
CANADA / JUDGMENT

Khullar v. Lee

2011 BCSC 1648

COURT

Supreme Court of British Columbia

DECIDED

2 December 2011

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2011 BCSC 1648 Khullar v. Lee

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Khullar v. Lee,

2011 BCSC 1648

Date: 20111202

Docket: S118849

Registry: New Westminster

Between:

Kundan Khullar and Puja Khullar

Plaintiffs

And

Hwang Soo Lee, Kyung Hee Hwang and

New Star Realty Ltd.

Defendants

Before: The Honourable Mr. Justice Wong

Reasons for Judgment

Counsel for the Plaintiffs:

Suzanne K. Sheena-Nakai

The Defendants,

Hwang Soo Lee and Kyung Hee Hwang:

Self-Represented

The Defendants,

New Star Realty Ltd.

Represented by:

Its Broker-Manager,

Dong Joo Park

Place and Date of Trial:

New Westminster, B.C.

October 24-28, 31, and

November 1-3, 2011

Place and Date of Judgment:

Vancouver, B.C.

December 2, 2011

Fraud and deceit abound in these days more than in former times.

Sir Edward Coke

Twyne's Case, 1602

Introduction

- [1] The plaintiffs Mr. and Mrs. Khullar seek damages for breach of contract arising from a purchase and sale transaction of a home at 3575 Morgan Creek Way in Surrey.
- [2] The plaintiffs allege that having made a contract for purchase of the defendants Lee's home, Mr. Lee, the vendor, who is also a licensed realtor, re-sold the home to a third party while a valid contract of purchase and sale with the plaintiffs was outstanding pending completion.
- [3] The defendant, New Star Realty Ltd. is the realty listing office from which Mr. Lee provided his real estate agent's service under a contractual arrangement.
- [4] The plaintiffs allege New Star is vicariously liable for the actions of Mr. Lee. In the alternative, the plaintiffs also allege that New Star's broker-manager, Mr. Park either conspired with the Lees to thwart completion of the Khullar contract or knowingly aided Mr. Lee towards breaching that contract.

[5] I have concluded that there was a breach of contract by the defendants Lees and that the plaintiffs are entitled to damages.

[6] Liability against the defendant New Star Realty is dismissed.

[7] The following are my reasons.

The Background

[8] Mr. and Mrs. Khullar immigrated to Canada in 2002 from India with their two young children.

[9] In late 2008, the Khullars wanted to purchase a home in the Morgan Creek area of Surrey with specific criteria:

- 1) It had to be located in the Morgan Creek Elementary School catchment area as the Khullars wanted their young children to attend this school in the fall of 2009;
- 2) It had to have a minimum of four bedrooms with three bathrooms located on the same floor. They required that number of bedrooms to allow each of their children to have their own room and to have the room for the Khullars' parents, who visited them for long periods of time;
- 3) It required a lot that was at least 9,000 to 15,000 square feet with living space of 3,600 to 5,000 square feet. This was required because of their young children and to permit them to deal with the needs of their extended family living; and
- 4) The purchase price to be no more than \$750,000.

[10] The Khullars retained the assistance of Mr. Dean Hooseman, a realtor with Re/Max Treeland Realty in Langley to assist them in locating a home that met their specific criteria. Mr. Hooseman has been a licensed realtor since 1992, was experienced with realty in the Fraser Valley, and won countless sales awards, including being ranked as No. 2, 3, and 5 in B.C. for total sales.

[11] Mr. Hooseman lived close to the Lee property and noted it was for sale. He had previously shown another client the property and knew it would suit the needs of the Khullars. He recommended the Khullars view that property.

[12] Mr. Hooseman described the Morgan Creek area as having very nice upscale homes that are located near the golf course and are usually assessed between \$850,000 to over \$1 million. He thought the property was a good deal, as the listing price was \$799,900. The property was listed on the MLS Exchange by New Star and only realty estate companies could post properties for sale on the MLS Exchange. Mr. Lee was identified in the listing as the vendor/agent.

