IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: Edwards Dean & Company v. University of King's College, 2007 NSSM 61

Date: 20071018
Claim: 237634
Registry: Halifax

Between:

Edwards Dean & Company

Claimant

v.

University of Kings College,
Douglas Taylor and Gerald Smith

Defendants

Adjudicator:	J. Scott Barnett
Heard:	June 20, 2007; last written submission received on August 17, 2007
Written Decision:	October 18, 2007
Counsel:	Thomas J. Singleton, Counsel for the Claimant Edwards Dean & Company Amy E. Higgins, Counsel for the Defendant University of Kings College Defendants Douglas Taylor and Gerald Smith, Not present

By the Court:

[1] **INTRODUCTION**: This is a Claim by Edwards Dean & Company ("Edwards") against the University of King's College ("Kings") for services rendered in connection with the planned creation of a Retirement Compensation Arrangement ("RCA") for certain employees of Kings.

[2] Prior to the RCA being established, Kings indicated that it did not wish to proceed with the establishment of an RCA in accordance with the agreement between the parties.

[3] Edwards then sued Kings seeking payment of two outstanding invoices as well as interest on the sum of the two invoices, less the deposit previously paid by Kings.

[4] Kings has issued a Counterclaim, seeking the return of the deposit.

[5] **BACKGROUND OF THE PROCEEDING**: Unfortunately this matter has been beset by a number of delays and setbacks.

[6] Edwards has been represented throughout by its current counsel. Members of McInnes Cooper initially represented the Defendants.

[7] A hearing in the Small Claims Court was held on March 24, 2005 and October 6, 2005, during which times numerous witnesses and documents were presented to the Adjudicator hearing the matter.

[8] The Adjudicator requested and received written submissions from the parties. He then prepared and filed a lengthy decision on December 12, 2005.

[9] Kings appealed the Adjudicator's decision and Order. In turn, the Adjudicator prepared and filed a detailed Summary Report.

[10] The appeal was heard by Justice Pickup on October 24, 2006 and his decision dated November 17, 2006 is available on QuickLaw: *University of King's College v. Edwards Dean & Co.* [2006] N.S.J. No. 460 (S.C.). He allowed the appeal and referred the matter back to the Small Claims Court for a rehearing before a different Adjudicator.

[11] When the matter came before me, Edwards alleged that counsel for Kings was in a conflict of interest and that McInnes Cooper ought to be removed from the file. Before the Court delivered a decision with respect to whether or not there was, in fact, a conflict that would require the removal of counsel for Kings, McInnes Cooper voluntarily withdrew.

[12] There was a relatively short delay while the new counsel for Kings familiarized herself with the matter and while attempts were made to schedule the rehearing.

[13] I finally heard the matter on June 20, 2007, more than two years after the originally scheduled hearing date in the Small Claims Court.

[14] **ISSUES**: The first issue that arose was the proper scope of the rehearing before me. Counsel for Edwards argued that all issues were open for consideration based solely upon the evidence to be presented to me at the rehearing. Counsel for Kings argued that Justice Pickup's decision simply ordered a rehearing on the issue of the scope of the applicability of the *Trust and Loan Companies Act*, S.N.S. 1991, c. 7, as amended, and that nothing

else ought to be considered. She indicated that no further evidence was necessary.

[15] The second issue was whether or not the agreement between Edwards and Kings was *void ab initio* as a result of illegality.

[16] **SCOPE OF THE REHEARING**: As noted by a brochure prepared by the Court Services Division of the Nova Scotia Department of Justice and dated March 2006, upon hearing an appeal from the Small Claims Court, the Supreme Court may:

a. dismiss the appeal;
b. allow the appeal in whole or in part;
c. require additional materials to be filed;
d. request a restatement of the case from the adjudicator;
e. refer the matter back to the Small Claims Court for rehearing; and
f. award costs.

[17] The contents of the brochure are consistent with the provisions of the *Small Claims Court Act,* R.S.N.S. 1989, c. 430, as amended, and the various regulations thereunder.

[18] In this case, Justice Pickup's Order clearly indicates that Kings' appeal was allowed and that the matter was being referred back to the Small Claims Court for a rehearing before a different Adjudicator.

