COURT OF APPEAL FOR ONTARIO

CITATION: Hearn v. McLeod Estate, 2019 ONCA 682
DATE: 20190903
DOCKET: C65584

Lauwers, Pardu and Nordheimer JJ.A.

BETWEEN

Kevin Hearn

Plaintiff (Appellant)

and

Estate of Joseph Bertram McLeod, Deceased
and Maslak-McLeod Gallery Inc.

Defendants (Respondents)

Matthew Fleming and Chloe Snider, for the appellant

No one appearing for the respondents

Michael Panacci for the proposed interveners

Heard: April 9, 2019

On appeal from the judgment of Justice Edward M. Morgan of the Superior Court of Justice, dated May 24, 2018, with reasons reported at 2018 ONSC 2918.

Lauwers J.A.:

[1] Kevin Hearn, the appellant, claimed that the respondents sold him a fake painting by the renowned Anishinaabe artist Norval Morrisseau, accompanied by a false provenance statement verifying the painting's authenticity. He claimed the return of the purchase price of $20,000, an additional $25,000 representing the

loss of investment return on the painting, and the sum of $50,000 in punitive damages, together with pre-judgment and post-judgment interest and costs.

[2] The trial judge dismissed the action.

[3] I would allow the appeal for two reasons. First, in considering the painting's authenticity, the trial judge was not obliged to accept the expert evidence tendered by the appellant, but he erred in rejecting that evidence based on his own personal research, which was not in evidence.

[4] Second, the trial judge misapprehended the evidence regarding the nature and purpose of the contract between the plaintiff and the defendants, particularly the contractual term that the respondents provide a valid provenance statement for the painting.

[5] I explain each of these reasons in turn. Before doing so, I explain briefly why we refused the last-minute efforts of White Distribution Limited, 2439381 Ontario Inc. and Nathaniel Big Canoe, who were intervenors in the trial court, to have the appeal adjourned so that they could bring a motion for leave to intervene in the appeal.

A. THE ADJOURNMENT MOTION WAS DISMISSED

[6] The trial was originally scheduled to go forward on an undefended basis because, although the respondents had filed a statement of defence, in May 2017, counsel advised the court that the defendants no longer intended to defend the

action. Mr. McLeod died in August 2017. The action would have proceeded as undefended but for the trial judge's decision to permit certain intervenors to participate, for the reasons he explained at 2017 ONSC 6711.

[7] Counsel for the proposed intervenors, Michael Pinacci showed up at the last minute and sought an adjournment, which the trial judge granted for reasons reported at 2017 ONSC 7247. At the trial, the intervenors effectively took on the role of the defendants. The trial judge explained, at para. 21 of his trial reasons:

> I therefore allowed James White, a well-known dealer in Norval Morrisseau works, along with his corporation [White Distribution Limited and 2439381 Ontario Inc.], to intervene. I also granted intervenor status to Nathaniel Big Canoe, a contemporary Anishinaabe painter who carries on in an artistic path similar to that of Morrisseau. These Intervenors were permitted to stand in the Defendants' shoes in presenting evidence and argument.

[8] Judgment was rendered and Mr. Hearn appealed. The date for this appeal was confirmed by the court by letter dated December 18, 2018. Counsel for Mr. Hearn wrote to Mr. Pinacci on January 29, 2019 asking whether his clients intended to participate in the appeal, but Mr. Pinacci did not respond.

[9] On March 21, 2019, Mr. Pinacci wrote to counsel for Mr. Hearn asserting that this court had no jurisdiction to hear the appeal and that Mr. Hearn was out of time to appeal to the Divisional Court. On April 1, 2019, Mr. Pinacci wrote to this court requesting an adjournment, and effectively asserted that intervenor status in the court below gave him the rights of a party in this matter. The panel refused the

adjournment request. On April 8, 2019, Mr. Pinacci requested leave to file a factum, which we refused on the basis that his clients were not parties.

[10] Undaunted, Mr. Pinacci appeared just after the appellant began argument, sought an adjournment for the purpose of bringing a motion for leave to intervene under r. 13 of the *Rules of Civil Procedure*, and then argued that this court had no jurisdiction over the appeal.

