COURT OF APPEAL FOR ONTARIO

CITATION: Austin v. Bell Canada, 2020 ONCA 142
DATE: 20200221
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MacPherson, Sharpe and Jamal JJ.A.

BETWEEN

Leslie Austin

Plaintiff (Appellant)

and

Bell Canada, Bell Media Inc., Expertech Network Installation Inc., and Bell Mobility Inc.

Defendants (Respondents)

Mark Zigler, Jonathan Ptak, and Garth Myers, for the appellant

Dana Peebles, for the respondents

Heard: February 5, 2020

On appeal from the judgment of Justice E.M. Morgan of the Superior Court of Justice, dated August 12, 2019, with reasons reported at 2019 ONSC 4757, 147 O.R. (3d) 198.

By the Court:

[1] The appellant is the representative plaintiff in a class action brought on behalf of retirees who are beneficiaries of the respondents' ("Bell") Pension Plan.

[2] The sole issue for this court to decide is the proper calculation of the cost-of-living adjustment under the Plan for 2017. That turns on the interpretation of the Plan's definition of the "Pension Index" and how that definition works together with

the provisions in the plan governing the calculation of the amount of the cost-of-living adjustment. The appellant argues that the motion judge erred by finding that Bell was entitled to round up the annual percentage increase in the Consumer Price Index, mathematically calculated as 1.49371%, to two decimal points, or 1.49%. The appellant says that, properly interpreted, the Plan requires Bell to follow Statistics Canada's policy of rounding to only one decimal point, or 1.5%. The difference is significant. Another provision in the Plan provides that to determine the annual pension increase for the appellant and most other Bell Pensioners, the Pension Index is to be rounded to the nearest whole number. If the appellant is right, 1.5% is rounded to 2%. If Bell is right, 1.49% is rounded to 1%. The difference to the class members between a 2% and a 1% increase in the 2017 pension is over $10 million for the first year and, over the long-term, over $100 million.

Background

[3] The appellant, a longtime Bell Canada employee, brings this class proceeding on behalf of approximately 35,000 pensioners who are all beneficiaries of the common Pension Plan administered by the respondents which are all part of the Bell corporate family.

[4] The motion judge certified the proceeding under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. It was common ground that the matter was suitable for

summary judgment. As we explain below, the motion judge concluded that Bell was entitled to round the Pension Index to two decimal points and accordingly granted summary judgment dismissing the action.

The Bell Pension Plan

[5] The motion judge's ruling and this appeal turn on two provisions in the plan dealing with the annual indexing of benefits.

[6] The first is the definition of Pension Index in s. 1.29 of the Plan:

> **1.29** "Pension Index" means the annual percentage increase of the Consumer Price Index, as determined by Statistics Canada, during the period of November 1 to October 31 immediately preceding the date of the pension increase;

[7] The second key provision is s. 8.7, which governs the calculation of the annual indexation increase. The case turns on how s. 1.29 and the determination of the Pension Index works in conjunction with the rounding provision in s. 8.7(iv):

> **8.7** On every first day of January, the retirement benefits payable to a Member, the surviving Spouse or the Beneficiary under the DB Provisions shall be augmented by a percentage determined as follows:
>
> (i) If, on the date of the increase, the Member has not reached 65 years of age, or would not have reached 65 years of age in the case of a surviving Spouse or Beneficiary, the Pension Index, limited to a maximum of 2% and calculated on a compounded basis.
>
> (ii) If, on the date of the increase, the Member has reached 65 years of age, or would have reached 65 years

> of age in the case of a surviving Spouse or Beneficiary, the percentage shall be the greater of:
>
> (a) 60% of the Pension Index, limited to a maximum of 4% and calculated on a compounded basis; or
>
> (b) the percentage determined under paragraph (i) above.
>
> (iii) For the purpose of any increase applicable to a Member, the surviving Spouse or the Beneficiary within the first year of retirement, the applicable percentage shall be prorated, taking into account the number of full calendar months of retirement in the calendar year preceding the date of the increase.
>
> (vi) All percentage increases shall be rounded to the nearest 2 decimal points, except for the percentage increase under paragraph (i) above which shall be rounded to the nearest whole number.

