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Seasoned real estate lawyers best help for home contracts

A decision of the Ontario Divisional Court this summer underscores the importance of having an experienced real estate lawyer review a builder purchase agreement before it is signed.

Patrick Ha and Rosanna Chiu purchased a new home in Markham from Arista Homes (Boxgrove) Inc. A schedule to the agreement of purchase and sale contained a list entitled: "The following items are included in the purchase price."

The item in the list which eventually resulted in litigation read: "Closing costs to be capped at $2,300 plus GST, which includes tree planting charge, asphalt driveway, hydro, water and gas hook-ups, educational levy, Tarion fee. . . "

The buyers believed that those listed closing expenses were to be included in the purchase price. On closing, the builder refused to close the transaction unless the buyers paid an additional $2,147.64. The disputed amount was paid under protest on closing, and the homeowners later sued the builder in Small Claims Court.

At trial, deputy judge James L. Robinson awarded the plaintiffs the full amount claimed, plus interest and costs of $500. The builder appealed to the Divisional Court in July, and the decision of Justice Peter Lauwers was released in August.

The appeal court had to decide if there was an ambiguity in the contract, and if so, what it meant. Reading the disputed clauses together, the judge reasoned, leads to this: "The following items are included in the purchase price. . . . Closing costs to be capped at $2,300 plus GST . . "

Lauwers concluded that there are two ways to read this clause. "The first way is to read it as the (builder) submits, as Arista Homes promising that it would absorb closing costs for the items listed in excess of $2,300. The second way is to read it as the (buyers) submit, as Arista Homes promising to absorb closing costs up to $2,300."

Each of the interpretations was plausible and the judges at trial and appeal both agreed that the contract was ambiguous. At trial, the deputy judge heard the evidence of the buyers' witnesses and concluded that the second interpretation was most appropriate. In other words, he decided that the buyers did not have to pay the extra money and the builder had to absorb it. The Divisional Court agreed with the trial decision and dismissed the appeal.

Although it was not argued in the courts, the old legal maxim of contra proferentum would seem to apply to this dispute. In plain English, the rule states that where there is an ambiguous clause in a contract, it will be interpreted against the party responsible for drafting it, in this case the builder.

The Divisional Court also awarded costs to the purchasers. The judge took note of the fact that the purchasers spent several thousand dollars to have a lawyer prepare the case for them, although the lawyer did not attend in court.

The total court costs awarded to the purchasers came to $8,587.64, including their lawyer's preparation fee of $6,750, an award of $640 as a form of counsel fee on the appeal, plus expenses and HST.

Arista ran up its own legal bills of at least $10,210.17, bringing its total layout for the court case to more than $21,445 plus some interest — 10 times the original claim of $2,147.

This court case clearly illustrates the importance of having a builder purchase contract (and in fact any real estate purchase contract) carefully reviewed by an experienced real estate lawyer before it is signed or during any conditional period. I doubt if a real estate lawyer would have let an ambiguity like the one in this case remain unchallenged.

The builder's sales contract in this case was negotiated and drafted by two people who are not currently licensed as real estate agents in Ontario. Our laws do not require builder's sales representatives to be licensed, trained, insured or regulated, and as this case illustrates, using inexperienced or untrained sales staff can hurt both builders and buyers.

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Ha et al. v. Arista Homes, 2011 ONSC 4561 (CanLII)

Date:	2011-08-25
Docket:	DC-10-000-160-00
URL:	http://canlii.ca/t/fn20g
Citation:	Ha et al. v. Arista Homes, 2011 ONSC 4561 (CanLII), <http://canlii.ca/t/fn20g> retrieved on 2012-10-20
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CITATION: Ha et al. v. Arista Homes, 2011 ONSC 4561
COURT FILE NO.: DC-10-000-160-00
DATE: 20110825

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:	)	
	)	
PATRICK HON-CHUNG HA and ROSANNA YUEN-YU CHIU	)))	Self-represented
Plaintiffs/Respondents in Appeal	)	
	)	
- and -	)	
	)	
	)	
ARISTA HOMES (BOXGROVE) INC.	)))	D. McConville, for the Defendant
Defendant/Appellant	)	
	)	
	)	
	)	**HEARD**: July 26, 2011

REASONS FOR DECISION

LAUWERS J.

[1] Deputy Judge Robinson awarded the plaintiffs $2,147.64 along with pre-judgment and post-judgment interest in costs in the amount of $500.00, inclusive of disbursements. The defendant appeals.

[2] The plaintiffs purchased a home from the defendants. The issue is with respect to the interpretation of Schedule "G" of the Agreement of Purchase and Sale, which provides (using similar type face):

Schedule G

EXTRAS WITH AGREEMENT

(Change Order)

…

THE FOLLOWING ITEMS ARE INCLUDED IN THE PURCHASE PRICE

Item	Description	Price
	Supply and Install the following:	
1	Closing costs to be capped at $2,300.00 plus GST which includes tree planting charge, asphalt driveway, hydro, water and gas meter hook-ups, Educational levy, Tarion Fee (Ontario New Home Warranty program)	
2	$7,500.00 in upgrades to be chosen at time of color chart selection meeting. (No cash value)	
3	Purchaser(s) acknowledge(s) and accept(s) that all existing promotions are applied herein.	
4	Optional 4th bedroom second floor plan	

The Purchaser(s) having entered into an agreement to purchase the property described above, requests that the Vendor build the above-noted changes/additions into the house at the additional cost agreed herein. The Purchaser(s) & Vendor agree that:

…

f) If there is any discrepancy between this schedule/change order and other schedules included in the Purchase and Sale Agreement then it is agreed to by all parties that this schedule/change order takes precedence.

[3] It is important to note that Schedule "G" does not list the "additional cost" of "the above-noted changes/additions."

[4] The agreed components of the "closing costs" are the following:

Driveway paving (including GST)	$636.00
O.N.H.W.P enrolment fee (including GST & RST)	$684.00
Water meter & installation (including GST)	$240.56
Hydro meter & installation (including GST)	$611.26

Realty tax adjustment	[$24.18]
Total	$2,147.64

These components appear to be derived from a clause in the schedules to the agreement reviewed below. The issue for trial was whether these listed "Closing costs" were to be included in the purchase price paid by the plaintiffs, or whether they were to be paid by the plaintiffs as an extra to the purchase price. The defendants refused to close unless the plaintiffs paid the disputed costs under protest, thereafter starting this Small Claims Court action.

The Reasons of the Deputy Judge

[5] The Deputy Judge noted Arista's argument that the closing costs "are stipulated for in Paragraph 17 of Schedule "A" and various clauses of paragraph 1 of Schedule "X" of the Agreement."

[6] Schedule "A" to the Agreement provides:

> 17. The finishing touches of a fully sodded lot and paved driveway. The basecoat paving is included in the purchase price and the topcoat is at a cost to the Client(s) of $600.00 for double wide driveways and $400.00 for a single to be paid on closing.

[7] Schedule "X" of the Agreement obliges the purchaser to pay adjustments that are listed:

> ADJUSTMENTS
>
> 1. The hot water and tank may not be included in the Purchase Price and shall remain chattel property. The Purchaser agrees to execute a rental contract for the said heater and tank…The Purchaser shall pay, or reimburse the Vendor for the cost of, or the charge made for, water service or installation of the water meter and the cost of hydro installation and connection fee. …
>
> a. Taxes, fuel, water rates, assessment rates and local improvements to be apportioned and allowed to the Closing Date. In the event realty taxes have not been individually broken down in respect of this Property and remain en bloc, then notwithstanding that such en bloc taxes may be outstanding and unpaid, the Purchaser covenants to complete this transaction and accept the Vendor's undertaking to pay realty taxes once individually assessed against this Property and agrees to pay on closing a deposit to be readjusted and to be applied on account of the Purchaser's portion of realty taxes applicable to this Property. Municipal realty tax re-assessment and/or supplementary tax bills relating to the Dwelling constructed on the Property issued subsequent to the Closing Date shall be the sole responsibility of the Purchaser.
>
> b. The Vendor represents and warrants that it is registered as a builder under the Act, as hereinafter defined, and that the Dwelling is or will be enrolled under the Act. The Purchaser covenants and agrees to reimburse the Vendor on closing for the enrolment fee paid by the Vendor for the Dwelling under the Act.
>
> c. [Deleted by agreement between the parties.]In the event that any level of government including without limited the generality of the foregoing, federal, provincial, or municipal, shall impose a levy, impost charge or any other charge or tax against the Property (the "New Charge") after the date of signing of this agreement by both parties, the Purchaser shall pay to the Vendor in addition to the Purchase Price an amount equal to the New Charge which amount will be added to the Statement of Adjustments and payable on the Closing Date.
>
> d. [Deleted by agreement between the parties.]The Vendor shall have the option to collect and remit the retail sales tax, if any, payable by the Purchaser on chattels which were purchased in this transaction as a charge on closing and the allocation on such chattels will be estimated, if necessary, by the Vendor.
>
> All proper readjustments shall be made after closing, if necessary, forthwith upon request. …
>
> …

