SUPREME COURT OF NOVA SCOTIA

Citation: *Innotech Aviation v. Skylink Express Inc.*, 2017 NSSC 176

Date: 2017-06-29
Docket: Hfx No. 454660
Registry: Halifax

Between:

Innotech Aviation, a division of IMP Group Limited

Applicant

v.

Skylink Express Inc.

Respondent

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	March 28 and 29, 2017, in Halifax, Nova Scotia
Written Decision:	June 29, 2017

Counsel:	Christa M. Brothers, Q.C., and Jeff Waugh for the Applicant Gary A. Richard, for the Respondent

By the Court:

[1] The parties to this Application in court have had a lengthy business relationship. The Applicant, Innotech Aviation (hereinafter "IMP"), is a division of IMP Group Limited, and provides fueling and maintenance services to airlines that rent hangar space from IMP, as well as pilot and passenger lounges, in flight catering, weather briefing and flight planning.

[2] The Respondent, Skylink Express Inc. (hereinafter "Skylink") is a regional air cargo operator servicing large courier and cargo companies. It states on its website that it is Canada's largest regional air cargo operator. Skylink's head office is in Toronto, with departure locations all across Canada.

[3] The parties first began their relationship on July 15, 1998, when they executed a lease. Pursuant to its terms, IMP agreed to let 11,365 square feet of hangar space to Skylink, as well as some office and maintenance space. This was considered by the Respondent, at the time, to be sufficient hangar space for any one of five aircraft, which were specifically noted in the lease.

[4] This lease was specified to be for a one-year term. It will be referred to, at times herein, as "the original lease". It was renewed, upon its expiration, for a further three (3) years with provision for new rental rates, which were to incrementally increase each year. This was done in the form of an amendment to the original lease. This 1999 amendment provided that the terms of the original remained in full force and effect except to the extent that they were expressly varied therein. It was to expire on July 14, 2002; however, the 1999 amendment was varied by the parties on December 1, 2001. More storage space was allocated on the hangar floor to Skylink, and the rental premiums were increased accordingly. Again, these changes were appended as a schedule to the 2001 Addendum.

[5] The remaining addenda (prior to 2014) may be very generally summarized as follows:

	Date	Document	Effect

#3	July 15, 2002	Addendum to lease	Extends lease to July 14, 2003. Updated rental amounts in Schedule I
#4	July 1, 2004	Addendum to lease	Extension to July 14, 2005. Increase storage area and rent payable.
#5	December 1, 2004	Addendum to lease	Adds additional storage space, office space and 2 parking spaces, increases rent payable in Schedule I.
#6 - 10	Further 1 year extensions in July 2005, 2006, 2007, 2008, October 2009 and August 2010	Addenda to lease	August 2010 lease extension expires on July 14, 2011.

[6] It is apparent from the amended affidavit of Joel Bédard, Vice President and GM of Innotech, that after July 14, 2011 the Respondent was, in effect, a tenant of the Applicant on a month-by-month basis. There were no further written variations or addenda, until the very last one.

[7] The antecedents to this final document ("the 2014 Addendum") have fueled the parties' present dispute. Negotiations commenced in late 2013, after the Applicant approached Skylink and requested that the Respondent's month-to-month tenancy be replaced with a written, fixed-term extension. Eventually, the discussions reached a point where options were extended to the Respondent for terms of one, three or five years. Each option carried with it its own distinctive rent for the office, hangar, maintenance shop, stores and parking space that would be involved. The one-year option came with a five percent (5%) rent increase over the (then) current figure. The other two options carried four percent (4%) and three percent (3%) annual increases respectively. These terms were offered to the Respondent via email from the Applicant's former Base Manager (Glenn Lyon) dated December 3, 2014.

[8] Further discussions ensued between the parties. The Respondent requested that the Applicant prepare a five-year lease document for its execution. By April 27, 2015, however, the document had not yet been signed by Skylink. On that date, Skylink's (then) Director of Maintenance, Graham Morgan, emailed (Vice President

and General Manager of Innotech) Joel Bédard advising that he only had "one question left". It was as follows:

> If we were to change the type or number of aircraft we have, or need more office space, would we be able to do an Ad Hoc Addendum to the lease when the event happened?

