
CANADA / JUDGMENT

Holmes v. Byl

2009 BCSC 246

COURT

Supreme Court of British Columbia

DECIDED

26 February 2009

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2009 BCSC 246 Holmes v. Byl

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Holmes v. Byl,

2009 BCSC 246

Date: 20090226

Docket: 0730915

Registry: Prince George

Between:

Dwayne Holmes and Grizzly West Logging Ltd.

Plaintiffs

And

John Byl

Defendant

Before: The Honourable Mr. Justice Chamberlist

Reasons for Judgment

In Chambers

Counsel for the plaintiffs:

R.J. Stewart, Q.C.

Counsel for the defendant:

G.A. Wright

Date and Place of Trial/Hearing:

November 27 and December 10 2008

Prince George, B.C.

[1] In these proceedings the plaintiffs seek a declaration, that under the terms of a written agreement, the defendant has breached the agreement by failing to cause Woodland West Lumber Company Ltd. to pay when due monies alleged to the plaintiffs or either of them according to the agreement, and judgment, pursuant to R. 18A, against the defendant for any and all amounts due to the plaintiffs pursuant to the terms of the agreement.

[2] Various preliminary issues arise:

1. Whether the action is suitable for an 18A determination;
2. If suitable for R. 18A determination, whether the defendant can be found personally liable to the plaintiffs pursuant to para. 9.2 of the agreement giving rise to this action if the company at the time of the obligation to pay monies to the plaintiffs was insolvent or would render the company insolvent.

[3] The relevant provisions of the agreement upon which the plaintiffs sue are found at paras. 9.1 and 9.2 of the agreement dated __ February 2007 (no date was ever entered on the agreement):

9.1 If a controlling interest in the share capital in the Company (the "Shares") is sold or if the land, buildings, machinery and current rolling stock of the company (the "Assets") are sold within TWO (2) years of the Closing Date the following conditions will apply:

9.1.1 if the Shares or Assets are sold for an amount in excess of ONE MILLION EIGHT HUNDRED AND FIFTY DOLLARS [sic] (\$1,850,000.00) but less than TWO MILLION ONE HUNDRED AND SEVENTY FIVE [sic] (\$2,175,000.00) any net proceeds in excess ONE MILLION EIGHT HUNDRED AND FIFTY DOLLARS [sic] (\$1,850,000.00) will be paid directly to the Vendor or one of his assigns;

9.1.2 If the Shares or the Assets are sold for more than TWO MILLION ONE HUNDRED AND SEVENTY FIVE THOUSAND (\$2,175,000.00) DOLLARS and less than TWO MILLION AND FIVE HUNDRED THOUSAND (\$2,500,000.00) any net proceeds in excess of TWO MILLION ONE HUNDRED AND SEVENTY FIVE THOUSAND (\$2,175,000.00) will be paid directly to the Purchaser or one of his assignees;

9.1.3 If the Shares or the Assets are sold for more than TWO MILLION AND FIVE HUNDRED THOUSAND (\$2,500,000.00) DOLLARS any net proceeds, will be divided equally between the Vendor and the Purchaser.

9.2 Subject to the above conditions if the Shares or the Assets are sold in a sale initiated by the Purchaser within TWELVE (12) months of the Closing date the Purchaser will cause the Company to pay to the Vendor no less than ONE HUNDRED AND SIXTY TWO THOUSAND AND FIVE HUNDRED (\$162,500.00) DOLLARS, unless the Shares or the Assets are sold to Bevel Road Construction Ltd. in which case the amount will be EIGHTY ONE THOUSAND TWO HUNDRED AND FIFTY (\$81,250.00) DOLLARS.

