COURT OF APPEAL FOR ONTARIO

CITATION: SpaceBridge Inc. v. Baylin Technologies Inc., 2024 ONCA 871
DATE: 20241204
DOCKET: COA-23-CV-0851

Tulloch C.J.O., Hourigan and Miller JJ.A.

BETWEEN

SpaceBridge Inc., Advantech AMT Corp., Advantech Wireless Do Brasil Produtos de Telecomunicações Ltda. and Advantech Wireless (EMEA) Ltd.

Applicants (Respondents)

and

Baylin Technologies Inc., Advantech Wireless Technologies Inc. (formerly Baylin Technologies Holdings Canada Inc.), Advantech Wireless Technologies (USA) Inc. (formerly Baylin Technologies (USA) Inc.), Advantech Wireless Technologies (EMEA) Limited (formerly Baylin Technologies (EMEA) Limited) and Baylin Technologies Do Brasil Produtos de Telecomunicações Ltda.

Respondents (Appellants)

Steve J. Tenai and Simon Dugas, for the appellants

James Plotkin and Todd Burke, for the respondents

Heard: April 23, 2024

On appeal from the order of Justice Jessica Kimmel of the Superior Court of Justice, dated July 13, 2023, with reasons reported at 2023 ONSC 4146.

B.W. Miller J.A.:

[1] This appeal arises from a dispute over the interpretation of the indemnification and escrow provisions in an asset purchase agreement. The main issue on appeal is whether the application judge erred in finding that an amendment to the Notice of Application was not statute-barred. For the reasons that follow, I would dismiss the appeal.

[2] The appellants, (collectively, “Baylin”), purchased assets from the respondents (collectively, “SpaceBridge”) in January 2018 through an Asset Purchase Agreement (“APA”). The APA set out a mechanism that prescribed how the parties were to make claims for indemnification from each other. The scope of the right to indemnification was specified in various provisions of the APA, which also provided for an indemnity escrow to be established by a separate Escrow Agreement. Substantiated indemnity claims were to be paid from the Indemnity Escrow, which was to be funded by Baylin. The Escrow Agreement set out the procedures for submitting a claim for indemnity, contesting the claim, resolution, and payment. All claims for indemnity had to be made within 18 months of the close of the APA. Any funds remaining at that time were to be released by the Escrow Agent to SpaceBridge, to be credited towards the purchase price.

The indemnification claim process

[3] Section 8.4 of the APA provided that an indemnified party making a claim against an indemnifying party was to initiate the claim by way of delivery of a written

notice describing the facts alleged as the basis of the claim, the section or sections of the APA alleged to have been violated, and the estimated dollar value of the damages claimed (an “Indemnity Claim”). Section 10.3 set out how notice was to be given for claims under the APA, and when notice was deemed effective. Notice could be given through personal delivery, registered mail, or email. Section 8.9 of the APA provided that amounts payable by SpaceBridge were to first be paid out of the Escrow Fund.

[4] The Escrow Agreement governed the process for claim indemnification payments from the Escrow Fund. Section 4.1(c)(1) of the Escrow Agreement required that a party seeking indemnification from the Escrow Fund deliver a certificate (a “Claim Certificate”) to the Escrow Agent and the party against whom the claim was made, setting out the particulars of the claim. Section 7.9 of the Escrow Agreement set out how notice of these claims was to be given, permitting delivery by “recognized national courier” or email. It did not list registered mail as a permitted means of giving notice.

[5] A party against whom an Indemnity Claim was made had 30 days to object to the claim by delivering an Objection Certificate to the Escrow Agent. If the Objection Certificate was not delivered within 30 days of delivery of a Claim Certificate, the indemnifying party would be deemed to have accepted the correctness of the indemnification claim, and the Escrow Agent would be required to release the amount claimed.

The Supplier Indemnity Claim

[6] Baylin made several indemnity claims. The first two claims – one made with respect to receivables, the other with respect to inventory, pay equity, and software representations – were delivered by email and processed according to the established procedures. This appeal relates to Baylin's third indemnity claim (the "Supplier Indemnity Claim"), in the amount of $1,826,512 (the "Indemnity Claim Amount"), to indemnify Baylin for SpaceBridge having allegedly stopped or delayed full payment to suppliers prior to the close of the APA.

[7] The Claim Certificate for the Supplier Indemnity Claim was sent to the Escrow Agent and SpaceBridge by overnight registered mail on August 29, 2018. This form of delivery would later become an issue.