- [13] On January 15, 2009, Mr. Hooseman brought the Khullars to view the Lee property. Having viewed it, the Khullars were excited as it contained all the requirements they required for a family home. That evening they instructed Mr. Hooseman to prepare a purchase offer.
- [14] Mr. Hooseman reviewed the MLS history listing for the property and noted that Mr. Lee had attempted to sell the property on and off since 2007, and each time had reduced the listing prices. He prepared an offer for \$725,000 and met with the Khullars for their signatures. The completion, adjustment and possession dates were left blank in the offer so as to be an incentive to the vendors. He then telephoned Mr. Lee to tell him the offer was coming and also faxed a copy of the offer to him. Mr. Lee said the offer amount was too low. Mr. Hooseman said it was just an initial offer and he should make a counter offer with the dates for completion, adjustment and possession to be stated by the vendor.
- [15] The next day, January 16, 2009, the counter offer sum was \$799,900, the listing price. On instruction from Mr. Khullar, Mr. Hooseman verbally negotiated an agreed purchase price with Mr. Lee of \$740,000 and agreed to meet at Tim Hortons restaurant to endorse the contract.
- [16] At Tim Hortons, Mr. Lee tried to re-negotiate the purchase price but Mr. Hooseman reminded him that he had already agreed to the sum of \$740,000. Mr. Lee then requested that the deposit monies be increased to the sum of \$100,000 with \$20,000 to be paid to the realty company and \$80,000 to be paid directly to him. Mr. Hooseman phoned Mr. Khullar who agreed to the deposit monies as requested by Mr. Lee so long as the purchase price remained at \$740,000.
- [17] Mr. and Mrs. Lee initialled the changes to the purchase price and deposit monies on the counter-offer. Mr. Lee had already earlier filled in his counter-offer his choice of completion, adjustment and possession dates. There was also a specified time limit for offer and acceptance until 5 p.m., January 19, 2009. Mr. Hooseman kept this original contract so that he could obtain the initials of the Khullars.
- [18] Mr. Hooseman notified Mr. Khullar the agreed contract had been endorsed by the vendors and Mr. Khullar asked to view the property again. Arrangements were made with Mr. Lee for the viewing to take place on January 17, 2009.
- [19] On January 17, 2009 the Khullars and their extended family viewed the property and were excited about the prospect of moving into their new home.
- [20] After the viewing the Khullars endorsed the agreed contract at a relative's home down the street. Mr. Hooseman told Mr. Lee that the purchasers had attended to the formality of endorsing the agreed contract. Mr. Hooseman told Mr. Lee that he would fax the agreed contract to his office or home, but Mr. Lee asked him not to fax his office as it would cost him money and he was not home to turn his fax machine on. So, Mr. Hooseman asked Mr. Lee to attend at his home and he would provide him with a copy of the agreed contract.

- [21] Mr. Hooseman testified that he copied the agreed contract and then went to his driveway and provided it to Mr. Lee when he arrived. Mr. Hooseman's son, Chris asked him who that was. Mr. Hooseman told him it was Mr. Lee who had sold his house. Chris Hooseman testified at this trial and confirmed the delivery event.
- [22] Mr. Hooseman testified he submitted the agreed offer to his office and was told by the manager, Al Bainbridge, that a deposit declaration form had to be endorsed prior to the subject removal and deposit monies paid to the vendors. This is a standard form used by realtors when dealing with direct deposit payments to the vendors and the purpose is to explain to the buyers the risk in providing the deposit monies directly to the vendors.
- [23] So as requested by his office, Mr. Hooseman had the Khullars endorse the deposit form, explained it to them and asked them to read the document. Mr. Hooseman testified he would have had the vendors endorse the deposit declaration form when he provided them with the deposit monies. However, this was not necessary given what subsequently occurred between the parties.
- [24] Mr. Hooseman then told Mr. Khullar to remove subjects and obtain an inspection. An inspection was arranged for January 22, 2009 and confirmed with Mr. Lee. Mr. Hooseman reviewed his cellular telephone records and confirmed he spoke to Mr. Lee on a number of occasions on January 19, 2009, prior to the time for acceptance on the agreed contract, to discuss subject removal. Specifically, on January 19, 2009, Mr. Hooseman called Mr. Lee:

Time

Duration

11:47

1:00

14:39

4:43

14:58

1:44

16:24

1:25

17:13

2:54

- [25] Mr. Hooseman then testified that he was requested to meet the vendors at Tim Hortons restaurant on January 22, 2009. At the meeting, he testified that Mr. Lee said he wanted to delay the inspection and asked if the Khullars would walk away from the agreed contract.

