A Business Deal Is a Business Deal or Is It

April 02, 2019

In some business deals, key employees holding equity are required by the purchaser to execute broad releases relating to pre-closing claims. A recent Ontario Court of Appeal ruling challenges the enforceability of such releases for certain purposes. Purchasers and vendors should take note of this decision.

Background

In *Kerzner v. American Iron & Metal Company Inc.*, 2018 ONCA 989, ArcelorMittal Montréal purchased the shares of a company in 2008. Mr. Kerzner owned one-third of the shares of that company and that company also employed Mr. Kerzner.

By the terms of that transaction, Mr. Kerzner received a bit more than $17 million for his shares, and executed a broad release in favour of the company and its successors. The release purported to release the company and its successors from claims against Mr. Kerzner, including his position as a shareholder, director, officer, employee or creditor of the company at any time up to and including the date of signing.

In connection with the transaction, Mr. Kerzner also entered into an executive employment agreement for the position of general manager, where, among other things, he agreed to work for the company for a minimum of three years after the transaction.

Fast forward seven years, to 2015. American Iron & Metal Company (AIMC) purchased the assets of ArcelorMittal Ottawa in or around March 2015. Mr. Kerzner's employment was assigned to AIMC. AIMC terminated Kerzner's employment without cause in September 2015. AIMC offered him six months' salary and benefits continuation, in accordance with a 2014 employment agreement that Mr. Kerzner had signed.

Mr. Kerzner brought a wrongful dismissal action seeking 24 months to 30 months' common law reasonable notice based on 35 years of employment with AIMC and its predecessors.

There were a number of issues before the court, but the key issue for the purposes of this article was whether the 2008 executed release could legally release or waive Mr. Kerzner's 2008 and pre-2008 service for the purposes of calculating his employment standards entitlements. Whereas the motions judge answered this question in the affirmative, the Court of Appeal's answer was "no".

Court of Appeal Decision

The Court of Appeal rejected the motion judge's reasoning that the release could "wipe the slate clean," despite there being no issue of inequality of bargaining power between Mr. Kerzner, his former company and ArcelorMittal. The Court of Appeal decided that subsections 5(1) and subsection 9(1) of Ontario's employment standards legislation, read together, had the effect of (i) deeming that Mr. Kerzner's employment was not terminated or severed by the sale of his former company, (ii) deeming Mr. Kernzer's employment with his former company to be employment with successor entities for the purpose of calculating his length and period of employment, and (iii) any contracting out of or waiving such statutory obligations was prohibited and any agreement purporting to do so was void.

The main effect of that finding was that the contractual termination provision in the 2014 employment agreement, which provided for six months' base salary and benefits continuation, was unenforceable. The court found that it impermissibly contracted for less than the minimum statutory termination and severance pay obligations under employment standards legislation once all Mr. Kerzner's years of service (including pre-2008 service) were "counted" for such purposes. However, the court deferred to the motion judge's finding that the release waived Mr. Kerzner's claim to *common law notice* based on his 2008 and pre-2008 employment.

In the end, on the common law notice point, the court found that he was entitled to a common law notice period of seven months based on post-2008 service. However, because Mr. Kerzner mitigated his damages when he found a job two months into that notice period, the court noted that his employment standards entitlements to eight weeks' statutory termination pay and 26 weeks' statutory severance pay (not subject to mitigation) would be greater than two months' notice, and accordingly awarded him that statutory amount.

Takeaway

This decision serves as a caution to both vendors and purchasers in business transactions. The Court of Appeal has, in definitive terms and contrary to the motion judge's decision, indicated that a release executed by a key employee holding equity in the context of a business transaction cannot legally release or waive pre-signing service for the purposes of calculating employment standards entitlements. What may appear to be a reasonable business deal, in this case $17 million as a "package deal" for a broad release as argued by AIMC, may nevertheless be qualified by statute.

Vendors are often careful in making representations, warranties and covenants in business transactions, and this decision should be factored into that careful consideration. Purchasers, particularly those who decide to employ the key employees (including founders) post-closing, should also factor this court decision into their employment considerations. Steps by both parties can be taken to lessen some risk, although some may not be agreeable from a business deal term perspective. It is important to note that although the release in this decision was made in a share transaction context, it would not be surprising that if that finding would also apply in an asset transaction context given similar circumstances.

Mr. Kerzner has applied for leave to appeal this decision to the Supreme Court of Canada. It remains to be seen whether the Supreme Court will grant leave to appeal, and if it does, what decision it will make. The last chapter on this case remains unwritten. Until then, at least in Ontario, purchasers and vendors will want to be careful regarding releases.

How BLG Can Help

Any member of our Labour and Employment Group would be pleased to advise you further with respect to releases in share transaction and asset transactions contexts (including their enforceability and steps to lessen some risk) and all other transaction-related questions. Our group has extensive experience in employment arrangements in transactions, including pensions and benefits matters.

By

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