DOCKET: C21223

COURT OF APPEAL FOR ONTARIO

FINLAYSON, ROSENBERG and MOLDAVER JJ.A

B E T W E E N :	)	
	)	Raymond H. Raphael
KAREN TRUSTER	)	for the Appellants,
	)	Respondent, cross-appeal
Plaintiff	)	
(Respondent)	)	
(Appellant by way of cross-appeal)	)	
	)	
and	)	Ronald From
	)	for the Respondent,
	)	Appellant, cross-appeal
	)	
TRI –LUX FINE HOMES LTD.,	)	
TERRY KAUFMAN and JERRY MATTA	)	
	)	
Defendants	)	
(Appellants)	)	
(Respondents by way of cross-appeal)	)	
	)	Heard: April 27, 1998
	)	

FINLAYSON J.A.:

[1] Tri-Lux Fine Homes Ltd. (“Tri-Lux Ltd.”), Terry Kaufman and Jerry Matta appeal from the judgment of the Honourable Mr. Justice Gibson of the Ontario Court (General Division). The respondent cross-appeals.

[2] This action arose out of An Agreement of Purchase and Sale (“Agreement”) executed on November 18, 1986 for the sale of a parcel of land that was to contain a dwelling house to be built to specifications contained within the Agreement. The respondent was the purchaser but there is some conflict as to the identity of the vendors.

[3] The respondent brought this action for damages in the amount of $208,297.03 arising from the failure of the defendants to comply with the specifications within the Agreement relating to the dwelling and for deficiencies in its construction. The appellants counterclaimed for extras in the amount of $14,500 and for payment of a mortgage to the appellant Tri-Lux Ltd. in the sum of $40,000. After a lengthy trial, the trial judge gave extensive reasons and in his judgment:

(a) assessed the respondent’s damages in the sum of $65,270;

(b) assessed the amount owing to the appellant Tri-Lux Ltd. for extras at

$6,050;

(c) found that the respondent was liable to pay the mortgage of $40,000 to the appellant Tri-Lux Ltd.; and,

(d) made adjustments for pre-judgment interest and Goods and Service Tax resulting in a net judgment in favour of the respondent of $19,220 plus pre-judgment interest at the rate of 5% per annum from October 1, 1987, plus Goods and Service Tax of $4,145.40.

[4] The appellants appeal this judgment on the grounds that the trial judge erred:

1. in not personally inspecting the property at issue in the action; and,

2. in finding the appellants, Terry Kaufman and Jerry Matta personally liable for the damages.

[5] The respondent cross-appeals the quantum of the damages on the basis that the trial judge erred in allowing parol evidence to prove the defendants' counterclaim and the trial judge misapprehended some of the evidence in regards to specific deficiencies in the home complained about by the respondent.

[6] After considering the submissions of the parties, I have concluded that there is no basis upon which I can interfere with the findings of fact made by the trial judge in his exhaustive treatment of the detailed complaints made at trial by the respondent. Accordingly, I am not prepared to entertain the cross-appeal. Similarly, I am not prepared to interfere with the exercise of discretion on the part of the trial judge in declining to take a view of the dwelling at the request of the respondent alone. The only issue I intend to address in these reasons is whether or not the trial judge erred in finding the individual plaintiffs personally liable.

The facts

[7] The individual appellants, Kaufman and Matta, were at all material times the directors and officers of the appellant corporation Tri-Lux Ltd. Tri-Lux Ltd. was incorporated in 1983 and carried on business as a builder of luxury custom homes until 1988. The trial judge found that, as of the spring of 1992, Tri-Lux Ltd. was not an active entity.

[8] The respondent, along with her husband, selected a design for a custom home after initial discussions with an agent of Tri-Lux Fine Homes. The Agreement was between the respondent, as purchaser, and Tri-Lux Fine Homes, as agent of the vendor. The Agreement indicates that the respondent was to pay $540,000 in exchange for a parcel of land and a house that was to be built by Tri-Lux Fine Homes to specifications described in the Agreement and its schedules. The specifications included architectural drawings. The Agreement was signed by the respondent, as purchaser, and Kaufman and Matta on behalf of the vendor.

[9] Subsequently, some amendments to the proposed home were agreed upon and

there was an amendment ("Amendment") to the original Agreement. The Amendment was executed on March 3, 1987 between the respondent, as purchaser, and Tri-Lux Fine Homes, as vendor. The Amendment was signed by "Tri-Lux Fine Homes, per Kaufman and Matta", as vendor.

[10] The trial judge found that the closing of the transaction occurred on August 31, 1987 after an extension from July 7, 1987. On August 31, 1987, Kaufman advised the respondent that the house would not be completed in accordance with the Agreement by that day and a document entitled UNDERTAKING ("Undertaking") was executed between the respondent and "Tri-Lux Fine Homes Limited per Kaufman and Matta". The Undertaking stated *inter alia*:

> 9. To complete in good and workman-like manner the 1st and second floor of the dwelling within ten days of the closing hereof and to complete the remainder of the dwelling within 30 days in accordance with the agreement of Purchase and Sale.

