
CANADA / JUDGMENT

Gulston v. Aldred

2010 BCSC 241

COURT

Supreme Court of British Columbia

DECIDED

25 February 2010

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2010 BCSC 241 Gulston v. Aldred

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gulston v. Aldred,

2010 BCSC 241

Date: 20100225

Docket: S086414

Registry: Vancouver

Between:

Christopher Gulston

Plaintiff/

Defendant by Counterclaim

And

Susan Aldred

Defendant/

Plaintiff by Counterclaim

And

Paula Vendargon and Sussex Realty Corporation

doing business as Prudential Sussex Realty and the said

Prudential Sussex Realty

Third Parties

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for Plaintiff:

R. M. Shore

Counsel for Defendant:

G. van Ert

Counsel for Third Parties:

S. Cordell

Place and Date of Hearing:

Vancouver, B.C.

November 23, 24, and 26, 2009

Place and Date of Judgment:

Vancouver, B.C.

February 25, 2010

INTRODUCTION

- [1] Christopher Gulston entered into a contract to purchase a house in West Vancouver from Susan Aldred for \$1,570,000. Mr. Gulston paid a deposit of \$75,000, and a further deposit of \$30,000, for a total of \$105,000. The sale did not complete and Ms. Aldred sold the house to another buyer for \$1 million. Mr. Gulston seeks judgment against Ms. Aldred for the \$105,000. Ms. Aldred seeks a declaration that she is the beneficial owner of the \$105,000 which is presently held in trust by Prudential Sussex Realty ("Sussex Realty"), an order that Sussex Realty pay the deposit to her, an order dismissing the action, and an order that Mr. Gulston pay damages for breach of contract in an amount to be determined.
- [2] There are conflicts in the evidence but the parties seek a determination of the issues on the basis of Rule 18A. Mr. Gulston contends that there must be a trial on the issue of estoppel because there are conflicts in the evidence. I have decided that the necessary facts and issues can be decided on the basis of the parts of the affidavits where there is no conflicting evidence.

THE FACTS

- [3] On March 2, 2008 Ms. Aldred and Mr. Gulston "and/or nominee" entered into a Contract of Purchase and Sale (the "Contract") for the property at 2304 Mathers Avenue, West Vancouver (the "Property"), at a purchase price of \$1,570,000 with a \$75,000 deposit to be paid on the following terms:

DEPOSIT OF \$5000.00 TO BE PAID BY WAY OF CERTIFIED CHEQUE OR BANK DRAFT WITHIN 24 HRS. OF SUBJECT REMOVAL, TO BE INCREASED TO \$75000.00 BY MARCH 10, 2008. DEPOSIT TO BE PLACED IN AN INTEREST BEARING TRUST ACCOUNT WITH INTEREST ACCRUING TO THE BENEFIT OF THE BUYER.

All monies paid pursuant to this section (Deposit) will be delivered in trust to PRUDENTIAL SUSSEX REALTY and held in trust in accordance with the provisions of the Real Estate Services Act [S.B.C. 2004, c. 42].

- [4] The Contract was recorded on the standard form of the Real Estate Board of Greater Vancouver.
- [5] Mr. Gulston had initially offered a completion date of April 29, 2008 and a possession date of May 1, 2009, but Ms. Aldred was required to complete the purchase of her new home on April 15 and could not afford to carry two mortgages at once. However, she obtained a one week extension to complete the purchase of her new home. The Contract therefore provided for a completion date of April 22, 2008 and a possession date of April 25, 2008.
- [6] By Limited Dual Agency Agreement, Paula Vendargon of Sussex Realty agreed to act for both parties to the sale.
- [7] The Terms and Conditions section of the Contract included an explanation of the consequences of failing to remove a condition precedent:

Each condition, if so indicated, is for the sole benefit of the party indicated. Unless each condition is waived or declared fulfilled by written notice given by the benefiting party to the other party on or before the date specified for each condition, this Contract will be terminated thereupon and the Deposit returnable in accordance with the Real Estate Services Act.

- [8] Clause 12 of the Contract provided that time would be of the essence, and described the consequences if Mr. Gulston failed to pay the balance of the purchase price to Ms. Aldred by the completion date:

TIME: Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreement to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and, in such event, the amount paid by the Buyer will be absolutely forfeited to the Seller in accordance with the Real Estate Services Act, on account of damages, without prejudice to the Seller's other remedies.

[9] On March 3, 2008, Ms. Aldred learned that there was a decommissioned underground oil storage tank on the Property. Ms. Aldred had been under the impression from the previous owners of the Property that the tank had been removed.