Furthermore, Mr. Hooseman said that Mr. Lee was saying he did not have enough money to complete because of the mortgage and wanted to purchase a condo. Mr. Lee told Mr. Hooseman that he intended to use the deposit monies to purchase a condo and if the Khullars did not provide the deposit monies then he would borrow monies to complete on the condo. Mr. Hooseman told Mr. Lee that he could not use the monies to buy a condo but had to use them to complete the deal.

- [26] Mr. Hooseman notified Mr. Khullar what Mr. Lee had said and Mr. Khullar said he wanted to complete the agreed contract as he had much invested and his children would be starting school soon. Mr. Hooseman testified he told Mr. Lee that the Khullars would be completing the agreed contract.
- [27] Mr. Hooseman said he spoke with Mr. Dong Joo Park, New Star Realty's broker-manager after the meeting at Tim Hortons restaurant, and Mr. Park said he needed to deal directly with Mr. Lee and he cannot speak to him because it would cost him money.
- [28] After the meeting, Mr. Hooseman became concerned and started to make notes of the meeting. He also recommended to Mr. Khullar he obtain the assistance of a lawyer in demanding access to the property for inspection.
- [29] Mr. Hooseman confirmed the lawyer letter was sent to Mr. Lee and in response Mr. Lee asked when he would get the deposit monies. On January 23, 2009, Mr. Lee delivered an addendum and Mr. Hooseman expressed his outrage of receiving the addendum that attempted to change the purchase price.

- [30] The addendum stated:

The sellers disclose that they do not have enough money to finish completion on April 30, 2009, and the amount of mortgage and buyer agent's commission is more than the purchase price. The buyers acknowledge that \$80,000 deposit paid directly to the vendors is for the seller's personal use as agreed upon making the contract and take all responsibilities of closing without asking the sellers to pay more money on completion date.

- [31] Mr. Hooseman explained an addendum is used to modify the terms of an accepted contract. The addendum will only change the terms of the accepted contract if it is accepted by all the parties. If the addendum is not accepted, then the parties are bound by the terms of the accepted contract.
- [32] Mr. Hooseman testified a further letter was sent from the lawyer in response to the addendum and he never received any response from Mr. Lee.
- [33] Mr. Hooseman testified he instructed Mr. Khullar to remove all subjects except for the inspection clause and met with Mr. and Mrs. Khullar to endorse the subject removal clause document. Mr. Hooseman testified as the managers, Mr. Keith Setter and Mr. Park, had agreed, he instructed Mr. Khullar to give the deposit monies to his lawyers to hold.

