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CANADA / JUDGMENT

# Firestar Custom Home Builders Inc. v. 1099000 B.C. Ltd.

2021 BCSC 721

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COURT

Supreme Court of British Columbia

DECIDED

23 March 2021

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2021 BCSC 721 Firestar Custom Home Builders Inc. v. 1099000 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Firestar Custom Home Builders Inc. v. 1099000 B.C. Ltd.,

2021 BCSC 721

Date: 20210323

Docket: S203820

Registry: Vancouver

Between:

Firestar Custom Home Builders Inc.

Plaintiff

And

1099000 B.C. Ltd.

Defendant

Before: The Honourable Madam Justice Gerow

Oral Reasons for Judgment

Counsel for Plaintiff:

M.G. Goldberg

Counsel for Defendant:

M. Stewart

Place and Date of Hearing:

Vancouver, B.C.

March 3 and 4, 2021

Place and Date of Judgment:

Vancouver, B.C.

### **March 23, 2021**

- [1] THE COURT: The plaintiff, Firestar Custom Builders Inc., entered into a contract dated October 5th, 2019, with the defendant, 1099000 B.C. Ltd., for the construction of a duplex on the property located at 6387 Argyle Avenue, West Vancouver, British Columbia (the "Project").
- [2] The Project was not built, and the plaintiff is suing the defendant for damages for breach of contract, or in the alternative breach of the duty of good faith.
- [3] On this summary trial, the plaintiff seeks judgment against the defendant for breach of contract, or in the alternative, for breach of duty of good faith, in the amount \$252,960 or its loss of profit on the Project. The plaintiff takes the position that the issues of both liability and damages are suitable for summary trial.
- [4] The defendant takes the position that it did not breach the contract or the duty of good faith. The defendant says it exercised the cancellation clause in the contract when it became clear that the Project could not be constructed as planned. The defendant asserts there is nothing in the evidence to imply it was acting in bad faith when relying on the cancellation clause. In fact, Mr. Locke, the former shareholder of the defendant, has suffered a large loss as a result of the cancellation of the contract.
- [5] The defendant takes the position that while it is appropriate to determine the issue of liability by way of summary trial, the issue of damages is not suitable for determination by way of summary trial.

### **Background**

- [6] I will set out some of the background facts. The defendant was incorporated for the purpose of purchasing and developing the project. It is a shell company, and in 2016 Herbert Locke was the director and operating mind of the defendant. The defendant's funds were provided by Mr. Locke or other companies affiliated with Mr. Locke.

- [7] The plaintiff is a construction company. On or about November 26, 2016, the defendant engaged the plaintiff to provide services in relation to the Project. The defendant and the plaintiff had worked together on a similar project in Anmore, British Columbia. The defendant entered into an agreement with the plaintiff to provide services for the purposes of obtaining designs and a building permit required to evaluate the feasibility of constructing the Project.
- [8] At the time, the plaintiff advised the defendant that it estimated the building permit would be obtained in approximately six months. On March 8, 2017, the defendant paid the plaintiff the amount of \$102,309.90, and the plaintiff commenced work on the Project.
- [9] In July 2017, the defendant obtained financing for the Project. The financing was in the form of a construction loan that would be drawn down by progress draws as construction of the Project progressed.
- [10] The building permit process was lengthy. It commenced in early 2017 and lasted until the end of 2019. While the plaintiff was working on designing the Project and obtaining the building permit, the defendant obtained quotes from other contractors for the construction of the Project. This apparently came as a surprise to the plaintiff. James Wendell, the president of the plaintiff, deposed that it was his understanding that the plaintiff had been retained not only to design the Project and obtain the building permits, but to construct the Project as well.
- [11] The defendant takes the position that the plaintiff was advised throughout the design and permitting phase that the defendant was seeking quotes from other contractors to construct the Project.
- [12] The plaintiff provided a quote to construct the Project which was accepted by the defendant. On October 9, 2019, the parties entered into the Canadian Home Builders' Association of British Columbia standard form construction contract, Form C0002, for the construction of a home on lands of another as the contract to govern the relationship of the parties for the construction phase of the work.
- [13] On December 3, 2019, the building permit was approved. The defendant informed the lender financing the Project that the permit had been obtained. As a result of the long delay in obtaining a building permit for the Project, the lender required a further appraisal before it was willing to proceed with financing. The defendant says it informed the plaintiff that the lender required a further appraisal.
- [14] A reappraisal was performed by the lender on or about December 13, 2019, after which the lender informed the defendant that it would no longer provide financing for the Project. As a result, neither the defendant nor its principal shareholder, Mr. Locke, had the funds to proceed with the construction of the Project.

