Date: 20000209
Docket: CA 157649

NOVA SCOTIA COURT OF APPEAL

[Cite as: Fairview Farms Ltd. v.
A. A. Putnam & Sons (1987) Ltd., 2000 NSCA 27]

Chipman, Freeman and Pugsley, JJ.A.

BETWEEN:

A. A. PUTNAM & SONS (1987) LIMITED Appellant - and - FAIRVIEW FARMS LIMITED and M.S.D. ENTERPRISES LIMITED and A.A. PUTNAM & SONS INVESTMENTS LIMITED and JEAN PUTNAM, CLAUDIA PUTNAM and LORNE PUTNAM Respondents	)	William M. Leahey for the appellant Peter M. Rogers for the respondents Appeal Heard: January 25, 2000 Judgment Delivered: February 9, 2000

THE COURT: Appeal dismissed as per reasons for judgment of Freeman, J.A., Chipman and Pugsley, JJ.A., concurring.

Freeman, J.A.:

[1] After the death of their parents in the 1980's the three brothers who had been carrying on various family business enterprises under the name of A. A.Putnam & Sons Limited decided to divide the operation among themselves.

[2] This appeal is from a Supreme Court order rectifying the agreement they reached to clarify a requirement for equal division of proceeds from all milk quota sold as an asset separate from the family farm as a going concern.

[3] With the help of a trusted accountant, lawyer and appraiser, they negotiated an agreement creating three units of roughly equal value which were capable of functioning independently. Each brother formed a company to acquire his share.

[4] The greatest difficulty centered on the dairy operation at the main farm property at Masstown, Colchester County. This had been part of a small mixed farming operation but when the second son, Gene Putnam, married in 1967 he and his wife Ellen focused on it and built it up to include a herd of 400 cattle with a fluid milk quota of 2,291 litres per day and a market share quota for industrial milk of 378,339 litres per year.

[5] Fluid milk is sold for direct consumption as such, and industrial milk sold under the market share quota is for manufacture into such products as butter and cheese. The chief distinction of note to the farmer is the higher price received for fluid

milk.

[6] Gene and Ellen Putnam wished to keep the dairy operation in which they had developed considerable expertise, but the oldest son Lorne wanted it on behalf of himself and his son Scott, who had attended agricultural college. After protracted negotiations an agreement resulted dated March 11, 1988, effective November, 1987, with the following results:

* Lorne Putnam incorporated A.A.Putnam (1987) Limited, referred to as Putnam (87), to take over the dairy operation with assets valued at $1,265,635 and assuming debts of $691,734 for a net value of $573,901 as a going concern. Lorne was president, Scott ran the operation, and they owned the shares equally.

* Gene Putnam incorporated Fairview Farms Limited and started afresh with the family beef operation, which he moved to a property known as the Stiles Farm, with assets valued at $485,829.

* The youngest brother, Merle Putnam, now deceased, incorporated M.S.D.Enterprises Limited with assets including a trailer park, rental properties and a gravel and construction business valued at $461,983.

The stumbling block in negotiations was that the breakup value of the dairy

farm at that time was $446,000 greater than its value as a going concern. All the brothers wanted the operation to continue, but recognized that the brother who received it could enjoy a windfall by selling off the assets piecemeal. In particular, the milk quota was worth more than a million dollars. This impasse was broken by a suggestion of Ellen Putnam's that if Lorne Putnam's company sold off the milk quota separately within twenty years, the money would be divided. This was expressed as a condition precedent in a preliminary agreement, or memorandum of intention, in June, 1987, as follows:

> Article 4.01(d)
>
> Gene Co., Merle Co., and Lorne Co., reaching a satisfactory agreement with respect to the purchase and sale of assets distributed on the reorganization subsequent thereto which agreement would also provide for the distribution of proceeds of the sale of milk quota within a period of twenty years after the reorganization.

