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CITATION: Collett v. Reliance Home Comfort
Szilvasy v. Reliance Home Comfort, 2011 ONSC 6928
DIVISIONAL COURT FILE NOS.: 203/11 and 202/11
DATE: 20111207

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
GEOFFREY COLLETT and SANDRA COLLETT Respondents/Plaintiffs	*Hillel David* and *Mark A. Mason*, for the Respondents (Plaintiffs)
– and –	
RELIANCE HOME COMFORT LIMITED PARTNERSHIP also known as RELIANCE HOME COMFORT Appellant/Defendant	*William A. Brunton* and *Tim Buckley*, for the Appellant (Defendant)
– and –	
SHIRLEY SZILVASY Respondent/Plaintiff	*Mark A. Mason*, for the Respondent (Plaintiff)
– and –	
RELIANCE HOME COMFORT LIMITED PARTNERSHIP also known as RELIANCE HOME COMFORT Appellant/Defendant	*William A. Brunton* and *Tim Buckley*, for the Appellant (Defendant)
	HEARD: November 17, 2011

PARDU J.

[1] Reliance Home Comfort appeals from the judgment of the Small Claims Court finding it liable for property damage caused by the failure of two hot water tanks. Reliance is in the

business of providing and servicing hot water tanks to residences. It is common ground between the parties that there is no written contract that governs the issue of who bears the risk for consequential property damage. Reliance undertakes with its customers to provide them with working hot water tanks. Where a tank fails, Reliance replaces it and also services tanks which need maintenance. Reliance maintains ownership of the tanks unless a leasee choses to purchase the tank from the company. The issue before the trial judge was whether there should be a warranty implied in the contract that Reliance was responsible for damage to property caused by water escaping from a corroded hot water tank. The contracts are of indefinite duration.

[2] The trial judge came to the conclusion that Reliance was responsible for the damage. He indicated in his reasons,

> But given the evidence that the water heater would at some point leak there is a duty to warn the consumer. While a warning might absolve the defendant of liability in negligence, is the warning sufficient to absolve the defendant of liability for breach of contract for goods. I think not. Since the water heater will at some time leak it is not sufficient to say that there is a possibility of a leak when there is a certainty of a leak. Only the timing is uncertain.
>
> The warning confirms the high degree of risk the consumer is asked to bear. The water heaters are rented on open-ended contracts for a monthly fee. The rental fee does not vary from day one until the heater breaks down. The risk of flooding increases as time goes by but the charges to the consumer remain constant without any recognition that it is more and more likely that the consumer will suffer damage. The contracts treat the water heater at all times as if it were just installed.
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> It has been economic for the defendant to act as it has. That is to deny claims rather that institute a program of replacement at a fixed time or to amortize the cost of the heater over a reasonable time and then transfer the ownership and the risk to the homeowner. By retaining ownership the defendant retains the risk of failure of the property, which it owns, and the liability that follows.
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> The property involved belongs to the defendant and is therefore under its care and control. This is not a case where the property was sold to the plaintiff and the vendor warranted that the goods were reasonably fit for the purpose. This is a case of an open-ended lease of property and by leaving the lease open-ended and continuing to charge the same amount each month, it is reasonable to say that the implied warranty of fitness continues with each monthly payment as a new starting point. If defendant is charging as if the water heater were new, why should the warranty not be as effective as if the heater were new?

[3] The parties do not agree as to the standard of review. The Appellant submits that the standard of review is correctness, and relies upon *Bell Canada v. The Plan Group* 2009 ONCA 548. The standard of review of the decision of a trial judge may be correctness on a legal issue, but palpable and overriding legal error may be required to justify intervention where a question

of fact or mixed fact and law is in issue. Blair J.A. described this spectrum at paragraphs [27] – [31] in *Bell Canada*,

