

CITATION: Elder v. Max Wright Real Estate 2023 ONSC 5661

COURT FILE NO.: CV-22-00684506-0000

DATE: 20231010

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: LEIF ELDER

Plaintiff

AND:

MAX WRIGHT REAL ESTATE CORPORATION carrying on business as
SOTHEBY’S INTERNATIONAL REALTY CANADA

Defendant

BEFORE: Koehnen J.

COUNSEL: *Tatha Swann* for the plaintiff, moving party

Andrew McCreary for the defendant responding party

HEARD: September 6, 2023

ENDORSEMENT

OVERVIEW

- [1] This is a motion for summary judgment arising out of a fixed term, renewable contract pursuant to which the plaintiff worked as a real estate agent for the defendant. The defendant terminated the relationship without notice.
- [2] The primary issue is whether the defendant could terminate without notice. I find that the defendant could not. The defendant was required to provide notice to the end of the one year term.
- [3] The second issue is damages. The defendant submits there are no damages because the plaintiff was hired by another real estate brokerage six days after his termination. The

plaintiff submits it is entitled to damages of \$101,130.48 for the remaining 11 month term of the contract. I award damages of \$21,034.01.

The Facts

- [4] The plaintiff, Leif Elder was hired by the defendant (“Sotheby’s”) as a real estate agent on June 10, 2021. The relationship was terminated without cause on July 5, 2022. Mr. Elder was given no notice of termination. Mr. Elder brings a motion for summary judgment. Both sides agree that this matter is suitable for summary judgment.
- [5] The relationship between Mr. Elder and Sotheby’s was set out in a written agreement which described the term of the relationship as follows:

A. TERM OF AGREEMENT

1. Except as provided in Section Q below, this Agreement will be for a period of one year from the effective date written above.
 2. The Agreement may be renewed for one additional year by mutual written agreement and on revision of the Contractor’s Compensation as set out in Appendix A of this Agreement. In order to benefit from an annual renewal of this Agreement, the Contractor acknowledges that the minimum production level in terms of annualized closed GCI shall be \$100,000.
 3. In the event no renewal Agreement is executed, and the Contractor continues to provide services to the Company, this Agreement will be deemed to be extended for a period of one year and the parties agree to be bound by all the terms, provisions, and conditions of this Agreement as if it has not expired.
- [6] The parties did not execute a renewal agreement, as a result of which the contract was deemed to be extended for a period of one year from June 10, 2022 to June 10, 2023.
- [7] The law is clear that when a fixed term contract is terminated, the terminating party owes the non-terminating party damages equal to the amount that would have been earned under the contract for the duration of its term subject to the nonterminating party’s duty to mitigate unless there is an enforceable early termination clause. This is the case regardless of whether Mr. Elder’s relationship with Sotheby’s is characterized as a dependent

contractor relationship as Mr. Elder argues or an independent contractor relationship as Sotheby's argues.¹

- [8] Until recently, there was some confusion about the degree to which the obligation to mitigate applied to fixed term contracts, especially in independent contractor relationships. In *Monterosso v. Metro Freightliner Hamilton Inc.*,² the Ontario Court of Appeal recently made clear that independent contractors working for fixed terms have a duty to mitigate, subject to an agreement providing otherwise.³ Mr. Elder agrees that he had a duty to mitigate regardless of whether his relationship with Sotheby's is characterized as one of an independent or dependent contractor.
- [9] Mr. Elder was hired by another real estate brokerage, Engel & Volkers, on July 11, 2023, only six days after his termination from Sotheby's.
- [10] The principal issues on this motion are whether the contract in fact contained a termination clause that allowed Sotheby's to terminate without notice and, if the contract contains no such clause, the quantum of Mr. Elder's damages.

Was There an Enforceable Early Termination Clause?

- [11] Sotheby's submits that the contract contained an enforceable early termination clause. Mr. Elder submits that there was no such clause. The termination clause provides:

Q. TERMINATION OF AGREEMENT

1. In the event the Contractor violates this Agreement or otherwise fails to conduct his/her business in accordance with the terms of this Agreement, the Company may terminate this Agreement immediately and without notice.

