COURT OF APPEAL FOR ONTARIO

CITATION: Sands v. Walpole Island First Nations Band, 2018 ONCA 188
DATE: 20180226
DOCKET: C63269

Sharpe, Rouleau and Benotto JJ.A.

BETWEEN

Rocky Robert Sands

Plaintiff (Respondent)

and

Walpole Island First Nations Band Council

Defendant (Appellant)

John Peters, for the appellant

Lucas Lung and Joyce Thomas, for the respondent

Heard: February 12, 2018

On appeal from the judgment of Justice Pamela L. Hebner of the Superior Court of Justice dated December 23, 2016, with reasons reported at 2016 ONSC 7983.

REASONS FOR DECISION

[1] This appeal arises from a series of leases granted to the respondent band member, Rocky Sands, by the appellant Walpole Island First Nations Band Council. Sands operated a hunting camp on the leased lands and made extensive improvements, constructing a lodge and performing other work. The central issue is whether Sands is entitled to credit against the outstanding rental payments on the leases for the cost of the improvements he made. The trial judge held that

Sands was entitled to credit in the amount of $532,500 for the improvements, plus his deposit of $40,000, less rent owing in the amount of $430,000, and accordingly awarded Sands judgment for $142,500.

[2] The Band's appeal turns on the *Indian Act*, R.S.C. 1985, c. I-5, s. 2(3):

> Unless the context otherwise requires or this Act otherwise provides,
>
> > (a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and
> >
> > (b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

[3] In the Band's submission, the trial judge erred by failing to apply s. 2(3) with respect to two issues:

1. Sands' assertion that rent specified in the lease for 2000-2005 was reduced as a result of an oral commitment given to him by Chief Donna Day; and
2. Sands' claim that an arrangement had been made whereby he would be given a credit for improvements to the leased property against rent.

[4] The Band argues that as neither arrangement was formally approved by resolution of the Band Council, neither is binding on the Band. On behalf of the Band, Mr. Peters pointed out that there are two lines of authority interpreting s. 2(3), one insisting on strict adherence to the rule that a Band Council resolution is

required and the other allowing for binding arrangements to be made by agents under actual or ostensible authority. He did not ask us to follow the strict line but argued that even if we follow the second line of authority, there is no basis in the evidence to find that anyone had actual or ostensible authority to bind the Band on either matter.

[5] The Band also argues that the trial judge erred in awarding Sands $30,000 in aggravated damages.

Analysis

(1) Rent reduction

[6] The trial judge accepted Sands' evidence that Chief Donna Day orally agreed to reduce the annual rent for the years 2001 to 2005 to $84,000. Day's evidence was that she could not recall the conversation. Sands' evidence was supported by an exchange of correspondence between him, Indigenous and Northern Affairs Canada ("INAC") and the Band. When INAC wrote to Sands asking him to pay the rent specified in the lease, he responded with a letter explaining that he had spoken to Day, who assured him that the lease had been amended to reflect the reduced rent. INAC forwarded a copy of Sands' letter to the Band and the Band did not respond.

[7] In our view, it was open to the trial judge on this record to find that Day had assured Sands that the rent was reduced and that the lease would be amended.

When told of this arrangement, the Band made no response and, rather than insisting on the terms of the written lease, acquiesced to the amendment asserted by Sands. However one interprets s. 2(3) of the Act, there is no basis for us to interfere with the trial judge's finding that the Band was bound by Chief Donna Day's agreement to reduce the rent.

(2) Credit for Leasehold Improvements

[8] On behalf of Sands, Mr. Lung points to two crucial documents in relation to the leasehold improvements. The first is an "Action Memo To File" dated April 20, 2005 recording a resolution of the Band Council. The memo records that Sands made a presentation regarding the construction he was carrying out and "that Rocky Sands is given approval by the Council to continue construction." The memo also records that the Council directed Administration in conjunction with the Lands and Membership Department to report back to Council on the current status of Sands' lease and to "identify impacts to revenue generation regarding the issue of lease reduction costs at half the amount for 1 and 2 years".

[9] The second "Action Memo To File", dated May 20, 2005, records a Band Council decision instructing the "Lands & Membership Department…to monitor and arrive at appraised value of construction work being done by the lessee Rocky Sands at St. Anne's Lodge; further, the final assessment will include receipts for

material and labour costs for the renovations with a final report forwarded to the Lands Department…."

