

COURT OF APPEAL FOR ONTARIO

CITATION: McLean v. Shedden, 2012 ONCA 860

DATE: 20121206

DOCKET: C54215

Sharpe, Rouleau and Hoy JJ.A.

BETWEEN

Lawrence McLean, Kevin Fehr and Sweeney Todd's
Microbrewery Pub and Restaurant Inc. Get Out of My Kitchen,
1422334 Ontario Inc., and Couple in Black Ltd.

Plaintiffs/Respondents

and

Callum Shedden and David Brown

Defendant/Appellant

Michael Bordin, for the appellant

Marc Munro, for the respondents

Heard: November 2, 2012

On appeal from the judgment of Justice D. Crane of the Superior Court of Justice, dated July 21, 2011.

ENDORSEMENT

[1] The appellant, a solicitor who had acted for the respondents when they purchased a pub, does not challenge the trial judge's finding that he was negligent in failing to advise the respondents of the steps they needed to take to transfer the pub's liquor licence.

[2] The appellant submits, however, that the trial judge erred in awarding the respondents damages of \$65,000, measured by one half of the price they paid for the pub.

[3] The appellant submits that the trial judge based his damage award on a theory not advanced by the respondents and for which there was no supporting evidence. We agree that the focus at trial appears to have been the respondents' assertion that the restaurant was economically viable. They led expert evidence to support that claim. The trial judge scrutinized and rejected that evidence and found that the restaurant was not economically viable.

[4] While that finding led the trial judge to reject the respondents' claim for damages measured by the value of the pub as a going concern reduced by the amount of the indebtedness the respondents incurred operating the pub, in our view it was still open to the trial judge to find that despite its serious economic difficulties, the pub had some resale value. The trial judge fixed that resale value by substantially discounting the amount paid by the respondents to purchase the pub

[5] The trial judge mentioned the good regular clientele the pub enjoyed, the opportunities of the Niagara Wine and Food Festival, the popularity of "microbrewery" specialty beers, and a favourable lease. These factors led him to conclude that despite the fact that, as run, the pub was not viable as a going

concern under the respondents' management, "there was a reasonable basis to build the business," and that it therefore would have had some resale value if it had maintained a valid liquor licence. While the trial judge's reasons certainly could have been clearer, we are satisfied that there was some evidence to support the award he made and that his assessment is entitled to deference on appeal.

[6] The appellant also submits that the trial judge erred by failing to find that the respondents were the authors of their own misfortune. They should have read the liquor licence and had they done so, they would have realized it had to be renewed. Again, the trial judge's reasons are admittedly not entirely satisfactory. However, we understand his analysis to have proceeded on the following basis. The sale of the pub closed in August 2000 and under the terms of their agreement with the vendor and the practice of the Liquor Licence Commission, the respondents had 90 days from the date of closing to obtain the then vendor's signature and to have the licence transferred in the purchaser's name.

[7] Had the respondents read the license, all they would have learned is that it expired in September 2001. From simply reading the licence, they would have been unaware that approval of the change in control of the business had to be obtained within 90 days in order to maintain the licence. The appellant negligently failed to advise the respondents to take the necessary steps to have

license transferred within that 90 day period. It follows, accordingly, that there was a basis on the evidence to support the trial judge's award of damages for the resale value of the pub with a valid licence, despite his finding that the respondents were themselves at fault for failing to read their own licence.

[8] Accordingly, the appeal is dismissed with costs fixed at \$15,000 inclusive of disbursements and taxes.

"Robert J. Sharpe J.A."

"Paul Rouleau J.A."

"Alexandra Hoy J.A."