WE'VE OVERPAID, NOW WHAT? OLRB CONFIRMS EMPLOYERS' OBLIGATIONS IN ADDRESSING PENSION OVERPAYMENTS

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A recent decision of the BC Court of Appeal in *Cellular Baby Cell Phones Accessories Specialists Ltd. v. Fido Solutions Inc.*[1] provides important guidance to suppliers seeking to terminate dealer agreements pursuant to "immediate" termination for default clauses. In short, the case finds that the failure by a supplier to promptly exercise such termination rights will itself constitute breach of contract by the supplier. The remainder of this bulletin summarizes the case and concludes with some important take-aways for suppliers.

The Facts in *Cellular Baby*

In 2003 the plaintiff, Cellular Baby, became an authorized dealer of Fido selling cellular phone products and wireless plans. The parties entered into their third successive dealer agreement in 2008. Cellular Baby operated 12 retail outlets in BC and Alberta, and was one of Fido's highest producing dealers. In 2009, Cellular Baby accounted for 27% of Fido's total sales and was recognized by Fido for its high customer satisfaction ratings.

Like most dealer agreements, the 2008 agreement at issue in this case was prepared by the supplier (Fido) and its terms were not subject to negotiation. The agreement was for a five-year term and provided that if the parties did not enter into a new agreement on the expiry of that term the agreement would continue month-to-month, subject to termination by either party on 30 days notice. It also permitted Fido to unilaterally set quarterly sales quotas and contained a fairly standard provision stating that Fido "may immediately terminate" for several enumerated events of default, including the dealer's failure to meet sales quotas set by Fido in any three quarters of a calendar year.

Although it had never failed to achieve its assigned quotas before, 2010 was a bad year for Cellular Baby – it did not meet its quarterly quotas at all in Alberta and also fell short in the first, second and fourth quarters in BC. After each of those quarters, Fido sent Cellular Baby a perfunctory email noting its underachievement, but the emails did not suggest any remedial action or warn Cellular Baby that its dealer agreement was in jeopardy as a result.

By sometime in January, 2011, Fido knew it had the right to terminate the dealer agreement under the above-

noted termination provision. Rather than immediately terminating for cause, however, Fido internally analyzed the impact of terminating Cellular Baby to determine whether it could recapture the sales that would be lost from termination. Fido waited until late September, 2011 (some eight to nine months after its right to "immediately terminate" crystallized) before sending its termination notice to Cellular Baby – a delay that came back to haunt Fido.

Cellular Baby sued Fido for improper termination of the agreement, seeking lost profits over the remaining term of the agreement as well as damages for the lost opportunity to sell the business as a going concern. Fido counterclaimed for about $300,000 in unpaid inventory. The trial judge held that Fido wrongfully terminated the agreement (because he found the obligation to terminate "immediately" required Fido to do so within a reasonable period of time, not eight to nine months later), but dismissed Cellular Baby's lost opportunity claim as being speculative and also held that Cellular Baby had failed to mitigate its losses. In the end, the trial judge awarded Cellular Baby only nominal damages of $500.00, and allowed Fido's $300,000.00 counterclaim.

Cellular Baby appealed the damages findings, and Fido cross-appealed the trial judge's findings that it had improperly terminated the agreement.

The BC Court of Appeal Decision

Although 2010 was a bad year for Cellular Baby, February of 2017 (when the BC Court of Appeal released its decision) proved to be a bad month for Fido. The Court of Appeal upheld the trial judge's conclusion that Fido had improperly terminated the agreement, and increased the damages award in favour of Cellular Baby from $500.00 to a total of $2,184,000.00, plus legal costs and interest.

Fido's main argument on appeal was that the trial judge erred by holding it had wrongfully terminated the agreement when it failed to do so immediately upon learning of Cellular Baby's breach of the quota requirements. Fido alleged that the trial judge misconstrued the import of the termination provision and argued that the words "may immediately terminate" gave it the right to terminate *without notice* or warning, but did not require it to do so immediately in the literal sense of the word.

The Court of Appeal acknowledged that when construing a contractual provision courts must read the provision in light of the contract as a whole, and agreed with Fido's interpretation that the words "may immediately terminate" gave Fido the right to terminate without notice or warning if Cellular Baby committed any of the enumerated defaults. In that respect, it found that the trial judge had erred. But the Court of Appeal went on to conclude that the error was not fatal to the trial judge's conclusion that for Fido to lawfully terminate on the basis of this provision, it must still do so within a reasonable period of time. The Court of Appeal agreed with the trial judge that, by waiting some eight to nine months in the circumstances before

terminating, Fido had lost the right to terminate under this provision for Cellular Baby's default in 2010.

