NOVA SCOTIA COURT OF APPEAL

Citation: *T.E. Gordon Home Inspections Inc. v. Smith*, 2021 NSCA 13

Date: 20220210
Docket: CA 504672
Registry: Halifax

Between:

T.E. Gordon Home Inspections Inc.

Appellant

v.

Michael Edwin Smith, Ab Mason Asaff and Doreen Asaff

Respondents

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	September 20, 2021, in Halifax, Nova Scotia
Subject:	Contracts: interpretation and enforceability of exclusion or limitation clauses; Civil Procedure: Scope of a *Rule* 12 motion to determine questions of law.
Summary:	The respondent, Michael Smith, hired the appellant to conduct a home inspection before completing an agreement of purchase and sale. The appellant presented a one-page Inspection Agreement. The terms were not discussed. The agreement contained a term that sought to limit the appellant's potential liability to the amount of the fee to conduct the inspection. The appellant's inspection disclosed no major issues with the home. Just over three years later, structural problems were discovered. The respondent sued the vendors and the appellant. The vendors admitted liability. Prior to trial, the appellant moved under *Rule* 12 for an order that the contractual terms limited its liability for negligence to the amount of the fee. The motion judge found the term ambiguous and interpreted it against its drafter, the appellant. The judge declined to consider if the limitation term was otherwise conscionable or contrary to public policy.

Issue:	Did the motion judge err in his approach on the *Rule* 12 motion?
Result:	Leave to appeal granted, the appeal is allowed and the issues as to the interpretation and applicability of the exemption or limitation clauses remitted to the Nova Scotia Supreme Court for determination at a trial. These questions are ones of mixed fact and law and are hence not amenable to a *Rule* 12 motion.

NOVA SCOTIA COURT OF APPEAL

Citation: *T.E. Gordon Home Inspections Inc. v. Smith*, 2022 NSCA 13

Date: 20220210
Docket: CA 504672
Registry: Halifax

Between:

T.E. Gordon Home Inspections Inc.

Appellant

v.

Michael Edwin Smith, Ab Mason Asaff and Doreen Asaff

Respondents

Judges:	Beveridge, Farrar and Van den Eynden JJ.A.
Appeal Heard:	September 20, 2021, in Halifax, Nova Scotia
Held:	Application for leave granted and the appeal allowed with costs to the respondent, per reasons for judgment of Beveridge J.A.; Farrar and Van den Eynden JJ.A. concurring
Counsel:	Richard Norman, for the appellant Ian Joyce, for the respondent Michael Smith Ab Asaff and Doreen Asaff, respondents in person (not participating)

Reasons for judgment:

[1] The respondent bought a home. He sued the vendors and his home inspector. Nine years later, a ten-day trial was to commence in the spring of 2021. There was no trial.

[2] Instead, the home inspector applied for a ruling that its liability was limited to the price paid for doing the home inspection pursuant to an exemption or limitation clause in its contract with the respondent.

[3] A judge found the clause ambiguous, construed it against the home inspector, and concluded its liability, if any, was not limited by the contractual term. The home inspector applies for leave to appeal this interlocutory ruling.

[4] I would grant leave to appeal and allow the appeal, but I would not grant the relief the appellant hoped to achieve. The potential application of the exemption or exclusion clause in this case is a question of mixed fact and law—it is a question for trial.

[5] To understand this conclusion, I will set out the necessary background, the controlling principles that guide the interpretation and applicability of exemption clauses, and why the efficacy of the subject exemption clause in this contract should not have been determined on a *Rule* 12 motion.

BACKGROUND

[6] The respondent is Michael Smith, an actor well-known for his role as Bubbles in the series and movies “Trailer Park Boys”. In 2008, Mr. Smith and his wife began looking for a new home. A realtor helped.

[7] They found a new home in Dartmouth. Multiple viewings lead to a February 23, 2009 Agreement of Purchase and Sale. There were conditions. The only one relevant to these proceedings was a term that made the Agreement subject to the buyer, at his expense, to have the property inspected, and such inspection(s) meeting his satisfaction.

[8] The inspections would be deemed satisfied unless the purchaser notified the vendor to the contrary on or before March 2, 2009. If such notice were given, it had to be accompanied by the pertinent sections of a written inspection report, and

either party would be at liberty to terminate the Agreement with a return of the deposit.

[9] The respondent's realtor recommended Terry Gordon to do the inspection. The respondent met Mr. Gordon at the property on February 26, 2009. Mr. Gordon presented the respondent with an Inspection Agreement. As I will detail later, the respondent's evidence about his knowledge and understanding of the limitation clause was contradictory.