[8] Davies Ward Phillips & Vineberg LLP, the Escrow Agent, forwarded the Claim Certificate to SpaceBridge on August 31, 2018. SpaceBridge thereafter had 30 days to file an Objection Certificate, failing which it would be deemed to have accepted the claim. SpaceBridge promptly instructed Davies to prepare an objection to the Supplier Indemnity Claim and provided Davies with a detailed memorandum setting out the basis for the objection. Davies drafted an Objection Certificate for SpaceBridge to sign but did not send the draft to SpaceBridge for approval and certification.

[9] Davies spoke briefly with counsel for Baylin on September 18, 2018, and advised that SpaceBridge was objecting to the Supplier Indemnity Claim. However, the Objection Certificate was not sent and Baylin wrote to the Escrow Agent on October 2, 2018 advising that as SpaceBridge had not delivered an Objection Certificate within 30 days, it was deemed to have accepted the Supplier Indemnity Claim. Baylin required the Indemnity Claim Amount to be paid out of the Escrow Fund.

[10] Within 2.5 hours of receiving the demand on the Escrow Fund, Davies forwarded the finalized Objection Certificate to SpaceBridge, which SpaceBridge signed and sent to the Escrow Agent (copying Baylin) less than an hour later, at 5:23 p.m. on October 2.

[11] Baylin took the position that the Objection Certificate had not been delivered within the requisite time period, and on October 4 demanded that the Escrow Agent release the full amount of the Indemnity Claim. Davies, as Escrow Agent, did so on October 10, and, as counsel for SpaceBridge, Davies wrote to Baylin's counsel the following day to advise that the payment was made "without prejudice to any and all rights of [SpaceBridge] in respect of same, including their rights to reclaim such amounts from [Baylin]."

Procedural history

[12] SpaceBridge commenced this application on December 6, 2018, seeking a return of the Indemnity Claim Amount based on relief from forfeiture of the amount released from escrow, or, in the alternative based on a declaration that SpaceBridge complied with the notice requirements of the Escrow Agreement.

[13] Four years later, SpaceBridge amended the application to raise the issue that the Claim Certificate had not been properly delivered in accordance with the procedure established in the Escrow Agreement. Baylin objected to the amendment on the basis that the amendment was statute-barred and that it would suffer prejudice: were the amendment permitted and the argument accepted, the monies would be returned to escrow, but Baylin would be out of time to redeliver the Claim Certificate in a compliant manner and to have the Supplier Indemnity Claim dealt with on the merits.

[14] The application judge organized the issues on application as follows:

1. Did Baylin validly deliver its notice of indemnity and Claim Certificate in respect of the Supplier Indemnity Claim?

    i. Is SpaceBridge barred by the *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B from arguing that the Claim Certificate in respect of the Supplier Indemnity Claim was not validly delivered under the Escrow Agreement?

ii. Is SpaceBridge estopped from arguing that the Claim Certificate in respect of the Supplier Indemnity Claim was not validly delivered under the Escrow Agreement?

iii. If the Claim Certificate was not validly delivered under the Escrow Agreement, can Baylin still pursue a claim for indemnification in respect of the Supplier Indemnity Claim under the APA?

2. If Baylin did validly deliver the Claim Certificate in respect of the Supplier Indemnity Claim, was SpaceBridge's Objection Certificate timely?

3. If Baylin's Claim Certificate in respect of the Supplier Indemnity Claim was validly delivered and SpaceBridge's Objection Certificate was not timely, should SpaceBridge nonetheless be granted relief from forfeiture?

The application judge's reasons

[15] The application judge noted that although the notice provisions of the APA specifically allowed for delivery by registered mail, the notice provisions of the Escrow Agreement did not. She found that the decision to omit registered mail as a form of delivery under the Escrow Agreement was deliberate. In the alternative, she held that registered mail is not a commercially reasonable equivalent to delivery by courier, which the Escrow Agreement permitted. Baylin's claim against escrow was therefore invalid, the funds ought not to have been paid out of escrow, and she ordered Baylin to repay the Indemnity Claim Amount to the escrow agent.

[16] On the question of whether SpaceBridge was barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, from arguing that the Claim Certificate was not

validly delivered, the application judge held that SpaceBridge's amendment to add a new declaration did not constitute consequential relief and, applying s. 16(1)(a) of the *Limitations Act*, was therefore not subject to the two year limitation period.

[17] The application judge further held that SpaceBridge had not made an unequivocal admission that the Claim Certificate had been validly delivered, and was therefore not estopped from asserting that it had not been.

[18] Finally, the application judge held that the Supplier Indemnity Claim had been validly delivered by registered mail, and Baylin's claim under the APA could accordingly still be adjudicated in court, meaning that Baylin had not lost the ability to have the Supplier Indemnity Claim dealt with on the merits.

