

CANADA / JUDGMENT

Argo Ventures Inc. v. Choi

2020 BCCA 17

COURT

British Columbia Court of Appeal

DECIDED

17 January 2020

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2020 BCCA 17 Argo Ventures Inc. v. Choi

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Argo Ventures Inc. v. Choi,

2020 BCCA 17

Date: 20200117

Docket: CA45925; CA45926

Docket: CA45925

Between:

Argo Ventures Inc.

Respondent

(Plaintiff)

And

Key Joo Choi

Appellant

(Defendant)

And

Tim Seo

Respondent

(Third Party)

- and -

Docket: CA45926

Between:

Argo Ventures Inc.

Respondent

(Plaintiff)

And

Yeong Ja Choi

Appellant

(Defendant)

And

Tim Seo

Respondent

(Third Party)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated

January 25, 2019 (Argo Ventures Inc. v. Choi, 2019 BCSC 85,

Vancouver Docket S166992).

Counsel for the Appellant:

J. Zeljkovich

Counsel for the Respondent:

A.P. Morrison

Place and Date of Hearing:

Vancouver, British Columbia

November 22, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 17, 2020

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Butler

Summary:

The appellants entered into a contract for the purchase and sale of a property for approximately \$6.5 million, with a non-refundable deposit of \$300,000 due within ten business days. The contract was immediately binding upon signature. After signing the contract, the appellants decided not to complete the purchase and did not pay the deposit, which was due and owing. Ultimately, the seller accepted the appellants' repudiation of the contract for non-payment of the deposit and sued. The trial judge awarded judgment in the amount of the unpaid deposit, plus pre-judgment interest and costs. The appellants argue, among other things, that the judge erred in making this award because an unpaid deposit, unlike a paid deposit, cannot be forfeited upon repudiation of a contract. Held: Appeal dismissed. A seller can sue for the amount of an unpaid deposit that is due and owing at the time the seller accepts the buyer's repudiation of the contract. A buyer is not entitled to put itself in a better position than it would be in had it met its contractual obligation to pay the deposit by simply refusing to pay the deposit.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Overview

- [1] On June 25, 2016, the appellants Key Joo Choi and Yeong Ja Choi, a married couple, entered into an agreement (the "Contract") with 534834 B.C. Ltd. ("534") for the purchase and sale of a property located at 1485 Coast Meridian Road, Port Coquitlam, British Columbia (the "Property") for approximately \$6.5 million, with an initial deposit of \$300,000 due within ten business days. On July 6 or 7, 2016, the appellants purportedly repudiated the Contract and did not pay the deposit as required by July 11, 2016. On July 25, 2016, 534 accepted the appellants' repudiation of the Contract for non-payment of the deposit, and on July 29, 2016, commenced an action seeking judgment in the amount of the unpaid deposit.
- [2] On January 25, 2019, in comprehensive reasons for judgment indexed as 2019 BCSC 85 (the "Reasons"), Justice Shergill ruled in favour of the respondent. She awarded judgment against the appellants in the amount of \$300,000, plus pre-judgment interest and costs.

- [3] The appellants' third party proceeding against the realtor, Tim Seo, was dismissed. No appeal is taken from that order.
- [4] The appellants challenge the order, arguing that the judge erred in finding that an unpaid deposit that was not owing at the relevant time was nevertheless forfeited upon their repudiation of the Contract. Of significance is that they do not take issue with the judge's conclusion that the Contract became legally binding on the parties on June 25, 2016. The respondent submits that there was no dispute at trial that the deposit was due by July 11, 2016. In fact, the appellants relied upon this binding obligation to support a defence of non est factum. The respondent's position is that the appellants should not be permitted to advance a contrary argument on appeal.
- [5] For the reasons that follow, I would dismiss the appeal.