[19] Although the parties' submissions clearly raised the *Trust and Loan Companies Act* as an issue, and it is therefore difficult to see how the previous Adjudicator could have avoided addressing the statute in his decision, Justice Pickup queried whether or not the Adjudicator ought to have dealt with the statute at all.

[20] Justice Pickup further faulted the Adjudicator for failing to fully explain his reasoning (and to disclose the supporting findings of fact) as to why the Claim would fail if the *Trust and Loan Companies Act* applied.

[21] In the result, Justice Pickup directed a "rehearing" before another Adjudicator. Despite Justice Pickup's statement in his written decision that "the real issue to be determined is the effect of the applicability of the *Trust and Loan Companies Act*", Justice Pickup's Order does not put an express limitation upon the scope of the "rehearing."

[22] In my view, the word "rehearing" means that a new trial or hearing must be held, and that the Adjudicator presiding at the rehearing is not burdened by the findings made by the previous Adjudicator.

[23] As a matter of simple English, the prefix "re" means "again." Moreover, the Canadian Law Dictionary, 2nd ed. (1990) by John Yogis, Q.C. defines "rehearing" as:

> a retrial or reconsideration of the issues by the same court or body in which the suit or matter was originally heard, and upon the pleadings and depositions already in the case.

See also the definition of "rehearing" in Black's Law Dictionary, 8th ed. (2004).

[24] The unanimous decision of the Manitoba Court of Appeal in *Kushnir v. Aleem*, [1993] M.J. No. 240 provides some guidance. The specific issue there was whether it was open to a judge of the Manitoba Court of Queen's Bench to come to a result less favourable to an appellant than that achieved by the appellant in a small claims hearing officer's original decision in the same proceeding. The *Court of Queen's Bench Small Claims Practices Act*, R.S.M. 1987, c. C-285, specifically mandated that an appeal should be by way of a new trial and apparently did not use

the word "rehearing."

[25] As already indicated, I believe that the terms "new trial" and "rehearing" are synonymous.

[26] As succinctly stated by Justice Twaddle:

> As a general rule, the answer has been that an appeal by way of a new trial involves a redetermination of the issues. The second trier of fact need pay no regard to the findings of the first trier of fact and may reach his own determination, even if that means a less favourable result for the appellant. [cites omitted]

[27] I think that the general rule stated by Justice Twaddle should apply here. Further, I believe that a party must raise all claims and defences upon which it wishes to rely at a rehearing, supported by evidence led at that rehearing.

[28] A problem would have inevitably arisen in this case had I accepted Kings' position with respect to the scope of the rehearing.

[29] Justice Pickup notes that not all necessary findings of fact were made to support the previous Adjudicator's conclusion that if the *Trust and Loan*

Companies Act applied, then the Claim would fail. Kings' position would require me to accept the findings of fact previously made by the prior Adjudicator and graft my own findings of fact (based upon evidence presented to me at the rehearing) onto those original findings. Such an exercise would be cumbersome, complicated and confusing. Proceeding in such a manner could create difficulties should a further appeal be filed.

[30] To illustrate the point, what should happen if the findings of fact of the previous Adjudicator conflict with the evidence presented to me? How would I properly resolve variations in the evidence in the two hearings, given that there is no transcript or other recording of the first hearing? Even if a transcript existed, information regarding the demeanour of witnesses during the course of testimony at the first hearing would not be available to me. On an appeal, would the Supreme Court have to review the original decision, the original Summary Report, the second decision and the second Summary Report before being in a position to address the appeal? In my view, these potential difficulties are best avoided by simply treating the rehearing as a trial *de novo*.

[31] At the outset of the rehearing, after hearing from both counsel, I informed

the parties that, in my view, the rehearing constituted a trial *de novo*. I offered the parties an adjournment but both counsel declined my offer. Counsel for Kings made it clear that she did not intend to call any witnesses on Kings' behalf despite my ruling.

[32] Another issue then arose. Neither the Defendant Douglas Taylor nor the Defendant Gerald Smith was present or represented at the rehearing, perhaps because those Defendants had not been involved in the appeal. The previous Adjudicator had dismissed the Claim against those Defendants and Kings had not appealed that portion of the decision.

