
CANADA / JUDGMENT

CSRS Ltd. v. Embley

2007 BCSC 1739

COURT

Supreme Court of British Columbia

DECIDED

3 December 2007

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

CSRS Ltd. v. Embley,

2007 BCSC 1739

Date: 20071203

Docket: S043015

Registry: Vancouver

Between:

CSRS Ltd., CSRS Software Co. Ltd.,

Canadian Securities Registration Systems (a Partnership),

Robert Conconi and Walter Weaver

Plaintiffs

And

Philip Thomas Embley, Dona Mae Dorash,

Constance Marie Embley, and 562835 B.C. Ltd.

Defendants

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiffs

W.S. Berardino, Q.C.

Sean George

Counsel for the Defendants

Stephen R. Schachter, Q.C.

Julia Lawn

Date and Place of Trial:

October 15, 2007

Vancouver, B.C.

Introduction

- [1] This matter has been the subject of two previous decisions, *CSRS Ltd. et al. v. Embley et al.*, 2006 BCSC 700 and *CSRS Ltd. v. Embley*, 2007 BCSC 363. The case concerns disputes concerning the rights and obligations of the parties to a purchase and sale agreement (the "Agreement"), the purpose of which was to accomplish the sale of the business of CCNS Corporate Services Ltd. and certain related entities, including its subsidiary CCNS Computer Systems Ltd., as of August 31, 1998 (the "Closing Date"). The Agreement called for certain payments to be made on the Closing Date, with subsequent additional payments to be made by the entities of the purchasers over the next four years. A description of the parties, the circumstances of the sale and the prior issues are set out in the two prior decisions.
- [2] The matters now before the Court are:
- (a) the issue of the damages flowing from the plaintiffs' breach of the obligation to use best efforts to obtain a PPSA Agreement relating to the Province of Quebec with the Bank of Nova Scotia ("BNS") and the Toronto Dominion Bank ("TD"), after September 1999. A PPSA Agreement was defined in the Agreement as an agreement in writing with one or more of the Banks to provide registration services for personal property security transactions;
 - (b) whether a deemed agreement existed in 1999-2000 between CSRS and CIBC Finance for registrations in Quebec; and
 - (c) whether the defendants are entitled to solicitor-client costs under the guarantees given to them by certain plaintiffs to secure amounts payable under the Agreement.

Breach of the Best Efforts Provision

- [3] Clause 6.2(g) of the Agreement provides:

The Purchasers and CCNS will use their best efforts to negotiate PPSA Agreements with the Banks as soon as it becomes publicly known that the Quebec Registry will go Live.

- [4] It is common ground that the Quebec Registry went live on September 17, 1999. In the 2006 BCSC 700 Reasons in relation to this litigation, I concluded that in the case of both BNS and TD Banks, the purchasers failed to use best efforts to negotiate PPSA Agreements. The issue to be determined is the measure of damages flowing from those breaches.
- [5] In this case, as in *BEM Enterprises Ltd. v. Campeau Corp.* 32 B.C.L.R. 116, (1981), 22 R.P.R. 240 (C.A.) [BEM], it is too late to exercise best efforts to see if the condition could be fulfilled. In such situations, the Court of Appeal in *BEM* directed that the damages are to be assessed taking into account the contingency that the conditions necessary for the completion of the provision in question could not be met. Additional guidance is provided in the subsequent case law with respect to the assessment of damages:
- (a) where there is no reasonable probability of the plaintiff realizing an advantage of some real substantial monetary value only a nominal award will be made: see *Bruce v. Region of Waterloo Swim Club* (1990), 73 O.R. (2d) 709, 31 C.C.E.L. 321 (Ont. H.C.J.) [Bruce], citing *Kinkel v. Hyman*, [1939] S.C.R. 364, [1939] 4 D.L.R. 1 [Kinkel]; and
 - (b) to recover more than nominal damages, the plaintiff does not have to establish that it was more probable than not that the condition could have been satisfied [Bruce]. To recover beyond a nominal award, the plaintiff must establish that there was some reasonable probability of the plaintiff realizing an advantage of some real substantial monetary value: see *Kinkel and McDonald's Restaurants of Canada Ltd. v. British Columbia* (1999), 68 B.C.L.R. (3d) 163, 48 B.L.R. (2d) 38 (S.C.).

