

CANADA / JUDGMENT

Technicon Industries Ltd. v. Woon

2017 BCCA 167

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 167 Technicon Industries Inc. v. Woon COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Technicon Industries Ltd. v. Woon, 2017 BCCA 167 Date: 20170424 Docket: CA43912

Between: Technicon Industries Ltd. Respondent (Plaintiff) And Chin Fong Woon Appellant

(Defendant) Before: The Honourable Chief Justice Bauman The Honourable Mr. Justice Goepel

The Honourable Madam Justice Fenlon On appeal from: an order of the Supreme Court of British Columbia, dated August 23, 2016 (Technicon Industries Ltd. v. Woon, 2016 BCSC 1543, Terrace Registry No. 18192) Oral Reasons for Judgment Counsel for the Appellant Chin Fong Woon

appearing In Person (with assistance from W.K. Chong): Counsel for the Respondent: C. MacEachern Place and Date of Hearing: Vancouver, British Columbia April 24, 2017 Place and

Date of Judgment: Vancouver, British Columbia April 24, 2017 Summary: Mr. Woon appeals the trial judge's order on the basis that she made palpable and overriding errors in assessing his

credibility and in determining that the parties had a cost plus contract, that Mr. Woon owed Technicon \$193,272.89 and that Technicon had cause for his dismissal. He applies to adduce new

and fresh evidence in support of his appeal. Held: Application and appeal dismissed. The proposed new and fresh evidence does not meet the criteria set out in Palmer. The judge made no

palpable and overriding errors in reaching the conclusions she did. Accordingly, her findings are entitled to deference and cannot be disturbed by this Court.

[1] FENLON J.A.: The background to this appeal is set out in the trial judge's reasons for judgment:

[1] This action involves a construction dispute and a wrongful dismissal claim. While they might, on the surface, appear to be disparate claims, these two claims are very much intertwined.

[2] The plaintiff, Technicon Industries Ltd. ("Technicon"), is a construction company. In March 2012, the defendant Chin Fong Woon ("Mr. Woon") was hired by Technicon as an estimator. Mr. Woon says that Technicon agreed to construct a house for him in Terrace as an enticement for him to accept this offer of employment. Technicon says that it was not an enticement but that it did later agree to build a house for Mr. Woon as a perk of his employment.

- [3] In mid-2012, construction of Mr. Woon's house at 5116 Coho Place, Terrace, B.C. (the "House") began.
- [4] By late 2012/early 2013, various disputes between the parties arose, principally relating to Technicon's requests for payment of construction costs and Mr. Woon's refusal or inability to pay them. Ultimately, the parties disagreed as to the financial terms upon which the House was to be built; Technicon asserted that monies remain owing under the cost-plus agreement; Mr. Woon asserted that he had a fixed-price contract. In addition, Mr. Woon argued that there were numerous deficiencies in the construction of the House, and that construction was not complete by the agreed-upon deadline of January 1, 2013.
- [5] In April 2013, after the construction issues came to a head, Mr. Woon was dismissed from his employment. He alleges that he was terminated by Technicon without cause and without notice. Technicon asserts that it had cause for dismissal. Mr. Woon seeks damages for what he describes as the wrongful dismissal, including aggravated damages.
- [2] The trial judge found that the parties had a cost plus contract pursuant to which Mr. Woon owed Technicon \$193,272.89 and that Technicon had after-acquired cause for his dismissal. Mr. Woon contends the trial judge made a number of palpable and overriding errors in coming to the conclusions she did. He seeks to set aside the trial judge's orders, and asks this Court to find that the construction contract was for a fixed price of \$168,950, and that he committed no misconduct such that there was no just cause for dismissal. He seeks aggravated damages if this Court allows his wrongful dismissal claim.
- [3] Mr. Woon applies to adduce new and fresh evidence. The test for admissibility of evidence on appeal is identified in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at p. 775:
- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
 - (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
 - (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
 - (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
- [4] I will deal with each of the two categories of evidence in turn.
- [5] First, most of the evidence is fresh evidence. It consists of documents disclosed to Mr. Woon's trial counsel by counsel for the respondent, and correspondence between them. All of that evidence was of course available to Mr. Woon's lawyer at trial. Mr. Woon, who now represents himself, says that he was not personally aware of each document, so he should now be allowed to rely on the evidence in this Court.

