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**Claim No. SCCH 304791**
**Date: 20090414**

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: Newbridge Academy v. Thompson, 2009 NSSM 16

BETWEEN:

**NEWBRIDGE ACADEMY**

Claimant

- and -

**GARY THOMPSON and HEATHER BLACK**

Defendant

**Claim NO. SCCH 304790**

BETWEEN:

**NEWBRIDGE ACADEMY**

Claimant

- and –

**MARK FLETCHER and MAUREEN FLETCHER**

Defendant

**Claim No. SCCH 304789**

BETWEEN:

**NEWBRIDGE ACADEMY**

Claimant

- and –

**ROBERT HORNE**

Defendant

**Claim NO. SCCH 304788**

BETWEEN:

**NEWBRIDGE ACADEMY**

Claimant

- and –

**MARK HINAM and PAM HINAM**

Defendant

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**ORDER**

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**Adjudicator: David T.R. Parker**

**Heard: February 5th, 2009**

**Decision: April 14, 2009**

Parker:-These cases came before the Small Claims Court in Halifax and they were heard at the same time with the consent of the parties and pursuant to the provisions of the *Small Claims Court Act*.

The Claims, Defences and Counterclaims were virtually the same however the evidence including documentary evidence varied between cases and following a general overview I shall deal with each case separately.

**General Overview**

The Claimant Newbridge Academy ("Academy") is claiming the Defendants enrolled their children in the Academy following acceptance by the Academy and that the Defendants owe the outstanding portion of the tuition fees, notwithstanding their child has withdrawn from the Academy.

The Defendants position is that the Academy did not provide or deliver what it promised and the Academy breached its contract with the Defendants thereby causing the Defendants to withdraw their children from the Academy. The Defendants are counterclaiming for tuition paid to the date of withdrawal and school supplies paid in advance.

**1. Claim No. 304791 – Newbridge Academy ("Academy") v. Gary Thompson and Heather Black ("Thompson & Black")**

**Pleadings:**

**The Claim**: The Claimant stated "The Defendants have completed enrolment and attended the Academy for which their student tuition is $7,500.00 and non-refundable. The Defendants have removed their student voluntarily and have a balance owing of $4,900 and are non responsive to requests for payment.

**The Defence:** The Defendants stated the Academy made specific representations, specifically the Academy promised their daughter would receive additional support related to her needs and academic abilities. The Academy promised one on one teaching which did not occur and the deficiencies led to the child's withdrawal from the Academy.

**The Counterclaim:** "Pursuant to the breach of Contract" Thompson and Black claimed $3,956.00 representing school uniform, mandatory down payment, log-in digital school books, and monthly payments for September, October and November.

Much of the evidence in all the cases involved the curriculum of the Province of Nova Scotia as being met by the Academy; personalize education plans not being in place with respect to the defendant's child and the defendants children not receiving the education and services promised. The Defendants however could not identify with any specificity where the Academy was not complying with what they claimed to be the case. Nor was the student in all these cases called upon to provide any information which might have assisted in this area. The Academy on the other hand provided witnesses which refuted the claim of the defendants. I have considered negligent misrepresentation and its elements as outlined in the case ***Queen v. Cognos Inc***. [1973] 1 SCR 87 as well as innocent and fraudulent misrepresentation and the defendants in each case have not provided foundational evidence to support any of these categories which might void the contract.

The Defendants also argued that there was a fundamental breach of contract. Chief Justice MacKeigan, in ***Canso Chemicals Ltd. v. Canadian Westinghouse Co. Ltd.*** [1974] NSJ No. 270 provides a review of the case law which defines instances of fundamental breach at paragraph 112:

**" 112 The phrase or concept has been defined or described as follows:**

**- "whether in consequence of [the breach] the performance of the contract becomes something totally different from that which the contract contemplates." - Lord Dilhorne in Suisse Atlantique, supra, at p. 393.**

**- "a situation fundamentally different from anything which the parties could as reasonable men have contemplated ..." - Lord Reid in Suisse Atlantique, at p. 397.**

**- "a breach which goes to the root of the contract" - Idem, p. 399.**

**- "when there is such a congeries of defects as to destroy the workable character of the machine" - Pollock & Co. v. Macrae, [1922] S.C. (H.L.) 192 at p. 200 (quoted by Lord Hodson in Suisse Atlantique at p. 413).**

**- "destroying the whole contractual substratum" - [*page345] Lord Wilberforce in Suisse Atlantique at p. 433.**

**- "totally different performance of the contract from that intended by the parties" and which will "undermine the whole contract" - Sellers, L.J., in Hong Kong Fir Shipping Co. Limited v. Kawasaki Kisen Kaisha Ltd., [1962] 1 All E.R. 474 (C.A.) at p. 479.**

