

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Capital West Partners v. Playtime
Community Gaming Centres Inc.*,
2014 BCSC 86

Date: 20140120
Docket: S121633
Registry: Vancouver

Between:

Capital West Partners

Plaintiff

And

Playtime Community Gaming Centres Inc. and Kenneth Mahon

Defendants

Before: The Honourable Madam Justice Fenlon

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial:

Vancouver, B.C.
August 13-15, 2013

Place and Date of Judgment:

Vancouver, B.C.
January 20, 2014

INTRODUCTION

[1] The plaintiff sues to recover a fee of \$763,000 it says is owed by one of the defendants. The case turns on the interpretation of two contracts.

BACKGROUND

[2] Capital West Partners (“Capital West”), the plaintiff, are experienced financial advisors in the investment banking industry in Vancouver, British Columbia. At the material time, the defendant Ken Mahon and Tom Nellis each owned 50% of the defendant Playtime Community Gaming Centres Inc. (“Playtime”) through various companies they owned or controlled. Playtime operates community gaming centres and bingo facilities across British Columbia.

[3] In 2009 Mr. Mahon was in his 70s and wanted to sell his half interest in Playtime. Mr. Nellis was a potential buyer. The two men agreed on a price of \$30 million. However, the deal did not proceed because Mr. Nellis could provide only half of the purchase price in cash, with the rest to be paid in installments over a seven-year period.

[4] In April 2010 Mr. Mahon and Mr. Nellis asked Capital West to assist in the sale of Playtime. Both men were interested in selling their respective half interest if the price was right. On April 19, 2010, Capital West drafted two agreements that detailed the terms of their engagement in the process of selling Playtime, the first with Playtime (the “Engagement Letter”), and the second with Mr. Mahon personally (the “Mahon Agreement”).

[5] The Engagement Letter provided that Capital West would be paid a “Work Fee” of \$60,000 and a further “Success Fee” if Playtime was sold. The Success Fee is based on a percentage of Playtime’s sale price.

[6] Capital West’s marketing resulted in proposals from five companies in August 2010, two of which Playtime considered to be worth pursuing: (1) Gateway Casinos & Entertainment Inc. (“Gateway”) proposed purchasing Playtime for \$40 - \$70

million; (2) Great Canadian Gaming Corporation proposed purchasing Playtime for \$60 million. However, neither proposal proceeded further at this point.

[7] By December 2010, Mr. Mahon was again considering selling his half interest to Mr. Nellis, as they had previously considered in 2009 prior to engaging Capital West's services. Negotiations between the two men took place with some minor assistance from Capital West.

[8] In April 2011, Gateway expressed renewed interest in purchasing Playtime for "the greater of \$77 million less debt or \$60 million with neutral working capital at closing". Playtime accepted the proposal and Gateway prepared a draft purchase agreement. However, by late July 2011 it was apparent that Gateway had lost interest in the acquisition.

[9] During September 2011, Mr. Nellis again expressed interest in buying Mr. Mahon's share of Playtime. This time the two men closed a deal, with Mr. Nellis acquiring Mr. Mahon's 50% shareholding for \$30 million. This was the same price that Mr. Nellis first offered to pay for Mr. Mahon's shareholding in 2009.

[10] Capital West seeks the payment of a Success Fee for this transaction. Both defendants, Playtime and Mr. Mahon, say it is preposterous for Capital West to receive a fee when it did not bring in the purchaser. They say Capital West is not entitled to compensation given that the original shareholders simply went back to a deal they had made before Capital West's services were engaged.

DECISION

[11] I conclude that Playtime is obligated to pay Capital West the Success Fee.

ANALYSIS

A. The Case Against Playtime

[12] There is commercial sense to Playtime's position that Capital West should not be paid a Success Fee for a transaction between existing shareholders that was on

the table before Capital West came on the scene. However, the parties are bound by the contract they signed, and that is not the deal Playtime struck.

