
CANADA / JUDGMENT

0981352 B.C. Ltd. v. Sarpal

2020 BCSC 1881

COURT

Supreme Court of British Columbia

DECIDED

1 December 2020

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2020 BCSC 1881 0981352 B.C. Ltd. v. Sarpal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0981352 B.C. Ltd. v. Sarpal,

2020 BCSC 1881

Date: 20201201

Docket: S190230

Registry: Vancouver

Between:

0981352 B.C. Ltd.

Plaintiff

And

Indu Sarpal

Defendant

And

Avtar Singh Gill

Defendant by Counterclaim

And

Pranav Kaintura, and Century 21 Coastal Realty Ltd.

Third Parties

Corrected Judgment: The front page and paragraph 110 were corrected on December 24, 2020

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff:

R.R. Hira, Q.C.

J.K. Bienvenu

R.N. Hira

Counsel for the Defendants:

R.J. Morton

A. Schlagintweit, Articling Student

Place and Date of Trial:

Vancouver, B.C.

October 13 - 16, 19, and 21 - 23 2020

Place and Date of Judgment:

Vancouver, B.C.

December 1, 2020

Introduction

[1] This case arises from a contract of purchase and sale of a parcel of property located at 2337 King George Boulevard in Surrey B.C. ("the Property"). The legal description of the Property is:

PID: 023-046-945

Lot 5 Plan LMP22600

Section 14

Township 1

Land District 36

[2] Prior to the closing date for the purchase and sale, the defendant, Indu Sarpal, paid three deposit payments totalling \$600,000 to the plaintiff, 0981352 B.C. Ltd. On the agreed closing date, the defendant paid no further amount. The plaintiff ultimately sold the Property at a lower price than that set out in the contract of purchase and sale.

- [3] The plaintiff seeks damages for the alleged breach of the contract of purchase and sale. The defendant resists that claim based solely upon a plea of unilateral mistake on her part.
- [4] Ms. Sarpal alleges that her mistake results in an equitable fraud rendering the contract void ab initio, or alternatively entitling her to rescission of the contract and the refund of her deposit payments. She brought a counterclaim, seeking, among other things, rescission of the contract of purchase and sale and return of \$550,000 of her deposit. The defendant's counterclaim against Avtar Gill was settled. She reduced her counterclaim to \$550,000, to take into account a \$50,000 payment by Mr. Gill under the settlement.
- [5] At the conclusion of the defendant's case, the plaintiff brought an application to dismiss Ms. Sarpal's counterclaim on a no evidence basis. I dismissed that application as I found that there was some evidence, which, taken at its most favourable could support the defence and counterclaim advanced by Ms. Sarpal.

The Positions of the Parties

- [6] The plaintiff contends that this is a straightforward case of breach of contract, as on July 17, 2018, it entered into an unconditional contract of purchase and sale with the defendant for the Property for \$7 million cash with a completion date of November 30, 2018. The plaintiff says that when the defendant failed to pay the balance of the purchase price on the completion date, it accepted her breach of contract and relisted the Property for sale. On May 16, 2019, the plaintiff sold the Property to a third party for \$6.5 million.
- [7] In its pleadings, the plaintiff sought judgment for:
- \$600,000 security held in trust;
 - \$500,000 being the difference between the original sale price, \$7 million, and the eventual sale price to the third party, \$6.5 million;
 - special costs for the wrongful filing of the certificate of pending litigation (CPL);
 - interest; and
 - special costs.
- [8] At trial, the claim for damages based upon the difference between the original sale price and the eventual sale price was not pursued.
- [9] The defendant submits that there was no consensus ad idem concerning the development potential of the Property for the purchase price, and therefore no contract. She contends that there are four issues before the Court:
- Was the \$7 million purchase price in the sale contract based on the defendant agent's unilateral mistake that it was reasonably possible to rezone the property?

- b) Was that mistake induced by misrepresentations and/or the conduct of the plaintiff's agents, or did the plaintiff's agent, Mr. Gill, have actual or constructive knowledge of the mistake while remaining silent, such that in either case the circumstances amount to equitable fraud?
- c) Should the sale contract be rescinded and \$550,000 of the \$600,000 in deposits be repaid to the defendant to avoid an inequitable or unconscionable result based on the actual fair market value of the property at the time?
- d) If \$550,000 should be repaid, is a remedial constructive trust warranted to ensure the defendant's recovery of that money from security funds held in trust?

The Evidence

- [10] Mr. Purba is the defendant's husband. He was a licenced real estate agent for about 10 years from March 2005 until about May or June 2015, when he permanently surrendered his licence. Century 21 Coastal Realty Ltd. was partly owned by Mr. Purba at all relevant times.
- [11] As between Ms. Sarpal and Mr. Purba, the latter was responsible for all decisions related to dealings for the purchase of the Property.
- [12] Unless it could be rezoned, the maximum Floor Area Ratio/Floor Surface Ratio (FAR/FSR) for the Property was 1.0.
- [13] On November 7, 2017, Ms. Sarpal and Mr. Purba made an offer to the plaintiff to purchase the Property for \$6 million through a company owned by them, Pure Land Investments Inc. ("Pure Land"). This offer was not accepted by the plaintiff.
- [14] On December 13, 2017, Pure Land and the plaintiff entered into a contract of purchase and sale whereby Pure Land would buy the Property for \$6.8 million, subject to certain conditions. That offer lapsed when the subject conditions were not removed.
- [15] On April 5, 2018, the plaintiff entered into a contract with an unrelated company to sell the Property for \$7,525,000, with subject clauses including a subject removal date of May 30, 2018. The subjects were not removed, and that offer lapsed.
- [16] On April 13, 2018, one of the plaintiff's real estate agents, Avtar Gill, and the plaintiff's architect, Doug Johnson, met with Kevin Broersma, a City of Surrey planner, to discuss the permitted use to which the Property could be put.
- [17] On May 30, 2018, the plaintiff entered into a contract with another unrelated company to sell the Property for \$7,525,000, with subject clauses including a subject removal date of June 25, 2018. The subject conditions were not removed, and that offer lapsed.
- [18] On June 19, 2018, Mr. Gill and Mr. Johnson again met with Mr. Broersma.

[19] Mr. Purba gave evidence that sometime in the middle of 2018, he was checking available properties and saw a listing for the Property. The listing listed the price as \$7.9 million, and described the Property as:

Investment opportunity. 1.18 Acres of highway commercial land in South Surrey with opportunities to develop into mix use development. Try for retail commercial up to 10,000 sq. ft. and 5 residential on upper floors. All services on property, not a single tree on ppty.

[20] As of July 10, 2018, Mr. Purba was aware of the zoning designation for the Property as Commercial Highway Industrial, which provided for a maximum FAR of 1.0.

[21] At that time, Mr. Purba was also aware of the Official Community Plan designation for the Property by the City of Surrey as Commercial.

[22] Pranav Kaintura was a friend of both Ms. Sarpal and Mr. Purba. His real estate brokerage firm was Century 21 Coastal Realty Ltd.

[23] On or about July 10, 2018, Mr. Purba, on behalf of Ms. Sarpal, retained Mr. Kaintura to act as Ms. Sarpal's realtor to make an offer to purchase the Property.

[24] On July 10, 2018, Mr. Kaintura prepared a draft offer dated July 10, 2018 to purchase the Property on instructions from Mr. Purba.

[25] Prior to preparing the July 10, 2018 draft offer, Mr. Kaintura reviewed the current zoning of the Property by looking at the City of Surrey Mapping Online System.

[26] On July 12, 2018, a second real estate agent for the plaintiff, Jolly Saluja, sent an email to Mr. Purba and Mr. Gill attaching the preliminary design drawings that Mr. Johnson had prepared for construction of a six-storey building on the Property.

[27] Approximately 10 minutes later, Mr. Purba emailed the offer to purchase the Property for \$7 million to the plaintiff's two real estate agents. This offer was not accepted by the plaintiff.

[28] On July 17, 2018, a representative for the plaintiff and Ms. Sarpal met with Mr. Saluja, Mr. Gill, and Mr. Kaintura at Mr. Saluja's home. Ms. Sarpal said that at the meeting, she signed a contract of purchase and sale whereby she agreed to purchase and the plaintiff agreed to sell the Property for a price of \$7 million on the terms and conditions contained in the contract. The stated completion date for the sale and purchase was November 30, 2018. The contract contained standard form terms, except for the restriction on the assignment of the contract. The only added terms were:

Selling Broker will receive total selling commission \$5,000 + GST; and

Upon Payment of second deposit to the seller, the buyer shall have right to register the buyers [sic] interest on the title of land in a form acceptable to sellers [sic] solicitor.

[29] Mr. Purba arranged for three deposits to be paid to the plaintiff under the contract consisting of \$100,000 on July 17, 2018, \$250,000 on August 14, 2018 and \$250,000 on October 4, 2018, for a total of \$600,000.

[30] On July 25, 2018, Mr. Saluja forwarded to Mr. Purba an email exchange that included a July 3, 2018 email from Mr. Johnson stating:

Notes from Steven. Some good news has found policy that the site is on a transportation corridor. This should make our justification of 6 storeys easier.

We should have a discussion on what we want to offer to the city prior to making the next presentation to them. Steven has outlined a number of different options.

I am assuming that the preferred outcome would be a 6 storey 2.5 fsr on gross site area - all strata. Make the argument on transportation corridor and have rental, daycare and non market as things we could potentially offer?

[31] Parmjeet Garcha is a real estate developer with considerable experience in development projects in the City of Surrey. Mr. Garcha and his family are friends of the plaintiff and her husband, and the two families have engaged in business together. Mr. Purba described Mr. Garcha as his mentor.

[32] Mr. Garcha gave evidence that in the summer of 2018, he was prepared to support the project envisaged by Mr. Purba for the Property, which was described by Mr. Purba as one storey of commercial space, and five storeys of residential space. Mr. Garcha gave evidence that he was prepared to support the project, both financially and through the development process with the City of Surrey.

[33] On or about October 30, 2018, by way of a proposed addendum to the July 17, 2018 contract, Ms. Sarpal sought to extend the completion date from November 30, 2018 to December 6, 2018 for the stated purpose: "Buyer has to be in India for a family matter and is requesting to move completion by six days". The plaintiff did not agree to extend the completion date.

[34] On November 8, 2018, Mr. Garcha, Mr. Purba, and Celso Stifelman, an architect recommended by Mr. Garcha, met with Mr. Broersma and other city staff and reviewed the architectural drawing prepared by Mr. Stifelman. Mr. Broersma gave evidence that he told Mr. Purba and the architect at this meeting that he would not approve either an FAR of more than 1.5, or the construction of a six-storey structure on the Property.

[35] Mr. Purba and Mr. Garcha said that at the meeting, Mr. Broersma said that he has never expressed support for an FAR over 1.5 to anyone. Mr. Purba said that he later told Mr. Garcha that Mr. Gill had lied to him. Mr. Garcha said that he concluded that someone was lying.

[36] On or about November 22, 2018, by way of a further proposed addendum, Ms. Sarpal sought to extend the completion date from November 30, 2018 to January 22, 2019, stating in her request that "all other terms and conditions remain the same. Time is of the essence". The plaintiff did not agree to this extension request.

[37] On November 29, 2018, the plaintiff gave notice to Ms. Sarpal that it was ready, willing and able to complete the sale of the Property on the completion date. Ms. Sarpal did not deliver the balance of the purchase price to the plaintiff and the sale did not complete.

[38] On November 30, 2018, counsel for the defendant wrote to counsel for the plaintiff, advising:

We have sufficient funds in trust for the Buyer to complete the purchase of the Property today for \$6,595,414.89 as set out in the attached copy of the buyer's statement of adjustments. As you may know, the sale is based on a written contract of purchase and sale (the "Contract") and a collateral oral contract (the "Oral Contract") with the Seller's agent, Mr. Avtar Gill.

The Buyer hereby demands that the Seller immediately take steps to ensure the Property is zoned for 2.37 FSR for a 6 story [sic] mixed commercial and residential building as promised and represented to the Buyer's representative, Mr. Harpreet Purba, in early July, 2018 by Mr. Gill in both the Oral Contract and the Contract. Absent provision of the Property with that capacity or a reduction in the purchase price to \$5.5 million, the Buyer takes the position that the Seller has repudiated both the Contract and Oral Contract in bad faith (the "Contracts").

The Buyer hereby insists on specific performance of the Contracts, but is prepared to mitigate her loss and complete today if the Seller reduces the price to \$5.5 million. Alternatively, the Buyer will agree to rescind the Contracts upon payment to our firm in trust of a refund of the deposits paid totalling \$600,000.00. Please advise.

We are advised that the Buyer entered into the Contracts based on representations from Mr. Gill to Mr. Purba that the Seller's agents had spoken with the City's planner and that the Buyer would receive the Property zoned for 2.37 FSR for 6 stories [sic]. Mr. Gill also represented that the Seller had received verbal offers for approximately \$8 million and that the any offer from the Buyer had to be subject free. In reliance on these representations and the promises contained in the Contracts, the Buyer entered into the Contracts and paid \$100,000.00 direct to the Seller.

Further, in reliance on the Seller's architect and agent, Mr. Doug Johnson, representing to Mr. Purba on or about July 30, 2018 that it would be very easy to get 2.37 FSR and 6 stories [sic] for the Property and that the Buyer could try to get a 4.0 FSR zoning, the Buyer paid two further deposits of \$250,000.00 each direct to the Seller.

[39] On December 3, 2018, Ms. Sarpal's counsel advised the plaintiff that she was still willing to complete the purchase of the Property if the plaintiff was able to provide the Property zoned at 2.37 FAR.

- [40] On December 20, 2018, Ms. Sarpal's counsel wrote to counsel for the plaintiff stating in part, "the Buyer's position is that the Contract referred to in your letter [of December 17, 2018] is rescinded, not terminated, and that the Seller is obligated to return the \$600,000 in deposits."
- [41] On January 8, 2019, the plaintiff filed its notice of civil claim.
- [42] On approximately January 28, 2019, the plaintiff received an offer for purchase of the Property from a third party. The offer of \$6.8 million was accepted, but conditions were not removed and that sale did not complete.
- [43] On February 5, 2019, the defendant filed her response to civil claim and a counterclaim.
- [44] On February 6, 2019, the defendant filed a CPL against title to the Property.
- [45] On February 27, 2019, the plaintiff filed an application to remove the defendant's CPL No. 7337302.
- [46] On March 19, 2019, the plaintiff and the defendant agreed to adjourn the plaintiff's application to cancel the CPL registered against title to the Property on the basis that the defendant would voluntarily discharge the CPL from title, without prejudice to the parties' rights under the Land Title Act, RSBC 1996, c. 250 (the "Application Adjournment Agreement").
- [47] Pursuant to the Application Adjournment Agreement, the defendant discharged the CPL from title to the Property and agreed not to register a new CPL without leave or consent.
- [48] On or about May 16, 2019, the plaintiff sold the Property to Cado Bankcorp Ltd. for a price of \$6.5 million.
- [49] Pursuant to the Application Adjournment Agreement, upon the sale of the Property and on condition of the defendant discharging the CPL from title to the Property, the plaintiff directed its conveyancing solicitor to transfer \$600,000 (the "Secured Funds") to the defendant's counsel, McQuarrie Hunter LLP, in trust.
- [50] The Secured Funds were subsequently paid in trust to McQuarrie Hunter LLP pursuant to the Application Adjournment Agreement. Of this, \$114,424.64 was released to the plaintiff, for a balance of \$485,575.36 remaining in trust exclusive of interest.
- [51] Between November 30, 2018 and May 21, 2019, the plaintiff paid \$60,192.63 in interest to Business Development Bank of Canada mortgage No. CA3436870.

Unilateral Mistake

- [52] The parties are in agreement that the elements of a unilateral mistake were set out by Mr. Justice Donald at para. 28 in 256593 B.C. Ltd. v. 456795 B.C. Ltd., 1999 BCCA 137 [256593 B.C. Ltd.]. They are (1) a mistake; (2) on a material term; (3) known actually or constructively by the non-mistaken party; and (4) an unconscionable result if the settlement agreement is enforced.
- [53] To that list, the plaintiff sought to add a requirement that there was no affirmation of the contract by the mistaken party, a proposition that the defendant disputes.

Discussion

- [54] There is no evidence, beyond the assertions of the defendant and her husband, that the agreed price of \$7 million for the Property was an error. The case thus falls to be determined on the credibility of the principal witnesses called at trial.
- [55] In *Bradshaw v. Stenner*, 2010 BCSC 1398, Madam Justice Dillon wrote:
- [186] ... The art of assessment [of credibility] involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (AB QB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

- (a) Was there a mistake on the part of the defendant?

- [56] The defendant gave evidence that her husband told her that he went to the City of Surrey Planning and Development counter in December 2017, and was told that he could only build a four-storey building on the Property. Mr. Purba gave evidence that on that occasion, the employee at the counter told him that the maximum FAR that would be allowed if the property was rezoned would be 1.5. For this reason, he said, they chose not to purchase the property at that time.
- [57] The defendant's evidence was that she was later mistaken that the City of Surrey would support an FAR of 2.37 or 2.5 with a six-storey structure on the Property, which induced her to make the \$7 million offer. She said her mistake was based upon what she was told by her husband.
- [58] The defendant argues that the circumstantial evidence from Mr. Kaintura, Mr. Garcha and Ms. Sarpal, the MLS listing, the provision of Mr. Johnson's preliminary design drawings, and what Mr. Gill said to Mr. Purba, are all more consistent with Mr. Purba being led to believe that the city planner was supporting a six-storey concept based on "2.0 something" FAR. She contends that it is inherently improbable Mr. Purba would be prepared to write a subject-free offer for \$7 million without a belief that a six-storey building could be constructed on the Property.
- [59] I find that the knowledge of Mr. Purba must also be attributed to the defendant, as he was her agent.
- [60] Mr. Purba was a realtor for ten years. At the time of trial, he was an assistant manager at Century 21 Coastal Realty. He was experienced in real estate transactions and familiar with real estate contracts and their standard terms. He gave evidence that it was his practice to read contracts carefully.
- [61] Mr. Purba gave evidence that Mr. Gill, the plaintiff's agent, told him that the City of Surrey planner for the area in which the Property was located was prepared to support an FAR of 2.37 or 2.5 with a six-storey structure on the Property, based upon architectural drawings prepared by Mr. Johnson. I do not accept that evidence.
- [62] Mr. Purba's evidence is not supported by the evidence of other witnesses. Mr. Gill denies ever representing to Mr. Purba that the City would support a six-storey building at 2.37 or 2.5 FAR, and no such representations were documented in writing throughout the evidentiary record.
- [63] Mr. Gill gave evidence that he met with Mr. Broersma with respect to the Property on two occasions, the first time being March of 2018. He said that he and Mr. Johnson met with Mr. Broersma, and it was clear that Mr. Broersma did not say he would support an FAR of either 2.5 or 2.37 and a six-storey building.

- [64] Mr. Gill gave evidence that he met with Mr. Broersma a second time, along with Mr. Johnson and an agent for another proposed purchaser (not the defendant or Mr. Purba), sometime in June of 2018. On this occasion, Mr. Gill said that Mr. Johnson again pressed for approval for a six-storey building, but that no one from the City said that they would support an FAR of 2.37 or 2.5 with six storeys.
- [65] Mr. Broersma gave evidence that at a June 19, 2018 meeting, which I find was the meeting that Mr. Gill recalled "sometime in June of 2018", he explained to Mr. Johnson and the seller's and buyer's representatives that the maximum permitted FAR for the Property was 1.0. He denied ever indicating to anyone that he would support an FAR above 1.5.
- [66] On June 25, 2018, Mr. Gill and Mr. Purba spoke by telephone. Mr. Purba gave evidence that Mr. Gill told him that the Property was a six-storey 2.5 FAR site, which Mr. Gill said he knew because he and the seller's architect had met with the city planner who said that he would support a 2.5 FAR as long as the development had childcare and rental units.
- [67] Mr. Gill and Mr. Purba met later that day at the Lovely Sweet Shop in Surrey to discuss the possible purchase of the Property. Mr. Purba said that at this meeting, Mr. Gill confirmed that the city planner had said that he would support an FAR of 2.5 so long as it had childcare and rental units.
- [68] Mr. Purba agreed that Mr. Gill told him that he had an outstanding offer for the purchase of the Property for \$8 million and could not accept another offer in those circumstances, but if that sale did not go through, he would try to get the Property for Mr. Purba for \$7 million if Mr. Purba made a "no subject" offer.
- [69] Mr. Gill denies Mr. Purba's version of events. It was Mr. Gill's evidence that he did not discuss the Property, its zoning or the FAR associated with it, or the number of storeys that the City of Surrey would permit on the Property during his phone call with Mr. Purba on June 25, 2018. He denied telling Mr. Purba that the City would support an FAR of 2.37 or 2.5 or a six-storey structure either on the telephone, or when he met with Mr. Purba later that day. He said what he did tell Mr. Purba was that Mr. Johnson was trying to get approval for a six-storey building, but the City was more supportive of a four-storey building.
- [70] Mr. Purba gave evidence that Mr. Gill called him on June 26, 2018 to tell him that the other sale had fallen through. Mr. Purba said that neither he nor his wife made any offer that day.
- [71] The defendant's evidence was that in July 2018, Mr. Purba told her that the plaintiff's real estate agent, Mr. Gill, told him that it was now possible to construct a six-storey building on the Property, and that he was thus interested in the Property again.

- [72] Mr. Purba agreed that he was concerned with the FAR and zoning of the Property. Despite those concerns, he said he only read the third paragraph of a lengthy three-page email from Mr. Johnson that addressed rezoning the Property, as the rest of the email did not concern him. I am hard pressed to accept that Mr. Purba could know what portion of that email would be of concern to him without reading the entire three pages.
- [73] I find that Mr. Purba's evidence is illogical. If the representations of FAR and storeys were of utmost importance to Mr. Purba and the defendant, they should have conducted at least some due diligence, attempted to negotiate some subject clauses in the contract of purchase and sale, or recorded their reliance on these representations regarding the Property's development potential in writing. None of this occurred.
- [74] According to Mr. Gill, Mr. Purba wanted to provide a subject-free offer on June 25th to get the best price. The defendant contends that Mr. Gill's version should not be believed. She argues that, if Mr. Purba had already been prepared to make the \$7 million no subjects offer on June 25th, it is highly improbable that Mr. Gill would have had to keep texting Mr. Purba from June 26th to July 10th to get an offer, and then have another meeting on July 12th where Mr. Gill was asked for preliminary design drawings from Mr. Saluja.
- [75] This argument ignores the rapidity with which the defendant's offer was made, some 10 minutes after the preliminary design drawings were sent by Mr. Saluja. It also ignores Mr. Purba's apparent disinterest in the content of the email exchange that included a July 3, 2018 email from Mr. Johnson, sent to Mr. Purba on July 25, 2018. Although the email post-dated the offer of July 17, 2018, it should have alerted Mr. Purba to the fact that approval for a six-storey 2.5 FAR was far from certain, and had not been agreed to by the City of Surrey.
- [76] At a minimum, the drawings and the email exchange would have compelled a buyer with the concerns professed to be held by Mr. Purba to make further inquiries, but he did not do so. I conclude that Mr. Purba intended to proceed with the offer the defendant made on July 17, 2018 regardless of whether the FAR and the number of storeys he wished to construct on the Property in fact enjoyed the support of the city planners.
- [77] While the defendant could not recall receiving advice from Mr. Kaintura to purchase the Property through a corporate entity, or to include a condition to allow her time to exercise due diligence to investigate the Property, Mr. Purba did recall receiving such advice from Mr. Kaintura.
- [78] Despite being concerned with the FAR and zoning for the Property, Mr. Purba only once had a discussion with a City Hall representative prior to the defendant signing the July 17, 2018 contract. The planner's evidence was that it could take days or weeks to set up a meeting, depending on schedules.

- [79] According to Mr. Purba's version of events, there was no reason to set up a city planner meeting after July 10, 2018. By that time, he said, he was agreeing to a no subjects offer, and he believed it would take weeks to set up a city planner meeting, despite the fact that he was able to simply walk into City Hall in December of 2017 and find out about the maximum FAR potential.
- [80] The defendant's argument is also difficult to reconcile with Mr. Purba's evidence that on July 30, 2018, he met alone with Mr. Johnson, who told him that the city planner would support an FAR of 2.37. If Mr. Purba was relying on Mr. Gill's advice, it would have been unnecessary to meet with Mr. Johnson.
- [81] The defendant says that Mr. Gill had a reason to misstate or mislead Mr. Purba, whether intentionally or not. That is that the plaintiff had three previous contracts lapse due to failure to remove subjects, and Mr. Gill stood to share in over \$149,000 in commission with Mr. Saluja on a \$7 million sale. I accept Mr. Gill's denial of this allegation and reject the defendant's submission.
- [82] I conclude that Ms. Sarpal took little, if any interest in the purchase of the Property, and that she was prepared to blindly accept whatever Mr. Purba told her. She allowed him to make any decisions that he chose to make with respect to the purchase of the Property, without questioning those decisions. I do not accept her evidence that Mr. Purba discussed the FAR for the Property with her. I am prepared to accept that he told her that he wished to build a six-storey structure on the Property, but not that he had the approval of the City of Surrey to do so.
- [83] I have concluded that the defendant reached no conclusion about the likelihood that the city planner would support an FAR of 2.37 or 2.5 with a six-storey structure on the Property. I find that she permitted her designated agent, Mr. Purba, to handle all steps to acquire the Property, and that he was under no mistake about either the permitted FAR for the Property, or the number of storeys that could be built with the permitted FAR.
- (b) If there was a mistake on the part of the defendant, was it with respect to a material term of the contract of purchase and sale?
- [84] The defendant's position is that the purchase price for the Property was a material term of the contract. She argues the price and the contract itself were based upon her misunderstanding from her husband about the FAR and number of storeys that would be permitted on the Property.
- [85] The plaintiff contends, and I agree, that even if a 2.5 FAR and a six-storey building were not possible, the \$7 million price was not an error.

- [86] The valuation by the defendant's expert, Mr. Terry Douglas Dowle, of \$7 million was in line with fair market value of the Property on July 17, 2018. The \$7 million price was also in accordance with Mr. Purba's previous offers made through Pure Land, and with other third party offers made during the listing period.
- [87] Mr. Dowle confirmed by December 13, 2017, the rising real estate market would have meant that the \$7 million offer was relatively lower than the earlier offer at \$6.8 million. The Property ultimately sold for \$6.5 million, which is closer to the price in the July 17, 2018 contract than the \$5.5 million price proffered by the defendant in her counsel's November 30, 2018 letter.
- [88] I find that neither her understanding of the permitted FAR nor the number of permissible storeys for the Property were communicated by Ms. Sarpal or her husband to the plaintiff, and were not material terms of the contract of purchase and sale.
- (c) If there was a mistake on the part of the defendant, was it actually or constructively known by the plaintiff?
- [89] There is no evidence of actual knowledge by the plaintiff or its agents that the defendant was paying \$7 million only because she thought the Property could be re-zoned to 2.5 FAR for a six-storey structure.
- [90] Mr. Purba and Ms. Sarpal both provided lengthy oral testimony during this trial, but nowhere in their testimony did either state that they orally informed the plaintiff's agents that the defendant was only offering \$7 million because of a representation that the City would support an FAR of 2.5 and a six-storey building.
- [91] The plaintiff says that it is unreasonable to expect that its agents knew of the defendant's alleged mistake, as the price the defendant offered was in line with fair market value, and previous offers made by third-parties, including Pure Land.
- [92] Mr. Purba gave evidence of a discussion with Mr. Gill wherein he advised Mr. Gill that with the presumably supported plan, the purchase of the Property for \$7 million was a good deal, and that Mr. Gill agreed with that view. While there was no evidence that this was the defendant's only motivation to offer \$7 million for the Property, it is open to me to draw the inference that this motivation was known, or could have been known to the plaintiff.
- [93] Mr. Purba gave evidence that the plaintiff's co-real estate agent Mr. Saluja expressed the view on July 17, 2018 (when the agreement for sale and purchase was signed by the defendant) that the Property was a good one and that after rezoning the defendant would be able to build six storeys, and that Mr. Saluja offered to participate in the development with the defendant. Ms. Sarpal also gave evidence that at the July 17, 2018 meeting, Mr. Saluja said that the sale was such a good deal that he wanted a part of the purchase. Mr. Gill denied that any such comment was made by Mr. Saluja.

[94] As I have explained above, I do not believe Mr. Purba's evidence of his dealings with Mr. Gill. In the circumstances, I do not accept that the defendant's alleged misunderstanding was either actually or constructively known to the plaintiff or its agents.

(d) If there was a mistake on the part of the defendant, will there be an unconscionable result if the contract of sale and purchase is enforced?

[95] In *Fraser v. Houston*, 2006 BCCA 66, Mr. Justice Lowry explained:

31 Where rectification of a document is sought because there has been a unilateral mistake made with respect to a particular term of a transaction, it can never be said that there was a common intention with respect to that term that continued until the document was executed. Indeed, the clear effect of rectifying a document where there has been a unilateral mistake is to impose on the non-mistaken party an agreement that, at least at the time the document was executed, that party did not intend to make. Rectification in this context is employed where the parties were, at least at that time, clearly not *ad idem*. It enables a party to overcome its own mistake by having the court impose on another an agreement the other did not intend to have to perform. The remedy is, for this reason, quite drastic in nature, as recognized most recently by the English Court of Appeal in *George Wimpey UK Ltd. v. V.I. Construction Ltd.*, [2005] EWCA Civ 77 [Wimpey] per Blackburne J. at para. 75.

32 However, the mistake of one party to an agreement cannot, of itself, constitute a basis for equitable relief

33 Thus, something more than a mistake on the part of one party is required before equitable relief can be employed.

36 However, what a person actually knew is not always easily proven, particularly where there is a high standard of proof, and the position with respect to constructive knowledge is much less clear. In *Performance Industries*, at para. 31, Binnie J. did say that what is essential to rectification based on a unilateral mistake is that, at the time of execution of the written document, the non-mistaken party "knew or ought to have known" of the error. But he also said that the attempt of the former to take advantage of the error by relying on the written document must amount to "fraud or the equivalent of fraud", being what in the cases is said to be equitable fraud.

[96] In *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*, 2000 BCCA 105 at para. 142, Madam Justice Southin expressed the view that a question of unconscionability is not to be determined on what someone ought to have known, but on what that person did know.

[97] I have rejected the defendant's contention that Mr. Gill was aware of Mr. Purba's allegedly mistaken understanding that the city planner would support a development of a six-storey building with an FAR of 2.37. In the result, I also reject the defendant's assertion that the plaintiff would be taking advantage of the defendant's mistake by insisting on the contract's enforcement.

[98] I accept that on July 17, 2018, the agreed purchase price was within the range of fair market value, and that the enforcement of the contract of purchase and sale will not create an unconscionable result.

(e) Affirmation of the Contract

[99] I consider this issue, if proven, to be a defence to the defendant's claim of unilateral mistake, rather than an additional component of the test articulated by Donald J.A. in 256593 B.C. Ltd.

[100] In *Yourside Club Consulting Solution Ltd. v. Exfone Exchange Inc.*, 2006 BCSC 862, Mr. Justice Maczko wrote:

31 The law on affirmation is quite clear. Once a plaintiff knows the facts of a misrepresentation, he will lose his right to rescind if he does any act which is inconsistent with the intention to rescind the contract. Chitty on Contracts, Twenty-ninth Edition, volume 1 at page 491 describes it as follows:

If the representee, having discovered the misrepresentation, either expressly declares his intention to proceed with the contract, or does some act inconsistent with an intention to rescind the contract, he is bound by his affirmation

[101] In *Kupchak et al. v. Dayson Holdings Co. Ltd. et al.*; *Dayson Holdings Co. Ltd. v. Palms Motel Ltd.*, 53 D.L.R. (2d) 482, [1965] B.C.J. No. 153 at para. 21, Mr. Justice Davey, as he then was, adopted the following passage from Halsbury's Laws of England (3rd ed.), vol. 26, pages 884-5:

1643. Affirmation of contract. A fourth defence is that the representee has elected to affirm the contract. It follows, from what has already been stated, that if, after discovery of the whole of the material facts giving him a right to avoid the contract, the representee has, by word or act, definitely elected to adhere to it, the representor has a complete defence to any proceedings for rescission. The acts and conduct relied upon as evincing the representee's affirmance must be such as are more consistent, on a reasonable view of them, with that than with any other theory. It is not sufficient to point to acts of a neutral character, or acts which are equally consistent with a possible ultimate intention to disaffirm, or with a mere suspension of judgment.

[102] The plaintiff argues the defendant affirmed the contract in writing and through her conduct once she became aware of the alleged unilateral mistake. Instead of immediately communicating her intention to no longer be bound by the contract, the defendant sought to (i) assign the contract, (ii) obtain an extension to find another third-party to assign the contract to, and (iii) to seek specific performance (and damages in lieu of) to complete the sale at a reduced price or the same price if guarantees could be met.

[103] The defendant argues that this is not an innocent misrepresentation case, where generally speaking the representee must disavow immediately.

[104] 478649 Ontario Ltd. (c.o.b. Green Acre Estates) v. Corcoran, [1996] O.J. No. 1779; 63 A.C.W.S. (3d) 744 (ONCJ) [Green Acres cited to O.J.], aff'd [1997] O.J. No. 4852, 75 A.C.W.S. (3d) 764 (ONCA), is similar to the case before me. In Green Acres, the plaintiff purchased 10 acres of rural land at a price of \$4.8 million. It alleged there was a misrepresentation that the Property could be commercially developed as a shopping centre with a septic tank system for sewage while, in reality, environmental regulatory requirements severely restricted the nature of any development. Mr. Justice Cumming allowed the defendants' motions for summary judgment on the basis that there was no genuine issue for trial. He found that the plaintiff could not have reasonably relied on the misrepresentation, and, further, that the plaintiff had affirmed the transactions.

[105] In Green Acres, Cumming J. discussed the principles that apply to contractual obligations:

33 The essence of contractual obligations is that reasonable expectations created by the contract are entitled to protection. When one signs an agreement, the other party relies upon that signature as manifesting assent to the contents of the agreement and the reasonable meaning of the words employed therein [see generally Waddams, *The Law of Contracts*, 3rd ed. (Toronto: Canada Law Book Inc., 1993) at paras. 208, 209]. The relying party is entitled to have his/her expectation interest, created through the contract, realized.

34 Therefore, mistake on the part of one party alone does not in itself give that party relief from the obligations into which it entered.

35 In an exchange transaction there is an allocation and assumption of risks which is inherent to the reasonable expectations which are created. For example, if S agrees to supply goods to P at a fixed price at a particular place at a future date, any unexpected increase in the cost of delivery is borne by S. For example, if demand for the goods drives up the price for that type of goods in the marketplace in the interim before delivery, then P gets the benefit of the fixed price of the contract.

36 The doctrines of mistake, frustration, unconscionability and misrepresentation all address exceptional situations where reasonable expectations created by the contract would be defeated by enforcing the contract.

[106] In Green Acres, like Mr. Kaintura did in this case, the plaintiff's solicitor had advised the purchaser, prior to signing the agreement of purchase and sale, that the agreement should be made conditional upon the purchaser receiving the necessary regulatory approvals required to develop the site.

[107] As in Green Acres, the contract of purchase and sale here had no subject clause or representation and warranty clause relating to the representation of Mr. Gill that the defendant and Mr. Purba say they relied upon, nor did the defendant or Mr. Purba investigate or conduct any due diligence of those representations.

[108] In *Green Acres*, Cumming J. also dealt with the affirmation of the contract in that case, writing:

53 A party which alleges misrepresentation, but which has affirmed the transaction induced by the alleged misrepresentation either verbally or through conduct, cannot then seek to set aside the transaction: *Hinchey v. Gonda*, [1955] O.W.N. 125 at 128-129 (H.C.J.). Similarly, a purchaser who discovers an alleged mistake fundamental to its contract with a vendor, and who elects orally, in writing or by conduct to affirm the contract, is barred from rescission and cannot refuse to specifically perform the contract on the ground of such mistake. Possession and payment are unequivocal acts and are consistent only with an election to affirm the contract. Such an election, once made, is irrevocable: *DiCatri*, *The Law of Vendor and Purchaser*, 3rd edition (1988) at p. 8-6.

54 In the present case, the plaintiff has affirmed the transactions. The purchaser had possession of the property from March 6, 1989, and made mortgage payments to September 6, 1990. In my view, the lapse of time constitutes affirmation. Therefore, even if there otherwise was an operative misrepresentation or mistake (and I find there is not), I would find that the plaintiff is unable to pursue its claim because of its affirmation of the agreement.

[109] The case at bar is remarkably similar to *Green Acres*. The defendant's agent, Mr. Purba, was the driving force behind the contract. In his evidence Mr. Purba admitted to being experienced in real estate and land acquisition and further described himself as a "smart guy".

[110] Mr. Purba gave evidence that after the November 8, 2018 meeting, he tried to sell the Property for the same price that his wife had agreed to pay, to his friend "Amin", a developer who Mr. Purba knew was planning to build a hotel. Mr. Purba said in his evidence that Amin told him that he would be unable to act as quickly as the existing completion date required. As a result, on November 22, 2018, Mr. Purba sought an extension to buy time. He gave evidence that he did not confront Mr. Gill about the advice that Mr. Broersma had given him because he felt that Mr. Gill might not be able to get him an extension if he did so.

[111] The defendant argues that Mr. Purba's conduct in trying to find another buyer and requesting to change the completion date after the revelation that occurred on November 8, 2018 was conduct "equally consistent with a possible ultimate intention to disaffirm" as it was with an intention to affirm. I find this submission unpersuasive, and reject it.

[112] While Mr. Purba's evidence was that he sought to change the completion date initially, and when that was refused he sought counsel, the defendant's conduct thereafter does not support this argument.

[113] Ms. Sarpal gave evidence that upon her return from India on November 28, 2018, her husband told her that they had been cheated and that they could not build a six-storey building on the Property. Ms. Sarpal said that she was shocked to learn this.

[114] It was not until her counsel's letter of November 30, 2018, that the defendant asserted that:

- (a) The Defendant had sufficient funds to complete the transaction;
- (b) That the sale of the Property was subject to the Contract and an oral agreement between Mr. Purba and Mr. Gill that the city would support the re-zoning of the Property at 2.37 FAR and six-stories [sic].
- (c) That it had been misled by the Plaintiff's agents as to the possibility of developing a six-storey structure at 2.37 FAR on the Property and that the Defendant had relied on these misrepresentations;
- (d) That the Defendant was seeking specific performance to complete the Contract at a reduced price of \$5.5 million that better reflected the value of the property at 1.5 FAR;
- (e) That the Defendant would be willing to complete at the price of \$7 million if the Plaintiff could ensure the Property is zoned for 2.37 FAR for a six-storey mixed commercial and residential building; and
- (f) That if the seller were not able to guarantee City support for development at six-stories [sic] and 2.37 FAR, and if the Plaintiff was not willing to accept a purchase price of \$5.5 million, then the Defendant would initiate legal proceedings to enforce the Contract and the alleged oral contract.

[115] After November 30, 2018, the defendant took the position that she was attempting to either assert a different contract based on the misrepresentations alleged, or to complete the contract of sale and purchase at a lower price."

[116] I have concluded that the defendant was not mistaken as to the development potential of the Property. Even if there had been a unilateral mistake, I would find that the contract of purchase and sale for the Property was affirmed by the conduct of the defendant and her husband after they purported to have learned that the FAR and number of storeys they wished to build would not be approved.

Remedy

[117] I find that the plaintiff is entitled to damages for the defendant's breach of the contract of purchase and sale for the Property.

[118] In *Tang v. Zhang*, 2013 BCCA 52, at para. 30, Madam Justice Newbury, for the Court, set out what she described as general principles applicable to deposits made for the purchase of property. The fifth principle identified is as follows:

5. A contractual term that a deposit will be forfeited "on account of damages" on the buyer's failure to complete does not alter the nature of a deposit, but may be construed to mean that if damages are proven, the deposit will be applied against ("on account of") them. If no damages are shown, the deposit is nevertheless forfeitable, subject always to the expression of a contrary intention.
- [119] Here, the difference between the contract sale price and the ultimate sale price was \$500,000. The plaintiff has limited its claim to the deposit funds, currently held by counsel for the defendant, in trust; that is, \$600,000 less payments already made to the plaintiff, for a net figure of \$485,575.36 plus interest.
- [120] I find that the damages to be paid by the defendant to the plaintiff is the amount of \$485,575.36 held in trust, together with interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.
- [121] The parties are granted liberty to file written submissions as to costs. Should they choose to do so, the plaintiff must file and serve its submissions on or before the expiry of two weeks from the date of these reasons for judgment. The defendant is granted liberty to file responsive submissions within two weeks following receipt of the plaintiff's submissions, and the plaintiff will then have one week from the receipt of the defendant's submissions to file a reply, if necessary.

"The Honourable Chief Justice Hinkson"

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Prepared on 28 October 2026 · Esheria