CANADA / JUDGMENT

1261682 B.C. Ltd. v. 617436 B.C. Ltd.

2022 BCSC 927

COURT
Supreme Court of British Columbia

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2022 BCSC 927 1261682 B.C. Ltd. v. 617436 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1261682 B.C. Ltd. v. 617436 B.C. Ltd.,

2022 BCSC 927

Date: 20220218

Docket: S219925

Registry: Vancouver

Between:

1261682 B.C. Ltd.

Plaintiff

And:

617436 B.C. Ltd., Jaswant Kaur Virk, RE/MAX Commercial Advantage, 411824 British Columbia Ltd. and Canada Road Holdings Ltd.

Defendants

And

1261682 B.C. Ltd., 411824 British Columbia Ltd. and 617436 B.C. Ltd.

Defendants by Way of Counterclaim

Before: The Honourable Justice Winteringham

Oral Reasons for Judgment

(re Summary Determination of Priority of Competing Assignments)

In Chambers

(Hearing proceeded via videoconference)

Counsel for the Plaintiff:

J.R. Pollard

Counsel for Defendant, 411824 British Columbia Ltd.:

G.T. Palm

Counsel for Defendants, 617436 B.C. Ltd. and RE/MAX Commercial Advantage:

J.A. Dawson

Counsel for Defendant, Canada Road Holdings Ltd.:

D.T. Eleff

Place and Date of Hearing:

Vancouver, B.C.

February 9-10 and 17, 2022

Place and Date of Ruling:

Vancouver, B.C.

February 18, 2022

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[1] THE COURT: These are oral reasons. If a transcript is ordered, these reasons will be edited to include the full case passages and citations referred to during the reasons. I have also referred to the evidence that is found in the affidavits that were filed, and the transcript will include full portions of the affidavits to which I refer in these oral reasons. The transcript will also be edited for grammar, but any editing will not change the decision or the reasons for it.

I. Overview

[2] This is a dispute about whether the Court should summarily determine priority over competing assignment agreements. There is a looming completion date for the sale of a property in Surrey, BC that is valued at about $18.5 million. The parties are connected to the trucking and transportation industry, and the two parties holding assignments seek a location to park their commercial trucks. Both want the property. The seller does not take a side but urges the Court to make the determination so that a sale can complete.

II. Notices of Application

[3] There are two applications before me. I will describe each.

[4] First, the plaintiff filed a notice of application on January 24, 2022 seeking a declaration that the executed assignment agreement entered into by the plaintiff and 617436 B.C. Ltd. ("617") dated October 18, 2021 (the "126 Assignment") has priority over the assignment agreement entered into between Canada Road Holdings Ltd. ("Canada Road") and 617 dated August 28, 2021 ("Canada Road Assignment").

[5] The plaintiff's application was brought pursuant to R. 9-7(5) of the Supreme Court Civil Rules.

[6] Second, in its amended notice of application, Canada Road seeks a declaration that the Canada Road Assignment has priority over the 126 Assignment. At the hearing, Canada Road, without objection from the plaintiff, restated the relief it seeks to be this:

A declaration that Canada Road is entitled to purchase the property at 12160 - 103A Avenue in Surrey from the defendant 411.

[7] Canada Road's application is brought pursuant to R. 9-7(5). Canada Road focused their submissions on a narrower issue than that sought by the plaintiff. This distinction is relevant because of the position taken by the parties on the cross-application.

III. The Parties' Positions

[8] The plaintiff takes the position that judgment can be granted on the evidentiary record that has been presented here. The plaintiff submits:

a) the principle of nemo dat does not apply;

b) the rule in Dearle v. Hall (1828), 3 Russ. 1, 38 E.R. 475, does apply in BC and that the exception to the rule in Dearle is not engaged;

c) the plaintiff was first in time; and

d) based on analysis of these legal principles and the court's equitable jurisdiction, the court should declare that the 126 Assignment has priority over the Canada Road Assignment.

[9] Despite the defendants' objections, the plaintiff says the evidentiary record presented is sufficient for it to satisfy its burden that the 126 Assignment is entitled to priority and any conflicts in the evidence can be resolved in the plaintiff's favour.

[10] In response to the Canada Road application, the plaintiff submits that it should be dismissed stating that Canada Road has not established that 126 repudiated the 126 Assignment.

[11] Canada Road takes the position that the plaintiff's claim is not suitable for summary trial disposition. At the same time, Canada Road takes the position that it seeks narrow declaratory relief that can be granted on the evidentiary record presented because there is not the same conflict in the evidence that would prevent the court from determining the issue. In particular, Canada Road submits that the principle of "no one can give what they do not have" (nemo dat) and/or repudiation apply to the dispute and determination can be made under either of those legal doctrines.

[12] 617 adopts much of Canada Road's submission with respect to suitability of the plaintiff's claim and supports the relief sought by Canada Road.

[13] 411824 British Columbia Ltd. ("411"), the actual vendor of the property, did not side with either party. Rather, 411 encouraged the Court to make a determination one way or another so that they could proceed with the sale of the property. 411 reminded all to "keep their eye on the prize" as the various issues were advanced and disputed by the parties.

IV. Background Facts

[14] I wish to provide an overview of the evidence that was presented as well as a brief chronology regarding the litigation.

[15] 126 is a company made up of four directors and was incorporated to acquire land for Hap Enterprises Ltd., a transportation and logistics business owned and operated by four partners:

a) Harpal Singh Bagri;

b) Amritpal Singh Bagri;

c) Pritpal Singh Brar; and

d) Harcharan Singh Gill.

[16] Since Harpal Bagri and Amritpal Bagri share the same surname, I will refer to them by their first name where applicable. This is for ease of reference and meaning no disrespect.

[17] Hap Enterprises owns commercial trucks and trailers used in the transportation and logistics business.

