IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Gay v. Whelan, 2006 NSSC 10

Date: 20060113
Docket: SH 247271
Registry: Halifax

Between:

Wendy Gay and Kenneth Gay

Appellant

v.

Christine Whelan and Derrick Kearney

Respondent

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	September 13, 2005, in Halifax, Nova Scotia
Counsel:	Lisanne Jacklin, for the Appellant Christine Whelan, on her own behalf and on behalf of Derrick Kearney

By the Court:

[1] This is an appeal of a Small Claims Court decision dated March 18, 2005. The adjudicator ordered the appellants to pay $4,800.00 on account of leaks in the basement of a house they sold the respondents. He dismissed a claim for the cost of insulation.

[2] The respondents bought the house from the appellants in October 2002. The appellants had completed a Property Condition Disclosure Statement in July 2002. In the Notice of Claim the respondents stated that the appellants stated in the Disclosure Statement that the home was insulated with blown-in insulation. This proved to be incorrect and the respondents claimed in Small Claims Court that they incurred a cost of $4152.00 to have insulation installed. As well, the respondents claimed they experienced water leakage in the basement. The appellants had indicated in the Disclosure Statement that there had been a leak around the exterior basement entrance. The respondents claimed in Small Claims Court that they incurred a cost of $7248.00 to repair the problem.

[3] In their Defence to the claim, the appellants stated:

> To our knowledge from Purchasing [and] living in this home, it was insulated. As per the water leakage, as stated earlier – a little around the exterior entrance [sic] of basement.

[4] On the issue of the insulation, the adjudicator said in his decision:

> ... The insulation is referred to in the Property Condition Disclosure Statement. Statements in a Property Condition Disclosure Statement do not often rise to the level of conditions in a contract. The document says such statements may become a part of the contract “if so agreed in writing” by the parties. There is no provision for including the insulation in the contract itself. Then there are the disclaimers at the bottom of the Disclosure saying that the information ... is provided only “to the best of my (the

> seller's) knowledge" may be incorrect, and that it is the responsibility of the buyer to verify the information. I accept the testimony of the Gays that they were told when they purchased that insulation had been blown in, but had no knowledge of the extent to which it may have filled the voids in the walls or served to actually insulate the premises.... [decision, para. 2.]

[5] On this basis the adjudicator found that there was no misrepresentation and dismissed the claim as it related to the insulation. As to the leaking of water into the home, however, the adjudicator said:

> There is ... a specific warranty about water entering the home in a schedule to the contract. The warranty is a term of the contract. It is not, in my view, any kind of a representation. The contract says "The seller warrants that during the occupancy, there has been no leakage or seepage of water from any source through any part of the building."
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> The fact is that the basement did have water coming in during the seller's occupancy and does have water coming in now. I do not cast aspersions on the Gays. I appreciate Mr. Gay's frankness in saying that he knew water came in, but could not imagine that the buyers would be oblivious to that. The Property Condition Disclosure Statement makes reference to water near an outside entrance to the basement. The sump pump was evident. Items in the basement were on blocks. Ms. Whalen and Mr. Kearney hired a building inspector. Just the same, a written warranty in a contract is a written warranty and the Gays have to be said to be liable, in my opinion, if the statement is not accurate. Ms. Whalen and Mr. Kearney do say they concluded from the documents and a conversation with Mr. Gay that the basement was dry. In any event, the warranty was breached and Ms. Whalen and Mr. Kearney are entitled to their claim for the cost of installing a drain in the basement in the amount of $4,800.00 plus the HST as provided in the Permacrete quotation. They are also entitled to the cost of issuing the claim in the amount of $150.00.

Grounds of Appeal

[6] The appellants appeal on the ground of error of law, the particulars of which are:

> 1. The adjudicator erred in law when he failed to dismiss the case when the claimants failed to produce evidence of the contract of which the Appellants were found to be in breach.
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> 2. The adjudicator erred in law when he failed to find the warranty in the contract of Purchase and Sale had been varied by the statements made in the Property Condition Disclosure Statement, which later became part of the Contract of Purchase and Sale.

