COURT OF APPEAL FOR ONTARIO

CITATION: Bertrand v. Academic Medical Organization of Southwestern Ontario, 2024 ONCA 319
DATE: 20240430
DOCKET: COA-23-CV-0694

van Rensburg, Zarnett and George JJ.A.

BETWEEN

Monique Bertrand, Jacob McGee, Michel Prefontaine and Akira Sugimoto

Applicants (Appellants)

and

Academic Medical Organization of Southwestern Ontario

Respondent (Respondent)

Gavin MacKenzie and Joseph Colangelo, for the appellants

Adam Stephens, for the respondent

Heard: April 9, 2024

On appeal from the judgment of Justice A. Duncan Grace of the Superior Court of Justice, dated May 31, 2023, with reasons reported at 2023 ONSC 3209.

REASONS FOR DECISION

OVERVIEW

[1] The appellants are gynecologic oncologists who treat patients at hospitals in London, Ontario. They also provide classroom instruction at Western University's medical school and supervise residents and clinical fellows.

[2] The appellants had been receiving funding for their academic services pursuant to an agreement known as the AHSC AFP Template Funding Agreement

(the “Agreement”). The Agreement is between the Minister of Health and Long-Term Care (“Ontario”), the Clinical Teachers Association of the University of Western Ontario (the “Physician Organization”), London Health Sciences Center and St. Joseph’s Health Care (the “Hospitals”), the Ontario Medical Association (the “OMA”), and the University of Western Ontario (the “University”).

[3] The respondent, the Academic Medical Organization of Southwestern Ontario (“AMOSO”), is comprised of the Physician Organization, the Hospitals, and the University, all parties to the Agreement. AMOSO, itself not a party to the Agreement, is an unincorporated not-for-profit governance organization responsible for distributing funding to practice plans in London[1]. The practice plans then distribute these funds to individual physicians. Pursuant to the terms of a governance agreement between the Physician Organization, the Hospitals, and the University, AMOSO’s funding decisions are made at the discretion of AMOSO’s Governing Committee. The practice plans are not parties to either the Agreement or the governance agreement.

[4] On April 1, 2015, Ontario, the Ontario Oncology Association, the OMA, and various hospitals entered into the Provincial Oncology Alternative Funding Plan (“POAFP”), otherwise referred to as the Cancer Care Ontario AFP. Once it became aware of the POAFP, AMOSO’s Resource Sub-Committee engaged in a lengthy

[1] The appellants are members of the Obstetrics and Gynecology practice plan.

investigation and subsequently recommended that the allocation of funds to members of the Obstetrics and Gynecology plan be discontinued.

[5] On June 29, 2018, AMOSO's Governing Committee accepted that recommendation and decided that the appellants were no longer eligible to receive funding pursuant to the Agreement. This decision would not come into effect until March 31, 2019. AMOSO afforded the appellants an opportunity to "directly initiate and participate in a process of reconsideration" ahead of this date. Written notice of AMOSO's decision was provided on July 19, 2018. At the request of one of the appellants, AMOSO's executive director provided further clarification about what aspects of the POAFP led to its decision.

[6] The appellants were then afforded an opportunity to make submissions seeking a reversal of AMOSO's decision. One of the appellants, Dr. Jacob McGee, made submissions directly to the AMOSO Resource Sub-Committee on February 19, 2019. AMOSO maintained its decision to cease funding to the appellants.

[7] The appellants commenced an application in the Superior Court. They argued that AMOSO's decision amounted to a breach of the Agreement and that they continued to be entitled to an allocation of the funds paid to AMOSO. The application was dismissed. The application judge found that the appellants, who are not parties to the Agreement, were not entitled to a contractual remedy; were

not intended to receive the benefit of any of the Agreement's provisions, in particular those that provide for mediation and alternative dispute resolution ("ADR"); and that even if the appellants had a contractual right, because AMOSO adhered to and exceeded its internal rules and the principles of natural justice, the court had no authority to review the correctness of AMOSO's decision.

ISSUES

[8] This appeal raises three questions:

i) Did the application judge err by failing to apply the rule in *Browne v. Dunn*?

ii) Did the application judge err by finding that the parties to the Agreement did not intend for the appellants to benefit from its provisions?

iii) Does the court have jurisdiction to review the correctness of AMOSO's decision?

ANALYSIS

[9] The rule in *Browne v. Dunn* was described by this court in *Yan v. Nadarahaj*, 2017 ONCA 196, 82 R.P.R. (5th) 175, at para. 15, as follows:

> The application of that rule is generally restricted to situations where a party cross-examining a witness called by the opposite side is planning on adducing contradictory evidence to impeach the witness's credibility. The cross-examiner must "put" the contradictory evidence to the witness to allow the witness to provide an explanation for it. The rule reflects fairness to the witness whose credibility is attacked and to the party whose witness is impeached. It "prevents the 'ambush' of a witness by not giving him an opportunity to

> state his position with respect to later evidence which contradicts him on an essential matter". [Citations omitted.]

