
CANADA / JUDGMENT

CIT Financial Ltd. v. Mike Closs Logging Ltd.

2012 BCCA 170

COURT

British Columbia Court of Appeal

DECIDED

19 April 2012

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2012 BCCA 170 CIT Financial Ltd. v. Mike Closs Logging Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

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

2012 BCCA 170

Date: 20120419

Docket: CA039215

Between:

CIT Financial Ltd.

Appellant

(Plaintiff)

And

Mike Closs Logging Ltd. and Michael Closs

Respondents

(Respondents)

Before:

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Lowry

The Honourable Madam Justice Neilson

On appeal from, Supreme Court of British Columbia, June 29, 2011

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

Vancouver Registry S105626)

Oral Reasons for Judgment

Counsel for the Appellant:

G.G. Plottel

Counsel for the Respondent:

A.C. Kempf

Place and Date of Hearing:

Vancouver, British Columbia

April 19, 2012

Place and Date of Judgment:

Vancouver, British Columbia

April 19, 2012

- [1] LOWRY J.A.: The question is whether the terms of a lease of logging equipment required the lessee to purchase the equipment from the lessor at the end of the term of the lease. At trial, for reasons indexed as 2011 BCSC 862, Madam Justice Gropper concluded there was no such requirement. The lessor appeals.
- [2] On 23 February 2006, CIT Financial Ltd. and Mike Closs Logging Ltd. entered into a lease under which the financing company leased a Madill Feller Buncher to the logging company for four years ending 23 February 2010. The lessee's obligations were guaranteed by its principle. The lease consisted of the lessor's standard form printed documents: a master lease, two schedules, and an amendment to one of the schedules. The material provisions are as follows:

Clause 14 of the master lease:

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

Clause 2 of one of the schedules:

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.

The amendment to that schedule:

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 scheduled 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.

- [3] In November 2009, the lessor wrote to the lessee informing the lessee it had the "opportunity to exercise the Option to Purchase the leased equipment" and inquiring of its intentions. In December, the lessee responded to the effect that it did not intend to purchase the equipment and would be returning it. Solicitors for the lessee wrote further in January 2010 confirming the lessee would be "exercising [its] option to return the machine pursuant to Article 14 of the lease". The solicitors maintained that although the amendment to the schedule "suggests [the lessee] does not have this option", they were of the opinion the provisions of the schedule were uncertain and that, when read with the lease, the lessee "maintains the right to return the equipment". The lessor maintained the lessee could not return the equipment; the only options available to the lessee were the three for which the amendment to the schedule provides. With no election having been made 60 days before the end of the lease term, the lessee was, in accordance with the notwithstanding provision, deemed to have elected the first option which was to purchase the equipment for \$200,000 plus tax. The equipment was ultimately sold to a third party by agreement for substantially less than that amount, without prejudice to a determination of the parties' rights under the lease. The lessor seeks to recover \$96,767.32 from the lessee.
- [4] The judge found the lessee was to return the equipment and she dismissed the action because, in her view, the amendment to clause 2 of the schedule conflicts with clause 14 of the master lease. She applied the doctrine of contra proferentem against the lessor to resolve what she saw as an ambiguity arising from the conflict. She concluded her analysis as follows:
- [26] The interpretation principles require me to give effect to every term of the contract. However, if the end-of-[term] 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.

- [5] In reviewing the authorities, the judge recognized that a court must strive to give meaning to all of the terms of an agreement but she nonetheless effectively discounted the whole of the amendment and thereby rendered the concluding phrase of clause 14 ("unless a purchase option is exercised in respect thereof") meaningless because the only purchase options are contained in the amendment.
- [6] With respect, I take a different view. I consider clause 14 of the lease and the amendment to clause 2 of the schedule can be read together such as to give business efficacy to the provisions of the lease read as a whole.
- [7] Under clause 14 of the master lease, the lessee was obligated to return the equipment at the end of the lease term unless a purchase option was exercised. The amendment afforded the lessee three options, the first two of which were purchase options: to purchase the equipment itself or to cause a third party to purchase it. In either event the lessee would not have been required to return the equipment to the lessor. The third option was not a purchase option; it was an option to enter into a new lease of the equipment. In the event of the lessee electing to enter into a new lease it was first required to return the equipment to the lessor at a place designated by the lessor (which could have been wherever the equipment was). Whether any return of the equipment would have been other than notional would have turned on whether the parties entered into a new lease and when its term began.
- [8] The lessee says that the third option was too uncertain to be enforceable; it was no more than an agreement to agree. The term of the lease and the rental were to be established by the lessor acting reasonably, and any lease was conditional upon the lessee providing credit and executing documentation satisfactory to the lessor. But whether the third option could have been enforced if the lessee had elected to enter into a new lease is of no consequence now. The enforceability of the option does not alter the clear intention to be attributed to the parties drawn from the whole of the lease.
- [9] The lessor is of course in the business of financing acquisitions; the lessee's business is logging. Under clause 2 of the schedule, the lessee had a choice between purchasing the equipment or returning it to the lessor. But that clause was amended and the amendment makes it clear the parties essentially intended the equipment would not be returned to the lessor at the end of the four-year lease term unless the lessee elected to enter into a new lease but was not able to meet the credit requirements. Then and only then would the finance company be burdened with the return of the equipment. Otherwise, it would be sold or leased under a new lease.
- [10] It follows that, having made no election 60 days before the end of the term of the lease which was open to it to make, the lessee is deemed to have elected to purchase the equipment and must now pay the lessor the difference between the actual sale price and what it should have been.

[11] I would allow the appeal, set aside the judge's order, and grant the lessor judgment against the lessee for \$96,767.32 with contractual interest.

[12] DONALD J.A.: I agree.

[13] NEILSON J.A.: I agree.

[14] DONALD J.A.: The appeal is allowed. The judge's order is set aside and the lessor has judgment against the lessee for the amount indicated by Mr. Justice Lowry.

"The Honourable Mr. Justice Lowry"

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