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The perils of selling the same property twice (with an aside on styles of appellate decision-making)

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Cases Considered:

Castledowns Law Office Management Ltd. v. FastTrack Technologies Inc., 2009 ABCA 148

This was a dispute between two purchasers of the same piece of commercial real estate in Edmonton, the Vienna Building at 7708-104 Street. The vendor, 1131102 Alberta Ltd, sold the property first to FastTrack Technologies Inc. (FastTrack). That agreement was conditional upon the vendor's lawyer's approval. The vendor also entered into a second or back-up agreement with Castledowns Law Office Management Ltd. (Castledowns). The back-up agreement with Castledowns was conditional on "satisfactory confirmation of termination" of the FastTrack agreement. The resolution of the dispute turned on the interpretation to be given those words. This was the issue on which the dissent of Mr. Justice Frans Slatter parted ways with the majority judgment of Madam Justice Carole Conrad, concurred in by Mr. Justice Clifton O'Brien. Was it enough if the vendor could legally terminate the agreement with FastTrack and did so? Or did FastTrack have to ratify any purported termination by the vendor? This contract interpretation issue is perhaps less interesting than the fact that neither the majority nor the dissenting judgment engage with the other on that or any other issue. This style of appellate decision-making has been called "uncooperative" in the empirical literature that examines why justices decide as they do. (See, e.g., Benjamin Alarie and Andrew Green, "Charter Decisions in the McLachlin Era: Consensus and Ideology at the Supreme Court of Canada.") The label "uncooperative" is not necessarily intended to be pejorative, depending on the reason for the lack of cooperation. Some judges value independence as the best method for achieving internally consistent reasoned decisions. Some Chief Justices encourage certain styles of interaction in the preparation of judgments. Sometimes, however, the lack of cooperation is due to ideological or personal differences. It usually takes a very large number of judgments before the reason becomes clear, with ideological or personal constraints on cooperation tending to lead to more plurality and dissenting judgments.

The facts

The vendor initially placed an advertisement for the sale of the Vienna Building in the Edmonton Journal in late August 2006. FastTrack's president, Dr. Michael Kouritzin, a Professor of Mathematics and Statistics at the University of Alberta saw the advertisement in the Edmonton

Journal and began negotiating to buy the property. FastTrack and the vendor reached an agreement on August 30, 2006 whereby FastTrack agreed to purchase the property for $1,625,000. The FastTrack agreement was prepared on a standard residential real estate contract form and FastTrack's deposit was only $10,000. The agreement was subject to one vendor's condition, namely, that the vendor obtain its lawyer's approval of the offer before 9 p.m. on September 15, 2006. It was also subject to a number of buyer's conditions relating to financing, contractor inspection, environmental assessment, lawyer approval and satisfaction with license requirements, all to be completed before September 22, 2006, and subject to a property inspection to be completed by October 22, 2006.

Between the date of the advertisement and the August 30, 2006 accepted offer, the vendor had entered into a commercial listing agreement with Century 21. Soon after the vendor agreed to sell the Vienna Building to FastTrack, Century 21 introduced the vendor to a number of interested buyers. The vendor negotiated with Castledowns and the two companies eventually agreed on a sale price of $1,724,250 for the Vienna Building. A representative from Castledowns inserted a handwritten condition precedent into clause 4.2 making the agreement subject to "Vendor confirmation of termination of contract dated Aug. 30, 2006″ - the FastTrack agreement. The Vendor's realtor crossed out this condition precedent and inserted the words: "Subject to satisfactory confirmation of termination of private purchase contract dated Aug. 30 2006."