[8] It is common ground that for the relevant period, the Consumer Price Index rose from 127.2 to 129.1 and, as a matter of simple mathematics, that represented a 1.49371 % increase. It is also undisputed that Statistics Canada has a policy of rounding the annual percentage increase to one decimal point. Accordingly, Statistics Canada published the annual percentage increase for the relevant period as 1.5%. Section 8.7(iv) provides that percentage increase for all pensioners other than those who are in their first year of retirement (s. 8.7(iii)), is to be rounded to the nearest whole number. Accordingly, if, as the appellant argues, the Statistics Canada policy governs, the Pension index of 1.5% should be rounded to 2%. On the other hand, Bell asserts that the words of s. 8.7(iv) apply: "All percentage increases shall be rounded to the nearest 2 decimal points". If s. 8.7(iv) does apply

to s. 1.29, the Pension Index is 1.49% which, when rounded to the nearest whole number, becomes 1%.

The Motion Judge's Reasons

[9] The motion judge turned first to s. 1.29. He held that the proper interpretation of that provision depended upon the importance to be ascribed to the comma after the words "Consumer Price Index". He reviewed in some detail case law and academic writing, both Canadian and American, dealing with the significance to be attached to commas that follow a sequence of items. Ordinarily, if there is no comma, the "last antecedent rule" states that the phrase at the end of the list will modify only the last item. If there is a comma, the "series qualifying rule" states that the phrase will modify all items on the list: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014), at p. 470. Here, there is not a list but there are two items: (1) the "annual percentage increase", and (2) the "Consumer Price Index". Accordingly, the comma after "Consumer Price Index" suggests that the phrase "as determined by Statistics Canada" modifies both items.

[10] The motion judge appears to have accepted that interpretation but found that it was rebutted by the need to read the Plan as a whole. He focused on the s. 8.7(iv) provision that "[a]ll percentage increases shall be rounded to the nearest 2 decimal points". There was uncontradicted expert evidence that the calculation

required under s. 8.7(ii)(a) for pensioners aged 65 or older – 60% of the Pension Index – will never yield more than a two-decimal place figure if the Statistics Canada one-decimal place increase is used. The motion judge found, at para. 61, that as using Statistics Canada's one-decimal rounding of the Pension Index "would eliminate the need for any further rounding as set out in s. 8.7(ii)," it would "render meaningless the provision in s. 8.7(iv) that all rounding be to two decimal places". He added that the expert evidence indicated that following Bell's policy of rounding the Pension Index to two decimal places would often yield a three-decimal place figure in the s. 8.7(ii)(a) calculation. The Bell two-decimal point rounding of the Pension Index would therefore give s. 8.7(iv) meaning.

[11] The motion judge concluded that while Statistics Canada uses the one-decimal place approach to rounding for its own purposes, that method did not govern the Plan when read as a whole. The key passage in his reasons is para. 65:

> Section 8.7 of the Plan is a precisely drafted, mathematically crafted section that is dependent on rounding being part and parcel of the calculations it prescribes. It is not possible to surmise that the drafters of the Plan went to all of that trouble and detail only to have the entire exercise rendered meaningless by a deferral to Statistics Canada's method of rounding when doing the initial Pension Index calculation under s. 1.29 of the Plan.

[12] At para. 64, the motion judge referred to the *contra proferentem* rule that would favour the pensioners as the non-drafting party, but stated that "there is no rule of interpretation that would implement a version of the Plan that renders it partly meaningless" or "effectively gut" a key aspect of the method of calculation.

ANALYSIS

[13] The appellant accepts that as the issue in this appeal turns upon the interpretation of a contract, the standard of review is that laid down by *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. To succeed, the appellant must establish either a palpable and overriding error of fact or an extricable error of law.

[14] The appellant argues that this appeal turns on the plain and ordinary meaning of s. 1.29. The appellant accepts that s. 1.29 must be read in the light of the Plan as a whole. The appellant argues, however, that the definition in s. 1.29 is unaffected by s. 8.7(iv) which deals only with percentage increase in pensions under s. 8.7. The appellant submits that the motion judge made a "foundational error" by finding that unless s. 8.7(iv) applies to the definition of Pension Index, s. 8.7(iv) would be meaningless. The motion judge failed to take into account the uncontradicted evidence regarding the calculation under s. 8.7(iii) of the annual percentage increase of pensioners who retired during the current year. Those

pensioners are not entitled to the full year's cost-of-living increase and their annual percentage increase is prorated according to the number of months of retirement. The expert evidence established that by reason of the prorating, using a Pension Index rounded to one decimal place will often yield an annual percentage increase with three or more decimal places. Therefore, resort must be had to the s. 8.7(iv) two-decimal place rounding rule. That, in turn, means that using the Statistics Canada one-decimal point rounding to determine the Pension Index does not render s. 8.7(iv) "meaningless" and the whole foundation for the motion judge's interpretation collapses.

