
CANADA / JUDGMENT

Yin v. Abexco Inc.

2018 BCSC 1821

COURT

Supreme Court of British Columbia

DECIDED

30 October 2018

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2018 BCSC 1821 Yin v. Abexco Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yin v. Abexco Inc.,

2018 BCSC 1821

Date: 20181030

Docket: S153972

Registry: Vancouver

Between:

Tao Yin

Plaintiff

And

Abexco Inc., American Midwest Oil and Gas Corp.,

Axiom Oil and Gas Corp., Michael Altman, and Robert Knight

Defendants

Corrected Judgment: identification of the parties on the cover page,

at paragraph 3 and a typographical error in paragraph 1

have been corrected on November 23, 2018

Before: The Honourable Madam Justice Iyer

Reserved Reasons for Judgment

Counsel for Plaintiff:

P. Kressock

Appearing for the Defendant American Midwest Oil and Gas Corp.:

E. Johnson

Appearing on his own behalf:

M. Altman

Appearing on his own behalf:

R. Knight

Place and Date of Hearing:

Vancouver, B.C.

September 26 and 27, 2018

Place and Date of Judgment:

Vancouver, B.C.

October 30, 2018

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I. INTRODUCTION

- [1] The plaintiff, Tao Lin, wanted to invest \$1,400,000 or more in the defendants' proposed oil and gas venture in Montana. Before the deal was finalized, he agreed to advance the defendants \$420,000 on terms set out in a written agreement ("Agreement"). When the deal fell apart, Mr. Yin demanded payment of the money stipulated under the Agreement.

However, the defendants said that the money had been spent and they did not repay him.

Mr. Yin filed a notice of civil claim in this court and now applies by way of summary trial for the money that he says he is owed under the Agreement.

- [2] The defendants consist of three corporations and two individuals. The corporate defendants are: Abexco Inc. ("Abexco"), American Midwest Oil and Gas Corp. ("AMOG"), and Axiom Oil and Gas Corp ("Axiom"). The individual defendants are Michael Altman, president of Abexco and Axiom, and Robert Knight, who was president of AMOG at the relevant time.

II. PROCEDURAL BACKGROUND

- [3] Abexco did not file a response to the notice of civil claim. Accordingly, this summary trial is only against the other four defendants. None of those four defendants filed a response to Mr. Yin's notice of application although they were properly served. AMOG's current president, Eric Johnson, appeared for AMOG by telephone and was prepared to proceed on behalf of AMOG. Mr. Altman, who is a member of the B.C. bar, and Mr. Knight each represented themselves. No one appeared for Axiom, although duly served.
- [4] At the outset of the two-day hearing, Mr. Altman and Mr. Knight said that they were not ready to proceed and sought an adjournment. They said that their counsel had withdrawn the day before, they intended to continue in person and had just filed notices to that effect, but required time to prepare. Mr. Yin opposed the adjournment. He said Mr. Altman, Mr. Knight, and Axiom had all been represented by counsel when they were served with the present application and throughout the period for filing an application response. Counsel for Mr. Yin said that he had not received any notice of withdrawal and characterized the adjournment application as a delay tactic. Neither Mr. Altman nor Mr. Knight provided an alternative explanation.
- [5] As the parties agreed that the application could be completed in a day, I granted an adjournment of one day. When the hearing resumed, I accepted affidavits tendered by Mr. Altman and Mr. Knight. I gave the parties considerable latitude in their submissions, as Mr. Yin did not have the benefit of application responses, and Mr. Altman and Mr. Knight had not anticipated that the application would proceed.

III. ISSUES

- [6] Resolution of this dispute turns on the interpretation of the Agreement. In particular, the question is whether the clauses that provide for repayment to Mr. Yin of his \$420,000 loan ("Loan"), and for payment to him of "liquidated damages" of a further \$420,000 if the deal did not complete ("Damages"), are binding on the four defendants presently before the court.

- [7] I must also consider whether this matter is suitable for determination by summary trial. None of the parties argued that it was not. As the matter concerns interpretation of a contract, and no credibility issues have been raised, I am satisfied that the matter is suitable for summary trial.

