COURT OF APPEAL FOR ONTARIO

CITATION: Matthew Brady Self Storage Corporation v. InStorage Limited Partnership, 2014 ONCA 858
DATE: 20141203
DOCKET: C57707

Doherty, Blair and Tulloch JJ.A.

BETWEEN

Matthew Brady Self Storage Corporation

Plaintiff (Respondent)

and

InStorage Limited Partnership and InStorage Trustee Corp.

Defendants (Appellants)

Robert Malen and Robert Drake, for the appellants

Clifford Lax, Q.C., and Shaun Laubman, for the respondent

Heard: October 29, 2014

On appeal from the order and judgment of Justice Richard C. Gates of the Superior Court of Justice, dated July 6, 2012 and August 30, 2013, respectively, with reasons for the judgment reported at 2013 ONSC 4345, 35 R.P.R. (5th) 232.

By the Court:

Background

[1] In 2007 the principals of Matthew Brady Self Storage Corporation (Robert and Michael Siskind) agreed with the principal of the InStorage appellants (James Tadeson) that they would jointly purchase a vacant factory in Windsor

and convert it into a self-storage facility. The InStorage appellants ("InStorage") were part of a group of corporations in the business of operating self-storage facilities and had approximately 50 sites in operation at the time. Matthew Brady was incorporated for the purpose of acquiring and converting the property for the joint venture.

[2] The agreement was that each party would provide one-half of the purchase price and they would each have an equal interest in the property during the period of time it took Matthew Brady to convert it into the self-storage facility. InStorage would then buy the whole property from Matthew Brady and operate it as an InStorage location.

[3] However, InStorage ran into financial difficulties before the purchase was to take place, and this led to further negotiations and another arrangement. Under the new arrangement, the Siskinds agreed to put up the entire purchase price, and Matthew Brady would become the sole owner of the property pending completion of the project.

[4] In addition, the parties entered into an Offer to Purchase and Sell Agreement (which we will refer to as the "Put/Call Agreement"). Under this latter agreement, Matthew Brady could force InStorage to purchase the property through a "Put" and InStorage could force Matthew Brady to sell the property to it

through a “Call”, beginning one year following substantial completion of the retrofit and for three years thereafter.

[5] In substance, the Put/Call Agreement provided that, in the event of a Put or a Call, the parties would have 15 days to agree on a purchase price. If they did not agree, an appraiser was to be retained to determine the purchase price and, “in the absence of manifest error”, the appraiser’s determination of “Fair Market Value”, as defined, would bind the parties. There was not to be an exercise of competing expert appraisals. By agreement, Valco Consultants Inc. was named as the appraiser.

[6] It is the language of the “Fair Market Value” definition, in conjunction with the “manifest error” caveat that lies at the heart of this appeal. “Fair Market Value” was defined as follows:

> **1.1(m) “Fair Market Value”** means, in respect of the Property, *the most probable price which the Property should bring in a competitive and open market under all conditions requisite to a fair sale*, the buyer and seller each acting prudently and knowledgeably and without compulsion and *with the primary consideration being the net cash flow being generated from the Property*, and assuming the price is not affected by undue “stimuli” in circumstances where: (i) both parties are typically motivated; (ii) both parties are well informed or well advised, and acting in what they consider their best interests; (iii) a reasonable time is allowed for exposure of the Property in the open market; (iv) payment is made in terms of cash in Canadian dollars or in terms of financial arrangements comparable thereto; and (v) the price represents the normal consideration for the

> Property sold, unaffected by special or creative financing or sales concessions granted by anyone associated with the sale. [Emphasis added.]

[7] On July 21, 2009 – a little more than a year after substantial completion – Matthew Brady exercised the Put.

[8] In the meantime, however, InStorage had been acquired by a large American self-storage business, Storage Mart, in a hostile take-over. Storage Mart's C.E.O., Michael Burnham, did not favour the Windsor project and, on the evidence before the trial judge, actively sought ways to get out of it and to avoid having to comply with the Put/Call Agreement. He had been advised by his lawyers in both Ontario and the United States that he was bound by InStorage's obligations under the Put/Call Agreement. He decided, nonetheless, that he would force Matthew Brady to sue and that he would "negotiate in court".

[9] Not surprisingly, the parties could not agree on a price. Valco was retained to conduct the appraisal called for under the Put/Call Agreement and James Telford of that firm did so. He concluded that the fair market value of the property was $7.3 million.