Background Facts

- [6] Since 1998, 534 has owned the Property--a business park with warehouses, restaurants, convenience stores, and industrial and office space. The Property has been encumbered by a statutory right of way in favour of the British Columbia Hydro and Power Authority ("BC Hydro") since 1962, which is registered in the Land Title Office as the first charge against title to the Property. BC Hydro installed overhead wires on the Property, which were visible to visitors at all times relevant to the underlying action.
- [7] The Property was encumbered by one mortgage at all relevant times, which was registered in favour of Industrial Alliance Insurance and Financial Services Inc. (the "Industrial Alliance Mortgage"). The principal outstanding on the Industrial Alliance Mortgage in March 2016 was approximately \$1.36 million.
- [8] In 2016, Tim Seo, a realtor, approached Mr. Eric Lee, the Director of Operations for the respondent, which managed the Property, to see if 534 was prepared to sell the Property if he could find a buyer. In June 2016, Mr. Seo was informed by Mr. Lee that 534 would not accept an offer of less than \$6.5 million or any condition except an assumption by the buyer of the Industrial Alliance Mortgage.
- [9] What then transpired is not in dispute and is set out at paras. 22-53 of the Reasons:
- [22] On June 21, 2016, three days after introducing Mr. Choi to the Property, Mr. Seo emailed Mr. Lee, seeking income and environmental information about the Property. Also on June 21, 2016, Mr. Lee emailed to Mr. Seo an environmental report and information about the income and expenses earned and incurred in respect of the Property.
- [23] Further on June 21, 2016, Mr. Seo forwarded by email an environmental report and information about income and expenses to Mr. Choi. On or before June 21, 2016, Mr. Choi agreed to have Mr. Seo draft an offer to purchase the Property. Mr. Seo left blank spaces to be completed with information to be decided by Mr. and Mrs. Choi.

[24] On June 22, 2016, Mr. Seo met with the Chois to sign an offer drafted by Mr. Seo (the "Offer").

[25] Later on June 22, 2016, Mr. Seo delivered the Offer to Mr. Lee, together with an email explaining some of the terms of the Offer. With respect to "subjects", the email stated: "No Subjects (Mortgage transfer only if any)".

[26] Respecting a deposit, the Offer included the following clause (the "initial deposit clause"):

The initial deposit, \$300,000 is made to Sutton Group - 1st West via bank draft within 7 10 business days of acceptance. Once the deposit is made, it is non-refundable and this contract is binding and irreversible unless the Buyer is disapproved by the lender. [Italicized portion reflects handwriting.]

[27] The numbers "\$300,000" and "10" were written in by hand by Mr. Seo on the Chois' instructions. Mr. and Mrs. Choi placed their initials beside the initial deposit clause as amended.

[28] On June 22, 2016, when the Offer was delivered to 534 Ltd., the only mortgage registered against title to the Property was the Industrial Alliance Mortgage.

[29] On June 23, 2016, 534 Ltd. entered into a fee agreement with Mr. Seo and his brokerage (the "Fee Agreement"). The Chois were not a party to the Fee Agreement. The Fee Agreement provided that Mr. Seo was not the agent for either the seller (534 Ltd.) or the buyers (Mr. and Mrs. Choi).

[30] On June 23, 2016, Mr. Seo delivered an email to Mr. Choi providing information about current market lease rates in the area near the Property.

[31] 534 Ltd. did not accept the Offer.

[32] On June 24, 2016, Mr. Lee delivered a counteroffer to Mr. Seo (the "Counteroffer"), together with an email explaining the two changes included in the Counteroffer. The first change was in relation to costs to be borne by the seller for prepayment penalties; the second change was to the initial deposit clause. In the email delivering the Counteroffer, Mr. Lee stated as follows:

Page 1: .. if any, exceeding \$70,000 (this is the prepayment penalty with the existing lender if the Buyer is not approved and the Seller has to provide the financing)

Page 7 of 7: The deposit is non-refundable terms and conditions at completion date. (this will give the Buyer some comfort in knowing that if Industrial Alliance does not approve the Buyer, the Seller will step up and provide the necessary financing at the same terms and conditions)

[33] On June 24, 2016, Mr. Lee also delivered a text message to Mr. Seo explaining the revisions in the Counteroffer.

[34] Respecting the deposit, the Counteroffer included the following clause (the "revised deposit clause"):

The initial deposit, \$300,000 is made to Sutton Group - 1st West via bank draft within 7 10 business days of acceptance. Once tThe deposit is made, it is non-refundable and this contract is binding and irreversible unless the Buyer is disapproved by the lender, or the seller is unable to provide the replacement financing to the buyer at the same terms and conditions at completion date. [Italicized portion reflects handwriting.]

