SUPREME COURT OF YUKON

Citation: *Ó Murchú v. DeWeert*, 2020 YKSC 24

Date: 20200619
S.C. No. 19-A0030
Registry: Whitehorse

BETWEEN

TRAOLACH Ó MURCHÚ and BRIONI CONNOLLY

PLAINTIFFS

AND

LEONARD LEE DEWEERT, SANDRA LYNN DEWEERT, INSITE HOME INSPECTIONS and KEVIN NEUFELD

DEFENDANTS

Before Madam Justice S.M. Duncan

Appearances:

Traolach Ó Murchú and Brioni Connolly	Appearing on their own behalf
James R. Tucker	Counsel for the defendants, Leonard Lee DeWeert and Sandra Lynn DeWeert
Lindsey Galvin and Elizabeth Cordonier	Counsel for the defendants, Insite Home Inspections and Kevin Neufeld

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiffs Traolach Ó Murchú and Brioni Connolly (the "respondents") have claimed against the defendant vendors of their home, Leonard and Sandra DeWeert, and the defendant home inspector, Kevin Neufeld, and his company, Insite Home Inspections, (the "applicants") for alleged defects in the condition of the home, purchased in October, 2017. The respondents allege that the applicants were negligent

in the conduct of the home inspection and that they negligently misrepresented the state of the home.

[2] This summary trial application, brought by the applicants Mr. Neufeld and Insite Home Inspections, is about the validity and enforceability of part of the limitation of liability clause in the Inspection Agreement (the "Agreement"). The defendant vendors are not part of this application.

[3] The applicants say the limitation of liability clause has the effect of limiting any damages for which they may be found liable after a full trial, to the cost of the home inspection, which was $446.25. They say the legal test set out in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, (*"Tercon")* is met. It is an appropriate issue to be determined on a summary trial.

[4] The respondents oppose the applicability and enforceability of the limitation of liability clause and argue the *Tercon* test is not met. While they say they do not oppose a summary trial, they raise several concerns about why a summary trial is not appropriate in the circumstances.

[5] For the reasons that follow, I have found that this matter is not appropriate to be decided by way of summary trial.

Background

[6] This matter arises out of alleged defects and conditions in the home purchased by the respondents at 161 Dalton Trail, Whitehorse. The respondents were first-time home buyers.

[7] Before the purchase of the home was finalized, the respondents requested Mr. Neufeld to conduct a home inspection.

[8] The respondents claim that Mr. Neufeld was negligent in his conduct of the inspection and negligently misrepresented the state of the home. Mr. Neufeld denies these allegations.

[9] Mr. Neufeld sent the written Agreement to Ms. Connolly by email, just after midnight on the day of the inspection. The Agreement was a two page document and contained the wording ("Please read carefully") on page one.

[10] The Agreement contained a limitation of liability provision set out in para. 4:

> The parties understand and agree that the Inspector and its employees and its agents assume no liability or responsibility for the costs of repairing or replacing any unreported defects or deficiencies either current or arising in the future or any property damage, consequential damage or bodily injury of any nature. If repairs or replacement is done without giving the Inspector the required notice, the Inspector will have no liability to the Client. **The client further agrees that the Inspector is liable only up to the cost of the inspection.** Not valid in State of___N/A___. [emphasis added]

[11] Ms. Connolly signed the Agreement on pages one and two.

[12] The applicants are limiting this summary trial application only to the third sentence of para. 4 of the Agreement.

Test for Summary Trial

[13] Rule 19 permits a party to apply to the court for judgment, either on an issue or generally, in any of the following: "(a) an action in which a defence has been filed".

[14] The leading case from the Supreme Court of Yukon on the test for summary trial is *Norcope Enterprises Ltd. v. Government of Yukon*, 2012 YKSC 25 ("*Norcope*"). Following *Western Delta Lands Partnership v. 3557537 Canada Inc.,* 2000 BCSC 54, which built on the factors set out in *Inspiration Management Ltd. v. McDermid St.*

Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202 (C.A.), the Court determined that the existence of one or more of the following circumstances will be cause for a summary trial application to fail:

> [28] …
>
> (a) the litigation is extensive and the summary trial hearing itself will take considerable time;
>
> (b) the unsuitability of a summary determination of the issues is relatively obvious, e.g. where credibility is a crucial issue;
>
> (c) it is clear that a summary trial involves a substantial risk of wasting time and effort and of producing unnecessary complexity; or
>
> (d) the issues are not determinative of the litigation and are inextricably interwoven with issues that must be determined at trial.