[13] The meaning of clause 2.3 of the Engagement Letter dated April 19, 2010, is central to the dispute. It reads:

- 2.3 Capital West will be paid the full Success Fee pursuant to clause 4.1 (b) at the closing of the Transaction or, if the Engagement has been terminated by Playtime, Capital West will be paid for any Transaction completed by Playtime within one year following the date of Termination with any party dealt with or contacted by Capital West during the term of the Engagement provided however that such party shall not include a shareholder (or such shareholder's principal) of Playtime or any shareholder, subsidiary, related, affiliated and/or associated entities of such shareholder. Capital West will provide a list of parties dealt with or contacted by Capital West during the term of the Engagement within 10 days of Termination by Playtime. This provision shall survive Termination of this agreement by Playtime. [Emphasis added.]

Capital West prepared the first draft of the contract. Playtime's solicitor added the underlined proviso to clause 2.3 (the "exclusion clause").

[14] Capital West submits that the exclusion clause only applies to a transaction that occurs after the Engagement Letter is terminated by Playtime. Playtime, on the other hand, argues that the exclusion clause applies regardless of whether the Engagement Letter is terminated.

[15] Playtime submits that Capital West's interpretation of clause 2.3 leads to an absurdity because the obvious point of the exclusion clause is to deny Capital West a Success Fee if they fail to bring in a third party purchaser. As such, there is no commercial sense to limiting the exclusion clause to only the period after the Engagement Letter is terminated.

(i) What is the meaning of clause 2.3?

[16] I will return later to the question of the commercial sense of the clause. I begin my analysis, as I must, with the "Golden Rule" of contract interpretation. The words of a contract should be given their plain and ordinary meaning unless to do so

would result in an absurdity: *Grace Residences Ltd. v. Whitewater Concrete Ltd.*, 2009 BCCA 144 at para. 23.

[17] Interpreting clause 2.3 in its ordinary grammatical sense, the exclusion clause is part of the phrase that begins after the word “or” in the second line of the first sentence.

[18] The word “or” is used to introduce (1) “the second of two, or all but the first or only the last of several, alternatives” or (2) “the only remaining possibility or choice of two or more quite different or mutually exclusive alternatives”: L. Brown, ed, *The New Shorter Oxford English Dictionary on Historical Principles*, (Oxford: Clarendon Press, 1993) *sub verbo* “or”.

[19] The use of a comma placed after the word “or”, as found in clause 2.3, simply reinforces the use of “or” to denote two distinct alternatives or scenarios: *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at 663-664.

[20] Playtime asserts that the word “or” can have a conjunctive meaning and relies on *Jardine v. General Hydrogen Corporation*, 2007 BCSC 119 at para. 24:

[24] As one might expect, a body of jurisprudence has developed with respect to the interpretation of the word “or”. The potential interchangeability of the words “or” and “and” was recognized by the Supreme Court of Canada approximately a century ago in the decision in *Clergue v. Vivian & Co.* (1909), 41 S.C.R. 607 at p. 617:

There is no doubt of the intention of the parties; and, where sense requires it, there are many cases to shew that we may construe the word “or” into “and”, and “and” into “or”, in order to effectuate the intent of the parties.

[21] I note, however, that Tysoe J. (as he then was) continues at para. 25:

[25] The jurisprudence does establish that the word “or” will ordinarily be given a disjunctive interpretation unless there is a reason to give it a conjunctive interpretation. In *REI.W.A., Local 2-306* (1971), 21 D.L.R. (3d) 239 (N.B.S.C., App. Div.), the Court said the following at p. 242 with respect to the interpretation of the word “or” in legislation:

While the natural meaning of “or” when used as a conjunction is to mark an alternative or present a choice, thereby implying an election is to be made to do one of two things, the word will not be so

construed where it would result in an absurdity or where the clear intent of the section in which it is found would be defeated.

[Emphasis added.]

[22] In *Jardine*, Tysoe J. considered words that in effect amounted to: If the company completes a financing by issuing warrants or shares for a total value of between \$4 and \$6 million then X happens. If the company does not achieve this financing then Y happens. The company achieved the requisite level of financing, but by issuing both warrants and shares. The company argued that the words “warrants or shares” was intended to be read conjunctively so as to encompass this situation. In the result, Tysoe J. found that applying the usual disjunctive meaning of “or” neither created an ambiguity nor resulted in a commercial absurdity. The assertion that “or” should be read conjunctively was thus dismissed.

