
CANADA / JUDGMENT

FWC Holdings Ltd. v. Virtue Films Inc.

2009 BCSC 1563

COURT

Supreme Court of British Columbia

DECIDED

16 November 2009

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2009 BCSC 1563 FWC Holdings Ltd. v. Virtue Films Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

FWC Holdings Ltd. v. Virtue Films Inc.,

2009 BCSC 1563

Date: 20091116

Docket: S105836

Registry: New Westminster

Between:

FWC Holdings Ltd.

and Interpac Log & Lumber Ltd.

Plaintiffs

And:

Virtue Films Inc. and Danny Virtue

Defendants

Before: The Honourable Mr. Justice Savage

Reasons for Judgment

Counsel for the Plaintiffs:

G.J. May

Counsel for the Defendants:

D.R. McGowan

Place and Date of Trial:

New Westminster, B.C.

November 2-4, 2009

Place and Date of Judgment:

New Westminster, B.C.

November 16, 2009

I. Introduction

- [1] This is an action by FWC Holdings Ltd. ("FWC") against Virtue Films Inc. ("VFI") and Danny Virtue ("Virtue") in respect of two documents purporting to be promissory notes, one in the amount of \$200,000 dated April 20, 2001 ("PN1") and the second in the amount of \$100,000 dated June 29, 2001 ("PN2").
- [2] The action arises in the context of the informality of essentially hand-shake agreements between parties contracting for the first time. There are no documents evidencing the debt and contractual arrangements other than PN1 and PN2.
- [3] Although the statement of claim includes other causes of action and other parties these were abandoned before trial. VFI is insolvent, so the issue here concerns the liability, if any, of Virtue personally.
- [4] Virtue, a stunt man with a Grade 6 education, but having experience in the film industry, approached Fred W. Clarke ("Clarke") a chartered accountant and principal of FWC to obtain funds in respect of an investment opportunity in North American Releasing ("NAR"). NAR had a production and movie distribution business. Although Virtue lacks education he had at various times legal and accounting advice.
- [5] As a result of discussions between Virtue and Clarke, FWC advanced VFI \$200,000 on April 20, 2001. Contemporaneous with the \$200,000 advance VFI and Virtue gave FWC what is alleged to be a promissory note, PN1. PN1 was drafted by Clarke's accountant. As a result of further discussions between Virtue and Clarke in June 2001, FWC advanced VFI \$100,000 on June 29, 2001. Contemporaneous with the \$100,000 advance FWC was given PN2. PN2 was drafted by Virtue.
- [6] There is conflicting evidence between Clarke and Virtue regarding the deal or deals that gave rise to FWC advancing \$300,000 to VFI. Virtue says this was part of a larger investment to come from FWC and/or Clarke and one Shafique Nizarelli ("Nizarelli") while Clarke denies this saying that the limit of his commitment was \$300,000. The terms of the deal or deals are germane in the action as there is an issue regarding the meaning to be given PN1 and PN2.

[7] The further issues concern whether PN1 and PN2 are promissory notes, whether PN1 is a demand promissory note or a delayed-demand promissory note, whether a limitation period has expired, whether a release provision has been triggered and, ultimately, whether Virtue is personally liable on either note.

II. The April 20, 2001 Document

[8] PN1 reads as follows:

PROMISSORY NOTE

\$200,000 Date: April 20, 2001

ON DEMAND, AFTER DATE AND FOR VALUE RECEIVED the undersigned promises to pay to or to the order of FWC HOLDINGS LTD. (the "Lender") at HSBC BANK OF CANADA (the "Bank"), 885 West Georgia St. Vancouver, B.C. V6C 3G1 the sum of TWO HUNDRED THOUSAND DOLLARS (Cdn\$200,000) together with interest thereon calculated at the Bank's prime lending rate plus 3%.

The undersigned parties agree that the loan, together with all outstanding interest, will, in any event, become due and payable in full on April 20, 2002.

The lender agrees to remove Danny Virtue as a party to this note if the agreement to provide additional financing to North American Releasing Inc. proceeds as contemplated.

Signed, sealed and delivered in the presence of:

)

)

JOINTLY AND SEVERALLY:

Virtue Films Inc.

