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# Investor required to return funds received for limited partnership units based on calculation mistake

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In certain circumstances, the legal doctrines of common mistake and rectification may provide a remedy to a party who has paid out funds that are based upon admitted errors in the formation of a contract. The decision of the Ontario Superior Court of Justice in *Delart Investments Ltd. v. Susan Alfred*, 2021 ONSC 7061 (CanLII) shows how these doctrines are applied.

In 2004, based on the advice of her financial advisor, the defendant purchased six limited partnership units at $25,000 per unit for a total investment of $150,000. Due to her personal circumstances at the time, she paid little or no attention to the details of the investments.

The investment proved to be a very favourable one. Between 2004 and 2018, there were quarterly distributions paid totaling approximately $368,000.

In 2018, the defendant emailed the principal of the plaintiff limited partnership and asked whether she could liquidate her units. The principal advised that although her investment was not liquid, the company did repurchase units from investors from time to time and he was willing to work with her to determine a value and share pricing.

On October 11, 2018, the principal wrote an email to the defendant stating that he was attaching a valuation of the property owned by the limited partnership, and had equated it to the sale of units so that in both cases the after tax amount was equivalent. Based on the valuation, each $50,000 investment (even though each investment was $25,000) was calculated to have a value of $44,100.

Of note, the principal stated in the email that "my understanding is that your original investment was $300,000, consequently the value of the original $300,000 invested would be $264,600."

Clearly this email was in error since the defendant's original investment was $150,000 not $300,000. The calculation and resulting price were therefore based on an assumed initial investment amount twice the actual amount.

The error was not discovered at the

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time and in January 2019 the plaintiff paid the defendant $264,600 in exchange for her six units. The transaction was completed pursuant to a written agreement that contained an "entire agreement clause," which generally means that the parties agree that there are no verbal or other terms that apply to the transaction that are not specifically contained in the written agreement.

In May 2019, the plaintiff discovered that the purchase price of the units had been $25,000 per unit rather than $50,000. The principal immediately emailed the defendant to advise of the error and requested a reimbursement of $132,300.

After some delay in responding, the defendant claimed that the money had been spent and that she would not have agreed to the sale price since it would not have met her financial needs at the time.

The plaintiff then commenced an action for return of the funds. The plaintiff's primary position was that the transaction proceeded on the basis of a common mistake. It acknowledged that it was the original author of the mistake (albeit an honest one), but argued that the intention of the parties was to base the purchase price on the correct original price and that there was a common error in that regard. Therefore, the plaintiff argued that the purchase price amounted to a common mistake in implementing the parties' intention or an incorrect expression of the parties' agreement.

At trial, the plaintiff's principal was entirely up front and transparent about the error, and "owned" it. He admitted that while he had asked his assistant to confirm the number of units held by the defendant, he neglected to ask his assistant to confirm the original price per unit. In the vast majority of projects the company had on the go at the time (approximately 20), the unit price was $50,000. So he assumed, without checking, that this was the unit price in the limited partnership as well.

It was not suggested that the defendant deliberately or deceitfully took advantage of the error. The defendant likely did not remember how many units she had purchased in 2004, or at what price.

The defendant did not challenge that the plaintiff's calculation was based upon a mistaken assumption as to the original price per unit. However, she argued that the error and therefore its consequences were the responsibility of the plaintiff. Since the repurchase agreement contained an "entire agreement clause," it did not matter what came before the agreement or what assumptions it was based upon. She argued that the price of $264,600 was agreed-upon and should not be undone.

In support of its position, the plaintiff relied on the Court of Appeal for Ontario's decision in *McLean v. McLean*, 2013 ONCA 788 (CanLII), which involved a dispute over the calculation of the fair market value of a farming business. In that case, the Court of Appeal confirmed that the test for rectification of an agreement due to common mistake requires that the courts use an objective approach: "that is, what a reasonable observer would have believed the parties intended, taking into consideration the evidence of all of the parties as well as the surrounding documentary evidence."

In the case at hand, the defendant did not dispute that there was an error. However, she argued that there was no *common* mistake since she paid no attention to the methodology of



the valuation and, instead, only focused on the bottom line price of $264,600. Therefore, she argued, she did not have a common intention beyond the bottom line price and made no common mistake with the plaintiff.

The trial judge was not persuaded with this position, stating as follows:

> I find this argument difficult to accept. It smacks to some extent of "gotcha". It also creates an incentive, if upheld, for parties to undertake no due diligence to investigate a calculation performed and provided in good faith, and to ignore the details of such calculation when it suits their interest to do so.

While no deceitful motives or actions were attributed to the defendant, the court was troubled by her willingness to try and retain a benefit that was based upon an acknowledged mistake.

Further, the legal doctrine of "common mistake" is "woven into the fabric of Canadian contract law": *Miller Paving Limited v. B. Gottardo Construction Ltd.*, 2007 ONCA 422 (CanLII) at para. 24. The fact that one party was clearly responsible for the error in issue does not preclude that party from resorting to the doctrine and prevailing in the dispute.

As to the defendant's reliance on the entire agreement clause, the trial judge reasoned that the subject matter of the case was not about precontractual negotiations and the mistake should not be swept under the rug by the entire agreement clause. To allow that to happen in these circumstances – where both parties acknowledged that the purchase price was based on an error – would be to allow the defendant to unfairly take advantage of what was clearly an innocent mistake.

As a result, the court ordered that the defendant was required to make an election to either accept that the written repurchase agreement was subject to rectification of the price, thereby requiring her to return half of the funds received for the units, or else the entire transaction would be unwound and she would have to repay the entire amount for the return of the units.

The decision demonstrates that courts will step in to apply what amounts to an equitable resolution when there has been a clear mistake in the formation of a contract. A person receiving funds in such circumstances cannot simply take advantage of the other party's mistake.

## Contact us

If you have a litigation matter and are in need of legal advice, please contact James Cook, at 416.865.6628 or jcook@grllp.com.

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