Citation: Albo v The Winnipeg Free Press et al, 2020 MBCA 50
Date: 20200512
Docket: AI19-30-09259

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre
Madam Justice Lori T. Spivak

B E T W E E N :

FRANK ALBO	)	
	)	
(Plaintiff) Appellant	)	***D. G. Hill*** *and*
	)	***K. M. McIntyre***
- and -	)	*for the Appellant*
	)	
THE WINNIPEG FREE PRESS, a division of FP CANADIAN NEWSPAPERS LIMITED PARTNERSHIP	)	***J. B. Kroft*** *and*
	)	***R. J. E. Prokopanko***
	)	*for the Respondent*
	)	
(Defendant) Respondent	)	*Appeal heard:*
	)	***January 8, 2020***
- and -	)	
	)	*Judgment delivered:*
MANITOBA ASSOCIATION OF ARCHITECTS	)	***May 12, 2020***
	)	
	)	
(Defendant)	)	

On appeal from 2019 MBQB 34

MAINELLA JA

Introduction

[1] The backdrop to this appeal is a dispute as to whether the defendant (a newspaper publishing company), in order to obtain the expert assistance of the plaintiff (a history professor) for a series of articles, agreed to not republish them into a future book. Despite representing to the plaintiff in negotiation of

the contract that it did not intend to publish a future book based on the articles to be written, the defendant ultimately did so because of an unforeseen event.

[2] The plaintiff commenced an action for copyright infringement and breach of contract which the judge dismissed after a trial. The plaintiff has appealed only the part of the judgment dismissing his breach of contract claim. In his reasons for judgment, the judge concluded that, while the parties entered into a consulting contract, it was not a term that the defendant was prohibited from republishing any articles written with the assistance of the plaintiff in book form and that the defendant performed the contract in good faith.

[3] Three issues are raised in the appeal. First is a question of contractual interpretation as to the nature and terms of the contract. Second is the concern raised that the judge did not adjudicate the contract claim independently of the copyright claim. Third is the matter of the defendant's performance of the contract in good faith.

[4] For the following reasons, I would dismiss the appeal.

Relevant Facts

[5] The facts of the unfortunate falling out between the parties are set out in some detail by the judge in his reasons. It is unnecessary to repeat them, save in summary.

[6] In 2006, the defendant published a 15-part series about the symbolism in the architecture of the Manitoba Legislative Building based in large part on the ideas of the plaintiff. In 2007, at the suggestion of the defendant, the articles were republished in a book, *The Hermetic Code*

(Carolin Vesely & Buzz Currie, *The Hermetic Code: Unlocking One of Manitoba's Greatest Secrets* (Winnipeg: Winnipeg Free Press, 2007)) (*The Hermetic Code*). The book received critical praise internationally and was a financial success with four printings. While the defendant owned the copyright, it agreed to share the profits of the book with the plaintiff: first through a royalty-sharing agreement and, later, through a deal whereby the plaintiff could buy the book at a wholesale price for resale in his business of conducting architectural tours of the Legislative Building.

[7] In 2013, the defendant's publisher, Mr. Robert Cox, approached the plaintiff and suggested another collaboration which would feature the plaintiff's research surrounding the development of Winnipeg in the early 20th century that had been influenced by the City Beautiful Movement (a philosophy as to the use of architecture in urban planning).

[8] After preliminary discussions, between January 20-30, 2014, the parties negotiated a contract through an exchange of emails between the plaintiff and the defendant's editor, Mr. Paul Samyn. During these discussions, Mr. Samyn told the plaintiff that, although he would have a "starring role in this project", "we need to be clear that this will be a different project than the Hermetic Code. In other words, we will not be publishing a book for profit, nor will there be any royalties." The defendant rejected the idea that the plaintiff would write or have any editorial control on the project. The writer was to be an employee of the defendant, Mr. Randy Turner, an experienced features writer. Mr. Turner, along with other of the defendant's employees, would decide the ultimate direction of the articles to be written.

[9] The judge found that the terms of the contract agreed to were (at para 23):

> a) [the plaintiff] would provide advice and information to the [defendant] and [Mr.] Turner regarding Winnipeg's architecture;
>
> b) [the plaintiff] would be paid a lump sum of $1,500 and an hourly consulting fee of $75 per hour; and,
>
> c) [the plaintiff's] assistance would be acknowledged.

