Date: 1999 01 11
Docket: CV 07618

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

YELLOWKNIFE CONDOMINIUM CORPORATION NO.7

Appellant

- and -

CREATIVE SPIRIT LTD.

Respondent

Appeal from a finding by trial judge that a painting contract was frustrated and at an end. Appeal dismissed, with costs.

Appeal heard: October 21, 1998

Reasons filed: January 11, 1999

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E.RICHARD

Counsel for Appellant: Elizabeth Hellinga

Counsel for Respondent: Sarah E. Kay

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REASONS FOR JUDGMENT

[1] This dispute involves a painting contract between an owner and a contractor. There was only part performance, and then the parties litigated in Territorial Court. The trial judge found in favour of the contractor, and in doing so held that the contract had become frustrated. The owner appeals the trial judge's decision to this Court, pursuant to a general right of appeal in s.18 of the *Territorial Court Act*, R.S.N.W.T. 1988, ch.T-2. On this appeal the owner alleges error in the application of the law regarding frustration of contracts, and other error.

[2] The owner is a condominium corporation in connection with a 19-unit residential project constructed in 1989. At the outset of the project the corporation budgeted the sum of $40,000.00 for the exterior painting of the residential units which painting was expected to be required some years in the future; e.g., 1996 or 1997. The trial judge found that this figure of $40,000.00 was an artificial figure in the sense that it was not based on any cost analysis. There was evidence at trial to support this finding.

[3] In 1996 the owner tendered the painting contract; however, only one bid was received and that was in the amount of $100,000.00. The owner did not accept that offer.

[4] In 1997 the owner again invited bids from painting contractors and four were received. All exceeded $40,000.00. The owner decided to negotiate with the two lowest bidders or contractors with the objective of bringing the contract amount under the budget figure of $40,000.00. One of these contractors was the respondent Creative Spirit Ltd., and these negotiations led to the contract which is the subject of this appeal.

[5] In its invitation for bids (trial exhibit 1), the owner required the bidder to quote a total price for the work and also a breakdown of the total price into five specific components. In its original bid dated May 6, 1997, the respondent Creative Spirit Ltd. quoted a total price of $44,260.35, broken down into components as follows:

Building No.1 (units 7-10)	$ 9,309.00
Building No.2 (units 17-19)	8,008.95
Building No.3 (units 11-16)	10,625.10
Building No.4 (units 1-6)	11,208,25
Fencing and utilidors	5,109.25
	$44,260.35

[6] In this offer (which was not accepted) the contractor was to provide labour, materials and equipment.

[7] In the contract (trial exhibits 3 and 4) which was eventually negotiated between the appellant and respondent, the respondent as contractor was to provide labour only. The owner was to supply all materials and equipment, subject to a maximum cost of $9,165.22 which figure the owner says was based on Creative Spirit's estimate of the quantity of paint which would be required. The contract provided that any additional paint required to complete the contract would be the responsibility of the contractor.

[8] The price for the contractor's labour was set at $29,371.50, broken down as follows:

Building No. 1 (units 1-6)	$ 7,597.00
Building No.2 (units 7-10)	6,045.50

Building No.3 (units 11-16)	7,490.00
Building No.4 (units 17-19)	5,778.00
Fencing and utilidors	2,461.00
	$29,371.50

[9] Together with materials and equipment at $9,165.22, the owner's total cost was thus to be $38,536.72.

[10] Although the contract was signed June 3, 1997, the contractor had already commenced the work. It started with the "fencing and utilidors" component and invoiced the owner $2,461.00. The owner inspected this work, pointed out some deficiencies. These were completed to the satisfaction of the owner and the invoice was paid.

[11] The contractor next turned to building No.4 (units 17-19). During the execution of this component of the work the contractor came to realize that there would not be enough paint to properly complete the entire contract (i.e., to meet the specified standard in the contract document) and also that there would be many more hours of labour than anticipated, involved in properly completing the work. The materials budget of $9,165.22 included provision for only one coat of paint. During the painting of building No.4, it became evident to the contractor that one coat of paint was inadequate to meet the standard of refinishing stipulated by the contract. Parts of building No.4 received three coats of paint. Forty percent of the paint budget was used up for building No.4 (i.e., on three units out of a total of 19 units).

[12] Upon completion of building No.4, the contractor requested the owner to increase the materials budget and also to increase the labour budget. The owner refused. The contractor invoiced the owner $5,778.00 for building No.4 and decided not to proceed with the remaining portions of the work under the existing contract. The owner refused to pay the invoice of $5,778.00. The contractor sued in Territorial Court (not for the entire $5,778.00, but only for $4,230.00 which represented the contractor's actual out-of-pocket expenses for hired help, and nothing for profit or for the principal Brian MacDonald's own time on the job). The owner counter-sued for damages for breach of contract.

[13] The doctrine of frustration developed in English law over decades and centuries. It was first introduced to cover situations where the physical subject matter of the contract has perished; e.g., by fire. It was eventually extended to cases where, without such physical destruction, the commercial adventure envisaged by the parties was

frustrated. See *Chitty on Contracts*, 26th ed., p.1015; and Fridman, *The Law of Contract in Canada*, 3rd ed., p.639.

[14] When the Court finds that a contract has become frustrated, the Court imposes upon the parties "the just and reasonable solution that the new situation demands". *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.*, (1975) 9 O.R.(2d) 617 (Ont.C.A.).

[15] The basis of the doctrine of frustration is impossibility.

> ...So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do. ...But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.
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> *Davis Contractors Ltd. v. Fareham U.D.C.*
> [1956] A.C. 696 (H.L.)

> It is clear from the authorities that hardship, inconvenience or material loss or the fact that the work has become more onerous than originally anticipated are not sufficient to amount to frustration in law so as to terminate a contract and relieve the parties thereto of their obligations to each other... Courts have, however, interpreted impossibility of performance to encompass not only absolute impossibility but also impossibility in the sense of impracticability of performance due to extreme and unreasonable difficulty, expense, injury or loss.
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> *Kesmet Investment Inc. v. Industrial Machinery Company Ltd.*, (1985) 70 N.S.R.(2d) 341 (N.S.C.A.)

[16] In the present case the trial judge's determination that the contract had become frustrated had its foundation in certain findings made by the trial judge: (a) the owner's budgeted figure of $40,000.00 was totally artificial and not related to the cost of the work, (b) the actual absorption rate/process of the paint by the buildings' exterior, experienced during the painting of the first building, was not anticipated, (c) there was no trial evidence that a journeyman painter can determine in advance by a visual inspection

how many coats of paint will be required, and (d) the contract "is just not going to work at $40,000.00". He stated, "You can't get a Cadillac for a hundred dollars." These were findings of fact available to the trial judge on the evidence at trial. On these findings it was open to the trial judge to conclude that the contract had become impossible to perform and was frustrated. No error of law was made in reaching this conclusion and hence this Court on appeal ought not to interfere.

[17] Frustration brings a contract to an end and releases both parties from any further performance of the contract. However, there are certain legal consequences which flow from frustration, because of the enactment of the *Frustrated Contracts Act*, R.S.N.W.T. 1988, ch.F-12. Relevant provisions from this statute are:

> s.2(1) This Act applies to a contract governed by the law of the Territories where the parties are discharged because the contract has become impossible to perform or has been otherwise frustrated.
>
> . . .
>
> s.5(1) If, before the parties were discharged, a party has obtained a valuable benefit other than a payment of money by reason of anything done by another party in connection with the performance of the contract, the court, if it considers it just having regard to all the circumstances, may allow the other party to recover from the party benefitted the whole or part of the value of the benefit.
>
> . . .
>
> s.8 Where it appears to the court that part of a contract
> (a) wholly performed before the parties were discharged, or
> (b) wholly performed except for the payment in respect of that part of money the amount of which is or can be ascertained under the contract,
> can be severed from the remainder of the contract, the court shall treat that part of the contract as a separate contract that has not been frustrated and shall apply this Act only to the remainder of the contract.

[18] The trial record does not indicate that the statute was raised before the trial judge. If it had been, it would have been open to the trial judge, on the findings he made on the evidence, to (pursuant to the statute):

(i) discharge both the owner and the contractor from further performance of the contract after the point of frustration; i.e., after completion of the first building -- this could lead to a dismissal of the owner's counterclaim for breach of contract;

(ii) sever the "fencing and utilidors" component and (possibly) the "building No.4" component of the contract from the remainder of the contract, and

(iii) allow the contractor to recover from the owner the value of the benefit obtained by the owner (the satisfactory painting of building No.4) prior to the discharge of the parties.

[19] In any event, the trial judge reached the same result. He held that further performance of the contract was frustrated and that its component parts were severable. He awarded restitution to the contractor for the completed building No.4 on the basis of *quantum meruit* (which award has essentially the same objective as s.5 of the statute). And he dismissed the owner's counterclaim, on the basis that the owner had not suffered any loss as a result of the contractor's alleged breach of its contractual obligations to complete the work. Again, this was a factual finding (no loss suffered) that was open to the trial judge on the evidence.

[20] The owner advanced various grounds of appeal in this Court; however, the central one is the trial judge's use of the doctrine of frustration. In my respectful view the other grounds fall with the failure of the central ground of appeal. As I have already discussed, the conclusion that the written contract had become frustrated or commercially impracticable was one that was, in law, available to the trial judge.

[21] The owner argued, both at trial and here, that the contractor breached the remaining parts of the contract, and committed a "fundamental breach" in its failure to complete the contract. The answer is that frustration has relieved the contractor from those further obligations. As those alleged breaches are the basis of the owner's counterclaim, the counterclaim is properly dismissed.

[22] It was argued on behalf of the owner, both at trial and here, that the contract was not severable. The trial judge looked at the terms of the written contract and determined that the contract was easily severable into distinctive components, especially given the express listing of five separate components and a price attached to each. There is no error there. In addition, I note that in exhibit 1, the owner's Request for Quotation document to be utilized by prospective bidders including the respondent, the owner lists

the five specific components and above this list is stated, “The contractor is advised that the owner may proceed in stages completing none, one, several or all components of the work. Provide break-out prices for the following components of the work.” Having reserved the option of severance to itself, the owner can hardly be heard to say that the contract does not have the characteristic of severability.

[23] Further, although the trial judge did not expressly utilize the provisions of s.8 of the *Frustrated Contracts Act*, there is additional statutory authority found there for precisely what the trial judge did.

[24] For these reasons, the appeal is dismissed. The contractor shall be entitled to its costs of the appeal.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
11th day of January 1999

Counsel for Appellant: Elizabeth Hellinga
Counsel for Respondent: Sarah E. Kay

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