

NOVA SCOTIA COURT OF APPEAL

Citation: W. Eric Whebby Ltd. v. Doug Bohner Trucking & Excavation Ltd., 2007 NSCA 117

Date: 20071206

Docket: CA 274238

Registry: Halifax

Between:

W. Eric Whebby Limited, a body corporate

Appellant

v.

Doug Bohner Trucking & Excavating Limited, a body corporate, United Gulf Developments Limited, a body corporate, Greater Homes Inc., a body corporate, and Garden Crest Developments Limited, a body corporate

Respondents

and

United Gulf Developments Limited, a body corporate, Greater Homes Inc., a body corporate, and Garden Crest Developments Limited, a body Corporate

Respondents

(Appellants by cross-appeal)

Judges:

MacDonald, C.J.N.S.; Cromwell and Saunders, JJ.A.

Hearing to settle order:

November 27, 2007, in Halifax, Nova Scotia

Counsel:

George W. MacDonald, Q.C., for the appellant
Michael Wood, Q.C. respondent Doug Bohner Trucking & Excavating Limited

David Farrar, Q.C. and Sara Scott, for the respondents (appellants by cross-appeal), United Gulf Developments Limited and Greater Homes Inc.

David Coles, Q.C., for the respondent (appellant by cross-appeal) Garden Crest Developments Limited.

Decision:

[1] Counsel apply to settle the terms of the order following reasons for judgment delivered on September 6, 2007. At issue is whether funds paid into court in compliance with the trial judge's order by Whebby and Garden Crest for the benefit of Boehner and United should be repaid by them now that the judge's order in this respect has been set aside on appeal.

[2] The Court allowed Whebby's appeal on the issue of its negligence, Boehner's cross-appeal on the issue of its contributory negligence and Garden Crest's cross-appeal on the issue of its negligence. The judge's order with respect to those claims was set aside and a new trial was ordered. The order for the new trial was specified to include a retrial of United's claims against Whebby in negligence but not of its claim in nuisance which had been dismissed by the trial judge. In addition, Boehner's cross-appeal in relation to its claim under s. 17(a) of the **Sale of Goods Act**, R.S.N.S. 1989, c. 408, was dismissed but Boehner's cross-appeal with respect to its claim under s. 17(b) of the **Sale of Goods Act** was allowed and a new trial was ordered of that claim. United's cross-appeal on the issue of Whebby's liability in nuisance was dismissed and the judge's dismissal of that claim upheld. United's cross-appeal on the issue of its contributory negligence and its failure to mitigate was allowed and only the issue of mitigation was ordered to be before the court at the new trial.

[3] The Court requested that counsel prepare a draft order. They have been unable to agree on its content. The difference of view concerns whether the order ought to direct repayment by Boehner and United of funds which the trial judge's order had directed be paid into court for the benefit of Boehner and United. The position of Whebby and Garden Crest is that Boehner and United should be ordered to repay those funds to them. United's position is that the order should be silent about the repayment of funds other than costs and a portion of the amount paid into court. Its submission is that it did not receive the benefit of most of the funds which were paid out of court to Boehner's solicitors. We are advised that Boehner is not in a position to repay the funds.

[4] We are in substantial agreement with the position advanced by Whebby.

[5] The trial judge directed that Garden Crest and Whebby pay certain sums into court “for the benefit of Doug Bohner Trucking & Excavating Limited and United Gulf Developments Limited”. The most relevant operative parts of the trial judge’s order were these:

IT IS ORDERED that:

- 1) The Fourth Party by Counterclaim, Garden Crest Developments Limited, shall pay \$36,002.00 into court or otherwise as agreed among counsel for the benefit of Doug Bohner Trucking & Excavating Limited and United Gulf Developments Limited;
- 2) The Third Party by Counterclaim, W. Eric Whebby Limited, shall pay \$221,510.00 into court or otherwise agreed among counsel for the benefit of Doug Bohner Trucking & Excavating Limited and United Gulf Developments Limited;
- 3) The Plaintiff and Defendant by Counterclaim, Doug Bohner Trucking & Excavating Limited, and the Defendant and Plaintiff by Counterclaim, United Gulf Developments Limited shall be equally liable for the balance of remediation costs totaling \$242,606.00;
(Emphasis added)

[6] Whebby paid the following amounts into Court in satisfaction of the finding of liability to pay damages and costs:

\$221,510.00 paid on December 20, 2006

\$21,000.00 paid on July 10, 2007

\$22,052.83 paid on August 3, 2007

Garden Crest also paid in the funds it was ordered to pay. We are told that after funds were paid into Court, applications were made on behalf of Bohner to pay the funds to its solicitors, Burchell Hayman & Parish, in trust. We are also told that the supporting affidavit of Bohner’s counsel, Michael J. Wood, Q.C., in each application contained a statement to the effect that the funds were paid into Court for the benefit of Bohner and United Gulf and that counsel for both Bohner and United Gulf had agreed that the funds should be paid out of court to Burchell Hayman & Parish in Trust.

[7] On appeal, the paragraphs of the judge's order which I have quoted directing payment were set aside. It follows that to reverse the effect of those parts of the trial judge's order, it is necessary to direct that the sums paid by Garden Crest and Whebby "for the benefit of Doug Boehner Trucking & Excavating Limited and United Gulf Developments Limited" must be repaid by the parties for whose benefit they were paid: Doug Boehner Trucking & Excavating Limited and United Gulf Developments Limited. In our view, the arrangements made between Boehner and United should not affect the rights of Garden Crest and Whebby to the repayment of the funds by those parties for whose benefit the judge directed the funds to be paid.

[8] Accordingly, we have issued an order reflecting the requirement for Boehner and United to repay those funds.

[9] Garden Crest asked that an additional provision be made in the order to the effect that Whebby will be responsible for repaying the funds paid by Garden Crest in the event that those funds are not paid by Boehner or United Gulf. In our view, inclusion of such a provision goes beyond setting aside and reversing the payments ordered by the trial judge and we decline to include such a provision in the order.

MacDonald, J.A.

Cromwell, J.A.

Saunders, J.A.