[19] Given these conclusions, it was unnecessary for the application judge to address the relief from forfeiture argument.

Issues on appeal

[20] On appeal, Baylin raises the following issues:

1. Preliminary issues
    a. The application judge erred by not finding that SpaceBridge's amendment to the Notice of Application was statute-barred; and
    b. The application judge made a palpable and overriding error in not finding that SpaceBridge was estopped from arguing that Baylin's delivery of the Claim Certificate was invalid.

2. Errors in contractual interpretation

    a. the application judge erred in her interpretation of the notice provision of the Escrow Agreement by finding that registered mail was an invalid form of delivery.

Analysis

[21] Baylin's argument before the application judge was, essentially, that SpaceBridge should be confined to its application for relief from forfeiture from having failed to object to the Supplier Indemnity Claim on time, and to its alternative claim that the objection to the Supplier Indemnity Claim was timely. Baylin argued that neither argument should succeed.

[22] Baylin's primary argument on appeal was that the application judge erred in not finding that SpaceBridge's amendment of its Notice of Application – to add a request for a declaration that Baylin had not properly delivered the Claim Certificate – was statute-barred by the general limitation period since it was brought 3.5 years after any claim arose.

[23] As explained below, although I agree with Baylin that the application judge erred in the application of s. 16(1)(a) of the *Limitations Act*, Baylin's broader objection, that the amended Notice of Application was entirely barred by the *Limitations Act*, cannot succeed in any event.

[24] The application judge preferred SpaceBridge's characterization of its amendment of the Notice of Application: that it applied a different legal theory to the same uncontested facts in order to provide an alternative route to the same remedy – the return of the funds to escrow.

[25] The application judge applied s. 16(1)(a) of the *Limitations Act*, which provides that "There is no limitation period in respect of, (a) a proceeding for a declaration if no consequential relief is sought". She held that adding to the notice of application a request for a declaration that the Claim Certificate was not validly delivered was not a matter of seeking consequential relief.

[26] I do not agree that that conclusion can be squared with the jurisprudence of this court in cases such as *Kyle v. Atwill,* 2020 ONCA 476, 152 O.R. (3d) 59.

[27] SpaceBridge has not simply sought a declaration of the state of rights and obligations subsisting between it and Baylin. This is not even a situation, such as the one that the court faced in *Kyle v. Atwill*, where the declaration enables the applicant to pursue other remedies founded on other facts. Spacebridge has expressly sought a remedy of a court order requiring Baylin to return monies to escrow as a consequence of rights that are to be declared by the court. The declaration, if granted, necessitates the relief sought by the applicant. On these facts, the declaration sought by the applicant entails the consequential relief

sought and does not fall within s. 16(1)(a): see *Kyle v. Attwill*, at paras. 72-73, *per* Brown J.A. (concurring).

[28] Nevertheless, the error does not affect the outcome. An amendment to a pleading may be made past the applicable limitations period when the amendment does not plead a new cause of action or a new or alternative remedy: see *1100997 Ontario Inc. v. North Elgin Centre Inc.*, 2016 ONCA 848, 409 D.L.R. (4th) 382, at paras. 19-21. The amendments here did neither. The application judge noted that, even if consequential relief was being sought, "[a]ll that changed when the Notice of Application was amended is that a new declaration was sought that supported the same outcome based on the same facts, just based on an alternative legal theory." SpaceBridge, out of an abundance of caution and to ensure that Baylin knew the argument it would be advancing, sought the additional declaration. But, crucially, it was not required to do so in order to advance its position.

[29] The amendment did not advance a new remedy: SpaceBridge sought, as it always has, the return of the funds paid to Baylin by its Escrow Agent. The amendment would therefore only be barred if it advanced a new cause of action.

[30] It did not.

[31] The original notice of application did not expressly state that since the delivery was not made in compliance with the Escrow Agreement it was therefore legally ineffective. The amended application did, and expressly sought a

declaration to that end. But this does not amount to advancing a new cause of action. A cause of action, following Lord Diplock's definition in *Letang v. Cooper*, [1965] 1 Q.B. 232 (C.A.), at pp. 242-43, is "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person." As explained in Morden & Perell, *The Law of Civil Procedure in Ontario*, 5th Ed. (Toronto: LexisNexis Canada, 2024), at para. 2.438:

> A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based.

