COURT OF APPEAL FOR ONTARIO

CITATION: Szilvasy v. Reliance Home Comfort Limited Partnership (Reliance Home Comfort), 2012 ONCA 821
DATE: 20121127
DOCKET: C55214

Rosenberg, Gillese and Lang JJ.A.

BETWEEN

Shirley Szilvasy

Plaintiff (Respondent)

and

Reliance Home Comfort Limited Partnership also known as Reliance Home Comfort

Defendant (Appellant)

Tim Buckley and Heather Pessione, for the appellant

Hillel David and Mark A. Mason, for the respondent

Heard: October 23, 2012

On appeal from the order of Justice Gladys Pardu, sitting as a single judge of the Divisional Court, dated December 7, 2011.

Gillese J.A.:

[1] A person rented a hot water heater for her home. The heater leaked and caused water damage. This appeal decides who should bear the cost of the property damage – the homeowner (or her property insurer) or the company that supplied the heater.

OVERVIEW

[2] Two separate Small Claims Court actions were brought against Reliance Home Comfort[1] (Reliance or the appellant) for consequential property damage arising from leaks in hot water heaters that Reliance had supplied. In the present case, the water heater was approximately 9 years old. In the companion case of Collett v. Reliance Home Comfort Limited Partnership C55215 (the companion case), the water heater was 19 years old.

[3] The two actions were heard together. The trial judge found Reliance liable in both cases. Reliance's appeals to the Divisional Court were dismissed.

[4] With leave, Reliance appeals to this court. For the reasons that follow, I would dismiss the appeal.

BACKGROUND IN BRIEF

[5] Reliance is a Manitoba limited partnership registered in the province of Ontario. It is in the business of renting water heaters to residential customers.

[6] In approximately 1998, a Reliance hot water heater was installed in the basement of a new house located at 95 Rodgers Road, Guelph, Ontario (the

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[1] This is Reliance's legal name. Although the style of cause reads "Reliance Home Comfort Limited Partnership, also known as Reliance Home Comfort", the style of cause was amended on consent at trial to reflect Reliance's correct name.

Rodgers Road house). It is probable that the water heater was installed by the homebuilder, as that is the normal practice.

[7] Shirley Szilvasy (Ms. Szilvasy or the respondent) purchased the Rodgers Road house in April 2004. The hot water heater was located in the basement of the house, in an unfinished furnace room that had a floor drain.

[8] After moving in, Ms. Szilvasy took over rental of the water heater from the previous homeowner and paid Reliance's monthly bills. There was no evidence that she had any discussion with, or sought any assurances from, the appellant regarding the condition of the water heater.

[9] Reliance sent the respondent a document entitled Water Heater Rental Agreement (the Terms & Conditions) along with her October 2005 bill. Neither party contended that the Terms & Conditions were a contract. The Terms & Conditions describe the parties' respective rights and responsibilities associated with the water heater rental.

[10] The respondent read the Terms & Conditions when she received them.

[11] The Terms & Conditions state that, among other things, the customer is to:

(a) pay rental charges when due; and

(b) ensure that the water heater is located in an area with sufficient drainage and that the drainage is open and unrestricted.

[12] The Terms & Conditions state that Reliance will:

(a) repair and/or replace the water heater; and

(b) provide access to a customer service centre 7 days a week, 24 hours a day.

[13] The Terms & Conditions also provide that Reliance:

> will not be liable for any loss, damage or injury of any type (including as a result of any water leakage) … caused or contributed to in any way by the use and operation of the water heater or any indirect, incidental, special or consequential damages, even if reasonably foreseeable.

[14] The water heater was equipped with a safety valve known as a temperature and pressure relief valve, as mandated by Ontario regulations. The valve is designed to discharge water under abnormal temperature or pressure conditions. Water can also leak out of the water heater due to a failure of the water tank. A warning label attached to the water heater warns of the possibility of discharge from the temperature and pressure relief valve.

[15] In August 2006, Reliance says it sent out a warning insert to its customers, along with their water heater rental bills. This notice, which was entitled “Protect your valuables in the event of a leak”, reminded customers that “there is always a possibility that the product may leak”. Customers were advised to not place valuable items near the water heater and to ensure that water that could escape should be directed toward a floor drain.

[16] In December 2007, prior to leaving on holidays, the respondent checked the water heater. She did not notice any leaks. She then went on a five-day vacation. She did not have anyone check the house in her absence. When she returned, she discovered that the water heater had leaked and the carpet in the basement was soaking wet. She called Reliance who replaced the water heater, without charge.

[17] The respondent brought a subrogated claim on behalf of her insurer in the Small Claims Court. She sought compensation for the property damage caused by the leak.