[10] In his email of January 30, 2014, responding to the terms being offered by the defendant, the plaintiff stated:

> This sounds great, although . . . [discussion of nature of upfront fee].
>
> That said, I think we have a solid basis on which to move forward. I trust that if the series were successful enough to develop it into a book, you would consider a much fuller treatment of this fascinating story with standard industry royalties.
>
> So when can we start? I am raring to go!

[11] Mr. Samyn replied to the email 13 minutes later. He made no comment on the plaintiff's added request regarding the consideration of standard industry book royalties and simply advised that Mr. Turner will "call to start the interviews." The judge made the following finding of fact about the January 30th exchange of emails (at para 25):

> It is clear from the evidence that, at the time this last email was sent, the [defendant] had no intention of publishing a book, and, in any event, did not agree to [the plaintiff's] suggestion respecting royalties. [The plaintiff] admits that nobody from the [defendant] ever told him that he would be paid royalties.

[12] The defendant published three articles about the history of Winnipeg's architecture called "City Beautiful" which were written by Mr. Turner and published in print and online in consecutive weekends beginning on September 6, 2014 (Randy Turner, "City Beautiful", *Winnipeg Free Press* (6 September 2014), online: <www.winnipegfreepress.com> [www.winnipegfreepress.com/city-beautiful/]) ("City Beautiful"). Part one of "City Beautiful" focussed on Winnipeg's architecture at the turn of the 20th century. The judge noted that the plaintiff was "extensively quoted" in this article (at para 38). He was also quoted in part three of "City Beautiful" which dealt with the influence of modernism in the mid-20th century and the architecture renaissance in the most recent decade.

[13] The judge found it was "clear" that the "narrative arc" of the three "City Beautiful" articles that Mr. Turner wrote, and the defendant published, was different than the original concept that the plaintiff discussed with Mr. Cox and Mr. Samyn before the contract was entered into (at para 97). In preparing the articles, Mr. Turner and others conducted over 100 hours of research and interviews, speaking to 17 experts in addition to the plaintiff, on Winnipeg's architectural history.

[14] On September 6, 2014, the plaintiff's company rendered an invoice for the plaintiff's services to the defendant for $3,150 which was duly paid.

[15] After the "City Beautiful" articles were published, the Manitoba Association of Architects (the MAA) approached the defendant and requested that they be republished into a book to assist in the commemoration of the MAA's 100th anniversary. The MAA agreed to provide $35,000 to assist in underwriting the costs of publishing the book. Mr. Samyn called that financial

contribution a "game changer" that created the possibility of publishing a book. A contract for the book deal between the defendant and the MAA was entered into on October 17, 2014.

[16] The book, *City Beautiful: How Architecture Shaped Winnipeg's DNA*, written by Mr. Turner, was published in December 2014 (Randy Turner, *City Beautiful: How Architecture Shaped Winnipeg's DNA* (Winnipeg: Winnipeg Free Press, 2014)) (*City Beautiful*), without the prior knowledge of the plaintiff. The judge found that the text of the book was "virtually identical" to the three articles as previously published (at para 43). The book had two printings. The defendant has received no profits from the sale of the book and has losses for its publication. The plaintiff described the book as an "abomination" and stated that he did not want to be "associated with it".

The Nature and Terms of the Contract

Background and Standard of Review

[17] The plaintiff makes essentially two arguments challenging the judge's interpretation of the contract: first, that the nature of the contract was a '"limited licence' contractual agreement"; and, second, that the words the plaintiff used in his January 30th email, when considered in the context of the surrounding circumstances, confirm that the plaintiff made a counteroffer modifying the essential terms of the contract proposed, which the defendant accepted, not expressly, but by its conduct (see *Cariboo-Chilcotin Helicopters Ltd v Ashlaur Trading Inc*, 2006 BCCA 50 at paras 1, 18, 20, 23).

[18] Generally, contractual interpretation is a question of mixed fact and law reviewable on the deferential standard of palpable and overriding error.

