In the Court of Appeal of Alberta

Citation: United Mine Workers of America, District 18 v. Cardinal River Coals Ltd., 1985 ABCA 28

Date: 19850129
Docket: 16097
Registry: Calgary

1985 ABCA 28 (CanLII)

Between:

District 18, United Mine Workers of America

Plaintiff
(Respondent)

- and -

Cardinal River Coals Ltd.

Defendant
(Appellant)

The Court:

The Honourable Mr. Justice McDermid
The Honourable Mr. Justice Lieberman
The Honourable Mr. Justice Belzil

Reasons for Judgment of The Honourable Mr. Justice Belzil
Concurred in by The Honourable Mr. Justice McDermid
Concurred in by The Honourable Mr. Justice Lieberman

APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE SHANNON DATED THE 24th DAY OF JUNE, A.D. 1983, FILED THE 15th DAY OF DECEMBER, A.D. 1983

COUNSEL:

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E.L. Bunnell, Esq. and R.C. Secord, Esq., for the Appellant

REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE BELZIL

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[1] The appellant Cardinal River Coals Ltd. is the operator of a coal mine at Luscar, Alberta. It is a member of the present Coal Operators' Association which is the successor by amalgamation of two former coal operators' associations in Western Canada. Its mine employees are members of the United Mine Workers of America and their bargaining unit is Local 1656, also called the Luscar Local. The respondent, District 18 of the United Mine Workers of America, comprises all locals of that union in Western Canada from Manitoba to the Pacific Ocean, including Local 1656.

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[2] By Trust Agreement dated May 1, 1948, made between the respondent. District 18 of the United Mine Workers of America, of the one part, and the members of the then coal operators' associations, of the other part, the parties agreed to establish a Welfare and Retirement Fund for the benefit of members of the United Mines Workers of America in District 18. I will refer to this fund as the "Welfare Fund". The appellant was not a member of the Coal Operators' Association at that time but subsequently became one, and does not contest that it was bound by the Trust Agreement. It in fact commenced to make contributions to the Welfare Fund in 1968 and continued to do so in each subsequent year up to and including 1975. The Trust Deed was amended from time to time, consolidated in 1952, further consolidated in 1967 and 1970, and again in 1972. Paragraph 20 of the 1972 consolidation provided as follows:

> "20. Each Mine Operator shall hereafter pay to the Trustees the amount of money agreed to be paid by such Mine Operators as provided in any existing or future wage agreement made between such Mine Operator and the U.M.W. The liability for such payment shall continue as long as there is any wage agreement providing for the payment of further monies into such fund and thereafter, as long as the terms of such wage agreement are being continued by mutual consent or are in effect by operation of law. Such liability shall include all payments now in arrears under such agreement. Such payments shall be made by cheque monthly in favour of the Welfare Fund, District 18, United Mine Workers of America, and shall be made on or before the 20th day of month following the calendar month in which such coal was sold and/or used by each respective Mine Operator, and shall be accompanied by a statement in such form as the Trustees may from time to time require, setting out the details in respect of which the payment is made including the number of tons of coal sold and/or used by such respective Mine Operator during the period for which such payment is made." (emphasis mine)

[3] The Trust Agreement thus provided that the contribution to be made in any year by a Mine Operator should be the subject of negotiation of any future wage agreement made between the United Mine Workers and each operator. As the District of the union has no status to negotiate collective wage agreements, this provision is interpreted to mean any

future wage agreements made between a local of the union and the operator. There is no issue on this interpretation. The negotiation of collective wage agreements is by law to be conducted on the employee side by the local only. The first paragraph in the preamble to the agreement recites that the Trust Agreement is made "pursuant to the provisions of various wage agreements. … providing for the establishment" of the Welfare Fund. There is no covenant binding any mine operator to contribute to the Welfare Fund, unless it has consented to do so as part of an overall wage agreement with its local. Without its consent, there is no liability.

[4] The 1974/1975 Collective agreement between Local 1656 and the appellant, effective to December 31, 1975, was the last collective agreement to contain a provision for contribution to the Welfare Fund. Article XVIII of that agreement provided as follows:

> "ARTICLE XVIII - WELFARE FUND
>
> A. The Employer shall pay assessments to the Welfare and Retirement Fund District 18, of the United Mine Workers of America, at the rate of 20¢ per clean net ton effective upon resumption of operations. Effective January 1, 1975, the assessment rate shall be 270 per clean net ton produced during 1975.
>
> B During 1974 assessments are to be paid into the Welfare and Retirement Fund on the 25th day of month on the previous month's production. During 1975 assessments due are to be paid annually into the Welfare and Retirement Fund on or about the 25th of January, 1976, on the previous year's production.
>
> C. It is understood and agreed that the terms and conditions of the Welfare and Retirement Fund of District 18. United Mine Workers of America, as set out in the Trust Deed and the various additions and amendments thereto are deemed to be part of this Agreement and Cardinal River Coals Ltd. is bound by all the terms and conditions and amendments in such Trust Deed.
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> D. The employer agrees to pay, in total, the Employee's and Employer's share of the Canada Pension Plan contributions."