[32] In this case, the facts are not disputed, although their legal significance is. I agree with SpaceBridge that what has been asserted in the amendments does not amount to a new cause of action. The fact that the Claim Certificate was delivered by registered mail was set out in the original Notice of Application, while the supporting affidavit referenced the terms of the Escrow Agreement and the APA; both of these agreements were also attached to the affidavit, in full, as exhibits. As this court affirmed in *1100998 Ontario Ltd. v. North Elgin Centre Inc.*, when looking at whether the facts necessary to support an amendment were initially pled, the "Notice of Application should be read with its supporting affidavits and with the evidentiary record for the Application": at para. 17, quoting *Przysuski v. City Optical Holdings Inc.*, 2014 ONSC 3686, at para. 11. The saliant facts on

which SpaceBridge relies are the same as in the original Notice of Application and supporting affidavit.

[33] Baylin disagrees with this reading of the record. It submits that the amended notice of application added new facts that there not pled in SpaceBridge's original Notice of Application. According to the appellants, these include the statement that (1) "Baylin never validly delivered its Claim in compliance with the Escrow Agreement", and (2) "Service by registered mail is a less advantageous mode of service" than courier or email.

[34] These statements do not constitute the pleading of new material facts. Material facts, in the context of pleadings, are those necessary to establish the claim or defence they are advanced to support. In order for SpaceBridge's claim to succeed, it needed to establish that the Claim Certificate was not validly delivered under the agreement. The material facts to support this claim are that the Claim Certificate was delivered by registered mail, and that the Escrow Agreement did not include registered mail as a valid method of delivery. SpaceBridge's original notice of application and the materials that supported it disclosed both of those material facts. Of the two statements mentioned above, the first is a legal conclusion, not a material fact, while the second is a premise in an argument made in the alternative, and not a material fact.

[35] What the amendments did, in effect, was argue a different (but not inconsistent) conclusion about the legal significance of some of the facts that had already been put in play; that is, they explained how those facts altered the parties' duties and obligations to each other. The amendments took the existing facts and arranged them in a new path to the same remedy that was originally sought. They did not advance a new cause of action, and they did not seek a new form of relief. Though the application judge erred in applying s. 16(1)(a) to SpaceBridge's amended Notice of Application, that error is harmless: as the application judge set out in an alternative finding, the claim was founded on existing facts. No limitations period applied to bar SpaceBridge's amendment.

Estoppel and withdrawal of admission

[36] Baylin argues further that the amended application effectively withdrew an admission that delivery of the Claim Certificate was valid, and it was estopped from so doing.

[37] I do not agree that the application judge erred. The application judge noted that SpaceBridge had asserted that the Objection Certificate made in response to the Supplier Indemnity Claim was timely. At most, one could (but need not) infer from that statement that that the Claim Certificate was validly delivered. The application judge reasoned "[t]o be estopped from withdrawing from an admission I would expect the admission to have been made directly and unambiguously. In

this case, the admission would have to be inferred." I agree. The application judge nevertheless carried on to consider the estoppel argument in its entirety and dismissed it on the further basis that Baylin had not demonstrated any detrimental reliance. This analysis is entirely sound, and there is no basis for appellate review.

Interpretation of the Escrow Agreement.

[38] On the ultimate question of whether the application judge erred in her interpretation of the Escrow Agreement, Baylin has not identified any reviewable error.

[39] The Escrow Agreement is not a standard form contract and is reviewable on a deferential standard: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23.

[40] The application judge noted that the Escrow Agreement, which governed the delivery of the Claim Certificate, provided that notice "shall be given in writing and delivered by personal delivery or delivery by recognized national courier or email". Unlike the notice provisions of the APA, which expressly provided for delivery by registered mail, the Escrow Agreement did not, and the application judge was entitled to factor that consideration into her conclusion that they called for different forms of notice.

[41] The application judge's reasoning as to why she concluded that the Escrow Agreement did not permit delivery by registered mail is careful, detailed, comprehensive, and without error. In short, she found it significant that the Escrow Agreement specifically omitted a form of delivery that the APA included, and that this drafting difference was intentional and reflected the significance of the obligation triggered by the delivery of the Claim Certificate. Following *Ross v. T. Eaton Co.*, (1992), 11 O.R. (3d) 115 (C.A.), she also found it significant that the Escrow Agreement – unlike the APA – did not use the language of "sufficiently given", which has been held to indicate that a list of notice modalities is non-exclusive. There is no basis upon which this court should interfere.

[42] Having concluded that the Claim Certificate had not been validly delivered, it was not necessary for the application judge to address the issue of relief from forfeiture argument, and she made no error in not doing so.

DISPOSITION

[43] I would dismiss the appeal. I would award costs of the appeal to SpaceBridge in the amount of $20,000, inclusive of HST and disbursements, as agreed between the parties.

Released: December 4, 2024 "M.T."

"B.W. Miller J.A."
"I agree. M. Tulloch C.J.O."
"I agree. C.W. Hourigan J.A."