SUPREME COURT OF NOVA SCOTIA
Citation: *Lukacs* v. *Best Buy Canada Ltd.*, 2022 NSSC 178

Date: 20220622
Docket: HFX No. 506364
Registry: Halifax

Between:

Dr. Gabor Lukacs

Plaintiff

v.

Best Buy Canada Ltd.

Defendant

DECISION

Judge:	The Honourable Justice John A. Keith
Hearing:	April 25, 2022
Oral Decision:	June 15, 2022
Counsel:	Dr. Gabor Lukacs, Plaintiff Sasha Gritt, for the Defendant

By the Court:

BACKGROUND AND FACTS

[1] The respondent Best Buy Canada Ltd. ("**Best Buy**") published an online advertisement offering for sale external portable backup hard drives which could transfer data between the device and a computer at a speed of 5,120 MB per second. On the strength of this advertised data transfer speed, the Appellant, Dr. Gabor Lukacs ("**Dr. Lukacs**") purchased four (4) units.

[2] Dr. Lukacs paid $99 plus taxes per unit for a total cost of $459.96, taxes included. Subsequently, Best Buy reduced the price of the hard drives and Dr. Lukacs was reimbursed $92 thus reducing the total cost to $367.96, taxes included.

[3] Upon receipt, Dr. Lukacs opened one of the four hard drives and tested it. He was only able to achieve a speed of 135 MB per second or approximately 2.6% of the capability described in the Best Buy advertisement.

[4] It quickly became apparent that Best Buy's representations with respect to data transfer speed were incorrect. The manufacturer of the hard drives confirmed that the correct data transfer speed was "up to 120 MB/s" - not 5,120 MB per second, as advertised. In other words, Best Buy mistakenly placed the number "5" in front of the actual data transfer speed so that the advertised speed became exactly 5,000 MB per second (almost 43 times) greater that what the external portable backup hard drive could achieve in reality.

[5] Best Buy did not knowingly intend to deceive customers and Best Buy did not act in bad faith. Equally, Dr. Lukacs did not hatch some scheme to purchase the external portable backup hard drives knowing the advertising was wrong with a view to suing Best Buy for damages.

[6] The manufacturer of the portable external hard drives freely gave Dr. Lukacs a replacement product that was more expensive and achieved faster data transfer speeds than the units Dr. Lukacs received. However, those replacement units also could not reach the advertised speed of 5,120 MB per second.

[7] Best Buy also offered to refund Dr. Lukacs for the amounts paid if he would return the four (4) external hard drives.

[8] Dr. Lukacs refused this offer and, instead, brought a claim in the Nova Scotia Small Claims Court for breach of contract seeking greater damages.

[9] Dr. Lukacs argued that, under the law of contract, he was entitled to "expectation damages"; meaning that Best Buy was obliged to pay him an amount equal to the market value of external hard drives that could actually achieve the advertised data transfer speeds.

[10] However, there was no evidence that any such external hard drives exist. At least the evidence presented by Dr. Lukacs at trial was limited to more expensive devices that could achieve faster data transfer speeds using superior technology (solid-state drive or "SSD") but could not approach the advertised data transfer speed of 5,120 MB per second.

[11] Regardless, Dr. Lukacs argued that where a contractual breach has been found, the innocent party will not be denied an effective remedy simply because damages may be difficult to quantify. Dr. Lukacs says that the Court strains to provide a just remedy for an innocent party who has suffered a contractual wrong. In this case, Dr. Lukacs argued that the market value of faster devices provided an appropriate benchmark against which the Court could measure his "expectation damages" for contractual breach.

[12] By decision dated March 15, 2022, Small Claims Court Adjudicator Nancy Elliott denied Dr. Lukacs' claim for damages. She ordered that "upon return of the purchased hard drives to [Best Buy], [Dr. Lukacs] will be entitled to receive a full refund of $367.96 from [Best Buy]." Adjudicator Elliott also declined to award Dr. Lukacs legal costs on the basis that the same result would have been achieved if Dr. Lukacs simply accepted Best Buy's earlier refund.

[13] Dr. Lukacs appealed under section 32(1)(b) of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430 as amended.