)

Signature

)

Per: "D. Virtue"

"G.E.Hansen"

)

c/s

Name

)

"Stamp"

)

Address:

)

)

"D. Virtue"

)

Danny Virtue

FWC Holdings Ltd.

"F.W. Clarke"

F.W. Clarke, President

[9] There are some obvious difficulties with PN1. It says it is "...ON DEMAND, AFTER DATE...." but also says it is payable, "....in any event...." on a date certain, one year from its making. There are ambiguities with respect to the calculation of interest, e.g., what interest is to be paid after April 20? Finally, there is the question of what meaning is to be given the final sentence:

The lender agrees to remove Danny Virtue as a party to this note if the agreement to provide additional financing to North American Releasing Inc. proceeds as contemplated.

There are multiple interpretations to be given this sentence in evidence before me. Virtue gives three interpretations, each of which he attested to. I will refer to two.

[10] In his evidence in chief Virtue said that upon signing an agreement with NAR the condition was satisfied and he would be released. This I find doubtful as it would not give meaning to the term "additional financing". I do not accept Virtue's evidence on this point.

[11] An agreement was signed April 27, 2001 between VFI and NAR. Later Virtue said that the sentence referred to additional financing of \$800,000 referenced in the April 27, 2001 agreement that was to be provided by Clarke and/or Nizarelli. Clarke denies that he ever committed to providing additional monies. I accept Clarke's evidence on that.

[12] With respect to Clarke's (and thus FWC's) evidence regarding the last sentence in PN1, the following is an extract from Clarke's examination for discovery:

162 Q. Do you recall whether what we've seen as transaction at Exhibit 4, 7 and 8, was that the additional financing that was being tied into the promissory note?

A Goddamned if I know. I just don't know.

163 Q Did you ever know or have you just forgotten?

A No, I don't think I ever knew.

[13] These questions and answers were affirmed at trial. The consequence of that testimony is that Clarke and thus FWC did not ever know what was referred to by this sentence.

III. Is the April 20, 2001 Note a Promissory Note?

[14] With respect to PN1, Virtue says that it is not a promissory note, relying on the decision of Verchere J., in *Toronto-Dominion Bank v. Parkway Holdings Ltd.* [1968] B.C.J. 239, 1 D.L.R. (3d) 716. In *Toronto-Dominion Bank* the court cited section 176(1) of the Bills of Exchange Act, R.S.C. 1985, c. B-4, saying:

7 Section 176(1) of the Bills of Exchange Act defines a promissory note. It reads as follows:

176(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.

8 Although that section apparently permits a promissory note to be expressed to be payable on demand or at some fixed or determinable future time, it clearly does not permit both of these alternative occasions to be recited in a single instrument capable of being a promissory note. In order to achieve that status the instrument must engage that payment of the sum stated therein shall be made when it is demanded or on a fixed or ascertainable future date. Certainty as regards the payment date is as necessary as certainty in the amount to be paid; without it the instrument does not qualify as a promissory note capable of endowing its holder with the advantages of a holder in due course.

[15] FWC argues first that the true meaning of PN1 is that the note is only payable one year from the date of its issue; the phrase "ON DEMAND, AFTER DATE" refers to the later date specified when due, not to the date of PN1 which is shown as April 20, 2001. In my view the express terms of PN1 belie this interpretation. This interpretation would give no meaning to phrase the loan "...will, in any event..." be due on a specific date. PN1 says, on its face, that it is both a demand note and that the sum secured is due on a specific date.

[16] FWC refers to Crawford and Falconbridge Banking and Bills of Exchange, 8th Ed. (Toronto: Canada Law Book Inc., 1986) at paragraph 4904.3 where the learned author, after referencing the decision in *Toronto-Dominion Bank* said:

Quaere, whether a note would recite an uncertain time of payment if it were to run "on demand but on May 1, 1989 if not demanded sooner".

[17] Relying on this passage, FWC says that PN1 is just such a note. I disagree. In my view, PN1 is very nearly the same as that referred to by Verchere J., in *Toronto-Dominion Bank*, where the note was as follows:

4 The instrument sued on reads as follows:

\$17,000.00 185 East Hastings St. at Main St., Vancouver 4, B.C. November 13, 1964. On Demand I promise to pay to

the order of Parkway Holdings Ltd. at the Toronto-Dominion Bank here the sum of.....SEVENTEEN THOUSAND..... DOLLARS With interest payable monthly at the rate of nil % per annum until paid, payable as \$1,000.00 per month commencing on the first day of December, A.D. 1964. VALUE RECEIVED (signed) E. B. Coulter.

