NOVA SCOTIA COURT OF APPEAL
Citation: *Burridge Estate v. Parker*, 2020 NSCA 63

Date: 20201007
Docket: CA 494190
Registry: Halifax

Between:

Rosetta Burridge, Personal Representative of the Estate of Stewart Augustus Burridge, deceased

Appellant

v.

Manfred Parker

Respondent

Judge: The Honourable Justice Carole A. Beaton

Appeal Heard: September 15, 2020, in Halifax, Nova Scotia

Cases Considered: *Printing and Numerical Registering Co v. Sampson*, (1875) 19 Eq 462; *Laframboise v. Millington*, 2019 NSCA 43; *Bank of Nova Scotia v. Kelly*, [1973] P.E.I.J. No. 7; *Fowler Estate v. Barnes*, [1996] N.J. No. 206; *Geldart v. Geldart*, 2018 ONSC 300; *Lynch Estate v. Lynch Estate*, [1993] A.J. No. 187; *R.M.K. v. N.K.*, 2020 ABQB 328; *R. v. Patterson*, 2018 NSCA 73; *R. v. Sheppard*, 2002 SCC 26; *S.R. v. Nova Scotia (Minister of Community Services)*, 2012 NSCA 46.; *Awalt v. Blanchard*, 2013 NSCA 11; *J.L.T. v. Nova Scotia (Community Services)* [*K.A.D.*], 2017 NSCA 68; *Courtney v. Bank of Montreal*, 2005 NSCA 153; *Downer v Pitcher*, 2017 NLCA 13; *Uber Technologies Inc. v. Heller*, 2020 SCC 16; *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573; *Input Capital Corp. v Gustafson*, 2019 SKCA 78; *Taberner v. Ernest & Twins Developments Inc.*, 2001 BCSC 367; *Jeffrie v. Hendriksen*, 2016 NSSC 27

Texts Considered: Robert J. Sharpe, *Injunctions and Specific Performance*, 4th

ed. (Toronto: Thomson Reuters Canada Limited, 2012)

Subject: Contracts; Contracts—incompetence; Contracts—undue influence; Contracts—unconscionability; Contracts—specific performance; Contracts—consideration; Costs

Summary: Manfred Parker offered to buy the fishing operation assets of Stewart Burridge and he accepted that offer. Paperwork was completed to reflect their agreement.
Before the contract could be fully completed Mr. Burridge died. His Estate would not effect the sale, causing Mr. Parker to make an application for relief by way of specific performance. The Estate countered that Mr. Burridge had not been competent to contract, had been subject to undue influence by Mr. Parker and his brother, and the contract was not only unfair to Mr. Burridge but unconscionable.
Following a four-day hearing the judge ruled in Mr. Parker's favour, ordering the Estate to complete the sale. The Estate appeals that decision, citing errors of fact by the judge in the weighing of the evidence and errors of law in her application of various legal principles.

Issues: (1) Did the judge err by failing to find that Mr. Burridge was incompetent when he signed the Contract?
(2) Did the judge err by failing to invoke the doctrine of undue influence?
(3) Did the judge err by failing to invoke the doctrine of unconscionability?
(4) Did the judge err in granting specific performance?
(5) Did the judge err in ordering the gifting of the fishing vessel?

Result: Appeal dismissed with costs to the respondent. The judge properly interpreted the law surrounding each issue raised on appeal. She considered the evidence, made credibility assessments, determined the weight she would give to certain evidence, and properly exercised her fact-finding role. There is no basis for the Court to interfere with the judge's decision.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 22 pages.

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Appellant

v.

Manfred Parker

Respondent

Judges:	Farrar, Bryson and Beaton JJ.A.
Appeal Heard:	September 15, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Beaton J.A.; Farrar and Bryson JJ.A. concurring
Counsel:	John T. Rafferty, QC, for the appellant Matthew J. Fraser, for the respondent

Reasons for judgment:

[1] The notion that the law respects parties' freedom to contract is hardly a modern invention:

> If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract.[1]

[2] This appeal engages an examination of whether a certain bargain should now be interfered with despite that public policy interest.

[3] In February 2014 Manfred Parker offered to buy the fishing operation assets of Stewart Burridge and he accepted that offer. Paperwork was completed to reflect their agreement ("the Contract").

[4] Before the Contract could be fully completed Mr. Burridge died. His Estate would not effect the sale, causing Mr. Parker to make an application to the Supreme Court of Nova Scotia for relief by way of specific performance of the Contract. The Estate countered that Mr. Burridge had not been competent to contract, had been subject to undue influence by Mr. Parker and his brother, and the Contract was not only unfair to Mr. Burridge but unconscionable.

[5] Following a four-day hearing in October 2018, Justice Denise Boudreau ("the judge") ruled in Mr. Parker's favour, ordering the Estate to complete the sale. The Estate appeals that decision, citing errors of fact by the judge in the weighing of the evidence and errors of law in her application of various legal principles.

[6] For the reasons that follow, I would dismiss the appeal.

