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CA 156181

NOVA SCOTIA COURT OF APPEAL

[Cite as: Eng v. Medjuck, 1999 NSCA No.138]

Bateman, Hart and Flinn, JJ.A.

BETWEEN:

FRANKLYN D. MEDJUCK		Harry E. Wrathall, Q.C. for the appellant
	Appellant	
- and -		
MARGARET ENG		Glenn E. Jones for the respondent
	Respondent	
		Appeal heard: October 13, 1999
		Judgment delivered: November 16, 1999

THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A.: Hart and Bateman, JJ.A. concurring.

FLINN J.A.:

[1] The appellant is an experienced real estate lawyer. In 1992 he represented the purchaser in a transaction involving the purchase of assets and good will of a small business. On the day of the closing of the transaction, a Friday, he gave an undertaking to the vendor's (respondent's) lawyer to deliver the purchase monies, in the form of his trust account cheque, on the following Monday. That undertaking was not fulfilled, resulting in this legal proceeding. The only issue at the trial was whether the appellant's undertaking was without conditions, or whether it was subject to conditions which were not met.

[2] The trial was held before Justice Wright of the Supreme Court with a jury. The jury found that the appellant's undertaking was without conditions.

[3] Counsel had agreed on the quantum of damages if it was determined that the appellant's undertaking was without conditions. As a result of the jury's finding, the trial judge ordered the appellant to pay the respondent the agreed quantum of damages ($15,900.00) plus interest and costs.

[4] The appellant appeals, claiming:

1. the jury had no facts upon which to base its finding;
2. the question posed to the jury was ambiguous;
3. the jury did not accept the trial judge's direction.

[5] Damages are not in issue in this appeal.

[6] Before considering these grounds of appeal, particularly whether there was evidence to support the finding of the jury, I will review the evidence at the trial in some detail.

[7] The respondent operated a small convenience store/video business at Lower Sackville, Nova Scotia, in premises she rented from Dino Marcatilli (the landlord).

[8] In May, 1992, the respondent (vendor) negotiated the sale of her business to Camille Chahoud (the purchaser) for $17,000.00. The purchaser retained the appellant to represent him in the transaction. The transaction was to be completed on Friday, May 29th, 1992. The assets being purchased were shelving units, counters, appliances, equipment and good will. The agreement of sale provided for an assignment of the vendor's lease of the premises to the purchaser. It was a condition precedent to the agreement that the landlord consent to that assignment of lease.

[9] The vendor became concerned about her continuing liability arising out of future dealings between the landlord and the purchaser. She decided she would prefer to be taken off the existing lease, and have the purchaser arrange his own lease with the landlord.

[10] During the last week of May, 1992, the vendor had several discussions with the purchaser. She took him to meet the landlord, and she took him to the bank so that

the purchaser could get references and financial information which the landlord required. She also discussed with the purchaser her desire to be free from liability under the lease, and her preference to be taken off the lease, and to have the purchaser enter into a new lease with the landlord. As to her discussions with the purchaser concerning the purchaser arranging his own lease with the landlord, she testified at trial as follows:

> First I went to discuss it with Camille [purchaser] to see if it was okay with him, if he could -- wouldn't mind having a new lease drawn up. He thought it was fine. He didn't see any problem with it. And then I went to talk to Dino Marcattili [landlord] and basically told him the same thing, I would like to have my name taken off the lease and if he would mind doing up the new lease with Camille because, you know, it was fine with him.

[11] This evidence was uncontradicted. The purchaser did not testify at the trial.

[12] The vendor then negotiated an arrangement with the landlord whereby, upon payment of $1,800.00, she was relieved of all responsibility under the lease.

[13] The appellant testified that prior to the closing he knew nothing of this arrangement between the vendor and the landlord, nor did he know that the purchaser had agreed to enter into a new lease with the landlord.

[14] Because the purchaser did not testify at the trial, it is not known what discussions he had with the landlord concerning a new lease. In any event, a draft of a new lease between the landlord and the purchaser was sent to the appellant by the landlord's lawyer. On that same day the appellant advised the landlord's lawyer that a

number of the proposed terms of the lease were unacceptable; namely, a rent acceleration clause; a provision that the store was to be moved 100 feet to another location; a provision that any default by the tenant was to be cured within three days; and a requirement for a security deposit.