[18] Mr. Gill tendered an affidavit and described 126's involvement with Jatinder Kang. Mr. Gill deposed that he knows Mr. Kang through his involvement in the trucking industry and provided a brief description of his business relationship with Mr. Kang. Mr. Gill deposed that Mr. Kang was aware that Hap Enterprises was looking to purchase a property to help store and park their trucks.

[19] In their written submissions, the plaintiff stated that Mr. Kang "knows a large network of people involved in the truck industry," including Davinder Kandola, the sole director of Canada Road, and Sukhminder Pandher, described by the plaintiff to be an unlicensed real estate broker who was involved in the assignment of the contract to the plaintiff. The plaintiff also stated that Mr. Pandher had direct dealings with Inderjit Singh Virk, a director of 617 and now deceased.

[20] The parties presented affidavits from: Mr. Gill; Mr. Kang; Mr. Pandher; Mr. Kandola; Dilraj Virk, a legal assistant with correspondence and documents attached; and, lawyers discribing certain steps teken.

[21] Mr. Virk is the litigation representative, and he also presented an affidavit.

[22] The dispute relates to a contract of purchase and sale for property located at 103A Avenue, Surrey, BC (the "103A Property"). The contract has 411 as its seller and Greatlink Express as the buyer. They are the original parties to the contract. The sale price was $15 million and the contract was dated May 20, 2021. Addenda to the contract of purchase and sale substituted 617 as the buyer and confirmed a completion date of December 20, 2021.

A. 102 Property

[23] In late September 2021, Mr. Kang had a discussion with another one of the Hap Enterprises partners about a potential property located at 12111-102 Avenue, Surrey, BC (the "102 Property"). Mr. Gill learned that the 102 Property was already under contract but was told that the purchaser was willing to assign the contract. Mr. Kang provided Mr. Gill with a copy of an assignment agreement for the 102 Property. However, Mr. Gill learned that the 102 Property did not have a driveway and that the City of Surrey was unlikely to grant permission for the construction of such driveway that would make the property accessible by commercial trucks and trailers. It was thus not suitable for use as required by 126.

[24] Mr. Kang and Mr. Pandher both had a role to play in the dealings with the 102 Property. Mr. Kang described his relationship with Mr. Pandher stating that they had known one another for about 14 years. Mr. Kang was cross-examined on his affidavit and described some of the dealings he had with Mr. Pandher regarding the sale of property generally, including one

commercial transaction. Mr. Kang deposed that Mr. Pandher told him that he had a property tied up, and he wanted to assign the purchase contract. This was the 102 Property. Mr. Kang says that this is when he offered to act as the broker for the Hap Enterprises partners because he knew they were looking for a property. Mr. Kang described communications he had with Amritpal about the 102 Property. He also stated that if the transaction completed, Mr. Pandher and he would share a $200,000 assignment fee.

[25] As I have stated, the transaction regarding the 102 Property did not advance.

B. 103A Property

[26] The parties' attention then moved to the 103A Property.

[27] I turn to a summary of the events leading to the signing of the 126 Assignment.

[28] There is some evidence that Mr. Pandher told Mr. Kang that Mr. Virk senior was the owner of the 102 Property and he wanted to sell it to raise funds to buy the 103A Property. Mr. Pandher and Mr. Kang talked about the 103A Property.

[29] Mr. Kang believed that the 103A Property would be suitable for the Hap Enterprises partners, but in September 2021 Mr. Kandola told Mr. Kang that he had purchased the 103A Property from Mr. Virk.

[30] I will address those events now.

[31] Mr. Kandola deposed that Canada Road was set up to acquire land for Mr. Kandola's main business, Canada Road Carrier Ltd. Canada Road Carrier is a trucking, transportations and logistics business that owns commercial trucks and trailers. Canada Road Carrier had been parking their trucks on Mr. Kandola's farm property, but the City of Surrey was demanding that the trucks be moved. As such, Mr. Kandola was seeking to find property to park his trucks. In August 2021, he learned that Mr. Virk senior may be seeking to sell the 103A Property. Mr. Kandola knew Mr. Virk. In or about August, Mr. Kandola and others went to Mr. Virk's home to discuss the sale of the 103A Property, and Mr. Virk told them that he would be willing to sell for $18.5 million.

[32] As a result of his interaction with Mr. Virk senior, Canada Road entered into the assignment of interest in contract of purchase and sale from the assignor, 617, to purchase the 103A Property.

[33] Mr. Kandola deposed that he spoke to Mr. Kang either on August 29, August 31, September 14 or September 20, 2021 and informed Mr. Kang that Canada Road was purchasing the 103A Property by way of the assignment agreement.

[34] I also note that Mr. Kandola provided evidence about Canada Road's solvency. He deposed that he did not tell Mr. Kang or anyone else that Canada Road was unable to secure financing to purchase the 103A Property.

[35] On October 18, 2021, Mr. Kang told Mr. Kandola about this conversation he had with Mr. Kandola. Mr. Kandola told Mr. Kang that he would speak to Mr. Virk about it. Later that same day, Mr. Kandola called Mr. Kang and told him that in his conversation with Mr. Virk, Mr. Virk had advised Mr. Pandher that:

a) he had not sold the 103A Property to Mr. Kandola;

b) the 103A Property was still available; and

c) he would sell the 103A Property for $18.5 million, including a fee of $1 million that he would pay to Mr. Pandher for arranging the deal.

[36] On October 18, 2021, Mr. Kang told Amritpal about the 103A Property. The Hap Enterprises partners met with him to discuss it, and Mr. Kang provided certain details to the partners about the 103A Property, including the purchase price of $18.5 million and that the purchase needed to proceed quickly because the seller was leaving Canada for a trip to India.

