KOSKIE MINSKY

JUSTICE MATTERS

Civil Litigation

This newsletter is intended to provide insight for our clients on relevant litigation issues.

Implied Terms and Business Efficacy as tools for Contractual Interpretation: Not Quite Say What You Mean, Mean What You Say

The recent Court of Appeal decision of ***Energy Fundamentals Group Inc. v Veresen Inc***., reminds us of the circumstances in which courts might exercise their power to imply a term into a contract. In this case, the parties entered into a joint venture by way of letter agreement, whereby they were to work together to obtain financing for an energy project. A condition of the letter agreement was that the respondent would have the option to acquire up to a 20% interest in the project upon securing financing.

After financing had been secured, the appellant took the position the option had expired and refused to provide the respondent with the documentation to verify either the pricing of the option or its likely economic value.

The lower court held the option was valid and, although the letter agreement did not address the issue of documentary disclosure, that disclosure "was a necessary incident to the existence of the option right itself", as no reasonable person would have exercised an option without prior disclosure as to its value. The court's reasoning rested upon the principle, as articulated by the Supreme Court of Canada in ***M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd***., that a term might be implied to give business efficacy to a contract, or where a term is considered too obvious to require express inclusion.

Curiously, the appellant only appealed the court's finding that the option included an implied term with respect to disclosure and not the validity of the option itself. The Court of Appeal upheld the lower court's decision, reaffirming that:

- in analyzing whether a contract includes an implied term, a deferential standard of review applies, and an appellate court should only intervene in a lower court's decision if the court can be found to have made a palpable and overriding error, or extricable error of law;

- a contractual term may be implied "on the basis of the presumed intentions of the parties where necessary to give business efficacy (what the parties intended at all events) to the contract or where it meets the 'officious bystander test'", or in other words is so obvious that it goes without saying the parties would have agreed to the term;
- the implied term must be reasonable and assessed as such both in the specific context it is to be applied and on the basis of general reasonableness as a term; and
- the finding an implied term exists does not require a finding that a party actually thought about the term or expressly agreed to the term.

This case is a good reminder that 'what we write may not always be what we mean'. The business efficacy and officious bystander tests are two interpretive tools which may be used by courts to give effect to disputes regarding contractual performance and parties should therefore be cognizant of these tests.

AshleyMadison.com Hack: User Data Leak Exposes Legislative Gaps in Copyright Law

A recent cyber-attack against Ashley Madison.com, a dating website for people looking to have an affair, has resulted in the release of confidential information of its users. This raised questions about online security and what legal recourse is available to users where personal data has been stolen and/or leaked. More importantly this incident has become the most recent example, in a string, where current outmoded legislation has no effect on the ever changing digital environment.

Many online businesses, including Ashley Madison, are built around the notion of safeguarding user information. Still, as citizens of the internet we must nonetheless assume that, despite assurances to the contrary, our data may be leaked and/or misused. Hence, the push from the public has been to force service providers to provide better security and transparency of use over user data.

However, is all of the above moot? Service providers are not interested in transparency as it undercuts their profitability, and online security cannot be guaranteed given the sophistication displayed by hackers. Instead service providers, like Ashley Madison, have turned to a cheaper legal approach in dealing with the foregoing issues. In summary, they avoid dealing with them.

Ashley Madison's End User Licence Agreements ("EULA") includes the following provision:

> **7. User Submitted Content and Copyrighted Material; Prohibited Uses of Submissions and Ashley Madison and Third-party Materials**
>
> By submitting any content (including without limitation, your photograph) to our Site, you represent and warrant to us that the content, including your photograph, is posted by you and that you are the exclusive author of the content, including your photograph, and use of your content by us will not

> infringe or violate the rights of any third party. You waive absolutely any and all moral rights to be identified as the author of the content, including your photograph, and any similar rights in any jurisdiction in the world. By submitting any content (including without limitation your photograph) to our Site, you automatically grant, and you represent and warrant that you have the right to grant, to us, and our licensees, affiliates and successors, a perpetual, worldwide, exclusive, royalty-free right and license to use, reproduce, display, and modify such content or incorporate into other works such content, and to grant and to authorize sub-licenses of the foregoing.
>
> Source: **http://www.ashleymadisontoronto.com/terms-and-conditions/**

By the operation of the EULA, the user has absolutely granted their copyright and authorship over "any content" as submitted to Ashley Madison. Ashley Madison, as the grantee, can then choose to protect and use the copyright in any way it sees fit. Users, as a consequence, are left with no simple legal recourse if that copyright is left unprotected and/or misused.