[10] What is not open to question is that Mr. Gordon presented a one-page contract to the respondent. It was entitled "T.E. Gordon Home Inspections Inc. Inspection Agreement". It contained eight single-spaced paragraphs. The only emphasis is found in the opening and closing words:

> **T.E. Gordon Home Inspections Inc.** agrees to conduct a visual inspection to acquaint the client with the actual condition of the subject property. This inspection is based on all of the exterior and interior areas of the structure that are easily accessible. Areas where no access is available (i.e., Attics or crawlspaces without any means of entry) will be considered uninspected. This inspection and report are not to be construed as a guarantee, warranty or certification as to the value of the property inspected or compliance with past or present government codes or regulations of any kind.
>
> **…**
>
> **Acceptance and understanding of this agreement are hereby acknowledged, with the signature of the client or an agent for them**.
>
> [Emphasis added]

[11] After the inspection, Mr. Gordon prepared a written report. It identified no significant concerns. The inspection clause in the Agreement of Purchase and Sale was deemed satisfied. The respondent completed the purchase of his new home.

[12] Over three years later, landscapers were doing work at the front of the property. They noticed problems with the house. The respondent hired a contractor. The exterior surface was beyond repair. There had been significant water infiltration to the extent the entire substructure was rotted. The respondent says the remediation process has cost him more than $600,000.

[13] The respondent sued the vendors for false or negligent misrepresentation about the condition of the property. The vendors have admitted liability. They are

the other named respondents. They did not participate in the appeal. Damages have yet to be assessed.

[14] The respondent also sued T.E. Gordon Home Inspections Inc. (hereafter, T.E. Gordon) for breach of contract and negligence. T.E. Gordon denied it was negligent, in breach of its contract, or had made any negligent misrepresentations.

[15] After discoveries were complete, T.E. Gordon moved for an order under *Rule* 12 that the contract limited its liability for negligence to the amount of the fee paid for the inspection. T.E. Gordon relied on the following contractual term:

> It is agreed that T.E. Gordon Home Inspections Inc. employees or agents assume no liability or responsibility for the cost of repairing or replacing any reported or unreported defects or deficiencies, either current or arising in the future, or for any property damage, consequential damage or bodily injury of any nature. T.E. Gordon Home Inspections Inc. liability shall be limited to a sum equal to the amount of the fee paid for the inspection.

The Rule 12 Motion

[16] The parties filed affidavits. Terry Gordon's affidavit recounted his "normal protocol" for purchasers who wanted to engage his services. He deposed he would provide the client with the Inspection Agreement, explain the process and Agreement, and ask the client to fill in their information and sign the Agreement. He was "reasonably certain" he followed this protocol with Mr. Smith. Documents and excerpts from Mr. Smith's discovery examination were attached.

[17] Mr. Smith's affidavit set out his lack of training and experience, scarce knowledge of real property transactions, and very limited exposure to home inspections or home inspection agreements. He deposed Mr. Gordon handed him the Inspection Agreement with the comment Smith would have to sign it—it was a "standard form". Gordon did not summarize for him the contents of the Inspection Agreement, nor alert him to the existence of any terms that purported to exempt T.E. Gordon from liability or limit damages to the amount of the inspection fee.

[18] Further, it was not Mr. Smith's understanding if T.E. Gordon were negligent there would be any limitation on his ability to pursue a claim against it; if he had understood that to be the case, he likely would not have signed the Inspection Agreement nor retained T.E. Gordon to do the inspection.

[19] Both parties filed extensive pre-hearing briefs on October 14 and 21, 2020, respectively. As expected, their positions were diametrically opposed. The appellant's position was the motion judge could determine whether the Inspection Agreement governed such that any damages award against T.E. Gordon could be no higher than the fee paid for the home inspection.

[20] The appellant submitted this was a question of law that could be resolved under *Civil Procedure Rule* 12. It went no further than reliance on the three-step framework set out by the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, which it summarized as:

1) Does the clause apply to the circumstances?

2) If the clause does apply, was the clause unconscionable at the time the contract was made?; and

3) If the clause was not unconscionable, should the court nevertheless refuse to enforce the clause by reason of overriding public policy?

[21] The respondent argued the question was not a question of law that could be determined pursuant to *Rule* 12, because it engaged questions of mixed fact and law, and the facts necessary to determine the question could not be found without a trial. He also argued even if the question could be determined under *Rule* 12, based on principles of contractual interpretation, the clause did not apply to claims of negligence and negligent misrepresentation. I will discuss these issues in more detail later.

