

CANADA / JUDGMENT

Gulf Management Inc. v. Burbank

2022 BCSC 471

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 471 Gulf Management Inc. v. Burbank

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gulf Management Inc. v. Burbank,

2022 BCSC 471

Date: 20220322

Docket: S189643

Registry: New Westminster

Between:

Gulfland Management Inc.

Plaintiff

And

Trent Kimball Burbank and Christine Anne Burbank

Defendants

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

Counsel for the Plaintiff:

M.D. Carter

Counsel for the Defendants:

C. Douma

Place and Dates of Trial:

New Westminster, B.C.

June 15-18 and 21-22,

September 23, 2021

and January 28, 2022

Place and Date of Judgment:

New Westminster, B.C.

March 22, 2022

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Introduction

- [1] Gulfland Management Inc. ("Gulfland") seeks damages for breach of an alleged oral agreement with the Burbanks to share the costs of an application to remove a group of lands from the Agricultural Land Reserve ("ALR") in Surrey, British Columbia.
- [2] Gulfland alleges that, when the time came for the Burbanks to pay their \$54,000 share, they reversed course, refused to pay, and relied on the lack of any written agreement. The Burbanks, on the other hand, say they were always clear that, although they agreed to the inclusion of their property in Gulfland's application, they were unwilling to share in the costs.
- [3] The case is unusual in that there is nothing in writing between the parties about these disputed costs despite dealing with each other on this issue from 2009 to 2016. The case is therefore a credibility contest between Gulfland's principal, Mr. Fred Scales, on the one hand, and the Burbanks and their realtor, on the other.
- [4] For the reasons that follow, I find that Gulfland has not met its burden of proof to establish, on a balance of probabilities, that the Burbanks agreed to share in the application costs, and therefore its claims are dismissed.

Facts

The parties

- [5] Gulfland is in the business of construction services. Its principal, Mr. Scales, is also the principal of 0757591 BC Ltd. ("075 Ltd."), which was at all material times the owner of certain of the lands that were part of the ALR application in issue.
- [6] The Burbanks own and operate West Coast Extraction Services Ltd., a marine cleaning services company. At all material times up to August 3, 2016, they also owned certain of the lands that were part of the ALR application.

ALR application

- [7] In 2006, Mr. Scales caused 075 Ltd. to purchase just over 15 acres within Surrey's ALR. Shortly after purchase, he concluded the lands were too wet to farm due to a highwater table and related drainage problems from the Serpentine River floodplain.
- [8] Familiar with such issues having filled and remediated farmland over the years as part of his business, he believed improving the land's agricultural capability was likely prohibitively expensive. In late 2006, he decided to investigate an application to remove the lands from the ALR (the "Application").

- [9] In response to his initial inquiries, City of Surrey ("Surrey") representatives advised that, if he applied, other neighbouring landowners with similar issues might decide to follow suit, and preferably they should all do so together in a single application. Consultants familiar with the process told him such applications typically took around six months, cost \$20,000-\$30,000, and that the agents and contractors preferred dealing with only one owner on behalf of a group.
- [10] In early 2007, Mr. Scales approached the five neighbouring landowners with similar drainage issues. Together, this group of six owners owned parcels of around 40 acres, almost 36 acres of which was within the ALR (the "Properties").
- [11] Mr. Scales met with each owner separately. He said that if they wished to join the Application Gulfland would cover the total costs and invoice them later pro rata based on the number of owners that applied. The four neighbouring owners other than the Burbanks agreed to join.
- [12] The Burbanks had their lands for sale. Mr. Scales' realtor, Mr. Myron Slobogean, contacted the Burbanks' agent, Mr. David Husty, to see if they wished to participate. Through Mr. Husty, the Burbanks replied they were more interested in selling their lands than joining. Mr. Scales decided to try to buy the Burbanks' lands because of the potential upside if the Application succeeded.

2007 contract of purchase and sale

- [13] On February 19, 2007, Gulfland offered to purchase the Burbanks' property for \$1.8 million, subject to its successful removal from the ALR by September 30, 2007. The Burbanks accepted the offer despite this highly contingent subject because the price was \$350,000 above asking.
- [14] The parties signed a standard contract of purchase and sale, February 19, 2007, and an addendum, February 26, 2007, requiring the Burbanks to sign future documentation necessary for the Application (the "2007 Contract").

