Case Name:

York Region Condominium Corp. No. 921 v. ATOP Communications Inc.

Between
York Region Condominium Corporation No. 921 and York Region Condominium Corporation No. 933, applicants, and
ATOP Communications Inc., respondent, and
The Daniels Swan Lake Corporation
And between
ATOP Communications Inc., applicant, and
York Region Condominium Corporation No. 921, respondent

[2003] O.J. No. 5255
Court File No. 03-CV-252474CM1

Ontario Superior Court of Justice
(Motions Court)
J. MacDonald J.

Heard: October 22 and 27, 2003.
Oral judgment: October 27, 2003. Released: December 24, 2003.
(38 paras.)

Counsel:

Tim Pinos, for the applicants (respondent).
Michael A. Spears, for the respondent (applicant).

J. MacDONALD J.:—

The Application

¶ 1 The issue to be decided is whether the terms of a contract known as the Television Service Agreement bind the applicants. The applicants submit that they are not bound. They did not execute this agreement because it was made prior to their incorporation. This agreement (to which I will refer as "the pre-incorporation agreement") is under date of August 1st, 1999. The applicant YRCC No. 921 was incorporated on October 29, 1999. The applicant YRCC No. 933 was incorporated on June 12, 2000.

¶ 2 The parties executing the pre-incorporation agreement were the respondent Atop Communications Inc. ("A.C.I.") and The Daniels Swan Lake Corporation ("D.S.L.").

¶ 3 D.S.L. (against which the application has been discontinued) was the owner and developer of a project which become the Swan Lake retirement community. Included in the project were condominium buildings. As part of the development of the project, D.S.L. contracted with A.C.I. to provide television services to the condominiums. D.S.L. then caused the applicant condominium corporations to be incorporated.

The Enforceability of Pre-Incorporation Contracts

¶ 4 The common law rule respecting the enforceability against a corporation of a pre-incorporation contract is determined in Szecket et al v. Huang (1998), 42 O.R. (3d) 400 (C.A.), in which the court adopted the analysis of this issue by Borins J.A. in dissent in Sherwood Design Services Inc. et al v. 872935 Ontario Limited et al (1998), 39 O.R. (3d) 576 at pp.593-600. See also Heinhuis v. Blacksheep Charters Ltd. (1987), 46 D.L.R. (4th) 67 (B.C.C.A.) where McLachlin J.A. (as she then was) for the Court considered these issues.

¶ 5 As Borins J.A. held in the Sherwood case (supra), absent statutory intervention, the common law principle governing the enforceability against a corporation of a pre-incorporation contract is stated in Kelner v. Baxter (1866), L.R. 2 C.P. 174. The principle may be stated as follows:

> After incorporation, a company cannot ratify, and thus make itself a party to a pre-incorporation contract. The company, once in existence, must enter into a new contract on the same terms as the pre-incorporation contract, in order to be bound by the terms of the pre-incorporation contract.

¶ 6 Section 21 of the Business Corporations Act, R.S.O. 1990, c. B.16 as amended ("the OBCA") addresses the enforceability of pre-incorporation contracts. The OBCA applies to corporations with share capital. The applicants were incorporated pursuant to the Condominium Act, R.S.O. 1990, c. C.26, which provides in s. 10 (1) that a condominium corporation is a corporation without share capital. Consequently, the OBCA does not apply. The parties agree that the Condominium Act applies herein, even though it has since been repealed and replaced.

¶ 7 The respondent submits that s. 39(2) of the Condominium Act makes the pre-incorporation agreement capable of ratification by the applicants and therefore enforceable against them. This subsection states:

> (2) Every agreement for the provision of services on a continuing basis, every lease of the common elements or part thereof for business purposes and every agreement for the provision of recreation facilities to the corporation on other than a non-profit basis entered into by a corporation after the 1st day of June, 1979 and at a time when the majority of the members of the board were elected when the declarant was the registered owner of a majority of the units that does not expire within twelve months after its effective date shall be deemed to expire twelve months after its effective date unless, with the twelve month period, the agreement is ratified by the board at a time when the majority of the board members were elected after the declarant ceased to be the registered owner of a majority of the units.