[10] On March 4, 2008, the parties entered into an addendum to the Contract. That addendum included the following terms:

THE UNDERSIGNED HEREBY AGREE AS FOLLOWS:

To remove the following subject clause:

Subject to the Buyer receiving, reading and being satisfied with an inspection report from the inspection conducted on Feb. 24, 2008, on or before March 4, 2008.

This condition is for the sole benefit of the Buyer.

The Seller agrees, at the Sellers expense, to have the underground oil storage tank removed in compliance with Municipal Legislation. The Seller shall remedy any soil contamination caused by said oil tank in compliance with current environmental standards as overseen by the municipal authorities prior to completion.

[11] On March 4, 2008, Mr. Gulston paid \$5,000 to Sussex Realty towards the deposit.

[12] On March 6, 2008, the parties entered into a further addendum to the Contract which specified as follows:

CHANGES RE: DEPOSIT

BOTH PARTIES AGREE TO INCREASE THE DEPOSIT BY \$20,000.00 ON OR BEFORE MARCH 10, 2008, THE BALANCE OF \$50,000.00 TO BE PAID ON OR BEFORE MARCH 18, 2008, FOR A TOTAL DEPOSIT OF \$75,000.00

[13] On March 10, 2008, Mr. Gulston paid \$20,000 to Sussex Realty. On March 18, 2008, he paid an additional \$50,000 to Sussex Realty.

[14] At some point in mid-March 2008 Ms. Aldred learned that Mr. Gulston wanted to delay the completion date by one week from April 22 to April 29 and to change the possession date accordingly. However, Ms. Aldred was required to complete the purchase of her new home on April 22 and would need bridge financing if completion was delayed beyond that date.

[15] On March 18, 2008, the parties entered into a further addendum to the Contract that altered the completion, possession and adjustment dates, and provided that Mr. Gulston compensate Ms. Aldred for bridge financing:

BOTH PARTIES AGREE AS FOLLOWS:

TO CHANGE THE COMPLETION DATE FROM APRIL 22, 2008 TO APRIL 29, 2008

POSSESSION AND ADJUSTMENT DATE FROM APRIL 25, 2008 TO MAY 1, 2008

THE SELLER AGREES TO OBTAIN BRIDGE FINANCING IN ORDER TO EXTEND COMPLETION AND POSSESSION DATES, THEREFORE,

THE SELLER SHALL BE COMPENSATED BY THE BUYER, AT COMPLETION, FOR ALL COSTS ASSOCIATED WITH BRIDGE FINANCING, INCLUDING INTEREST PAID BY THE SELLER AT PRIME + 1%.

ESTIMATED COST: \$500.00 TO SET UP BRIDGE FINANCING \$270.00 - \$280.00 INTEREST PER DAY.

- [16] In early April 2008 Ms. Aldred retained Digger Dick's Contracting Ltd. ("Digger Dick's") to remove the underground oil storage tank. She thought removal was all that was required. When Digger Dick's dug up and removed the tank on April 4, 2008, she learned that that tank had not been properly decommissioned and had leaked oil into the soil, which meant that the soil had to be remediated. Digger Dick's and its contractors worked on the Property off and on throughout April, digging up most of the back yard.
- [17] On April 15, 2008, Mr. Gulston e-mailed Ms. Vendargon advising her that he required more time to complete the Contract. She replied that a specific date for an extension would be required. In an e-mail dated April 18, 2008, Mr. Gulston advised her that "Paul Riley from BMO is arranging the mortgage" and that he would likely need "until the middle of May. It's still better to complete later than not at all."
- [18] On April 28, 2008, the parties entered into another addendum (the "April 28 Addendum") to the Contract that again included a remediation clause and other terms:

All parties agree to the following:

The Seller shall, at the Seller's Expense, remedy the soil contamination caused by the underground oil storage tank in compliance with current environmental standards as overseen by the municipal authorities and obtain a certificate of approval from the municipal authorities on or before May 29, 2008.

THE SELLER AGREES TO RESTORE THE PROPERTY AND AFFECTED BUILDING AREA TO PREVIOUS CONDITIONS, OR A CONDITION ACCEPTABLE TO THE BUYER, ON OR BEFORE MAY 29, 2008.

TO CHANGE:

COMPLETION DATE FROM APRIL 29, 2008 TO AUGUST 29, 2008

POSSESSION AND ADJUSTMENT DATE FROM MAY 01, 2008 TO AUGUST 30, 2008

THE BUYER RESERVES THE RIGHT TO BRING COMPLETION DATE FORWARD

THE BUYER AGREES TO PAY FOR THE SELLERS COST TO BRIDGE FINANCE \$1,570,000.00 AT PRIME PLUS 1% FROM MAY 29, 2008 UNTIL COMPLETION DATE ONLY, SAID INTEREST IS PAYABLE AT THE TIME OF COMPLETION OF SALE. THE BUYER TAKES NO RESPONSIBILITY FOR THE SET UP FEE OF THE SELLER'S BRIDGE FINANCING.