Alleged cost-sharing agreement

- [15] For the next two years, Mr. Scales worked on the studies and reports for the Application. Though taking longer and costing more than expected, he believed it was technically strong due to the lands' poor suitability and insufficient size for commercial agriculture and isolation from other agricultural lands.
- [16] Over this time, he paid the Burbanks \$75,000 to repeatedly extend the 2007 Contract. At the end of 2008, however, he decided to cease paying for such extensions because of the lengthy delays and uncertainties of the Application.

- [17] Mr. Scales' testified that he instructed Mr. Slobogean to advise Mr. Husty that Gulfland was terminating the 2007 Contract, effective December 31, 2018, and that the Burbanks could keep their lands in the Application if they agreed to pay their 1/6th share of the costs.
- [18] Mr. Scales testified that Mr. Burbank called him within a few days. Having spoken with his wife and Mr. Husty, Mr. Burbank said they were on board to join the group and that he wanted Mr. Husty to be involved on their behalf. Mr. Scales says he told Mr. Burbank approximately \$150,000 was spent so far and, if the lands were removed, it would be a huge financial win for everyone. Mr. Burbank denied this conversation occurred.
- [19] A few days later, Mr. Scales met with the Burbanks and Mr. Husty at the Burbanks' home. He says he repeated the information conveyed in the telephone call, including the 1/6th share of costs. He testified that the Burbanks confirmed their desire to remain in the Application and pay their share. Mr. Scales said he brought some of the documents and reports and told them the technical aspects of the submission was positive. He advised he had spent \$150,000-\$175,000 so far and the future costs were unknown. He said Mr. Burbank replied that they (the Burbanks) could use Gulfland's own \$75,000 extension payments to pay their share.
- [20] The Burbanks and Mr. Husty denied Mr. Scales' version of events. They agreed that, from time to time, Mr. Scales came to their home to update them on the application because their property was included. But Mr. Burbank testified that Mr. Scales never directly asked them to contribute to the Application's costs. He said it was always clear they were unwilling to do so, and so Mr. Scales knew that, if he asked, the Burbanks would refuse even if it meant their lands would be removed.
- [21] Ms. Burbank recalled around a dozen meetings with Mr. Scales over the years. She did not recall Mr. Scales ever asking them to pay part of the Application costs, and testified that they never agreed to do so.
- [22] She recalled that Mr. Scales provided updates, showed them reports, and discussed his rising costs and other difficulties with the application. She testified that, after the 2007 Contract collapsed, she was not interested in the Application but followed Mr. Husty's advice. She testified that Mr. Husty said the Application was a longshot and, even if successful, the whole process of rezoning and development would take many years. On the other hand, he said there was no downside to allowing their property to be included even if they wanted to sell.
- [23] Mr. Husty testified that he attended around seven to ten meetings with Mr. Scales and the Burbanks. He advised the Burbanks that the Application was likely to fail and told them that Mr. Scales would push them to pay some of his costs but they should refuse. He expected that Mr. Scales' believed the Application needed all six neighbouring owners for any chance of success. He testified that in some of the meetings Mr. Scales did push the issue of costs but that he and the Burbanks were clear that the Burbanks refused to pay.

ALR Application - 2009 to 2013

- [24] In August 2009, Gulfland submitted the Application to Surrey on behalf of all six landowners.
- [25] Mr. Scales testified that the Application then bogged down because the City's Planning Department tied it to preparation of the upcoming Official Community Plan. It remained connected to that process until 2013.
- [26] Eventually, on April 8, 2013, the City referred the Application to the Agricultural Land Commission ("ALC") on a "without comment" basis.
- [27] Mr. Scales saw this as a great first step. It meant the Application passed the initial political process, which he thought was its biggest hurdle. He believed the ALC was reasonably likely to approve the Application because they would be sympathetic to the specific farmland issues and recognize that granting the exclusion would not affect or isolate any adjacent ALR lands.
- [28] At the same time, however, Mr. Scales was frustrated that the process was far slower and costlier than expected.