[11] A Statement of Adjustments ("Statement"), which reconciled how much each party needed to pay upon closing, was compiled and was dated August 31, 1987. The Statement lists "Tri-Lux Fine Homes Limited" as the vendor and the respondent as purchaser. A second mortgage for $40,000 was given back to the vendor on closing. The chargor on the mortgage was the respondent, a guarantor was her husband Perry Truster, and the chargee was "Tri-Lux Fine Homes Limited". The Transfer/Deed of Land ("Deed") indicates that the transferor was Christine Schickedanz and the transferee was the respondent. Ms. Schickedanz signed the Deed on August 31, 1987, but it appears the Deed was filed on September 2, 1987. The Deed includes a sworn statement by the respondent, dated September 2, 1987, consenting to the registration of the Deed, a mortgage to Scotia Mortgage Corporation, and a mortgage to "Tri-Lux Fine Homes Limited".

[12] An undated Certificate of Completion and Possession ("Certificate") was prepared to be sent to the Ontario New Home Warranty Program. The respondent admitted in cross-examination that Kaufman had requested her to write in "Ltd." after Tri-Lux Fine Homes on the Certificate and to initial the change. The respondent testified that the inspection was done after the closing.

[13] Throughout the extensive negotiations, the preparation and execution of the various documents, and the land transfer, solicitors represented all the parties. Specifically, the solicitor for the respondent who appeared as counsel on the appeal prepared the Charge. He conceded in oral argument that the respondent and Mr. Truster were aware of the new legal entity that had been introduced at the last moment and instructed him to close the transaction regardless.

[14] The trial judge found that the testimony included marked variances, but that none of the parties had deliberately tried to mislead the court. I do not propose to review the testimony of the relevant parties at trial. I think it is clear that much of what the

respondent and her husband said was self-serving afterthought. Mr. Truster, in particular, gave an extended explanation of what he was thinking when he realized that a corporation had been inserted into the closing, but if we are to believe them, neither of the Trusters communicated their concerns to any one, including their solicitor. On the other hand, only Kaufman testified for the appellants and he was most unclear in his recollection on crucial details and he conceded that he had never told the Trusters that Tri-Lux Fine Homes was a corporation.

[15] The trial judge found that the agreement between the parties consisted of the Agreement and its schedules, the Amendment and its schedules, and the accepted architectural drawings subject to any agreed written changes or extras. He found that "it was just about closing" when the Trusters saw the Undertaking and the Statement, which were the first documents to indicate that Tri-Lux Ltd. was a corporation.

[16] The trial judge found that the Agreement and the Amendment did not comply with s. 10(5) of the *Business Corporations Act*, R.S.O. 1990, c. B.16. Subsection 10(5) states:

> (5) Despite subsection (4), a corporation shall set out its name in legible characters in all contracts, invoices, negotiable instruments and orders for goods and services issued or made by or on behalf of the corporation and in all documents sent to the Director under this Act.

[17] The trial judge concluded that:

> . . . persons who profess to be carrying on business under their corporate name (and who deny any personal responsibility in respect of contracts or obligations for which they have signed in what might be considered to be personal circumstances) must take reasonable steps to make it clear to the other party with whom they have contracted, ostensibly in their own name, or a partnership, that the contract is with a corporation and disclose its full and proper name.
>
> While technically, in my view, the Plaintiff did not have a contract with the corporation, but only with Kaufman and Matta, since they executed the documents on behalf of a non-existent entity, Tri-Lux Fine Homes, Kaufman and Matta are personally responsible to the Plaintiff under these Agreements.

Analysis

[18] The trial judge had the opportunity to assess the testimony of the parties first hand, and accepted the testimony of the Trusters that they only became aware that they were dealing with a corporation at the time of closing. Even if I was disposed to do so, I could not interfere with his findings.

[19] There are two components to the issue of whether the appellants Kaufman and Matta should be held personally liable in the transaction at issue. The trial judge appears to have addressed only the first component, which is whether Kaufman and Matta held themselves out as individuals rather than agents of a corporation to the degree that attracted personal liability. He did not consider the second component which assumes that the individual appellants were initially liable on the undertakings in the Agreement. Had he done so, he would have addressed whether there was sufficient evidence to indicate that, prior to closing, the Trusters elected to look only to Tri-Lux Ltd. to carry out those undertakings by reason of accepting, without protest, the Undertaking executed by the limited company. In other words, a complete inquiry into the issue considers whether there is evidence that reveals a continuing intention of the respondent to hold Kaufman and Matta personally liable.

[20] I should say at the outset that the consideration here involves agency principles and not the doctrine of merger. The deed delivered on closing was executed by the owner of the land who was a stranger to the construction undertakings and did not commit the grantor to perform anything relating to the dwelling house. It has all but been conceded, and it is evident from the record, that the collateral undertakings in the Agreement, the Amendment, and the Undertaking were intended by the parties to survive the closing: see *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720. What is at issue here is not the continuing existence of the undertakings, but upon whom the obligation to perform the undertakings now rests.

