COURT OF APPEAL FOR ONTARIO

CITATION: Beatty v. Wei, 2018 ONCA 479
DATE: 20180524
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2018 ONCA 479 (CanLII)

Pepall, Hourigan and Brown JJ.A.

BETWEEN

Jonathan Beatty and Jacqueline Beatty

Applicants (Appellants)

and

Zhong Wei and Re/Max Premier Inc.

Respondents (Respondents)

AND BETWEEN

Zhong Wei

Applicant (Respondent)

and

Jonathan Beatty, Jacqueline Beatty, Harold Balchand and Re/Max Premier Inc.

Respondents (Appellants)

John Lo Faso and David Morawetz, for the appellants Jonathan Beatty and Jacqueline Beatty

Patrick Bakos and Shida Azari, for the respondent Zhong Wei

Heard: January 26, 2018

On appeal from the judgment of Justice Peter J. Cavanagh of the Superior Court of Justice, dated June 5, 2017, with reasons reported at 2017 ONSC 3478, and from the costs order, dated August 25, 2017, with reasons reported at 2017 ONSC 5086.

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BROWN J.A.:

I. OVERVIEW

[1] This appeal puts into question the interpretation of an illegal substances clause commonly used in the Ontario Real Estate Association/Toronto Real Estate Board Agreement of Purchase and Sale. At issue is the second part of the clause where the seller represents and warrants that "to the best of the Seller's knowledge and belief, the use of the property and the buildings and structures thereon has never been for the growth or manufacture of illegal substances."

[2] In the present case, after the parties had entered into their agreement of purchase and sale, the purchaser, through his own inquiries, discovered that the property had been used as a marijuana grow-op before the sellers had acquired it. The purchaser took the position that he was entitled to terminate the agreement; the sellers disagreed. Competing applications ensued. The application judge held that the purchaser's discovery of information about the property's prior use amounted to a breach by the sellers of their representation and warranty in the clause. The application judge held the purchaser was entitled to rescind the agreement and obtain the return of the deposit.

[3] For the reasons set out below, I conclude the application judge erred in reaching that conclusion. I would allow the appeal.

II. THE TRANSACTION

[4] The parties entered into a standard form Ontario Real Estate Association/Toronto Real Estate Board Agreement of Purchase and Sale dated May 15, 2016 (the "APS") under which Zhong Wei (the "Purchaser") agreed to purchase from Jonathan and Jacqueline Beatty (the "Sellers") a residential property at 39 Stainforth Drive, Toronto, for the purchase price of $916,000. The Purchaser submitted a deposit of $30,000. Closing was scheduled for August 22, 2016.

[5] The APS consisted of a standard, pre-printed section, to which were attached two schedules. The Purchaser added to his offer a Schedule A, which contained additional terms he proposed. The Purchaser was also directed to attach a Schedule B, which contained additional terms. Schedule B originated with the Sellers' real estate agent, and any purchaser who wished to submit an offer for the property was directed to include the Sellers' Schedule B in his offer.

[6] The Purchaser did so. Although the record is not clear about the precise sequence of events that followed, some of the additional terms proposed by the Purchaser on his Schedule A, including a home inspection clause, were deleted.

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In the result, the Purchaser accepted those deletions and the parties executed the APS.

[7] Schedules A and B formed part of the APS. Both contained, as an additional term, an identical illegal substances clause (the “Illegal Substances Clause” or the “Clause”), which stated:

> The Seller represents and warrants that during the time the Seller has owned the property, the use of the property and the buildings and structures thereon has not been for the growth or manufacture of any illegal substances, and that to the best of the Seller’s knowledge and belief, the use of the property and the buildings and structures thereon has never been for the growth or manufacture of illegal substances. This warranty shall survive and not merge on the completion of this transaction.

[8] About a month after the execution of the APS, the Purchaser’s real estate agent conducted internet searches and came across information that suggested the property had been used as a grow-op before being purchased by Jonathan Beatty. Subsequently, the Toronto Police Services confirmed to the Purchaser that in 2004 the property had been used to produce marijuana. By letter dated July 8, 2016, Purchaser’s counsel conveyed this information to the Sellers’ counsel and stated: “As a result of the stigma from the fact the home was a previous marijuana facility, my client is not willing to complete the transaction and demands return of his deposit.”

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[9] The Sellers refused to terminate the APS. Instead, they commenced a July 26, 2016 application seeking: declarations that the Purchaser had breached a binding APS by refusing to close; the forfeiture of the deposit to them; and damages for any loss they might suffer as a result of the delayed re-sale of the property.

