SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Thibodeau v. Hodder*, 2019 NSSM 48

Date: 20190819
Docket: SCCH 488837
Registry: Halifax

Between
: Yves Thibodeau

Claimant

- and -

Heather
Hodder

Defendant

Adjudicator: Eric K. Slone

Heard: in Halifax, Nova Scotia on August 12, 2019

Appearances: For the Claimant, self-represented

For the Defendant, Brennan LeJean, counsel

BY THE COURT:

[1] The Claimant sues for the balance owing ($15,990.26) on a promissory note given by the Defendant in connection with a commercial transaction, wherein the Defendant purchased the Claimant's beer and wine-making business, Hops'n Grapes Supplies.

[2] The Defendant says that she is not liable for the whole amount because the Claimant misrepresented the ownership of some of the assets that were supposed to pass to her under the purchase agreement. Specifically, she believes that she purchased two heat pumps and a heat recovery ventilation system (HRV) which, as she later learned, are claimed by the landlords of the premises as fixtures which are attached to the premises and therefore legally theirs. She seeks a reduction in her financial obligation to reflect the fact that she did not obtain ownership of these items, or put another way, to recognize that the Claimant had no legal right to purport to sell her these items.

[3] The Claimant moved the business to its current location in Elmsdale in August 2017, renting a space in a commercial plaza owned by husband and wife Abraham and Salam Khouri. The Claimant signed a ten-year lease at a starting rent of $1,500.00 per month, with modest increases in future years. This lease was a simple one-page document, rather than a fully fleshed out commercial lease as one might expect.

[4] A separate verbal deal was also made at the time whereby the Claimant agreed with the landlord to perform certain leasehold improvements, at his own expense, and as a partial incentive would receive several free months of rent. The Claimant was not certain of the precise amount of such rent relief, though there was an affidavit of Mr. Khouri filed which stated that it was three and a half months of rent. The Claimant thought it might have been slightly less than that. In the end, it does not matter what the amount was. It was simply a negotiated amount.

[5] The Claimant testified that he spent $17,000.00 on leasehold improvements in 2017. This figure apparently included the two heat pumps and HRV system, which themselves cost approximately $9,400.00 of that larger total. The rent relief that he received was considerably less than what he spent on leasehold improvements.

[6] About 6 months after moving into the Elmsdale location, the Claimant negotiated a sale of the business to the Defendant. The sale was structured as an asset sale. The Asset Purchase Agreement dated February 23, 2018 ("the agreement") called for a global purchase price of $75,000.00, representing $20,000.00 for inventory and *"for equipment, leasehold improvements and intangibles [as set out in a Schedule A] the amount of Fifty-Five Thousand Dollars ($55,000)."*

[7] The price was to be paid with $55,000.00 cash on closing and the signing of a promissory note for $20,000.00 payable over 48 months starting in June 2018. The note carries interest at 5% per annum.

[8] The above-mentioned Schedule A consisted of a one-page table with 54 rows, setting out a brief description of the items with columns for "quantity" and "equipment age." Two of those rows were:

Items	**Qty**	**Equipment Age**
LG Heat Pump	2	1
Heat Recovery Ventilation System	1	1

[9] There were no values attributed to the items in Schedule A, though during negotiations toward the agreement there had been a document supplied to the Defendant (a so-called "equipment listing") which placed the original cost of the heat pumps at $6,440.00 and the HRV at $2,990.00. That same document listed a "value now" (i.e. depreciated value) of $6,000.00 and $2,600.00 respectively. The equipment listing document, minus the financial columns, is what became Schedule A.

[10] All other items on Schedule A had similarly contained values shown on the equipment listing, though the heat pumps and HRV were the largest ones. The total of the "value now" column was $36,100.00.

[11] Significantly, no items (other than arguably the heat pumps and HRV) were in the nature of leasehold improvements, despite the fact that the Claimant had by his own evidence spent at least $8,000.00 on other leasehold improvements.

[12] There seems no doubt that the placing of values on all of the items on the equipment listing was intended to justify - at least in part - the sale price.

[13] The agreement contained several clauses which are relevant to this dispute:

> 4.1 **Vendor's Warranties and Representations** - the Vendor warrants and represents to the Purchaser, and acknowledges the Purchaser is relying on these representations and warranties, that:
> .....
>
> (c) At the closing date the Vendor will have good and marketable title to the Purchased Assets, excluding leasehold improvements, free and clear
> .....
> .....
>
> (d) No other person has or will have at the Closing Date, any right, absolute or contingent, to purchase or acquire any of the Purchased Assets.

[14] To accommodate the deal, the landlords had agreed with the Claimant that they would extend a lease to the Defendant on the same terms. Without such an arrangement, the transaction would not have worked.

