

Super Save Disposal Inc. v. Mr. Rent-A-Car Inc.
BCPC (BC Provincial Court), 2009

This is a case brought in Small-Claims Court (or more formally, the Small Claims Division of the Provincial Court). The monetary jurisdiction of the Small Claims Court is claims for \$25,000.00 or less.

The result is unremarkable and, I suggest, (you are more than free to disagree) roughly accords with our sense of fairness. But a number of issues are quietly present and I think the case is kind of interesting.

First, read the case. It is not long or too convoluted.

No, really, go read it!

Thanks. Notice that the parties appear to be unrepresented by lawyers. That is often true in Small Claims Court. Many law firms would not agree to take on a civil suit of any description, unless on a contingency fee basis¹, without an initial retainer of \$5000.00, which makes hiring a lawyer kind of pointless if your claim is for, say, \$4500.00, let alone \$1004.33.

What difference does it and should it make to the way the court treats the litigants if they are unrepresented? Should it *ever* effect the outcome or should it only effect perhaps the manner in which the court charts the path to the outcome required, lawyer or no lawyer. Think about this for a bit and we will discuss it for a little while in class.

Here is the rough and ready mental trip that I took after reading the case and thinking about it. Your trip may be and should be different, but there ought to be some points of intersection, because the issues are real, rather than simply flights of imagination:-

¹ Where the law firm makes a contract with the client to take a percentage of the damages recovered in lieu of any other fee, thus agreeing to receive no fee if the case is lost.

1. It is unremarked by the Adjudicator², but there is a real irony to this case. Tilden Rent-A-Car Co. v. Glendenning is the Ontario Court of Appeal case that stands for the principle that businesses that rely on standard form (pre-printed) contracts in circumstances where the nature of the transaction discourages attention to contractual detail cannot rely on 'onerous or stringent' provisions in the contract, without having taken reasonable steps to have brought those provisions to the attention of the other party before the contract is signed. Auto rental companies are the perfect example of such a set up, which is why it makes perfect sense that such a company generated the Ontario case. The public, particularly at the airport, prizes speed of transaction and even if the rental company wanted to spend an hour or so in negotiating a contract, competitive pressure for a very different kind of transaction would force such a company to serve the market or go out of business. But each auto rental company well understands the contract that it is using. Cars are too expensive and driving is too dangerous for ignorance or naivety to be the basis for allowing people to drive off with your cars. So how does an auto rental firm, which spends its every waking hour dealing with the implications, including the fine print, of written contracts end up getting bamboozled by a disposal bin firm?
2. Ah, but you say, Mr. Li, who is the owner of Mr. Rent-A-Car Inc., doesn't speak English as his first language, making him vulnerable to fast-talking disposal bin operators. Possible, but unlikely. Whose garbage problem is so urgent that they don't have time to read the contract or find the help of somebody who can? True, Mr. Li could become the owner of an auto-rental company without any skill or familiarity with written contract transactions. Indeed some people have a real talent for sensing market opportunity but no skill at the operations level. What is characteristic of such people, if successful, is not that they are hands on, but they are hands off. They delegate; they hire the talent that they do not personally

² In Vancouver senior lawyers are sitting as judges in Small Claims Court. It is an ongoing experiment. that, if successful, may serve as a solution to the problem that the demand for adjudication may surge or diminish at a rate that is significantly faster than the rate at which the supply of judges can be varied (up or down). Appointing judges, who once appointed, have tenure, a high salary and a fully indexed pension is a very expensive solution to a problem which may be a temporary backload of cases waiting for adjudication.

possess. So, we might suppose, Mr. Li said to himself, ‘You know, that corner lot would make a great auto rental location, which this part of town needs. I’ll hire that guy who was so nice to me when I rented a car six months ago. He can run the business for me.’ OK, makes sense. But then we have to posit that being the owner of such a business has taught him nothing about the importance of fine print in written contracts - not even, that, being vulnerable in a language that is not his own, he should not disavow his excellent policy of leaving such matters to the people that he has hired. He is a curious fellow, this Mr Li.