IV. AGREED FACTS AND POSITIONS OF THE PARTIES

- [8] All of the parties agree that the Agreement was validly executed. They also agree that it was drafted by counsel for Mr. Yin and presented to the defendants six days before it was signed. Further, all agree that the reason that the underlying transaction did not complete was because AMOG's board of directors rescinded its prior approval of the transaction and removed Mr. Knight as president. That fact means that, if the Loan and Damages clauses are binding, Mr. Yin is entitled to be paid these amounts.
- [9] Mr. Yin says that the Agreement is binding and that it expressly states that he is entitled to repayment of the Loan and to payment of the Damages.
- [10] Mr. Altman and Mr. Knight say that these clauses of the Agreement are not binding because not all of the Agreement's provisions are binding. The Agreement identifies some of its terms as non-binding, others as binding provisions that survive termination of the Agreement, and yet others as binding provisions that do not survive termination of the Agreement. Mr. Altman and Mr. Knight say that the Loan and Damages provisions are not binding because they are not expressly identified by section number as binding. Mr. Altman also says that, as the Agreement was drafted by Mr. Yin, the principle of *contra proferentum* applies and the contract should be interpreted against Mr. Yin's interest.
- [11] On behalf of AMOG, Mr. Johnson says that the parties intended for the Agreement to be temporary, and that it would be replaced by a comprehensive agreement regarding the terms of Mr. Yin's investment in the underlying oil and gas venture. He also says that because investment in the oil and gas industry is risky, industry practice is that investors do not get guarantees of repayment for their investments. Mr. Johnson filed no evidence to support these assertions. In any event, the fact that the Agreement was intended to be temporary does not mean that its provisions are not binding. Even if there was evidence to support Mr. Johnson's characterization of industry practice, there is no question that AMOG chose to sign the Agreement. Accordingly, if the Loan and Damages clauses are binding, AMOG is liable to the same extent as the other defendants.

V. ANALYSIS

1. Legal Principles

- [12] The principles governing contractual interpretation are well-established. The decision-maker must identify the objective intention of the parties in light of the words of the contract and the circumstances or "factual matrix" known to the parties at the time they entered into the contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47.

The surrounding circumstances must only be examined with reference to objective evidence of what the parties knew or reasonably ought to have known on or before the contract date: *Sattva* at para. 58. As the Court stated in *Sattva*, evidence of the surrounding circumstances, "must never be allowed to overwhelm the words of [the] agreement": at para. 57.

- [13] The *contra proferentum* ("against the person putting forward") rule applies only when the language of the contract is ambiguous. In such cases, it ensures that the meaning least favourable to the author of the document prevails: *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415 at 425.

2. The Agreement

- [14] The Agreement was entered into by the parties on March 31, 2014. It is entitled "Letter of Intent, Loan Agreement and Guarantee". As indicated by its title, the Agreement has three components: it records some of the intended terms of Mr. Yin's proposed investment in the underlying oil and gas venture ("Letter of Intent"); it sets out the terms of Mr. Yin's loan to the corporate defendants ("Loan Agreement"); and it provides for personal guarantees from Messrs. Altman and Knight of the obligations of the corporate defendants ("Guarantee").[1]

- [15] The Agreement states its purpose as follows:

The purpose of this [Agreement] is to describe in broad terms the basis upon which Abexco, AMOG, Axiom and Yin are prepared to complete the Proposed Transaction by setting out certain non-binding understandings under Sections 1-4 below (the "Non-Binding Provisions") and certain binding obligations under Sections 7 to 26 below (the "Binding Provisions") between the parties.

[Emphasis added.]

- [16] "Proposed Transaction" is defined as "the subscription by Yin for certain shares in the capital of Axiom (the "Shares"), and the subscription by Yin of Warrants to purchase further shares in Axiom, as set out below."

- [17] The heading "Non-Binding Provisions" appears following the recitals. Contrary to the recital quoted above, six (not four) sections are set out under that heading. The first four sections record that the "precise terms and conditions of the understandings and obligations of the parties relating to the Proposed Transaction will be contained in a subscription agreement to be prepared by the parties' respective lawyers" and specify certain conditions that must be contained in that agreement. Section 5 provides that Axiom's bylaws will be amended to ensure that Mr. Yin has specified representation on Axiom's Board. Section 6 requires Axiom to make reasonable efforts to obtain EB-5 visas ("green cards") for Mr. Yin and his family.

- [18] The following text appears after Section 6:

BINDING PROVISIONS

In recognition of the significant costs to be borne by each of the parties in pursuing the Proposed Transaction, and in consideration of their respective undertakings as to the matters described in this [Agreement], the Binding Provisions will be legally binding upon execution and delivery of this [Agreement]. Sections 7 through 10 of the Binding Provisions (the "Surviving Binding Provisions") survive if this [Agreement] is terminated. Sections 14 through Section 26 of the Binding Provisions (the "Non-Surviving Binding Provisions") terminate upon termination or expiration of this [Agreement].