> [27] Where the matter referred to is more a matter of legal principle and sits towards the error of law end of the spectrum, the standard is correctness. Where the matter is one in which the legal principle and the facts are inextricably intertwined – where the facts dominate, as it were – it falls more towards the factual end of the spectrum, and significant deference must be accorded. Contractual interpretation, in my opinion, is generally the type of case that falls within the former category, negligence one that generally falls into the latter.
>
> [28] In my view, this distinction between the nature of the question to be determined and the standard of appellate review to be applied to that determination can help in clarifying a number of cases that might otherwise be misunderstood. For example, in *Casurina Limited Partnership et al. v. Rio Algom Ltd. et al.* (2004), 181 O.A.C. 19 (C.A.), at para. 34, Feldman J.A. concluded that, "The construction of a written instrument is a question of mixed fact and law". She did not say, however – nor should she be understood to have said, I think – that a deferential standard of appellate review must *always* be applied to the interpretation of a contract. Indeed, in *Palumbo v. Research Capital Corp.* (2005), 72 O.R. (3d) 241 (C.A.), Laskin J.A. observed at para. 32 that, "That standard of review of the interpretation of a contract provision ordinarily is correctness."
>
> [29] The palpable and overriding error standard of review, it seems to me, is designed to afford deference to trial judges in their essential fact-finding functions, including the drawing of inferences from the facts and the determination of issues where law and facts are inextricable intermixed. We leave it to trial judge to sort these matters out with good reason. They have seen and heard the witnesses and are attuned to the dynamics of the trial. In *Waxman et al. v. Waxman et al.* (2004), 186 O.A.C. 201, at para. 292, this Court articulated the policy reasons for giving such deference to trial judges:
>
> > The "palpable and overriding" standard demands strong appellate deference to findings of fact made at trial. Some regard the standard as neutering the appellate process and precluding the careful second hard look at the facts that justice sometimes demands. This viewpoint is tenable only if facts found on appeal are more likely to be accurate than those determinations made at trial. If findings of fact were to be made on appeal they might be different from those made at trial. Most cases that go through trial and onto appeal will involve evidence open to more than one interpretation. Merely because an appellate court might view the evidence differently from the trial judge and make different findings is not, however, any basis for concluding that the appellate court's findings will be more accurate and its result more consistent with the justice of the particular case than the result achieved at trial.
>
> [30] The exercise of interpreting a contract is not essentially a fact-finding exercise, however. As the authorities cited above have noted, there may be questions involving the determination of the factual context in which the contract was negotiated, or

considerations of extrinsic evidence, that evoke the fact-finding functions. Those decisions are to be addressed from the palpable and overriding error perspective. In substance, though, the exercise of interpreting a contract is a legal exercise, calling upon the learning and training that judges and lawyers acquire over years of experience. Apart from the truly factual aspects that may underlie the task, trial judges have no particular advantage over appellate judges in the art of contractual interpretation.

[31] In my view, certainty in contract is an important policy value underlying the construction of contracts. This factor alone is sufficient to push the standard of review in such cases towards correctness and away from deference. At the very least, contractual interpretation is an exercise that generally falls much more towards the error of law end of the *Housen* spectrum, once the factual issues referred to above have been resolved or if – as is the case here – they are not in dispute. The Supreme Court of Canada has yet to consider the standard of review in contractual interpretation cases post-*Housen*. I am not entirely persuaded that it makes sense to take one type of analysis (the *Housen* analysis) that is designed to discourage appellate courts from re-trying *the factual issues* in cases, and apply its analytical paradigm (the facts/mixed fact and law/law spectrum) to what is essentially *a legal exercise*.

[4] In *Bell Canada*, the issue was the interpretation of an arbitration provision in a written contract.

[5] The Respondent relies on *G. Ford Homes Ltd. v. Draft Masonry (York) Co.* (1983) 43 O.R. (2d) 401, C.A. at para. 9, where the Court indicated "implied terms are as a rule based upon the presumed intention of the parties and should be founded upon reason. As a result, it is clear that every case must be determined on its own particular facts."