ISSUES ON APPEAL

[14] The primary grounds of appeal are that the Adjudicator erred at law by:

1. Failing to award damages for the sole reason that it may be difficult to accurately assess damages;
2. Conflating damages for repudiation of contract with recission of contract; and

3. Failing to consider and/or properly apply the pertinent provisions of the *Sale of Goods Act*, RSNS 1989, c. 408, including sections 52 and 55.

[15] Dr. Lukacs also alleged that the Adjudicator erred in law by denying costs.

[16] In responding to this appeal, Best Buy raised a new issue regarding the legal doctrine of mistake and its potential impact on Dr. Lukacs' claim.

Raising New Defences on Appeal

[17] I begin with a preliminary issue of whether Best Buy should be entitled to raise the defence of mistake on appeal.

[18] There does not appear to be any dispute that Best Buy did not argue mistake before Adjudicator Elliott and certainly Adjudicator Elliott does not refer to the doctrine of mistake in her decision.

[19] Neither side provided any case law as to when the Court should exercise its discretion to entertain issues being raised for the first time on appeal but, in my view, this is a preliminary issue which merits attention.

[20] As a general rule, the Court strongly discourages the practise of raising new issues for the first time on appeal. The rationale is obvious and relates to concerns such as those expressed by McGrath, J in *BriDawn Holdings Inc.* v *Wabana (Town)*, 2019 NLSC 106:

> The principles of judicial economy, consistency, finality and the integrity of the administration of justice are all appropriate considerations in deciding whether to allow new issues to be raised on appeal. However, a court should never lose sight of ensuring that the process is fair to the parties. In fact, ensuring that the principle of finality of litigation is respected is mostly concerned with making sure that justice is served to each party who has gone through the time and expense of a trial.

[21] That said, the Court does retain the discretion to consider a new issue on appeal in exceptional circumstances. This discretion should be exercised "sparingly and only where the interests of justice require it." (*R* v *Gill*, 2018 BCCA 144 at paragraph 10)

[22] In *Performance Industries Ltd* v *Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19, Binnie J, for the majority of the Supreme Court, described the principles

which constrain the Court's discretion to entertain a new issue on appeal. He held that a court is "free to consider a new issue on appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice." (at paragraph 33)

[23] In *Quan* v *Cusson*, 2009 SCC 62 ("***Quan***"), 2009, McLachlin CJ clarified (at paragraph 38) that when considering whether to allow a new issue on appeal, each of the following questions must be answered in the affirmative:

1. Is the issue truly new;
2. If the issue is truly new:
    a. Is the evidentiary record sufficient for the Court to address the new issues; and
    b. Do the interests of justice support granting an exception to the general rule?

[24] I respond to each question separately below.

Question 1: Is the issue truly new?

[25] In *Quan*, the "new" issue on appeal involved the nature and scope of the defence of responsible journalism to a claim in defamation. The Court found that this was not a "new" issue because:

> … the issue on appeal — responsible journalism — did not raise entirely new factual matters without any basis in the evidence. The arguments on qualified privilege and responsible journalism were both directed toward the same fundamental question: whether the Citizen enjoyed a privilege to publish the impugned material on grounds of public interest and due diligence.
>
> [at paragraph 40]

[26] In reaching that decision, the Supreme Court of Canada contrasted its conclusion against that reached by the Ontario Court of Appeal in *Wasauksing First Nation* v *Wasausink Lands Inc.*, 2004 CarswellOnt 936 (Ont. C.A.) ("***Wasauksing***") where the Ontario Court of Appeal concluded that the issue being raised for the first time on appeal was truly "new".

[27] In *Wasauksing*, the appellant Wasauksing First Nation sought a declaration of a constructive trust for the first time on appeal. The Ontario Court of Appeal

found that the constructive trust issue was new and agreed that it could be advanced and considered.

[28] The Supreme Court of Canada in *Quan* distinguished the findings from those in *Wasauksing* on the basis that "the issue argued on appeal [in *Wasauksing*] was genuinely "new" in the sense of being legally and factually distinct from the issues litigated at trial" (at paragraph 39, emphasis added). By contrast, in *Quan*, the Court pointed out that there was considerable legal and factual overlap between the defences to defamation as raised at trial (qualified privilege and malice) and the new issue raised on appeal (responsible journalism) (see paragraph 39).

