IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Learning v. Glen Arbour Condominium Inc., 2005 NSSM 16

Claim No.: SCCH 236197
BETWEEN: Date:20050620

Name: **Lisa Learning and Egon Wallet** Claimants

- and -

Name: **Glen Arbour Condominium Inc.** Defendant

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on November 3, 2006.. This decision replaces the previously distributed decision.

Appearances:
Claimant: Eric K. Slone, Slone & Munro
Defendant: Stephen L. Ling, Landry, McGillivray

D E C I S I O N

[1] This matter was heard on February 28th, April 19th and April 20th, 2005. Following the April 20th hearing, written submissions were filed by Mr. Slone for the Claimants, on April 27th, by Mr. Ling for the Defendant on May 5th, 2005, and in response by Mr. Slone on May 11th, 2005.

[2] At the conclusion of the hearing on April 20th and after hearing oral submissions, I gave a brief decision as to the issue of liability. At that time I found, and I do so find, as a fact, that there was mould in the unit in question and that it was caused by an incursion of water. As such, I find that this was a substantial breach and to such a degree that under the law in cases such as ***Monette v. All Season Siding and Carpentry,*** 102 N.S.R. (2d) 389 (c.c.) the Claimants were entitled to terminate the contract.

DAMAGES

[3] The basic principles in a breach of contract case are not controversial. I quote from *Damages for Breach of Contract*, (2nd Ed.), Harvin D. Pitch and Ronald M. Snyder (p 1-1):

> *In contrast, the purpose of a damage award in a contract action is to place the innocent party in the position that party would have occupied had the contract been carried out by both parties. This was explained by the Privy Council in Wertheim v. Chicoutimi Pulp Co. in the following terms:*
>
> > *[1] It is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in fit the contract had been performed.... [T]hat is a ruling principle. It is a just principle.*
>
> . . .
>
> (and, at p. 1.4 et. sec.)
>
> ***2. RELIANCE, RESTITUTION AND LOSS OF BARGAIN: THREE TYPES OF CONTRACT DAMAGES DEFINED***
>
> ***(a) Out-of-Pocket Expenses: Reliance Interest***
>
> *The first type of damages which may be awarded to a plaintiff in a contract action is reimbursement for moneys paid to third parties in expectation that the contract would be honoured. This type of damage was defined as the 'reliance interest' by Professors Fuller and Perdu in their important 1937 article in the Yale Law Journal. They define the 'reliance interest' in these terms:*
>
> > *The plaintiff has in reliance on the promise of the defendant changed his position. For example, the buyer under a contract for the sale of land has incurred expense in the investigation of the seller's title or has neglected the opportunity to enter*

> *other contracts. We may award damages to the plaintiff for the purpose of undoing the harm which his reliance on the defendant's promise has caused him. Our object is to put him in as good a position as he was in before the promise was made. The interest protected in this case may be called the reliance interest.*

For example, a buyer who has entered into a contract to purchase goods from a seller may lease a warehouse in anticipation of delivery. If the vendor breaches the contract and fails to deliver, the buyer will have a claim for reimbursement of these out-of-pocket expenses. These expenses are referred to as the 'reliance interest'.

(b) Restitution Interest

The plaintiff may also be entitled to reimbursement for any moneys paid directly to the defendant in anticipation of a contract being honoured by that defendant. A claim for reimbursement is referred to as the 'restitution interest'. For example, a purchase of real estate who has paid a deposit pursuant to an agreement of purchase and sale may be entitled to restitution through the return of the deposit in the event the vendor fails to close the transaction.

(c) Loss of Bargain

Finally, in a contract case the plaintiff may be entitled to recover the potential profits he or she would have earned had the contract been carried out. This unrealized benefit is referred to as the 'loss of bargain'. As Professors Fuller and Perdue explain:

> *We may seek to give the promisee the value of the expectancy which the promise created. We may in a suit for specific performance actually compel the defendant to render the promised performance to the plaintiff... [and] in*

> *a suit for damages, we may make the defendant pay the money value of this performance. Here, our object is to put the plaintiff in as good a position as he would have occupied had the defendant performed his promise. The interest protected in this case we may call the expectation interest.*
>
> *To illustrate this type of damage, consider the example of a buyer suing the vendor for loss of profits sustained as a result of the vendor failing to deliver goods he has contracted to sell to the buyer. The buyer may have entered into a resale contract in anticipation of delivery through which the buyer stood to make a handsome profit. On non-delivery, the buyer may be required to cancel the resale contract and suffer a loss of potential profits. Subject to issues of remoteness of damages, to be discussed later in this text, the buyer would be entitled to claim the loss of profits based upon the loss of bargain.*

Applying those principles to the facts as hand I make the following comments.

Deposit

[4] The evidence clearly establishes that a deposit of $10,000.00 was paid. Clearly, this is to be returned by the Defendant to the Claimants.

