

CANADA / JUDGMENT

Ohman v. Synq Access + Technology Limited

2018 BCSC 1556

COURT

Supreme Court of British Columbia

DECIDED

11 September 2018

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2018 BCSC 1556 Ohman v. Synq Access + Technology Limited IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Ohman v. Synq Access + Technology Limited, 2018 BCSC 1556 Date: 20180911 Docket: S187014 Registry: New Westminster Between: Grant Ohman Plaintiff And Synq Access + Security Technology Limited Defendant Before: The Honourable Mr. Justice Jenkins Reasons for Judgment Counsel for Plaintiff: R.A. Finlay Counsel for Defendant: P.F. Waller Written Submissions of Plaintiff: July 12, 2018 Written Submissions of Defendant: July 30, 2018 Place and Date of Judgment: New Westminster, B.C. September 11, 2018 I. Introduction

- [1] On June 29, 2018, I issued reasons indexed at 2018 BCSC 1078 (the "reasons"). In the reasons I concluded the plaintiff was entitled to judgment in the amount of \$225,000 plus contractual interest at 3.5% from the date of the advances made from the plaintiff to the defendant. I dismissed the plaintiff's application for judgment on a summary trial under Rule 9-7 of the Supreme Court Civil Rules [the "Rules"], leaving the amount of business expenses owing to the plaintiff from the defendant to be determined at trial. I also dismissed the defendant's counterclaim.
- [2] I ordered costs on Scale B to the plaintiff, but left it open to the parties to make submissions on costs within 30 days of the issuance of the reasons. These reasons address their submissions. II. Background
- [3] The facts of this case were outlined in the reasons. These reasons will only provide the details necessary to determining the issue of costs.
- [4] The plaintiff, Grant Ohman ("Mr. Ohman"), is a businessman who met Nolan Wheeler, the principal of the defendant, in 2016. Discussions ensued and Mr. Ohman eventually expressed an interest in investing in the defendant ("Synq").

- [5] On May, 28, 2016, Mr. Ohman and two of his associates (the "Greg Associates") entered into a Term Sheet under which they would loan \$250,000 to a new company. The shares were to be held by Greg Associates and Synq. As part of the term Sheet, Synq was to assign certain physical and intellectual property to the new company. Mr. Ohman alleges that Synq did not follow through with the assignment.
- [6] On May 26, 2016, Mr. Ohman advanced a total of \$225,000 to Synq (no further funds were advanced). The defence does not dispute the amount they received. On July 21, 2016, Mr. Wheeler for Synq provided a Promissory Note (the "Note") in the amount of \$250,000 to Mr. Ohman. He admitted to signing the note as an officer of Synq. It is on the basis of the Note, I ordered the defendant to pay the plaintiff \$225,000 plus interest.
- [7] The Note included the following clause which dealt with the collection of costs payable under it. It reads: III. Collection of Costs If any payment obligation under this Note is not paid when due, the Borrower [Synq] promises to pay all costs of collection, including reasonable attorney fees, whether or not a lawsuit is commenced as part of the collection process.
- [8] It is on the basis of this clause the plaintiff seeks an order for special costs. III. Position of the Parties A. Plaintiff
- [9] The plaintiff seeks an order for special costs of the proceeding against the defendant on the basis of the contractual costs indemnity clause contained in the Note.
- [10] The plaintiff submits that by virtue of what they describe as "the indemnity clause" the defendant agreed to "pay all costs of collection, including reasonable attorney fees, whether or not a lawsuit is commenced." They submit that on its reading the indemnity clause contemplates full indemnity of the plaintiff's legal costs and expenses related to the enforcement and collection of the amount due under the Note. This is so because "reasonable" modified "all" meaning that the borrower agreed to pay "all costs" including "reasonable attorney fees". The plaintiff submits this is clearly different than would have been the case if the borrower had agreed to simply pay "reasonable attorney fees".
- [11] In support of their argument the plaintiff cites *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489 [Group Eight], at paras. 20-21, where the court discussed the general principles applicable in considering costs indemnity clauses. These principles include (a) words must be given their plain and ordinary meaning unless to do so would result in an absurdity; (b) words must be interpreted in light of the whole of the contract and the intention of the parties expressed therein; and (c) the court assumes that the words in a contract are there for a purpose and may reject an interpretation that would render one of the contract's terms ineffective.