[8] Schedule "X" of the Agreement also contains an "entire agreement clause":

> 11. …There is no representation, warranty, collateral agreement or condition affecting this Agreement or the Property, or supported hereby, except as set forth herein in writing. In the event there is a conflict between any term(s) in this Agreement, the Vendor shall determine which conflicting term(s) prevail(s). …

[9] The Deputy Judge noted that the Defendant "forcefully argues" that the parol evidence rule was "a strict legal barrier" which prevented him from considering the testimony of the plaintiffs that contradicted the written terms of the Agreement:

> The Defendant points to Schedule "X" of the Agreement which contains a specific clause confirming that there were no representations or warranties between the parties except as expressly set forth in writing in the Agreement. The Defendant argues that the court must disregard the testimony of the Plaintiffs and give effect solely to the terms of the written Agreement.

[10] The Deputy Judge then reviewed the plaintiffs' position and evidence:

> The Plaintiff's position is less technical. The testimony of Ms. Chiu is that she and the co-Plaintiff were told by the Defendant's three real estate agents (Peter Seto, Rina Devillis and a third individual whose name is unknown) that "capped" in the Agreement meant "absorbed" by the Defendant. Ms. Chiu was very definite on the point and completely credible. She did not retreat in the least under vigorous cross-examination by the defendant's counsel.
>
> The evidence of Ms. Chiu, confirmed by the Defendant's representative Mr. Sistilli, was that Phases "A" and "B" of this particular development had provided buyer inducements in the form of $10,000.00 of upgrades, at no further charge to the purchaser. The Plaintiffs' home, in Phase "C" of the same development, was eligible for only $7,500.00 in upgrades, as specified in Schedule "G" of the Agreement

of Purchase and Sale tendered in evidence at trial.

Ms. Chiu testified, and the court accepts, that the Plaintiffs' negotiating posture when purchasing the subject property was to "make up" that $2,500.00 difference by winning a concession from the Defendant in an equivalent dollar amount. This the plaintiffs believed they had done. The Defendant now strives strenuously to argue the contrary. The court cannot agree. The plaintiffs clearly bargained for a $2,500.00 countervail which they thought was properly recorded in the contractual arrangements between the parties.

[11] The Deputy Judge found that the parol evidence rule was not a strict legal barrier, and that the rule did not exclude this evidence.

[12] In reaching this conclusion the Deputy Judge relied specifically on a statement of Professor McCamus:

In his 2005 text The Law of Contract Professor John D. McCamus offers the following brief restatement of the law: "…evidence that a party has misrepresented, however innocently, the meaning or effect of a term in written agreement is admissible. In such a case, the misrepresenting party cannot rely on the written version of the term." (p. 202) He notes that the Canadian Indemnity decision [Canadian Indemnity Company v. Okanagan Main Line Real Estate Board et al., 1970 CanLII 152 (SCC), [1971] S.C.R. 493, per Judson J. at p. 500] was subsequently followed by the Ontario Court of Appeal in Bank of Nova Scotia v. Zackheim (1983) 44 O.R. (2d) 244.

In the present case, innocently or not, the Defendant's real estate agents misrepresented "the meaning or effect of a term in a written agreement." The completely credible testimony of the Plaintiff Ms. Chiu was that she was told by the Defendant's real estate agents that "capped" in the Agreement meant "absorbed." Every detail of her evidence and every subsequent step taken by the Plaintiffs with reference to the purchase and its aftermath was clearly consistent with such an understanding on the part of the Plaintiffs.

[13] The Deputy Judge drew an adverse inference from the fact that "the Defendant elected not to tender the evidence of any of three real estate agents who were involved in the negotiations. The testimony of the Plaintiff is accordingly un-contradicted on the material point." He found that the plaintiffs had proven their case and awarded judgment accordingly.

The Standard of Review

[14] The applicable standard of review on an appeal was expressed by Swinton J. in *Fresco v. Canadian Imperial Bank of Commerce* , (2010), 103 O.R. (3d) 659 (Div. Ct.):

[36] On appeal, the standard of review on a question of law is correctness. The standard of review for findings of fact is palpable and overriding error, while questions of mixed fact and law are on a spectrum. If a legal question can be separated out, it will be reviewed on a standard of correctness. Otherwise, questions of mixed fact and law will not be overturned absent palpable and overriding error (Housen v. Nikolaisen, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, at paras. 8, 10 and 36-37).