THE BUYER AGREES TO PAY ON OR BEFORE MAY 7th, 2008 DIRECTLY TO THE SELLER A FURTHER DEPOSIT BY WAY OF BANK DRAFT IN THE AMOUNT OF \$30,000.00 (thirty thousand) WHICH FORMS PART OF THE PURCHASE PRICE.

THE BUYER AGREES TO MAINTAIN THE YARD AT THE BUYERS EXPENSE UNTIL COMPLETION.

[Emphasis added to portions written in by hand and initialled by the parties.]

[19] On May 7, 2008, Mr. Gulston paid the further deposit of \$30,000.

[20] Backfilling of the Property began in early May. From the end of April to the end of May, Digger Dick's did the following work on the Property based on Mr. Gulston's instructions: added about 500 tons of dirt, extended the upper level of the backyard; covered up the rock garden, replaced rocks all around the back yard, extended the driveway, covered up the steps from the house to the back yard in dirt, and made a ramp to the lower yard. For the work Digger Dick's did on the Property following Mr. Gulston's instructions, Digger Dick's sent an invoice to Ms. Aldred in the amount of \$44,513.

[21] On May 28, 2009, Richard Lambert of Digger Dick's wrote to Ms. Aldred confirming that over 430 tons of contaminated soil had been removed from the Property, transported, and disposed of at Quantum Environmental Group. Digger Dick's had contracted with Entech Environmental Consultants Ltd. ("Entech") to see that the work complied with the relevant statutory criteria, and Mr. Lambert would forward its report as soon as they received it. Mr. Lambert also enclosed a Certificate of Soil Remediation.

[22] Ms. Vendargon provided a copy of Mr. Lambert's letter of May 29, 2008 and Certificate of Soil Remediation to Ms. Gulston on the same day while he was at the Property. Mr. Gulston said he wanted (as was his right under the Contract) the certificate from the District of West Vancouver.

[23] On May 29, 2008, Mr. Gulston signed another addendum to the Contract. That addendum was signed only by Mr. Gulston and was never signed by Ms. Aldred. It contains the following provisions:

ALL PARTIES AGREE TO THE FOLLOWING:

THE SELLER SHALL, AT THE SELLER'S EXPENSE, REMEDY THE SOIL CONTAMINATION CAUSED BY THE UNDERGROUND OIL STORAGE TANK IN COMPLIANCE WITH CURRENT ENVIRONMENTAL STANDARDS AS OVERSEEN BY THE MUNICIPAL AUTHORITIES AND OBTAIN A CERTIFICATE OF APPROVAL, OR APPROVAL FROM THE MUNICIPAL AUTHORITIES ON OR BEFORE JUNE 30, 2008

THE SELLER AGREES TO RESTORE THE PROPERTY AND AFFECTED BUILDING AREA TO PREVIOUS CONDITIONS, OR A CONDITION ACCEPTABLE TO THE BUYER, ON OR BEFORE JUNE 30, 2008

THE BUYER AGREES TO PAY FOR THE SELLERS COST TO BRIDGE FINANCE \$1,570,000.00 AT PRIME PLUS 1% FROM JUNE 30, 2008 UNTIL COMPLETION DATE ONLY, SAID INTEREST IS PAYABLE AT THE TIME OF COMPLETION OF SALE. THE BUYER TAKES NO RESPONSIBILITY FOR THE SET UP FEE OF THE SELLER'S BRIDGE FINANCING.

THE BUYER RESERVES THE RIGHT TO CHANGE

COMPLETION DATE FROM AUGUST 29, 2008 TO SEPTEMBER 30, 2008

POSSESSION AND ADJUSTMENT DATE FROM AUGUST 30, 2008 TO OCTOBER 1, 2008

- [24] Mr. Gulston in his affidavit refers to the addendum he signed on May 29 as a "different" contract from the Contract in issue, but clearly and on its face, the proposed addendum was to be "further" to the March 2, 2008 Contract. However, Ms. Aldred would not agree to a further extension.
- [25] On June 4, 2008 the District of West Vancouver completed its Underground Fuel Storage Tank Removal or Abandonment in Place Disposition Form (number 0906), which notes the Entech report stating the Property is now clean. The parties agree that the District's June 4, 2008 Disposition Form is the certificate of approval that Ms. Aldred was obliged to obtain by May 29, 2008.
- [26] On June 9, 2008 Mr. Gulston asked Ms. Vendargon for a current market appraisal of the Property, citing in his words, "my interest in having a current valuation on 2304 Mather Avenue so as to allow me to make an offer to purchase 2304 Mathers Avenue". She completed a market analysis, which indicated a price for the Property between \$1.615 and \$1.649 million.
- [27] On June 10, 2008 Ms. Vendargon sent a copy of the certificate issued by the District of West Vancouver to Mr. Gulston by e-mail and on the same day spoke with him by telephone. He said he was satisfied with the certificate, happy with Digger Dick's work in replacing the top soil, and did not want the grass replanted because it was the wrong time of year for replanting grass. He indicated he would replace the grass in the fall.