**- "an 'event' ... which has deprived the plaintiffs of substantially the whole benefit which they were to obtain under the contract." - Widgery, L.J., in Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd., [1970] 1 All E.R. 225 at p. 239.**

**- "so defective as to be quite incapable of performing the function which both parties contemplated it should perform ... resulting in performance totally different from what the parties had in contemplation." - Arnup, J.A., in McLean, supra, in [1971] 1 O.R. at p. 212.**

**- "an accumulation of defects which ... taken en masse, constitute such a ... breach going to the root of the contract, as disentitles a party to take refuge behind an exception clause intended to give protection only in regard to those breaches which are not inconsistent with and not destructive of the whole essence of the contract." - Pearce, L.J., in Yeoman Credit Ltd. v. Apps, [1961] 2 All E.R. 281 at p. 289. But**

There is no evidence before me that shows the Academy did not provide what it said it would provide in the contract or in its brochure.

All of the above comments apply equally to each of the other factual situations before this court involving the common Claimant, the Academy.

The real issue here in this case and all the ones that were heard concerning the Academy is whether the defendants are contractually bound to pay for the full year's tuition after enrolling their child and then unilaterally withdrawing their child part way through the academic year.

Consideration will have to be given to what did the Defendants agree to do and was there a breach of that agreement.

The evidence discloses:

(a) The Defendants and the Claimant agreed to have the child enrolled in the institution;

(b) The child was enrolled;

(c) Certain education services were to be provided to the child;

(d) That the Academy did provide the curriculum as instituted by the Province of Nova Scotia;

(e) That a tuition down payment of $500.00 was made and monthly tuition payments were made by the Defendants covering the time the child attended the Academy;

(f) No further tuition payments were made by the Defendants after the child withdrew from the Academy;

(g) The Defendants paid for school supplies and uniforms.

The information provided to parents concerning tuition is found in the Academy's pamphlet which stated:

"Tuition Payments
$7,500.00* per year tuition and textbooks and uniform
*If deposit is paid by March 31, tuition will be $7,000.00
*semester/monthly payment plans available upon request"

In this particular case an Enrolment Contract was sent out to the Defendants which the Defendants did not sign. In the contract it stated:

**"In understand that my obligation to pay the fees for the full academic year is <u>unconditional</u> and that after September 1st no portion of such fees paid or outstanding will be refunded or cancelled in the event of absence, withdrawal, or dismissal from the school of the above named student."**

The Claimant argues that the parents, i.e. the Defendants knew they were responsible for the full year's tuition even though they did not sign the contract. The Claimants rely on the information contained in their brochure.

The Defendant argues that there was a breach of the contract as there were representations made by the Academy which did not occur as far as their child was concerned.

The clause if it is to stand up assuming it was agreed to must be clear as requiring the

Defendant to pay for a full year's tuition whether or not the child attends the Academy once enrolled.

If there is ambiguity in the language contained in a contract between the parties it will not be construed in favour of the party who drafts the contract and where the other party had no say in the drafting of the contractual language. This is referred to as the ***Contra Proferentum Rule*** and I refer to the following case which discusses the rule in some depth.

**Cape Breton Development Services Ltd. v. D. Roper Services Ltd.,** [2001] N.S.J. No. 524

"154 Absent ambiguity in language, courts have held there are no grounds to invoke the *Contra Proferentum* Rule. The doctrine, as recently affirmed by the Supreme Court of Canada in Eli Lilly & Vo. V. Novapharm, [1998] 2 S.C.R. 129, operates to prevent a party who has drafted confusing or 'deviously ambiguous' language in a contract, from benefiting from the ambiguity, by interpreting any ambiguity in the language against the drafting party.

155 Counsel for Roper Ltd. suggests that any ambiguity in the contract, and particularly clause 14, should be resolved in favour of Roper Ltd. Counsel refers to Hillis Oil and Sales Limited v. Wynns Canada Limited (1986), CarswellNS 145, [1986] 1S.C.R. 57, where it had been found there was ambiguity in respect to how a distributor's agreement could be terminated. Justice Ladane said the rule applies where there is ambiguity in the meaning of a contract of which one of the parties is the author and where the other party has no opportunity to modify the wording. He then cites from Anson's Law of Contract (25th ED. 1979), at p. 151, to the effect that words in a written document are construed more forcibly against the party using them. He then references the reasons of Justice Estey in McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada, [1981] 2 S.C.R. 6 at p. 15:

- That principle of interpretation applies to contracts and other documents on the simply theory that any ambiguity in a term of a contract must be resolved against the author if the choice is between him and the other party to the contract who did not participate in its drafting.