Online service providers, by using copyright in this manner, have corrupted the intention of the law and have been able to skirt responsibility to users. Ashley Madison, outside the ultimate success of its business model and any potential misrepresentations it made, may not owe a duty of care to its users given that it is the ultimate owner and author of said data.

Whether or not the courts have or will address these issues, the continued misuse of the law in this manner by service providers further reinforces and perpetuates the idea that personal information can be owned, and misused. The lack of legislation establishing a legal framework fosters the belief that service providers can own what users upload (including pictures) without any duty, obligation, and/or responsibility to the person to whom that information is intrinsically tied. Such unregulated forces, solely driven by service providers, oblige users to assume all the risk inherent in the use of online services and create a new norm whereby it is accepted that the service providers themselves take no responsibility when the user data they store and collect is misused and/or leaked.

Contextual approach applied to reinstate administratively dismissed action:

The Ontario Court of Appeal recently allowed a plaintiff's appeal of a motion judge's order declining to set aside the Registrar's order administratively dismissing an action against the respondents, Computer Packages Inc. ("CPI") and Rogers Law Office ("Rogers").

In this action, the appellants sued the respondents for negligently permitting three patents owned by the appellants to lapse and failing to take steps to reinstate these patents. The action was issued in October 2011.

The appellants focused their attention on settling the action against Rogers and did not request a defence from CPI until July 2013, only days after Rogers passed away. An Order to Continue was not obtained following Roger's death. In November 2013 the Court issued a Status Notice which was not received by Appellants counsel, nor was the subsequent Registrar's Order dismissing the action.

The appellants moved to reinstate the action approximately three months after learning of the Registrar's Dismissal Order. The motion's judge refused to reinstate the action because there was an insufficient explanation for the litigation delay and the appellants failed to demonstrate that the respondents would not suffer prejudice if the action was reinstated.

In addition to the four (4) part test applied on motions to set aside a Registrar's dismissal order, the Court of Appeal also considered the two (2) part test applicable on a status hearing. The Court found that both tests do not provide an "exhaustive list of considerations". Rather, the Court must apply a contextual approach and consider "all of the circumstances of the case" to "arrive at a just result." This decision is significant because it confirms the two-part conjunctive status hearing test established by the Court of Appeal in *Faris v. Eftimovski* is subject to the contextual approach requiring the Court to consider all relevant factors to make the fair order.

In allowing the plaintiff's appeal, the Court unanimously held that the litigation delay was adequately explained. In assessing delay, while a plaintiff has the obligation to move an action forward, the Court found that one cannot ignore a defendant's passivity. In this case, the appellants' decision to focus their efforts to settle the action against Rogers and effectively hold the action against CPI in abeyance was consistent with achieving the least expensive determination of a civil proceeding in accordance with Rule 1.04. A settlement with Rogers could have eliminated or reduced the damages claimed against CPI.

The Court of Appeal also held that the motions judge erred in his assessment of prejudice in several respects. Firstly, the lower court judge did not link the question of prejudice to whether a fair trial was possible. Secondly, the court did not address uncontested evidence from the appellants' lawyer that the respondents would suffer no prejudice if the action was reinstated. While the court was entitled to reject this evidence as bald and self-serving, it was not entitled to ignore this material evidence. Thirdly, the Court found that a plaintiff does not automatically fail to rebut a presumption of prejudice by not adducing affirmative evidence. Rather, the court must consider all relevant circumstances, including the defendant's conduct, which in this case, did not support the existence of any material actual prejudice occasioned by approximately two years of litigation delay.

This decision is significant because it reinforces the Court's predisposition to resolve litigation on the merits rather than dismiss claims on procedural grounds for delays occasioned in part by the acts and

omissions of the appellants' solicitors.

***H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173**

Costs Implications for Rule 2.1 Proceedings

Access to justice is a hot-button issue that has received numerous headlines as well as extensive comments from the bench. It is a pillar of any just judicial system. With that said however, this basic right is often abused, as parties routinely commence frivolous, vexatious and abusive proceedings. These proceedings slow the whole legal system to a crawl and force innocent parties to expend enormous sums of money trying to deal with baseless claims. The cost, time and waste is compounded further when dealing with vexatious**[1]** litigants who use every opportunity to abuse the processes of the Court.