[7] In a document called a "post reorganization transfer agreement", which effectively was part of the final agreement, the period was reduced from twenty years to fifteen years. The main focus of the trial and the appeal, however, was on the significance, if any, of the modifier "fluid" inserted before the words "milk quota" in the final document, in which the relevant clause reads as follows:

> 3.00 Sale of Quota by Putnam (87)
>
> 3.01 At any time prior to December 31, 2003 should Putnam (87) sell all or any part of its fluid milk quota, or should a creditor of Putnam (87) realize on and sell the same, Putnam (87) agrees to pay the following:
>
> (a) To M.S.D., one third (1/3) of the gross proceeds received on the sale of the fluid milk quota.
>
> (b) To Fairview, one third (1/3) of the gross proceeds received on the sale of the fluid milk quota.

[8] (Reference to sale of the milk quota by a creditor recognized that even the forced sale of milk quota piecemeal would result in enhancement of its value as part of a going concern. The debt reduction resulting from such a sale would increase the net worth of Putnam (87), accordingly.)

[9] The fifteen year term was described as a compromise, but Lorne Putnam testified that he had not attempted to negotiate the shorter period. He said he had no intention of selling quota and would not have cared if the period had been for a hundred years. Quota had been acquired but not sold during the 20 year period when Gene and Ellen Putnam managed the dairy undertaking.

[10] None of the witnesses, including the brothers, the accountant, the lawyer or the appraiser could shed light on the reason for the insertion of the word “fluid". None could recall any discussions during the negotiations which would explain it. There was evidence that those in the industry, up to the time of the negotiations, had never considered that market share quota had a value apart from fluid milk quota, and that the terms “milk quota” and “fluid milk quota” were used interchangeably. The Putnam farm was a fluid milk operation and the market share quota would have applied to fluid milk, as distinct from quotas for butterfat or milk solids, sold for industrial purposes. The appraiser valued the entire milk quota and did not assign a separate value to market share quota on the assumption, shared by the brothers, that it had no value by itself. Whatever value it had was included in the figure for fluid milk quota. There was evidence, however, that regulatory changes facilitating the buying and selling of market

share quota, which took effect only in late 1987, would have given the Putnam market share quota a value of $229,000 by March of 1988, when the final agreement was signed. There was no evidence that change was considered by the brothers or their advisors in negotiating the agreement, nor that the final draft was carefully read.

[11] In 1994, fluid milk quota and market share quota were combined, according to a conversion formula set out in the regulations, as total production quota.

[12] The dairy operation did not prosper under Scott's management. A year after the execution of the agreement he began selling off market share quota. Milk production soon declined and the herd was reduced to 200 animals. By 1997 he had sold $541,000 worth of milk quota. Scott Putnam had not considered it necessary to disclose these sales and only a portion of the money was divided pursuant to the agreement.

[13] Gene Putnam heard of quota sales by Putnam (87) in 1995 and 1997 and each time approached Lorne Putnam, who had not been informed of them either. After checking with Scott on each occasion he confirmed sales of total production quota of $180,000 and $101,000 respectively. Lorne Putnam tried to persuade his brothers to forego their companies' shares so Scott could use the money. Merle Putnam waived the share for M.S.D. Enterprises on the first sale but Gene's company, Fairview Farms, was eventually paid its one-third share in full. Both companies eventually received their full shares of the second sale. At no time was the argument raised that they were not entitled to the portion of the total production quota proceeds represented by the former

market share quota.

[14] The dairy license of Putnam (87) was revoked in 1997 for milk quality infractions and the remaining milk quota was sold in 1998 for $1,042,132. Fairview Farms and M.S.D. Enterprises sued Putnam (87) under the agreement for their shares of the proceeds. After indebtedness to the Farm Loan Board of more than $500,000 was paid off, the balance of $531,329.30 was kept in trust pending the outcome of the proceedings.

[15] Scott Putnam took the position in the action that Putnam (87) was not accountable to Fairview Farms and M.S.D. Enterprises for proceeds of the sale of market share quota because the agreement specified only fluid milk quota. As counsel explained it on the hearing of the appeal, his approach differed markedly from that of his father and uncles, the contracting parties, and particularly that of his uncle Gene who had been the herdsman for the twenty years preceding the agreement.

