

CANADA / JUDGMENT

Gescan v. Vancouver Green Electric Ltd.

2017 BCCA 116

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 116 Gescan v. Vancouver Green Electric Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Gescan v. Vancouver Green Electric Ltd.,

2017 BCCA 116

Date: 20170308

Docket: CA43833

Between:

Gescan, a Division of Sonepar Canada Inc.

Appellant

(Plaintiff)

And

Vancouver Green Electric Ltd. and

Siavash Behrooz-Nowbar also known as Steve Behrooz

Respondents

(Defendants)

Before:

The Honourable Madam Justice Kirkpatrick

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Willcock

On appeal from: an order of the Supreme Court of British Columbia, dated
July 4, 2016 (Gescan v. Vancouver Green Electric Ltd., 2016 BCSC 1220,
New Westminster Registry No. S169175)

Oral Reasons for Judgment

Counsel for the Appellant:

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Counsel for the Respondent:

W. Ryan

J. Bhullar

Place and Date of Hearing:

Vancouver, British Columbia

March 7, 2017

Place and Date of Judgment:

Vancouver, British Columbia

March 8, 2017

Summary:

Appeal from a summary trial judgment dismissing the appellant's claim in contract against the respondent Steve Behroozi. Mr. Behroozi signed a credit agreement with the appellant for the supply of electrical materials to several construction projects but failed to make payment of \$68,127.21. The judge found Behroozi was not personally liable because he signed the contract only once, as principal for Vancouver Green. Further, the contract was inconsistent and confusing, and should be construed contra proferentum against the appellant. Held: appeal allowed; the judge erred in finding there was any ambiguity in respect of Behroozi's liability. The words of the contract make clear that Behroozi is a "co-covenantor" and is "jointly and severally liable" for the debts of Vancouver Green.

Introduction

- [1] WILLCOCK J.A.: In early 2015, the appellant obtained a default judgment against Vancouver Green Electric Ltd ("Vancouver Green") for \$68,127.21, the amount it claimed for the supply of electrical materials to several construction projects. On July 4, 2016, following a summary trial, the appellant's claim against Siavash Behroozi-Nowbar also known as Steve Behroozi ("Behroozi") founded upon the argument he was a co-covenantor and liable under the terms

of a credit application to pay the debts of Vancouver Green was dismissed (for reasons indexed at 2016 BCSC 1220). This is an appeal from the dismissal of that claim.

The Evidence

- [2] The credit application (accepted by Gescan and referred to herein as the Contract) is far from a model of clarity. The top of the Contract identifies Vancouver Green as the "Company or Proprietor" and Behroozi as a "Principal or Director". The Contract is written entirely in upper case letters in a small font. That makes it particularly difficult to read. For ease of reading and reference, I reproduce the text below in lower case with emphasis added to identify critical terms:

In consideration of Gescan "supplier" permitting the purchase of goods and services on a credit basis, the principal and applicant hereby agree to the following terms and conditions.

Every transaction indicated or referred to in any notice, invoice, statement, confirmation or other communication and every statement of account shall be deemed and treated as authorized and correct and as ratified and confirmed by the customer unless Gescan receives from the undersigned written notice to the contrary within fifteen days upon receipt of such notice forwarded by Gescan to the customer by ordinary mail.

I/We hereby covenant that this application for charge account shall inure to the benefit of your successors and shall apply with respect to goods supplied by any of them to the above named customer.

In consideration of Gescan extending credit to the principal and applicant, the undersigned principal co-covenantor shall be jointly and severally liable as principal debtor and not as guarantor or surety for due payment of all amounts on money payable by the above named customer to Gescan.

