Case Name:

Rogers Cable Communications Inc. v. York Condominium Corp. No. 312

Between
Rogers Communications Inc., applicant, and
York Condominium Corporation No. 312 and Bell ExpressVu Limited Partnership, respondents

[2005] O.J. No. 4099
Court File No. 05-CV-289907PD1

Ontario Superior Court of Justice
K.E. Swinton J.

Heard: September 14, 2005.
Judgment: September 26, 2005.
(31 paras.)

Counsel:

Timothy Pinos, for the Applicant

Patricia M. Conway, for the Respondent YCC No. 312

Hugh M. DesBrisay, for Bell ExpressVu

REASONS FOR JUDGEMENT

¶ 1 **K.E. SWINTON J.**:— The Applicant, Rogers Cable Communications Inc. ("Rogers"), has brought an application for a declaration that Rogers has entered into a valid and binding five year agreement with the Respondent York Condominium No. 312 ("YCC 312") for the provision of communication services commencing on October 1, 2005.

¶ 2 At the outset of the hearing, an order was made to add Bell ExpressVu Limited Partnership ("Bell") as a party respondent to this application.

Factual Background

¶ 3 Since 1984, Rogers or its predecessor companies has had a contractual relationship with YCC 312, a residential condominium complex, whereby Rogers provides communication services to the units in the complex. On September 29, 1998, YCC 312 entered into two further agreements with Rogers Cablesystems Limited for the provision of communication services. One was an Access Agreement and the other was a Bulk Cable Services Agreement.

¶ 4 The Access Agreement gave Rogers the right to access the condominium premises to install and maintain its equipment for an indefinite term. In Article 4, the agreement stated, among other things, that Rogers is the owner of the distribution system, and that the agreement is not for the provision of communication services. It reads:

> Rogers is the owner of the Distribution System which will remain the property of Rogers and will not be or become a fixture despite any rule of law or equity to the contrary. This is not an

agreement for the provision of Communication Services. Rogers will solicit and enter into agreements with those who wish to receive Communication Services.

¶ 5 Article 5 is of central importance in this application. It reads:

> During the term of this agreement and thereafter for so long as Rogers is providing services, if the Corporation receives an offer from a third party to provide, on a bulk discounted basis, communication services similar to those available through Rogers, the Corporation shall provide Rogers with a copy of the third party offer ("the Notice"). Rogers shall have 10 days following receipt of the Notice to agree to provide comparable services on the terms described in the Notice, failing which, the Corporation shall be free to enter into a binding contract with the third party to obtain such services on the terms set out in the Notice provided that Rogers rights herein shall be revived if the Corporation fails to enter into such contract within 30 days.

¶ 6 The Bulk Service Agreement was for an initial term of seven years, commencing October 1, 1998. It sets out the cable services to be provided and the price on a bulk discounted basis. YCC 312 charges unit owners for these services as part of the common expenses.

¶ 7 On December 9, 2004, YCC 312 advised Rogers that it did not intend to renew the service contract after September 30, 2005. Rogers then advised that it was entitled to receive a copy of any third party offer for bulk services, in accordance with Article 6 of the Access Agreement. In response, YCC 312 sent Rogers two letters from Bell, each dated December 8, 2004. One was a written offer to provide digital television services for a period of five years following the expiration of Rogers' existing agreement in September, 2005.

¶ 8 By letter dated December 30, 2004, and within the ten day period in Article 6 of the Access Agreement, Rogers stated that it "will match the offer provided by you to Rogers for review that you received from Bell Expressvu" for a five year term. The contract terms were not set out in the letter, which stated that the contract renewal agreement would be sent in the new year. Rogers takes the position in this application that it has the right to match the Bell offer, and having done so on December 30, a new agreement was created on December 30, 2004.

¶ 9 Altin Nani, the onsite manager for YCC 312, then wrote to Rogers requesting the Rogers' proposal. Rogers replied that it had matched Bell's proposal. However, Don O'Brien of Rogers entered into further discussions with YCC 312 on the services to be provided. Mr. Nani filed an affidavit in which he stated that he had discussions with Mr. O'Brien and Rogers' lawyers, and that he knew Rogers was unable to offer everything that Bell was offering. However, he suggested that they tell the YCC 312 board of directors that they were prepared to provide Bell's more advanced technology as soon as it was available from Rogers at no added cost.