[5] Between December 1, 1975 and January 19, 1976. Local 1656 and the appellant negotiated the terms of a new collective agreement for 1976 and after some 10 to 12 meetings settled the terms of the new collective agreement for that year. This agreement, signed by the Local and the appellant Cardinal on January 19, 1976, made no provision for contributions to the Welfare Fund by the appellant. In new Article 18 of this agreement, subparagraphs A and B of Article XVIII of the 1975 agreement had been deleted and the whole of new Article 18 pertaining to the Welfare Fund now provided as follows:

> "ARTICLE 18 - WELFARE FUND

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> 18.01 It is understood and agreed that the terms and conditions of the Welfare and Retirement Fund of District 18. United Mine Workers of America, as set out in the Trust Deed and the various additions and amendments thereto, are deemed to be part of this Agreement and Cardinal River Coals Ltd., is bound by all the teems and conditions and amendments in such Trust Deed.
>
> 18.02 The Employer agrees to pay, in total, the Employee's and Employer's share of the Canada Pension Plan contributions."

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[6] There was evidence that the members of Local 1656 were unhappy with the fund because its membership was young and the contributions from its employer, the appellant, benefited mainly older members from other locals. This had been one of the disputes leading to a four month strike by the members of Local 1656 in 1974. They wanted to replace the Welfare Fund with a pension plan which would be more beneficial to them.

[7] Notwithstanding that the collective agreement for 1976 negotiated and signed between the local and the appellant did not provide for contributions to the funds by the appellant, the appellant continued to set aside a royalty of 27 cents per ton in that year in anticipation that a new pension agreement would be negotiated for 1976 and subsequent years. This in fact occurred and the royalty fund so accumulated in 1976 was in fact applied to the new pension plan by the appellant.

[8] The respondent plaintiff contended that there was an agreement between the Local and the appellant, collateral to the 1976 collective agreement, that the appellant would continue to make contributions to the Welfare Fund in the year 1976 at the rate applicable for 1975. The total contribution for 1975 had amounted to over $396,000.00.

[9] The trial judge allowed the respondent's application at trial to introduce extrinsic evidence in proof of that alleged collateral agreement. The rule, an exception to the parol evidence rule, which permits the admission of extrinsic evidence to prove a supplementary or collateral term is stated as follows in Chitty on Contracts, 25th Edition at p.343

> "Supplementary terms. Although extrinsic evidence is not admissible to add to or vary the terms of a written instrument, evidence may be admitted to show that the instrument was not intended to express the whole agreement between the parties. If, for example, the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement. But a heavy burden of proof rests upon the party who alleges that a seemingly complete instrument is incomplete and it would seem that the extrinsic evidence must not be inconsistent with the terms of the instrument.
>
> Collateral terms. Extrinsic evidence may also be admitted to show a collateral agreement or warranty and it is sometimes said that these, too, must not contradict the

> express terms of the written contract. But it is sometimes possible to prove an overriding oral warranty or even a promise not to enforce an express term of the written agreement. Thus is *City and Westminster Properties (1934) Ltd. v. Mudd* the draft of a new lease presented to a tenant contained a covenant that he would use the premises for business purposes only and not as sleeping quarters. The tenant objected to this covenant, and the landlords gave him an oral assurance that, if he signed the lease, they would not enforce it against him. The tenant signed the lease, but later the landlords sought to forfeit the lease for breach of this covenant. Harman J. held that the oral assurance constituted a separate collateral agreement from which the landlords would not be permitted to resile."

[10] Two recent decisions of the Supreme Court of Canada restate the general principles governing the admission of evidence to prove a contact alleged to be collateral to a primary contract in writing. The most recent of these is *Carman Construction v. C.P.R.* (1982) 42 N.R. 147, in Which Martland J. delivered the unanimous decision of the entire Court. He quoted the following statement by Lord Moulton in the decision of the House of Lords in *Heilbut, Symons and Co. v. Buckleton* [1913] A.C. 30 at 47:

> "… It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds', is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by 100%., and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the pact of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by verbal collateral agreements relating to the same subject-matter."

[11] Martland J. then added:

> "This passage was accepted by this court as a statement of the law in *Hawrish v. Bank of Montreal.* [1969] S.C.R. 515. at 520."

