IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Morfund Financial Inc. v. Tilray Brands Inc.,* 2023 BCSC 1751

Date: 20231006
Docket: S190879
Registry: Vancouver

Between:

Morfund Financial Inc.

Plaintiff

And

Tilray Brands Inc. (formerly Tilray, Inc.) and Tilray Canada Ltd.

Defendants

Before: The Honourable Justice E. McDonald

Reasons for Judgment

Counsel for the Plaintiff:	G.E.H. Cadman, K.C. L. Morris
Counsel for the Defendants:	A. Cocks J.K. Choi
Place and Date of Trial/Hearing:	Vancouver, B.C. September 14-15, 2023
Place and Date of Judgment:	Vancouver, B.C. October 6, 2023

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Overview

[1] The plaintiff, Morfund Financial Inc. (“Morfund”) is a commercial finance brokerage. Starting in 2016, it began providing financing-related services to one or more of Tilray Brands Inc. (formerly Tilray, Inc.) and Tilray Canada Ltd. (“Tilray USA”) and (“Tilray Canada”). Tilray USA and Tilray Canada conduct business in various aspects of the cannabis industry, including in British Columbia.

[2] Morfund claims that it is owed significant sums under the terms of an agreement with one or both of Tilray USA and Tilray Canada. Morfund alleges that it agreed to seek out financing opportunities for Tilray USA and Tilray Canada in exchange for payments, including service fees. Morfund alleges that Tilray USA and Tilray Canada breached the terms of their agreement by failing to pay all amounts due (the “Claim”).

[3] In early 2019, Morfund commenced this action relying on a number of causes of action including breach of contract and unjust enrichment. A seven-day trial is scheduled to commence on October 30, 2023.

[4] Tilray USA and Tilray Canada deny any liability or amount owing to Morfund. Pursuant to the summary trial rule, they apply for an order dismissing the Claim.

[5] For the reasons that follow, I have determined the matter is not suitable for summary trial.

Background

[6] Larry Carter owns and operates Morfund.

[7] Tilray Canada, was previously named “Lafitte Ventures Ltd.” (“Lafitte”). Tilray USA is a publicly traded company incorporated in Delaware, U.S.A. on January 24, 2018.

[8] Dorada Ventures Ltd. (“Dorada”) is the registered owner of the cannabis production facility operated by Tilray USA and Tilray Canada in Nanaimo, B.C. (the “Nanaimo Facility). Dorada is a wholly owned subsidiary of Tilray Canada.

[9] At all material times, Brendan Kennedy was the Chief Executive Officer of Tilray USA and the President of Tilray Canada. Mr. Kennedy is also the founder and Executive Chairman of the Board of Directors of Privateer Holdings Inc. ("Privateer"). Privateer is a shareholder of Tilray Canada.

[10] On May 26, 2016, Tilray Canada and Privateer entered into an agreement entitled "Financial Advisory and Agency Agreement" (the "2016 Agreement"). On June 28, 2016, the parties amended the 2016 Agreement in respect of the term of the agreement.

[11] The 2016 Agreement appointed Morfund as the company's "financial advisor, placement agent, and exclusive mortgage broker on the terms and conditions set out". The 2016 Agreement defined the company as Privateer and Lafitte. Morfund's role was "to advise and assist in the planning, arranging and execution of corporate or property financing, including structuring advice and raising the necessary strategic alliance, equity, senior debt, subordinated debt, bridge or mezzanine financing required by the Company". Morfund's role included preparing approved marketing material to present to prospective lenders.

[12] Morfund assisted in arranging an offer of mortgage financing from Romspen Investment Corporation ("Romspen") for an 18 month term. Under this financing, Lafitte and Dorada were the borrowers and Privateer was the covenantor. Morfund was paid a success fee under the 2016 Agreement of $240,000 on or about January 11, 2017 for the Romspen mortgage financing.