¶ 10 On January 17, 2005, Rogers submitted its standard form bulk service agreement to the board of YCC 312 for review and execution. In the covering letter, Rogers stated:

> We trust the foregoing satisfies the Corporation has agreed [sic] to provide communication services comparable to those offered by Bell Expressvu on the terms described in Bell Expressvu's letters and look forward to early acceptance of this agreement.

¶ 11 The minutes of the board of directors dated January 20, 2005 raised three issues with the Rogers agreement: the failure to assure that Rogers would provide call display or call answering; the lack of guarantee of the rates after the initial term; and the failure to mention how many digital boxes would be provided per unit.

¶ 12 YCC 312 then took legal advice. On February 4, 2005, Rogers was advised that its "offer" was rejected because of the lack of a commitment with respect to call display and call answering and the lack of a pricing guarantee on renewal. YCC 312 subsequently entered into an agreement with Bell on April 7, 2005 for the provision of digital television services commencing October 1, 2005.

The Issues in this Application

¶ 13 The major issue in this application is whether Article 6 of the Access Agreement gave Rogers the right to create a legally binding agreement for comparable services when it promised to match Bell's offer. The Respondents have made a number of arguments challenging this position, arguing that the Article 6 of the Access Agreement is not enforceable; that it does not give the right to Rogers to create a new agreement; that the provision is an unreasonable restraint on trade; that Rogers Cable Communications Inc. can not rely on the clause; and that Rogers failed to offer comparable services on the same terms as Bell.

Analysis and Conclusions

¶ 14 YCC 312 argued that Article 6 is unenforceable because it is an unusual and onerous clause in a consumer contract which was not brought to the attention of the YCC 312 board of directors at the time that the agreement was signed.

¶ 15 In Tilden Rent-a-Car Co. v. Clendenning (1978), 83 D.L.R. (3d) 400 (Ont. C.A.), the Court of Appeal stated that a party is bound by a written contract which has been signed only if the other party, on reasonable grounds, believes that the terms express the signer's intention (at p. 7 Quicklaw). There is an onus on a party to draw to the attention of the signer any unusually onerous terms in a printed form which differ from what the signing party might reasonably expect.

¶ 16 In my view, Tilden is not applicable here. While the Access Agreement was prepared by Rogers, it is not a detailed standard form contract, signed in circumstances where a party could not reasonably be expected to have notice of the terms. The terms of the agreement are on one page, which was provided to the board for its consideration and signature. Whether or not the members read it, they are bound by the terms, having signed it (978011 Ontario Ltd. v. Cornell Engineering Co. (2001), 53 O.R. (3d) 783 (C.A.) at para. 32).

¶ 17 In the alternative, the Respondents argued that Article 6 does not confer a right of first refusal on Rogers. In my view, their interpretation is correct.

¶ 18 Under the terms of the clause, YCC 312 is required to provide any third party offer and, in the following ten day period, it is prohibited from entering into an agreement with any other third party service supplier. The provision does not expressly state that by offering to provide comparable services on the terms described in a third party offer, Rogers has created a new bulk service agreement.

¶ 19 If Rogers is correct in its interpretation, Article 6 confers the right on Rogers to match any third party offer for bulk communications services and thereby create a new bulk service agreement, whether or not YCC 312 wishes to accept that particular offer. Such an interpretation would make no commercial sense, since the terms of a third party offer may well be ones that YCC has no desire to accept.

¶ 20 Under the normal rules of construction of contractual terms, a court ought to seek an interpretation, from the whole of the contract, which appears to promote and advance the intention of the parties at the time of the contract. Where there is more than one meaning which can be given to contractual terms, a meaning which brings about a result that would not be contemplated in the commercial atmosphere in which the contract was made ought to be rejected in favour of a meaning which is more commercially sensible (Canada (Attorney General) v. Chomcy, [2002] O.J. No. 355 (C.A.) at paras. 13-14; Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888 at p. 10 Quicklaw).