[7] The appellants do not dispute that the evidence and arguments on appeal are different from those summarized in the adjudicator's decision and findings of fact. I will first deal with the second ground of appeal, as I believe that its disposition will make it unnecessary to deal with the first ground.

The Warranty and its Alleged Variation

[8] It is not evident from the decision, but is pointed out in the appellants' brief, that the Property Condition Disclosure Statement was attached to the Agreement the day after the Agreement was signed. The Disclosure Statement is dated July 11, 2002. The buyers' offer is dated October 20, 2002, and the sellers' counter-offer

carries the same date. The Agreement of Purchase and Sale is in the standard form. Schedule A-1 to the Agreement contains several clauses initialled by the parties. Among the initialled clauses is para. 21, by which "[t]he seller warrants that during his occupancy there has been no leakage or seepage of water from any source through any part of the building." This is the statement that the adjudicator held to be a warranty, and upon which he found liability. The Agreement also provides, at para. 3(b), that "the Disclosure Statement shall form part of the Agreement of Purchase and Sale."

[9] The buyer acknowledged "having received and read" a copy of the Property Condition Disclosure Statement on October 21, 2002. Paragraph 6 of the Disclosure Statement contains the following question and answer:

> A. Are you aware of any structural problems, unrepaired damage, or leakage, in the foundation?
>
> [√yes] A little around the outside entrance to the basement.

[10] The Disclosure Statement includes the following words in capitals, at the top of the first page:

> The sellers are responsible for the accuracy of the answers on this disclosure statement and if uncertain should reply "do not know". <u>This disclosure statement will form part of the contract of purchase and sale if so agreed in writing by the sellers and buyers</u>. [Emphasis added.]

[11] The Property Condition Disclosure Statement was signed by the respondents the day after the Agreement was signed. Arguably this resulted in an amendment to the Agreement of Purchase and Sale. The question is whether the adjudicator made findings of fact with respect to the effect of the introduction of the Disclosure Statement the day after the Agreement was signed. The appellants assert that if he had done so, he could only have concluded that the statement in the Schedule was not a warranty, but only a representation. The failure to make such findings, the appellants assert, amounts to an error of law.

[12] The adjudicator's decision does not indicate what importance, if any, he attached to the Disclosure Statement being added to the Agreement, and whether this indicated an intention to vary para. 21 of the Agreement. There is some basis upon which to conclude that he rejected this proposition. He stated that, although there was evidence that the appellants indicated that there were some leaks in the basement, including physical evidence to indicate that the basement had leaked, the statement in the Agreement was a warranty. The basic error alleged is that the adjudicator failed to give due weight to the effect of the Disclosure Statement, and particularly to the claim that its addition after the Agreement was signed indicated

the parties' intention to treat the statement in para. 21 of Schedule A-1 of the Agreement as a representation and not a warranty.

[13] This Court's jurisdiction on this appeal is limited to considering whether there was an error of law. Saunders J. (as he then was) considered the term "error of law", as it appears in s. 32(1)(b) of the *Small Claims Court Act*, in *Brett Motors Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76 (S.C.) at para. 14:

> One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[14] Findings of fact by a trial judge are entitled to a high degree of deference: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at paras. 10-18. A recent discussion of

this principle by the Nova Scotia Court of Appeal appears in *Davison et al. v. Nova Scotia Government Employees Union* (2005), 231 N.S.R. (2d) 235; [2005] N.S.J. No. 110:

> 61 Findings of fact will not be reversed on appeal unless the trial judge made a palpable and overriding error. The same degree of deference is paid to inferences drawn from the evidence and to all of the trial judge's findings whether or not they are based on findings of credibility: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 per Iacobucci and Major, JJ. at paras. 10 and 23 to 25.
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> 62 The "palpable and overriding error" standard underlines that a high degree of deference is paid on appeal to findings of fact at trial. An error is palpable if it is one that is plainly seen or clear. An error is overriding if, in the context of the whole case, it is so serious as to be determinative in the assessment of the balance of probabilities with respect to that factual issue: see *Housen v. Nikolaisen, supra,* at paras. 1 to 5 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 78 and 80. Thus, not every misapprehension of the evidence or every error of fact by the trial judge justifies appellate intervention. The error must not only be clear, but "overriding and determinative."
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> 63 If the trial judge failed to consider relevant evidence, the appellate court should reconsider the evidence if the trial judge's omission is material. A failure to consider evidence is material if it gives rise to a reasoned belief that it affected the judge's conclusions: see *Delgamuukw, supra,* at para. 90; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014 at para. 15; *Fralick v. Dauphinee* (2003), 219 N.S.R. (2d) 238, N.S.J. No. 434 (Q.L.) (C.A.) at paras. 19-20. As LaForest, J. stated in *Schwartz v. Canada*, [1996] 1 S.C.R. 254 at para. 35:
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> > 35 ... the appellate court must, in order to disturb the trial judge's findings of fact, come to the conclusion that the evidence in question and the error made by the trial judge in disregarding it were overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue.

> 64 A trial judge does not err because the appellate court would draw different inferences or would emphasize some portions of the evidence over others: *Housen* at para. 56. It is wrong for an appellate court to intervene simply because it would give a different interpretation of the evidence as a whole: *Housen* at paras. 20 and 29.
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> 65 Errors of law, such as the misstatement of a legal principle or a wrong characterization of a legal standard, attract the correctness standard of review: *Housen*, paras. 33-34.
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> 66 Mixed questions of fact and law, such as the application of a legal standard to the facts, 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 extricated from the mixed question of law and fact. Where that is possible, the alleged legal error should be reviewed on the standard of correctness: *Housen, supra,* at paras. 26 through 35. Questions of mixed law and fact fall along a "spectrum of particularity" (*Housen* at para. 28). Where the legal principle in issue is not readily extricable, then the issue is one of mixed law and fact and is reviewable on the standard of palpable and overriding error: *Housen* at para. 36.

[15] It has been said that “[a]n error in the qualification of a legal test is an error of law justifying the Court of Appeal’s intervention”: *R. v. Kerr*, [2004] 2 S.C.R. 371 at para. 20, *per* Bastarache J. In Southam Iacobucci J. said:

> [I]f a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

[16] I am mindful that Small Claims Court proceedings are intended as a method of determining claims “informally but inexpensively”; however, such claims must also be determined “in accordance with established principles of law and natural justice” (see s. 2 of the *Small Claims Court Act*). It is necessary for decision-makers and adjudicators in any court or tribunal to give reasons, which includes finding facts from the evidence. In Small Claims Court proceedings, where there is no record, it is important for adjudicators to state facts as found from the evidence, and to give reasons for their findings. As Davison J. stated in *Victor v. City Motors Ltd.,* [1997] N.S.J. No. 140 (S.C.)(QL):

> 10 The court has made it clear that it would be slow to overturn findings of fact made by an adjudicator of the Small Claims Court. The adjudicators are, for the most part, faced with extensive dockets with limited time to hear evidence and submissions of the parties and their counsel. The very nature and purpose of the Small Claims Court compel hearings to be conducted under circumstances which have facilities unlike that of the Supreme Court. Furthermore, there is not available to them transcripts of evidence. For these reasons the Supreme Court is reluctant to interfere with findings of fact made by the adjudicator.
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> 11 On the other hand it must be recognized that claims advanced through the Small Claims Court and appeals from the adjudicator's decision are different from claims advanced through the Supreme Court and appeals from the decisions of the Supreme Court. The Court of Appeal, over the years, have referred to many cases involving the respect which should be given, on appeal, to the findings of fact of the trial judge.... It is trite to say that one of the principles on appeal with respect to fact finding must be respect for the advantage of the trial judge over the judges of the Court of Appeal on findings of fact.