April and May 2013 meetings

- [29] Shortly after the City's decision, Mr. Scales met with the Burbanks to update them.
- [30] According to Mr. Scales, the Burbanks were pleased with the news. Mr. Burbank was concerned however about the mounting costs and how he could be sure the other owners all had the same deal and would all pay their share. Mr. Scales testified that Ms. Burbank offered to pay Gulfland its shares of the costs to date, but he told her he did not know the exact amount and suggested they wait until the Application was complete.
- [31] The Burbanks agreed that Mr. Scales provided this update but denied any suggestion they agreed to share in the costs.
- [32] Mr. Scales testified that this discussion prompted him to realize that, because the costs were substantially more than expected, a new approach was called for. He saw that a pro rata share, based on the number of owners, was unfair because some properties were much larger and so had more to gain. This was particularly true of his own property, by far the largest parcel. He decided it would be fairer to share costs in proportion to the size of each owner's lands in the ALR.
- [33] In around April 2013, Mr. Scales asked his lawyer to prepare an agreement reflecting this new approach, which he then presented to the other owners individually. He testified that he did not ask the owners to sign the agreement, but merely showed it to them to show how the new cost-sharing arrangement worked, the estimated costs so far, and his willingness to assist them to finance these costs if necessary. He re-confirmed that he was not seeking payment until they received the ultimate decision.

[34] Mr. Scales testified that he met with the Burbanks in May 2013 to show them the draft agreement. The Burbanks deny seeing it.

ALC conditional approval

[35] At the ALC, the Application was delayed yet again. Mr. Scales testified that reviews ground to a halt for over two years while the ALC reorganized its chairperson and panel members.

[36] On November 13, 2015, the ALC conditionally approved the Application. The main pre-conditions were a drainage study to protect the adjacent farms to the east and south, and a \$400,000 bond that Gulfland posted. Because the Application had taken so long, however, a renewed application to the City was also required.

[37] Shortly after the ALC approval, Mr. Scales met with the owners individually for another update. On November 17, 2015, he met with the Burbanks and Mr. Husty at the Burbanks' home.

[38] Mr. Scales testified that the Burbanks voiced numerous concerns: The process had already taken eight years so who was to say when it would complete? How could they know if other owners would pay their share? Did this make sense when they might sell their property before the process was done?

[39] Mr. Scales testified that Mr. Burbank wanted an estimate of the future costs for the rezoning stage. Mr. Scales told him he could not provide it but he knew someone who could - Oleg Verbenkov at Pacific Land Group. Mr. Scales said he would ask Mr. Verbenkov to prepare an estimate and that Mr. Husty agreed with this suggestion. He testified that Ms. Burbank once again offered to pay their share of costs to date. He told her the Application would only take a few months and he would invoice for everything then.

[40] The Burbanks and Mr. Husty denied these discussions or any offer to pay.

[41] In November 2016, Mr. Scales received the report from Pacific Land Group, estimating a further \$336,000, and four to six years, to rezone and prepare for development. He testified that he met with the Burbanks and Mr. Husty to review this estimate.

[42] Mr. Scales testified that the Burbanks said they were not sure if they were going to stay involved and might consider selling their lands. Mr. Scales told the Burbanks he would prepare invoicing for the costs of the Application to date. The Burbanks and Mr. Husty deny this.

Gulfland invoices the Burbanks

- [43] Mr. Scales testified that, on February 23, 2016, he met with the Burbanks to advise of their share of the Application costs to date. He prepared an invoice for \$54,242 representing his calculation of their share of expenses incurred. He said that Mr. Burbank objected to the calculations because he felt it attributed too many acres for his property within the ALR, and Mr. Burbank said he was not going to pay the invoice until he checked with Mr. Husty.
- [44] Mr. Scales testified that Ms. Burbank called him around a week later, to say that the Burbanks and Mr. Husty had talked it over and they were not going to pay because they never signed anything. She said they had recorded their meetings. Mr. Scales testified that he told her it was great that she had recordings and asked her to send him a copy but she never did. He suggested that the Burbanks reconsider their refusal. He testified that Ms. Burbank called again a few days later to confirm their decision not to pay.
- [45] The Burbanks did not recall seeing the invoice in February. Ms. Burbank testified that, as best she recalls, the first time Mr. Scales demanded payment from them was by lawyer's letter of April 11, 2016.

The Burbanks sell their property

- [46] In March 2016, the Burbanks listed their property for sale again. On March 22, 2016, they agreed to sell their lands to New Urban Investments Ltd. ("New Urban"), an owner of one the neighbouring properties already participating in the Application.

Removal from the ALR

- [47] In March 2018, the ALC notified the Land Title Office of its satisfaction with the Applications' bonding and development plans and instructed that titles to the Properties should be removed from the ALR.

Evidence of other landowners

- [48] Mr. Scales called as witnesses three of the other landowners. Although providing helpful background and context, generally their evidence was not germane to his dispute with the Burbanks.
- [49] Mr. Cory Innes, a real estate manager for Suncor Energy Products Ltd. ("Suncor"), testified that there was a May 11, 2007 letter agreement between Gulfland and Petro Canada, Inc. (as Suncor was then) regarding cost-sharing, but neither Suncor nor Mr. Scales produced it in the litigation. He described conversations with Mr. Scales about the Application over the years, keeping him up to date, and that he (Mr. Innes) assisted with strategy and decision-making.

- [50] Ms. Surinder Dhillon testified that, with the assistance of legal advice, she paid Mr. Scales her share of the expenses in 2018, totalling around \$250,000. She believed the successful removal from the ALR greatly increased her property value and she provided some market evidence to substantiate that.
- [51] Mr. Jupal Bilg testified on behalf of his company, New Urban. Mr. Bilg, who is a realtor, explained that Mr. Scales kept him up to date throughout the process. He recalled the change in April 2013 to cost-sharing based on acreage rather than number of owners, and that this worked in his favour. He paid Gulfland's invoice for the costs of the Application in January 2016, and later told Mr. Husty that he had done so.
- [52] After purchasing the Burbank's property in March 2016, Mr. Bilg paid that property's pro rata share of the Application costs going forward. He testified the he believed he paid \$300,000-\$500,000 over-market for the Burbanks' home because of his expectation that Mr. Scales would be successful with the Application. In May 2020, New Urban sold both properties for a substantial profit.

Issues for determination

[53] The issues for determination are:

- a) Did the Burbanks agree to pay their share of the Application costs?
- b) If not, do they owe equitable damages in quantum meruit?
- c) If the answer to a or b is yes, what are Gulfland's damages?

[54] Also to be decided is Gulfland's application to re-open the trial to submit fresh evidence from Ms. Burbank's phone records. This application was argued in January 2022 and judgment was reserved.

Governing law

[55] *Go Transport Ltd. v. Moore*, 2021 BCSC 1099, describes the key principles of oral contract formation as follows:

- [17] A lack of a written agreement is not fatal to a contract because oral contracts are "perfectly enforceable": *Anchorage v. 465404 B.C. Inc.*, 1999 BCCA 771 at para. 10. The party seeking to enforce an oral contract must establish "that the parties intended to contract and that the essential terms of the contract can be determined with a reasonable degree of certainty": *Copcan Contracting Ltd. v. Ashlaur Trading Inc.*, 2010 BCCA 597 at para. 8. This may be more difficult with no written contract and when the parties provide conflicting testimony, but it is still possible.
- [18] A contract need not be elegantly drafted to be enforceable. It is important to examine the substance of the contract rather than its form. As Justice Watchuk stated in *Tham v. Bronco Industries Inc.*, 2017 BCSC 828, aff'd 2018 BCCA 207:

- [77] [W]ith regard to the intentions of the parties, the test is not what the parties subjectively intended but whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract (Berthin v. Berthin, 2016 BCCA 104 at para. 46).
- [19] The court must determine the parties' intention at the time the contract was formed: Gilchrist v. Western Star Trucks Inc., 2000 BCCA 70 at para. 17; Sherstobitoff v. British Columbia (Workers' Compensation Appeal Tribunal), 2019 BCSC 1659 at para. 69. When the words, viewed objectively, bear two or more reasonable interpretations--or, as here, where there are no written words at all--the court considers other matters such as the subsequent conduct of the parties: Gilchrist at para. 18. The court also considers the surrounding circumstances known to both parties at the time the contract was allegedly formed. In other words, the court considers the factual matrix.
- [20] Justice Adair articulated the principles that specifically apply to oral agreements in Shaw Production Way Holdings Inc. v. Sunvault Energy, Inc., 2018 BCSC 926, aff'd 2019 BCCA 72:
- [151] In general, the interpretation of oral contracts turns on the same essential principles, although in the case of a completely oral contract there is greater flexibility in the nature of the evidence that is admissible to prove the contents of the contract and the meaning of the language used by the parties. This flexibility follows intuitively from the recognition that oral contracts must often be construed without the key interpretive tool used to understand written contracts - the words of the agreement. See De Cotiis v. Viam Holdings Ltd., 2010 BCCA 368, at para. 21 (citing Fridman, The Law of Contracts in Canada (5th ed., 2006) at p. 440).
- [56] If the court is ultimately unable to determine whether or not an enforceable agreement was reached, the plaintiff has not met its burden of proof. Go Transport put it this way:
- [16] The party relying on a contract, here the plaintiff, must prove the existence of the contract. The plaintiff must satisfy the court on a balance of probabilities that its existence is more probable than not. If the court is unable to determine which party to believe, the plaintiff has not met its burden of proof.
- [57] The same point was made more generally by the Court of Appeal in Sonic Holdings Ltd. v. Savage, 2021 BCCA 441:
- [112] in civil proceedings a court is required to make determinations on the balance of probabilities and there is no question that is what the judge did here. This point was made by Justice Spence in Arnold v. Teno, [1978] 2 S.C.R. 287 at 298, where he approved of the following statement of Viscount Dunedin in Robins v. National Trust Co., [1927] 2 D.L.R. 97 at 101 (J.C.P.C.):

But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.