- [35] The representative of 534 Ltd. initialled the Counteroffer twice beside the revised deposit clause.
- [36] On Saturday, June 25, 2016, Mr. Choi met with Mr. Seo to consider the Counteroffer. Mr. Choi initialled the Counteroffer on behalf of himself and Mrs. Choi (for which he had authority from Mrs. Choi).
- [37] On June 25, 2016, Mr. Seo delivered the fully executed Counteroffer to Mr. Lee.
- [38] On June 25, 2016, Mr. Seo sent a text message to Mr. Lee, asking him to obtain the information required by Industrial Alliance to determine whether it would agree to permit the Chois to assume the Industrial Alliance Mortgage. Mr. Lee responded by advising Mr. Seo that he would obtain a credit application from Industrial Alliance on Monday, June 27, 2016.
- [39] On June 27, 2016, Mr. Lee emailed to Mr. Seo the credit authorization form required by Industrial Alliance. Also on June 27, 2016, Mr. Seo re-forwarded to the Chois the environmental report and information about income and expenses for the leased units (sent previously on June 21, 2016).
- [40] On June 30, 2016, Mr. Seo emailed Mr. Lee advising him that the Chois were preparing a credit authorization form. He also requested additional information about the leases of the Property.
- [41] On July 4, 2016, Mr. and Mrs. Choi met with Mr. Seo, and completed the credit authorization form for the assumption of the Industrial Alliance Mortgage and provided documents to support their application. Mr. Seo emailed this information to Mr. Lee on the same day, stating: "We hope that he gets the transfer approval asap so that he could deposit \$300,000". Mr. Lee delivered the credit authorization form and financial information to Industrial Alliance shortly after he received them from Mr. Seo.
- [42] Also on July 4, 2016, Mr. Choi met with Gaeten Royer to discuss the development potential of the Property. Mr. Royer was a long-time friend and associate of Mr. Choi, to whom Mr. Choi turned for business advice from time to time. Mr. Royer had many years of experience in land acquisition, land development, dealing with rights-of-way and other urban planning issues.
- [43] On July 5, 2016, Mr. Seo sent a text message to Mr. Lee asking for environmental information about the Property.

- [44] On July 5, 2016, Mr. Royer advised Mr. Choi that the SRW might impact the development potential of the Property.
- [45] On July 7, 2016, Mr. Lee emailed Mr. Seo advising him that the lender was requesting further information from Mr. and Mrs. Choi that it was required to consider their request to assume the Industrial Alliance Mortgage. The Chois did not respond to these requests for information.
- [46] Around July 6 or 7, 2016, Mr. Royer told Mr. Choi that the Property had no development potential. Mr. Choi decided not to complete the purchase of the Property. Shortly thereafter, Mr. Choi called Mr. Seo to tell him that he did not want to purchase the Property due to the SRW. Mr. Choi's decision not to proceed with the purchase of the Property due to the SRW was confirmed by Mr. Royer to Mr. Seo in a telephone conversation on July 7, 2016.
- [47] Around July 7 or 8, 2016, Mr. Choi met with Mr. Seo and confirmed that he no longer wished to proceed with the purchase of the Property.
- [48] Shortly thereafter, Mr. Seo advised Mr. Lee that the Chois had decided not to complete the purchase of the Property. Industrial Alliance had not yet agreed to allow the Chois to assume the Industrial Alliance Mortgage.
- [49] Pursuant to the Counteroffer, the deposit was due on July 11, 2016. It was never paid.
- [50] On July 15, 2016, counsel for 534 Ltd. (Mr. Morrison) delivered a letter to the Chois asserting that they had breached the Contract and provided them with an opportunity to keep the Contract alive. They were also advised that if the lender did not approve the assignment of the Industrial Alliance Mortgage to them, that 534 Ltd. would provide financing on the same terms.
- [51] On July 21, 2016, counsel for the Chois (Ms. Ducey) wrote to Mr. Morrison, taking the position that the Chois were unaware of the changes to the Offer that were made in the Counteroffer, and were ultimately included in the Contract. She denied that the Chois had any obligation to complete the Contract.
- [52] On July 25, 2016, Mr. Morrison delivered a letter to Ms. Ducey accepting the Chois' repudiation of the Contract. This action was commenced on July 29, 2016.
- [53] The Property was subsequently sold to a third party.

