Words matter: A reminder for drafters and contracting parties

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In *Chemtrade Electrochem Inc v Superior Plus Corporation*, 2025 ABCA 31, the Court of Appeal of Alberta set aside a trial judgment of $25 million based on the lower court's palpable and overriding error related to the court's interpretation of a "Reverse Terminating Fee." The Court of Appeal held that trial judge's findings were based on the parties' subjective intentions rather than the words of the agreement. The Court of Appeal emphasised that the parties' subjective intentions cannot be used to override the wording of agreements. This case highlights the importance of ensuring that precise and clear drafting is used in agreements.

Background

Superior Plus Corporation entered into an agreement with Canexus Corporation to acquire all its shares by way of a plan of arrangement (the Agreement). The Agreement provided for a $25 million reverse termination fee payable to Canexus if the parties could not obtain certain competition and anti-trust approvals in Canada and the United States prior to the outside date of March 31, 2016 (which was extended by agreement to June 29, 2016).

The approval that was in dispute was the meaning of the "HSR Approval" under the Agreement. HSR Approval was defined in the Agreement as "the expiration or early termination of any waiting period, and any extension thereof, applicable to the completion of the transactions contemplated by this Agreement under the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* (HSR Act).

The United State's Federal Trade Commission (FTC) is involved in reviewing transactions under the HSR Act. After completing a series of regulatory steps with the FTC and attempting to work with the FTC to address their concerns, the parties gave notice to the FTC that their commitment under the timing agreement not to close the transaction would expire on June 28, 2016. On June 28, 2016, the FTC obtained a temporary restraining order and preliminary injunction from the United States District Court for the District of Columbia pursuant to the FTC Act, preventing the parties from closing the deal.

After the FTC, obtained its injunction, the parties exchanged notices of termination, claiming a termination fee or the reverse termination fee.

Trial decision

The trial judge found that the HSR Approval required under the Agreement included avoiding any legal challenges brought by a regulatory agency. Since the FTC obtained an injunction preventing the parties from closing the deal, the trial judge held that HSR Approval was not acquired, entitling Canexus to the $25 million reverse termination fee.

The trial judge based the decision on the “common understanding” between the Parties that the reverse termination fee was to compensate Canexus if the transaction failed to close because the parties failed to obtain regulatory approval. In determining the “common understanding” of the parties, the trial judge relied on evidence negotiations, including non-binding proposals and internal documentation. As a result, the Court determined that Superior owed Canexus a Reverse Termination Fee of $25 million.

Appeal decision

On Appeal, the Court of Appeal held that the trial judge committed a palpable and overriding error and reversed the $25 million judgment. The Court of Appeal held that evidence about the purpose of the reverse termination fee was evidence of subjective intent more than it was evidence of the factual matrix. The Court noted that evidence that reveals subjective intent does not necessarily reflect the agreement as ultimately written between the parties and the surrounding circumstances cannot be allowed to overwhelm the words in an agreement.

Focusing on the specific wording of the contract, the Court of Appeal held that the language chosen by the Parties intentionally contemplated that the expiration of a waiting period under the HSR Act would amount to HSR Approval. The Court held that the wording of HSR Approval did not include legal proceedings. The Court also noted that the parties were well aware of potential court proceedings and injunctions yet those were not included in the definition of HSR Approval.

On that basis, the Court of Appeal concluded that the trial judge made a palpable and overriding error by adopting an interpretation of the Agreement that was unavailable. The trial judge allowed the subjective intentions of the parties to overwhelm the wording of the agreement. The parties’ decision to define “HSR Approval” narrowly cannot be made broader with attempts to supplement the definition with subjective intent from the factual matrix.

Key takeaways

This decision reconfirms an important point: the exercise of contractual interpretation is not to determine what the parties subjectively intended their contract to mean. Rather, contractual interpretation seeks to reveal mutual and objective intentions of the parties as expressed through the words of the contract itself. While the factual matrix is important for understanding the mutual and objective understanding, it cannot overwhelm the actual words of the contract.

From a practical perspective, this case highlights the importance of commercial parties ensuring that precise and clear drafting is utilized in contractual agreements. If a provision of a contract is challenged, absence any plea of mistake, the court will remain grounded in the actual plain text of the provision, rather than allowing what the parties meant the provision to mean to be “written in” to the contract.

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