[22] Both parties cross-examined the principal affiants at the November 30, 2020 hearing before Justice J. M. Arnold of the Nova Scotia Supreme Court. There is no need to elaborate on what was elicited. Oral submissions followed.

[23] The appellant reiterated its position that there were no contested facts and it was unnecessary to resolve any important facts in order to interpret the contract, which it referred to as the legal question. The motion judge was skeptical. Counsel reassured the judge he was not arguing then or later there were any facts in the respondent's affidavit that were not reliable nor credible.

[24] Yet the appellant also tendered the respondent's discovery evidence where he appeared to acknowledge he had not only read the limitation clause, but

understood it to mean if the appellant failed to report on a defect, its liability would be limited to the cost of the home inspection.

[25] The appellant argued there was no contradiction between the respondent's discovery evidence and his affidavit, but, even if there were, invited acceptance of the version set out in his affidavit.

[26] The appellant said the respondent was just trying to create a smokescreen made up of facts immaterial to the *Tercon* analysis. The respondent's cases pre-dated *Tercon*. They could no longer be relied upon. In a nutshell, all roads relevant to exclusion clauses run through *Tercon*. He asked the judge to follow the post-*Tercon* cases from British Columbia of *Gordon v. Krieg*, 2013 BCSC 842 and *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83 that enforced limitation clauses in home inspection contracts.

[27] With respect to applicability, the appellant argued the clause is not ambiguous. The language is broad and captures negligence and negligent misrepresentation. As for the second and third *Tercon* steps, the contract is neither unconscionable, nor contrary to any overriding public policy.

[28] At the conclusion of oral argument, the motion judge reserved. On January 21, 2021, he released written reasons (2021 NSSC 16). The judge concluded the first *Tercon* step—whether the limitation clause applies in the circumstances—was a question of law.

[29] The answer, he said, depended on the Court's assessment of the intention of the parties as expressed in the contract. He found two problems in the limitation clause: it was ambiguous and would have to be read against the drafter in accordance with the principle of *contra proferentem* (para. 41); and, because the second sentence in the limitation clause referred to T.E. Gordon's liability, this created further ambiguity (para. 42).

[30] The judge concluded:

> [43] The clause here, like the one in *Tercon*, "is at best ambiguous and should be construed *contra proferentem*..."

[31] As for the British Columbia cases which had applied limitation clauses in home inspection contracts, the motion judge distinguished them. In both, the limitation of liability clause had expressly relieved the inspector of liability for

negligence or limited damages recoverable for negligence. In neither case had there been any suggestion of ambiguity (para. 48).

[32] The motion judge did not discount the possibility that parties could contract out of tort liability. In referring to the two British Columbia cases, he commented:

> [50] These two cases stand for the proposition that "absent a legislative prohibition, parties are free to contract out of tort liability provided they do so in clear and unambiguous language..." (*Ferrer* at para. 26). They do not help T.E.G. The meaning of the purported exclusion of liability clause in the instant case is anything but clear and unambiguous. It makes no reference to negligence or fault in any form. Its two sentences are facially inconsistent as to whom or to what it applies. The provision is not even drafted in grammatically-correct English. In these circumstances, there is no conceivable reason to read it in accordance with the subjective intentions of the drafter, which is effectively the position of T.E.G.

[33] The judge reiterated the possibility one could exclude or limit the liability of home inspectors, but the clause in the appellant's contract did not limit T.E. Gordon's liability for negligence:

> [58] As the court said in *Brownjohn*, "the average 'consumer' of home inspection services would be very surprised to be told in clear and understandable language that the inspector can be incompetent, or reckless, or incompetent and reckless, and express any opinion he likes regarding major structural aspects of the house, and have no responsibility to the client beyond the fee" (para. 92). Nevertheless, the court went on to say, such a result is achievable with clear language. That is also the case here. However, the provision before the court does not achieve the result desired by T.E.G. At best, the provision is ambiguous and should be construed narrowly, against the drafter, as the majority did in *Tercon*. It does not relieve T.E.G. of liability for negligence.

[34] The judge recognized he need not proceed further in the *Tercon* analysis. Nonetheless, he chose to do so.

[35] The judge found that both the questions of unconscionability and public policy engaged issues of mixed fact and law. This disqualified them from being resolved under *Rule* 12 (paras. 65 and 68).

ISSUES

[36] The appellant argues on appeal the motion judge erred by concluding the limitation clause was ambiguous and by not ruling in its favour on the questions of unconscionability and public policy. It frames the following four issues:

1) Should leave to appeal be granted?