[10] The trial judge found that the Lands and Membership Department "dropped the ball" and failed to monitor the construction or to obtain an appraised value of the construction work conducted by Sands.

[11] A year later, in May 2006, the Band established a "Hunt Club Task Force" to monitor the Band's various hunt club properties and to deal with improvements and outstanding rent. In May 2008, the Hunt Club Task Force made a recommendation indicating: "The total expected amount in consideration [of Sands' improvements] is $532,500, to be used to offset arrears and disbursed yearly for the remainder of the lease with reference to Action Memo dated May 20, 2005". There is no evidence as to whether that recommendation was submitted to or dealt with by the Band Council.

[12] In June 2008, there was a Band Council election resulting in a complete turnover in membership and the election of a new Chief who did not get along with Sands. The newly constituted Hunt Club Task Force met in June and July of 2009 and recommended that Sands be credited with half of the $532,000. The trial judge found, at para. 78, that Sands "cannot be faulted for refusing to accept the offer" as the statement upon which it was based "was manifestly inaccurate."

[13] At a Band Council meeting held October 4, 2010, following a procedure found by the trial judge to be "completely improper", one Council member's vote in favour of Sands was not counted, leading to the defeat of a motion to present another offer to Sands. The member whose vote was not counted left the meeting and, by a vote of 5 to 4, the Council made the decision to evict Sands for non-payment of rent.

[14] At para. 65 or her reasons, the trial judge found:

> Rocky was given the clear message from Band Council to proceed with his construction renovations. He was also given the clear message that the cost of those improvements would be paid for by the Band by way of a credit against his rent.

At para. 74, she found:

> In 2005, Rocky and the Band, through Council, agreed that Rocky could proceed with construction and renovations at St. Anne's Hunt Club. I find that the Band agreed to reimburse Rocky for the improvements by way of a capital improvement credit to his rent. This finding is supported by the evidence that the Band gave Rocky approval to continue construction and instructed the Lands and Membership Department to arrive at an appraised value of the construction work. Over the next two years, the Band was aware of the work being done on its property and did not object. Rocky attended at Council meetings to provide reports on the work. When the Hunt Club Task Force was struck, Rocky attended at task force meetings to provide reports on the work. Rocky did so because he expected to be reimbursed for the improvements to the Band's lands. It is inconceivable that the Band would not have known of the work being done. It is inconceivable that the Band would not have known of Rocky's expectation of reimbursement. At the time,

> other band members leasing hunt clubs on lands owned by the Band had an expectation of reimbursement for improvements. Rocky was no exception. Accordingly, the Band allowed and encouraged the work to be completed knowing Rocky expected to be reimbursed for same.

[15] In our view, these findings are fully supported by the record. It was open to the trial judge to find that the Band Council had undertaken to credit Sands for the leasehold improvements he made. The finding was supported by the two "Action to File" memos, the fact that Sands continued to make improvements in reliance on the position taken by the Band Council and the evidence that other band members were given credit for the cost of leasehold improvements. As these findings rested on decisions made by the Band Council, the argument that Sands' claim is defeated by s. 2(3) of the Act cannot be sustained.

[16] We do not agree that because the precise amount of the credit Sands was to receive was never resolved by the Band Council, Sands lost his entitlement to claim a credit. The Band could not avoid the obligation it had undertaken by failing to resolve the precise amount of the credit to which he was entitled. It was open to the trial judge to determine the appropriate amount and the record before her fully supported the calculation she made.

Aggravated Damages

[17] We see no error on the part of the trial judge in awarding compensatory aggravated damages. Sands was evicted in a sudden and peremptory manner on the day before the opening of the hunting season. The eviction caused Sands

significant distress and humiliation. He lost customers, guides and the opportunity to earn income during the hunting season. An award of $30,000 as compensation for his loss was fully justified.

Disposition

[18] Accordingly, the appeal is dismissed with costs to the respondent Sands fixed at $15,000 inclusive of taxes and disbursements.

“Robert J. Sharpe J.A.”
“Paul Rouleau J.A.”
“M.L. Benotto J.A.”