[18] Although not referenced by counsel, the decision of Justice Verchere has been referred to and approved in a number of other cases. In *Industrial Acceptance Corp. v. Harding* (1972) 5 N.B.R. (2d) 880, Robichaud J. said:

40 Among the many Canadian cases which I have considered on the point in issue here, I have come across an interesting and rather recent one, decided on December 4, 1968, in the Supreme Court of British Columbia: - *Toronto-Dominion Bank v. Parkway Holdings Ltd.* (1969), 1 D.L.R. (3d) 716.

41 Although this case, on the facts, is not on "all fours" with the case at bar, yet, Mr. Justice Verchere explains, at page 718, the very principles by which I intend to be guided herein. After dealing with Section 176(1) above recited, as permitting two alternatives in a promissory note (i.e.:- payable on demand or at some fixed determinable future time), the learned judge is quoted as saying:-

In order to achieve that status the instrument must engage that payment of the sum stated therein shall be made when it is demanded or on a fixed or ascertainable future date.

Certainty as regards the payment date is as necessary as certainty in the amount to be paid; without it the instrument does not qualify as a promissory note capable of endowing its holder with the advantages of a holder in due course.

[19] In *Bay Chaleur Construction (1981) Ltd. v. Caisse Populaire de Shippagan Ltée* (1995) 168 N.B.R. (2d) 257, 430 A.P.R. 257 Justice McIntyre said:

34 The plaintiffs quote *Toronto-Dominion Bank v. Parkway Holdings Ltd. et al* (1968), 1 D.L.R. (3d) 716 (B.C.S.C.) and *La Caisse Populaire de Caraquet Ltée v. LeBlanc* (1972), 8 N.B.R. (2d) 102 (N.B.S.C., Q.B.D.) to support its argument that a negotiable instrument which purports to be payable both on demand and in instalments is not a negotiable instrument. I could not agree more with this statement of the law. But as indicated in the previous paragraph, I have concluded that the debenture in the present case was a contract payable on demand only and is enforceable as such.

[20] In *Sniderman v. Gibbs*, 2004 CarswellOnt 4271, [2004] O.J. No. 4272, Low J. cited the decision without doubting it, although in the case before him he allowed that the document was evidence of a debt enforceable between the parties.

- [21] FWC also refers to the decision of Madam Justice Arnold-Bailey in *Zeitler v. Zeitler Estate*, 2008 BCSC 775, 40 E.T.R. (3d) 185. There the court found that a promissory note "FOR VALUE RECEIVED, the undersigned unconditionally promises to pay, 30 days after demand..." was a delayed demand note. This case is of no assistance with regard to the question of whether the subject note is a negotiable instrument. In *Zeitler* the promissory note sets one date on which the note is payable, namely, "30 days after demand", not two.
- [22] Counsel referred to the decision of the Supreme Court of Canada in *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607 where Ritchie J. considered a note containing a provision requiring payment "on or before" did not violate the Bills of Exchange Act, as the effect was merely to grant an option for earlier payment, not make payment subject to the happening of a contingency, such as a demand. In my view this case is not of assistance here where the note is said to be both payable on demand and payable at a set future date.
- [23] In the result, I find that PN1 is not a negotiable instrument.

