Brant Avenue Manor Limited Partnership v. Transamerica Life Insurance Company of Canada et al.

Transamerica Life Insurance Company of Canada et al. v. Brant Avenue Manor Limited Partnership et al.

[Indexed as: Brant Avenue Manor Limited Partnership v. Transamerica Life Insurance Co. of Canada]

48 O.R. (3d) 363
[2000] O.J. No. 1664
Court File no. 97-CU-119047

Ontario Superior Court of Justice
Greer J.

May 12, 2000

Debtor and creditor — Enforcement of security for loan — Conversion — Operator of seniors' home granting land mortgage, chattel mortgage and assignment of rents as security for loan — Operator not granting general security agreement to lender — Loan going into default — Lender appointing private receiver to operate business of seniors' home — Lender foreclosing and then selling assets of operator including name, goodwill, and intangible property — Securities not including goodwill — Operator having cause of action against lender for damages founded on conversion of goodwill.

B Ltd. operated a seniors' home in Brantford, Ontario. Its assets were subject to a land mortgage, a chattel mortgage, and an assignment of rents granted to Transamerica. There was, however, no general security agreement. In October 1990, the mortgage went into default and, in 1991, Transamerica appointed a private receiver, who operated the nursing home. In September 1993, Transamerica obtained a final order of foreclosure and, in 1996, after operating the seniors' home in the interim, Transamerica sold the seniors' home business. After the sale, B Ltd. sued for damages based on the alleged unlawful conversion of its name, goodwill, and intangible property. Pursuant to Rule 21, B Ltd. moved for the determination of the questions of (a) whether the securities charged the goodwill, name, undertaking, and business of B Ltd.; and (b) whether it had a cause of action founded upon the alleged unlawful conversion.

Held, the motion should be granted.

It was appropriate to determine the questions asked by the Rule 21 motion and there was no issue of interpretation involving words that could have more than one meaning. The security held by Transamerica did not include the undertaking and business of B Ltd. and such a term could not be implied. There was nothing to prevent Transamerica from obtaining security over B Ltd.'s intangible property but it did not do so. A cause of action can be founded upon a conversion of goodwill.

Cases referred to

Alex Richmond Holdings Ltd. v. Kayes [1969] 1 O.R. 459 (Master); Bonaire Aviation Co. v. Chapman, [1995] O.J. No. 2588 (Gen. Div.); Chissum v. Dewes (1825), 38 E.R. 928, 5 Russ. 929; Clark v. White, [1899] 1 Ch. 316; Ford Motor Co. of Canada v. Manning Mercury Sales Ltd. (Trustee) (1996), 148 Sask. R. 161, 140 D.L.R. (4th) 344, 134 W.A.C. 161, [1997] 1 W.W.R. 43, 43 C.B.R. (3d) 84 (C.A.) (sub nom. Manning Mercury Sales Ltd. (Bankrupt) (Re)); Manina Investments Ltd. v. Regatta Investments Ltd. (1993), 92 Man. R. (2d) 88, 61 W.A.C. 88, 6 P.P.S.A.C. (2d) 1 (C.A.); Manitoba Fisheries Ltd. v. Canada, [1979] 1 S.C.R. 101, 88 D.L.R. (3d) 462, 23 N.R. 159, [1978] 6 W.W.R. 496; Sugarman (in trust) v. Duca Community Credit Union Ltd. (1999), 44 O.R. (3d) 257, 47 B.L.R. (2d) 34 (C.A.), affg (1998), 38 O.R. (3d) 429, 39 B.L.R. (2d) 237 (Gen. Div.); Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (1999), 45 O.R. (3d) 417, 178 D.L.R. (4th) 634, 50 B.L.R. (2d) 64 (C.A.)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 21

Authorities referred to

Fridman, The Law of Torts in Canada, Vol. 1 (Toronto: Carswell, 1989), p. 97
Halsbury's Laws of England, 4th ed. (London: Butterworths, 1994), Vol. 35, Part VII, p. 647
Leonard, Guide to Commercial Insolvency in Canada (Toronto:

Butterworths, 1988), p. 17-4

MOTION to determine questions of law pursuant to Rule 21.