Two recognised exceptions to this rule, where a standard of correctness applies, are: (i) a readily extricable question of law; and (ii) the interpretation is of a standard-form contract, the interpretation at issue is of precedential value and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process (see *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 50-55; *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 46; and *Corydon Village Mall Ltd v TEL Management Inc et al*, 2017 MBCA 8 at paras 30-41).

[19] It is not open to an appellate court to reweigh the evidence or retry the case (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 3, 21-23). A palpable and overriding error is an obvious error that can be plainly identified in a judge's reasons that is determinative of the outcome of the case (see *HL v Canada (Attorney General)*, 2005 SCC 25 at paras 55-57; *Benhaim v St-Germain*, 2016 SCC 48 at paras 38-39; and *Salomon v Matte-Thompson*, 2019 SCC 14 at para 33).

Analysis and Decision

[20] Interpreting a commercial contract to ascertain the objective intention of the parties requires that the decision maker read the contract as a whole, "giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" and with regard to commercial efficacy and reasonableness (*Sattva* at para 47; see also *Nickel Developments Ltd v Canada Safeway Ltd*, 2001 MBCA 79 at paras 32-34; *Sattva* at paras 49, 55; *Elias et al v Western Financial Group Inc*, 2017 MBCA 110 at para 76, leave to appeal

to SCC refused, 37907 (9 August 2018); and *Filkow et al v D'Arcy & Deacon LLP*, 2019 MBCA 61at paras 30-38).

[21] The plaintiff's argument that this was a limited licence contractual agreement mixes concepts of copyright law and contract law. The differences in these areas of law must be respected. Copyright "is a creature of statute and the rights and remedies provided by the *Copyright Act* [RSC 1985, c C-42] are exhaustive" (*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 9). In contrast, the law of contracts is "almost entirely judge-made law" (SM Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at para 5).

[22] The concept of a "licence" is not unique to the *Copyright Act*, RSC 1985, c C-42 (the *Act*) (*Euro-Excellence Inc v Kraft Canada Inc*, 2007 SCC 37 at para 27). However, one of the distinctions the *Act* draws in relation to licences is between "[a] licence granting an interest in the right" (proprietary licence) and "a licence operating as a mere permission to do a certain thing" (non-proprietary licence) (John S McKeown, *Fox on Canadian Law of Copyright and Industrial Designs*, 4th ed (Toronto: Thomson Reuters, 2003) (loose-leaf updated 2020, release 2), ch 19 at 19:4, online: <nextcanada.westlaw.com> [nextcanada.westlaw.com/Document/I14546f20fabb6dbde0540021280d79ee/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.DocLink)&nortId=I1454bf5e2c631ecfe0540021280d79ee] (last visited 1 May 2020)). Proprietary licences under the *Act* require a certain form (see section 13(4)). A non-proprietary licence "merely [permitting] or [consenting] to do that which would be otherwise unlawful" does not have to be in a particular form and may be implied (McKeown at 19:4; see also *Robertson v Thomson Corp*,

2006 SCC 43 at para 56). Such a non-proprietary licence "will only extend to the right actually licensed to be done" (McKeown at 19:4).

[23] The plaintiff's reference to a "limited licence" is that the nature of the contract was that he gave a non-proprietary licence to the defendant, limited to publishing his work in print and digital articles only.

[24] The judge found that the nature of the contract the parties agreed to was not a "limited licence" (at para 117). In my view, the plaintiff has not demonstrated that this finding is an error. There is an evidentiary basis for the judge's conclusion that the agreement entered into was a "[c]onsulting contract" (at para 23) and his reasons demonstrate he intelligibly analysed and weighed the evidence in coming to that decision.

[25] In addition, the judge found that there was nothing in the "City Beautiful" articles or the resulting book in which the plaintiff "can claim copyright" (at para 97). That finding is not appealed. Even if this was a limited licence agreement, the defendant owned the copyright on the "City Beautiful" print and online articles and had the right to reproduce that work into a book (see section 3(1) of the *Act*), subject to contracting away its right, which is the plaintiff's main argument.