- [15] On or about December 17th, 2019, the defendant informed the plaintiff that there was no longer financing for the Project and the defendant was not going to proceed with construction. As a result, the plaintiff did not perform any construction on the Project.
- [16] On February 7, 2020, Mr. Locke sold his shares in the defendant to the current owners. Amir Kamiri is a director and one of the controlling shareholders of the defendant and has been so from February 7, 2020. Mr. Locke did not advise the new shareholders of the plaintiff's claim because he was of the view that all of the monies due and owing to the plaintiff for its work on the Project had been paid. Mr. Locke is indemnifying the defendant from any losses as a result of this claim.
- [17] Mr. Locke deposes he suffered losses in the sale of the shares of approximately \$297,000.
- [18] Since the share transfer, the new shareholders have commenced construction of the Project without the plaintiff's involvement. The plaintiff says the evidence is that the Project is being constructed using the plans developed by the plaintiff. The defendant had to obtain a new building permit following the share transfer.

## Issues

- [19] The issues raised in the summary trial are:
- 1) Is the matter suitable for adjudication on summary trial?
  - 2) Did the defendant breach the terms of the contract by purporting to cancel it in January 2020?
  - 3) If the contract was cancelled, is the plaintiff still entitled to claim for loss of profits pursuant to the contract?
  - 4) Alternatively, did the defendant breach its duty of good faith by cancelling the Project?
  - 5) What is the appropriate measure of damages?

## Is the Matter Suitable for Adjudication on a Summary Trial

- [20] I will first deal with the issue of whether or not the matter is suitable for adjudication on a summary trial. The test for granting summary relief pursuant to a summary trial is set out in Rule 9-7(15) of the Civil Rules of Court. The court may grant judgment in favour of any party, either on an issue or generally, unless the court is unable to find the facts necessary to decide the issues of fact, or if it would be unjust to decide the issues on the application.

[21] In *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), a case on the former rule for summary trial, the Court of Appeal set out a number of factors a judge should consider in determining whether a determination by way of summary trial is appropriate. These factors include the amount involved, the complexity of the matter, the cost of a conventional trial in relation to the amount involved, and the course of the proceedings.

[22] As stated in *Gichuru v. Pallai*, 2013 BCCA 60 at para. 31:

To this list has been added other factors, including the cost of the litigation, the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices.

## Analysis

- [23] The parties agree that the issue of liability can be determined summarily. However, the defendant takes the position that the issue of quantum is unsuitable for determination by way of summary trial, and liability and quantum should be severed. The defendant submits that the time required for a trial on liability and damages would take ten days. The defendant argues that if liability is determined on summary trial, it would result in a savings of time and cost of the trial.
- [24] The plaintiff takes the position that both liability and quantum are suitable for determination by way of summary trial. The plaintiff submits the defendant had notice that quantum was in dispute and had opportunities to collect and provide rebuttal evidence if it so wished.
- [25] The plaintiff says that the defendant has had ample time to conduct an examination for discovery of the defendant's representative. The plaintiff relies on *Kok v. Adera Natural Stone Supply Co. Ltd.*, 2018 BCSC 1542, for the proposition that a summary trial cannot be frustrated by one of the parties delaying pretrial procedures such as an examination for discovery or not responding to an application once it is brought. The plaintiff says the defendant cannot, by failing to have conducted an examination for discovery, frustrate the benefits of the summary trial rule. As a result, the plaintiff says its evidence regarding damages is effectively uncontroverted.
- [26] However, the defendant says it was unaware of the calculation of profits until the application was filed on February 10, 2021. The defendant says it did not avail itself of pre-trial procedures regarding the plaintiff's claim for damages because it did not know it needed to.
- [27] The plaintiff's claim is for loss of its expected profits on the Project. The plaintiff is claiming that its loss of profits is equal to the line item for labour contained in the budget sheets for the Project. The plaintiff says it has performed \$252,000 in labour in constructing the Project and that would all be profit.