BACKGROUND

- [4] The plaintiff, Dwayne Holmes, up to the execution of the agreement made in February 2007 owned 51% of the issued and outstanding shares in Woodland West Lumber Company Ltd. (the "company"). Dwayne Holmes, at all material times, owned the issued and outstanding shares in the plaintiff Grizzly West Logging Ltd. The defendant John Byl and his wife owned the remainder of the issued and outstanding shares in the company.
- [5] Following negotiations in late 2006 and early 2007 the plaintiff, Holmes, and the defendant entered into an agreement in writing dated the __ day of February 2007 whereby the plaintiff Dwayne Holmes sold his shares in the company to the defendant. The agreement dealt with a subsequent sale of the company or its assets after the transaction between the plaintiff and the defendant in February 2007 was consummated including the provisions as set out in para. 3 hereof.
- [6] Subsequent to February 2007 and by an agreement dated for reference as September 1, 2007, the company sold to Transco Mills (1992) Ltd. ("Transco") the lands and buildings and assets of the company for \$1,990,000.00. A cost to the company of the subsequent sale included legal fees (inclusive of disbursements and taxes) of \$9,839.12.
- [7] Neither of the words contained in 9.2 of the agreement, being "a sale initiated by the Purchaser" or the term "net proceeds" referred to in para. 9.1 are defined in the agreement.
- [8] The reference to Bevel Road Construction Ltd. in 9.2 of the agreement is given more meat in affidavit #1 of the defendant, filed May 23, 2008, where at para. 17 thereof Byl states:
 - 17. During approximately the month of September 2006, an Agreement was reached to sell Woodland West to a company called Bevel Road Construction Ltd. (hereinafter "Bevel") for \$1,850,000.00 but, after several extensions of the proposed closing date, we were informed on or about November 30, 2006 that Bevel would not complete the purchase.
- [9] At para. 27 of the same affidavit, Byl states:
 - 27. At the time Dwayne and I agreed to the share sale, Woodland West was insolvent.
- [10] The plaintiff Holmes, in his affidavit #2 sworn May 9, 2008, at para. 35, agrees somewhat with this evidence of the defendant where he stated:

35. . . . Given that the value of assets and liabilities of the Company were roughly equivalent at the Closing Date . . .
- [11] As such there really is no disagreement as to the financial circumstances of the company when the agreement of February 2007 was reduced to writing and executed.
- [12] At the time, it is of some import that a major creditor of the company was Woodland Forest Products Ltd. (in which the defendant and his wife were the principal shareholders) who, on November 30, 2006, was owed \$987,388.73.
- [13] Thus, the evidence is clear and uncontradicted that the parties executed the agreement between them in February 2007 and that later that year there was a sale of the land, buildings and sawmill assets of the company effective October 9, 2007, at a price of \$1,990,000.00. Subsequent to the sale, the defendant first took the position that the net proceeds, although not defined in the agreement, were not sufficient to trigger any obligation of the vendor under the agreement since the proceeds of sale had to be applied inter alia to the debts of the company and that nothing remained after the application of such funds.
- [14] In the statement of defence filed on December 17, 2007, the defence made it clear that as there were no net proceeds there was no obligation and further the defendant raised para. 9.2 as a possible defence on the basis that monies would only become due if the subsequent sale (sale to Transco) was initiated by the defendant.
- [15] The plaintiff Holmes, in his affidavit #2 at para. 35, states as follows with respect to net proceeds:
35. On the Closing Date, the term "net proceeds" used in Part 9 of the Agreement was understood by me to mean the proceeds of the sale, less closing costs. I am an experienced businessman, and the Defendant is also, based on my experience dealing and negotiating with him. I understood closing costs to be the costs associated with the legal fees and disbursements associated with finalization of the sale of shares or assets, as the case may be, including registration fees. I did not understand that "net Proceeds" meant the sale price less the payment by the Company of its debts. Given that the value of assets and liabilities of the Company were roughly equivalent at the Closing Date, I had no reason to believe that "net proceeds" meant anything other than the sale price less legal fees and disbursements.
- [16] Mr. Byl, in his affidavit #1 filed May 23, 2007, does not refer to any interpretation he had put on net proceeds, but on May 23, 2008 Vera Colville, chartered accountant for Woodland West Lumber Company Ltd., deposed at para. 9 of her affidavit #1 the following:
9. I have been a chartered accountant since 1992. In my experience the term "net proceeds" is generally accepted in the accounting profession to mean the sale price of an asset, less legal fees, less all secured and priority claims.