[28] In May 2008 Mr. Gulston asked a contractor do some work on the Property. The contractor carried out the work in July 2008, which included mowing the lawn, sweeping the stairs, and trimming the hibiscus tree. Mr. Gulston said he never informed the contractor (using his words) "that the Contract had ended on May 29, 2008".

[29] On June 18, 2008, another addendum to the Contract was drafted, but not signed by either party. That addendum reads as follows:

IT IS HEREBY CONFIRMED THAT THE BUYER HAS RECEIVED CERTIFICATION THAT THE SOIL CONTAMINATION CAUSED BY THE UNDERGROUND OIL STORAGE TANK HAS BEEN REMEDIED IN COMPLIANCE WITH CURRENT ENVIRONMENTAL STANDARDS AND OVERSEEN BY THE MUNICIPAL AUTHORITIES AND THAT THE PROPERTY HAS BEEN RESTORED TO A CONDITION ACCEPTABLE TO THE BUYER.

IT IS HEREBY AGREED THAT THE DATE THE BUYER SHALL START PAYING FOR THE SELLERS COST TO BRIDGE FINANCE AS PER CONTRACT, IS JUNE [left blank]

ALL OTHER TERMS AND CONDITIONS SHALL REMAIN THE SAME AND TIME IS OF THE ESSENCE

[30] On June 22, 2008, Ms. Aldred commenced an action against Alexander and Lynda Colbeck, the former owners of the Property, for misrepresentation and the costs of remediating the contaminated soil. The trial was heard in October and November 2009, and the decision reported at Aldred v. Colbeck, 2010 BCSC 57.

[31] On June 23, 2008, Rupert Shore, counsel for Mr. Gulston, sent a letter to Ms. Vendargon asserting Mr. Gulston's interest in the Property and warning her not to sell it to anyone else. The letter is marked "WITHOUT PREJUDICE" but was attached to Mr. Gulston's affidavit and reads:

Mr. Gulston signed an interim agreement with S. Aldred regarding the Mathers Property. Mr. Gulston has advanced \$30,000.00 towards the soil remediation on the Mathers Property. Mr. Gulston has also paid \$75,000.00 by way of deposit on the Mathers Property.

Ms. Aldred failed to discharge her contractual covenant to have the soil remediation completed by the time specified in the contract. Ms. Aldred now seeks to have Mr. Gulston execute an addendum that does not allow for her contractual failure.

Mr. Gulston will complete and pay the full purchase price on or before October 31, 2008. Mr. Gulston will pay interest on Ms. Aldred's bridge financing from June 30, 2008 until October 31, 2008. All interest paid by Mr. Gulston, of course, be deducted from the purchase price of the Mathers Property. This includes the \$30,000.00 already paid.

Given that Mr. Gulston has underwritten a portion of the soil remediation, and given that the breach of the contract was occasioned by your client failing to meet the contractually defined time for completion of soil remediation, our client has a title interest in the Mathers Property.

Our client intends to register a Certificate of Pending Litigation ("CPL") against the Mathers Property. This will preclude any sale of the Mathers Property. Any Realtor who undertakes to list the Mathers Property will be subject to legal liability for their act in furthering the breach of contract and causing further damages for our client.

Any British Columbia Supreme Court action commenced related to the Mathers Property will name as a Defendant any Realtor who participates, in any way, in attempting to market the Mathers Property to any other individual other than Mr. Gulston. Ms. Aldred has a responsibility to notify any Realtor who she contacts regarding the Mathers Property of our position in this letter, as do you.

We are amenable to having this matter resolved by agreement between Mr. Gulston and Ms. Aldred. The most sensible course of conduct would be for Ms. Aldred to receive interest payments from Mr. Gulston up until the time the purchase price is paid by Mr. Gulston on or before October 31, 2008.

Our clients request that, in the circumstances, there be no telephone communication and that all communication be in letter form only, sent to our facsimile number

[32] There is no evidence that Ms. Aldred put any of Mr. Gulston's deposit funds towards the remediation costs.

[33] On June 23, 2008, Digger Dick's filed a lien against the Property in the sum of \$166,463.07.