[11] The nub of Mr. Pinacci's argument was that the decision of the trial judge properly fell within s. 19 (1.2) (d) of the *Courts of Justice Act*, RSO 1990 c. C.43, which gives the Divisional Court jurisdiction where the trial court has dismissed a claim for an amount not more than $50,000 exclusive of costs, "and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount" of $50,000 exclusive of costs.

[12] However, the trial judge did not assess damages, so s. 19 (1.2) does not apply and this court has jurisdiction: *Mars Canada Inc. v. Bemco Cash & Carry* 2017 ONSC 3399, 146 C.P.R. (4th) 263 (Div. Ct.), at para. 14. The panel refused Mr. Pinacci's request for an adjournment because it was far too late. The appeal proceeded as undefended.

[13] I now turn to the substantive issues in the appeal.

B. THE NATURE AND PURPOSE OF THE CONTRACT

[14] The evidence overwhelmingly supports the appellant's claim that he bargained for and was promised an authentic Morrisseau painting to be accompanied by a valid provenance statement attesting to the painting's authenticity.

[15] However, the trial judge effectively severed the contractual term that the painting be an authentic Morrisseau from the contractual term that the painting be accompanied by a valid provenance statement.

C. WAS THE PAINTING AN AUTHENTIC MORRISSEAU?

[16] In a nutshell, the trial judge characterized the sole issue at trial as whether the defendants had sold the appellant a forged Norval Morrisseau painting. The trial judge said, at para. 146: "The issue is whether this contention has proven to be true." At para. 155, he concluded: "While *Spirit Energy of Mother Earth* may indeed be a fraudulent Morrisseau, there is an equal chance that it is a real Morrisseau." Accordingly, in the trial judge's view, the appellant had failed to prove the central issue in the case. He explained, at paras. 157-58:

> *Spirit Energy of Mother Earth* is one more painting – an interesting and beautiful one, if I may say so – that is possibly an authentic Norval Morrisseau and possibly not. As a matter of law, what is important is that a tie goes to the Defendants (or, here, to the Intervenors). Where a court is left in doubt because the relevant burden of proof has not been satisfied, the 'fact' sought to be proved is in

> law not true: *Re B,* [*Re B (A Child)* [2008] UKHL 35], at para 2 (per Lord Hoffmann).
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> *Spirit Energy of Mother Earth* has not been proved to be a forged or fake Morrisseau. From the law's point of view, it is therefore a real Norval Morrisseau painting.

[17] The appellant led the evidence of Professor Carmen Robertson as an expert in Mr. Morrisseau's art. She is a full professor of Indigenous Art History at the University of Regina. She has written several books on Mr. Morrisseau's art and has received substantial funding for her research from the Social Sciences and Humanities Research Council of Canada.

[18] Determining the authenticity of art is an area in which expert evidence is admissible. Professor Robertson's evidence was relevant and it was necessary to assist the trier of fact. The trial judge qualified Professor Robertson in the following words:

> Professor Robertson has an impressive cv. I am prepared to accept Professor Robertson as an expert in the areas which Mr. Sommer has asked her to be qualified in, that (being) art history, art and artistic methods, and authenticity of Norval Morrisseau and in contemporary Aboriginal art. And I will – and she is therefore entitled to give opinion evidence on those subjects. She certainly has knowledge going beyond that of the trier of fact, I must admit.

[19] Although the trial judge had both Professor Robertson's curriculum vitae and her expert report, it appears that only Professor Robertson's curriculum vitae was made a lettered exhibit for identification. In para. 31 of the decision, he noted:

> Indeed, Dr. Robertson, a noted scholar with substantially more training than [Ritchie] Sinclair [the person who first asserted that the painting was a fake], took 50 pages to come to the subtly stated conclusion that, "The disparate elements discussed throughout this report, when taken as a whole, result in an artistic dissonance with Morrisseau's artistic style, conventions, and art practice."

