Should Contract or Tort Principles Apply When Determining Damages for Breach of an Express Contractual Warranty? - - A Comment on the Decision in *Unan v. Beckerman (2005) 31 R.P.R. 4th 110*

by
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(with assistance from Jennifer Atkins, student-at-law)

SUMMARY

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1. INTRODUCTION

Unan v. Beckerman[1] (hereinafter referred to as the "**Beckerman Case**"), is a recent decision of the Ontario Superior Court of Justice which epitomizes the confusion that can sometimes arise when determining whether damages awarded to the innocent party, in a real estate case involving the breach of an express contractual warranty, should be decided on the basis of contract principles or tort principles. In situations where a contractual misrepresentation could give rise to both a claim in damages based on a breach of contract, or alternatively tort damages for negligent misrepresentation (based on a breach of duty of care and detrimental reliance, pursuant to the principles first espoused in Hedley Byrne[2]), how should the Court properly determine the damages to be awarded, given that the Supreme Court of Canada has already supported the "theory of concurrency" and confirmed that where it is possible to sue in both contract and tort, the plaintiff may choose the cause of action that is most advantageous to his or her case?[3]

While both contract and tort law may be used to redress the same wrong (in the absence of specific contractual language which would limit, restrict or contradict the general tort duty), the

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[1](2005), 31 R.P.R. (4th) 110 (Ont. S.C.J.).

[2]*Hedley Byrne & Co. V. Heller & Partners Ltd.*, [1964] 2 All E.R. 575 [*Hedley Byrne*].

[3]See *BG Checo International v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.) [*BG Checo*] and *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.) [*Central Trust*].

damages that are ultimately awarded to the innocent party may be significantly different, depending on which of the two avenues for relief are pursued by the judiciary, and which principles for quantifying damages prevail. Nowhere is this more evident than in the Beckerman Case, where Mr. Justice Grossi found that an erroneous contractual representation about what was included in the common expenses attributable to a dwelling unit that was sold to the plaintiff, amounted to a breach of an express contractual warranty, but nevertheless proceeded to award damages for negligent misrepresentation based on factors or considerations that are only relevant in the context of such a tort claim. The result is a decision which provides no guidance to the real estate bar as to how damages would (or should) be quantified and awarded in similar circumstances, and frankly raises serious doubts as to the propriety of the ultimate decision.

2. THE FACTS OF THE CASE

The Beckerman Case involved the sale of a luxury condominium dwelling unit at 1 Post Road, in the City of Toronto. Beckerman, was a real estate agent employed at Forest Hill Real Estate Inc. (hereinafter referred to as "**Forest Hill**"), who acquired title to the condominium dwelling unit in July 2001, and had only personally occupied the suite during the period of July, August and part of September. However, in the year 2000, prior to completing her purchase of the suite, Beckerman listed the dwelling unit for sale through Forest Hill for $1,399,000.00. In February 2002, Beckerman sold the unit to Unan for $1,160,000.00. Both the original listing and the agreement of purchase and sale included the monthly maintenance fees or common expenses that the owner of the unit would be required to pay. The common expenses, totaling $1,270 per month, were expressly warranted to include "heat, water, central air conditioning, parking, building insurance and common elements". When Unan inquired about these costs, Beckerman verbally assured Unan that heating and air

conditioning were included in the common expenses. Unfortunately, Unan found out only after closing that this was incorrect. The costs of heating and air conditioning the dwelling unit were not included in the common expenses, but rather only the cost per unit to control the perimeter heating and cooling systems provided and serviced by the condominium corporation. In fact, each dwelling unit had its own independent heating and air conditioning system that was contained in a mechanical room which comprised part of the unit. At no time prior to closing was Unan made aware that such a room even existed. Unan was provided with a status certificate prior to closing, but he did not review it with his lawyer before completing the transaction. The Court also noted that Unan signed "the waiver on the status certificate", but since a status certificate *per se* does not contain a waiver for execution, it is presumed that the agreement of purchase and sale between Beckerman and Unan was conditional for a period of time upon the purchaser or the purchaser's solicitor obtaining a current status certificate and being satisfied with its contents, and by Unan waiving said condition the transaction proceeded to completion.