[15] This standard also applies to appeals from the decision of a Deputy Judge of the Small Claims Court: *Meyknecht Lischer Contractors Ltd. v. Stanford*, [2006] O.J. No. 4360, 57 C.L.R. (3d) 145 (Ont. Sup. Ct. (Div. Ct.)) at para. 17; *Kaur v. Deopaul*, [2006] O.J. No. 4170, 216 O.A.C. 247 at para. 24.

[16] Questions of contractual interpretation are generally seen as questions of law to be determined by an appellate court on the basis of correctness although the issue is not closed: *Bell Canada v. The Plan Group*, 2009 ONCA 548 (CanLII), (2009), 96 O.R. (3d) 81 (C.A.) per Blair J.A. at paras. 19-31.

[17] The appellant also argues that a breach of natural justice occurred in this case which does not attract deference of any sort: *Dew Point Insulation Systems Inc. v JV Mechanical*, [2009] O.J. No. 5446 (Div. Ct.) per Bellamy J. at para. 25.

Issues and Analysis

[18] The first issue raised by the appellant is about natural justice.

Was the Trial Procedurally Fair?

[19] The appellant submits that the trial was procedurally unfair and lacked natural justice. The specific complaint is that the Deputy Judge's decision is based on a misrepresentation by the appellant's real estate agents that was not pleaded. The appellant submits that under Rule 1.03 of the *Small Claims Court Rules*, the standard of pleading is set by rule 25.06(8) of the *Rules of Civil Procedure*, which states that where misrepresentation is alleged, "the pleadings shall contain full particulars," but there are none in the plaintiffs' Claim.

[20] There is no doubt that a party is bound by its pleading, as a general proposition: *Allison v. Street Imports Ltd*., [2009] O.J. No. 1979 at para. 13,*Atlas Construction Inc. v. The Brownstones Ltd*., [1996] O.J. No. 616 at paras. 82-83, *Lubrizol Corp. v. Imperial Oil Corp.*, [1996] S.C.J. No. 454 (C.A.) at pars. 18-19.

[21] The appellant submits that "the court cannot make findings of liability and make orders against the defendant based on factors which were not pleaded." The appellant submits that the plaintiffs did not raise the issue of misrepresentation in the pleadings but only raised it for the first time in evidence. In consequence, the appellant states that it did not have the agents present to give evidence at the trial and their absence was used unfairly by the Deputy Judge to draw the inference that the plaintiffs' testimony was true.

[22] I reject the appellant's submission on this issue for two reasons. First, a fair reading of all of the material filed by the plaintiffs and served on the appellant before trial, taken together as the relevant "pleading", makes it very clear that the plaintiffs were relying on representations by the appellant's agents. The claim states:

We were forced to pay the closing costs, $2147.64 on top of the purchase price on closing date (10 July 2008). As per purchase agreement in the Schedule G (extra with agreement) stated very clearly that the purchase price included closing cost (as per item 1). We have completed the transaction under protest and now claim to recover the above mentioned sum of money ($2147.64) from the vendor after closing.

[23] As required by the *Small Claims Court Rules*, the plaintiffs attached Schedule G with some annotations. They also appended an email they sent to the defendant which provides:

> …As per purchase agreement in the Schedule G, extra with agreement stated very clearly that the purchase price included closing cost (as item #1) and other 3 items as mentioned as Extras added within the agreement.
>
> But now, your statement adjustment to my lawyer saying that Closing Cost (item #1) is not included in the purchase price, and should be paid by us on closing.
>
> At first, it is a verbal agreement, but before we signed the purchase agreement, we insisted that your agent (Ms. Rina) to include the closing cost capped $2300 included in the purchase price on the purchase agreement to avoid future dispute. …

[24] The plaintiffs also appended an exchange of letters between counsel which reiterated the plaintiffs claim.

[25] An overly technical approach to the rules is not to be taken by the court, as noted in section 23 of the Courts of Justice Act, and by rule 2.01 of the*Small Claims Court Rules*. I find that the pleading and the attached material provided to the appellant with the Claim, especially the email, raise squarely the issue about the agents' representations during negotiations. The decision of trial counsel, a paralegal, not to have the agents present at the trial to provide evidence if necessary was a calculated risk in the face of the material filed by the plaintiffs.