Analysis and Findings

Credibility

- [58] Credibility involves the assessment of a witness's truthfulness. Generally speaking, it is to be assessed based on "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 4 W.W.R. (N.S.) 171 (B.C.C.A.).
- [59] Other factors to consider include: clarity and firmness of memory; harmony with other accepted evidence; internal consistency; and motives to lie. Demeanor may also be considered, but with caution. *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296.
- [60] I found Mr. Scales, Ms. Burbank and Mr. Husty to be credible witnesses.
- [61] Mr. Scales' evidence was consistent, clear and reasonable throughout. He had a good recollection of events. He made concessions where appropriate, such as his lack of personal knowledge about Gulfland's breakdown of expenses prepared by his accountant.
- [62] Ms. Burbank was also a consistent, clear witness, willing to concede what she was unsure of or did not know. I found particularly persuasive her evidence that, had the Burbanks agreed to pay a share of the costs, she would have handled the situation far differently. She explained that, as long-time manager of the Burbanks' family business, with responsibility for almost 50 employees, she had a way of dealing with such things. If she were expected to reimburse Mr. Scales for these costs, she would have required from him a written plan, budget, and monthly accounting. She also would have contacted a lawyer so the deal was clear and there was "something to fall back on" if someone did not do their part.
- [63] I found Mr. Husty credible, as an independent witness who gave consistent, straightforward evidence. He never veered from the position that, from the first meeting on, he advised the Burbanks not to share in the costs of the Application because: (a) it would be such a long, drawn-out longshot; and (b) Mr. Scales would pay because of the potential windfall for his property and his need for the Burbanks' property to be included in the Application.
- [64] In final argument, Mr. Scales submitted that Mr. Husty's evidence should be discounted because he was aligned with the Burbanks as their former realtor. I saw no indication, however, that this was interfering with his testimony.

- [65] With all due respect, I did not find Mr. Burbank's evidence to be credible and I do not rely on it. In both direct and cross-examination, he was argumentative and hostile towards Mr. Scales rather than responsive. His evidence was internally inconsistent on the key issues. At times he was adamant that Mr. Scales never suggested the Burbanks should pay their share of costs and there were never discussions of them doing so. But he also testified that this issue may have come up, the notion of paying 1/6th was mentioned, and that in 2013, Mr. Scales "began changing the narrative that I owed him money."
- [66] He initially denied knowing anything about Gulfland but later admitted that was incorrect. He denied things that both Ms. Burbank and Mr. Husty acknowledged occurred, such as a disagreement about the number of acres the Burbanks owned in the ALR and discussions in November 2015 with Mr. Scales about the cost to complete the Application.

Did the Burbanks agree to pay costs?

- [67] This issue comes down to a credibility dispute between Mr. Scales, on the one hand, and the Burbanks and Mr. Husty on the other.
- [68] As described above, Mr. Scales testified that the Burbanks expressly agreed to pay their share of costs and even offered to do so twice.
- [69] Ms. Burbank testified that they never agreed to pay, it was always clear that Mr. Scales was responsible for their costs, and if they had agreed she would have required a lawyer to document the deal and for Mr. Scales to provide a plan and regular, written updates and accounting.
- [70] Mr. Husty testified that he made it clear to Mr. Scales more than once that, although the Burbanks were willing to participate, they would not pay any of the costs. He recalled Mr. Scales suggesting the Burbanks might contribute, and testified that he was quick to say they would not do so. He recalled a meeting where Mr. Scales discussed the \$54,000 invoice and he strongly advised the Burbanks they should not pay because they were not obliged. He testified that the Burbanks never asked him for any update on the progress of the application, consistent with the position that they were not paying for it. He was adamant that Ms. Burbank never offered to pay Mr. Scales at any meeting he attended.
- [71] As noted above, I find these three witnesses all gave credible versions of events. I also find nothing in the overall circumstances to tip the "preponderance of the probabilities" (to quote Faryna) towards one version or the other.
- [72] Turning first to what, in my view, were Mr. Scales' key arguments for the plausibility of his position, he argued that the Burbanks had good reason to agree to pay for the Application. They acknowledged that they wanted to sell their property and thought a developer was their likely buyer. In a related argument, he said that it made no sense for him to be willing to carry their costs as he could easily have withdrawn their property from the Application.