[15] The Claimant admitted that in his discussions with the landlords prior to completing the sale, he became aware of their understanding that all leasehold improvements and fixtures belonged to them by operation of law. He did not agree with that view, but he did nothing specifically to challenge it, nor anything to alert the Defendant to the issue of ownership of these items. In particular, he did not propose a change the wording of the agreement to reflect the possibility that he could not legally pass title to these items, or to clarify that he was not purporting to do so.

[16] It was only some months later that the Defendant learned that she might not own the heat pumps and HRV, and she accordingly stopped making her payments on the promissory note, precipitating this lawsuit.

The law of fixtures

[17] The law concerning leasehold improvements and fixtures is fairly settled, though not without its subtleties. In general terms, items that become part of a

building are either “chattels” or “fixtures.” Fixtures typically begin as chattels but after being installed or attached to the premises their character changes and they become part of the land with ownership passing to the landowner, in this case the landlord. In only very limited circumstances can fixtures legally be removed and become chattels again. That right only extends to what are called tenants’ fixtures, or more particularly trade fixtures.

[18] In the case of *Frank Georges Island Investments Ltd. v. Ocean Farmers Ltd.*, 2000 CanLII 2543 (NS SC), Justice Saunders (as he then was) of the Nova Scotia Supreme Court reviewed the law:

> [39] The way to distinguish fixtures from chattels (which may be taken and do not form part of the freehold) was explained in the seminal case of *Stack v. T. Eaton Co.* (1902), 4 O.L.R. 335 (Ont. C.A.). Speaking for the court, Meredith,
> C.J. formulated the following principles for distinguishing fixtures from chattels:
>
> > "(1) That articles not otherwise attached to land than by their own weight are not to be considered as part of land, unless the circumstances are such as shew that they were intended to be part of the land;
> >
> > (2) That articles fixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue as chattels;
> >
> > (3) That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation which are patent to all to see;
> >
> > (4) That the intention of the person affixing the article to the soil is material only insofar as it can be presumed from the degree and object and annexation."
>
> [40] In this case the applicant has admitted that these structures are fixtures. Specifically the applicant argues that these four structures fall within a particular category of fixtures known as "tenant fixtures" and as such the applicant claims the right to sever the buildings from the freehold and remove them. In light of Ocean Farmers' concession that the structures are fixtures, I need not inquire as to whether the structures are so attached to the land as to become a part of it. Nor is there any need to examine the degree and object of annexation, or other features from the case law, tending to distinguish chattels

from fixtures. Rather, the single question in this application is reduced to whether the buildings come within the specific category of fixtures known as "tenant fixtures".

[41] "Tenant fixtures" were described in *Stack v. T. Eaton Co.*, supra as a fifth principle or rule which applied uniquely to fixtures attached by tenants to the leased property. Meredith, C.J. described this category of fixtures as follows:

> "(5) That, even in the case of tenants' fixtures put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant." (at p. 338)

[42] Williams & Rhodes, *Canadian Law of Landlord and Tenant* (6th ed.), vol. 2 describes this unique right of tenants, in certain circumstances, to remove fixtures:

> "Fixtures of a chattel nature erected or placed by tenant upon the leased premises, for the purposes of carrying on a trade, for ornament or as a domestic convenience become part of the freehold but may nevertheless be severed. If so severed, they cease to be ‘fixtures' and resume their character as chattels. They may be removed by the tenant or his assigns, provided that such removal may be effected without serious injury to the freehold." (at pp. 13-17)

[43] Not every fixture affixed to the land may be removed prior to the end of the lease term simply because it is attached by a tenant. The article must be either:

> (a) for the purpose of carrying on a trade; or
>
> (b) ornamental in nature or for the purpose of domestic convenience. Williams & Rhodes, supra., Vol. 2, pp. 13-17

This particular sub-category of tenants' fixtures has come to be described as "trade fixtures". "Trade fixtures" are defined as:

> "Things which a tenant has fixed to the freehold for the purposes of trade or manufacture may be taken away by him during the term whenever the removal is not contrary to any express or

> implied stipulation in his lease. But the items must be capable of being removed without causing material injury to the estate: *Cartwright v. Herring* (1904), O.W.R. 511 (Ont. H.C.); or 'irreparable damage': *Spyer v. Phillipson*, [1931] 2 Ch. 183 (C.A.); *Can. Credit Men's Trust Association (Campbell River Mills Ltd.) V. Ingham*, 1932 CanLII 442 (BC SC), [1933] 1 W.W.R. 8, 4 B.C.R. 300 (S.C.); affirmed 1933 CanLII 284 (BC CA), [1933] 3 W.W.R. 305, 47 B.C.R. 358, [1933] 4 D.L.R. 626 C.A.; *Liscombe Falls Gold Mining Co. V. Bishop* (1904), 1905 CanLII 69 (SCC), 35 S.C.R. 539; and without being entirely demolished or losing their essential character or value: *Hughes v. Towers* (1866), 16 U.C.C.P. 287 (C.A.)."