Background

[7] Mr. Burridge resided and fished out of Canso, Nova Scotia for many years. In January 2014, he was under medical care for cancer, which had prompted a

[1] *Printing and Numerical Registering Co v. Sampson*, (1875) 19 Eq 462 at p. 465.

referral by his oncologist for radiation therapy scheduled to commence with his admission to a hospital-based treatment plan on February 24. In the meantime, Mr. Burridge was contacted by a sales agent who had heard through "wharfside conversations" that he might be interested in selling his enterprise. The two met at Mr. Burridge's home on February 3, conversed several times by phone, and met again on February 13. At that time the sales agent produced on his company's standard form listing agreement the details pertaining to listing the enterprise for $600,000, amended during the meeting to $700,000. Nothing was signed as Mr. Burridge wanted the agent to speak to Mr. Burridge's "bookkeeper". When contacted by the agent, it turned out the bookkeeper was Mr. Burridge's daughter Rosetta Burridge, who then resided in British Columbia.

[8] Mr. Parker is also a fisherman resident in Canso. During the relevant period, he was looking to purchase a fishing enterprise, with the assistance of his brother. On February 15, two days after Mr. Burridge's last meeting with the sales agent, Mr. Parker's brother received a phone call from a friend of Mr. Burridge about a possible sale of Mr. Burridge's enterprise to Mr. Parker. Several meetings ensued between the Parkers and Mr. Burridge. On February 21 the parties executed a typewritten purchase and sale document drafted by Mr. Parker, with one page reflecting a purchase price of $350,000 for all assets save the fishing vessel *Lady Rosetta 99*, and a separate page identifying the gifting of that vessel from Mr. Burridge to Mr. Parker in tandem with the transaction.

[9] Three days later, on February 24, Mr. Burridge entered hospital as planned. Once there, it was determined his condition was too advanced to treat and Mr. Burridge died on February 25. Rosetta Burridge was appointed Personal Representative of his estate, which subsequently rebuffed Mr. Parker's attempts to enforce the terms of the Contract. As the litigation ensued, Rosetta Burridge fished under her late father's licenses, using his assets, until Justice Boudreau's order for specific performance was made.

Issues

[10] The Notice of Appeal cites several areas where the Estate asserts the judge erred, either in fact or in law. In written and oral argument these were summarized as:

1. Did the judge err by failing to find that Mr. Burridge was incompetent when he signed the Contract?

2. Did the judge err by failing to invoke the doctrine of undue influence?
3. Did the judge err by failing to invoke the doctrine of unconscionability?
4. Did the judge err in granting specific performance?
5. Did the judge err in ordering the gifting of the fishing vessel?

[11] The applicable standard of review is dictated by whether an assertion of error by the hearing judge relates to fact, law, or mixed question of fact and law. Saunders J.A. explained the standards this way:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 ff.; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.[2]

An appeal is not an opportunity for this Court to re-hear the case that was before the judge.

[12] In considering each of the arguments advanced by the Estate, I note much of the evidence before the judge was "overlapping" in the sense that her assessment of it, and its significance, was relevant to more than one of the legal arguments put before her. For example, the question of undue influence includes a consideration of the fairness of the bargain struck, and also informs the issue of unconscionability. In this way, the application of the law to the facts may create here, as it did for the judge, some repetition of the significance of certain evidence.

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[2] *Laframboise v. Millington*, 2019 NSCA 43.

Issue No. 1—Incompetence

[13] The Estate asserts the judge made an error of fact in coming to the conclusion there was insufficient evidence, the proof of which rested with the Estate, to establish Mr. Burridge was mentally incompetent at the time he entered into the Contract.

[14] Findings of fact made by the judge are to be afforded considerable deference by this Court in light of the standard of review, being that of palpable and overriding error.

[15] There was no dispute between the parties before the judge or in this Court as to the test for establishing the voidability of a contract due to incompetence. The party asserting the incompetence must prove on a balance of probabilities that:

> (i) the party to the contract was incompetent;
>
> (ii) the incompetence rendered the party incapable of understanding the contract and its effects; and
>
> (iii) the other party had actual or constructive knowledge of the incompetence.[3]

[16] The Estate argues the judge erred because she did not conclude, on the evidence before her, Mr. Burridge was incompetent. Mr. Parker counters it was open to the hearing judge, on the evidence, to come to the conclusions and make the factual findings she did about Mr. Burridge's level of competence.

[17] In properly applying the test, the judge explained why she was not satisfied on the first branch—that is to say she was not prepared to conclude, on the evidence she did accept, Mr. Burridge had been incompetent at the time he entered into the Contract. The judge described the evidence of various parties who had contact with Mr. Burridge in the weeks and days leading to the making of the Contract. She formed the conclusion that at the relevant time Mr. Burridge was aware of the nature of his assets and their value. For example, there was evidence before the judge that Mr. Burridge had been able to seek clarification of certain of the terms proposed by Mr. Parker during the course of their dealings.

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[3] *Bank of Nova Scotia v. Kelly*, [1973] P.E.I.J. No. 7; *Fowler Estate v. Barnes*, [1996] N.J. No. 206; *Geldart v. Geldart*, 2018 ONSC 300; *Lynch Estate v. Lynch Estate*, [1993] A.J. No. 187.

[18] The record reveals sound reasoning as to why the judge was satisfied Mr. Burridge was competent. Following a canvass of the evidence, the judge instructed herself:

> [69] The Court's first task is to assess all of this evidence relating to Mr. Burridge's mental or cognitive state, to determine whether he had the capacity to contract in late February 2014; keeping in mind that the onus is on the party who claims incompetence (in this case, the respondent).