[18] The evidence at trial established the following. Reliance did not inspect the hot water heaters. However, the condition of the key elements of a water heater cannot be assessed without destroying the water heater. Moreover, inspections cannot assist in predicting, averting or determining when an individual tank will leak. All water heater tanks will eventually fail. It is not possible to predict the life expectancy of a water heater. The lifespan depends on several factors including the volume of consumption of hot water, the local water quality, and the local municipal water treatment process. Reliance has no plan or policy for automatically replacing a tank based on age. It replaces tanks only when they are already leaking.

[19] While no rental agreement was entered into evidence at trial, the parties agreed that the respondent had rented the water heater from the appellant.

[20] The trial judge found Reliance liable for the consequential damage caused by the failure of the water tanks based on an implied warranty of fitness. He awarded the respondent damages in the amount of $5,916.40, plus disbursements, costs and interest.

[21] Reliance appealed, as of right, to a single judge of the Divisional Court. The Divisional Court observed that the provision on implied warranties in s. 9 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Schedule A (the *CPA*) applied to the rental arrangement. At para. 13 of the reasons, the court concluded:

> Given [Reliance's] acknowledged contractual obligation to provide a working hot water tank at all times, it would be illogical to conclude that there was not a continuing warranty as to the proper functioning of the tank.

[22] By order dated December 7, 2011 (the Order), the Divisional Court dismissed Reliance's appeals in both this case and the companion case.

[23] Reliance was given leave to appeal to this court.

THE ISSUES

[24] The central issue to be decided on this appeal is whether s. 9 of the *CPA* applies to the water heater rental arrangement between the parties.

DOES SECTION 9 OF THE *CPA* APPLY TO THE WATER HEATER RENTAL?

[25] Section 9 of the *CPA* reads as follows:

> 9. (1) The supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality.
>
> (2) The implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* are deemed to apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement.
>
> (3) Any term or acknowledgement, whether part of the consumer agreement or not, that purports to negate or vary any implied condition or warranty under the *Sale of Goods Act* or any deemed condition or warranty under this Act is void.

[26] Reliance submits that the Divisional Court erred in holding that s. 9(1) of the *CPA* applies to the water heater agreement.

[27] It is not clear to me that the Divisional Court relied on s. 9(1) of the *CPA* for its determination. In para. 10 of its reasons, the court finds that the implied warranties in the *CPA* apply because the failure of the water tanks occurred after the effective date of the legislation. In para. 11, both s. 9(1) and 9(2) are set out. In paras. 12 and 13, the court discusses warranties and their application to the present case but does not specifically avert to either s. 9(1) or 9(2). If the Divisional Court did find liability based on s. 9(1) of the *CPA*, I agree with Reliance that this was an error. Section 9(1) could not apply because it relates to the provision of services, rather than goods; clearly, a water heater is a good and not a service.

[28] I turn, therefore, to a consideration of s. 9(2).

[29] Section 9(2) of the *CPA* provides that the implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act*, R.S.O. 1990, c. S.1 (*SOGA*) are deemed to apply to goods that are leased or otherwise supplied under a consumer agreement. The first question is whether the hot water heater was supplied under a consumer agreement. In my view, it was.

[30] "Consumer agreement" is defined in s. 1 of the *CPA* to mean "an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment". The respondent is a consumer because she was a residential, not a business, user of the product. Reliance did agree to supply a good (the water heater) for payment.

[31] Reliance argues that, nonetheless, s. 9(2) does not apply in this case for two reasons. First, it contends that it would amount to an impermissible retroactive application of the *CPA*. Second, it submits that the statutory preconditions in s. 15 of the *SOGA*, which s. 9(2) of the *CPA* imports, are not met.

Application of the *CPA* – Retroactive or Retrospective?

[32] The *CPA* came into force on July 30, 2005. Ms. Szilvasy began renting the water heater from Reliance in April of 2004. Reliance points to the common

law presumption that new legislation will not apply retroactively, unless the legislation expressly so provides. The *CPA* does not explicitly state that it is to have retroactive application. Therefore, Reliance says, the Divisional Court erred in applying the *CPA* retroactively to the rental relationship that had been in existence prior to its coming into force.

[33] I do not accept this submission. In my view, the Divisional Court applied the *CPA* retrospectively, not retroactively.

[34] In *Épicier Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, 2004 SCC 59; [2004] 3 S.C.R. 257, at para. 46, Lebel J. explains when legislation is properly applied with retrospective effect:

> New legislation does not operate retroactively when it is applied to a situation made up of a series of events that occurred before and after it came into force or with respect to legal effects straddling the date it came into force. [Citation from Coté omitted] If events are under way when it comes into force the new legislation will apply in accordance with the principle of immediate application, that is, it governs the future development of legal situations. If the legal effects of the situation are already occurring when the new legislation comes into force, the principle of retrospective effect applies. [Citations omitted]

[35] The present case falls squarely within the expression of principle as enunciated in *Épicier*. The events in question happened both before and after the *CPA* came into force. That is, the parties' rental agreement began prior to the effective date of the *CPA* but the legal effects of that arrangement were

occurring when the *CPA* came into force as the rental arrangement was ongoing. Consequently, the principle of retrospectivity operates and the *CPA* applies.