- [73] Neutralizing this argument in my view, however, was the potential prejudice to the Application if the Burbanks withdrew, particularly given their property's location right in the middle of the group of Properties. Mr. Husty and Mr. Bilg both testified to believing that the Application would be harmed by the withdrawal of any of the Properties. This perspective is also supported by the fact that Mr. Scales, on his own evidence, paid Ms. Dhillon \$27,500 not to withdraw her property from the Application. Mr. Scales endeavoured to distinguish that situation because Ms. Dhillon was contemplating leasing her lands for farming, which he said would have been particularly prejudicial. Mr. Scales did acknowledge though that, if the Burbanks withdrew, the Application would have required an approved drainage plan protecting their farmland. Though he said he had seen such plans numerous times over the years, it seems reasonable that such a requirement carried at least some risk for the Application. Overall, I find that Mr. Scales perceived some risk to the Application if the Burbanks withdrew their property from it.
- [74] Mr. Scales also relied on Mr. Bilg's evidence that, when he inspected the Burbank property before buying it, Ms. Burbank told him she had offered to pay Mr. Scales her share of the costs but he did not have the numbers. He said Mr. Burbank was more negative about the whole process, saying along the lines of: "He's asking us for money and we're not engaging with it and don't have to pay."
- [75] I do not find Mr. Bilg's evidence persuasive enough to overcome the general credibility of Ms. Burbank and Mr. Husty. I give it little weight because, in my view, Mr. Bilg's evidence was influenced by his perspective that the owners should be grateful and generous to Mr. Scales because his skill and perseverance had ultimately added so much value to their lands. Because of that perspective, he seemed to go out of his way to assist Mr. Scales. For example, he testified that, even if the \$27,500 paid to Ms. Dhillon and the \$75,000 for the 2007 Contract extensions were not actually costs required for the Application, he was fine with Mr. Scales including them in Gulfland's costs because he looked at the big picture of how profitable the outcome was. Also, he testified that he was confident Mr. Scales provided him with a written agreement for payment of the ALR expenses that both parties signed, although no such agreement was ever produced.
- [76] Mr. Scales argued that Mr. Husty's evidence about the Burbanks refusal to pay costs was referring only to meetings while the 2007 Contract was in effect. I do not accept that. Although there was some ambiguous questioning in that regard in cross-examination, the general tenor of Mr. Husty's evidence was clear that he attended many meetings with the Burbanks and Mr. Scales after the 2007 Contract terminated, in which he thought Mr. Scales was angling for the Burbanks to pay costs but he and the Burbanks were clear they would not.
- [77] Mr. Scales argued that Mr. Husty's evidence was inconsistent with the Burbanks', in that Mr. Husty portrayed Mr. Scales as pushing for payment whereas the Burbanks testified he did not expressly ask them to do so. I find this discrepancy could well be just a matter of perspective. Mr. Husty, by his own evidence, felt his role was to assist the Burbanks resist

any pressure to share in the costs. He therefore appears to have focussed on Mr. Scales' comments about costs during the meetings and interpreted them as implicit pressure for the Burbanks to agree to pay some share.

