

CANADA / JUDGMENT

0827857 B.C. LTD v. DNR Towing Inc.

2020 BCSC 717

COURT

Supreme Court of British Columbia

DECIDED

11 May 2020

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2020 BCSC 717 0827857 B.C. LTD v. DNR Towing Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0827857 B.C. LTD v. DNR Towing Inc.,

2020 BCSC 717

Date: 20200511

Docket: S179829

Registry: Vancouver

Between:

0827857 B.C. LTD

Plaintiff

And

DNR Towing Inc., Richard Moroz and Darla Weichert

Also Known as Darla Moroz

Defendants

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Counsel for Plaintiff:

David J. Taylor

Counsel for Defendants:

Travis W. Brine

Place and Date of Hearing:

Vancouver, B.C.

February 24-25, 2020

March 2-3, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 11, 2020

introduction

- [1] In 2017, Parminder Singh ("Mr. Singh"), the sole shareholder, director and officer of the plaintiff company, 0827857 B.C. Ltd. ("0827857"), engaged into discussions with Richard Moroz ("Mr. Moroz") and Darla Weichert also known as Darla Moroz ("Ms. Moroz"), the principals of the defendant DNR Towing Inc. ("DNR"), concerning the purchase by his company of the assets of their company. No written contract was ever executed by the parties, but the plaintiff claims that the negotiations culminated in a legally enforceable oral agreement for the sale of land, vehicles, and other assets of DNR.
- [2] In August 2017, Mr. Moroz informed Mr. Singh that he and Ms. Moroz had received a better offer, and that they would not complete the sale to Mr. Singh's company.
- [3] On October 23, 2017, the plaintiff commenced the current action against the defendants, seeking specific performance of the alleged oral agreement, or in the alternative, damages for breach of contract. The defendants filed their response to this civil claim on November 28, 2017.
- [4] Now before me is the plaintiff's summary trial application, filed September 18, 2018 pursuant to Rule 9-7 of the Supreme Court Civil Rules, for judgment against the defendants and for specific performance of the alleged oral contract. This is opposed by the defendants, who submit that there was no concluded oral agreement, or if there was, an oral agreement is not legally enforceable because it concerned the disposition of land. The defendants submit that the result of the summary trial application should therefore be the dismissal of the plaintiff's action.

- [5] Certain facts are not in dispute. All parties agree that Mr. Singh, Mr. Moroz and Ms. Moroz had discussions in 2017 concerning a possible sale of the assets of DNR, including two parcels of land, to 0827857. All agree that various written draft agreements were prepared by Larry Hagen, the lawyer for Mr. Moroz and Ms. Moroz, and that there were discussions among the parties about proposed changes to the written drafts. All agree that there was never a written agreement signed by all the parties.
- [6] The crucial difference between the parties is that Mr. Singh maintains the negotiations reached a point where they had agreed on all the essential elements of a contract, and the involvement of lawyers would only be to memorialize in written form the binding oral agreement they had reached. Mr. Moroz and Ms. Moroz, on the other hand, maintain it was understood that their oral discussions would not become a legally binding agreement until all parties signed a written contract. Mr. Moroz and Ms. Moroz also say that there were still aspects of the deal that were yet to be worked out, and they had not come to a consensus on all the essential elements of a contract of purchase and sale.

THE EVIDENCE

- [7] Both the plaintiff and the defendants filed evidence on this application for summary trial. That evidence consists of the following affidavits and the exhibits attached to them:
1. Affidavit #1 of Parminder Singh, sworn September 18, 2018;
 2. Affidavit #1 of Haley Marie Fryer, sworn on September 18, 2018;
 3. Affidavit #1 of Richard Moroz, sworn October 1, 2018;
 4. Affidavit #1 of Darla Moroz, sworn October 1, 2018;
 5. Affidavit #2 of Darla Moroz, sworn February 18, 2020;
 6. Affidavit #1 of Alex Binnie, sworn October 1, 2018;
 7. Affidavit #1 of Victoria Bain, sworn October 3, 2018;
 8. Affidavit #1 of Natalie Carmichael, sworn October 1, 2018;
 9. Affidavit #2 of Natalie Carmichael, sworn October 4, 2018; and
 10. Affidavit #3 of Natalie Carmichael, sworn July 10, 2019.
- [8] Among the numerous exhibits attached to the affidavits are excerpts from the transcripts of examinations for discovery of Mr. Moroz, Ms. Moroz, and Mr. Singh. Each party seeks to rely on those excerpts as admissions by the opposing party.

summary of events AS SET OUT IN THE AFFIDAVIT EVIDENCE

- [9] Mr. Moroz and Ms. Moroz are the sole shareholders and officers of DNR, a towing company. Mr. and Ms. Moroz have owned and operated DNR for the last 30 years, and it has been their only source of income. Their children have also been employed by the company. DNR operates on property at 10671 Timberland Road, Surrey, British Columbia. That property and the adjoining property at 11706 Pine Road are personally owned by Mr. and Ms. Moroz as joint tenants.
- [10] Mr. Singh is the sole shareholder and director of 0827857. He is also the owner of Scott Truck and Trailer Repairs Ltd., which is in the business of repairing trucks and trailers.
- [11] Mr. Singh came to Canada in 1990. In his affidavit, he states that English is his second language and he is more comfortable in Punjabi. He completed his affidavit with the assistance of an English-Punjabi interpreter. He also used an interpreter at his examination for discovery.
- [12] In his affidavit, Mr. Singh states that he first met Mr. and Ms. Moroz around 1996. From time to time, he did work on DNR vehicles, and DNR performed towing services for his company.
- [13] Sometime in the spring of 2017, Mr. Singh met with Mr. and Ms. Moroz (the "First Meeting") and asked about purchasing the assets of DNR for \$2.6 million. The sale was also to include the two properties at 10671 Timberland Road and 11706 Pine Road. Mr. and Ms. Moroz would not sell for less than \$2.8 million. Mr. Singh agreed to that price.
- [14] All parties agree that the First Meeting ended with an understanding that Mr. Moroz would get his own lawyer to prepare a draft form of agreement, but their accounts of how this came about are somewhat different.
- [15] Mr. Singh states at para. 20 of his affidavit that he asked Mr. Moroz if he needed a written agreement to record the transaction, but he said his word was good enough:
20. At the meeting in April 2017, I asked Richard if he required a written agreement to record the transaction but he told me that his word was good enough and that I did not need to worry about obtaining anything in writing. However, he told me that he would ask his own lawyer to prepare a draft form of an agreement that we could look at and discuss so that there could be something in writing that would give us all some comfort regarding the details of the agreement and so that our accountants and advisers would have the information they may need for other paperwork our companies or that we may require.
- [16] Mr. Moroz denies ever saying that he did not need anything in writing. He states at paras. 6-7 of his affidavit:
6. From the very beginning of our negotiations with Parminder, I made it clear to him that Darla and I would need a lawyer to draft the terms of the agreement for the sale of the company. Parminder initially stated that he did not want to get lawyers involved but after I insisted that a lawyer draft a formal agreement he agreed to this condition. I had never sold a company before and this was going to be the largest transaction of my life. I wanted to

consult with our lawyer and have him draft a formal agreement so that there would not be any surprises or misunderstandings between the parties. This was especially important to me given that English was Parminder's second language and I wanted to make sure that there were not any misunderstandings between us.

7. In response to paragraph 20 of Parminder's Affidavit, I never told Parminder that a written agreement was not required. This is completely not true. Darla and I made Parminder well aware that we wanted to speak with our lawyer about the terms of purchase agreement and that it was absolutely necessary that the parties sign a formal draft agreement that was prepared by a lawyer.
- [17] Similarly, Ms. Moroz confirms that they insisted on having a written contract. She states at paras. 10-12 of her affidavit:
10. During the First Meeting, we advised Parminder that we had to speak to our lawyer about the sale and what terms needed to be included. We told Parminder that we would have our lawyer draft an agreement which would include all of the terms for the sale of DNR. We understood that there would need to be a lot of additional terms to work out with Parminder and this would have to be incorporated into a formal contract. We also had never sold a business before and this was going to be the biggest transaction of our lives so we wanted to make sure that a formal contract was drafted by a lawyer. Further, given that English was Parminder's second language we wanted to make sure that there were not any misunderstandings about the terms of the sale as a result of potential miscommunications with him.
11. Parminder initially told us that he did not want to have any lawyers involved in the transaction however we emphasized to him that it was important for us that we consult with our lawyer and that our lawyer draft a formal written agreement which would include all the terms of the sale. We insisted that we would not proceed with the sale without the parties signing a formal agreement drafted by our lawyer. Parminder then agreed that that (sic) we could have our lawyer draft a purchase agreement which would contain the purchase terms for him to review.
12. In response to paragraph 20 of Parminder's Affidavit, at no time did my husband or I ever say to Parminder that his word was good enough and that he did not need to worry about obtaining anything in writing. In fact it was the exact opposite. It was always our intention that any sale of DNR would be conditional on the parties executing a formal agreement which would include all of the terms for the sale of DNR. We required the parties to sign a formal agreement drafted by a lawyer so that all of the terms of the sale would be clear and that there would not be any surprises after the sale completed. We made Parminder well aware that this was a requirement for the sale and Parminder appeared to be agreeable to this.

[18] Mr. Singh states at para. 22 of his affidavit that they all shook hands at the end of the First Meeting "to confirm the agreement we had reached." This is denied by both Mr. Moroz and Ms. Moroz in their affidavits. In my view, nothing turns on whether there was a handshake at this meeting, or at any of the subsequent meetings. If there was, this is consistent with the simple courtesy of saying goodbye, and it is not evidence that the parties had reached a legally binding agreement. In any event, during submissions counsel for the plaintiff made it clear that the plaintiff's position is not that a contract had been concluded at the end of the First Meeting, but only an agreement in principle.

[19] Mr. Singh states that after the First Meeting, he asked a real estate agent to prepare a contract for the purchase they had discussed, and he provided that to Mr. and Ms. Moroz for their consideration. Mr. Singh went on to say at para. 24 of his affidavit:

24. ...Richard and Darla did not consider the document that I gave to them to be suitable and they told me that their lawyer would be preparing a draft agreement. I was content with that.

[20] In order to arrange financing for the purchase, Mr. Singh needed evidence for his bank manager that he had begun negotiations with Mr. and Ms. Moroz for the purchase of the DNR assets. Mr. and Ms. Moroz provided a letter for that purpose, confirming that "negotiations are currently in progress with respect to the sale of DNR", but Mr. Singh advised them that his bank required further documentation. In response to Mr. Singh's request, Mr. and Ms. Moroz provided a copy of the draft agreement that their lawyer had prepared (the "First Draft Agreement"), along with a covering letter from their lawyer, Larry Hagen, that read, in part:

You will note that there are a number of blanks in here and I think that you are still trying to work out the details with Mr. Singh as to whether you have a firm deal or not.

We also note that we are requiring schedules as to the assets that are to be sold and those that are not to be sold that are owned by DNR Towing Ltd. and we understand you are just getting these schedules together.

[21] As explained in their affidavits, Mr. and Ms. Moroz signed the copy of the First Draft Agreement that was sent to Mr. Singh's bank in order that the bank would know it was an authentic document, and not as an indication that there was a binding agreement. The First Draft Agreement was never signed by Mr. Singh.

[22] At the request of Mr. and Ms. Moroz, their lawyer prepared a more detailed draft agreement (the "Second Draft Agreement") with more complete terms, including schedules of lands, buildings, machinery, equipment and vehicles. They sent a copy of the Second Draft Agreement to Mr. Singh and agreed to meet to discuss it.

- [23] Mr. Singh deposed at para. 33 of his affidavit that he received the Second Draft Agreement with the schedules in July 2017, and he gave it to the lawyer he had retained. Mr. Singh's lawyer made handwritten comments on the document and recommended that Mr. Singh discuss these additional changes with Mr. and Ms. Moroz.
- [24] During the week of July 18, 2017, Mr. Singh met with Mr. and Ms. Moroz at a Tim Hortons in Surrey (the "Second Meeting"). Mr. Singh presented Mr. and Ms. Moroz with a copy of the Second Draft Agreement containing his lawyer's handwritten comments, and they discussed them. These comments concerned the condition of vehicles, equipment and machinery at the time of closing.
- [25] Mr. Singh's position is that they concluded a binding agreement at the Second Meeting. In reference to that meeting, he deposes at para. 35 of his affidavit:
35. In or about late July 2017, I met with Richard and Darla at the Tim Hortons on 88th and Nordel Way, in Surrey. At that meeting, we agreed to all of the further changes to the written form of the Asset Purchase Agreement. I believed then and still believe that we had a binding contract. We agreed on the price, the price allocation, and the lands to be sold, having addresses at 10671 Timberland Road Surrey, and 11706 Pine Road, Surrey. We agreed that the condition of the vehicles, machinery and equipment at the time of our Final Agreement would be the condition of the vehicles and equipment at the time of completion. We specifically agreed to sign whatever other documents were required to give effect to our Final Agreement. I expected we would have to execute separate documents regarding the conveyance of the real estate assets to the Plaintiff. All of the essential terms of such agreements were agreed upon by Richard, Darla and I by this point in time.
- [26] Mr. and Ms. Moroz maintain that there was no final agreement at the end of the Second Meeting. They say that there were numerous items on which they still had not agreed, including the purchase price allocation, the deposit, the closing date, and the condition of the vehicles on the date of possession.
- [27] Mr. Singh acknowledges at para. 36 of his affidavit that at the end of the Second Meeting, Mr. and Ms. Moroz were going to have their lawyer prepare a further draft written agreement (the "Third Draft Agreement"). He states that because environmental work still had to be done, there was a "need for flexibility regarding the closing date." It was unclear whether any remedial work would need to be done and if so, how long that would take. Mr. Singh states in para. 37 that they all agreed the environmental work would be done as soon as reasonably possible, "with the closing date to be set as soon as these contractual obligations of the Defendants were satisfied."
- [28] At paras. 12 - 13 of his affidavit, Mr. Moroz explains how the Third Draft Agreement came about:

12. After this meeting with Parminder, we had our lawyer draft another purchase agreement to incorporate the changes suggested by Parminder with the exception of his suggested changes to the condition of the vehicles, machinery and equipment. Darla and I were not agreeable to this condition given a lot of our vehicles and equipment are very old and some have not been operational for many years. It was going to cost us tens of thousands of dollars to get these vehicles and equipment into "good condition" and we also were concerned that there might be a dispute about what constitutes "good condition". We therefore decided that we would go back to Parminder with a term that the vehicles, machinery and equipment be provided at closing in "as is" condition. Our lawyer incorporated this term into a new draft agreement. Attached hereto and marked as Exhibit "E" is a true copy of the Third Draft Agreement.
13. At the time the Third Draft Agreement was drafted, Parminder had still not told us that he could pay the full purchase price at the time of closing. In fact, Parminder never at any time told us that the full purchase price would be paid at closing. We understood that Parminder's position could change if he sold his house but he never advised us at any point that this had happened. Darla and I were never agreeable to carrying any of the purchase price so we never had our lawyer incorporate such a term in any of the draft agreements.
- [29] It is unclear whether the Third Draft Agreement was ever sent to Mr. Singh, but after it was drafted, Mr. and Ms. Moroz received an offer from a different party to purchase DNR for \$3.2 Million. Accordingly, they had a further meeting with Mr. Singh in August 2017 to tell him of the new offer they had received and to inform him that they did not intend to proceed with the sale to him.
- [30] Mr. Singh describes the meeting in para. 41 of his affidavit:
41. In or about August 2017, Richard, Darla and I met at the Tim Hortons at 88th and Nordel. At that meeting, Richard informed me that another party had made an offer to purchase DNR's assets for 10% more than the price we had agreed upon. Richard apologized to me, saying it was a lot of extra money for his retirement and pension and he could not give it up. Richard expressly acknowledged to me that he knew we had reached a Final Agreement on all matters related to the purchase and sale of the DNR assets and that he and Darla were breaching the Final Agreement, but he said that they could not walk away from what they considered to be a much higher purchase price with another potential buyer. Richard told me that if the other potential purchaser did not close the deal the following day, we would continue with our agreement for the purchase of DNR's assets. I was very disappointed and told Richard and Darla very clearly that I wished to see all of us perform the Final Agreement we had made. I was not in any manner at all in agreement with Richard and Darla that they would refuse to respect and perform their obligation under the Final Agreement we had reached.
- [31] Mr. and Ms. Moroz deny acknowledging to Mr. Singh that they knew they were breaching a legally binding agreement. According to Mr. Moroz, at para. 14 of his affidavit:

14. I do not recall whether the Third Draft Agreement was sent to Parminder. After the Third Draft Agreement was drafted, we received an offer of \$3.2 million from Bhinder Bajwa who operates a truck repair company called Akal Diesel. I understand that Mr. Bajwa and Parminder are competitors. Darla and I decided that we wanted to proceed with the sale of DNR to Mr. Bajwa instead and as result we met with Parminder again at Tim Hortons and we let him know that we would not be proceeding with the sale to him. At this meeting, Parminder had with him one of the draft agreements with further handwriting on it. I thought Parminder was intending to discuss further revisions he wanted to the draft agreement. Darla and I asked Parminder to provide us with a copy of the draft agreement he had however he declined to do so.
- [32] After the August 2017 meeting at Tim Hortons, there was a subsequent meeting at DNR's business premises. In his affidavit at para. 42, Mr. Singh states that he told Mr. and Ms. Moroz that they had a binding deal, but Mr. Moroz said he would say they did not have a deal because they did not sign anything. Mr. Moroz does not agree with that account.
- [33] In his affidavit, Mr. Moroz states that at the meeting at DNR's business premises, Mr. Singh offered to increase the purchase price he would pay for DNR. Mr. Moroz states at paras 15-16 of his affidavit:
15. A few days after this meeting, Parminder attended at our office and said that he would pay \$3 million for DNR. At that point we had advised him that we had been offered \$3.2 million for DNR. He then offered us \$3 million for DNR. I told him that this offer was not high enough. Parminder then left but later that day called me at our offices and offered \$3.2 million for DNR. I told him that I would talk to Darla about this offer. Parminder however then called back again shortly afterwards and said that he would only pay \$2.8 million. I told him this was not acceptable and he told me that he would see us in court.
16. We then did not hear from Parminder again until his lawyer sent us a letter dated September 28, 2018 (sic). Attached hereto and marked as Exhibit "F" is a true copy of this letter.
- [34] The letter from the plaintiff's lawyer, which in fact is dated September 28, 2017, reads as follows:

Re: Purchase Agreement

Vendor: DNR Towing Ltd.

Purchaser: 0827857 BC Ltd.

Completion Date: September 30, 2017

We refer to the above matter and write to advise you that we have been retained by the Purchaser to complete the above mentioned transaction.

We have reviewed the draft agreement provided by your client by signing and forwarding to our client. By this letter we are confirming the acceptance of the agreement by our client. We request you to send us the final draft of the Agreement for execution by our client. Once we receive the final Agreement, we will send you the closing documents.

We hereby confirm that our client has arranged the required funds and ready and willing to complete the deal on the completion date i.e. September 30, 2017.

We enclose draft agreement signed by your client for your ready reference.

Yours truly,

Singh Law Group

Sumandeep Singh

[35] The defendants' lawyer responded to this letter by stating that the parties had never reached a binding agreement.

suitability for summary trial

[36] All parties acknowledge that the affidavits filed and the answers given on examinations for discovery yield some discrepancies and contradictions that could only be resolved by making findings of credibility.

[37] One of the unusual aspects of this case is that Mr. Moroz has filed an affidavit that contradicts some of the evidence he gave at his examination for discovery. In his examination for discovery on July 24-25 2018, he was asked several questions about whether, during negotiations with Mr. Singh, they had reached agreement on various matters. In his affidavit sworn October 1, 2018, he swore that many of those answers were wrong.

[38] For example, he swore at paras. 27-30 of his affidavit:

27. At the examination for discovery, I agreed to the proposition that the parties had agreed to what the condition of the vehicles would be at the time of closing. This is not true. Parminder was insisting that the vehicles were to be in good working condition at the time of completion of the contract. At no point did he ever tell Darla and me that his position on this issue changed. Darla and I were never agreeable to this condition due to the amount of money it would have cost us to get many of the vehicles into good working condition.
28. At the examination for discovery, I stated that I knew we were going to have to get at least a phase 2 environmental report for our properties. This is not true either and I do not know why I agreed that this was the case.

29. At the examination for discovery, I agreed to the proposition that I had signed the First Draft Sale Agreement in order to authenticate that an agreement had been reached with Parminder. This is not correct as we had not even discussed with Parminder most of the terms in the First Draft Agreement at that point. The only reason I had signed this draft agreement was because Parminder needed this document to see if he could get approval for a loan from the bank.
30. At the examination for discovery, I agreed to the proposition that there was no disagreement between the parties with respect to the terms contained in the Third Draft Agreement. I also had agreed that what was contained in the Third Draft Agreement was nothing more than what I had already agreed to with Parminder at our last meeting. These answers were not accurate. During our meeting with Parminder, we had discussed Parminder's handwritten notes on the Second Draft Agreement with Parminder but did not discuss the remainder of the terms. Parminder had not advised us that the remainder of the terms were acceptable. We also had not reached an agreement on what the conditions of the vehicles would be nor had we reached an agreement on the timing of the payment of the purchase price as Parminder had still not told us that he would be able to pay the full purchase price at closing.
- [39] Mr. Moroz explained in his affidavit that he had been diagnosed with an aggressive form of liver cancer in January 2018 and was told that he had a limited time to live. He underwent aggressive radiation and chemotherapy that caused him to have significant problems with fatigue and forgetfulness. He said this had affected him at his examination for discovery in July 2018. He said that he gave incorrect information and agreed with propositions put to him that he did not agree with. He said he was tired and wanted to get the examination for discovery process over with as it was very stressful to him.
- [40] Notwithstanding the discrepancies in the evidence, all parties say that they want to avoid the expense and delay that would result if I ordered a full trial with witnesses. For this reason, the defendants, as well as the plaintiff, have told me that they would like to have this action resolved by way of summary trial if possible.
- [41] The powers of the Court hearing a summary trial application are set out in Rule 9-7(15), which provides:
- 9-7(15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
 - (b) impose terms respecting enforcement of the judgment, including a stay of execution, and

(c) award costs.

[42] In *Girchuru v. Pallai*, 2013 BCCA 60 the British Columbia Court of Appeal discussed the factors that should guide a judge in exercising his or her discretion whether or not to grant judgment on a summary trial application. The Court wrote at paras. 30-32:

[30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.

[43] The existence of disputed facts is not always a bar to summary trial determination. In *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, the British Columbia Court of Appeal observed at para. 22:

[22] The principles relating to the applicability of the summary trial procedure are not in dispute. It should be noted that the mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding under Rule 18A. A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.

[44] The Court went to say at para. 31 that in a suitable case, conflicts in the evidence may be resolved by reference to the documentary record:

[31] It is clear that the judge was alive to the conflicts in the evidence. She was able to resolve the conflicts by making reference to and relying on the extensive documentary evidence before her. I agree with her decision in that regard.

- [45] In the present case, it would clearly be to the benefit of all parties if the matter could be resolved in a summary trial rather than subjecting them to the cost and delay of a full trial. As the Court of Appeal observed, the crucial question is whether it is possible to achieve a just and fair result by proceeding summarily. This in turn depends on whether it is possible to find the facts necessary for a just determination by examining the written record without the benefit of seeing and hearing witnesses.
- [46] It is clear from the decision in *Girchuru v. Pallai* that a summary determination under Rule 9-7 does not require the Court to make credibility assessments and findings of fact with respect to all disputed matters, but only with respect to those matters that are necessary for a just determination.
- [47] For the reasons that follow, I am satisfied that it is possible on the record before me to make findings of fact on certain key issues, and that applying the law to those findings of fact, a just determination of the case can be arrived at without requiring the parties to conduct a full trial with witnesses.

analysis of the parties' position

- [48] The key component of the plaintiff's position is that through their oral discussions and negotiations, by the end of the Second Meeting in July 2017, the parties had reached agreement on the essential elements of a contract of purchase and sale. The plaintiff submits that even though some details may not have been finally settled, such as the date of closing and the terms of payment, the parties had reached a consensus on price, parties, and property, and that since there was agreement on these three essential elements, they had a binding oral agreement from which the defendants were not entitled to resile. While the plaintiff acknowledges that the parties intended to have the agreement reduced to writing, he submits that this was not a precondition to the agreement having binding effect. The plaintiff contends that the written document that was being prepared by the defendants' lawyer was only a written memorandum of what the parties had already legally bound themselves to. In effect, the lawyer's function was simply to act as a "scrivener" or scribe.
- [49] The plaintiff relies heavily on the answers given by Mr. Moroz in his examination for discovery and submits that those answers constitute an admission by the defendants that the parties had reached a consensus on the essential elements of an oral asset purchase agreement, notwithstanding the denials by Mr. and Ms. Moroz in their subsequent affidavits. The plaintiff maintains that since they had agreed on the essential elements of parties, property and price, they had an enforceable oral asset purchase agreement.
- [50] The plaintiff refers to *Vancouver Canucks Limited Partnership v. Canon Canada Inc.*, 2015 BCCA 144, and *Langley Lo-Cost Builders Ltd. v. 474835 Ltd.*, 2000 BCCA 365 as examples of cases where the Court found oral agreements to be legally binding despite the fact that they had not yet been reduced to writing.

- [51] The defendants dispute the plaintiff's contention that they had orally settled all the essential elements necessary for an asset purchase agreement. In addition, the defendants raise two other bases upon which they submit that the plaintiff's case should be dismissed. First, they submit that there was no intention to be legally bound by any oral agreement until it had been reduced to writing and signed by all parties. Second, they submit that since the negotiations concerned the transfer of land, s. 59(3) of the Law and Equity Act, R.S.B.C. 1996, c. 253 would render any oral agreement unenforceable.

Did the Negotiations of the Parties Result in a Binding Oral Contract?

- [52] Despite the denials in the affidavits of Mr. and Ms. Moroz, the plaintiff maintains that by the end of the Second Meeting, the parties had reached an oral agreement on the essential terms of parties, property and price. The plaintiff submits that this means they had a legally binding contract, notwithstanding that they had not yet signed a written agreement. In this regard, the plaintiff relies on *Birdi v Luch*, 2016 BCSC 1361, where Pearlman J. wrote at para. 54:
- [54] The essential terms of a contract for the sale of land are the parties, the property and the price: *First City Investments Ltd. v. Fraser Arms Hotel Ltd.* (1979), 13 B.C.L.R. 107 (C.A.).
- [53] It is to be noted, however, that neither *Birdi v. Luch* nor *First City Investments Ltd. v. Fraser Arms Hotel Ltd.* stand for the proposition that whenever negotiating parties reach an oral consensus on parties, property, and price, they have thereby entered into a legally binding oral agreement. On the contrary, those cases make it clear that there must in addition be an intention to contract, which is manifest to an objective reasonable bystander. As Pearlman J. wrote at para. 53 of *Birdi v. Luch*:
- [53] In *Hoban Construction Ltd. v. Alexander*, 2012 BCCA 75 at para. 35, the Court cited with approval following passage from G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Canada Limited, 2006) at 15:

Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did ; it is whether a reasonable [person] in the situation of that party would have believed and understood that the other party was consenting to the identical terms. [Footnotes omitted.]

- [54] The same principle, that there must be an intention to be bound as well as certainty of terms, was clearly expressed in *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303, where Dickson, J., as she then was, wrote at para. 322:

- [322] For parties to be bound in a contractual relationship there must be a manifest meeting of the minds. They must express themselves outwardly in a manner that indicates both an intention to be bound and reasonably certain mutually agreed terms: *Klemke Mining Corporation v. Shell Canada Ltd.*, 2007 ABQB 176, affirmed 2008 ABCA 257.
- [55] In that case, Madam Justice Dickson elaborated on the test for determining whether the parties have manifested an intention to create legal relations. After citing the above-noted passage from *Fridman's The Law of Contract*, she wrote at para. 325:
- [325] The objective test serves the main purpose of contract law: to protect reasonable expectations created by promises. Accordingly, "the test of whether a promise is made, or of whether assent is manifested to a bargain, does not and should not depend on an enquiry into the actual state of mind of the promisor, but on how the promisor's conduct would strike a reasonable person in the position of the promisee": S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005), cited in *Hammerton v. MGM Ford-Lincoln Sales Ltd.*, 2007 BCCA 188.
- [56] Similarly, in *Middleton v. Howard*, 2012 BCSC 1089, Fitzpatrick J. wrote at para. 21:
- [16] The Court in *Indotan* [*Indotan Inc. v. Invincible Resources Corp.*, 2009 BCSC 1482, aff'd 2010 BCCA 318] stated that the test to be met as to whether an agreement, whether oral or in writing, had been entered into is an objective one:
- [57] The test for deciding whether a binding agreement - whether written or oral - has been made is an objective one. Even when certain fundamental terms have been accepted by both parties to a negotiation, it does not mean, necessarily, that a concluded, binding agreement has been made. The initial question must be whether the parties themselves consider that a binding agreement has been made.
- [17] The Court in *Canadian Bedding* [*Canadian Bedding Company Ltd. v. Western Sleep Products Ltd.*, 2009 BCSC 1499] expressed the objective test as follows:
- [72] Of course, when determining the intentions of the parties to a contract, a court must look at the outward expression of the parties' intentions, not their personal knowledge or understanding which was not expressed. In other words, the question a court must ask is what a reasonable outside observer would conclude from the facts.
- [18] Finally, the Court in *Bawitko* [*Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.)], at 106-107, found that in addition to considering what was discussed by the parties, it was important to examine the conduct of the parties after those discussions that purportedly resulted in an agreement:

The parties' conduct after the April 18 meeting supports the conclusion that no final agreement had been reached. At all relevant times the appellant plainly considered that the terms of the intended formal agreement were not yet settled. Consistent with its position that there was no binding agreement, it invited the respondent, on more than one occasion, to comment on the

draft form of agreement, so that, if necessary, terms could be negotiated, presumably, an agreement reached, and the formal written documents thereafter engrossed and executed. It is to be noted that the respondent at no time asserted, as it has throughout this action, that the terms had in fact already been agreed to and the formal agreement should accordingly be prepared for signature in the form of the draft as amended. Quite to the contrary.

- [19] The Court in *Indotan* also examined the subsequent conduct of the parties in coming to the conclusion that there was simply an agreement to agree in that the parties intended to document the terms of their relationship and legal obligations in writing: para. 58. Subsequent conduct was also considered in *Canadian Bedding* where the parties had moved forward in the business relationship and had governed themselves in accordance with their understanding of the arrangement. In that event, the Court stated that, "[i]n these circumstances courts look to the subsequent conduct of the parties to assist in determining what agreement was reached": para. 91.
- [20] I would also add to the comments of the Court in *Canadian Bedding* that the courts would also look to subsequent conduct of the parties in terms of determining whether an agreement was reached at all.
- [21] Accordingly, the evidence must be reviewed to determine if all essential terms of the agreement have been agreed upon. Further, even if such was the case, the further issue is whether the understanding or intention of the parties was that in any event, there was no enforceable contract until such time as a formal contract had been negotiated and executed. The Court must look at all of the evidence from an objective point of view. The evidence relevant to the enquiry as to whether the parties intended to enter into binding legal relations will include all of the circumstances, including any documentation, evidence as to any verbal discussions or agreements, the credibility of such oral evidence, and finally, the parties' subsequent conduct.
- [57] Applying those principles to the case at bar, the issue is not whether Mr. Singh subjectively thought there was a legally binding oral contract at the end of the Second Meeting, but rather, whether a reasonable objective observer considering all the circumstances would have understood that the parties intended to be legally bound prior to the signing of a written contract.
- [58] On the basis of the evidence before me on this Rule 9-7 application, I am satisfied that a reasonable objective observer would conclude that the parties did not intend to be legally bound until they had signed a written contract.
- [59] In this regard, I do not believe the evidence of Mr. Singh at para. 20 of his affidavit that Mr. Moroz told him that his word was good enough and that he did not need to worry about obtaining anything in writing. Rather, I accept the evidence of Mr. Moroz at para. 6-7 of his affidavit, and Ms. Moroz at para. 10-12 of her affidavit, that they told Mr. Singh that they required a written agreement in order to ensure that there were no misunderstandings. Their evidence is consistent with common sense. As they deposed, the sale of their business

was going to be the biggest transaction of their lives. They had never sold a company before, and they wanted to make sure there were no surprises or misunderstandings. Considering the fact that English is not Mr. Singh's first language, it would have been foolish for the defendants to enter into a legally binding agreement of this magnitude simply on the basis of oral discussions with him. I am satisfied that they did indeed insist, when talking to him, that they needed to have their lawyer involved and that a signed, written agreement would be required.

[60] It is significant that Mr. Singh also retained his own lawyer to review draft agreements and recommend changes. Clearly, the lawyers were not mere "scriveners", as suggested by the plaintiff in his submissions. On the contrary, the lawyers for both parties were involved in giving substantive legal advice about the contents of an eventual written contract. This is clear, not only from the evidence of the defendants, but also from the examination for discovery of the plaintiff.

[61] For example, in Mr. Singh's Examination for Discovery, he stated at Q. 331 that his lawyer made revisions to defence document A1-4, which is the Second Draft Agreement that had been prepared by the defendants' lawyer. At Q. 338-340, Mr. Singh identified specific instances of his own lawyer's suggested changes to the Second Draft Agreement:

Q: All right. So if I look through defence document A1-4, if we look at page 2, paragraph 2(c) there's a handwritten notation referencing "to be in good working condition on date of possession." All right? And is that your lawyer's handwriting?

A: Yes.

Q And the again on page 6.

A: He's the one who wrote down everything.

Q: Okay. So are you saying that all handwritten notations contained on A1-4 is from your lawyer?

A: That's my lawyer's.

[62] Later, at Q. 423, Mr. Singh said that the parties never discussed a closing date, and then, at Q. 425, he said this in relation to the Second Draft Agreement:

Q: So if we look at exhibit 3 and specifically page 9. Exhibit 3 is defence document A1-4.

MR. TAYLOR: What page are you on, Mr. Birnie?

MR. BIRNIE: Page 9.

Q: All right? And when we look at clause 12.1 you'll see there's a reference to a closing date being September 30th, 2017.

A: My lawyer had said that until this deleted stuff doesn't come back rectified we will not sign this, and no date is there.

[63] It is therefore clear, not only that the defendants were relying on their lawyer for legal advice about the contents of an eventual contract, but also that Mr. Singh was relying on his lawyer for legal advice about the form of a written contract. Indeed, at Q. 425, Mr. Singh stated that his lawyer advised him not to sign unless certain changes were made. None of this supports the plaintiff's position that the parties had entered into an oral agreement that was legally binding regardless of whether or not they signed a written contract.

[64] In this regard, I agree with the following passage at pp. 368-369 of Chitty on Contracts, 32nd Edition, 2015, which suggests that where both parties have retained and involved lawyers in the drafting of formal written agreements for execution, the normal inference will be that the parties are not bound until they both sign the agreement:

The effect of a stipulation that an agreement is to be embodied in a formal written document depends on its purpose. One possibility is that the agreement is regarded by the parties as incomplete, or as not intended to be legally binding, until the terms of the formal document are agreed and the document is duly executed in accordance with the terms of the preliminary agreement (e.g. by signature). This is generally the position where "solicitors are involved on both sides, formal written agreements are to be produced and arrangements are made for their execution." The normal inference will be that "the parties are not bound unless and until both of them sign the agreement."

[65] The inference that the parties were not bound until they both signed a written contract is also supported by the fact that both the Second Draft Agreement and the Third Draft Agreement contained a requirement, at clause 3, that "On execution of this Agreement, the Purchaser shall pay a deposit of TWO HUNDRED THOUSAND (\$200,000) DOLLARS (the "Deposit") to the solicitors for the Vendor..." The reference in this clause to the deposit being payable "on execution" makes little sense if the parties considered that they had a legally binding oral agreement regardless of whether a written contract was ever executed.

[66] Mr. Singh was asked about the deposit clause during his examination for discovery. He said this, at Q. 442-447:

Q: All right. Okay. So you never reached any agreement with my clients about a deposit; is that your evidence?

A: Nothing happened in the first deal.

Q: But at any time you never had an agreement on the deposit?

A: They were saying about that, and I discussed with my lawyer, and my lawyer said let that come back after being rectified.

Q: All right. And, yeah, you never expressly agreed to clause 3 in exhibit 3.

A: What is number 3?

MR. BIRNIE: Could the witness be shown exhibit 3?

MR. TAYLOR: Oh, pardon me.

MR. BIRNIE: Exhibit 3, page 2, clause 3.

Q: And this clause was earlier interpreted to you; right?

MR. TAYLOR: Depending on what you are going to ask, it may need to be dealt with again.

MR. BIRNIE: All right.

Q: You never told my clients you were agreeable to clause 3.

MR. TAYLOR: I think we need to find out whether he remembers the translation before he answers a response.

THE WITNESS: Yes. I remember.

Q: All right. Did you ever tell my clients you were agreeable to the wording of clause 3?

A: Brother, I'm answering the same. My lawyer was saying let the deleted part come back after being rectified; then I can - after that I have to sign.

[67] Mr. Singh's answers here support the fact that his lawyer was not merely acting as a scribe, but was giving him legal advice about when, and under what circumstances, he should or should not sign a contract. As well, these exchanges illustrate the fact that Mr. Singh is not entirely fluent in English, and that without an interpreter, misunderstandings would be a real possibility. This supports the defendants' evidence that throughout the negotiations, they made it clear that there would be no legally binding agreement until all parties signed a written contract.

[68] For these reasons, I am satisfied that a reasonable objective observer, considering all the circumstances, would conclude that that the parties did not intend to be legally bound until they had executed a written agreement. Since no written agreement was ever signed by both parties, there was no contract.

The Effect of s. 59(3) of the Law and Equity Act

[69] In light of the conclusion I have reached on the first point raised by the defendants, it is not strictly necessary for me to address their second submission, namely, that even if there was an oral agreement, it is not enforceable because it was not in writing. Nevertheless, since this issue was argued by the parties, I shall address it briefly.

[70] Section 59(3) of the Law and Equity Act provides:

59 (3) A contract respecting land or a disposition of land is not enforceable unless;

- (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,

- (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
 - (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.
- [71] There is no question that the alleged contract in the present case was respecting land or a disposition of land. The transfer of land was not merely a peripheral part of the deal; it was the major component. Clause 2 of both the Second Draft Agreement and the Third Draft Agreement allocated \$1,720,000 of the purchase price to the lands. That is more than sixty-one percent of the total purchase price. Thus, as the plaintiff is only alleging an oral agreement, it would not be enforceable pursuant to s. 59(3)(a) of the Law and Equity Act unless either s. 59(3)(b) or (c) applied.
- [72] In *Jeyaratnam v. Cheng* 2015 BCSC 538, Leask J. summarized the effect of these provisions by saying at paras 16 and 17 that In order for subsections (b) or (c) to apply, the plaintiff must show that the defendants did an act or acquiesced to an act done by the plaintiff that is consistent with the alleged contract, or that the plaintiff changed its position in reliance on the alleged contract.
- [73] With respect to s. 59(3)(b), the plaintiff alleges that the defendants undertook some initial steps toward an environmental audit, and with respect to s. 59(3)(c), the plaintiff relies on his efforts to arrange funds for completion of the sale.
- [74] In response, the defendants say that they would have undertaken the initial environmental steps irrespective of any potential sale to Mr. Singh. With respect to Mr. Singh's efforts to arrange funds to purchase DNR, the defendants point out that Mr. Singh did not sell his property on 92nd Avenue until long after they informed him that they were no longer proceeding with a sale of DNR to him. Indeed, the contract of purchase and sale for Mr. Singh's property on 92nd Avenue is dated November 30, 2017.
- [75] I agree with the defendants that the acts relied upon by the plaintiff do not amount to the kind of reliance or part performance that would bring s. 59(3)(b) or (c) of the Law and Equity Act into play.
- [76] In *Palkovics v. Barta*, 2012 BCSC 399, affd 2013 BCCA 181, Burnyeat J. wrote at para. 48 that a party seeking to rely on s. 59(3)(b) or (c) must show that the acts relied upon are unequivocally referable to the agreement alleged:
- [48] The party who relies on the exceptions set out in s. 59(3)(b) and (c) of the Act must prove that the acts relied on are unequivocally referable to the agreement alleged: 574409 B.C. Ltd. v. Spring Creek Aggregates Ltd., 2008 BCSC 978, where Hinkson J., as he then was, stated:

This section [59(3)] of the Act is a direct descendent of the much amended Statute of Frauds (1677). In *Gill v. Grant* (1988), 30 E.T.R. 255 at 263-264, [1988] B.C.J. No. 1705 (S.C.) [Gill cited to E.T.R.], Rowles J., as she then was, stated that s. 59(3)(b) and (c) codified the doctrine of part performance:

By virtue of ss. 3(b) and 3(c) a contract relating to land or a disposition thereof is no longer unenforceable simply because it does not exist in written form. These subsections are the statutory embodiment of the equitable doctrine of part performance, developed by the Courts of Chancery to overcome the use of the Statute of Frauds as an instrument of fraud by refusing to allow a defendant to rely upon the technical defence of the statute.

However, in *Schild v. Staud Estate (Official Administrator)*, [1993] B.C.J. No. 1604 (S.C.), Cashman J. conducted a thorough review of the case law and disagreed with the finding in *Gill* that s. 59(3)(c) was also a statutory embodiment of the doctrine of part performance at paras. 89-90:

Section 54 [now s. 59] replaced the Statute of Frauds, R.S.B.C. 1979, c. 393, which was repealed by the Law Reform Amendment Act, S.B.C. 1985, c. 10. What was formerly found in the Statute of Frauds is now to be found in s. 54(3) of the Law and Equity Act with the additions of s-s. (4) and (5). It appears to me that s. 54(3)(b) is an attempt to codify the doctrine of part performance. The Report on The Statute of Frauds (1977) of The Law Reform Commission of British Columbia at pp. 69-73 appears to indicate that that was the intention of the drafters ...

The meaning to be attached to s. 54(3)(c) [now s. 59(3)(c)] is less clear. With respect to the view expressed in *Gill v. Grant*, supra, I am not persuaded that that subsection is as well a statutory embodiment of the doctrine of part performance. In fact, it may be that that section embodies the concept of estoppel.

The Supreme Court of Canada considered the doctrine of part performance where a plaintiff sought to enforce an oral assignment of an interest in land in *McNeil v. Corbett* (1907), 39 S.C.R. 608, [1907] S.C.J. No. 73, stating at 611-612:

... A condition of the application of that doctrine is thus stated by Lord Selborne, in *Maddison v. Alderson* (1), 8 App. Cas. 467 at page 479:

All the authorities shew that the acts relied upon must be unequivocally, and in their own nature, referable to some such agreement as that alleged;

i.e. to an agreement respecting the lands themselves; and, as further explained in that case, a plaintiff who relies upon acts of part performance to excuse the non-production of a note or memorandum under the Statute of Frauds, should first prove the acts relied upon; it is only after such acts unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject of the agreement sued upon have been proved that evidence of the oral agreement becomes admissible for the purpose of explaining those acts.

(at paras. 18-20)

- [77] The plaintiff concedes that the Supreme Court of Canada has never resiled from its position in *McNeil v. Corbett* (1907), 39 S.C.R. 608, that the acts relied on must be unequivocally referable to the agreement alleged, but he submits that recent cases in lower courts have taken a more flexible and holistic approach to determining what constitutes part performance sufficient to exempt an agreement from the statutory requirement that it be in writing.
- [78] Even on the more flexible standard suggested by the plaintiff, however, I am not satisfied that the acts he relies upon are sufficiently connected with the alleged oral agreement to bring it within the ambit of either s. 59(3)(b) or (c).

summary and conclusion

- [79] I find that this case is suitable for summary determination pursuant to Rule 9-7, notwithstanding that there are contested facts.
- [80] Based on the evidence before me, I am satisfied that a reasonable objective observer would conclude that the parties did not intend to be legally bound until they had executed a written agreement. Since no written agreement was ever signed by both parties, there was no contract.
- [81] In the alternative, if there was an oral contract, it is not enforceable by reason of s. 59(3) of the Law and Equity Act.
- [82] The plaintiff's action is therefore dismissed in its entirety.
- [83] If the parties are unable to agree on the proper order for costs, they are at liberty to make submissions in that regard.

"Ehrcke J."

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