

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Wilson Equipment Limited v. Simpson*, 2018 NSSC 323

**Date:** 20181219

**Docket:** Hfx 480246

**Registry:** Halifax

**Between:**

Wilson Equipment Limited

Appellant

v.

Dawson E. Simpson

Respondent

**DECISION**

**Judge:** The Honourable Justice Jamie Campbell

**Heard:** November 26, 2018, in Halifax, Nova Scotia

**Written Submissions:** November 30, 2018, from the Appellant  
December 10, 2018, from the Respondent

**Counsel:** Caitlin Regan-Cottreau, for the Appellant  
Jordan Armstrong, for the Respondent

## **By the Court:**

[1] This is an appeal by Wilson Equipment Limited from a decision of the Small Claims Court. It is not an appeal of the entire decision but relates only to one part.

[2] Wilson is in the business of selling and servicing heavy equipment. The company made a claim against Dawson Simpson who operates a farming and forestry business with his brother, Harold Simpson. In late September 2016, the Simpsons bought from Wilson a Komatsu excavator with specialized attachments equipped to be a forestry harvester. They took delivery of the equipment before the first payment was due, on December 1, 2016. The Simpsons made three payments, in December 2016 and in January and February 2017. It was around that time that things started to unravel. There were service calls to repair the machine. It couldn't be fixed. After February 1, 2017, the Simpsons stopped making payments. The forestry harvester was repossessed in May 2017.

[3] Then the case got to Small Claims Court. Wilson claimed about \$17,000 from the Simpsons. That was made up of three service invoices totalling \$8,552.95 and another \$8,430. That \$8,430 was the amount of a cheque that Wilson had paid to the Simpsons as part of the financing arrangements. The adjudicator found that the amount paid by Wilson to the Simpsons was gratuitous. It was a roundabout way of reducing the purchase price, so the Simpsons would complete the transaction. The parties had, according to the adjudicator, agreed to void the sale transaction. It would be unjust for the Simpsons to then keep the money and he ordered it repaid.

[4] The Simpsons claimed \$25,000 from Wilson for the hours of lost work when the machine was not functioning. The adjudicator dismissed that claim. He determined that there was no evidence to establish the Simpsons lost operational costs or a loss of profit.

[5] That left the issue of the three service invoices.

## **Adjudicator's Decision**

[6] Adjudicator Andrew Nickerson Q.C. did not award Wilson the cost of three invoices for the repair of the machine. It is that aspect of the decision that is the subject matter of the appeal.

[7] The adjudicator determined that the piece of equipment sold by Wilson to the Simpsons did not function as expected by both parties. It was then not fit for

the purpose. There had been an imbalance in the hydraulic pressure to the excavator and the forestry head that was never rectified. Wilson made repeated efforts to fix it, but they were not successful. The adjudicator held that the repairs were done as part of Wilson's effort to fulfill their obligations under s. 17 of the *Sale of Goods Act*. They had to rectify the problems.

[8] The adjudicator found as a fact that the service manager for Wilson, Kevin Malay, offered to send replacement parts and service personnel. There was no clear arrangement about who was to pay for the service. Mr. Malay did not make it a condition that payment would be provided by the Simpsons. The adjudicator found that an objective observer would conclude that the parts and services were being offered as part of Wilson's effort to provide a machine that was capable of performing as expected by both parties. When the Simpsons accepted the service they reasonably expected that they would not have to pay. The adjudicator also noted that Mr. Malay had said to the Simpsons that "we will handle it" and did not mention payment. The adjudicator concluded that there was no contract between Wilson and the Simpsons with respect to the service charges.

[9] Wilson relied on a waiver in a contract that pertained to the financing of the machine. Those sections of the financing agreement say essentially that there are no warranties or agreements unless they are in writing and attached to the agreement. The statutory warranties then do not apply. And any agreement by the service manager to "handle it" would not be binding either. The service manager would have had no authority to alter the contract to impose an obligation on Wilson unless that alteration was in writing. Wilson says that the Simpsons received the service and they should pay for it.

[10] The adjudicator held that the security agreement-conditional sales contract was between Komatsu Financial and Mr. Simpson, not between Wilson and Mr. Simpson. That agreement could not affect the liabilities of Wilson only those of Komatsu. The agreement was purely for the purpose of financing and was not part of the actual sale contract between Wilson and the Simpsons. The contract was to protect Komatsu from representations that may have been made by Wilson and was not intended to protect Wilson from a claim by the Simpsons. The adjudicator held that the agreement did not provide the kind of protection to Wilson that would exclude the operation of the statutory warranties and preclude the ability of the service manager to provide the service at no cost to the Simpsons.