IV. Does the April 20, 2001 Note Evidence An Enforceable Agreement Against Virtue?

- [24] The parties at length argued the issue of certainty of terms in the context of whether PN1 was enforceable as a promissory note against Virtue. In my view, however, the above cases do not stand for the proposition that the invalidity of a note qua bill of exchange renders the note void or unenforceable inter parties, that is, as between the maker and the original promisee. There is no doubt that as between FWC and VFI the debts are enforceable. VFI is insolvent so that is of no assistance to FWC. The only issue concerns whether the obligation is enforceable against Virtue personally.
- [25] There must be certainty of terms. The further question here, assuming that the statement of claim could be amended at this stage, is whether personal liability of Virtue is contractually enforceable. I have no doubt that the agreement contemplated personal liability, and that personal liability might be released. The question is whether there was a meeting of the minds with regard to this term and if not whether any personal liability must fall with it. In my opinion there was no meeting of the minds.
- [26] The clause in question lacks certainty. First, it says there was an agreement to provide financing to NAR. There was no agreement to provide financing at the time PN1 was signed. It refers to the agreement to provide financing proceeding "as contemplated". While there was an agreement later entered into between VFI and NAR, that agreement is, at best, an agreement to agree, and there are many ways that agreement to agree could have proceeded.
- [27] The agreement to agree also contemplates a spate of other agreements the terms of which are not specified. Finally, even if this later agreement is the agreement in the mind of Virtue, the evidence of Clarke (and thus FWC) is that it was not something he ever knew. In short, there was no meeting of minds.

[28] In finding there was no meeting of minds I am mindful of the oft quoted admonition of Lord Wright in *Hillas & Co. Ltd. v. Arcos Ltd.* (1932) 147 L.T. 503, [1932] All E.R. 494:

Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such document fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should see to apply the old maxim of English Law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as they are appropriate implications of law.

[29] This case is not one where, for example, there is a history of dealings between the parties, where a court may be more likely to conclude an agreement where there are vague terms but usage has meaning based on prior dealings or trade custom: *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.*, [1968] 66 W.W.R. 477 at p. 481-2 (B.C.C.A.). This is a one off contract between the parties who found themselves, experienced in different industries, seeking to come to an agreement for the first time.

[30] Hall J.A., speaking for the Court in *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2008 BCCA 336, said:

[27] Courts strive to uphold contracts for the very good reason that commerce would be gravely impaired if parties could with impunity shrug off contractual obligations solemnly and freely undertaken. But, of course, if important terms of a purported contract are not agreed, it would be contrary to settled law for a court to impose a contract upon parties who have not concluded an agreement. The law will on occasion imply certain terms to give efficacy to a contract but it will not impose a contractual arrangement upon parties where salient terms of an agreement are unresolved. Somewhat reluctantly, I conclude that is what we would be doing here if we affirmed the judgment of the trial judge.

[31] To like effect is the decision of the Court of Appeal in *Palethorpe v. Bognerm* 1995 CanLii 2944 (B.C.C.A.), [1995] B.C.J. No. 2311 (B.C.C.A.), where the court in declining to uphold the document as creating an agreement noted that the meaning to be ascribed "...was quite literally all over the place....".

[32] Reluctantly here I too conclude that there is no appropriate objective method of determining the meaning of the clause in the agreement concerning the contingent removal of Virtue as a party. Because the clause lacks certainty, and in my opinion is central to the personal liability of Virtue, the document PN1, qua agreement, is unenforceable against Virtue personally.

V. The June 29, 2001

[33] PN2 reads as follows:

PROMISSORY NOTE

\$100,000 Date June 29/ 2001

ON Demand, After Date and For Value Received the undersigned promises to pay to or to the order of F.W.C. Holding LTD. (The Lender).

The undersigned parties agree that the loan, together will in any event, become due and payable in full on July 28 2001. The Lender agrees to remove Virtue as a Party to this Note, if the agreement to provide additional financing to Virtue Films proceeds as contemplated.

"signature illegible"

____ "DVirtue"

WITNESS

- [34] The informality of the document is perhaps because the loan was agreed to at Clarke's home, after a discussion around the swimming pool.
- [35] There are many issues regarding the certainty of this document as a promissory note. It does not specify the amount due except obliquely, it does not refer to interest, it speaks about removing a party to the note but there is only one person who has signed the note, and it includes a provision regarding the prospective cessation of liability, but is not signed by FWC, the party granting the concession.
- [36] The provision regarding the prospective cessation of liability is similar to but not the same as that included in PN1. This provision purports to remove Virtue from the note "...if the agreement to provide additional financing to Virtue Film proceeds as contemplated...." The PN1 provision removed Virtue from the note if the agreement to provide additional financing to NAR proceeds as contemplated.
- [37] Clarke thought the agreement was the same agreement as that referred to in PN1 but, as noted earlier, his evidence was that he never really knew what agreement was referred to. Virtue says that this was not the same agreement, but concerned the financing of Virtue Films as opposed to the financing of the agreement with NAR. Virtue says this was supposed to be a note from Virtue Films and not from himself personally.
- [38] On this point, as with the earlier note, I find that Virtue's testimony is less than candid. Virtue denied that the note created or was intended to create personal liability. The note is signed by Virtue not by VFI, or by Virtue on behalf of VFI. On its face it includes a provision that removes Virtue "as a Party". That suggests that it was intended that there be more than one signatory to the note.
- [39] In my opinion Clarke's evidence on one point is to be preferred as it is consistent with the note, namely, that it was intended to be signed by both VFI and Virtue, with Virtue being removed "as a Party" if the condition was fulfilled.

