NOVA SCOTIA COURT OF APPEAL
Citation: ***Boyle v. Maritime Travel Inc.***, 2014 NSCA 44

Date: 20140501
Docket: CA 415498
Registry: Halifax

Between:

Hugh Boyle

Appellant

v.

Maritime Travel Inc., a body corporate

Respondent

Judges:	Oland, Fichaud and Beveridge, JJ.A.
Appeal Heard:	February 7, 2014, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Oland, J.A.; Fichaud and Beveridge, JJ.A., concurring
Counsel:	George W. MacDonald, Q.C., Kiersten Amos and Katie Archibald (Articled Clerk), for the Appellant William L. Ryan, Q.C. and Christa M. Brothers, Q.C., for the Respondent

Reasons for judgment:

[1] Outside a courtroom, counsel for Maritime Travel Inc. ("Maritime") and Go Travel Direct.com Inc. ("Go Travel") set out to strike a deal on a stay of an execution order Maritime held against Go Direct. During their negotiations, counsel for Go Travel had telephone discussions with the appellant, Hugh Boyle, that company's Chairman and a Director, about the funds to be put up to secure the stay and the source of those funds. Mr. Boyle agreed to pay the first installment of $100,000.00. Later, litigation ensued as to whether he was personally liable to make the second installment, being the balance of the judgment amount.

[2] Justice A. David MacAdam heard four days of evidence and submissions. In his decision dated December 11, 2012 (2012 NSSC 428), the trial judge determined that the appellant was liable for that second payment. Mr. Boyle appeals his order dated April 8, 2013.

Background:

[3] At the relevant time, Maritime was represented by the now Honourable Justice David P.S. Farrar and John T. Shanks. Go Travel was represented by the now Honourable Justice Peter Bryson and Daniel Wallace. Maritime had been successful in an action against Go Travel. It obtained an execution order for over $250,000.00 in damages and interest against Go Travel.

[4] In his decision, Justice MacAdam summarised the circumstances which led to negotiations in a hallway of the Law Courts and concluded in a consent order:

> [4] In June 2008, Go Travel filed a notice of appeal which was followed by a cross-appeal by Maritime. Go Travel subsequently filed a motion for a stay of execution of the judgment pending the outcome of the appeal. Saunders J.A. heard the motion on September 17, 2008. Go Travel took the position that it did not have the financial resources to pay the judgment and if the execution was pursued, it would likely be put out of business. Following cross-examination by Farrar of Ian Dodd (Dodd), President of Go Travel, on his affidavit filed on the motion for the stay, at the suggestion of Saunders J.A. there was an adjournment to permit the parties to determine whether they could settle on terms for imposing a stay. Counsel, together with Rob Dexter (Dexter), president of Maritime, and Dodd, retired to the hallway outside the courtroom. Boyle, the Chairman and Director of Go Travel, was in Ottawa and all communications with him on September 17 were by telephone.

[5] During the discussion the parties dispersed to separate ends of the hallway. Eventually Bryson asked Farrar to meet with him for a discussion. He told Farrar that after speaking with Boyle he had instructions that $100,000.00 would be paid into the trust account of his law firm, McInnes Cooper. This would be conditional on Maritime consenting to the granting of the stay of the execution.

[6] Farrar reported this proposal to Dexter and Shanks. Dexter expressed concern because of the position taken by Go Travel on the stay application. In view of the financial circumstances described by Dodd, if Go Travel paid the money to McInnes Cooper, the funds might be subject to seizure by creditors of Go Travel. Dexter advised Farrar that the money could not be put up by Go Travel and suggested Boyle as the person who would have to place the funds in trust. Dexter also said that any agreement by Maritime to consent to the stay would require the payment into the Mc[I]nnes Cooper trust account of the balance of the judgment, together with any interest and costs that may accrue. The balance was to be paid into the trust account by Boyle by the end of February 2009 unless, prior to that date, the Court of Appeal decision had been released.

