NOVA SCOTIA COURT OF APPEAL

Citation: Can-Euro Investments Ltd. v. Industrial Alliance Insurance and Financial Services Inc., 2009 NSCA 114

Date: 20091113
Docket: CA 308170
Registry: Halifax

Between:

Can-Euro Investments Limited

Appellant

v.

Industrial Alliance Insurance and
Financial Services Inc., a body corporate

Respondent

Revised judgment:	The text of the original judgment has been corrected according to the erratum dated **December 17, 2009.** The text of the erratum is appended to this decision.
Judges:	MacDonald C.J.N.S.; Bateman, and Oland, JJ.A.
Appeal Heard:	November 10, 2009, in Halifax, Nova Scotia
Held:	Appeal is dismissed, per reasons for judgment of Oland, J.A.; MacDonald, C.J.N.S. and Bateman, J.A. concurring. Appeal costs awarded to the respondent of $3,500 inclusive of disbursements.
Counsel:	David G. Coles, Q.C., for the appellant Alexander Beveridge, Q.C., and Ian R. Dunbar, for the respondent

Reasons for judgment:

[1] At the conclusion of the hearing of this appeal we dismissed the appeal with brief reasons to follow. These are those reasons.

[2] The parties entered into a contract whereby, provided certain terms were satisfied, Industrial Alliance Insurance and Financial Services Inc. ("Industrial Alliance") would provide Can-Euro Investments ("Can-Euro") with mortgage financing of approximately $12,500,000. The transaction did not close on the disbursement date selected by Can-Euro. Unsuccessful attempts were made to close in the days following. Industrial Alliance then refused to close at the interest rate fixed for the original disbursement date, and Can-Euro refused to close at a higher rate.

[3] Beveridge, J. (as he then was) dismissed Can-Euro's application pursuant to *Civil Procedure Rule* (1972) 9.02 which sought an order for specific performance to compel Industrial Alliance to advance the mortgage funds at the fixed interest rate or an order that Industrial Alliance must return the $125,000 commitment fee and pay damages. The Chambers judge's decision is reported at 2009 NSSC 20 and his order issued February 18, 2009. Can-Euro appeals, submitting that the facts as set out in the decision reveal palpable and overriding error and that the Chambers judge erred on matters of mixed law and fact.

[4] The standard of review for findings of fact and inferences drawn from facts is palpable and overriding error: *Housen v. Nickolaisen*, [2002] S.C.J. No. 31 at ¶ 10 and 25. Appellate courts are to pay great deference to a trial judge's findings of fact or inferences drawn from those facts: *Miller v. Royal Bank*, 2008 NSCA 118 at ¶ 6. Questions of mixed fact and law where factual determinations are not readily extricable from questions of law are also reviewed on a standard of palpable and overriding error: *Housen, supra* at ¶ 36.

[5] In his decision, the Chambers judge carefully reviewed the evidence. His detailed reasons made certain crucial findings of fact and drew inferences from facts. In its factum, Industrial Alliance pointed out that these included the following:

- Matthew Pendlebury was “at a minimum” an agent of Can-Euro for limited purposes, including as a conduit of important information (Decision, para. 116).

- On May 16, 2009, Industrial Alliance communicated to Can-Euro, through Mr. Pendlebury, that the 4.08% interest rate would be extended until May 23, 2008 (Decision, para. 49, 133). No other promise or assurance was given (Decision, para. 138).

- Industrial Alliance’s failure to provide the mortgage documentation before May 16, 2008 was not an operative cause of the failure of the transaction to close on May 19 (Decision, para. 119). Can-Euro did “little or nothing” to put itself in a position to close on May 19 (Decision, para. 113).

- Can-Euro could not satisfy the pre-funding conditions by May 23, 2008. Industrial Alliance did not prevent or hinder Can-Euro from doing so (Decision, para. 3 & 129).

[6] According to the Chambers judge, Industrial Alliance communicated to Can-Euro an informal waiver of the contractual mechanism setting the interest rate and, when it refused to advance funds of the fixed interest rate, did not breach its contractual obligations to Can-Euro. He found that Industrial Alliance lived up to the only promise or assurance it made to Can-Euro, namely to extend the May 19, 2008 closing date to May 23, 2008. Accordingly, the Chambers judge rejected Can-Euro’s argument based on promissory estoppel. He also found that there was no evidence that Industrial Alliance had, in any way, acted in bad faith.

[7] A close review of the Chambers judge’s findings of fact, inferences drawn from facts, and on matters of mixed fact and law where factual determinations are not readily extricable from questions of law discloses no error so clear or obvious as to be palpable nor one so serious as to be determinative and therefore overriding. No grounds for appellate intervention have been made out.

[8] We would dismiss the appeal and award Industrial Alliance costs in this appeal of $3,500, inclusive of disbursements.

Oland, J.A.

Concurring:

MacDonald, C.J.N.S.

Bateman, J.A.

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Respondent

Revised judgment:	the original judgment has been corrected according to this erratum dated **December 17, 2009**.
Judges:	MacDonald C.J.N.S.; Bateman, and Oland, JJ.A.
Appeal Heard:	November 12, 2009, in Halifax, Nova Scotia
Held:	Appeal is dismissed, per reasons for judgment of Oland, J.A.; MacDonald, C.J.N.S. and Bateman, J.A. concurring. Appeal costs awarded to the respondent of $3,500 inclusive of disbursements.
Counsel:	David G. Coles, Q.C., for the appellant Alexander Beveridge, Q.C., and Ian R. Dunbar, for the respondent

Erratum:

[9] The “Appeal Heard” date on the front page of the original decision is to be corrected to read “November 10" instead of November 12.