In order to combat the worst of these proceedings, last summer Rule 2.1 was enacted. Rule 2.1 allows the Court on its own initiative to stay or dismiss a proceeding which appears on its face to be frivolous, vexatious or otherwise an abuse of process. Practically speaking, Rule 2.1 allows a party to write to the Regional Senior Justice requesting a review of a particular proceeding on the basis it offends the Rules and/or the law to such a degree that there is no chance of success and accordingly ought to be struck. If the Court finds this to be the case, the offending party has the ability to make submissions in writing as to why the proceeding should not be stayed or dismissed. The Court will then render a decision. This streamlined process is far quicker and more cost effective than the traditional route of bringing a motion pursuant to Rule 21.01(b). By proceeding summarily and in writing, Rule 2.1 avoids the pitfall inherent to a Rule 21.01(b) motion which provides a vexatious litigant further opportunity to abuse the processes of the Court.

While this is an enormous amount of power for the Court to wield, it is only meant to be invoked in the clearest of cases.

By way of example, we assisted a client with one such case in *Kaptain Nino King James El-Bey a.k.a. Jamie Howe v. Magnum Opus (Brampton) et al.* In this matter, our client, the Defendant, was the builder/owner of a housing sub-division. The Plaintiff was an adherent of Moorish Law, members of which have been found by the Courts to be "Organized Pseudolegal Commercial Argument Litigants" ("OPCA")**[2]**. OPCA litigants have previously been found to abuse the Court procedures and have been found to be vexatious litigants in Courts across Canada.

The Plaintiff viewed one house in our client's sub-division on the open market but never made an offer to purchase the home. Nonetheless, utilizing principles of Moorish Law, the Plaintiff attempted to assert ownership of the house pursuant to an alleged "verbal contract". He attended at the property numerous times, posted various Moorish Law "ownership permits" to the front door of the home, attempted to slander title by attending the Land Registry Office asking them to transfer title to his name, attended

unannounced at our offices and engaged in other vexatious conduct. The Plaintiff also issued a Statement of Claim seeking "ownership" of the property pursuant to a "verbal contract" and various Moorish Law principles, which have no force in Canada.

Upon review, the Statement of Claim failed to disclose a reasonable cause of action, and relied on principles unknown to Ontario law. As a result, our firm wrote to the Regional Senior Justice and requested the Court institute a Rule 2.1 review. Ultimately, the Plaintiff's Action was dismissed pursuant to Rule 2.1.

What is most notable, is that our client was awarded Full Indemnity Costs against the Plaintiff for all costs incurred *incidental* to the Action as contemplated in s.131(1) of the *Courts of Justice Act.* Thanks to the R.2.1 process, only minimal costs incurred were directly attributable to the litigation procedures. However, significant costs were incurred resulting from the Plaintiff's overall conduct surrounding the litigation as noted above. To our knowledge this is the first such instance in which the Court has awarded costs of this nature in a R. 2.1 proceeding. In Justice Daley's unreported decision, his Honour held:

The Plaintiff instituted an action devoid of any merit, clearly for the sole purpose of disrupting the business of the Defendants. The conduct of the plaintiff was egregious and caused the moving defendant to incur significant legal costs and disbursements. The plaintiff intentionally and without any right to do so, interfered with the good title and ownership of the property in question. The Plaintiff and persons like him . . . must be deterred in instituting meritless actions and an award of full indemnity costs is one means of doing so.

As a result of Rule 2.1 this Action was fully disposed of in only 3 months, giving closure to our client far more quickly and less expensively, than otherwise would have been possible.

---

[1] I use the word "vexatious" liberally, to include those whose conduct is abusive and not just those who have been formally found by the Court to be "Vexatious Litigants" pursuant to s.140 of the *Courts of Justice Act*.

[2] For an understanding of "Moorish Law" and OPCA litigants, please see the decision of the Court of Queen's Bench of Alberta in *Meads v. Meads* 2012 ABQB 571; *http://www.canlii.org/en/ab/abqb/doc/2012/2012abqb571/2012abqb571.html*

Philip E. Graham, Associate
David Silver, Partner
Daniel Resnick, Associate