Trial Judgment

Non Est Factum

- [10] The appellants' primary defence at trial was non est factum. The judge noted that a successful plea of non est factum renders a contract void. To achieve this result, the judge held the appellants needed to establish that they signed the Contract by mistake in the sense that what they believed they were signing was fundamentally different from what the Contract actually provided.
- [11] The judge began her analysis by considering the appellants' personal characteristics, noting that they emigrated from South Korea in the 1970s and had been successful business people, accumulating assets worth about \$30 million as of June 2016. They started with a grocery store business, which they conducted in English. By June 2016, they had been involved in at least ten real estate transactions in British Columbia pertaining to both residential and commercial properties. All of the contracts for these transactions were written in English. Although Korean is their first language, they speak English as a second language, and they can read and understand simple written English. Mr. Choi admitted on cross-examination that he can understand real estate contracts written in English.
- [12] The judge set out the three-part test for non est factum at para. 58 of the Reasons:
- A party seeking to rely on the doctrine of non est factum must establish that (1) the document they signed was fundamentally different from what they believed the document to be, (2) they signed the document as a result of misrepresentation, and (3) that they were not careless in doing so: *Farrell Estates Ltd. v. Win-Up Restaurant Ltd.*, 2010 BCSC 1752 at paras. 82, 100 [Farrell]; *Bulut v. Carter*, 2014 ONCA 424 at paras. 18, 24; *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774 [Marvco]. A successful plea of non est factum renders the agreement void at common law: *Fraser* at para. 38. The analysis is "highly fact-specific and contextual": *Zhang v. Soong*, 2012 BCSC 758 at para. 78. By its very nature, non est factum is a "difficult defence to establish": *Tang v. Chan*, 2014 BCSC 2251 at para. 51.
- [13] First of all, the judge accepted the appellants' argument that the Contract was fundamentally different from what Mr. Choi believed he was signing on June 25, 2016.
- [14] She found that the initial offer was a non-binding agreement, which provided the appellants with ten days to perform due diligence inquiries. She then concluded that the executed counteroffer was binding on the parties on signature, rather than on payment of the deposit ten days later. The appellants had advanced this argument in support of their position that Mr. Choi did not understand the effect of the changes to the deposit clause in the counteroffer, as he mistakenly understood that he still had ten days to conduct due diligence inquiries and he and his wife would not be bound until the deposit was in fact paid. Since, by the time of trial, Mr. Choi now understood the Contract was binding on acceptance, it was fundamentally different from what he believed to be the case on June 25, 2016.
- [15] The factual basis for reaching this conclusion was, in part, Mr. Choi's evidence that:

MR. CHOI: It's my mistake ...

THE WITNESS: I know it's my fault that I didn't read the details of it, but because of the other contract I also had 10 days, and there's 10 here, so I trusted they were the same.

- [16] Secondly, despite Mr. Choi's mistaken belief, the judge found that it was not caused by Mr. Seo's misrepresentation. The judge preferred Mr. Seo's evidence that he explained the revised deposit clause to Mr. Choi, rather than misleading Mr. Choi into believing that he still had ten days to conduct due diligence. Furthermore, the judge found that it was implausible that Mr. Choi would initial the revised deposit clause without reading it himself or asking Mr. Seo what the changes meant.
- [17] Finally, the judge found that Mr. Choi's mistaken belief arose from his own carelessness in failing to read the details of the revised deposit clause, assuming unreasonably that it was the same as the initial offer, and not seeking independent legal advice from his lawyers before signing the Contract. Mrs. Choi was also careless in deciding to completely rely on her husband to determine whether to enter into the Contract. As a result, the defence of non est factum was unsuccessful.

Alternative Defences

- [18] The judge also rejected the appellants' alternative arguments. First, she found that the Contract was not a standing offer but binding on acceptance, and it was not void for uncertainty. Secondly, while 534 was required to provide the appellants with a document prescribing that the property was free from contamination within three days of acceptance (the "environmental term"), this term was a warranty and not a condition. Thus, 534's failure to fulfill the environmental term did not amount to repudiation of the Contract.
- [19] Finally, the judge rejected the appellants' argument that they were entitled to rescind the Contract when they learned about the undisclosed statutory right of way. The judge not only held that 534 was not responsible for Mr. Seo's alleged misrepresentation about the size of the property contained in the Brochure, but also dismissed the appellants' third party claim against him.