2) Did the learned motion judge err in concluding that the exclusion clause was ambiguous?

3) Did the learned motion judge err in concluding that the second part of the *Tercon* test involving unconscionability could not be determined?

4) Did the learned motion judge err in concluding that the third part of the *Tercon* test involving public policy could not be determined?

ANALYSIS

[37] The respondent concedes the appellant has raised an "arguable issue". Leave to appeal is not opposed. I would grant leave.

[38] The only path to success for the appellant is if this Court were to agree the motion judge not only erred when he concluded the limitation clause was ambiguous but also finds he committed reversible error in not deciding in its favour the unconscionability and public policy questions. The motion judge declined to consider these latter two questions. The appellant says this Court should simply declare, as a matter of law, that the limitation clause governs and the amount of damages can be no higher than the fee paid for the home inspection.

[39] I am not persuaded there is any merit to the appellant's third and fourth grounds of appeal. The issues engaged are clearly ones of mixed fact and law. The motion judge was correct not to try to resolve them within a *Rule* 12 motion.

[40] As for the first substantive ground of appeal, the respondent is in a difficult position. He has secured an order from the Nova Scotia Supreme Court that "… the Inspection Agreement entered into by Michael Edwin Smith and T.E. Gordon Home Inspections Inc. does not govern damages such that any damages awarded against the Defendant T.E. Gordon Home Inspections Inc. can be no higher than the fee paid for the home inspection".

[41] The respondent asks us to uphold this order on the basis the motion judge's conclusion that the clause was ambiguous is correct, and the motion judge properly interpreted it so as not to limit the appellant's liability for negligence.

[42] With respect to the parties and the motion judge, the interpretation of this contract, including the limitation clause, was a question of mixed fact and law and

thus not amenable to a *Rule* 12 determination. This was the respondent's position on the motion (para. 24), but ultimately rejected by the motion judge (para. 35).

[43] I would restate the issue as follows:

> Did the motion judge err by embarking on an interpretation of the home inspection agreement within the parameters of a *Rule* 12 motion?

[44] To address this issue, I will set out the parameters of a *Rule* 12 motion and why the interpretation of this contract was a question of mixed fact and law and not amenable to a *Rule* 12 motion.

Rule 12

[45] This *Rule* replaced the former *Rule* 25.01 of the *Nova Scotia Civil Procedure Rules* (1972). *Rule* 25.01 permitted a judge to determine relevant questions of law and make ancillary pre-hearing or trial directions. A judge could even grant judgment. Although *Rule* 25.01 made no reference to any such requirement, it became settled law the *Rule* required an agreed statement of facts (see: *Seacoast Towers Services Ltd. v. MacLean* (1986), 75 N.S.R. (2d) 70 (S.C.A.D.); *Binder v. Royal Bank of Canada* (1996), 150 N.S.R. (2d) 234 (C.A.); *Reynolds v. Fortune*, 2003 NSCA 20).

[46] The advent of the now not-so-new *Nova Scotia Civil Procedure Rules* in 2010 permitted a judge to separate a question of law from other issues and proceed to determine it even though the parties disagree on relevant facts. It provides:

> **Scope of Rule 12**
>
> 12.01 (1) A party may, in limited circumstances, seek the determination of a question of law before the rest of the issues in a proceeding are determined, even though the parties disagree about facts relevant to the question.
>
> (2) A party may seek to have a question of law determined before the trial of an action or the hearing of an application, in accordance with this Rule.
>
> **Separation**
>
> 12.02 A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:
>
> (a) the facts necessary to determine the question can be found without the trial or hearing;

(b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;

(c) no facts to be found in order to answer the question will remain in issue after the determination.

Determination

12.03 (1) A judge who orders separation must do either of the following:

(a) proceed to determine the question of law;

(b) appoint a time, date, and place for another hearing at which the question is to be determined.