[15] In addition to these factors, it is also necessary to consider the Supreme Court of Canada decision in *Hryniak v. Mauldin*, 2014 SCC 7 ("*Hryniak*"), decided after *Norcope*. Addressing in part the historical reluctance of courts to provide decisions on discrete issues separate from the rest of the litigation, the Supreme Court of Canada noted the correlation between summary trial procedures and improved access to justice. After observing that alternative processes to trial can still be fair and just and a legitimate way of resolving disputes, the Court wrote:

> [28] …The principal goal remains the same: a fair process that results in a just adjudication of disputes. **A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found.** However, that process is illusory unless it is also accessible - proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure [emphasis added].

[16] The British Columbia Court of Appeal in *Ferrer v. Janik*, 2020 BCCA 83, ("*Ferrer")* summarized the factors set out by the authorities in British Columbia, and included *Hryniak,* for consideration of whether a summary trial is appropriate to determine one or some of the issues in a lawsuit:

> [27] …
>
> a) whether the court can find the facts necessary to decide the issues of fact or law;
>
> b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
>
> i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
>
> (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
>
> (2) the potential for multiple appeals; and
>
> (3) the novelty of the issues to be determined;
>
> ii. the amount involved;
>
> iii. the complexity of the matter;
>
> iv. its urgency;
>
> v. any prejudice likely to arise by reason of delay; and
>
> vi. the cost of a conventional trial in relation to the amount involved.

[17] The Court emphasized that not all factors will be relevant in every case, and discouraged a checklist approach.

[18] Here, I will apply the relevant factors of the four set out in the test in *Norcope.* These are the existence of credibility concerns and the interweaving of this issue with the issues to be determined at trial. I will consider generally whether it would be unjust to resolve this issue at a summary trial. Additionally, I will consider whether the Court can find the facts necessary to decide the issues of fact and law, based on the principles set out in *Hryniak.*

Position of the Parties on Summary Trial

[19] The applicants confine their application to the third sentence of para. 4 of the Agreement. They say that the previous two sentences in that paragraph require a full hearing on the evidence at a regular trial. They argue that the third sentence in the limitation of liability paragraph is straightforward, without complex factual or legal questions to be determined. The applicants describe the third sentence as distinct, broad and not requiring the hearing of evidence of the categories or types of defects and damages alleged by the respondents. It will not delay the proceedings, nor will it add complexity. A decision on whether or not damages may be limited would benefit the parties in determining how to allocate their resources for the trial. *Ferrer* provides a recent precedent in support of this reason (see para. 35).

[20] The respondents do not explicitly oppose a summary trial but request the Court to exercise caution in granting relief by way of a summary trial in this case for two reasons. First, there are issues of credibility that are linked to the validity and enforceability of the limitation of liability clause. Second, there are additional facts related to the signing of the Agreement, and facts related to the alleged level of

recklessness and incompetence of Mr. Neufeld that are disputed and require determination in order to decide on the enforceability of the clause.

[21] I note the finding in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2012 BCSC 1799, that the summary trial judge has the discretion to determine if the matter is suitable for summary trial, and must make that determination, even when parties are in agreement that the matter is suitable (para. 93).

Legal Test for Enforcement of Limitation of Liability Clause

[22] The Supreme Court of Canada in *Tercon* at paras. 122-23 set out the following three-step inquiry for determining the validity and enforceability of a limitation of liability clause, also called an exclusion clause:

a) Does the exclusion clause apply to the circumstances established in evidence on the facts of this case?

b) If so, was the exclusion clause unconscionable and thus invalid at the time the contract was made?

c) If found to be applicable and valid at the time of contract formation, should the court nevertheless refuse to enforce the clause because of an overriding public policy?