She then continued:

> [70] On February 23, 2014, Mr. Burridge was ill with cancer. Obviously, that fact does not automatically render him mentally incompetent to contract.
>
> [71] For the reasons I have already provided, I do not consider the opinion of Dr. Hollenhorst to be determinative of the issue either.
>
> [72] The lay witnesses' evidence, while useful, does not definitively establish anything. For the most part, the lay witnesses found Mr. Burridge to be lucid and "his normal self". Of course, I note the evidence of Mr. Jamieson, who testified that Mr. Burridge was forgetful or distracted during February 2014; but that is a far cry from incompetence. Let us remember that Mr. Burridge had much to contend with during that time: his recent diagnosis of cancer; the associated symptoms; his upcoming radiation treatments; the sale of his business; and so on.
>
> [73] Furthermore, I can easily accept that Mr. Burridge was having difficulty speaking in February 2014, as was testified to by various witnesses. However, that is not evidence of mental incapacity either. By that point, Mr. Burridge was living with a very large tumour at the base of his tongue. I am entirely unsurprised that Mr. Burridge was having difficulty speaking, and/or having difficulty controlling his saliva. But such physical observations do not lead me to the conclusion that Mr. Burridge's mental capacities were affected.
>
> [74] Obviously, we cannot and must not jump to the conclusion that a person, simply because s/he is ill, cannot make decisions for him/her self.
>
> [75] The onus of showing mental incapacity on the part of Stewart Burridge is, in this case, on the respondent. In the final analysis, I find that the respondent has not met her onus. I simply cannot conclude, on the basis of what is before me, that Stewart Burridge was mentally incompetent at the time of the contract between himself and the applicant.

The judge clearly understood deciding the question of competency was a fact-driven analysis:

> [130] Whether an individual has the requisite capacity for the decision being made is a question of fact to be determined in all of the circumstances. The

> assessment is a highly individualized and fact-specific inquiry: *Lazio v Lawton*, 2013 BCSC 305 at para 197.
>
> […]
>
> [137] Furthermore, it is not mental incapacity in the abstract which renders the contract liable to be set aside. The mental incapacity must be such that it impairs the ability to contract, that is, the ability to understand the nature of the transaction being entered into and its general effect or consequences.
>
> [138] The understanding and competence required to uphold the validity of a transaction depend on the nature of the transaction. There is no fixed standard of sanity which is requisite for all transactions. What is required, in relation to each particular matter or piece of business transacted, **is the party in question should understand the general nature of what he is doing**: *Malley v Red River Mutual Insurance Co*, 2010 MBQB 111 at paras 9 and 10, citing *Gibbons v Wright* (1954), 91 CLR 423 (Australia High Court), which was cited with approval in *Egli (Committee of) v Egli*, 2005 BCCA 627, and citing *Chitty on Contracts*, 28th ed (London: Sweet & Maxwell, 1999) at 488; and *Lynch Estate* at para 96, citing *Re: Beaney*, [1978] 2 All ER 595 (Ch) at 601.[4] (Emphasis added)

[19] The judge additionally was not persuaded on the third branch of the test given her finding: "There is nothing before me to show that the applicant either knew Stewart Burridge was mentally incompetent to contract, or should have known."

[20] On its face, the test to establish incompetence sets a high bar. The party asserting the incompetence must prove not only that it existed, and impacted the bargain made, but that its presence should have been recognized by the other party:

> [26] It is not mental incapacity in the abstract which renders the contract liable to be set aside. The mental incapacity that has this effect must be such that it impairs the ability to contract, that is, an ability to understand the nature of the transaction being entered into and its general effect. See Perell, *Remedies and the Sale of Land* (1988), p. 8.[5]

[21] The judge concluded even had she been persuaded of Mr. Burridge's incompetence at the relevant time, she found no evidence at all to satisfy the third branch of the test, namely that Mr. Parker then knew or should have known Mr. Burridge to be incompetent. There is no basis upon which to interfere with her conclusions in light of her proper application of the law to the evidence before her.

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[4] *R.M.K. v. N.K.*, 2020 ABQB 328.
[5] *Fowler Estate v. Barnes*, *supra*.

[22] The Estate asserts the judge failed to adequately consider the totality of the evidence. The judge's reasons did not include an indication she had taken specific account of the evidence of nurse Rhonda Bennet, the QE2 hospital admission records, or the Canso Pharmacy records in her assessment of the issue of Mr. Burridge's competence to contract.

[23] The Estate argues the so-called omitted evidence is important and persuasive because it "… demonstrates a stark decline in both Mr. Burridge's mental health and physical health beginning around February 11, 2014." With respect, it would seem to be a significant leap in reasoning for the omitted evidence alone to have automatically led to a determination that Mr. Burridge was incompetent.

[24] The judge was presented with very detailed evidence from a variety of witnesses regarding the events surrounding the negotiation of the Contract and the circumstances of its signing. Those witnesses included family, friends, business associates, and acquaintances of Mr. Burridge, as well as medical records and expert medical opinions. The judge heard lay descriptions and medical evidence about Mr. Burridge's physical presentation, ability to communicate and level of engagement. The Estate asks this Court to now draw inferences about the significance of the omitted evidence despite the judge not having had the benefit of, for example, expert pharmacological evidence as to the impacts of certain of Mr. Burridge's medications upon his mental functioning.

[25] Justice Boudreau was ideally positioned to make both assessments of credibility and determinations of the weight to be afforded to the evidence.

[26] The record reveals the judge conducted a thorough review of the evidence. It satisfied her the Estate had not met its burden to establish the incompetence of Mr. Burridge. I am not persuaded there was something essential missing from her analysis or that her reasoning was flawed or incorrect.