[12] In the second recent decision of the Supreme Court of Canada, *Hawrish v. Bank of Montreal,* the principle is stated that the evidence must show a clear intention to create a binding agreement collateral to the primary written agreement. The collateral agreement must not be inconsistent with or contradict the primary agreement.

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[13] The trial judge did not find a collateral agreement. Having ruled that extrinsic evidence surrounding the negotiation of the principal collective agreement was admissible in proof of a collateral agreement, he improperly used that evidence not to find a collateral agreement but to add to or vary the 1976 Collective Agreement by re-introducing into it the specific provisions of Article 18 of the 1975 Collective Agreement which had been deleted from the 1976 Collective Agreement by consent of the parties.

[14] After quoting the relevant part of s.20 of the 1948 Trust Agreement, the trial judge accurately interpreted it as follows:

> "Thus it is clear that the liability for such payments depends upon a wage agreement requiring payment into the fund. Further, such an agreement, once in effect, could be continued by mutual consent or by operation of law."

[15] He then went on to find as follows:

> "Negotiations for the 1976 wage agreement between the defendant and the local took place in December of 1975. Those negotiations resulted in the wage agreement which is in evidence as Exhibit 4. For some curious reasons. Article 18 was altered so as to eliminate items (A) and (B) that had been in the 1975 agreement. Items (C) and (D) of Article 18 of the 1975 agreement were retained and became Sub Articles 18.01 and 18.02 respectively. The result was that the written agreement did not provide an assessment rate for contributions to the fund; nor did it provide a date for payment. … On the preponderance of the evidence, this Court is persuaded that it was agreed between the parties that the defendant would continue to make the payments for the year 1976. It is apparent that the negotiations which commenced in December of 1975 and continued until August 13th, 1976, were conducted on the understanding that those payments would continue. Judging by the words and acts of the parties, I am convinced that there was mutual consent on that issue. This Court reaches that conclusion on the basis of Exhibit 9, in which it is clear that the defendant entered into negotiations with no intention of changing Article 18 as it was in the 1975 agreement or, at least, that it led the representatives of the local to believe that that was the situation."

[16] The respondent faces a dilemma. It does not want to add to or vary or complete the 1976 Collective Agreement by reintroducing into Article XVIII the deleted assessment clause because the issue of the appellant's liability thereunder would raise questions of interpretation or application of the Collective Agreement which would be subject to arbitration either under the agreement itself or under the Alberta Labour Act. As counsel concedes, to be successful it must establish a collateral agreement by the appellant to contribute to the Welfare Fund in 1976. On the authority Of *Carman Construction and Hawrysh* cited above, such a collateral agreement must be independent of the principal collective agreement. It could not therefore be part of a wage agreement upon which, as the trial judge properly held, depends the liability

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of the appellant to contribute to the Welfare Fund as specifically provided by s.20 of the constituting trust agreement of 1948. Such a collateral agreement as alleged, standing alone and independent of the collective agreement would not in any event comply with the requirement of s.20 of the trust agreement to give rise to liability to contribute by the appellant.

[17] The respondent sought to avoid this dilemma by urging the Court to read s.20 as providing for the continuation "by mutual consent" of the one term of the 1975 wage agreement which fixed the 1975 contribution to the Welfare Fund. If that argument was made before the trial judge, it is correctly disposed of by him in holding that it was the wage agreement which might be continued by mutual consent.

[18] The wording of s.20 of the Trust Agreement makes it clear that the parties to that agreement had in contemplation that future wage agreements might not contain a provision for the payment of further moneys into the Welfare Fund, in which event the liability of the mine operator to make such payments would cease. The situation here fell within that contemplation.

[19] In my view the extrinsic evidence admitted at trial falls far short of establishing a collateral agreement. Indeed the testimony of the respondent's principal witness Tamtom makes it clear that there was no such agreement. The extrinsic evidence shows that Article 18 was reviewed during bargaining leading to the 1976 collective agreement and the wording of it settled without provision for contribution to the Welfare Fund in that year because there was an understanding between the appellant and Local 1656 that the appellant would negotiate with the District the winding up of the Welfare Fund with a view to implementing at the local level a new and entirely separate pension plan. While negotiations with the District broke down, the appellant did in fact implement the new pension plan at the local level and contributed to it the royalties accumulated in 1976. This was accepted by Local 1656. While the respondent's witnesses testified of their understanding that the appellant would continue contributions to the Welfare Fund during its negotiations with the District, none testified of an understanding that the appellant would make a double contribution for 1976, one to the old Welfare Fund, the other to the new pension plan.

[20] The appeal is allowed, the respondent's action is dismissed with costs here and below on the scale allowed by the trial judge.

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DATED at CALGARY, Alberta
this 29th day of January, A.D.
1985.

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