Thomas G. Heintzman, O.C., Q.C., FCIArb

Heintzman ADR

Arbitration Place

Toronto, Ontario

www.arbitrationplace.com

416-848-0203

tgh@heintzmanadr.com

www.constructionlawcanada.com

www.heintzmanadr.com

Thomas Heintzman specializes in alternative dispute resolution. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia, Nova Scotia and New Brunswick and has made numerous appearances before the Supreme Court of Canada.

Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

Thomas Heintzman is the author of ***Heintzman & Goldsmith on Canadian Building Contracts,*** 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

The Seven Principles Of Value For Unjust Enrichment

What is something worth? And if it's worth something to you, is it worth the same to me? Or is everything in the eyes of the beholder?

These are tough questions at the best of times. But they are even tougher in the case of a claim for unjust enrichment. In unjust enrichment, value is simply at large. There is no contractual context to develop an express or implied intention to establish the criteria for value.

The recent decision of the UK House of Lords in ***Benedetti v. Sawiris*** is a Must Read for anyone who is interested in the law of unjust enrichment. It is also a must read for anyone who enjoys five English law lords spending 78 pages pondering over the meaning of value, writing in true British elegant style and relying on everything from *Vanity Fair* to Oscar Wilde. The decision is truly a *tour de force.*

This decision is particularly important for construction projects because it provides a comprehensive approach to value when building services or materials are provided without a contract, which happens more often than one might suppose.

Full tribute to this decision cannot be given in one article. So the background will be related and then the seven principles which appear to arise from the decision will be stated.

Background

Mr. Benedetti learned of an opportunity to obtain control of an Italian telecom company. He went to Mr. Sawiris and offered to help Mr. Sawiris' family obtain control. An elaborate agreement was prepared under which Benedetti was to be paid for his services. However, control of the Italian telecom company proved impossible on the terms contemplated by that agreement. Ultimately, the Sawiris family did get control of the Italian telecom but only upon devoting much more capital than had been contemplated in the agreement with Benedetti. Benedetti acknowledged that he was not entitled to compensation on the basis of that agreement, or any other agreement, but asserted that he was entitled to compensation on an unjust enrichment basis. Sawiris agreed that Benedetti was entitled to compensation on that basis. The dispute between them was about how much.

During the whole process, Benedetti was able to engineer the arrangements so that he in fact received €67 million. The trial judge found that the services for which Benedetti received that amount were only 60 percent of what he had actually done. The trial judge found that the fair market value of the compensation for the sort of services which Benedetti provided was €36million. During the negotiations of the commercial arrangements whereby the Sawiris family obtained control of the Italian telecom, and during the settlement discussions, Sawiris offered Benedetti €75 million which Benedetti declined, insisting on much more.

So what was the value to which Benedetti was entitled?

The Decisions

The trial judge held that Benedetti was entitled to €75 million. He held that, while the market value of Benedetti's services was €36 million, the value of those services to Sawiris was, by Sawiris' own admission in the offers he had made, much greater. Therefore there should be an

upward “subjective revaluation” of that value for the purpose of an award in unjust enrichment.

The Court of Appeal held that Benedetti was entitled to €14 million. The Court of Appeal held the law of unjust enrichment did not recognize any principle entitling Benedetti to an upward revaluation of the award due to any greater subjective value of the benefit to Sawiris evidenced in the offers made by Sawiris. The Court of Appeal got to €14 as follows. It said that, on the trial judge’s findings, Benedetti had only been paid (in the €67 million) for 60 percent of the services he had provided. He was entitled to be paid for the other 40 percent. Since 100 percent of the services were worth €37 million, then 40 percent was worth 40 percent of €37 million, or €14 million.

The UK Supreme Court agreed with the Court of Appeal that the law of unjust enrichment does not permit the upward revaluation beyond market value based on the so-called subjective value of the services to Sawaris. The Supreme Court disagreed with the Court of Appeal’s award of €14 million. It held that the services provided by Benedetti were captured within the services which had a market value to Sawiris of €37 million. Since Benedetti had received €67 million, he had been over-paid and his action was dismissed.

Discussion

I will set out what I believe to be the Seven Principles of Value for Unjust Enrichment that can be drawn from this decision:

1. Prima facie, the value of the benefit or enrichment to be compensated is the market value of the benefit (in this case, the services rendered by Benedetti) to the defendant at the time the benefit was received. It is to the extent of that value, and that value only, that the defendant has been enriched.