- [78] Mr. Scales argued against Ms. Burbank's credibility on the issue of whether she called him to say the Burbanks refused to pay. He argued that it was in those same calls that Ms. Burbank said she had recorded their meetings, and she did not explain how he knew of the recordings other than by these calls. Ms. Burbank's evidence was that the possibility of recording some of the meetings was discussed due to a concern about Mr. Scales' reference to possible political donations. She testified that in the end, however, nothing was actually recorded.
- [79] I do not find this issue sheds light on Ms. Burbank's credibility. None of the parties had much specific recollection of the details of their discussions in their many meetings some years ago. In my view, it is quite possible Ms. Burbank mentioned the recordings in a meeting rather than a call. Alternatively, there might well have been a call or two between her and Mr. Scales regarding these issues that she no longer remembers.
- [80] This brings me to the new evidence application which is a closely related argument. The new evidence on which Mr. Scales seeks to rely is telephone records indicating a call to him from Ms. Burbank's work cellphone number on April 13, 2016. He submits this supports his evidence that he did discuss his invoice at the February 23, 2016 meeting, and Ms. Burbank called him afterwards to say they were unwilling to pay. Ms. Burbank denied seeing the invoice at that time or making such a call, and testified that Mr. Scales always called her rather than the other way around. The Burbanks oppose the new evidence and take the position that, if admitted, they require cross-examination of Mr. Scales.
- [81] In *Mayer v. Mayer Estate*, 2020 BCCA 282, the Court adopted the following summary of applicable principles for the exercise of discretion to reopen a trial for new evidence before the order is entered:
- [20] Justice Garson's summary of the applicable principles in *Moradkhan [v. Mofidi]*, 2013 BCCA 132] nevertheless remains helpful (I have jettisoned the adjective "unfettered" from the second bullet point):
- [31] I would summarize the main principles applicable to such an application in the following way:
- it is generally speaking in the interests of justice to consider that a trial is complete when each side has closed their case and the judge has delivered his or her judgment;
 - a judge's discretion to reopen a trial should be exercised with restraint;
 - a party may not use the rule to re-argue, re-cast, or re-state his or her case, rather the rule is available to remedy what might otherwise be a substantial injustice;

- it is not intended that a party should be able to lead substantial new evidence, nor does the rule generally permit the leading of new expert evidence;
- the reasons that the evidence was not led or submissions not made in the first place may be relevant to the exercise of the judge's discretion, particularly where the failure to do so in the first place was a considered or pragmatic decision; and
- the discretion should only be exercised if the reception of the new evidence would probably change the result of the trial.

I would add to this list that a judge may reasonably exercise such discretion where a relatively discreet error in math or some mechanical consideration of the evidence is clearly in error. Finally, the overarching consideration is whether it is in the interests of justice that the court reopen the case. (See also *Brown v. Douglas*, 2011 BCCA 521, 314 B.C.A.C. 143.)

- [82] I find the new evidence does not meet the test for admission because it is of no probative value. In my view, it would be a mistake to draw any substantial conclusions from this phone record. As counsel for the Burbanks pointed out, the call may have gone unanswered. Alternatively, it may have been in response to Mr. Scales' lawyer's demand letter to the Burbanks of April 11, 2016, just two days earlier, a possibility never put to Ms. Burbank.
- [83] The record does not even fit particularly well with Mr. Scales' version of events. He testified that the disputed call occurred about a week after the February 23, 2016 meeting, whereas this is almost two months later. He also testified Ms. Burbank called him twice around that time, once to say they were not going to pay and then again, a few days later, to re-confirm that and say they had recorded the meetings. The records do not indicate such a second call.
- [84] Mr. Scales also argued against Ms. Burbank's credibility that she denied knowing Gulfland was claiming \$54,000 from them until after they had sold their home in March 2016. This conflicts with Mr. Husty's evidence that he was at meeting where Mr. Scales discussed the \$54,000 and that he included a reference to that amount in the purchase and sale agreement between the Burbanks and New Urban in March 2016. I do not find this discrepancy enough to override the general reasonableness and credibility of Ms. Burbank's testimony. Much time has passed and it is not surprising there are discrepancies in the chronology as between the witnesses. It may also be that, once again, Mr. Husty focussed on what he perceived as the implicit pressure about costs from Mr. Scales, and his determination to protect the Burbanks from agreeing to pay, whereas Ms. Burbank was not as alive to the issue until she received Mr. Scales' demand letter in April 2016.
- [85] Finally, Mr. Scales argued that the Burbanks may have communicated their acceptance, not expressly, but by their conduct of continuing to participate in the Application. I do not accept this as it conforms with no one's version of events. Mr. Scales' evidence was that the Burbanks repeatedly confirmed their agreement to pay. Mr. Husty and Ms. Burbank's evidence was that they were always clear that they would not agree to do so.