Bank of Nova Scotia

- [6] The defendants submit that there should be no reduction or, at worst, minimal reduction for contingencies, relying in particular on the following:
- (a) throughout the relevant period the plaintiffs continued to do all the direct registration work for BNS;
 - (b) one strategy that the plaintiffs employed to secure business was to forward draft contracts to the banks containing simple terms, typically providing for a one-year term with renewal provisions. However, the plaintiffs did not send such a draft to BNS in an effort to secure a written agreement with respect to the direct work; and
 - (c) Paul Brownell, who was the Assistant General Manager responsible for projects and product support for the retail lending services division of BNS, testified that if CSRS had asked him to sign a contract for direct registration work in 2001, the Bank would have been receptive. It was his evidence that "I would have had no problem with that".
- [7] The plaintiffs submit that the negative contingencies are such that there was no prospect or, at best, only a slim prospect for a written agreement being secured during the relevant period. The plaintiffs rely in particular on the following:

- (a) the plaintiffs' efforts in 1999 to secure a written agreement with BNS were rebuffed;
 - (b) prior to Mr. Brownell assuming responsibility in the area, Ms. Hague advised by letter dated July 28, 2000, that the future work would be awarded pursuant to a request for proposal ("RFP") process;
 - (c) BNS eventually did issue an RFP with respect to registration work and it took about a year and half to complete. The matter was not concluded until 2006; and
 - (d) Mr. Brownell testified that it was possible that an RFP would have been required for a contract with respect to the direct work. He had advised Ms. McMillan in September 2002 that he would look into a registration contract after the search issue was finalized.
- [8] In my view, the defendants have established that there was a reasonable prospect of securing a written agreement with respect to the direct work with BNS had the plaintiffs pressed the issue with Mr. Brownell in 2001. The plaintiffs submit that it was likely that if the matter had been pressed, it would have raised the ire of the Bank's senior management and the efforts would have been rebuffed. That appears to have been the Bank's reaction to earlier efforts of the plaintiff; however, by 2001, Mr. Brownell was dealing with the matter and I have no reason to question his evidence with respect to his receptiveness.
- [9] I agree with the submission of the plaintiffs that had the matter gone to an RFP, the process would likely have extended beyond the timelines specified in the Agreement. Mr. Brownell testified that the matter might have required an RFP. It is therefore appropriate to discount for that possibility. In that regard, it is significant that an RFP was eventually issued, there were multiple suppliers of the service, the decision may well not have been solely Mr. Brownell's and there had been several communications to the plaintiff that the Bank's registration business would be awarded pursuant to an RFP.
- [10] I have concluded that it is appropriate to apply a 50% discount to reflect the negative contingencies with respect to BNS.

Toronto Dominion Bank

- [11] The defendants submit that the full amount payable under the Agreement in respect of TD should be awarded as damages for breach of the best efforts provision. The defendants place particular reliance upon the following:
- (a) throughout the relevant period CSRS did all of the TD indirect registration work in all provinces, including Quebec, through Greenlight, in addition to all of the direct registration work in every province except for Quebec;
 - (b) CSRS had agreements in writing with TD with respect to the registration work done in other provinces;