[7] This counterproposal was conveyed to Bryson, who then phoned Boyle a second time. Bryson and Boyle disagree on what was discussed during this call. However, Bryson then informed Farrar that Boyle was prepared to place his personal funds in trust with McInnes Cooper providing the date for the second payment was extended until March 31, 2009. Dexter advised Farrar that this was acceptable and counsel returned to the courtroom, where Farrar informed the court of the settlement and its terms. It appears that in outlining the terms of the settlement, it was not mentioned that the source of the monies to be placed into trust were to be Boyle's personal funds.

[8] The consent order staying execution of the judgment pending appeal contains the following provisions:

> 1. The sum of one hundred thousand dollars, ($100,000) will be placed into trust by Hugh Boyle in an interest bearing account with McInnes Cooper by October 17, 2008;
>
> 2. should the Appeal and the Cross Appeal not be disposed of by this Court by March 31, 2009, an amount equal to the remainder of the outstanding judgment (including any costs subsequently awarded by Justice Hood) will be placed into trust by Hugh Boyle with McInnes Cooper no later than March 31, 2009;
>
> 3. should the disposition of the Appeal and Cross Appeal result in the Appellant being required to pay an amount to the Respondent, the Respondent will be entitled to that amount from the above mentioned

> funds held in trust. Should any funds remain in trust after the amount owing to the Respondent is satisfied, the remainder will be returned to the party who placed the funds into trust. Any accumulated interest will be paid prorated, according to the percentage payable to each party.
>
> 4. should the disposition of the Appeal and Cross Appeal result in the Appellant not being required to pay an amount to the Respondent, the total amount of the above mentioned funds held in trust, together with accumulated interest, will be fully returned to the party who placed the funds into trust....
>
> [9] Boyle agrees with paragraph 1 but takes exception to paragraphs 2 and 3. He maintains that he never agreed to pay into trust the balance of the judgment from his personal funds. Bryson testified that after discussion with Boyle about Maritime's counter offer, Boyle agreed that in addition to paying the first instalment of $100,000.00 from his personal funds, he would also pay the remaining balance of the judgment from his personal funds on March 31, 2009, providing the Court of Appeal decision had not been released by that date. He also stated that Boyle was aware that he would communicate this to Farrar, who would then advise Maritime of Go Travel's position, including the position of Boyle.

[5] It is evident from this recounting of the facts, the accuracy of which is undisputed, that Go Travel's financial ability to pay the judgment, or to pay funds into trust for the stay that would be safe from seizure by its creditors, was a great concern. Moreover, everyone involved in the negotiations understood that Maritime would not consent to a stay of execution without Mr. Boyle's participation.

[6] The appellant paid the first installment as stipulated in the consent order. This Court had not issued its decision by March 31, 2009. The appellant did not make the second payment. On April 22, 2009, this Court dismissed Go Travel's appeal and Maritime's cross-appeal. After several unsuccessful attempts to enforce the consent order against the appellant, Maritime commenced an action against him, alleging breach of his agreement by failing to make that second payment.

[7] Before the trial judge, it was undisputed that:

(a) Mr. Boyle was not a party to the litigation between Maritime and Go Travel;

(b) Mr. Bryson did not act as solicitor for Mr. Boyle in his personal capacity;

(c) The appellant agreed to make the initial $100,000.00 payment; and

(d) Maritime was not entitled in law to sue the appellant on the consent order.

[8] As the judge recounted in [9] of his decision, Messrs. Boyle and Bryson gave different testimony as to whether the former had agreed to make the second payment from his personal funds. The judge preferred the evidence of the latter:

