IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Hartley* v. *Turnbull and Sim*, 2005 YKSC 53 Date: 20050824
Docket: S.C. No. 03-A0089
Registry: Whitehorse

BETWEEN:

HOPE HARTLEY

Plaintiff

AND:

GEORGE NELSON TURNBULL and ROBERT SIM

Defendants

Before: Mr. Justice R.P. Marceau

Appearances:
Sean Kelly For the Plaintiff
George Nelson Turnbull On his own behalf

MEMORANDUM OF JUDGMENT DELIVERED FROM THE BENCH

[1] MARCEAU J. (Oral): This is an action in the Supreme Court of the Yukon Territory, number 03-A0089, between Hope Hartley as plaintiff and Nelson Turnbull and Robert Sim as defendants. Robert Sim made an agreement and was not part of the trial. The agreement that he made was that he would be released upon payment of $15,000 including interests and costs.

[2] MR. KELLY: For clarification, My Lord, that would include interest, but not costs. It's a separate amount for costs.

[3] THE COURT: Does he have to pay costs in addition?

[4] MR. KELLY: Yes, it was part of the agreement; he agreed to pay $8,000 in costs.

[5] THE COURT: In costs?

[6] MR. KELLY: In costs, yes.

[7] THE COURT: All right, plus some costs.

[8] It is obvious from the evidence that Nelson Turnbull is the way by which George Nelson Turnbull is known and I will grant an amendment to the style of cause so that his name is changed to George Nelson Turnbull, his legal name.

[9] This is a sad case in many ways because had the parties at least obtained a smattering, a casual time in a coffee shop with a lawyer, they could have perhaps seen the problems with what they were doing without legal advice.

[10] The contract, which was entered into on its face, and I am going to have to, in this judgment, deal with a lot of contract and evidence law, most of which arises because the parties made an agreement that was partly in writing, made other agreements, side agreements, or had other understandings which were never committed to writing.

[11] It is clear there was a document prepared. There is only one person who could have, on the evidence, prepared it, and it was Mr. Turnbull. The 17th of October, 2002, is the nominal date on it. There are no other dates. I am satisfied on the evidence that

within a short period of time, and most likely on the 17th of October, this agreement was signed by all of the parties. The purchasers were said to be Rob Sim and Nelson Turnbull. The property was said to be the No Pop Shop with a Schedule A attached for the equipment. The vendor was Hope Hartley and all three of them signed. I am satisfied on the evidence they all signed and had their signatures witnessed by Allen Hartley, at that time, the husband of Hope Hartley.

[12] The agreement on its face is absolutely clear and unambiguous. The purchase price, so far as it goes, is $60,000. The vendor is to ensure that all of the utilities are paid up to October 17, 2002. The vendor is to pay the taxes for the tax year 2002. The purchaser is to pay the vendor $2,000, along with a November 2002 down payment, for propane, taxes, and goodwill on or before November 1, 2002. It was clear to me from the rest of the evidence that the purchaser was to pay $2,000 and then was to be responsible for propane, taxes, and goodwill by November 1st. I do no know where the word goodwill gets in there. It is meaningless here. Schedule A was attached. That is unambiguous. It is an equipment list.

[13] The balance of the cash payment $36,000 is to be made November 1st 2003, which is the completion date. Possession was to be October 18, 2002 and adjustments October 18, 2002.

[14] Now, there were four conditions added in here. (F) says:

> Purchasers responsible for insurance November 1, 2002 and electrical to be switched into purchasers' names December 1, 2002."

[15] (G) is:

> "Purchasers responsible for any new inventories and all utilities as of October 18th, 2002."

[16] (H) is:

> Vendor agree to carry purchasers for one year commencing November 1st, 2002 and ending October 1st, 2003, with principal and interest payments of $2,000 monthly, which forms purchasers down payment ($24,000).

[17] (I) is:

> "Purchasers to make lump sum payment November 1st 2003, of $36,000 representing balance of purchase price."

As I said, that relates back to completion November 1st, 2003, when the balance of cash payments are to be made.

[18] As I said, on its face, this is an unambiguous agreement of purchase and sale. Mr. Turnbull says that whatever I may characterize it as in law in the Yukon there is a different practice and this is the agreement that is used as a lease purchase. I note first of all, the word lease is nowhere in the agreement.

[19] As evidence that the Hartleys know about these lease purchase agreements, there is in evidence Exhibit 3, which is a contract of purchase and sale on the same kind of form as Exhibit 1 in these proceedings. It is signed by Hope Hartley and Al Hartley

as vendors, and it is for a sale price of $213,000 of a residential property, I am told. The deposit is to be made and vendor is to carry a mortgage in the amount of $193,000 at an interest rate of 9.5 percent over an amortization period of 25 years, turned to be two years with payments of $1,661.73, P and I, principal and interest.

[20] I look at this agreement and I look at this agreement and I do not see any provision for the difference between $193,000 and $213,000 being paid ever. Mr. Turnbull points out to me that if the purchaser falls into arrears, number 21 Hayes goes back to vendor and purchaser forfeits all monies paid. That, as I indicated to him quite a bit earlier, only means and says exactly what a mortgage says.

[21] Now, a lease purchase agreement is a very familiar document in law and it does not matter whether you are in Alberta, Saskatchewan, Manitoba, British Columbia, the Yukon Territory or in the Northwest Territories, and I confine my comments to western Canada. In many cases, a purchaser approaches a vendor and does not have a down payment that is sufficient to ensure that if the purchaser fails to make payments as provided in a mortgage or an agreement for sale, then the vendor will not be out when they have to take back the property. Vendors, therefore, often insist that the agreement that is drawn be a lease agreement and that only after the lease payments have been made for a certain period of time will it be considered that the purchaser has enough equity that the matter could become an agreement for sale. The true nature of that document is a lease with an option to purchase. Usually, the payments that are made on the lease are more than normal lease payments so that an equity is built up.

[22] It may be and probably is that Mr. Turnbull acted in good faith and thought that this was the way in which to achieve a lease option. It is absolutely clear to me that the document that he drew up does not come near to that. There is an additional problem with the document and that is that if this was to be a lease option, the first thing that the vendor thinks about is how will I determine or end the lease if the payments are not made. Every lease agreement along these lines will -- usually deal with a cancellation as soon as possible after default.

[23] In many of these cases, the purchaser also negotiates a clause that says that although, in this case the lease was intended, I gather by Mr. Turnbull, to be for one year, if the purchaser or the lessee has a problem, the lessee can get out of the lease on giving reasonable or whatever notice is provided for. Now, that is the document that Mr. Turnbull may very well have thought that he had drawn and those are the terms that should have been considered. The only possible defence that I know to this is *non est factum* or the minds of the parties did not go with the contract that was drawn.

[24] It was not pleaded as such the *Rules of Court* require that it be pleaded, but I will deal with it as though it was pleaded because I do not think that defence is viable in any event. The reason that it is not viable is that there is the evidence of Hope Hartley that she had thought she had sold the property, and I cannot see how she could have thought otherwise, in light of the clear wording of the contract that she signed.

[25] It was strongly suggested and it was put to Mr. Hartley, this is Allen Hartley, that first of all, he was a real estate agent and he agreed that he was, that he knew about

lease purchases and he said he did not, and that he had been told this was going to be a lease purchase and he denied that.

[26] Given that the terms of a lease, in terms of cancellation of the lease by one party or another, were never put into the contract, that the form which was used was clearly that for an agreement for sale, and the terms were absolute in the sense that there was an absolute obligation to pay both 12 months of payments of $2,000 and the balance of $36,000 on the purchase price, I have concluded that while there may not have been a meeting of the minds, it was clear that Hope Hartley thought that she had an agreement for sale and she was entitled to rely on the document. Mr. Turnbull drew a contract that on the face of it was an agreement for sale, not a lease with an option to purchase.

[27] It does not help Mr. Turnbull that he acted in good faith, and I will find as a fact that he did act in good faith. He believed that so long as he made the payments while he was in possession and gave reasonable notice, he could turn the business back to the vendor. He was negligent in not ensuring that that was the agreement that was signed and he certainly did not draw it up in that way. There is no way that Hope Hartley should bear the consequences of his negligence, even if he acted as he did in good faith. I find, therefore, that there was an agreement for sale; $60,000 was the purchase price.

[28] With respect to the question of mitigation, which is also mixed in with the fact that it is obvious that at some point in January, Mr. Turnbull tried to list the property and sell it, and then some time in May, Mr. Hartley tried to sell the property. The fact is that Mr. Turnbull treated the property as something that he could sell. I think he was correct in

that, obviously, from my findings, he could have sold the property. I think that Mr. Hartley certainly could not have sold the property, that is the restaurant, without some sort of a release from Nelson Turnbull and Robert Sim. So that I treat his listing the property as simply an attempt to get the property sold so that the consequences would not be as horrendous for Mr. Turnbull and Mr. Sim.

[29] With respect to what was paid and what credits Mr. Turnbull is entitled to, he says that he paid $12,600. I am not satisfied with the documentation, in fact, the total lack of documentation presented by the plaintiff, so that the accounting, such as it is, of Mr. Turnbull, I am prepared to accept. I am prepared to accept that he paid $12,000. It is clear on all of the evidence that the $600 was payment for inventory.

[30] I am not prepared to accept, on the evidence of Mr. Hartley, that there was a loss of $3,000, because it is not properly documented, as far as the loss on the utilities or the switch in the hydro.

[31] There is evidence with respect to what exactly the obligation was to pay the head lease here to Pot of Gold, the landlord. It was, I am satisfied, that those payments were supposed to be made in a side agreement by the purchasers. I am also satisfied that the plaintiff's agent, her husband, failed to get it switched over. I am satisfied that the parties treated it as a done deal or *fait accompli* and acted on it. But because I do not know what the obligations were under the lease beyond that the payment was over, well, in fact, it was $4,936.98 a month, beyond that I do not know when the term was to end, whether there was a notice that could have been given to the vendor to the

landlord, and I am not prepared to allow anything as a reduction on that account, or as an increase in Mr. Turnbull's obligations.

[32] I give him credit for $12,000 and I give him credit for $15,000, the amount that was agreed to be paid by Robert Sim, and I give him those credits as of the 1st of March, 2003. That leaves a balance of $33,000. There will be judgment against the defendant, Mr. Turnbull, for the sum of $33,000 and I will listen to the submissions with respect to costs.

[33] MR. KELLY: For clarification, My Lord, the credit should be $12,600, for the amount paid and I believe you said $12,000 even.

[34] THE COURT: No, $12,000 even. The $600 was clearly a $2,600 cheque, $600 of which was agreed to be a payment for inventory, the other $2,000 was that payment due November 1st. That is clear.

[35] MR. KELLY: Okay. Thank you, My Lord.

[36] THE COURT: A matter of costs.

[37] MR. KELLY: My Lord, I think with the benefit of a five minute recess I could be much shorter in the long run in terms of my submissions on costs, so I would ask Your Lordship for an indulgence of a five minute recess.

[38] THE COURT: Well, before you make your submission on costs, has not Sim agreed to pay half of them?

[39] MR. KELLY: Well, Sim has agreed to pay an agreed amount of $8,000 of costs so we would submit that perhaps in my submission, the most simple submission would be that the $8,000 would be half of the costs up to the point on August 12th, up to the point in mid-August when Mr. Sim settled, and that from that point forward for the preparation for the trial and the trial itself, Mr. Turnbull would be responsible for the entirety of those costs himself.

[40] THE COURT: Do you have any submissions to make, Mr. Turnbull?

[41] MR. TURNBULL: I don't know what he just said, something to do with costs, whatever. I don't know what to tell you, Judge.

[42] THE COURT: The offer is reasonable. The plaintiff will have, as taxed costs, one half of his tax costs up to preparation for trial and full costs at trial. Interest, of course, will run from the 1st of March. You may close court.

[43] MR. KELLY: My Lord, well, there was an offer.

[44] THE COURT: Pardon me?

[45] MR. KELLY: There was a formal offer sent to Mr. Sim.

[46] THE COURT: Well, maybe you should have said that before I made my ruling on costs.

[47] MR. KELLY: Yes.

[48] THE COURT: What was the offer?

[49] MR. KELLY: It was for, I believe, $29,000 plus costs. And it was sent to Mr. Sim -- sorry, Mr. Turnbull, prior to trial last Friday, I believe. And in the circumstances we would submit that special costs for the trial should be appropriate.

[50] THE COURT: Your *Rules of Court* say that unless special circumstances be shown, the defendant is to pay double costs after; is that what the rule says?

[51] MR. KELLY: Excuse me, My Lord, I'm relatively new to the jurisdiction. Yes, that's correct, My Lord, after Rule 37(23).

[52] THE COURT: Read it to me.

[53] MR. KELLY:

> If the plaintiff has made an offer to settle a claim for money, and it has not expired or been withdrawn or been accepted, and if the plaintiff obtains a judgment for the amount of money specified in the offer or a greater amount, the plaintiff is entitled to costs assessed the date that the offer was delivered and to double costs assessed from that date.

[54] THE COURT: Well, is there another rule that says you have got to give that at least 30 days before trial?

[55] MR. KELLY: My Lord, under subrule (6) it says:

> An offer may be delivered at any time before the trial commences.

But that if the offer -- and then under Rule (7):

> If an offer is delivered less than 7 days before the trial commences, subrules (23) to (29) do not apply but the court may, in exercising its discretion as to costs, consider the offer and the date that it was delivered.

And so --

[56] THE COURT: All right, so are we within the seven days or outside the seven days?

[57] MR. KELLY: I believe by the time it was served to Mr. Turnbull it would have been outside or, sorry, within the seven days, but we would ask the Court in exercising its discretion as to costs to take the offer into account.

[58] THE COURT: Well, I will consider it. Obviously, the rule does not strictly apply here; it is not one of those situations where I have to find special circumstances apply in order not to double the costs. In my view, an offer given in less than seven days is not timely, but I also take into account that Mr. Turnbull is a layman. It is obvious to me that his impecuniosity at the time, it means your lack of money, at the time he drew this almost foolish contract was the reason that it was drawn instead of with consultation, some consultation with a lawyer. It is obvious to me that if he had been able to afford a lawyer, a lawyer would have, at least, made this trial much longer and much more involved. The plaintiff should be happy that she only has to pay a lawyer for this day of trial. So that costs will be as originally awarded, one-half to the date of preparation for trial, after preparation the costs are in full, but one set of costs. Is that clear?

[59] MR. KELLY: Yes, thank you.

[60] MR. TURNBULL: No. What's that mean?

[61] THE COURT: Pardon me?

[62] MR. TURNBULL: What's that mean?

[63] THE COURT: What it means is that until a few days ago, when there was a settlement by Mr. Sim, there were two defendants, and two defendants should be paying the costs to that time. Obviously, the rule is that the loser pays the costs. You are a loser, so is Mr. Sim. By his agreement, he has agreed to pay $15,000 plus $8,000 of costs. I do not know what the costs, which would be taxed between party and party would be, that is the clerk of the court that does those taxations, but I am awarding only half of that.

[64] Now, after there is a settlement, then there is only one defendant left to pay and you are responsible for the fact that there was a trial, which you have lost, and I have awarded costs against you, full costs for preparation for the trial and for the trial.

[65] Now, it is in the Rules of Court, a schedule that awards so much for each step, and there is an escalating one, depending how much is involved and there are different columns. Now, $33,000 is on a particular column, I am not sure which it is, then --

[66] MR. TURNBULL: $33,000 for what?

[67] THE COURT: $33,000 plus interest is the award against you, the cost --

[68] MR. TURNBULL: I thought it was $30,000

[69] THE COURT: The costs that you must pay the other side are calculated in different columns according to a schedule.

[70] MR. TURNBULL: So am I paying $30,000 or $33,000? I thought it was $30,000 you just awarded her.

[71] THE COURT: No, you are paying $33,000 -- it was $33,000, was it not?

[72] MR. KELLY: Yes, it was $33,000, My Lord.

[73] THE COURT: $33,000, interest, according to the *Adjudicator Act*, what is the rate of that? Does it change?

[74] MR. KELLY: It does, it changes every six months, My Lord. It is basically the bank prime rate.

[75] THE COURT: All right. That is, so what, four or five percent, or even less.

[76] MR. KELLY: I believe it's been, since 2003 -- it would be in that range, yeah.

[77] THE COURT: All right. And then, in addition, the judgment will be for costs. Costs will be one-half for what they normally would have been on $33,000 plus interest, too.

[78] MR. TURNBULL: That's what I'm paying?

[79] THE COURT: That is what you are paying. And then there was an application for double the costs of the trial because you turned down an offer to settle for $28,000, and I refused to award that to them on the basis that you did not have enough time to consider it, okay. That is the ruling.

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MARCEAU J.