IN THE MATTER OF A REFERENCE PURSUANT TO THE WALKERTON SETTLEMENT AGREEMENT

(Smith, et at. v. The Corporation of the Municipality of Brockton, et at. Court File No. 00-CV492173 CP)

BETWEEN:

[redacted]
(The Appellants)

and

The Administrator

(On an appeal of the decision of Martin Teplitsky, Q.C., released October 16, 2008)

Reasons for Decision

WINKLER C.J.O.:

Nature of the Appeal

1. This is an appeal of a decision of an arbitrator made pursuant to the Settlement Agreement in the Walkerton Class Action. Under this Settlement Agreement, Class Members are entitled to certain compensation for losses caused by the contamination of the Walkerton water supply for the period April 1, 2000 to December 5, 2000.

Facts

2. The Appellants owned a duplex in Walkerton between 1990 and 2004 (the "Property"), which they rented to residential tenants. The sole issue on this appeal is whether the water contamination crisis in Walkerton had a negative impact on the price that the Appellants obtained for the Property when they sold it in 2004. If the Appellants can prove that there was such a negative impact, then they are entitled to compensation under the Settlement Agreement.

3. In support of their position, the Appellants emphasize that the price that they obtained for the Property in 2004 ($64,000.00) was less than the price that they paid for the Property in 1990 ($71,900.00). It is the Appellants' position that this is evidence that the value of the Property was affected by the water contamination crisis.

4. The Administrator relies on the evidence of Douglas F. Farmer, a certified real estate appraiser. In a 24 page appraisal dated December 13, 2004, Mr. Farmer opined that the Property "did not suffer a loss in value as a result of the water crisis of May 2000".

5. The Appellants take issue with the existence of certain factual errors and omissions in Mr. Farmer's December 13, 2004 appraisal. For example, Mr. Farmer indicated that the property

was listed for sale on September 12, 2003 rather than on September 16, 2003. Mr. Farmer prepared a supplementary report dated April 13, 2007 in which he corrected these factual errors and omissions, and reasserted his opinion that the "loss was not caused by the events of the water crisis of May 2000."

6. In their written submissions, the Appellants note that Mr. Farmer failed to inspect the interior of the Property prior to finalizing his appraisal, and that he failed to recognize that the Appellants had invested $13,673 in repairs and improvements to the interior. The Appellants also refer in their written submissions to "false, assumed numbers and creative accounting".

7. The Appellants have expressed concerns regarding a memorandum dated August 31, 2004 in which a representative of the Administrator incorrectly indicated that the Property was on the market for 6½ years prior to being sold in 2004 whereas it had in fact only been listed for a half a year. There is no evidence before me as to how this memorandum could have affected the Appellant's claim. The incorrect information set out in the memorandum was not repeated in Mr. Farmer's appraisal, and there is no evidence that Mr. Farmer was influenced by the memorandum.

8. The Appellants' claim was heard by arbitrator Martin Teplinsky in 2007 and 2008. Mr. Teplitsky indicates in his reasons that the arbitration was initially adjourned in part to give the Appellants an opportunity to obtain expert evidence. Despite this, the Appellants did not adduce any appraisal evidence or other expert evidence before Mr. Teplitsky, nor have they adduced such evidence before this court.

9. Mr. Teplitsky ultimately denied the Appellants' claim on the basis that there was no evidence to support their position. Mr. Teplitsky noted in his decision that the burden of proof was on the Appellants.

Standard of Review

10. Under the Settlement Agreement, applications for compensation are initially considered by the Administrator of the settlement plan. If the Administrator declines to make a compensation offer or makes an offer that is not satisfactory to the applicant, the applicant *may* elect to have his or her entitlement determined by an arbitrator appointed pursuant to the Settlement Agreement. Any appeals of an arbitrator's decision are then determined by this court.

11. It must be noted that the appeal is not a new hearing or trial *do novo,* nor is it a re-hearing of the matter. An arbitrator has an opportunity to hear the witnesses and assess the evidence that does not occur on appellate review.

12. Appeals under the Settlement Agreement are analogous to appeals from a reference. Accordingly, the appropriate standard for that review is that as set out in *Jordan v. McKenzie* (1987), 26 C.P.C. (2d) 193 (Ont. H.C., aff'd (1990), 39 C.P.C. (2d) 217 (C.A.), where Anderson J, stated that the reviewing court "ought not to interfere with the result unless there has been some error in principle demonstrated by the [initial decision maker's] reasons, some absence or excess of jurisdiction, or some patent misapprehension of the evidence."

13. In other words, to be successful on appeal, it is not enough for the Appellant to re-argue the facts of the case before the Arbitrator in an attempt to have the reviewing court substitute its own opinion for that of the Arbitrator. Argument that the Arbitrator should have made a different finding or reached a different result, without more, is not sufficient to be successful.

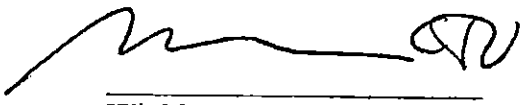
Analysis

14. The Appellants claim that the fact that they received less for the Property in 2004 than they paid for it in 1990 is evidence that the Property suffered a loss in value due to the water contamination. However, as noted in the report of Mr. Farmer, there are many possible alternative explanations for the Appellants' loss, including: a) the Appellants could have overpaid for the Property in 1990; b) the condition of the building situated on the Property could have deteriorated over time; and c) the value of the Property may have been negatively affected by the loss of Walkerton's largest employer in February 1999. For example, Mr. Farmer notes that the "exterior components" of the building that is situated on the Property "were worn and 'tired in appearance". He also notes that the Property was purchased by a third party in July 1989 for $65,000.00 before being sold to the Appellants for $78,000.00 on January 18, 1990. In addition, Mr. Farmer alludes to the fact that the Appellants purchased the Property near the peak of the real estate market, and just prior to (or at the very beginning of) the collapse of the market in the early 1990s.

15. The Appellants rely on the bald assertion that the reason that the selling price in 2004 was less than the purchase price in 1990 was the water crisis. They have not provided any evidence to support the assertion, nor have they provided any evidence that indicates that the water crisis is the more likely cause of the diminution in value when compared to other factors. The only viable evidence before the Arbitrator was the opinion of Mr. Farmer, which was accepted.

Result

16. In my view, the appeal cannot succeed. The Arbitrator committed no errors, either in principle, with respect to jurisdiction or by patent misapprehension of the evidence before him. Accordingly, his decision is hereby affirmed.



Winkler C.J.O.

Released: August 16, 2010