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Issue 344

HIGHLIGHTS

* The Saskatchewan Court of Appeal has reviewed the Saskatchewan law regarding the partition of jointly owned land in a case in which two brothers held joint ownership of 10 quarter sections of farmland. In Saskatchewan the partition of land is governed by old English statute law - The Partition Act, 1539; The Partition Act 1540 and The Partition Act, 1868. These partition statutes provide that a single co-tenant of land may apply to Court to have land partitioned as of right between or among them or sold unless there is a good reason not to order a sale. The Court of Appeal upheld the decision of a Chambers Judge who awarded 6 quarter sections to one brother and 4 quarter sections to the other brother and concluded that there were no grounds to interfere with the Judge's decision with respect to which brother got the home quarter. The Court did not comment on the Chambers Judge's conclusion that he had no authority under the Partition Acts to divide the home quarter between the two co-owners because the issue had not been raised by either party on appeal. The Chambers Judge also directed one brother to make an equalization payment to the other to account for a difference in property values. The Court of Appeal adjusted the amount of the payment to correct an error. (Raymond v. Raymond, CALN/2016-006, [2016] S.J. No. 60, Saskatchewan Court of Appeal)

* The Ontario Superior Court of Justice, Divisional Court, has upheld the decision of Ontario Agriculture, Food and Rural Affairs Appeal Tribunal that Regulations under the Farm Implements Act (Ontario) which require all Dealership Agreements to contain terms which require distributors to not unreasonably withhold renewal or transfer of Dealership Agreements, have retroactive effect. As a consequence, a renewal provision in a Dealership Agreement between CNH Canada Ltd. and Chesterman Farm Equipment Inc. was held void. The majority of the Divisional Court upheld the

Tribunal's decision that CNH had breached the renewal provisions mandated by the Regulation. Damages were awarded for breach of contract, however the amount awarded was reduced, and the Court concluded that the Tribunal had no jurisdiction to award damages for the value of obsolete tools which had been purchased by the dealer from CNH. The Court also upheld the Tribunal's authority to award pre-judgment interest but directed that it reconsider its award for legal costs. The case contains a thorough discussion of the law with respect to the regulation of the renewal of farm equipment dealership agreements in Ontario. (Chesterman Farm Equipment Inc. v. CNH Canada Ltd., CALN/2016-007, [2016] O.J. No. 1183, Ontario Superior Court of Justice)

NEW CASE LAW

Raymond v. Raymond;

CALN/2016-006,

Full text: [2016] S.J. No. 60;

2016 SKCA 16,

Saskatchewan Court of Appeal,

R.K. Ottenbreit, N.W. Caldwell and J.A. Ryan-Froslie JJ.A.,

February 10, 2016.

Partition and Sale of Farmland -- Saskatchewan Law.

Barry Alfred Raymond ("Barry") appealed to the Saskatchewan Court of Appeal from a decision of a Saskatchewan Court of Queen's Bench Chambers Judge who distributed ownership of 10 quarters of jointly owned farmland between Barry and Barry's brother, Alan Raymond ("Alan"). Alan and his son David Raymond appealed the amount of an equalization judgment in the sum of $42,000.00 in favour of Barry.

Barry's appeal primarily concerned the Chambers Judge's decision to award the historical home quarter to Alan.

Barry and Alan grew up on the historical home quarter.

Alan began residing on the east side of the home quarter in 1976. Barry and his wife live across the road on their own quarter.

For a time Barry and Alan farmed together, however this ended in 1984. Thereafter they each farmed on their own although they continued to farm the 10 quarter sections of land

owned as joint owners through an arrangement pursuant to which one or the other of them farmed each quarter. Alan and Barry each held a 50% interest in 8 of the 10 quarter sections. Barry held a 75% interest, and Alan held a 25% interest in 2 quarters, including the historical home quarter.

A partition application was made to a Queen's Bench Judge in Chambers for the purpose of separating the joint ownership interests of Barry and Alan. The application was based on Affidavit evidence and some cross-examination evidence.

On June 3, 2015, the Chambers Judge issued a decision (2015 SKQB 164 (CanLII)) which directed that 6 of the 10 quarter sections be transferred to Barry and that 4 of the 10 quarter sections, including the historical home quarter, be transferred to Alan.

