately alleging that the Factoring Agreement was an additional, independent trigger.

[4] The trial judge found that ABC had not breached the Share Purchase Agreement and dismissed the action. She concluded that, properly interpreted, for

a sale to trigger accelerated Earn-Out Payments under s. 3.10(12)(a), it must be a transaction that is “material to the operation of the earn-out.” She made factual findings that neither the Sale Leaseback nor the Factoring Agreement impacted the ability of the businesses acquired by ABC to hit financial performance targets (the “Contribution Margin”) used to calculate Earn-Out Payments.

[5] In the appeal before us, Project Freeway argues that the trial judge committed several legal errors that led her to misinterpret s. 3.10(12)(a) and committed palpable and overriding errors of fact relating to the impact of the Sale Leaseback and Factoring Agreement on its ability to earn the Earn-Out Payments. At the close of Project Freeway’s oral submissions, we dismissed the appeal with reasons to follow. These are the reasons.

[6] Most of Project Freeway’s grounds of appeal take issue with the trial judge’s interpretation of the contract. It is important to bear in mind that absent an extricable error of law, the interpretation of a contract of this kind – one that raises implications mostly limited to the interests of the contracting parties – is a question of mixed fact and law that attracts “deference to first instance decision-makers on points of contractual interpretation”: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 52; *Wiener Städtische Versicherung AG Vienna Insurance Group v. Infrasure Ltd.*, 2025 ONCA 20, 504 D.L.R. (4th) 81, at paras. 44, 45.

[7] Project Freeway’s primary submission is that when s. 3.10(12)(a) is given its grammatical and ordinary meaning in the context of the contract as whole, the phrase “material portion” necessarily refers to the size of the sale, and not to the impact of the transaction on the ability to earn. It argues that this reading is compelled by the language. It submits further that the trial judge therefore erred in law by failing to respect the grammatical and ordinary meaning of s. 3.10(12)(a) by giving it a meaning it cannot bear. Additionally, it argues that this conclusion is supported by the manner in which the word “material” is used in s. 3.10(12)(b), another of the three trigger provisions. Section 3.10(12)(b) accelerates the payment of the earn-out if, “the purchaser breaches any of the covenants in Section 3.10(13) in a manner that materially impairs the ability of the Vendor Shareholders to earn Earn-Out Payments”. Project Freeway argues that since the parties used this specific language in s. 3.10(12)(b) but not in s. 3.10(12)(a), they clearly did not intend the trigger in s. 3.10(12)(a) to turn on material impairment of the ability to earn Earn-Out Payments.

[8] We are not persuaded that the trial judge failed to apply the principles of construction that Project Freeway relies upon or that her interpretation is not reasonably supported by the language of the section. The trial judge did not misapprehend the language used by the parties or the need to read it in context. Twice, she reaffirmed the “cardinal presumption” that parties intended what they have said, and she described explicitly her obligation to “[r]ead the text of the

written agreement as a whole, giving the words used their ordinary and grammatical meaning”. It is plain that the trial judge simply disagreed that the ordinary and grammatical meaning of s. 3.10(12)(a) has the clear meaning that Project Freeway contends. It is also clear that she found the provision to be ambiguous.

[9] The trial judge was entitled to come to these conclusions, and she did so without error. The term “material portion” as used in s. 3.10(12)(a) begs the question of when a “portion” is “material”. Based on its ordinary and grammatical meaning and the context in which the phrase is used, namely a provision addressing Earn-Out Payments, a “portion” sold may be “material” either because of the size of the asset or because of the impact of the sale on the Earn-Out Payments. The ordinary and grammatical meaning of the term is ambiguous; it is not as clear as Project Freeway submits.

[10] Moreover, there is no doubt that the trial judge considered Project Freeway’s reliance on the parties’ use of the term “material” in s. 3.10(12)(b). She fully recounted Project Freeway’s argument, including its position that “the absence of words in some areas of the contract, while present in others, is presumed to have meaning”. However, she concluded that the difference between the language used in ss. 3.10(12)(a) and (b) does not drive the outcome. We see no basis to interfere with this decision. While familiar with the technical merits of Project Freeway’s position, the trial judge approached the interpretive exercise as she should have,

by taking what she described as a “practical, common-sense approach”. The trial judge was entitled to attempt to ascertain the objective meaning of the words used by the parties in this way, rather than relying on an approach “dominated by technical rules of construction”: *Sattva*, at para. 47.

[11] In the face of the ambiguity that she encountered the trial judge selected ABC’s interpretation over Project Freeway’s interpretation after assessing a range of considerations. She found it was supported by the factual matrix of the contract, consistent with the purpose of the contract as a whole, and commercially reasonable, unlike the competing interpretation offered by Project Freeway. She also noted that Project Freeway’s conduct prior to launching the action was consistent with the interpretation she was giving the contract.

[12] Project Freeway takes issue with several features of this reasoning.