[27] In addition to her reasons reflecting a thorough analysis, it is important to remember it was not incumbent on the judge to canvass each and every aspect of the evidence in setting out her reasons, provided the pathway of the reasoning process could render it subject to meaningful appellate review. As stated by this Court in *R. v. Patterson*:

> [65] The trial judge was very much alive to the surveillance evidence. He referenced it each of the three times he reviewed the evidence before he began his analysis. There was no obligation on him to recite every piece of evidence at

> every juncture of his analysis. There is no requirement "to itemize every conceivable issue, argument or thought process" (*R. v. O'Brien*, [2011] 2 S.C.R. 485, at para. 17). What is expected is that:
>
> > ...read in the context of the entire record, the trial judge's reasons demonstrate that he or she was alive to and resolved the central issues before the court.
> >
> > (*R. v. H.S.B.*, [2008] 3 S.C.R. 32, at para. 8)[6]

[28] In *S.R. v. Nova Scotia (Minister of Community Services)*, Bryson J.A. discussed the ability to exercise meaningful appellate review as key to the adequacy of reasons:

> [17] In a series of cases, the Supreme Court of Canada has recognized the importance of reasons in various settings: e.g., *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39; *R. v. Sheppard*, 2002 SCC 26; *R. v. Braich*, 2002 SCC 27; *R. v. Walker*, 2008 SCC 34; *F.H. v. McDougall*, 2008 SCC 53; *R. v. R.E.M.*, 2008 SCC 51. Their import can be summarized thusly:
>
> > (a) the need for, and adequacy of reasons, is contextual and depends upon the adjudicative setting, (*Sheppard*, para. 19);
> >
> > (b) reasons inform the parties – and especially the losing party – of why the result came about, (*R.E.M.*, para. 11);
> >
> > (c) reasons inform the public, facilitating compliance with the rules thereby established, (*Sheppard*, para. 22);
> >
> > (d) reasons provide guidance for courts in the future in accordance with the principle of *stare decisis*, (*R.E.M.*, para. 12);
> >
> > (e) reasons allow both the parties and the public to see that justice is done and thereby enhance the confidence of both in the judicial process, (*Baker*, para. 39);
> >
> > (f) reasons foster and improve decision-making by ensuring that issues are addressed and reasoning is made explicit, (*Baker*, para. 39; *Sheppard*, para. 23; *R.E.M.*, para. 12);
> >
> > (g) reasons facilitate consideration of judicial review or appeal by the parties, (*Baker*, para. 39);
> >
> > (h) reasons enhance or permit meaningful appeal or judicial review, (*Sheppard*, para. 25; *R.E.M.*, para. 11).
>
> …

[6] 2018 NSCA 73. See also *R. v. Sheppard*, 2002 SCC 26 at para. 23.

> [19] At common law, the inadequacy of reasons does not automatically trigger appellate intervention. "Poor reasons may coincide with a just result" (*Sheppard*, para. 22). As Chief Justice MacDonald said in *McAleer v. Farnell*, 2009 NSCA 14, citing *R.E.M.*:
>
> > [15] For this reason, our role on appeal is not to criticize the level of detail or expression. Instead it is to determine if the functions noted above have been fulfilled to the point where a meaningful appeal is available:
> >
> > > ¶53 However, the Court in *Sheppard* also stated: "The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. ***More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.***[7]

[29] I am satisfied the impugned decision as a whole reflects an identifiable reasoning process and does not frustrate the exercise of meaningful appellate review, regardless of the absence of specific mention of certain evidence. Drawing on the evidence before her and identifying what she was prepared to rely upon and why, the judge reached factual conclusions that must not be lightly disturbed.

[30] The Estate argument also suggests the judge did not draw the proper conclusions about the credibility of witnesses. Decisions of this Court remind us of the latitude of a trial judge, and the concomitant restrictions on an appellate court, in relation to the credibility finding function:

> [24] Finally, at the heart of this appeal is the trial judge's assessment of credibility. In considering the trial judge's conclusions in that regard, I found helpful the comments of Cromwell, J.A. (as he then was) in *MacNeil v. Chisholm*, 2000 NSCA 31:
>
> > [9] The judge, as the trier of fact, must sort through the whole of the evidence and decide which to accept and which to reject so as to piece together the more plausible view of the facts. Many considerations properly influence this decision, including the nature of any unreliability found in a witness's testimony, its relationship to the significant parts of the evidence, the likely explanation for the apparent unreliability and so forth. The trial judge may find that some apparent errors of a witness have

[7] 2012 NSCA 46. See also *Awalt v. Blanchard*, 2013 NSCA 11 at para. 38.

> little or no adverse impact on that witness's credibility. Equally, the judge may conclude that other apparent errors so completely erode the judge's confidence in the witness's evidence that it is given no weight.
>
> [10] Making these judgments is the job of the trial judge and the Court of Appeal generally should not substitute its own judgment on these matters. An appellant alleging an error of fact must show that the trial judge's finding is clearly wrong. Not every error in findings of fact permits appellate intervention. As Lamer, C.J.C. said in **Delgamuukw**, supra at para 88:
>
> > ... it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. The error must be sufficiently serious that it was 'overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue'.
>
> **Where credibility is in issue, only errors that fundamentally shake the appeal court's confidence in the trial judge's findings of fact justify appellate intervention.**[8]

[31] I am not persuaded that had the judge specifically addressed the omitted evidence, it would have led her to a different conclusion on the question of incompetence.