[Emphasis added.]

[19] For the purposes of this case, the distinction between surviving and non-surviving binding provisions is irrelevant as there is no evidence that the Agreement was terminated.

[20] Sections 11-13 and section 27 appear in the Agreement but are not referenced in this clause.

[21] The heading "Surviving Binding Provisions" appears immediately below the text reproduced above. Sections 7-10 follow. They address confidentiality, public announcements, reliance on confidential information, and responsibilities for fees and costs. Sections 11-13 also appear under this heading.

[22] Section 11 is entitled "Loans." It contains the provisions that are the basis of Mr. Yin's claim (Chinese characters omitted):

Abexco, AMOG and Axiom, jointly and severally, acknowledge receipt of a loan of CAD\$120,000 from Yin. Yin will, upon the signing of this [Agreement] by all parties, lend a further CAD\$300,000 to Abexco, AMOG and Axiom. All such loans, totalling a principal amount of CAD\$420,000 (the "Loan") will be repaid within one year following the date of signing of this [Agreement], and will incur 10% interest per annum [sic] payable on principal and outstanding interest.

Michael Altman and Robert Knight (together, the "Guarantors") hereby jointly and severally, unconditionally and irrevocably guarantee to Yin the full and prompt repayment of the Loan and interest thereon. The parties hereto agree that the aforementioned guarantee shall be discharged if Abexco, AMOG and Axiom fulfill their respective obligations herein and in the Definitive Agreement, but Yin does not complete the Proposed Transaction in accordance with the Definitive Agreement. The Guarantors must make payment to Yin the amount of liability of the Loan and interest, when due, immediately after demand in writing. Other than the discharge specified herein, the obligations of the Guarantors are unconditional and absolute, and will not be released, discharged, limited or otherwise affected, except by the full repayment of the Loan and interest thereon or by the conversion of the debt to shares. Yin is not bound to exhaust his recourse against Abexco, AMOG and Axiom or any other person before being entitled to payment from the Guarantors.

If any of Abexco, AMOG or Axiom do not to [sic] complete the Proposed Transaction then the amount of Loan to be repaid to Yin shall be doubled, as a reasonable pre-estimate of liquidated damages.

Yin will, at his option, decide before the Closing Date whether to keep the Loan as a loan, or convert the Loan to Shares in Axiom. If Yin chooses to keep the Loan as a loan, the parties will further document the Loan with a new loan agreement and new personal guarantees in writing by Michael Altman and Robert Knight. If Yin chooses to convert the Loan to Shares, the parties will treat the Loan as consideration for Shares, and the Loan will count toward the CAD\$1,000,000 purchase price on closing.

Upon the advance of the CAD\$300,000 portion of the Loan, Abexco, AMOG and Axiom will, as further consideration, transfer to Yin a 3% working interest in the first 2 drilled wells on the lands leased under the Lease, namely Koenig #12-33 well (SWNW Section 33, T35N-R1E) and Koenig# 32-32 well (SWNE Section 32). Such a transfer will be in writing with form and substance acceptable to Yin, acting reasonably.

[Emphasis added.]

[23] In summary, section 11 does the following:

- a) It acknowledges Mr. Yin's loan of \$420,000 to Abexco, AMOG, and Axiom, and defines this amount as the "Loan".
- b) It requires repayment of the Loan within one year of the date of the Agreement - that is, by March 31, 2015 - with interest of 10% per annum payable on both principal and outstanding interest.
- c) It records that Mr. Altman and Mr. Knight personally "jointly and severally, unconditionally and irrevocably" guarantee the Loan and interest and must pay it when due immediately after a written demand. Mr. Yin is entitled to payment on the guarantee even if he has not exhausted any recourse he has against AMOG, Abexco, and/or Axiom. Mr. Altman and Mr. Knight are only relieved from their guarantee if Mr. Yin fails to complete the Proposed Transaction.
- d) It provides for payment of Damages to Mr. Yin if the corporate defendants do not complete the Proposed Transaction in the following terms: "the amount of the Loan to be repaid to Yin shall be doubled, as a reasonable pre-estimate of liquidated damages."