> 12 There are cases where the findings of fact by a judge would not reasonably be supported by the evidence after a perusal of the transcript. In that case an appeal court judge, after reviewing the transcript, can and should interfere.
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> 13 In my respectful view one of the most helpful comments on the subject is that of Justice Vincent MacDonald in *Rhodenizer v. Rhodenizer*, [(1953), 31 M.P.R. 127] where he commented that the Appeal Court will rarely interfere with findings of fact based on the judge's opinion as to credibility....
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> 14 Appeals from the Small Claims Court must be considered in a slightly different manner. In my view the difference is recognized by the legislature when they required the adjudicator to place in the summary report the basis for findings of fact. The Supreme Court, on appeal, does not have a transcript of the evidence and does not have a basis to consider the findings of fact made by the adjudicator. In my view, when the adjudicator prepares the summary for the appeal effort should be made to expressly state the findings of fact and the basis for those findings.
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> 15 Respect should be accorded the findings of fact, but where it cannot be established from the record the appropriateness of the findings, the danger exists that the findings are unreliable.

[17] In this proceeding, as in other Small Claims Court cases, there is no record of the evidence given or of rulings made on evidence. The adjudicator relies primarily upon the documents and his notes. Consequently, any appeal from an adjudicator’s decision is, by its very nature, dependent on the written decision and the Summary Report of Findings. Given these systemic limitations, adjudicators discharge their tasks admirably.

[18] However, I am of the opinion that a collateral warranty is a remedy firmly embedded in contract law. It is an exception to the doctrine of merger and is available to a contracting party after the closing of a real estate transaction. In *Anger and Honsberger Law of Real Property*, 2d edn. (1985), vol. 2, the authors, A.H. Oosterhoff and W.B. Rayner, describe two categories of remedies that arise under a real estate contract: "those remedies sought prior to completion of the contract and those sought after completion of the contract." They note that distinct factors operate "in the formulation of the appropriate legal principles in both areas" (p. 1142). Once the contract has been executed by delivery of a deed, the available remedies are "severely curtailed" by the doctrine of merger (pp. 1213-1214). The doctrine holds that,

> upon completion of an agreement for the sale of land, the agreement and the parties' rights thereunder are merged in the deed, so that thereafter they can no longer rely on the terms of the contract, but must look to the deed for any remedy.
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> The doctrine is based upon sound policy, namely, that there be finality and certainty in business affairs. It would be unfair to allow a party to seek to set aside the transaction or to obtain damages for an indefinite period after closing. Thus, in general, a purchaser must satisfy himself by appropriate searches that he is obtaining what the contract entitles him to, that is, a marketable title and whatever else the contract may provide for. The purchaser, "if he is to be wise ... must be wise in time, and he cannot be wise in time unless he objects before he completes the contract" [*Allen v. Richardson* (1879), 13 Ch. D. 524 at 537]. [p. 1214]

[19] The authors go on to discuss the history of the doctrine and its non-application to the sale of chattels or general contract law. However, they state, its "application ... to contracts for the sale of land appears not to have been called into question" although "attacks upon the doctrine are far from over." They go on to discuss two decisions – *Hashman v. Anjulin Farms Ltd.*, [1973] S.C.R. 268 and *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720 – in which the Supreme Court of Canada "indicated strongly that, in deciding whether a contractual term is merged or not, the court must look to the intention of the parties." The authors conclude that the modern rule is "[d]id the parties intend that certain terms should or should not survive closing? It is their intention that governs, not a presumption of merger." (pp. 1214-1216).

[20] There are exceptions to the doctrine of merger. The authors of *Anger and Honsberger Law of Real Property* refer to *Di Cenzo Construction Co. Ltd. V. Glassco; Di Cenzo Construction Co. Ltd. v. City of Hamilton* (1978), 90 D.L.R. (3d) 127 (Ont. C.A.) at pp. 139-140:

> ... After the closing of the transaction, a purchaser is generally restricted to the covenants, conditions and warranties set forth in the conveyance. Apart from the conveyance, relief can only be obtained in the case of (1) fraud, (2) a mutual mistake resulting in a total failure of consideration or a deficiency in the land conveyed amounting to error *in substantialibus*, (3) a contractual condition, or (4) a warranty collateral to the contract which survives the closing.... Apart from these exceptional cases caveat emptor applies....