[13] It argues that the trial judge erred by relying on the terms of the Letter of Intent (“LOI”) the parties entered prior to the execution of the Share Purchase Agreement as part of the factual matrix because doing so was contrary to the entire agreement clause. Section. 14.11 of the Share Purchase Agreement contains the entire agreement clause, and states, in material part:

“This Agreement, [and related documents] ... constitute the entire agreement among the Parties with respect to the transactions contemplated by this Agreement, and supersede all prior agreements, understandings, negotiations and discussions, whether oral or written, of

the Parties with respect to such transactions, including the Letter of Intent ....” [emphasis added.]

[14] The trial judge’s reasoning did not offend this contractual term. The trial judge considered the LOI as one of “all the circumstances” leading her to conclude that the word material in s. 3.10(12)(a) means material to the earn-out regime. The trial judge used the LOI as an interpretive aid to identify what the agreement between the parties in the Share Purchase Agreement was, so that she could apply the entire agreement in resolving the issue before her. She was entitled to do so: see *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2021 ONCA 592, at para. 62.

[15] Relatedly, Project Freeway argues that the trial judge erred in relying on the LOI to support her interpretation of s. 3.10(12)(a). The LOI describes two distinct triggers for the acceleration of the Earn-Out Payment, only one of which, in Project Freeway’s view, is directly linked to its ability to earn the Earn-Out Payments. Again, we do not agree. It may well be unclear whether the reference in the LOI to “in a manner which materially impairs the ability of the Vendor to earn Earn-Out Payments” was intended to modify both: (1) the sale of the business, and (2) the failure to follow the operating covenants, or only the latter. However, a consistent theme in the principles expressed in the LOI reflects the general objective that the purchaser will not act to impair Project Freeway’s ability to earn the Earn-Out Payouts and will maintain the working capital required to do so. Ultimately, the trial

judge's conclusion about the principles that are reflected in the LOI is an issue of fact that attracts deference: *Ontario First Nations (2008)*, at para. 63. Again, we see no error that would warrant intervention.

[16] Project Freeway also takes issue with the trial judge's conclusion that the interpretation it advances would be commercially absurd. In particular, the trial judge reasoned that it would not make commercial sense to accelerate the Earn-Out Payments simply because the purchaser engaged in a sale that has no effect on the Contribution Margin, and that this is particularly so in an agreement that explicitly, and "[f]or greater certainty", does not limit ABC's right "to complete mergers, amalgamations or other internal reorganizations". Project Freeway argues that this outcome is not commercially absurd because it "simply reflects the bargain struck" by sophisticated parties. This submission begs the question as to the bargain that was struck. Commercial absurdity is consulted to determine what bargain the parties intended, on the premise that commercial parties would not be likely to intend commercially absurd consequences. In the face of ambiguity, a judge will try to avoid a commercially absurd interpretation so that their decision will accurately reflect the "bargain struck" by the parties.

[17] Project Freeway also argues that the trial judge erred in considering evidence of post-agreement conduct of individuals associated with Project Freeway. She based this on her finding that despite being aware that ABC was negotiating a Sale Leaseback after the sale closed, Project Freeway raised no

concern. In coming to this conclusion, she referred to the definitions section of the Share Purchase Agreement which defines the term “knowledge”, qualifying various representations and warranties, to mean the “actual knowledge of” the two individuals referred to in the trial judge’s reasons, among others. The trial judge relied on the testimony of one of those individuals, David Mastronardi, who was the President and Chief Executive Officer of the Target Companies and a principal business contact during negotiations. The trial judge noted that Mr. Mastronardi did not view the Sale Leaseback “as a transaction of significant concern” when he facilitated site visits for prospective Sale Leaseback purchasers.

[18] The trial judge did not err in relying on a provision relating to representations and warranties to buttress her conclusion that the knowledge of these individuals could be ascribed to Project Freeway. Their role, as recognized in this provision, is evidence of the nature of their connection to the vendor corporation. We also find no error in the trial judge’s reliance on Mr. Mastronardi’s comment. She was not obliged to ignore his direct testimony simply because of later testimony he gave “clarifying” what he meant.

[19] We do, however, recognize that the factual inference that the trial judge drew from the fact that no objection was raised despite this knowledge is problematic given that s. 3.10(12)(a) contemplates permissible sales, with the vendor’s consent. A vendor, believing that their consent would be sought pursuant to the contract before an asset sale triggering s.3.10(12)(a) was finalized would have no

need to raise concern. However, any error the trial judge made in drawing this inference or in misusing post-contract conduct to glean intention was not an overriding error, or a reversible legal error. This point was far from a central consideration in the trial judge's conclusion, which was well supported and no doubt driven by the other factors she addressed.

[20] Finally, Project Freeway argues that even if she interpreted the contract without error, the trial judge erred in finding that the Sale Leaseback and the Factoring Agreement were not material to the operation of the earnout. This is an appeal of factual findings made by the trial judge. These findings are owed substantial deference. Project Freeway has failed to identify any palpable or overriding errors made by the trial judge relating to these findings, having done little more before us than to attempt to reargue these issues on the evidence.

[21] We therefore dismissed Project Freeway's appeal.

[22] Costs are payable by the appellant to the respondents in the amount of \$40,000 inclusive of applicable taxes and disbursements, as agreed between the parties.

“David M. Paciocco J.A.”

“J. George J.A.”

“P.J. Monahan J.A.”