[24] Section 12 sets out how the Agreement may be terminated, as follows:

This [Agreement] may be terminated:

- (a) by mutual written consent of all parties;
- (b) by written notice from Yin to Abexco, if Yin decides, for any reason, that it is not in its best interests to proceed with the Proposed Transaction; or

- (c) by written notice from Abexco, AMOG and Axiom to Yin, if such companies decide, for any reason, that it is not in their best interests to proceed with the Proposed Transaction, provided that upon termination for this reason the Loan will be immediately due and payable in its entirety, including interest;
- (d) by written notice from Abexco, AMOG and Axiom to Yin, if the parties have not entered into a Definitive Agreement within 60 days following the date of this [Agreement], provided that upon termination for this reason the Loan will be immediately due and payable in its entirety, including interest;

but the termination of this [Agreement] will not affect the liability of a party for breach of any of the Binding Provisions before the termination, or the survival of the Surviving Binding Provisions. Upon termination of this [Agreement], the parties will have no further obligations under this [Agreement], except with respect to the Surviving Binding Provisions which will survive in full force and effect, unamended, and which will continue to be interpreted and enforced according to the relevant provisions under "General", below. Termination of this [Agreement] will not affect the liability of Abexco, AMOG, Axiom, Michael Altman and Robert Knight in respect of the Loan.

- [25] Two aspects of this section are noteworthy. First, it reiterates that the Surviving Binding Provisions will survive termination of the Agreement and, "will continue to be interpreted and enforced according to the relevant provisions under "General" below." Sections 21 to 27 fall under that heading. This is not easily reconciled with the introductory clause below the heading "Binding Provisions" (referenced above), which says that Sections 14 to 26 do not survive termination of the Agreement.
- [26] Second, the last sentence of Section 12 states: "Termination of this [Agreement] will not affect the liability of Abexco, AMOG, Axiom, Michael Altman and Robert Knight in respect of the Loan." The only liability of these parties relating to the Loan is found in Section 11.
- [27] The heading "Non-Surviving Binding Provisions" appears after section 13. Sections 14 to 20 are set out under that heading. They provide for Mr. Yin's immediate and subsequent acquisition of shares if the Proposed Transaction completes, impose obligations to act in good faith and due diligence, as well as to provide access to financial information during negotiation of the Proposed Transaction. They also restrict the ability of the corporate defendants to enter into transactions with other parties and dictate how they may use the funds received from Yin.
- [28] The heading "General" appears after section 20. Sections 21 to 27 follow. They contain standard terms, including terms regarding interpretation of the Agreement, governing law, that time is of the essence, severability, amendment and waiver, the use of counterparts, and provide that the corporate defendants' obligations are joint and several. Notably, none of these provisions state that headings in the Agreement are for reference only, so I must consider the headings as well as the text of the various clauses when interpreting the Agreement.

3. Interpretation of the Agreement

- [29] As I have said, the defendants' argument is that the Loan and Damages provisions in Section 11 of the Agreement are not binding because they are not expressly referenced by section number as "Binding Provisions" in the text under that heading. That is not a reasonable interpretation of the Agreement for six reasons.
- [30] First, such a reading is inconsistent with the clause, reproduced at paragraph 15 above, which expressly distinguishes between the binding and non-binding provisions of the Agreement, and identifies sections 7 to 26 as "Binding Provisions".
- [31] Second, the text on which the defendants rely (reproduced above at paragraph 18) appears under the heading "Binding Provisions." It simply distinguishes between binding provisions that survive termination of the Agreement and binding provisions that do not survive termination of the Agreement. It is not concerned with non-binding provisions. While this paragraph does not assign sections 11-13 to either category of binding provisions, it is not reasonable to interpret it as implicitly categorizing sections 11-13 as non-binding.
- [32] Third, nothing in the Agreement expressly states that sections 11-13 are non-binding.
- [33] Fourth, the structure of the Agreement implies that sections 11-13 were intended to be binding because they do not appear under the heading "Non-Binding Provisions"; rather, they appear under the headings "Binding Provisions" and "Surviving Binding Provisions". The structure of the Agreement is as follows:

LETTER OF INTENT, LOAN AGREEMENT AND GUARANTEE

[recitals]

[purpose clause]

NON-BINDING PROVISIONS

[sections 1-6]

BINDING PROVISIONS

[introductory clause]

SURVIVING BINDING PROVISIONS

[sections 7-13]

NON-SURVIVING BINDING PROVISIONS

[sections 14-20]

GENERAL

[sections 21-27]

