

2004 CarswellAlta 993, 2004 ABPC 113



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Doeve v. Bruchet

John Doeve and Patty Doeve (Plaintiffs / Defendants by Counterclaim) and George Marvin Bruchet and Helen Elizabeth Bruchet (Defendants / Plaintiffs by Counterclaim)

Alberta Provincial Court

Jacobson Prov. J.

Heard:

Judgment: July 21, 2004

Docket: Lethbridge/Macleod 0302600027

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Counsel: Marcy A. Kain for Plaintiffs / Defendants by Counterclaim

Richard A. **Low** for Defendant / Plaintiffs by Counterclaim

Subject: Contracts; Property; Civil Practice and Procedure

Sale of land --- Remedies — Forfeiture of payments — Right to retain deposit — General

Plaintiff purchasers entered into conditional agreement for purchase of home of elderly defendant vendors and paid \$10,000 deposit — Contract was conditional upon purchasers selling own residence and obtaining financing and deposit was forfeited if purchasers backed out of closing for other reasons — Closing date was extended three times at purchasers' request as sale of purchasers' home was taking longer than expected — Vendors were no longer living in home and prior to closing purchasers obtained key to take measurements — Purchasers then commenced renovations, stored personal property and trimmed trees — Purchasers were approved for financing but as their house had not sold, they decided to back out of contract — Vendor returned \$5,000 of deposit on without prejudice basis — Purchasers brought action for recovery of remainder of deposit — Vendor brought counterclaim for return of balance of deposit and damages including damages for mental suffering — Action dismissed — Counterclaim granted — Purchasers were not entitled to return of deposit as their conduct caused all problems — Purchasers' behaviour treated contract as completed by taking de facto possession of house and exercising rights only lawful purchasers were properly entitled to have — Purchasers unilaterally and arbitrarily without notice or permission commenced to make major irreversible changes to property.

Sale of land --- Agreement of purchase and sale — Interpretation of contract — Conditions — Conditions precedent — General

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\$10,000 deposit — Contract was conditional upon purchasers selling own residence and obtaining financing and deposit was forfeited if purchasers backed out of closing for other reasons — Closing date was extended three times at purchasers' request as sale of purchasers' home was taking longer than expected — Vendors were no longer living in home and prior to closing purchasers obtained key to take measurements — Purchasers then commenced renovations, stored personal property and trimmed trees — Purchasers were approved for financing but as their house had not sold, they decided to back out of contract — Vendor returned \$5,000 of deposit on without prejudice basis — Purchasers brought action for recovery of remainder of deposit — Vendor brought counterclaim for return of balance of deposit and damages including damages for mental suffering — Action dismissed — Counterclaim granted — Conditional clause in contract was inserted for benefit of purchasers who by their conduct unilaterally waived benefit of that clause — When they decided to back off agreement, they were too late to rely on precondition and were estopped from relying on it as basis for claiming any part of deposit.

Sale of land --- Remedies — Damages — Miscellaneous issues

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Cases considered by *Jacobson Prov. J.*:

Bruno v. Fraser (1981), 16 Alta. L.R. (2d) 101, 1981 CarswellAlta 49 (Alta. C.A.) — referred to

Dewees v. Morrow (1932), [1932] 2 W.W.R. 228, 45 B.C.R. 154, [1932] 2 D.L.R. 800, 1932 CarswellBC 33 (B.C. C.A.) — referred to

Farquhar v. Sherk (1979), 14 R.P.R. 18, 1979 CarswellOnt 634 (Ont. Dist. Ct.) — referred to

Flannery v. Mockler (1983), 53 N.B.R. (2d) 91, 138 A.P.R. 91, 1983 CarswellNB 196 (N.B. Q.B.) — referred to

Fortin v. Testart (1995), 47 R.P.R. (2d) 74, 1995 CarswellOnt 401 (Ont. Gen. Div.) — referred to

Henderson v. McLean (1859), 16 U.C.Q.B. 630, 1858 CarswellOnt 359 (U.C. Q.B.) — referred to

Kempling v. Hearthstone Manor Corp. (1996), 41 Alta. L.R. (3d) 169, [1996] 8 W.W.R. 735, 137 D.L.R. (4th) 12, 184 A.R. 321, 122 W.A.C. 321, 3 R.P.R. (3d) 291, 1996 CarswellAlta 611 (Alta. C.A.) — considered

Nash v. McMillan (1997), 222 A.R. 4, 1997 CarswellAlta 1206 (Alta. Q.B.) — referred to