[10] InStorage – now controlled by Storage Mart – refused to accept the appraisal. Mr. Burnham took the position that Mr. Telford had made a "manifest error" in failing to found his conclusion about fair market value on the income approach to valuation, thereby ignoring the provision in the Put/Call Agreement

that the “primary consideration” in establishing fair market value was to be “the net cash flow being generated from the Property”.[1]

[11] Not surprisingly, Matthew Brady sued.

[12] At trial, InStorage attempted to introduce the report and evidence of a different appraiser, Mr. Bower, who calculated fair market value at less than $5 million, using primarily the income approach. At the conclusion of all of the evidence bearing on the “manifest error” argument, Matthew Brady’s counsel moved for an order excluding Mr. Bower’s report.

[13] The trial judge excluded the evidence, and in the course of his mid-trial ruling on the issue he also concluded that Mr. Telford had made no manifest error in arriving at his fair market value conclusion. This ruling effectively took “manifest error” off of the table for further argument at the conclusion of trial.

[14] In the end, the trial judge ruled in favour of Matthew Brady and awarded it specific performance of the Put/Call Agreement; InStorage is therefore required to accept a conveyance of the property and to pay Matthew Brady the $7.3 million purchase price. Damages of $728,080.05 were awarded for other matters, but they are not the subject of appeal. In addition, the trial judge awarded Matthew Brady costs in the amount of $415,000 plus HST, in part on a partial indemnity basis, but also on a substantial indemnity basis from the time of

[1] InStorage also argued that there had been deficiencies in the retrofit done by Matthew Brady. That issue consumed a considerable amount of time at trial, but is not raised on appeal.

an email offer to settle made by a principal of Matthew Brady, Michael Siskind, directly to Mr. Burnham on behalf of InStorage. Matthew Brady bettered this offer at trial.

Issues

[15] On appeal, InStorage raises essentially three issues. It submits that the trial judge erred:

a) in substance, by concluding that Mr. Telford had not made a manifest error in his valuation, and procedurally, by making that decision mid-trial – in the context of the motion to exclude Mr. Bower's evidence – without giving InStorage's counsel the opportunity to argue the issue more fully at the conclusion of trial;

b) in awarding Matthew Brady specific performance and in finding that Matthew Brady did not have a duty to mitigate; and

c) in awarding costs on a substantial indemnity basis and, in any event, awarded costs that were excessive.

Discussion

[16] We would not give effect to these grounds of appeal for the following reasons.

“<u>Manifest Error</u>”

[17] InStorage argues first that the trial judge erred in finding that Mr. Telford had not made a manifest error in his valuation. It submits that under the terms of the Put/Call Agreement, the appraiser had to use the income approach to valuation as at least one of the methods of appraisal and that in failing to do so Mr. Telford committed a “manifest error”.

[18] We disagree that the language of the Put/Call Agreement required the appraiser to use the income approach as one method. Instead, he was required to give that approach “primary consideration”. Ultimately, however, it was open to the appraiser, after considering it, to determine that the income approach was not helpful in the circumstances. Mr. Telford did so and explained why he reached the conclusion he did on valuation.

[19] InStorage further argues that the trial judge erroneously determined the “manifest error” issue mid-trial when it was only necessary to determine the admissibility of the opinion of its expert appraiser, Mr. Bower. The trial judge’s determination was a procedural failing that deprived InStorage of the opportunity to make full submissions on the “manifest error” point, it submits.

[20] For the purposes of disposing of the appeal, we are prepared to assume that the trial judge should not have made a finding that there was no “manifest error” in the Telford appraisal in the course of his ruling as to the admissibility of

the Bower opinion. We are also prepared to assume that the trial judge should have determined only whether the Bower opinion went to the question of whether there was a “manifest error” but should have left the ultimate determination of that issue to the end of the case.

[21] We are also satisfied that it is at least arguable that InStorage did not get a full opportunity at trial to address whether there was “manifest error” in the Telford appraisal. It is accepted that all of the evidence relevant to that issue was heard, but counsel for InStorage maintains that, given the way the trial judge decided the issue, he never had a full opportunity to argue it. He agrees that the Bower report did not address the issue of “manifest error” directly.

[22] The question then becomes whether this procedural failing resulted in any prejudice to InStorage at trial.

[23] InStorage’s prejudice argument rests on the assertion that, had counsel been able to argue the manifest error issue at the conclusion of trial, he could have raised aspects of the Telford appraisal and aspects of Telford’s cross-examination which may have convinced the trial judge that the appraiser had made a manifest error in not using the income approach.