[23] I find the “or” at issue in this case to be even harder to read conjunctively than the “or” at issue in *Jardine*. Clause 2.3 describes two discrete scenarios: (1) transactions that occur during the term of the contract, and (2) transactions that occur in the year after the contract is terminated. It is not necessary to read the “or” conjunctively in order for the clause to make sense. Giving “or” its normal disjunctive meaning, the exclusion clause applies only to the second scenario.

[24] It may well be that Playtime intended the exclusion clause to apply to both scenarios, but construction of a contract does not have as its object the determination of the parties’ actual intention. Rather, the Court seeks to determine the objective intention expressed in the words of the contract. As stated in H.G. Beale, ed, *Chitty on Contracts*, 29th ed (London, UK: Sweet & Maxwell, 2004) vol. 1 at 729-730:

The task of ascertaining the intention of the parties must be approached objectively: the question is not what one or other of the parties meant or understood by the words used, but “the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”. The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say the meaning of the documents or of a particular part of it is to be sought *in the document itself*. “One must consider

the meaning of the words used, not what one may guess to be the intention of the parties”.

[25] Does the plain meaning of clause 2.3 lead to an absurdity? I conclude that it does not. While, as Playtime asserts, it would have been logical to deny Capital West the Success Fee if one shareholder in Playtime bought out another either during or after the term of the contract, it does not follow that an interpretation to the contrary is an absurdity. I reach this conclusion for three reasons.

[26] First, it was within the power of each party to the contract to terminate it on 30 days’ notice. Thus, if Mr. Mahon and Mr. Nellis wanted to do a deal between themselves that did not require them to pay Capital West a Success Fee, they had only to give notice, wait 30 days, and then close the transaction. Their deal would then fall under scenario two of clause 2.3, the exclusion clause would apply, and no Success Fee would be payable.

[27] The words of Tysoe J. in *Jardine* at para. 34 pertain:

[34] I have been unable to locate an authority which describes what is meant by the term “commercial absurdity”. In my opinion, the term means a result brought about by the literal interpretation of the words which is so ludicrous that no sensible business person in negotiating the agreement, if he or she had directed their mind to the point, would have agreed to it. A consequence stipulated in an agreement will not constitute a commercial absurdity if a reasonable business person would have agreed to it in the prevailing circumstances because he or she was confident that the event giving rise to the consequence would not occur. [Emphasis added.]

[28] Second, there is a commercially sensible reason for Capital West to be paid a Success Fee even if the ultimate buyer for Mr. Mahon’s shares turned out to be his fellow shareholder. Capital West wanted to avoid a situation in which it marketed Playtime and brought in a serious buyer, only to have Mr. Nellis and Mr. Mahon use the process to fix the share price and conclude a deal between themselves without compensating Capital West.

[29] In fact, it is clear that Capital West was not prepared to act for Playtime without an assurance that it would be paid a Success Fee in just such an event. James Bruce, a principal of Capital West, wrote to Mr. Mahon personally on April 19,

2010 (the same date the Engagement Letter with Playtime was forwarded), to address this situation. I set out that letter in full:

Dear Ken:

Re: Playtime Community Gaming Centres Inc

With reference to paragraph 2.3 of the Engagement Letter dated April 19, 2010 (the "Engagement Letter") between Playtime Community Gaming Centres Inc ("Playtime") and Capital West Partners ("Capital West") we agreed to amend the first sentence of this paragraph by adding the words:

"provided however that such party shall not include a shareholder (or such shareholder's principal) of Playtime or any shareholder, subsidiary, related affiliated and or associated entities of such shareholder."

The effect of this change is that if your partner in Playtime, Tom Nellis, were to purchase your interest within a year after Capital West was terminated no Success Fee would be payable. As discussed, Capital West does not want to be involved in a process that ends up setting the price for one shareholder to buy out another shareholder without compensation. Accordingly, you agree that:

- If during the sale process we generate a proposal or proposals (the "Proposal") to acquire the business and no transaction occurs; and
- you sell all or part of your interest in Playtime to your partner at an Enterprise Value less than or equal to 103% of the highest value Proposal;

you will pay the Success Fee as defined in the Engagement Letter regardless of whether it is due under the terms of the Engagement Letter or not.