[16] Gene Putnam's strategy for increasing his market share quota during the regulatory regime that had prevailed until 1987 had been to pay a penalty for overproduction, which resulted in the assignment to him of additional market share quota. Scott Putnam took advantage of the new quota exchange provisions as an adjusting mechanism to buy or sell market share quota so as to avoid penalties for overproduction or underproduction at years end.

[17] The appellant's counsel argued that adjusting quota from time to time to avoid production penalties should not trigger the requirement for dividing the proceeds. However, the evidence showed a consistent pattern of quota sales beginning in 1988 and culminating in the final sale of remaining quota in 1998. The trial judge identified only one relatively minor purchase in 1990.

[18] After hearing five days of testimony during a week in March, 1999, and after a careful analysis, Justice MacLellan found that the parties intended that Clause 3.01 of the agreement should refer to milk quota, by which he meant all milk quota, and not merely fluid milk quota. His reasons included the finding that:

> . . . [A]ll the parties understood milk quota to be one entity, that is, Fluid Milk Quota and that Market Share Quota or Industrial Milk was simply an extension of the Fluid Milk Quota. The people most involved in the dairy operation were Gene Putnam and Ellen Putnam. I believe them when they testified that they assumed that "you can't have one without the other". I believe that Lorne Putnam who really was not much involved in the daily operation did know that there were different quotas, but did not understand how each related to the other.

[19] He concluded:

> I conclude in this case that all the requirements necessary to allow rectification have been proven. I find that all the parties to the agreement signed in March 1988 intended that the milk quota owned by A.A.Putnam & Sons Limited would be shared by all three if sold within fifteen years of that date. I believe that the document signed by the parties in June of 1988 did not reflect this intention when it referred to only Fluid Milk Quota. I would therefore rectify that agreement to read milk quota, which I find includes Fluid Milk Quota and Market Share Quota.

[20] His order reflected this conclusion.

[21] The trial judge reviewed the evidence at length and gave detailed reasons for reaching the conclusion that all parties to the agreement understood that Clause 3 was

intended to refer to all of the milk quota which had been owned by the parent company at the time the agreement was finalized. His reasons included credibility findings adverse to Lorne and Scott Putnam.

[22] Justice MacLellan found that in the experience of the parties and their professional advisors at the time the agreement was being negotiated, market share quota did not have a value distinct from fluid milk quota and the two terms were used interchangeably.

[23] If the regulatory regime for selling market share quota had not been coincidentally changed during the same time period as their negotiations, nothing would have turned on the use of the term “fluid milk quota” rather than simply “milk quota” in Clause 3. In the circumstances found by Justice MacLellan, it would have been unreasonable to conclude that market share quota was excluded from the agreement.

[24] Justice MacLellan calculated total sales of quota which would have resulted in claims by the companies of Gene and the late Merle Putnam of $399,345.23 each. However he referred to the one purchase of market share quota for $5,250 by the appellant in 1990 and held there was no obligation to share the proceeds of quota purchased after 1988. Accordingly, he found the appellant was liable to each of Fairview Farms and M.S.D. Enterprises for $397,595.23.

[25] Appellant’s counsel seized upon this adjustment to argue before this court

that the trial judge had not only rectified the agreement by excluding “fluid” as a modifier for milk quota but by adding a new term exempting quota purchased after 1988. I do not agree. The determination that the appellant was not obliged to share the proceeds of quota it purchased itself merely gives reasonable effect to the agreement negotiated among the parties, which related to quota owned at the time it was executed. It is at most, a question of interpretation, not of rectification. It is not an error of fact or law.

[26] In **Toneguzzo- Norvell v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at p. 121 McLachlin, J., (as she then was) stated:

> It is by now well established that a Court of Appeal must not interfere with a trial judge’s conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it. ...