[21] I am concerned here with the exception for collateral warranties. The authors of *Anger and Honsberger Law of Real Property* write, at p. 1222:

> As an alternative to an action in tort for negligent representation, or in circumstances where such an action does not lie, the plaintiff may be able to succeed in an action for breach of a collateral warranty. In effect, what happens is that a misrepresentation is classified as a collateral contract. In order to be able to find a remedy on this basis, however, it must be shown that the warranty was given in circumstances where it must be said to have been collateral to the main contract and as part consideration therefor. If that can be shown, damages will lie for breach even after closing. Moreover, parol evidence will then be admissible to prove the collateral contract.
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> A collateral warranty must be distinguished from a representation which becomes a term of the main contract which, if it is not reduced to writing, presents a problem of proof. Whether there exists a collateral warranty or a contractual term depends upon the parties' intention and that is a question of fact.... [Emphasis added]

[22] In *Davis v. Kelly* (2001), 208 Nfld. & P.E.I.R. 109 (P.E.I.S.C.T.D.) Desroches C.J.T.D. described the factual nature of the question of whether a warranty exists:

> [41] In order for a warranty to be created, there must be a contractual intention to warrant which usually can be inferred from the facts surrounding the creation of the contract. The necessity for proof of an intention to contract with respect to a warranty is clear from the following passage which appears in Anson's *Law of Contract* (25th ed.) at p. 126:
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> > "But all of these factors are at best only secondary guides and they are subsidiary to the main test of contractual intention, that is, whether there is evidence of an intention by one or both parties that there should be contractual liability in respect of the accuracy of the statement. The question therefore is: On the totality of evidence, must the

> person making the statement be taken to have warranted its accuracy, i.e. promised to make it good? This overriding principle was laid down in *Heilbut, Symons & Co. v. Buckleton* [[1913] A.C. 30]:
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> > ‘The respondent telephoned the appellants' agent and said “I understand you are bringing out a rubber company”. The reply was “We are”. The respondent asked for a prospectus, and was told there were none available. He then asked 'if it was all right', and the agent replied “We are bringing it out”. On the faith of this, the respondent bought shares which turned out to be of little value. The company was not accurately described as “a rubber company”, although this assurance had not been given in bad faith. The respondent claimed damages for breach of contract.’
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> “[The] House of Lords held that no breach of contract had been committed. There had been merely a representation and no warranty. There was no intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement.”
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> [42] This passage has been quoted with approval by the Supreme Court of Canada in *Carman Construction Limited v. C.P.R.*, [1982] 1 S.C.R. 958 at p. 966.

[23] With respect, I do not believe that it is sufficient to simply state that a warranty exists without assessing the contrary evidence and the intentions of the parties. I am unable to determine from the decision whether the adjudicator decided that the provision in the Agreement was a warranty and not a mere representation based on a consideration of all the evidence. While an agreement may contain a warranty, it is only after taking into account all of the evidence that the parties’ intentions can be assessed. In the circumstances, it was necessary for the adjudicator to determine whether a warranty or collateral warranty was intended by

the parties: see *Carman Construction* at pp. 966-967. From the reasons it appears that the adjudicator did not consider – or make findings of fact on – the actual intentions of the parties, in view of the incorporation of the Disclosure Statement into the Agreement. Rather, he ended his analysis with the word “warrant” in the Agreement.

[24] This Court cannot determine the facts on appeal. Thus, it appears to me that, in addition to the examples stated in *Brett Motors*, an error of law may result if an adjudicator fails to make necessary findings of fact. In this case, I believe that the adjudicator erred in law by applying the wrong legal standard.

Disposition

[25] I direct that there be a new hearing before a different adjudicator.

J.