

Take Home Examination: Law 633

October 30, 2017

Instructions

Please answer Part A and either Part B or Part C. Please deliver your answers to dstratas@yahoo.com by 5:00 PM EST on November 13, 2017.

PART A –

You are junior counsel for Air Oakville.

Air Oakville is defending a breach of contract action brought by the Plaintiff, Mary Hughes. Mary Hughes alleges that Air Oakville published a false advertisement that induced her to buy a fight from Air Oakville. The advertisement was a representation that forms part of the contract.

Separately, Air Oakville and its CEO, Elizabeth Fraser, have been charged for a criminal offence under s. 116 of the *Consumer Protection Act*, specifically the making of a false, misleading or deceptive representation under section 14 that constitutes an “unfair practice” under section 17(1) of that Act. The false advertisement that led to the contract is the “unfair practice” relied upon in the criminal charges.

Air Oakville and its CEO, Elizabeth Fraser (a non-party to the action for breach of contract) have brought a motion for a stay of the breach of contract action until such time as the criminal charges are determined.

Senior counsel on the file – your supervisor on the file – has prepared the attached factum. It is really bad.

As junior counsel, your task is to redraft it and make sure that it complies with the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, Rule 37.10(6), as amended. This is the Rule applicable to motions in the Ontario Superior Court of Justice.

Note that Rule 37.10(6) does not specify any particular parts of the factum or headings in it, such as Rule 61.11 (the rule for appellants’ factums in the Ontario Court of Appeal). So you have flexibility concerning the use of parts or headings.

Do not worry about the style of cause. Simply begin with the heading your supervising counsel used.

This problem does not call for any legal research. Use the cases (fictional) set out in the attached draft. Do not add facts, other than what you see in this examination paper.

In redrafting this factum, please apply the lessons of the class concerning writing. You are also free to use the strategies and tactics concerning factums that we discussed in class.

PART B –

Edit the following:

1. Meditrust's assertion that it is not a proper defendant in this case and, therefore, relief cannot be granted is incorrect.
2. The plaintiff is not in a position to provide additional affidavits to support its contention that W Corp. and Y Corp. are an integrated enterprise at this time.
3. The court is of the opinion that it is within sound judicial discretion to determine whether, once the claim is asserted, the fraud exception is applicable.
4. If it had been the intention of the court to do otherwise, it would have said so.
5. This case involves the novel issue of whether or not a minor is responsible for the damages sustained by a restaurant in lost profits resulting from a liquor licence suspension caused when the minor orally misrepresented his age to the owner of the restaurant who thereafter sold liquor to her.

PART C –

In 150 words maximum, comment on the quality of the draft factum your supervisor prepared. Use the writing tips provided in class. Try to be as persuasive as possible.

ONTARIO SUPREME COURT OF JUSTICE
Submissions of Air Oakville and Elizabeth Fraser

1. With respect to the trial for damages breach of contract by the plaintiff Mary Hughes against Air Oakville and Elizabeth Fraser, currently scheduled for June 14, 2018, the trial should be adjourned, generally for the reasons and explanations set out below.
2. Air Oakville wants the trial to be delayed until June 2019 because it will be in a criminal trial starting on September 24, 2018. The criminal trial is generally in regards to the same incident that is the subject of litigation in the contract matter previously referred to.
3. Also charged is the company CEO, Elizabeth Fraser. It is important to note that she could go to jail for up to six months if found guilty.
4. Both the individual and the company is charged with making a false and misleading consumer representation with respect to an advertisement published in the Globe and Mail on November 25, 2016: Affidavit of Elizabeth Fraser, para 24; Motion Record of Air Oakville, page 45. In that marketing initiative, the airline indicated that it would fly passengers like Ms Hughes to Washington D.C. for just \$50: Affidavit of Elizabeth Fraser, para 27; Motion Record of Air Oakville, page 46. But there were added fees, such as a fee to check in at the airport, a charge to have the boarding pass accepted at the gate, a charge for any pieces of hand baggage, including something as small as a purse: Affidavit of Elizabeth Fraser, para 29; Motion Record of Air Oakville, page 49. Ms Hughes was charged a total of \$125 for her flight, not inclusive of taxes, in order to travel to the US capital: Affidavit of Elizabeth Fraser, para 34; Motion Record of Air Oakville, page 52. She brought suit, alleging that the CEO approved the marketing statement to the public: Affidavit of Elizabeth Fraser, para 37; Motion Record of Air Oakville, page 54. She stated (transcript, p. 49; Motion Record, page 125): “I thought this was a really terrific deal but I was just shattered to learn about all of the hidden fees. I felt that I was lyed to in the worst possible way.” While she thought this, Fraser did not draft the advertisement, and she reviewed its wording only after the ad has been sent to the newspaper for publication, which was by then too late to be modified. “It was just too late to pull the advertisement, so, feeling horrible, I immediately asked for staff to inquire into whether we could run a promotion where people responding to the advertisement complaining about it would get a \$50 voucher good for any future flight”: see discovery of Fraser, p. 53; Motion Record, page 89.
5. It is expected that the CEO will be a witness at the civil trial for damages and may go beyond this testimony and incriminate herself, prejudicing her chances of prevailing

- in the criminal trial and escaping criminal incarceration. In any event, the Crown in the criminal proceedings will get advance notice of what she will say in the criminal proceedings, something that Crowns normally do not get in criminal proceedings.
6. Here, the CEO, Fraser, undertakes that if this Court bestows upon her an adjournment of the civil proceedings as is requested, she will not to seek to delay the criminal proceedings and the fact is that she will consent to a trial date earlier than September 24, 2018 if that will make this Court more willing to grant the adjournment.
 7. There are three cases that speak to this situation and generally indicate the parameters of the judge's discretion with respect to an adjournment.
 8. In *Thomas v. Kalanj* (2012), 74 O.R. (4th) 537, 2012 ONCA 637 (Ont. C.A.), the Court said that adjournments of civil proceedings would be granted only in extreme circumstances, where a criminal accused might suffer irreparable harm. But concerning irreparable harm, the Court said that a threat that the accused might be convicted, did not qualify. But *Davidson v. Rejani*, [2009] 4 WWR 367 (Alta. C.A.) 2009 ABCA 125 was different. Adjournments are granted in unusual circumstances where a criminal accused might suffer irreparable harm and the threat of a jail sentence over one month would often qualify as irreparable harm. But the court did not grant an adjournment of the civil trial in *Davidson* because the accused had engaged in conduct with respect to the civil proceedings that delayed them considerably. The Court said that those who do not have "clean hands" cannot get a favourable exercise of discretion in favour of an adjournment. Finally, in *Whanczny v. Krazy Whale Developments Ltd.*, 2008 B.C.C.A. 235, [2007] 2 W.W.R. 135 (B.C.C.A.), in regards to an adjournment, the court said that an adjournment of a pending civil action would usually follow where jail was a possible consequence of later criminal proceedings, the two proceedings involved the same subject-matter and where the accused were not guilty of any conduct that would prompt the Court to exercise an exercise of discretion which was unfavourable against the accused. What the cases emphasize is that it is all a matter of discretion, even though there are principles that can govern the exercise of that discretion, as noted *supra* in this paragraph.
 9. In this case, Fraser requests an adjournment be granted, in the discretion of this court. It is important to note that she is not guilty of any conduct that would be considered to be grounds for denying her requested adjournment. She may be jailed for up to six (6) months or half a year.

10. Therefore, Fraser requests that the civil proceedings be adjourned for a period of eight months or 2/3rds of a year in order to ensure that the testimony of Fraser cannot be used against her in the criminal proceedings.

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