¶ 21 Article 4 of the Access Agreement, quoted earlier, states that "This is not an agreement for the provision of Communication Services. Rogers will solicit and enter into agreement with those who wish to receive Communications Services". Rogers' interpretation of Article 6 contradicts Article 4, since it would effectively require YCC to enter into an agreement with Rogers for the provision of services where YCC does not wish to receive those services.

¶ 22 The 1998 Access Agreement is a standard form agreement prepared by Rogers, and Article 6 was inserted for Rogers' benefit. Therefore, under the contra proferentum rule of construction, to the extent that the language of Article 6 is ambiguous, it should be interpreted against the drafter (Manulife Bank of Canada v. Conlin, [1996] 3 S.C.R. 415 at para. 8).

¶ 23 In my view, on a proper interpretation of Article 6, Rogers is given the right to receive notice of any third party offer received by YCC and a ten day window within which to reach an agreement with YCC. That gives Rogers the valuable advantage of knowing what its competition is offering, so that it can try to persuade its customer not to switch suppliers. However, the clause does not create an agreement to provide communication services in the absence of YCC 312's determination that it wishes to enter such an agreement with Rogers on the terms in the third party offer. Therefore, the December 30, 2004 offer to match did not result in a binding agreement between YCC 312 and Rogers for bulk services.

¶ 24 In the alternative, if I am incorrect in my interpretation of Article 6, I am not satisfied that Rogers has offered "comparable services on the terms of the Notice" provided by Bell. To determine whether it has done so, one must look not at its offer to match on December 30, 2004, but at the terms of the agreement provided January 17, 2005. The December 30 letter contained no details about Rogers' services and price. These were first set out in the January 17 document.

¶ 25 In that document, there is no mention that Rogers will provide call answering and call display, despite Mr. Nani's evidence that he mentioned this service to Rogers in their discussions. The failure to offer this service was noted as a concern by the board of YCC 312 when it reviewed the draft agreement.

¶ 26 In addition, Rogers did not offer the same price guarantee on renewal. Bell had offered "Guarantee of contract renewal with discounted retail price equal or lesser than present contract." Rogers had promised, on renewal, "for a discount from the then current retail price of the Cable Service equal to or better than the discount from the current retail price being provided during the term". The board reasonably concluded that the renewal prices were different and Bell's was better.

¶ 27 The paramount consideration in providing a definition of what are "comparable services" and "similar terms" must be the expectations of the purchasing party. Here, Rogers did not offer to provide comparable services, and therefore, YCC 312 was free to enter into an agreement with Bell.

¶ 28 Relying on Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada, (1995), 123 D.L.R. (4th) 449 (S.C.C.), Rogers argued that YCC 312 had a duty of good faith that required it to inform Rogers of the concerns about the differences in the offers. Counsel for YCC 312 agreed that YCC must act in good faith in evaluating Rogers' offer and deciding whether it was comparable. However, she submitted that Rogers had no duty of good faith that required it to go back to Rogers with its concerns about the offer.

¶ 29 There is no evidence that YCC No. 312 acted in bad faith when it determined that the offers were not comparable. Rogers did not offer call display or call answering, although Mr. Nani had indicated that these were of importance to YCC 312. Rogers did not match the Bell offer with comparable services on the same terms as the Bell offer. YCC 312 chose not to proceed any further with Rogers, as it was legally entitled to do, as it had no duty to continue bargaining with Rogers.

¶ 30 Given these conclusions, I need not address the argument made by Bell that Article 6, as interpreted by Rogers, is an unreasonable restraint of trade and unenforceable, nor that Rogers Cable Communications Inc. is unable to exercise rights under the Access Agreement between YCC 312 and Rogers Cablesystems.

¶ 31 For these reasons, the application is dismissed. If the parties can not agree on costs, the Respondents may make brief written submissions within 21 days of the release of this decision, and the Applicant may make responding submissions within 10 days thereafter.

K.E. SWINTON J.

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