

CANADA / JUDGMENT

Gill v. Khural

2020 BCCA 332

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 332 Gill v. Khural COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Gill v. Khural, 2020 BCCA 332 Date: 20201120 Docket: CA46613 Between: Kuldip Singh Gill and Balwinder Kaur Gill Respondents (Plaintiffs) And Harjinder Singh Khural Appellant (Defendant) And Gurwinder Kaur Khural and Amitoz Kaur Khural Respondents (Defendants) And Harnaik Singh Respondent (Third Party) Before: The Honourable Mr. Justice Willcock The Honourable Madam Justice Fenlon The Honourable Madam Justice Griffin On appeal from: An order of the Supreme Court of British Columbia, dated December 10, 2019 (Gill v. Khural, 2019 BCSC 2143, New Westminster Docket 197232). Oral Reasons for Judgment Counsel for the Appellant, appearing via videoconference: J.S. Malik Counsel for the Respondent, Kuldip Singh Gill, appearing via videoconference: J. Woods Place and Date of Hearing: Vancouver, British Columbia November 17, 2020 Place and Date of Judgment: Vancouver, British Columbia November 20, 2020 Summary: A fire on the appellant's property spread and caused damage to the respondent's property. The parties subsequently entered a contract in which the respondent would withdraw their insurance claim in exchange for direct payment for damages from the appellant. The appellant ceased payments after receiving legal advice that a potential claim against them by the insurance company had been unlikely to succeed. The respondent sued for breach of contract, and the summary trial judge found the appellant liable. The appellant challenges the judge's finding that there was valid consideration and that the contract was enforceable. Held: Appeal dismissed. Forbearance to sue constitutes valid consideration even if the potential claim was unlikely to succeed. The trial judge did not err in finding that the contract was enforceable, as the appellant received the benefit he sought of negating the risk of a claim by the insurance company. FENLON J.A.:

Introduction

- [1] The issue on this appeal is whether the summary trial judge erred in finding that a contract entered into by the appellant Harjinder Singh Khural, and the respondent Kuldip Singh Gill was supported by consideration.

Background

- [2] Mr. Gill and Mr. Khural owned neighbouring properties in Surrey. Mr. Khural's property was unoccupied, as he planned to demolish and redevelop it. A fire began at the property on September 2, 2016, which spread to Mr. Gill's property and caused damages in the range of \$100,000. Mr. Gill had an insurance policy; Mr. Khural did not. Shortly after the fire, Mr. Gill filed a claim with his insurance company.
- [3] Although the parties do not agree on who initiated the meeting, it is common ground that they met on September 26, 2016, to discuss the fire damage. Mr. Gill's brother-in-law, Harnaik Singh, who is an insurance broker, was also present. The parties do not agree on who raised the potential for Mr. Gill's insurance company to bring a subrogated claim against Mr. Khural, but Mr. Khural does not dispute that he was concerned about being pursued by Mr. Gill's insurance company and entered into a contract with Mr. Gill pursuant to which Mr. Gill agreed to withdraw his insurance claim in exchange for Mr. Khural paying him directly for the cost of repairing at least some of the fire damage.
- [4] I note parenthetically that the parties do not agree on the amount of the payment Mr. Khural was to make. Mr. Khural says he agreed to pay \$45,000, and Mr. Gill says the payment was to cover the full amount of the repairs. The summary trial judge did not decide that question, and it is not in issue on this appeal.
- [5] Following the meeting on September 26, Mr. Khural paid Mr. Gill \$20,000 in part payment of the sum promised, and Mr. Gill withdrew his insurance claim. What happened next was described by Mr. Khural in his affidavit this way:
21. Approximately a few days after I had provided a bank draft of \$20,000.00, I sought legal advice ("the Advice") and I learned that the Agreement was not a fair and proper agreement as the Fire was not my fault, and so I did not owe a duty to Mr. Gill and Mrs. Gill, therefore I was not receiving a benefit from the Agreement. After learning of the Advice, I ceased payments to the Plaintiffs. Summary Trial
- [6] Mr. Gill sued for breach of contract, and Mr. Khural applied by way of summary trial to have the action dismissed on the basis that the contract was unenforceable because it was not supported by consideration. The judge concluded the issue of whether the contract was enforceable was suitable for resolution by way of summary trial because it was a distinct question of law determinable on agreed-upon facts: at para. 45. He found the contract to be valid and enforceable, saying:
- [29] Mr. Gill's right to payment of his claim under the Optimum policy was incontestably of value to him. He gave it up in exchange for Mr. Khural's promise of payment. Accordingly, Mr. Gill gave something of real value in exchange for Mr. Khural's promise. Mr. Gill acquired a reasonable expectation of payment in the circumstances.