Because the decision turns on the vendor's conditions in clauses 4.2 and 4.3 of the agreement with Castledowns, it is worth quoting those conditions at length. Those conditions read:

> 4.2 **Seller's Conditions**: The obligations of the Seller described in this Contract are subject to the satisfaction or waiver of the following conditions precedent, if any. These conditions are inserted for the sole and excusive benefit and advantage of the Seller. The satisfaction or waiver of these Conditions will be determined in the sole discretion of the Seller. The Seller agrees to use reasonable efforts to satisfy these conditions. These conditions may only be satisfied or waived by the Seller giving written notice (the "Seller's Notice") to the Buyer on or before 5 p.m. on the 15 day of September 2006, (the "Seller's Condition Day"). If the Seller fails to give the Seller's Notice to the Buyer on or before the Seller's Condition Day, then this Contract will be ended and the Initial Deposit plus any earned interest will be returned to the Buyer and all agreements, documents, materials and written information exchanged between the parties will be returned to the Buyer and the Seller respectively.
>
> > Vendor confirmation of termination of contract dated Aug. 30, 2006 (crossed out).
> >
> > **Subject to satisfactory confirmation of termination of private purchase contract dated Aug. 30 2006**

> 4.3 Subject to clauses 4.1 and 4.2, the Buyer and the Seller may give written notice to the other party on or before the stated Condition Day advising that a Condition will not be waived, has not been satisfied and will not be satisfied on or before the Condition Day. If that notice is given, then this contract is ended upon the giving of that notice. (emphasis in the original)

The vendor then sent both the FastTrack and the Castledowns offers to his lawyer, Mr. Engleking, for review. The lawyer did not like the small deposit and the long time period for satisfying the purchaser's conditions in the FastTrack agreement. The vendor therefore told his lawyer to terminate the agreement with FastTrack and return the $10,000 deposit. On September 7, 2006, Engelking wrote to FastTrack's lawyer, Mr. Caruk, advising that his client was not prepared to remove "the 'subject to condition' in the Seller's favour." He returned the $10,000 deposit and stated that his client considered the transaction at an end.

As soon as FastTrack heard from their lawyer about the purported termination by the vendor, they immediately instructed him to express their displeasure and intention to enforce the agreement through the courts. The vendor and FastTrack complicated matters greatly by trying to resolve the issues themselves on September 12, 2006, meeting without their lawyers or agents. They negotiated what they called changes to their original agreement, which they put into a document they called an "Addendum" to that agreement. The changes included a higher purchase price, a larger deposit, a rent-free lease back to the vendor for one year, a different closing date, and a consideration of the GST. In addition the Addendum expressly removed the condition that the transaction was subject to approval by the vendor's lawyer. Having failed to seek or use their lawyers' advice to "resolve" matters, these parties would come to spend a great deal of time on legal proceedings and money on legal fees and disbursements in order to actually bring the matter to a close. Perhaps neither the vendor nor the mathematics professor had heard the old saying about "he who is always his own counselor will often have a fool for his client."

On September 15, 2006, the vendor's lawyer sent a letter to Castledowns stating that his client "is unable to confirm termination of the private purchase contract dated August 30, 2006, and consequently the back up offer from Castledowns Law Office cannot be satisfied and our client considers that offer to be at an end."

Castledowns immediately notified the vendor that it would challenge this termination. On October 13th, 2006, Castledowns waived the buyer's conditions in its agreement. Castledowns did not, however, forward their $100,000 deposit to the vendor. On November 21, 2006, when the vendor refused to complete the sale, Castledowns sued the vendor for specific performance of their agreement. It also sued FastTrack for tortuous conspiracy, inducing breach of contract, damages, and the removal of its Caveat protecting its agreement for purchase. The vendor counterclaimed for a declaration removing Castledowns' caveat from the Vienna Building, for damages for slander of title, interest and costs. FastTrack defended and counterclaimed for interference with contractual relations, wrongful filing of caveats, exemplary and other damage and costs. Century 21 and its realtors were included in the counterclaim. (An interesting post could be written on "slander of title," a rather obscure intentional tort.)

All of the actions were eventually consolidated and set down for trial. Castledowns won at trial. Mr. Justice Gill concluded that the FastTrack agreement had terminated when the vendor wrote to FastTrack on September 7, 2006 and said the condition would not be waived and the agreement was at an end. In the alternative, he found that the FastTrack agreement terminated when the parties agreed to the "Addendum" because the negotiation of the Addendum amounted to a counteroffer, acceptance of which terminated the first agreement.