On Appeal

- [20] The appellants' appeal is predicated on a new argument, which was not advanced at trial. It is to the effect that the judge erred in finding that an unpaid deposit that was not owing and due was nevertheless forfeited upon repudiation of the Contract.
- [21] There are two aspects to this argument.

- [22] The first is that the deposit was not owing on the date they repudiated the Contract. Of significance to this submission is that the repudiation relied on by the appellants is the one of July 6 or 7, 2016, when they communicated their decision not to complete the Contract on the basis that the BC Hydro statutory right of way prevented further development of the Property.
- [23] The second is that an unpaid deposit is of a different character than one that has been paid. On this point, the appellants argue that the deposit could not be "forfeited" because it was never paid, and thus, enforcing payment at trial amounted to an unlawful penalty.
- [24] The respondent's position is that there was no dispute at the trial that the deposit was due by July 11, 2016. In fact, the appellants relied upon this binding obligation to support their defence of non est factum. The respondent argues that the appellants should not be permitted to argue the opposite on appeal.
- [25] The respondent further submits that the appellants repudiated the Contract when they did not pay the deposit by July 11, 2016. According to the respondent, the appellants owed the deposit within ten business days immediately upon signing the Contract. Since the right to payment of the deposit had accrued by the date of the appellants' repudiation, they should not be in a better position for having defaulted than they would have been in had they complied with the terms of the Contract.
- [26] Finally, in response to the appellants' claim that an unpaid deposit cannot be forfeited, the respondent argues the judge did not order the deposit to be forfeited, but instead awarded damages for breach of contract in the amount of the deposit.
- [27] In fact, the judge did not identify whether the action was for an award in damages or debt, which is an issue I will return to below.

Discussion

- [28] Before considering what the issues on this appeal are about, it is necessary to state what is not disputed by the appellants, specifically:
- the judge's findings of fact and conclusions regarding the enforceability of the counteroffer when it was initialled, that is accepted, by the appellants on June 25, 2016; and
 - the judge's conclusion that the environmental term was a warranty, not a condition.
- [29] Essentially, what the appellants now argue in this court is that the judge made an error of mixed fact and law by failing to find that the deposit:
- was not unconditionally owing until July 11, 2016;
 - could not be "forfeited" since it was never paid; and

that in any event, they had repudiated the Contract themselves on July 6 or 7, 2016, and thus, the deposit was no longer payable on July 11, 2016.

- [30] In my view, it is relevant that the appellants did not advance these arguments at trial. On the contrary, the appellants relied on their unconditional obligation to pay the deposit by July 11, 2016 to support their defence of non est factum.
- [31] A distinction is to be made between raising a new issue on appeal and resiling from a position deliberately taken in the tribunal of first instance: *VIH Aviation Group Ltd. v. CHC Helicopter LLC*, 2012 BCCA 125 at para. 44. Generally, this court has not permitted a party that has chosen a particular position in the trial court to abandon that position on appeal: *Sahlin v. The Nature Trust of British Columbia, Inc.*, 2011 BCCA 157 at para. 38. Furthermore, taking inconsistent positions in legal proceedings can constitute an abuse of process: *Fortinet Technologies (Canada) ULC v. Bell Canada*, 2018 BCCA 277 at para. 23.
- [32] The appellants' position at trial, in support of their non est factum defence, was that they had been misled into signing a contract that they failed to understand was binding on acceptance and unconditionally required them to pay a deposit of \$300,000 within ten business days. As they stated in their written closing argument:

It is submitted that a non-binding agreement subject to due diligence is fundamentally different than a binding agreement.

In making the Offer, the Chois intended and understood that they would not be bound by the Offer until the deposit was paid and that they had 10 days to do so during which they could conduct their due diligence.

The Chois did not understand the impact of the changes to the Offer when Mr. Choi initialled the Counteroffer.

Specifically, Mr. Choi did not understand the effect of the change to the deposit clause which the plaintiff now asserts, ie that the deposit was owing regardless of whether it had been paid, which is not surprising given how nuanced that clause was in the first instance and the fact that English is not his first language..."

[Emphasis added.]

