

CANADA / JUDGMENT

Cornerview Farms Ltd. v. Friesen

2020 BCCA 2

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 2 Cornerview Farms Ltd. v. Friesen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Cornerview Farms Ltd. v. Friesen,

2020 BCCA 2

Date: 20200102

Docket: CA45798

Between:

Cornerview Farms Ltd.

Appellant

(Plaintiff)

And

Everett Friesen and Emilie Friesen

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

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

November 22, 2018 (Cornerview Farms Ltd. v. Friesen, 2018 BCSC 2060,
Chilliwack Docket S27907).

Counsel for the Appellant:

R.W. Howarth

Counsel for the Respondent:

M.L. Palleson

Place and Date of Hearing:

Vancouver, British Columbia

November 15, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 2, 2020

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

Summary:

A contract for the sale of a farm granted the buyer early access to the "residence" before the completion date. The parties discussed a change in the early access date, before and after the first agreed date, but did not come to an agreement. The sellers eventually gave the buyer early access to the home but not the garage. The appellant buyer terminated the contract and brought an action for the return of its deposit and damages, arguing the respondents had fundamentally breached the contract by not affording access to the home by the first agreed date, or to the garage at any point. The respondents counterclaimed for damages arising from the lost sale. The trial judge dismissed the appellant's claim and awarded the respondents damages, holding: the respondents had not breached the contract by failing to give access to the home by the first agreed date, because the appellant waived the right to rely on that date; and the term "residence" in the contract did not include the garage. Held: Appeal dismissed. The trial judge correctly applied the principles of contractual interpretation. There was ample evidence to support the judge's conclusion that the buyer had waived the November 1 access date. There is no basis to interfere with the judge's assessment of damages.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] On August 12, 2013, Cornerview Farms Ltd., the appellant, entered into a contract to purchase Everett and Emilie Friesen's poultry farm at 6957 Bradner Road in Abbotsford, British Columbia for \$1,560,000. The buyer paid a deposit of \$100,000. The contract called for the sellers, the respondents, to deliver up vacant possession of the property at noon on January 31, 2014. It allowed, however, for the appellant to have early access to the residence on the property, pursuant to a clause that read as follows:

Seller will vacate residence not later than November 1, 2013 and will allow Buyer access for purposes of improvements as follows:

- replace flooring
- painting
- replacement of plumbing fixtures.

[2] Negotiations with respect to the early access to the residence continued in the period between the execution of the contract and the completion date. The sellers say those negotiations resulted in an agreement to modify the date upon which the buyer would get early access to the residence to November 30, 2013. The sellers vacated the home on the property by November 24 but did not vacate the garage outbuilding.

[3] The buyer took the position the term "residence" included the garage and, on December 2, 2013, asked the sellers to vacate the garage immediately. The sellers refused to do so. On December 16, 2013 the buyer advised the sellers they had breached the contract, purported to terminate the contract and asked for the immediate return of the \$100,000 deposit and interest.

[4] The sale did not complete. The property was subsequently sold by the sellers for an amount substantially below \$1,560,000. The deposit was not returned.

[5] The buyer brought this action for return of the deposit and damages for breach of contract. The sellers commenced a counterclaim seeking damages arising from the breach, principally the difference between the sale price and the price for which they later sold the farm, but also including carrying costs: interest expenses, utilities and property taxes.

[6] The judge found the contract permitted the buyer to have early access to the house only and not the garage. He also found the buyer had waived the provision allowing it to have early access to the house on November 1, and agreed that the contract could be performed by affording access to the house by November 30. In any event, he found the failure to give the buyer early access to the garage (if that had been required by the contract) would not have amounted to a fundamental breach of the contract so as to permit the buyer to terminate the agreement. He found the buyer to be in breach of the contract of purchase and sale and

awarded the sellers damages in the sum of \$120,000

[7] The appellant says the trial judge erred:

- a) in finding that the term "residence" did not include the garage;
- b) in finding that there was waiver of the November 1 vacancy date and no fundamental breach of the contract;
- c) in assessing damages by:
 - i. failing to take into account the inadequate measures taken by the sellers to mitigate their losses;
 - ii. excluding revenue from a specific flock of chickens; and
 - iii. failing to adequately assess the credibility of Mr. Friesen.