…

[47] Some of the implications of the new *Rule* were canvassed in *Mahoney v. Cumis Life Insurance Company*, 2011 NSCA 31. Fichaud J.A., for the Court, confirmed the *Rule* not only scrapped the need for an agreed statement of facts but permitted a judge under *Rule* 12 to make findings of fact necessary to determine the legal question in issue. But as Fichaud J.A. stressed, *Rule* 12 does not authorize determinations of questions of mixed fact and law:

> [16] The new *Rule* 12 does not require an agreed statement for the determination of a preliminary question of law. This is clear from *Rule* 12.01(1) -- a party may "in limited circumstances, seek the determination of a question of law ... even though the parties disagree about the facts relevant to the question".
>
> [17] *Rule* 12.02 recites those "limited circumstances": (a) "the facts necessary to determine the question can be found without the trial or hearing", (b) the determination will reduce the length or expense of the proceeding, and (c) "no facts to be found in order to answer the question will remain in issue after the determination". Conditions (a) and (c) contemplate that the Chambers judge, on a *Rule* 12 motion, may find facts, but only (1) the facts necessary to determine the pure legal question before him and (2) if all those facts, necessary to decide the pure legal question, can be determined without a trial.
>
> [18] So the first step with *Rule* 12 is to identify the pure legal question to be determined. *Rule* 12.01(1) permits a motion for determination of "a question of law". *Rule* 12.03(1) permits the judge either to determine "the question of law" or appoint a time to determine that question of law. **The *Rule* does not authorize a determination of a question of fact or mixed fact and law, excepting only those facts that scaffold the point of pure law under *Rule* 12.02(a) as I have discussed**.
>
> [Emphasis added]

[48] With these parameters in mind, I turn to discuss the questions the appellant asked the judge to determine.

Interpretation of the contract

[49] Historically, the common law treated interpretation to determine the legal rights of the parties under a written contract as a pure question of law. In *Sattva Capital Corp. v. Creston Moly Corp*, 2014 SCC 53, the Supreme Court of Canada rejected that historical approach. Rothstein J., for the Court, explained:

> [49] As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam*. Questions of law "are questions about what the correct legal test is" (*Southam*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).
>
> [50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. **Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.**
>
> [Emphasis added]

[50] Appeal courts must defer to a trial court's resolution of questions of mixed fact and law. The jurisdiction to interfere exists in cases of extricable legal error or if the trial judge committed clear and material error.

[51] However, contractual interpretation may not always be a question of mixed fact and law. *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 clarified that sometimes interpretation of standard form contracts, such as insurance policies, is a question of law. Wagner J., as he then was, for the majority concluded as follows:

> [24] I would recognize an exception to this Court's holding in *Sattva* that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. In my view, where an appeal involves the interpretation of a

> standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[52] This begs the question: what is a standard form contract? The reasons penned by Wagner J. offer some insight. First, he cited with approval Professor John D McCamus's description of a standard form contract:

> [25] The statements made in *Sattva* on the standard of review of contractual interpretation must be considered in their full context. That case concerned a complex commercial agreement between two sophisticated parties — not a standard form contract. Professor John D. McCamus has described standard form contracts as follows:
>
> > ... the document put forward will typically constitute a standard printed form that the party proffering the document invariably uses when entering transactions of this kind. The form will often be offered on a "take it or leave it" basis. In the typical case, the other party, then, will have no choice but either to agree to the terms of the standard form or to decline to enter the transaction altogether. Standard form agreements are a pervasive and indispensable feature of modern commercial life. It is simply not feasible to negotiate, in any meaningful sense, the terms of many of the transactions entered into in the course of daily life.
>
> (*The Law of Contracts* (2nd ed. 2012), at p. 185)

[53] Justice Wagner also identified as relevant whether the interpretative exercise would be of precedential value and if there exists a factual matrix that would assist or impact contractual interpretation:

> [39] These teachings, however, do not necessarily apply in cases involving standard form contracts, where a review on the standard of correctness may be necessary for appellate courts to fulfill their functions. Standard form contracts are "highly specialized contracts that are sold widely to customers without negotiation of terms": *MacDonald*, at para. 37. In some cases, a single company, such as a bank or a telephone service provider, may use its own standard form contract with all of its customers: *Monk*, at para. 23. In others, a standard form agreement may be common throughout an entire industry: *Precision Plating*, at para. 28. Either way, the interpretation of the standard form contract could affect many people, because "precedent is more likely to be controlling" in the interpretation of such contracts: Hall, at p. 131. It would be undesirable for courts to interpret identical or very similar standard form provisions inconsistently, without good reason. The mandate of appellate courts — "ensuring the consistency of the law" (*Sattva*, at para. 51) — is advanced by permitting

> appellate courts to review the interpretation of standard form contracts for correctness.
>
> …
>
> [48] Depending on the circumstances, however, the interpretation of a standard form contract may be a question of mixed fact and law, subject to deferential review on appeal. For instance, deference will be warranted if the factual matrix of a standard form contract that is specific to the particular parties assists in the interpretation. Deference will also be warranted if the parties negotiated and modified what was initially a standard form contract, because the interpretation will likely be of little or no precedential value. There may be other cases where deferential review remains appropriate. As Iacobucci J. recognized in *Southam*, the line between questions of law and those of mixed fact and law is not always easily drawn. Appellate courts should consider whether "the dispute is over a general proposition" or "a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future" (para. 37).