¶ 8 In my opinion, s. 39(2) of the Condominium Act applies to some agreements entered into by a condominium corporation. It has no application to the pre-incorporation agreement in issue because the applicant condominium corporations are not parties to that agreement. I adopt what Killeen J. said in Lambton Condominium Corporation No. 16 v. Plowright, [1997] O.J. No. 5413 about the intended application of s. 39(2).

¶ 9 This case is subject to the common law rule respecting the enforceability against a corporation of a pre-incorporation agreement. The legal issue therefore is not the enforceability of the pre-incorporation agreement itself against an applicant which is not a party to that agreement. It is whether each of the applicants has contracted with A.C.I. in the terms which are found in the pre-incorporation agreement.

The Pre-Incorporation Agreement

¶ 10 The relevant provisions of the pre-incorporation agreement, which refers to D.S.L. as the "owner", are as follows:

> (1) The Owner, in accordance with its operating option to designate whichever party(ies) may provide Cable Television Communications to the occupants of the Premises, grants to A.C.I. the sole and exclusive right to operate the telecommunication services system on its behalf for the term of this Agreement....
>
> (3) The Condominium Corporation for The Boardwalk Collections Stage 2A (buildings A & B) and Stage 2B (buildings C & D) agrees to pay A.C.I. a bulk $20.11 per suit per month taxes extra for the provision of satellite television services as listed in schedule "A". The Cable fee will be guaranteed for the first year of the term and will be subjected to adjustment annually under the following conditions:

a. Increases in monthly fees charged by the program suppliers to Atop.

b. Condominium request for additional services to be added to the Cable Service resulting in additional hardware costs and programming fees. An additional monthly fee to be mutually negotiated with the condominium for the provision of any such new channels

c. Additional copyright costs, all such costs may be passed on directly to the condominium

d. Any increases in applicable Federal and Provincial taxes

e. Inflationary factor increase of 1% per year on the basic cable rate at each anniversary date.

(4) This Agreement shall become binding on the date hereof and shall continue for a period of ten (10) years from the effective date of September 1, 1999.

(8) The Owner agrees that this Agreement shall run with the land and that it is not personal unto the owner. In the event that the Owner transfers or disposes of its interest in the Premises; the Owner shall require the transferee, as a condition of the transfer, to abide by this Agreement and shall notify A.C.I. thereof.

¶ 11 From the above, it is clear that the parties to the pre-incorporation agreement intended that D.S.L. would ensure that any corporation to which it transferred its interest in the premises (including the applicants) would be bound by the terms of the pre-incorporation agreement.

Efforts To Ensure That Material Facts Are not In Dispute

¶ 12 The parties have agreed to the following, in an attempt to ensure that there are no factual issues which may require a trial, and therefore to ensure that their issues will be determined summarily by means of this application:

(1) the pre-incorporation agreement was not registered on title.

(2) the applicants are the corporations contemplated by paragraph 3 of the pre-incorporation agreement.

(3) at the turnover meeting, when D.S.L. relinquished control of each applicant corporation to its independent board, D.S.L. gave a copy of the pre-incorporation agreement to the new board and to its property managers. The takeover meeting for YRCC No. 921 was in January 2000. The takeover meeting for YRCC No. 933 was in August 2000.

(4) despite paragraph 8 of the pre-incorporation agreement, there is no document executed by either of the applicant corporations which states that it agrees to be bound by that agreement, that it ratifies it, or that it agrees to become a party to it.

(5) the evidence in respect of whether either applicant contracted with A.C.I. in the terms of the pre-incorporation agreement is contained in affidavits and in cross-examinations

on the affidavits. The affidavits, the documents therein and the transcripts of cross-examinations speak for themselves. There is no issue respecting the credibility of any of this evidence, and no issue about whether the deponents recollections are accurate.