- [28] The contract between the parties indicates an anticipated completion date for the Project of September 1, 2020. The plaintiff asserts that the Project would have taken nine to 12 months to complete.
- [29] There is evidence that the plaintiff worked on another construction project in Gibsons, BC, commencing in or around March 2020, the same time the construction of the Project would have occurred. As well, there is evidence that the plaintiff performed other work during the time it would have been constructing the Project.
- [30] The plaintiff asserts that its mitigated profits are so low they ought not to be set off against expected profits from the Project and that any profit from the Gibsons project will not be received during the "notice period."
- [31] In *Novelty Holdings Ltd. v. FMF Construction & Trading Ltd.*, 2008 BCSC 337, the court discussed the principles that govern the assessment of damages where a defendant denies the plaintiff the opportunity to fulfil a contract, stating:
- [149] The principle that governs the assessment of damages where a defendant denies a plaintiff the opportunity to fulfill a contract for services is explained by S.M. Waddams, *The Law of Damages* :

The basic principle of compensation is that the plaintiff is entitled to be put, so far as money can do it, in the position that would have been occupied if the wrong had not been done. This principle in a case where the plaintiff is deprived of opportunities to render services and earn a reward suggests as a starting point the amount of the reward (wages, commission or price) that would have been earned. From this, however, must be deducted as Anglin J. said in a building case: "the time, labour and expense which the plaintiffs have been saved through being relieved of their obligation to carry out the contract under which they would have earned it." Thus, out-of-pocket expenses that have been saved, such as the cost to a builder of materials, must be deducted. This is merely to say that the plaintiff is entitled to the expected net profit not to gross revenues.

- [150] Not all income earned by the plaintiff during the period which, but for the defendant's breach, he or she would otherwise have been performing the contract, is applied against the plaintiff's losses. In *Karas v. Rowlett*, [1944] S.C.R. 1, Rand J. wrote (at 8):

It is settled, also, that the performance in mitigation and that provided or contemplated under the original contract must be mutually exclusive, and the mitigation, in that sense, a substitute for the other. Stated from another point of view, by the default or wrong there is released a capacity to work or to earn. That capacity becomes an asset in the hands of the injured party, and he is held to a reasonable employment of it in the course of events flowing from the breach.

- [32] As stated earlier, the plaintiff takes the position that all of the labour it would have provided for the Project was profit. However, in order to earn those monies, the plaintiff would have had to forego other work. In order to be put back in the position it would have been but for the breach, any money the plaintiff earned during the period of construction would have to be deducted from the losses the plaintiff is claiming.
- [33] In this case if the Project had gone ahead, it would have commenced sometime after December 3, 2019, and continued for some months. As indicated earlier, the plaintiff says the construction of the Project was anticipated to take nine to 12 months. The contract contained an anticipated completion date of September 1, 2020. There is evidence the plaintiff became involved in some other projects in 2020, including the project in Gibsons, after being notified the Project was not proceeding.
- [34] There is very little evidence of what the plaintiff earned from those projects. As a result, it is my opinion that there is insufficient evidence to find the facts necessary to determine what the plaintiff's earnings were during the time it would have been constructing the Project. Accordingly, I conclude that the issue of quantum is not suitable for determination by way of summary trial.
- [35] Rule 9-7 provides that the court may grant judgment on an issue. I agree with the parties that there is sufficient evidence to find the facts necessary to determine the issue of liability, and it is suitable for determination by way of summary trial. In my opinion the determination of the issue will advance the case, and it is a proportionate, timely, and cost-effective way to proceed in this case.

Did the Defendant Breach the Terms of the Contract by Cancelling it in January 2020?

- [36] I turn to the issue of whether the defendant breached the terms of the contract by purporting to cancel the agreement pursuant to clause 2 of the contract. The relevant clauses in the contract provide:

## 2. CANCELLATION

The Builder and Purchaser agree that if the Builder is not able to commence construction within a period of sixty (60) days from the date of this Agreement due to causes beyond his reasonable control, such as an inability to obtain a building permit, failure of the Purchasers to qualify for a mortgage (if a condition of this agreement), or failure to comply with provincial or municipal statutes, the Builder or the Purchasers may cancel this Agreement on written notice mailed to the address of the other party shown on this agreement. The Builder's liability to the Purchasers shall be limited to the refund of any monies paid by the Purchasers to the Builder less any costs reasonably incurred by the Builder on account of this Agreement.

