

JANUARY 2016

## Are Parties Required to Act Reasonably When Choosing Not to Renew a Contract?

At common law, any powers that confer discretion on a contracting party must be exercised reasonably.

In *Data & Scientific Inc. v. Oracle Corporation*, 2015 ONSC 4178, a decision of Justice Belobaba of the Ontario Superior Court ("*Data & Scientific*"), the Court affirmed that the duty to exercise discretionary contractual powers reasonably also applies to contract renewal situations.

### The Facts

The Plaintiff, Data & Scientific Inc. ("Data"), was a member of the defendant Oracle Inc.'s ("Oracle's") "partner network". Oracle is a computer technology company. For 20 years, Oracle renewed its contract with Data consistently. As a result, Data became more and more reliant on its contract with Oracle as the years passed.

Under the contract between Data and Oracle (the "Contract"), Oracle had the sole discretion to renew its relationship with Data as follows:

Any renewal of this agreement shall be subject to Oracle's standard terms and fees...and shall be at Oracle's sole discretion. You may apply for renewal of your member

in OPN by on-line electronic acceptance of the terms of the then current OPN agreement and Oracle will notify you if it accepts your application for renewal. [emphasis added]

In 2014, Oracle asked Data to renew the Contract as it had done in years past. Data attempted to renew the Contract online, but was unsuccessful. Data then wrote to Oracle to request a renewal. To Data's surprise, it received a letter from Oracle on December 15, 2014 stating that Oracle had exercised its discretion not to renew the Contract.

Accordingly, Data commenced an action against Oracle seeking damages for failure to give notice



### Marco P. Falco

Partner, Litigation & Written Advocacy

### PHONE

416 777 5421

### EMAIL

[mfalco@torkinmanes.com](mailto:mfalco@torkinmanes.com)

Marco is a partner in the Litigation Department at Torkin Manes. He provides written advocacy for a wide range of civil disputes, including commercial litigation and administrative law. He specializes in applications for judicial review and civil appeals.

of the non-renewal of the Contract. Data argued that Oracle had a duty to exercise its discretionary renewal power reasonably and that Oracle breached that duty by ending a long-standing relationship without any notice to Data.

In reply, Oracle argued that while there is a general duty to exercise discretion under a contract reasonably, that duty did not apply in cases where a party has the right to exercise its discretion as to whether or not to renew a contract.

In advancing this position, Oracle relied on the Supreme Court of Canada's decision *Bhasin v. Hrynew*, 2014 SCC 71 ("*Bhasin*"). The *Bhasin* decision was released in 2014 and recognized a new duty at common law of "honest contractual performance".

### **Did Bhasin Rule that the Duty to Exercise Contractual Discretion Reasonably Does not Apply to Contract Renewals?**

*Bhasin* also involved the failure to renew a contract. In *Bhasin*, the three-year term of the contract was automatically renewed unless either party to the contract gave six-months' notice that the contract would not be renewed. The defendant in *Bhasin* did give six-months' notice to the plaintiff that it did not intend to renew the contract. However, the plaintiff argued that the defendant exercised its discretion not to renew the contract dishonestly and that the defendant's

conduct leading up to the non-renewal was actively dishonest.

The Supreme Court of Canada agreed with the plaintiff in *Bhasin* and held that the defendant breached what the Court recognized as the "duty of honest contractual performance" to the plaintiff. That is, the parties to a contract must not actively mislead one another in the performance of the contract.

In *Data & Scientific*, Oracle argued that the Supreme Court of Canada in *Bhasin* "specifically curtailed" the general rule that discretionary contractual powers must be exercised reasonably. In other words, Oracle argued that the Court in *Bhasin* held that the duty to exercise discretionary contractual powers reasonably did not apply to contract renewal situations—ever. According to Oracle, so long as the party deciding not to renew the contract was not "actively dishonest", the Court in *Bhasin* implied that the party had no duty to act reasonably in exercising its discretion not to renew the contract. On this basis, Oracle brought a motion to strike Data's action against it.

Justice Belobaba rejected Oracle's argument and refused to dismiss Data's action.

First, Justice Belobaba observed that, in *Bhasin*, the defendant complied with the six-month notice requirement. Thus, it would be impossible to argue that the

decision by the defendant in *Bhasin* not to renew the contract was exercised unreasonably. The Court's focus in *Bhasin*, according to Justice Belobaba, was *dishonesty* and not *unreasonableness*. Justice Belobaba held:

[The Supreme Court of Canada in *Bhasin*] said nothing about the situation that is before me on this motion: there is a long-term 20 year business relationship, no written notice requirement regarding non-renewal and the discretionary power not to renew is allegedly exercised not dishonestly but reasonably, i.e. without any notice whatsoever.

Accordingly, Justice Belobaba rejected Oracle's argument that the Court in *Bhasin* held that the duty to exercise discretionary contractual powers reasonably did not apply to contract renewal situations:

...The Supreme Court has not (yet) decided that the long-standing requirement that discretionary contractual power must be exercised reasonably can never apply in contract renewal situations where, as here, the contractual agreement bestows a "sole discretion" non-renewal power and requires no notice of any kind.

Based on this analysis, Justice Belobaba dismissed Oracle's motion to strike the action against it.

### **The Implications for Parties Seeking Not to Renew Their Contract**

While the decision in *Data & Scientific* involved a motion to strike and

Justice Belobaba was clear that he was not ruling on the actual merits of the plaintiff's action, the case has implications for parties exercising a renewal clause in a contract.

The Court in *Data & Scientific* was clear that, in addition to a duty not act dishonestly, a party exercising a broad discretionary contractual renewal clause must exercise such

discretion reasonably. This means, at a minimum, that the party choosing not to renew the contract should provide some period of reasonable notice to the other party of the non-renewal. This is especially so if no reasonable notice period is set out in the contract. What amounts to a reasonable notice period remains unclear and

likely depends on the facts of the case.

For more information about the implications of the *Data and Scientific* decision to your contractual arrangements, contact Marco P. Falco at [mfalco@torkinmanes.com](mailto:mfalco@torkinmanes.com).

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