- [34] Fifth, it is apparent that the Agreement was revised before it was executed and that section numbers were not necessarily updated. For example, there are six sections under the heading "Non-Binding Provisions" rather than four, which is what is stated in the introductory clause following that heading. In the paragraph under the heading "Binding Provisions" the wording "Section 26" in the phrase "Sections 14 through Section 26 of the Binding Provisions" is inserted in handwriting. Finally, although this clause identifies sections 14-26 as "Non-Surviving Binding Provisions," sections 21 through 27 actually appear under the heading "General".
- [35] Sixth, quite apart from the textual reasons set out above, a purposive reading of the Agreement necessitates a conclusion in favour of Mr. Yin. The Agreement states that it has three purposes: to record the parties intentions about the Proposed Transaction (the "Letter of Intent" component), to establish the terms under which Mr. Yin was advancing funds to the defendants (the "Loan Agreement" component), and to provide security for Mr. Yin in advancing the funds (the "Guarantee" component). Those objects are achieved by designating the provisions relating to the Proposed Transaction as non-binding and the provisions relating to the money advanced by Mr. Yin as binding. They would be frustrated entirely by providing that repayment of the Loan, payments of Damages, and the personal guarantees made by Mr. Altman and Mr. Knight were not binding.
- [36] Put another way, the whole point of putting the Loan, Damages, and personal guarantees in writing would be to make them binding. If there was no intention to make them binding, there was no need to document them: the money had already been advanced and the transaction recorded.
- [37] The conclusion that section 11 is binding is supported by consideration of the contents of sections 12 and 13. Section 12 concerns termination of the Agreement and section 13 provides that the English language text is authoritative. It would be nonsensical for these terms to be non-binding.
- [38] For these reasons, I am satisfied that the language of the Agreement is not ambiguous and it would be unreasonable to read it as the defendants submit. Accordingly, *contra proferentum* does not arise.
- [39] None of the defendants took issue with the plaintiff's characterization of the interest due on the Loan, which is stated to be "10% interest per annum [sic] payable on principal and outstanding interest" as a compounding annual interest rate, and I agree with that reading of the contractual language.
- [40] Mr. Altman disputes the plaintiff's description of the Damages as a "break fee." However, I do not understand his position to be that this amount was an unenforceable penalty. In the event that I am wrong in this conclusion, I would find, following *Do v. Nichols*, 2016 BCCA 128, that the Damages are not a penalty, either at common law or under s. 24 of the Law and Equity Act, R.S.B.C. 1996, c. 253.

- [41] In Do, the Court of Appeal affirms that where a stipulated sum is payable upon the occurrence of an event - as opposed to upon breach of contract - it is not a penalty, and it is enforceable: at paras. 20-21; see also *Sew Cozzi Ventures Inc. v. Apex Outdoor Innovations Corp.*, 2017 BCSC 481 at paras. 305-307. Here, the Damages became payable when the Proposed Transaction did not complete. This was an event contemplated in the Agreement, not a breach of it.
- [42] Section 24 of the Law and Equity Act gives the court a discretion to relieve against penalties where the party seeking relief can show both that the obligation is a penalty rather than a pre-estimate of damages and that it would be oppressive or unconscionable to enforce the contractual provision. Oppressive or unconscionable circumstances arise where there is inequality of bargaining power and substantial unfairness in the bargain: *Bankers Mortgage Corporation v. Plaza 500 Hotels Ltd.*, 2016 BCSC 722 at paras. 69-71, *aff'd* 2017 BCCA 66; *Sew Cozzi* at paras. 307-308. Here, neither aspect was proven. The defendants were sophisticated individuals and corporate entities with experience in oil and gas venture industry. No evidence was tendered as to how the Damages provision compares with industry practice.
- [43] I conclude that the Loan and Damages provisions and the personal guarantees in section 11 of the Agreement are valid and enforceable.

VI. CONCLUSION

- [44] Mr. Yin is entitled to judgment against AMOG, Axiom, Mr. Altman, and Mr. Knight, jointly and severally as follows:
- a) \$644,027.07, representing the amount of the Loan (\$420,000) plus interest of 10% per annum compounded annually from April 1, 2015, to September 27, 2018 (\$224,027.07);
 - b) \$420,000, pursuant to the Damages provision;
 - c) \$12,711.04 in interest on the Damages pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79; and
 - d) costs.

"IYER J."

- [1] The Agreement is written in English, but includes some writing in Chinese. Section 13 expressly states that the English version shall govern and that the portions in Chinese are for reference only. As no one relied on the Chinese portions, I need not consider them.

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