[20] Professor Robertson testified that in her opinion the painting was a forgery and not an authentic Morrisseau. She testified:

> [I]t is my opinion that this appears to be a pastiche, meaning a conglomeration of Morrisseau visual vocabulary, in effect, a studied, almost hyper-real, to call on Jean Baudrillard, that brings together elements that are found in Morrisseau paintings surely, in his original paintings, but the result here, in my opinion, is a pleasing simulation of Morrisseau's artistic vocabulary that does not fit within Morrisseau's art, especially in the 1973, '74, '75 period.

[21] Professor Robertson also stated that the signature on the back of the work is "not representative of the works that I have observed in art museums from Canada, in important private collections, but for the purpose of this report, in viewing works in the noted art museums from the period of 1973 through 1975, I did not observe any paintings with black dry brush and of a signature on the back of the works."

[22] Professor Robertson added:

> So, based on provenance, based on my reading of formulaic elements of this particular work, based on my knowledge of – of visually seeing work in art museums, private collections and at art exhibitions throughout

> Canada, I have to say that, in my opinion, this is not an original Morrisseau painting.

She was “absolutely certain” of that opinion.

[23] In the course of her evidence, Professor Robertson described her approach to determining the authenticity of the painting as “Morellian” analysis. In the *voir dire* to qualify Professor Robertson, she said this about the currency of that approach:

> I’ve only used Morellian analysis for the purposes of this expert report. I will admit that art history no longer acknowledges Morellian analysis as a number one focus of research, but that said, it is one of the many tools available, and so I have taken advantage of using that. I have still done iconographic searches and research, however not Morellian analysis on other paintings before this.

[24] In *voir dire* cross-examination Professor Robertson noted that Morellian analysis had been superseded by “critical theory,” and that while Morellian analysis was taught when she was in school, it is no longer taught. This reference to critical theory caught the trial judge’s attention, who remarked: “I’m only smiling because I’m looking forward to a two-sentence explanation of [French philosopher Michel] Foucault,” to which she replied: “I’m happy I didn’t mention [French philosopher Jacques] Derrida.”

[25] When he qualified Professor Robertson as an expert witness, the trial judge made the following comment:

> As for Morellian analysis, I will hear Professor Robertson's evidence on that methodology. She's been straightforward and frank about the place of Morellian analysis and the weaknesses – and its weaknesses in the present scholarly view. I'll take her evidence on that with that perspective in mind. For those legal academics, former legal academics in the room, it sounds to me something sort of akin to someone who has studied traditional statutory interpretation, the canons of constructions, which were of course early 20th century attempts at so-called scientific legalism, and today in law schools critical theory has come to dominate legal scholarship and interpretation.

[26] This comment morphed into a significant aspect of the judgment, which was largely a deconstruction of the Morellian method using critical theory. In paras. 117-134 the trial judge drew on numerous critical theorists and their works. Unfortunately, none of these were in the evidence nor had Professor Robertson been given any opportunity to respond to them. The trial judge said, at para. 117: "While I genuinely respect the scholarly effort that Professor Robertson has put into this analysis, I frankly am skeptical of its usefulness." He then began the deconstruction process with the comment, at para 118: "This tendency to read undiscernible qualities into physical detail represents the central effort, and central fallacy, of Morellian analysis."

[27] Given Professor Robertson's earlier comment about Derrida, it is perhaps ironic that the trial judge concluded, at para 134:

> The Morellian analysis simply does not produce the kind of scientific, objective conclusions that its promoters claim for it. It stresses the artist's conventions, but, as

> leading critical theorists' caution, "conventions are by essence violable and precarious, in themselves and by the fictionality that constitutes them, even before there has been any overt transgression": Jacques Derrida, *Limited Inc.* (Northwestern University Press, 1988), p. 105.

[28] I see three errors here. The first is a breach of the rules of natural justice. In *Pfizer Co. v. Deputy Minister of National Revenue (Customs & Excise)*, [1977] 1 S.C.R. 456, the Tariff Board relied on two scientific publications that were not put into evidence or referred to at the hearing. The Supreme Court found this to be a breach of the rules of natural justice. Pigeon J. noted, at para. 18: "It is clearly contrary to those rules to rely on information obtained after the hearing was completed without disclosing it to the parties and giving them an opportunity to meet it." He added at para. 19 that this was a "grave error". In my view this principle applies to this case. See also *Cronk v. Canadian General Insurance Co.* (1995) 25 O.R. (3d) 505, at paras. 24-26, per Lacourciere J.A.