2. Either party may terminate this Agreement, without cause, at any time with written notice to the other party.

¹ *1397868 Ontario Ltd. v. Nordic Gaming Corp.*, 2010 ONCA 101 at para 13; *Howard v Benson Group Inc.*, 2016 ONCA 256 at paras. 21, 22, 26; *Radikov v. Premier Project Consultants Ltd.* 2017 ONSC 7192 at paras. 2, 4, 12, 62-64, 72, 75; *Mohamed v. Information Systems Architects Inc.*, 2017 ONSC 5708 at para. 56; aff'd at 2018 ONCA 428.

² *Monterosso v. Metro Freightliner Hamilton Inc.*, 2023 ONCA 413 (ON CA)

³ *Monterosso v. Metro Freightliner Hamilton Inc.*, 2023 ONCA 413 (ON CA) at para. 9.

- [12] Mr. Elder notes that the Supreme Court of Canada dealt with a very similar clause in *Hillis Oil & Sales v. Wynn's Canada*⁴ and found that it should be excised for vagueness. In *Hillis* the clause provided:

“20 **In the event that distributor shall breach, or shall have breached, any of the terms, provisions or conditions of this agreement, [...] manufacturer may, at its option, by notice in writing to distributor by mail to distributor's last known address, terminate and cancel this agreement; and upon the giving of such notice, this agreement shall be cancelled, terminated and at an end.**

23 [...] **this agreement may be terminated and ended**, wholly or as to any marketing division designated in this agreement, and/or as to any 'XTEND Products' specified in this agreement, **at any time, with or without cause, by either party hereto, by written notice** given to the other of them by mail addressed to the last known address of the party to whom said notice is directed. And upon any termination of this agreement by either party, the distributor shall remain liable for all sums due to manufacturer for purchases made by distributor and unpaid for up to the time of such termination.” [Emphasis added]

- [13] In addressing this provision, the Supreme Court noted that clause 20 created the ability to terminate the agreement immediately for the cause because the closing words of clause 20 provided that on notice in writing for cause, the “agreement shall be cancelled, terminated and at an end.” In clause 23, however, the agreement provided merely that the contract could be terminated “by written notice.” The court noted that if a distributorship agreement does not contain a provision for termination without cause, it is terminable only on reasonable notice and that a right to terminate without notice must be expressly provided for in the agreement.
- [14] The court considered whether the language in clause 23 of the agreement giving the manufacturer the right to terminate “at any time” meant that the agreement could be terminated without cause and without advance notice. The court concluded that it does not. The expression “at any time” in paragraph 23 indicated only that the right to terminate under clause 23 could be exercised whenever either party wanted but that the clause did not speak to when the termination would take effect. In the absence of that specificity, the

⁴ *Hillis Oil & Sales v. Wynn's Canada* 1986 1 SCR 57

court held that the rule requiring reasonable notice should continue to be implied. More specifically, the court stated:

[16] With great respect, I agree with the learned trial judge that **the inclusion of the words "upon the giving of such notice, this Agreement shall be cancelled, terminated and at an end" in clause 20 and their omission in clause 23 creates an ambiguity as to whether the distributor's agreement may be terminated pursuant to clause 23 with immediate effect. If a distributorship agreement does not contain a provision for termination without cause it is so terminable only upon giving reasonable notice of termination.** See *Martin-Baker Aircraft Co. v. Canadian Flight Equipment, Ltd.*, [1955] 2 All E.R. 722 (Q.B.), at p. 736; *Paper Sales Corporation Ltd. v. Miller Bros. Co.* (1962) Ltd. (1975), 55 D.L.R. (3d) 492 (Ont. C.A.), at p. 498; *C.C. Hauff Hardware, Inc. v. Long Mfg. Co.*, 19 ALR3d 191 (Iowa 1965). **A right to terminate a distributorship agreement without cause with immediate effect must be expressly provided for in the agreement. ... The question is whether, having regard to the inclusion of the above words in clause 20 and their omission in clause 23, the words "at any time" in the latter clause nevertheless make it clear and unequivocal that the agreement may be terminated without cause with immediate effect. In my respectful opinion they do not.** There is a strong suggestion that where it was intended to provide for termination with immediate effect the concluding words in clause 20 were the ones considered to convey that meaning. **The words "at any time" in clause 23 then bear the same relationship to the right to terminate under that provision as the specified events (breach of the agreement, insolvency and change in partnership) bear to the right to terminate in clause 20; they merely indicate that the right to terminate provided by clause 23 may be exercised at any time, but the clause is silent as to when termination may take effect. In the absence of provision for this question, the rule requiring reasonable notice of termination should be applied as an implied term of the contract. ... [Emphasis added]**

[15] Sotheby's submits that the language of its contract is distinguishable from the language in *Hillis*. For convenience sake I reproduce the term of the Sotheby's contract here:

Q. TERMINATION OF AGREEMENT

1. In the event the Contractor violates this Agreement or otherwise fails to conduct his/her business in accordance with the terms of

this Agreement, the Company **may terminate this Agreement immediately** and without notice. (Emphasis added)

2. Either party may terminate this Agreement, without cause, at any time with written notice to the other party.

- [16] Sotheby's submits that, on a plain and ordinary reading of the termination provision, the word "immediately" in clause Q1 refers to when the right to terminate for cause may be exercised and not when the termination would take effect. Put another way, clause Q1 states that Sotheby's may terminate the Agreement "immediately" upon the occurrence of a violation and there is no requirement on Sotheby's part to provide notice about when the termination takes effect because it takes effect right away by virtue of the words "without notice."
- [17] Sotheby's then argues that in clause Q 2 the words "at any time" also refer to when the right to terminate without cause may be exercised so long as the party terminating the contract advises the other party in writing of the termination. Under Clause Q2, neither party has an express or implied contractual right to be provided with a specific amount of advance notice of termination if one party terminates the agreement without cause.
- [18] Sotheby's submits that the omission of the word "immediately" in Clause Q2 does not create an ambiguity in the provision. The term "immediately" is included in the 'with cause' provision because it refers to when the right to terminate arises relative to potential violations of the Agreement – circumstances that are simply not applicable in the 'without cause' provision.
- [19] I do not agree with Sotheby's interpretation of the agreement. It strikes me that Sotheby's is interpreting the words "written notice" as the act of advising Mr. Elder that the contract has been terminated as opposed to the amount of advance warning Mr. Elder must be given of the termination or the amount of damages Mr. Elder is entitled to in lieu of advance warning of termination.
- [20] Clause Q 1 states that Sotheby's can terminate the agreement if Mr. Elder breaches it and can terminate the agreement "immediately and without notice." Notice in that provision cannot refer to the act of advising Mr. Elder that the agreement is at an end. It goes without saying that one must advise one's counterparty that an agreement is at an end. It is impossible to terminate an agreement otherwise because, Mr. Elder would presumably keep showing up at the Sotheby's office unless he were told that the agreement has been terminated. In those circumstances, the expression "without notice" can only refer to the time period of advance warning of termination that the common law requires. In the case of termination for cause, no period of advance warning is required.
- [21] In clause Q2, Sotheby's may terminate the agreement without cause whenever it wants to (i.e. at any time) "with written notice to the other party." In that clause, the concept of

notice also refers to the period of advance warning although I concede that it could also refer to the manner in which the other party is being advised of the termination because it must be in writing. I nevertheless conclude that the concept of notice even in clause Q 2 must refer to the period of advance warning. If it were otherwise, it would render the inclusion of a one-year renewable term in clauses A 1 and A 3 superfluous and would in fact negate the concept of a renewing one-year term. The concept of a one-year renewing term would be meaningless if either party could terminate the contract at will, at any time, without any advance warning. It is a well accepted canon of contractual interpretation that contracts should be read as a whole and should be read harmoniously so as to avoid conflict between terms and so as to avoid rendering any terms superfluous. The easy way of doing that here is to interpret the concept of “notice” in accordance with the well-established concept of common-law notice of termination in the sense of advance warning.

- [22] In clause Q 2 the actual amount of notice is not referred to because it is not necessary to do so. The amount of notice required is the period of time remaining in the one-year term.

Contra Proferentem

- [23] Although, on my interpretation of the contract I find no ambiguity, if I am wrong in my interpretation of the contract I would, at the very least, find an ambiguity between the two provisions as the Supreme Court of Canada did in *Hillis*.
- [24] In those circumstances the concept of *contra proferentem* would apply.
- [25] The doctrine of *contra proferentem* applies where there is an ambiguity in the meaning of a contract which one of the parties drafted and presented to the other party, with no opportunity to modify its wording.⁵ The contract in question here is a standard form contract that Sotheby’s uses for all of its approximately 400 Agents in Ontario.

Damages

- [26] When the contract was terminated, there were 11 months remaining on its renewed one-year term. Mr. Elder is therefore owed damages equivalent to what he would have earned during that 11 month period.
- [27] The challenge in calculating those damages is that Mr. Elder obtained a new position as a real estate agent approximately six days after Sotheby’s terminated its relationship with him. Sotheby’s submits that given the new position; the damages are zero. Mr. Elder

⁵ *Hillis*, paras 17-18

submits that the damages remain significant because transitioning from one brokerage takes time and that the goodwill associated with the Engel & Volkers brand is not equivalent to that associated with Sotheby's.

- [28] He notes that Engel & Volkers consist of independent, stand-alone brokerages with little communication with each other whereas Sotheby's is a centrally driven organization that offers leads between its brokerage offices. While that may be the case, there is no evidence that Mr. Elder did or would have received leads from other Sotheby's offices. I find that a notice period to the end of the term is nevertheless appropriate. Although Mr. Elder mitigated his damages by joining Engel & Volkers, mitigation of damages does not mean the elimination of damages. I accept that it would take time to transition from one brokerage to another, especially if one has been marketing oneself under a more specialized brand like Sotheby's.
- [29] Mr. Elder submits that during his 12 months at Sotheby's he earned a commission of \$79,008.12. He also submits that any calculation of damages should be heavily weighted to the last six months of his time there because his commissions increased materially during that period. Between his hire on June 10, 2021 and December 31, 2021 he earned commissions of \$23,846.06. During the first six months of 2022 he earned commissions of \$55,162.06.
- [30] Mr. Elder submits that damages should be calculated using his last six months earnings which averaged \$9,193.68 per month. In the alternative, his monthly earnings averaged out over his time at Sotheby's come to \$6,320.65 per month. In the 12 months after joining Engel & Volkers, he earned commissions of \$9,377.40.
- [31] Part of the challenge of determining Mr. Elder's damages is that he had only reinstated his license in 2021 and that it is common for agents to start off slowly and build business as time goes on. His earnings at Sotheby's are sporadic as is reflected in the following table:

Transaction Go Firm Date	Mr. Elder's Commission	Address of Property
August 20, 2021	\$1,245.68	30 Shore Breeze Drive, #1921, Toronto
September 15, 2021	\$19,041.26	285 Mutual Street, #1706, Toronto
October 6, 2021	\$2,643.92	801 Bay Street, #2002, Toronto
October 29, 2021	\$915.20	210 Christie Street, #3Toronto
2021 TOTAL	\$23,846.06	
May 31, 2022	\$37,377.00 (to be paid on close)	The Garden District Condo, #3003, Toronto
June 1, 2022	\$0.00	100 Hayden Street, #608, Toronto
June 20, 2022	\$1,194.84	170 Sumach Street, #2106 Toronto
June 28, 2022	\$15,090.31	150 Sudbury Street, #821 Toronto

July 1, 2022	\$1,499.91	20 Richardson Street, #2307
2022 TOTAL	\$55,162.06	
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GRAND TOTAL	\$79,008.12	

- [32] As can be seen from the table above, there are long periods in which Mr. Elder earned no income. In addition, the material portion of his income was due to three transactions.
- [33] In addition, Sotheby's notes that Mr. Elder's sales would like to have been affected by the significant downturn in the real estate market in the second half of 2022. By way of example, year-over-year sales declined in the latter half of 2022 by approximately 45% over 2021.
- [34] The largest commission Mr. Elder earned in 2022 is attributable to the Garden District condominium. He has been paid one half of that commission. The sale of the condominium will not actually close until 2025 at which point the remainder of the commission will be earned. I would therefore be inclined to deduct one half of the Garden District condominium from the income attributed to Mr. Elder for 2022. The purpose of actual notice or damages in lieu of notice is to give a party time to adjust to the loss of their actual earnings. Mr. Elder's actual earnings during 2022 was not \$55,162.06 but was \$36,474.06.
- [35] In my view, the appropriate way to calculate Mr. Elder's damages in lieu of notice is to take his actual income while at Sotheby's (\$60,320.12), divide that by 12 months to arrive at a monthly income of \$5,026.68 and multiply that by 11 months notice to arrive at a gross figure of \$55,293.48.
- [36] I would then apply a 45% discount to that figure to take into account the decline in the real estate market. I obtain the 45% as a straight-line average of the year over year decline between July and December 2021 and 2022 sales as set out in Sotheby's factum. That would leave Mr. Elder with notional earnings of \$30,411.41. From that one should deduct the actual earnings of \$9,377.40 which would bring his damages down to \$21,034.01.
- [37] The parties have agreed that Sotheby's is obliged to pay Mr. Elder the balance of the commission owing on the Garden District condominium if and when it closes in 2025. That commission will be paid in addition to the damages awarded in these reasons.

Should Damages Be Gross or Net of Expenses

- [38] Sotheby's submits that any damages awarded should be net of the expenses that Mr. Elder incurs. I do not believe that should be the case in the circumstances of this case.

- [39] In some circumstances, it may be appropriate to award damages based only on net commissions after expenses such as, for example, where the expenses were required to earn the commissions in question.⁶ Here, however, the expenses Mr. Elder incurred were not specific to the number of properties sold. That is because of the nature of the expenses he claimed which included rent for his apartment, vehicle costs, meals, entertainment, stationery and supplies.
- [40] The parties spent some time arguing over whether Mr. Elder was a dependent or an independent contractor. I do not find it necessary to address that question given my interpretation of the contract. The right to notice of termination until the end of the existing contractual term would apply regardless of whether the relationship between Mr. Elder and Sotheby's that of a dependent or independent contractor.

Conclusion and Costs

- [41] In light of the foregoing, I award the plaintiff damages of \$21,034.01. The plaintiff seeks costs of \$43,364.46 including HST and disbursements. The defendant's bill of costs comes to \$36,586.96 including HST and disbursements. It is not unusual for the plaintiff's costs to be higher than a defendant's costs because it is more difficult to establish a proposition than to attack it.
- [42] The costs nevertheless strike me as somewhat high given the real nature of the damages. Although the plaintiff claimed over \$100,000 in damages, in my view that was never realistic given his actual earnings. While the plaintiff tried to characterize his earnings as being on a significant upswing, the upswing is really attributable to a single transaction in respect of which he has only been paid one half of the commissions and in respect of which the balance of the commissions are not expected to be earned until 2025. The damages also did not take into account the significant fall in the real estate market after he left Sotheby's. The plaintiff was nevertheless put through the cost of seeking damages. I appreciate that at the lower scale of damages costs can be disproportionate to the amount recovered. At the same time, counsel should have an eye on the realistic amount of damages that are recoverable. In those circumstances it strikes me that fixing costs at \$25,000 including disbursements and HST fairly balances the interests of both sides.

Date: October 10, 2023

Koehnen J.

⁶ *Sklar-Pepler Furniture Corp. v. George C. Sweet Agencies Ltd.*, 1995 NSCA 125 at paras. 6, 8