[33] Rather than face more potential delays to address this issue, Edwards simply withdrew its Claim against the Defendants Douglas Taylor and Gerald Smith at the outset of the rehearing and elected to proceed solely against Kings.

[34] With that, the Claimant opened its case.

[35] After the rehearing was concluded, I requested written submissions from the parties with respect to the defence of contractual illegality. The last written

submission is dated August 17, 2007.

[36] **EVIDENCE, FINDINGS OF FACT AND BASIC POSITIONS OF THE PARTIES PRESENTED AT THE REHEARING**: The evidence upon which Edwards relies was presented to me in a very summary fashion. Only one witness, Michael Edwards, was called to testify. He was able to address all material matters because he acted on the Claimant's behalf in all of the Claimant's dealings with Kings concerning the RCA.

[37] After the examination in chief, Mr. Edwards was cross-examined by counsel for Kings.

[38] No other witnesses were called by either party. Mr. Edwards provided evidence with respect to some but not all of the documents contained in a booklet previously entered as an exhibit in the prior hearing and entered again during the rehearing before me.

[39] It seems possible that the parties could have presented an Agreed Statement of Facts to the Court because, as suggested by Justice Pickup, the main debate

focused on the possible applicability of the *Trust and Loan Companies Act* in the context of the law relating to contractual illegality.

[40] The basic facts, as I find them, are straightforward.

[41] In essence, Kings retained M.L. Edwards Inc. (the predecessor company of Edwards) to create an RCA, a form of private pension plan, for three university employees.

[42] Pursuant to a letter of engagement dated February 16, 2004, and signed by the parties, Edwards agreed to do all necessary research and legal document drafting and to register the RCA with the Canada Revenue Agency ("CRA") prior to March 31, 2004, the last date upon which Kings wanted the RCA implemented and funded.

[43] Moreover, Edwards proposed that an affiliate, EDC Tax and Trust Services Inc. ("EDC"), act as the trustee for the RCA.

[44] The fee to carry out the agreement, exclusive of trustee fees to be paid to

EDC, was $8,500.00, plus Harmonized Sales Tax.

[45] Kings paid a $4,000.00 deposit retainer when the letter of engagement was signed.

[46] The letter of engagement constitutes a legally binding contract. In addition to the previously mentioned terms, the letter of engagement ("the Contract") provides for interest on overdue accounts at a rate of 1½% a month.

[47] With the assistance of its own legal counsel, Edwards proceeded to take the steps necessary to establish the RCA. Draft documentation was prepared and forwarded to Kings and Kings' actuary, Plenus Consulting, for comment.

[48] The parties generated various correspondence, including email, commenting upon suggested changes to the wording used in the RCA documents. There was very little, if any, direct communication between Edwards and Kings; most dealings went through Plenus Consulting.

[49] By letter dated March 25, 2004, Kings informed Edwards, through Plenus

Consulting, that it did not intend to proceed with the establishment of the RCA through EDC.

[50] Among other things, the letter stated:

> The advice that the University has obtained has led to increasing discomfort with the documents provided, to the point where it has been deemed imprudent to pursue the RCA through EDC. Numerous issues were identified, and the lawyer for King's has indicated that it would be more appropriate for him to start over then to comment line by line on the draft agreement.
>
> The concern is that the documents that were provided by your firm to the University are not appropriate for a public institution. The documents appear to have been adapted from forms that do not recognize the distinct nature of the University environment, as opposed to a corporate scenario.
>
> This view is also supported by the presentation of a document in which it is proposed that the University, EDC and three employees enter into an agreement in a three party contract.
>
> The number of issues identified and the nature of these issues led to a lack of confidence that the nature of the arrangement, as intended by the University, was adequately appreciated.
>
> As the documents provided cannot be used by the University, the University has not obtained value in respect of the fees to produce the documents, and anticipates your consideration of this. [emphasis added]

[51] Mr. Edwards testified that, by March 25, 2004, virtually everything that needed to be done in order to establish the RCA had been done, with the exception of Kings' execution of the RCA legal documentation and the sending of the same to the CRA for approval. Similar documentation to establish RCAs for other clients of Edwards had been accepted by the CRA, so there is no suggestion that the CRA would not also have accepted the documentation drafted for Kings in this case.