Keith M. Landy, for plaintiff.
Paul J. Bates and Jeffrey A. Radnoff, for defendants.

---

[1] **GREER J.**: — The plaintiff, Brant Avenue Manor Limited Partnership ("Brant"), moves, pursuant to Rule 21, for a determination of the following questions:

1. Can the Plaintiff have a cause of action founded upon the unlawful conversion of goodwill as alleged in paragraphs 1(a)(ii), and 18 of the Statement of Claim;

2. Did or did not the security of Transamerica Life Insurance Company of Canada (which security is defined in paragraph 6 of the Statement of Claim) charge the goodwill, name, undertaking and business of the Plaintiff, as alleged in paragraph 18 of the Statement of Claim?

Rule 21.01(1)(a) operates so that the parties may determine, before trial, a question of law as raised by the pleadings. The Rule specifically prohibits the admission of evidence on the motion. Thus, the questions must be answered through an examination of the documents in question and the law, as it applies.

[2] Brant operates a seniors' home in Brantford, Ontario, known as Brant Avenue Manor ("the home") which was subject to various forms of security. At no time was it subject to a general security agreement. The forms of security, which covered the home were as follows:

1. A mortgage in the amount of $2,350,000 at 12.25% with #609557 Ontario Limited in trust ("#609557") made between it and Transamerica Life Insurance Company of Canada ("Transamerica"), registered February 14, 1989, which was personally guaranteed by Beverley Kelman and Gerald Kelman, to come due on March 1, 1990;

2. A chattel Mortgage dated February 14, 1989 made between #609557 as mortgagor and Transamerica as mortgagee. Attached to the chattel mortgage was a list of assets outlined in Schedule A, which included the furniture and appliances used in the home itself.

3. An Assignment of Rents made February 14, 1989 with #609557 as Assignor and Transamerica as Assignee.

The mortgage was extended to October 1990, but then went into default. A notice of sale was issued in November 1990 and the mortgagee notified Brant that it would move under power of sale on April 30, 1991. TGEA Management Inc. ("TGEA") was asked by Transamerica to act as its agent pursuant to the terms of the general assignment of leases and rentals to collect, dispose of, seize and realize on the security. Finally, on September 27, 1993, Master Linton signed the final order of foreclosure over the property secured by these three securities. During the intervening years, Transamerica operated the home and it was not until 1996 that Transamerica entered into an agreement of purchase and sale for the home, which closed on June 18, 1996 for a price of $2,600,000. Transamerica received only $305,000 in cash and took back a mortgage of $2,295,000.

[3] It is the position of Brant that after Transamerica appointed a private receiver, it took over Brant's goodwill, undertaking and business, purporting to do this as part of its security, which it did not have a right to do under its security. Transamerica takes the opposite position, holding that its three pieces of security cover everything, although those aspects of the business of the retirement home are not specifically mentioned in any of the security documents.

[4] Brant, in its amended statement of claim made April 27, 1998, sets out in para. 14, with some specificity, what it says was taken by the receiver which still belonged to Brant. Paragraph 14 states that the goodwill, undertaking and business were taken and that these included the resident medical records, resident files, medical supplies and medical equipment, staff records and employment records, food supplies, maintenance supplies, all full and part-time staff, all residents, the financial records and files and operating files, and the management files.

[5] Although the documents given to me did not include a copy of the executed agreement of purchase and sale ("the agreement") made between Humancare Inc., in trust for a company to be incorporated, as Purchaser, and Transamerica, as Vendor, I take it that this is the final agreement. Brant objects, in particular, to para. 2(e) and (f) and (g) and (h) thereof. In the agreement under the heading Goodwill, it reads as follows:

> All of the right, title and interest of the Vendor, if any, in the name "The Brant Avenue Manor" and other trade names or trade marks and telephone numbers used exclusively to identify same, supplier lists and all other goodwill used in the conduct of the Business (the "Goodwill").

The other three paragraphs cover "contracts", "intangibles" (including all computer programs and licences) and "inventory", none of which, Brant says, formed part of the security which Transamerica had.

