COURT OF APPEAL FOR ONTARIO

CITATION: First Elgin Mills Developments Inc. v. Romandale Farms Limited, 2015 ONCA 54
DATE: 20150128
DOCKET: M44238 (C57028)

Epstein, Lauwers and Pardu JJ.A.

BETWEEN

First Elgin Mills Developments Inc.

Applicant
(Appellant/Responding Party)

and

Romandale Farms Limited, Angela Maria Roman, Anne Catherine Ruth Roman, David Andrew Roman, Stephen George Roman, and Helen Elizabeth Roman-Barber

Respondents
(Respondents/Moving Parties)

R. Leigh Youd and Adam J. Wygodny, for the moving parties

John J. Longo and Martin J. Henderson, for the responding party

ENDORSEMENT

[1] Reasons for judgment in this appeal were released by the court on Wednesday, August 6, 2014, and are reported at 2014 ONCA 573. The moving parties, led by Romandale Farms, have brought a motion for a re-hearing of the appeal on the basis that the court applied the wrong standard of review and that the interests of justice require a re-hearing.

[2] The moving parties allege that the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, released on Friday, August 1, 2014, altered the applicable standard of review.

[3] Our decision was released several days after the Supreme Court's decision in *Sattva*. It did not refer to that decision. Writing for the court, Lauwers J.A. described the applicable standard of review at para. 29:

> In my view, the standard of review on this appeal is correctness, since it involves the interpretation of a contract, with due deference to be paid to the application judge on those determinations in which the facts dominate: *The Plan Group v. Bell Canada*, 2009 ONCA 548, 96 O.R. (3d) 81, at paras. 19-20, 27, 30, 31.

[4] In *Sattva,* Rothstein J., writing for the court, held at para. 50 that contractual interpretation involves issues of mixed fact and law. Rothstein J. went on to leave open the possibility of identifying "an extricable question of law from within what was initially characterized as a question of mixed fact and law", including the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor (at para. 53).

[5] The moving parties assert that *Sattva* requires a greater degree of appellate deference to the decision of the application judge than this court showed in its reasons for judgment. Accordingly, they argue that this court's decision was made in error, and that the interests of justice require a re-hearing of the appeal.

[6] The respondent on the motion, First Elgin Mills Developments Inc., contends that our approach to the standard of review was entirely consistent with the principles articulated in *Sattva*. The predominant errors made by the application judge in this case were properly classified as legal errors, thus attracting the standard of correctness in accordance with the principles articulated in *Sattva*.

[7] This court has jurisdiction to reconsider and vary its decision before the formal order is issued: *McDowell v. Barker*, [2014] O.J. No. 2363 (C.A.), at para. 22; *Pastore v. Aviva Canada Inc*., 2012 ONCA 887, at para. 9; *Gore Mutual Insurance Co. v. 1443249 Ontario Ltd.*, [2004] O.J. No. 1896 (S.C.), at paras. 3, 7. However, the court will re-open an appeal prior to the entering of the order only in the type of rare circumstance where it is in the interests of justice to withdraw the reasons of the court and re-hear the case on the merits: *Pastore*, at para. 9.

[8] We agree with the British Columbia Court of Appeal that "[s]omething in the nature of overlooked or misapprehended evidence, or failing that, a clear and compelling case in law on the point and the prospect of a very serious injustice absent reconsideration" would be required to justify withdrawing the court's reasons and holding a re-hearing: *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.*, 2005 BCCA 111, 209 B.C.A.C. 197, at para. 6.

[9] In our view, this is not one of those rare circumstances in which it would be in the interests of justice to withdraw the reasons of the court and re-hear the case on the merits: *Doman Forest Products Ltd.*, at para. 6; *Pastore*, at para. 9. The result in the appeal was not driven by the standard of review and would not have been different under the application of the *Sattva* test. As found in our reasons, the application judge misapprehended the evidence, reached an interpretation of the agreement that was commercially unreasonable, and improperly implied a term in the agreement when the legal standard for doing so was not met. The standard of review articulated in *Sattva* supports appellate intervention in these circumstances.

[10] Accordingly, there is no serious injustice that will result if the court refuses to re-hear the appeal.

[11] The request to re-hear the appeal in this case is denied.

"Gloria Epstein J.A."
"P. Lauwers J.A."
"G. Pardu J.A."