[29] The second and corollary error is with respect to the sufficiency of reasons. There is no obligation on a trial judge to accept all or any of an expert witness's evidence. But, if the evidence is to be rejected, reasons must be given for doing so, and those reasons must themselves be rooted in the evidence before the trial judge. Otherwise the trial reasons are not reasonably intelligible to the parties and cannot provide the basis for meaningful appellate review: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 1, 24, 28, and 55, per Binnie J.; *C.(R.) v.*

McDougall, 2008 SCC 53, [2008] 3 S.C.R. 41, at para 98; and *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, [2011] 4 F.C.R. 425, at para. 16, per Stratas J.A.

[30] The third error relates to the treatment of expert evidence. The trial judge rejected Professor Robertson's expert evidence on a contrary theory that was not put to her and on which she was not cross-examined. He drew on resources that were not in evidence but were obtained by him outside of the courtroom through research done by him or at his direction. In doing so, the trial judge stepped out of the impartiality of his position as trial judge and descended into the arena, effectively becoming the art expert posed against Professor Robertson. In the words of Doherty J.A. in *R. v. Hamilton*, 72 O.R. (3d) 1, at para. 71, the trial judge assumed “the multi-faceted role of advocate, witness, and judge”. This was not appropriate: *Phillips v. Ford Motor Co. of Canada*, [1971] 2 O.R. 637, at para. 64, per Evans J.A.; *R. v. Bornyk*, 2015 BCCA 28, 366 B.C.A.C. 194, at paras. 10, 11, and 16.

[31] I note in passing that neither Professor Robertson’s curriculum vitae nor her expert report were provided to this court by the appellant’s counsel in the Exhibit Book or the Compendium. This oversight defeats the purpose for which a trial record is designed: *1162740 Ontario Limited v. Pingue*, 2017 ONCA 52, 135 O.R. (3d) 792, at para. 14.

[32] At trial, the intervenors led the evidence of Kenneth Davies, on “graphoanalysis and forensic analysis of handwriting and signatures.” The trial judge permitted him to give evidence despite the appellant’s objections. Mr. Davies' report was provided only two days before he testified. The appellant was not given any time to prepare or to call a responding expert on such short notice. There were several other difficulties with Mr. Davies’ evidence, including the fact that he had only examined the painting by video link, which is also the means by which he testified. All of this was substantially unfair to the appellant.

[33] The trial judge set out Mr. Davies’ evidence from paras. 136-145. He noted, at para. 143, that Mr. Davies “laid out his conclusion that the black dry brush signature on the painting at issue was done by the same hand as did the others he has studied,” but then noted, at para. 144, that Mr. Davies, in cross-examination, “agreed that there is nothing in his study that establishes that any black dry brush signatures, including his specific comparators, are authentic in the first place.” The trial judge recorded Mr. Davies’ evidence but it is not clear to what degree, if at all, the trial judge relied on it in reaching his conclusion about the authenticity of the painting.

[34] On the totality of the evidence, including his own ill-advised foray into the generation of evidence, the trial judge found that it remains an open question whether the painting is a genuine Morrisseau. But, contrary to his view, this finding should not have led to the dismissal of the appellant’s action.

D. PROBLEMS WITH THE PROVENANCE STATEMENT

[35] The appellant wanted a valid provenance statement because Mr. Morrisseau's paintings had inspired a clandestine industry along with a substantial market in fake Morrisseau paintings. The trial judge covered this evidence at length in paras. 39-92, and came to the following conclusion, at para. 93:

> I do not doubt the existence of a Thunder Bay-area fraud ring and the circulation of fraudulent paintings produced there. However, I cannot impugn the authenticity of *Spirit Energy of Mother Earth* simply because it was produced in a 'high crime area', as it were. The information conveyed by the witnesses who relate the existence of a fraud ring is only truly probative of the issues in this action to the extent that it relates to paintings possibly acquired and re-sold by McLeod and the Gallery. And the little evidence that exists in that respect is, as described above, highly suspect. Indeed, since no one can identify *Spirit Energy of Mother Earth* at all, let alone as having been produced by the fraudsters, the relevance of this evidence turns out to be tangential at best.