[23] The onus is on the applicants, as the party seeking to rely on the clause, to establish its applicability. The onus then shifts to the respondents to establish that the clause is unconscionable or should not be enforced for reasons of public policy.

ANALYSIS

[24] The primary reason that this matter is unsuitable for a summary trial proceeding is the unfairness that may result if the third sentence of para. 4 of the Agreement were

interpreted in isolation from the rest of the Agreement and all of the circumstances surrounding it. Further, the existence of credibility issues that are better determined at trial, is a relevant factor for the unsuitability of this matter for summary trial.

[25] The applicants rely heavily on both the trial decision and its confirmation by the Court of Appeal for British Columbia in *Ferrer*. There are many factual similarities between that decision and the case at bar, but there are also significant distinguishing elements.

[26] In *Ferrer,* the plaintiff homeowners brought a claim in negligence and negligent misrepresentation against the vendors, the City and the home inspector. The home inspector had provided a positive report after his inspection, stating he did not detect any major deficiencies or serious problems. Soon after they moved in, the plaintiffs suffered damages in excess of $350,000 from water leaking into their home from a sundeck and they sought compensation from the defendants. There was a written agreement between the home inspector and the plaintiffs that contained a limitation of liability clause. It stated at para. 5:

> 2.1 In the event of any errors, omissions, breach of contract, and/or negligence by the Inspector the Client hereby agrees to the following restrictions on their legal rights:
>
> …
>
> d) The Inspector's total liability to the Client for errors, omissions, breaches of contract and/or negligence in any part of the Inspection or Inspection Report shall be limited to the amount of the fee paid for the inspection. For greater clarity this means that if the Client sues the Inspector any damages awarded cannot exceed the cost of the Inspection.

[27] The Court of Appeal for British Columbia upheld the trial judge's finding that the issue of the enforceability of this limitation of liability clause was appropriate for a summary trial proceeding. The limitation clause issue was relatively straightforward, did not involve novel issues, and no unfairness resulted from determining it in advance of other trial issues. A determination of the issues would assist the parties in deciding what resources they should devote to the trial. The Court of Appeal was not concerned with the criticism that deciding the summary trial application amounted to "litigating in slices": this was just another way of describing the disposition of the litigation in a sequence of hearings. Finally, the Court wrote:

> [36] … I would observe that one of the most important considerations in determining whether a single issue should be separated out and determined in a summary trial is the question of whether it is intertwined with other issues. In this case, there is very little connection between the Limitation Clause and other issues in the litigation.

[28] The British Columbia courts in *Ferrer,* in their consideration of the first step of the inquiry set out by the Supreme Court of Canada in *Tercon,* found that it was clear that the claims of negligence and negligent misrepresentation are covered by the Limitation Clause. This factor was interpreted to require the Court's assessment of the intention of the parties as expressed in the contract. The Court found that the allegations of negligence made by the plaintiffs in terms of the inspection itself and the completion of the home inspection report were covered by the Limitation Clause. The Limitation Clause in *Ferrer* clearly stated:

> d) The Inspector's total liability to the Client for errors, omissions, breaches of contract and/or negligence in any part of the Inspection or Inspection Report shall be limited to the amount of the fee paid for the inspection…

[29] In the case at bar, the third sentence of para. 4 of the Agreement is broader than the Limitation Clause in *Ferrer.* It provides: “The client further agrees that the Inspector is liable only up to the cost of the inspection.” The applicants argue that this supports their position, as it is a catch-all provision that clearly encompasses claims in negligence or negligent misrepresentation.

[30] This may turn out to be a correct interpretation but I am unable to decide this on the facts and legal principles provided. In order to interpret this third sentence properly, the entire paragraph must first be examined, as well as the context of the entire Agreement, both its content and the circumstances of its signing. For example, how, if at all, does the limitation of liability in the third sentence relate to the previous parts of the paragraph which address the costs of replacement and repair? Does it mean limitation of liability for all damages claimed for whatever reason? Which causes of action are covered under this clause? Is it liability for the inspection or the inspection report or both? The determination of the meaning of the third sentence in the limitation of liability clause is intertwined with the determination of the meaning and applicability of the other limitation of liability provisions and of the entire Agreement. The circumstances surrounding the signing of the Agreement may also be relevant to the interpretation of this clause and its applicability to this case.