National Theatres Ltd. v. Macdonalds Consolidated Ltd. (1940), [1940] 1 W.W.R. 168, 1940 CarswellAlta 5 (Alta. Dist. Ct.) — referred to

North End Investments Inc. v. Alzman (1989), 66 Alta. L.R. (2d) 302, [1989] 4 W.W.R. 545, 1989 CarswellAlta 64 (Alta. Q.B.) — referred to

Porto v. Di Domizio (1996), 50 R.P.R. (2d) 113, 1996 CarswellOnt 9 (Ont. Gen. Div.) — referred to

Regnier v. Nelson (1956), 19 W.W.R. 36, 64 Man. R. 56, 1956 CarswellMan 30 (Man. Q.B.) — referred to

Reidy v. Fisher (1953), 9 W.W.R. (N.S.) 226, 1953 CarswellSask 51 (Sask. Q.B.) — referred to

Sajko v. Doore (1999), 1999 CarswellBC 2783 (B.C. S.C.) — referred to

Wishloff v. Boyko (1984), 52 A.R. 260, 1984 CarswellAlta 487 (Alta. Q.B.) — referred to

Woodridge Lincoln Mercury Sales Ltd. v. Paramount Towing Ltd. (2000), 2000 ABCA 147, 2000 CarswellAlta 502, 82 Alta. L.R. (3d) 47, 261 A.R. 372, 225 W.A.C. 372 (Alta. C.A.) — referred to

658612 Alberta Ltd. v. Yu (1999), 1999 CarswellAlta 637, 246 A.R. 111 (Alta. Q.B.) — considered

ACTION by purchaser for recovery of deposit; COUNTERCLAIM by vendor for forfeiture of deposit and damages.

Jacobson Prov. J.:

Introduction

1 The Plaintiffs, John and Patty Doeve, as the "Buyer", entered into a residential real estate purchase contract with the Defendants, George and Helen Bruchet, as the "Seller", to purchase a property in Lethbridge, Alberta and paid a deposit of \$10,000. The contract was conditional upon the buyers being able to sell their own residence. Before the closing, the buyers wrongfully obtained possession, stored their personal property, and commenced renovations. Then, they decided not to complete the contract. The Bruchets repaid \$5,000 of the deposit "without prejudice". The Doeves sued for the return of the balance of \$5,000, less set off. The Bruchets counterclaimed for \$15,774.89 being a declaratory judgment that the Bruchets are entitled to the full \$10,000 deposit and its' forfeiture, plus damages for breach of contract, premature possession, and mental suffering.

Issues

2 The parties argued the law of contract and evidence. Matters of trespass were not directly submitted to the Court by the parties. The issues are:

a) Are the Plaintiffs, as buyers:

1. Entitled to recover their deposit of \$10,000, or
2. By their conduct, waive the condition so that they lost the right to recover all or part of their deposit, or
3. Are they estopped from claiming relief?

b) The assessment of the nature and quantum of damages.

c) Are the Defendants, as sellers, entitled to damages for mental suffering? And if so, in what amount?

The Evidence

3 Frequently there was uncertainty and lack of recall, as well as conflict and contradiction between and among witnesses. It is not necessary to detail all of those differences.

4 On September 9, 2002 at Lethbridge, Alberta, at the request of the Bruchets, with the agreement of the Doves, and in the presence of all four individuals, Wayne King, a realtor, completed Exhibit 1, a preprinted form for a "Residential Real Estate Purchase Contract" which had been developed by the Alberta Real Estate Association "for the use of its members". It also states, "others using this document do so at their own risk." The document, as completed, is also described as "Real Estate Purchase Contract No. 120781". The contract describes the "Buyer" as Patty Dowe and John Dowe, and the "Seller" as Helen Bruchet and George Bruchet. The property was located at the municipal address of "1301 - 17 Ave. S., Leth.". The purchase price of \$123,900 (less initial deposit of \$10,000) was to be "fully paid" with vacant possession available by noon on the "23rd day of Sept. 2002 (the "Completion Day)". The contract consists of 15 sections and a general schedule. Each section has a varying number of numbered clauses. It is helpful to refer to some of the clauses.

5 Section 3, "Deposits" states:

3.1 All Deposits shall be delivered in trust to HELEN BRUCHET.

3.5 The Deposits shall be held in trust for both the Seller and the Buyer and shall be:

b) forthwith refunded to the Buyer if this offer is not accepted, a condition is not satisfied or waived (as per clause 8.4) or the Seller fails to perform this Contract; and

c) forfeited to the Seller if this offer is accepted and all conditions are satisfied or waived and the Buyer fails to perform on this Contract.