With respect to Cellular Baby's appeal on the question of damages, the Court of Appeal found that had the agreement run to the end of its term Cellular Baby would have had the right to sell its business as a going concern to a third party. The trial judge was unable to conclude that the sale of the business was anything more than a possibility and speculation, and found that Cellular Baby failed to prove its losses on a balance of probabilities. The Court of Appeal disagreed.

The Court of Appeal relied on earlier law which sets out the correct approach when assessing a loss of opportunity claim: if the plaintiff shows with some degree of certainty that a future opportunity was lost because of the defendant's breach, some damages should be awarded even if the plaintiff cannot prove the amount of loss with certainty. The more certain the possibility of the loss, the greater the damages award. And where the defendant's conduct caused the loss, any doubt should be resolved in favour of plaintiff.

The Court of Appeal found that while it is impossible to say with certainty what would have happened, that uncertainty is properly dealt with by applying a modest deduction. Because Cellular Baby previously had a buyer willing to purchase its business for about $2.1 m, was one of Fido's largest dealers in BC and had a profitable business, the court applied a modest deduction to account for the uncertainty and awarded it damages for this lost opportunity in the amount of $1,617,000 (plus lost profits and business losses that took the total award up to $2,184,000.00).

Finally, the Court of Appeal also found the trial judge erred in concluding that Cellular Baby had not acted reasonably to mitigate its damages. Fido extended the termination date to give Cellular Baby some time to sell its business, but insisted that as a condition of any sale, it must release Fido of any liability from future claims. Cellular Baby elected not to do so. The Court of Appeal concluded that the trial judge erred in finding that Cellular Baby should have availed itself of this opportunity because the duty to mitigate does not require a party to release claims against a wrongdoer. Accordingly, the Court of Appeal found that no amount should be deducted from the damages award on the basis that Cellular Baby failed to properly mitigate its damages.

Key Take-Aways For Suppliers

1. If your dealer agreement permits you to terminate *immediately* for cause, do not delay in exercising that right. The language of your dealer agreement, assuming it is a contract of adhesion like the one in this case, will be read strictly against you. You must exercise the termination right within a reasonable amount of time. While the case does not establish a bright line rule as to how much time you have (the length of time will depend on the circumstances in each case), if you delay for months you do so at your own peril.
2. If your dealer shows with some degree of certainty that a future opportunity was lost due to your

improper termination of its dealer agreement, the court will be inclined to award damages even if the dealer cannot prove the amount of loss with certainty. Any uncertainty of outcome of a lost opportunity claim will be resolved against you.

3. The duty to mitigate does not require a dealer to provide you with a general release releasing all claims against you. The Court of Appeal specifically noted that it may have reached a different conclusion on the mitigation point had Fido not made the potential sale of Cellular Baby's business conditional on Cellular Baby giving it a release.
4. Be reasonable when setting sales quotas. The trial judge reviewed Fido's practices in this regard and compared the quotas it set for Cellular Baby with those for other major dealers at the relevant time. The trial judge found that Fido increased Cellular Baby's quotas in 2010 but reduced those of its other similar dealers without any reasonable explanation. He therefore concluded that because Cellular Baby's quota was not reasonably set in 2010, it could not be said that Cellular Baby breached the agreement. While the Court of Appeal did not address this issue given its finding that Fido failed to exercise its termination right within a reasonable time, suppliers should be mindful of the trial judge's findings - set reasonable quotas, and be prepared to explain how and why they are reasonable.
5. Warn your dealer if its conduct may result in termination before exercising your termination right. The trial judge found that Fido failed to act reasonably and in good faith by failing to: a) respond and deal with some legitimate complaints Cellular Baby had raised; b) warn Cellular Baby that its dealer agreement was in jeopardy when it missed its quotas; and c) offer assistance to Cellular Baby to address the quota problems before terminating. While the Court of Appeal did not need address this point either, to defend against bad faith allegations suppliers should do all of the above before pulling the pin on a dealer.

by W. Brad Hanna

[1] 2017 BCCA 50.[ps2id id='1' target=''/]

A Cautionary Note