- [34] Mr. Hooseman testified he was having difficulty locating Mr. Lee on the date of subject removal and contacted Mr. Park for assistance. He testified he sent the subject removal document to Mr. Lee and Mr. Lee confirmed he had received the document and asked when he would receive the deposit monies. Mr. Hooseman testified that Mr. Lee was always concerned about when he would receive the deposit monies.
- [35] Mr. Hooseman testified that, as outlined in the agreed contract, the deposit monies were not payable until all the subject clauses had been removed.
- [36] Mr. Hooseman then testified that he tried to deal with Mr. Lee to resolve matters and Mr. Lee requested the Khullars pay his closing costs in the sum of \$2,500. At the request of Mr. Lee, Mr. Hooseman prepared an addendum and sent it to Mr. Lee. Mr. Hooseman testified Mr. Lee told him he had signed and was waiting for his wife to sign.
- [37] Subsequently, Mr. Lee agreed to an inspection date of January 27, 2009 and arrangements were made with the inspector to conduct the inspection at 1:30 p.m.
- [38] Mr. Hooseman sent numerous emails to Mr. Lee to find out the status of the closing costs addendum that had been requested by the vendors. After Mr. Hooseman made it clear that the Khullars were no longer willing to pay the additional \$2,500 as requested by the vendors and would take steps to file a caveat, Mr. Lee responded by asking for a further meeting at Tim Hortons restaurant.
- [39] On January 27, 2009, Mr. Hooseman met with Mr. Lee and his wife at the Tim Hortons restaurant. Mr. Lee told Mr. Hooseman that he required two further days to obtain monies from Korea for the closing and he would then sign the addendum. Mr. Hooseman said that Mr. Lee kept leaving the table and when he went to walk over to Mr. Lee, Mrs. Lee grabbed his arm and started to cry.
- [40] Mr. Hooseman said he later realized Mrs. Lee did not want him to overhear Mr. Lee talking on the phone as he believed Mr. Lee was communicating with the third party, the Vahlas, to close the deal with them for the property the next day. Mr. Hooseman testified that in the subsequent contract with Mr. Vahlas, Mr. Lee had acknowledged the "accepted contract" with the Khullars. No doubt Mr. Hooseman was frustrated by the conduct of Mr. Lee as a realtor.
- [41] The January 21, 2009 Contract of Purchase and Sale with Mr. and Mrs. Vahlas included the following insertion by Mr. Lee:

Subject to the seller ceasing to be obligated in any way under the previously accepted Contract of Purchase and Sale on the subject property by January 26, 2009. This condition is for the sole benefit of the seller.

- [42] Mr. Hooseman testified that he left Mr. Lee and his wife on January 27, 2009 and was later contacted by the inspector, Robert Abbink, who told him he was unable to get access to the property for the inspection that had been scheduled for that day. Mr. Hooseman went to the

property and tried to get access for the inspector but was unable to and the inspector had to leave. Mr. Hooseman said he turned around and saw Mr. Lee and told him there would be no further inspection until the addendum was signed and Mr. Lee said ok. His notes reflected that the conversation with Mr. Lee took place at the property at 1:50 p.m.

- [43] The next day, Mr. Hooseman spoke to Mr. Lee and was told he had had just spoken with Korea and money was coming. Mr. Hooseman notified Mr. Khullar who became concerned because of the time difference in Korea.
- [44] Mr. Hooseman then called the conveyance lawyer and was told that Mr. Khullar was going to file a caveat as the vendors were in the process of transferring title to third parties. Mr. Hooseman expressed his frustration with Mr. Lee and said he felt like he had been "played" as an honest realtor and he had trusted Mr. Lee.
- [45] Mr. Hooseman testified that he again spoke with Mr. Lee on February 2, 2009 and Mr. Lee said he would complete the agreed contract and permit the inspection and wanted the deposit monies. Mr. Hooseman told Mr. Lee that it now had to be dealt with by the lawyers.
- [46] Mr. Hooseman testified that through inadvertence of the Khullars' previous lawyers, the caveat was subsequently discharged and the Khullars had to start looking for another home. Mr. Hooseman described the market had changed as it was spring and the prices had increased, so the Khullars had to increase their budget to the sum of \$950,000.
- [47] Mr. Hooseman testified the Khullars looked at all houses in their budget and even looked at houses that were not workable for their family. He said that in the end, they purchased the alternative property two doors away from the Lee property for the sum of \$917,000, which was the best available property to meet their needs. Mr. Hooseman described the significant difference between the property and the alternative property, namely smaller square footage and inferior type of house.
- [48] Mr. Hooseman testified that only after the commencement of litigation did the vendors or Mr. Park ever allege that the accepted contract was not accepted within the specified timeframe, namely January 19, 2009 at 5:00 p.m., or that the accepted contract was illegal, invalid or unenforceable due to the deposit monies payable directly to the vendors contrary to s. 27(1) and (2) of the Real Estate Services Act.
- [49] Mr. Rex Cheng, an appraiser, gave expert opinion evidence to assist the Court with respect to the properties available that met the requirements of the Khullars, and to provide a comparative analysis of the Lee property and the alternative property.
- [50] With respect to the properties available that met the requirements of the Khullars, the evidence of Mr. Cheng was that there were eight possible properties. Only two of the properties were available between April 1, 2009, the date that the caveat was discharged, and July 11, 2009, the date that the Khullars entered into the contract for the alternative property.