3. Ah (again), but you further say, Mr. Li stays out of the auto rental part of the business because he knows that is not his strength, but garbage disposal, that is where We could finish the sentence in a number of ways, but does anyone of them ring true or logical?
4. But *isn’t* it true that otherwise halfways sensible people become a little unhinged when it comes to ‘unauthorized use’ of their garbage disposal bins. I think it is. Fred will put up with all kinds of humiliation from the well placed and powerful, not to mention rude indifference from Adam Smith’s invisible hand³, but he cannot endure the disrespect of a fellow whose low ambition is to sneak his garbage into Fred’s bin. It’s a way of saying, like deliberately letting your dog relieve himself on Fred’s lawn - the fifty square feet where Fred has some say in life - “You’re nothing!” and, as is true for all the other ways of saying that, people take it very hard. So yes we expect the irrational when the subject is garbage disposal bins, but it still doesn’t give us a picture of Mr. Li that makes intuitive sense,
5. Before we leave, for a moment, the curious Mr. Li, whose business is standard form contracts, but who has positioned himself as the victim of a standard form contract because he doesn’t speak English well enough to protect himself, we should note that it is not ‘himself’ but his company that he is protecting, for Mr. Rent-A-Car is an Inc. If the Inc. sends someone who does not speak English well enough to negotiate a written contract, can the Inc. subsequently seek the benefit of a claim of unequal bargaining power? If it can, is not the law then providing a company with an incentive to send the negotiator who is best positioned

³ Adam Smith wrote the Wealth of Nations in 17

to pose as unequal to the task should things later go sour? 'Why don't we send that Wilson from accounts. He's as sharp as they come but he had that minor stroke six months ago and if things go wrong later we can always claim that ...'"

6. Mr. Rent-A- Car Inc. is creating documents every day. It has a fax machine. It sent a fax prior to the one year anniversary of the 'contract' but the bin is not removed for another 7 or so months. Why did they not send another fax during that whole period? Because they have an interest in continued ambiguity.

7. Super Save Disposal Inc. may have misallocated the fax, such that it didn't end up where it was supposed to or maybe not. In the course of her judgment the adjudicator said that *'Mr. Li and Mr. Madar on behalf of the Defendant testified that the bins were not being properly maintained and as a result they had unauthorized persons accessing the bins'* So they got mad and faxed SSD Inc. telling them they wanted to terminate the contract. Because people get mad about garbage bin cheats and no less mad about people pulling garbage out and strewing it around, Having customers mad is something SSD Inc. is used to. A percentage of their customers will be unhappy in any given month. But SSD Inc's experience may be that when they do a better job of sealing the bin, the mad customers cool off and pretty soon they carry on and keep paying because it's less hassle than switching. 'So, the truth is we always ignore the first fax and often that is the last we hear of people quitting. They cool off!' And sometimes the customer loses his copy of that first fax or throws it away when subsequently he decides to stay with the disposal company. So, sometimes we will have the customer pretending he never sent the fax and the company pretending it never received it, and everyone is happy. It's sort of like the commercial equivalent of 'I never said those hasty words and you never heard them'. However in this case SSD Inc. received an unambiguous message that things were not well - it wasn't getting paid. So why did it not contact Mr. Rent-A- Car Inc. and say, 'Hey, what's the deal? Are you unhappy?'. Because it too had an interest in ambiguity.