[31] I note the limitation of liability clauses referred to in the case authorities provided have similar clarity to the clause in *Ferrer*. In *Larouche v. Radwanski* 2011 YKSM 3, the limitation clause states:

> [87] …
>
> (k) The Inspector’s total liability to the Client for negligence and breach of conflict [sic], including liability for

> mistakes, errors or omissions in the inspection and the Inspection Report, shall be limited to the amount of the fee paid for the inspection, and the client releases the Inspector from any liability in excess of the amount paid.

[32] In *Brownjohn v. Pillar to Post*, 2003 BCPC 2, the limitation clause states:

> [13] … inspector and its employees are limited in liability to the fee paid for the inspection services and report in the event that client or any third party claims that inspector is in any way liable for negligently performing the inspection or in preparing the inspection report, or for any other reason or claim the inspector has not fully satisfied all its obligations hereunder.

[33] A final example is found in *Gordon v. Krieg*, 2013 BCSC 842, where the limitation clause states at para. 73:

> 4. Inspector and its employees are limited in liability to the fee paid for the inspection services and report in the event that Client or any third party claims that Inspector is in any way liable for negligently performing the inspection or in preparing the Inspection Report, for any breach or claim for breach of this Visual Inspection Agreement or for any other reason or claim.

[34] These clauses are all much clearer than the one in the case at bar. They are all stand-alone paragraphs and not part of a larger paragraph that addresses other kinds of limitations of liability, as exists in the case at bar. The examples in the other cases all refer to limitations of liability for claims in negligence in performing the Inspection or providing the Inspection Report, or for other specified claims, to the cost of the inspection. In the case at bar, the clause at issue does not specify the claims it covers and it does not state whether the Inspection and/or the Inspection Report are included.

[35] A summary trial is an insufficient mechanism to achieve a proper interpretation of the third sentence of para. 4 of the Agreement. The interpretation of this sentence must be done after interpreting the rest of the paragraph and the Agreement as a whole, in

order to determine the scope of its application and the intention of the parties as expressed in the Agreement. The difference in the structure and content of this limitation of liability clause in comparison to the limitation of liability clauses in the examples from the other relevant case authorities provided suggests that it may not be straightforward, and may require additional evidence.

[36] The second step of the *Tercon* inquiry is whether the clause was unconscionable and therefore invalid at the time the Agreement was entered into. In *Ferrer,* the Court of Appeal for British Columbia agreed with the trial judge that the contract was not unconscionable when it was entered into because the plaintiffs understood what they bargained for and were on equal footing with the inspection defendants in entering into the inspection contract. The bargain was not unfair given the nature of the services provided by the inspector and their cost.

[37] There are some factual differences between *Ferrer* and the case at bar on this point. In *Ferrer*, there was no dispute that the plaintiffs' attention was specifically drawn to the limitation clause before they signed the contract. The plaintiffs initialled the stand-alone, clearly worded limitation clause. There was no contradiction in the evidence either from the plaintiffs themselves or between the plaintiffs and the defendants.

[38] In the case at bar, it is undisputed that the limitation of liability clause was not specifically pointed out to Ms. Connolly by Mr. Neufeld, nor was there any discussion about it. However, there is some contradiction in her evidence about her understanding of the clause. In the Affidavit #2 of Brioni Connolly she testified that:

i) she was not aware of the limitation clause;

ii) she had only a few moments to review and sign the Agreement;

iii) she had no time to discuss it with Mr. Ó Murchú or Mr. Neufeld;

iv) she was sent the Agreement by email just after midnight on the day of the inspection, but was not able to read it until she arrived at the home for the inspection;

v) she did not sign it until after the inspection was completed; and

vi) she did not receive the entire Agreement because she did not receive a copy of the Standards that formed part of the Agreement until three days after signing.