[13] On July 14, 2017, Mr. Carter wrote to Mr. Kennedy on behalf of Tilray Canada, which is defined as the "Company", regarding the "Financial Advisory and Agency Agreement". The first page of the letter states as follows:

> This letter, including the attached schedules, forms the agreement for the appointment of MorFund Financial Inc. ("MFI") as the exclusive mortgage broker to the Company on the terms and conditions set forth herein.
>
> MFI's role shall be to advise and assist in the planning, arranging, and execution of corporate and/or property financing notes in Schedule C (or such other amounts, terms, and conditions accepted by the Company), including

> structuring advice and raising the necessary senior debt, subordinated debt, factoring and operating lines required by the Company.
>
> A description of MFI's services included in this mandate, with all the restrictions and limitations thereto, is provided as Schedule C; the "Scope of Work".
>
> As part of this mandate, MFI will use its best efforts to secure a Financing and will submit your project firstly to its preferred capital sources, and if necessary, other financing resources as may be required.
>
> Please sign two copies of this agreement, retain a copy and return one to us, and please call if you have any questions or comments pertaining to this agency agreement.
>
> Yours truly,
>
> MorFund, Financial Inc.
>
> Per: Larry P. Carter, President

[14] Mr. Kennedy signed the letter as President, following a line stating: "Agreed and accepted this 17 day of July, 2017 with full authority to bind the Company". The parties referred to this as the "2017 Agreement" and I will do the same.

[15] The 2017 Agreement includes a number of schedules, the relevant portions of which state as follows:

> **SCHEDULE A**
>
> **SUMMARY OF BUSINESS TERMS**
>
> …
>
> **TERM OF AGREEMENT**
>
> Commencing upon execution hereof and terminating 120 days from the date the Company approves MFI's marketing presentation. If a term sheet or commitment has been issued and is still outstanding or under discussion, this term shall be extended by at least 30 days or such other reasonable time as is necessary to conclude such financing.
>
> **RETAINER/WORK FEE**
>
> *No initial retainer fee
>
> *Ten Thousand Dollar (C$10,000) work fee + 5% GST is due upon signing of this Agreement. This work fee shall be credited against Success Fees hereunder, if any, Electronic funds transfer information is as follows:
>
> MorFund Financial Inc
> Royal Bank of Canada
> Bank # ...
> Transit # ...
> Account # …

…

SUCCESS FEE*
Financing Types and Fees:
Mezzanine or Subordinated Debt……3.0%
Senior debt or 1st Mortgages…… ……...1.5%
Operating lines of credit……1.5%
Factoring program……...1.5%

*A Success Fee is a service commission. All expenses are due and payable by the Company upon receipt of an invoice from MFI.

SCHEDULE B

TERMS AND CONDITIONS

For good and valuable consideration, the parties agree as follows:

1. General: The Company engages MFI, and MFI agrees to be engaged, to provide exclusive mortgage brokerage services as set forth herein. During the term of this Agreement, MFI shall have exclusive rights to seek a Financing on behalf of the Company.

2. Definitions:

a. Financing: The term "Financing" means any private debt, factoring, operating lines, senior debt, or subordinated debt raised by the Company, by, through or with a Targetco (as defined below).

b. Targetco: The term "Targetco" means any person or company introduced to Company by MFI that undertakes, either directly or indirectly through one or more of its affiliates, a Financing with the Company.

c. Introduction: For purposes of this Agreement, a Targetco shall be considered "introduced" to the Company upon:

the Company's receipt, from a prospective lender, of a written indication of interest; or

upon a prospective mortgage lender coming to the Tilray facility or office or elsewhere to meet with Company's staff and/or to undertake a due diligence review of the Company's files; or

upon receipt of written documentation from MorFund indicating that the potential lender has been provided with an approved marketing presentation regarding the proposed financing for the Company.

3. Fees: The Company will pay MFI a Success Fee (service commission) on the date that any Financing closes. Further, the Company will pay MFI a work fee as set out in Schedule A opposite the heading "RETAINER/WORK FEE", plus GST, to be paid as outlined in Schedule A. In the event of default by the Company in the payment of fees or expenses earned by MFI, the Company shall promptly reimburse MorFund for all reasonable costs and charges incurred by MFI in connection with collecting payments due to MFI under the terms of this Agreement.

4. Services: MFI will use its best efforts to secure Financing acceptable to the Company, at all times acting in the best interests of the Company, as further described in Schedule C.

5. Investigations by Company: The Company will have the right to accept or reject any offer of Financing in its sole and absolute discretion. Once an offer is accepted, MFl has earned the Fee noted herein which Fee will then be paid from the proceeds of the first release of funds under the Financing. The Company also acknowledges that it is responsible for its own independent investigation and evaluation of any Financing proposal and that MFI will not have any obligation or liability whatsoever for choices or actions taken by the Company, and the Company is strongly advised to obtain independent legal advice.