3.6 The brokerage holding the Deposits is further directed and authorized to pay that portion of the Deposits exceeding the Commission in trust to the Seller's lawyer no later than two (2) Business Days prior to the Completion Day.

If there is a dispute between the Seller and the Buyer as to entitlement to the Deposits then:

a) the brokerage holding the Deposit shall review the circumstances, determine entitlement and pay the money to the party who is entitled to the Deposit;

b) if no reasonable conclusion can be made in regard to (a) above, the brokerage shall notify the parties to the Contract in writing and shall pay the money into a lawyer's trust account mutually agreed to by the parties;

c) if the parties fail to name a lawyer within ten (10) days of receiving the notice in (b), the brokerage is authorized to pay the Deposits into court and the parties agree to reimburse the brokerage for the costs of such court application;

d) a brokerage acting in good faith under this clause shall not be liable to either party for any damages associated with the handling of the Deposit by the brokerage, except arising from the negligence of the brokerage.

The initial part of Section 3.6 did not form part of the contract because it was struck out. However, clauses (b) to (d) appear to have been left in effect.

6 Section 4, "Closing" provides for certain requirements on closing including payment of interest:

4.1 Unless otherwise agreed in writing, this Contact will be completed, the purchase Price will be fully paid and vacant possession will be available by:

Noon on the 23 day of Sep 2002 (the "Completion Day"), subject to the rights of the existing tenants, if any. [Bold print in original].

If the Completion Day is not a Business Day, then conveyancing matters and payment of the Purchase Price will be completed by 12 noon on the preceding Business Day. Possession will be available on and adjustments will be made as of the Completion Day.

4.3 If the Seller agrees in writing to accept late payment of the Purchase Price, then the Buyer will pay interest to the Seller calculated daily from and including the Completion Day to (but excluding) the day the Seller is paid in full. Payment received after noon on any day will be payment as of the next Business Day. Interest means the prime lending rate of the Province of Alberta Treasury Branches at the Completion Day plus 3%.

However "plus 3%" was struck out and initialled.

4.6 When the Buyer obtains possession, the Property will be in substantially the same condition as it was in when this contract was accepted.

7 Section 5 "Insurance" provides:

5.1 The risk of loss or damage to the Property shall lie with the Seller until the Purchase Price is paid according to the terms of this Contract. If loss or damage to the Property occurs before the Seller is paid the Purchase Price, then any insurance proceeds shall be held in trust for the Buyer and the Seller according to their interests in the Property.

8 Section 6 covers "Warranties and Representations", in particular:

6.4 The Seller and the Buyer each acknowledge that, except as otherwise described in this Contract, there are no other warranties, representations or collateral agreements made by or with the other party, the Seller's brokerage and the Buyer's brokerage about the Property, any neighbouring lands, and this transaction, including any warranty, representation or collateral agreement relating to the size/measurements of the Land and Buildings or the existence or non-existence of any environmental condition or problem. [Bold print in original].

9 Section 7 refers to "Additional Terms":

7.1 All time periods, deadlines and dates in this Contract shall be strictly followed and enforced. All times will be Alberta time unless otherwise stated.

7.2 This Contract is for the benefit of and shall be binding upon the heirs, executors, administrators and assigns of the individual parties and the successors and assigns of corporate parties.

7.3 All changes of number and gender shall be made where required.

7.4 Portions of this Contract may be enforced even if the Contract has ended.

7.5 The following Schedules form part of this Contract:

Financing Schedule Property Schedule

However, "7.5" was not completed.

10 Section 8 covers "Conditions":

Only one condition was completed in writing:

8.1

d) This Contact is subject to the sale of the Buyer's home, as per attached "Sale of Buyer's Home" Schedule.
 Yes No

Before 9 p.m. on 23 Sep 2002 (the "Condition Day"). [Bold print in original].

The box for "Yes" was marked with an "X".

The following conditions applied to each party:

8.3 Unless otherwise agreed in writing, the Buyer's Conditions are for the sole benefit of the Buyer and the Seller's Conditions are for the sole benefit of the Seller.

8.4 The Buyer and the Seller may unilaterally waive or satisfy their Conditions by giving a Notice to the other party (the "Notice") on the stated Condition Day.

8.5 Provided that the Buyer or the Seller, as the case may be, uses reasonable efforts to satisfy the Condition(s), if the Notice has not been given on the stated Condition Day, then this Contact is ended.