- [30] At the time, Mr. Khural valued what he was getting in exchange - the abandonment of Mr. Gill's insurance claim - and should have reasonably expected that he would have to honour his promise to pay Mr. Gill. It is only subsequently that Mr. Khural came to understand that what he wanted was of no value to him.
- [31] The point is that Mr. Gill's agreement to abandon his insurance claim and Mr. Khural's promise of payment gave rise to reasonable expectations on both sides at the time the agreement was made and both sides acted on it. Following Professor Swan's reasoning, a bargain giving rise to reasonable expectations should in principle be viewed as one supported by consideration. On Appeal
- [7] On appeal, Mr. Khural says the judge made three main errors:
1. In deciding the case on the basis of promissory estoppel, which was neither pleaded nor argued;
 2. By reasoning that the case was analogous to a guarantee; and
 3. By finding that Mr. Gill's withdrawal of his insurance claim constituted consideration.
- [8] In my view, and with respect, the first two issues reflect a misreading of the judge's reasons for judgment.
- [9] As to the first ground, the appellant says the judge assessed the case before him on the basis of promissory estoppel. That focus is said to be demonstrated by the judge's use of the term "reasonable expectations" and his reference to a text by Professor Swan in which the author discusses alternative legal theories for holding people to their promises. The appellant submits that the phrase "reasonable expectations" is used in assessing whether the doctrine of promissory estoppel is made out.
- [10] I would not accede to this submission. The judge did not refer to promissory estoppel at any point in his reasons for judgment. Nor do I see any indication that he relied on that doctrine to ground his analysis. In using the phrase in issue, the judge was simply recognizing that contract law is concerned with identifying promises the law will enforce in accordance with the parties' reasonable expectations. There is nothing remarkable about that statement.
- [11] Turning to the second ground of appeal, I do not agree that the judge reasoned that the facts of this case were directly analogous to a contract of guarantee. Rather, he referred to the impugned example in reviewing the nature of consideration and, in particular, whether there was substance to the consideration provided by Mr. Gill. In any event, nothing in the judge's discussion about the kind of consideration that will support a contract detracts from the judge's sound analysis on the substance of the consideration underpinning the contract in this case. That is the issue raised by the third ground of appeal, which I turn to now.
- [12] I see no error in the judge's conclusion that Mr. Gill's agreement to abandon his insurance claim gave something of benefit to Mr. Khural. Mr. Khural admits that, on the day the contract was entered into, he bargained to obtain the benefit of protecting himself from the

potential risk of a costly subrogated claim being brought against him. But, he says, the judge erred in finding that this amounted to consideration capable of supporting the contract because, given that Mr. Khural did not cause the fire, the insurance company would not have sued him in a subrogated claim, and, even if it had, it would not have succeeded. It follows, he says, that, objectively, he received no value from Mr. Gill's performance of his part of the bargain.

[13] The judge squarely addressed this argument, saying:

[33] The present case is equivalent to one in which a plaintiff has refrained from suing the defendant in exchange for a payment by the defendant. While Mr. Gill did not refrain from suing Mr. Khural, his abandonment of the insurance claim meant that there was no possibility of Optimum suing Mr. Khural in Mr. Gill's name. In a case of forbearance from suing, it does not generally matter if the claim the plaintiff did not pursue would have failed at the end of the day, so long as it is "a serious claim, honestly made". In *Bougainville Investment Corp. v. Semple*, 2013 BCSC 1919, Justice Fitzpatrick summarized the authorities addressing this point:

[166] In *Visscher Lumber Inc. v. Ivis Partners Inc.*, 2008 BCSC 1893, rev'd on other grounds 2009 BCCA 548, the court stated at para. 36 that "the relevant timeframe for the parties to consider the adequacy of the consideration is at the time of the making of the agreement or the contract and not at the time the agreement is sought to be enforced."