[15] The appellant testified that as far as he was concerned he and the landlord's lawyer were not negotiating a new lease; although he did not request an assignment of the existing lease. He simply advised the landlord's lawyer that the terms of the proposed new lease were not acceptable. The appellant testified that he assumed that the existing lease was still to be assigned to the purchaser. The following day, Friday, May 29th was the closing date for the transaction.

[16] On May 29th, 1992, the vendor's lawyer delivered to the appellant the closing documents for the transaction, as follows:

1. a bill of sale for the assets;
2. the agreement of purchase and sale which was to be signed by the purchaser;
3. a statutory declaration with respect to trade creditors;
4. a statutory declaration deposing that the assets are fully paid for and not subject to liens and that all taxes, payroll remittances and source deductions had been fully paid;
5. an authorization signed by the vendor authorizing that funds be paid to the vendor's lawyer.

[17] In the letter which accompanied this documentation, the vendor's lawyer said:

> Note that I will undertake to pay out of the sale proceeds of $17,000.00, the three trade creditors listed in the enclosed declaration.
>
> Please hold the above documents in escrow until your client has signed the enclosed Agreement and you are in a position to confirm my receipt of your trust cheque in the amount of $17,000.00 and a signed copy of the agreement.

[18] The vendor's lawyer testified that he approached the closing of the transaction on the understanding that the assignment of the lease was no longer necessary, and that the purchaser was arranging his own lease with the landlord. He also testified that he was not told of any problems concerning lease arrangements between the landlord and the purchaser until Monday following the closing.

[19] The vendor's lawyer further testified that on the closing date he received a telephone call from the appellant acknowledging receipt of the closing documentation; and indicating that the purchaser was ready to close. There was no request for an assignment of the existing lease. The vendor's lawyer testified that the appellant asked him if he would accept the purchaser's cheque in payment of the closing proceeds, and the vendor's lawyer indicated to the appellant that he would not close on that basis. Later, on the closing day, the appellant telephoned the vendor's lawyer indicating that he had funds from the purchaser, and that he could cover the closing purchase price with his trust account cheque. The vendor's lawyer testified that the appellant was very eager to have his client (the purchaser) gain access to the premises over the weekend,

so that the purchaser could get the premises ready for the opening of business on the following Monday morning. The vendor's lawyer testified that, in return for the appellant's undertaking to forward the closing funds, in the amount of $17,000.00, and in the form of his trust account cheque, on the following Monday, the vendor's lawyer agreed to advise the vendor to turn over the keys to the purchaser. The appellant gave that undertaking. He did not specify that it was conditional or contingent upon anything, nor did he ask specifically about an assignment of lease, or the landlord's consent to such an assignment. On that basis the vendor's lawyer instructed the vendor to turn the keys over to the purchaser.

[20] The vendor testified that she made arrangements for the purchaser to pick up the keys at the store premises at 7 o'clock that evening. She further testified that to this point in time the purchaser had given her no indication that he was having any difficulties concerning leasing arrangements with the landlord.

[21] The vendor's testimony as to the events which ensued is as follows:

> Q. Okay. And so what happened over the weekend?
> A. Nothing to my -- I didn't hear anything to my knowledge. There was - I didn't hear anything else until June 1st, that Monday.
> Q. And what happened on Monday?
> A. I had gotten a knock on my door and it was Camille Chahoud [the purchaser]. He passed me over the keys to the store.
> Q. Okay.
> A. I'm sorry
> [Discussion between the Court and counsel together with a recess]
> Q. Thank you, My Lord. Margaret [vendor], when we broke, you were telling us that Camille [the purchaser] came to see you at your house.
> A. Yes.
> Q. What happened then? What happened?
> A. He passed me over the keys.