[39] However, on examination for discovery, Ms. Connolly testified that:

a) she was aware she was signing an Inspection Agreement with Mr. Neufeld;

b) she did not recall asking for more time to review it;

c) she did not recall asking questions of Mr. Neufeld before signing, including questions about the limitation clause;

d) she did sign the Agreement twice;

e) she had a general understanding that the laws of the Yukon would apply to the Agreement; and

f) she had an understanding of the Standards applicable to the inspector from research she had done before the home inspection.

[40] A resolution of these discrepancies in the evidence is necessary in order to determine the circumstances in which the Agreement was signed and the degree of understanding of the respondents of the third sentence of the limitation of liability clause. A summary trial is an inadequate mechanism to assess credibility of testimony

on this issue, and in turn how that assessment may affect the determination of unconscionability and validity of the clause.

[41] The third step in the *Tercon* inquiry was also addressed in *Ferrer*. The Court of Appeal for British Columbia confirmed the trial judgment that there was no overriding public policy reason not to apply the limitation of liability clause. A regulatory change made in 2016 to prohibit the inclusion of such a limitation clause in an inspection agreement was not retroactive. The respondents could have provided more evidence on this part of the inquiry, if desired, but they chose not to.

[42] In the case at bar, the respondents rely on the findings in two Provincial Court decisions for their argument that the incompetence and recklessness of a home inspector provides a good public policy reason to reject a limitation of liability clause. They allege in this case that the inspector was incompetent and reckless.

[43] As was evident during the hearing of this matter, a determination of this issue requires a review of evidence related to the merits of this case. Scrutiny of the actions of Mr. Neufeld in conducting the inspection and providing the inspection report is necessary to determine whether or not applicable standards were met and whether his actions can be considered reckless or incompetent. To undertake this inquiry would be a duplication of evidence that would form part of the trial on the merits.

[44] However, as noted by the applicants, the respondents have not pleaded incompetence and recklessness. Further, I agree with the applicants that the preferred view of the applicable legal principle in determining whether there is an overriding public policy reason not to enforce a limitation clause is that absent a legislative prohibition, parties are free to contract out of tort liability provided they do so in clear and

unambiguous language (*Ferrer v. Janik*, 2019 BCSC 1004, para. 26). Any overriding public policy must outweigh the strong public interest in the enforcement of contracts.

[45] To determine whether the parties have clearly and unambiguously contracted out of tort liability requires an interpretation of the entirety of para. 4 of the Agreement, as well as the rest of the Agreement. The applicants have conceded that the interpretation and applicability of the first two sentences of para. 4 require additional evidence. This includes evidence from the respondents about which alleged defects are said to have caused the alleged damages; evidence as to which of the alleged defects fall within the definition of “unreported”, meaning that they are outside the scope of the home inspection; and evidence as to whether the respondents are alleging any damage for defects which were repaired without notice to the applicants. How the third sentence of this paragraph fits in with this analysis requires an interpretation and full understanding of all of para. 4, as well as the rest of the Agreement, and the circumstances of its signing. This is necessary to determine whether there was a clear and unambiguous contracting out of tort liability through the Agreement. The summary trial proceeding does not provide a sufficient means to make these determinations.

CONCLUSION

[46] Further analysis of how the third sentence of para. 4 of the Agreement should be interpreted given the wording of the rest of para. 4 and the whole of the Agreement, is required in order to determine the application of this clause, its intent as expressed in the Agreement, and whether its meaning was capable of being clearly understood. Further exploration of the credibility of Ms. Connolly with respect to her evidence about the circumstances of signing the Agreement and her understanding of the third

sentence in the limitation of liability clause is also necessary. Finally, an assessment of whether there was a clear and unambiguous contracting out of tort liability through this clause in the Agreement requires the consideration of further evidence and interpretive principles on the other clauses in para. 4, as well as the making of credibility findings about the circumstances surrounding the contract. As a result it is unfair to make a ruling about the validity and enforceability of the final sentence of para. 4 of the Agreement at a summary trial proceeding.

[47] Costs may be spoken to in case management if necessary.

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DUNCAN J.