11 Section 9 refers to "Remedies/Disputes":

9.1 If the Seller or Buyer fails or refuses to complete this Contact according to its terms, then the other party may pursue all available remedies. The Seller's remedies include keeping the Deposits and claiming additional damages. Both the Seller and the Buyer can claim reasonable costs including legal fees and disbursements on a solicitor/client full indemnity basis.

9.2 If the Seller must restore title to the Property, enforce a lien against the Property or regain possession of the Property due to the Buyer's default, then the Buyer will pay the Seller's reasonable costs including legal fees and disbursements on a solicitor/client full indemnity basis.

12 Section 11 contains the following relevant "Definitions":

11.1 In this Agreement:

d) Completion Day is the day described in clause 4.1

e) Deposits means the Initial Deposit plus all Additional Deposits.

g) Unless otherwise agreed in writing means a written agreement by letter or otherwise between the Seller or the Seller's lawyer and the Buyer or the Buyer's lawyer. [Bold print in original].

13 Section 12 "Representatives/Notice" states: The contract did not identify the Representatives of the Parties nor any addresses for the purpose of Notice.

12.2 For the Purposes of giving and receiving any notice referred to in this Contract, and for acceptance of an offer to purchase, communication must be in writing and must be delivered to the address or faxed to the number described below.

A notice sent or received by a Representative is proper notice for the purposes of this Contract. [Bold print in original].

14 The "General Schedule" signed by all parties was attached to the contract. It provided details of the proposed sale of the buyers home at "1504 - 11 Ave S Leth", and permission for the Seller to continue to market their property:

- The Buyers home is being privately sold and will be advertised as such within 24 hours of acceptance of this Contract with: At an asking price of (of not more than) \$242,000.
- The Buyer wants to sell the Buyers Home on or before 9:00 p.m. 20 Sep, 2002 (the Condition Day).
- "Sell the Buyers Home" means the Buyer has signed a legally binding and enforceable contract and that all conditions have been either satisfied or waived by a properly given notice.
- The Sellers' Agent will continue to market the Property and the Seller may sign another Real Estate Purchase Contract (the Second Contract) until the Buyer gives notice (the Notice) that all conditions have been satisfied or waived according to clause 8.4 of the Purchase Contract.
- The Second Contract may contain a Buyer's Condition(s).
- If the Buyer fails to give the Buyer's Notice properly, then this Contract is ended, the Deposits must be returned to the Buyer as soon as reasonably possible and the Buyer and the Seller will have no further obligations or liabilities under this Contract.

15 At the request of the Doeves, to extend the closing date and for the Sellers not to try to sell to someone else, the Real Estate Purchase Contract was subsequently amended four times in writing (Exhibit 2), as follows:

- a) Amend Clause 8.1(d) the "*condition day*" from 23 Sep 2002 to 30 Sep 2002.
- b) Amend Clause 8.1(d) the "*condition day*" from 30 Sep 02 to 2 Oct 02.
- c) Amend Clause 8.1(d) the "*condition day*" from 2 Oct 02 to 7 Oct 02.

And:

"Amend" Clause 4.3 to provide interest at prime plus 3 from 2 Oct 02.

- d) Amend Clause 8.1(d) the "*condition day*" from 2 Oct 02 to 15 Oct 02.

And:

AMEND Clause 4.3 to provide interest at 10% from 7 Oct 02.

16 The Bruchets are an elderly couple. Mr. Bruchet is a retired painting contractor. He did not testify. Helen Bruchet, age 84, did most of the negotiating and gave evidence at the trial. The Sellers had purchased the property at 1301 - 17th Avenue South, Lethbridge, Alberta, in the summer of 2002 for their new home. She said it was "what we wanted to live in" and no renovations were required.

17 The property had been vacant for the prior two years. The yard was overgrown and needed maintenance. However, the interior of the house was in good condition and the Bruchets intended to move in without changes. Shortly after buying the property, the Bruchets realized that they would no longer be close enough to have daily contact with their grandchildren. For that reason, they decided not to move.

18 The Bruchets then went to Wayne King, a local realtor, and entered a special contract (Exhibit 14) to sell the property for \$123,900. If the realtor sold the property, he would receive a commission of 3 $\frac{1}{2}$ %. However, if the Bruchets sold the property, there would be no commission payable to the realtor. The realtor's sign with phone numbers was placed on the property. The Bruchets also advertised the property in the Lethbridge Herald as a sale by owner and held an open house about the end of August.