> [15] Where there is conflict between the evidence of Bryson and the evidence of Boyle, I prefer the evidence of Bryson. He articulated a specific recall of conversations with Boyle relating to Boyle placing personal funds in McInnes Cooper's trust account in order for Go Travel to obtain the stay of execution. Boyle agreed that he had instructed Bryson that he would make the initial $100,000.00 payment, as required by Maritime, but also stated he had not authorized Bryson to communicate to Farrar, or Maritime, that he was prepared to commit to pay, from his personal funds, the balance of the judgment if the Court of Appeal decision had not been released by March 31, 2009. The evidence of Bryson is more consistent with the documentary evidence. Additionally, Boyle was inconsistent in his evidence as to the extent of any discussion he had with Bryson about the remaining balance of the judgment.
>
> [16] Bryson's evidence is also consistent with that of Shanks and, to the extent he had any recollection of these events, Farrar. Although neither Farrar nor Shanks would have been privy to the telephone calls between Bryson and Boyle, their evidence as to what Bryson informed them is consistent with his. Bryson indicated, on more than one occasion, that he discussed both payments with Boyle, that it was a condition required by Maritime that it would not consent to the stay unless the funds came from Boyle personally, Boyle agreed to this arrangement, and Boyle's approval was communicated to Farrar.
>
> [17] Although both Farrar and Bryson testified to only having a recollection of one agreement on that day, I believe they are in error. The main agreement related to the conditions for Maritime consenting to a stay of its execution. Go Travel feared that if the stay was not granted it would effectively be put out of business at the busiest time of its selling season. Go Travel sold vacation packages primarily in the winter months for travel to southern destinations. On September 17 this busy season was approaching. Go Travel hoped to continue its business and anticipated that by the end of the season it would have sufficient funds to retire the judgment.

[9] Since there was no evidence of any direct contact between the appellant and Maritime or its counsel, the judge had to determine whether Mr. Bryson was acting as Mr. Boyle's agent, whether he negotiated a contract on the appellant's behalf, and whether any such contract included a personal obligation on Mr. Boyle to pay the first installment of $100,000.00 and, if this Court had not ruled on Go Travel's appeal on March 31, 2009, the remaining balance. He decided that there had been a relationship of implied agency, Mr. Bryson was "wearing two hats, one as solicitor for Go Travel and the second as the agent for Boyle," and he had the authority to commit the appellant to make the two payments. As well, agency by estoppel was established. The judge also concluded that Mr. Bryson, as agent for the appellant, negotiated an agreement between Mr. Boyle and Maritime to pay monies into trust from his personal funds. As a result, the appellant was personally liable for the second payment, together with interest.

[10] Mr. Boyle appeals.

Issues:

[11] The issues on this appeal can be consolidated and re-framed as follows:

(a) did the judge err in concluding that Mr. Bryson was the appellant's agent and had the authority to legally oblige the appellant to make both payments?

(b) if not, did he err in concluding that, as agent for the appellant, Mr. Bryson entered into an enforceable contract which required the appellant to make both payments?

Standard of Review:

[12] The applicable standard of review in this matter is not contentious. In *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2012 NSCA 33, Beveridge, J.A. stated:

> [59] … On questions of law, the trial judge must be correct; on questions of fact or mixed law and fact, an appeal court can only intervene if convinced the trial judge has committed a palpable and overriding error. Saunders J.A. in *McPhee v. Gwynne-Timothy*, 2005 NSCA 80, for the Court, wrote:
>
> > [31] A trial judge's findings of fact are not to be disturbed unless it can be shown that they are the result of some palpable and overriding error.