[19] To reiterate, where items are attached to the land or building, they lose their character as chattels and become fixtures - part of the land. Property in those items belongs to the owner of the land. The case law is full of examples where these principles are applied to prevent tenants or their creditors from removing such chattels against the wishes and interests of the landlord.

[20] The slight exception is in the case of "tenant or trade fixtures" where the items are intrinsic to the tenant's business and may be removed at the end of the tenancy, without doing any harm to the leasehold premises.

[21] There is also an exception for ornamental items, or those attached for "domestic convenience." Ornamental items are easy to distinguish. Unfortunately, there seems to be no discussion in the cases as to what "domestic convenience" means, but it would appear to be in distinction to items which are more intrinsic to the functioning of the building. For example, a stove or refrigerator may be attached to the building via electrical or plumbing connections, but would most likely remain chattels.

[22] Heat pumps and a HRV system are not in any way unique to the beer and wine business, and cannot be considered trade fixtures. Their purpose is to control the climate within a building. They cannot be removed without doing harm to the building, by leaving it without essential mechanical systems. There is no basis to consider them trade fixtures, or items placed for domestic convenience.

[23] While the landlords are not parties to this claim, it seems beyond any doubt that they are correct in their legal position that upon installation by the

Claimant these items attached to the leasehold and title therein passed to them. The fact that they extended a financial allowance to the Claimant only strengthens their position.

[24] Assuming that, for whatever reason, the Defendant tried without permission to remove the heat pumps and HRV, she would be without any legal right to do so and would be subject to legal action by the landlords.

[25] So, the questions come down to these:

a. Did the Claimant agree to pass legal title to the heat pumps and HRV, which title he no longer had after he affixed these items to the leased premises?

b. Did the Defendant have a reasonable expectation under the contract that she would acquire legal title to these items?

[26] The answers to these questions are not as clear as either party contends, although in both cases, on balance, I would answer "yes."

[27] In article 2.2(a) of the agreement the Defendant was paying $55,000.00 for "*equipment, leasehold improvements and intangibles, as set out in the attached Schedule A."* The provision in 4.1(c) that "*at the closing date the Vendor will have good and marketable title to the Purchased Assets, excluding leasehold improvements"* recognizes that the Claimant was not purporting to pass title to leasehold improvements. However, Schedule A itself does not list any leasehold improvements other than the heat pumps and HRV. It does list many intangibles such as websites, computer systems etc.

[28] The argument can be made that the Defendant knew that the heat pump and HRV were part of leasehold improvements, and not chattels that she could exercise ownership of. Practically speaking, she was benefiting from the fact that these items had been recently acquired and, as long as she remained as a tenant in the building, she would benefit therefrom.

[29] The issue of ownership of the heat pumps and HRV would only arise if the Defendant terminated her lease early and wished to remove these items, or upon the expiry of the lease she wished to take them with her. In either of these scenarios, she would be stymied by the landlords' superior claim to ownership

by virtue of their status as fixtures.

[30] On balance, I believe that the Claimant represented that he was passing some form of title to these items to the Defendant. Furthermore, he knew that the landlords were claiming to own these leasehold improvements and he did nothing to disclose the fact that there was a cloud (if not a wet blanket!) on the title to these items. His warranty that he had "good and marketable title" turns out to be incorrect.

[31] As such, I consider that the Claimant breached his warranty of title and the Defendant is entitled to be compensated for the items that she did not acquire, free and clear.

[32] These items had a claimed value of $8,600.00 at the time of the agreement. This number was used to justify, in part, the purchase price for the business.

[33] While the Defendant claims to be entitled to a reduction of that amount, her position ignores the fact that she still gets to benefit from the heat pumps and HRV. Their value is measured mostly by what they do to improve the climate within the building. The air quality or temperature within the building is no different whether she owns the items, or merely leases them as part of her tenancy.

[34] However, there is an arguable financial loss predicated on the possibility that she might seek to remove the items at some point in the future, either before or at the end of the lease. There could also be insurance or warranty implications which turn on ownership of the items. Whether any of these things will come to pass is impossible to predict at this time. As such, I believe her damages are best approached on a "loss of chance" basis.