## 8. COMPLETION DATE

Subject to any extensions required as a result of paragraph 9, the Builder agrees to construct the dwelling in accordance with paragraph 3 of this agreement in a proper workmanlike manner and with all due diligence and to have the said dwelling house completed on or about Sept.1, 2020

#### 11. DEFAULT BY PURCHASERS

If the payment of any of the monies herein agreed to be paid to the Builder are not made at the times and in the manners provided, or if the Purchasers default in any of the other covenants or agreements herein, the Builder may at his option cease work and treat the contract as repudiated forthwith on the occurrence of such a default, and the Builder may recover payment for the work already complete plus damages, including loss of profit, together with interest thereon at a rate of 5 percent per annum.

#### 20. ENTIRE AGREEMENT

This Agreement shall constitute the entire Agreement between the Builder and the Purchasers and there is no representation, warranty, collateral, agreement or condition affecting this agreement other than as expressed in writing in this Agreement.

[37] In December 2019, the lender reappraised the property, and shortly thereafter the lender advised the defendant it would not provide financing for the Project. Mr. Locke, the shareholder of the defendant, deposes that he informed Mr. Wendell of the plaintiff that the project was not going to proceed due to a lack of financing, in a telephone call on or about December 17, 2019.

[38] Mr. Locke was hospitalized from December 22, 2019, until January 23, 2020, and from March 16 to March 20, 2020, for a serious medical condition. Mr. Locke deposes that while he was in hospital his wife received a demand letter dated January 6, 2020, from the plaintiff's counsel.

[39] On January 13, 2020, the defendant's counsel wrote to the plaintiff's counsel indicating that the defendant was cancelling the contract pursuant to s. 2 of the contract on the basis that:

- a) the plaintiff had not commenced construction on the project within 60 days of the contract; and
- b) the defendant was unable to secure the financing in order to proceed with the construction.

[40] On January 27, 2020, the plaintiff, through his counsel, wrote to the defendant objecting to the fact that notice of cancellation pursuant to clause 2 was delivered under the cover of without prejudice correspondence and attaching three invoices dated January 16, 2020, June 21, 2019, and July 26, 2019.

- [41] On February 13, 2020, the defendant's counsel wrote to the plaintiff's counsel responding to the plaintiff's objection that the defendant was improperly cancelling the agreement under the cover of a without prejudice letter, and confirming that only the portions of the letter of January 13, 2020, relating to settlement would be covered by privilege. The defendant further confirmed in the letter that the defendant was not taking the position that the settlement privilege extended to its notice of cancellation of the agreement.

#### Parties' Positions

- [42] I will set out the parties' positions.

#### Plaintiff's Position

- [43] The plaintiff takes the position that the cancellation clause under the contract was not triggered. The plaintiff submits the defendant did not comply with the contract's express notice provision and that the written cancellation was ineffective because it was sent under the cover of a "without prejudice" letter between counsel.
- [44] The plaintiff relies on *KPMG Inc. v. 0747825 B.C. Ltd.*, 2017 BCCA 277 for the proposition that actual notice is not a substitute for contractual requirements that specify how notice should be given.
- [45] The plaintiff also relies on the case of *High Tower Homes Corporation v. Stevens*, 2014 ONCA 911, for the proposition that notice to a party's lawyer is insufficient notice if there are explicit terms in the contract that set out how notice should be given.
- [46] The plaintiff submits the case law is clear that when a contract requires written notice, neither actual nor implied notice will suffice. Courts will not rewrite contracts to allow actual or perceived notice to replace the requirements imposed by the parties.
- [47] In this case, clause 2 provides the builder or the purchaser may cancel this agreement on written notice mailed to or delivered to the address of the other party shown on this Agreement.
- [48] The plaintiff submits that if the defendant wished to exercise the clause, it was required to provide notice at the address set out in the contract. It failed to do so and instead sent notice by letter to the plaintiff's counsel under cover of without prejudice communication.
- [49] The plaintiff concedes that labelling correspondence without prejudice does not automatically render correspondence inadmissible on the basis of settlement privilege. However, the plaintiff says the correspondence in its current form, unredacted for settlement discussions, cannot be adduced into evidence on this summary trial.
- [50] The plaintiff says that it has not waived litigation privilege over the settlement discussions contained in the letter. The plaintiff says if the portions discussing the settlement position had been redacted, the documents may have been admissible.

- [51] The plaintiff does not take the position that the entire letter is privileged and inadmissible. It is, however, taking the position that since the letter is marked without prejudice and includes privileged settlement discussions, it should be found that the letter did not provide written notice that the defendant was relying on the cancellation clause and therefore the clause was not triggered.
- [52] The plaintiff points to the fact that the defendant concedes it was put on notice to the impropriety of triggering a cancellation clause under cover of a without prejudice correspondence. It had the opportunity to provide notice as set out in the contract and chose not to do so.