19 Perhaps seven or eight couples indicated their interest in purchasing the property. The Bruchets advised everyone to attend at the house at a certain time on a Saturday morning. They were certain that they had a buyer in that group.

20 The Doeves were part of that group. They insisted that because they had phoned and were the first to attend at the house, they should have the first opportunity to purchase the house. They advised the Bruchets that their house in Gyro Park could be sold in a short time but they needed one week. Property sales in the Gyro Park area at that time were very brisk. One of the Doeves' neighbours sold his property in one week.

21 Mr. Bruchet agreed that since the Doeves were first, they should have the first opportunity to purchase the house.

22 Mrs. Doeve's father was also involved. The Bruchets made all three aware that they were anxious to sell because they needed funds to meet their mortgage and liabilities. Mrs. Bruchet claims that Mrs. Doeve's father stated that the buyer should give a cheque for a \$10,000 deposit forthwith, and if the Doeve property was not sold in one week, the buyers would get a mortgage. The Doeves say they never intended, nor could they carry two mortgages.

23 The parties went to the office of Wayne King to give him the details of their agreement. He completed and they then discussed and signed the real estate purchase contract. Mrs. Bruchet says she did not see either plaintiff after that time until the pre-trial conference. However, she frequently spoke to Mrs. Doeve by phone. Later, she was frequently contacted by Mr. King at the request of the Doeves, to see if the Bruchets would give them extensions since the Doeves' house was "good as gone". The Doeves also offered to increase the rate of interest.

24 Mrs. Doeve also phoned Mrs. Bruchet stating that "we really want the house, we need a few more days".

25 Some time during the period that the requests were made by the Doeves for the extension, Mr. King suggested to them that they should "perhaps" seek alternate financing and recommended that they see Susan Maier at The Mortgage Centre.

26 Mrs. Bruchet believes that Mr. King asked for the key in order for the Doeves to measure the house for curtains and furniture.

27 She authorized Mr. King to deliver the key to the house to the Doeves in order for them to gain access to take measurements. He did not give the Doeves the garage door opener. He was not aware that the Doeves had stored personal

possessions in the garage.

28 Mrs. Bruchet subsequently contacted the Doeves by telephone to ask for the key to be returned. For various reasons, it was not available.

29 Mrs. Doeve said they got the key in order to get to work, "the sale was going to happen". Mr. Doeve said they got the key in order to "clean up" the new house and to move their possessions from their Gyro Park house, which would also clean up the clutter there. The evidence is not clear, when or how, the Doeves came into possession of the garage door opener.

30 In cross-examination, Mr. Doeve could not remember if he had mentioned removing the carpets or pruning the trees. He said:

I just went ahead and did it. We were pretty sure our house would sell.

31 Mrs. Bruchet believes it was October 14, when she went to the house to check for flyers. When she and her daughter arrived, they found that the branches of the spruce trees in the front yard had been cut off and the lilac bush adjacent to the driveway had been cut to the ground. The lawn was covered with branches. When they went to the back of the house, there were branches over the patio roof, and bushes and branches from the front were lying in the back yard. Two big flower containers and a patio bench were missing.

32 Mrs. Bruchet contacted a locksmith and had the locks changed. The garage door opener was returned to her later.

33 Mrs. Bruchet also found that a trellis above a room divider and also a bathroom mirror had been broken. The property was not at all in the same condition that it had been when they had first shown it to the Doeves.

34 While they were there, she said Mr. Doeve drove by several times without stopping. Shortly afterwards, Mr. King arrived and later Mr. Doeve. Mrs. Bruchet asked what was going on. She can't recall what the response was. Inside the house the carpets and underlay were torn out, the curtains were pulled off, there was dust over everything, and there was a big trailer parked in the garage together with numerous personal possessions belonging to the Doeves. At that time, Mr. Doeve advised her that he did not think they could take the property. When she asked why they hadn't picked up their mortgage, he replied "we decided not to go that way".

35 On October 1st, 2002, the City of Lethbridge Solid Waste Department issued a bylaw enforcement order directing that refuse in the form of "trees" piled in the lane be removed by October 15, 2002. This bylaw enforcement arose from Mr. Doeve's action of piling much of the branch cuttings in the laneway. He said he intended to remove the refuse but his "back went out".

36 The Doeves applied and were approved for mortgage financing on the property with a draw-down date of October 31, 2002. Because their house had not sold, they decided to back out of the contract. They could not afford two mortgages.

