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INVESTMENT LOST

When a party to an agreement loses his investment to another, the losing party is usually a touch upset and often looks to the legal process for compensation. Of course, there are many reasons for losing an investment and not all of them are compensable. In *Jedfro Investments (U.S.A.) Ltd. v. Jacyk* [2007] S.C.J. No. 55, the party who lost his investment took the matter right up to the Supreme Court of Canada and, in the process, allowed the Supreme Court to further refine the law dealing with termination of an agreement and unjust enrichment.

The Deal

Three partners purchased land near Denver. Their goal was to develop and sell it. They purchased the land from the vendor and gave back a mortgage for about \$3.8 million. Partner X paid 60% of the down payment for the purchase; partner Y paid 30%; and partner Z paid 10%. Partner Y's investment was about \$1.4 million.

The partners entered into a joint venture agreement. One of the terms of the JV agreement was that if more funds were required, each partner had to pony up his proportionate share. If he failed to do so, then a non-defaulting partner could advance funds on behalf of the defaulting partner and buy out the interests of the defaulting partner according to a specified formula.

Problems

When the mortgage fell

due, Y and Z were either unable or unwilling to pay their share of the mortgage. This was problematic because the vendor had put a time limit on repayment and was threatening to foreclose. X, who had sufficient available funds to pay his share and the shares of Y and Z, then had a choice to make. He could either pay no money and allow the joint venture to lose its equity (and his investment) or he could ensure that the vendor was paid all money due. He chose the latter.

He then had another choice. He could either pay his proportionate share, and the proportionate shares of X and Y, to the joint venture and have the joint venture pay the vendor or he could pay the vendor directly, take an assignment of the mortgage, and ignore the JV agreement. He chose the latter; one of his corporations repaid the vendor and obtained an assignment of the mortgage.

X then went to Y and Z to attempt to get a better deal. Among other things, he wanted an enhanced share of the ultimate profit. Z buckled, acceded to X's demands, and made a new deal. Conversely, Y refused to make a new deal; he simply did not believe that X's corporation would foreclose – even in light of X's stated intention to do exactly that if Y refused to come to terms.

X's corporation then foreclosed the joint venture's ownership of the land. Consequently, Y retained his interest in the joint venture, but the joint venture had no assets.

Y sued X and X's cor-

poration. He claimed that even though the parties had paid little attention to the terms of the JV agreement, it was still in force and that, under it, X's only recourse for Y's default was to advance money on Y's behalf and then buy out Y's interest. Y also claimed that X was unjustly enriched to Y's detriment.

Termination

The trial judge found as a fact that the parties had acted as if the JV agreement did not bind them. X therefore argued that he did not have to act in accordance with its terms and did not have to buy out Y's interest.

The court noted that a contract can be discharged in one of the following ways:

- a) performance,
- b) frustration,
- c) agreement, and
- d) repudiation or fundamental breach

In addition, there are less usual ways to discharge a contract, such as merger, death, and bankruptcy.

The court quickly eliminated performance and frustration. As to discharge by agreement, the court noted that X and Y had never entered into a new agreement (as X and Z had) because, to replace the old JV agreement with a new one, there had to be offer, acceptance, consideration, and a meeting of the minds – just as for any contract. X and Y had attempted to negotiate a new agreement, but failed. The fact that they ignored the JV agreement did not mean that it died. X also argued that the parties had abandoned the old JV agreement. The court noted that abandonment discharges a con-

tract only if it amounts to a new agreement in which the parties agree to abandon the old one. There has to be a consensus between the parties to that effect. In this case, there was no such consensus.

As to repudiation, one party has to show an intention to repudiate and the other party then has to elect to terminate the contract. Y's refusal to pay was not an intention to repudiate the JV agreement; indeed, Y still relied on the contract for his contention that X had to buy him out.

Accordingly, the court concluded that the old JV agreement remained alive. Y won that portion of the argument, but did it do him any good?

Breach

Y still had to demonstrate that X breached the JV agreement. The court noted that provisions of the JV agreement set out guidelines to follow if one party put up money that the other party was to have paid; however, the provisions applied only in the circumstances set out in the agreement.

In this case, X did not put up money for Y; rather, X's corporation purchased the vendor's mortgage. Y was in no different position regardless of whether the vendor or X's corporation was foreclosing. X's corporation was simply exercising the same rights that were given to the vendor under the mortgage. The foreclosure had nothing to do with X's obligations under the JV agreement.

Accordingly, the court held that X did not breach the JV agreement.

Unjust Enrichment

To establish unjust en-

richment, there must be an enrichment, a deprivation, and no juristic reason for the enrichment. The latter condition is necessary to give effect to the operative word "unjust".

The court agreed that there was an enrichment and a deprivation; at the end of the transaction, Y had lost his equity in the development and X, through his corporation, had received the benefit of that loss. The real question was whether there was a juristic reason for the enrichment.

A juristic reason means that there is a reason in law (e.g. a contract or other valid common law, equitable, or statutory obligation).

The court held that there were juristic reasons for the enrichment:

a) The JV agreement was a juristic reason. The parties contracted to invest money

without providing for any right to regain their investments if lost under the circumstances of the case.

b) There is a general rule that the courts should not rewrite contracts or relieve one party against the consequences of an improvident contract.

c) The foreclosure proceeding resulted from a statutory regime and was a known and fair consequence of not paying monies due.

Accordingly, Y failed in his argument to establish unjust enrichment.

Epilogue

You might think that X was elated and Y was despondent with the result. You would be wrong; they were both dead, having died between discovery and trial. Their estates had carried on the litigation to the bitter end.

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