[26] The plaintiff submits that the judge made a palpable and overriding error as to the parties' reasonable expectations because payment of royalties, if a book was published, was an essential term of the contract. At the hearing of the appeal, counsel for the plaintiff put it forcefully that the bottom line here is that the defendant could not publish a book without the plaintiff's permission because of its contractual obligations. The plaintiff says the judge ignored relevant evidence as to the factual matrix of the contract: (i) the

defendant represented no book was to be published in its offer for the plaintiff's services; and (ii) the plaintiff "trust[ed]" (i.e., had the expectation) that royalties would be paid if the success of the "City Beautiful" articles led to a book.

[27] In his reasons, the judge rejected the submission that the plaintiff's statement about book royalties was a term of the contract (see paras 115, 123). In reference to the plaintiff's January 30th email, he stated (at paras 119-20):

> It is implicit in this email that [the plaintiff] understood completely that the project being contemplated by the [defendant] was one that would not amount to a full treatment of the subject. At the same time, he was aware, as evidenced in his email exchanges with [Mr.] Samyn leading up to his agreement to the terms of the Consulting Contract, that the direction of the project was uncertain beyond the fact that the end result would be in print and online.
>
> Neither [Mr.] Samyn nor anyone else on behalf of the [defendant] ever agreed to the suggestion of a fuller treatment of the story with royalties.

[28] I am not persuaded that the judge erred in his interpretation of the parties' reasonable expectations given the language used and the surrounding circumstances. In the emails exchanged, the words Mr. Samyn used made it clear that there would be no royalties from the project. There was ample evidence for the judge to find that the factual matrix at the time the contract was agreed upon was that the project the plaintiff was to provide assistance on was not yet defined, other than a book and royalties would not follow from it. Appropriately, the judge did not allow his consideration of the surrounding circumstances, particularly the prior arrangement of the parties that led to *The Hermetic Code*, to overwhelm the words used by the parties in their exchange of emails (see *Sattva* at para 57). Nor did the judge look at the plaintiff's

subjective intentions or motivations for asking for royalties to interpret the contract (see *SA v Metro Vancouver Housing Corp*, 2019 SCC 4 at para 30).

[29] I am also not satisfied that the judge made a palpable and overriding error in rejecting the argument that the plaintiff's email of January 30th was a counteroffer that, while not accepted expressly, was accepted by the defendant's conduct.

[30] Certainty of terms is an age-old problem of contract law which has kept the litigation mill grinding for centuries. As Professor Fridman explains, "Not everything that is spoken or written by the parties in the course of the negotiations that lead to the conclusion of a contract will amount to a term of such contract" (Prof GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 434).

[31] One enduring truism is that agreements are often reached in a "crude and summary fashion" even by sophisticated parties (*WN Hillas & Co Ltd v Arcos Ltd*, [1932] UKHL 2 (BAILII) at 10). Trial judges have the responsibility, and often difficult task, of determining the objective intention of the parties and legal effect, if any, of words added to an acceptance. There is a wide range of possibilities: a counteroffer, a minimal or trivial change, a meaningless term, a mere enquiry request or suggestion, or an acceptance together with a new proposal for modification (see Waddams at para 60). The case law confirms that each case turns "on its own particular facts" (*Sinanan v Woodyer*, 1999 CarswellNS 144 at para 26 (CA)).

[32] While now somewhat dated, *Nicolene Ltd v Simmonds*, [1953] 1 QBD 543 (CA (Eng)), remains the leading case on what may be done when the words used and the factual matrix do not provide a meaning to a purported

clause of a contract, but a contract otherwise exists. *Nicolene Ltd* was a case where the seller of steel bars agreed to clear terms, but then said in his acceptance letter that "we are in agreement that the usual conditions of acceptance apply" (at p 544). There were, in fact, no usual conditions of acceptance.

[33] Denning LJ explained there is a distinction between a clause which is "meaningless [and] can often be ignored, whilst still leaving the contract good" and a clause which is yet to be agreed upon which "may mean that there is no contract at all, because the parties have not agreed on all the essential terms" (at p 551). He stated that the additional words added in the acceptance letter were "meaningless. There is nothing to which they can apply" (at p 550). In the result, the clause "was so vague and uncertain as to be incapable of any precise meaning" and was severed from the rest of the agreement reached (at p 552).