Please acknowledge your agreement to this arrangement by signing and returning the enclosed copy of this letter.

Yours truly,

Capital West Partners

The foregoing is accepted and agreed to this 22 day of April 2010.

By:

By:

James M I Bruce

Kenneth W Mahon

[Emphasis added.]

[30] Mr. Mahon accepted the terms of this "side deal", which I have called the Mahon Agreement. Mr. Mahon is a sophisticated businessman who presumably understood the commercial sense of Capital West's insistence on getting paid even if a deal was ultimately concluded between Mr. Mahon and Mr. Nellis.

[31] Third, Playtime's submission that payment of a Success Fee for the transaction is an absurdity is based on the assumption that the transaction between Mr. Nellis and Mr. Mahon was the very same deal that was on the table before Capital West's services were engaged. I conclude that is not the case. While it is true that Mr. Nellis and Mr. Mahon had agreed on a purchase price of \$30 million in 2009, and Mr. Nellis ultimately paid \$30 million in the October 2011 transaction, it was not simply a case of dusting off their old draft agreement and changing the dates. I come to this conclusion for three reasons.

[32] First, the value of Playtime increased between 2009 and 2011. Debt alone was reduced by more than \$7 million. Thus in real terms Mr. Nellis was offering to pay significantly less for the company in October 2011 than he originally offered in 2009.

[33] Second, the two men engaged in negotiations over the price and other terms of the sale in September 2011. That would not have been necessary if they were simply putting the previous deal back on the table. On September 4, 2011, Mr. Mahon emailed Mr. Nellis, among others, saying in part:

I have purposely left the lawyers out of this round as we need to get the business deal agreed before involving them. Let's try to agree on the business deal this week so we can instruct the lawyers re the changes that are needed.

[34] The two men had not agreed on price at that point. Mr. Mahon wanted \$32 million for his 50% shareholding in Playtime. Mr. Nellis responded to Mr. Mahon's email on September 5, 2011, as follows:

3. Price. As you know I said I would consider a total of \$32 million. But after much thought I think that \$30 million is already a more than fair number. My thoughts are as follows:

Gateway was at \$60 million for the entire company. Once we added in the additional cash to us for the excess of current assets less liabilities and reinforced that they were buying only 50% of Playtime Peardonville they disappeared - and never did respond to our offer of sharing in the Courtenay costs.

Most other offers forwarded to CapWest were based on a 5 year multiple. At \$30 million I'm already quite a bit above that multiple.

[35] In short it appears that, as Mr. Bruce testified at trial, the process Capital West ran for Playtime brought value to the two Playtime shareholders: In 2009 Mr. Mahon was unwilling to accept \$30 million in part cash and part deferred payment, but after the process with Capital West he knew there was no better deal out there. Similarly, Mr. Nellis knew that \$30 million was a reasonable price and had a basis for rejecting Mr. Mahon's asking price of \$32 million. For Playtime itself, Capital West's involvement led to an agreement between its two major shareholders that resulted in the consolidation of its shares with one of them.

[36] In summary on this issue, I conclude that the words of clause 2.3 are clear and their plain meaning does not result in an absurdity. Clause 2.3 obligates Playtime to pay a Success Fee to Capital West for any transaction concluded during the term of the contract.

(ii) Is there any ambiguity in clause 2.3?

[37] I do not find the meaning of clause 2.3 to be ambiguous. But even if the exclusion clause could be construed as applying either to one or both scenarios with nothing to choose between them, I would still resolve the ambiguity in favour of Capital West. That is so because Playtime drafted the exclusion clause and the *contra proferentem* doctrine therefore applies.

[38] In *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888 at 900, Estey J., writing for the majority, referred to the process of gathering the intention of the parties from the words used as "step one" in the interpretative process. He continued:

...Step two is the application, when ambiguity is found, of the *contra proferentem* doctrine. This doctrine finds much expression in our law, and one example which may be referred to is found in *Cheshire and Fifoot's Law of Contract* (9th ed.), at pp. 152-3:

If there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who has inserted it and who is now relying on it. As he seeks to protect himself against liability to which he would otherwise be subject, it is for him to prove that his words clearly and aptly describe the contingency that has in fact arisen.

