COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Calandra v. Henley,***
2009 YKCA 6

Date: 20090528
Docket: CA08-YU623

Between:

Francesco Calandra

Appellant
(Plaintiff)

And

Winston Henley, Air Ride Mobile Moving, and Cathy Rehn

Respondents
(Defendants)

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Smith

Oral Reasons for Judgment

John Bethell — Counsel for the Appellant

James Tucker — Counsel for the Respondents, Winston Henley and Air Ride Mobile Moving

Place and Date: Whitehorse, Yukon Territory
May 28, 2009

[1] **DONALD J.A.:** Francesco Calandra appeals from the order of Mr. Justice Veale pronounced 28 October 2008 finding for Winston Henley (the respondent), ordering that there was a valid lease between the respondent and Yvonne Fradsham, who subsequently sold her property to the appellant. The judge ordered that the respondent have until 15 June 2009 to remove a trailer and addition which were on the property pursuant to the lease, and that the removal and cleanup be supervised by an independent engineer at the appellant's expense. The judge also ordered that the respondent have special costs against the appellant.

[2] The neutral citation for the judgment is 2008 YKSC 82.

Facts

[3] Cathy Rehn owned a trailer and rented space on acreage owned by Yvonne Fradsham. After her husband died, Ms. Rehn sold her trailer to the respondent, doing business as Air Ride Mobile Moving. He agreed to buy the trailer for $5,000 on the understanding that he would incur the $10,000 cost of moving it from Ms. Fradsham's land and that he would spend an additional $5,000 cleaning up the old cars and debris around the trailer.

[4] On 15 October 2007, the respondent and Ms. Rehn signed a bill of sale transferring the trailer to the respondent for $5,000.

[5] When the respondent found he would not be able to move the property before winter, as hoped, he made an agreement on 12 October 2007 with Ms. Fradsham

that he would have until 15 June 2008 to remove it. They signed an agreement that day, which read:

> This is concerning the double wide trailer belonging to Kathy Rains (sic) situated on the property owned by Yvonne Fradsham on the Alaska Hiway (sic) south of the Carcross Rd.
>
> I, Winston Henley of Air Ride Mobile Moving, am purchasing the double wide from Kathy Rains and wish to be granted until June 15th, 2008 to remove said trailer from property of Yvonne Fradsham.
>
> At no cost to Air Ride Mobile Moving for land use or land rental until June 15th, 2008.
>
> Thank you.

[6] The appellant, then a lawyer with a Toronto law firm, came to view the property that Ms. Fradsham had offered for sale. She advised him that the trailer had been purchased and would be gone and the site would be cleaned up. The appellant agreed to buy the property on 17 October 2007. There were no conditions in the agreement about the trailer.

[7] The appellant offered to purchase the trailer from the respondent for $5,000 plus $1,000 for his trouble. The respondent refused the offer.

[8] The purchase and sale of Ms. Fradsham's land closed on 24 December 2007.

[9] On 7 January 2008, the appellant wrote a letter to the respondent on his firm's letterhead. He said that while the respondent and the previous owner had agreed that the respondent would have until 15 June 2008 to remove the trailer, the

appellant required him to remove it by 15 January 2008 or to pay $2,500 per month in rent through June. He also reiterated his offer to buy the trailer for $5,000.

[10] The respondent telephoned the appellant and offered to sell him the trailer for $50,000. This caused the appellant to "blow up". He sent the respondent a letter dated 25 January 2008. Amongst other things, the appellant instructed the respondent not to trespass on his property, asserted a lien against the trailer of $100 per day effective 24 December 2008 for storage costs, informed the respondent that legal action would be commenced for his failure to pay storage/rent, and that the appellant would be taking possession of it immediately as abandoned on his land, and required a security deposit from the respondent in the amount of $10,000 before the respondent could remove the trailer from his land, to be returned if there was no damage to the appellant's property and the debris was cleaned up.

[11] The appellant took possession of the trailer and, as of the date of trial, had allowed an employee to live in it. The respondent had not been permitted to remove the trailer, before or after 15 June 2008.

Reasons for Judgment

[12] The judge found that the 12 October 2007 agreement between Ms. Fradsham and the respondent was a lease and therefore binding on the appellant by operation of s. 67(d) of the *Land Titles Act,* R.S.Y. 2002, c. 130:

> 67 The title to the land mentioned in any certificate of title granted under this Act is, by implication, and without any special

> mention in the certificate, unless the contrary is expressly declared, subject to
>
> * * *
>
> (d) any subsisting lease or agreement for a lease for a period not exceeding three years, if there is actual occupation of the land under the lease or agreement;

[13] Regarding the terms and conditions under which the respondent should be permitted to remove the trailer, the judge went on to find that in the circumstances it would be reasonable for him to level the ground after removing the buildings, remove any fuel lines, tanks and electronic wires, and to clean up the cars and debris within a 100-foot radius of the trailer.

[14] Because both parties were concerned about the execution of that obligation, the judge ordered that it be overseen by an independent engineer retained to inspect the property, file a brief report (with photographs) outlining the proposed cleanup, to be discussed with the judge and the parties in chambers, and to file a letter after the removal of the trailer confirming the completion of the cleanup. The judge said that after receiving the initial report and submissions on it, he would order the conditions of the cleanup.

[15] The appellant, who, as the judge found, was insisting on cleanup conditions exceeding the respondent's obligations by the purchase agreement, was directed to retain and pay the engineer.

[16] The judge went on to order that the respondent have special costs against the appellant. The respondent had substantial success, and the appellant's pre-litigation conduct was "reprehensible" and warranted rebuke.

Issues on Appeal

[17] The appellant raises the following issues on appeal:

(1) the validity of the lease;

(2) if the lease was valid, the assignment of the engineering expense to the appellant;

(3) the order of special costs.

Discussion

1. The Validity of the Lease

[18] The judge found that the agreement satisfied the requirements of a lease, following *Pitt Air Ltd. v. Pitt Meadows Airport Society*, 2006 BCSC 1230, which adopted the following test set out in Williams & Rhodes, *The Canadian Law of Landlord and Tenant*, 6th ed. (Toronto: Carswell, 1988-present) [looseleaf], p. 3-4:

> To be valid an agreement for lease must show the parties, a description of the premises to be demised, the commencement and duration of the term, the rent, if any, and all material terms of the contract not incident to the relation of landlord and tenant, including any covenants or conditions, exceptions or reservations.

[19] On appeal, the appellant takes three points:

1. The agreement does not grant exclusive possession of land.
2. The agreement is nothing more than a licence.
3. A licence does not bind a purchaser.

[20] As to the first point, the appellant submits that the words in the agreement "land use or land rental" are insufficient to evidence an intention to grant exclusive possession of land. The judge came to a different conclusion. He said in his reasons:

> [24] In my view, the October 12, 2007 agreement and the evidence of the parties to the agreement confirms that Ms. Fradsham and Mr. Henley agreed that the trailer could remain on her property at no rental cost until June 15, 2008. It constitutes a valid lease between Ms. Fradsham and Mr. Henley, and they were clear that it applied to Ms. Rehn's trailer and addition which were on Ms. Fradsham's property. The consideration was that Mr. Henley would purchase, remove the trailer and clean up the property, which was a benefit to Ms. Fradsham in selling the property.

[21] Having construed the instrument within the factual matrix of the case, the judge made a decision of mixed fact and law. I cannot say that his decision was unreasonable, which is the appellate review standard. The words can reasonably bear the construction given them and the decision accords with the surrounding circumstances, including the obvious fact that the trailer and addition would have to occupy the land on which they sat to the exclusion of any other use until they were removed.

[22] This is sufficient to dispose of the attack on the validity of the lease and it makes unnecessary any consideration of the licence argument. But there is another reason for rejecting the challenge and that is because the arguments on exclusive possession and licence were not raised at trial. Each is something on which evidence could have been called and the respondent is now prejudiced in having to respond on an insufficient record. I would not entertain the arguments on an application of the general rule succinctly put by Mr. Justice Major in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 51:

> The general rule is that an appellant may not raise a point that was not pleaded, or argued in the trial court, unless all the relevant evidence is in the record: John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal* (1993), at p. 51.

2. Engineering Expenses

[23] The judge foresaw another dispute over the removal and cleanup of the site. While the judge determined that the respondent was obliged to leave the site in "a reasonably clean condition": s. 76(2)(f) of the *Landlord and Tenant Act*, R.S.Y. 2002, c. 131, he understood the appellant's requirements to exceed that standard. I am not persuaded he was mistaken in that regard. Mindful of the appellant's highhanded behaviour in the past, the judge wanted to head off another quarrel by ruling as follows:

> [28] There was no evidence that the trailer and addition were not maintained, and in fact Mr. Calandra has converted them to his own use. However, there was little evidence to establish the extent and substance of the cleanup required, but I find that it is reasonable in these circumstances for Mr. Henley to level the ground after removing the buildings, remove any fuel lines, tanks and electronic

> wires and to clean up the cars and debris within a 100-foot radius of the trailer and addition.
>
> [29] As both parties are concerned about the execution of this obligation, I order that it be overseen by an independent engineer from EBA Engineering who will be retained to do the following:
>
> 1. inspect the property on which the trailer and addition sit and the 100-foot radius with both Mr. Calandra and Mr. Henley present;
> 2. prepare a brief letter report outlining the proposed cleanup with photographs and meet with me, Mr. Henley and Mr. Calandra in chambers to present his proposal;
> 3. upon completion of the removal of the trailer and addition and the cleanup to file a letter report to the Court and the parties confirming the completion or lack of completion;
>
> [30] Upon receiving the report and hearing submissions, I will order the conditions of the cleanup.
>
> [31] Since Mr. Calandra is insisting on cleanup conditions exceeding any obligation of Mr. Henley when Mr. Henley agreed to purchase the trailer and addition, Mr. Calandra shall retain and pay for the engineering services.
>
> [32] I give leave to Mr. Calandra to further litigate any deficiencies in the cleanup and for Mr. Henley to claim occupation rent and damages or loss of profit he may have suffered as a result of being prevented from removing the trailer and addition on or before June 15, 2008, and for the delay between June 15, 2008, and June 15, 2009. The latter date of June 15, 2009, is the date at which I order Mr. Henley to have the trailer and addition removed and the property cleaned up.

[24] The appellant argues that it was illogical to put engineering expenses on him when the cleanup obligation was that of the respondent.

[25] I do not accept that submission. It was the appellant who argued for the supervision of an engineer in the removal and cleanup process. He did not want the respondent disconnecting services on his own and he raised the fear that the soil

may be contaminated, requiring environmental remediation. The respondent bears the cost of cleanup but there is no reason why he should pay for allaying the appellant's fears. Since the appellant felt he needed engineering services it is not unreasonable that he pay for them.

[26] As it has not been shown that the judge acted on a wrong principle or was clearly wrong, I would not disturb the order on engineering costs.

3. Special Costs

[27] The order of special costs is challenged on the grounds that: (1) the basis for the order was insufficient; (2) certain findings of fact supporting the order were patently unreasonable; and (3) the order was inappropriate because of divided success.

[28] In his reasons, the judge said:

> [35] In my view, the pre-litigation conduct of Mr. Calandra is reprehensible and warrants rebuke for the following reasons:
>
> 1. This court action is between Mr. Calandra and Mr. Henley. The inclusion of Ms. Fradsham and Ms. Rehn was instigated by Mr. Calandra. The evidence of Ms. Fradsham and Ms. Rehn confirmed that neither of them had any interest in pursuing the claims put forward by Mr. Calandra. They had long since moved on from the arrangements made in 2007. Their inclusion in the court action added to the cost and complexity of the court action.
>
> 2. Mr. Calandra's letters of January 7, 2008, and January 25, 2008, are highhanded and reprehensible given that he had full knowledge of the terms of the October 12, 2007 agreement between Mr. Henley and Ms. Fradsham. He acknowledged that he ultimately

> received a written copy from Mr. Henley's lawyer but he certainly knew the terms in November 2007 and had every opportunity to confirm them with Ms. Fradsham. He should have known that he was bound by those arrangements. If he had any claim, it would be against his purported client, Ms. Fradsham, and not Mr. Henley.
>
> 3. The actions of Mr. Calandra and his letters were motivated entirely by his desire to deny Mr. Henley of his ownership of the trailer and addition and his right to remove them pursuant to his lease until June 15, 2008.
>
> [36] I want to be very clear that Mr. Calandra was professional and courteous in his court appearances before me. I have no concern about his conduct in court. However, as previously stated, his conduct towards Mr. Henley was outrageous and quite frankly would cause any citizen to think twice about asserting their rightful ownership of the trailer and addition. The message to Mr. Henley could be none other than "transfer the trailer to me or you will get nothing without an expensive court fight."

[29] In my respectful opinion, the judge correctly identified the applicable principles for special costs in *Brosseuk* v. *Aurora Mines Inc.,* 2008 YKSC 18 at paras. 24-27, which he followed in the present case. Among those principles are that pre-litigation conduct can give rise to special costs and that reprehensible conduct includes making an improper allegation of fraud and bringing the proceedings for an improper motive.

[30] As to the sufficiency of the evidence on which the order is based, this is a matter attracting considerable appellate deference to the trial judge because it relates to an assessment of the circumstances in exercising a discretion on costs. The appellant included a *Fraudulent Preferences and Conveyances Act* claim in the action, which was unnecessarily aggressive and complicated the action needlessly.

The judge found that the appellant was motivated by a desire to deprive the respondent of the trailer by launching expensive litigation.

[31] The appellant complains that the judge said he knew of the lease agreement when he had not actually seen it until after he corresponded with the appellant and that it was not fair and reasonable for the judge to fix him with knowledge in all the circumstances. I find no substance in this complaint. The appellant wrote the offending letters with the knowledge that an agreement existed and it was therefore at least irresponsible to make claims of lien and to impose storage charges without first examining the instrument. I think it is significant that the appellant maintained those claims after he received a copy.

[32] The appellant contests the judge's findings of the motive behind the letters. I can see nothing patently unreasonable about the judge's assessment of the evidence. Indeed, it is hard to arrive at any other conclusion than that the appellant was using his position as a lawyer to bully the respondent into giving up the trailer by issuing threats of expensive litigation.

[33] Success in the action was not divided. The respondent accepted the obligation to clean up the site; that was the deal he made with the vendor of the property and formed the consideration for a rent-free lease. The respondent did not accept the terms of removal stipulated by the appellant. It cannot be said that the appellant succeeded on that issue.

[34] I can find no basis for disturbing the order of special costs.

Conclusion

[35] For the foregoing reasons, I would dismiss the appeal.

[36] FRANKEL J.A.: I agree.

[37] SMITH J.A.: I agree.

[38] DONALD J.A.: The appeal is dismissed. Thank you, counsel.

The Honourable Mr. Justice Donald