> Q. And what did he tell you?
> A. He was sorry. He had a -- he was in over the weekend, had a fight with Dino [the landlord], and he said he couldn't deal with it and he wasn't buying the store, and he left.
> Q. Now, what was ...
> MR. WRATHALL
> I'm sorry. Did everybody hear that. My Lord, did she say, "I can't deal with it, I'm not buying the store"? Is that what she said? It's very important.
> THE COURT
> Yeah. Would you mind repeating your answer, Ms. Eng?
> MS. ENG
> Camille [the purchaser] had passed me the keys, said "I'm sorry, Margaret [the vendor], I've had an argument with Dino [the landlord]. I'm not going to deal with this." .....
>
> [emphasis added]

[22] The vendor's lawyer and the appellant had a discussion concerning this matter on Monday morning following the closing date. The vendor's lawyer was requesting the closing funds. The position of the appellant is as set out in his letter, sent by fax to the vendor's lawyer on Monday, June 1st, 1992, as follows:

> I was in the process of confirming our telephone conversation this morning to advise you in writing that this transaction has become unravelled when your fax arrived. My indication to you that I would send you the $17,000 was always contingent upon the Landlord and my client coming to satisfactory terms, either in a new lease or by assignment of the existing lease, as provided for in the Agreement form you sent me. .....
>
> In view of these conditions, I am not in a position to send you any monies and if there ever was an agreement between our clients, it has been frustrated by the Landlord and is now null and void.

[23] The appellant then returned to the purchaser the purchase monies which had been deposited to the appellant's trust account to complete the transaction.

[24] The vendor commenced an action against the purchaser and the appellant.

She claimed damages against the purchaser for breach of the agreement of purchase and sale; and damages against the appellant for breach of his undertaking to pay the closing proceeds. Each of the purchaser and the appellant filed separate defences. The purchaser subsequently disappeared, and his whereabouts are unknown. On that basis, an application was made to strike out the purchaser's statement of defence. That was done and default judgment was entered against the purchaser. Since his whereabouts are unknown, no recovery has been made against him.

[25] The matter proceeded to trial against the remaining defendant, the appellant.

[26] The question that was put to the jury was prepared by the trial judge, after counsel's attempt at framing a question, satisfactory to both, was unsuccessful. It is as follows:

> Was the undertaking given by Mr. Medjuck to deliver the purchase price of $17,000.00 to Mr. Campbell on June 1, 1992 (in order to get the keys) made:
>
> (a) with no conditions attached?
>
> OR
>
> (b) on the condition that the purchaser (Chahoud) be able to obtain a right to possession of the leased store premises in which to operate a business?

[27] The reference in that question to "Mr. Medjuck" is to the appellant. The reference to "Mr. Campbell" is to the vendor's lawyer. The trial judge sought counsel's view on whether the form of question was satisfactory. Counsel for the respondent

agreed that the question was satisfactory. Counsel for the appellant agreed, as well, saying:

> MR. WRATHALL:
>
> I can't come up with a better question than what we've got here. So I mean, I have to go along with that. I don't think asking the jury for a general verdict suits this any more than anything else. But I mean, what would you say to the jury, "Who do you find in favour of, X or Y?" The thing is -- maybe it shouldn't have been -- but it was made entirely too complex for that kind of question, I think. But ...
>
> THE COURT
>
> Well, I tend to agree with you.
>
> MR. WRATHALL
>
> Yeah. So I can't come up with a better question or fairer questions than those, and I like them all right, but they do raise a lot of questions of law. And I wanted to make any argument on that just so it would be on the record as well. I'm not urging Your Lordship in any direction. I'm just expressing my views on the matter.

[28] Following instructions from the trial judge, and deliberation, the jury answered the question put to it by finding that there were no conditions attached to the undertaking given by the appellant.

[29] I will now consider the appellant's grounds of appeal.

I. The jury had no facts upon which to base its finding:

[30] The role of this Court in reviewing the factual findings of a jury is clear. In **Cameron v. Excelsior Life Insurance Co.** (1981), 35 N.R. 213 the majority of the Supreme Court of Canada approved of the opinion of Justice Hart of this Court when he said ((1981), 32 N.S.R. (2d) 668) at p. 704:

> ... The jury had the opportunity of observing all of these witnesses and deciding which part of the evidence they would accept. In my opinion it is not for this court to disagree with their findings when there is some evidence upon which they could have reached the conclusion that they did.