[26] Second, trial counsel for the appellant did not object to the evidence being tendered by the plaintiffs. The appellant's argument that an adjournment ought to have been granted to allow the defendant to call the real estate agents who negotiated the Agreement of Purchase and Sale with the plaintiffs would have had more force if trial counsel had actually asked for an adjournment, but he did not.

[27] I therefore dismiss this ground of appeal.

[28] This is enough to dispose of the appeal since the appellant does not quarrel with the legal correctness of Professor McCamus's statement on which the Deputy Judge relied to admit the parol evidence, only with the procedural fairness of admitting the evidence in the face of the pleading. In the event that I am mistaken, I now turn to the other ground of appeal.

Does the Wording of the Agreement Support the Appellant?

[29] The second ground of appeal is that the wording of the Agreement clearly and unambiguously supports the defence so that the Deputy Judge ought not to have admitted the parol evidence.

[30] The appellant submits that the case turns on the meaning of Schedule "G":

> The plain, ordinary and literal meaning of this clause is that the plaintiffs would be responsible for closing costs up to $2,300.00 plus GST. There are no provisions in the Agreement which stipulate or even suggest that Arista Homes would "absorb" closing costs.

[31] In this submission the appellant relies especially on the words in Schedule G: "Closing costs to be capped at $2,300.00 plus GST…" The appellant argues that:

> The meaning of item 1 of Schedule "G" is that if actual [closing] costs were higher than $2,300.00, Arista Homes would charge the plaintiffs no more than that capped amount. Item 1 of Schedule "G" does not mean that Ha and Chiu would have no closing costs. If, as Ha and Chiu appear to allege in the plaintiffs' claim, there are no closing costs chargeable to them, the promise to cap the $2,300.00 would be meaningless.

Principles of Contractual Interpretation

[32] In my view, it is inappropriate to simply focus on a single provision in an agreement in isolation as the appellant urges the court to do in respect of the expression "Closing costs to be capped at $2,300.00 plus GST…". I am required to consider the whole document along with the relationship between the parties and the business purpose of the Agreement, and not just the specific words in a provision. See *Bell Canada v. The Plan Group*2009 ONCA 548 (CanLII), (2009), 96 O.R. (3d) 81, 2009 O.J. No. 2829 (C.A.) per Blair J.A., where he noted:

> [38] In addition, as Doherty J.A. observed in *Glimmer Resources Inc. v. Exall Resources Ltd.* , 1999 CanLII 1102 (ON CA), [1999] O.J. No. 1357, 119 O.A.C. 78 (C.A.), at para. 17, each word in an agreement is not to be "placed under the interpretative microscope in isolation and given a meaning without regard to the entire document and the nature of the relationship created by the agreement". Courts should not strain to dissect a written agreement into isolated components and then interpret them in a way that -- while apparently logical at one level -- does not make sense given the overall wording of the document and the relationship of the parties.

[33] I am also cautious about invoking the "plain meaning rule," based on Professor Ruth Sullivan's cogent argument in *Sullivan on the Construction of Statutes,* 5th ed. (Markham, Ont.: LexisNexis Canada, 2008) at pp. 353-58 and 12-13, that the court must avoid unconsciously invoking the rule, since doing so may conflate the important analytical steps of identifying the text to be interpreted, determining the relevant context, and testing for ambiguity. The words of any written instrument take their meaning from their context and those words, properly understood in context, can well reveal a latent ambiguity:*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 (CanLII), [2005] 3 S.C.R. 141, [2005] S.C.J. No. 63 at para. 10 per McLachlin C.J.

[34] The basic law was most recently expressed in *Salah v. Timothy's Coffees of the World Inc* . (2010), 74 B.L.R. (4th) 161, [2010] O.J. No. 4336 (C.A.) per Winkler C.J.O. at para. 16:

> The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity.

[35] Ryan J. noted in *Delisle v. Bulman Group Ltd*., 1991 CanLII 295 (BC SC), [1991] 4 W.W.R. 637, [1991] B.C.J. No. 585, 1991 CarswellBC 54 (B.C.S.C) at para. 12 (*Delisle* cited to CarswellBC):

> If, after examining the agreement itself in its factual matrix, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then additional evidence may be admitted. This evidence includes evidence of the facts that led up to the making of the agreement, evidence of the circumstances as they existed at the time the agreement was made, and evidence of subsequent conduct of the parties to the agreement. The two existing reasonable interpretations may be the result of ambiguity arising from doubt, uncertainty or difficulty of construction. (Re C.N.R. and C.P. Ltd. (1979), 95 D.L.R. (3d) 242 (B.C.C.A.).