[34] On June 25, 2008, Marjon Hollander, counsel for Ms. Aldred, replied to Mr. Shore:

We are the solicitors for Ms. Susan Aldred. We are writing in response to your letter of June 23, 2008 addressed to Paula Vendargon of Prudential Sussex Realty.

As you are aware, on March 2, 2008 Ms. Aldred, as Seller, entered into a Contract of Purchase and Sale with C. Gulston, as Buyer, for the Property (the "Contract"). The purchase and sale was originally scheduled to close on April 22, 2008. By an addendum to the Contract dated March 18, 2008 the closing date was extended to April 29, 2008. By a further addendum to the Contract dated April 28, 2008, the closing date was extended to August 29, 2008. No further extensions of the closing date have been agreed to by the Seller. In particular, the Seller has not agreed to an extension of the closing date to October 31, 2008 as alleged in your letter of June 23, 2008 or at all.

We advise that the Seller is ready, willing and able to complete this transaction on the completion date, August 29, 2008.

With respect to the interest due on the bridge financing, we advise that under the Contract as amended, the Buyer is to compensate and/or pay for the Seller's costs to bridge finance. Those costs are not to be "deducted from the purchase price" as alleged in your letter of June 23, 2008 or at all. Please ensure that the Buyer's Statement of Adjustments correctly reflects these costs.

Finally, please immediately contact the writer to confirm whether your client's unilateral attempt to vary the closing date to October 31, 2008 and to vary the bridge financing payment provisions as set out in your letter of June 23, 2008 should be viewed as any anticipatory breach of Contract by the Buyer.

We advise that should the Buyer fail to complete the transaction on August 29, 2008 our client will take immediate proceedings to pursue any and all remedies available to her under the Contract including, but not limited to, the specific performance of the Contract and damages, or alternatively, damages.

We trust you will find the foregoing to be in order. Should you have any questions, please do not hesitate to contact the writer.

[Emphasis in original.]

[35] On August 19, 2008 Mr. Shore replied to Ms. Hollander advising her that Mr. Gulston did not intend to complete the purchase of the Property for a number of reasons, including "massive adverse publicity relating the soil contamination", Ms. Aldred's litigation against the Colbecks, that the certificate provides no indemnity to Mr. Gulston in the event adjoining neighbours claim against him for contaminated soil, and:

(d.) There is no contract between the vendor of the above referenced property and Mr. Gulston. The vendor failed to complete the soil remediation within the time specified in the expired contract;

(e.) Our client has received an informal evaluation from a real estate appraiser who is very familiar with West Vancouver property values, indicating that the value of the property, given the circumstances referred to in this letter, is far less than what the vendor purported the property value to be and far less than the assessed value, said assessed value not recognizing the factors referred to in this letter;

* * *

In light of the above, and on a without prejudice basis, our client is prepared to purchase the property for the amount of one million dollars (\$1,000,000.00) and no more.

Despite the fact that our client has made this without prejudice offer, our client will not purchase the Mathers Property. Please communicate your response in writing only.

[36] Mr. Gulston did not complete the purchase of the property on August 29, 2008. Ms. Aldred immediately relisted the Property and in January 2009 sold it to another buyer for \$1 million (resulting in a loss of over \$500,000).

[37] In his examination for discovery Mr. Gulston confirmed that during the period from March 2, 2008 to August 30, 2008 he had no income or assets (save his interest in two timeshare properties in South Africa valued at approximately \$150,000) against which he could borrow funds. He owned no house or vehicle. To pay the deposits, he borrowed money from his brother and used his credit cards.

THE POSITION OF THE PARTIES

[38] Mr. Gulston contends that Ms. Aldred's obligation to obtain a certificate from the District of West Vancouver relating to the soil remediation by May 29, 2008 was a condition precedent to the Contract, and because she failed to satisfy the condition precedent, the Contract came to an end. Mr. Gulston therefore argues that he is entitled to the return of his \$105,000 deposit. He also contends that this Court is not entitled to look at the conduct of the parties after May 29, 2008 but is strictly confined to looking at the wording of the Contract.

[39] Ms. Aldred contends that as Mr. Gulston failed to complete the Contract by the completion date, he forfeited the \$105,000 deposit and is liable for damages in breach of contract (in an amount to be determined).

[40] The third parties, Ms. Vendargon and Sussex Realty, contend that Mr. Gulston's application must fail and Ms. Aldred's application must succeed on the basis that Mr. Gulston waived any breach of the Contract by Ms. Aldred and is estopped by his subsequent conduct from relying on any breach. They also say that he failed to accept any repudiation of the Contract by Ms. Aldred in a timely way, or at all.