[24] Counsel provided us with three examples. We do not propose to examine these examples in detail. We do not agree than any could support a finding of prejudice. For example, while it is true that Telford did not refer specifically to the

terms of the Put/Call Agreement and, specifically, to the provision relating to the determination of fair market value, in his report, in his evidence he made it clear that he was fully aware of the terms of the Put/Call Agreement and explained his reasons for following the course he did. The fact that he did not mention the terms of the Put/Call Agreement in his report would not provide fodder for the kind of argument needed to demonstrate manifest error in the report.

[25] We reject this ground of appeal.

Specific Performance and the Obligation to Mitigate

[26] In this case, the arguments relating to specific performance and mitigation are intertwined. If Matthew Brady is entitled to specific performance there can have been no duty to mitigate by selling the property and crystallizing its claim in damages. Otherwise, the claim for specific performance would become moot.

[27] The issue, therefore, is whether Matthew Brady was justified in pursuing its claim for specific performance in the circumstances. The trial judge found that it was and granted specific performance. We see no basis for interfering with that decision.

[28] As Matthew Brady points out in its factum, the trial judge granted specific performance because (i) the property was unique, (ii) damages would not be an adequate remedy, and (iii) there was a fair, real and substantial justification for specific performance. Although InStorage does not contest that these are the

appropriate principles, it submits that the trial judge erred in all three respects nonetheless. It says that specific performance should not have been granted because Matthew Brady is a *vendor* seeking specific performance of an agreement for the sale of a non-unique investment property whose losses can readily be compensated for in damages.

[29] In its essence, specific performance is a discretionary equitable remedy granted where damages cannot afford an adequate and just remedy in the circumstances. Almost 200 years ago, the principle was described by Sir John Leach, V.C., in *Adderley v. Dixon* (1824), 57 E.R. 239, at p. 240:

> Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, *but because damages at law may not, in the particular case, afford a complete remedy*. [Emphasis added.]

[30] Although specific performance is not in principle granted on the basis of any distinction between contracts for the sale of land and contracts involving personal property, until relatively recently that distinction has prevailed as a matter of course. That is because the law has traditionally viewed land as inherently unique such that damages could not sufficiently compensate its prospective purchaser.

[31] In *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, the Supreme Court of Canada discarded that approach, however. The Court confirmed that specific performance was not to be available automatically as the default remedy for

breach of a contract for the sale of lands "absent evidence that the property is unique to the extent that its substitute would not be readily available" or absent a fair, real and substantial justification for the claim to specific performance (at para. 22).

[32] Whether specific performance is to be awarded or not is therefore a question that is rooted firmly in the facts of an individual case. In *Landmark of Thornhill Ltd. v. Jacobson* (1995), 25 O.R. (3d) 628 (C.A.), at p. 636, this Court identified three factors bearing on the exercise of discretion in favour of specific performance: (i) the nature of the property involved; (ii) the related question of the inadequacy of damages as a remedy; and, (iii) the behaviour of the parties, having regard to the equitable nature of the remedy.

[33] What makes this case unusual is that it is the *vendor* rather than the purchaser seeking to have these factors reviewed in its favour. In such circumstances, damages will often be an adequate remedy. Indeed, there is a debate about whether the arguments in favour of granting specific performance to a vendor are weaker than those in favour of the purchaser: see Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Toronto: Canada Law Book, 2012), at paras. 8.100 to 8.220; *Dick v. Dennis* (1991), 20 R.P.R. (2d) 264 (Ont. Gen. Div.), at paras. 31-33.

[34] But it will not always be the case that damages are an adequate remedy where the vendor is the plaintiff, and there are authorities supporting the granting of specific performance in favour of a vendor: see, for example, *Landmark of Thornhill*; *Dick v. Dennis*, at para. 38; *Westwood Plateau Partnership v. WSP Construction Ltd.* (1997), 37 B.C.L.R. (3d) 82 (S.C.), at paras. 148-156, 163; and *Comet Investments Ltd. v. Northwind Logging Ltd.* (1998), 22 R.P.R. (3d) 294 (B.C. S.C.), at paras. 35-39.

[35] In an analogous context, where the claim relates to an investment property and any "unique" characteristics can be reflected in the sale price or profits from the investment and, therefore, give rise to quantifiable damages, courts have taken the position – following the approach taken in *Semelhago* – that there is no clear rule one way or the other as to whether specific performance is available. Its availability will turn on the uniqueness of the property and whether there is a fair, real and substantial justification for the claim. See, for example, *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341 (S.C.), at para. 59, aff'd (2003), 63 O.R. (3d) 304 (C.A.), at paras. 37-39, 43-44, leave to appeal to S.C.C. refused, (2003) 223 D.L.R. (4th) vi; *Monson v. West Barrhaven Developments Inc.*, [2000] O.J. No. 5209 (S.C.), at paras. 8-9; *1174538 Ontario Ltd. v. Barzel Windsor (1984) Inc.* (1999), 29 R.P.R. (3d) 256 (S.C.), at paras. 7-8; *365733 Alberta Ltd. v. Tiberio*, 2008 ABCA 341, 440 A.R. 177, at paras. 10-12.