> The standard of review applicable to inferences drawn from fact is no less and no different than the standard applied to the trial judge's findings of fact. Again, such inferences are immutable unless shown to be the result of palpable and overriding error. If there is no such error in establishing the facts upon which the trial judge relies in drawing the inference, then it is only when palpable and overriding error can be shown in the inference drawing process itself that an appellate court is entitled to intervene. Thus, we are to apply the same standard of review in assessing Justice Richard's findings of fact, and the inferences he drew from those facts. **H.L. v. Canada (Attorney General)** [2005] S.C.J. No. 24; **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235; **Campbell MacIsaac v. Deveaux & Lombard**, 2004 NSCA 87.
>
> [32] An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue. Thus, invoking the "palpable and overriding error" standard recognizes that a high degree of deference is paid on appeal to findings of fact at trial. See, for example, **Housen,** supra, at ¶ 1-5 and **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 at ¶ 78 and 80. Not every misapprehension of the evidence or every error of fact by the trial judge will justify appellate intervention. The error must not only be plainly seen, but "overriding and determinative."
>
> [33] On questions of law the trial judge must be right. The standard of review is one of correctness. There may be questions of mixed fact and law. Matters of mixed fact and law are said to fall along a "spectrum of particularity." Such matters typically involve applying a legal standard to a set of facts. Mixed questions of fact and law should be reviewed according to the palpable and overriding error standard unless the alleged error can be traced to an error of law which may be isolated from the mixed question of law and fact. Where that result obtains, the extricated legal principle will attract a correctness standard. Where, on the other hand, the legal principle in issue is not readily extricable, then the issue of mixed law and fact is reviewable on the standard of palpable and overriding error. See **Housen**, supra, generally at ¶ 19-28; **Campbell MacIsaac**, supra, at ¶ 40; **Davison v. Nova Scotia Government Employees Union**, 2005 NSCA 51.

Agency:

[13] Mr. Boyle's arguments on this ground of appeal can be summarized as follows:

(a) The judge erred by placing the burden of proof on him to disprove agency, rather than on Maritime to prove agency; and

(b) The judge erred in finding, on the evidence, that implied agency and agency by estoppel had been established.

[14] As the appellant points out, the burden of establishing an agency relationship lies on the party alleging its existence: *Hav-A-Kar Leasing Ltd. v. Vekselshtein*, 2012 ONCA 826, at ¶ 38. The judge correctly identified that burden in ¶ 26 of his decision and provided additional legal authority.

[15] However, urges the appellant, the judge effectively put the burden on Mr. Bryson to represent to Maritime that he was not acting as his agent. He relies on the last sentence of the following extract from the judge's reasons:

> [29] Throughout the negotiations, which lasted approximately half an hour, Bryson confirmed to Farrar that he was speaking with Boyle. Boyle acknowledges instructing Bryson to communicate to Farrar that he was prepared to pay $100,000.00 from his own funds, into trust with McInnes Cooper in exchange for Maritime's consent to the stay of the execution. Although the defendant says that Bryson was acting as solicitor for Go Travel, and although this was the case, I am satisfied that by his conduct, and within the instructions provided by Boyle, he was communicating Boyle's personal commitment, not Boyle's instructions as majority shareholder and officer of Go Travel.
>
> [30] The agency relationship does not preclude Boyle, while instructing counsel on behalf of Go Travel, from authorizing the company's solicitor to act as his personal agent - that is, in his personal capacity - to communicate a personal commitment. Maritime was entitled to view Bryson's confirmation as Boyle's commitment, as distinct from Go Travel's commitment. Effectively, at this stage of the negotiations, Bryson was wearing two hats, one as solicitor for Go Travel and the second as the agent for Boyle. Maritime understood this to be the case, and on the evidence it was entitled to do so. Bryson did not indicate to Farrar that he was making these commitments on behalf of Go Travel alone.
>
> [Emphasis added]

[16] With respect, the judge did not place the burden on the appellant to disprove that Mr. Bryson was his agent. Rather, these paragraphs show that, after reviewing the evidence, the judge was persuaded that, during the negotiations for a stay of execution, Mr. Bryson was acting as agent for Mr. Boyle as well as representing his corporate client. The appellant's reliance on the last sentence is misplaced. It does not pertain to the burden of proof. Rather, it relates to the two previous

sentences, in which the judge confirmed that Maritime was entitled in law to rely on Mr. Bryson's representations, provided he acted within his apparent or ostensible authority. In that last sentence, the judge correctly recounts the law that, Mr. Bryson not having communicated any limitations on his authority, Maritime could assume that he was acting within his authority as agent.

[17] The appellant then submits that the judge erred by applying the wrong principles regarding implied agency to his analysis of the facts. In particular, he urges that the judge undertook an analysis which relates to the relationship between principal and agent, rather than principal and third party.