[39] In summary on this issue, even if I am wrong and there is an ambiguity in clause 2.3, I would resolve the ambiguity against Playtime.

(iii) Was the contract terminated before the Mahon and Nellis transaction occurred?

[40] Playtime argues that even if clause 2.3 obligates them to pay Capital West a Success Fee during the term of the contract, the contract was in fact terminated before the transaction closed.

[41] It is not disputed that the transaction closed on November 1, 2011. Playtime submits that notice to terminate was given to Capital West on August 16, 2011, thereby making the termination effective September 16, 2011. In support of this submission Playtime relies on an email Mr. Mahon wrote to Capital West on August 16, 2011, which said:

This has been a long, drawn out exercise without results so far. You should know that Tom and I are beginning to discuss again the possibility of Tom's group buying us out so time is relatively short for anyone else who might be interested. Tom is talking an Oct. 1 close and says he has his financing organized. Tom says that the renos in Courtenay are proceeding on schedule and the building should be ready to receive the 50 additional slots Oct. 1, 2011 which is good news for everyone. As you know, we have the cash to complete this \$2m project so we should not have to increase debt. I'm copying Rick so he will know the situation.

[42] This email was written in response to an email from Capital West to both Mr. Mahon and Mr. Nellis earlier that day, which said:

I haven't heard anything direct from Paragon, but Rick Turner did get back to me. He is also waiting to see if his folks with Paragon in the US are interested. He mentioned that if Paragon is not interested in acquiring Playtime that he may be interested in doing it personally. I asked him to call me to discuss. Once I hear from him I will give you an update.

[43] It is apparent from this email exchange that Mr. Mahon is communicating with Capital West about the potential sale of Playtime to either Rick Turner or Paragon. Mr. Mahon's response does not constitute a termination or a direction to "down tools". To the contrary, he states only that time is running out for "anyone else who might be interested". Emails between Capital West and Playtime continued into the

middle of September and include a reference to Paragon “getting something to Playtime” by September 23, the date Mr. Mahon originally expected to conclude a transaction with Mr. Nellis.

[44] In summary on this issue, I find that notice of termination was given on January 4, 2012, the date Playtime wrote to Capital West expressly terminating the Engagement Letter. It follows that the sale of Playtime occurred during the term of the contract.

[45] In conclusion on the overall case against Playtime, I find that Playtime is liable to pay Capital West a Success Fee of \$763,286.62 (\$680,748 plus disbursements and taxes).

B. The Case Against Mr. Mahon

[46] Given my conclusion that Playtime is liable for Capital West’s fee under the Engagement Letter, it is not necessary to address the defences raised by Mr. Mahon. I will do so, however, in the event that an appellate court differs in its interpretation of clause 2.3.

[47] The main issue raised by Mr. Mahon is whether the Mahon Agreement is unenforceable due to the uncertainty of its terms.

[48] The relevant portions of the Mahon Agreement are:

...Accordingly, you agree that:

- if during the sale process we generate a proposal or proposals (the “Proposal”) to acquire the business and no transaction occurs; and
- you sell all or part of your interest in Playtime to your partner at an Enterprise Value less than or equal to 103% of the highest value Proposal;

you will pay the Success Fee as defined in the Engagement Letter regardless of whether it is due under the terms of the Engagement Letter or not.

[49] Mr. Mahon argues that two terms in this agreement are uncertain: (1) the word “proposal” used in both bullet points, and (2) the phrase “highest value” in the second bullet point. I will deal with each in turn.

(i) Is the word “proposal” uncertain?

[50] The word “proposal” is not defined in either the Engagement Letter or the Mahon Agreement. Mr. Mahon argues that the word “proposal” is vague. He relies on a comment made by Mr. Bruce on examination for discovery that some of the five proposals generated by Capital West did not fall into the definition of a proposal:

Q But, so what I am asking you is, are you saying that you generated a proposal?

A I generated five, five proposals in August '10. There was another proposal from Gateway in the summer of '11 -- April '11, sorry. And yeah, nothing from Rick Turner. So, those are the proposals that we generated.