- [12] After outlining the general principles applicable to the interpretation of indemnity clauses the plaintiff referred to cases where indemnity clauses similar to the one at issue were interpreted as providing for full indemnity or special costs: *Epoch Press Inc. v. Sewak*, 2011 BCSC 323; *Aegon Canada Inc. v. Ing Canada Inc.* (2003), 122 A.C.W.S. (3d) 29, 26 C.C.P.B. 161; *Zero Stores (Sask.) Ltd. v. K.A.H. Investments Ltd.*, 1983 ABCA 56.
- [13] Finally the plaintiff relies on R. 14-1(3) of the Rules which reads: Assessment of special costs
- (3) On an assessment of special costs, a registrar must
- (a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and
- (b) consider all of the circumstances, including the following:
- (i) the complexity of the proceeding and the difficulty or the novelty of the issues involved; (ii) the skill, specialized knowledge and responsibility required of the lawyer; (iii) the amount involved in the proceeding; (iv) the time reasonably spent in conducting the proceeding;
- (v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding; (vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained; (vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer; (viii) Rule 1-3 and any case plan order. The plaintiff submits that the indemnity clause is consistent with payment of "reasonable attorney fees" on a special costs basis because that is precisely how fees are assessed under the Rules governing special costs.
- [14] Finally, the plaintiff notes the defendant drafted the clause itself and therefore the contra proferentem rule applies. B. Defendant
- [15] The respondent submits the plaintiff is entitled to costs at Scale B and nothing further. They argue that the clause does permit an interpretation that the defendant agreed to indemnify the plaintiff fully for their costs of collection.
- [16] With respect to the plaintiff's argument that the contra proferentem rule applies, they submit that the Note appears to be a "boiler plate" document with "fill in the blank sections" and that the costs provision was not drafted specifically for this transaction. I take it that their submission on this point is that the court should hesitate before interpreting the agreement against the drafter as required by the principle of contra proferentem.
- [17] The defendant agrees that the overriding concern in contract interpretation is the intent of the parties: citing *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 S.C.J. 53. They submit that because the plaintiff had no say in the drafting of the Note, it could never have been their intent to be fully indemnified. As such, solicitor-and-client costs should not be awarded.

- [18] The defendant referred to *Park Royal Shopping Center Holdings Ltd. v. Gap (Canada) Inc.*, 2017 BCSC 1257 [Park Royal], submitting that the costs provision in that case is sufficiently similar to the cost provision at issue to help guide this court in its interpretation. The costs provision in *Park Royal* read: 18.04 Costs The Tenant shall pay to the Landlord all damages, and reasonable costs and expenses (including, without limitation, all reasonable legal fees)
- [19] This court, citing *Bakshi v. Shan*, 2013 BCSC 969 at para. 44, concluded that "a contractual right to be indemnified by solicitor-and-client costs must be clearly and unequivocally expressed". The defendant submits that the costs provision in *Park Royal* was more encompassing because it included "all reasonable legal fees" whereas the Note refers to "reasonable attorney fees". As such the provision cannot be interpreted as providing for full indemnity costs because it is even less unequivocally expressed than the costs provision in *Park Royal*. IV. Legal Principals A. Contractual Interpretation
- [20] The first step in contractual interpretation is to determine whether the contract gives rise to more than one reasonable interpretation. In making this determination, it is undisputed that the plain and ordinary meaning must be given to words in the contract unless to do so would result in an absurdity: see *Group Eight*, at para. 20.
- [21] In the context of commercial contracts, they must be construed in accordance with sound and commercial principles and good business sense. Provisions should also be read in light of the agreement as a whole: see *Group Eight*, at para. 21 citing *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.* (1986), 25 D.L.R. (4th) 649 at p. 655. *Contra Proferentum*
- [22] I agree with the plaintiffs that where ambiguity exists in the collection of costs provision, those ambiguities should be interpreted against the drafter. I have considered the defendant's argument that the Note appears to be standard form, and that it was not drafted with the specific transaction in mind. The same can be said for many contracts. One example of such standard form contracts being interpreted against the drafter is in the case of *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, where Rothstein J. made it clear that insurance policies are to be interpreted against the insurer: see para. 24. To conclude that the drafters of standard form contracts are free from the consequences of poor or ambiguous drafting because their contracts receive widespread application would be to undermine the principle of *contra proferentum* and, in some cases, disproportionately shift contractual power to parties capable of building an inventory of standard form contracts for their transactions. V. Discussion
- [23] For convenience, I will reproduce the impugned provision here: III. Collection of Costs If any payment obligation under this Note is not paid when due, the Borrower [Synq] promises to pay all costs of collection, including reasonable attorney fees, whether or not a lawsuit is commenced as part of the collection process.