Novation

¶ 13 The applicants submit that the doctrine of novation applies herein. As Wilson J. explained in National Trust Company v. Mead, [1990] 2 S.C.R. 410 at paragraph [31], a novation is a trilateral agreement by which an existing contract is extinguished and a new contract is formed, in its place. As Wilson J. stated, "...for an agreement to effect a valid novation the appropriate consideration is the discharge of the original debt in return for a promise to perform some obligation".

¶ 14 There is nothing which establishes that A.C.I. discharged D.S.L. or that D.S.L. discharged A.C.I. from their respective rights and obligations pursuant to the pre-incorporation agreement and as a result, novation principles do not apply. Leaving aside commercial considerations and addressing only the law's requirements, the formation of a new agreement between each applicant and A.C.I. does not require that the rights and obligations between A.C.I. and D.S.L. be discharged, whether as part of trilateral arrangements involving the applicants or otherwise. The Issue

¶ 15 The issue to be determined herein is as follows: has each applicant, once in existence, entered into an agreement with A.C.I., being a new agreement in the same terms as the pre-incorporation agreement?

Analysis

¶ 16 In the admitted absence of an express agreement between each applicant and A.C.I., the determination of whether each applicant contracted with A.C.I. in the terms of the pre-incorporation agreement turns on the evidence, and on the parties agreement that all of the evidence speaks for itself, it is credible and there is no issue about whether the deponents recollections are accurate.

¶ 17 The first question to be resolved is a dispute about one provision of the pre-incorporation agreement. It is necessary to determine the duration of the pre-incorporation agreement in order to determine whether any contract between an applicant and A.C.I. is for that length of time.

¶ 18 A.C.I. submits that the pre-incorporation agreement was for a ten year term commencing on September 1, 1999, as provided in paragraph 4 thereof. The applicants, whose position is that they are not bound by the pre-incorporation agreement, submit that it was an agreement from year to year, subject to renewal or lapse.

(a) The Duration Of The Pre-Incorporation Agreement

¶ 19 The applicants submit that the pre-incorporation agreement makes only the rights and obligations between A.C.I. and D.S.L. subject to a ten year term, and that the pre-incorporation agreement does not propose to bind the corporations to be incorporated (the applicants) to this term. Their position is that paragraph 3 of the agreement sets out what the corporations to be incorporated (the applicants) would be bound to do pursuant to paragraph 8, and nothing is stated about the duration of those obligations. In the applicants submission, the ten year term is stated elsewhere, in paragraph 4, because the contracting parties intended that the applicants would not be bound to a ten year term.

¶ 20 I do not see merit in this submission. In construing the pre-incorporation agreement to determine its intended duration, it should be read as a whole, giving effect to all of its provisions, so long as that does not result in an absurdity. Where there is no ambiguity, the agreement should be given its literal meaning: see Holt v. The Corporation of the City of Thunder Bay (2003), 65 O.R. (3d) 257 (C.A.) at paragraph [20], and the extract therein from Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd. [1986] 1 S.C.R. 57, at p. 66, which quotes from Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co. (1979), 112 D.L.R. (3d) 49

(S.C.C.) at p. 58, and from McLelland & Stewart Ltd. v. Mutual Life Assurance Co. Canada (1981), 125 D.L.R. (3d) 257 (S.C.C.) at p. 259.

¶ 21 I have looked for an interpretation of the whole of the pre-incorporation agreement, based on its wording, which would appear to promote and to advance the true intent of the parties to that agreement, at the time they entered into it. In my opinion, paragraph 3 states what the corporations to be incorporated (the applicants) would be obliged to do pursuant to paragraph 8, and it demonstrates clearly that the contracting parties intended that the applicants were to be made subject to a multi-year agreement, not an agreement from year to year. This is seen in the preamble to paragraph 3 which refers specifically to the cable fee being "guaranteed for the first year" and being "subjected to adjustments annually". It is also seen in paragraph 3 (e), which provides for increase in the base cable rate due to inflation of "1% per year...at each anniversary date". Paragraph 4 then stated: "[t]his agreement...shall continue for a period of ten (10) years". In my opinion, the plain meaning of the phase "this agreement" in paragraph 4 is that it includes the terms agreed upon in paragraph 3, to which the applicants were to be made subject.