....

Q Okay. But you had -- would you consider the Canterbury Park proposal to be --

A No.

Q Okay. So, not all of the five proposals necessarily fall into the definition of a proposal in your mind?

A No.

Q Okay. But, but you felt the last Gateway proposal --

A It is the most definitive and the most well-developed proposal.

[Examination for Discovery of James Bruce, September 11, 2012, Questions 461-472]

[51] In cross-examination, the admission that “not all of the five proposals ... fall into the definition of a proposal...” was put to Mr. Bruce. He then explained that he meant only that Capital West was not relying on all of the five proposals, but only on the most definitive, *i.e.* the Gateway proposal. Mr. Bruce described all five proposals as “serious proposals”. He said Capital West gave interested third parties a process; those third parties had to provide their view of value, specify how they proposed to finance the purchase, and detail what further work they would need to do before making a final binding offer.

[52] I conclude that on the face of the Mahon Agreement there is some ambiguity about the meaning of the word “proposal”. However, I find that the context within

which the Mahon Agreement was made clarifies its meaning and resolves the ambiguity.

[53] In *Hoban Construction Ltd. v. Alexander*, 2012 BCCA 75 at paras. 47-48, Bennett J.A. addresses the role of the Court when essential terms of a contract are vague and uncertain:

[47] ... [T]he inquiry is not whether the contracts were competently drafted, but rather whether they disclose the parties' intentions as to the substance of their agreement. In *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* (1968), 1 D.L.R. (3d) 513 (B.C.C.A.), the majority outlined the role of the court at 517-18:

... The primary rule of construction has been expressed by the maxim, *ut res magis valeat quam pereat* or as paraphrased in English, "a deed shall never be void where the words may be applied to any extent to make it good". The maxim has been basic to such authoritative decisions as *Scammell v. Ouston*, [1941] 1 All. E.R. 14; *Wells v. Blain*, [1927] 1 D.L.R. 687, [1927] 1 W.W.R. 223; *Ottawa Electric Co. v. St. Jacques* (1902), 31 S.C.R. 636, as well as many others, which establish that every effort should be made by a Court to find a meaning, looking at substance and not mere form, and that difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted. In other words, every clause in a contract must, if possible, be given effect to. Also, as stated as early as 1868 in *Gwyn v. Neath Canal Navigation Co.* (1868), L.R. 3 Ex. 209, that if the real intentions of the parties can be collected from the language within the four corners of the instrument, the Court must give effect to such intentions by supplying anything necessarily to be inferred and rejecting whatever is repugnant to such real intentions so ascertained.

[48] In *Langley*, before citing *Marquest Industries*, McEachern C.J.B.C. stated the following at para. 37:

[37] Having determined that the legal force of the arrangements represented by the communications I have described is not contingent upon the preparation of a formal document, it is necessary to consider what the terms of the bargain are and whether they are legally sufficient to constitute a binding agreement. This analysis is carried out according to the standard rules of contract construction: give the words their plain and ordinary meaning where that meaning does not conflict with the context of the communications as a whole. Where there is ambiguity, extrinsic evidence may be considered.

[Emphasis added by Bennett J.A.]

[54] I conclude from the extrinsic evidence that both Mr. Mahon and Capital West knew exactly what was meant by a "proposal" when they entered the Mahon

Agreement. Mr. Mahon is an experienced businessman. He is a professional chartered accountant who founded Wolrige Mahon LLP, the chairman of Adera Development Corporation, and the president of Terrapin Mortgage Investment Corporation.

[55] Mr. Mahon and Mr. Nellis retained Capital West to garner expressions of interest in Playtime. Prior to being retained, Capital West described the process they would engage in. That process involved obtaining non-binding proposals initially. The *Process Update & Proposal Analysis* provided by Capital West on August 10, 2010, referred to the receipt of five “[n]on binding initial expressions of interest” from third parties. After analyzing those five expressions of interest, Capital West recommended moving to the due diligence stage with two of them.