[6] Transamerica says that the question of conversion of goodwill should not be decided on a Rule 21 motion but should be left for trial where evidence is led. I disagree with its position, in this regard, and am satisfied that the two questions, which have been put to the court by Brant are appropriate, under the circumstances, in its attempt to narrow the issues. Transamerica further says that when a receiver is appointed, it is done to "run the business" which is within the scope of security held by Transamerica. Transamerica says that the home had been allowed to deteriorate and that there was no goodwill. Evidence is not admissible on a Rule 21 motion and so I do not take into account the state of the home when the mortgagee stepped in with its receiver. Goodwill, says Transamerica, runs with the land and is therefore covered by its mortgage or is personal to a person operating the business. Further, it says, since the receiver had to use the equipment, which was part of its chattel mortgage, to run th e home, any goodwill was also that of the mortgagee as it was now running the home and the mortgagor had no further say in it.

[7] Transamerica says, that if one analyzes the mortgage's standard charge terms, it can be seen that this covers the goodwill. The list of items, as set out in the amended statement of claim in para. 14, Transamerica says cannot be dealt with without the consent of the residents themselves or by the employees. It says that there is no way that Brant could have "sold the residents" as part of the business since each resident was free to go wherever he or she wished.

[8] Brant says what else would you expect the mortgagee to do, if it did not have the protection of a general security agreement? It would attempt to extend whatever security it had to cover the items in question. None of this, however, says Brant, allowed Transamerica to operate the business per se. If it did, what would be the point of ever getting a general security agreement or a floating charge? What security they had would allow them to operate the property and sell it, not run the retirement home for five years, says Brant.

[9] Does the security given include the goodwill, undertaking and business of Brant? I think that it does not. None of the documents specifically refer to those aspects of the operation of Brant. Further, I am satisfied that one cannot imply such terms into a standard mortgage document, nor do they fit within the parameters of the chattel mortgage or the assignment of

rents, being all of the security which Transamerica had. Our court has held that intangible property, such as a nursing home licence, can be the subject of security under the Personal Property Security Act, R.S.O. 1990, c. P.10: see Sugarman (in trust) v. Duca Community Credit Union Ltd. (1998), 38 O.R. (3d) 429 at p. 446, 39 B.L.R. (2d) 237 (Gen. Div.). There was, therefore, nothing to prevent Transamerica from seeking security over the intangibles which Brant had. Nor was there anything to prevent Transamerica from specifically securing contracts with employees and covering goodwill in the security. The Saskatchewan Court of Appeal has held that a floating charge, ". . . gives the only effective security over goodwill and the undertaking": see Ford Motor Co. of Canada v. Manning Mercury Sales Ltd. (Trustee) (1996), 140 D.L.R. (4th) 344, 148 Sask. R. 161 (C.A.). Goodwill can also be considered one of those intangibles which is bought when a business is purchased, as are computer programs used in the business.

[10] It is the position of Transamerica that the ambit of the security can be determined by a consideration of the business matrix of the transaction. It wants the court to consider the objective business circumstances of the various transactions entered into in the three security agreements, which it has. The purpose of the documents, in my view, is quite plain on the face of the documents as noted above. Transamerica relies on a long line of old English cases, starting with Chissum v. Dewes (1825), 5 Russ. 929, 38 E.R. 928, which deal with mortgages that include the goodwill of the mortgaged property (except that goodwill which is personal to an owner of the mortgaged property). For example, in Clark v. White, [1899] 1 Ch. 316, the court held when a mortgagee enters into possession of property, the goodwill of that property or business situate therein, may pass to the mortgagee. Some of these old cases are referred to in Halsbury's Laws of England, 4th ed., Vol. 35 (London: Butterworths, 1994).