[15] Bell argues that the motion judge did not err. The evidence regarding the calculations and need to round or not round was uncontradicted and the argument that the motion judge made a palpable and overriding error of fact should be rejected. Bell has used the two-decimal rounding policy since 1998 with no complaint from the pensioners. The motion judge did not err by finding that the Statistics Canada one-decimal policy would render s. 8.7(iv) meaningless in relation to s. 8.7(ii) which governs the annual percentage increase for all but a very small number of pensioners.

[16] For the following reasons, we conclude that the appeal should be allowed.

[17] Our starting point is the language of s. 1.29. We agree with the appellant and the motion judge that, on its face, s. 1.29 states that <u>both</u> the annual

percentage increase and the Consumer Price Index are to be determined by Statistics Canada. That conclusion is supported by the comma following the phrase "Consumer Price Index" and the "series qualifying rule" referred to by the motion judge.

[18] We add here that the appellant led evidence to explain the reason for the Statistics Canada one-decimal point rounding policy. An expert testified that the Consumer Price Index cannot be accurately measured to two decimal points and "to publish more than one decimal point would convey a message about the precision and accuracy of the index that would not be justified." The one-decimal point rounding is also the convention among most statistical agencies.

[19] We do not accept Bell's submission that adhering to the one-decimal rounding policy is undermined by the expert's admission on cross-examination that Statistics Canada follows the one-decimal rounding policy "for its own purposes" and "is not in the business of telling people how to use [its] data." As the expert explained, the policy Bell adopts for the Plan is matter for negotiation between Bell and its employees. In our view this simply states the obvious. Statistics Canada determines and publishes the annual percentage increase in the Consumer Price Index using what it regards as sound statistical practices. Statistics Canada has no authority to dictate how pensions are to be adjusted for inflation and parties are free to adopt whatever method they wish. However, the question before the motion

judge and before us is whether the words in the Plan require the parties to adopt the Statistics Canada approach.

[20] We agree with the motion judge that the language the parties have adopted in s. 1.29 points in the direction of applying Statistics Canada's calculation of the annual percentage increase of the Consumer Price Index. That interpretation is supported by use of the comma indicating that the phrase "as determined by Statistics Canada" modifies both the phrases "Consumer Price Index" and "annual percentage increase". It is also supported by the evidence of sound statistical methodology supporting the one-decimal rounding policy.

[21] In our view, having regard to the grammatical meaning of s. 1.29 and the evidence regarding accepted statistical conventions for rounding, a strained interpretation of s. 1.29 would be required to make it mean that Statistics Canada determines only the increase in the Consumer Price Index and leaves it to Bell to adopt a different rounding policy to determine the Pension Index.

[22] This brings us to the next stage, namely reading s. 1.29 in the context of the Plan as a whole. We agree with the motion judge that this is an important part of the interpretive exercise. We also agree that when a pension scheme should be interpreted as a whole and that the meaning of a particular clause should be considered in conjunction with other relevant clauses: *Dinney v. Great-West Life Assurance Co.*, 2009 MBCA 29, 236 Man. R., 299, at paras. 61-2; Geoff R. Hall,

Canadian Contractual Interpretation Law (3rd ed.) (Toronto: LexisNexis Canada, 2016), at p. 256. There can be no doubt that the crucial point for the motion judge was his conclusion that accepting the Statistics Canada one-decimal rounding policy would render s. 8.7(iv) "meaningless" or "partly meaningless". In our view, that conclusion rests on either (or both) a palpable and overriding error of fact or an extricable error of law.

[23] The palpable and overriding error of fact is that the motion judge's conclusion ignores the uncontradicted evidence that using the Statistics Canada one-decimal rounding policy will frequently produce a three-decimal figure in the calculation of the annual percentage increase for recently retired pensioners under s. 8.7(iii), and that the two-decimal rounding provision on s. 8.7(iv) applies and therefore has meaning.