THE ISSUES

[41] The issues that need to be determined are as follows:

- 1) Is the remediation clause in the April 28 Addendum a condition precedent?
- 2) Did Mr. Gulston waive the condition, or is he otherwise estopped from relying on the remediation clause?

ARGUMENT AND ANALYSIS

1. Is the remediation clause in the April 28 Addendum a condition precedent?

[42] The remediation clause reads:

The Seller shall, at the Seller's Expense, remedy the soil contamination caused by the underground oil storage tank in compliance with current environmental standards as overseen by the municipal authorities and obtain a certificate of approval from the municipal authorities on or before May 29, 2008.

[43] The leading case on the definition of a condition precedent is *Turney v. Zhilka*, [1959] S.C.R. 578. At 584, the Supreme Court of Canada stated that a true condition precedent exists where:

The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party. This is a true condition precedent--an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur.

[44] Mr. Gulston relies on *Turney* and the following cases in support of his contention that the remediation clause is a condition precedent: *Mill Creek Developments Ltd. v. P & D. Logging Ltd.*, 2008 BCCA 531; *Edgington v. Mulek Estate*, 2008 BCCA 505; *Georgina Island Development Inc. v. Neale* (2008) 71 R.P.R. (4th) 248 (Ont. Sup. Ct. J.); and *Hutchingame v. Johnstone*, 2007 BCCA 74.

[45] Ms. Aldred argues that the remediation clause does not make the Contract conditional upon anything. The clause requires her to remedy the soil contamination. She is positively and unconditionally required to do so. She could not have excused her non-performance by pointing to some "future uncertain event" upon which her obligation depends. Ms. Aldred distinguishes the remediation clause from the clauses in the cases relied on by Mr. Gulston:

Turney v. Zhilka [1959] S.C.R. 578 at 582

"Providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision."

***Mill Creek Development Ltd. v. P&D Logging Ltd.*, 2008 BCCA 531 at para. 4**

"THIS OFFER IS subject to the following Conditions Precedent being satisfied or waived. These Conditions Precedent are for the sole benefit of the Purchaser."

***Edgington v. Mulek Estate*, 2008 BCCA 505 at para. 6**

"This Option shall not be exercisable by the Purchaser unless 100% per cent [sic] of the leases of Suites in the Building demised and leased by the Lease have been assigned by the Lessee named in the Lease "

***Georgina Island Development Inc. v. Neale and LeBlanc*, 2008 CanLII 30302 at paras. 3-4**

[Clause not quoted but paraphrased as "subject to the consent of the Georgina Island Indian Reserve Band Council" and "conditional on the plaintiff obtaining all necessary consents and permits from all third parties"]

Hutchingame v. Johnstone

2007 BCCA 74 at para. 3

[No express clause; court found "an implied term of the agreement that the vendors would assign their leasehold interest in the foreshore to the purchaser providing that the Crown's consent could be obtained."]

[Emphasis in original.]

[46] In my view, it cannot be said that the obligations of both parties under the Contract were dependent upon a future uncertain event that depended entirely on the will of a third party. Ms. Aldred was obliged to remedy the contaminated soil according to current environmental standards. She retained Digger Dick's to carry out that obligation. That obligation did not depend entirely on the will of any third party. Ms. Aldred was also obligated to obtain a certificate from the municipal authorities certifying that the soil had been remediated to the appropriate standard. It cannot be said there was no right to performance by Ms. Aldred until the certificate was obtained. Her obligation to "remedy the soil contamination caused by the underground oil storage tank" was not conditional upon anything. I therefore find that the remediation clause was not a condition precedent to the performance of the Contract by Mr. Gulston.

[47] If I am wrong, or even if the remediation clause is simply a covenant, then the next question is whether Mr. Gulston is estopped from relying on the remediation clause and the time of the essence clause.

2. Did Mr. Gulston waive the condition, or is he estopped from relying on it?

[48] Mr. Gulston relies on the time of the essence clause in the Contract to support his argument that the Contract came to an end because Ms. Aldred did not obtain the certificate from the District of West Vancouver on or before May 29, 2009.