[32] The Estate additionally maintains the judge fell down in the task of weighing the two expert medical opinions regarding Mr. Burridge's competence, specifically in that she failed to consider the observations and conclusions of Dr. Hollenhorst. With respect, I note the judge first had to consider the report of Dr. Hollenhorst in order to then explain why she chose not to rely on it, in favour of reliance on the competing opinion.

[33] The judge clearly distinguished between the two reports before her and explained which she preferred and why:

> [44] It must be understood that neither expert actually assessed Mr. Burridge's mental status while he was alive. Both have simply reviewed medical charts and have provided their opinions on that basis. Therefore, in my view, neither report is entirely determinative of the issues before me.

[8] *J.L.T. v. Nova Scotia (Community Services)* [*K.A.D.*], 2017 NSCA 68.

> [45] Having said that, it must be acknowledged that the issue of mental functioning or psychiatric analysis is the area of Dr. Bourget's specialty. Dr. Hollenhurst [*sic*], while obviously quite knowledgeable in his field of oncology, does not have any expertise in mental health or psychiatry. For that reason alone I would be inclined to place more weight on Dr. Bourget's opinion as to Mr. Burridge's cognitive functioning.
>
> [46] Furthermore, there are certain deficiencies with the opinion put forward by Dr. Hollenhorst. His discussion related to medications is not entirely helpful, since we do not know the dosage Mr. Burridge was taking at any relevant time; nor, in fact, do we know that he took them at all. The list of "possible" side effects, as noted by Dr. Bourget, is certainly not evidence that Mr. Burridge experienced any of these symptoms.
>
> [47] Mr. Burridge was taking some or all of these medications in January as well. While it appears that Mr. Burridge's physical health deteriorated from January to February, his mental deterioration is less clear.
>
> [48] The fact that Mr. Burridge, for example, showed resistance to accepting help, or felt overwhelmed by a cancer diagnosis, is not necessarily evidence that he was mentally incompetent. One could perhaps infer, that since Dr. Hollenhorst and hospital staff accepted Mr. Burridge's consent to medical procedures in both January and February, they did not identify any significant concerns with his mental status at the relevant times.
>
> [49] In the final analysis, I cannot place much, if any, weight on Dr. Hollenhorst's opinion as to Mr. Burridge's mental capacities. The opinion is simply too hypothetical, and not sufficiently grounded in any real facts or analysis. In the simplest of terms, I must say that I agree with the concerns raised by Dr. Bourget about Dr. Hollenhorst's conclusions.

The Estate would have this Court substitute our own findings for those of the trial judge. Respectfully, that is not our function.

Issue No. 2—Undue Influence

[34] The Estate's second argument attracts a correctness standard in relation to the argument of an error of law. The Estate says the judge erred in her application of the test for undue influence by failing to properly consider the relationship between the parties. Consideration of whether there was any palpable and overriding error made is engaged by its additional argument the judge erred in failing to find undue influence and unfairness in the transaction as a question of fact.

[35] Undue influence can be actual—by words or deeds—or it can be presumed from the nature of the relationship. The two-part test was outlined by Oland J.A in *Courtney v. Bank of Montreal*:

> [29] In *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, [1991] S.C.J. No. 53 (QL version), Wilson, J. (Cory, J. concurring) addressed what a plaintiff had to establish in order to trigger a presumption of undue influence:
>
> > 43. … In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. …
> >
> > 44. Having established the requisite type of relationship to support the presumption, the next phase of the inquiry involves an examination of the nature of the transaction. When dealing with commercial transactions, I believe that the plaintiff should be obliged to show, in addition to the required relationship between the parties, that the contract worked unfairness either in the sense that he or she was unduly disadvantaged by it or that the defendant was unduly benefited by it. ..."
>
> Once this two-part test is satisfied and the presumption raised, then the onus moves to the defendant to rebut it.[9]

[36] In the case before us, the judge was not persuaded there had been any influence foisted upon Mr. Burridge such that he entered into a bargain he otherwise would not have made absent that pressure. Nor was the judge satisfied the nature of the relationship between Mr. Parker and Mr. Burridge warranted an examination of their relative positions as would be required, for example, in the case of a testator and beneficiary or between spouses.

[37] The judge began her consideration of the question of undue influence by recognizing it could involve actual influence or be presumed from the nature of the relationship. She turned her mind to the nature of the relationship between the parties at the outset of her analysis:

> [78] The caselaw asserts that "undue influence" can either take the form of "actual" influence, involving the use of pressure of coercion; or influence can be presumed, in cases of relationship of trust between parties (for example, family relationships, doctor/patient relationships, and so on) (*Allcard v. Skinner* (1887) 36 Ch. D. 145). **In the case at bar, there has been no suggestion that the**

[9] 2005 NSCA 153.

> **relationship between the applicant and Mr. Burridge was one of trust**. In such circumstances, actual influence must be shown:
>
> > [39] If the facts fall within the first class of cases mentioned by Cotton, L.J., in *Allcard v. Skinner*, it is necessary for the party seeking to set aside the transaction to establish on a balance of probabilities not only that the other party had the opportunity to exercise undue influence but also that that opportunity was exercised: *Bishop v. Fleet* (1989) 76 Nfld. & P.E.I.R. 197 at p. 211; *Campbell v. Campbell*, supra. (*Fowler Estate v. Barnes* [1996] N.J. No. 206) (Emphasis added)

[38] While she may have made "short work" in her conclusion the relationship was not one that raised a presumption of influence, the judge clearly considered the first aspect of the test set out in *Courtney, supra*.