[36] I do not agree. The evidence was highly relevant. In the context of the known existence of fake Morrisseau paintings, the appellant's purpose in requiring the provenance statement was to give him assurance that the painting he was buying from the respondents was authentic, and not the product of the active industry and market in fake Morrisseau paintings.

[37] The supporting evidence is clear. Mr. Hearn testified that Mr. McLeod made several representations to him in May 2005 before he bought the painting. In response to Mr. Hearn's concern about fake Morrisseau paintings, Mr. Hearn

testified that Mr. McLeod told him: "you've come to the right place. This is the safest and best place to buy a Norval Morrisseau painting." Mr. Hearn further testified that Mr. McLeod went over the painting, and showed Mr. Hearn the thunderbird design, explaining: "Whenever Norval thought that a painting was special, or that he was particularly proud of, he would draw this thunderbird on the back." He added that the painting "was from a period when Norval Morrisseau was influenced by a religion he had recently discovered called Eckankar." As to the provenance, Mr. Hearn testified that Mr. McLeod "said he would have to go through his files and find out the information," and would provide the provenance information if Mr. Hearn wanted to buy the painting.

[38] When Mr. Hearn bought the painting, he got a document, labelled as: “Appraisal Form,” which specified the purchase price of $20,000. It stated that the painting was by Mr. Morrisseau. The provenance statement listed in ownership sequence Norval Morrisseau, Rolf Schneiders, Allan Swanson, the Maslak-McLeod Gallery and finally, Mr. Hearn.

[39] In April 2010 the painting was on display at the Art Gallery of Ontario, but shortly after the exhibit opened an official told Mr. Hearn that the painting “was most likely a fake” and took the exhibit down.

[40] Mr. Hearn met with Mr. McLeod, who denied that the painting was a fake. Mr. McLeod then provided Mr. Hearn with a second and different provenance

statement, dated July 10, 2010, listing in ownership sequence Norval Morrisseau, Rolf Schneiders, Robert Voss, and Irving Jacobs. (The statement of defence did not invoke either provenance statement, but simply said: "The Painting was on consignment to the Defendant and had been purchased from Khan Auctions.")

[41] The trial judge noted, at paras. 27 and 28:

> Hearn, however, was not inclined to believe McLeod at this point -- a skepticism that was reinforced when the ownership as set out on the provenance statement proved impossible to verify. I cannot blame Hearn for being frustrated. One does not expect a long time, respected art dealer such as McLeod and a high-end outlet such as the Gallery to provide its customers with an unreliable provenance statement. If McLeod himself had some doubts about the painting's provenance, one would think he would have advised Hearn of those doubts in a forthright way.
>
> It also turned out that McLeod's reference to Eckankar was incorrect, as Morrisseau was not introduced to that movement until 1976, two years after the date of *Spirit Energy*.

[42] The trial judge noted Professor Robertson’s evidence about the provenance statements, at para. 101:

> Before starting her Morellian analysis, Dr. Robertson testified about the provenance letter for *Spirit Energy* supplied by the Gallery at the time of its purchase by Hearn. She indicated that in her view, the written provenance is suspect, as the several previous owners listed there could not be found or would not confirm that they had owned the painting. None of these previous owners were called to testify at trial and so, of course, their statements are hearsay. Since Dr. Robertson is a

> credible source of the hearsay I have admitted them, but the limitations on this evidence are self-evident.

[43] The trial judge then referred to the evidence regarding several of the people listed on the provenance statements. His culminating statement is at para. 106:

> The fact that a Morrisseau painting is sold with an inaccurate provenance letter, or with a provenance letter that lists untraceable prior owners or prior owners who do not wish to involve themselves in a current legal controversy, should surprise no one.

