

CANADA / JUDGMENT

FBI Foods Ltd. v. Glassner

2001 BCSC 1472

COURT

Supreme Court of British Columbia

DECIDED

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2001 BCSC 1472 Docket:

C995160

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

FBI FOODS LETD. - LES ALIMENTS FBI LTEE.
PLAINTIFF

AND:

IRVING GLASSNER
DEFENDANT

AND:

CADBURY SCHWEPPEES INC. AND
CADBURY BEVERAGES CANADA INC.
THIRD PARTIES

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE DILLON

(IN CHAMBERS)

Counsel for the Defendant: R. Sugden, Q.C. and

C. Dennis

Counsel for the Third Parties: J. Giles, Q.C. and

T. Timberg

Date and Place of Hearing/Trial: September 12, 2001

Vancouver, BC

Introduction

[1] The defendant, Irving Glassner (hereafter "Glassner"), claims for breach of contract of settlement against the third parties, Cadbury Schweppes Inc. and Cadbury Beverages Canada Inc. (hereafter "Cadbury"). On February 1, 2001, this court found the defendant liable to the plaintiff for contribution of \$150,000, half of the amount paid by the plaintiff to Cadbury in settlement of the decision of the Supreme Court of Canada in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.) (2001 BCSC 151). Prior to that case proceeding to the British Columbia Court of Appeal, the defendant had settled Cadbury's claim against him for \$1.00. As a result, he did not participate in the appeals. With the defendant's liability for part of the settlement between Cadbury and the plaintiff established, he now proceeds by third party claim against Cadbury for breach of settlement and unjust enrichment of the \$150,000 that the defendant is now required to pay the plaintiff.

Facts

[2] The defendant was found liable to Cadbury at trial of the original action with Cadbury as plaintiff and Glassner and FBI Foods Ltd. as defendants ((1994) 93 B.C.L.R. (2d) 318 (B.C.S.C.)). Prior to hearing of the appeal from the trial decision, the defendant settled Cadbury's claim against him by a covenant not to sue and payment to Cadbury of \$1.00. The defendant decided not to appeal notwithstanding that there existed the possibility that he may have been found not liable at all. The plaintiff was not apprised of the terms of this settlement at the time. Cadbury agreed to the following terms on July 2, 1996:

COVENANT NOT TO SUE

FOR AND IN CONSIDERATION of the sum of ONE DOLLAR (\$1.00), and other good and valuable consideration, the receipt and sufficiency whereof is hereby acknowledged, the Undersigned hereby jointly and severally promise, covenant and agree to and with IRVING GLASSNER, his heirs, executors, administrators, agents and assigns, that neither we, or either of us, nor anyone claiming through us, will hereafter bring, commence, prosecute or maintain, or cause or permit to be brought, commenced, prosecuted or maintained, any suit or action, either at law or in equity, against IRVING GLASSNER, either personally or in his capacity as a former officer and director of CAESAR CANNING LTD., and that neither we, nor either of us, nor anyone claiming through us, will enforce, prosecute or recover upon, or attempt to enforce, prosecute or recover upon, any claim or right of action whatsoever, which we, or either of us, or anyone claiming through us, may now have or may hereafter assert.

Without restricting the generality of the foregoing, the Undersigned agree to discontinue all proceedings as reflected in British Columbia Supreme Court Action Nos. C880184 and C894223 and further agree we will not recommence the proceedings at any time.

In executing this Covenant Not to Sue, the Undersigned expressly reserve any and all rights of action, claim or demands we may have against FBI FOODS LTD. and FBI BRANDS LTD., their successors or assigns.

