COURT OF APPEAL FOR ONTARIO

CITATION: Ruparell v. J.H. Cochrane Investments Inc., 2021 ONCA 880
DATE: 20211210
DOCKET: C68960

Doherty, Benotto and Huscroft JJ.A.

BETWEEN

Deepak Ruparell

Plaintiff (Respondent)

and

J.H. Cochrane Investments Inc., 2117105 Ontario Inc., 2122192 Ontario Inc., dba Town + Country Volkswagen and 1788289 Ontario Inc.

Defendants (Appellants)

James Doris and Abhishek Vaidyanathan, for the appellants

Paul Fruitman and Vlad A. Calina, for the respondent

Heard: November 30, 2021

On appeal from the judgment of Justice Janet Leiper of the Superior Court of Justice, dated December 7, 2020.

REASONS FOR DECISION

[1] The appellants were negotiating the sale of their car dealership to the respondent. Negotiations continued over several months and agreement was reached on a number of terms. The appellants then received an unsolicited offer from a third party for more money, which they accepted. The respondent sued for breach of contract, seeking specific performance.

[2] The appellants argue that the trial judge erred in finding that the parties had reached an agreement and erred in her calculation of damages, which she awarded in lieu of specific performance.

[3] We do not accept these arguments. The appeal is dismissed for the reasons that follow.

[4] It is not unusual for contracts to be made by agreement on the essential terms, which are later incorporated into a formal written document. Whether the parties reached a binding contract depends on the circumstances of the case, and in particular on the intention of the parties.

[5] The trial judge considered the history of the parties' negotiations, noting that they had two distinct phases. The parties had been negotiating pursuant to the terms of a non-binding letter of intent that described the terms of engagement for a due diligence and financial information review, expectations on closing, purchase price, and a deposit of $1 million. The letter required share purchase agreements and contained an exclusivity clause preventing the appellants from negotiating with other parties, but that clause expired on April 15, 2020.

[6] The trial judge found that the second phase of the parties' negotiations began with the expiry of the exclusivity period, by which time the global COVID-19 pandemic was adversely affecting the appellants' business. The respondent made a new, lower offer to the appellants on April 16, which included a vendor take-back

mortgage. The parties continued negotiations from April 16 to April 24, 2020. The appellants counter-offered a higher price but this was rejected by the respondent.

[7] The trial judge found that the commercial purposes of the letter of intent were spent after April 15 and that a new deal was contemplated. The essential terms of the new transaction were price, share sale, financing, security, timing of payment, asset valuation and post-closing adjustment and retaining the general manager to work for the new company. The trial judge found that the parties agreed to these terms on April 24, 2020, when Peter Hatges, a KPMG adviser engaged by the appellants and authorized to represent them, told the respondent in a voicemail message: “we have a deal”. The trial judge found, further, that the parties acted as though they had a deal. Between April 26-28, 2020, counsel for the parties revised the share purchase agreements in accordance with the April conversations and the term sheet.

[8] The appellants press this court’s decision in *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.), which they submit governs the outcome in this case. But the trial judge properly distinguished *Bawitko*, which concerned a franchise agreement. The court found that the parties’ agreement in that case “did not encompass essential aspects of the intended formal agreement” and did not satisfy the standards of certainty the law requires.

[9] In this case, the trial judge found that the parties agreed on the essential terms of their deal. This finding was open on the record before her and is entitled to deference. We do not accept the appellants' submission that the trial judge misapprehended the evidence or otherwise made a palpable and overriding error. Nor do we accept any of the appellants' arguments that the contract was not sufficiently certain or that the parties did not intend to be bound. These arguments were considered and rejected by the trial judge at paragraphs 63-71 of her decision. We agree with her treatment of these arguments and see no error requiring intervention.

[10] The trial judge did not err in dismissing the appellants' counterclaim that the respondent breached the terms of the letter of intent by commencing the action and seeking specific performance. Dismissal of the counterclaim follows from her finding that the commercial purposes of the letter of intent were spent by April 15 and that a new deal was contemplated, and there is no basis to interfere with that finding.

[11] The trial judge declined to exercise her discretion to order specific performance and awarded the respondent $5 million in damages (exclusive of pre-judgment and post-judgment interest), reflecting their lost opportunity. This amount was the difference between the $19 million the respondent offered and the $24 million offer from the third party the appellants accepted.

[12] There is no basis to interfere with the trial judge's award of damages. The third-party offer came at essentially the same time as the respondent's offer, and as a result established a proxy for the value of the business the respondent had agreed to purchase. The difference between what the third party was willing to pay and the amount the respondent had agreed to pay demonstrates that the respondent would have realized surplus value had the sale been completed as required, and the trial judge did not err in awarding this amount as damages.

[13] The appeal is dismissed. The respondent is entitled to costs in the agreed amount of $40,000, all inclusive.