37 The Doeves had overpriced their house at \$240,000. They did not get a single offer despite the "tons of enquiries". Prior to trial, they sold the house for \$208,000.

38 Until mid-October 2002, but especially when they first contacted the Bruchets, the Doeves weren't concerned, they didn't see a problem and there was no question in their mind that they were going to sell their house. "The sale was going to happen!" They started to move and to renovate.

39 In addition to the outside work and storage of personal items in the garage, Mr. Doeve, his two sons, and his father-in-law, had entered the house and torn up the carpet and underlay in the dining room, living room and hallway. He had removed and delivered the remnants to the City dump. The Doeves claim the carpet was a brown, worn, dirty shag carpet, 20 to 25 years old, and very dated. They said it was "worn out".

40 JoAnne Kelly, real estate agent, with 10 years experience, first evaluated the property for estate purposes and was subsequently given the listing in May 2000. Until the property was sold in July 2000, Ms. Kelly checked it every day for insurance purposes. She was also present for both realtors' showings and her own clientele. She also arranged for a thorough house cleaning (but not carpet cleaning) on June 7th, 2002 and also for some yard work.

41 Ms. Kelly recalled that the carpet was sculptured in brown tones. It was not a shag carpet. It would be "acceptable" if steam cleaned.

42 Mrs. Bruchet described the carpet as "tanny brown, quite thick, quite smooth and plush". She considered the carpet to be in very good condition, "absolutely perfect".

43 Mr. King was the agent for the Bruchets when they bought the property. He had been inside the property frequently before and after they purchased it. He said the carpet was brown, fairly deep plush and appeared to be in good condition. There was no need to replace or repair it, even in the high-traffic areas. The carpet was of good quality, or it was reasonably new.

44 Mr. Doeve claimed that he wanted to replace the carpets, initially for himself and subsequently to properly compensate the Bruchets. Mr. King and Mr. Doeve took measurements. Then, Mr. Doeve faxed the details to a friend and received a quote. He states that he couldn't finalize matters with the Bruchets. No evidence was submitted by the Doeves on their estimate of the cost of replacement. Mr. Doeve intended to replace the carpet with new material.

45 After Mr. Laczo of End of Roll had given evidence on carpet replacement costs, Mrs. Bruchet testified that she had shown a sample of the old carpet to him when she obtained his quotes on the cost to install new carpet. However, Mr. Laczo was never examined on this point by anyone.

46 Mr. King noted that at the front of the property, six feet of the lower branches of four fir trees were cut off. The lilac bush was cut down to ground level. In the backyard, the trees and bushes had also been trimmed. Bits and pieces of the cuttings were on the ground, and there was a pile of cuttings in the alley.

47 The Bruchets continued to try to sell the property "as is". Despite their best efforts, they couldn't sell it and they continued to incur costs. Mr. King said the house was not saleable due to external and internal conditions; there was a "marked decrease in market value". There was no evidence from anyone as to the current market value.

48 Subsequently, the Bruchets agreed to rent the property for \$800 for the month of December in exchange for work to be done by the tenant, Jack Lambert. However, he was not required to replace the carpets. That work has not yet been done.

49 The Bruchets paid \$1,000 to Mr. King for his services, some of which were done at the request of and for the benefit of the Doeves, as well as to clarify issues between the parties. Nevertheless, Mr. King considered himself to be acting for the Bruchets.

50 Mrs. Bruchet returned \$5,000 of the deposit on a "without prejudice basis" after she considered her potential damages.

51 The Doeves seek judgment in the amount of \$4,912.64 including pre-judgment interest of \$432.23 as follows:

Remainder of deposit		\$5,000.00
Less:		
Locksmith	\$44.41	
Alley cleanup	\$150.00	
Carpet installation costs	\$325.28	
		\$519.69
		\$4,480.31
Pre-judgment interest:		
Oct. 15, 2002 to July 8, 2004		\$432.33
Balance of Claim		\$4,912.64

52 In addition to general damages (including forfeiture) the Bruchets claim special damages for breach of contract and premature possession as follows:

Damages -

a) (Exhibit 2) — Loss of Interest		\$456.10
b) (Exhibit 5) — Locksmith		\$44.41
c) (Exhibit 6) — Mirror Glass		\$5.00
d) (Exhibit 7) — Alley Cleanup		\$150.00
e) (Exhibit 8) — Replace and install 64 sq. yds.		
— Carpet at	\$1,663.36	
— Underlay at	\$319.36	
	\$1,982.72	
GST on product	\$138.79	
Installation (including G.S.T.)	\$325.28	
Total Carpet Costs		\$2,446.79
f) (Exhibit 9) — Advertising		\$55.43
g) (Exhibit 10) — Wayne King compensation		\$1,000.00
h) (Exhibit 11) — Utilities (Oct. to Dec. 2002 (Exhibit 13) — Loss of rent, Jack Lambert account		\$707.23
for cleanup, repair and paint		\$800.00
i) Patio furniture and flower pots		\$92.00
j) Lilac bush		\$100.00
Total	\$5,856.96
	

53 The Bruchets have not established that the Doeves were ever in possession of the flower pots and patio furniture, nor that the total value was approximately \$130 to \$150.