- (c) the Greenlight work was administered in Toronto. There was no one in Quebec dealing with the Greenlight work or to speak with concerning this work;
 - (d) the discussions that were undertaken were with respect to securing the direct work in Quebec that CAS was doing; and
 - (e) the plaintiffs did not pursue obtaining a written agreement for the Greenlight work in Quebec. There is no evidence that such a request would have been refused and no reason to suppose that it would have been met with a refusal.
- [12] The plaintiffs submit that the award of damages with respect to the breach of the best efforts provision as it relates to TD should be nominal or, at worst, subject to an 80% reduction for contingencies. The plaintiffs place particular reliance upon:
- (a) the extremely tight timeline within which to obtain a PPSA Agreement with TD in order to trigger additional payments - this being two years after closing or August 31, 2000; and
 - (b) Mr. Weaver's evidence that all inquiries with respect to agreements in relation to registration work in Quebec were met with the response that the plaintiffs had to deal with the people in Quebec. He testified further, "[W]e were told that Quebec was not prepared to deal with a contract of any sort, that they were going to do their own work irrespective if it was Greenlight or direct credits".
- [13] In my view, Mr. Weaver's evidence must be viewed in light of his evidence given in cross-examination that the efforts with respect to dealing with the personnel in Quebec were directed to obtaining the direct work, and that the discussions held in Toronto with respect to Quebec work related to obtaining this business. It was in that context that he was told to speak with the people in Quebec. Moreover, he agreed in cross-examination that he was never told specifically to deal with people in Quebec with respect to Greenlight issues. He agreed that:

Q Yes. Well, what you were discussing with them in Toronto was getting the rest of the TD work in Quebec that CAS was doing, correct?

A Correct.

- [14] He also agreed that the personnel in Quebec had no responsibilities for Greenlight. He stated, "There was no one to talk to in Quebec".
- [15] In those circumstances, it seems to me to be quite unlikely that, in response to an inquiry specific to obtaining an agreement in relation to Greenlight work, the plaintiffs would have been directed to deal with Quebec. There is a possibility that the sort of commercial vacuum described in Mr. Weaver's testimony existed with respect to contractual arrangements for Greenlight work in Quebec. However, I conclude that the possibility is slight. The other contingency is the timing issue identified by the plaintiffs. I agree that there should be a deduction to reflect the possibility that, had best efforts been taken, an agreement would not have been concluded within the timeline identified in the Agreement.

- [16] I have concluded that it is appropriate to apply a 20% discount to reflect the negative contingencies with respect to TD.

Deemed Contract

- [17] Subsection 6.2(f) of the Agreement provides that the plaintiffs are deemed to have entered into a PPSA Agreement and thus trigger the payment obligations in respect of a Bank in a given year if they perform more than 50% of the registrations for that Bank in Quebec for the year in question. The Banks referred to in the Agreement were TD, BNS and CIBC Finance. Subsection 6.2(4) states:
- (f) For purposes of the above [payments under the Quebec Note], on the assumption that there is no written PPSA Agreement in place with a Bank, for any given year, CCNS, CSRS, the Purchasers or a Related Person will be deemed to have entered into such a PPSA Agreement with that Bank for that year if any one of CCNS, CSRS, Purchasers or a Related Person, or collectively, they perform more than 50 percent of the statutory personal property security registrations for that Bank in the Province of Quebec for that year. However, any such agreement will only be deemed to be in effect for that one year. For all subsequent years a new assessment must be undertaken each year in order to determine if the 50 percent threshold has been met for that subsequent year, and in the case of any such deemed agreement, the payments under the Quebec Computer Software Promissory Note will be adjusted to only provide for a payment in respect of the applicable Bank for only those years, if any, during which any such agreement is deemed to be in place. For purposes of this paragraph (f), a "year" will be a period of 12 calendar months, commencing as of the day and month of the Closing Date and terminating on each anniversary of the day and month. Once this paragraph (f) has been relied upon once to deem the existence of an agreement with a given Bank, then the amounts payable by Subco under the Quebec Computer Software Promissory Note in respect of that Bank will be adjusted in accordance with the provisions of paragraph 6(e) in light of the provisions of this paragraph (f), unless a written PPSA Agreement is subsequently entered into between that Bank and any one of CCNS, CSRS, the Purchasers or a Related Person, in which case all amounts attributable to that Bank that have not already been paid by Subco will become payable by Subco, and will then be paid by Subco in accordance with the schedule set out in subparagraphs (e)(iii) to (vi) above.
- [18] The issue between the parties is whether a deemed agreement existed between CSRS and CIBC Finance in Year 1 as a result of certain registrations performed by the plaintiffs in August 2000 at the Quebec Registry (the "RZ Registrations").