2. That value is to be determined by the price at which the particular defendant could have purchased the benefit in the market. If the defendant could have obtained the benefit in the market at lower than the “normal market rate” then the lower rate is to be used. Similarly, if the particular defendant would have had to pay a price higher than the “normal market value” then the defendant may be required to pay that higher price. For example, if the defendant is a government and the benefit is the unjustified receipt of money (for instance, by a taxpayer paying money it did not owe) and if the benefit is be compensated for by way of interest until repayment, then the interest rate is the rate which a government would have paid during the relevant period of time, not what an individual would have paid.

3. The difference between the "normal market value" and the "defendant's market value" is to be demonstrated by objective evidence. Thus, if in the period immediately before or after the events in question, the defendant has purchased the benefit at a higher or lower rate in the market, then that is objective evidence of value to the defendant.

In addition to the market value of the benefit to the defendant, as determined under the first three principles, there may be a dispute about whether the value of the benefit has a lesser or greater value due to the subjective worth of the benefit to the particular defendant. The reduction of the value could be called "subjective devaluation" if the subjective value of the benefit to the defendant is less than market value, or "subjective revaluation" if the subjective value of the benefit to the defendant is worth more. With respect to these issues:

4. The claimant will not be entitled to an increased value of the benefit, above the market value to the defendant, because the defendant subjectively viewed the benefit as more valuable. Subject revaluation upward should not be permitted. That is because the defendant could always have purchased the benefit in the market, even though he or she valued it at more than the market value. Only if there is a contract between the parties should a defendant be required to pay more than market value, because the defendant agreed to do so in the contract. [For this reason, the trial judge was wrong to award €73 million based on Sawiri's offers.]

5(a) On the other hand, a defendant may be able to show that the benefit was worth less to him or her than the market price at which he or she could have purchased the services in the market. In this case, "subjective devaluation" may be permitted. This may occur if the defendant demonstrates that, for whatever reason, the benefit was not worth the price at which he or she could have purchased them in the market. Again, however, there must be some objective evidence or reason for the devaluation, not just the defendant's say-so. [Three of the judges adopted this approach to "subjective devaluation."]

[One of the judges did not accept this approach to "subjective devaluation." He approached the issue through a "choice of benefit approach."]

5(b) Awarding less than the market value of the benefit to the defendant should only occur when the defendant has been forced to accept the benefit, yet should pay something for it. Only in rare cases will a defendant be required to pay anything for something that he or she did not contract for, did not request and did not accept except involuntarily.

In those circumstances, the law must recognize the freedom of choice, the freedom not to accept the benefit. So, if the law requires the defendant to pay something for the benefit, the court may require the defendant to pay less than the market value of the services to him or her. This approach can be called the "choice of benefit approach," which may give the same result as the "subjective devaluation" approach. [The fifth judge said that he would not decide which of the two approaches was the correct one, as it was not necessary to do so on the facts of the present case.]

6. Offers to settle or to smooth over business relations are poor, or even dangerous, evidence of value. [So the offers of Sawiri were not reliable evidence of value. In fact, the trial judge held that the market value was about half of Sawiris' offers.]

7. If a claimant has already been paid for the benefit he or she provided to the defendant, then that payment must be brought into account, assuming the payment relates to the same sort of benefit for which compensation is claimed, even if the result of the benefit (in this case, the ultimate agreement to acquire the Italian telecom) was different and between different parties than originally contemplated. In addition, when the evidence shows that benefits of that nature are normally paid and valued by way of one lump sum, all-in, fee, then if the claimant alleges that part of the benefit he or she provided was not paid for, he or she must prove the separate value of that part. If that is not proven, then no recovery can be made for the alleged extra benefit. [For this reason, the Court of Appeal was wrong to award any compensation for the alleged unrewarded services.]

This analysis may seem complicated now. But it will be invaluable when the next unjust enrichment case comes along. Indeed, it will bear re-reading whenever a valuation issue arises in a legal context. So let's keep this decision close at hand, and when the occasion arises, let's pull out that decision in ***Benedetti v. Sawiris*!**

See *Heintzman and Goldsmith on Canadian Building Contracts*, 4th ed., chapter 4, part 4(d)

***Benedetti v. Sawiris*, [2013] UKSC 50**

Construction Contracts – Unjust Enrichment - Valuation

Thomas G. Heintzman O.C., Q.C., FCIArb **November 16, 2013**
www.heintzmanadr.com
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