[52] Mr. Edwards further testified that, before the first Small Claims Court hearing, no one at Kings or Plenus Consulting had ever informed Edwards of the exact nature of any unresolved problems or concerns despite Edwards' previously expressed interest in addressing any such problems or concerns.

[53] According to Mr. Edwards, the issue of EDC's lack of a license to carry on business as a trust company in Nova Scotia pursuant to the *Trust and Loan Companies Act* was not raised until Kings' counsel raised it during his closing comments at the first hearing.

[54] During cross-examination before me, Mr. Edwards conceded that EDC was not licensed in Nova Scotia as a trust company. He also admitted that an implied

term of the contract with Kings was that the RCA documents would comply with all legal and regulatory requirements. He also agreed that no RCA ever came into being in this case as a result of Edwards' efforts.

[55] However, Mr. Edwards noted that EDC was never officially engaged to act as a trustee of the RCA in question nor did it ever issue any invoice to anyone with respect to that RCA. He further stated that other trustees could have been substituted for EDC had that been Kings' real problem concerning the establishment of an RCA through the services of Edwards.

[56] In closing submissions, counsel for Edwards argued that the defence that EDC was not a licensed trust company was an "after the fact rationalization" now employed by Kings as a means of avoiding legal liability.

[57] This appears to have been the conclusion drawn in the prior Adjudicator's decision and referenced at paragraph 26 of Justice Pickup's appeal decision.

[58] Meanwhile, counsel for Kings argued that the Claim must fail because the contractual scheme proposed whereby EDC would act as trustee was illegal

because EDC did not have the necessary license.

[59] As pointed out by Justice Pickup, it is necessary to determine if the *Trust and Loan Companies Act* applies and, if so, its effect with respect to Edwards' Claim and Kings' Counterclaim.

[60] **CONTRACTUAL ILLEGALITY**: It is true that illegality was not pleaded in the Defence filed by Kings nor was it referenced in the correspondence between the parties after the initial RCA documents were drafted.

[61] However, the issue did arise in the examination-in-chief of Mr. Edwards at the rehearing.

[62] Further, while pleadings are important in circumscribing the scope of a Small Claims Court trial, some degree of leniency is nevertheless permitted given the forum.

[63] There can be no question that Edwards was aware, by the time that the matter came before me, that Kings would be raising the issue of contractual

illegality as a defence to the Claim.

[64] The oral and written submissions of both parties canvassed the law with regard to the applicability of the *Trust and Loan Companies Act*. Kings' defence at the rehearing rested solely on the proposition that the statute does apply and that, as a result, Edwards cannot be successful in this Claim.

[65] I therefore consider it appropriate to examine the argument of contractual illegality.

[66] As indicated in the brief filed on behalf of Kings, courts have moved away from the originally more rigid approach of declaring a contract void ab initio because of illegality, however trivial.

[67] Justice Krever made this point in *Royal Bank of Canada v. Grobman et al.* (1977), 83 D.L.R. (3d) 415 (Ont. H.C.) at 432:

> As I understand the evolution of the current law of contract, modern judicial thinking has developed in a way that has considerably refined the knee-jerk reflexive reaction to a plea of illegality.

[68] The same trend can be seen in the decision of the Federal Court of Appeal in *Still v. M.N.R.*, [1997] F.C.J. No. 1622 (C.A.).

[69] Curiously, Kings' argument that the contract in this case was illegal potentially leads Kings' Counterclaim down a doctrinal dead-end. As noted in Cheshire, Fifoot and Furmston's Law of Contract, 15th ed. (2007) at page 490, when a contract is declared *void ab initio* by reason of being illegal,

> [The contract] is totally void and no remedy is available to either party. No action lies for damages, for an amount of profits or for a share of expenses. Thus, in the case of an illegal contract for the sale of goods, the buyer, even though he has paid the price, cannot sue for non-delivery; the seller who has made delivery cannot recover the price.

[70] In short, "[n]either party can recover what he has given to the other under an illegal contract if in order to substantiate his claim he is driven to disclose the illegality.": Law of Contract, supra at page 494.

