

Back to Basics: A Refresher on the Fundamentals of Contractual Interpretation

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By

As the new school year kicks off, the Ontario Court of Appeal's recent decision in *RBC Dominion Securities Inc. v. Crew Gold Corporation*, 2017 ONCA 648 serves as a handy study guide for lawyers looking to brush up on Contracts 101.

Crew Gold Corporation ("**Crew**"), a public gold mining company, and RBC Dominion Securities Inc. ("**RBC**") entered into an agreement for the provision of investment banking services related to a sale of the company. Under the agreement, RBC was entitled to fees for work performed plus a success fee payable on completion of a "Transaction", which was defined broadly in the agreement.

While the agreement was in force, Crew was the subject of a takeover, which had not been anticipated by either party. RBC's offer to assist Crew with the takeover was refused, and Crew ultimately terminated the agreement. Although RBC was not involved in the takeover, it claimed to be entitled to the success fee because the takeover fell within the definition of "Transaction". Crew refused to pay the success fee, and RBC sued.

The trial judge found that RBC was not entitled to a success fee under the agreement because there was no causal link between its activities and the takeover. RBC appealed on the ground that the trial judge made extricable errors of law in interpreting the agreement by: (1) failing to consider the plain words of the agreement in the context of the contract as a whole; (2) relying on the parties' subjective intentions rather than the objective intentions expressed in the agreement; and (3) failing to consider the commercial reasonableness of RBC's interpretation of the agreement.

In support of its first argument, RBC asserted that its entitlement to the success fee did not require any causal link between the services provided and the takeover because the takeover was a type of transaction contemplated by the broad definition of "Transaction" in the agreement, and there was no express requirement that RBC participate in such Transaction to become entitled to the success fee. Further, the agreement distinguished between fees to be paid for services provided and the success fee, which was payable on the successful closing of a Transaction.

The Court of Appeal rejected RBC's interpretation of the agreement and its argument that the trial judge had not properly applied principles of contractual interpretation. The Court of Appeal stated that the specific words relied upon by RBC had to be considered in the context of the agreement as a whole, and found that the trial judge's interpretation that the success fee had to be linked to some action by RBC was reasonable. Pursuant to the agreement, RBC was engaged as financial advisor to Crew in connection with a potential Transaction, and the Court of Appeal agreed with the trial judge's interpretation that the success fee payable on closing of a Transaction was meant to reward RBC for successfully completing such Transaction. RBC's proposed interpretation was too narrow as it focused on the definition of the term "Transaction", among others, without regard to the nature and substance of the agreement as a whole.

Turning to RBC's argument that the trial judge relied on the parties' subjective intentions rather than the objective intentions

expressed in the agreement, the Court of Appeal reaffirmed that when interpreting written contracts in the context of commercial relationships, it is necessary to determine the meaning of the contract against its objective contextual scheme; the analysis should not be framed in terms of the parties' subjective intention at the time they entered into the contract. In interpreting a contract, the court should consider the contract as a whole, the factual matrix underlying it, and the need to avoid commercial absurdity, among other factors. Upon review of the trial judge's reasons, the Court of Appeal did not find any indication that he relied on evidence of the parties' subjective intentions in his interpretation of the agreement or on their conduct after entering into the agreement.

Finally, the Court of Appeal was not swayed by RBC's argument that the trial judge's interpretation did not accord with sound commercial principles and good business sense. The trial judge's interpretation showed consideration of commercial reasonableness. The parties had anticipated a sale process and there was an expectation that RBC would have to provide services in connection with the sale process to become entitled to the success fee. Had the trial judge accepted RBC's proposed interpretation, it would have resulted in a significant windfall to RBC where there was no nexus between the services it provided and the Transaction.

This decision is a timely refresher on the proper approach to contractual interpretation as we return from summer vacation and head back into the courtroom.

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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