[36] In our view, in the context of vendor claims – consistent with the approach taken in *Semelhago* – there is no absolute rule, one way or the other. The following passage from the Sharpe text, at paras. 7.210 and 7.220 is instructive:

> *Where the subject-matter of the contract is "unique"*, a strong case can be made for specific performance. *The more unusual the subject-matter of the contract*, the more difficult it becomes to assess the plaintiff's loss.
>
> …
>
> An award of damages presumes that the plaintiff's expectation can be protected by a money award *which will purchase substitute performance*. If the item bargained for is unique, then there is no exact substitute. [Emphasis added.]

[37] Two considerations emerge from that passage. First, it is the subject-matter of *the contract*, not the land alone that must be unique or unusual. Second, the measure of the adequacy of a money award is whether it "will purchase substitute performance". These considerations help shed light on the analysis where the vendor is the plaintiff.

[38] The "uniqueness" analysis in such circumstances has a slightly different focus than in the usual case where the purchaser seeks the remedy. There, the issue is whether *the land itself* has some peculiar or special value *to the purchaser* who is seeking to obtain it and whether there is a reasonable substitute readily available. That paradigm does not fit into the analysis as readily where *the vendor* seeks specific performance. In one sense, there is

nothing “unique” about the property the vendor receives when such an order is made. The vendor receives the purchase price – the value of the land in money according to the contract.

[39] It does not follow, however, that there may not be uniqueness, or a special character, to the circumstances of *the transaction* – the subject-matter of the contract viewed more broadly – that will justify specific performance. Where the vendor seeks the remedy the focus should be on the transaction as a whole.

[40] The trial judge recognized this. He said that “the adequacy of money damages will turn on the question of whether the subject matter of the contract is generic or unique.” InStorage argues he was wrong in taking this approach and that it is the land, and not the subject-matter of the contract, that must be unique. We do not agree. The special character of the land may remain a factor for consideration but the key factors, looking at the contract broadly, are (i) whether on the facts as a whole, damages will afford the vendor an adequate and complete remedy or whether a money award will be sufficient to purchase substitute performance; (ii) whether the vendor has established some fair, real and substantial justification for the granting of specific performance; and, (iii) whether the equities as between the parties favour the granting of specific performance.

[41] The trial judge found that those criteria were met. We see no error in his conclusion that Matthew Brady was entitled to specific performance. There were ample circumstances justifying the award. These included the following:

a) InStorage was always intended to be the sole owner of the property. As its pre-takeover principal, Mr. Tadeson, testified, the Put/Call Agreement was entered into so that InStorage would not have to outlay the necessary capital for its acquisition immediately.

b) Matthew Brady renovated the subject premises to InStorage's specifications and design criteria. The property had a high ratio of climate controlled storage units and was the only "Class A" self-storage facility in Windsor.

c) But for InStorage's commitment to owning the property, Matthew Brady would not have acquired it and done the retrofit. Its principals were out of the self-storage business, having sold their seven outlets to InStorage previously. The deal did not contemplate Matthew Brady being left holding a single-purpose and specially-designed building suitable only for carrying on a business in which it and its principals were no longer engaged.

d) InStorage had occupied, managed and operated the building (under the brand InStorage, and later Storage Mart) since the completion of the retrofit – the state of affairs contemplated by the parties from the very outset of their contractual dealings.

e) InStorage had, admittedly, done a poor job in managing the property – something that would affect its value and impede a ready sale.

f) Storage Mart's C.E.O., Burnham, had candidly admitted that if there were no manifest error in the Telford appraisal, "he would write a cheque". He made no secret of the fact that he did not want anything to do with the Windsor project, had not understood the Put/Call Agreement, and that his strategy was "to negotiate in court". He purposely resiled from the contract, and repudiated the advice of both Ontario and U.S. counsel that InStorage was obliged to comply.

[42] In all of these circumstances, the trial judge was entitled to conclude, as he did, that damages would not adequately and justly compensate Matthew Brady for InStorage's refusal to abide by the Put/Call Agreement and that Matthew Brady had shown a fair, real and substantial justification to compel performance of the Agreement, and that the equities favoured Matthew Brady. That being the

case, there was no obligation on Matthew Brady to have attempted to mitigate by selling the property in an effort to crystalize its damages.