The Chambers Judge concluded that he had no power to divide the home quarter by giving 80 acres to Alan and 80 acres to Barry, however no appeal was taken from this decision. The Chambers Judge also directed Alan to pay Barry $42,000.00 in equalization having regard to the appraised values of the land including some buildings on the land.

A number of errors in the initial Judgment were addressed in a July 6, 2015 corrigendum issued by the Chambers Judge.

The issues on appeal primarily dealt with the decision to award the historical home quarter to Alan, and the amount of the equalization payment.

Decision: Caldwell, JA, Ottenbreit and Ryan-Froslie, JJA concurring, dismissed the appeal and allowed the cross-appeal [at para. 38].

Caldwell, JA summarized the law with respect to partition of jointly owned land in Saskatchewan as follows, at para. 11 to 12:

> [11] In that they address the partition of land, this appeal and cross-appeal deal with old English statute law, namely, The Partition Act, 1539, 31 Hen VIII, c 1 (UK), The Partition Act, 1540, 32 Hen VIII, c 32 (UK) and The Partition Act, 1868, 31 & 32 Vict, c 40 (UK). This law was received in Saskatchewan by reason of s. 11 of The North-West Territories Act, 1886, SC 1886, c 50 and s. 16 of The Saskatchewan Act, 1905, SC 1905, c 42 (See: Matovich Estate v. Matovich, 2015 SKCA 130 (Can)LII); Blacklaw v. Beverage, 1939 CanLII 158 (SK CA), [1939] 3 WWR 511 (Sask CA); Wagman v Obrigewitsch, 2010 SKQB 84 (CanLII), [2010] 9 WWR 462 (Wagman], varied on other grounds 2011 SKCA 68 (CanLII); Bay v Bay (1984), CanLII 2315 (SK QB), 38 Sask R 101 (QB); and Grunert v Grunert (1960), 1960 CanLII 230 (SK QB), 32 WWR (NS) 509 (Sask QB)). Although long-since repealed and replaced in the United Kingdom and many Canadian provinces, the Imperial partition statutes remain in effect in Saskatchewan and are part of our law.
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> [12] Originally written in old English, the partition statutes together provide that a single co-tenant of land may apply to court to have the land partitioned as-lf-right as between or among the co-tenants or sold unless there exists a good reason not to order a sale -- rights that did not exist at common law,

> other than for co-parceners. The two earlier statutes empower a court to partition lands upon application by a co-tenant; where, The Partition Act, 1868 empowers a court to sell it, "unless it sees good reason to the contrary".

Caldwell, J did not comment on the Chambers Judge's conclusion that he had no authority to partition the home quarter, stating at para. 13:

> [13] While the parties' application and this appeal were expressed in terms of The Partition Acts, the matter of the judge's power thereunder to divide the properties in question as between the parties was not canvassed or argued before us and we leave that to another day.

With respect to the Chambers Justice's decision to award the home quarter to Alan, Caldwell, JA observed at para. 18 that this decision was made primarily on the ground that Alan lived and operated a veterinary clinic on the home quarter, stating at para 18:

> [18] The judge found the circumstances tipped in favour of Alan receiving title to the historical home quarter, chiefly by reason that he lives and operates a veterinary clinic on that quarter section but also because the judge had ruled he could not "impose a completely different ownership structure on the parties [than] that which is specified by title". That is, he found the powers of partition and sale under The Partition Acts did not empower him to divide the historical home quarter by giving the most easterly 80 acres to Alan the most westerly 80 acres to Barry; and, no appeal was taken from this legal conclusion. On the other hand, although Barry also owns buildings on the historical home quarter, the judge found Barry had actually made limited use of that quarter section. For these reasons, the judge found it more equitable to transfer the historical home quarter to Alan and to require him to compensate Barry for Barry's 3/4 interest in it.

Caldwell, JA concluded, at para. 19 and 20 that this decision was a discretionary one, and that there was no material before the Court to conclude that the Chambers Judge had abused his discretion, erred in principle, or disregarded a material fact or failed to act judicially.

With respect to the amount of the equalization payment, Caldwell, JA held [at para. 30 to 37] that the Chambers Judge had made errors in his calculation. The equalization payment was adjusted from $42,000.00 to $24,250.00.