[10] The Purchaser commenced a competing application on September 14, 2016 seeking a declaration that he was not required to complete the purchase of the property, together with the return of the deposit and damages resulting from the Sellers' breach of the APS.

[11] The Sellers ultimately sold the property to another purchaser for $86,100 less than the price stipulated in the APS.

III. THE REASONS OF THE APPLICATION JUDGE

[12] The applications were heard together. The application judge dismissed the Sellers' application but granted the Purchaser's. The application judge held that the Purchaser was entitled to rescind the APS and to the return of the deposit. The application judge directed that the Purchaser's claim for damages proceed to trial.

[13] In his analysis, the application judge divided the Illegal Substances Clause into a separate "representation" and "warranty".

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[14] When he considered the “warranty”, the application judge accepted that the words “to the best of the Seller’s knowledge and belief” meant that “the Sellers did not warrant the absolute truth of the statement that the Property has never been used for the growth or manufacture of illegal substances”: para. 18.

[15] However, he viewed the effect of those words differently when considering the “representation” in the Clause. He treated those words as “a statement of a present fact, to the best of the Sellers’ knowledge and belief, that was intended to be relied upon when made and one upon which the Purchaser was entitled to continue to rely, at least until closing, while the APS was an executory contract”: para. 20.

[16] As a result, he found that the Purchaser’s discovery after the execution of the APS that the property previously had been used to grow marijuana and the Purchaser’s communication of that information to the Sellers meant the Sellers’ representation was false. He reasoned that since the Sellers would be obliged to disclose such information if they discovered it after signing the APS, then upon acquiring the information from the Purchaser, “the Sellers could no longer honestly give the representation in the Illegal Substances Clause.” The application judge found that the Purchaser was induced to enter into the APS on the basis of the Sellers’ misrepresentation, as a result of which the Purchaser could rescind the APS.

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[17] By order dated August 25, 2017, the application judge awarded the Purchaser costs in the amount of $26,436.43.

IV. POSITIONS OF THE PARTIES

The Appellant Sellers

[18] The Sellers submit the correctness standard applies to the interpretation of the Illegal Substances Clause because it forms part of a standard form contact widely used in Ontario residential real estate transactions.

[19] They contend that whether the Illegal Substances Clause is regarded as a warranty or representation, under its language the relevant state of knowledge and belief of the Sellers was that existing at the date of the execution of the APS, not at the date of closing as found by the application judge. At the date of execution, the Sellers did not know about the property's prior use as a marijuana grow-op, so no breach of the Illegal Substances Clause occurred.

The Respondent Purchaser

[20] The Purchaser contends a deferential standard of review applies to the application judge's interpretation of the Illegal Substances Clause because facts regarding his reliance on the Clause and its materiality are essential to the interpretive exercise. As well, the provisions contained in Schedules A and B were the subject of extensive negotiations between the parties, thereby taking those provisions out of the category of standard form contractual terms. The

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dispute is of little precedential value and the interpretation depends on a unique set of facts that would not give rise to a broader precedent. In any event, the Purchaser submits the application judge arrived at the correct interpretation.

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[21] In the Purchaser's submission, the application judge's conclusion that the representation in the Illegal Substances Clause continued through to closing was supported by the language in the clause that the warranty survived and did not merge on the completion of the transaction. To interpret the clause in the manner suggested by the Sellers would render it almost meaningless. Once the Sellers were made aware of the marijuana grow operation by the Purchaser, they could no longer honestly make the representation and warranty.

V. STANDARD OF REVIEW

[22] In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, the Supreme Court recognized an exception to the principle in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal: "[W]here an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review": para. 24.

[23] Such is the case with the Illegal Substances Clause in the APS. The pre-set portion of the APS indisputably constitutes a standard form contract. The evidence discloses that the Illegal Substances Clause is a standard provision commonly used in residential agreements of purchase and sale in the Toronto region: the Purchaser's Schedule A, and the Sellers' Schedule B, each contained an identical Illegal Substances Clause; an identical clause was found in the 2009 agreement under which Jonathan Beatty had acquired the property; and the other two 2016 offers entertained by the Sellers also contained identical Illegal Substances Clauses.

[24] There is no meaningful factual matrix specific to the parties that could assist interpreting the Illegal Substances Clause: the Purchaser included the clause in Schedule A to his offer and attached the Sellers' Schedule B that contained the identical clause.

