

A Deal's a Deal: Court of Appeal Reaffirms That Setting Aside Contractual Provisions on Public Policy Grounds Should Be Done Sparingly

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By Emma Romano

The Ontario Court of Appeal recently considered a case where a defendant corporation argued it should not be required to pay a debt owed to a long-standing business partner. The defendant/appellant argued that the Court should recognize, as a matter of public policy, that contract payments do not need to be paid to agents who are under a “cloud of suspicion for corrupt practices.”

The appeal was dismissed from the bench with reasons to follow.

The concise decision in *Kirloskar Technologies (P) Ltd. v. Best Theratronics Ltd.*, [2022 ONCA 331](#), reaffirmed the principle that courts ought to be cautious about expanding the heads of public policy considerations for setting aside contractual provisions and a strong evidentiary record will be required.

Background

This action was brought by the plaintiff, Kirloskar Technologies (P) Ltd. (“KTPL”), for payment of a debt owed to it by the defendant, Best Theratronics Ltd. (“BTL”), for unpaid commissions for work done by KTPL.

BTL is incorporated in Canada in the business of manufacturing medical equipment. KTPL is incorporated in India. The parties entered into an agency agreement which provided commission rates payable to KTPL from BTL for the sale of medical equipment in India and Nepal.

Both parties agreed that there was a debt payable pursuant to the agency agreement and agreed upon the amount owed. The parties had a long-standing commercial relationship and BTL had previously paid KTPL’s commissions for the sale of its equipment without issue.

Trial Decision

At trial, BTL argued it was under no obligation to pay the debt for three reasons:

- It claimed a portion of the amounts owing were statute barred by virtue of the [Limitations Act 2002](#);
- It claimed to be entitled to a set-off against the amount owing for various alleged breaches of contract by KTPL; and
- It argued that BTL risked prosecution under the [Corruption of Foreign Public Officials Act, C. 1998, c. 34](#) (“CFPOA”) if it made any payments to KTPL.

The trial judge rejected these arguments. With respect to the potential violation of the *CFPOA*, the trial judge admitted into evidence a “Charge Sheet” from India that related to criminal charges against KTPL, BTL, and others relating to the sale of medical equipment in 2006. As these charges were unrelated to the debt payments at issue in the action before her, the trial judge found they were not relevant.

The trial judge ordered BTL to pay KTPL the commissions owing in the full amount claimed.

Appeal Decision

On appeal, BTL contested the trial judge’s finding on the violation of the *CFPOA* argument, asserting that the trial judge erred by:

- ordering a Canadian business to pay an agent in a foreign jurisdiction where there are “red flags” of potentially corrupt practices on the part of the agent (such as the Charge Sheet);
- declining to take judicial notice of the high level of corruption in India; and
- failing to find that the contract clauses that required KTPL to comply with the domestic laws of India and indemnify BTL for any malfeasance strengthened the policy argument against ordering payment, or provided an independent contractual basis to delay payment until and if KTPL is exonerated.

BTL asked the Court of Appeal to find that, as a matter of public policy, contractual payments need not be paid to agents who are under a “cloud of suspicion for corrupt practices.”

The Court of Appeal declined to make this finding, affirming the trial judge’s finding that BTL should be held to its bargain.

The Court of Appeal noted that the evidentiary record was flawed, pointing to the trial judge’s concern that BTL did not produce an expert in Indian law to provide guidance on the significance of the Charge Sheet entered into evidence or the status of the charges before the court in India. The Court of Appeal also noted that the parties agreed that the charges related to unproven allegations and that they involved a transaction unrelated to the debt owing in the case at bar.

Ultimately, the Court of Appeal agreed with the trial judge that there was no evidence to ground BTL’s submission that the parties’ agreement was tainted by criminality or that BTL’s obligation to pay its debt was unenforceable.

The Court of Appeal also cited *Uber Technologies Inc. v. Heller*, [2020 SCC 16](#), at para 109, for the principle that public policy considerations should be relied on “sparingly”. The Court of Appeal endorsed the exercise of caution when asked to expand the heads of public policy for setting aside contractual provisions.

Takeaways

Parties to contracts should ensure a strong evidentiary record if seeking to set aside or avoid a contractual provision on public policy grounds, as courts have repeatedly expressed that parties ought to be held to their bargains absent exceptional circumstances.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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