### Defendant's Position

- [53] The defendant acknowledges that its January 13, 2020 letter to the plaintiff's counsel is marked without prejudice. However, the defendant takes the position the letter is admissible for the limited purpose of determining the issue of whether written notice that the defendant was cancelling the Project pursuant to clause 2 was given to the plaintiff.
- [54] In the alternative, the defendant takes the position that written notice was given in its counsel's letter of February 13, 2020, which is not marked without prejudice, and confirms the defendant's position that it is relying on the cancellation clause to terminate the agreement.
- [55] The defendant says that as soon as it became aware that it no longer had financing and would not be able to proceed with the Project, it informed the plaintiff by telephone on or about December 17, 2019. When the defendant received a demand letter from the plaintiff's counsel on January 6, 2020, the defendant retained counsel to respond, including providing written notice of the cancellation of the agreement.
- [56] The defendant says that if the plaintiff intended to object to the sufficiency of the delivery, that is, that it was not sent to the address set out in the contract, as opposed to the fact it was sent under the cover of a without prejudice correspondence, it could have done so. It did not and raised the issue for the first time in the notice of application for summary trial.

### Applicable Law

- [57] I turn next to the applicable law. In *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301, the Court of Appeal discussed the admissibility of without prejudice correspondence in the context of a class action proceeding. At para. 31, the court recognized an exception to the blanket privilege for settlement communications where the party claiming privilege advances a position before the court which opens the door to contrary evidence. See also *Leonard v. The Manufacturers Life Insurance Company*, 2019 BCCA 375 at paras. 30-32.

- [58] The plaintiff relies on *Nesis v. Benter Investments Ltd.*, [1990] B.C.J. No. 200 (S.C.), and *KPMG Inc. v. 0747825 B.C. Ltd.*, 2017 BCCA 277, for the proposition that where a contract requires written notice, neither actual nor implied notice will suffice. Both cases deal with the issue of whether actual notice was sufficient to make compliance with the contractual term requiring written notice unnecessary.
- [59] *Nesis* involved a real estate transaction where the contract required that subject clauses be removed in writing. The court found that the plaintiff could not rely upon the words "we have a deal" for the purpose of circumventing the requirement of the removal of the subject clauses in writing. Accordingly, *Nesis* found that the plaintiff had failed to comply with the requirements to remove the subject clauses in writing as required by the contract.
- [60] *KPMG* was an appeal from an order dismissing the appellant's claim in contract following the respondent's refusal to complete an agreement for purchase and sale. The summary trial judge dismissed the appellant's claim on the basis that it had failed to give written notice of satisfaction of the condition precedent. The appellant was a court-appointed receiver who had entered into a contract in writing to sell real property owned by the company in receivership. The contract entered into between the parties required written notice of the waiver of fulfilment of conditions by each party. The appellant did not provide written notice as required by the contract. The court found that actual notice has been found to be effective in limited circumstances even when written notice is required by the contract. However, the court found that the actual notice was insufficient in face of express language requiring written notice.
- [61] In *High Tower Homes Corporation* at para. 43, the court adopted the following summary of the law about when waiver of terms of a contract occurs:

Waiver occurs when one party to a contract (or proceeding) takes steps that amount to foregoing reliance on some known right or defect in the performance of the other party. It will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated. Communication can be formal or informal and it may be inferred from conduct. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

## Analysis

### Should the Correspondence Marked "Without Prejudice" be Excluded from Evidence

- [62] I will first deal with the issue of whether the correspondence marked without prejudice and attached to Mr. Locke's affidavit should be excluded in its entirety from the evidence on this summary trial.

- [63] It is clear from the case law that there is an exception to the blanket privilege for settlement communication when the party claiming the privilege takes a position that makes the evidence contained in the letter relevant. As noted earlier, the plaintiff concedes that there are exceptions to the blanket privilege, but says that the correspondence should be struck because it contains settlement discussions and is marked without prejudice and has not been redacted.
- [64] In this case the plaintiff is claiming it did not receive written notice of the cancellation contrary to the provisions of the contract. The correspondence in issue purports to provide notice to the plaintiff that the defendant is cancelling the contract pursuant to clause 2. Although the plaintiff argues that the entirety of the correspondence should be excluded because it contains information regarding settlement, it is clear from the case law that such correspondence can be admitted for limited or narrow purposes: see Leonard at para. 32.
- [65] Accordingly, I have concluded the correspondence is admissible for the limited purpose of determining whether written notice was provided as required to the plaintiff.