[39] The judge next embarked on a detailed examination of the timing of and reasons for the points of contact between Mr. Parker and Mr. Burridge:

> [81] It is a fact that when Real Parker and the applicant discovered that Mr. Burridge was interested in selling his fishing enterprise, they wasted no time in approaching him. Both Mr. Parker and the applicant knew Mr. Burridge, from living in the community. They attended at Mr. Burridge's home in Canso to discuss the possible sale of Mr. Burridge's entire operation. Mr. Burridge expressed interest in selling, but he wanted to think about it. No price was discussed at that time.
>
> [82] The next day, the Parker brothers returned to Mr. Burridge's home. Mr. Parker testified that, on that occasion, he asked Mr. Burridge if he would accept $350,000 for "everything". Mr. Burridge replied that he would think about it. Later that day, Mr. Burridge called the applicant to inquire about some details. Real Parker and the applicant returned to Mr. Burridge's that evening for another visit and further discussion.
>
> [83] Real Parker, the applicant, and Mr. Burridge then met a third time at the home of Mr. Burridge. At that time Mr. Parker asked Mr. Burridge, "So do we have a deal for $350,000?" According to Mr. Parker, Mr. Burridge then agreed to that amount.
>
> [84] A few days later, Mr. Parker prepared some documents for signature. On February 23, 2014, Mr. Parker, the applicant, and Mr. Burridge went together to the home of Anthony Baker, another local resident. The documents were signed and Mr. Baker witnessed their signatures.
>
> [85] The witnesses to that meeting were Real Parker, the applicant, and Anthony Baker. All agree that while Mr. Burridge was somewhat frail physically, he was still "himself". He had difficulty speaking but could be understood.

> Neither the Parkers, nor Mr. Baker, held any authority or influence over Mr. Burridge that I am aware of.
>
> [86] The respondent points to the "quick" nature of this transaction as evidence of pressure, as well as the fact that Mr. Burridge was by then quite ill, living with a large cancerous tumour.
>
> [87] While this transaction happened quickly, I do not necessarily accept that the Parkers took advantage of Mr. Burridge. All the evidence shows, in my view, is that the Parkers made him an offer which, after a few days, Mr. Burridge accepted.

[40] Being satisfied there was no undue influence, the judge then turned to the question of the fairness of the Contract. Having assessed the evidence of the witnesses on the culture of sale practices in the fishing community and the market values of comparable sales, the judge explained why she was prepared to give certain evidence more weight, and some none at all. Finally, the judge concluded: "Mr. Burridge was well aware of the options for the sale of his enterprise, and he specifically chose to sell to the applicant. I do not see that he was treated unfairly."

[41] The Estate argues the judge appeared to prefer some sales data to the exclusion of other data in concluding the sale price contained in the Contract was "within an acceptable range of 'fair market value'." However, it was within the purview of the judge to accept or reject competing evidence as to comparable sales. The judge's decision reflects she was prepared to rely on evidence of sales that occurred in the same region and during the same time frame when the Contract was made. This was not an unreasonable approach, and was entirely within the ambit of the judge's task of weighing the evidence. The judge reviewed at some length the evidence of the various witnesses for each party regarding comparable sales, and then explained why she was prepared to rely on certain witnesses over others concerning those sales.

[42] I am not persuaded the judge made any errors of law, nor that she made any palpable and overriding errors in her assessment of the evidence.

Issue No. 3—Unconscionability

[43] The Estate does not suggest the judge erred in relation to the law on the notion of unconscionability. Rather, it contends the judge should not have come to the conclusion she did—that the Contract was not unconscionable—given the

evidence put before her. This ground of appeal therefore attracts a standard of review of palpable and overriding error.

[44] The Estate submits the evidence before the judge demonstrated Mr. Parker's worldliness in comparison to Mr. Burridge, and that looking at all of the surrounding circumstances—the time span between their first and final meetings, the pace of the negotiations, and the failure of Mr. Parker to suggest to Mr. Burridge that he seek independent advice—there existed an inequality of bargaining power which rendered the bargain unconscionable.

[45] The judge firmly rejected a conclusion Mr. Parker was more worldly than Mr. Burridge (the implication being that the relative sophistication of Mr. Parker would have been to the disadvantage of Mr. Burridge in relation to their respective bargaining acumen). Citing an absence of detailed evidence on the point, on the evidence that was before her the judge was not prepared to conclude the parties "… had any appreciable differences in terms of their education or 'sophistication'."

[46] I note the record reflects a number of similarities between Mr. Burridge's dealings with the sales agent who first approached him, and his later dealings with Mr. Parker:

(i) the sales agent and Mr. Parker initiated contact with Mr. Burridge; he did not approach either of them;

(ii) there were multiple meetings and phone calls between each party and Mr. Burridge during the course of their respective discussions;

(iii) Mr. Burridge's difficulties in communicating (due to the tumour at the base of his tongue) became more pronounced as time passed;

(iv) all in-person meetings took place at Mr. Burridge's home, save the one where Mr. Burridge signed the Contract, which happened at Mr. Burridge's best friend's home, because Mr. Parker arranged for Mr. Burridge to attended there.