[27] No such reversible error has been shown. Where rectification of a contract is sought as a remedy, a finding such as that made by Justice MacLellan, that the written agreement did not express the true intention of the parties, is critical. In the circumstances of this case, the finding cannot be interfered with by this court.

[28] As to when rectification is available as a remedy, the trial judge cited Fridman’s **Law of Contract in Canada**, Third Edition, at pp. 821-822:

> ...The essence of rectification is to bring the document which was expressed or intended to be in pursuance of a prior agreement into harmony with that prior agreement. It deals with the situation where, contracting parties having reduced into writing the agreement reached by their negotiations, some mistake was made in the wording of the final, written contract, altering the effect, in whole or in part, of the contract. What the court does is to alter the document, in accordance with the evidence, and then enforce the document as changed. Rectification is not used to vary the intentions of the parties, but to correct the

> situation where the parties have settled upon certain terms but have written them down incorrectly. But the court will not give a remedy for a party who is displeased with what the contract has brought him.

[29] Hallett J. (as he then was) quoted from the same passage to grant rectification in **Federal Business Development Bank v. Elcon Petroleum Maintenance Limited** (1983), 58 N.S.R. (2d) 246 (N.S.S.C.T.D.) and continued:

> At p. 624, Mr. Fridman states:
>
> > The essential idea is that the written document must not defeat the spirit and terms of the accord reached between the parties.
>
> The requirements for rectification are: First, there must be a mistake and proof of the real intention of the parties. That proof must be clear and convincing. As stated by Fridman at p. 627:
>
> > The proof must be clear and convincing, by incontrovertible testimony, as regards the agreement actually made by the parties and their mutual mistake. All the circumstances must be looked at to see whether the plaintiff has discharged the onus, which is on him, and is a heavy one, of establishing the ingredients of a case of rectification. There is no special rule of evidence, it has been said. The court must come to a conclusion using good sense and in the light of such documentary and strong oral evidence as is adduced.

[30] In **Dartmouth Policy Association v. Dartmouth** (1998, 172 N.S.R. (2d) 352 (N.S.C.A.), Cromwell, J.A. stated at p. 354:

> **…**Fundamental to that claim is proof of an agreement between the parties which is not reflected in the written instrument which they signed. Courts do not rectify agreements, they rectify instruments recording agreements: see I.F.C. Spry, **The Principles of Equitable Remedies** (5th, 1997) at 607. Professor Fridman put this point succinctly: "Rectification is not used to vary the intentions of the parties, but to correct the situation where the parties have settled upon certain terms but have written them down incorrectly: G.H.L. Fridman, **The Law of Contract in Canada** (3d), 1994) at p. 822; see also **Tobias et al. v. Nolan** (1987), 78 N.S.R. (2d) 271; 193 A.P.R. 271 (C.A.), at 287 and ff.
>
> The existence of the agreement must be clearly proved. As McLachlin, J.A. (as she then was) said in **Bank of Montreal v. Vancouver Professional Soccer Ltd.** (1987), 15 B.C.L.R. (2d) 34 (C.A.), at 36, "The standard of proof of

> these elements is a stringent one because of the danger of imposing on a party a contract which he did not make.

[31] In my view, the key finding by Justice MacLellan meets the test stated by Fridman and applied by Hallett J. and the restatement by Cromwell, J.A. Rectification was the appropriate and just remedy. The trial judge did not err in granting it as he did so to ensure that Fairview Farms and M.S.D. Enterprises share in the proceeds of all milk quota sold by Putnam (87), pursuant to Clause 3.01 of the agreement.

[32] This resulted in a calculation that each of Fairview Farms and M.S.D. Enterprises were entitled to recover $397,595.23 plus pre-judgment interest from Putnam (87). A second ground of appeal, which related to the calculation of fluid milk quota as a proportion of the total proceeds of quota sales, need not be considered. I would dismiss the appeal with costs which I would fix at 40 per cent of the costs at trial, plus disbursements.

Freeman, J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.