[18] Here is the law on implied agency which the judge set out in his decision:

> [27] Agency may arise by implication. The authors of *Bowstead & Reynolds on Agency*, 17th ed. (London: Sweet & Maxwell, 2001) state, at ¶2-032, that consent of the principal "may be implied when he places another in such a situation that, according to ordinary usage, that person would understand himself to have the principal's authority to act on his behalf: or where the principal's words or conduct, coming to the knowledge of the agent, are such as to lead to the reasonable inference that he is authorising the agent to act for him." Fridman writes, in *The Law of Agency*, 7th ed. (Butterworths, 1996), at 60-61:
>
> > ...in general it will be the assent of the principal which is more likely to be implied, for, except in certain cases, 'it is only by the will of the employer that any agency may be created.' Such assent may be implied where the circumstances clearly indicate that he has given authority to another to act on his behalf. This may be so even if the principal did not know the true state of affairs...
> >
> > ...
> >
> > Mere silence will be insufficient. There must be some course of conduct to indicate the acceptance of the agency relationship. The effect of such an implication is to put the parties in the same position as if the agency had been expressly created.

[19] The appellant accepts that, as explained by these authorities, in the absence of an express agency relationship, one may be implied from the conduct of the parties. However, he emphasizes that neither Mr. Bryson nor he himself offered any evidence that Mr. Bryson was acting for him personally; rather, the evidence with respect to the purpose of the lawyer's communications with the appellant were all further to the scope of his retainer as counsel for Go Travel in seeking a stay of execution for his corporate client. He says that, as solicitor for Go Travel,

Mr. Bryson had a duty to pass along Maritime's conditions for a stay but his relaying his responses to Maritime cannot make the lawyer the appellant's agent.

[20] According to the appellant, for apparent or ostensible authority to exist, the implied representation of authority must be that of the principal and not the agent. He cites *Hav-A-Kar* at ¶ 42:

> ". . . It is well-established that the actual authority of an agent requires a "manifestation of consent" by the principal to the agent that the agent should act for or represent the principal: *Monachino v. Liberty Mutual Fire Insurance Co.* (2000), 47 O.R. (3d) 481 (C.A.) at para. 33. Further, apparent or ostensible authority in favour of an agent only arises where the alleged principal has impliedly represented that another person has the authority to act on the principal's behalf. The implied representation must be that of the principal, not that of the agent. See *Monachino*, at paras 35–36; *Hunter's Square Developments Inc. v. 351658 Ontario Ltd.* (2002), 60 O.R. (3d) 264 (S.C.), at para. 23, aff'd (2002), 62 O.R. (3d) 302 (C.A.), at para. 9." [Appellant's underlining]

[21] The evidence from Mr. Bryson, which the judge accepted, set out the authorization Mr. Boyle gave to him:

> **Q.** … And sir, no one else could have pledged his personal funds other than Hugh Boyle.
>
> **A.** Well, Mr. Boyle had to convey to me that he would do what he was being asked to do by Maritime Travel.
>
> **Q.** Certainly. But you couldn't do that without his authorization and direction and instructions.
>
> **A.** I don't know if I'd use those words. I'd say I couldn't do it without speaking to him and without him saying he would do it. Simple as that.
>
> **Q.** And by him saying I agree or it's okay …
>
> **A.** Yeah.
>
> **Q.** … he was authorizing you to communicate that to Maritime Travel.
>
> **A.** Well, I felt because he had said it, I could say it to Mr. Farrar, yes.
>
> **Q.** Uh-huh. And you felt that Mr. Farrar could rely upon that on behalf of his client.
>
> **A.** Yes.
>
> **Q.** Thank you. And sir, you would agree with me that you knew Hugh Boyle … or rather Hugh Boyle knew that you would be communicating that information to Mr. Farrar and Maritime Travel.

> **A.** Yes, yes.
>
> **Q.** And at no time when you went back to Mr. Farrar did you put any restrictions on the information which was conveyed to you by Mr. Boyle that he had agreed to place those funds in trust, both amounts, on or before March 31st for the benefit of the Maritime Travel judgement.
>
> **A.** I'm not sure I understand your question, Mr. Ryan.
>
> **Q.** You didn't place any restrictions by saying I'm not the solicitor for Hugh Boyle so you can't rely upon this. You just said I've been told by Mr. Boyle that he's agreed to do this.
>
> **A.** That's right.