156 The requirement for an initial ambiguity was noted by the Court of Appeal in Arthur Anderson Incorporated v. Toronto Dominion Bank, [1994] O.J. No. 427, (1994), Carswell Ont 233, where are para. 17, Grange and McKinlay, J.A., for the majority, said:

- …one must find an ambiguity in the contract before applying the rule, rather than after, as done by the trial judge;"

The question is then is the clause relied on by the Claimant ambiguous.

At first blush and taken on its own it is clear that all fees for the year are due whether the child is absent, withdraws or is dismissed. The question is do fees mean tuition as the Claimant suggests. It is my view if it meant tuition it would have said tuition. The brochure makes reference to an application fee and tuition payment. The latter appears to be described as a money amount plus text books and uniform. It does say in the brochure that no tuition will be refunded if the child is dismissed. However this does not clarify whether tuition means fees. It could also mean that all tuition paid will not be refunded. However it is not necessary to go down that path at the moment. The enrolment contract itself draws a distinction between tuition and fees in the first paragraph which states:

**"In consideration of the acceptance of this Enrolment Contract by Newbridge Academy, the undersign agrees to pay the required tuition and fees as specified in the Newbridge Academy school handbook."**

With respect to the Counterclaim the student received services form the Academy while attending and for those reasons already made earlier on the Defendants being unable to support their allegations outlined in their defence, the tuition payments should not be

returned to the parents. The school uniform can still be worn by the student whether or not they are attending classes. The school supplies and log-in digital school books are the child's possession and if there are any books or supplies held by the Academy they should be returned to the student. If this does not happen the Defendants can make an application to this court for a recovery order provided all items can be identified.

The last item on the counterclaim is the $500.00 described by the Defendants as a mandatory tuition down payment.

In the Academy's brochure under Application Procedure it stated:

**"Upon receipt of a successful letter of acceptance, a seat for enrolment will be offered. To confirm your child's seat, a deposit (non-refundable – directly applied to tuition cost) of $500.00 and a signed enrolment agreement must be received by the admissions office."**

This would appear to be a non-refundable payment which would if the child continues as a student at the Academy be applied to the child's tuition costs. However it is still a non-refundable deposit due upon acceptance of the child into the Academy and simply confirms that child's enrolment.

Therefore that party of the counterclaim is not allowed.

**IT IS THEREFORE ORDERED** that the Claim and the Counterclaim be dismissed with no Order as to costs.

**2. Claim No. 304790 – Newbridge Academy ("Academy") v. Mark Fletcher and Maureen Fletcher ("Fletcher")**

The fact situation in this case mirrors the Thompson/Black case No. 304791 except there are two children.

As these cases were heard together I shall not repeat the fact situation and analysis.

The Counterclaim refers to school uniform of $1,249.00, school supplies of $881.62 and tuition of $2,720.00. The decision in this case would be the same however there was no claim for the $500.00 payment paid upon enrolment and it is not necessary to deal with same.

**IT IS THEREFORE ORDERED** that the Claim and Counterclaim be dismissed with no order as to costs.

**3. Claim No. 304789 – Newbridge Academy ("Academy") v. Robert Horne ("Horne")**

Again this claim is a similar fact situation as Claim No. 304790 and No. 304791 except in this case the Defendant signed the Enrolment Contract and the wording in the contract differs from the other two claims.

The Enrolment Contract makes no mention of tuition but rather uses the "fees". The contract does say "If enrolment is cancelled after September 1st parents or guardians financially responsible for the students are obligated to pay the full tuition."

Again the wording is ambiguous in my view – earlier in the contract it speaks to absence, withdraw or dismissal and here the contract talks about cancellation of enrolment. In this case the child's enrolment was not cancelled the parents withdrew their child from the school. Further even if it applies to payment of withdrawal of a student it is not clear the tuition that must be paid is for the time the child was not receiving instruction.

**IT IS THEREFORE ORDERED** that the Claim and Counterclaim are dismissed with no order as to costs.

**4. Claim No. 304788 – Newbridge Academy v. Mark Hinam and Pam Hinam**

This Claim is the same as the Horne matter, Claim No. 304789, and the decision in this case is the same.

**IT IS THEREFORE ORDERED** that the Claim and Counterclaim are dismissed with no order as to costs.

Dated at Halifax, this 14 day of April, 2009.

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David T.R. Parker
Small Claims Court Adjudicator