[11] Wilson says that the adjudicator made an error in law when he held that the financing contract was not a written contract between Dawson Simpson and

Wilson. They say that the applicable provisions in that contract provide that the only warranties are those set out in writing in the contract and that the agreement cannot be modified verbally.

## **Issues**

[12] Defining the precise issue to be decided in this case has not been an entirely straightforward exercise. Counsel argued in their first written submissions as to whether the financing agreement was a standard form contract and if so whether surrounding circumstances should be considered in interpreting the contract to determine whether the contract was binding as between Wilson and Dawson Simpson and had the effect of specifically ousting the warranties set out in the *Sale of Goods Act*.

[13] The financing agreement on its face was a contract between Wilson and Dawson Simpson even though it was assigned or was intended to be assigned to Komatsu. Through that contract the parties opted out of the *Sale of Goods Act* warranties and any unwritten agreements. The question is whether the Simpsons are obligated to pay for work that was authorized by Wilson with no agreement from Dawson Simpson or Harold Simpson that they would pay for that work.

## **The Documents**

[14] The first document to consider is a purchase order. That is dated September 30, 2016. It is between Dawson Simpson and Wilson Equipment. It sets out the description of the equipment, the price and the terms for payment. It does not purport to limit the warranties or the liability of Wilson with respect to the sale of the machine. The purchase order provides among other things that the buyer would get a “3 year 5000 hr Powertrain Plus warranty”. There is no copy of that warranty in the Record and no indication as to what that warranty would include. The purchase order is a brief document given that it deals with the purchase of a piece of equipment for \$477,000. The purchase order says that the order is placed by the customer “subject to the additional terms on the reverse side”, which the customer acknowledges having read. There is no information on the Record as to what the terms on the reverse side of the document were or are.

[15] The purchase order is clearly an agreement between Wilson and Dawson Simpson for the purchase of the equipment.

[16] The second document is called a “security agreement-conditional sales contract”. It is a standard form contract prepared by Komatsu International (Canada) doing business as Komatsu Financial. It is for use in all provinces except Quebec. The buyer and seller fill in the form with the required information. Its purpose is to provide for financing of the equipment, but it is also an agreement between Wilson and Dawson Simpson for the purchase of the equipment. The parties are Wilson and Dawson Simpson and there is no reasonable way to interpret the contract otherwise. The buyer acknowledges receipt and delivery of the equipment in good condition from the seller. The agreement makes a number of references to the assignment by Wilson to Komatsu. It says that the agreement “is assigned”, says that the agreement may be assigned and says that the agreement is intended to be assigned.

[17] For an agreement that contains so much impenetrably technical and ostentatiously repetitive language it does seem to lack some consistency. Given how difficult it is to interpret however it may be that it is entirely consistent. It’s just really hard to tell. It is also hard to imagine that anyone, looking for the warranty obligations or the entire lack of warranty obligations of the seller of the equipment would presume that the security agreement – conditional sales contract would be the place to find that information. If they did, they would be confronted with protective legal boilerplate that is capable of translation into some kind of intelligible summary, but not without some effort and legal or commercial imagination.<sup>i</sup>

[18] The adjudicator’s conclusion that it was a financing agreement and not a sales agreement is understandable. The agreement was created for purpose of being assigned to the financing company. The security agreement-conditional sales contract contemplates the assignment to Komatsu and deals primarily with the eventual relationship between the buyer and Komatsu as the financier. The agreement is a financing agreement. The seller, Wilson, signs it almost as a convenience and then assigns it to Komatsu.

[19] But then the document at paragraph 15 contains a provision that on its face appears to be intended to govern the relationship between the buyer and seller as it pertains to the equipment purchased, not the financing of it.

The Buyer agrees that there are no representations, warranties, conditions, or other agreements relating to the Equipment or this Agreement, express or implied, statutory or otherwise, other than as expressly set out herein or attached hereto. The Seller may correct patent errors herein and fill in such blanks as serial numbers, date or first payment and the like.

[20] That paragraph excludes the application of any implied or statutory warranty. The only warranties are those set out in the agreement or attached to it. And there are none. There is the 3-year Powertrain Plus warranty referred to in the purchase order but there is nothing to indicate what that covers. In effect, Dawson Simpson paid \$477,000 for a piece of equipment and had no enforceable warranty other than whatever might be contained in the Powertrain Plus warranty.

### **Interpretation**

[21] The adjudicator found that the security agreement-conditional sales contract was not between Wilson and Dawson Simpson. On that point, I respectfully disagree. The contract sets out who the parties are. They are Wilson and Dawson Simpson. That contract is an agreement that relates to the financing of the equipment. But, the agreement does say that buyer agrees that there are no warranties or other agreements relating to the equipment. That statement is not with respect only to financing. It means what it says. The buyer, here Dawson Simpson, agrees that there are no warranties and no other agreements outside the four corners of the contract.