Mr. Bédard replied in the affirmative that same day:

> Yes, we would just do an addendum reflecting that change to ensure that we don't have the same problem. But it would be important to let us know ASAP so we can reflect the changes. If it is only temporary I would rather lease everything as is and agree to a temporary rate via e-mail when it comes to extra aircrafts we can just agree on a daily rate.

[9] The Respondent then executed the final addendum to lease on April 27, 2015, which the parties had made retroactive to July 15, 2014.

[10] Almost contemporaneous with the execution of the five-year addendum by the Respondent (in fact, three days later) IMP provided Skylink with a credit note in the amount of $27,121.53. This represented the cost to the Respondent of the hangar space for which it had paid since October 2013, but not actually used, and had been sought by the latter.

[11] The Respondent initially paid the rental stipulated in the 2014 Addendum. On September 15, 2015, however, it indicated to IMP that it would be reducing the number of Cessna C208 Caravan aircraft, and the number of Beechcraft B1900 aircraft, stored at the Heliport. The intent was that the Respondent would no longer pay IMP for the space that had been reserved in the hangar for aircraft that it no longer needed to store there.

[12] This was followed up by an email to the Applicant on October 15, 2015:

> Hi Dennis,
>
> As per our discussion, this email is to <u>reiterate all our C208 hangar spots 30-day termination notice (provided in September)</u> with a 31Oct2015 end date and to now add that, due to our B1900 flight contract ending on 31OCT2015, we must now serve 30-day termination notice (final date 14NOV2015) for our YHZ B1900 hangar spot, as well.

> C208 CGSKS + C208 CGFGA have already been moved off base as of today.
>
> B1900 CGSKN will be departing YHZ for the last time on 31OCT.
>
> This will leave only our C208 CGEGA in our B1900 hangar spot until ongoing inspections are completed in early November. At that time, it too will depart YHZ.
>
> Please note we are still assessing our office requirements so no change to that part of the YHZ lease agreement is being raised at this time. Graham Morgan will contact you directly should we decide any office reductions are necessary from YYHZ-based (sic) flight contract loss. [Emphasis added]

[13] In the course of the parties' subsequent discussions (more on which will be said later) it was pointed out to the Respondent that there was no "out" or termination clause in the agreement(s). Then Skylink sent another email to the Applicant dated November 12, 2015:

> [Management] confirmed we are not attempting to terminate the lease but merely require an Addendum to the lease to show the present situation and change in requirements. This had been done repeatedly in the past as aircraft or office requirements change. You confirmed this would happen, if there was a change in aircraft or office space, prior to the signing of the present lease. We never anticipated such a dramatic change at the time but we could be in the reverse situation and need the aircraft space back if UPS open [sic] a YHZ Gateway. Such is the industry in these times. [Emphasis added]

[14] Mr. Bédard provided IMP's position that very day:

> Hi unfortunately we can't do this. The reason we accepted to change the last time was because you still had many aircrafts and your company was going to review a 5 years [sic] agreement. We had no obligation to change and or credit your company for the other lease but we accepted to help out as your [sic] were signing for a long term. This being say [sic] the new lease agreement that was signed and agreed by both party [sic] are firm and for the terms it was agreed with no out clause. [Emphasis added]

[15] Skylink, which had been communicating up to this point through Graham Morgan, then had this to say, through its Director of Commercial Operations, Todd Gilbert, on December 14, 2015:

> Given your 27APR commitment to aircraft number modification process via "an addendum reflecting that change", our signing in good faith based on this understanding, your being the signatory to the current addendum, and our September notice to Innotech regarding impending October/November changes to our local aircraft numbers, we see no reason why implementing another aircraft addendum to them any previous ones breaches our existing agreement.

[16] While Skylink continues to pay for office space in accordance with the 2014 Addendum, it completely stopped paying rent (in November, 2015) for the use of the hangar space allocated in that document for its aircraft.