[34] This is not a case where the words used by the plaintiff in his email of January 30th are simply difficult to construe because they are open to more than one meaning (see *Moore Realty Inc v Manitoba Motor League*, 2003 MBCA 71 at para 25). For example: What amount of "success" would be required for the series to be made into a book? What obligation(s) would the defendant have had to "consider" in making a book? What would a "much fuller" treatment of the story about the influences to Winnipeg's architecture in the early 20th century be? What are "standard industry royalties", particularly when the plaintiff holds no copyright?

[35] None of these questions have answers on the words the parties used when read as whole and in the context of the surrounding circumstances. A

"reasonably definite meaning" cannot be given to the plaintiff's statement about royalties such that it could have been a term of the contract, if accepted (*Mitsui & Co (Point Aconi) Ltd v Jones Power Co Ltd et al*, 2000 NSCA 95 at para 74).

[36] For completeness, I would note that no argument was advanced at the trial that the judge should resolve the ambiguity by admitting evidence as to the subjective intention of the parties as an exception to the parol evidence rule (see *Sattva* at paras 59-60; and Waddams at para 334).

[37] As was done in *Nicolene Ltd*, the role of the Court is to discern the parties' "reasonable expectations with respect to the meaning of a contractual provision" (*Ledcor* at para 65). This is not a situation of a counteroffer; the words used by the plaintiff in accepting Mr. Samyn's offer were meaningless, in terms of their legal effect, for the agreement reached.

[38] My final observation is that how the judge ascertained the parties' intentions in his interpretation of the contract is a sensible commercial result on an objective basis. An arrangement for book royalties was not obvious and necessary for the commercial efficacy of the transaction such that the parties must have intended such a term from their prior dealing on *The Hermetic Code* (see *Atomic Interprovincial Transport (Eastern) Ltd v Geiger et al* (1987), 45 DLR (4th) 312 at 316-17 (Man CA)). Leaving aside Mr. Samyn's express words that no book royalties would be paid in the "City Beautiful" project, the consulting contract was commercially reasonable and effective in the absence of an agreement on book royalties.

[39] In summary, the plaintiff has not established that the judge made a palpable and overriding error in failing to consider the January 30th statement about possible royalties to be an essential term of the contract.

Adjudication of the Contract Claim Independent of the Copyright Claim

Background and Standard of Review

[40] The plaintiff's next ground of appeal is that the judge did not adjudicate the copyright and contract claims independently. This issue is reviewable on a standard of correctness as the allegation is that the judge applied an incorrect legal principle by requiring the plaintiff to establish a successful copyright claim in order to succeed on his contract claim (see *Sattva* at para 53). In his reasons, the judge stated (at para 113):

> [The plaintiff] alleges that the [defendant] breached their contract with him by using Works in which he held copyright beyond the terms of what he alleges was a "limited licence" that restricted the use of the Works to the newspaper and digital publications. If there is no valid copyright claim then the claim based on the said "limited licence" must fail.

Analysis and Decision

[41] The judge's comments must be read in their proper context. As was explained in *Robertson*, "'Originality' is the foundation stone of copyright" (at para 35). A review of the record confirms that the trial was dominated by the copyright claim, with the parties having diametrically opposed views as to exactly how original the "City Beautiful" articles that Mr. Turner wrote were. The facts related to the contract claim were straightforward and that claim took a back seat to the copyright claim in terms of the tenor of the trial.

[42] The judge's reasons demonstrate that, after he decided there was no "limited licence", he went on to separately decide whether one of the terms of the consulting contract was that the defendant would be restricted from publishing the "City Beautiful" articles into a book. The judge did not commit an error in principle in the course of interpreting the contract by requiring the plaintiff to prove copyright as a prerequisite to a successful contract claim.

Good Faith Performance of the Contract

Background and Standard of Review

[43] The judge found that the defendant "act[ed] in good faith in fulfilling its obligations" (at para 114) and that the plaintiff "was treated fairly" (at para 122).

[44] The plaintiff argues that he was "taken advantage of by [the defendant]"; it did not perform the contract in good faith (see *Bhasin v Hrynew*, 2014 SCC 71 at para 33). He relies on several submissions: (i) Mr. Samyn neglected to respond to his January 30th email about book royalties; (ii) Mr. Samyn neglected to disclose to the plaintiff that it was going to publish a book with the MAA based on the "City Beautiful" articles; and (iii) Messrs. Samyn and Cox acted with an alleged "ulterior purpose" to ensure that the plaintiff did not receive the type of compensation that he received in *The Hermetic Code* project which was approximately half a million dollars (from book royalties/sales and tours).