[22] According to this evidence, the appellant specifically authorized Mr. Bryson to communicate his agreement respecting both amounts to Maritime, and imposed no restrictions on his authority to bind him. The context must be remembered. This was not a stroll in the park. The viability of a business was at risk, unless a stay could be agreed upon or obtained by court order. The lawyer was not simply passing along a casual comment; he was confirming a personal legal commitment which the appellant knew would be relied upon, in order to obtain the much desired legal result. The judge made no error regarding the implied representation of authority which would attract appellate intervention.

[23] Next, the appellant urges that the judge made a palpable and overriding error in finding that Maritime established agency by estoppel. The judge considered the requirements of that doctrine:

> [36] Counsel also references the decision of Hall J. in *Horne v. Capital District Health Authority*, 2005 NSSC 41, where at para. 28 he outlines the three requirements for an agency by estoppel:
>
> > ....Under the common law principle of agency, a principal may be bound by the acts of his or her agent under circumstances where the agent has the ostensible or apparent authority to act and bind the principal. This is usually referred to as the doctrine of "agency by estoppel". In order for the doctrine to arise three requirements must exist. First, there must be a representation or holding out by the principal by a statement or conduct indicating the agent's authority to act for him or her; second, there must be a reliance on the representation by the third party; and third, there must have been an alteration to the third party's position as a result of the reliance.
>
> [Emphasis added]

and then considered the evidence in regard to each.

[24] With respect to the representation or holding out requirement for agency for estoppel, the judge found:

> [37] The first requirement is clear: the evidence establishes that Boyle authorized Bryson to speak to Farrar, personally, in respect of his commitment to pay the $100,000.00 from his personal funds and also to counter-offer as to the date for the payment of the remaining balance, requesting it be on or before March 31, 2009, rather than at the end of February as had been proposed by Maritime. In respect to both these representations, Boyle acknowledges that he had so instructed Bryson knowing that Bryson would be communicating this to Maritime through Farrar. Additionally, he made the first $100,000.00 payment, consistent with his commitment to do so.

[25] According to the appellant, the representation by the principal must be clear and unequivocal: G.H.L. Fridman, *Canadian Agency Law*, 2nd ed. (Toronto: LexisNexis Canada Inc., 2012) at p. 57 citing *Woeller v. Orfus*, [1979] O.J. No. 4497 (Ont. H.C.J.):

> **33** There was also no evidence that Orfus had so conducted its dealings with Woeller that Orfus could be held liable by estoppel from denying that George Whitney Limited or Whitney had any apparent or ostensible authority. As stated in DiCastri, Law of Vendor and Purchaser, 2nd ed. (1976), p. 31:
>
> > But the authority to make such a contract [principal and real estate agent] must be clear, express and unequivocal and is not to be lightly inferred from vague or ambiguous language. Likewise, agency by implication must be proved to the hilt. [Appellant's underlining]

[26] The appellant argues that there was no unequivocal representation to support a finding of agency by estoppel in this case. He maintains that throughout the negotiations pertaining to a stay of commercial litigation, Mr. Bryson was acting as lawyer for Go Travel in the discharge of his instructions to obtain a stay of execution for his client. Only in his role as Go Travel's lawyer did he relay any communications regarding any agreements by Mr. Boyle personally, to counsel for Maritime.

[27] In my view, the judge committed no palpable and overriding error in determining that Mr. Bryson was acting as more than simply counsel for Go Travel. Although the negotiations surrounding the stay arose in the context of the action brought by Maritime against Go Travel, both the appellant and Mr. Bryson

gave evidence that Mr. Boyle agreed to pay $100,000.00 of his personal funds, directed the lawyer to communicate his commitment to make that first payment to counsel for Maritime, and asked that the date for the final payment be pushed back to March 31, 2009. He placed no restrictions on the communication to Maritime of his agreement to place his personal funds. Moreover, all the parties knew that Maritime would never agree to a stay of execution without the appellant pledging his personal funds. According to Mr. Bryson, whose evidence the judge accepted, the authority given him by Mr. Boyle to assure Maritime that the appellant would be personally responsible for both payments was expressed clearly and without equivocation.