[21] Returning to the first component, s. 10 (5) of the *Business Corporations Act* does not create automatic personal liability if it is not complied with. It is evident that the trial judge was aware of this. He also recognized a principle arising from the case law that persons wishing to benefit from the protection of the corporate veil should not hold themselves out to the public without qualification. They should identify the name of the company with which they are associated in a reasonable manner or risk being found personally liable if the circumstances warrant it: see cases such as *Watfield International Enterprises Inc. v. 655293 Ontario Ltd.* (1995), 21 B.L.R. (2d) 158 (Ont. Ct. (Gen. Div.)) and *Pennelly Ltd. v. 449483 Ontario Ltd.* (1986), 20 C.L.R. 145 (Ont. H.C.J.). This principle properly flows from the fact that incorporation provides corporate officers and shareholders the legal protection thought to be necessary for modern business relations; however, if one expects to benefit from this protection, then others must, at a minimum, be informed in a reasonable manner that they are dealing with a corporation and not an individual. In the last analysis, persons who set up after the fact that they contracted solely on behalf of another bear the onus of establishing that the party with whom they were dealing was aware of the capacity in which they acted: *Clow Darling Ltd. v. 1013983 Ontario Inc.*, [1997] O.J. No. 3655 (Gen. Div.); *Nord Ovest Spa v. Gruppo Giorgio Ltd.*, [1994] O.J. No. 1657 (Gen. Div.).

[22] The trial judge was in error in holding that Kaufman and Matta were acting for a non-existent entity. However, I would agree with the trial judge's assessment that they did not take reasonable steps to ensure they were not holding themselves out as individuals rather than as agents of a corporation. For this reason alone, the trial judge would have been justified in finding them personally liable. However, the inquiry does

not end there. The second component to address is whether there was sufficient evidence to establish that the intention of the parties was that the Undertaking by the corporation was intended to supplant the initial Agreement or whether the individual appellants had added a fresh party that the respondent accepted without releasing the unincorporated entity, and hence Kaufman and Matta, from their initial liability.

[23] The record and the trial judge's finding shows that the Trusters knew by closing they were dealing with a corporation but there is no evidence of an intention on the part of the Trusters to relieve Kaufman or Matta of their personal liability. The Trusters testified that the fact that Tri-Lux Fine Homes was not a corporation was important to them. As Mr. Truster's testimony reveals, he knew the respondent did not need to go through with the closing but was fearful of litigation if she declined to do so. The Trusters consciously agreed to complete the transaction and accept the undertaking from the corporation, Tri-Lux Fine Homes Limited. But none of this testimony indicates more than that Mr. Truster was accepting that Tri-Lux Ltd. was now liable for the obligations under the Undertaking.

[24] An agent who contracts in his or her own name does not cease to be contractually bound merely because it is proved the other party knew when the contract was made that he or she was acting as agent: *Basma v. Weekes*, [1950] A.C. 441 (P.C.). The agent remains personally liable (though the principal may also be found liable) unless there is sufficient evidence to establish that the intention of the parties was that the contract would only be with the principal, or in other words that there has been an unequivocal election to contract only with the principal: *Dramburg v. Pollitzer* (1873), 28 L.T. 470; *Lawson v. Kenny* (1957), 9 D.L.R. (2d) 714 at 717-718 (Ont. H.C.J.); *Vic Priestly Landscaping Contracting Ltd. v. Elder* (1978), 19 O.R. (2d) 591 at 598-599 (Co. Ct.). The agent held personally liable may have resort to their principal for indemnification: *Vic Priestly Landscaping Contracting Ltd.*, *supra*.

[25] The documents and the testimony reveal that there was an intention of the parties that the obligation to build the house to specification continue after the conveyance, but there is no evidence that this obligation was to be held only by the corporation and not Kaufman and Matta. The terms of the contract did not change upon closing, but the appellants Kaufman and Matta, perhaps inadvertently, added a party to the contract. The Undertaking clearly sets out the obligations of the corporation to the Trusters up to, and past, the closing. However, there is no mention of Kaufman or Matta being relieved of their personal capacity in that document. On the whole, the corporation undertook to convey the land and build the house within a time-limited period in compliance with the specifications in the Agreement and the Amendment. The Trusters accepted the undertaking, but did nothing to indicate that they did not also consider Kaufman and Matta personally bound under the contract.

[26] The second mortgage given back to Tri-Lux Ltd. on closing reveals that the Trusters were aware that there was a corporate entity known as Tri-Lux Ltd. from whom they were receiving a mortgage, and that this mortgage would be given back to the vendor upon closing. The mortgage does not show that the Trusters had elected to contract only with this corporate entity since a mortgage can come from many sources, and it in no way

indicates the liability of Kaufman and Matta did not continue.

Disposition

[27] For the foregoing reasons, I would dismiss the appeal with costs, and I would dismiss the cross-appeal with costs.

Released: