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ARTICLE

Liability when breaching a non-binding letter of intent

On July 8, 2020, the Honorable Bernard Synnott, j.c.s. rendered judgment in a case pertaining to the scope of obligation incumbent on parties who negotiate by way of a non-binding letter of intent.

*Beauregard c. Boulanger*¹ involves the sale of the Mount Sutton ski resort, owned since the early 1960s by the Boulanger family (Boulanger). In 2011, the two Beauregard brothers (Beauregard) wanted to acquire the share capital of the companies that own Mount Sutton and the surrounding land. The parties signed a letter of intent in October 2011, establishing the basis of the upcoming discussions for the possible transaction. The letter stipulated that "the concepts established in this letter of intent do not create any obligation for the parties."

After more than a year of negotiation, Boulanger put an end to the discussions, which triggered a lawsuit for wrongful and abusive termination of the negotiations. Beauregard is claiming \$3 million in damages, representing financial losses and loss of yield related to the loss of opportunity.

Nature of the alleged fault

According to Beauregard, Boulanger's conduct during negotiations and the untimely termination was faulty and contrary to their duty to act in good faith.

The Court indicated that a letter of intent is an agreement qualified as a preliminary contract, requiring parties to negotiate in good faith for the successful conclusion of the envisaged contract. Failure to meet this standard engages contractual liability of the defaulting party.

In this case, the Court accepted the evidence that Beauregard did not have the minimum amount required for this investment, and that they were unable to meet the requirements of the financial institutions in order to secure their financing.

Moreover, the Court said, Beauregard made use of nonsensical pretexts and repeated subterfuges to gain time. The Court did not give credibility to Beauregard's testimonies and also drew admissions of their financial incapacity from their denials. The Court, therefore, concluded Beauregard had negotiated in bad faith while Boulanger had shown patience and could have put an end to the negotiations long before they did.

Claimable damages

Having concluded that Boulanger were entitled to terminate the negotiations, the Court could have dismissed the action on that basis alone. However, it decided to rule on the quantum of the claim in an *obiter dictum* that reiterates the limitations on the type of damages available in an action for failure to negotiate in good faith or abusive breach of negotiations.

The Court added that even if Boulanger had improperly terminated the negotiations, Beauregard would not have been entitled to the damages claimed since the only admissible damages in such circumstances are those suffered between the signing of the letter of intent and the breakdown of the discussions. Examples include the cost of the negotiations, lost time, travel expenses, preliminary studies, consultant fees, etc.

In the context of a dispute related to the breach of a preliminary contract, the damages are not the same as those that would be payable in the context of a breach of contract. Hence, there is no connection between the loss of future performance or profits and the breach of negotiations, since there is no guarantee that good faith negotiations would have led to the conclusion of the contract contemplated by the letter of intent.

Conclusion

Even though the Beauregard claim was dismissed, a party to a non-binding letter of intent should exercise caution during negotiations and their conclusion, keeping in mind the principles of the case at hand.

A party considering a non-binding letter of intent in order to acquire information on a target should also be aware of the reasoning the Beauregard case, and the requirement that such a party be committed to negotiating.

¹ *Beauregard c Boulanger*, 2020 QCCS 2090.