### **Was the Written Notice Provided Sufficient to Trigger the Cancellation Clause**

- [66] I turn next to the issue of whether the notice given to the plaintiff was sufficient to trigger the cancellation clause. The plaintiff does not claim it did not receive notice of the cancellation. The plaintiff concedes it received oral notice in or around December 16, 2017, that the plaintiff could not proceed with the Project because its lender would no longer provide financing. The plaintiff retained counsel, who sent a demand letter to the defendant and Mr. Locke marked without prejudice, dated January 6, 2020.
- [67] The defendant retained counsel who responded on January 13, 2020, in a letter marked without prejudice. The letter refers to clause 2 of the contract between the parties and states:

We understand that construction of the project has not started. Furthermore, as you are aware, 109 was unable to obtain financing. My client hereby notifies your client of its cancellation of the agreement pursuant to clause 2.

- [68] The plaintiff relies on KPMG and Nesis for the proposition that the written notice sent to counsel was ineffective because it was not sent to the plaintiff's address set out in the contract. However, both those cases dealt with the issue of actual notice versus written notice and therefore are of little assistance.
- [69] In this case the defendant retained counsel when it received the demand letter from the plaintiff. Counsel responded to the demand letter and provided written notice that the defendant was relying on the cancellation clause in the contract.
- [70] As stated earlier, the plaintiff relies on the case of High Tower Corporation for the proposition that service to the party's counsel is insufficient when the contract specifies an address to which written notice should be sent. In my opinion High Tower Corporation is

distinguishable. High Tower Corporation involved the purchase and sale of a property where a vendor had been mistaken as to the terms of the agreement. Completion of the sale would have resulted in the purchaser's acquisition of the property below market value. The motions judge found that the vendor could avoid completing the sale by relying on the purchaser's failure to give notice of its waiver of conditions personally to the vendor. The vendor's lawyer had responded to the purchaser's lawyer's fax within three days, indicating the agreement was at end because the purchaser had not given notice waiving the conditions within the manner required by the agreement. The Court of Appeal found in the circumstances that the motion judge did not err in finding the purchaser had not complied with the express terms of the contract and the vendor had not waived the requirement to be given notice in person.

- [71] This is very different from the case at bar. Prior to filing the summary trial application, the plaintiff did not object to the address to which the notice of cancellation had been sent. Rather, the plaintiff took issue with the fact the notice had been sent in without prejudice correspondence. Counsel for the defendant wrote back confirming the cancellation of the letter which was not marked without prejudice. I note that if counsel for the plaintiff had indicated that the notice of cancellation was not in compliance because it was not sent to the address shown in the agreement, the defendant would have had the opportunity to comply. As a result, I find that the plaintiff through its lawyer's course of conduct waived the requirement, with notice given pursuant to clause 2 to be given in accordance with its express terms, that is, to the specific address set out in the agreement.
- [72] In the circumstances, I conclude that written notice of cancellation pursuant to clause 2 was provided to the plaintiff on January 13, 2020. I further conclude the defendant was entitled to rely on the clause because the plaintiff had not been able to commence construction within sixty days from the date of the agreement due to causes beyond its control. The defendant had not been able to obtain financing. As a result, I find the agreement was cancelled on January 13, 2020.

### **Is the Plaintiff Able to Advance a Claim for Loss of Profits in the Circumstances**

- [73] I turn next to the issue of whether the plaintiff is still able to advance a claim for loss of profits even though the contract was cancelled.

#### **Parties' Positions**

#### **Plaintiff's Position**

- [74] The plaintiff submits that even if the cancellation clause had been triggered, the clause does not limit the plaintiff's ability to claim for loss of profit. Clause 2 explicitly limits the builder's liability to the purchaser but not the other way around. The plaintiff submits the principles of contractual interpretation may be employed to confirm the potentially unlimited liability of the purchaser/defendant to the builder/plaintiff.

