
CANADA / JUDGMENT

CIT Financial Ltd. v. Mike Closs Logging Ltd.

2011 BCSC 862

COURT

Supreme Court of British Columbia

DECIDED

29 June 2011

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2011 BCSC 862 CIT Financial Ltd. v. Mike Closs Logging Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

CIT Financial Ltd. v. Mike Closs Logging Ltd.,

2011 BCSC 862

Date: 20110629

Docket: S105626

Registry: Vancouver

Between:

CIT Financial Ltd.

Plaintiff

And

Mike Closs Logging Ltd. and Michael Closs

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Plaintiff:

G.G. Plottel

Counsel for the Defendants:

A.C. Kempf

Place and Date of Hearing:

Vancouver, B.C.

May 12, 2011

Place and Date of Judgment:

Vancouver, B.C.

June 29, 2011

- [1] CIT Financial Ltd. (CIT) is a company which leases heavy equipment, including logging equipment. Mike Closs Logging is a logging contractor. This action involves the interpretation of a lease dated February 23, 2006, for a 2006 Madill feller buncher (the equipment), which Michael Closs signed on behalf of Mike Closs Logging Inc. Mr. Closs also granted a personal guarantee. I will refer to the defendants collectively as MCL.
- [2] Based upon the terms of the lease, CIT seeks judgment against MCL in the amount of \$96,767.32, plus interest and special costs.

Issue

- [3] Do the terms of the lease allow MCL to return the equipment at the end of the lease term, or is MCL required to exercise the "end-of-lease options" specified?

Lease Terms

- [4] The lease is in standard form drafted by CIT. The lease includes a master lease, a lease schedule, and a lease schedule amendment (amendment). Each of these documents was signed by a representative of CIT and MCL on February 23, 2006.

- [5] The master lease provides at paragraph 14:

Return on Termination. At the end of the Lease Term of each Schedule, the Equipment shall be returned to Lessor or a place reasonably designated by Lessor, unless a purchase option is exercised in respect thereof.

- [6] The lease schedule provides at paragraph 2:

Purchase Option: Lessee shall, when not in Default under the Lease Agreement and upon 60 days' prior written notice to Lessor, is hereby granted the option to purchase all but not less than all of the Equipment on the date(s) and for the price(s) ("Option Price") referred to below subject to the terms and conditions of the Lease Agreement:

- (a) On March 23, 2010 for \$200,000.00 + Taxes Canadian, together with the Rental and other amounts due under this Schedule or the Lease Agreement; or

- (b) On the last day of the Lease Term at fair market value as reasonably estimated by Lessor together with the Rental and other amounts due under this schedule or Lease Agreement.

On Lessor's receipt of the Option Price in cash, plus sales and other taxes, if applicable, the Equipment will be sold to Lessee in its then condition, quantity and location, on an "as is, where is" basis, free and clear of liens, charges or encumbrances created by Lessor, without further warranties or representations whatsoever, express or implied, on the part of Lessor.

[7] The amendment provides:

Attached to and forming part of Lease Schedule No. _ dated FEBRUARY 23, 2006, between MIKE CLOSS LOGGING LTD. as Lessee and CIT Financial Ltd. as Lessor the "Lease Schedule").

The terms of the Lease Schedule are hereby amended by deleting Section 2 of the Lease Schedule and substituting the following:

2. END-OF-TERM OPTIONS: At least 60 days prior to the schedule expiry of the Lease Term, the Lessee shall elect by written notice delivered to lessor, one of the following end-of term options:
 - a) Purchase the Equipment from the Lessor on the last day of the Lease Term for an amount equal to the aggregate of (1) \$200,000.00 which is the estimated fair market value of the Equipment as at such date, (2) all Rentals and other amounts due under this Schedule or the Lease Agreement, and (3) all applicable sales and other taxes (collectively, the "Option Price");
 - b) Cause a third party to purchase the Equipment from the Lessor on the last day of the Lease Term for the Option Price; or
 - c) Lease the Equipment from the Lessor for an additional term and at a Rental to be established by Lessor acting reasonably, conditional upon Lessee meeting Lessor's credit approval requirements and upon the execution and delivery by Lessee of such additional lease documentation as Lessor may require.

Notwithstanding any such notice, Lessee shall be deemed to have elected option (a) above in any of the following events:

- (i) Lessee is in Default; (ii) Lessee fails to notify Lessor of its election; (iii) Lessee elects option (b) above and the third party fails to purchase the Equipment; or (iv) Lessee elects option (c) above and Lessor does not approve the credit for Lessee, or Lessee fails to execute Lessor's lease documentation. Following the exercise of option (a) or (b) above, and upon receipt by Lessor of the Option Price in cash, the Equipment will be sold to Lessee (or third party, as the case may be) in its then condition, quantity and location, on an "as is, where is" basis, free and clear of encumbrances created by Lessor, but otherwise without any further warranties, conditions or representations whatsoever, express or implied, on the part of Lessor.

Except as amended hereby, the Lease Schedule remains in full force and effect unamended. All terms defined in the Lease Schedule shall have the same meaning when used herein.

[8] The lease term expired on February 23, 2010.

Background

[9] On November 4, 2009, CIT wrote MCL advising that MCL had the opportunity to exercise the option to purchase the equipment. MCL responded by letter dated December 17, 2009. The letter notified CIT that MCL did not intend to purchase the equipment and would return it on March 23, 2010.

[10] On January 20, 2010, counsel for MCL wrote to CIT reiterating that MCL did not intend to purchase this equipment and would return it. Counsel for MCL clarified that the return date would be February 23, 2010, and not March 23, 2010, as had been erroneously stated in the December 17, 2009 letter.

[11] In May, 2010, the parties agreed that CIT would sell the equipment without prejudice to the party's positions regarding the lease.

The Law

[12] The parties agree that the basic principles of construction of contracts must be considered in construing the lease. The principles to which they refer are:

- a) The court must objectively determine the meaning of the document in its factual matrix, excluding the parties evidence of subjective intent: *Cheshire, Fifoot and Furmston's Law of Contract*, 14th Ed. (London: Butterworths, 2001) at ch. 6, pp. 136-137.
- b) The agreement must be construed in accordance with sound commercial principles and good business sense. It should be construed as a whole and effect should be given to all of its provisions: *Group 8 Investments Ltd. v. Taddei*, 2005 BCCA 489 at paras. 21 and 22.
- c) The court should "reject an interpretation that would render one of its terms ineffective": *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 at 425.
- d) "The words of the contract must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning": *Gilchrist v. Western Star Trucks Inc.*, 2000 BCCA 70 at para. 18.
- e) The rule of *contra proferentum* as described by Abella, J.A. (as she then was) in her dissenting reasons in *Arthur Andersen Inc. v. Toronto-Dominion Bank*, [1994] O.J. No. 427 at para. 93:

It is a rule meant to relieve the non-authorial party to a contract from an interpretation that party could not clearly discern from a plain reading of the document. This prevents the party who did draft and understand the contract from springing a hidden contractual burden on an unsuspecting signator [citations omitted].

Position of the parties

- [13] CIT submits that the lease requires that one of the three options in the amendment apply. There was no option not to renew the lease or purchase the equipment. It argues that the parties' true intent, objectively measured in the context of a commercial equipment lease, was that CIT would recover \$200,000 at the expiration of the term, either from the defendant or a third party, or permit MCL's application for a further lease. There was no option to return the equipment to CIT in accordance with paragraph 14 of the master lease because it was "superseded by the existence of the end-of-term options contained in the [amendment]." CIT argues that to interpret the lease in any other way ignores the contractual provisions in the amendment. The entire amendment would be ineffective. The options provided ensure that one of them must be followed.
- [14] CIT argues that paragraph 14 of the master lease does not provide a right for MCL to return the equipment unilaterally; it imposes an obligation to do so, subject to the condition of the exercise of one of the end-of-term options. Because MCL has no right to return the equipment, paragraph 14 merely relieves MCL from an obligation it would otherwise have at the end of the lease term. MCL gets the benefit of the equipment or its value instead of the obligation to return it. CIT is entitled to enforce the obligations as it chooses.
- [15] CIT asserts that the contra proferentum rule, as discussed in *Crawford v. Morrow*, 2004 ABCA 150 (in dissenting reasons at para 64-75) has four important qualifications:
- a) the rule is "a very weak canon of construction to be applied last (if at all), and only when other rules have failed";
 - b) the court must not search for or create an ambiguity and then apply the doctrine; the ambiguity must already exist on the face of the document;
 - c) the necessity for finding an ambiguity does not refer to uncertainty or difficulty of interpretation. It requires that the passage can only be read in either of two opposed ways; and
 - d) the application of the rule must apply to the interpretation of the contract at the time it is made. It does not apply to protect ordinary people against excessive legalese.

- [16] MCL asserts that paragraph 14 of the master lease is clear and ascertainable and should be given effect to allow MCL to return the equipment, as it chose to do. CIT's position ignores paragraph 14 in favour of the options clause in the amendment. CIT is in the business of leasing heavy equipment and drafted the lease and its schedules, and thus the principle of contra proferentum should be applied. The ambiguities should be construed against CIT.
- [17] MCL relies on *Central Guaranty Leasing Inc. v. Vancouver Office Services Inc.*, 1997 CarswellBC 1693 (S.C.), where the court applied the doctrine of contra proferentum, after attempting to determine the intention of the parties when they entered into their guarantee. The court, having concluded that the language of the guarantee was ambiguous, applied the contra proferentum rule and resolved the ambiguities against the maker of the guarantee (at para. 26).
- [18] Alternatively, MCL argues that the options clause in the amendment is too vague to be enforceable. Particularly, MCL argues, sub-paragraph c in the amendment provides an agreement to agree. The lessee must still meet the lessor's credit approval requirements in order to continue to lease the equipment. The option is entirely discretionary in the hands of the lessor. It was impossible to ascertain the terms of a lease renewal. Thus the clause is too uncertain to be enforceable.

Decision

- [19] Paragraph 14 in the master lease is clear: when the lease term expires, the equipment shall be returned to the lessor... unless a purchase option is exercised in respect thereof" (underlining added).
- [20] There is no "purchase option" described in the master lease or the amendment. The lease schedule which provided those options was replaced by the amendment. The amendment provides for "end-of-lease options." That term is undefined. The effect of the amendment is that, despite the mandatory terms of the master lease requiring the lessee to return the equipment, MCL has neither an obligation nor the right to return the equipment.
- [21] Applying the principles of construction referred to, the intention of the parties is not clear from the master lease and the amendment. Paragraph 14 refers to purchase options whereas the amendment refers to end-of-lease options. CIT's intention, as explained by its counsel, was that the true intent of the parties, objectively measured in the context of a commercial equipment lease, at the time of entry into the agreement, was to provide for CIT to recover \$200,000 at the expiration of the term (either from the defendant or a third party), or to permit the defendant's application for a further lease. MCL was entitled to elect one of these three options.
- [22] MCL disputes that this was the true intention.
- [23] The subjective view of each of the parties is not relevant. However, the provisions of the master lease and the amendment do not demonstrate a clear intention.

- [24] The application of sound commercial principles does not favour one party's interpretation over the other's. In my view each position is supportable on sound commercial principles.
- [25] The principles direct that I give effect to every provision of the lease. I do not accept CIT's interpretation of paragraph 14 of the master lease. That provision does not suggest that the amendment relieves MCL of its obligation to return the equipment. With respect, CIT's tortured interpretation of the plain wording of paragraph 14 in its ordinary and natural sense does not yield the interpretation which CIT suggests: that paragraph 14 does not provide the right to the defendant to return the equipment, but instead impose an obligation to do so, subject to the condition of the exercise of the purchase option.
- [26] The interpretation principles require me to give effect to every term of the contract. However, if the end-of-lease options apply, then paragraph 14 is ineffective. MCL has neither the obligation nor the right to return the equipment.
- [27] I find that paragraph 14 and the end-of-term options cannot be read together sensibly. Either paragraph 14 applies or the end-of-term option provisions apply. I find that there is an ambiguity in the master lease and the amendment which existed at the time that MCL and CIT entered into the lease. As there is an ambiguity, I find that the contra proferentem rule applies. CIT drafted the lease and provided it to MCL for signing. I therefore construe the provision against CIT and find that paragraph 14 of the master lease entitles, indeed requires, MCL to return the equipment at the end of the lease unless it chooses some other option.

"Gropper J"

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