COURT OF APPEAL FOR ONTARIO

CITATION: 1758704 Ontario Inc. v. Priest, 2023 ONCA 283
DATE: 20230425
DOCKET: COA-22-CV-0214

Fairburn A.C.J.O., Lauwers and Miller JJ.A.

BETWEEN

1758704 Ontario Inc. and 1191305 Ontario Inc.

Plaintiffs
(Appellants)

and

Carl Priest

Defendant
(Respondent)

AND BETWEEN

Carl Priest and 1737161 Ontario Limited

Plaintiffs by Counterclaim
(Respondents)

and

1758704 Ontario Inc., and 1191305 Ontario Inc. and Martin Donkers

Defendants by Counterclaim
(Appellants)

Scott R. Hawryliw, for the appellants, Martin Donkers, 1758704 Ontario Inc. and 1191305 Ontario Inc.

Maanit Zemel, for the respondents, Carl Priest and 1737161 Ontario Limited

Heard and released orally: April 21, 2023

On appeal from the judgment of Justice Annette Casullo of the Superior Court of Justice, dated September 20, 2022, with reasons reported at 2022 ONSC 5344, and the costs order dated October 21, 2022.

REASONS FOR DECISION

[1] The respondents (collectively, “the Priest parties”) purchased the assets of a waste removal and recycling business from the appellants (collectively, “the Donkers parties”). The corporate respondent defaulted on a promissory note, guaranteed by Carl Priest and secured by assets purchased by the Priest parties from the Donkers parties. The Priest parties had secured funding to put the loan in good standing. However, the Donkers parties seized the assets from the Priest parties without notice. Having thereby put the Priest parties out of business, the Donkers parties began a competing enterprise, soliciting the Priest parties’ former clients.

[2] In the litigation that followed, the Donkers parties successfully sued the Priest parties on the promissory note and were awarded damages in the amount of $200,865.48. The Priest parties’ counterclaim – for damages for breach of contract – was dismissed by the trial judge. That dismissal was later set aside by this court, which granted the counterclaim on the basis that the Donkers parties breached the asset purchase agreement (“APA”) by seizing the assets without providing the Priest parties with the requisite notice, thus putting the

Priest parties out of business, and then selling the assets on an improvident basis. This court remitted the matter back to the trial judge for quantification of damages.

[3] The trial judge quantified damages to the Priest parties in the amount of $474,117.35, from which she set-off the $200,865.48 awarded to the Donkers parties on the promissory note. The total payable to the Priest parties was therefore $273,251.87.

[4] The Priest parties were also awarded $66,916.89 in costs, payable by the corporate Donkers parties (calculated as $129,950 for the counterclaim plus $59,779.54 in disbursements, less $103,357.21 in costs payable to the Donkers parties plus disbursements of $19,344.45 for the main action).

[5] The Donkers parties now appeal both the damages and costs awards made in the counterclaim.

[6] The Donkers parties argue that the trial judge made two errors: (1) in failing to reduce the award payable to the Priest parties to account for the use of a John Deere Excavator for which the Priest parties were obligated to make lease payments to John Deere but did not; and (2) failing to apply the same values in the damages quantification that she assigned to the various seized assets in the main action.

[7] We see no merit in either of these submissions. With respect to the excavator, the Donkers parties are, in effect, attempting to litigate a collateral

issue. The excavator was not an asset purchased under the APA. Neither was it seized by the Donkers parties. Although 1737161 Ontario Limited breached its obligations by failing to have the lease transferred from the Donkers parties and failing to make the lease payments to John Deere, this breach was not relevant to the counterclaim.

[8] With respect to the claim that the trial judge erred by not using the same valuations for the seized assets that she used in the main action, we are not persuaded that the trial judge made any error. The appellant advances a new argument that the trial judge ought to have reduced the value of the seized assets to account for the fact that the respondents had only made 80% of the payments on them. However, although the degree of payment was relevant to the action on the promissory note (and was taken into account in the action on the promissory note), it had no relevance to the value of the seized assets.

[9] With respect to the claim that the trial judge erred in assessing damages for loss of business income because she failed to deduct income that would have been earned from the John Deere excavator, this is a new argument that was not advanced before the trial judge, and this court will not exercise its discretion to hear it. In any event, we see no merit in it.

[10] The Donkers parties also argue that the Priest parties failed to mitigate their losses by acquiring new equipment. This is a revision of an earlier argument

advanced at the hearing of the counterclaim that the Priest parties ought to have mitigated their losses by buying from the Donkers parties the illegally seized assets and continuing business. As the trial judge rightly noted with respect to the original argument, the argument is perverse and would require the victim of conversion to pay the tortfeasor and at a price set by the tortfeasor. The new argument is similarly unpersuasive.

[11] With respect to the costs appeal, we are not persuaded that the argument now advanced with respect to the unreasonableness of disbursements for expert fees was made at the damages hearing, and we would not exercise our discretion to hear it now. In any event, we see no merit in it.

[12] The appeal is dismissed. Costs of the appeal are awarded to the respondents, payable by the appellants, jointly and severally, in the agreed amount of $10,000 including disbursements and HST.

"Fairburn A.C.J.O."
"P. Lauwers J.A."
"B.W. Miller J.A."