FastTrack appealed. The only parties involved in the appeal were FastTrack and Castledowns, the two competing purchasers. Interestingly, a stay of Justice Gill's order pending the hearing of the appeal was denied. In refusing the stay, Mr. Justice Ronald Berger held that "the grounds of appeal, although arguable, are, in my opinion, barely arguable" (*Castledowns Law Office Management Ltd. v. Fasttrack Technologies Inc.*, 2007 ABCA 262 at para. 6). Of the 5 judges who considered this matter, therefore, three thought Castledowns had the better case. That is not the majority that counts, however, and the Court of Appeal vacated the order transferring the Vienna Building to Castledowns.

The majority's judgment

The Court of Appeal, in a judgment written by Madam Justice Conrad, held that the trial judge erred in law because he failed to expressly interpret the meaning of the words "satisfactory confirmation of termination" in the condition in the Castledowns agreement. The trial judge had held that the purported termination of the FastTrack agreement amounted to "satisfactory confirmation of termination." According to the majority, he wrongly equated "satisfactory confirmation of termination" with simple "termination." Had the trial judge interpreted the words of the hand-written condition precedent, the majority held that he would have been forced to consider the effect of the words "satisfactory" and "confirmation" on the seller's condition precedent in the context of the whole of the agreement and its surrounding circumstances. The whole of the contract included Clause 4.2 which provided, *inter alia*, that the seller's condition precedent was for the sole and exclusive benefit of the seller.

Looking initially to the words used, the majority first focused on "satisfactory." They held (at para. 31) that "satisfactory" meant "sufficient for the needs of the case, adequate" (Online Oxford English Dictionary) but stated that the most important issue was whether satisfactory was to be determined objectively, subjectively or by some combination of the two. What were the choices? Analogizing to the categories used by the British Columbia Court of Appeal in *Griffin v. Martens* (1988), 27 B.C.L.R. (2d) 152 at 154 (quoted at para. 31), and recalling that the condition precedent in this case was for the sole benefit of the seller, there were four alternatives:

1. Satisfactory to a reasonable person making the sale about whom nothing else is known;
2. Satisfactory to a reasonable person in the objective circumstances of the seller;
3. Satisfactory to a reasonable person with all the subjective but reasonable standards of the particular seller; and
4. Satisfactory to the particular seller, with all its quirks and prejudices, acting honestly.

The majority held (at para. 33) that the fact that the condition was inserted for the sole and excusive benefit of the seller who had the sole liberty to determine whether it was satisfied or not meant that it was the vendor who must be satisfied. That would be alternative four above, the subjective test. Then the majority went on to say (at para. 37) that, at the very least, the person who had to be satisfied was a reasonable person with all the subjective but reasonable standards of the vendor. (The majority incorrectly identifies the latter person as the purchaser in para. 33 but this is an obvious failure to translate the *Griffin* formulation of a purchaser's condition to the vendor's condition context and is corrected in para. 37).

Then the majority considered the meaning of "confirmation" in the phrase "satisfactory confirmation of termination." Again relying on the *Online Oxford English Dictionary*, it was said to mean "making firm or sure; strengthening, settling, . . . confirming, corroborating, or verifying; verification, proof…" But once again the majority held (at para. 35) that the important issue was: confirmed by whom or to whom? Finding the agreement ambiguous on this issue, the majority looked at the broader context of the agreement, including its nature as a "back-up agreement." The majority held (at para 36) that the purpose behind the handwritten seller's condition was to make sure that the vendor did not become liable under two agreements:

> [T]he Vendor would want to ensure that it was out of one contract before being liable on another, and that it would not be facing the expense and inconvenience of a legal challenge if and/or when it attempted to terminate the FastTrack agreement. The way to achieve this purpose was to provide that the Vendor would have confirmation of termination from FastTrack before the Castledowns agreement could come into effect.

That is a very vendor-friendly interpretation. It is like saying that the vendor wanted to get away with selling to whoever gave him the most money regardless of what contracts might have been signed and the court was willing to give effect to that desire. The vendor's realtor was the one responsible for the ambiguous phrasing of the condition but that was not taken into account. Whether the handwritten clause actually achieved what the vendor is supposed to have wanted it to achieve was not considered.

Once the vendor's condition precedent is interpreted this way, the only thing left to consider was whether the vendor (or a reasonable person with all the subjective but reasonable standards of the vendor) was satisfied that FastTrack had verified that the vendor's purported termination was accepted without challenge. And, of course, the vendor could not be satisfied they had done so because FastTrack had not let the purported termination go by without challenge.

There was only one issue about application on the facts considered by the majority and that was whether the so-called "Addendum" amounted to a new agreement. If it was a new agreement, then it probably would amount to satisfactory confirmation of termination of the first agreement.

The majority notes (at para. 40) that parties to a contract are entitled to vary their obligations, through re-negotiation, without terminating the contract. They did concede that re-negotiation

can be so extensive as to amount to the execution of a new agreement. In this case, however, according to the majority (at para. 41): "FastTrack had already stated that it was not prepared to accept termination of the original agreement and that it was only prepared to negotiate minor changes. The parties negotiated changes and put them into an Addendum to the original agreement, rather than execute a new agreement." The majority goes on to state that even if the Addendum was a new agreement, it was negotiated under threat of a lawsuit and FastTrack's position that it was never going to relieve the vendor from its obligations to sell the Vienna Building to it. Therefore, the Addendum was "a settlement of those obligations, not confirmation that they did not exist" (at para.41).

If the Addendum was not a new agreement, then the vendor could not be satisfied that FastTrack had ratified the vendor's purported termination of the first agreement. Therefore the seller's condition in the Castledowns agreement was not satisfied or waived, the Castledowns agreement could not come into force and Castledowns loses.

The dissent

It is a difficult to determine what aspects of the majority decision the dissent of Mr. Justice Slatter takes issue with because his opinion gets off to a very slow start. Justice Slatter starts his 20 page dissent with a recitation of the facts (at paras. 50 - 60), but the majority's 14 page decision set out the facts as well, and they do so first. His recitation quotes more extensively from the agreements, but otherwise does not appear to quarrel with the facts summarized by the majority.

The dissent proceeds with a complex but brief discussion of the standard of review (at paras. 61-63), something only alluded to by the majority when it stated (at para. 29) that the trial judge "erred in law." He then sets out FastTrack's arguments and the reasons supporting them (at para. 64). This is followed by an eight paragraph general discussion of conditions precedents, mostly divorced from the specific facts and issues in this case (at paras. 65-72, but see the brief para. 68). This is followed by a discussion (at paras. 73-85) entitled "The Role of the Lawyer" and what might be said about a "subject to lawyer's approval" type of provision. This section is where the dissent starts to take issue with the majority, although the points of contention are somewhat buried in the generalities of "The Role of the Lawyer" topic, some aspects of which are quite tangential to the reasons for the decision.

FastTrack had argued that the lawyer's role in approving the agreement between the vendor and itself was constrained. A lawyer's disapproval could not be based just on price, i.e., on the fact a better offer was in hand. They submitted that a lawyer can only withhold approval based on "legal" considerations. Justice Slatter had three problems with FastTrack's arguments (at para. 73):

> Firstly, such an interpretation would be inconsistent with the principles of contractual construction. Secondly, it would introduce great uncertainty into real estate practice, as the distinction between "legal" considerations and economic

> and business considerations is often unclear. Are a small deposit and a lengthy condition period a legitimate concern of a lawyer? But thirdly, and most importantly, it would be inconsistent with the role that lawyers play in the affairs of their clients.

The first reason is the main reason for Justice Slatter's conclusion: if the parties' real estate agents did not insert any words stating that the lawyer's discretion was fettered, then it was not. The only limit on the lawyer's reasons was the requirement for "good faith" in clause 2.1 of the agreement. Thus, the conclusion to this section of the dissent (at para. 84) is that "[w]here the clause is unrestricted in its scope, a lawyer who declines to give his approval because the contract is not in his or her client's best interest is acting in good faith."