¶ 22 I conclude that the juxtaposition of paragraphs 3 and 4, with the former specifying that the applicants would be bound to a multi-year agreement but not specifying the duration of that agreement, and the latter immediately providing for that, demonstrates that the contracting parties agreed that the applicants were to be bound for a term of ten years from September 1, 1999. The plainly stated terms of this agreement admit of no ambiguity when they are given their usual and ordinary meaning.

(b) Did Each Applicant Contract with A.C.I. In The Terms Of The Pre-Incorporation Agreement?

¶ 23 The question which remains to be determined, on the uncontradicted evidence and the aforesaid agreement which addresses the credibility and accuracy of this evidence, is whether each applicant agreed or did not agree to be bound by the provisions of the pre-incorporation agreement and, in particular, to be bound for the term of ten years from September 1, 1999 which is stated therein.

¶ 24 I have considerable sympathy for the desire of the parties to have this question determined summarily, by means of this application, rather than by means of a trial which will be more expensive and time consuming. I have looked for a way of doing this which meets the ends of justice. In my opinion, it is not possible to decide this question on an application because there is no agreement about the persuasive effect or weight to be given to the various aspects of evidence, and no proper means of determining the persuasive effect or weight of this evidence from a written record. There must be a trial of this issue so that the persuasive effect or weight of the various aspects of the evidence may be determined by assessment of viva voce evidence.

¶ 25 In exercising decisional responsibilities, the court retains the discretion to order that the whole application or any issue therein proceed to trial. Rule 38.10(1) states that on the hearing of an application, the presiding judge may,

> (a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or
>
> (b) order that the whole application or any issue proceed to trial and give such directions as are just.

¶ 26 Rule 1.04(1) establishes how rule 38.10(1) should be interpreted. It requires that the rule be liberally construed to secure the just, most expeditious and least expensive determination of this civil proceeding on its merits.

¶ 27 In my opinion, a trial is the only means of securing a just determination of this question on its merits, and not just the expeditious and less expensive determination which the parties propose. This is because assessing the persuasive effect or weight properly given to credible and accurate testimony requires the court to take into account that some of it may fly in the face of common sense and reasonability. Such evidence may have

little or no persuasive effect or weight even though it is the accurate recollection of a credible witness.

¶ 28 I will give only one example of why I have come to this conclusion. I will refrain from discussing the rest of the evidence because there must be a trial.

¶ 29 The evidence of the applicants witnesses that the pre-incorporation agreement was from year to year may well be relevant to the issue of whether each applicant contracted with A.C.I. in the terms of the pre-incorporation agreement. This is because the understanding of these witnesses about the duration of the pre-incorporation agreement may well be relevant to what the applicants intended, in any new contract with A.C.I.. However, the evidence of these witnesses that the pre-incorporation agreement was from year to year is inconsistent with the plain language of the pre-incorporation agreement and, for this reason, their evidence may be given little or no persuasive effect or weight by the trial judge. Alternatively, the trial judge may give persuasive effect or weight to this evidence based on how each witness presents his or her evidence. In this circumstance, how much persuasive effect or weight is given to the evidence of each witness will depend upon the trial judge's assessment. It is only with the assessment of each witness's evidence at trial that it can be determined whether the understanding of that witness about the duration of the pre-incorporation agreement properly should influence the determination of whether either applicant contracted with A.C.I., and if so, whether the duration of that agreement matches the duration of the pre-incorporation agreement, or was for a different term, which would lead to different issues from those the parties have chosen to present in this application.

¶ 30 In Shields v. The London and Western Trusts Co. [1924] S.C.R. 25, one issue was rule 606 of the Ontario Consolidated Rules of Practice which stated in part:

> 606(1). The judge may summarily dispose of the questions arising on an originating notice and give such judgment as the nature of a case may require or may give such directions as he may think proper for the trial of any questions arising upon the application.