[25] Finally, given that the Illegal Substances Clause is commonly used as an additional term in the Ontario Real Estate Association/Toronto Real Estate Board Agreement of Purchase and Sale, the interpretation of the clause has precedential value. Regardless of whether the pending decriminalization of the possession of marijuana in certain circumstances will necessitate modifications to the clause, until that time there is precedential value in interpreting this widely-used clause.

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[26] In those circumstances, I conclude the interpretation of the Illegal Substances Clause is best characterized as a question of law subject to correctness review.

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VI. INTERPRETATION OF THE ILLEGAL SUBSTANCES CLAUSE

[27] I shall consider the issues concerning the interpretation of the Illegal Substances Clause in the following order:

(i) The application judge's differentiation of the "representation" from the "warranty" in the Clause;

(ii) The application judge's reliance on a duty to disclose to inform his interpretation of the Clause;

(iii) The guidance other provisions in the APS offer to the interpretation of the Clause; and

(iv) The effect of the "survives closing" language at the end of the Clause.

(i) The application judge's differentiation of the "representation" from the "warranty" in the Clause

[28] In the Illegal Substances Clause, the Sellers both "represent" and "warrant" two state of affairs: (i) the property was not used to grow or manufacture illegal

substances while owned by them; and (ii) “to the best of the Seller’s knowledge and belief”, the property had never been used for those purposes.

[29] The application judge concluded the Sellers had not breached their “warranty” because the contractual language did not disclose an intent that “the content of the warranty could change with changing circumstances after the date of the APS when the warranty was given”: para. 19. By contrast, he treated the Clause’s “representation” as a material representation that induced the Purchaser to enter into the contract which, if ultimately shown to be false, entitled the Purchaser to rescind.

[30] In other words, when he considered the legal effect of the Clause, the application judge applied different analytical approaches to the same contractual term: he interpreted the “warranty” language as a term of the contract, while he looked at the “representation” language through the lens of the principles concerning pre-contractual representations. That approach contained several errors.

[31] First, the application judge failed to take into account the inter-related nature of the “representation” and the “warranty” in this particular contract. They were not stand-alone statements. They worked together since, generally speaking, a contractual representation is a statement of present or past fact, while a warranty is a contractual undertaking or guarantee that the fact is true:

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John D. McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at pp. 336 and 729.

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[32] Second, by focusing on the availability of the remedy of rescission in some cases of misrepresentation, the application judge did not address the real interpretive issue: What did the Sellers' representation in the Illegal Substances Clause mean? Were the Sellers making a statement about the state of affairs as they existed, to their knowledge, at the time the parties executed the APS? Or, were the Sellers representing that their knowledge of a state of affairs would continue until closing? The application judge first had to decide what the representation meant before turning to the question of what remedies would be available in the event the representation was breached.

[33] Third, it is problematic to view, as the application judge did, the "representation" in the Illegal Substances Clause as some kind of pre-contractual or collateral representation. In the present case, the Purchaser made an offer to buy the property. His offer included the Illegal Substances Clause in Schedule A and attached the Sellers' Schedule B additional terms, which included the Clause. The Purchaser either accepted a modified sign-back of his offer or the Sellers accepted a modified Purchaser's offer – the record is not clear about the precise sequence of events. In either case, both parties treated the Illegal Substances Clause as an integral term of the contract they concluded.

[34] The principles concerning pre-contractual representations have little role to play in those circumstances. Instead, as Professor McCamus notes, at p. 736, the use of the verb "represents" in contractual provisions "does not lead to the conclusion that the representations are mere representations and not proper terms (that is, undertakings) of the contract. Such representations are terms of the contract in the sense that that they are the subject of a promise that they are true, and accordingly, when the statements prove to be false, they give rise to the normal remedies for breach of contract": See also: *Benedek v. Dorian Homes* (1986), 43 R.P.R. 16 (Ont. H.C.), at para. 35; *Zien v. Field* (1963), 41 D.L.R. (2d) 394, at paras. 50-52, rev'd on other grounds, [1963] S.C.R. 632; and G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at p. 434.

[35] Finally, to treat the "representation" contained in the Illegal Substances Clause as something other than a term of the contract would ignore the language of the entire agreement clause in the APS. Section 26 states: "This Agreement including any Schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no *representation*, warranty, *collateral agreement* or condition, which affects this Agreement other than as expressed herein" (emphasis added).

[36] Accordingly, the application judge erred by removing the "representation" from the contract and treating it as akin to a pre-contractual misrepresentation.