[54] The contract between the appellant and the respondent certainly has one of the attributes of a standard form contract. The parties agreed the one-page document was a pre-printed form. It was not open to negotiation. It was a take it or leave it proposition.

[55] However, the contract is not one used by a bank or telephone company or insurer for all of their customers, nor am I satisfied on this record it is one that is used commonly throughout the industry of home inspections. I see no inherent precedential value in the outcome of its interpretation.

[56] To be sure, each case that resolves an issue of a party's rights and liabilities under a contract can help shape the common law, but resolution of whether and to what extent the limitation clause applies in this contract does not create a binding precedent.

[57] I recognize that limitation of liability clauses seem to be common in home inspection agreements. But the agreements are by no means identical, nor can they even be said to have similar language. The only commonality is a desire, in some way, to try to exempt or limit the home inspector's liability to the amount of the fee. The parties cited the following home inspection disputes: *Brownjohn v. Ramsay*, 2003 BCPC 2; *Gesner v. Ernst*, 2007 NSSC 146; *Burgess v. Rickard*, 2008 NSSM 15; *Gordon v. Krieg*, *supra*; *Ferrer v. 589557 B.C. Ltd.*, *supra*; *Larouche v. Radwanski (c.o.b. Sherlock Homes Inspections)*, 2011 YKSM 3. The motion judge also referred to *Lippa v. Colletta*, 2017 ONSC 1122.

[58] The language in the home inspection agreements in these cases was different, as were the factual matrices of the contracts. Importantly, each involved either a trial, or in the case of *Ferrer v. 589557 B.C. Ltd.*, *supra*, a summary trial, where issues of fact and of mixed fact and law were resolved.

[59] The degree to which the homeowner plaintiff actually knew or ought to have known of the limitation clause, and the extent to which a reasonable person would expect a limitation clause and understand its significance form part of the surrounding circumstances. Those circumstances help a trial judge understand the mutual and objective intentions of the parties, as expressed by the words of the contract (*Sattva*, at para. 57). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact (*Sattva*, at para. 58).

[60] The clarity of the language and the surrounding circumstances were key to the outcome in the cases the parties relied on before the motion judge. In *Brownjohn*, *supra*, the trial judge refused to enforce the limitation clause because the average consumer of home inspection services would not expect the inspector could be incompetent, reckless, or both, express any opinion he likes, and have no responsibility beyond the small inspection fee.

[61] On the other hand, in *Ferrer*, *supra*, the trial judge's enforcement of the limitation clause was upheld on appeal. The contract contained clear understandable language. Amongst other things, it provided that "[i]n the event of any errors, omissions, breach of contract, and/or negligence by the Inspector", the homeowners agreed to a number of restrictions on their legal rights. One such clause provided: "The Inspector's total liability to the Client for errors, omissions, breaches of contract and/or negligence in any part of the Inspection or Inspection Report shall be limited to the amount of the fee paid for the inspection. For greater clarity this means that if the Client sues the Inspector any damages awarded cannot exceed the cost of the Inspection".

[62] The homeowner plaintiff's attention had been specifically drawn to this clause, which had been initialled. The trial judge found they had read and understood it (para. 7).

[63] In the case at bar, there was contradictory evidence from the respondent. His discovery evidence suggested he had read the limitation clause and had understood it. However his affidavit and evidence at the *Rule* 12 hearing suggested he had not understood that if T.E. Gordon were negligent there would be

a limitation on his ability to pursue a claim against it; if he had understood that to be the case, he likely would not have signed the Inspection Agreement nor retained T.E. Gordon to do the inspection.

[64] I do not find it necessary nor even desirable to recount all of the history of what has been termed by some to be judicial hostility to enforcement of exclusion clauses. One of the oft-referenced requirements for enforcement is adequate notice to the plaintiff of the inclusion of the limitation provision in the contract (see for example: *Tilden Rent-A-Car Co. v. Clendenning* (1978), 18 O.R. (2d) 601 (C.A.); *Inglis v. Medway Pines Stables*, 2020 NSSC 97).