[37] Mr. Gill deposed that the Hap Enterprises partners agreed to purchase the 103A Property and instructed Mr. Kang to organize the assignment. On that same day (October 18, 2021), Mr. Kang and Mr. Kandola organized the 126 Assignment agreement, and Mr. Kang gave the contract to Mr. Pandher to have 617 sign it.

[38] During the same evening, Mr. Kandola went to Mr. Virk's house, and Mr. and Ms. Virk ultimately signed the 126 Assignment agreement.

[39] There is a dispute in the evidence about what occurred at the Virks' residence that evening.

[40] Indeed, there is a significant disagreement between the parties about the events of October 18, 2021, including whether Mr. Pandher attended at the Virks' residence as agent for the plaintiffs. The plaintiff says he did not. I will come back to this point.

[41] The 126 Assignment contains express representations that:

a) 617 had not previously assigned the contract; and

b) 617 had the full power and authority to assign the contract to 126.

[42] On October 19, 2021, Mr. Kang sent an email from Mr. Pandher attaching the signed 126 Assignment to Amritpal. The plaintiffs say that none of the Hap Enterprises partners knew who Mr. Pandher was at this time.

[43] On October 19, 2021, the Hap Enterprises partners reviewed the lease for the 103A Property. They instructed counsel to send a letter to 617 removing the subject conditions in the 126 Assignment and to pay the required deposit. The Hap Enterprises partners provided their law firm with two bank drafts, one in the amount of $200,000 and the second in the amount of $300,000, for the first two payments required under the 126 Assignment.

[44] On October 20, 2021, the solicitors for the plaintiff deposited the two bank drafts ($200,000 and $300,000) into the trust account of KS Lawyers, the solicitors for 617 and advised that the plaintiff waived the subject conditions in the 126 Assignment.

[45] The plaintiff described the subsequent events that followed:

a) On October 21, 2021, the solicitors for the plaintiff wrote to RE/MAX Commercial Advantage seeking confirmation that RE/MAX now held the $300,000 deposit paid to it by 617 pursuant to the contract for the benefit of the plaintiff;

b) On October 23, 2021, Mr. Pandher told Mr. Kang that Mr. Virk senior may have previously assigned the purchase contract for the 103A Property;

c) On October 23, 2021, Mr. Kang told Amritpal that Mr. Virk already sold the 103A Property before he sold it to 126.

[46] The plaintiff states that this was the first time that any of the Hap Enterprises partners discovered that 617 may have entered into another assignment agreement for the 103A Property.

[47] On October 28, 2021, Gaurav Parmar of LK Law emailed Simran Randhawa, of KS Lawyers, to follow up on his letter dated October 20, 2021 and to ask for confirmation that the second deposit under the 126 Assignment was due on November 9, 2021. Mr. Randhawa replied to Mr. Parmar that day advising that his office has not prepared the 126 Assignment and that he needed to "discuss and seek instructions of the contents of the email with his client and he would get back to him on this accordingly."

[48] On November 2, 2021, Bridgehouse Law wrote to Mr. Parmar to advise that they had been retained by 617 in relation to the sale of the 103A Property.

[49] On November 3, 2021, Mr. Parmar emailed Mr. Randhawa to ask whether the $500,000 in deposits due to 617 under the 126 Assignment on October 20, 2021 had been released to 617. Mr. Randhawa responded to advise that his firm still held the $500,000 in trust.

[50] On November 8, 2021, Mr. Pollard emailed Mr. Dawson advising that LK Law had $500,000 in trust for the payment of the second deposit due under the 126 Assignment and requesting that Mr. Dawson call him in the morning to discuss Mr. Dawson's receipt of that payment.

[51] Mr. Dawson responded to Mr. Pollard at 11:08 a.m. on November 9, 2021, and advised that "the person at [617] with whom I was dealing passed away unexpectedly this weekend. I need to confirm instructions and get back to you once I have them."

[52] At this point in time the plaintiff summarized the position of 126 as follows.

[53] First, 126 had been advised after entering into the 126 Assignment that the contract may have been previously assigned contrary to express representations and warranties in the 126 Assignment. Second, that RE/MAX (617's real estate agent) had not responded to LK Law's October 21, 2021 letter to confirm that it held the $300,000 deposit under the contract for the

benefit of the plaintiff. Third, that 126 was advised that the person giving instructions had died over the weekend (November 6-7, 2021); and that the conveyancing solicitors for 617 had received the first deposits due under the 126 Assignment.

[54] On November 9, 2021, LK Law tendered payments of the second $500,000 to Mr. Dawson in trust on undertakings not to release the funds to 617 until he provided a written acknowledgment signed by 617 confirming:

a) that 617 intended to proceed with the assignment of its interest in the contract of the plaintiff; and

b) that the representations and warranties contained in the 126 Assignment were true and correct as of November 9, 2021.

[55] On November 12, 2021, Mr. Dawson wrote to Mr. Parmar and advised that 126 had repudiated the 126 Assignment by not paying the deposit funds to 617 "directly" and by imposing conditions.

[56] This action was commenced on November 15, 2021.

[57] After the action commenced, the parties wrote to the Chief Justice of the BC Supreme Court and to the senior scheduler requesting an early hearing date for a summary trial so that the issues could be determined in light of the imminent closing date. Their request was granted, and a summary trial was scheduled for three days commencing February 9, 2022.

[58] The parties readied themselves for the hearing, conducted a cross-examination of Mr. Kang, presented affidavits and many, many authorities in support of the various positions.

[59] The hearing of the notices of application occurred over four days. I granted 617 an adjournment in light of amendments that had been made by the plaintiff to the pleadings, including the addition of Mr. Virk junior.

[60] When we resumed the hearing yesterday, I dismissed the plaintiff's application to tender additional affidavits from three of the four directors. That application was dismissed because I was not satisfied that the interests of justice could be served in the circumstances. That is, the parties had prepared their positions based on a particular record that would be quite significantly altered should new evidence be presented. I was of the view that any prejudice could not be cured by an adjournment because of the proclaimed urgency of the application, the status of the hearing and the positions taken by the parties.