[56] Further, each of the five third parties described their initial expression of interest in purchasing Playtime as a “proposal” or “preliminary proposal”. For example, Great Canadian Gaming Corporation wrote to Capital West as follows:

Further to your letter dated July 26, 2010 Great Canadian Gaming Corporation (GCGC) is pleased to provide you with this preliminary written proposal (the “Proposal”) outlining our interest in acquiring the business and undertaking of Playtime Community Gaming Centres (“Playtime”). This Proposal was developed based on the information provided to us by way of the Confidential Information Memorandum dated July 7, 2010 and such other supplemental information provided by you. The information and proposals contained herein are an expression of our interest and are not intended to be binding upon us. Any indications of our interest, including those with respect to value, are subject to further due diligence and the other conditions and caveats set out herein. [Emphasis added.]

[57] Each of the five expressions of interest set out the nature of the proposed transaction, the value of the transaction, the form of consideration, the identity of the parties making the proposal, the funding mechanism, and what further work would be required to provide a binding offer, along with a timetable for completing that due diligence.

[58] On April 18, 2011, Playtime agreed to and signed Gateway’s proposal after clarifying the price. I find that all three principals (Mr. Mahon, Mr. Nellis and Mr. Bruce) understood a proposal to be a detailed expression of interest, made in

accordance with the process set up by Capital West, but something less than a binding offer.

[59] In summary on this issue, I find that the word “proposal” in the Mahon Agreement is not uncertain.

(ii) Is the phrase “Highest Value Proposal” uncertain?

[60] The phrase “highest value Proposal” is found in the larger phrase “an Enterprise Value less than or equal to 103% of the highest value Proposal”. Mr. Mahon argues that the word “value” means something different each time it is used in this sentence as it is capitalised in one phrase and not in another.

[61] With respect, I do not accept this submission.

[62] “Value” is capitalized in “Enterprise Value” because it is a defined term in the Engagement Letter:

... Enterprise Value is defined to include the sum of the fair market value of the cash, securities and other amounts, fees or remuneration paid or payable in connection with the Transaction by a purchaser (the “Purchaser”) to Playtime or its shareholders, plus the face value of Playtime’s long-term debt and shareholder loans assumed by the Purchaser or its shareholders.

[63] Enterprise Value thus refers specifically to the actual sale price of Playtime. This amount is then to be compared to the “highest value Proposal”, which refers to the proposal, or expression of interest, that offered the best price for Playtime.

[64] Playtime argues further that even if the challenged terms are certain, it is not possible to determine the value of the proposals made. I conclude to the contrary. Capital West did just that in the *Process Update & Proposal Analysis*, which compared the value of the five proposals received and recommended that Playtime proceed to due diligence with the two most attractive ones.

[65] In any event, there can be no doubt that the Gateway proposal of April 18, 2011, had a determinable value. Before Mr. Mahon and Mr. Nellis accepted the proposal, Mr. Mahon added a handwritten paragraph clarifying the price:

We confirm that Gateway is aware that the minimum price for the shares (excluding the 50% of Abbotsford not owned) is the greater of \$77M less debt or \$60M, with neutral working capital at closing.

[66] In summary on this issue, I find that phrase “highest value Proposal” is not uncertain.

[67] Two conditions must be met before Mr. Mahon owes a Success Fee to Capital West under the Mahon Agreement: (1) Capital West must have generated at least one proposal for the purchase of Playtime, and (2) the actual price at which Mr. Mahon sold his share in Playtime to Mr. Nellis must be “less than or equal to 103% of the highest value Proposal”.

[68] I find that both conditions were met in this case. First, through the process overseen by Capital West, Gateway made a proposal on April 18, 2011. At a value of \$60 - \$77 million, it was the highest of the five proposals received for Playtime. Second, the transaction between Mr. Mahon and Mr. Nellis valued Playtime at \$60 million, a price that is less than 103% of that offered by Gateway. The defendants did not challenge Capital West’s calculations which show that this second condition of the Mahon Agreement has been met.

[69] In summary on this issue, I find that both conditions in the Mahon Agreement were met. It follows that, if I am wrong in my interpretation of the Engagement Letter and Playtime is not required to pay the Success Fee, Mr. Mahon must pay Capital West the \$763,286.62.

COSTS

[70] Capital West is entitled to its costs against both defendants.

The Honourable Madam Justice L.A. Fenlon