They now resile from that position on appeal by arguing instead that the deposit was not unconditionally owing and due by July 11, 2016.

- [33] At para. 75 of the Reasons the judge found that there was "no dispute" that the Contract was immediately binding on signature. The issue raised by the appellants in this court was not before the trial judge because it would have been inconsistent with their non est factum defence. In my view, having made that decision at trial, they must now live with it in this court: *Protection Mutual Insurance Co. v. Beaumont* (1991), 58 B.C.L.R. (2d) 290 (B.C.C.A.).

- [34] While this is sufficient to dispose of the appeal, I will nonetheless address the merits of the new arguments advanced by the appellants.
- [35] First of all, I note there was ample evidence to support the judge's findings that the Contract was binding upon signature and 534's right to payment of the deposit accrued on July 11, 2016, before it accepted the appellants' repudiation and terminated the Contract on July 25, 2016. The judge's interpretation of the deposit clause--as negotiated between the parties in unique factual circumstances--is a question of mixed fact and law, which is entitled to deference, absent a palpable and overriding error: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at para. 50; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 46.
- [36] This court has held that where the seller's right to a non-refundable deposit has accrued before it accepts the buyer's repudiation, the seller can sue for an amount equal to the unpaid deposit owed under the contract: *Vanvic Enterprises Ltd. v. Mack* (1985), 66 B.C.L.R. 211 (B.C.C.A). In *Tang v. Zhang*, 2013 BCCA 52, this court further clarified that a deposit is intended to encourage parties to complete their contracts. While a deposit cannot be excessive or unconscionable, it is an exception to the usual rule against penalties: *Tang* at para. 30.
- [37] Nor would I accede to the appellants' new argument that the judge erred by awarding judgment against them in the amount of the unpaid deposit. The appellants do not argue that the deposit was excessive, but only that an unpaid deposit, unlike a paid deposit, cannot be "forfeited".
- [38] Contrary to what the appellants now argue, the judge did not order that the deposit be forfeited. The deposit could not be forfeited because it was never paid. Rather, the judge awarded the respondent judgment in an amount equal to the unpaid deposit.
- [39] She was entitled to make that order. In *Vanvic*, at paras. 17-18, this court distinguished between the concepts of rescission (which is a remedy arising in cases of mistake, fraud, or lack of consent) and repudiation (which occurs when a party elects to treat the contract as no longer binding). The Court held that when a party accepts a repudiatory breach, the contract is not void ab initio. A party who accepts a repudiatory breach is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded. Rights that have already been acquired by a party who accepts a repudiatory breach are not divested or discharged: see also *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at paras. 39-41.
- [40] *Vanvic* involved a contract of purchase and sale of property, which was supplemented by a trust agreement by which the buyer agreed to provide a non-refundable deposit to the seller's solicitor "forthwith upon acceptance". The buyer's agent delivered a cheque in the deposit amount to the seller's lawyer. Shortly thereafter, the buyer decided not to pursue his purchase of the property and stopped payment of the deposit cheque. The seller notified the buyer that it considered the buyer's conduct to amount to a repudiation of the contract and

that it accepted the buyer's repudiation. The seller demanded immediate payment of an amount equal to the unpaid deposit. The buyer refused to pay the amount demanded.

[41] This court upheld the trial judge's award to the seller of judgment in an amount equal to the unpaid deposit with Hinkson J.A., for the Court, stating at para. 17:

In my opinion that covers the situation in the present case. When repudiation occurred the right to the \$45,000 non-refundable deposit had already accrued to the plaintiff. The acceptance of the repudiation by the plaintiff did not affect that right. The plaintiff was still entitled to claim under the contract for that accrued right and, as a result, I conclude that the learned trial judge came to the correct conclusion. In the result, I would dismiss the appeal.