[17] I.M.P. has demanded payment from the Respondent of these monies, whereas the Respondent takes the position that it was entitled to adjust (and ultimately eliminate) the rental payment for the hangar space, as and when that space was no longer required for operational purposes.

Issues:

A) What are the Respondent's obligations pursuant to the original lease and the 2014 Addendum?

B) Is there an enforceable collateral contract between the parties entitling Skylink to reduce and/or eliminate the rental for aircraft hangar space before the end of the five year term in the 2014 Addendum if it no longer needs the space?

Analysis:

(A) What are the Respondent's obligations under the original lease and the 2014 Addenda?

(i) What principles of contractual interpretation apply?

[18] The approach to contractual interpretation and its acolyte, the parole evidence rule, and the exceptions to that rule, have been simplified considerably in recent years after *Eli Lilly and Company v. NovoPharm Limited*, [1998] 2 S.C.R. 129, and those cases decided in its wake. To start, I consider the words of G.H.L. Fridman, The Law of Contract in Canada, 6th ed. (Toronto: Carswell 2011) and, specifically, some selections from pp. 440 and 442-443 thereof:

> The fundamental rule is that if the language of the written contract is clear and unambiguous, then no extrinsic parole evidence may be admitted to alter, vary, or interpret in any way the words used in the writing…[p. 440]
>
> …There are some real exceptions, by virtue of which a party introducing such evidence is at one and the same thing upholding the validity of the written contract yet attempting to have its meaning understood in a certain way.
>
> First, where the contract as written is ambiguous, extrinsic evidence can be admitted to resolve such ambiguity. But the court should not strain to create an ambiguity that does not exist. It must be an ambiguity that exists in the language as it stands, not one that is itself created by the evidence that is sought to be adduced…[pp. 442-443]

[19] Next, I have recourse to the *Eli Lilly* case itself and the words of Justice Iacobucci therein:

> 54. The trial judge appeared to take *Consolidated-Bathurst* to stand for the proposition that the ultimate goal of contractual interpretation should be to ascertain the true intent of the parties at the time of entry into the contract, and that, in undertaking this inquiry, it is open to the trier of fact to admit extrinsic evidence as to the subjective intentions of the parties at that time. In my view, this approach is not quite accurate. The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.
>
> 55. Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in *Lampson v. City of Quebec* (1920), 54 D.L.R. 344 (P.C.), at p. 350:
>
> > …the intention by which the deed is to be construed is that of the parties as recealed by the language they have chosen to use in the deed itself…[I]f the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention was wholly different from which the language of our deed expresses…
>
> 56. When there is no ambiguity in the wording of the document, the notion in *Consolidated-Bathurst* that the interpretation which produces a 'fair result' or a 'sensible commercial result' should be adopted is not determinative. Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the

> commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words.

[20] Then, I consider Justice Rothstein's explication of the process in *Sattva Capital Corporation v. Creston Moly Corporation*, 2014 S.C.C. 53:

> 56. I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered…
>
> 57. While the surrounding circumstances will be considered in interpreting the terms of a contract, *they must never be allowed to overwhelm the words of that* (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to *deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract*. The interpretation of a written contractual provision *must always be grounded in the text and read in light of the entire contract* (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, *courts cannot use them to deviate from the text* such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).
>
> 58. The nature of the evidence that can be relied upon under the rubric of 'surrounding circumstances' will necessarily vary from case to case. It does, however, have its limits. *It should consist only of objective evidence* of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was *or reasonably ought to have been within the knowledge of both parties* at or before the date on contracting. Subject to these requirements and the parole evidence rule discussed below, this includes, in the words of Lord Hoffman, 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man' (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> (c) *Considering the Surrounding Circumstances Does Not Offend the Parole Evidence Rule*
>
> 59. It is necessary to say a word about consideration of the surrounding circumstances and the parole evidence rule. The parole evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing

> (*King*, at para. 35; and *Hall*, at p. 53). To this end, the *rule precludes, among other things, ecidence of the subjective intentions of the parties (Hall*, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paras. 54-59, per Iacobucci J.). The purpose of the parole evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attach a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 341-42, per Sopinka J.).
>
> 60. The parole evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, *not to change or overrule the meaning of those words*. *The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting*; therefore, the concern of unreliability does not arise.
>
> 61. Some authorities and commentators suggest that the parole evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), at paras 19-20; and *Hall*, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parole evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contact." [underlining added]

[21] In *Halifax Regional Municipality v. Canadian National Railway Company*, 2014 N.S.C.A. 104, Fichaud J.A. summarized the effects of both *Eli Lilly* and *Sattva Capital* as follows:

> 40. In short, my view is this. The text of article 2.2, read in the context of the entire written Agreement, supports the judge's interpretation. Evidence of the parties' purely subjective intentions cannot alter the parties' mutual intentions that are objectively manifested by the contractual wording of their written and signed Agreement. The surrounding circumstances comprise the objective evidence of the background facts, either known or which reasonably ought to have been known to both parties are or before the contract's signature. That evidence was properly admitted before Justice LeBlanc. The judge did not rely on that evidence. But the consideration of those surrounding circumstances supports the judge's interpretation of article 2.2.

[22] While the foregoing is not nearly exhaustive, it is certainly representative of the state of the law insofar as it pertains to the process of contractual interpretation. I conclude that I am to attempt to determine "the mutual and objective intentions of

the parties as expressed in the words of the contract" (*Sattva Capital*, *supra*, para. 57).

[23] In so doing, I am entitled to consider the surrounding circumstances to the extent necessary to ascertain the parties' mutual and objective intentions, but must remain rooted, first and foremost, in the text or words with which the parties have chosen to express themselves. Patently, this does not confer upon me a license to rewrite the contract. "Surrounding circumstances" as noted in *Sattva* at para. 58 consist "… only of objective evidence of the background facts at the time of execution of the contract … that were or reasonably ought to have been within the knowledge of the parties at or before the date of contract."

[24] Justice LeBlanc in *Sparks v. Nova Scotia (Assistance Appeal Board)*, 2016 NSSC 201, summarized the exercise very succinctly when he said:

> 48. Accordingly, I am to examine the words of the August Action Plan, considered in the context of the document as a whole, giving those words their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at that time.

[25] Almost as succinct was Justice Murphy, in *Hefler Forest Products Ltd. v. MCAP Leasing et al.*, 2011 NSSC 505, who put it this way:

> 19. The object of contractual interpretation is to give effect to the parties' objective intentions, as determined by the words used in the contract and occasionally by the factual matrix present when those words were chosen *(Eli Lilly & Co. v Novopharm Ltd*, 1998 CanLII 791 (SCC), [1998] 2 SCR 129, 161 DLR (4th) 1); *Ryan v. Sun Life Assurance Co. of Canada*, 2005 NSCA 12 (CanLII), 230 NSR (2d) 132).
>
> 20. Absent ambiguity in the contract, extrinsic evidence is not admissible (*Hawrish v. Bank of Montreal*, 1969 CanLII 2 (SCC), [1969] SCR 515). This does not mean that the Court must interpret the contract in a vacuum; the Court may look at the "surrounding circumstances" or "factual matrix" in its objective interpretation of the contract (*Hill v. Nova Scotia (Attorney General)*, 1997 CanLII 401 (SCC), [1997] 1 SCR 69).

(ii) The Original Lease

[26] Let me start, then, by observing that what is contained in the original lease itself is clear. The most significant terms of the document involve the rental of space at the hangar, for a term, at a cost. It contains provisions regarding the "use and

conduct of business" (clause XA-C, for example), and a description of the aircraft which may be housed there.

[27] This document provided for the use by the Respondent of "sufficient hangar space at the Heliport for accommodation of any one of the aircraft described in Schedule 3 annexed hereto", as well as for the use of office and storage area (shown in Schedule 2), and the use of ramp space at the Heliport sufficient for aircraft described in Schedule 3. It also provided that if the Respondent remains in possession after the agreement has expired "without any objection by the owner (Applicant) and without any written agreement providing otherwise", it shall be deemed to be a month-to-month tenancy and "otherwise subject to the provisions of this agreement insofar as same are applicable". This month-to-month tenancy describes the relationship of the parties after July 14, 2011, prior to the execution of the 2014 Addendum. The original lease also includes this clause (XVI P):

> This agreement constitutes the entire agreement between the owner and occupant and neither party shall amend this agreement unless in writing properly executed by the parties hereto.

