
CANADA / JUDGMENT

0452954 B.C. Ltd.

2013 BCSC 2481

COURT

Supreme Court of British Columbia

DECIDED

5 September 2013

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2013 BCSC 2481 0452954 v. Helo Investments Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0452954 v. Helo Investments Ltd.,

2013 BCSC 2481

Date: 20130905

Docket: S18923

Registry: Chilliwack

Between:

0452954 B.C. Ltd.

Plaintiff

And

Helo Investments Ltd.

Defendant

Before: The Honourable Madam Justice H. Holmes

Reasons for Judgment - Summary Trial

Counsel for the Plaintiff:

Ronald A. Wattie

Counsel for the Defendant:

Tracey M. Cohen

Tariq Ahmed

Place and Date of Trial:

Vancouver, B.C.

August 7, 2013

Place and Date of Judgment:

Chilliwack, B.C.

September 5, 2013

INTRODUCTION

- [1] In a summary trial, the defendant Helo Investments Ltd. asks for an order dismissing the plaintiff numbered company's claim. In the claim, the plaintiff seeks damages based on unjust enrichment or quantum meruit in respect of time and effort expended by its principal, Guy Stewart, to develop a parcel of property on Sumas Way in Abbotsford, B.C., and to secure a long-term lease to Starbucks Coffee Company. The defendant has owned the property since July 2002, and leases it to Starbucks under a lease dated September 5, 2002.
- [2] The defendant submits that the claim should be dismissed because the evidence fails to establish that the plaintiff was enriched by Mr. Stewart's services or, if it was, that the enrichment was unjust because without juristic reason.
- [3] The plaintiff submits that the matter is not suitable for summary determination because of conflicts in the evidence concerning the basis and extent of Mr. Stewart's services and the compensation he is said to have received from the defendant.

THE FACTS

- [4] Guy Stewart is the plaintiff's president and sole director and shareholder, and references to him should be taken as references to the plaintiff.
- [5] In early 2002, Mr. Stewart agreed to purchase the property from its previous owners, in the hope and expectation of securing Starbucks as a long-term tenant on a portion of the property, and eventually reselling the property at a profit. However, he lacked the funds to pay the \$25,000 deposit required under the Contract of Purchase and Sale, or to develop the property for commercial leasing, including by obtaining the necessary licenses and approvals.
- [6] Roy Heaps, operations manager for the defendant, was a long-time friend of Mr. Stewart's who agreed to assist. He and Mr. Stewart agreed that the defendant would take an assignment of the plaintiff's interest under the Contract of Purchase and Sale, subject to a right in the plaintiff to re-purchase that interest for \$15,001 plus the defendant's agreed costs. The agreement was handwritten, and reads in full as follows:

I Guy Stewart authorized signatory for 452954 BC Ltd. hereby agree as follows to assign its interest in the Purchase and Sale Agreement date Feb 16 2002 to purchase the property known as 1907 Sumas Way to Helo Investments Ltd.

For the sum of \$1 and other considerations.

And Both parties agree that 452954 BC Ltd. Shall have the right to purchase the said property for the purchase price of \$1.00 and \$15,000.00 dollars plus all costs to date as approved by both parties.