[24] Bell argues that as the evidence was uncontradicted, the motion judge could not have misunderstood or mistaken its effect. However, even if the motion judge understood and did not mistake the effect of the evidence, we have no explanation for why he failed to take it into account in reaching the conclusion that s. 8.7(iv) would be rendered "meaningless". In our respectful view, the motions judge's failure to apply the evidence to the interpretation of the Plan amounts to a palpable and overriding error of fact. In the words of *Waxman v. Waxman* (2004), 186 O.A.C. 201, at paras. 296-7, his finding was "made in conflict with accepted

evidence" and is "plain to see" and therefore "palpable". The error is also "overriding" as it determined the result.

[25] If we were to accept Bell's submission that the motion judge only meant "meaningless" in relation to s. 8.7(ii), we are left with his conclusion that s. 8.7(iv) would be rendered "partly meaningless". In our view, that reflects an extricable error of law.

[26] It is not apparent what "partly meaningless" means. A contractual provision either has a meaning or it does not. Courts will strive to give all provisions in a contract meaning and to avoid an interpretation of one provision that would render another provision meaningless or redundant. The redundancy rule relied upon by the motion judge was explained by this court in *Scanlon v. Castlepoint Development Corp.* (1992), O.R. (3d) 744, at para. 88 (leave to appeal refused, [1993] S.C.C.A. No. 62).

> To the extent that it is possible to do so, [a contact] should be construed as a whole and effect should be given to all of its provisions. The provisions should be read, not as standing alone, but in light of the agreement as a whole and the other provisions thereof: *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57 at p. 66, 25 D.L.R. (4th) 649 at p. 655. The court should strive to give meaning to the agreement and "reject an interpretation that would render one of its terms ineffective": *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 at p. 425, 71 D.L.R. (4th) 488 at p. 499.

[27] In this case, as we have explained, the rounding provision in s. 8.7(iv) would not be rendered ineffective by giving s. 1.29 its plain grammatical meaning. It will be frequently necessary to round to two decimal points to determine the annual percentage increase for recently retired pensioners.

[28] Bell asks us to ignore that fact as the recently retired pensioners represent only between 4% and 5% of the class. That number amounts to hundreds of pensioners each year. We fail to see why that category of pensioners should be ignored in the interpretation of the Plan.

[29] Adhering to the Statistics Canada one-decimal rounding policy for the purpose of determining the Pension Index pursuant to s. 1.29 does not strip s. 8.7(iv) of meaning. The plain grammatical reading of s. 1.29 is readily reconcilable with the rounding method specified by s. 8.7(iv) with respect to the other provisions of s. 8.7 and it follows that the plain grammatical meaning should be followed.

[30] Alternatively, the motion judge made an extricable error of law by failing to consider the *contra proferentem* rule. The motion judge found the wording of the Plan to be "awkward" (para. 69). He referred briefly to the appellant's *contra proferentem* argument but did not explain why the doctrine should not apply.

[31] The Plan was drafted by Bell without meaningful participation by the pensioners who are a vulnerable group in relation to Bell. The *contra proferentem*

rule of interpretation "applies to contracts ... on the simple theory that any ambiguity ... must be resolve against the author if the choice is between him and the other party to the contract who did not participate in its drafting": *McClelland & Stewart Ltd. v. Mutual Life*, [1981] 2 S.C.R. 6, at p. 15. *Contra proferentem* is regularly applied to resolve ambiguities in pension documents in favour of pensioners: see *O'Neill v. General Motors of Canada Ltd.*, 2013 ONSC 4654, 6 C.C.P.B. (2nd) 257, at paras. 21-2.

[32] In our view, the Plan is not ambiguous and, for the reasons above, the appellant's interpretation is the correct one. We therefore do not find it necessary to resort to *contra proferentem*. However, it is a very short step to take from the motion judge's observation that the wording of the Plan is "awkward" to finding that the wording is ambiguous. Having found the wording to be "awkward", the motion judge should have taken that step, applied the *contra proferentem* doctrine, and ruled that given the ambiguity, the interpretation favouring the pensioners should prevail. His failure to do so represents an extricable error of law reviewable by this court under the *Saatva* standard of review.

DISPOSITION

[33] Accordingly, we allow the appeal, set aside the summary judgment dismissing the action and in its place award summary judgment in favour of the appellant. The matter is remitted to the motion judge for any ancillary or consequential matters that may arise from our judgment.

[34] The appellant is entitled to costs fixed in the amount agreed to by the parties, namely $22,500 inclusive of taxes and disbursements.

Released: JCM FEB 2 1 2020

J.C. MacPherson J.A.

Paperny J.A.

Myers J.A.