- [6] A party represented by counsel, however, acts through his lawyer and is bound by his lawyer's strategic decisions, including decisions about what evidence should be tendered at trial. That is so absent evidence of a manifest injustice, which has not occurred in this case. In my view the fresh evidence does not meet the Palmer criteria.
- [7] I turn next to the "new" evidence: two experts reports prepared after the trial judge rendered her decision on August 23, 2016. The reports were based on two documents the trial judge described as the Technicon contracts, one of which provided for an interest rate of 26.8% on unpaid invoices (the "Interest Contract"); and the other of which provided for 0% interest (the No "Interest Contract").
- [8] The first expert report Mr. Woon wishes to adduce on appeal was prepared on August 31, 2016 by David Babb, who is a forensic document examiner. He examined scanned copies of the Interest and No Interest Contracts. By way of context, the trial judge found Mr. Woon had sent the Interest Contract to his bank when seeking a mortgage in May 2012. She also found Mr. Woon produced the No Interest Contract in the litigation, claiming to have found it in his house construction file at Technicon's office when he reviewed and copied its contents in December 2012.
- [9] The trial judge concluded at paras. 91 and 92 of her reasons that Mr. Woon removed the Interest Contract from Technicon's file and altered it to create the No Interest Contract to gain an advantage in the parties' dispute.
- [10] Mr. Babb found the Interest Contract was a copy of the No Interest Contract. That would call into question the trial judge's finding that Mr. Woon altered the Interest Contract to create the No Interest Contract, since according to Mr. Babb, the No Interest Contract would have existed first.
- [11] The difficulty with this opinion is that we have no idea what Mr. Babb was working from in performing his comparison. Mr. Woon acknowledges that Mr. Babb did not have the versions of the documents entered at trial. Mr. Babb bases his opinion largely on the clarity of the printed portion of the documents, but it is apparent that if he is working from copies rather than originals, the clarity of the document would be affected by the number of times it has been copied. In short, the report as tendered does not provide reliable evidence about the relative times at which the original contracts were created as opposed to copied.
- [12] The second expert report in issue is an opinion by Wendy Carlson, who is a handwriting expert. It was dated September 28, 2016. She assumed that Mr. Woon's handwriting is on the No Interest Contract and concludes that someone else wrote on the Interest Contract. In my view, her opinion is consistent with the trial judge's conclusion that Mr. Woon altered the 26.8% and replaced it with 0%. That opinion could not therefore affect her assessment.
- [13] In my view, the two reports do not meet the Palmer criteria and therefore should not be considered on this appeal.

- [14] I turn now to the substantive appeal. In all of the grounds of appeal raised, Mr. Woon asks this Court to reconsider and reweigh the evidence before the trial judge and to come to different conclusions. As noted during the hearing, that is not the role of an appellate court. An appeal is not a second trial. The findings of fact and assessments of credibility of the trial judge are entitled to deference and are not to be disturbed unless she has made a palpable and overriding error.
- [15] Here, the trial judge made findings about the terms of the construction contract and Mr. Woon's conduct justifying dismissal which were supported by the evidence. Mr. Woon has demonstrated no error in the trial judge's reasoning--he simply disagrees with her findings and argues she was wrong to reject his evidence and wrong to rely on the evidence of Technicon's witnesses.
- [16] I would accordingly deny the application to adduce new and fresh evidence and would dismiss the appeal with costs to the respondent.
- [17] BAUMAN C.J.B.C.: I agree.
- [18] GOEPEL J.A.: I agree.
- [19] BAUMAN C.J.B.C.: The appeal is dismissed with costs to the respondent. "The Honourable Madam Justice Fenlon"

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