[28] The course of the parties' dealing since the original lease was executed in 1998 has been earlier described in a general sense. It consisted of the various addenda that were executed, generally when the terms of each predecessor document had expired, although, on occasion, before expiry, when the Respondent's need for space increased.

[29] The 2014 Addendum, and all of the addenda which preceded it, refer to the original lease between the parties (below "the lease") in the following manner:

> All other terms and conditions of the lease shall be as set forth therein except as specifically amended by this addendum to lease.

(iii) The 2014 Addendum

[30] This Addendum was intended to provide for a new term and rental as compared with the original lease and the preceding addenda. As previously noted, the new term was to be five years and it was to run from July 15, 2014, to July 14, 2019. Office and storage space were specifically delineated in red in Schedule 2 of the document. A provision was also made for use by Skylink of "sufficient hangar

space at the Heliport for a combination of one Beechcraft 1900 and four Caravan aircraft, of the aircraft described in Schedule 3 annexed hereto".

[31] From Schedule 3 we learn that the registration numbers for the aircraft are (Beechcraft): C-GSKN; (four Caravans): C-FFGA, C-GEGA, C-GLGA, and C-GSKS.

[32] The rental was to be increased by three percent (3%) each year on the anniversary date (July 14, 2014) - the effective date of execution of the document. This was the rate applicable to the five year lease and corresponded with the third of the options with which Skylink had been provided by the Applicant during negotiations.

[33] The operative clause in that regard is number 2, the relevant portion of which is as follows:

> A. The Occupant shall pay the rent (plus Harmonized Sales Tax ("HST"), if applicable) shown in Schedule 1, which sum shall be payable in advance on the first day of each and every month commencing on the first day of August, 2014. PROVIDED that rent for the period July 15, 2014 through July 31, 2014, shall be invoiced and payable on the 15th day of July, 2014. And shall be in the amount of one-half (1/2) of the monthly rent as set out on Schedule 1. It is further agreed that said rent shall be increased by three percent (3%) on each anniversary date of this Agreement.

[34] The rent specified by the 2014 Addendum is further broken down in Schedule 1 thereof:

SCHEDULE 1
(effective July 15, 2014 to July 14, 2015)

TERMS AND SERVICES AGREEMENT

IMP HALIFAX HELIPORT

1.	Office	$845.13 Monthly
	Maintenance Office	1,147.55 Monthly
2.	Ramp Parking (as required, as available)	105.00 Daily per Aircraft
3.	Hangarage (1 Beachcraft 1900 Aircraft)	4,403.70 Monthly
	Hangarage (4 Caravan Aircraft)	11,482.44 Monthly
4.	Storage Space	448.84 Monthly
5.	Parking (8 spaces)	504.00 Monthly
6.	Aviation Fuel	

All purchasing of Aviation Fuel, oil, greases at Halifax must be purchased at IMP Aviation Services and must be on a Shell credit card.

Any fuel price escalation will be passed on to customer with one day's written notice.

All amounts mentioned above are exclusive of H.S.T. unless otherwise stated. In the event of any increases to the H.S.T., P.A.F.T., Airport Fee, Federal Excise Tax or the implementation of any new tax or charges applicable to aviation fuels levied by any level of Government will be passed on to Lessee. IMP will give one day written notice or one days telex notice to Lessee for any such increases.

[35] From the date of actual execution of the addendum (April 27, 2015 – although, to repeat, it was backdated to July 14, 2014) until September 15, 2015, there was no apparent controversy between the parties.

