SUPREME COURT OF NOVA SCOTIA
Citation: *Rydel Homes Ltd. v. Desrochers*, 2014 NSSC 250

Date: 20140709
Docket: Ken No. 423350
Registry: Kentville

Between:

Rydel Homes Ltd.

Appellant

v.

Pamela Desrochers

Respondent

Judge:	The Honourable Justice Margaret J. Stewart
Heard:	May 8, 2014, in Kentville, Nova Scotia
Counsel:	W. Bruce Gillis, Q.C. for the Appellant Pamela Desrochers, Self Represented

By the Court:

[1] This is an appeal from a Small Claims Court Adjudicator's decision ordering payment of debt, general damages and costs under an Agreement of Purchase and Sale.

FACTS

[2] The Appellant, Rydel Homes Ltd., is the seller in an agreement to purchase and sell property to the Respondent buyer, Ms. Pamela Desrochers. The parties executed the Agreement in November 2012. That Agreement included a rescission clause allowing the buyer to terminate the sale prior to closing on December 12, 2012 if the results of a sewer, septic, and well test were unsatisfactory. Desrochers's test results returned unsatisfactory levels of lead contamination in the water. Rydel Homes conducted its own test, arriving at the opposite result. Desrochers proceeded with the sale closing, but not before the parties amended the Agreement to give Desrochers the option to take another sample within one year of the closing date, in the presence of both parties, and to have that sample tested at a government-approved laboratory. Rydel Homes agreed to pay for the cost of installing a lead removal system if the new test revealed unacceptable levels of lead. Rydel Homes now appeals the decision of a Small Claims Court Adjudicator

ordering it to pay damages both specific and general under the option despite partial noncompliance with the option's terms; namely, the sample was not taken in the presence of the parties as stipulated in the amended Agreement.

ISSUES

1. Did the Adjudicator correctly interpret the buyer's noncompliance with the term of the Purchase and Sale Agreement requiring a water sample "to be taken in the presence of the buyers and the sellers or their representatives" as non-fatal to the buyer's claim for damages under the option?
2. Did the Adjudicator's failure to offer an adjournment of the hearing amount to a denial of natural justice?

ANALYSIS

[3] The grounds for appeal from an Adjudicator's decision in Small Claims Court to the Supreme Court of Nova Scotia are listed in section 32 of the *Small Claims Court Act*, R.S.N.S. 1989, c. 430 as amended. The grounds of error of law and failure to follow the requirements of natural justice are at issue in the present appeal.

Issue 1: Did the Adjudicator correctly interpret the buyer's noncompliance with the term of the Purchase and Sale Agreement requiring a water sample "to be taken in the presence of the buyers and the sellers or their representatives" as non-fatal to the buyer's claim for damages under the option?

[4] "Error of law" is not defined under the *Small Claims Court Act*; however, in *Brett Motors Leasing Ltd. v. Welsford* (1999), 181 N.S.R. (2d) 76, [1999] N.S.J. No. 466 (S.C.), at para 14, Saunders J. (as he then was) canvassed the grounds on which a superior court will allow a Small Claims appeal:

> 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. […P]recedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include […] 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 apply the appropriate *legal* principles to the proven facts

Misinterpretation of a contract is an error of law.

[5] The basic question of contractual interpretation is how to best give effect to the parties' intentions, as discerned by the words and actions of the parties in the context of the contract as a whole and the broader context in which it was made. A contract's words and context must be interpreted objectively at the time the

contract was made. In other words, the question for the court is what a reasonable person would have objectively understood the words of the document to mean in their context. The subjective intentions of the parties are not to be considered: *Geophysical Services Inc*. v. *Sable Mary Seismic Inc.*, 2012 NSCA 33, at para 105.

[6] Contractual terms can generally be classified as either conditions or warranties. Conditions are terms that go to the root of the contract whose breach would have been understood by the parties as giving rise to the innocent party's right to rescind the contract and excuse the non-performance of outstanding obligations. By contrast, warranties are those terms of a contract which would not have been intended by the parties to unravel the agreement. Instead, breach of a warranty only gives the innocent party a right to claim damages. That party is not excused from future performance of outstanding obligations. Yet, as Angela Swan points out in *Canadian Contract Law*, 3d ed (Markham, Ont: LexisNexis, 2012) at para 7.66, classifying the terms of a contract is, strictly speaking, unnecessary. In any event, the test is that articulated by Lord Diplock in the landmark English case *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd*. [1962] 2 Q.B. 26 at 66 and confirmed by the Supreme Court of Canada in *Sail Labrador v. Challenge One (The)*, [1999] 1 SCR 265, at para 31:

> The test whether an event has this effect [discharged the party who has yet to perform from performance of his undertakings] or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

Swan emphasizes that the event is not to be assessed in the abstract. The question is "whether, *given the party's reasonable expectations from the terms of the contract*, it has been substantially deprived of what it was to get from the contract." (Swan & Adamski, *supra* note 4, at para 7.66)

[7] In this case, the buyer's failure to take the water sample in the presence of both parties arguably did not deprive Rydel Homes of substantially the whole benefit which the parties intended that it should obtain as consideration for offering the option for the buyer to conduct a new water test. The terms imposed on the buyer's exercise of the option were apparently intended to ensure the independence of the test results. If the seller had not doubted the reliability of the initial test, it might have agreed to pay for the cost of a lead removal system outright.

[8] Given that the Adjudicator found as a fact that Mr. Hibbert, the Department of National Defence employee who had drawn the latest water sample, *was* independent and professionally trained to collect the sample; that the lab that conducted the test was government-approved; and that the quality of the water

sample would not have changed if the parties had been present when it was drawn; Rydel Homes was not substantially deprived of the whole benefit of the contract. It was able to successfully close the transaction and, at the same time, ensure that an independent sample could confirm the water's contamination before it was obligated to pay the costs to install a lead removal system.

[9] That the seller did not challenge Mr. Hibbert's independence and insists it has no intention of avoiding its contractual obligation to pay the cost to install a lead removal system supports an interpretation of the term requiring the sample to be drawn in both parties' presence as a mere warranty, breach of which entitles Rydel Homes to an action in damages, and does not excuse it from its obligation to pay the cost to install a lead removal system. Again, since the Adjudicator found that the failure to take the sample in the parties' presence would not have affected its quality, the seller's entitlement to damages for the buyer's breach of this term is negligible.

[10] The adjudicator's findings and reasoning would support the conclusion that the option that was added to the Purchase and Sale Agreement formed part of a single bilateral contract requiring substantial performance rather than a separate unilateral contract requiring strict performance.

[11] The Supreme Court of Canada in *Sail Labrador, supra,* dealing with a lease agreement, which included an option to purchase the leased vessel, held, at para 41:

> Courts must examine the text of the contract and the context surrounding it in order to determine the intention of the parties, keeping in mind that this Court has previously approved of the tendency by courts to treat offers as calling for bilateral rather than unilateral performance whenever a contract can fairly be so construed: *Dawson v. Helicopter Exploration Co.*, [1955] S.C.R. 868, at p. 874, per Rand J.

Factors that the majority in *Sail Labrador* considered to militate in favour of a bilateral construction include the fact that: (i) the option is given in consideration of the performance of the buyer's obligation under the main object of the agreement, (at paras 43,49); (ii) the option is intimately connected to the main agreement, particularly in the sense that the option in *Sail Labrador* was explicitly conditional on performance of the obligations under the main agreement (i.e. the lease), (at para 44); and (iii) the option and main transaction involve the same property, (at para 45).

[12] In the instant case, it appears that the consideration for the option was the same as under the original Purchase and Sale Agreement: that is, to purchase the property in exchange for the transfer of title and the option to conduct an additional test and have the Appellant pay the cost to install a lead removal system if

necessary. Although it seems that performance of the option was not specifically dependent on "full performance" of the terms of the purchase and sale (as was the case in *Sail Labrador*) and may be distinguished on this basis, there was no apparent basis for the adjudicator to find that the parties intended that the "buyer" should get an option to conduct an additional water test and compel Rydel Homes to install a lead removal system on a property which she had not purchased. It was implicit that the sale would have to close before the option could be exercised. In this sense, the sale and option were intimately connected. Lastly, the option and main transaction involved the same property. These reasons support a bilateral construction of the contractual option in this agreement to which the doctrine of substantial performance applies. In other words, strict compliance with the terms of the option was not necessary.

[13] Furthermore, unlike in *Can-Euro Investments Ltd. v. Industrial Alliance Insurance*, 2009 NSSC 20, at paras 108-109, aff'd at 2009 NSCA 114, the option here did not prescribe what was to occur if the term was not followed.

[14] The Adjudicator relied on *LeMesurier et al v. Andrus*, 54 O.R. (2d) 1 (Ont. C.A.), a decision of the Ontario Court of Appeal, for the proposition that minor defects in the performance of purchase and sale agreements should not give a right of rescission to the buyer. In *LeMesurier*, the contractual provision was not

expressly phrased in the language of an option. The buyer alleged a defect in title relating to square footage which the seller made efforts to remedy substantially, if not completely. The Court held that the buyer could not rescind the contract because the seller was in a position to convey substantially what the contract required based on an objective test. This appears to be consistent with the doctrine of substantial performance generally applicable to bilateral contracts. A key difference between the facts in *LeMesurier* and the present appeal, however, is that while the adjudicator's findings indicate that the Respondent made efforts to comply substantially with the terms of the option, it does not appear that the Respondent made any effort to fulfil the term of the contract stipulating that the new water test was to be taken in the presence of both parties. The Adjudicator, however, accepted that the Respondent was merely "hoping that Mr. Peckford would accept the results," and this was "reasonable and in good faith" per *LeMesurier* in light of her findings that Mr. Peckford, the Appellant's principle, presented in an aggressive manner, was not cooperative with the Respondent and her husband after they took possession of the property and that she understood why the Respondent would not want to deal with him again in obtaining another water sample.

[15] In summary, the stated preference of courts to interpret contracts as bilateral, rather than unilateral, agreements whenever the terms of a contract can reasonably bear such a construction suggests that the doctrine of substantial performance applies to the Purchase and Sale Agreement in this case. The option clause should not be construed as a separate unilateral contract apart from the main object of the Agreement; but, rather as an element of a single bilateral contract, in which case the requirement that the water sample "be taken in the presence of the buyers and the sellers" is a mere warranty and the buyer's substantial performance is sufficient to exercise the option. The adjudicator's findings suggest that Rydel Homes received substantially the whole benefit that the parties intended it should receive under the contract: it successfully closed the sale and received the results of a new, independent water test before it incurred an obligation to pay for a lead removal system. As a result, Rydel Homes cannot now avoid its obligation to pay for a lead removal system under the amended agreement. The Adjudicator's interpretation of the buyer's own compliance with the term of the amended Agreement is in keeping with this.

Issue 2: Did the Adjudicator's failure to offer an adjournment of the hearing amount to a denial of natural justice?

[16] The second issue was not strenuously argued. At issue is whether the procedures followed (or not followed, as the case may be) amount to a failure of natural justice. Nature justice does not guarantee perfect justice. The overriding question is always whether the process was fair, which involves a context-specific analysis.

[17] Although Small Claims adjudicators should generally inform self-represented litigants about their procedural rights and entitlements, I am satisfied there was no positive duty on the Adjudicator, in the circumstances of this case, to offer an adjournment of the hearing to the Appellant and therefore, there was no denial of natural justice. In particular, the Adjudicator's offer of counsel which was rejected, the Appellant's opportunity to cross-examine Mr. Hibbert (the technician who authored the new water report, the existence and conclusion of which the Appellant was aware of and had not requested), the Appellant's own indication that it was ready to proceed despite having received Mr. Hibbert's written report shortly in advance of the proceeding, the Appellant's access to witnesses inclusive of Mr. Hibbert and the Respondent's earlier technician out of court as suggested by the Adjudicator, the Appellant's own indication that

presence at the site was "a matter of principle" and the fact that the Appellant did not then, nor does it now dispute the accuracy or independence of the report causes me to conclude that Rydel Homes had a full opportunity to meet the case against it and that the process was fair in the context of the *Small Claims Court Act*'s dual purposes of fairness and efficiency. (*Small Claims Court Act*, supra, s. 2; *Spencer v. Bennett*, 2009 NSSC 368, at paras. 13-14).

Conclusion

[18] The Appellant has failed to demonstrate that there was either an error of law or a failure to follow the requirements of natural justice. I dismiss the appeal.

[19] In keeping with the Small Claim's court statutory jurisdiction for general damages under sections 9-11 of the *Small Claims Court Act*, supra, the Respondent/Claimant Pamela Desrochers is entitled to $100.00 in general damages. The order of dismissal should reflect a general damages award of only $100.00.

[20] Payment of the outstanding amounts should be made forthwith.

Stewart, J.