Subsequently, Unan brought an action against Beckerman for breach of the warranty contained in the agreement of purchase and sale. Unan claimed damages in the amount of $169,000.00, which was derived by taking his out of pocket expenses of $250.00 per month to heat and cool the unit, multiplied over the anticipated 50 year life span of the condominium building, plus the cost to replace the in-suite heating and cooling equipment during that time. Unan owned the suite for a total of 28 months, but for 6 months of that period, he was away from the dwelling unit while it was undergoing repairs unrelated to the litigation involving Beckerman. After the law suit was initiated, but well before the trial of the action, Unan was successful in selling the suite for $1,285,000.00, resulting in a profit of approximately $125,000.00.

3. THE COURT'S RULING

Mr. Justice Grossi held that Beckerman should have known that the in-suite heating and air-conditioning costs were not included in the monthly common expenses attributable to her unit, since it must be assumed that "when she purchased the unit she would have conducted the types of searches and investigations about the suite that she argues her purchaser Unan failed to conduct". As owner of the unit, Beckerman can be assumed to have paid some of the utility bills in question, even if she did not physically occupy the dwelling unit during the cooler months of the year. The Court ruled that Beckerman failed to take the necessary steps to discern the truth about the costs attributable to the unit, and she negligently put false information in her advertisement and listing agreement, and subsequently confirmed the false information in response to Unan's query. On the facts under review, Mr. Justice Grossi found that Beckerman was liable for a breach of an express contractual warranty, which did not merge on closing, and that Unan was correspondingly entitled to damages that flowed from said breach. The Court also confirmed that the foregoing scenario constituted a negligent misrepresentation, since Beckerman ought to have known that the information she provided was untrue.

After the finding of liability, the Court turned its attention to the quantification of damages, and ultimately awarded Unan the total sum of $5,500.00, based on his out of pocket expenses of $250 per month for the 1 ½ year period in which he personally occupied the suite. The Court found that Unan's claim for the annual costs of heating and cooling the suite over the estimated life span of the building, including the replacement cost of the mechanical equipment, was completely unrealistic, particularly in light of the fact that Unan owned the unit for only 28 months. In the view

of Mr. Justice Grossi, Unan was not entitled to much in damages, for the following specific reasons, namely:

a) Unan had an obligation to verify the information received;

b) Unan had professional representation, and he was not an inexperienced buyer;

c) Unan cannot rely on Beckerman to his detriment, because he failed to conduct the full and detailed search of the condominium documents that he was offered an opportunity to conduct;

d) Unan waived the very conditions that he wanted to rely upon, in order to obtain damages; and

e) Unan ultimately resold the unit at a profit, so his claimed losses or damages were questionable.

4. CRITIQUE OF THE COURT'S DECISION

At the outset, it should be noted that the plaintiff Unan chose to pursue his claim as a breach of warranty under contract law. Although Mr. Justice Grossi quite properly concluded that Beckerman was liable for committing a breach of warranty, the Court endeavoured to cover all bases by concomitantly finding Beckerman liable for negligent misrepresentation. However, rather than quantifying the damage award predicated on breach of contract principles, the Court proceeded to calculate the damage award in the context of tort principles applicable to negligent misrepresentation and detrimental reliance. In other words, it appears that Justice Grossi believed that the two separate causes of action in the case at bar, namely the breach of an express contractual warranty on the one hand, and a negligent misrepresentation (based on an independent duty of care and founded on detrimental reliance) on the other hand, were interchangeable. Unfortunately, such an analysis gives

rise to a very perplexing damage award, which point is underscored by reviewing each of the rationales proffered by Justice Grossi for reducing Unan's overall entitlement to damages, as outlined below:

a) **Unan had an obligation to verify the information** ... Since when does a party to an executed and binding contract, such as the purchaser in an agreement of purchase and sale involving real property, have an independent duty or obligation to verify the veracity or accuracy of the other party's representations or express warranties? In the writer's view, the essence of contractual obligations is that reasonable expectations created by the contract are entitled to protection. As so aptly noted by Waddams in *The Law of Contracts, 3rd ed. (Toronto: Canada Law Book Inc., 1993) at paragraphs 208 and 209,* "when one signs an agreement, the other party relies upon that signature as manifesting assent to the contents of the agreement, and the reasonable meaning of the words employed therein". Simply put, the innocent party is entitled to rely on the contract, and to correspondingly have his or her expectation interest, created by virtue of the contract, duly realized.