8. One of two factors might limit SSD Inc's revenue: the number of bins or the number of customers. If it is the latter then unless and until they have a new customer with whom to place the bin, it may well be in their interest to leave where it is, keep emptying it as if there were a contract - people might start paying again because they don't feel right about getting something for nothing - and of course SSD Inc. has the option to sue if they receive no payment. (A significant percentage of people would pay once they receive the Notice of Claim because the prospect of being taken to court is too unpleasant, regardless of the merits of the claim). The adjudicator said that they ought to have mitigated (put the bin in a new profitable place) but, chances are, the bin had no place to go until it went.
9. Maybe Mr. Rent-A-Car Inc. was phoning repeatedly to ask that the bins be removed or maybe it was mostly resting on that carefully preserved fax copy and enjoying free garbage pick up until to wait longer would strain credibility, at which point, in October, it phoned.
10. Does it over-strain our imaginations to picture the adjudicator, Ms. Pratchett, Q.C., smiling to herself as she reflected that the ostensibly naive and vulnerable Mr. Li, was, in fact, anything but and had probably bested SSD Inc. at their own murky game.
11. Why didn't Ms. Pratchett declare both sides duplicitous? Because she could not know for sure without cross-examining each side and a judge cannot do that. There are severe limits to the extent to which a judge in a common law court can engage in hostile or challenging examination of a witness. And, supposing that she had questioned each side with a view to uncovering the truth, would it have made a difference to the result?
- 12.. I don't think so. I doubt, if the whole truth had come out, that invoking Tilden Rent-A-Car Co. v. Glendenning was justified. I don't really think it was justified on the facts that *did* come out. What is it, after all, that discourages the reading of standard form contracts in a garbage bin transaction? But, Tilden aside, the handwritten scrawl, "1 yr terms" changes everything. Who can say what each party had in his and her duplicitous heart. The court got it right in finding that a simple one year

cancelable contract was about all one might be objectively (remember!) sure of. Everything else would be speculative.

13. But shouldn't Mr. Rent-A-Car Inc. have to pay something for all that garbage pick-up? There is a body of law (decided cases) called 'Unjust Enrichment' that stands for the principle that people ought to pay for what they receive, even where there is no contract, but that principle does not apply where one party has said "I don't want it" and the other party has said 'Well you are going to get it anyway and then later I'm going to claim that you were unjustly enriched at my expense!'. But shouldn't Mr. Rent-A-Car Inc. have quit using the bin if it didn't want it (We don't know for sure whether they did or not, but their lack of vigour in demanding that the bin be removed - one fax in seven months- is suggestive)? Their answer would have been 'We wanted to put our garbage in somebody else's bin but until SSD Inc. removed theirs, what choice did we have?'. I think it is a fair answer.
14. Does it matter that the truth may not have come out in this case? If so, why? If not, why not?
15. Sometimes a party decides that contractual ambiguity, recognized even before the contract is signed, is the best deal available. If SSD Inc had been told in no uncertain terms that its automatic renewal term, (absent cancellation on or before 60 days prior to the end of the first term) was unacceptable then SSD Inc might have said, 'OK, we'll forgo a right of renewal, but the monthly payment must be higher.' In such circumstances Mr. Li may calculate that a lower payment and a questionable right of renewal is as good as it gets. Sometimes each party calculates, going in, that clarity is not in his or her interest; in fact clarity may be a deal breaker. Calculated ambiguity is not only for diplomatic agreements. It also has its place in commercial agreements. A vague deal may sometimes be better than no deal and cheaper than a clear deal. But courts have a duty not to play this game. A judge's job is not to decide what a contract might mean, but what it does mean.
16. Suspecting a different version of events from the one alleged, the lawyer, in preparing for trial, does not stop there but goes on to ask him/herself, 'If my speculation is true, what then follows?'. The technique

sometimes delivers startling results. Suddenly what really happened becomes clear; events that lacked reason or logic slot loudly into place and people, whose character and motivation seemed blurred around the edges, come sharply into focus. But you should know that sometimes the result of wrestling with 'what if questions' is that you suddenly realize the nature and extent of the mess your client has gotten himself into. Not only did your client lie to you, but you now understand the enormity of the situation that meant he had to. Now what, on the very eve of trial? The popular idea that law as portrayed on television is more exciting than the real thing, is wrong. Sometimes what happens in a courtroom is more exciting than anything you will ever see on television, in part because it is real.

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