[6] The Respondent also relies on *The Toronto-Dominion Bank v. Magnolia Tree Holdings Inc.* Ont. C.A. February 22, 2006, at para. 1, where the Court indicated an appellant "can successfully challenge [a conclusion by the trial judge regarding an implied term in a contract] only if he can demonstrate that the finding of fact on which it is based is the product of clear and palpable error."

[7] In this case, "reasonableness" lay at the heart of the issues before the trial judge. S. 9(1) of the *Consumer Protection Act* provides that a supplier is deemed "to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality."

[8] In this case, in a consumer context, the trial judge had to decide what it meant to provide goods of a "reasonably acceptable quality" in the factual circumstances before him.

[9] I conclude that the issues determined by the trial judge raised issues of mixed fact and law, and that a palpable and overriding error must be established to justify appellate intervention.

[10] There is no doubt that the *Consumer Protection Act* implied warranties apply, as the failures of the water tanks occurred after the effective date of the legislation. (See *Griffin v. Dell Canada Inc.*, 2010 ONCA 29)

[11] The relevant portions of the *Consumer Protection Act*, 2002 S.O. 2002 Ch. 30, provide as follows:

> **Quality of services**
>
> 9. (1) The supplier is deemed to warrant that the services supplied under a consumer agreement are of a reasonably acceptable quality. 2002, c. 30, Sched. A, s. 9 (1).
>
> **Quality of goods**
>
> (2) The implied conditions and warranties applying to the sale of goods by virtue of the *Sale of Goods Act* are deemed to apply with necessary modifications to goods that are leased or traded or otherwise supplied under a consumer agreement. 2002, c. 30, Sched. A, s. 9 (2).

[12] In The Law of Contracts, 5th edition, Canada Law Book, S.M. Waddams described the evolution and significance of a warranty at pp. 289-290,

> In the late 18th and 19th centuries the warranty became established primarily for procedural reasons, as a contractual rather than a tortious remedy. Thus the seller who made a warranty was now treated as having promised the truth of the fact warranted. What began as a matter of procedural convenience eventually had far-reaching, substantive results. One change led to enlargement of the buyer's rights by the application of the contractual measure of damages. This measure made the seller liable not only for the buyer's expectation, but also for damage arising out of the use, as well as of the sale, of the defective goods, as, for example, personal injuries.

[13] The factual context here is important. All hot water tanks will corrode and eventually leak. The Appellant had no plan to replace water tanks before they leaked at any stage of their life span. There is no way to diagnose whether an individual hot water tank is likely to fail. The Appellant has approximately 1.2 million hot water tanks leased to customers. Based on past experience, in any given year, the chance that a hot water tank will fail and cause consequential property damage is .005%. This case is quite different from the case of the sale of a used car, where there is no ongoing relationship between the parties, and both parties would recognize that mechanical issues would arise in the future for which the vendor would bear no responsibility. Here the leasor promised to provide the leasee with a working hot water tank at all times. If the tank failed they undertook to replace it. If it required service, they provided it. The leasor retained ownership of the tank at all times. A tank provided by the leasor might be brand new or it might be 19 years old. In rare cases, a hot water tank might fail almost immediately because of a manufacturing defect. There is no meaningful way to differentiate amongst the leasor's contractual obligations depending on the age of the tank. Given the leasor's acknowledged contractual obligation to provide a working hot water tank at all times, it would be illogical to conclude that there was not a continuing warranty as to the proper functioning of the tank.

[14] Having regard to the factual context before him, I cannot conclude that the trial judge made a palpable and overriding error in concluding that the Appellant was responsible for the

consequential damage resulting from the failure of the water tanks. For this reason, the appeal is dismissed.

[15] Counsel may make written submissions as to the costs of the appeal, due from the Respondents within 30 days of the release of these reasons, and due from the Appellant within 15 days thereafter.

Pardu J.

Released: December 7, 2011

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Respondent/Plaintiff

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REASONS FOR JUDGMENT

Pardu J.

Released: December 7, 2011