[65] In addition, relevant to this case are the principles that apply where an exemption clause seeks to limit a party's liability for its own negligence. The leading case is *Canada Steamship Lines Ltd. v. The King*, [1952] A.C. 192 (J.C.P.C.). The Crown leased a freight shed to Canada Steamship Lines in Montreal. It undertook to keep the shed in repair. There was also a clause in the lease which provided that Canada Steamship Lines would have no claim against the Crown for damage to goods stored in the shed. While doing repairs, Crown servants negligently caused a fire that destroyed the shed and all of its contents. The Supreme Court of Canada ruled the lease precluded liability.

[66] The Privy Council reversed, relying on a statement of principle from the English Court of Appeal in *Alderslade v. Hendon Laundry Ld*, [1945] K.B. 189:

> [...] where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject-matter. Where, on the other hand, the head of damage may be based on some ground other than that of negligence, the general principle is that the clause must be confined to loss occurring through that other cause to the exclusion of loss arising through negligence. The reason for that is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms the clause is to be construed as relating to a different kind of liability and not to liability based on negligence.
>
> p. 207

[67] The Privy Council accepted that this common law statement did not conflict with the civil law of Quebec. Lord Morton of Henryton, on behalf of the unanimous Board, set out the following three-part test for courts when considering such clauses:

> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the proferens") from the consequence of the negligence of his own servants, effect must be give to that provision. Any doubts which existed as to whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court of Canada in *The Glengoil Steamship Company v. Pilkington*.
>
> (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens in accordance with article 1019 of the Civil Code of Lower Canada: "In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation."
>
> (3) If the words used are wide enough for the above purpose, the court must then consider whether "the head of damage may be based on some ground other than that of negligence," to quote again Lord Green in the *Alderslade* case. The "other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are, prima facie wide enough to cover negligence on the part of his servants.
>
> p. 208

[68] Subsequent Supreme Court of Canada decisions have confirmed this test is part of the common law in Canada (*Salmon River Co. v. Burt Bros.*, [1953] 2 S.C.R. 117; *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752).

[69] Judicial control of exemption or limitation clauses irrespective of contractual interpretation found acceptance in the doctrine of fundamental breach of contract. Simply put, if a party committed a fundamental breach of contract, as a rule of law, it could not rely on an exemption clause to exclude or limit its liability. The House of Lords eventually rejected the rule of law approach (*Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361; and *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827).

[70] Canada followed suit in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 and *Tercon*, *supra*. However, in *Hunter* the five member Court divided on how exactly courts should deal with exemption or limitation clauses in situations of fundamental breach. The only thing in common was

unenforceability was not automatic where a court was satisfied a party had committed a fundamental breach of contract.

[71] Twenty years later, the full Court in *Tercon* unanimously agreed on the correct analytical approach but disagreed on how it applied (5-4). The trial judge had concluded the Province fundamentally breached its contract with Tercon, and that, as a matter of contractual interpretation, the exclusion clause was ambiguous. The Court of Appeal found no ambiguity and decided the exclusion clause effectively barred Tercon's claim.

[72] In the Supreme Court, Cromwell J., for the majority, accepted it was time to abandon the connection between fundamental breach and exclusion clauses. He agreed with Binnie J.'s analytical approach, but concluded the exclusion clause did not apply:

> [61] The trial judge held that as a matter of construction, the clause did not bar recovery for the breaches she had found. The clause, in her view, was ambiguous and, applying the *contra proferentem* principle, she resolved the ambiguity in Tercon's favour. She also found that the Province's breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the nature of the Province's breach. The Province contends that the judge erred both with respect to the construction of the clause and her application of the doctrine of fundamental breach.
>
> [62] On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest, as Dickson C.J. was inclined to do more than 20 years ago: *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at p. 462. I agree with the analytical approach that should be followed when tackling an issue relating to the applicability of an exclusion clause set out by my colleague Binnie J. However, I respectfully do not agree with him on the question of the proper interpretation of the clause in issue here. In my view, the clause does not exclude Tercon's claim for damages, and even if I am wrong about that, the clause is at best ambiguous and should be construed *contra proferentem* as the trial judge held. As a result of my conclusion on the interpretation issue, I do not have to go on to apply the rest of the analytical framework set out by Binnie J.