[45] The applicable standard of review as to whether a party performed a contract in good faith was described by Pardu JA in *Willowbrook Nurseries Inc v Royal Bank of Canada*, 2017 ONCA 974, as follows (at para 25): "The

trial judge's decision about whether [a party] acted in bad faith is a question of mixed fact and law. It is owed deference absent an extricable error of law: [*Housen*] at paras. 10 and 36." (See also *Warkentin v BMO Nesbitt Burns Inc et al*, 2018 MBCA 22 at para 25.)

Analysis and Decision

[46] *Bhasin* is a consequential decision to contract law. Unlike in other jurisdictions, such as Québec and in the United States, in the common law Canadian provinces, there was no accepted standard as to when there is a legal duty to perform contractual obligations in good faith. As Geoff Hall explains, the law was "frankly a mess" based on "*ad hoc* exceptions" and theories that were not "convincing" (Geoff R Hall, *Canadian Contractual Interpretation Law*, 3rd ed (Toronto: LexisNexis, 2016) at 36). In *Bhasin*, the Supreme Court of Canada signaled that a principled approach must be taken to rationalise contract law to bring "certainty and coherence . . . in a way that is consistent with reasonable commercial expectations" (at para 62).

[47] This principled approach is based on the idea that "good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance" (at para 33).

[48] The duty of honest performance of a contractual obligation is a specific manifestation of the general organising principle of good faith (see paras 33, 93). Cromwell J explained the duty this way (at para 73):

> . . . This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. . . .

[49] The plaintiff's critiques of Mr. Samyn's neglect to respond to the January 30th email and to disclose the book deal with the MAA can be dealt with together. There are several considerations that undermine the plaintiff's position. None of the traditional *ad hoc* exceptions, where a duty of good faith contractual performance has been recognised and were preserved by *Bhasin*, applied here (see Hall at pp 38-45). For example, the contract agreed to was not a contract of utmost good faith. The parties were not in a fiduciary relationship. The contract was short term and not automatically renewing. The defendant was not exercising a discretionary power. There were no conditions precedent in the contract because, as previously explained, the statement the plaintiff made on January 30, 2014 about possible book royalties was not a term of the contract.

[50] The plaintiff's argument turns on whether the defendant acted contrary to its duty of honest performance. As was noted in *Bhasin*, "The duty of honest performance . . . should not be confused with a duty of disclosure or of fiduciary loyalty" (at para 86). As I will explain in more detail shortly, Mr. Samyn did not lie to or mislead the plaintiff during the performance of the contract contrary to the duty of honest performance. Also important is that dishonesty has to be "directly linked to the performance of the contract" (at para 73). In terms of Mr. Samyn's non-disclosure of the decision to publish

the book to the plaintiff, that alleged dishonesty occurred after the contract had been performed. I fail to see how, on these facts, the judge could reasonably have come to any other conclusion than the plaintiff was treated fairly in light of Mr. Samyn's non-response on January 30th and his failure to tell the plaintiff about the defendant's book deal with the MAA.

[51] Consideration of the submission that Messrs. Cox and Samyn acted in bad faith because of an alleged ulterior purpose against the plaintiff requires some discussion of the evidence.

[52] It is undisputed that relations between the plaintiff and the defendant appeared friendly on the surface. The judge heard a significant amount of evidence that both Mr. Samyn and Mr. Cox were complimentary to the plaintiff in wanting him to collaborate on the "City Beautiful" project and were appreciative of the assistance he provided right up until January 6, 2015, when the plaintiff first complained about the way he had been treated.

[53] It is also unquestioned that, below the surface, the parties' relationship was not entirely positive. Mr. Cox, in his testimony, expressed the view that the defendant's arrangement with the plaintiff for *The Hermetic Code* was "a very poor [commercial] deal" for it.