[10] This common law rule requires counsel to confront a witness they are cross-examining with any conflicting evidence they intend to call later on in the proceeding. The purpose is to alert the witness to the fact that counsel intends to impeach his or her evidence and to ensure that they are given an opportunity to respond.

[11] The appellants argue that because there was nothing to contradict their evidence that the intent of the Agreement was to benefit them individually, and because they were not cross-examined on this aspect of their evidence, the application judge had no choice but to accept it and find that they were entitled to the benefit of the Agreement. The appellants' argument that they were "entitled to the benefit" of the Agreement rests largely on a declaration they signed, per Article 5.1(d) of the Agreement, acknowledging that they had read, understood, and agreed to be "bound by the terms and conditions of the [Agreement]."

[12] However, the respondents did not argue that the appellants did not sign the declaration. This was acknowledged. The dispute was over the legal effect of the declaration. In the end, the application judge rejected the appellants' argument that the declaration entitled them to the benefit of the Agreement's provisions; he interpreted it simply as an acknowledgment by each appellant that the physician

organization represented their interests and could bind them contractually. In circumstances like these the rule in *Browne v. Dunn* has no application.

[13] The common law doctrine of privity of contract, accurately summarized in the application judge's reasons, stands for the proposition that "no one but the parties to a contract can be bound by it or entitled to it": *Greenwood Shopping Plaza v. Neil J. Buchanan Ltd*., [1980] 2 S.C.R. 228, at para. 9. The application judge recognized that there are exceptions to the doctrine, pursuant to the "principled approach" identified in *Fraser River Pile & Dredge Ltd. v. Can-Drive Services Ltd.*, [1999] 1 S.C.R. 108, at para. 31, which required him to consider the following "two critical and cumulative factors": 1) whether the parties to the Agreement intended to extend the benefit in question to the appellants; and 2) whether the activities performed by the appellants are the very activities contemplated as coming within the scope of the Agreement in general, or the provision in particular (i.e., access to ADR), again as determined by the intention of the parties.

[14] The application judge's reasons address both of these prerequisites. First, he found that there was no express intention in the Agreement that an individual physician would benefit from any contractual provision, nor could one be implied. And second, he found that it "would not accord with commercial reality and common sense" if each physician had the right to commence proceedings (under either the funding agreement's ADR provisions or in court) each time AMOSO

made a decision with which they disagreed. These findings were amply supported by the record.

[15] In any event, even if the appellants were in effect third party beneficiaries who had a right to enforce the Agreement, the application judge was right to conclude that a court's review of the discretionary decision of an unincorporated association was limited to whether it acted in accordance with its internal rules, the principles of natural justice, and whether the decision was *bona fide*. Perell J. summarized the relevant legal principles in *Karahalios v. Conservative Party of Canada*, 2020 ONSC 3145, at para. 183:

> If a significant private law right or interest is involved; for example if a member of the association has been expelled or lost his or her membership status, been deprived of his or her membership privileges, or his or her ability to pursue vocations and avocations associated with the association, the court does not review the merits of the association's conduct or decision but reviews whether the purported expulsion or loss of membership or of membership privileges was carried out according to the applicable rules of the association and with the principles of natural justice (procedural fairness), and without *mala fides*. Thus, where there is jurisdiction as a matter of contract and a significant right or interest is engaged, the court may determine: (a) whether the voluntary group or unincorporated association acted in accordance with its rules; (b) whether it acted in accordance with the principles of natural justice; and (c) whether the association's decision was come to *bona fide.* [Citations omitted.]

[16] Given the application judge's finding that AMOSO's decision-making process – detailed in the respondents' affidavits and in the minutes of AMOSO's sub-committee's meetings – not only met, but exceeded, these requirements, he

correctly concluded that it was not open to him to assess the correctness of AMOSO's decision. In other words, the appellants' contractual rights were satisfied by the process that AMOSO conducted, regardless of the correctness of the outcome.

[17] The appellants sought, in their application, a determination by the court that AMOSO's decision breached their contractual rights, or in the alternative, that the matter be referred to ADR under the Agreement's ADR provisions. In this court, the appellants argued that the appropriate result, upon a determination that the appellants were entitled to enforce the contract, would be to refer the matter to ADR. Given that the application judge considered, as he was asked to, the assertion that AMOSO's decision breached any contractual rights of the appellants even if they were entitled to enforce the Agreement, and rejected it, the request for ADR on the same issue was no longer available to the appellants.

CONCLUSION

[18] For these reasons the appeal is dismissed.

Costs are payable by the appellant to the respondent in the agreed upon all-inclusive amount of $30,000.

"K. van Rensburg J.A."
"B. Zarnett J.A."
"J. George J.A."