Anglin J. (Mignault J. concurring) was of the view (at pages 32-33, supra) that, especially if material facts were controverted, the discretion given by rule 606 would be properly exercised by directing that an action be brought or an issue be tried to determine these matters.

¶ 31 In Re Island of Bob-Lo Co. and Township of Malden et al, [1969] 2 O.R. 535, at 35, (Ont.C.A.) three applications were brought to determine whether certain amusement rides were assessable as land. Kelly J.A. for the court held at page 538 that the issue:

> "...requires a detailed consideration of many factors, not all of which are set out in the material before the Court, or, if set out, not with that particularity which would enable the Court to make a well-founded decision.
>
> In other circumstances where there were before the Court undisputed facts of such detail as would enable the Court to come to a decision with respect to each ride, an application by originating notice on affidavit evidence might be the appropriate manner in which to proceed, but in my opinion the informality with which this matter was presented to the Court was such as to call for the learned Judge to direct the trial of an issue or viva voce evidence so that the Court would have the benefit of much more particularized information than was made available under the method followed."

As a result, the court set aside the decision below and directed that the issues be tried.

¶ 32 In R. v. Jetco Manufacturing Ltd. (1987), 57 O.R. (2d) 776 (Ont.C.A.), a notice of application was brought pursuant to the Rules of Civil Procedure for an order holding the appellants in contempt of court. The issue was determined upon affidavit evidence and the appellants were convicted and sentenced. The Court of Appeal held that, while civil procedures were involved, the proceedings were essentially criminal in nature. The appellants were entitled to the presumption of innocence and the respondent was required to prove their guilt

beyond a reasonable doubt. Since all findings of facts were based on affidavit evidence, Brooke J.A. for the court held at page 181:

> "When there are controverted facts relating to matters essential to a decision as to whether a party is in contempt of court, those facts cannot be found by an assessment of the credibility of deponents who have not been seen or heard by the trier of fact, as was done in this case. The judge here quite simply was in no position to make the factual determination upon which his contempt order was predicated. On the disputed state of evidence before him he could not properly conclude that the municipality has established beyond a reasonable doubt that the appellants were aware of the publication order of the justice of peace. In the circumstances of this case, a trial of the issue raised by the application ought to have been ordered."

¶ 33 These cases demonstrate the tension between the attractions and advantages of expeditious determinations on the one hand, and the necessity of just determinations on the other hand. In the Bob-Lo case (supra), Kelly J. A. speaking for the Court of Appeal stated that, for the issues to be determined on affidavit evidence in an application, that evidence must "enable the court to make a well-founded decision". In my opinion, a well-founded decision respecting the persuasive effect or weight of the evidence herein requires a trial.

¶ 34 Given the positions taken by the parties at the hearing, they have not had an opportunity to address the terms of an order for trial of the above issue. The applicants submissions respecting these terms shall be delivered within ten days of the release of these reasons and the respondent's submission shall be delivered within ten days thereafter. These submissions should also address the costs of this application, given the outcome.

The Cross Application

¶ 35 A.C.I.'s application is to recover from the respondent YRCC No. 921 the amount of the monthly service fees and late payment charges deducted by YRCC No. 921. As of October 1, 2003, the amount in issue was $11,648.77. The amount is increasing by approximately $2,000.00 per month.

¶ 36 By letter dated June 28, 2001, YRCC No. 921 took the position that the cost of hydro being drawn from its meter to supply the television signal to both condominium corporations was not properly its expense. It began deducting amounts from its monthly payment to A.C.I.

¶ 37 The rights and obligations of the parties depend upon the nature of any contractual arrangements between them. As I have already determined, a trial is required to determine that issue. The factual underpinnings of this dispute are also in issue, and should not be determined on an application. I direct that the issues in the cross application be tried.

¶ 38 The parties should also provide their written submissions respecting the terms of the order directing trial of this issue, and respecting the costs of the cross application.

J. MacDONALD J.

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