The Costs Award

[43] Finally, InStorage attacks the trial judge's costs award of $415,000 plus HST. The award was made on a partial indemnity basis to the point of an offer to settle made by Matthew Brady (and not accepted by InStorage) and on a substantial indemnity basis thereafter.

[44] InStorage's principal attack is on the substantial indemnity aspect of the award. InStorage submits that the offer to settle did not qualify as a Rule 49 offer to settle for costs purposes because, although it had been exchanged directly between the parties, it had not been served on InStorage's solicitors, as required by rule 16.01(4)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides that:

> Any document that is not required to be served personally or by an alternative to personal service,
>
> (a) shall be served on a party who has a lawyer of record by serving the lawyer, and service may be made in a manner provided in rule 16.05.

[45] We do not agree. In *Igbokwe v. HB Group Insurance Management Ltd.* (2001), 55 O.R. (3d) 313 (C.A.), leave to appeal to S.C.C. refused, (2002), 166 O.A.C. 200 (note), Labrosse J.A. ruled that, while an offer should be served on the solicitor of record, "failure to comply with this technical requirement ought not

to alter the nature and legal effect of the offer under Rule 49" where, in the circumstances, "the service of the offer to settle on the [party] did not create any difficulty, confusion or otherwise mislead the plaintiff" (at paras. 10-11).

[46] That is the case here, in our view. The trial judge found that the offer "represented a serious and reasonable attempt to settle the matter", that the parties "had turned their minds to a settlement, within [the email exchange in which the offer was contained]". When asked during argument, counsel confirmed there was no evidence that InStorage's lawyers were unaware of the offer. Indeed, it appeared to the trial judge that Burnham had discussed it with counsel, because InStorage later delivered an offer to settle itself.

[47] Rule 2.01(1) provides that a failure to comply with the rules is "an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity." In the circumstances, we see no error in the trial judge's conclusion that the lack of formal service on InStorage's solicitors did not render the offer a nullity for Rule 49 purposes.

[48] Even if he erred in concluding the offer met the requirements for Rule 49, however, the trial judge was still entitled to take the offer to settle into account in arriving at his award of costs: r. 49.13. As this Court recently observed, in *Lawson v. Viersen*, 2012 ONCA 25, 108 O.R. (3d) 771, at para. 46, rule 49.13 "allows a judge to consider offers even though the offers do not comply with [the]

rules"; it is not concerned with "technical compliance" and "calls on the judge to take a more holistic approach." That is what the trial judge did here.

[49] InStorage also attacked the award on the basis that the substantial indemnity costs exceeded the 1.5 times multiplier provided for in the definition of "substantial indemnity costs" found in rule 1.03(1). It states:

> In these rules, unless the context requires otherwise,
>
> …
>
> "substantial indemnity costs" mean costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A.

[50] Here, the context required otherwise, in our view.

[51] Matthew Brady had originally agreed to costs on a partial indemnity basis in the amount of approximately $252,000, subject to the effect of the offer to settle. Subsequently, the claim was made for substantial indemnity costs flowing from the offer to settle. InStorage therefore argues that the substantial indemnity amount – taking into account the date of the offer – should have been approximately $334,000, based on the 1.5 times multiplier. Instead, the trial judge awarded $415,000, amounting to a factor of about 1.65.

[52] The trial judge was alive to the 1.5 multiplier, and took it as a starting point. However, he exercised his discretion to increase that amount, based on InStorage's conduct that had unnecessarily prolonged the trial (seeking to put forward the Bower report, a trial adjournment that required further preparation

and the pursuit of an unmeritorious claim for deficiencies that was ultimately withdrawn). In the end, the trial judge applied the proper balance by instructing himself on the basis of *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26, that “the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding”. He was entitled to take this approach in the exercise of his discretion, and there is no basis to interfere with his determination of the amount.

[53] InStorage’s final attack on the costs award was to argue that it was simply too high. The trial judge exercised his discretion after applying all of the proper principles. There is no basis to interfere with the amount he ultimately arrived at. In this respect we note that InStorage’s claim for costs on a partial indemnity basis only was approximately $300,000.

Disposition

[54] For the foregoing reasons, the appeal is dismissed. While leave to appeal costs is granted, the appeal as to costs is dismissed as well.

[55] In accordance with the agreement of counsel, costs of the appeal are fixed in the amount of $30,000 all inclusive, in favour of Matthew Brady.

Released: “R.A.B.” December 3, 2014

“Doherty J.A.”
“R.A. Blair J.A.”
“M. Tulloch J.A.”