[61] I also note that 411 had earlier extended the closing date on the sale of the 103A Property to February 28, 2022, and there was no indication that the closing date would be extended further.

V. Legal Framework

[62] The plaintiff seeks judgment by way of summary trial brought pursuant to R. 9-7.

[63] Canada Road seeks declaratory relief and similarly brings their application pursuant to R. 9-7.

[64] A threshold issue on any such application is whether the matter is suitable for summary determination.

[65] In terms of suitability, the critical question facing the court is whether it can find the facts necessary to decide the disputed issues. Even where the court can find the necessary facts, it must still consider whether it would be just to decide the matter summarily by reference to factors such as the amount involved, the complexity of the matter, its urgency, any prejudice that might arise by reason of the delay, the cost of taking the matter forward to a convention trial, the course of the proceedings and any other matters which arise for consideration. See Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 C.P.C. (2d) 199 (B.C.C.A.).

[66] Conflicts in the evidence do not necessarily mean that a matter is not suitable for summary trial if there is other admissible evidence upon which the court can find the necessary facts: Inspiration Management at 26.

[67] In a summary trial, the court has discretion on such an application to give judgment or to adjourn or dismiss the application on the ground that the issues raised by it are not suitable for disposition under the rule or it will not assist in the efficient resolution of the proceedings.

[68] The predecessor rule, R. 18A, has been used extensively for decades in this province, and the principles are well known (as set out in Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202 at 215 (C.A.)) and not contested in this application.

[69] There is no question that R. 9-7 may shorten litigation and reduce cost and delay.

[70] However, not all matters are suitable for summary trial as contemplated by sub-rule (11).

[71] The factors to consider as to whether a summary trial is suitable were summarized by Justice Masuhara in RC Hotel Ventures Ltd. v. Meristar Sub 2C, L.L.C., 2008 BCSC 918. I refer to para. 13, which reads as follows:

[13] There are various factors in the authorities that have been considered as to whether a summary trial is suitable. They include:

(a) A court should be reluctant to decide isolated issues in the absence of a full factual matrix and should not decide issues on the basis of assumed facts.

(b) While the court may in certain circumstances resolve issues and find facts in the face of conflicting evidence, it should be reluctant to do so where there are direct conflicts in affidavit evidence, the resolution of which will require findings with respect to credibility.

(c) A court should be reluctant to resolve factual issues in the absence of admissible evidence where such evidence may well be tendered in admissible form at a subsequent trial.

(d) A court should be reluctant to "slice off" and decide isolated issues and circumstances where resolution of those issues will not resolve the litigation or will only resolve the litigation if answered in a particular way. In such circumstances, the 18A applicant will be required to demonstrate and the court expected to decide that the administration of justice including the orderly and effective use of court time will be enhanced by dealing with the separate issue brought forth by the applicant.

(e) The matter will not be suitable for resolution by Rule 18A where resolution of a particular issue or issues in the summary trial will require that the court make findings or rulings which will impact on parties or issues which are not before the court on the application. In particular, the court hearing the summary trial must not decide the issues on the basis of facts which might be inconsistent with the findings of the judge at trial.

(f) In some cases, the complexity of the issues raised or the volume of the material before the court may be such that the matter is unsuitable for resolution by summary trial.

[72] Rule 9-7 permits the court to grant judgment either on an issue or generally. There is considerable case law cautioning the court in determining whether it should give judgment on a single issue, particularly where it is intertwined with the other issues that will be left for determination at trial: The Owners Strata Plan LMS 4443 v. Travelers Guarantee Company of Canada, 2013 BCSC 296; Coast Foundation v. Currie, 2003 BCSC 1781; Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd., 2002 BCCA 138; Prevost v. Vetter, 2002 BCCA 202.

[73] In addition, litigating in slices may hinder the object of the rules for a just, speedy and inexpensive determination of every proceeding on its merits. In addition, I add that the rules of evidence play an important role in a summary trial process, principally because the orders sought are final in nature. As such, the summary trial process demands adherence to the rules of evidence.

[74] In the parties' submissions issues were raised about hearsay and the use that could be made regarding some of the out-of-court statements, including statements that were attributed to Mr. Virk senior, now deceased.

[75] A useful summary of the principles governing the treatment of such evidence can be found in the decision of Justice Voith in Gutierrez v. Gutierrez, 2015 BCSC 185. That was a resulting trust case in which both parties, who were siblings, sought to rely on out-of-court statements made by their deceased father. Justice Voith discusses the court's approach to considering such statements. I have cited paras. 31-34, which read as follows:

[31] Since Mr. Gutierrez is deceased, his direct evidence is no longer available to the court and so the requirement of necessity is met; R. v. Blackman, 2008 SCC 37 at para. 34.

[32] In Khelawon, the Court addressed the need for threshold reliability and observed that "the central underlying concern is the inability to test hearsay evidence" and that a principled approach should be adopted in order to identify "those cases where this difficulty is sufficiently overcome to justify receiving the evidence"; at para. 61. The Court then identified two scenarios where this might be the case: Where the truth and accuracy of the statement can still be sufficiently tested despite an inability to cross examine the declarant under oath in court, or where the circumstances are such that there is no concern about the trustworthiness of the statement; at paras. 62-63. The Court then noted:

[92] When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need to inquire further into the likely truth of the statement. That question becomes one that is entirely left to the ultimate trier of fact and the trial judge is exceeding his or her role by inquiring into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not .

[33] Here, the Deceased did not leave a sworn or taped statement, nor were there early opportunities to cross examine him under oath, and so the first Khelawon circumstance, the presence of adequate substitutes, does not apply; Khelawon at para. 106. Turning to the second circumstance, inherent trustworthiness, I must consider whether there are "indicia of trustworthiness sufficient to displace the general exclusionary rule"; Blackman at para. 38.

[34] A number of factors can be considered when assessing the threshold reliability of a hearsay statement, including:

1) the presence or absence of a motive to lie (Blackman at para. 42; Khelawon at para. 67);

2) independent corroborative evidence that "goes to the trustworthiness of the statement" (Blackman at para. 55; Khelawon at para. 67; R. v. Couture, 2007 SCC 28 at para. 83);

3) timing of the statement relevant to the event, contemporaneity (Khelawon at para. 67);

4) the declarant's mental capacity at the time of making the statement (Khelawon at para. 107);

5) solemnity of the occasion and whether the declarant's statement was made "in circumstances that could arguably be akin to the taking of an oath where the importance of telling the truth and the consequences of making a false statement were properly emphasized" (Couture at para. 89; Khelawon at para. 86).

[76] I have examined the evidence tendered on this application in light of those principles.

VI. Discussion

A. Plaintiff's NOA

[77] I am going to deal first with the plaintiff's notice of application.

[78] For the reasons that follow, I have concluded that the plaintiff's application is not suitable for determination by way of a summary trial.

[79] In reaching this decision, I have considered generally the authorities governing summary proceedings and the principles that I must consider. My decision about suitability is grounded in three factors that predominated the submissions.

[80] I wish to address each of those factors.

[81] The first factor relates to the law of agency and the factual matrix presented here. In particular, this area of deficiency relates to the role that Mr. Kang and Mr. Pandher had in the transaction and the interaction that each had with one another and with others, including Mr. Kang's interaction with the directors of 126 and Mr. Pandher's interaction with Mr. Virk senior, some of which was in the presence of Mr. Virk junior.

[82] I pause here to observe that on this point I have taken Mr. Gill's affidavit at its highest. That is, I appreciate there is inadmissible hearsay contained in that affidavit. The plaintiff invites me to disregard this evidentiary objection and examine Mr. Gill's affidavit on the basis that he had first-hand knowledge of Mr. Kang (as a director of 126) and that Mr. Gill had direct knowledge, on behalf of 126, of Mr. Kang's authority and of what Mr. Kang was up to.

[83] 126 submits that Mr. Kang was to be paid $150,000 for arranging the purchase of the 103A Property. Mr. Gill deposed that the directors did not worry about using an unlicensed broker in the transaction because they eventually intended to use a lawyer to assist with the completion of the transaction and did not foresee any risk regarding Mr. Kang. The plaintiff says that Mr. Kang was authorized to represent 126 in discussions with potential vendors but that he was not authorized to delegate this authority or to employ others to perform this work.

[84] The plaintiff submits that Mr. Kang's authority did not arise until after September 20, 2021. That date is important because there is undisputed evidence by the plaintiff that Mr. Kandola told Mr. Kang on September 14, 2021 that he had purchased the 103A Property from Mr. Virk. On October 18, 2021, Mr. Kang told Mr. Pandher about the conversation he had had with Mr. Kandola, and Mr. Pandher told him he would speak to Mr. Virk senior about it. That is when Mr. Pandher had a conversation, the content of which is disputed, with Mr. Virk senior about the status of the 103A Property. The result of this conversation was that Mr. Pandher supposedly assured Mr. Kang that:

a) the 103A Property had not been sold to Mr. Kandola,

b) the 103A Property was still available; and

c) Mr. Virk would sell the 103A Property for $18.5 million.

[85] This included a fee of $1 million that Mr. Virk would pay to Mr. Pandher for arranging the deal.

[86] Mr. Kang was cross-examined about his interaction with Mr. Pandher, among other topics, and I have reviewed Mr. Kang's evidence from that cross-examination. There are two significant points regarding the agency issue. The first point relates to the timing of Mr. Kang's knowledge about Mr. Kandola's interest and whether it coincided with Mr. Kang's role as 126's agent (that is, when should Mr. Kang's knowledge, which he is said to have learned on September 14, 2021, that Mr. Kandola had purchased the very property at issue.) When does that knowledge matter in terms of determining the legal issues of agency raised on this application?

[87] In my view, I cannot resolve the disputes in the evidence so that I can make findings material and necessary to the agency issues.

[88] Second, what occurred between Mr. Kang and Mr. Kandola on October 18, 2021 is important. What I draw from the evidence, and the parties do not disagree on this factual chronology, is that a decision was made by the plaintiff in a matter of hours to purchase a property worth $18.5 million and significantly, there is a fee to be paid to Mr. Pandher in the amount of $1 million. There are many questions about this transaction that would benefit from a trial.

[89] If this were a traditional trial, the trial judge would have the benefit of witnesses testifying and being cross-examined about these critical events.

[90] It is necessary to resolve these disputes in order to fairly address the plaintiff's submission. The plaintiff submits that the rule in Dearle is good and applicable law in BC and can be used to determine priority between equitable assignments of a chosen action.

[91] I do not decide here whether the rule in Dearle applies in the circumstances presented.

[92] However, there is an exception to the rule in Dearle based on notice of the prior assignment. The plaintiff submits that the rule is not engaged, because 126 did not have notice (despite Mr. Kang's September 14, 2021 conversation) of the prior assignment and that the plaintiff can claim priority because it was the first to provide notice of the assignment to 411.

[93] Canada Road submits that if the rule in Dearle applies, and Canada Road does not agree that it does, then the exception governs because of the September 14, 2021 conversation among other factors.

[94] In response, the plaintiff says Mr. Kang's receipt of the Canada Road Assignment cannot be attributed to 126 because he was not acting as 126's agent at that time. The plaintiff goes on to address constructive notice and states Mr. Kang took steps to inquire whether Mr. Virk had sold the property by asking Mr. Pandher to speak to Mr. Virk senior about this on October 18, 2021. Mr. Pandher, with a $1 million fee, reported back that all was good and Mr. Virk was willing to assign the contract to 126.

[95] It is my view that on the record presented, this legal issue cannot be resolved because it fully engages issues of credibility on material points. Based on my overall assessment of the record, I am very unsure as to whether the plaintiff ever could have presented an acceptable and admissible record with the circumstances being the way they are. I appreciate that the defendants did not seek to cross-examine Mr. Pandher or conduct examinations for discovery. Nonetheless, the Court is being asked here to resolve issues and find facts in the face of conflicting evidence on material points.

[96] The jurisprudence is clear that the court should be reluctant to do so where there are direct conflicts in affidavit evidence, the resolution of which will require findings with respect to credibility.

[97] Determining these issues of credibility which will ultimately serve as the foundation for factual findings is necessary for a resolution of the legal issues as presented.

[98] The Court of Appeal has made it clear that a court should be reluctant to resolve factual issues in the absence of admissible evidence where such evidence may well be tendered in an admissible form at a subsequent trial.

[99] I turn to the second factor that informs my decision that the plaintiff's application is not suitable for summary trial. This factor is somewhat connected to the earlier submissions that I received regarding agency. However, this time I focus on the evidence about the interaction between Mr. Pandher and Mr. Virk senior.

[100] I pause to address the allegations of fraud that are raised in the pleading. Counsel for 411 cautions the Court about focusing too much attention on the fraud allegations because they are raised in the alternative and that 411 takes the position that the dispute raised here can be resolved based on the "contract pleadings".

[101] Counsel may very well be correct on this point. However, I am not satisfied on the record before me that I can simply ignore the circumstances set out in the material about Mr. Pandher's dealings with Mr. Virk senior.

[102] Mr. Virk junior, at least in part, challenges Mr. Pandher's evidence about what occurred in the evening of October 18, 2021, at the Virks' residence. It seems clear on the evidence that Mr. Virk and Mr. Pandher spoke about whether 126 could purchase the 103A Property because steps were taken to have the 126 directors sign. There were expressions of urgency on the basis that people were travelling to India, and so the paperwork had to be completed quickly.

[103] In the evidence, it is suggested that Mr. Pandher said something about Canada Road's solvency or ability to purchase the 103A Property and that this statement somehow played a role in Mr. Virk's decision to deal with the 126 Assignment.

[104] Further, I comment but briefly on the consulting agreement that is dated October 18, 2021, that Mr. Pandher apparently presented to Mr. Virk senior after the 126 Assignment had been signed. In the consulting agreement, it seems Mr. Pandher was representing that 126 was his client. I am told that he used the consulting agreement to corroborate certain aspects of 617's position regarding Mr. Virk, what Mr. Virk was told and when. Further, I am invited to reject Mr. Pandher's evidence that "[he] was acting as the consultant for 617, and Mr. Kang was acting for the agent 126." This submission, I was told, was that this could be nothing further from the truth.

[105] In my view, fraudulent or not, which I am clearly not deciding, this interaction is significant. Mr. Virk junior suggests a version that is different from what is presented by the other affiants, and the documents, including this consulting agreement, are controversial to say the least.

[106] In my view, there will need to be an assessment of credibility of Mr. Virk junior, Mr. Pandher and Mr. Kang and the 126 directors about this information and whether there is any basis for a concern about Mr. Pandher's misrepresenting the state of Canada Road's financial affairs and the impact of such a representation if it had been made.

[107] The third factor that governs my decision that this case is not suitable for summary determination relates to findings that will need to be made about the conduct of the parties, generally. I have reviewed the affidavits tendered, and what is clear is the following.

a) For the most part, the deponents knew one another and importantly had prior business dealings with each other; and

b) These are not individuals without experience in commercial transactions. Mr. Gill, Mr. Kandola, Mr. Kang and Mr. Pandher all on their own admission had been around the block. The directors of the plaintiff company were sophisticated in the sense that they could get an $18.5 million deal done in a day. If they chose to take risks with their agent, then they did so at their peril when it comes to making findings in a summary proceeding.

[108] I am not satisfied that the plaintiff's application is suitable for disposition by summary trial, and I dismiss the plaintiff's application.

B. Canada Road's NOA

[109] I turn then to Canada Road's notice of application. Again, Canada Road seeks declaratory relief that Canada Road is entitled to purchase the 103A Property from 411.

[110] Canada Road also relies on R. 9-7 but says that the narrow issue engaged does not require the court to rely on the disputed evidence.

[111] Canada Road takes the position that despite its opening remarks in its written submission in essence describing a frenetic pace to the litigation requiring the parties to move hastily through the complexities of the issues raised, Canada Road put it this way:

The pace and indeed the complexity of the matter are unusual in deference for summary determination. Yet the parties are motivated by an already extended completion date of February 28, 2022, on an underlying contract of purchase and sale of property and as to which 126 and Canada Road are competing purported assignees, both asserting a right to purchase and to complete on that date. The owner, 411, it is not known what its position will be around timing and completion if justice cannot yield the rightful purchaser within this admittedly tight space of time.

[112] Despite its position on suitability regarding the plaintiff's application, Canada Road submits that the court can resolve two of the legal issues it raises. That is because the evidence necessary for those determinations is not really disputed. This point was emphasized primarily on the issue of repudiation. That is, did the plaintiff repudiate the agreement when it delivered correspondence to a law firm seeking to impose terms? In other words, did that comment constitute a repudiation such that 617 was permitted to accept a repudiation?

[113] On these points, 617 and Canada Road join in their position. They both contend the issues can and should be determined summarily.

[114] In its description of the issues, Canada Road submits the following.

a) It sets out the position of 617. That is, that 617 takes the position that the 126 Assignment was invalid and unenforceable at inception due to fraudulent misrepresentations by a 126 agent and it pleads fraud, misrepresentation and mistake. Canada Road adopted that submission.

b) Canada Road and 617 submit that 126 repudiated the 126 Assignment but 617 accepted that repudiation, and that acceptance brought the 126 Assignment to an end.

c) As such, Canada Road was the only valid assignee and rightful purchaser.

d) Canada Road relies on the doctrine of nemo dat, that being that no one can give what they do not have, submitting that on these facts 126 could not have taken good title in the underlying contract with 617 as 617's interest in that contract had by then already been conveyed to Canada Road.

[115] Canada Road submits that 411 does not contest the position, and 617 accepts the validity of the Canada Road Assignment.

[116] Canada Road contends that 126 must prevail on the following issues in order to succeed in its application:

a) priority;

b) validity and enforceability (meaning an absence of fraud, misrepresentation and a basis for mistake);

c) repudiation; and

d) residual right to convey (nemo dat).

[117] Canada Road says that it need only succeed on one of these issues and invites the court to consider in particular its submissions regarding repudiation and nemo dat and to resolve those issues or at least one of those issues in its favour.

[118] Finding for Canada Road on the issue of repudiation or nemo dat will, in effect, determine the rights as between 126 and Canada Road. Though claims for damages may subsist, the priority dispute would be at an end and the property could be transferred.

[119] In that vein, Canada Road submits that its application is well suited to a summary trial "despite the infancy and general complexities of the case."

[120] As I have said, 617 generally joins in this position.

[121] I start with the nemo dat submission and whether it is suitable for summary disposition.

[122] I do not accept that it is.

[123] In my view, some of the very same obstacles, perhaps to a lesser extent but present nonetheless, that plague the plaintiff's summary trial application similarly permeate a resolution of this issue.

[124] Canada Road submits that 617 assigned all of its rights in the contract of purchase and sale to Canada Road on August 28, 2021. It then had nothing left to assign to 126 or to anyone else, unless Canada Road failed to waive subjects and pay their required deposit, which it did not do.

[125] Canada Road relied on a number of authorities in support of its position. One of those authorities on which it relies was Green v. Green, 2015 ONCA 541. I refer to para. 53, which reads as follows:

[53] Thirdly, at common law, an assignor may not assign more than it has or, put differently, nemo dat quod non habet, no one gives who does not possess. Further, "an assignee cannot take any better title than that held by the assignor":Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd. (1985), 1985 CanLII 144 (BC CA), 20 D.L.R. (4th) 689, 65 B.C.L.R. 31 (C.A.), at p. 702.

[126] I have also considered Guraya v. Kaila, 2019 BCCA 367, at para. 20, where the court examines the creation of equitable assignments, including the Court of Appeal's reference to Justice Pearlman's decision in University of British Columbia v. Kapelus, 2012 BCSC 486, and among other things noting that "an intention to assign must be proved." The passage reads as follows:

[20] The principles concerning the creation of equitable assignments were reviewed by Justice Pearlman in University of British Columbia v. Kapelus, 2012 BCSC 486, in these terms:

[68] In Bank of NS v. Nfld Rebar Co. (1987), 1987 CanLII 5168 (NL SC), 65 Nfld. & P.E.I.R. 165, (Nfld. T.D.), Steele J. reviewed the law on equitable assignments and at para. 12 cited the following passage from Snell's Principles of Equity, 27th Ed. Where the learned author stated at p. 74:

An assignment which does not comply with the statutory requirements is not necessarily ineffectual, for it may operate as an equitable assignment. "The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree." In many cases an assignment which fails to satisfy the statute (e.g., because only part of the chose is assigned) is nevertheless fully effective in equity. As assignment, too, may at first be merely equitable, and then, when, e.g., the necessary notice is given, become statutory.

[69] Steele J. then summarized the essential requirements for an equitable assignment at para. 13:

Generally speaking, it can be said that an equitable assignment is deemed to exist where a sufficient expression of an intention to assign can be found. An intention to assign must be proved. Equity is more concerned with intent than actual form. The assignment must adequately identify the chose. In certain circumstances consideration may be necessary. Notice to the debtor is not necessary to perfect an equitable assignment but notice is indeed desirable in order to prevent the debtor from paying the assignor and, secondly, it also gives to the assignee priority over other assignees.

[70] An equitable assignment will be deemed to exist where there is a sufficient expression of an intention to assign, which must be demonstrated by evidence before the court: Bramalea Ltd. (Receiver manager of) v. Citibank Canada, [1996] O.J. No. 3895 at para. 14 (Ct. J. Gen. Div.), reversed on other grounds, [1997] O.J. No. 4283 (C.A.).

[71] In Chudy v. Merchant Law Group, 2008 BCCA 484 at para. 39, Low J.A. stated that "[e]quity looks to any evidence of an intent to assign, rather than to the form of the assignment".

[127] I have also taken into account Justice Adair's decision in Bajwa v. Habib, 2018 BCSC 1822, where she was satisfied that a dispute over a real estate transaction could be determined summarily, and the Court of Appeal agreed with her decision in this regard.

[128] However, in my view, the circumstances presented on this issue in this case engage complexities that were not present before Adair J. in Bajwa.

[129] Mr. Kandola deposed that he had multiple communications with Mr. Kang about the 103A Property. He says he told Mr. Kang that Canada Road was purchasing the 103A Property by way of assignment agreement. Mr. Kandola also deposed that he never told anyone that Canada Road was unable to secure financing in order to purchase the 103A Property.

[130] In his second affidavit presented by Mr. Kandola, he described his relationship with Mr. Kang. He stated that he has known Mr. Kang for about 10-15 years and that they both do business in the trucking industry and speak on the phone regularly. In his second affidavit,

he enumerates the dates of certain phone calls but states he believes he called Mr. Kang on September 14, 2021 to tell him Canada Road had entered into an assignment agreement to purchase the 103A Property. There was then a discussion about meeting for lunch because of the location.

[131] The cross-examination transcript of Mr. Kang and his evidence that he did not tell Mr. Kandola about 126's interest in the 103A Property causes me considerable pause on this point. Mr. Kang was cross-examined about his communications with Mr. Kandola and his disclosure or lack of disclosure about his role as 126's agent. There is an uncertainty about Mr. Kang and his dealings with Mr. Kandola that I have been unable to reconcile on the whole of the evidence. Though Mr. Kandola is not challenged on his affidavit, some of the statements he makes raised questions that are unanswered.

[132] There is also evidence from Mr. Virk junior about what Mr. Pandher said to Mr. Virk senior about Mr. Kandola, the difficulty raising financing and whether Canada Road would not be waiving the assignment subject conditions.

[133] Perhaps following the trial, the same questions will remain just that, unanswered. However, in the context presented, I decline to make findings necessary to determine that legal issue.

[134] I turn then to the issue of repudiation and ask whether this issue can and/or should be resolved summarily.

[135] In the paragraphs that follow, I set out how Canada Road, and adopted by 617, express their position regarding repudiation and suitability.

[136] Mr. Lewis submitted that there were really two prongs to the repudiation issue:

a) First, 126 gave the money to the wrong place / recipient. That is, it should have been directed to 617 directly and was not and invites the Court to reject the plaintiff's position that 617 acquiesced to this form of payment because it accepted the first tranche of payment in this way; and

b) Second, that the tender of the second tranche was conditional. The gist of this aspect of the submission was that the plaintiff sought to impose conditions on the delivery of the second installment when the contract provided for no such conditions. The money was paid to 617 directly without conditions and without the sort of undertaking the plaintiff sought to oppose in the November 9, 2021 letter. The defendants submit that this request for affirmation of the contract was what changed the contract in a significant way. It placed counsel on an undertaking saying that the money must be held pursuant to terms, and the contract did not call for such an affirmation or the proposed terms.

[137] In other words, say the defendants, the money was not to go into trust. It was to go to 617 directly, and the contract contemplated that the money would be usable. The agreement did not admit to any undertaking or condition whatsoever and hence was an invalid tender.

[138] The defendants submit that when 617 accepted the repudiation, the 126 Assignment then came to an end and they submit it should bring the plaintiff's action to an end.

[139] The parties do not disagree about the legal principles that govern repudiation, and it is tempting to work to resolve this issue and conclude the plaintiffs repudiated the 126 Assignment and thus the last party standing is Canada Road.

[140] I accept the plaintiff's submission on this point. In my view, the evidentiary record, though certainly less convoluted than the events from September and October 2021, still leaves questions to be answered. Mr. Pollard described what occurred in early November 2021 that caused decisions to be made about form of tender. I accept his characterization that there is a dispute to be resolved on a proper evidentiary record regarding the sufficiency of the plaintiff's tender.

[141] I decline to determine whether the plaintiff repudiated the 126 Assignment in the manner subjected. There are two reasons for this conclusion.

[142] First, the evidence is not clear on this point. Though I am invited to simply follow the correspondence, Mr. Pollard advances the submission that there was a material change in the circumstances that warranted 126 to conduct themselves the way they did. I do not decide this point. It is disputed, and at the end of the day it may not matter to the legal conclusions sought.

[143] However, the second factor is more important. I accept that finding in the defendant's favour on this point will effectively bring this litigation to an end, aside from any claim for damages. In all that has been presented, this is slicing up the litigation in a manner that is unfair and unjust in the circumstances.

[144] Rule 9-7 certainly permits the court to grant judgment either on an issue or generally. Yet there is considerable case law cautioning the court in determining whether it should give judgment on the single issue, particularly where it is intertwined with the other issues that will be left for determination at trial. Indeed, this is an example of where litigating in portions may hinder the object of the rules for a just, speedy and inexpensive determination of the proceeding on its merits. It is concerning that there may be findings made by me on this disputed record where a trial judge dealing with a conventional trial may make findings based on a different record that are inconsistent with the findings made by me.

[145] Ultimately based on the submissions advanced and the evidence presented, I am of the opinion that it would be unjust to decide the issues on the application, and I decline to do so.

[146] Canada Road's notice of application for the declaratory relief sought is dismissed because it is unsuitable for summary determination.

VII. Conclusion

[147] In some instances, cross-examination (even limited cross-examination) can assist the court to resolve disputed evidence presented on a summary trial, particularly where credibility findings are necessary. That means that a judge presiding over a summary trial can, in fact, hear the witnesses. The summary trial rule permits that procedure. However, no party sought it here, and in my view, it would not ease the time pressures because 411, having extended the completion date once, has not indicated it would do so again.

[148] The parties wrote to Hinkson C.J. and the senior trial scheduler requesting a priority two-day hearing. Their request was granted. They were provided three days to hear the summary trial. When we commenced last week, accepting the submissions about pleadings amendments and the role of the litigation representative in attempting to answer the concern about urgency, I granted additional time for the hearing.

[149] I accept that all parties moved mountains in order to ready themselves for this hearing.

[150] That said, sometimes sober reflection is required. In my view, this is such a case. The issues should be examined after a trial judge has the chance to hear the witnesses, assess their evidence and their credibility and make determinations accordingly.

[151] 411 took the position, as is its right, to rely on the completion date of February 28, 2022. The Court, the parties and counsel did all they could to present their cases so that 411 could complete. The parties will need to determine how they now wish to proceed having failed to persuade the Court that it could and should make findings in the circumstances presented.

[152] In light of my decision regarding the cross-applications, it is my view that the parties should bear their own costs.

"Winteringham J."

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