[36] See also the words of Gale C.J.O. in *Leitch Gold Mines Ltd. et al. v. Texas Gulf Sulphur Co. (Incorporated) et al.* (1969), 3 D.L.R. (3d) 161, [1969] 1 O.R. 469, [1968] O.J. No. 1336 (H.C.) at para. 232 (*Leitch* cited to O.J.):

> Extrinsic evidence may be admitted to disclose a latent ambiguity, in either the language of the instrument or in its application to the facts, and also to resolve it, but it is to be noted that the evidence allowed in to clear up the ambiguity may be more extensive than that which reveals it. Thus, evidence of relevant surrounding circumstances can be accepted to ascertain the meaning of the document and may clarify the meaning by indirectly disclosing the intention of the parties.

Is there an Ambiguity in the Agreement?

[37] The expression "Closing costs to be capped at $2,300.00 plus GST…" must be read in its context. That context includes Schedule "G" itself. I note that Schedule "G" begins, in capital letters: "THE FOLLOWING ITEMS ARE INCLUDED IN THE PURCHASE PRICE." The items listed do not have a price attached to them in the Schedule.

[38] Reading the clauses together leads to this: "THE FOLLOWING ITEMS ARE INCLUDED IN THE PURCHASE PRICE …Closing costs to be capped at $2,300 plus GST…"

[39] There are two ways to read this clause. The first way is to read it as the appellant submits, as Arista Homes promising that it would absorb closing costs for the items listed in excess of $2,300.00. The second way to read it is as the plaintiffs submit, as Arista Homes promising to absorb closing costs up to $2,300.00 for the closing costs.

[40] Paragraph (f) of Schedule "G" states: "If there is any discrepancy between this schedule/change order and other schedules included in the Purchase and Sale Agreement then it is agreed to by all parties that this schedule/change order takes precedence." It seems to me that paragraph (f) effectively displaces any contradictory language on which the appellant relies in Schedules "A" and "X" of the Agreement.

[41] On the language of the Agreement, each of these interpretations of Schedule "G" is plausible so an ambiguity plainly exists. To determine which interpretation is most appropriate, regard may be had not only to the terms of the agreement but also to the context within which those terms were negotiated.

[42] Faced with this choice of interpretations, the Deputy Judge considered the evidence of the negotiating history and concluded that the second interpretation was most appropriate in the circumstances. This was largely an assessment of the witnesses; the choice was open to him on the evidence and he committed no palpable and overriding error in accepting the evidence of the plaintiffs in preference to the evidence of the witness for the appellant. The outcome of the decision on the proper interpretation of the Agreement is, moreover, correct. I conclude that there is no merit to the appellant's second ground of appeal.

[43] The appeal is therefore dismissed with costs.

[44] The appellant filed a Costs Outline seeking costs in the total amount of $10,210.17. The respondents filed a Costs Outline prepared by Gary J. McCallum, who had represented them in preparing the responding material but who was not present to argue the appeal. The material was well prepared. The plaintiffs' Costs Outline seeks fees in the total amount of $7,647.34, which includes an estimated counsel fee of $640.00 for appearing but fails to include HST on fees. Ms. Chiu sought an additional $2,600.00 for her appearance and argument of the matter; she was unable to provide me with a reasonable explanation for the generation of that number and I decline to award it to her.

[45] The amount in issue in this case was $2,147.69 along with interest and a costs award of $500.00. The appellant has the right to pursue the appeal despite the fact that its own legal costs greatly exceed the amount in issue. That said, however, given the appellant's own expenditures, I see no reason to discount the amount claimed by Ms. Chiu as an expenditure on counsel. In the circumstances, I therefore award the plaintiffs $6,750.50 plus HST in reimbursement of fees paid to Mr. McCallum. Ms. Chiu sought an additional $2,600.00 for her appearance and argument of the matter; she was unable to provide me with a reasonable explanation for the generation of that number and I decline to award that amount to her; instead I also award the plaintiffs $640.00 plus HST as a form of counsel fee for their appearance. Finally, I award disbursements in the amount of $236.94 which includes HST.

_____

Justice P.D. Lauwers

RELEASED: August 25, 2011