[11] Notwithstanding some of the principles as set out in these early cases, it is clear that the business of the operation of the retirement home did not run with the land, and was not part of the mortgaged premises. There are cases which hold that when a mortgaged property includes a business carried on, on the premises, the mortgagee is entitled to carry on the business for a reasonable period and allowed to use the name of the mortgagor for that purpose: see Halsbury, supra, Part VII, Mortgage Accounts, p. 647. In the case at bar, however, the mortgagee operated the business, used the business records and medical records and other records of the patients, for five years before it was finally sold. Brant is not challenging the right of Transamerica to appoint the receiver under the security it had, but challenges the right of Transamerica to use the goodwill, undertaking and intangibles.

[12] In my view, the issue for determination does not involve the interpretation of words in the documents, which can have more than one meaning. Therefore, the principles as set out in Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (1999), 45 O.R. (3d) 417, 178 D.L.R. (4th) 634 (C.A.) do not apply to the case at bar. In disposing of collateral, the secured party is bound by the limitations in the security agreements themselves and must act on its powers to realize, in good faith: see E. Bruce Leonard, Guide to Commercial Insolvency in Canada (Toronto: Butterworths, 1988) at p. 17-4. The court will not write additional terms in the security held by Transamerica, and as a general rule, parol evidence will not be applied where there is no ambiguity in the documents themselves. In my view, the goodwill had not been specifically assigned in the security instruments held by Transamerica and it cannot be implied

from other words in the mortgage of the lands. I adopt the principle as set out in Alex Richmond Holdings Ltd. v. Kayes [1969] 1 O.R. 459 (Master).

[13] The second issue to be determined is whether an action can be founded upon conversion of goodwill? G.H.L. Fridman, The Law of Torts in Canada, Vol. 1 (Toronto: Carswell, 1989) at p. 97 states that "Conversion is concerned with interference with chattels". He then goes on to say:

> The term "chattels", however, is broader in its meaning than "goods". The statutory meaning applicable in the law of sale is not appropriate where conversion is involved. Thus, shares and stock are not goods for the purposes of sales law. The wrongful sale or hypothecation of another's shares or stock will be conversion. Other intangibles, such as cheques, insurance policies, or guarantees, can also be converted, even though they do not come within the ambit of the law relating to sale of goods. In such instances, however, the law treats the value of the document as being more than the nominal worth of the piece of paper that is involved. It is the ultimate value of the document that is the subject-matter of the action.

The Supreme Court of Canada held in Manitoba Fisheries Ltd. v. Canada, [1979] 1 S.C.R. 101, 88 D.L.R. (3d) 462 that goodwill, although intangible in character, is part of the property of a business. It follows then that goodwill can be subject to conversion, and that such conversion is not strictly limited to chattels of the usual form: see Bonaire Aviation Co. v. Chapman, [1995] O.J. No. 2588 (Gen. Div.). Transamerica relies on the Manitoba Court of Appeal decision Manina Investments Ltd. v. Regatta Investments Ltd. (1993) 6 P.P.S.A.C. (2d) 1, 92 Man. R. (2d) 88, where at p. 4 of the decision, the court stated:

> There can be no conversion of an intangible such as goodwill. We simply see no basis for a claim for damages for loss of goodwill, once it is conceded that the defendant Regatta had the right to take over possession of the real property.
>
> I cannot accept Manina, supra, as good law in Ontario. It is a short three-page decision which makes no reference to any case law, any authorities and only refers to the Manitoba Mortgage Act, R.S.M. 1987, c. M200. In that case, the plaintiff, Manina, acquired a car wash facility from the defendant, Regatta, and accepted some cash down with the balance secured by a debenture on the real and personal property of the business. It also obtained transfers of land, which could be registered in the event of a default. At trial, the trial judge awarded damages for loss of goodwill, which was overturned by the Court of Appeal with no analysis of the law in the area and, respectfully, without any real explanation other than what I have quoted above. Given this, I prefer the reasoning of Cosgrove J. in Bonaire, supra.

[14] The answers to the two questions raised on the motion are as follows:

(i) Yes, the plaintiff can have a cause of action founded upon the unlawful conversion of goodwill, and

(ii) The security of Transamerica did not charge the goodwill, name, undertaking and business of the plaintiff.

[15] If the parties cannot otherwise agree on costs, I may be spoken to.

Order accordingly.