- [86] The Burbanks likewise argued for numerous considerations they said undermined Mr. Scales' version of events and credibility. In my view, the most important were the following.
- [87] The 2013 draft agreement stated costs were not payable by the other owners until 30 days after Gulfland advised the lands were removed from the ALR. Mr. Scales' evidence was that he had not paid attention to this and it did not reflect his agreement with the owners. It is hard to understand how such a fundamental error would make its way into the draft. But, in my view, this discrepancy between Mr. Scales' version of events and the terms of the draft do not shed light on whether or not the Burbanks agreed to pay their share of the costs. No one's version of events was that the costs were to be paid only if Mr. Scales was successful.
- [88] The Burbanks denied ever seeing this draft agreement and they argued that Mr. Scales' evidence about showing it to them was internally inconsistent. In cross-examination, Mr. Scales said that, when he showed it to them, he did not show them the copies for the other owners. In discovery, however, he said he clearly remembered showing them the agreements that others had signed. At trial, the only other signed copy produced was for Ms. Dhillon. I do not draw much from this, however, as I don't see it shedding light on the key dispute and it is the sort of detail that can become confused over time.
- [89] The Burbanks argued that, if there were an agreement on costs, Mr. Scales would have confirmed it in writing particularly when he had them sign numerous other documents such as agent authorizations and permits for soil and fill. They pointed out that one of the fill applications even said that any filling of their lands would be "at no cost" to the Burbanks.
- [90] Although I agree that it was unusual, if there was a cost-sharing agreement, for Mr. Scales to get nothing in writing about it, the evidence supports his contention that he generally avoided email and texts, and it appears he had nothing in writing from other owners who paid him, such as Ms. Dhillon and likely Mr. Bilg (though Mr. Bilg thought otherwise). The documents that he did have the Burbanks sign are different in that signatures were required for the Application to proceed. Finally, the reference to "no costs" in the fill application refers to the potential costs of filling their property, not the costs of the Application itself.
- [91] The Burbanks argued that Mr. Scales' accounting of Gulfland's costs undermined his credibility. They pointed to the costs including Gulfland's own fees of over \$130,000, though Mr. Husty testified Mr. Scales said he was not charging anyone for his time. The costs also included the \$75,000 Mr. Scales paid the Burbanks for the 2007 Contract extensions and the \$27,500 paid to Ms. Dhillon.
- [92] In my view, Gulfland's accounting was problematic. Even if there were the agreement to pay as alleged by Mr. Scales, in my view these items would not have been reasonably expected, and so would not be payable by the Burbanks absent express agreement. Mr. Scales' evidence did not suggest there was such an express agreement for their inclusion. But I do not see it as an issue that sheds light on the larger question of whether the Burbanks agreed to pay their share of the Application costs.

- [93] On another accounting issue, I do not agree with Mr. Scales' argument that, if the Burbanks did agree to pay, they owe based on a per-owner share rather than a per-acre share. On Gulfland's accounting, on the former approach the Burbanks owe \$99,206.18, whereas on the latter they owe \$57,299.68. Gulfland seeks the higher, per-owner amount based on its argument that there was no consideration from the Burbanks for Gulfland's agreement to change the cost-sharing methodology to the per-acre approach in 2013. I reject this "no consideration" argument. If Mr. Scales' version of events were accepted, Mr. Burbank expressed reservations about the fairness of the per-owner approach, and so the consideration for the amendment was that the Burbanks were more likely to continue with the Application.
- [94] In conclusion, considering the evidence as a whole, I find the competing versions of events equally plausible and the witnesses on each side equally credible. I therefore cannot reach a determination on the balance of probabilities whether, throughout the many meetings between the parties, the Burbanks agreed or refused to pay their share of the Application's costs. I find the evidence evenly balanced on this issue and so Gulfland, as plaintiff, has not met its burden of proving the Burbanks' agreement.

Quantum meruit

- [95] Quantum meruit is a means of assessing damages, typically for unjust enrichment or breach of contract where the basis for remuneration is unclear. It is not an independent cause of action. See *Nicholson v. Brown Estate*, 2018 BCSC 141, at paras. 82-88.
- [96] Having not established an agreement to pay, Gulfland is not entitled to quantum meruit damages in contract.
- [97] Regarding unjust enrichment, Gulfland has proven a benefit to the Burbanks, from Gulfland's payment of their share of the costs of the Application, and a corresponding deprivation to itself.
- [98] Gulfland has not, however, met its onus of establishing a lack of juristic reason for its deprivation on a balance of probabilities. If the Burbanks refused to pay, and Mr. Scales chose to keep their lands in the Application anyway, this constitutes a juristic reason for Gulfland's deprivation. Gulfland has not proven, on a balance of probabilities, that the Burbanks agreed to pay their share of the costs as opposed to refusing to do so.

Conclusion

- [99] Gulfland's claim is dismissed. Unless the parties wish to make further submissions on costs, the Burbanks are entitled to costs at Scale B.

"Coval J."

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