[29] In my view, the issue being raised by Best Buy for the first time on appeal (the defence of mistake) is truly new. The defence of mistake is legally and factually distinct from the issues raised before the Adjudicator. My reasons include:

1. The doctrine of mistake is substantively different from the issues which surrounding contractual breach and resulting damages. Fundamentally, the doctrine of mistake relates to the question of contract formation and raises questions around whether a contract actually came into existence at all (i.e., was the contract void *ab initio*). By contrast, alleging damages for breach of contract presumes an existing valid contract. The legal issues and implications are entirely different;
2. The factual issues which bear upon the doctrine of mistake are also different and distinct from the factual issues that bear upon the assessment of damages for contractual breach. The doctrine of mistake is primarily concerned with those matters that are considered fundamental and bear heavily upon the efficacy of entire agreement. If there is a mistake of a type recognized in law regarding these fundamental matters, the entire contract is rendered void. In examining this issue, the Court will also consider such related matters as how any such mistakes arose and whether the mistake is shared by all parties to the contract or unilateral. I return to the doctrine of mistake below. For present purposes, suffice it to say that the factual issues which are relevant to mistake are much different from the factual issues which are relevant to the assessment of damages for contractual breach.

[30] I make two final points with respect to issues being raised for the first time on appeal:

1. The inquiry is highly fact specific. This decision should not be taken as some form of guarantee that the defence of mistake in an alleged breach of contract may be raised for the first time on appeal; and
2. The requirement that a "new" issue engage distinct factual issues does not mean that there will be no overlap between the evidence presented at trial and the evidence required to address the new issue. Indeed, as indicated, the question of whether a new issue may be raised for the first time on appeal includes an assessment as to whether the *existing* evidentiary record is sufficient to consider the new issue. Thus, some overlap is possible. However, issues around relevance and the weight which attaches to the relevant evidence must be entirely different, reflecting differences in the substantive legal issues. Any additional concerns around the sufficiency of the evidentiary record constitutes a separate factor which is examined below. Related to this point, the considerations would dramatically change if a party not only asks to argue a new issue on appeal but also seeks to introduce fresh evidence to support the new issue. Appeals are obviously not opportunities to completely re-imagine and re-litigate the case.

Question 2: Is the evidentiary record sufficient for the Court to address the new issue?

[31] In my view, this is an example where the evidentiary record before the Court is sufficient to address the issue being raised for the first time on appeal.

[32] The central evidentiary issue surrounding the doctrine of mistake is whether the technology needed to achieve the data transfer speeds which Dr. Lukacs demands (and claims a contractual expectation to receive) even exists.

[33] On this issue of the evidentiary records, I am sensitive to my limited jurisdiction on appeal of a Small Claims Court Adjudicator's decision. In the frequently quoted decision of *Brett Motors Leasing Ltd.* v. *Welsford*, [1999] N.S.J. No. 466 (N.S. S.C.) ("***Brett Motors***"), Saunders, J (as he then was) said:

> 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.
>
> [at paragraph 14]

[34] Along the same lines, an appeal of a Small Claims Court decision is not a hearing *de novo*. It is not an invitation to re-argue the case. The record is therefore limited but includes any exhibits filed at the original hearing together with the adjudicator summary report of findings of law and fact (*Killam Properties Inc.* v *Patriquin*, 2011 NSSC 338 (N.S. S.C.)).

[35] In my view, the question of whether the evidence is sufficient to permit consideration of a "new" issue is similarly limited. Thus, absent the sort of extraordinary circumstances outlined in *Brett Motors* for example, the Court should not venture outside the adjudicator's findings of fact to permit a new issue be argued on appeal. The evidentiary restrictions which constrain the Court on appeal of a Small Claims Court decision must apply with equal force to any effort to raise new issues on appeal. No such circumstances exist here.

[36] In my view, the Adjudicator's findings of fact are sufficiently comprehensive and detailed as to fully and fairly adjudicate the issue of mistake on appeal. In particular, the Adjudicator made specific findings regarding the parties' shared expectations and understanding regarding the contractual data transfer speeds and the availability of technology to achieve those speeds (or lack thereof).