- [17] Woodland West Lumber Company Ltd. thus became a company controlled by John Byl. Mr. Byl, in his affidavit #2 filed November 26, 2008, attached a balance sheet of the company to indicate that in January 2007 the total assets of Woodland West, excluding current assets, totalled the sum of \$1,638,571.00 with long term debts of the company being \$1,610,054.00. Mr. Byl's evidence was that based on those figures Woodland West was in an approximately break-even situation but that its current portion of its assets, less current liabilities, put it into an insolvent situation. Mr. Byl, in the same affidavit, goes on to explain that had the sale to Bevel Road Construction Ltd., at a price of \$1,850,000.00, proceeded there would have been recapture of approximately \$211,000.00 and that it was the possibility of that sale completing that gave rise to the possibility that there would be net proceeds available for distribution to the shareholders of Woodland West. Commencing at para. 17 of the same affidavit, Mr. Byl goes on to state:
17. The reason there were no net proceeds available for distribution to the shareholders as a result of the sale to Transco Mills (1992) Ltd. arose from the fact that Woodland West continued to incur significant losses from its operations over the 9 months between my purchase of Dwayne Holmes' shares and the sale of Woodland West's assets to Transco Mills (1992) Ltd.
 18. The magnitude of these losses can be seen on the second page of Exhibit "A" to this my Affidavit (highlighted for ease of reference) and are noted to have totaled [sic] the sum of \$544,134.00 over the period January through October 2007.
 19. These accumulated losses from operations completely wiped out the recapture that would have occurred if Woodland West had sold in January of 2007.
 20. In specific response to paragraphs 3(3) and 3(f) of Holmes #3, I did not pay out "most of [the] money" received from the softwood lumber duty rebate of \$640,000.00. Woodland West was in default of its overdraft account obligations to the Bank of Nova Scotia when that rebate was received, and the bank unilaterally took the sum of approximately \$500,000.00 to cover the overdraft.
- [18] To counter the opinion of Vera Colville the plaintiff filed an expert report, dated September 12, 2008, being the report of Jane Newman, CA, CBV, CFE. She opined that the Canadian Institute of Chartered Accountants Handbook does not contain a definitive definition of net proceeds and that "the net proceeds on the sale of assets of a corporation do not contemplate the use of those proceeds to satisfy the debts of the corporation".
- [19] With reference to the condition precedent found in para. 9.2 of the agreement "... in a sale initiated by the purchaser" the plaintiff filed the affidavit of Jerry Sine, accountant, sworn October 31, 2008. Mr. Sine was the accountant for Transco Industries Ltd. and met with John Byl in July of 2007 to inspect a finger-jointing machine which had been made available for sale through the defendant. At para. 6 he stated:

6. In the course of the conversation, I was informed by Mr. Byl of three buildings owned by the Company and situated at 988 and 888 Great Street in the City of Prince George. I viewed these buildings, at his invitation, and to my surprise the buildings were empty.
- [20] At the meeting in July the defendant advised Mr. Sine that the buildings were also for sale but that there was another buyer.
- [21] He thereafter described how he had returned to Prince George on August 23, 2007 to speak to the defendant about the equipment for sale on Great Street and "to hopefully meet the buyers of the buildings on Great Street that he had informed me of".
- [22] Thereafter Mr. Sine described further discussions with the defendant and was subsequently advised that the other interested persons or companies had not paid a deposit and, as a result on October 2, 2007, Sine provided a cheque in the amount of \$97,000.00 which was to pay for equipment already negotiated, and \$10,000.00 as a deposit on the purchase off the sawmill in the name of Tansco Industries Ltd. At para. 22 of his affidavit, Mr. Sine concludes by stating:
22. On or about October 15, 2007 I and Mr. Nordal returned to Prince George to finalize the terms for the purchase of the mill, and Mr. Byl informed us that he had instructed his lawyer to draft a sale agreement for the mill in which Transco Industries Ltd. was the purchaser, since the other party had not paid their deposit, nor responded to his ultimatum.
- [23] With respect to Sine's affidavit, all that is contained in reference to that affidavit is para. 3 of affidavit #2 of John Byl which states:
3. The Affidavit of Sine #1 is filled with errors as to the points of detail set out therein concerning the various meetings between Jerry Sine, Sig Nordal and myself and the steps involving Sig Nordal's tour of the Woodland West Lumber Company Ltd. mill (hereinafter "Woodland West") and the mechanism by which an offer was made to purchase the mill.

ANALYSIS

- [24] The first step in any R. 18A application is to determine if the facts can be found.
- [25] In this case, two chartered accountants have provided evidence with respect to the meaning of "net proceeds". Expert opinions can generally be helpful to the Court where there is a need to give meaning to a phrase where the contract does not provide a definition. However, on the facts of this case, I have formed the opinion that the contract as a whole can itself be looked at to determine what "net proceeds" meant to these contracting parties.