[8] The critical finding of the trial judge with respect to the interpretation of the contract is at paras. 241-243 of the reasons for judgment:

[241] Having considered counsel's submissions and construed the plain language and primary meaning of the words used in the debated term; and having regard to the context of the contract as a whole; and, to a lesser degree, evidence related to the factual matrix - or surrounding circumstances -- when the contract was made - that is to say, circumstances the parties knew or reasonably ought to have known about that assist in determining the meaning a reasonable person would give to the word's use by the parties, I have come to the view that the term "residence" insofar as it relates to the defendants' obligation to vacate the garage by November 30 is not ambiguous; that the term "residence" in this factual matrix meant the house. The defendants had vacated the house on November 24, 2013. They were not obligated to vacate the garage by no later than November 30, and were not in breach of the contract for their not having vacated the garage by November 30, 2013.

[242] To the extent any ambiguity may remain. I find this interpretation consists [sic] with commercial efficacy and good sense, and is reasonable and fair.

[243] It is noteworthy that the plaintiff had asked for early access to carry out some renovations in the house. The defendants granted what was a request as a pay forward response to a kindness they had received with respect to their own quite recent purchase of another property. The plaintiff did not stipulate anything specific with respect to the garage, which was fully occupied at the time. The plaintiff was minded to use the garage as a staging area, but never stipulated that or an intention to "gut the house", as Mr. Shead [the buyer's principal] testified.

- [9] The trial judge then turned to the question of waiver. As the sellers had not afforded the buyer access to the residence by the date specified in the contract, November 1, 2013, the sellers' claim for damages hinged upon the continued validity of the contract after that date. The judge addressed that issue obliquely, by describing the positions of the parties, without expressing a clear conclusion.
- [10] At paras. 246-254 of the reasons, the judge set out the submission of the sellers' counsel to the effect that, whether or not an agreement to amend the vacancy date was actually reached, there was no doubt that, after a meeting between the parties to discuss the issue on October 24, neither side expected the buyer to have access on November 1. The sellers relied on statements in *Endacom 2000 Inc. v. Hydro One Networks Inc.*, [2002] O.J. No. 129 (S.C.J.); *Rados v. Paconla Investments Ltd.*, [1981] B.C.J. No. 72 (S.C.), and *2329131 Ontario Inc. v. Carlyle Development Corp.*, 2014 ONCA 132 to illustrate the consequences that arise when parties to a contract conduct themselves in a manner that indicates they are no longer relying on a deadline stipulated in the agreement. The reasons for judgement cite the following passage from *Endacom* in this regard:
- [37] In law, when both parties to a contract let the time for completion go by, and one of the parties wishes to reinstate time as of the essence, it is necessary to serve a notice upon the other party, fixing a new date for completion, which must be reasonable, and stating that time is to be of the essence with respect to the new date.
- [11] Based on this principle, the sellers reasoned that after having agreed to extend the November 1, 2013 date, and letting that date pass, the buyer could only impose a new schedule on reasonable terms and could not reinstate the November 1 early access date.
- [12] The judge's recitation of the position taken by the sellers ends with the following passages:
- [253] The defendants submitted there is in place an entirely enforceable Contract between the parties consisting of the document set out in Ex. 2 at p. 6, [the original agreement] together with the "waived" or later date to vacate the residence. Accordingly, the defendants submit the plaintiff did not have the ability or right to try walk away from that enforceable deal.
- [254] The defendants further submitted that the agreement to move the date to November 30 is a waiver of the November 1 date; the plaintiff, in essence, acquiescing in approving the delay to November 30, 2013.
- [13] These paragraphs are immediately followed by a discussion of fundamental breach, clearly founded upon the presumption that the sellers were to provide "vacant possession" of the residence by November 30:

- [255] I will briefly consider an alternative finding if my disposition of the issue of whether the term "residence" encompassed both the house and the garage; and on the operative date, if the defendants were to provide vacant possession of the garage as well as the residence by November 30. Is in error. [sic] Then, I will consider whether the failure to vacate the garage (the house was vacated by November 24) by that date does not amount to a fundamental breach of the Contract.
- [14] Only by reading the judgment as a whole is it apparent that the judge implicitly accepted the argument that the buyer had, through the course of its conduct, agreed to treat November 30 as the "operative date" by which it was to have early access to the residence. When he turned to the question of fundamental breach, the trial judge addressed only whether failure to vacate the garage by November 30 went to the root of the contract; he did not consider whether the failure to vacate the house on November 1 amounted to a fundamental breach.
- [15] He concluded that even if the contract had called for the sellers to afford early access to the garage as well as the house, the failure to do so did not amount to a fundamental breach of the contract:
- [267] There is no breach justifying repudiation where the parties have received substantially what they had bargained for: *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265 at para. 86.
- [270] I agree with the defendants that the failure to vacate the garage cannot reasonably be characterized as a breach of Contract that deprived the plaintiff of substantially the whole benefit of the Contract; further, counsel for the defendant aptly submitted that while the failure of the defendants to vacate the entire residence by the early possession date arguably could be considered an inconvenience for the plaintiff, it cannot tenably be said that they lost substantially the whole benefit of the Contract (see *Stearman v. Powers*, 2014 BCCA 206). [Emphasis added]
- [16] Having found the contract to be binding, he concluded the buyer, by failing to complete, had breached the contract and was liable for consequential damages. Those damages included the difference between the original purchase price and the final purchase price, \$130,000, together with carrying costs, less the deposit, interest on the deposit and earnings flowing from the continued operation of the chicken farm in the interval between the collapse of the first sale and the completion of the subsequent sale of the property.

Appellant's argument

Interpretation of the contract

- [17] The buyer takes issue with the trial judge's finding that the sellers undertook to provide early access to the residential building only and not the garage.

- [18] The buyer does not take issue with the trial judge's description of the principles of contractual interpretation. These were drawn from the decision of this Court in *Miller v. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311. However, the buyer contends the analysis was inadequate because the judge did not consider the principle of *contra proferentem* which, it submits, has application in this case because the sellers' lawyer drew up the contract.
- [19] As this Court noted in *Miller*, resort to the rule of *contra proferentem* is necessary only where there is ambiguity that cannot otherwise be resolved. The principle may not be used to create or magnify an ambiguity. In my view, it was not an error to interpret the contract in the case at bar without resort to the rule. The contract was interpreted by considering, first the ordinary meaning of the word "residence", and turning, secondly, to the words of the contract describing the purpose for which access was to be afforded to the buyer. Early access was given to the buyer specifically "for purposes of improvements" that were to be effected to the residential building, not the garage. That analysis left no ambiguity.
- [20] The appellant does not identify either an error in principle or a palpable or overriding error that can be said to undermine the trial judge's findings of fact. This is clearly a case where the contractual interpretation involved issues of mixed fact and law. That being the case, we should defer to the trial judge for the reasons expressed in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 52: such deference promotes "the goals of limiting the number, length and cost of appeals and of promoting the autonomy and integrity of trial proceedings." That is particularly so where, as here, only the parties have an interest in defining the legal obligations arising from the contract.

Waiver and fundamental breach

- [21] The buyer submits "the facts do not support the submission of Respondents counsel as set out by the trial judge" with respect to waiver of the November 1, 2013 early access date. Properly, in my view, the buyer considers the judge to have accepted the sellers' submissions with respect to waiver.
- [22] The buyer identifies instances in the history of dealings between the parties where its principal, Mr. Shead, took the position that unless an amendment to the contract could be agreed to, he would insist upon the right to have access to the residence on November 1, 2013. It contends these weigh heavily against the conclusion that it waived the provision for access on November 1.
- [23] However, these instances were not overlooked by the judge, who clearly appreciated the buyer's position that it had occasionally sought to reinstate the original agreement. In my view, the evidence strongly supported the judge's implicit conclusion that the provision calling for early access to the residence on November 1, 2013 was waived by the buyer.
- [24] The trial judge referred in his reasons to the following evidence with respect to waiver:

- a) the buyer acknowledged there was a meeting on October 24, 2013 to discuss extension of the November 1, 2013 vacancy date (para. 35);
- b) it was "undisputable that the parties had a discussion on October 24, 2013, that touched on the question of early vacant access" (para. 86);
- c) on October 24, 2013, Mr. Shead wrote to the sellers' solicitor confirming he had agreed with Mr. Friesen that he would have "full access and possession of the house on Nov 30- 2013 at noon" (para. 42);
- d) on cross examination, Mr. Shead acknowledged the parties agreed on October 24th, "as gentlemen", that the early access date would be November 30 (para. 90);
- e) Mr. Shead confirmed an e-mail was sent on October 31 at 4:04 p.m., to the sellers' solicitor which read, in part: "The date for access to the house was discussed to be November 30th at noon" (para. 95);
- f) on cross examination Mr. Shead acknowledged that as of October 31 he was still "living with an agreement with the November 30th date" (para. 97);
- g) on November 6, 2013 the buyer's acting solicitor wrote a letter to the sellers' solicitor that included the following passage: "my clients indicate that they and the Friesens agreed to November 30, 2013 at noon for possession of the residence" (paras. 36, 83 and 84);
- h) Mr. Shead agreed in cross-examination that he had provided those instructions to his solicitor (para. 92); and
- i) finally, the following cross-examination was noted (para. 94):

Q Now, you've eventually agreed with me that the November 1st date for vacancy of the garage or whatever we want to call it it was agreed it would be extended to November 30; correct?

A Correct.

Q All right. And that was an agreement you reached with the Friesens at this October 24th meeting at their house; right?

A That was discussed and agreed upon verbally.

[25] In my view, the evidence supported the conclusion that the buyer had waived the term of the contract providing the buyer access to the residence on November 1, 2013.

[26] There is some merit to the buyer's submissions that the reasons are deficient in failing to address numerous issues and conflicts in the evidence identified by the judge. The buyer says, for example, that the judge describes in detail the submissions impugning the credibility of Mr. Friesen but does not make any finding with respect to his credibility. Similarly, I note, the judge set out in detail the submissions impugning the credibility of the buyer's principal, Mr. Shead, without making any finding with respect to his credibility. However, I am unable to identify any point of importance turning on the credibility of either

party. There is little dispute with respect to the terms of the contract and the essential aspects of the negotiation relied upon by the judge were set out in correspondence between the parties and their solicitors.

- [27] In light of his finding that the sellers complied with their contractual obligations when they vacated the residence and made access available to the buyer before November 30, 2013, the judge's consideration of the fundamental breach issue became unnecessary and can be regarded as obiter. Because I would uphold the trial judge's interpretation of the contract and would find the buyer to have waived the provision affording it access to the residence on November 1, 2013, it is not necessary to revisit the question of fundamental breach.
- [28] I would note, however, that the appellant does not take issue with the trial judge's description of what amounts to a fundamental breach: a breach that is such as to "deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as consideration for performing those undertakings." (*Coal Harbour Properties Partnership v. Liu*, 2005 BCSC 873 at para. 36 (citing *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26 (C.A.)). The course of negotiations between the parties made it clear that the buyer was flexible about obtaining that access and there was nothing in the buyer's conduct that suggested that later access to the residence to effect repairs would frustrate its intentions. The course of dealings that led the trial judge to find the agreement to afford early access to the residence had been waived is, in my view, inconsistent with the argument that breach of that term would amount to a fundamental breach of the contract, if it had not been waived.

Assessment of damages

- [29] When he assessed damages the judge had before him a detailed calculation of the loss on the resale of the property and carrying charges. He accepted that the deposit was forfeited "on account of damages". He made an allowance for interest on the deposit and for profits the Friesens earned through their continued operation of the poultry farm. He accepted the evidence of Mr. Friesen that one cycle of poultry production, identified as A122, would have been completed and the profits from that cycle would have been earned before the completion date. He deducted profits from cycles that finished after the completion date. He made a moderate adjustment to the claim to reflect the delay in listing the property for resale while giving some weight to the Friesens' "uncontradicted testimony that the market did not favour selling at the time" of the breach (para. 263).
- [30] The appellant contends the trial judge inadequately assessed Mr. Friesen's credibility. The appellant says the trial judge should not have given credence to Mr. Friesen's explanation of his slow attempts to sell the property and erred in accepting the evidence that flock A122 would have been sold before the scheduled completion date.

[31] In my view, the appellant has not identified an error in principle or a palpable and overriding error affecting the findings of fact. The trial judge expressly addressed the appellant's argument that the respondents failed to mitigate and made some allowance for deficiencies in the respondents' conduct. In the course of argument we were taken to documentary evidence in support of the trial judge's findings of fact. In my view, there is no basis to interfere with the trial judge's assessment of damages and in particular no reason to say that the trial judge should have drawn an adverse inference from any deficiencies in the documentary record.

[32] I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Fitch"

I agree:

"The Honourable Mr. Justice Hunter"

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