[36] Sometime after April 27, 2015 (when the 2014 addendum was executed), but before September 15, 2015 (when the email was sent by Skylink advising of an intention to reduce the Cessna C208 aircraft stored at the Heliport to zero), Skylink lost a major customer. It had required the hangar space to house planes which serviced a number of banks in the Atlantic provinces by transporting/couriering documents for them. Skylink lost that contract during this time interval.

[37] It is for this reason that the Respondent sought to (first) reduce the Cessna C208 aircraft from four to zero ("thirty days notice" given on September 15, 2015), then, to attempt to terminate the lease for hangar space entirely on October 15, 2015, by providing "thirty days notice" for the Beechcraft 1900 aircraft as well, "due to our B1900 flight contract ending on October 31, 2015".

[38] Shortly thereafter, as previously noted, the Applicant responded to the fact that neither the lease, nor the 2014 Addendum thereto, possessed a termination clause. That was when the November 12, 2015, email was sent by Mr. Morgan on behalf of the Respondent, Skylink, to the effect that the respondent was not seeking a termination. This email indicated that they would still retain the office space, but "merely require an addendum to the lease to show the … change in (hangar space) requirements."

[39] I conclude that the wording of each of the documents was clear and unambiguous on its face. Nothing in the text of the original lease, the 2014 Addendum, or any of the other addenda prior has provoked any controversy (prior to September 15, 2015) as to how it was to be interpreted.

[40] Until September, 2015, the parties' business relationship had been a harmonious one – more or less. It had shown itself to be flexible enough, on occasion, to allow the parties to enter into a new addendum before the expiry of its predecessor, when the Respondent's need for space at the Heliport had increased beyond that encompassed in the (then) current contract. That said, nothing in the original lease or the 2014 Addendum supports the Respondent's right to reduce and/or eliminate payment for hangar space for which it has no further use.

B. Is there an enforceable collateral contract between the parties entitling Skylink to reduce and/or eliminate the rental for aircraft hangar space before the end of the five-year term of the 2014 Addendum if it no longer needs the space?

[41] Skylink's position with respect to the 2014 Addendum, or the original lease for that matter, does not purport to take issue with what they say *per se*. The Respondent simply says that there was, in addition, an enforceable collateral agreement between the parties to reduce (and ultimately eliminate) the rental for the hangarage noted in the 2014 Addendum if Skylink determined that it needed to reduce its aircraft fleet for operational reasons. This collateral contract (as asserted)

allows it to amend or modify its obligations to the Applicant if and when Skylink's need for space changed or varied.

[42] Skylink's position is predicated upon the wording of the email exchange between Mr. Morgan (Skylink) and Mr. Bédard (I.M.P.) on April 27, 2015 – the "one final question" exchange. It will be recalled that the former asked:

> If we were to exchange the type or number of aircraft we have or need more office space would we be able to do an Ad Hoc Addendum to the lease when the event happened.

And that Mr. Bédard responded:

> Yes we would just do an addendum reflecting that change to ensure we don't have the same problem. But it would be important to let us know ASAP so we can reflect the changed. If it is only temporary I would rather leave everything as is and agree to a temporary rate via E-Mail when it comes to extra aircrafts we can just agree to a daily rate.

[43] Skylink contends that further collateral support for its position lies in the fact that it was provided, upon execution of the 2014 Addendum, with a cheque in excess of $27,000.00 from I.M.P. representing a credit for storage space pre-2014 for which it had paid but had not actually used. Skylink stresses that it continues to pay for the office, which is space which it actually still needs, and that its needs for hangar space may increase during the remainder of the term of the 2014 Addendum, in which case the Respondent would then pay, once again, for as much of the hangar space (stipulated in the document) as it needs, at the rate prescribed therein.

[44] With respect, I cannot agree with the Respondent's position.

[45] First, the agreement itself (the 2014 Addendum and the original lease) contains no provision which could support such an interpretation. Indeed, as will be recalled, the original lease contained an "entire agreement" clause. While I accept that this fact, on its own, does not preclude the possibility of a side deal or collateral contract, it is certainly something to consider in conjunction with the other points noted below.