[47] The significance of these similarities diminishes the Estate's position that the circumstances surrounding the execution of the Contract "diverge substantially from community standards of commercial morality." (This is from their factum). Mr. Burridge entered into the Contract for a sale price of $350,000 despite his

conversations earlier that month with the sales agent, where a price of $700,000 was discussed. To that end, the judge commented:

> [88] There may be all manner of reasons why Mr. Burridge accepted the offer of the applicant at that time. Perhaps he was interested in selling quickly, to ensure that the money would be available as soon as possible. Perhaps he wished to sell to the applicant in particular, or perhaps he wished to sell to a resident of Canso in particular. We cannot know what was in Mr. Burridge's mind; all I can assess is the evidence I have. There is, quite simply, no evidence before me of "oppression, coercion, compulsion or abuse of power or authority", and nothing that would have overwhelmed Mr. Burridge's ability to exercise independent judgment.

[48] The judge was not persuaded Mr. Burridge's bargaining power was impaired or interfered with, a conclusion available to her on the evidence.

[49] The essence of the Estate's argument regarding unconscionability is captured in its factum in relation to the body of evidence from multiple witnesses, for both parties, as to the fair market value of Mr. Burridge's fishing assets versus the actual Contract price. The Estate submits:

> 97. The trial judge did not definitively determine the fair market value of Mr. Burridge's fishing enterprise. Instead, Justice Boudreau relied on selective evidence, (the evidence of Mr. Dixon and Mr. MacDonald) in the face of contradictory evidence, (the evidence of Manfred and Real Parker, Anthony Baker, Jameson Theriault and David Bishara) to establish that $350,000 was within the range of the lowest possible valuation that could be assigned to Mr. Burridge's fishing enterprise.

[50] The heart of the Estate's objection is that the judge was prepared to rely on the evidence proffered by Mr. Parker regarding the fairness of the sale price, to the exclusion of the evidence offered by the Estate's witnesses. Once again, I can see only that the judge thoroughly explained her reasons for doing so, comparing and contrasting among the varying witnesses' opinions provided to her. In the end, she was prepared to recognize:

> [112] […] that a broker clearly would have valued Mr. Burridge's assets at a higher price, and would have listed them at a higher price on the open market. Furthermore, there is certainly a possibility, perhaps even a probability, that had Mr. Burridge listed with a broker, he would have obtained a higher sale price.
>
> [113] However, this asset belonged to Mr. Burridge, to do with as he pleased. He was aware of Mr. Bishara's opinion as to value on the "open market". He

> knew that Mr. Bishara would have listed the enterprise for $700,000. Mr. Burridge chose, for whatever reason, to not list with Mr. Bishara. He chose to sell privately.

[51] There was no palpable or overriding error made by the judge in this regard. With respect, the Estate's dissatisfaction with the outcome of the proper exercise of the judge's functions, including discretion, cannot trigger a different result on appeal.

[52] The Estate's argument would have us assume there was an inherent unfairness in the Contract, even if Mr. Burridge could be said to be competent (which the judge was satisfied he was) due to the difference in the various prices—the Contract price, the price Mr. Burridge first discussed with the sales agent, and some of the comparable sales identified in the evidence. Even accepting the figures *could* establish Mr. Burridge made a "bad deal" (of which the judge was not persuaded), the law is clear that he was free to do so:

> [24] There is a discernible reluctance in the case law towards allowing a generalized doctrine of unconscionability based on simple notions of unfairness to supercede or undermine common law doctrines of freedom of contract. Thus it is often reiterated that there is no general power in the courts to protect people from improvident or foolish bargains. To assert otherwise would be to interfere with self-interested bargaining. The struggle has been to find an appropriate principled balance between continuing to recognize freedom of contract while ensuring that the mechanistic application of that doctrine does not become an instrument of abuse in ways that would generally be regarded as unfair.[10]

Issue No. 4—Specific Performance

[53] Specific performance is an extraordinary discretionary remedy. The party disadvantaged by the failure to perform the contract must establish the unique nature of the asset would justify such an award, as opposed to the imposition of an award of damages.

[54] The Estate's concern with the judge's order of specific performance targets two issues: the manner in which the judge characterized the unique nature of the

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[10] *Downer v Pitcher*, 2017 NLCA 13; see also *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para. 74; *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573 at para. 36; and *Input Capital Corp. v Gustafson*, 2019 SKCA 78 at para. 72.

asset in question, and its assertion that Mr. Parker did not bargain with "clean hands."

[55] As to the matter of whether the fishing enterprise was unique, the Estate says because the judge failed to rely on the evidence of certain witnesses as to the fair market value of the asset (as discussed earlier), that led to her incorrect conclusion there was only one way to properly remediate Mr. Parker's loss, which was to order the completion of the sale by the transfer of the assets to him.

[56] Relying on *Taberner v. Ernest & Twins Developments Inc.*, 2001 BCSC 367, the Estate suggests while determination of the uniqueness of an asset is ultimately a matter of fact (with which I agree), the judge heard evidence of other operations that had been or were for sale during the relevant time period, which would serve to dilute any suggestion the assets in question were unique.

[57] I agree with Mr. Parker's submission there was evidence before the judge that: (i) the respondent was looking to buy specifically a Canso port fishing operation; (ii) there were not often opportunities to buy a fishing operation on the "open market" because licenses tended to transfer through private sales (e.g. without a broker); (iii) sales tended to "remain" in the port where they originated; (iv) the combination of the various licenses held by Mr. Burridge was unusual, and included among those was both a lobster fishery license and a crab fishery license; and (v) at the relevant time, it was difficult for buyers to locate lobster licenses for sale.