54 The lilac bush valued at \$100.00 was not destroyed. The benefits of its original growth and blossoms have been temporarily lost, however, the lilac bush should recover.

55 The bottom six feet of branches of the fir trees are permanently removed, but the trees survive. In both cases, the Doeves' conduct has caused loss.

Authorities

56 The following authorities have been considered:

1. *Henderson v. McLean* (1859), [1858] O.J. No. 102 (U.C. Q.B.) per Robinson C.J.
2. *Deweese v. Morrow*, [1932] 2 W.W.R. 228 (B.C. C.A.) per Macdonald, C.J.B.C.
3. *National Theatres Ltd. v. Macdonalds Consolidated Ltd.*, [1940] 1 W.W.R. 168 (Alta. Dist. Ct.)
4. *Reidy v. Fisher* (1953), 9 W.W.R. (N.S.) 226 (Sask. Q.B.) per Graham J.
5. *Regnier v. Nelson* (1956), 19 W.W.R. 36 (Man. Q.B.) per Freedman J.
6. *Farquhar v. Sherk*, [1979] O.J. No. 3156 (Ont. Dist. Ct.) per Gould D.C.J.
7. *Bruno v. Fraser* (1981), 16 Alta. L.R. (2d) 101 (Alta. C.A.) per Laycraft J.A. (as he then was)
8. *Flannery v. Mockler*, [1983] N.B.J. No. 391 (N.B. Q.B.) per Creaghan J.
9. *Wishloff v. Boyko* (1984), 52 A.R. 260 (Alta. Q.B.) per Feehan J.
10. *North End Investments Inc. v. Alsman*, [1989] 4 W.W.R. 545 (Alta. Q.B.) per Rowbotham J.
11. *Fortin v. Testart* (1995), 47 R.P.R. (2d) 74 (Ont. Gen. Div.) per Sedgwick J.
12. *Porto v. Di Domizio*, [1996] O.J. No. 22 (Ont. Gen. Div.) per Pitt J.
13. *Kempling v. Hearthstone Manor Corp.* (1996), 184 A.R. 321 (Alta. C.A.) per Picard and Harradence JJ.A.
14. *Nash v. McMillan* (1997), 222 A.R. 4 (Alta. Q.B.) per Andrekson J.
15. *Sajko v. Doore*, [1999] B.C.J. No. 2864 (B.C. S.C.) per Bouck J.
16. *Woodridge Lincoln Mercury Sales Ltd. v. Paramount Towing Ltd.*, 2000 ABCA 147, 82 Alta. L.R. (3d) 47, 261 A.R. 372 (Alta. C.A.) per Fruman J.A.
17. *658612 Alberta Ltd. v. Yu*, [1999] A.J. No. 808 (Alta. Q.B.) per Lee J.

Analysis

57 In *Kempling*, Picard, J.A. reviewed the law on a true condition precedent. At para.28 she said:

.... although the fulfilment of a true condition precedent depends on the will of a third party, one or both of the parties to the contract may, in the circumstances, have some obligation to pursue that end.

A true condition precedent cannot be waived unilaterally.

58 At para.32, Picard, J.A. held:

In order to construe the term said to be a true condition precedent, it is necessary to review the terms of the contract, the circumstances and the actions of the appellant and respondents. It is the intention of the parties that ultimately determines their duties under a contract containing a conditional clause

She concluded that there was not a true condition precedent in *Kempling*.

At paras. 54 to 69 she reviewed the process for the "determination of a claim for mental suffering or distress in breach of contract suit".

