COURT OF APPEAL FOR ONTARIO

CITATION: Amtim Capital Inc. v. Appliance Recycling Centers of America, 2024 ONCA 225
DATE: 20240326
DOCKET: COA-23-CV-0156

Pepall, Lauwers and Monahan JJ.A.

BETWEEN

Amtim Capital Inc.

Plaintiff (Appellant)

and

Appliance Recycling Centers of America

Defendant (Respondent)

Joseph Figliomeni, Jeffrey Leon, and Ethan Schiff, for the appellant

Jonathan Rosenstein, for the respondent

Heard: March 11, 2024

On appeal from the judgment of Justice David A. Broad of the Superior Court of Justice, dated December 12, 2022, with reasons reported at 2022 ONSC 6877.

REASONS FOR DECISION

A. INTRODUCTION

[1] We agreed with the trial judge's disposition and dismissed the appeal with reasons to follow, which we provide below.

B. FACTS

[2] Amtim Capital Inc. (“Amtim”) is an Ontario-based personal services corporation hired to run the management and sales of Appliance Recycling Centers of America (“ARCA”)’s Canadian subsidiary, ARCA Canada.

[3] On September 24, 2007, the parties entered into two agreements (which the trial judge defined as the “Governing Agreements”): a Sales Agreement, under which Amtim would facilitate and assist with the solicitation of contracts in Canada and represent ARCA’s interests in connection with its Canadian customers, and a General Management Agreement, under which Amtim would manage ARCA Canada’s operations with some assistance from ARCA.

[4] This appeal turns on the facts as found by the trial judge, who dismissed Amtim’s claim as unproven. He found that Amtim had not discharged its onus of proving that ARCA had underpaid Amtim by allocating its head office expenses to its Canadian subsidiary in a manner that did not relate properly to the “supply of services in Canada” and that was “not in accordance with U.S. GAAP, consistently applied”. Amtim argued that this claimed misallocation of overhead costs artificially reduced ARCA Canada’s net profit and the compensation payable to Amtim.

C. ANALYSIS

[5] The trial judge noted that the onus of proving that ARCA breached the Governing Agreements in its allocation of head office expenses to ARCA Canada rested on Amtim.

[6] ARCA provided a binder to Amtim containing financial summaries. Amtim then pursued a production motion. On March 6, 2018, Braid J. ordered, among other things, that:

> 7) on or before May 7, the defendant shall provide to the plaintiff the raw data referred to at question 530 of the defendant's examination for discovery. The data shall be in paper format or electronic format that does not require extra software to review the data and is reviewable off site from the defendant's offices;
>
> 8) the parties shall serve supplementary affidavits of documents no later than May 31, 2018.

[7] ARCA provided data in response to the order, which Amtim says was inadequate.

[8] Amtim's expert, Philip Dowad, said that he was unable to provide a clear opinion as to whether the allocation was in accordance with "U.S. GAAP, consistently applied", because of a lack of ARCA data. The trial judge explained, at paras. 84 and 85.

> In response to this question Dowad offered only a qualified opinion that "the information that has been provided by ARCA does not support a conclusion that the allocation method applied is in accordance with U.S.

> GAAP." He did not offer an unqualified opinion that the cost allocation method applied by ARCA *was not* in accordance with U.S. GAAP.
>
> As noted previously, on cross-examination Dowad expanded on the qualifications to his opinion as follows:
>
> > Q. …My note here is that you had a number of concerns and questions regarding whether… the allocation methods that ARCA says it used were appropriate, and… whether they actually were followed?
> >
> > A. Yes … I think I indicated that – I believe I indicated that the information provided to me does not allow me to reach a conclusion that those two things occurred.
> >
> > Q. And I take it that what you mean by that is that they may or may not – they may have been followed. They may not have been followed. You just cannot – you lack sufficient information to make any reasonable determination one way or the other?
> >
> > A. Yes, that's my conclusion.

[9] Amtim argues that the evidentiary shortfall was the result of ARCA's failure to comply with its disclosure obligations under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, with the production order made by Braid J., and with its own undertaking given at discovery.

[10] The trial judge did not accept this argument. He noted, in context at para. 65, that Amtim had not utilised its right to access ARCA's documents provided in the Governing Agreements. He explained, at para. 93:

> Very soon after the dispute between the parties arose ARCA invited Amtim to review its records pursuant to the

> contractual provision permitting access, with or without an auditor of Amtim's choosing. This invitation was never withdrawn prior to trial. Berta declined to avail himself of the right to review or audit ARCA's records and there is no indication that he mandated or instructed either of Amtim's experts to do so. Dowad was not limited to reviewing the documents listed at Appendix A to his report (including the "ARCA Binder") but had the right of access, by virtue of the Governing Agreements, to all of ARCA's records pertaining to the Canadian operations. He was simply not mandated by Amtim to do so.

[11] The trial judge added, at para 96:

> Amtim was given full discovery all of the relevant documents including the "raw data" (in electronic format) which ARCA had relied upon in carrying out the calculations contained in the brief of documents produced to Berta in July 2010, as ordered by Braid, J. on March 6, 2018. Although ARCA's former counsel Mr. McRae was unable to locate sworn copies of the first two of the four Affidavit of Documents which ARCA served, the evidence indicated that the actual documents listed in those draft Affidavits of Documents were produced by ARCA.

[12] The trial judge noted, at para. 97, that the appellant had failed to take the usual procedural steps:

> Even if ARCA's disclosure of documentation or information might be considered to have been deficient (which I am not persuaded was the case) Amtim's remedy was to bring a motion to compel production (which it did, leading to the Order of Braid, J.) Since Amtim did not bring any further motion or motions for production, it must be taken to have accepted ARCA's position that no further production was required, and no adverse inference can be drawn. (see *Bawas Gas Bars Ltd. v Kiosses*, [1998] O.J. No. 5450 (Gen. Div.), para. 38 and *Wade v. Baxter*, 2001 ABQB 812, para. 25).