b) **Unan had professional representation, and he was not an inexperienced buyer** ... While the relative experience or inexperience of the parties to a contract certainly has a bearing on issues involving inequality of bargaining power, *non est factum*, or unconscionability, none of these defences to the enforcement of contractual provisions are relevant in the context of the facts or pleadings in this case. Is an experienced and sophisticated buyer of property, who enters into an agreement of purchase and sale having the benefit of independent legal advice, precluded (at law, or in equity) from relying upon an express contractual warranty that was not provided by the vendor under duress, or under any other relevant mitigating circumstances? In the writer's respectful opinion, the relative experience of Unan was totally

irrelevant to his unqualified and unconditional entitlement to rely on the vendor's contractual warranty regarding what was included in the common expenses attributable to the unit being acquired, absent any bad faith on the part of Unan, or absent any knowledge of Unan to the contrary prior to entering into the contract. The fact that Mr. Justice Grossi raised Unan's experience as an issue, and purported to penalize the non-defaulting party to a contract by reducing the award of damages simply because he had professional representation to assist him in the transaction, is not only misconceived and incorrect at law, but is downright perplexing, if not frightening.

c) **Unan cannot rely on Beckerman to his detriment, because he failed to conduct the full and detailed search of the condominium documents that he was offered an opportunity to conduct** ... The foregoing statement clearly highlights Mr. Justice Grossi's focus on (and characterization of) the vendor's misstatement regarding the common expenses as a negligent misrepresentation in tort, and the corresponding requirements to succeed on such a claim based on the principles or elements first enunciated in Hedley Byrne, and subsequently confirmed by the Supreme Court of Canada in *Queen v. Cognos*[4], and more recently by the Ontario Court of Appeal in *Country Style Food Services Inc. v. 1304271 Ontario Ltd.*[5], as follows, namely:

(i) a false statement negligently made;

(ii) a duty of care, based on a "special relationship" between the person making the statement and the recipient of the statement, which relationship is created whenever

[4][1993] 1 S.C.R. 87 [*Queen*].

[5][2005] WL 1524395 (Ont. C.A.) (WL) [*Country Style*].

there is sufficient proximity between the parties (including a relationship spawned by contractual duties), where the person making the statement is possessed of special skill or knowledge on the matter in question, and the circumstances establish that a reasonable person making that statement would know that the recipient is relying upon his or her skill, knowledge or judgment, and the representor has correspondingly failed to take due care and attention to ensure that the statement so made is true or accurate;

(iii) reasonable reliance on the statement by the recipient; and

(iv) loss suffered by the recipient or representee, as a consequence of his or her reliance.

Notwithstanding the foregoing elements required for a claim to succeed based on negligent misrepresentation, it is the writer's respectful opinion that none of the foregoing matters are relevant in the context of an express contractual warranty that is subsequently found to be untrue. The reliance by the innocent party on a contractual warranty is simply assumed as a reasonable expectation, arising upon the formation of the contract. Absent any prior knowledge on the part of the innocent party which would make reliance upon the veracity or accuracy of the warranty unreasonable under the circumstances, and absent any special contractual condition or provision requiring the exercise of due diligence inquiries to substantiate the accuracy of the warranty, the innocent party is not required, nor expected, to undertake any searches or inquiries to ensure that the vendor's warranties are true. Unlike an agreement of purchase and sale involving a proposed new condominium unit acquired from the declarant, where the unit purchaser has the benefit of a 10 day rescission period under The Condominium Act 1998, the Beckerman Case involved a resale condominium transaction where no such cooling off period is applicable. In this context, why would Unan