[28] I would dismiss the grounds of appeal based on agency.

Contract:

[29] According to the appellant, the judge erred by finding, on the evidence before him, that a legally enforceable contract was reached between Mr. Bryson as his agent and Mr. Farrar on behalf of Maritime. He argues that there was only one contract, namely, the one contained in the consent order.

[30] In his factum, the appellant explained his position thus:

> 46. Mr. Boyle submits that the Trial Judge made a clear error of fact in relation to his finding that the contract between Maritime and Go Travel, embodied in the Consent Order, was the main contract, but not the only contract. At paragraph 17 of his decision, the Trial Judge held:
>
> > [17] Although both Farrar and Bryson testified to only having a recollection of one agreement on that day, I believe they are in error. The main agreement related to the conditions for Maritime consenting to a stay of its execution…
>
> 47. Mr. Boyle submits that it is a palpable and overriding error of fact for the Trial Judge to substitute his opinion for the evidence of the only two individuals involved in the discussion which led to an agreement. Both testified that only one agreement was reached. Both testified that the one agreement reached during their closed discussions was embodied in the Consent Order. An agreed upon document is not a matter of recollection. The parties in this matter were experienced commercial litigants represented by experienced commercial counsel, all of whom were content with the Consent Order as the agreement. The Trial Judge erred in rejecting the evidence of Justices Farrar and Bryson, the only two individuals involved in the negotiations.

[31] In order to appreciate this issue and its resolution, it is necessary to set out the evidence of the lawyers for Go Travel and Maritime. I begin with Mr. Bryson. Under direct examination, he testified that Mr. Boyle advised him that to take into account Go Travel's high selling season, it would be better if the date for the final payment could be pushed back from a February date to March 31st. According to Mr. Bryson, the appellant was willing to be the source of the funds, but the later date meant it was unlikely he would have to pay. As a result, he went back and advised Maritime's counsel that if the date could be March 31st, ". . . we have an agreement". He confirmed that the parties negotiating were Go Travel and Maritime and ". . . the Order embodies the agreement".

[32] Later, the transcript shows this exchange between Go Travel's trial counsel and Mr. Bryson, regarding the consent order:

> **Q.** ... What do you say as to whether it represents the agreement that was reached on September the 17th between Go Travel and Maritime Travel?
>
> **A.** That was the agreement that Mr. Farrar and I negotiated, yes.
>
> **Q.** And to your knowledge, was there any other agreement made that day?
>
> **A.** No, there was not.

[33] Under cross-examination, Mr. Bryson gave this evidence:

> **Q.** All right. And I'm going to make a suggestion to you, Mr. Bryson. On direct examination, my learned friend, Mr. MacDonald, suggested to you that there was only one agreement made that date. Do you recall his question to you?
>
> **A.** Yes.
>
> **Q.** And you agreed that that was the case.
>
> **A.** That's right.
>
> **Q.** And I'm going to suggest to you that there were actually two agreements made that date. First, there was an agreement between Maritime Travel and Go Travel that there would be a Consent Order first thing. Certainly that was in agreement, was it not?
>
> **A.** Yes. Oh, yes. Yeah, yeah.
>
> **Q.** And I'm going to suggest to you that there was a second agreement, and that was between Maritime Travel and Hugh Boyle, that Hugh Boyle would place those funds that we've just discussed into McInnes Cooper's trust account. And that was agreed to that day, wasn't it?
>
> **A.** I would not agree that that was a separate agreement, no.

Q. And why wouldn't you agree that that's a separate thing, sir?

A. Mr. Boyle's placing of funds into McInnes Cooper's trust account was a condition of Maritime Travel's agreement to the stay with Go Travel.