Chesterman Farm Equipment Inc. v. CNH Canada Ltd.;

CALN/2016-007,

Full text:[2016] O.J. No. 1183;

2016 ONSC 698,

Ontario Superior Court of Justice,

A.M. Molloy, C.T. Hackland and P.B. Hambly JJ.,

March 7, 2016.

Farm Equipment Dealership Agreements -- Mandatory Regulations Governing Renewal of Dealership Agreements in Ontario.

CNH Canada Ltd. ("CNH") appealed to the Ontario Superior Court of Justice, Divisional Court, from a decision of the Agriculture, Food and Rural Affairs Appeals Tribunal (the "Tribunal") that CNH had improperly terminated a Dealer Agreement with Chesterman Farm Equipment Inc. ("Chesterman") and judgment of $200,516.16 for breach of contract, pre-judgment interest, and costs of $376,338.00.

Section 1 of Ontario Regulation 123/06 made under the Farm Implements Act, R.S.O. 1990, c. F4 (the "Regulations" and the "Act"), which came into force on April 25, 2006, requires all Dealer Agreements to contain certain mandatory terms. It provides as follows:

> Mandatory terms
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> 1. (1) The terms set out in sections 2 and 3 are prescribed as the mandatory terms that must be included in any dealership agreement under subsection 3(4) of the Act.
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> (2) The mandatory terms set out in sections 2 and 3 are deemed to form part of any dealership agreement even if the agreement fails to include them as required.
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> (3) A provision in a dealership agreement that limits, varies or attempts to waive a term set out in sections 2 and 3 is void.

Section 3 of the Regulation set out mandatory terms which prohibit distributors from unreasonably withholding the renewal or transfer of Dealership Agreements. Section 3 provides in part as follows:

> 3(1) The dealer has the right, and the agreement shall not be interpreted as interfering with the right of the dealer to,.
>
> b) renew or transfer the dealership agreement;.
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> (3) A dealer who wishes to renew or transfer a dealership agreement under clause (1)(b) shall notify the distribution in writing of that fact.

> (4) A renewal or transfer of a dealership agreement under clause (1)(b) is subject to the approval of the distributor, which approval shall not be unreasonably withheld.
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> (6) If the distributor intends to refuse the transfer or renewal of the dealership agreement, the following rules apply:
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> > 1. The distributor shall notify the dealer in writing of the reasons for the refusal, within 45 days of receiving the request for approval.
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> > 2. If the distributor fails to notify the dealer within the 45-day period, the transfer or renewal is deemed to be approved.
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> > 3. The dealer shall be allowed 15 days from receipt of the notice to address the concerns underlying the refusal.
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> > 4. After the 15-day period has passed, the distributor may, subject to subsection (3), refuse the transfer or renewal.
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> (7) The distributor has the right to set sales targets that are fair and reasonable.

Section 5 of the Act permits an appeal from the Tribunal, but solely on questions of law.

CNH and Chesterman had entered into a Dealer Agreement on December 3, 1999 which was stipulated to continue to December 31, 2002 unless earlier terminated by either party. Clause 22 of the agreement stated in part:

> "The agreement shall be extended for successive 1-year terms unless at least ninety days prior to the expiration date of the original term or any extension of the term either party notifies the other of its intention not to extend."

On September 30, 2006, CNH gave written notice to Chesterman that it would not be extending the Dealer Agreement beyond its expiration date of December 31, 2006 based on alleged "serious breaches" of the Dealer Agreement by failing to meet reasonable market share as required under the Agreement because sales levels were "severely deficient" during the previous 4 years as Chesterman had failed to achieve its required market share.

Chesterman commenced proceedings against CNH for improperly ending the Dealer Agreement. A hearing was conducted before the Tribunal for 7 days commencing October 18, 2010.

In a brief decision, the Tribunal concluded that the right not to renew set out in the Dealer Agreement was void. It treated the letter as a notice of intent not to renew and also concluded that CNH's refusal to approve Chesterman's requested renewal did not comply with the Regulations because it did not give Chesterman the required period to address the concerns raised in the notice. The Tribunal therefore concluded that CNH had breached its contract.

CNH appealed to the Divisional Court from its decision. The Divisional Court remitted the matter to the Tribunal with directions to deal with issues not previously addressed including the issue as to whether the Regulation has retroactive or retrospective affect.

A further hearing then proceeded before the Tribunal in February and November of 2013.

