CHOMICHUK v. *MERRIFIELD* — THE WESTWARD FARMS CASE RE-VISITED

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In a recent edition of this Journal[1] the writer assailed the bulk of the conclusions reached by the Manitoba Court of Appeal in their decision rendered in the case of *Westward Farms Ltd. and Deniau* v. *Cadieux et al.*[2] Particular emphasis was placed on the far-ranging implications arising out of the conclusion of O'Sullivan J.A. who stated that there never existed a valid agreement for sale in writing between the vendor, and one Mr. Deniau, the nominal purchaser, because the latter was designated as "Deniau or nominee" in the Offer to Purchase.[3]

Exactly the same point arose in the Manitoba Court of Queen's Bench case of *Chomichuk* v. *Merrifield*[4], a decision of the late Mr. Justice Deniset, which was subsequently appealed.[5] Both the trial and appellate decisions in *Chomichuk* were handed down prior to the actual publication of this author's *Westward Farms* case comment.

At trial, Mr. Justice Deniset felt himself to be expressly bound by the previous Manitoba Court of Appeal decision in *Westward Farms* as Chomichuk, one of the plaintiffs, designated himself as a nominal purchaser by inserting in the relevant documentation the following terminology:

> "I/we Walter Chomichuk or nominee . . . offer and agree to purchase . . ."

In *Chomichuk* the relevant documentation was, from a strictly technical point of view, an offer to sell, whereas in *Westward Farms* the relevant documentation, although almost exactly the same as to form, was, in essence, an offer to purchase. However, nothing germane emanates from this mere technical difference, and indeed, neither the trial nor the appellate decision is predicated on any technical distinction between an offer to purchase and an offer to sell. Both documents serve to accomplish the same purpose, that is, to form the basis of a purportedly enforceable contract relating to the sale and purchase of a parcel of land.

In *Chomichuk*, the reluctant vendors (the Mesdames Merrifield) just happened to be two little old ladies. In *Westward Farms*, the reluctant vendor was a farmer presumably conversant in the ways of the business world. There is no doubt that the vendors in *Chomichuk* invoked the sympathy of the court. But, this aside, Deniset J. really did not need any justification for granting judgment in favour of the vendor defendants, for if the doctrine of *stare decisis* was to maintain any validity at all, Deniset J. quite rightly felt himself compelled to follow the Court of Appeal in the previous *Westward Farms* decision.

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1. A.B. Bass, "The *Westward Farms* Case" (1983), 13 Man. L.J. 143.
2. [1982] 5 W.W.R. 1 (Man. C.A.) (hereinafter referred to as *Westward Farms*).
3. *supra*, n. 1, at 148.
4. (1982), 20 Man. R. 256 (Man. Q.B.) (hereinafter referred to as *Chomichuk*).
5. (1983), 20 Man. R. 251, (Man. C.A.).

It is in the Manitoba Court of Appeal's decision in *Chomichuk* that is of some importance here. For, interestingly enough, the appellate Court's decision is not founded in any way on its previous utterances in *Westward Farms*. Monnin, J.A. (as he then was), in dissent would have ordered a new trial to deal with the issue of *non est factum*; for as he pointed out when referring to the defendants' Merrifield: "[t]hough these ladies are well advanced in age, there must be a new trial wherein all the evidence pertaining to this unusual transaction can be examined and weighed."[6] Thus, Monnin, J.A. did not find it necessary to advert to the *Westward Farms* decision at all.

Morse, J. (ad hoc) wrote the majority decision of the Court of Appeal, with O'Sullivan, J.A. concurring. Mr. Justice Morse, made specific reference to the *Westward Farms* decision, but concluded that it was not necessary to decide this appeal on any of the points raised in the previous case, for, as he maintained:

> In my view, all that is necessary to consider on this appeal is the question of damages. At the commencement of the trial, the plaintiff abandoned his claim for a specific performance and claimed damages only. It was thus incumbent on the plaintiff to prove his damages. I am satisfied that the plaintiff failed to prove with sufficient particularity or certainty the amount of damages, if any, which he sustained. After reading the evidence, I am unable to conclude that the plaintiff necessarily sustained damages, or, if so, the amount of such damages.
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> ... The plaintiff's loss, if any, was clearly *de minimis*.[7]

Thus, there was no direct incorporation of any of the principles previously enunciated by the Court of Appeal in *Westward Farms*. Hopefully, the Manitoba Court of Appeal, in future, will not find that the mere designation of a purchaser as "x or nominee" will in all instances serve to void a contract on the grounds of uncertainty. As previously pointed out by this author,[8] such a finding is consonant neither with common sense nor the daily practice of real estate agents and their principals engaged in land development and assembly. Also as previously noted,[9] the New Zealand Courts have decided to the contrary in the cases of *Power* v. *Nathan*[10] and *Lambly* v. *Silk Pemberton Ltd*[11]. In both of these cases, the prospective purchaser, even though designated as nominal only, was held liable on contracts to purchase and sell; any contractual uncertainty as to the actual parties to the contract was thus avoided. Such a finding is desirable, for the designation of a purchaser as "x or nominee" is commonly used and accepted in mercantile practice.

It is to be hoped that the Manitoba Court of Appeal will rethink the position it enunciated in *Westward Farms*, and avoid casting yet another standardized contractual provision automatically into the outer darkness of

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6. *Ibid.*, at 255.
7. *Ibid.*, at 252-253.
8. *Supra*, n. 1
9. *Ibid.*.
10. [1981] 2 N.Z.L.R. 403 (H.C.)
11. [1976] 2 N.Z.L.R. 427 (C.A.)

uncertainty. It is desirable from the point of view of general policy that mercantile contracts entered into in good faith should not be unneccessarily voided. Vendors are not always disadvantaged by not knowing with absolute certainty the description of the parties who ultimately take title to a parcel of land sold by them. When they enter into a contract of that nature it can generally be assumed that they willingly undertake the risks (if any) inherent in agreements of that nature. The mere semantics of the technical wording of a contract should not alter this general principle.

Slavery to semantics, like hard cases, make bad law.