- [19] By way of background to this issue, the Quebec Registry gave lenders the opportunity to register pre-existing security instruments at a discounted rate during the first year after the Quebec Registry went live in September 1999. In May of 1999, CIBC Finance ceased financing indirect retail loans and thereby no longer required the registration of any new financing statements. However, CIBC Finance had a portfolio of loans in Quebec prior to the opening of the Registry.
- [20] Prior to June 1, 1999, Ron Morrison was employed by CIBC Finance as General Manager, Risk Management. He deposed that CIBC Finance ceased its active business operations effective May 31, 1999. He was then employed by CIBC in the Retail and Small Business Lending Division as Director of Operations. In that capacity, he instructed CSRS in relation to the RZ Registrations that CSRS performed at the Quebec Registry in August 2000. Mr. Morrison deposed that he provided the instructions to CSRS with respect to the RZ Registrations on behalf of CIBC and to secure for the purpose of securing the interests of CIBC. It was his evidence that the RZ Registrations were not performed for or on behalf of CIBC Finance. CIBC paid CSRS for its services with respect to the RZ Registrations.
- [21] The plaintiffs submit that there is no reasonable basis for the defendants to assert that the RZ Registrations were performed for CIBC Finance because the RZ Registrations:
- (a) were billed to CIBC, not CIBC Finance;
 - (b) were paid for by CIBC, not CIBC Finance;
 - (c) were prepared on instructions from a CIBC employee, not a CIBC Finance employee;
 - (d) were performed to secure the interests of CIBC, not CIBC Finance; and
 - (e) were not being performed for or on behalf of CIBC Finance.
- [22] The plaintiffs submit that as a result, no payment obligations under the Agreement can be said to arise because of the RZ Registrations.
- [23] The defendants' position is that the loans that were the subject of the RZ Registrations were the portfolio of CIBC Finance, despite the fact that by the time they were registered, CIBC head office "took care" of the actual registrations by giving directions to the plaintiffs and paying for the registrations. The defendants submit that the RZ Registrations were a direct result of the agreement between the plaintiffs and CIBC Finance that CSRS had acquired under the Agreement. Finally, the defendants submit that the Agreement ought not to be construed so that the parent company's arrangements in relation to the CIBC Finance loan portfolio deprive the defendants of payment in relation to the asset sold under the Agreement. Registrations for the "bank" should embrace work that arose directly from the banking relationship that was sold under the Agreement.

- [24] I find that most, but not necessarily all, of the loans that were the subject of the RZ Registrations were originally part of the CIBC Finance portfolio. However, the origin of the loans is not the issue with respect to the deemed agreement provisions of Clause 6.2(f).
- [25] The test under the language of the Agreement is whether "they perform more than 50 percent of the statutory personal property security registrations for that Bank in the Province of Quebec for that year". [Emphasis added]. In order for the deemed agreement provisions to apply with respect to CIBC Finance, the RZ Registrations would have to have been performed for that Bank, namely, CIBC Finance. However, in my view, the RZ Registrations could not be said to have been performed for CIBC Finance. At the time of the registrations, CIBC Finance had ceased its active business operations. CIBC had acquired its loan portfolio. It is not the case that CIBC was "taking care" of the loans for CIBC Finance. Rather, the registrations were performed to secure the interests of CIBC. Accordingly, I conclude that there was no deemed agreement with CIBC Finance arising from the RZ Registrations.

Costs

- [26] The obligations under the Agreement and promissory notes were guaranteed under a series of corporate and personal guarantees (the "Guarantees."). Three of the Guarantees named the corporate predecessors to the plaintiff CSRS Ltd. (386943 B.C. Ltd; 386876 B.C. Ltd., Rapid Yacht Charters Ltd. and CCNS Corporate Services Ltd.) as Guarantors; and the fourth was a personal guarantee naming the plaintiffs Robert Conconi and Walter Weaver as Guarantors. The recipients of the Guarantees were variously the defendant 562835 B.C. Ltd. a.k.a Sisterco (the Computer Notes Guarantee); the defendants Philip Embley and Dona Dorash as Executives (the Additional Payments Guarantee); Philip Embley, Constance Embley and Dona Dorash as Note Holders (the Promissory Notes Guarantee); and Philip Embley, Dona Dorash and Constance Embley as Vendors, (the Personal Guarantee).
- [27] The Guarantees contain provisions with respect to costs of litigation:
- (a) The Guarantee (Computer Notes) between the corporate predecessors to the plaintiff CSRS Ltd. and the defendant 562835 B.C. Ltd. provides at s. 2:

The Guarantors unconditionally guarantee to Sisterco [defined as the defendant 562835 B.C. Ltd.] the due performance and observance by the Purchasers of the Purchasers' Obligations. The Guarantors also promise to pay to Sisterco all costs, expenses, and charges, including without limitation reasonable legal fees and disbursements, on a solicitor and own client basis, incurred by Sisterco in reference to any suit upon this guarantee.

- (b) The Guarantee (Additional Payments) between the corporate predecessors to the plaintiff CSRS Ltd., and Philip Embley and Dona Dorash as Executives, provides at s. 2:

The Guarantors unconditionally guarantee to the Executives the due performance and observance by the Purchasers of the Purchasers' Obligations. The Guarantors also promise to pay to the Executives all reasonable legal fees and disbursements, on a solicitor and own client basis, incurred by the Executives in reference to any suit upon this guarantee.

- (c) The Guarantee (Promissory Notes) between the corporate predecessors to CSRS Ltd. and Philip Embley, Constance Embley and Dona Dorash as Note Holders, provides at s. 2.

The Guarantors unconditionally guarantee to the Note Holders the due performance and observance by the Purchasers of the Purchasers' Obligations. The Guarantors also promise to pay to the Note Holders all costs, expenses, and charges, including without limitation reasonable legal fees and disbursements, on a solicitor and client basis, incurred by the Note Holders in reference to any suit upon this guarantee.

- (d) The Personal Guarantee between Robert Conconi and Walter Weaver as Guarantors and Philip Embley, Dona Dorash and Constance Embley as Vendors, provides at s. 1:

The Guarantors unconditionally guarantee payment by the Purchasers of the Promissory Notes. The Guarantors also promise to pay to the Vendors all costs, expenses, and charges, including without limitation, reasonable legal fees and disbursements, on a solicitor and client basis, incurred by the Vendors in reference to any suit upon this guarantee.

- [28] The defendants submit that the counterclaim constitutes a "suit upon this guarantee" with the respect to the Guarantees. The defendants submit that they have been successful in the proceeding and, accordingly, are entitled to a declaration that the covenants in the Guarantees are enforceable and provide for a full indemnity to the defendants for their reasonable legal fees and disbursements in relation to this proceeding.
- [29] The plaintiffs submit that the parties chose to limit the indemnification provision to suits upon the Guarantees and not to extend the indemnification to any disputes arising from the Agreement. It is the plaintiffs' position that the phrase "any suit upon this guarantee" should be limited to proceedings to enforce payment by and from the guarantors under the Guarantees in circumstances where the guaranteed performance has not been made. The indemnification for legal fees under the Guarantees does not extend to include proceedings relating to a dispute between the payor and the payee as to the existence of a payment obligation. If the parties had intended the plaintiffs' indemnification to extend that broadly, they would have included language specifying so.
- [30] It is the plaintiffs' submission that since this is not "a suit upon this Guarantee", the indemnification provisions of the Guarantees have no application. The plaintiffs submit that, having regard to the divided success in the litigation, each party should bear its own costs or, in the alternative, the costs be divided two-thirds in favour of the defendants and one-third in favour of the plaintiffs.

- [31] I have concluded, having reviewed the pleadings and prior decisions, that this litigation does not constitute a "suit upon this guarantee" as that term is used in the Guarantees. The indemnification provisions of the Guarantees are not applicable in the circumstances. Success in the litigation has been divided. In my view, failure to apportion costs would result in unfairness.
- [32] The defendants have achieved greater success having regard to the substance of the claims. Accordingly, the defendants are entitled to two-thirds of their costs and the plaintiffs to one-third of their costs.

"Ross J."

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Prepared on 29 October 2026 · Esheria