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THE SWAN GROUP INC. V. BISHOP, AB CA, 2013 JANUARY 28

CONTRACTS -- REAL PROPERTY -- CONDITIONS PRECEDENT -- DEPOSITS -- DAMAGES

Appeal from a decision that allowed an appeal from a Master's decision that had granted summary judgment to Swan Group. HELD: Appeal allowed.

The countervailing claims by Swan Group and Bishop related to an agreement for the sale by Swan Group to Bishop of a residential condominium unit and an accompanying parking condominium unit located in Canmore (the "property"). Bishop paid to Swan Group a deposit of $130,485.00 against a total purchase price, including G.S.T. at 6%, of $ 922,094.00. The Master and chambers judge were correct that the precise question of true condition precedent can be decided summarily in this case: Tottrup v Clearwater (Municipal District No 99), 2006 ABCA 380 at para 11, 401 AR 88. Nonetheless, to do so was not advantageous to these proceedings as a whole.

The interpretation and application of contract principles to a settled set of facts is a question of law reviewed for correctness: Spartacus Holdings Ltd v Building 400 Ltd, 2011 ABCA 18 at para 7, 100 RPR (4th) 1; Diegel v Diegel, 2008 ABCA 389 at para 20, 100 Alta LR (4th) 1. The difference between a "condition precedent" and a "true condition precedent" was defined in Turney v Zhilka, [1959] SCR 578 at 583-84, 18 DLR (2d) 447 as follows: The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party - the Village council. This is a true condition precedent - an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur. The "time of essence" clause is part of the contract and, along with the other parts of the contract, the words are relevant considerations: see e.g. BG Checo International Ltd v British Columbia Hydro and Power Authority, [1993] 1 SCR 12 at 23, 99 DLR (4th) 577.

The Developer's Condition here is not the same as the clause discussed in Leasing Group Inc. v Prospect Developments (2003) Inc., 2011 ABCA 83, 41 Alta LR (5th) 377, nor, for that matter, is it like the clause in Kempling v Hearthstone Manor Corp. (1996), 184 AR 321, 41 Alta LR (3d) 169. In particular, there is no indication in this case that failure to meet this condition would cause the agreement to be "null and void".

Returning to the agreement itself, the Developer's Condition is worded as an obligation of the vendor under the agreement. It did not by its terms suggest that the involvement of an uncontrolled third party could frustrate the ability of either the vendor or the purchaser to complete the agreement, let alone roll back what had already happened. The law should attempt to assist parties to carry out their original intentions and agreements, not to bust them. By analogy to what Lord Wright said in Hillas & Co Ltd v Arcos Ltd (1932), 147 LT 503 at 514 (UKHL), albeit in the context of commercial interpretation of " inartistic language", a "court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereatâ. Analogously, this Court said in Sumner v PCL Constructors Inc, 2011 ABCA 326 at para 60, 515 AR 231, leave to appeal to SCC denied, [2012] SCCA No 32 (QL) that "[b]reaches of procedural provisions in private contracts do not render subsequent actions "null and void": Dunsmuir v New Brunswick, 2008 SCC 9, at paras 81-2, [2008] 1 SCR 190; Alberta Health Services (Calgary Area) v Health Sciences Association of Alberta (Paramedical Professional Technical Unit), 2011 ABCA 306 at para. 22."

Certainly, it is not the role of the court to invent terms and construct an agreement that the parties did not make, particularly where what the parties purported to have agreed to is so nebulous that it cannot be understood, let alone enforced: Ko v Hillview Homes Ltd, 2012 ABCA 245, leave to appeal to SCC refused, [2012] SCCA No 445 (QL).

The principles for distinguishing between conditions precedent which are not true conditions precedent were articulated in Wiebe v. Bobsien (1984), 59 B.C.L.R. 183 (S.C.), aff'd 64 B.C.L.R. 295 (C.A.).

The Master went on to conclude that even if the Developer's Condition allowed Bishop to treat himself at that stage as discharged from further performance under the contract, Bishop chose prior to closing to not treat himself as discharged from the contract; instead, he sought an extension of the closing date by letter as a matter of "jockeying". The difficulty with these positions is that they turn on evidence, not exclusively on interpretation of the documents. Questions of waiver, or estoppel, or, for that matter, whether the parties agreed to modify the contract were not things which could be decided by summary judgment on the record provided to this Court or the courts below. The Master found Swan Group entitled to keep the deposit and to sue for damages based on Bishop's failure to complete on the final closing date specified. But that approach presumed there was nothing else about the contract that gave rise to an ability on the part of Bishop to resist the claims of Swan Group, in whole or in part, or to seek relief from forfeiture or to cross-claim. Other issues in this case may still need to be determined. There must be a trial.

This Court recently counseled against separating issues in matters more conveniently tried in one piece: Gallant v Farries, 2012 ABCA 98, 522 AR 13.

R. V. ANGELIS, ON CA, 2013 FEBRUARY 1

CRIMINAL LAW -- MURDER -- MANSLAUGHTER -- SELF DEFENCE -- PROVOCATION -- POST-OFFENCE CONDUCT

Appeal from a conviction on a charge of second degree murder. HELD: Appeal allowed.

The trial judge erred by refusing to leave the defence of provocation with the jury

From the statutory definition, it is evident that provocation has both an objective and subjective element. The Supreme Court considered these elements in R. v. Tran, 2010 SCC 58, [2010] 3 S.C.R. 350, at para. 23, citing with approval the following passage from Cory J.'s majority judgment in R. v. Thibert , [1996] 1 S.C.R. 37, The trial judge's ruling is wrong in law. The air of reality test requires a trial judge to leave a defence with a jury where there is evidence upon which a "reasonable jury acting judicially" could find that it succeeds: R. v. Tran , at para. 41. In making this determination, a trial judge must examine "the totality of the evidence": R. v. Krasniqi , 2012 ONCA 561, 295 O.A.C. 223, Although an accused's testimony is an important consideration in assessing the viability of a provocation defence, the trial judge should always consider any other evidence capable of supporting an inference of sudden rage or loss of control.

The Crown's argument that the appellant became enraged immediately before or during the struggle suggests that there was some evidentiary basis for finding that he was provoked. The Crown cannot have it both ways. It cannot go to the jury and argue that the appellant killed his wife because he became suddenly enraged, and yet object to the defence of provocation being left with the jury. That is simply unfair. Apart from the Crown's position, there was evidence, both direct and circumstantial, from which a jury could conclude that the subjective element of provocation was made out.

The trial judge erred by telling the jury that they could infer from the appellant's post-offence conduct that he had the intent to kill his wife. The appellant that the error was neither harmless nor the result of a tactical decision by defence counsel. An accused's post-offence conduct is generally admissible to show that the accused acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person: R. v. Peavoy (1997), 34 O.R. (3d) 620 (C.A), at p. 629.

Post-offence conduct is not subject to blanket rules. It is circumstantial evidence whose probative value depends on the nature of the evidence, the issues at trial and the positions of the parties. the trial judge should not have invited the jury to use the appellant's post-offence conduct to infer the level of his culpability - to infer that he was guilty of murder, not manslaughter.