[42] Furthermore, the England and Wales High Court (Commercial Court) and Court of Appeal (Civil Division) have rejected the argument that only a paid deposit is valuable: see *Griffon Shipping LLC v. Firodia Shipping Limited*, [2013] EWHC 593 (Comm.), *aff'd* *Firodi Shipping Limited v. Griffon Shipping LLC*, [2013] EWCA Civ. 1567, where Mr. Justice Teare stated at para. 27:

The requirement to pay a deposit encourages the buyer to perform. "It is a guarantee that the purchaser means business"; see *Soper v Arnold* (1889) 14 AC 429 at p.435 per Lord Macnaughten. The encouragement flows from the fact that the deposit may indeed exceed the seller's damages. Moreover, it has long been recognised that a deposit which has been paid will be forfeited if the buyer fails to perform even though the deposit exceeds the loss of bargain damages. In those circumstances there is, in my judgment, no commercial or business sense in permitting a buyer to improve his position by the simple expedient of not paying the deposit. This has been recognised since at least 1868; see *Hinton v Sparkes* [(1868) 3 LR 3 CP 161 at p.166].

[43] The Court in *Griffon* emphasized, at paras. 18 and 26, the value of a commitment to pay a deposit, as distinct from receipt of a deposit:

The right to a deposit is valuable. It is the seller's "security for the correct fulfilment of this Agreement". It has long been recognised that a deposit remains payable notwithstanding the termination of the contract.... The court would therefore expect that if the parties intended to exclude such right they would do so by the use of clear words

A deposit serves the commercial purpose of providing the seller with security for the performance of the MOA. It would not be consistent with business common sense to enable a buyer to put himself in a better position than he would be in having paid the deposit by adopting the simple expedient of refusing to pay the deposit...

[44] On this point, I agree with the respondent that to accept the appellants' argument on this point would create an inequitable situation in which a party to a contract could take advantage of its breach to obtain a better outcome than it would have had if they had performed their contractual obligations: see, for e.g., *Angus v. Sian*, 1982 CarswellBC 618 (B.C.S.C.) at paras. 35 and 41.

- [45] Accepting that the respondent can sue the appellant for judgment in the amount of the unpaid deposit, a question remains as to whether this is properly characterized as a claim for damages or debt. In this case, the judge did not identify the award as either. The respondent says that the judge awarded damages. As the judge made no reviewable error in making the award, it is not necessary to decide the issue in this case. Nevertheless, it is worth noting that both remedies are referred to in the case law.
- [46] There is authority in this province for the proposition that a claim relating to an unpaid deposit is a claim for debt: see e.g., *Busnex Business Exchange Ltd. v. Canadian Medical Legacy Corp.*, 1999 BCCA 78 at para. 15, where an unpaid portion of a deposit was a claim in debt, and *Vanvic*, aff'd [1982] 5 WR 530, where this court upheld an award by the trial judge, who found that an unpaid deposit was a debt owing upon acceptance of the offer. The English cases referred to above also addressed this issue. In *Firodi*, at para. 4, the Court of Appeal clarified that an unpaid deposit that fell due before termination of the contract may be recovered as a debt. However, if the deposit had not fallen due--as occurred in *Damon Compania Naviera v. Hapag-Lloyd International*, the *Blankenstein* [1985] 1 WLR 435, where the deposit was due "on signing" but the contract was never signed--a claim may still be brought for damages for loss of bargain in the amount of the unpaid deposit.
- [47] Finally, in my view, none of the principles to which I have referred, in particular those in *Vanvic*, was overturned by this court in *Tang*. In *Tang*, this court held that a deposit is forfeitable regardless of whether the other party suffered any damages, and in doing so, reversed *Agosti v. Winter*, 2009 BCCA 490. Accordingly, in my view, the principle set out in *Vanvic* that a party may sue another for the amount of an unpaid deposit owing under a contract when it accepted the other party's repudiation remains the law in this province.
- [48] As the authorities to which I have referred make clear, what is important is the state of affairs that existed when 534 accepted the appellants' repudiation for non-payment of the deposit on July 25, 2016. As noted by the judge at para. 50 of the Reasons, on July 15, 2016, 534 had offered the appellants the opportunity to "keep the contract alive", but this was refused. The appellants' repudiation was then accepted on July 25, 2016, and at that time, the unpaid deposit was due and owing.

Conclusion

- [49] The Contract required the appellants to pay the deposit within ten business days of June 25, 2016, being July 11, 2016. This obligation was neither optional nor conditional. It was mandatory, a finding which the appellants urged the judge to make in support of their defence of non est factum.
- [50] In my view, no reviewable error was committed by the judge. In fact, the opposite is the case.
- [51] I would dismiss the appeal with thanks to counsel for their very helpful submissions.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Butler"

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