be required or expected to conduct a full and detailed search of the condominium documents for the purposes of determining what was included in the common expenses, when he is contractually entitled to rely on an express warranty given by the vendor to that effect, and with the vendor being in the best possible position to know what the common expenses comprise? Even if Unan had conducted a full and detailed search of the condominium documents, and subsequently discovered that the common expenses attributable to the unit did not include the in-suite heating and cooling costs associated therewith, it is arguable that such an error or misrepresentation, in and of itself, would not constitute a fundamental breach of contract on the part of Beckerman, nor an "*error in substantialibus*", which would otherwise entitle Unan to resile from the transaction with impunity. Unan's due diligence discovery of the error, after the date of acceptance of the contract and prior to closing, would undoubtedly have resulted in Unan's solicitor attempting to negotiate a significant abatement in the purchase price, which if unacceptable to Beckerman, would inevitably have led a prudent and cautious purchaser in the position of Unan to complete the transaction, and ultimately pursue a claim for damages in the Ontario Superior Court of Justice ... therefore no amount of detailed searching or reviewing of documents prior to closing would have likely altered Unan's plight, nor have been helpful, insofar as the ultimate damages awarded to Unan are concerned. Moreover, had Unan reviewed the condominium documents before closing, he would likely not have had any more information about the in-suite heating and cooling costs attributable to the unit than the information that was already provided to him by Beckerman. The condominium documents (including the annual operating budget) would not show or reflect the monthly heating and cooling costs for each dwelling unit. That is something only Beckerman as the unit owner would know, since the actual cost or expense

of same would depend on the level of use and the average temperatures that Beckerman had maintained within the suite. In other words, the condominium documents which the Court was critical of Unan for not reviewing, would have merely outlined or reiterated the fees for the common expenses, which Unan quite rightly believed had included the heating and cooling costs for the dwelling unit. Consequently, Mr. Justice Grossi's finding of contributory fault on the part of Unan is totally unwarranted and inequitable under the circumstances.

d) **Unan waived the very conditions that he wanted to rely upon, in order to obtain damages** ... As previously mentioned, Mr. Justice Grossi referred to Unan having signed "the waiver on the status certificate", but since a status certificate does not contain a waiver for execution, one can only infer that the agreement of purchase and sale was made conditional upon Unan obtaining a status certificate and being satisfied with its contents, and that Unan subsequently waived this condition when he received a status certificate from the condominium corporation, even though he did not review the contents of same with his solicitor. In the writer's respectful opinion, nothing turns on this waiver, and same is really a "red herring", since none of the information that a status certificate is required to contain or address would have confirmed that the in-suite heating and cooling costs attributable to the dwelling unit were not included within the stipulated common expenses, nor would it likely have shed any light on the quantum of the heating and cooling costs applicable to the suite. More importantly, Unan's waiver of the condition relative to the status certificate does not qualify, restrict or negate Beckerman's express warranty regarding the common expenses, nor does such waiver disqualify or disentitle Unan from relying upon the accuracy or veracity of said warranty.

e) **Unan ultimately resold the unit at a profit, so his claimed losses or damages were questionable** … The fact that Unan made a profit on the sale of his condominium unit does not relate in any way to the breach of warranty committed by Beckerman, nor is it necessarily relevant to the quantification of damages. From the writer's perspective, the innocent party to a contract should not be precluded from pursuing a claim in damages for costs or losses incurred because of an erroneous warranty or misrepresentation, even where a profit has been realized on the sale of the property, provided that such damages have a significant causal connection to the breach of warranty and are reasonably ascertainable and quantifiable. If Unan could show the Court, through appraisal evidence or otherwise, that the dwelling unit in question would likely have garnered a higher sale price than the price ultimately obtained, had the in-suite heating and cooling costs been included in the common expenses, as expressly warranted (thereby making it a more attractive or compelling property than would otherwise be the case), then why shouldn't Unan be entitled to the price differential, in terms of the ultimate damage award? In tort, the damages are calculated by moving backwards in time, and assuming that the wrongful act had never occurred. In other words, from a tort perspective, the Court generally attempts to undo the harmful act by restoring the position that the innocent plaintiff occupied prior to the tortious act, and compensation for all costs and expenses incurred in connection with such restoration efforts is awarded accordingly. However, in contract, the Court generally considers what the results should have been, or what benefits (in monetary terms) the innocent plaintiff would have attained or been entitled to, had the contract been carried out according to its terms. In the pre-eminent work of Fuller and Perdue, the authors have noted that "the reason the Courts have awarded the loss of bargain as damages for breach of contract is to encourage contracting parties to carry out