[46] Second, the entire course of the parties' dealings had only ever dealt with increases in the Respondent's need for space - never decreases, and certainly never the reduction of hangar space to zero. For example, Mr. Bédard's email to Graham

Morgan on April 27, 2015 spoke of increases ". . . when it comes to extra aircrafts we can just agree to a daily rate".

[47] Third, the argument of the Respondent (as to the existence of a collateral contract permitting it to take the course of action which it did) is one which would confer an unfettered discretion upon Skylink to unilaterally modify (as it did here) its contractual obligations to the Applicant, whenever its perceived business needs changed. This flies in the face of the parties' prior conduct. Indeed, whenever a change was required in the past, the parties negotiated and reduced to writing how they had agreed they would deal with it. They did not do so in this case.

[48] Fourth, not only was a unilateral reduction in (or elimination of) the number of aircraft to be stored by Skylink in the hangar during the term of an extant addendum by the Respondent unprecedented, the potential need to do so could not have even been in the mind of the Respondent, much less that of the Applicant, when the 2014 Addendum was signed in late April, 2015. This is because the Respondent itself had no inkling (at that time) that it would lose, later in 2015, the courier contract with the banks, which the planes stored (in the hangar space in question) at the Heliport serviced.

[49] Fifth, to give effect to the proposition urged by the Respondents would be, in effect, to allow Skylink to pass its own business losses, as and when incurred, along to the Applicant. Such is completely contrary to usual business practice and would require very clear evidence of such an intention. As previously discussed, I have found no such evidence (much less, clear evidence) to that effect here.

[50] Sixth, the existence of such a collateral contract would be in complete opposition to what was clearly intended by the parties when they negotiated for the 2014 Addendum. The Respondent was presented with three options: a one, three or five-year extension. Had it selected a one-year term, it would have paid rent at a rate of five percent (5%) higher than current. Had it selected a three-year term, the rent would have increased four percent (4%) (over the then current rent) each year. By selecting a five-year term, the Respondent assured itself of the lowest possible rent. It traded a longer commitment to the Applicant in exchange for the lowest available (3%) annual rental increase. It also thereby secured for itself a credit note in the amount of $27,121.53 from the Applicant (more on which will be said below).

[51] Correspondingly, what the Applicant was to have received was the security of a rental of the hangar space for a longer term. For the Court to give effect to the

Respondent's argument would deny to the Applicant the principal benefit for which it had bargained (the security of a five-year rental of its hangar space) while allowing the Respondent to retain the benefits of (1) the credit note in the amount of $27,151.53, (2) the best possible rate (3%) when it does need the space and (3) the ability to pay nothing for that space when it does not.

[52] Finally, there is the fact that Skylink purported, first, to give the Applicant "thirty days notice" of its intention to terminate with the respect to the hangar space dealt with in the 2014 Addendum. It was only when it was brought to the Respondent's attention that the agreement did not, in fact, contain a termination clause that it asserted the existence of a collateral contract on the basis of the email correspondence between Mr. Morgan and Mr. Bédard on April 27, 2015.

[53] As Professor Friedman noted in his text *The Law of Contract in Canada*, *supra*, at pp. 5513-514:

> The party alleging a collateral contract must not only prove the terms of such a contract, he must also show the existence of animus contrahandi on part of the parties. Any laxity on these points would enable a party to escape from the full performance of the main contract, proved by the writing assented to by the parties, and would lessen the authority of the written contract by permitting variation simply by suggesting the existence of a verbal agreement relating to the same subject matter. Thus, to establish a collateral contract requires the same kind of evidence as to certainty of terms and intention to enter into a binding, contractual agreement, as is needed where any contract is alleged to exist between the parties.
>
> What this means is that the statement purporting to be the contractual promise in such a collateral contract must amount to more than a broad general inducement to enter into the main contact, or even a representation in the sense in which the word has been discussed earlier. The statement must constitute a definite, contractual undertaking, a binding promise meant to be taken seriously by the party to whom it is made, and intended to have such affect by the party who made the statement. An understanding or expectation is not sufficient to create a contractual obligation. [Emphasis added)

[54] I have considered the entire course of the parties' dealings from their inception in 1998 to the present. In particular, I have considered the surrounding circumstances, which is to say, the "objective evidence of background facts at the time of execution that reasonably ought to have been known to both parties at or before the date of contracting" when the 2014 addendum was executed. There is nothing in the documents, in the circumstances or the communications attendant

upon the creation of the 2014 Amendment, or any of its predecessors, or in the original lease, which gives rise to an enforceable collateral contract, let alone one of the magnitude urged by the Respondent.