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Instead, he should have interpreted the Illegal Substances Clause as a term of the parties' contract in accordance with the standard rules of contractual interpretation, as summarized, for example, in *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, 13 C.E.L.R. (4th) 28, at para. 65, leave to appeal to SCC requested.

(ii) The application judge's reliance on a duty to disclose to inform his interpretation of the Clause

[37] The application judge made a related error. To arrive at his conclusion that the Sellers' representation in the Illegal Substances Clause covered information about the past use of the premises unknown to them but discovered by the Purchaser between the date of execution of the APS and closing, the application judge reasoned in the following way. He posited that if the Sellers had discovered, after the execution of the APS, that the property had been used as a marijuana grow-op before they acquired it, their silence – or failure to disclose such information to the Purchaser – could found an action for misrepresentation. From this he concluded, at para. 22, that the Purchaser's "rights are not affected by the fact that he was the one who discovered this information and communicated it to the Sellers."

[38] The application judge's reasoning does not persuade me. The representation and warranty the Sellers gave about the use of the premises was

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limited, not absolute. It was a representation and warranty "to the best of [their] knowledge and belief". On the record before the application judge, it appears that the Purchaser's discovery that a previous owner of the house had used it for a grow-op came as a complete surprise to the Sellers.

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[39] Certainly, liability may attach where a vendor knew about a major latent defect but concealed the information from the Purchaser: see, for example, *McGrath v. MacLean* (1979), 22 O.R. (2d) 784 (C.A.), at pp. 791-92. Silence about such a major latent defect can amount to fraud: *Empire Communities Ltd. v. Her Majesty the Queen*, 2015 ONSC 4355, 46 B.L.R. (5th) 235, at para. 37. But the present case does not involve vendors who concealed material information about the condition of the property from the purchaser. Here, it appears the Sellers did not know about the premises' past use as a grow-op until told by the Purchaser.

[40] As well, the application judge's reliance on the decision in *Sevidal v. Chopra* (1987), 64 O.R. (2d) 169 (H.C.), at pp. 187-89, was misplaced. I do not quarrel with the application judge's statement, at para. 21 of his reasons, that silence which follows a representation can found an action for misrepresentation where the silence continues after the representor learns that the representation is no longer true or was never true. However, I take issue with what the application judge, relying on *Sevidal*, said next: "This principle applies *<u>even where a</u>*

representation made at the time a contract is signed becomes untrue before or at the time of completion": para. 21 (emphasis added).

[41] With respect, that principle cannot be teased out of the decision in *Sevidal* because that case did not involve a claim for breach of a contractual representation. In *Sevidal*, the vendors of a residential property were found liable for deceit in part because they did not disclose to the purchaser information they received after signing the contract about the presence of radioactive material on the property. The court held that the failure to disclose such information before closing amounted to a fraud on the purchaser.

[42] This misunderstanding of the jurisprudence led the application judge to conclude, erroneously, that "[u]pon acquiring knowledge that the Property had been used to grow marijuana, the Sellers could no longer honestly give the representation in the Illegal Substances Clause": para. 22. In fact they could, if the representation was limited to their knowledge and belief about the prior use of the property at the time they executed the APS. Instead of addressing the key interpretive question about what the representation meant, the application judge improperly applied principles concerning a vendor's concealment of material information about the condition of a property to a situation where no such concealment had occurred.

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(iii) The meaning of the Illegal Substances Clause

[43] Applying the general principles of contractual interpretation to the Illegal Substances Clause, what is the meaning of the representation and warranty given by the Sellers in the second part of the Clause: “[T]o the best of the Seller’s knowledge and belief, the use of the property and the buildings and structures thereon has never been for the growth or manufacture of illegal substances”?

[44] In my view, the Sellers’ representation and warranty that the use of the property had never been for the growth or manufacture of illegal substances was limited to their knowledge and belief as it existed when they executed the APS. I reach that conclusion for three reasons.

[45] First, that interpretation flows from the plain language used in the Clause.

[46] Second, the interpretation is supported by the absence of any language in the Clause that speaks of the Sellers’ knowledge and belief at the date of closing, in contrast to the use of such language in other provisions of the APS.

[47] A fundamental precept of contractual interpretation is that “a contract is to be construed as a whole with meaning given to all of its parts”: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3d ed. (Toronto: LexisNexis Canada, 2016), at p. 16. A provision in a contract should not be read as standing alone, but in light of the agreement as a whole and its other provisions: *Hillis Oil and*

Sales Limited v. Wynn's Canada, Ltd., [1986] 1 S.C.R. 57, at p. 66. See also Hall, at p. 21.