[44] This view of the evidence misapprehends the contract between the appellant and the Maslak-McLeod Gallery. The trial judge erred in failing to find that the Gallery's provision of a valid provenance statement was a term of the purchase and a warranty, not mere puffery.

[45] Thus, shortly stated, the fact that both provenance statements were false means that the appellant did not get what he bargained for and is entitled to a remedy, as requested, under the *Sale of Goods Act*, R.S.O. 1990, c. S.1. Mr. Hearn seeks the expectation measure of damages, which is the amount that would put him in the position he would have been in had the description of the painting been accurate, under s. 14 of the *Sale of Goods Act*, which provides: **"**Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description…" The remedy for the breach is specified by s. 51 of the Act, which provides:

> 51(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat a breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but may,
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> (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
>
> (b) maintain an action against the seller for damages for the breach of warranty.
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> (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

[46] I am satisfied that this was a sale by description within the meaning of the *Sale of Goods Act*: *Bailey v. Croft*, [1932] 1 D.L.R. 777 (Man. C.A.); *Lederman v. Goldfarb*, 2010 CarswellOnt 11315. See also *Hall v. Gascard*, 2018 DNH 152, 96 U.C.C. Rep. Serv. 2d 473; *Balog v. Centre Art Gallery-Hawaii Inc.*, 745 F. Supp. 1556 (D Haw. 1990).

[47] The appellant argues that he is entitled to expectation damages in the amount that the market establishes would be the value of a similar genuine Morrisseau painting on the basis of the *Sale of Goods Act* or ordinary contractual principles: *Langille v. Keneric Tractor Sales Limited*, [1987] 2 S.C.R. 440, at para. 29. The evidence sets that range between $40,000-$60,000. If the painting is not a genuine Morisseau, then it is valueless. I would set the value at $50,000.

[48] A secondary issue arises and that is whether there was either civil fraud or misconduct on the part of Mr. McLeod and the Maslak-McLeod Gallery that would justify a punitive damages award?

[49] Mr. McLeod and the Maslak-McLeod Gallery did not provide any documentary support for the first provenance statement, or the second, or the bald statement in the statement of defence about the consignment arrangement with another gallery. Mr. Hearn met with Mr. McLeod after he got the Art Gallery of Ontario official's assertion that the painting was a fake. He requested his money back, but Mr. McLeod refused because "that would set off a chain of events that would result in the closing of my gallery." When Mr. Hearn suggested that they work together to investigate the allegation that the painting was fake, Mr. McLeod refused. Mr. McLeod's assertion that the painting was genuine was only matched by his elusiveness in demonstrating that fact, which can only be explained as deliberate. In my view the elements of civil fraud, as prescribed by the Supreme Court in *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 21 have been fully made out. With respect to the provenance statement, Mr. McLeod made a false representation, either knowing that it was false and without an honest belief in its truth, or he made the statement recklessly without caring whether it was true or false, with the intent that Mr. Hearn would rely upon it, which he did, to his personal loss.

[50] A modest punitive damages award is warranted in these circumstances in light of the egregious conduct of the respondents.

E. DISPOSITION

[51] For the reasons set out above, I would allow the appeal and give judgment in the appellant's favour for breach of contract and breach of the *Sale of Goods Act* against the respondents in the amount of $50,000, plus pre-judgement interest. I would fix punitive damages in the amount of $10,000. If the appellant recovers damages, he must return the painting to the respondent, the Maslak-McLeod Gallery.

[52] I conclude with an observation. It is often said that the most important person in a courtroom, and the primary audience for reasons is the losing party, who is entitled to be treated with respect. In his reasons, apparently as an ill-advised attempt at humour, the trial judge used lyrics from songs that had been made popular by a well-known musical group, of which Mr. Hearn is a member, to describe Mr. Hearn's actions in buying and displaying the painting. The trial judge's comments were inappropriate and unnecessary.

Released: September 3, 2019

"P. Lauwers J.A."
"I agree. G. Pardu J.A."
I agree. I.V.B. Nordheimer J.A."