[13] The trial judge added that "there was no indication at trial that, following the production by ARCA of the "raw data" as ordered by Braid, J. on March 6, 2018, Amtim took any steps to make enquiries of counsel for ARCA or to otherwise follow up in an effort to render the data production useful for Lewis' purposes."

[14] The trial judge stated, at para. 95:

> Given that the onus of proving that the allocations of corporate overhead costs were improper as not being in accordance with U.S. GAAP consistently applied rested with Amtim, it is not necessary for the court to make a specific finding on whether ARCA had satisfactorily demonstrated through its evidence that the calculations carried out by ARCA accurately reflected the underlying accounting data that it maintained, as compiled in the ARCA Binder, as there is no onus on it to do so. However, it is noted in this respect that ARCA's current controller Todd Swenson ("Swenson") testified that in advance of trial he and his staff engaged in an extensive "tie-out" sampling process which took approximately one month to complete, which verified this.

[15] In short, the trial judge accepted Mr. Swenson's evidence on the accuracy of the financial records. This is a factual finding to which appellate deference is due.

[16] Amtim argues that the trial judge took the wrong approach to the onus of proof. ARCA's records showed that it changed its method of allocating expenses from ARCA to ARCA Canada. Having shown there was a change, Amtim's counsel argues that the evidentiary burden switched to ARCA to provide better proof of the contested numbers. However, the trial judge found, at para. 79, that based on the

expert evidence, alterations in the allocation method are permitted, provided that the result is "rational, reasonable and consistent."

> Given the foregoing, I accept that there may be a range of available allocation methodologies which may be considered rational and reasonable, and it is open to corporate financial management to exercise its own discretion in selecting the allocation methodology to be employed. An assessor or adjudicator charged with determining whether the allocation of corporate overhead costs to a subsidiary was "in accordance" with U.S. GAAP is required to be deferential to the exercise of management's discretion, so long as it is rational, reasonable and consistent.

[17] The appellant argues that it was open to the trial judge, and remains open to this court, to remedy the evidentiary shortfall by drawing an adverse inference that, if the documentary evidence had been properly provided, it would have established the appellant's case.

[18] The trial judge described Amtim's argument, at para. 87:

> Amtim seeks to overcome the qualification of Dowad's opinion by reliance upon the principle permitting adverse inferences to be drawn against ARCA in two respects, as set forth in Mr. Figliomeni's closing written submissions, as follows:
>
> (a) the court should draw an adverse inference against ARCA resulting from its failure to deliver on its promise to prove that the financial summaries contained at Exhibit 26 (labelled the "ARCA Binder"), which were relied on by all of the expert witnesses, are faithful to the underlying data; and
>
> (b) the court should draw an adverse inference against ARCA for its failure to call any of the accountants or

> auditors that were allegedly involved in determining the nature and quantum and method of allocation of ARCA's corporate overhead expenses to ARCA Canada.

[19] After instructing himself properly on the law relating to adverse inferences, the trial judge declined, at para. 94, to draw an adverse inference regarding the provision of the underlying data:

> I am unable to accept Amtim's submission that ARCA had an obligation to prove that the financial summaries contained in the ARCA Binder "are faithful to the underlying data" and that, in the absence of such proof, the court should draw an adverse inference that they are not. In my view this unjustifiably reverses the onus on Amtim to prove that the calculations were wrong.

[20] The trial judge also declined to draw an adverse inference from ARCA's failure to call auditors or other personnel:

> For the reasons set forth above, I am also unable to accept Amtim's submission that the court should draw an adverse inference against ARCA for its failure to call the accountants or auditors involved in determining the allocation of ARCA's corporate overhead expenses to ARCA Canada: para. 96.

[21] As a result, the trial judge dismissed the case. He declined to fix damages on the basis that Amtim, noted at para. 118, "has not proved sufficient facts upon which the damages can be estimated fairly and reasonably." As already explained, it cannot be said that ARCA's conduct prevented Amtim from proving its loss.

[22] The trial judge rejected Amtim's claim to payment for three invoices on the basis that Amtim had failed to prove "that it actually performed the services that would entitle it to payment": para. 126.

[23] We agree with the trial judge's analysis and, on that basis, dismissed the appeal.

[24] Finally, we decline to grant Amtim leave to appeal the costs order of the trial judge. Amtim argues that he erred by failing to reduce the award significantly on the basis that ARCA filed a $2 million counterclaim that it abandoned at the outset of the trial. The trial judge set out the submissions of Amtim's counsel on the counterclaim in his costs reasons, at 2023 ONSC 849, paras. 10-11 and 15, and of ARCA's counsel's submissions, at paras. 16-18. He concluded, at para. 28: "I find that the defendant's proposed reduction of former counsel's fees by 20% to account for any involvement with the counterclaim is reasonable." The trial judge properly instructed himself on the applicable principles and exercised his discretion, to which we defer.

[25] As a practice note, this court does not condone inadequate document production under the *Rules of Civil Procedure*. However, the act of setting an action down for trial signals a party's willingness to proceed on the record and the evidence that it has, and to forego other procedural remedies. The decision to set an action down has consequences. The appellant made the strategic decision to

rest its case on the potential use of an adverse inference and must bear the consequences of its strategic choice.

[26] The appellant shall pay the respondent costs for the appeal in the agreed amount of $15,000 all-inclusive and $281,368 in costs ordered by the trial judge, out of the funds held by the appellant's counsel in trust for this purpose.

"S.E. Pepall J.A."
"P. Lauwers J.A."
"P.J. Monahan J.A."