What this consideration of the "subject to lawyer's approval" condition means is that Justice Slatter interprets the legal effect of the September 7, 2006 letter from the vendor's lawyer to FastTrack differently than does the majority. On that date, following a review of both agreements with his client, Engelking wrote to FastTrack's lawyer to advise that his client was not prepared to remove "the 'subject to condition' in the Seller's favour." He returned the $10,000 deposit and stated that his client considered the transaction at an end. Justice Slatter found the letter of September 7 was unequivocal and clearly terminated the FastTrack agreement when it indicated that the lawyer's approval was not forthcoming. In addition, Justice Slatter held that the negotiation and execution of the Addendum could not revive the original FastTrack agreement to the detriment of Castledowns.

Once he decided that the FastTrack contract was terminated, the backup agreement with Castledowns came into play. It had a condition precedent as well, the one at the heart of the majority's judgment about "satisfactory confirmation" that the FastTrack agreement had been terminated. Justice Slatter takes issue with FastTrack's argument that the condition precedent should be interpreted to mean that the termination had to be satisfactory to FastTrack. Justice Slatter ties "satisfactory to FastTrack" to avoiding a lawsuit. He states (at para. 88) that "[t]he premise that the vendor did not want to get into a lawsuit over the two contracts depends on this interpretation being both (a) the common intention of the parties at the time they signed the agreement, and (b) the intention of the parties derived from the plain wording of the agreement." He raises the parol evidence rule and the standing of FastTrack to raise the argument when it wasn't their contract. Then he interprets the conduct of the vendor as not being focused on avoiding a lawsuit. He characterizes the vendors' entering into the Addendum, without the involvement of its lawyer, as indicating the vendor was reckless about triggering a lawsuit. Justice Slatter notes that the trial judge specifically found that the vendor was primarily motivated by price. Why price cannot be the reason that the condition precedent should be interpreted to mean that the termination had to be satisfactory to FastTrack is not considered.

Neither is the fact that the majority did not decide that the condition precedent should be interpreted to mean that the termination had to be satisfactory to FastTrack. The majority held (at para. 37) that the condition precedent had to be interpreted as meaning that the person who had to be satisfied was either the vendor or a reasonable person with all the subjective but reasonable

standards of the vendor. Justice Slatter deals with an argument that the purchaser had to be satisfied. Indeed, Justice Slatter later (at para. 94) refers to the clause 4.2 in the Castledowns agreement relied upon by the majority, the one that provides that the seller's conditions are "inserted for the sole and exclusive benefit and advantage of the Seller." Justice Slatter holds that in the face of this language it cannot be argued that the condition was inserted for the benefit of FastTrack and that the language instead leads to the conclusion that "satisfactory confirmation" means "satisfactory to the vendor". That is exactly what the majority decided was the correct interpretation of the condition precedent.

So, what is the point of contention? Still addressing the FastTrack argument and not the majority's reasons, Justice Slatter concludes (at para. 94) that "it cannot be argued that there was not 'satisfactory confirmation of termination of [the FastTrack] private purchase contract'." The double negative makes this sentence a little difficult to decipher. In essence, he was stating that there was satisfactory confirmation of termination and no one could argue there was not. The confirmation of termination was satisfactory despite the fact that FastTrack gave immediate notice that they would be suing to enforce their agreement. Putting any decision-making power in the hands of the competition was so commercially unreasonable that it could not be what the parties intended. Indeed, Justice Slatter states that the vendor was not bothered by FastTrack's threats to sue as a matter of fact. He refers to the record as disclosing the vendor simply believed he was free to choose between the two offers. That is the application of a subjective standard.

Conclusion

The key point of divergence between the majority and the dissent is the "subject to lawyer's approval" clause in the agreement with FastTrack. The majority considers that the vendor could not terminate the agreement to sell to FastTrack merely by saying its lawyer had not approved. Instead, FastTrack had to go along with their termination. The dissent argues the opposite.

Both the majority judgment and the dissent would be more worth a reader's while on the points of law involved had they engaged with the other's opinion. Instead, they read like the proverbial ships passing in the night and talking on different wavelengths.