- [3] The Contract is signed by Behroozi on a line that identifies him as "Principal". It is signed only once. None of the terms other than "Supplier" is defined. The question before the judge was whether by signing the Contract Behroozi became liable as the principal co-covenantor.
- [4] The judge addressed that question by considering the entire agreement with a view toward giving meaning to all of its provisions: *Canadian Newspapers Co. v. Kanda General Insurance Co.* (1996), 30 O.R. (3d) 257 at 270 (C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 553.
- [5] His analysis was "informed by" reference to the rules applicable to bills of exchange signed by an agent or person acting in a representative capacity set out in s. 51 of the Bills of Exchange Act, R.S.C. 1985, c. B-4. That provides:

- 51 (1) Where a person signs a bill as drawer, endorser or acceptor and adds words to his signature indicating that he has signed for or on behalf of a principal, or in a representative character, he is not personally liable thereon, but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.
- (2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.
- [6] The judge noted the critical provision of Contract, the paragraph that is alleged to have made Behroozi jointly liable with Vancouver Green, referred to the "principal and applicant" and the "principal co-covenantor". He concluded these were different entities, and found:
- [31] In order to be bound by the terms of the credit application each of those parties would have to execute the document.
- [32] Mr. Behroozi signed above the words "Principal Signature". In the box on the application where "Principals or Directors" are to provide their names and information, Mr. Behroozi inserted his name and also "checked" a box to indicate that Vancouver Green was a "corporation". This box seeks information as to those involved with the business, whether it be a corporation, partnership or sole proprietorship. The only logical interpretation of this portion of the application is that Mr. Behroozi is advising that the applicant, i.e. Vancouver Green, is a corporation of which he is a principal or director. It was Vancouver Green that was seeking a credit facility and therefore the signature of Mr. Behroozi would have been given in his capacity as a director or principal of Vancouver Green. Section 51(1) of the Bills of Exchange Act would thus apply to his benefit.
- [33] Further, the terminology used in the credit application is inconsistent and confusing. In addition to the considerations set out above, there is no designated space for a "co-covenantor", the "customer" or the "corporation" to sign the document. The credit application was created by the plaintiff and the uncertainty as to its terms invites application of the doctrine of contra proferentum such that the uncertainties are to be interpreted against the person drafting the document, here Gescan.
- [34] Gescan otherwise made no argument for how Vancouver Green could bind Mr. Behroozi as a co-covenantor.
- [35] As such, and despite the language in the credit application [suggesting] some kind of joint liability, I have determined he did not sign the application in his personal capacity.
- [7] He dismissed the argument Behroozi had acknowledged his liability as a co-covenantor. He was satisfied that such statements as Behroozi made acknowledging responsibility to see Gescan paid were expressions of "his moral obligation to the creditors for the failure of his company to pay its creditors".

Grounds of Appeal

[8] The appellant says the judge erred: "in misapprehending the evidence and found ambiguity in the Agreement and its terminology when none existed".

Discussion

Misapprehension of the evidence

[9] The first alleged error is described as a misapprehension of the affidavit evidence:

[The judge] misapprehended the evidence and made an overriding and palpable error in finding that the Respondent denied that he guaranteed or otherwise was a co-covenantor of the obligations and that the Respondent had taken the position that he was not personally liable to the Appellant.

[10] The appeal on this ground is founded upon the assumption that the trial judge made a finding of fact: that Behroozi had not intended to become a co-covenantor when he signed the Contract. The appellant says Behroozi did not testify to that effect.

[11] The relevant passages in the judgment read as follows:

[23] Gescan says Mr. Behroozi is jointly and severally liable under the credit application. They argue, with reference to the terms of the agreement, he signed on both behalf of the corporation and in his personal capacity as a co-covenantor.

[24] Mr. Behroozi denies that he guaranteed or otherwise was a co-covenantor of the obligations of Vancouver Green to the plaintiff.

[12] In my view, this is clearly a description of the argument and the respective positions of the parties. It is not a finding of fact, but rather an accurate description of the pleadings and cannot be said to be founded on a misapprehension of the evidence.

Ambiguity of the Contract

[13] The argument with respect to contractual interpretation has not been not fully developed by either party. The appellant simply says the Contract is unambiguous and the trial judge erred in finding ambiguity. The sum of the argument is as follows:

25. The Agreement is unambiguous and the Court should give effect to the clear language of same. Specifically, the Agreement provides that:

- (a) The parties to the Agreement are the Appellant and Respondents;
- (b) The corporate account is opened up in the name of the corporate Respondent Van Green;
- (c) The Respondent Behroozi, by the terms of the Agreement and by attaching his signature as principal, agreed to be a "co-covenantor" and "shall be jointly and severally liable" as a principal debtor to the Appellant; and

- (d) The Respondents are to pay "all collection costs including solicitor costs on a solicitor and client basis which may arise from non-payment of the account".