Golfing Privileges

[5] The evidence shows that $5,000.00 was paid by the Claimants to Annapolis Group for golfing privileges for the 2004 golf season. This amount, while paid to Annapolis Group, would, under the contract between the Claimants and the Defendant, have been credited on the closing. However, if the closing did not take place, the $5,000.00 was absolutely non-refundable as between the Claimants and Annapolis Group.

[6] With respect, the fact that there is no privity of contract between the Claimants and the Defendant with respect to the payment of golfing privileges is, in my opinion, beside the point.

[7] This type of payment falls under what, in the reference above, would be considered a "*reliance interest*". I fully accept the Claimants only made this payment on the belief that the closing would take place and would not otherwise have paid this amount or the $575.00. It seems to me that any payment or expense incurred to a third party made in reliance on the contract closing between the parties to the contract, is, at least as a general principle, recoverable as against the defaulting party.

[8] As I understand the principle, the fact of whether or not the Defendant received any benefit from a third party contact is wholly irrelevant to the issue.

[9] At the same time, it seems to the loss of the Claimants must be reduced somewhat by the benefit that they did enjoy from the expense. I accept Mr. Slone's information and consider it to be a reasonable estimate of the "value received".

[10] I will allow $4,075.00 as the claim under this heading.

Lighting, Spice Rack and Carpet

[11] I do not think the Claimants have established on a balance of probabilities a loss of $1,200.00. I accept the figure referred to in Mr. Ling's letter of $820.00. However, I do think the Claimants are entitled to claim for the Wacky's invoice as it would appear that Wacky's has a legitimate legal claim against the Claimants. Therefore, in total I will allow $1,339.70.

COSTS

[12] Section 29(2) of the Nova Scotia *Small Claims Court Act* states:

> *No costs other than those authorized by this Act or the regulations may be awarded by an adjudicator.*

Regulation 15(1) and (2) read as follows:

> ***15(1)*** *The adjudicator may award the following costs to the successful party:*
>
> ***(a)*** *filing fee;*
> ***(b)*** *transfer fee;*
> ***(c)*** *fees incurred in serving the claim or defence/counterclaim;*
> ***(d)*** *witness fees;*
> ***(e)*** *costs incurred prior to a transfer to the Small Claims Court pursuant to Section 10;*
> ***(f)*** *reasonable travel expenses where the successful party resides or carries on business outside the country in which the hearing is held;*
> ***(g)*** *additional out of pocket expenses approved by the adjudicator.*
>
> ***(2)*** *No agent or barrister fees of any kind shall be awarded to either party.*

Account of Burke Thompson

[13] The account of Burke Thompson dated November 24th is, in my view, more in the nature of costs than damages. As such, in my view, it would not be allowable under Regulation 15(2).

Tupper and Thorpe Reports and Invoices

[14] In aggregate, these expenses are quite significant: $8,500.00. They are in the nature of costs and to be allowable must fall under Regulation 15 and, in particular, Regulation 15(1)(g) or (d). Typically the allowed disbursements in Small Claims Court are, in relative terms, modest. However, I am aware of no Supreme Court Authority and have not been referred to any which would purport to limit the "out-of-pocket expenses" in 15(1)(g) to a "modest" level.

[15] Accordingly, I think the guiding principle in respect of experts' reports is to consider the degree to which they assist the Court in arriving at the decision. The Thorpe and Tupper reports and Mr. Tupper's evidence were all significant pieces of evidence in arriving at the conclusion that the mould was a significant issue and, that it was caused by the incursion of water. This was a significant factual issue which, in the absence of the reports, could well have been found against the Claimants. Accordingly, it seems that it was necessary evidence and certainly helpful to the Court and the case.

[16] Mr. Ling seems to make the point that only reports commissioned for litigation purposes should be recoverable. No authority has been cited for that proposition and I am not sure that the principle ought to be that strict. It seems to me, for example, that if a report was commissioned prior to contemplation of litigation but ended up being used as part of the litigation and is usefully part of the litigation, then it ought to be allowed as an expert's report.

[17] Using that approach, I would conclude that the experts' invoices should be allowable.

Filing and Process Fees

[18] The Claimants are entitled to the filing fee of $160.00, together with the process server fee of $50.00.

Prejudgment Interest

[19] I accept the submission that pre-judgment interest should be allowed at the rate of 4% .

Summary

[20] In summary, the Claimants claim is allowed as follows:

Deposit:	$10,000.00
Golfing Privileges:	4,075.00
Spice Rack/Carpet:	1,339.70
Total	15,414.70
Capped at jurisdictional limit	15,000.00
Prejudgment Interest @ 4% for 10 mths: (Sept 1, 2004 - June 30, 2005)	500.00
Experts' Fees :	8,511.99
Filing & Process Fees:	210.00
Total:	**$ 24,221.99**

Disposition

[21] **IT IS ORDERED** therefore that the Defendant pay to the Claimants:

Debt:	$15,000.00
Prejudgement Interest	$500.00
Costs:	$8721.99
Total:	**$ 24,221.99**

DATED at Halifax, Halifax Regional Municipality, Nova Scotia on June 20, 2005.

Michael J. O'Hara
Adjudicator

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