VI. Does the June 29th Document Evidence an Enforceable Agreement Against Virtue?

- [40] Struggle as I might, I am still left with uncertainty regarding the contingent removal of Virtue from the obligation. The evidence of Clarke, that it refers to the same agreement, might be what was intended, but Virtue had sought larger financing for VFI from Clarke, FWC, and Nizarelli. Clarke was unequivocal that he was not interested in the larger financing contemplated by Virtue.
- [41] Clarke's evidence regarding the reference to the agreement in PN1 is not helpful: it was that in respect of PN1 and the agreement between VFI and NAR of April 27, 2001 that he did not know if they were tied together or whether he ever knew this. In these circumstances, again, in my view there could be no meeting of the minds regarding the contingent removal of Virtue from the obligation.
- [42] Reluctantly I again conclude that there is no appropriate objective method of determining the meaning of the clause in the agreement concerning the contingent removal of Virtue as a party. Because the clause lacks certainty, and in my opinion is central to the personal liability of Virtue, the document PN2, qua agreement, is unenforceable against Virtue personally.

VII. Other Submissions

- [43] The parties made interesting and careful submissions, especially with respect to PN1, concerning the proper calculation of interest. In light of my findings regarding the lack of certainty, it is not necessary to address those arguments.
- [44] The parties also made submissions on the limitation period for enforcing PN1, based on it being a demand promissory note. I have found that PN1 is not a promissory note as it offends the provisions of the Bills of Exchange Act.
- [45] Of course, a demand promissory note is subject to a six-year limitation period, running from the date the note was made and funds advanced: see *Berry v. Page*, [1989] B.C.J. No. 1285; (1989), 60 D.L.R. (4th) 289 (B.C.C.A.), *Barclay Construction Corporation v. Bank of Montreal*, [1988] B.C.J. No. 855; (1988), 40 B.L.R. 150 (B.C.S.C.), *Ponti v. Marathon Motors Limited* [1978] B.C.J. No. 1065; (1978), 9 B.C.L.R. 46 (B.C.S.C.), *Canada Permanent Trust Co. v. Kowal* (1981), 120 D.L.R. (3d) 691 (Ont. H.C.).
- [46] I also reject the thesis that PN1 is a "delayed demand" note. Thus *Zeitler* does not apply.
- [47] Of course, these findings are academic, given my findings on the main issue, the lack of certainty of the conditions of Virtue's personal liability in both agreements.

VIII. Conclusion

- [48] PN1 is not a promissory note. PN1 as an agreement giving rise to personal liability of Virtue is void for uncertainty, as the central clause giving rise to the contingent removal of Virtue from the obligation is too vague to be enforceable, and there was no meeting of minds concerning its meaning. Whether or not PN2 is a promissory note is moot; it suffers the same flaw as PN1, and is unenforceable against Virtue personally.
- [49] With regard to costs, costs would normally follow the event. There are no strict list of "good reasons" to depart from the rule, which lies in the discretion of the court hearing the matter: *Scott v. Scott*, 2007 BCCA 392.
- [50] Virtue has been successful as the claims are dismissed, including the abandoned claim. I found, however, that Virtue was not candid with the court and gave contradictory and self-serving evidence. Most of the evidence and much argument was devoted to the meaning of the two agreements and I did not accept Virtue's evidence in that regard.
- [51] The court has a discretion in such circumstances in making an order for costs: *R.L.L. v. R.L.* 2001 BCCA 386, per Hall J.A., and *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201, per Cumming J.A. In the circumstances, the action is dismissed but without costs.

"The Honourable Mr. Justice Savage"

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Prepared on 29 October 2026 · Esheria