A further decision was issued by the Tribunal on March 24, 2014 in which the Tribunal affirmed its earlier decision and awarded Chesterman damages of $200,516.61 including approximately $60,000.00 for lost profit, $80,000.00 for obsolete assets and $60,000.00 in pre-judgment interest as well as costs in the sum of $376,338.05.

CNH appealed this decision. Chesterman cross-appealed the amount awarded for loss of profits.

Decision: Hackland and Hambly, JJ (Molloy, J dissenting in part) held that the Tribunal was correct in holding the Regulation applied retrospectively to the Dealer Agreement [at para. 6]; held that the manner in which the Tribunal applied the Regulation to the Dealer Agreement was a question of mixed law and fact which was not subject to review by the Court [at para. 8]; allowed the appeal with respect to the damage award of approximately $80,000.00 for obsolete equipment [at para. 18]; dismissed Chesterman's appeal for loss of profits [at para. 20]; upheld the Tribunal's right to award interest [at para. 19] and quashed the Tribunal's decision with respect to costs [at para. 23] which was remitted to the Tribunal for consideration.

With respect to these issues:

1. Retroactive Effect:

Malloy, Hackland and Hambly, JJ all agreed that the Tribunal was correct in holding that the Regulation applied retrospectively to the Dealer Agreement and other dealer agreements throughout the province [at para. 6 and para. 96 to 127].

2. Whether CNH had complied with the Regulation:

Malloy and Hackland, JA concluded that the manner in which the Tribunal applied the Regulation to the Dealer Agreement was a question of mixed fact and law and was not subject to review by the Court [at para. 8]. They summarized the Tribunal's findings at para. 9 to 12 as follows:

> [9] the Tribunal went on to find the September 30, 2006 notice of non-renewal was void as it breached the Regulation because; (1) it was based on the void automatic renewal provision, (2) it did not give Chesterman the required period to address the concerns raised and (3) it did not adequately set out the reasons for the non-renewal. The Regulation provided that if the distributor intends to refuse the renewal, it must give 45 days notice to the dealer stating the reasons for the refusal. The dealer then has 15 days to address the identified concerns.
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> [10] The Tribunal was not satisfied that CNH's letter of September 20, 2006 complied with the requirement of the Regulation that the distributor provide written reasons for the refusal to renew so that the dealer would then address the concerns within the allowable 15 days. We are of the view that the nature

> and adequacy of the reasons for non-renewal provided by CNH are matters of fact arising from the dealings between the parties and clearly do not engage questions of law. They are likewise not subject to review by this Court.
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> [11] The Tribunal in its reasons under the heading "11. Liability for Ending the Relationship" summarized the reasons for its conclusion that CNH had not met its burden to prove on the balance of probabilities that it did not unreasonably withhold renewal approval.
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> [12] the Tribunal stated in the section of its reasons quoted above that "what is reasonable is determined from the factual context" and further observed that the numerous considerations listed are "findings of fact". We agree with the Tribunal. the considerations leading the Tribunal to its decision are not, in any event, questions of law, and therefore, this Court has no jurisdiction to intervene.

Malloy, J dissented [at para. 128 to 161].

3. Damage Claim for Obsolete Equipment

Hackland, Hambly and Malloy, JJ held that the Tribunal had erred in law in awarding damages for the sum of approximately $80,000.00 for the value of special tools and materials Chesterman had purchased from CNH because neither the Regulation nor the terms of the Dealer Agreement imposed any repurchase obligation on CNH, at para. 18 and 162 to 167.

4. Claim for Loss of Profits

Malloy, Hackland and Hambly, JJ dismissed Chesterman's cross-appeal as it relates to the quantum of damages for the loss of profits as this was an issue of fact and was not reviewable by the Court [at para. 20 and 168 to 170].

5. Interest

Malloy, Hackland and Hambly, JJ held that the Tribunal had jurisdiction to award interest on any damage award [at para. 19 and 171 to 176].

6. Costs

Malloy, Hackland and Hambly, JJ agreed that the Tribunal erred in law in exceeding its jurisdiction to award costs. Hackland and Hambly, JJ [at para. 23] directed the Tribunal to reconsider the issue of costs in accordance with its rules and s. 17.1 of the Statutory Powers Procedure Act, which were reviewed by Malloy, J at para. 177 to 193.

CREDITS

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