(hereafter referred to as "the agreement")

- [3] FBI Foods Ltd. settled the outstanding judgment from the Supreme Court of Canada with Cadbury for \$300,000. It then commenced this separate action in contribution and indemnity to recover from the defendant half of the \$300,000 that it paid to Cadbury. In negotiations leading to the \$300,000 settlement, Cadbury's solicitor offered to settle the claim based upon losses in the east through FBI Foods Ltd. This settlement was not payment in full for damages as claimed by Cadbury but a reflection of practical considerations that generally lead to settlement. Although the defendant argued that this indicated that Cadbury was aware that it could not seek payment for damages attributable to Glassner, this court found that Cadbury never relinquished its claim for damages in full. In reasons for judgment of February 1, 2001, this court said at para 20-21:
- [20] Throughout the original action, Cadbury pursued the whole of its loss that it suffered through wrongful copying and use of the Clamato formula without distinction between the defendants when it came to damages. The trial judge found a common liability between the plaintiff and defendant through the joint venture and the conduct of the defendant and Kurlender in wrongfully copying and using the Clamato formula. Damages flowed from that. The sole separation of the defendants in damages occurred in the Court of Appeal in respect of FBI Brands only. FBI Brands was the corporation operating in the west that had taken over after the receivership of Caesar's Canning Ltd. and after the head start period. There was no attempt at trial or in the Court of Appeal to separate causation or to apportion damages between the defendants, except as already stated. The damages as agreed between Cadbury and the plaintiff were for lost profits in eastern Canada as arose through Caesar Beverages Inc. In the Supreme Court of Canada, Cadbury did not contest the separation out of FBI Brands. In settlement correspondence, Cadbury made it clear that it sought damages for lost sales only within the FBI area and not the area of Caesar's Canning. By FBI 'area' was meant eastern Canada as indicated in tables to the settlement letters. This situation is different from B.C. Ferry Corp. v. T&C plc. where the plaintiff elected to claim from one defendant only that portion of loss caused by that defendant alone.
- [21] The benefit derived here was payment by FBI of damages for the lost profits and royalties from the eastern market which was operated through the eastern production and distribution company, Caesar Beverages Ltd., which was owned equally by FBI and Mr. Glassner through his company, Caesar Canning Inc. That equal ownership would give rise to benefit of 50 percent in a settlement was not, in itself, contested.

- [4] The plaintiff and defendant were concurrent wrongdoers so that each was liable in full for the damage collectively done.

Issue

- [5] Both parties agreed that the issue now before the court is whether there was an express or implied covenant by Cadbury when it settled with Glassner that it would not seek to recover from the plaintiff any portion of its loss that the court might attribute to wrongdoing by Glassner. Is Cadbury required to reimburse Glassner for the \$150,000 that he is required to pay the plaintiff?

Analysis

- [6] In multi-party litigation, it is recognized professionally that there is increasing complexity and risk associated with partial settlement on behalf of one defendant (see Martin, Karen, "Advising Clients on the Settlement of Multi-party Litigation", *The Advocate* (Vol.55, Part 2 (March 1997))). This is because the plaintiff may continue the action to recover damages in full against one of several concurrent wrongdoers or one wrongdoer may decide to claim equitable recovery against someone who has benefited from that defendant's burden (*Tucker (Guardian ad litem of) v. Asleson* (1993), 102 D.L.R. (4th) 518 at 574-575(B.C.C.A.); *Clayburn Industries v. Recor Services* (2000), 78 B.C.L.R. (3d) 19 at 25-27 (B.C.S.C.); *FBI Foods Ltd. v. Glassner et al.* 2001 BCSC 151 at paras 13-15). If the other defendants/wrongdoers have not had their share of liability assessed in the main action in law or if equitable relief is claimed, the defendant/wrongdoer left responsible for the whole of the loss may claim contribution and indemnity from the other defendants/wrongdoers in a separate, independent action for contribution in law or equity, whichever applies. In this event, the right of contribution or indemnity is independent and separate from what the original plaintiff or injured person did (*Tucker supra* at 576).
- [7] If this occurs, as it has here, the other defendant will want to have ensured that his interests were ultimately protected within the settlement with the original plaintiff. There are several ways that this can be accomplished including by indemnity or by agreement from the plaintiff that it will not pursue the remainder of the defendants/wrongdoers for the released defendant's share of the loss (see *Tucker (Guardian ad litem) v. Asleson* (1991), 86 D.L.R. (4th) 73 at 110, see also Martin, "Advising Clients on the Settlement of Multi-party Litigation" at 209). An example of the latter is in *British Columbia Ferry Corp. v. T&N plc* (1993) 86 B.C.L.R. (2d) 353 at 355 (para 5)(B.C.S.C.), *app'd* (1995)16 B.C.L.R. (3d) 115 at 121 (para 14).
- [8] It is conceded here that the agreement did not provide for an indemnity to the defendant. However, the defendant says that the covenant not to sue contains an agreement from Cadbury not to recover any amount on account of wrongdoing by Glassner. This is based upon the clause:

Without restricting the generality of the foregoing, the Undersigned agree to discontinue all proceedings as reflected in British Columbia Supreme Court Action Nos. C880184 and C894223 and further agree we will not recommence the proceedings at any time.