[71] Applied to the facts of this case, it is possible that if the Contract is illegal, Kings cannot recover the retainer deposit that it paid.

[72] However, I do not need to consider that possibility because of the conclusion

that I have reached in this case.

[73] In addressing the issue of contractual illegality, I believe that it is important to distinguish between illegality as to contractual formation and illegality as to the performance of the Contract.

[74] The decision of Justice Schroeder in *Maschinenfabrik Seydelmann K.-G. v. Presswood Brothers Ltd.*, [1965] O.J. No. 1093 (C.A.) is instructive. Justice Schroeder gives the example of a situation where the parties agree to commit a crime. Such a contract is intrinsically illegal (or "inherently illegal" - see *Beer v. Towngate Ltd.* (1997), 152 D.L.R. (4th) 671 (C.A.)) since it necessarily involves an offence or violation of the law. This represents illegality as to contractual formation.

[75] Illegality as to contractual formation can be contrasted with a contract that, while not inherently illegal, can be illegally performed: see *Still v. M.N.R.*, supra at para. 22.

[76] A very significant presumption of law is available to Edwards in this case.

Specifically, there is a presumption against intended illegality of performance of a contract when a contract is capable of being legally *performed: Re Bank of Western Canada; Genovese v. York Lambton Corp. Ltd.* (1969), 8 D.L.R. (3d) 593, leave to appeal refused [1969] S.C.R. xii.

[77] It is clear that Kings has the burden of proving illegality: *Hire Purchase Furnishing Co. Ltd. v. Richens* (1887), 20 Q.B.D. 387.

[78] In this case, I cannot find that the Contract itself was illegal. There is nothing inherently illegal about one person hiring another to take the steps necessary to establish an RCA.

[79] The complaint that Kings raises now is that the manner in which the Contract was to be carried out was illegal in that the proposed trustee was not licensed as a trust company in Nova Scotia.

[80] Here, Kings committed an anticipatory breach and, if it was concerned about the proposed trustee being licensed as a trust company, it did not advise Edwards of this concern at the time of repudiation. Kings repudiated the contract before it

had been fully performed and before the RCA was actually set up.

[81] In my view, the presumption that the contract was going to be performed in a legal manner should be applied. There is no evidence to the contrary that the proposed trustee (EDC) could not have been licensed as a trust company. Further, there is no evidence that EDC would not have come into compliance with the *Trust and Loan Companies Act* by attaining a license before the RCA was established. In fact, there was no evidence one way or the other as to whether or not steps were being taken by EDC to obtain a license. Neither counsel asked Mr. Edwards about that possibility or about what is required for a company to obtain a license under the *Trust and Loan Companies Act* or how long such a process generally takes.

[82] Kings repudiated the contract before it was fully performed. By letter dated April 6, 2004, I find that Edwards accepted Kings' repudiation and this Claim was the ultimate result.

[83] As a result of Edwards' acceptance of King's repudiation of the Contract, both parties were excused from any further performance, so the fact that EDC was and still remains unlicensed as a trust company is not important.

[84] In short, the presumption must be that, in the absence of any evidence to the contrary, the Contract would have been performed in a legal manner. We must presume that EDC would have been licensed before the RCA was established.

[85] Accordingly, Kings' defence of illegality cannot succeed and its Counterclaim correspondingly fails as well.

[86] Should I be wrong in that regard, I believe that Edwards can nevertheless benefit from the doctrine of severance: see, e.g., Prof. Trakman, "The Effect of Illegality in the Law of Contract: Suggestions for Reform" (1977), 55 Can. Bar Rev. 625 at 641 *et seq.*

[87] Specifically, I believe that the portion of the Contract that proposed EDC as the trustee of the RCA can be severed from the rest of the Contract.

[88] While it is true that an RCA cannot be established without the involvement of a trustee, the actual name of the trustee proposed in the Contract is merely incidental to the performance of the Contract.