[37] On this issue, I am also compelled to observe that, in proving his claim for damages at trial, Dr. Lukacs was obliged to present the evidence on those alternatives which he says would be sufficient to fulfill his contractual expectations. Indeed, Dr. Lukacs did tender evidence at trial as to the market value of devices which would achieve higher data transfer speeds, but he did not present any evidence that the technology to achieve the advertised data transfer speeds

actually exists, despite having the opportunity to do so. Respectfully, it does not now lie in Dr. Lukacs' mouth to say that his evidence is insufficient or that, had he known the doctrine of mistake would be raised, he would have tried to find better evidence.

[38] In any event, I simply repeat that the evidentiary record is sufficient.

Question 3: do the interests of justice support granting an exception to the general rule?

[39] The factors which inform and bear upon the "interest of justice" cannot be reduced to a single, definitive list but, in my view, the following issues are germane:

1. Best Buy would be seriously disadvantaged if denied the opportunity to argue the doctrine of mistake on appeal. The evidence is sufficiently strong that the defence may lead to a different outcome. (see *R* v *Gill*, 2018 BCCA 144 at paragraph 45);
2. Related to this first factor, Best Buy did not ambush Dr. Lukacs by surprising him with this issue just before the appeal was heard. Dr. Lukacs had ample opportunity to prepare; and his written and oral submissions on appeal were fulsome, articulate and supported by relevant caselaw;
3. I do not find that Best Buy has engaged in bad faith or deployed questionable tactics. On the contrary, I am concerned that the interests of justice and the proper adjudication of claims outweigh any concerns regarding either prejudice or procedural fairness. On this, I emphasize the important and legitimate demands for finality and the equally important principle that an appeal is not a second "kick at the can" where litigants are given the chance to advance issues that should have been argued at trial. However, the restrictions which guide the Court's discretion to allow new issues on appeal balance these legitimate demands against countervailing impulses designed to serve the aims of justice. That balance is embedded in *Quan* and resonates in the context of Small Claims Court proceedings where the litigants are often self-represented, and the procedures are designed to be informal and inexpensive so as to enhance access to justice.

MISTAKE

[40] I turn now to the defence of mistake.

[41] There are several branches to the doctrine of mistake. The subbranch which is relevant to the issue before me is common mistake.

[42] In 1931 in *Lever Bros Ltd v Bell*, [1931] UKHL 2, Lord Warrington of Clyffe stated, "[t]hat a mistake of this nature common to both parties is, if proved, sufficient to render a contract void is, I think, established law" (at page 23) .

[43] In 2003, Wilson J, for the British Columbia Supreme Court in *Dyson v Moser*, 2003 BCSC 1720 ("***Dyson***"), held:

> In Associated Japanese Bank (International) Ltd v Credit du Nord SA and another, [1988] 3 All ER 902 (QB) Steyn J held, quoting the headnote:
>
> > A contact will be void *ab initio* for common mistake if a mistake by both parties to the contract renders the subject matter of the contract **essentially and radically** different from that which both parties believe to exist at the time the contract was executed. However, the parties seeking to rely on the mistake must have had reasonable grounds for entertaining the belief on which the mistake was based.
>
> [at paragraph 20, emphasis added]

[44] Similarly, in *Dimick v Dimick*, 2008 NSSC 333, MacAdam, J wrote that "[a] common mistake justifies the recision of a contract if the misapprehension was "**fundamental** and the party seeking to set it aside was not himself at fault"" (at paragraph 109, emphasis added). MacAdam J, quoted the following passage from Fridman's *Law Of Contract in Canada*:

> In common mistake cases, the issue would seem to be whether the existence of such shared mistake destroyed the basis of the contract. In these instances there is no question of a lack of *consensus ad idem*. The parties have clearly agreed on the contract and its terms. However, there may be no contract, or the contract may be affected by some equitable remedy such as rectification, because the real, underlying intentions of the parties have been foiled….there is no contract because the underlying intentions of the parties have in some way been thwarted.
>
> [at paragraph 41]

[45] In *Eastern Canadian Coal Gas Venture Ltd v Cape Breton Development Corp*, 2001 NSSC 196 ("***Eastern***"), the contract in question involved the

production of electricity from methane gas. Both parties entered into the contract with the mistaken belief that the gas sourced alone could support the project. However, there was not sufficient gas to make the project viable. Edwards J found that the insufficiency related to the volume of gas available constituted, in light of the circumstances, a "fundamental mistake [as to] a matter of fact essential to the agreements" (at paragraphs 347 – 348). Through no misconduct on the part of either party, the contract was impossible to perform and therefore rescinded.