Q. Oh, I fully understand that. But Mr. Boyle agreed to do it, and he agreed to do it through you with Maritime Travel.

A. He didn't agree with Maritime Travel about anything. He didn't offer Maritime Travel anything. He didn't guarantee anything to Maritime Travel. He said he would put money in trust with McInnes Cooper because Maritime Travel wanted that if Go Travel was going to get a stay.

Q. Oh, I understand.

A. That's what happened.

Q. But when he said okay and told you to go back knowing that you would tell Mr. Farrar that, are you suggesting to this Court that he wasn't agreeing to place those monies in trust for the benefit of Maritime Travel?

A. Well, he told me … he certainly agreed with me that he would do it.

Q. Yes.

A. And I suppose you could say he agreed with Mr. Dodd he would do it because he was there.

Q. Yes.

A. And I was authorized, you know … and I could tell him … I could tell what he told me to Mr. Farrar. I was allowed to do that.

Q. Yes. But you knew by communicating it to Mr. Farrar, you were expressing Mr. Boyle's agreement to do that.

A. That he would place the money in trust with McInnes Cooper, yes.

Q. Thank you. And you've already indicated to my learned friend, Mr. MacDonald, that the Order which was subsequently drafted by yourself embodied the terms of that agreement, correct?

A. Yeah, the Order as drafted by myself and commented upon by Mr. Shanks, yes, yeah.

[Emphasis added]

[34] In his direct examination, Mr. Farrar described the result of the negotiations and his understanding as to the source of the funds to enable a stay of Maritime's execution order:

Q. And can you indicate to the Court, please, what was the culminating agreement reached as a result of those negotiations?

A. Well, the agreement reached is that as it is contained in the order, is that there would be a payment of $100,000.

Q. By whom?

A. By Mr. Boyle, before … I forget the date, I think it was immediately or very close to it, but the order speaks for itself, and then there would be another amount paid, the remainder of the judgment would be paid by Mr. Boyle if the decision of the Court of Appeal was not rendered by March 31st of 2010, I believe.

…

Q. ... With respect to the agreement reached in the hallway, Mr. Farrar, what was your understanding as to what was the source of the funds which were to be paid into McInnes Cooper?

A. Well, the understanding is as reflected in the order, is that it would be, the source of the funds would be Hugh Boyle.

Q. In what capacity, sir?

A. In his personal capacity.

[35] Under cross-examination, Mr. Farrar reiterated that the consent order accurately reflected the agreement that was reached in the hallway:

Q. ... And the consent order that's at tab 12 of Exhibit 1, Mr. Farrar.

A. Yes.

Q. That accurately reflects the agreement that was reached that day, doesn't it?

A. That's correct.

Q. Okay. And you have no recollection of any other agreement being reached that day?

A. That's …

Q. Other than what's shown here?

A. That's correct.

[Emphasis added]

[36] The appellant made much of the testimony of Messrs. Bryson and Farrar that only one agreement was reached, and that single agreement was between Go Travel and Maritime and embodied in the consent order. He says that means there

could not have been any additional agreement to the effect that Mr. Boyle was personally liable to make the second payment. Even if there was an agency relationship, that would not create a contract. He submits that if there was to have been an agreement between him personally and Maritime, the lawyers would have prepared a separate agreement to record it.

[37] I am unable to accept this argument. The evidence of those counsel makes it clear that the "one agreement" reached in the hallway negotiations was reflected in the consent order. That document provided that not only would Mr. Boyle place the first installment in trust, but also the second, if this Court's decision should not be rendered by March 31, 2009. Thus, when the terms and conditions in the consent order incorporated "the agreement", that single agreement included the appellant's personal liability for both payments.

[38] I would dismiss the ground of appeal based on contract.

Disposition:

[39] I would dismiss the appeal, and order the appellant to pay the respondent costs in the amount of $3,000.00 inclusive of disbursements.

Oland, J.A.

Concurred in:

Fichaud, J.A.

Beveridge, J.A.