26 The Respondent Behroozii filled out the information required on the Agreement, which included information about the company, the Respondent Van Green, information about himself, the principal, banking information and credit references. The Respondent Behroozii signed the Agreement.

27 There is no evidence that the Respondent Behroozii did not read nor understand the terms of the Agreement before signing.

28 The unambiguous Agreement sets out the terms and conditions for credit and supply of the Materials that the Appellant and the Respondents intended to be bound by. The Respondent Behroozii and the Respondent Van Green intended to apply for credit to purchase the Materials on credit and by signing the Agreement, the Respondent Behroozii agreed to be a co-covenantor with the corporate Respondent Van Green and to be jointly and severally liable. This is clearly stated in the terms and conditions of the Agreement.

[14] The respondent says, in an almost equally terse argument:

11 "The plaintiff landlord prepared the document. It failed to include language which spelled out the obligation to be assumed by the guarantor. I cannot accept that in the absence of any such language it should be implied that the obligation consists of guaranteeing all the obligations of the tenant."

Times Square v. Shimizu, 2001 BCCA 448 at para. 26

12 "In the case at bar, the parties were even further from an agreement than the parties in Times Square, because it cannot be said which obligation - guarantor or covenantor - the parties intended (the defendant) to assume."

Kalsi v. Achary, 2012 BCSC 361 at para. 31

13 The Agreement was drafted by the Appellant, and the Honourable Mr. Justice Jenkins found that there was an absence of clarity in the language of the Agreement which failed to spell out the obligation to be assumed by the party signing it. The Honourable Mr. Justice Jenkins correctly applied the law to this fact to determine that the Agreement did not obligate the Respondent Behroozii as a co-covenantor.

[15] The respondent says we should interpret the Contract in this case strictly against the drafter and with a view toward ensuring that the personal liability of Behroozii is unequivocally established by its terms. In my view our approach to the Contract should be that taken in *Lindstrom Construction Ltd. v. Capozzi Enterprises Ltd.* (1992), 50 C.L.R. 37 (B.C.S.C.), and 598227 B.C. Ltd. v. Peace River Oil (P.R.O.) Inc., 2009 BCSC 811, (both guarantee cases) which adopted the approach described in *Marquest Industries Ltd. v. Willow Poultry Farms Ltd.* (1968), 66 W.W.R. 477 at 482, 1 D.L.R. (3d) 513 at 517 (B.C.C.A.), as follows:

... every effort should be made by a court to find a meaning, looking at substance and not mere form, and . difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted. In other words, every clause in a contract must, if possible, be given effect to.

- [16] There is no dispute with respect to some aspects of the interpretation of the Contract. Vancouver Green is the customer to which goods are to be supplied. It is the entity first described on the application as the "Company or Proprietor". So, wherever the term "customer" or "above-named customer" is used "Vancouver Green" may be substituted.
- [17] Behroozi is identified as the "Principal or Director". Where the term "Principal" is used "Behroozi" may therefore be substituted.
- [18] In my view, the trial judge correctly considered Vancouver Green to be the "Applicant". The first paragraph of the text of the Contract says "the principal and applicant hereby agree to the following terms and conditions", and the last paragraph says Gescan extends credit to "the principal and applicant". The reference to the "applicant" in each of these clauses must be a reference to Vancouver Green if it is to be a party to the Contract and to receive credit. That is the only rational way it may be read.
- [19] Neither party appears to take issue with this reading of the Contract. Making the appropriate substitution of names for descriptors, the essential paragraphs of the Contract may be read as follows:
- In consideration of Gescan permitting the purchase of goods and services on a credit basis, Behroozi and Vancouver Green hereby agree to the following terms and conditions.
- In consideration of Gescan extending credit to Behroozi and Vancouver Green, the undersigned principal co-covenantor shall be jointly and severally liable as principal debtor and not as guarantor or surety for due payment of all amounts on money payable by Vancouver Green to Gescan.
- [20] The appellant says the last paragraph is unambiguous and that Behroozi signed the agreement both in his capacity as a principal of Vancouver Green, as he is described on the top of the form, and as the "undersigned principal co-covenantor".
- [21] The respondent's counsel says the trial judge correctly found Behroozi should not be personally liable for the Vancouver Green debt because of his dual, and therefore ambiguous, status. The cases he cites, *Times Square v. Shimizu*, 2001 BCCA 448, and *Kalsi v. Achary*, 2012 BCSC 361, are of some, but very limited, assistance in addressing this question.
- [22] In the former case the appellant had signed a lease as a guarantor but the lease contained no description of the guarantor's obligation. Mr. Justice Donald for the majority held:

- [26] The plaintiff landlord prepared the document. It failed to include language which spelled out the obligation to be assumed by the guarantor. I cannot accept that in the absence of any such language it should be implied that the obligation consists of guaranteeing all the obligations of the tenant. In the final analysis, although [the defendant], indicated a readiness to assist in the leasehold arrangements by acting as a guarantor, the landlord did not actuate that intention by settling the applicable terms.
- [23] In the latter case, Mr. Justice Myers dismissed a claim brought against defendants who signed a mortgage as guarantors, where the mortgage referred to covenantors but not guarantors. He held:
- [28] Did the [defendants] sign as covenantors? I do not see how I can come to that conclusion. They are designated as "guarantors" and nowhere as covenantors. If there is any ambiguity which would allow me to address the surrounding circumstances of the arrangement, I do not think those circumstances are clear enough to solve the ambiguity when no one addressed their minds to the issue.
- [24] Neither case is directly on point; in neither case did the defendant take on an obligation expressly described in the contract. Both are some authority for the proposition that the court should not resolve ambiguity against a guarantor and the drafter of an ambiguous document cannot look to the court to resolve that ambiguity in its favour. In the case at bar, however, the respondent does not point to any ambiguity in the description of the obligations of the principal co-covenantor. The ambiguity, he argues, arises from the fact Behroozi signed the Contract only once and it is unclear in what capacity or on whose behalf he did so. The respondent says we should not find Behroozi to have signed the Contract both on his own behalf and for the company, but he does not take us to any authority for the proposition that he could not in law have done so. The Bills of Exchange Act, referred to by the judge, does not assist us in this context. In my opinion it is inapplicable and in any event the interpretive guidance it provides is not helpful in this case.
- [25] It is not uncommon for persons to sign contracts in both their personal capacity and as principal of a company: see, for example, the discussion of compliance with the signature provisions of the Statute of Frauds in *Law of Guarantees*, Andrews and Millett, 4th ed., (London: Sweet & Maxwell 2005) at pp. 65-72. At p. 71 of that text the authors note:

The signature of a document on behalf of a company by a director may result in his being held personally liable as a surety, either because the document is a sufficient memorandum of an oral agreement with him, or because as a matter of construction of the written agreement he has undertaken personal liability instead of, or as well as, the company.

[Emphasis added.]

- [26] As a matter of construction, in my view, Behroozi, agreed to terms and conditions that included an agreement to be jointly and severally liable with Vancouver Green as principal debtor to Gescan. The fact the Contract was signed only once by Behroozi does not give rise

to such ambiguity as to make the clear words of the agreement in its last paragraph unenforceable. At para. 33 of the reasons for judgment the judge noted, as one basis for concluding Behroozi did not sign the Contract in his personal capacity, that there is no designated space for a "co-covenantor", the "customer" or the "corporation" to sign the document. But it is not disputed that Behroozi bound the company by signing the Contract. There is also no doubt he is the person referred to as "the undersigned" and the "principal". The Contract provided that "the undersigned principal co-covenantor shall be jointly and severally liable" with Vancouver Green to Gescan as principal debtor. There is no ambiguity in that provision and in my view it was an error to find ambiguity arose out of the manner in which the Contract was executed.

[27] For that reason, I would allow the appeal, set aside the dismissal of the claim against Behroozi and substitute in its place an order for judgment against Behroozi in the amount claimed.

[28] KIRKPATRICK J.A.: I agree.

[29] GROBERMAN J.A.: I agree.

[30] KIRKPATRICK J.A.: The appeal is allowed in the terms expressed by Mr. Justice Willcock.

"The Honourable Mr. Justice Willcock"

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