[89] If the subparagraph on the first page of the Contract that refers to EDC is deleted and if the portion respecting the annual trust fees payable to EDC is similarly deleted from the second page of the Contract, a valid and legally binding agreement still remains. If references to EDC are removed as indicated, what remains is an agreement between Edwards and Kings whereby for a stipulated fee to be paid by Kings, Edwards agrees to:

a. carry out required tax law, administrative policy and case research as appropriate;
b. provide detailed instructions to legal counsel in order to establish an RCA for three key employees of Kings;
c. review draft legal documentation and advise thereon;
d. arrange the RCA trust registration with Canada Revenue Agency prior to March 31, 2004.

[90] In effect, after severing the allegedly illegal portions of the Contract, and in order to ensure that the RCA documentation complied with all legal and regulatory requirements, the parties could simply have proceeded to select as a trustee for the RCA from any licensed trust company acceptable to Edwards and/or Kings.

[91] As can be seen, while the arrangement of an RCA trust registration with CRA requires that a trustee be involved, the actual name of the proposed trustee was not a critical term of the Contract and the provisions referring to EDC can

easily be removed from the Contract.

[92] The argument of Kings' counsel is that severance is not possible because the identity of the trustee is more than simply incidental. She says that it was "a key component of the RCA that it would be administered by a qualified trustee."

[93] However, Kings' argument confuses the RCA contractual documentation with the Contract at issue in this case.

[94] The identity of the party named as trustee in the RCA contractual documentation is clearly something more than incidental; the identity of a party to a contract is a fundamental term. By the term "RCA contractual documentation," I mean the draft documentation that could have been signed by Kings, the three Kings employees and the trustee so as to establish an RCA. I also agree with Kings' counsel's contention that the proposed RCA could not work without a provision dealing with and identifying a trustee.

[95] With respect, Kings' argument fails to recognize and maintain the distinction between the RCA contractual documentation, that was never executed and upon

which there was never any final agreement, and the Contract between Edwards and Kings.

[96] If the RCA contractual documentation had been executed and EDC was now claiming payment of its fees as trustee of the RCA, then the outcome of this case would undoubtedly be much different. In that circumstance, the legality of the RCA contractual documentation would be in issue.

[97] Indeed, a Claim by EDC for payment of trust fees, if EDC did not have the necessary license, would fall directly within that class of cases where payment of unpaid invoices was denied to unlicensed contractors: see, e.g., *Sprague's Well Drilling Ltd. v. Mills*, [1990] N.S.J. No. 272 (S.C.T.D.) and the case cited by Kings' counsel in her brief - *Kocotis v. D'Angelo*, 1957 CarswellOnt 108 (Ont. C.A.).

[98] In this case, however, it is only the legality of the Contract that is in issue, not the legality of the draft RCA contractual documentation.

[99] In summary, the fact that EDC required a license to act as a trust company

under the *Trust and Loan Companies Act* does not prevent Edwards from being successful in this Claim. Kings' defence of illegality would also fail by reason of the application of the doctrine of severance and its Counterclaim would fail as well.

[100] **DAMAGES**: I now turn to the issue of Edwards' damages. It is clear that Edwards is entitled to sue for damages following Kings' repudiation of the Contract.

[101] It is also clear that the normal rules as to the measurement of loss in breach of contract cases apply here: see Prof. Fridman, The Law of Contract in Canada (5th ed., 2006). Edwards is entitled to be put in the position it would have been in had Kings not repudiated the Contract.

[102] The evidence was that virtually all that needed to be done by Edwards to establish an RCA had been done, so Edwards would not have incurred any more expense had the contract been fully performed by both sides.

[103] Kings had already paid a retainer deposit of $4,000.00, and thus Kings is

required to pay to Edwards the balance of the contractual consideration agreed upon ($5,775.00).

[104] Edwards has been deprived of that sum to which it has been entitled for roughly three and a half years. I allow pre-judgment simple interest for that period of time at a rate of eighteen percent per annum, amounting to $3,638.25.

[105] In addition, Edwards is entitled to reimbursement of the costs of filing the Claim in the amount of $160.00.

[106] **CONCLUSION**: The Claimant Edwards Dean & Company shall have judgment against the Defendant University of King's College in the total amount of

$9,573.25. The Defendant's Counterclaim is dismissed.

Small Claims Court Adjudicator