- [7] Mr. Heaps knew that Mr. Stewart hoped to secure a lease to Starbucks and ultimately to re-sell the property at a profit; in Mr. Heaps's words, Mr. Stewart hoped to "flip" the property, and the defendant agreed to provide bridge financing for that purpose. Mr. Stewart similarly describes the defendant's role as one of "financier".
- [8] Although the parties agree that their agreement gave the plaintiff an option to re-purchase the interest or property from the defendant for \$15,001 plus the defendant's agreed costs in relation to the property, they disagree about the duration of the plaintiff's option to repurchase. The plaintiff says that the option was indefinite, while the defendant says that the option was to last until or within a reasonable time of the completion date, in the event that the defendant completed the purchase. However, this dispute has little direct consequence for the claim or this application, because, each for slightly different reasons, the parties agree that the agreement has no effect at this time. The plaintiff takes the view that the agreement is unenforceable because some of its terms are vague. In accordance with its view of the effect of the agreement, described above, the defendant takes the view that the agreement has no effect at this time because Mr. Stewart's option to repurchase expired shortly after the defendant completed the purchase.
- [9] The defendant paid the \$25,000 deposit under the Contract of Purchase and Sale in late June 2002, and completed the purchase on July 22, 2002, at a purchase price of \$428,000. The plaintiff did not attempt then or later to exercise its option to repurchase the interest it had assigned to the defendant under the agreement.
- [10] The lease to Starbucks is for a term of ten years with four options to renew for five years each. The lease commenced in September 2002, but provided for rent to begin at the end of November 2002, when the Starbucks store opened.
- [11] It is common ground that Mr. Stewart made the arrangements with Starbucks to secure and finalize the lease and to develop the property to make it suitable for that use. It is also common ground that he performed some property management or other services relating to the property after the lease came into effect.
- [12] The dispute arose in 2006, when Mr. Stewart presented the defendant with an offer from other parties to purchase the property for \$890,000, and the defendant rejected the offer or declined to consider it. It is Mr. Stewart's (and the plaintiff's) position that his services in relation to the property gave him an equitable interest in any profit resulting from an

increase in the value of the property. The defendant, by contrast, maintains that it acquired the entire interest in the property when it completed the purchase and operated the property over the ensuing years. The defendant says that while Mr. Stewart performed some services in relation to the property, he was fully compensated for them.

ANALYSIS

[13] Unjust enrichment has three elements:

1. enrichment of the defendant
2. corresponding deprivation of the plaintiff, and
3. absence of juristic reason for the enrichment.

Garland v. Consumers' Gas Co., 2004 SCC 25 at para. 30.

[14] The plaintiff has the burden of proving these elements on a balance of probabilities. The burden of proof on the plaintiff is no different in a summary trial than in a conventional trial: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 35.

[15] The basis for the plaintiff's position that the defendant is unjustly enriched in its failure to recognize Mr. Stewart's equitable interest in the property is not entirely clear. The plaintiff clearly contends that the defendant is enriched by any increase in the value of the property, which it fails or refuses to share (to at least some degree) with the plaintiff. However, it is not clear whether the plaintiff relies only on Mr. Stewart's services as the source of that alleged enrichment, or, rather, also on an agreement giving Mr. Stewart an interest in the property or in any profits on a re-sale. The ambiguity arises from the following.

[16] In its submissions, the plaintiff referred only to Mr. Stewart's services as the source of the alleged enrichment. However, the Amended Statement of Claim filed April 23, 2013, seems to imply reliance also on an agreement. In connection with the plea of unjust enrichment, para. 10 refers expressly to "the agreement". Also, the plaintiff relies on its alternative pleading of quantum meruit "if the [a]greement is unenforceable" (para. 13), suggesting thus that the primary pleading of unjust enrichment can apply only if the agreement is enforceable:

10. The defendant has refused or neglected to honor the agreement.

...

12. The Plaintiff says that:

- (a) the Defendant has been unjustly enriched by all the effort and work of the Plaintiff, its agents and servants and the Plaintiff correspondingly deprived; and
- (b) there is no juristic reason for the aforesaid enrichment.

13. In the alternative if the Agreement is unenforceable, that the Plaintiff be entitled to damages for all the work and time and effort he has expended and claims quantum meruit.

[emphasis added]

I note that the "agreement" to which the Amended Statement of Claim refers is necessarily the 2002 agreement as quoted above -- there is no suggestion in the pleadings, evidence, or submissions that the parties reached any other agreement at any time, or that the 2002 agreement had any additional terms.

[17] The ambiguity in the plaintiff's position carries over into the evidence in the summary trial. Mr. Stewart's affidavit of July 29, 2013, exposes the problem. Responding to Mr. Heaps's evidence about typical compensation for the services of realtors and property managers, respectively, and the length of Mr. Stewart's involvement in the latter capacity (which Mr. Heaps put at less than three months), Mr. Stewart deposes as follows:

10. . . . I was never the realtor. I was the partner and the equity owner of the Property as set out in the Agreement between Mr. Heaps and myself.

11. It was only after I brought an offer to [purchase for] \$890,000.00 that Mr. Heaps decided not to be interested in selling the property and splitting the profit.

[18] In this evidence, Mr. Stewart simply asserts that he was "the equity owner", without explaining the source or nature of his equitable interest. One may reasonably infer that the interest he asserts must be either his option to re-purchase the interest he assigned, or equitable or beneficial title to the property which, according to the plaintiff's Application Response (the stated facts in which Mr. Stewart deposes are true), the defendant held in trust for the plaintiff after the purchase. However, these are interests under the 2002 agreement which, as I have noted, the plaintiff says is unenforceable. Again, the plaintiff appears to both acknowledge in this application that the agreement cannot apply, while also relying on the effect it may once have had to describe Mr. Stewart's relationship to the property.

[19] Mr. Stewart's evidence as quoted above may be read as also suggesting an agreement to share profits from a re-sale of the property. However, the evidence includes nothing to indicate that any such agreement was ever concluded. To the contrary, Mr. Heaps, in his examination for discovery, indicated that he and Mr. Stewart discussed the potential sharing of profits on a re-sale, but this was before the defendant made the purchase, and in any event it came to nothing: Mr. Heaps indicated that he did not agree to Mr. Stewart's suggestion of 50/50 sharing, and told him instead that if the defendant found itself required to put up the funds to purchase the property, Mr. Stewart could later bring in any proposed "deal" (associated with a re-sale) and the defendant would consider a profit-splitting arrangement, depending on the amount of profit. Where parties to a business arrangement or agreement negotiate toward an additional agreement but fail to achieve one, it does not automatically follow that one party is unjustly enriched: *Kosaka v. Chan*, 2008 BCSC 1231 at para. 58.

[20] According to the plaintiff's position in the Application Response, the unjust enrichment it alleges should be measured proportionally to the amount by which the plaintiff's efforts and services increased the value of the property (in an assessment at a later date) (para. 10):

. . . the elements of unjust enrichment have been established due to increasing value of the Property as a result of the Plaintiffs effort. There would have been enrichment to the Defendant, a corresponding deprivation and absence of a juristic reason for the enrichment. The question is what is the proportionate entitlement of the Plaintiff to the increased value of the Property since it was purchased and constructed under the direction of the Plaintiff

[21] The main difficulties with this formulation of the plaintiff's position are that the evidence includes little to support a conclusion that the plaintiff contributed uncompensated services that have increased the value of the property, or that such an enrichment (and corresponding deprivation), if proven, fell outside the scope of the 2002 agreement and hence lacked juristic reason. I will explain, first addressing the latter problem.

[22] The plaintiff submits that it has satisfied the first part of the juristic reason analysis by showing an absence of contract governing the parties' relationship concerning the property. If an enrichment has no juristic reason from the established categories, such as contract, disposition of law, or donative intention, then the plaintiff has made out a prima facie case of no juristic reason: *Consumers' Gas* at para. 44. Contract is the juristic reason on which the defendant relies in relation to any enrichment it may have received.

[23] However, I am unable to agree that the evidence does not establish contractual reason for an enrichment, if one were proven. True, no employment contract applied, as the plaintiff notes, but the parties clearly considered their relationship to be governed by the 2002 agreement at the time they made it and for some considerable time afterwards. The plaintiff's current position in this application that the agreement is unenforceable cannot retrospectively remove the contractual framework of the parties' earlier dealings, and, as I will explain, the evidence does not establish that Mr. Stewart's services fell outside the scope of that agreement.

[24] With the exception of the services mentioned in para. 10 below, which are not described in any detail, the services which the plaintiff says gave rise to an unjust enrichment appear all to have been directed to readying the property for the Starbucks lease. The Application Response (which Mr. Stewart deposes is true) says the following:

5. As a result of the Letter of intent and the Agreement, the Plaintiff assigned its interest in the purchase of the Lands to the Defendant.
6. Notwithstanding the assignment [the 2002 agreement] [Mr. Stewart] on behalf of the Plaintiff through its agents and servants arranged for:
 - (a) the Demolition on the Lands;

- (b) the arrangements with the City of Abbotsford for construction of the Building pursuant to the requirements of Starbucks;
- (c) all negotiations with all the sub-trades for the construction of the Building;
- (d) all the negotiations between Starbucks and the Defendant for entering into a ten year Triple Net Lease (tenant pays rent, taxes, waste collection and insurance) with four 5 year options on the Lands dated 22/Nov/2002

. . .

8. No one from the Defendant was involved with:
 - (a) the day-to-day matters concerning the Demolition;
 - (b) the obtaining of the permit of the City of Abbotsford; and
 - (c) arranging for the easement over the adjoining property . . .
 9. The Principal of the Plaintiff submitted the invoices for payment to the Defendant who paid them. At no time material was any representative of the Defendant involved with the Demolition, or the purchase, negotiation or supervision and construction of the Building on the Lands purchased by the Defendant for the Plaintiff.
 10. After the execution of the Lease with Starbucks, the Plaintiff remained involved in the day-to-day dealings with Starbucks until after the commencement of the within Action . . .
- [25] At the times of these services (except those described in para. 10), both parties evidently considered their relationship to be governed by the 2002 agreement, and under that agreement Mr. Stewart had every incentive to secure the lease in order to increase the value of his option to repurchase his interest in the property. The agreement thus provided juristic reason for services Mr. Stewart may have contributed without compensation. That Mr. Stewart chose not to exercise his option to repurchase his interest does not render unjust the terms of the agreement which would have allowed him to do so. This was a commercial contract, and the analysis of fairness as between the parties, for the purposes of assessing whether an enrichment is unjust, may reasonably take account of the parties' business relationship: *Atlas Cabinets and Furniture Ltd. v. National Trust Co. Ltd.* (1990), 45 B.C.L.R. (2d) 99 (C.A.) at paras. 29-33. As Lambert J.A. noted in that case (at para. 29), a commercial contract has as its very essence the enrichment of the participants, sometimes at each others' expense.
- [26] The defendant bears, and has borne, all the risks associated with the property, and is legally entitled to the benefits. Absent evidence of a supplementary agreement giving the plaintiff a share of the profits from the property, there is nothing unjust in the defendant having exclusive entitlement to those profits.

- [27] Uncompensated services Mr. Stewart may have performed outside the scope of the 2002 agreement, such as those mentioned in para. 10 of the Application Response, are not described there or elsewhere in the evidence in enough detail to establish enrichment (and corresponding deprivation).
- [28] Mr. Stewart's evidence generally concerning the services he performed is not specific about when he performed them, their extent or value, or to what extent and on what basis, if any, they were funded or compensated.
- [29] The services themselves and their approximate dates are not outlined. Indeed, in his examination for discovery, Mr. Stewart testified that he had no record of the hours he worked in relation to the property because "it wasn't about the hours; it was about the property and the amount of time that [he] had been involved in the property . . .".
- [30] Similarly non-specific is the plaintiff's evidence about the basis on which Mr. Stewart received substantial amounts of money from the defendant around the time of the agreement and the purchase and subsequently. Presented in his examination for discovery with a cheque for \$9,575 from the defendant to Guy Stewart Consultants and invoiced to "leasing", Mr. Stewart acknowledged that he "was drawing money out of the property". However, he gave no specifics then or elsewhere in his evidence about the precise amounts or bases for these draws, except through his acknowledgement that they were amounts which would be taken into account in the calculation of the purchase price were he to exercise his option to repurchase his interest in the property. His evidence does not disclose whether the amounts were on account of expenses paid to others in respect of the property, or alternatively to remunerate him for his own services, or for some other purpose.
- [31] Responding to Mr. Heaps's evidence that the defendant fully compensated Mr. Stewart for his services by paying him a total of approximately \$40,000 between 2002 and 2006, Mr. Stewart deposes simply that the amounts he received from the defendant were not for personal use but rather "to pay other expenses". However, this evidence is so vague and general that, in the context of this application, it amounts to no real answer or explanation at all.
- [32] In addition, there is little, if any, evidence to support the proposition, fundamental to the plaintiff's claim of unjust enrichment, that Mr. Stewart's services substantially increased the value of the property so as to enrich the defendant and correspondingly deprive the plaintiff. While one may reasonably infer from the parties' dealings in relation to the property that they both expected the Starbucks lease to increase the property's value, the evidence does not establish that this was the actual result. The plaintiff relies on the evidence that in 2006 the defendant did not take up the offer to purchase the property for \$890,000, but without further evidence concerning the source of the offer and its precise terms, evidence of the offer establishes neither that the property had that or a greater value, nor that any increase in value (since the purchase for \$428,000 in 2002) was due to Mr. Stewart's efforts. The evidence does not disclose, for example, whether other properties in the area had increased

similarly in value over the time period in question.

- [33] The claim of unjust enrichment is for the plaintiff to establish. At best, the plaintiff's evidence is not inconsistent with an unjust enrichment. It certainly does not establish unjust enrichment in the face of uncontroverted evidence that Mr. Stewart received substantial payments from the defendant, and in the absence of clear evidence about what those payments represented (other than the defendant's evidence that they represented full compensation for Mr. Stewart's services).
- [34] The plaintiff submits that the matter is not suitable for summary determination because of the conflicts between Mr. Stewart's evidence and that of Mr. Heaps concerning whether and to what extent Mr. Stewart performed services and received compensation for them. However, I cannot agree. The defendant having brought this application for summary determination, it is for the plaintiff to establish its case. Simply put, the evidence does not do so, even taking Mr. Stewart's evidence at face value, because that evidence is not sufficiently specific to establish the matters which the plaintiff must prove. The weaknesses in the plaintiff's evidence are all the more evident when Mr. Heaps's evidence is also considered.
- [35] Many of the same or similar conclusions apply to the plaintiff's claim based on quantum meruit, which I note is not pleaded with sufficient detail to distinguish it from the claim based on unjust enrichment. To the extent that the quantum meruit claim seeks damages based on a valuation of Mr. Stewart's time and effort spent on the property, rather than a share in a resulting increase in the property's value, the claim fails for lack of sufficient evidence about the extent of his services and want of compensation, for many of the reasons discussed earlier.
- [36] The plaintiff submits that there should be a trial to assess the amount of the unjust enrichment or the quantum meruit claim, but this presupposes entitlement. It is no answer in this application to refer to the fact that the plaintiff asks for damages to be assessed in a separate process which could determine the extent of the defendant's gain from the property. The cart does not go before the horse. The plaintiff has had ample time to marshal its case. I agree with the defendant that a plaintiff is not entitled to frustrate the benefits of the summary trial process in the hope that "something will turn up" at a full trial.

ORDER

- [37] The defendant's application under Rule 9-7 is granted and the plaintiff's claim is dismissed.
- [38] Is there anything else that needs to be addressed?
- [39] MS. COHEN: Only the matter of costs, My Lady.
- [40] THE COURT: You are seeking costs?
- [41] MS. COHEN: Yes.

[42] MR. WATTIE: I would say no costs.

[43] THE COURT: What is the basis for your submission, Mr. Wattie?

[44] MR WATTIE: There (indiscernible) - there was some potential reason for advancing this case and that it is in the discretion of the Court (indiscernible) not grant the (indiscernible) plaintiff or defendant their costs.

[45] THE COURT: I see the matter a little differently, Mr. Wattie, and in my view the usual rule should prevail and the defendant should have its costs.

[46] Anything further?

[47] MS. COHEN: No, My Lady.

[48] THE COURT: Thank you very much and we will adjourn.

The Honourable Madam Justice H. Holmes

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