6. Carry-On Financing: If any Financing is obtained or transacted from a Targetco, and if that Targetco provides additional Financing to the Company within eighteen (18) months following the expiry of the Term, the Company agrees to pay MFI an additional Success Fee equal to that set forth in Schedule A. Should any entity owned or controlled by Company obtain debt financing from a Targetco within eighteen (18) months following the expiry of the Term, such entity shall pay a fee which fee the parties, acting reasonably, agree is reasonable in the circumstances.

Company represents and warrants that as of the date of the execution of this Agreement, neither it nor it's parent company nor any associated companies are engaged in discussions with any prospective lender that may result in a Financing.

7. Obligation to Pay: The Company is obligated to pay the Success Fee upon the first release of funds following the closing of a Financing by a Targetco within eighteen months of the expiry of the Term.

8. Authorization: This letter will serve as an authorization and an irrevocable direction to the legal counsel for the Company to enter the amounts payable hereunder to MFI as a direction to pay on the closing statement for payment of the full Success Fee(s) (plus other amounts that may be due and payable hereunder, and less the Work Fee) out of proceeds of the first funding on the day of closing of any Financing or Business Combination.

…

10. Confidential Information: MFI acknowledges and agrees that the terms of the Non-Disclosure Agreement executed by the Parties, dated May 26 2016 remains binding and in full effect, and that MFI shall limit access to Company Confidential Information to only those of its employees or authorized representatives (including Targetcos) having a need to know and who have signed an approved confidentiality agreement. Notwithstanding the foregoing, the MFI marketing presentation may be presented to prospective lenders prior to requiring of them an approved confidentiality agreement.

The Company agrees that the names of all Targetcos which have been introduced by MFI shall be held in confidence. Unauthorized disclosure may have an economically detrimental effect on MFI and shall entitle MFI to seek financial relief. This obligation shall survive for a period of two (2) years following expiration or termination of this Agreement.

11. Non-circumvention Covenant: The Company agrees not to circumvent or attempt to circumvent this Agreement in any way whatsoever in an attempt to deprive MFI of any fees which would otherwise be payable to MFI under this Agreement.

…

15. Entire Agreement: This Agreement is the final, complete and exclusive agreement of the parties with respect to the subject matters hereof and supersedes all prior discussions and agreements between the parties with respect to such matters, including but not limited to the May 26, 2016 Agency Agreement. Notwithstanding the foregoing, the Parties acknowledge that the entities set forth in Schedule D shall be deemed Targetcos for purposes of this Agreement as a result of discussions undertaken by MFI on behalf of the Company pursuant to the May 26, 2016 Agency Agreement. No modification of or amendment to this Agreement will be effective unless in writing and signed by both Parties.

…

SCHEDULE C

SCOPE OF WORK

MFI shall provide the following services during the Term the Agreement:

1) Prepare material for presentation to Targetcos;
2) Identify Targetcos for financing transactions involving the Company;
3) Advise and assist the Company in negotiating terms of a potential construction, take-out and debt financing:
4) Advise and assist the Company and its advisors in the diligence and closing processes;
5) Targeted financing goal consists of:

    Loan Amount: C$18,000 000 +

    Rate: less than 6.0%

    Term: 5 years or ideally 10 years or longer

    Amortization: interest-only or an amortization of 15 years or longer

    Recourse: ideally non-recourse or recourse limited to Tilray

SCHEDULE D

…

Romspen

…

Bank of Montreal

…

Preliminary Issue

[16] On September 14, 2023, Morfund applied, returnable the same day, to further amend the notice of civil claim to, among other things, claim amounts arising from the 2016 Agreement (the "Amendment Application").

[17] At the hearing of the summary trial application, Tilray USA and Tilray Canada took the position that the Amendment Application was not served in accordance with the *Rules*. The defendants did not have an adequate opportunity to respond to the Amendment Application.

[18] I agree that the Amendment Application was not served or set down in compliance with the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*]. In my view, Morfund is effectively seeking to unilaterally insert the Amendment Application into the time reserved by the parties for the hearing of the summary trial application. Therefore, beyond noting that there is a filed Amendment Application, I am not determining or otherwise considering it as part of my reasons on the summary trial application.

Why the matter is unsuitable for summary trial

[19] In *Gichuru v. Pallai*, 2013 BCCA 60, our Court of Appeal described the legal framework for determining whether a matter is suitable for summary trial:

> [28] A summary trial is governed by R. 9-7 of the *Supreme Court Civil Rules* (previously R. 18A of the *Supreme Court Rules*). Subrule (2) permits a party to an action, to which a Response to Civil Claim has been filed, to apply to the court for judgment under the rule, either on an issue or generally. In support or response to the application for a hearing by summary trial, subrule (5) provides that a party may tender evidence in a variety of forms: (i) affidavit; (ii) answers to interrogatories; (iii) examination for discovery transcripts; (iv) admissions; and (v) expert reports.
>
> [29] The scope of a summary trial application is set out in R. 9-7(15) of the *Supreme Court Civil Rules*:
>
> > (15) On the hearing of a summary trial application, the court may
> >
> > > (a) grant judgment in favour of any party, either on an issue or generally, unless

> > > (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
> > >
> > > (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
> >
> > (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
> >
> > (c) award costs.
>
> [30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd., (1989), 36 B.C.L.R. (2d) 202* (B.C.C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):
>
> > In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.
>
> [31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank*, 2005 BCSC 1263 (B.C. S.C.) at para. 12, upheld on appeal at 2006 BCCA 369 (B.C. C.A.).

[20] Tilray USA and Tilray Canada submit that the matter is ideally suited for summary trial because it only raises straight-forward matters of contractual interpretation. While Tilray USA and Tilray Canada acknowledge there may be some differences in the parties' evidence about certain events, they say credibility is not a significant issue.

[21] Tilray USA and Tilray Canada also point out that examinations for discovery are complete and the parties have exchanged responses to notices to admit.

Indeed, each party's evidence on this application includes affidavits, selections from transcripts of the parties' examinations for discovery, and notice to admit responses.

[22] In submitting that summary trial is appropriate, Tilray USA and Tilray Canada referred me to *Kovacevic Consult Inc. v. Coastal Contacts Inc.*, 2017 BCSC 321 [*Kovacevic*]. In that case, at para. 76, Justice G.C. Weatherill considered whether the defendant's application for summary trial was appropriate. He concluded that it was because the issue turned on an interpretation of a contract, the facts were not complex and the documents were clear. G.C. Weatherill J. also found that where there were factual conflicts, they had no bearing on the issues to be decided. Ultimately, he concluded, at para. 78, that the case is a "poster child" for the concept of proportionality having been adopted as a goal of the *Rules*.

[23] Tilray USA and Tilray Canada submit that the court has all of the material needed to decide the issues which, according to them, are as follows:

a) Who were the parties to the 2017 Agreement?

b) Did the 2017 Agreement expire on May 24, 2018?

c) Was the convertible notes offering or the mortgage renewal a "Financing" under the 2017 Agreement?

d) Was BMO Capital Markets "introduced" to Tilray USA?

e) Did Tilray USA and Tilray Canada breach the non-circumvention clause in the 2017 Agreement?

f) Did Morfund suffer damages as a result of any breach of the 2017 Agreement?

g) Is Morfund entitled to a remedy of unjust enrichment?

[24] Again, Morfund disagrees that the matter is suitable for summary trial. However, if the court agrees that it is suitable, Morfund identifies the issues that the court must resolve as follows:

a) Are both Tilray USA and Tilray Canada bound by the 2017 Agreement?

b) Was the Term of the 2017 Agreement extended through October 2018?

c) Did Tilray USA and Tilray Canada, or either of them, breach the non-circumvention covenant in the 2017 Agreement?

d) Is Morfund entitled to the BMO Success Fee or damages in lieu?

e) Is the BMO Convertible Note Offering a debt financing?

f) Is Morfund entitled to the Romspen Success Fee?

g) Is Morfund entitled to a remedy in unjust enrichment?

h) What is the correct measure of the Morfund's damages?

[25] As mentioned, Tilray USA and Tilray Canada suggest the action turns on straight-forward issues of contractual interpretation. For example, they submit that if the court finds that the parties to the 2017 Agreement are Morfund and Tilray Canada, that finding would resolve Morfund's claim for a success fee under the 2017 Agreement.

[26] In my view, the list of issues identified by the parties, which include many varied legal and factual issues, militate against this matter being suitable for summary trial. It is not straight-forward and is complex. For example, Morfund alleges Tilray Canada executed the 2017 Agreement as agent, or partner of, Tilray USA or Privateer. Tilray USA and Tilray Canada say resolving that issue is simple because Tilray USA did not exist when the 2017 Agreement was executed.

[27] However, there is a significant quantity of evidence in the record concerning communications between Morfund and various representatives who worked

interchangeably for Privateer, Tilray Canada or Tilray USA, including on the day that Tilray USA was incorporated. Unlike the situation in *Kovacevic*, I am unable, at this juncture, to find that factual conflicts in that evidence are irrelevant to the many issues the court is being asked to resolve on this application.

[28] Morfund also alleges that Tilray USA and Tilray Canada breached the 2017 Agreement by working directly with the Bank of Montreal to raise substantial investment and monies in circumstances where it introduced the Bank of Montreal to Tilray USA and Tilray Canada . Tilray USA and Tilray Canada submit that this is straight-forward to resolve because, for example, the impugned transactions occurred after the expiration of the 2017 Agreement.

[29] As previously noted, there is a significant volume of evidence in the record concerning the term of the 2017 Agreement and events that may or may not have extended the term. The evidence also extends to, for example, issues of whether the convertible note transaction at issue in the Claim involved a "Targetco" identified under the 2017 Agreement and whether that type of funding is included in the 2017 Agreement. Again, at this juncture, I am unable, especially in the context of a summary trial application, to find that the factual conflicts in that evidence are irrelevant to many issues the court is asked to decide.

[30] Some, but not all, of the individuals that Morfund communicated with have provided affidavits for the application record. For example, Steven Yoo and Brendan Kennedy provide affidavits in support of Tilray USA and Tilray Canada's application. However, issues of credibility may arise due to Morfund's allegation that Mr. Carter communicated on material issues with other individuals who have not provided affidavits and who are apparently no longer employed by Tilray USA and Tilray Canada.

[31] While I appreciate that the claim involves questions of contractual interpretation, I do not regard the issues raised in it as straight-forward and non-complex. In my view, the claims made, including allegations of agency relationships and unjust enrichment, raise some complex factual and legal issues. Considering all

of the evidence and the totality of the pleadings, I conclude that the complexity of the matter and the sheer volume of issues is not well-suited to a summary trial.

[32] Tilray USA and Tilray Canada point out that all pre-trial steps have been completed and the record for this application includes not only affidavit evidence, but also evidence from the parties' examination for discovery transcripts and their responses to notices to admit. Tilray USA and Tilray Canada also point out that the claim is ripe for determination since the pleadings closed with the filing of the amended response to civil claim over a year ago on June 13, 2022.

[33] It is clear that a two-day summary trial application, if successful, would cost less and consume fewer days than a seven day trial. Although the parties reserved two-days for this summary trial hearing, counsel still ended up rushing through and cutting short their submissions to complete the hearing even after I extended the sitting day.

[34] I do not mention this to be critical of counsel. In fact, Ms. Cocks and Ms. Choi, for the defendants, and Mr. Cadman, for the plaintiff, were extremely organized and thorough in their submissions. I had the benefit of receiving the parties' detailed written submissions that spanned more than 75 pages in total. I also benefitted from receiving a well-organized, multi-volume application record, along with condensed books of authorities and evidence.

[35] While I appreciate that pre-trial steps have been completed and there is a variety of evidence available to the court on this application, that is not the only factor to consider when deciding whether the matter is appropriate for summary trial. The amount at issue in the claim exceeds $7,000,000 and I find that is a significant amount. The significant amount at stake, along with the many and varied issues raised in the claim, are all factors for me to consider in light of the object and purpose of the *Rules*, including proportionality. A seven day trial is not disproportionate to the amount at issue.

[36] While Morfund makes much of the fact that the application was brought on the last possible dates allowed under the *Rules*, I do not find that weighs against the application. The dates for the hearing of the application were selected, in part, to accommodate the availability of Morfund's counsel. The *Rules* set a deadline after which a summary trial application may not be brought and Tilray USA and Tilray Canada filed within that deadline.

[37] After a careful consideration of the pleadings, the issues raised on this application, the evidence in the record, the counsel submissions and the applicable authorities, for the reasons I have discussed, I find that I am unable, on the whole of the evidence, to find the facts necessary to decide the issues of fact or law, or, even if had been able to find the facts necessary to decide the issues, I find that it would be unjust to decide the issues on the application.

Disposition

[38] The defendants' application is dismissed, with costs.

"E. McDonald J."