[36] This court faced a similar situation in *Griffin v. Dell Canada Inc.* 2010 ONCA 29, 98 O.R. (3d) 431 and reached the same conclusion. In *Griffin*, Mr. Griffin bought a computer from Dell before the *CPA* was in force. However, his computer failed after the effective date of the legislation. Until the computer failed, there was no claim. Although the contract was concluded prior to the effective date of the legislation, because some of the facts giving rise to the claim arose after the effective date, the *CPA* applied: see para. 41.

[37] Similarly, in the present case, although the rental arrangement was entered into prior to the effective date of the legislation, the failure of the water heater occurred after that date. Consequently, based on the principle of retrospectivity, the *CPA* applies.

Were the Statutory Preconditions in s. 15 of the *SOGA* met?

[38] Section 9(2) of the *CPA* provides that the implied conditions and warranties applying to the sale of goods by virtue of the *SOGA* are deemed to apply, with necessary modifications, to goods that are leased or otherwise supplied under a consumer agreement.

[39] Section 15 of the *SOGA* reads as follows:

> 15. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
>
> 2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality...

[40] Reliance submits that the statutory preconditions set out in s. 15 of the *SOGA* were not met in this case. It points to the language of s. 15.1 which requires that the buyer make known to the seller the particular purpose for which the goods are required "so as to show that the buyer relies on the seller's skill or judgment". Reliance says that it is not sufficient to the establishment of a warranty that the buyer merely makes known to the seller the particular purpose for which the goods are required. Such an interpretation, it argues, would fail to give effect to the words "so as to show". Reliance submits that the respondent had to demonstrate that she relied on Reliance's skill or judgment that the water heater would not leak ever, in order for the court to imply the s. 15 warranty. Such an inference could not be drawn, it is contended, because the respondent

was on notice that the tank could leak, having received communications from Reliance to that effect and having read the product warning label on the water heater. Further, there was no evidence that the respondent sought assurances from Reliance to that effect. Without proof that the respondent relied on such an assurance, Reliance says, the obligation to pay consequential property damage cannot be implied under the *CPA*.

[41] I do not accept this submission.

[42] Ms. Szilvasy was an ordinary homeowner. Reliance is in the business of supplying – by means of providing and servicing – hot water tanks to residences. At the relevant time, Reliance had approximately 1.2 million tanks on lease to its customers. In the circumstances, there can be no doubt but that Reliance knew the purpose for which Ms. Szilvasy rented the hot water heater (namely, to produce hot water for her home) and that she was relying on its skill and judgment to provide a properly functioning water heater. Accordingly, pursuant to s. 15.1, there was an implied condition that the water heater would be "reasonably fit" for the purpose of heating water in her home. The water heater in question was not reasonably fit for that purpose because it leaked.

[43] Reliance argues that this interpretation amounts to the court implying a warranty that the rental heater would be "as good as new" throughout the term of the lease. I disagree. The water heater need not be in the same condition as a

new heater. It can be worn, rusted or otherwise in a less than pristine condition so long as it is reasonably fit for the purpose of heating water – without leaking.

CONCLUDING COMMENTS

[44] Reliance posed three additional questions for the court: (1) what standard of review should the Divisional Court have applied when reviewing the decision of the trial judge; (2) is there is an implied warranty of fitness, apart from the *CPA*, on which to ground liability for consequential damages; and (3) did Reliance assume the risk of consequential damage because it retained ownership of the water heater?

[45] Whether s. 9 of the *CPA* applied to the water heater arrangement between the parties is a matter of statutory interpretation. Accordingly, the standard of review is correctness: see *Mazur v. Elias* (2005), 75 O.R. (3d) 299 (C.A.). However, to the extent that findings of fact made by the trial judge are engaged in the application of the statute, those factual findings are not to be overturned absent palpable and overriding error.

[46] Having concluded that s. 9 of the *CPA* applies to the water heater rental, it is unnecessary to decide the second and third questions.

DISPOSITION

[47] Accordingly, I would dismiss the appeal with costs to the respondent in this appeal and the companion case fixed in the agreed on amount of $16,000, all inclusive.

Released: November 27, 2012 (“E.E.G.”)

“E.E. Gillese J.A.”
“I agree M. Rosenberg J.A.”
“I agree Susan Lang J.A.”