[55] The email exchange on April 27, 2015, in response to Mr. Morgan's "one last question" amounts to nothing more, in my view, than a commitment to discuss, as the parties had done in the past, any future changes to the 2014 addendum that might be required by the Respondent's operational needs in the future, and to reduce to writing anything to which they could agree at that time. It is, therefore, the proverbial "agreement to agree". It is of no force and effect whatsoever.

[56] The Respondent has attempted to make much of the credit, in excess of $27,000, given to it by I.M.P. for unused hangar space paid for prior to 2014. Yet why, if this conduct actually supports (as it urges) the existence of a right to reduce (and not pay for) space when it is no longer needed, did Skylink actually pay for the space in the first place, and then wait (and negotiate) for a refund?

[57] Rather, what actually happened was explained by Mr. Bédard both in his amended affidavit and in *viva voce* evidence – the money was provided by I.M.P. to Skylink as an inducement to it to enter into a written five-year lease extension. And this is what the Respondent ultimately did. Far from being available to the Respondent as of right, the money would not have been provided had the Respondent selected either of the three or one-year options. Moreover, the instructions with which Mr. Bédard provided his staff, and his communications with the Respondent, were clear. The money would not be provided until the five-year lease was executed (see, for example, Bédard Amended Affidavit, Exhibit N - email Bédard to Morgan January 19, 2015). In fact, the funds were provided only three days later (April 30, 2015).

Conclusion

[58] Simply put, what appears to have happened here is that Skylink, after executing the 2014 Addendum and then unexpectedly losing the courier contract with the banks, has attempted to foist its own unforeseen business loss onto the Applicant. There was nothing in the original lease, the history of the parties' past dealings, or the 2014 Addendum which permitted them to do this. Nor was there a collateral contract which permitted such conduct.

[59] Accordingly, I have concluded that the Respondent breached its contractual obligations to the Applicant when it stopped paying the full rental amount (in November, 2015) required of it pursuant to the 2014 Addendum.

[60] The parties have requested, in the event that such were to be my decision, that I allow them to make further submissions on the issue of IMP's damages. This results from a request by the Applicant to update and correct an error in the quantification of its damages that surfaced during counsel's submissions with respect to same, and the Respondent's corresponding request that it be permitted to respond to the corrected information when it is available.

[61] Accordingly, I would direct that the parties arrange to schedule a further date before me, at which time the issue of the Applicant's damages, and collateral questions such as whether or not, in these circumstances, the Applicant was subject to an obligation to mitigate its losses, and if so, the sufficiency of its efforts in that regard, may be determined.

[62] I will also direct that the Applicant file its updated information and brief on the issue of damages twenty (20) days before the next hearing, the Respondent shall reply ten (10) days before, and any reply response from the Applicant shall be provided five (5) days before.

[63] My decision on costs in this matter will be rendered after damages have been quantified.

Gabriel, J.

SUPREME COURT OF NOVA SCOTIA
Citation: *Innotech Aviation v. Skylink Express Inc.*, 2017 NSSC 176

Date: 2017-06-29
Docket: *Hfx* No. 454660
Registry: Halifax

Between:

Innotech Aviation, a division of IMP Group Limited

Applicant

v.

Skylink Express Inc.

Respondent

Erratum

Judge: The Honourable Justice D. Timothy Gabriel

Heard: March 28 and 29, 2017, in Halifax, Nova Scotia

Written Decision: June 29, 2017

Counsel: Christa M. Brothers, Q.C. for the Applicant
Gary A. Richard, for the Respondent

Erratum Date: July 10, 2017

Erratum: The electronic version of this decision has been modified to include Jeff Waugh as co-counsel for the Applicant