- [24] An award of special costs is rare. However, parties may choose to allow for them as a term of their agreement. At issue is whether the term above provides for full indemnity to the plaintiff. In interpreting the words in accordance with their plain and ordinary meaning, in light of the Note as a whole, and in accordance with sound business principles, I conclude that it does.
- [25] First, the parties agreed that the defendant would pay "all costs of collection whether or not a lawsuit is commenced as part of the collection process". This phrasing in and of itself is broad enough to capture solicitor-client-fees related to the collection of the debt. The plain and ordinary meaning of the word "all", as defined by the Oxford English Dictionary, is "the whole amount, quantity or extent of", "the entire number of", "any, whatever" or "greatest possible". By wording the costs collection term in this way, the defendant, in its drafting, and the plaintiff in its acceptance, clearly meant that the defendant's failure to adhere to its payment obligations would result in stiff consequences--namely the defendant would bear in its entirety, any, whatever, or the whole amount of the costs their breach caused.
- [26] The parties then went further than this. The parties clarified that "all costs" included "reasonable attorney fees". Blacks Law Dictionary, defines 'Attorney Fees' as "[t]he charge to a client for services performed for the client, such as an hourly fee, a flat fee or a contingent fee". From this, the only interpretation that can arise is that, regardless of whether or not the issue of collection required a lawsuit, if the plaintiff needed to consult with a lawyer to determine the best way to collect the amount owing, the defendant would be responsible for that cost.
- [27] In coming to this conclusion I have reviewed the Park Royal decision relied on by the defendants. I note that conclusion made by DeWitt-Van Oosten J. that "the intentional use of the word "reasonable" by the signatories more closely aligns the impugned phrase with the nature of costs that would be applied by a court in the ordinary course of litigation, than costs on a solicitor-client basis" (para. 84). Respectfully I disagree. The interpretation in Park Royal fails to take into account the fact that the parties intentionally used the phrase "all reasonable legal fees", not just "reasonable legal fees". It cannot be the case that in choosing the word 'all' the parties meant simply that the default costs schedule would apply. Instead of reading "reasonable" as meaning that the parties intended the standard costs rules to apply, I read "reasonable" as a means of insulating the indemnifying party from paying frivolous, unnecessary, or vexatious legal fees aimed at prolonging the litigation or increasing its costs by a prohibitive amount.
- [28] Finally, I note that the defendant drafted the Note and included a cost collections clause that led the plaintiff to believe that their loan was made on a full indemnity basis. The rule of contra proferentum applies. As such, the clause shall be read against the drafter. VI.
- Conclusion

- [29] The cost collections clause is unambiguous. Given the fact that it appears in the context of a promissory note, it is commercially reasonable to conclude that, in an effort to make the plaintiff's loan appear more secure, the defendant agreed to indemnify the plaintiff on the cost of collecting the loan.
- [30] The plaintiff is entitled to costs on a solicitor-client basis to be determined by the registrar. "Jenkins J."
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