### **The Invoices**

[22] So, if there are no warranties Dawson Simpson would not be entitled to make a claim against Wilson to have the equipment repaired at Wilson's cost. But that's not exactly what happened here. This is not a warranty claim by Dawson Simpson to have Wilson do repairs or pay for repairs that Simpson had done to the equipment. This is a claim by Wilson to be paid for repairs that they had done to the equipment. The warranty, or absence of warranty, doesn't enter into it.

[23] The adjudicator made an important finding of fact that relates to the work done with respect to the three invoices. He was alert to the significance of that finding and explicitly noted that. There was a dispute ongoing about the fitness of the equipment for the work intended. The adjudicator's factual finding about the fitness of the equipment for the purpose intended supports the reasonableness of the Simpson's position at least that there was something wrong with the equipment. The Simpsons had stopped making payments. Arrangements were made to have work done to repair the equipment. There was some hope that Komatsu might cover it, but neither Dawson nor Harold Simpson considered that they might be responsible to pay for repairs.

[24] The adjudicator noted that Mr. Malay on behalf of Wilson, had said that Harold Simpson asked if these invoices would be paid by warranty after they were rendered. Mr. Malay submitted the invoices to Komatsu and they were not accepted. He did not say that he advised Harold Simpson that if the warranty claims were not paid the Simpsons would be expected to pay them. The adjudicator was adamant about the accuracy of that finding. Harold Simpson said that when he called Mr. Malay, Mr. Malay would always say, “we will handle it”. The adjudicator accepted Harold Simpson’s evidence in that regard.

Of importance for my decision, I have concluded that at all times it was not communicated to Mr. Harold Simpson that if the warranty claims failed that he would be expected to pay. I am satisfied that Mr. Harold Simpson understood based on the statements and actions of Mr. Malay, that the services provided as described in the service invoices in question were being provided as part of the claimant’s efforts to stand behind the products which they sell. (Decision para. 42.)

[25] The Simpsons reasonably assumed that the work was being paid for by Wilson if not covered by Komatsu.

[26] There may be no obligation imposed on Wilson by the contract to pay for the repair work, because they had contracted out of any warranty. If that were the case, had a representative of Wilson told the Simpsons that Wilson would not pay for the repairs, the Simpsons would have no recourse under the terms of the contract to require them to do it, or to require Wilson to pay for work that the Simpsons had contracted with someone else to perform.

[27] When Wilson had the work performed and then sought payment from the Simpsons different considerations applied. The repair work involved a new contractual arrangement. Wilson authorized work to be performed on the equipment. If they sought to impose the obligation to pay for that work on Dawson Simpson, they would have to have Dawson Simpson’s agreement to that. Neither Dawson nor Harold Simpson ever agreed to that. Had the Simpsons been presented with proposition that the work would be done but they would end up paying for it, they could then have refused the work and tried to set aside the contract. They accepted the work as an effort on the part of Wilson to make things right. They did not order the work or accept the work on any reasonable understanding that they would have to pay for it.

[28] The security agreement-conditional sales contract says that there are no agreements outside those expressly set out or attached to the contract, relating to the equipment. Wilson’s authorizing work to be done on the equipment and

requiring it to be paid for by the Simpsons was not an agreement. There was no agreement on anything. That's the point. Wilson had the work done. The Simpson's assumed they would not be paying. And there was never any agreement that they would pay for it. Had Kevin Malay on Wilson's behalf simply made a promise that the work would be done that would be an agreement outside the contract that might well not be enforceable. But, when the work was done, with no agreement from the Simpsons that they would pay for it, they cannot be held liable for the costs that they never approved.

[29] The adjudicator found that Dawson Simpson was not liable for the payment of the three invoices. He is not.

[30] The appeal is dismissed.

Campbell, J.

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<sup>i</sup> Paragraph 1 contains this ponderous sentence: If this Agreement is assigned to KF, then in addition to such retention of title, and in order to secure the payment of all such amounts and all other amounts that may from time to time be owing by the Buyer to KF (which amounts and other amounts are referred to herein as "Obligations") the Buyer hereby grants to the Seller, as trustee for KF, a security interest in, and assigns to the Seller, the Equipment, all goods and chattels which have been or hereafter acquired by the Buyer under contracts which have been or are hereafter assigned to KF, all replacements and substitutions for such Equipment, goods and chattels and all proceeds of any such Equipment, goods, chattels, replacements and substitutions or of any such proceeds, including amounts payable under insurance policies with respect thereto and all proceeds of sales, exchange or other disposition, lease or rental (which Equipment, goods, chattels, replacements, substitutions and proceeds are referred to herein as "Collateral").