[73] Binnie J. succinctly summarized the enquiries a court must address as follows:

> [122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed

> in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.
>
> [123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

[74] For Cromwell J., the key principle of contractual interpretation at play was that the words of a provision must not be read in isolation but considered in harmony with the rest of the contract in light of its purposes and commercial context. He applied those principles as follows:

> [78] To hold otherwise seems to me to be inconsistent with the text of the clause read in the context of the RFP as a whole and in light of its purposes and commercial context. In short, I cannot accept the contention that, by agreeing to exclude compensation for participating in this RFP process, the parties could have intended to exclude a damages claim resulting from the Province unfairly permitting a bidder to participate who was not eligible to do so. I cannot conclude that the provision was intended to gut the RFP's eligibility requirements as to who may participate in it, or to render meaningless the Minister's statutorily required approval of the alternative process where this was a key element. The provision, as well, was not intended to allow the Province to escape a damages claim for applying different eligibility criteria, to the competitive disadvantage of other bidders and for taking steps designed to disguise the true state of affairs. I cannot conclude that the parties, through the words found in this exclusion clause, intended to waive compensation for conduct like that of the Province in this case that strikes at the heart of the integrity and business efficacy of the tendering process which it undertook.
>
> [79] If I am wrong about my interpretation of the clause, I would hold, as did the trial judge, that its language is at least ambiguous. If, as the Province contends, the phrase "participating in this RFP" could reasonably mean "submitting a Proposal", that phrase could also reasonably mean "competing against the other eligible participants". Any ambiguity in the context of this contract requires that the clause be interpreted against the Province and in favour of Tercon under the principle *contra proferentem*: see, e.g., *Hillis Oil and Sales Ltd. v. Wynn's Canada, Ltd.*, [1986] 1 S.C.R. 57, at pp. 68-69. Following this approach, the clause would not apply to bar Tercon's damages claim.

[75] Binnie J., in dissent, found no ambiguity, and the exclusion clause was neither unconscionable nor contrary to public policy.

[76] In my view, there is nothing in either *Hunter* or *Tercon* that in any way detracts from the well-established principles of contractual interpretation of exemption or limitation clauses.[1] I would add that there is also nothing in these cases to say or even imply the doctrine of fundamental breach is dead—it just does not operate to dictate whether a particular exemption or limitation clause is enforceable (see, for example, *Hunter*, *supra*, *per* Dickson C.J. at para. 61).

[77] To determine at trial whether the exemption or limitation clause in the Inspection Agreement applies, the trial judge will need to determine a number of issues. Some are factual. Others are of mixed fact and law. While not exhaustive, these would include: whether the respondent knew, or had in all of the circumstances reasonable means of knowledge, of the exclusion or limitation clause; in light of all of the other contractual terms, whether the exemption clause exclude or limit the appellant's liability for negligence—which invites consideration of whether there were other heads of damage, neither remote nor fanciful, other than negligence and, in light of the circumstances and language used, whether the provision is ambiguous—which could trigger recourse to other principles of contractual interpretation such as assessment of the reasonable expectations of the parties and *contra proferentem*?

[78] If a trial judge were to conclude the exclusion or limitation clause applied, the judge would have to decide if they should decline to enforce it as being unconscionable or contrary to public policy. Here, the motion judge properly abstained from answering these questions in the context of a *Rule* 12 motion. He cited a number of authorities that described unconscionability a question of mixed fact and law. The appellant did not seek to qualify those authorities and referenced none to the contrary.

[79] If the exemption or limitation clause were found to be applicable and otherwise enforceable, it would be up to the respondent to establish, if it could, the existence of an overriding public policy to avoid enforcement.

SUMMARY AND CONCLUSION

---

[1] See, e.g., *Canadian Pacific Forest Products Ltd. v. Belships (Far East) Shipping (Pte.) Ltd.*, [1999] 4 F.C. 320 (C.A.) at para. 18, leave to appeal dismissed [1999] S.C.C.A. No. 421.

[80] The applicability of the exemption or limitation clause is not a pure question of law. It is one of mixed fact and law. As such, it was beyond the reach of resolution in *Rule* 12 motion. The respondent was correct in its position before the motion judge.

[81] The other queries to be addressed—if a party seeks to avoid enforcement of an applicable exemption or limitation clause—are clearly matters to be addressed at trial. The attempt to separate a question of law before trial was ill-conceived. It did nothing to advance a speedy and inexpensive determination of the proceeding.

[82] The remedies specified by the appellant in its Notice of Application for Leave to Appeal were "an order declaring the subject clause limits the amount of damages which may be claimed" or "an order remitting the matter back to a judge of the Supreme Court to be redetermined in accordance with directions from this Court".

[83] I would grant leave to appeal, allow the appeal and remit the determination of the applicability and enforceability of the exemption or limitation clause to the trial court. No costs were ordered by the motion judge. I would award the respondent the parties' suggested amount of $1,500.00 payable forthwith.

Beveridge, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A.