[48] In the APS, section 17 states: "[T]he Seller represents and warrants that the Seller *is not and on completion will not be* a non-resident under the non-residency provisions of the Income Tax Act which representation and warranty shall survive and not merge upon the completion of this transaction" (emphasis added).

[49] Schedule A contains two provisions that make clear the Sellers' representation or warranty operates at the time of closing:

(i) "The Seller warrants that there are no work orders or deficiency notices outstanding against the property, and if so will be complied with at his expense, *on or before closing*"; and

(ii) "The Seller warrants and represents that all electrical, plumbing, mechanical components, all existing appliances and chattels included in the purchase price shall be in normal working condition *on closing*." [Emphasis added.]

[50] That other provisions of the APS use language signifying that the Sellers' representation or warranty operates at the time of closing suggests that the absence of similar language in the Illegal Substances Clause reflects the parties' intention to limit its operation to the state of affairs known at the time of the APS'

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execution.[1] Put another way, it was open to the parties to craft the representation and warranty so that it either spoke to the Sellers' state of knowledge and belief on closing, or required the Sellers to give some sort of declaration or bring-down certificate about the state of their knowledge on closing. The Purchaser did neither.

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(iv) The effect of the "survives closing" language at the end of the Clause

[51] Third, the Illegal Substances Clause concludes with the following sentence: "This warranty shall survive and not merge on the completion of this transaction." I do not regard this language as meaning that the representation and warranty about the Sellers' knowledge and belief refers to that held at the date of closing, as the respondent submits. Instead, the language reflects the debate that took place in the jurisprudence some time ago about whether a purchaser could sue on a warranty or condition contained in a contract for the sale of land following the completion of the transaction and the conveyance of the land by deed.

[52] An older line of cases held that a purchaser could only bring an action on conditions and warranties contained in the deed of conveyance, unless the parties stipulated at an earlier stage of their dealings that any conditions and

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[1] Section 23 of the APS contains a representation and warranty concerning ureaformaldehyde that is very similar in structure and content to the Illegal Substances Clause. Unfortunately, there does not appear to be any reported case that has considered this precise clause, which might have provided some guidance on interpreting the Illegal Substances Clause.

warranties in the agreement of purchase and sale were not to be superseded by the deed: see, for example, *Redican v. Nesbitt*, [1924] S.C.R. 135, at pp. 146-47.

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[53] Later cases took a different approach. In *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720, at pp. 734-735, the Supreme Court stated:

> Where the sale agreement creates rights or imposes obligations or stipulations collateral to, or independent of, the conveyance, the question of whether those stipulations are extinguished by merger is to be treated as one of intention. In the absence of evidence on the point, there is no presumption that the purchaser intended to surrender or abandon the rights acquired by him under the sale agreement. [Citations omitted.]

[54] In my view, the "survives closing" language at the end of the Illegal Substances Clause does nothing more than clarify that whatever the content of the representation or warranty given by the Sellers, it did not merge with the deed on closing. The representation and warranty survived closing to offer a basis for a post-closing action for breach. However, that language does not assist in ascertaining the content or meaning of the representation or warranty given.

[55] For these reasons, I conclude that the Sellers' representation and warranty in the Illegal Substances Clause that the use of the property had never been for the growth or manufacture of illegal substances was limited to their knowledge and belief as it existed when they executed the APS. At that time, they did not know about the property's prior use as a grow-op. In those circumstances, I

conclude the application judge erred in finding the Sellers breached the Clause. They did not.

VII. DISPOSITION

[56] For the reasons set out above, I would set aside the judgment dated June 5, 2017 and the costs order dated August 25, 2017.

[57] In their place, I would substitute an order allowing the Sellers' application to the extent of declaring that: (i) the Purchaser breached the APS by failing to close; and (ii) the Sellers' are entitled to the deposit in the amount of $30,000.

[58] I would remit to the Superior Court of Justice the determination of the following issues, in accordance with these reasons: (i) the entitlement of the Sellers to their costs of the proceeding before the application judge; (ii) the costs of Re/Max Premier Inc. and Harold Balchand arising out of the Purchaser's application (as referenced in para. 2 of the August 25, 2017 order); and (iii) the Sellers' claim for damages.

[59] I would award the Sellers' their partial indemnity costs of the appeal fixed at $15,000, inclusive of disbursements and all taxes.

Released: "CWH" May 24, 2018

"David Brown J.A."
"I agree. S.E. Pepall J.A."
"I agree. C.W. Hourigan J.A."

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