[49] In appropriate circumstances it may be unjust or inequitable for a party to insist that time is of the essence and a court may refuse to give effect to such a provision. In *Salama Enterprises (1988) Inc. v. Grewal* (1992), 66 B.C.L.R. (2d) 39 (C.A.), the B.C. Court of Appeal stated at para. 11:

[11] it is my view that the line of authority, which is generally conceded to be most explicitly stated in *Barclay v. Messenger* (1874), 43 L.J. Ch. 449 (Ch.), is to be regarded as the law in this jurisdiction. The judgment of Madam Justice Hetherington in *Landbank Minerals Ltd. v. Wesgeo Enterprises Ltd.*, [1981] 5 W.W.R. 524 [Alta. Q.B.] provides at pp. 530-535 a persuasive analysis and I would adopt this statement from p. 535 of her judgment:

I think that where time is of the essence of an agreement and there is an extension of time for performance of an obligation under the agreement to a specified date, the effect of the extension on the essentiality of time must be determined in the context of the circumstances of the case. If there are circumstances which make it unjust or inequitable for a party to insist that time is of

the essence, the court may refuse to give effect to this provision in the agreement. In the absence of such circumstances, however, the extension of time simply results in the substitution of a later date for the one stipulated in the agreement. I do not think that it in any way affects the provision in the agreement that time is of the essence.

[50] Ms. Aldred agreed to postpone completion from April 22 to April 29 to accommodate Mr. Gulston, and then agreed to a further extension of four months to further accommodate him. Mr. Gulston has shown no need for Ms. Aldred to obtain the certificate by May 29 (she did by June 4), or any loss to himself for her failure to do so.

[51] Indeed after May 29, 2008, on June 23, 2008, Mr. Gulston (through his counsel) asserted an interest in the Property, warned Ms. Aldred not to sell it to anyone else, and stated that he would complete and pay the full purchase price on or before October 31, 2008. Mr. Gulston thereby affirmed the Contract. In July 2008, Mr. Gulston had work performed on the Property.

[52] Where a party unequivocally affirms a contract, whether by words or conduct, or circumstances would make it unjust, inequitable, or unfair for that party to resile from the contract, he or she will be estopped from doing so. In *Litwin Construction (1973) Ltd. v. Pan* (1988), 29 B.C.L.R. (2d) 88 (C.A.) (sub nom. *Litwin Construction (1973) Ltd. v. Kiss*), at 97-98, the Court of Appeal approved of the following statement on the law of estoppel from the English Court of Appeal in *Re Eaves*, [1940] Ch. 109 (C.A.):

It is well settled that if a party has so acted that the fair inference to be drawn from his conduct is that he consents to a transaction to which he might quite properly have objected, he cannot be heard to question the legality of the transaction as against persons who, on the faith of his conduct, have acted on the view that the transaction was legal. The principle applies even if the party whose conduct is in question was himself acting without full knowledge or in error.

[Citations omitted.]

[53] The Court approved the following statement of principle on the law of waiver and estoppel (at 99):

[H]as the party affirmed the contract unequivocally by his words or conduct in circumstances making it unfair or unjust for him now to resile from that contract?

"Unfair or unjust" means "producing a result contrary to a sound sense of the equities, rights and conduct of the parties".

Under this broad principle, the distinctions between estoppel, promissory estoppel, waiver, election, laches and acquiescence do not always affect the outcome, though they may in some cases. The underlying concept is that of unfairness or injustice and it is not essential to its application that there be knowledge, detriment, acquiescence or encouragement although their presence may serve to raise the unfairness or injustice to the level requiring the exercise of judgment. If the unfairness or injustice is very slight, then the principle would not be applied. If

it is more than slight, then the principle may be applicable.

[54] In *Revell v. Litwin Construction (1973) Ltd.* (1991), 62 B.C.L.R. (2d) 328 (C.A.) (sub nom. *Bowen v. O'Brian Financial Corp.*), the Court of Appeal reaffirmed its approach to the law on waiver and estoppel. At paras. 26-27, Mr. Justice Wood (writing for the Court) said the following:

[26] As I read the authorities, and in particular those relied upon by this Court when formulating the modern doctrine in *Litwin v. Kiss*, there is no requirement that the conduct, which was relied upon by the person who seeks to raise an estoppel, have been intentionally designed to induce that reliance. Nor is it essential that there be any positive acts upon which the reliance may reasonably be said to have arisen. The conduct relied upon may, in fact, be a failure to act in circumstances which gave rise to an inference upon which the reliance is founded.

[27] As to the requirement that the reliance be based upon unequivocal conduct, the perspective from which the application of the doctrine must be viewed is that of the person who seeks to rely on it. The issue is not so much whether the reliance was based on unequivocal conduct, as it is whether the conduct, when viewed through the eyes of the party raising the doctrine, was such as would reasonably lead that person to rely upon it.

At para. 30, he continued as follows:

[30] [T]he modern doctrine of estoppel was adopted by this Court in *Litwin v. Kiss*. The hallmark of that doctrine is its flexibility. It defies a single definition and resists imprisonment in any specific formulation. [I]ntention was not essential to the trial judge's conclusions in that case, nor to this court's endorsement of those conclusions. Nor, in my view, was it essential to those conclusions that the affirmation of the contracts in those cases resulted from the positive acts described by the trial judge, although the fact that there were such positive acts undoubtedly made the result in those cases all the more obvious.