[58] In his text *Injunctions and Specific Performance*, 4th ed. the Honourable Robert J. Sharpe discussed the challenge of assessing the objective value of an item in certain instances, and the further difficulty of quantifying the purchaser's subjective value of the item in question:

> 7.220 An award of damages presumes that the plaintiff's expectation can be protected by a money award which will purchase substitute performance. If the item bargained for is unique, then there is no exact substitute. The lack of an available substitute produces two problems. First, it makes the purely monetary loss caused by the defendant's breach very difficult to measure. There are no comparable sales to which reference may be made in order to establish an objective estimate of the value of the promised item or performance. Secondly, **even if an objective value of some sort can be found, the effect of denying specific performance and granting damages is to force the plaintiff to settle for some inexact substitute. The plaintiff may, however, have attached to the particular item bargained for a value, sometimes called the "consumer**

> **surplus", which is not reflected by objective measurement. In such a case, the value of the item to be plaintiff exceeds the market value (even if it can be established) and it is difficult to justify forcing the plaintiff to accept only the lesser objective value.** […] By requiring performance of the defendant's obligation *in specie*, the court can avoid the expensive and time-consuming task of translating the effect of the breach into money terms and, more importantly, avoid the risk of inaccurate assessment and thereby achieve a virtual guarantee of remedial adequacy in favour of the plaintiff.[11] (Emphasis added; footnotes removed)

[59] Several times in her decision the judge noted the assets in question were difficult to value for a variety of reasons. I am not persuaded the judge made any factual errors in concluding the uniqueness of the asset. This finding was open to her to determine based on her assessment of the evidence.

[60] As to the second question, whether Mr. Parker came to the Contract with clean hands, the Estate asks us to conclude, contrary to what the judge found, that Mr. Parker misrepresented the value of the asset to Mr. Burridge. The Estate points to Mr. Parker's evidence that he had later valued the fishing enterprise at $435,000, and not the $350,000 purchase price, in his subsequent financing paperwork.

[61] The notion of clean hands relates to whether the party to a contract has behaved badly, although Sharpe, *supra*, reminds us "… wrongdoing will not deprive the plaintiff of a specific performance or an injunction unless it bears directly upon the appropriateness of the remedy."[12] Put another way, a party's wrongdoing does not automatically exclude the remedy of specific performance if it would otherwise have been appropriate.[13]

[62] The judge found the sale price fell within an "acceptable range" of value. She accepted evidence the valuation of $435,000 was in relation to Mr. Parker's financing arrangements with the Fisheries Loan Board. Despite that, the judge was unequivocal in her conclusion that Mr. Burridge knew the value of his asset:

> [118] In the final analysis, I find that Mr. Burridge was well aware of the options for the sale of his enterprise, and he specifically chose to sell to the applicant. I do not see that he was treated unfairly.

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[11] (Toronto: Thomson Reuters Canada Limited, 2012) at 7-12.
[12] *Ibid*, at 1-52.
[13] *Jeffrie v. Hendriksen*, 2016 NSSC 27.

[63] Once again, I am of the view these findings were open to the judge to make on the evidence, and this Court cannot disturb them in favour of a different result.

Issue No. 5—Gift of the Boat

[64] The Estate maintains the judge's tacit approval of the gifting of the vessel *Lady Rosetta 99* from Mr. Burridge to Mr. Parker, as evidenced in her order, cannot stand as there was no transfer or delivery of the gift to the recipient, concurrent with the expression of the giving of it.

[65] The record bears out that the signing of the paperwork for transfer of the boat captured Mr. Burridge's intention to gift it to Mr. Parker, but sadly Mr. Burridge died before the entire transaction—that is to say both the sale and the gifting—could be effected.

[66] There was ample evidence before the judge as to the reason the vessel, part of Mr. Burridge's enterprise, was categorized on paper as a gift between the parties. The purpose was to ensure the vessel was included as one of the items transferred, but to describe it as a gift in order to ideally position the purchaser vis-à-vis the lending requirements that would be imposed by the Fisheries Loan Board. The parties believed the Board would not recognize any equity in vessels of a certain age, such as *Lady Rosetta 99*.

[67] All of the evidence in relation to the parties having proceeded in the manner they did supports the designation of the vessel alone as a "gift" was as part of the sale transaction. The judge's order reflects she treated the vessel as part and parcel of the consideration upon which the Contract was based.

[68] The intention of the parties with respect to the vessel, regardless of having labelled it as a gift, was clear—it was an asset to be transferred from Mr. Burridge to Mr. Parker as part of the sale of Mr. Burridge's enterprise. I do not see any error made by the judge in that regard.

Conclusion

[69] In summary, I am satisfied the judge properly interpreted the law surrounding the making of the Contract. She considered the evidence and made credibility assessments, and determined the weight she would give to certain evidence. The judge properly exercised her fact-finding role, and there is no basis upon which this Court should now interfere with her conclusions.

[70] For the foregoing reasons, the grounds of appeal advanced cannot succeed on the record put before us, and I would dismiss the appeal.

Costs

[71] In oral argument both parties took the position that any award of costs on appeal should reflect this Court's usual practice of a costs award calculated as equivalent to forty percent of the costs awarded by the judge. In this case that would equate to an award of $23,500. The Estate shall pay costs to Mr. Parker in that amount.

Beaton J.A.

Concurred in:

Farrar J.A.

Bryson J.A.