- [26] True ambiguity can arise where an expression in a written contract is capable of being understood in more sense than one (*Imperial Oil Ltd. v. NS Light & Power Co.* (1977), [1977] 2 S.C.R. 817(S.C.C.)) and extrinsic evidence can be used to resolve such ambiguity but, as was found in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, [1992] S.C.J. No. 96, it must be "an ambiguity in the language as it stands, not one that is itself created by the evidence that is sought to be adduced".
- [27] Thus, I have found it helpful to have before me the extrinsic evidence relating to the company's financial position in February 2007 when the parties executed their agreement. This assists in interpreting the agreement of February 2007 in the sense of how the parties understood it and thus the affidavits of both the plaintiff and the defendant are of some assistance. I have therefore concluded that the extrinsic evidence of both parties showing that at the time the agreement of February 2007 was executed the company was either in break-even or insolvent circumstances must lead to the conclusion that "net proceeds" as now explained by the defendant cannot make sense. If this were the case, the amount left over would be negligible or non-existent and yet if the sale to Bevel (which had been outstanding for a year) would have completed, it would have yielded \$1,850,000.00, but still would have resulted in an obligation of the defendant to cause the company to pay \$81,250.00 to Mr. Holmes.
- [28] As said earlier, the extrinsic evidence discloses that the defendant's company, being Woodland Forest Products Ltd. was a secured creditor as of November 30, 2007 of an amount approaching \$1,000,000.00. This I find to be an important aspect of the background to the February agreement.
- [29] While Mr. Byl has attempted to explain how it would have been possible in February 2007 to agree to cause the company to pay to the plaintiff Holmes some \$81,250.00, it is noteworthy that obligation of Byl would have continued up to February 2008 if the sale to Bevel proceeded notwithstanding what the financial circumstances of the company were at the time of such sale.
- [30] This bare minimum of extrinsic evidence has led me to conclude that the net proceeds as used in para. 9 of the agreement can only mean the net proceeds and not the proceeds, if any, after payment of all corporate debts. This must be the meaning that the parties considered when at the time it is clear from the extrinsic evidence that the company either had matching liabilities and assets or was technically insolvent.
- [31] Thus, with respect to the various issues that I said arise in paragraph 2 of the introduction, I find that this action is suitable for an 18A determination as I can find the facts. With respect to the second question, being whether the defendant can be found personally liable to the plaintiffs pursuant to para. 9.2 of the Agreement, if the Company at the time of the obligation to pay monies to the plaintiff was insolvent or had rendered the company insolvent, I find that there was obvious contemplation by the parties that John Byl would cause the company to pay \$162,500.00 if the shares or assets of Woodland West Lumber

Company Ltd. were sold within one year in a sale initiated by the purchaser.

- [32] This covenant, I find, was given by John Byl regardless of whether the payment would render the company insolvent or if the company was insolvent at the time.
- [33] I find the position of the defendant unacceptable when one looks at the reality of the situation regarding a sale to Bevel Road Construction Ltd. to be the truest measure of the intention of the parties at the time the agreement was executed in February 2007. That covenant certainly would continue notwithstanding the future losses of the company once John Byl took over the control of it in February 2007. The necessary inference from the proven facts of this case are that Mr. Byl would merely reduce the amount of money payable to his other company, Woodland Forest Products Ltd., to ensure payment was made if the sale to Bevel Road Construction Ltd. completed within the one year period and there were no funds available to pay Holmes.
- [34] I have concluded that it flows therefore that the plaintiff will have its declaration that the defendant has breached the agreement of February 2007 by failing to cause Woodland West Lumber Company Ltd. to pay the monies alleged due to the plaintiff Wayne Holmes.
- [35] With respect to the claim for judgment, I have concluded from the affidavit of Jerry Sine that there is no doubt that the sale was initiated by Mr. Byl. The affidavit offered by John Byl does not raise contradictory evidence relating to the issue of who initiated the sale. I find from Mr. Sines's affidavit, and particularly Mr. Sine's reference in para. 22 of his affidavit that it was Mr. Byl who instructed his lawyer to draft the sales agreement, as more evidence that the sale had been initiated by Mr. Byl as required under para. 2 of the February 2007 agreement.
- [36] The damages sustained by the plaintiff as a result of Mr. Byl's breach of his covenant contained in para. 9.2 is that Holmes did not receive the \$162,500.00 contemplated in the agreement.
- [37] Mr. Byl was the driving force of the sale to Transco on behalf of the company.
- [38] As such, I find that the damages sustained by Holmes as a result of the breach by Mr. Byl of his covenant was \$162,500.00.
- [39] The plaintiff Dwayne Holmes shall therefore have judgment against the defendant John Byl in the amount of \$162,500.00 together with Court order interest and costs.

"E.G. Chamberlist, J."

The Honourable Mr. Justice Chamberlist

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Prepared on 29 October 2026 · Esheria