[54] In a candid email exchange on January 6, 2015 between Mr. Cox and Mr. Samyn, Mr. Cox described his predecessor as being "incredibly stupid" for giving the plaintiff such a "ridiculously generous royalty package" for *The Hermetic Code* as the book was not written by him and "was written despite him in many ways." He said he had "worked for years" to get out of the arrangement with the plaintiff on *The Hermetic Code*. Mr. Samyn replied

that he thought the plaintiff's "nose is out of joint" because he was "agitating for a cut" of the second printing of the *City Beautiful* book.

[55] Mr. Samyn's credibility was vigorously challenged during cross-examination as to why he told the plaintiff that no book would be published "for profit" in negotiation of the contract. In his closing argument, counsel for the plaintiff described Mr. Samyn as being "cute" in how he negotiated the contract. He said the only reason a book would be published by a publicly traded company like the defendant would be to make profit. He argued that Mr. Samyn's evidence "doesn't make any sense."

[56] Unlike what occurred in the facts of *Bhasin*, here, the judge made no finding that the plaintiff was lied to or treated dishonestly in any way. The judge accepted Mr. Samyn's evidence "that the [defendant] initially had no plans to publish the articles in book form" (at para 41) when the contract was agreed to on January 30, 2014. That decision was only made much later when the MAA unexpectedly came forward, after the "City Beautiful" articles had been published, and offered to underwrite the book publishing in part.

[57] The judge's finding that the defendant did not act in bad faith in performing the contract turned largely on him accepting the evidence of Mr. Samyn and his bona fides. Findings of credibility will not be lightly interfered with by this Court given the privileged position of a trial judge (see *Permaform Plastics Ltd v London & Midland General Insurance Co*, 1996 CarswellMan 325 (CA)). If a trial judge's credibility assessment of a witness can be reasonably supported by the record, it cannot be interfered with on appeal. That is the situation here.

[58] There was evidence before the judge that the book based on the "City Beautiful" articles was only published because of a coincidence that occurred after the contract had been performed and not because of some earlier duplicity designed to prejudice the plaintiff's interests. The judge did not accept that Mr. Samyn intended to mislead the plaintiff or had any reason to believe that his conduct may have had that effect while the contract was being performed. For example, in an email on January 6, 2015, Mr. Samyn said, "publishing a book was not on our radar screen" when the contract was discussed in January of 2014. That statement is corroborated by the evidence of Mr. Turner (the ultimate author of the book) who said that he first learned that a book would be published after all three "City Beautiful" articles had been published in print and online in September of 2014. In my view, there was an evidentiary basis to the judge's overall conclusion that the plaintiff had not proven bad faith.

[59] The limits of the organising principle of good faith are undefined and will evolve in time. The circumstances of this case do not require comment on this organising principle other than to point out that it was highlighted in *Bhasin* that "[t]he development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or 'palm tree' justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties" (at para 70).

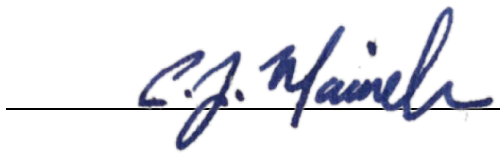
[60] It was well within the rights of the defendant to strike a less generous bargain with the plaintiff than their prior association on *The Hermetic Code* despite the parallels between the two collaborations. It is a common commercial reality that not every deal will be the same, even with parties who

have conducted similar transactions in the past. Such self-interest is routine in the marketplace and, by itself, is not "necessarily contrary to good faith" (*ibid*). This is particularly the case where, as here, the negotiation did not take place within an existing contract and there is no firm benchmark outside the contract allowing for an objective assessment of the duty of good faith (see *PP (Portage) Holdings v 346 Portage Avenue* (1999), 177 DLR (4th) 358 at para 35 (Man CA); and Hall at pp 44-45).

[61] In conclusion, I have not been convinced that the judge made a palpable and overriding error in deciding that the defendant acted in good faith in performing the contract.

Disposition

[62] In the result, I would dismiss the appeal with costs.

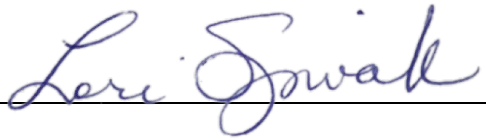


JA

I agree:

JA

I agree:



JA