[55] This approach--the modern doctrine of estoppel--was cited with approval by Madam Justice Saunders (as she then was) in *Novam Development Ltd. v. Hutchins* (1992), 25 R.P.R. (2d) 76 (B.C.S.C.). In that case, Saunders J. found the defendant purchaser estopped from relying on the plaintiff vendor's failure to follow the statutory requirements set out in the Real Estate Act (requiring a disclosure statement to be provided to the purchaser before entering into the purchase agreement). However, the purchaser sought to rely on the vendor's alleged failure to follow the statute as a means to render the contract unenforceable only after he had signed the purchase agreement and negotiated two separate delays of the closing date. After reviewing the approach set out in the *Litwin Construction* cases, she said the following of the purchaser's actions at para. 15:

[15] The issue here is whether it is unjust or unfair for Mr. Hutchins to rely on the statutory non-compliance. Although Mr. Hutchins only became aware of the provisions in the Real Estate Act at the end of November, 1990, other factors must also be considered. First in these is the

significant passage of time from the time he "tied up" the property in February until he tried to unloose it in November. During that time he had tried to sell it and Novam Development Ltd. could not sell it. He affirmed the contract by listing his interest in the contract for sale, by paying the second portion of the deposit several months after the contract was agreed and by requesting and receiving an extension of the closing date. Only after the time for extension of the November 26, 1990 closing date, did Mr. Hutchins advise he was not buying the property as agreed. He represented by conduct that he intended to complete the transaction. In doing so he deprived Novam Development Ltd. of the opportunity to market the unit until the real estate market had fallen substantially. In these circumstances it would be unfair or unjust for Mr. Hutchins to resile from the contract, as he sought to do in December, 1990. Accordingly, I find that he is estopped from relying upon s. 62 of the Real Estate Act and the non-compliance with the statutory requirements established by s. 50(7) of that Act.

- [56] It was not until August 19, 2008 that Mr. Shore informed counsel for Ms. Aldred that Mr. Gulston did not intend to complete the purchase of the Property. This was long after Mr. Gulston had work done on the Property by Digger Dick's and another contractor throughout the month of May 2008 and as late as July 2008 and long after he (through his counsel) asserted his interest in the Property and intention to complete the Contract.
- [57] I find that Mr. Gulston breached the Contract by failing to complete by August 29, 2008, and that based on his affirmation of the Contract he is estopped from relying on any breach by Ms. Gulston in failing to obtain the certificate by May 29, 2008. He effectively tied up the Property from March 2, 2008 to August 19, 2008 by requesting extensions of the closing date; he represented, by his conduct, that he intended to complete the Contract.
- [58] Mr. Gulston argues that Ms. Aldred would have been unable to clear title (and therefore was in breach of the Contract) because of Digger Dick's lien and points to the fact that the lien was not discharged until January 20, 2009. However, it was Mr. Gulston who gave notice on August 19, 2008 that he would not be completing the Contract on August 29, 2008. Ms. Aldred still had ten days to clear title. It is speculative to say that she would not have cleared title by the closing date. Certainly there was no need on her part to clear title prior to August 29, 2008 based on Mr. Gulston's anticipatory breach of the Contract. Ms. Aldred cleared title on January 20, 2009, which was one week before she sold the Property for \$1 million.

CONCLUSION

- [59] I conclude that Mr. Gulston has forfeited his deposit to Ms. Aldred. Clause 12 of the Contract provides that if the buyer fails to complete the purchase by the completion date the amount paid by the buyer will be forfeited to the seller.
- [60] In *Lede v. Greither*, 2009 BCSC 432, Mr. Justice McEwan interpreted the same clause, and after reviewing the case authorities stated at para. 33:

[33] In the absence of an agreement to the contrary, the general rule is that if the contract collapses by reason of the buyer's default, then the deposit, being a guarantee of performance, becomes the property of the seller, even if he resells the land at an increased price.

[61] I make the following orders:

- 1) a declaration that Ms. Aldred is the beneficial owner of the \$105,000 which is presently held in trust by Sussex Realty;
- 2) an order that Sussex Realty pay the \$105,000 deposit to Ms. Aldred;
- 3) an order dismissing Mr. Gulston's action against Ms. Aldred; and
- 4) an order that Mr. Gulston (defendant by counterclaim) pay damages for breach of contract in an amount to be determined.

[62] The parties have agreed to make submissions on costs.

"Loo J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/10/02/2010BCSC0241.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/gulston-v-aldred-2010>

Prepared on 29 October 2026 · Esheria