[167] It is clear that forbearance to sue may in itself constitute consideration: *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 adopted in *Visscher* at para. 38. Forbearance of a serious claim, honestly made, is good consideration even if it should later be proved that no valid claim existed: *Attorney General of British Columbia v. Deeks Sand & Gravel Co.*, [1956] S.C.R. 336 (S.C.C.). See also *Stott v. Merit Investment Corp.*, [1988] O.J. No. 134 (C.A.), leave to appeal to SCC refused, *Stott v. Merit Investment Corp.*, [1988] S.C.C.A. No. 185 at paras. 37-40.

[34] Mr. Gill's insurance claim was serious, and it was honestly advanced. The benefit to Mr. Khural was the same as if Mr. Gill had refrained from pursuing a potential claim against Mr. Khural. There is nothing in the evidence to suggest that Mr. Gill was aware that his abandonment of the insurance claim would be of no value to Mr. Khural, or that he was taking advantage of Mr. Khural in any way: *Famous Foods Ltd. v. Liddle* (1941), 56 B.C.R. 372 (C.A.) at 377-378. Mr. Gill has been examined for discovery and Mr. Khural has had an opportunity to explore this point, if there were anything to it. [Underline emphasis added; italic emphasis added in original.]

[14] Mr. Khural relies on *Quach v. Mitrox Services Ltd.*, 2020 BCCA 25 at para. 15, in support of his position that a contract based on consideration that turns out to be valueless will not be enforceable.

- [15] In my view, Quach is readily distinguishable. That case involved a contract between an employer and an employee. The parties agreed to a fixed-term, one-year contract. Before the employee took up his position, the employer obtained legal advice and wished to cancel the fixed-term contract and replace it with a month-to-month contract of employment--a change that would limit the employer's obligations to the employee on termination. The consideration for the employee giving up the fixed-term contract and entering into a second month-to-month contract of employment was stated in the second contract to consist of the employer waiving the three-month probationary period provided for in the Employment Standards Act, R.S.B.C. 1996, c. 113, which relieves the employer from having to give an employee termination pay during the first three months of employment. This Court found the second contract was unenforceable, in part because the Act provides minimums but permits parties to agree to more generous terms, as the employer had done in the first contract. It followed that the provisions the employer agreed to waive did not apply to the first contract, so the employee received no benefit from their waiver at the time he entered into the second contract.
- [16] In contrast, in the present case, Mr. Khural obtained the benefit he sought. Once Mr. Gill released his insurance company, there was no prospect of a subrogated claim being brought against Mr. Khural. As the judge noted, forbearance to sue constitutes valid consideration even if it should later be proved that no valid claim existed: at para. 33. In this regard, I note that the assumptions Mr. Khural makes about the potential for the insurance company to have pursued a claim against him will never be tested, precisely because Mr. Khural got the forbearance he sought--the risk of a subrogated claim against him, even if small, has been negated.
- [17] Finally, I address Mr. Khural's submission that the judge could not conclude the contract was enforceable without first deciding whether Mr. Gill withdrew his insurance claim after Mr. Khural told him he was not going to make any further payments. I see no merit to that submission. In the circumstances of this case, the sequence of those events has no bearing on whether the agreement the parties entered into on September 26 was supported by consideration and therefore enforceable.

Disposition

- [18] I would accordingly dismiss the appeal with costs to the respondent.
- [19] WILLCOCK J.A.: I agree.
- [20] GRIFFIN J.A.: I agree.
- [21] WILLCOCK J.A.: The appeal is dismissed with costs to the respondent. "The Honourable Madam Justice Fenlon"

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