their respective obligations, by making it prohibitively expensive if they fail to do so ... an award which reflects the loss of bargain encourages people to perform their side of a bargain, thereby upholding the working of the market economy… if parties could only recover their reliance interest (expenses) there would be no incentive to perform -- in fact, this principle encourages people to enter into contracts."[6]

Accordingly, from a contract perspective, the Court's objective is to endeavour to place the innocent plaintiff in a position where he or she receives the expected benefits of the contract, including the monetary equivalent of the "lost profit" or the "expectation interest". Conversely, from a tort perspective, damages are based on the "reliance interest", where the innocent plaintiff will be awarded damages that places him or her in the same position that they would have been in had they not relied on the representation to their detriment.[7] Regrettably, Mr. Justice Grossi mistakenly adopted the tort perspective when assessing Unan's damages, even though the case was framed, pleaded and argued as a breach of an express contractual warranty. The Court simply looked at the cost per month that Unan was claiming, and determined that he should only receive reimbursement or compensation for his actual out of pocket expenses, incurred only during the period of time that he physically occupied the suite. Mr. Justice Grossi never addressed the quantification of Unan's lost profit or expectation interest, and never referred to any evidence regarding the appraised value of the dwelling unit, and the impact of the in-suite's heating and cooling costs on same.

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[6]L.L. Fuller and W.R. Perdue, "The Reliance Interest in Contract Damages" (1936-37) 46 Yale L.J. 52 at 373.

[7]*BG Checo*, *supra*, see footnote 3 at ¶52.

It is quite conceivable that in a hot real estate market, the evidence may have shown that the in-suite heating and cooling costs had absolutely no detrimental impact or prejudicial effect whatsoever on the resale value of the suite, and if such were the case, Unan would have suffered or incurred no damages whatsoever, from a pure contract perspective. What is also disconcerting about the approach adopted by Mr. Justice Grossi in assessing damages, is the fact that Unan could just as easily have retained ownership of the dwelling unit until after the trial, and in such circumstances, Mr. Justice Grossi's view would not have been tainted by any profit attained by the plaintiff, and based on its tort perspective for assessing damages, the Court may have been persuaded to accept the extrapolation of the monthly out-of-pocket heating and cooling costs over the life span of the building, irrespective of the appraised value of the suite.

5. CONCLUSION

The decision in the Beckerman Case highlights the difficulty in assessing damages when the innocent party to a contract has the option of claiming damages in either tort or contract, based on one's entitlement to advance concurrent claims in appropriate circumstances, and the corresponding danger of misinterpreting the true cause of action, in terms of the assessment of damages ultimately awarded. In the writer's respectful opinion, Mr. Justice Grossi's reasons for judgment were unfortunately coloured by factors that are essentially irrelevant to a proper assessment of damages based on contract principles, particularly when the substance of the claim arose in the context of a breach of warranty expressly stipulated in the contract that governed both litigants. In the writer's view, damages for breach of an express contractual warranty should not be equated with (nor assessed on the same basis as) damages arising from a negligent misrepresentation that is unrelated

to a contractual context. Rather, such damages should only be determined based on contract principles, because any other basis or methodology of assessment will not truly or equitably address (nor fulfil) the reasonable expectations of the contracting parties and the commercial realities involving same, which is precisely the goal that the Court should always strive to attain whenever it is required to adjudicate a dispute or claim that has arisen in the context of a contractual relationship.

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