- [75] The plaintiff submits the cancellation clause did not preclude the parties from making claims against each other. The plaintiff asserts that the defendant is seeking to have an implied term that the party which exercises the cancellation clause is immune to any claims arising from the contract. The plaintiff says that the intention of the parties as set out in the contract was that in the event the Project was cancelled, the builder would be sheltered from unlimited liability, not the purchaser.
- [76] The plaintiff submits that there can be no implied term limiting the liability of the defendant. The principles of contractual interpretation do not support implying that term into the contract, and clause 20, the entire agreement clause, expressly prohibits such an inference being made.
- [77] The plaintiff says that despite the apparent advantage flowing to it from these terms, it should be recalled that the defendant decided to use a standard form contract on which the cancellation clause appears. The plaintiff did not seek out this term or require its inclusion.
- [78] The plaintiff says the result is that even if the contract is cancelled, there is no reason to believe that it could limit the liability of the defendant to the plaintiff specifically in respect of the expected profits.

### Defendant's Position

- [79] The defendant says the contract is a standard form contract that is publicly available for purchase. The stated purpose of the Canadian Homebuilders' Association of BC in providing the contract is as a "service to the industry." The defendant understood the contract to be a form that provided protection and certainty to both parties.
- [80] The defendant submits the plaintiff's interpretation of the cancellation clause requires reading the clause in a manner that is inconsistent with its plain meaning and does not make sense when the contract is read as a whole.
- [81] The defendant says the plain meaning of the cancellation clause is that if it is exercised, the contract comes to an end, and any money paid to the builder prior to the commencement of the construction would be refunded to the purchaser, less costs reasonably incurred by the builder on account of its work under the contract.
- [82] The defendant says that the plaintiff's interpretation would render the inclusion of the cancellation clause to be of no benefit to the purchaser. If the builder as a party to the contract is entitled to consequential damages if the purchaser relies on the cancellation clause, it would be in the same position as if it had breached the contract. There would be no meaning assigned to the inclusion of the cancellation clause at the option of the purchaser.
- [83] The defendant submits it should not be taken as a strike against it for failing to draft into a standard form agreement a limitation of this liability as the plaintiff suggests. The defendant says a second unreasonable outcome of the plaintiff's interpretation of the cancellation clause is that it would allow the builder to exercise the option and refund to the purchaser

any excess monies paid to it and then to sue to collect its consequential damages. The defendant says that this lopsided interpretation is contrary to the stated intent of the contract and general intent of the standard form contract, which is to provide certainty and fairness to contracting parties.

## Applicable Law

[84] I turn to the applicable law. In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47, the Supreme Court of Canada discussed the modern approach to contract interpretation as follows:

47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding." To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[85] In *Sattva*, the court adopted the modern approach, noting at para. 55 that the goal of contractual interpretation, i.e., to discover the objective intention of the parties, is inherently specific.

[86] As set out in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 50, when there is ambiguity, general rules of contract construction must be employed to resolve the ambiguity. These rules include that the interpretation should be consistent with the reasonable expectations of the parties as long as that interpretation is supported by the language of the contract. It should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the agreement was entered into, and it should be consistent with interpretation of similar contracts.

[87] As set out in *Trenchard v. Westsea Construction Ltd.*, 2020 BCCA 152 at para. 33, whether or not the contract under consideration is a standard form agreement, the judge must attempt to find the most reasonable interpretation of the contested language.

## Analysis

- [88] It is my opinion that the defendant's interpretation of the cancellation clause is the most reasonable interpretation of the contested language. The contract was entered into before construction had commenced.
- [89] The cancellation clause provides that if a builder has not been able to commence construction within sixty days of entering into the agreement for causes beyond his reasonable control, then any party can bring the contract to an end.
- [90] The agreement contemplates the payment of deposit. The cancellation clause provides for the return of any deposit money paid by the purchaser to the builder, less any costs reasonably incurred by the builder, in the event that the construction is not started within sixty days of the parties entering into the contract.
- [91] I agree that this interpretation accords with commercial reality and provides certainty to both parties. In the event that construction could not commence within sixty days of entering into the contract due to causes beyond the control of the builder, such as the failure to obtain a building permit, failure to obtain financing, or failure to comply with provincial or municipal statutes, either party can cancel the contract.
- [92] When the commencement of a contract has been frustrated by the failure to obtain a building permit, obtain financing, or failure to comply with provincial or municipal statutes, for a period of sixty days the purchaser cannot insist the builder wait for conditions to be met which it has no control over to start construction. Likewise, the builder cannot insist on carrying on the construction contemplated by the contract.
- [93] The clause also provides certainty that the builder will receive compensation for any costs it has incurred prior to the commencement of construction.
- [94] The plaintiff's interpretation of the cancellation clause does not accord with common sense or commercial reality and would render the purchaser's right to cancel the contract meaningless. If the plaintiff's interpretation of the cancellation clause is accepted, a purchaser relying on that clause would be in the same position it would be in as if it breached the contract. The plaintiff's interpretation of the contract would allow the builder the option to cancel and sue to collect his lost profits in the event that construction could not proceed for any of the enumerated reasons. In my view that result would be unreasonable and could not have been the intention of the parties at the time the contract was entered into.
- [95] The plaintiff relies on clause 11 of the contract in claiming that it is entitled to its lost profits. Clause 11 is entitled "DEFAULT BY PURCHASERS". The clause states it operates when amounts become due and owing under the contract. If the purchaser does not pay the amounts owing, the builder can cease work and declare the contract as repudiated.