Loss of chance

[35] A good discussion of the loss of chance doctrine can be found in the judgment of Griffiths, J.A. in *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.,* 1993 CanLII 3431 (ON CA) (which case was referred to with approval by Moir J., *in Grant v. Gold Star Realty*, 2011 NSSC 2 (CanLII)):

> The general rule is that the burden is on the plaintiff to establish on the balance of probabilities that as a reasonable and probable consequence of the breach of contract, the plaintiff suffered the damages claimed. If the plaintiff is not able to establish a loss, or where the loss proven is trivial, the plaintiff may recover only nominal damages.
>
> A second fundamental principle is that where it is clear that the breach of contract caused loss to the plaintiff, but it is very difficult to quantify that loss, the difficulty in assessing damages is not a basis for refusal to make an award in the plaintiff's favour. One of the frequent difficulties in assessing damages is that the plaintiff is unable to prove loss of a definite benefit but only the "chance" of receiving a benefit had the contract been performed. In those circumstances, rather than refusing to award damages the courts have attempted to estimate the value of the lost chance and awarded damages on a proportionate basis.
> .....
>
> In short, in assessing damages the court must discount the value of the chance by the improbability of its occurrence.
> .....
>
> On my analysis these two Supreme Court of Canada decisions [*Webb & Knapp (Canada) Ltd. v. Edmonton (City)*, 1970 CanLII 173 (SCC), [1970] S.C.R. 588, 11 D.L.R. (3d) 544 and *Kinkel v. Hyman*, 1939 CanLII 7 (SCC), [1939] S.C.R. 364, [1934] 4 D.L.R. 1] stand for the following propositions. The burden rests on the plaintiff alleging breach of contract to prove on the balance of probabilities that the breach and not some intervening factor or factors has caused loss to the plaintiff. In this respect the courts have not relaxed the basic standard of proof. Where it is clear that the defendant's breach has caused loss to the plaintiff it is no answer to the claim that the loss is difficult to assess or calculate. The concept of the loss of a chance then begins to operate and the court will estimate the plaintiff's chance of obtaining a benefit had the contract been performed. But even in this situation, the Supreme Court of Canada has said in Kinkel v. Hyman, supra, that proof of the loss of a mere chance is not enough; the plaintiff must prove that the chance constitutes "some reasonable probability" of realizing "an advantage of some real substantial monetary value".

[96] As put in a nutshell by Bauman J., of the B.C. Supreme Court in *Manley v. Chilliwack General Hospital Society*, 2000 BCSC 649 (CanLII) (albeit in a

medical context):

> [15]..... In contract it is not, as it is in tort, an all or nothing proposition. Whereas in tort, a plaintiff must prove on a balance of probabilities that the defendant's negligence caused his or her injuries and is then entitled to 100% of his or her loss, in contract, a plaintiff can argue that the defendant's breach cost the plaintiff the chance of avoiding some of the injury he or she suffered. In contract, the plaintiff need not show causation on a balance of probabilities - every breach of contract entitles the innocent party to damages although they may be only nominal. .....

[36] In the case here, the Defendant has lost a chance of being able to remove the heat pumps and HRV, or otherwise to realize some of the value.

[37] What is the value of such chance?

[38] I believe that the most probable outcome is that the Defendant will serve out the balance of her lease. By then, the items will have considerably depreciated. The possibility that she would seek to remove the items before the end of the lease seems to be a more remote proposition.

[39] While it is far from an exact science, I rate the Defendant's chance of incurring a loss at 35%. As such, I assess her damages at 35% of $8,600.00, which totals $3,010.00.

[40] The best way to reflect this recalculation of the Defendant's financial liability is to deduct the $3,010.00 from the $20,000.00 promissory note. Her obligation to the Claimant is reset at $20,000.00 - $3,010.00 = $16,990.00.

[41] The Defendant made ten payments of $460.65, for a total of $4,606.50, leaving owing $12,383.50. This is less than the amount claimed by the Claimant, and more than the amount conceded by the Defendant.

[42] To that should be added interest at the agreed-upon rate of 5%.

[43] I do not accept that the Claimant should necessarily be entitled to a judgment for the full principal owing, because the Defendant was justified in stopping her monthly payments on the note when she became aware of the

landlords' claimed ownership of the disputed assets. She should not lose the opportunity to spread her payments over time. However, she might prefer to pay it off and be done with it.

[44] For purposes of this decision, provisionally, I would ask the parties to perform a recalculation of the Defendant's financial obligations consistent with the damages I have allowed her. They should arrive at a payment schedule that works for both of them. In the event they cannot work out the appropriate payments, either of them may ask the court to do so by contacting Court Administration and making such submissions as they see fit. If necessary, we could convene a further hearing, a conference call or merely an exchange of correspondence.

Eric K. Slone, Adjudicator