> Even though we as judges might reach a different conclusion than the jury did at this trial it would not be proper for us to set aside this verdict as being against the weight of evidence because it cannot be said that it was so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

[31] Similarly, in **Wawanesa Mutual Insurance Co. v. MacIsaac** (1983), 60 N.S.R. (2d) 124 (N.S.S.C.A.D.), Justice Jones of this Court, said:

> This court has no power to disagree with a jury finding when there is some evidence upon which they could have reached the conclusion that they did. (See ***Cameron v. Excelsior Life Insurance Company***). There was a substantial conflict in the evidence in this case and the issue of credibility was for the jury.
>
> As there was evidence to support the jury's verdict, this court has no right to intervene and accordingly the appeal is dismissed with costs.

[32] Counsel for the appellant submits that it is clear on the facts that the appellant had not been informed that the landlord had agreed to remove the vendor from liability on the lease, or that the purchaser had agreed to enter into a new lease with the landlord. Therefore, he submits, the appellant expected an assignment of lease to be executed to complete the closing of the transaction. He submits that the appellant gave his undertaking to deliver the funds to the vendor's lawyer on the condition that the arrangements for the closing - either an assignment of existing lease or a new lease between the landlord and the purchaser - were complete. That, he submits, is the only reasonable conclusion on the evidence adduced at trial.

[33] I do not agree.

[34] It was not unreasonable for the jury to conclude, on the evidence, that the

purchaser had waived any requirement in the agreement that the existing lease be assigned from the vendor to him. Further, that the purchaser had agreed to enter into his own lease with the landlord. Also, it was not unreasonable for the jury to have drawn the inference, on the evidence, that the purchaser's plan was to gain occupancy of the landlord's premises and then take his chances on negotiating the lease terms with the landlord.

[35] The evidence from which the jury could have come to these conclusions is:

1. the uncontradicted evidence of the vendor that the purchaser had agreed to new arrangements with respect to the lease;
2. the evidence that the appellant had discussions with the landlord's lawyer over the terms of a new lease with the purchaser, coupled with the fact that at no time before the appellant gave his undertaking did he request an assignment of the existing lease;
3. the uncontradicted evidence of the vendor as to what the purchaser told her on Monday morning following the closing - that after gaining occupancy of the premises, he had a fight with the landlord, that he could not deal with it, and that he was not buying the store.

[36] It was within the province of the jury to accept or reject all or part of the evidence before it. Whether the appellant, as the purchaser's lawyer, knew of these arrangements is irrelevant.

[37] I would dismiss this ground of appeal.

II. The question posed to the jury was ambiguous

[38] The issue before the jury was clear. Was the appellant's undertaking to deliver the funds unconditional, or was it on condition that the purchaser have a leasing arrangement with the landlord, either by assignment of the existing lease, or by being able to enter into a new lease with the landlord? Counsel clearly addressed their respective positions on this issue to the jury. Similarly, the trial judge's instructions to the jury clearly set this out as the issue between the parties. There is, in my view, no ambiguity in the question that was put to the jury. Further, at trial, counsel for the appellant raised no objection to the question on the grounds of ambiguity. In fact, counsel for the appellant told the trial judge that he could not come up with "a better or fairer question".

[39] I would dismiss this ground of appeal.

III. The jury did not accept the trial judge's direction

[40] The submission of counsel for the appellant on this ground of appeal is that the trial judge instructed the jury that the agreement of purchase and sale, dated May 29th, 1992, was "the contract that the parties were working under". Further, that agreement provided, as a condition precedent, that the vendor - with the landlord's consent - assign the existing lease to the purchaser. In view of that, counsel submits,

the jury could not have found that the undertaking to deliver the purchase monies was without any conditions; and that a finding to the contrary is perverse.

[41] I reject that submission. It ignores the fact that the trial judge also instructed the jury that there were two different positions before them as to whether the requirement of the vendor to provide an assignment of the lease to the purchaser was waived.

[42] The jury could well have accepted the evidence that such requirement was waived; and, therefore, it cannot be said that the jury did not accept the directions of the trial judge.

[43] I would, therefore, dismiss this appeal. I would order the appellant to pay the respondent her costs of this appeal which I would fix at $1,000.00 plus disbursements.

Flinn, J.A.

Concurred in:

Hart, J.A.

Bateman, J.A.