- [96] In my view, a plain reading of this clause is that it is only operative after work has started under the contract and amounts owing to the builder had not been paid or the purchaser has defaulted in some of the other covenants or agreements contained in the agreement.
- [97] As stated earlier, the contract was cancelled before any work commenced under the contract. None of the progress payments referred to in clause 5, "TERMS OF PAYMENT", were due at any time because the construction had not started. The evidence is that the defendant paid all of the plaintiff's invoices for its work on the project up to and including the invoice of January 16, 2020.
- [98] In my opinion, clause 11 provides that the builder has a right to loss of profits in specific circumstances, none of which occurred in this case. The plaintiff has failed to establish that the defendant defaulted in paying any of the amounts agreed to be paid to the plaintiff or in any of the other covenants or agreements in the contract. As a result, the plaintiff is not entitled to a claim for loss of profits.

#### Did the Defendant Breach its Duty of Good Faith by Cancelling the Contract

- [99] I turn next to the issue of whether the defendant breached its duty of good faith by cancelling the contract.

#### Parties' Positions

- [100] The plaintiff points to the fact that after Mr. Locke sold his shares to the defendant, the defendant remained the registered owner of the property and retained the benefits of its assets, including the building permits, plans, and other work performed by the plaintiff. The plaintiff says it takes approximately 90 percent of its profits during the building phase of a project. The defendant, by removing the plaintiff from the Project, prevented it from receiving its expected profits. Its basis for doing so was that it could not finance the project. Within weeks of attempting to cancel the contract, the defendant commenced construction.
- [101] The plaintiff says that the defendant is constructing the Project using the work the plaintiff did without providing it with the intended fruits of its labour. The plaintiff submits the defendant's use of the cancellation clause in the circumstances was in breach of its duty of good faith.
- [102] The defendant takes the position that there is nothing in the evidence to imply it was acting in bad faith when it relied on the cancellation clause. In fact, Mr. Locke has suffered a large financial loss as a result of losing financing and cancelling the contract. The defendant says it also cannot be said that its obligation survived under the contract that had been cancelled once the defendant's circumstances changed.

## Applicable Law

[103] I turn to the applicable law. In *Bhasin v. Hrynew*, 2014 SCC 71, the Supreme Court of Canada recognized a new common law duty of honest performance which requires parties be honest with each other in relation to the performance of their contractual obligations. At para. 73, the court explained the duty of honest performance as follows:

This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance.

## Analysis

[104] In this case there is no evidence that the defendant lied or knowingly misled the plaintiff about matters directly linked to the performance of the contract. The evidence is that as a result of the lengthy time in obtaining the building permit, the defendant's lender conducted another appraisal of the property and declined to proceed with providing financing for the Project.

[105] As soon as the defendant lost its financing, it informed the plaintiff that it would not be able to proceed with the Project. The defendant relied on the cancellation clause, as the builder had not been able to commence construction within sixty days due to the lack of financing. It paid all of the plaintiff's outstanding invoices and was of the view its obligations to the plaintiff had come to an end.

[106] There is no evidence to support the plaintiff's allegation that the defendant cancelled the Project to retain the plaintiff's labour or work product. The evidence is that the plaintiff was paid all of the invoices it rendered for the work it undertook on the Project prior to the cancellation.

[107] The plaintiff has not provided any authority to support its argument that the defendant's obligations were revived under a contract that had been cancelled if the defendant obtained financing later.

[108] In the circumstances, I find the plaintiff has not established the defendant breached its duty of good faith by either lying to it or knowingly misleading it.

[109] In conclusion, for the reasons I have set out, I find the plaintiff has failed to establish that the defendant breached the terms of the agreement or breached its duty of good faith to it. Accordingly, the plaintiff's claim is dismissed with costs to the defendant.

"Gerow J."

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