- [9] The defendant maintains that the words, "Without restricting the generality of the foregoing...", refers back to the first paragraph's promise not to maintain any action against the defendant, which is to be interpreted as a promise not to recover against the defendant for any amounts. Also, the words in the first paragraph, "...nor anyone claiming through us...", refer to the claim against FBI Foods.
- [10] The agreement is clearly not a release, but a covenant not to sue. Cadbury agreed to discontinue the action but not to a dismissal of the claim. There was no express release from liability. Nor is there an express covenant not to seek from the plaintiff any loss flowing from the concurrent liability of the defendant. Such an express clause could have been included as it was in *BC Ferry Corp supra*. Cadbury was still free to claim against the plaintiff for the whole of the loss and did so. Also, because FBI Foods Ltd. was not a party to the agreement, there was also the possibility that FBI Foods Ltd. might claim recovery in equity regardless of whether or not the defendant was in the original action. FBI Foods Ltd. could not be considered to be claiming through Cadbury in this situation because such an action is separate and independent from the injured person, Cadbury. Finally, Cadbury expressly reserved in the last clause of the agreement the right to proceed against FBI Foods Ltd. without limitation.
- [11] Cadbury argued that this last clause of the agreement makes it clear that no covenant as suggested by the defendant can be implied. The defendant says that this clause is inconsistent with the previous clauses which are a promise not to recover for wrongdoing of Glassner and that the court should reconcile this apparent inconsistency by rejecting the last clause altogether (*Bush v. Watkins* (1851), 14 Beav. 425 at 432). I disagree. There is no inconsistency here. The agreement is consistent throughout that it is a covenant not to sue that does not contain any limitation of Cadbury's right to pursue FBI Foods Ltd. for its loss in full.
- [12] Cadbury's letter of negotiation of settlement sent by its solicitor on April 30, 1999 is no help to the defendant here. Cadbury proposed settlement for the eastern market only because FBI Brands in the west had taken over a receivership after the head start period identified as crucial to the measure of damages. Further, the eastern market was a joint venture with Glassner (*FBI Foods Ltd. v. Glassner supra* at para 21). In any event, the letter was a settlement negotiation and cannot be taken as consciousness of an inability to claim for losses caused by Glassner. Finally, there is no basis to consider subsequent conduct because the covenant not to sue is not capable of two reasonable alternative interpretations (*Canadian National Railways v. Canadian Pacific Ltd.* [1979] 1 W.W.R. 3358 at 372 (B.C.C.A.), app.dism'd 95 D.L.R. (3d) 242 (S.C.C.)).

[13] Finally, the defendant asserts that to interpret the agreement without a 'non-recovery from Glassner' clause is to render the agreement meaningless and commercially unreasonable, something clearly not intended by the parties (*Aita v. Silverstone Towers Ltd.* (1978), 19 O.R. (2d) 681 at 683-83, 686 (Ont.C.A.)). The agreement is not meaningless and certainly not extraordinary. The defendant did not pay anything towards Cadbury's loss. There was no reason for Cadbury to give the defendant anything at the time. While the defendant argued before me that Glassner's argument on appeal was winnable, he chose not to proceed on appeal and not to obtain an express clause of non-recovery in the covenant not to sue. He saved himself legal costs by making the decision that he did. Beyond that, there is really no basis to examine the agreement as a sham.

Conclusion

[14] The defendant's claim against Cadbury is dismissed with costs to Cadbury on the scale of 2.

"J.R. Dillon, J."

The Honourable Madam Justice J.R. Dillon

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