[46] In reaching this conclusion, Edward, J recognized *Lever Bros Ltd* as the seminal decision on mutual mistake, and he summarized the doctrine as follows:

> Where the parties contract under a false and fundamental assumption, going to the root of the contract, and which both of them must be taken to have had in mind at the time they entered into it as the basis of their agreement, the contract is void.
>
> [at paragraph 335]

[47] Edwards J further framed the issue by citing Treitel's *The Law of Contract*, 8th edition at page, he noted:

> Consent may be nullified if both parties make a fundamental mistake of fact. In such cases, the extreme injustice of holding one of the parties to the contract outweighs the general principle that apparent contracts should be enforced.

[48] The authors then go on to classify what mistakes might be considered as "fundamental" for purposes of the analysis and include a discussion of mistake as to the existence of the subject matter, mistake as to the identity of the subject matter, mistake as to quality, mistake as to quantity, and, most significantly in this case, mistake as to the possibility of performing the contract.

[49] In this case, the erroneous description relating to the data transfer speed in the online advertisement induced Dr. Lukacs to enter into the contract. It is noteworthy that the advertisement did not include qualifiers such as "more or less" or "up to". The representation as to data transfer speed was specific (5,120 MB per second) and, indeed, it was that precise representation as to the device's extraordinary data transfer speed that caught Dr. Lukacs' attention and was critical to his decision to buy. Thus, this case can be distinguished from other cases where:

1. The common mistake as to the quality or quantity of the subject matter was not expressly stated in the sale agreement. Rather, the

common mistake was based on a belief or an unspoken shared between the contracting parties.

2. The common mistake was proper identification of the subject matter, as opposed to an expressly described quality or quantity. Recall that, here, the essential subject matter of the contract, hard drives, is correctly identified. The mistake relates to the quality of those hard drives when comparing the advertised data transfer speeds against reality.

[50] Given this characterization of the data transfer speed as a contractual condition and as a critical factor for purchase by both the Small Claims Court Adjudicator and Dr. Lukacs, three conclusions necessarily arise:

1. This feature (i.e. the data transfer speed should be characterized as an "essential condition of the contract").
2. The actual data transfer speed achieved by the hard drives was about 120 MB/seconds – or about 2% of the advertised 5,120MB/second which, in my view, constitutes an error *in substantialibus*.
3. Dr. Lukacs presented evidence of superior technology could achieve higher data transfer speeds. But there was no evidence that any external hard drive technology existed which could reach the advertised data transfer speed. Based on the evidence, the performance of the contract, as agreed to by the parties, was simply impossible.

[51] Respectfully, demanding damages which reflect the market value of external hard drives that can achieve higher data transfer speeds but do not approach the advertised speeds sidesteps the real issue.

[52] The problem is not whether the Court should strain to award a remedy in damages even where they may be difficult to calculate. I do not dispute that the Court should undertake that effort in appropriate circumstances. Indeed, the cases cited by Dr. Lukacs all involve the Court making reasonable assumptions based on existing information regarding such things as fair market value of comparable assets or the pain a person has suffered or the damages regarding the loss of an opportunity.

[53] Respectfully, the problem here is that the technology required to achieve the critical data transfer speeds does not exist, based on the evidence before the Court.

There was no evidence of any external hard drive that could achieve the data transfer speeds which formed the basis of the contractual expectations.

[54] There is no reasonable value associated with that loss because, based on the evidence, any damages figure would be based on imagined technology that does not presently exist. More to the point, this is not a case where the Court must strain and provide an innocent party to a contractual breach with a just remedy. Rather, "expectation" damages are neither warranted nor possible because, through no misconduct on the part of either party, the fundamental assumption that went to the root of the contract was based on a mutual mistake. In my view, the contract was void *ab initio*.

[55] I order that:

1. Dr. Lukacs shall forthwith return the purchased hard drives to Best Buy; and
2. Immediately and forthwith upon receiving the hard drives in question, Best Buy shall return to Dr. Lukacs the full amounts of money paid for these hard drives ($367.96).

[56] The appeal is otherwise dismissed.

[57] I am not prepared to make a costs award in favour of Best Buy or Dr. Lukacs in this proceeding. In my view, this is an appropriate case for the parties to each bear their own costs.

Keith, J.