My conclusion is that the determination of a claim for mental suffering or distress in a breach of contract suit must begin with the application of the rule in *Hadley v. Baxendale*. The rule has within it the means to test and limit liability where the claim arises through special circumstances, which will be the usual case with mental suffering or distress. The contract must be made on the basis of those special circumstances being known to the parties and the plaintiff having communicated them to the defendant. Also, the plaintiff bears the further burden of having to prove the casual link between the breach and the mental suffering or distress and foreseeability of that injury. Damages would be restricted to those that "would ordinarily follow from a breach under the special circumstances so known and communicated". A breach of contract will often result in unhappiness, frustration, inconvenience, anger and even malevolence. The rule is not intended to assure compensation in those cases. The rule allows a court to award damages but does not mandate doing so.

59 Harradence J.A. came to the same result as Picard, J.A. but found that there was a true condition precedent that "was mutually waived by the parties" . He said at para.78:

As Picard, J.A., notes, it is the intention of the parties which determines the effect of this clause. But that intention, first and foremost, must be found in the words that the parties chose. Failing any ambiguity, it is not for the court to look to how the parties acted in order to attribute the proper meaning to the sentence in question. As Gerwing, J.A. stated in *Canada Safeway Ltd. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Hancock* (1989), 74 Sask.R. 152 at pp. 154-155 (C.A.):

It is the most fundamental rule of contractual interpretation that if a contract is clear it must be taken to mean what it says; without inherent ambiguity none of the other rules for construing a contract or adducing further evidence to explain it are relevant.

60 In the *Yu* case at para.22, Lee J. referred to *Kempling* and particularly to the reasons of Picard J.A. in para.32. He said:

The Court preferred to consider the intention of the parties that ultimately determines their duties under a contract containing a conditional clause.

61 On the facts, all of the problems were caused by, and are attributable to the Doves' conduct. Their actions did not improve the property, instead, the property value was diminished. They caused damage and loss.

62 This is not a proper case to apply the contra proferentem doctrine.

63 Interpretation of the contract is significantly effected by the conduct of the parties under that contract, especially the conduct of the Doeves.

64 The preconditions that the Doeves' house be sold was for their benefit. They were "eager and desirous" of completing the transaction. They constantly and strongly reinforced their intention that the contract would be properly concluded, and when there was delay, they sought extensions and offered to pay additional interest. They also had the option of financing the transaction through a new mortgage.

65 It was naive, but under the circumstances, it was not unreasonable for the Bruchets to allow the Doeves access to the property in order for the buyers to take measurements. Unhappily, the Doeves went far beyond that purpose and took possession.

66 Although they were ready, willing and able to carry out the agreement, the Bruchets were innocent and unaware of the intentions and actions of the Doeves. The Doeves treated the contract as concluded, that they had purchased the property and they were the new owners. They exercised rights in respect of the property that only a proper purchaser could do. They unilaterally, without notice or permission, arbitrarily commenced to make major, irreversible changes to the property.

67 The Doeves caused substantial alterations to the property which adversely changed its condition and value. The difficulty is to assess the quantum of damage and forfeiture of the deposit.

Conclusion

68 The Doeves took defacto possession. They were approved for a new mortgage, and continued to represent to the Bruchets that the purchase would soon be completed. Their behaviour was more than treating the contract as one yet to be completed. They exercised rights that only a lawful purchaser was properly entitled to have under the contract.

69 The conditional clause did not depend entirely on the will of a third party. It was inserted for the benefit of the Doeves as the Buyer. They could, and by their conduct in taking possession of the property and making substantial changes to it, unilaterally waived the benefit of that clause.

70 Later when they realized that they couldn't afford two mortgages, the Doeves decided to "back off". They would not complete the contract. Under the circumstances, they were too late to rely upon the precondition. They unilaterally waived the right and are estopped from relying upon the precondition in this action as the basis for claiming all or even the remainder of their deposit. The Doeves conduct caused all of the problems. They breached the contract. They are not entitled to recover their deposit and they are responsible for any excess damages. It is fair and just that the Bruchets as Sellers retain the deposit. They attempted to mitigate their loss.

71 Despite the extreme inconvenience, frustration and emotional upset, the circumstances of this case do not justify an award in law for mental suffering.

72 The Bruchets' special and general damages did not exceed the sum of \$10,000 but were close to that amount. Forfeiture of the total deposit of \$10,000 is fair and just and in accordance with the original intention of the parties.

Decision

73 The Plaintiffs' claim is dismissed. The Defendants, Plaintiffs by Counterclaim, are entitled to recover the sum of \$10,000. Since they already have \$5,000, they will have judgment for the balance of \$5,000.

Costs

74 Costs may be spoken to by counsel including submissions in respect of Section 9, Clause 9.1 of Exhibit 1.

Action dismissed; Counterclaim granted.

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