- [51] Of those two available properties, one was listed for the sum of \$925,000 and the other property would require the children to cross 32nd Street to walk to school.
- [52] Mr. Cheng testified when he changed his search criteria from four bedrooms to three bedrooms, then the only other available property that met the balance of the requirements of the Khullars, was the alternative property.
- [53] With respect to the comparability of the property and the alternative property, the evidence of Mr. Cheng was that the property and the alternative property were not comparable and the alternative property was inferior to the Lee property.
- [54] In conclusion it was the evidence of Mr. Cheng, that if the property was valued for the sum of \$740,000, as outlined in the agreed contract, then the indicative value for the alternative property would be the sum of \$659,000. This is a price differential in the amount of \$81,000 that would compensate the alternative property for being inferior to the Lee property.
- [55] Of significance is that Mr. Cheng maintained his view with respect to the alternative property being inferior to the property after being cross examined with respect to the lots and basements of the Lee property and the alternative property with its fewer bedrooms, bathrooms and fixtures. Its costs were also \$177,000 more. Clearly the alternative property is inferior to the Lee property sought by the Khullars.
- [56] Mr. Lee testified and confirmed he was a realtor providing his services from New Star in January 2009. He also acknowledged his property was listed for sale intermittently from 2007 to 2009 without sale success. Accordingly, he had reduced his listing price a number of times, and the first written offer that he received for the property was from the Khullars in January 2009.
- [57] He agreed to the purchase price of \$740,000 even though his mortgage exceeded that amount by \$16,000; his bank line of credit outstanding registered against the property was \$10,000; and commission and closing costs were estimated to be another \$10,000. To transfer clear title to the Khullars, he would need another \$36,000 to close. He said he could likely obtain the necessary monies for closing by borrowing from sources in Korea. Mr. Lee said he received the accepted contract endorsed by the Khullars on January 20, 2009. He also said he never spoke to Mr. Hooseman before delivery of the Khullar contract. This is clearly contradicted by the cellular phone records of Mr. Hooseman dated January 19, 2009, which revealed a number of calls from Mr. Hooseman to Mr. Lee before 5:00 p.m. on January 19, 2009.
- [58] Mr. Lee also testified that he spoke with Mr. Park on January 21, 2009, and asked him if a contract for deposit payment to the vendor without a separate written document was legal and Mr. Park told him that if there is no separate written agreement then it is against s. 27 of the Real Estate Services Act and he could lose his license. Mr. Lee then asked Mr. Park if an offer was accepted after the specified timeframe, could he unilaterally cancel the deal and was told by Mr. Park that it depends on how the buyers approach the matter and he should

get legal advice.

- [59] Mr. Lee testified that he sought guidance from Mr. Park because he was a realtor at New Star and relied upon what Mr. Park advised him.
- [60] On January 21, 2009, Mr. Lee and his wife entered into a contract to sell the property to Mr. and Mrs. Vahlas for \$779,000. Mr. Lee said he never told Mr. Hooseman about this contract. He said he was under no obligation to speak with Mr. Hooseman or the Khullars if the agreed contract was not accepted within the timeframe.
- [61] Mr. Lee said after he received a letter from the Khullars' lawyer demanding inspection access and completion of the contract, he delivered in response his addendum on the standard form of the Real Estate Board of Greater Vancouver, the governing board for New Star to "officially express my thoughts" to Mr. Hooseman, but never responded to the Khullars' lawyer. That addendum dated January 23, 2009, as recited previously, increases the purchase price to the Khullars by another \$80,000.
- [62] Mr. Lee confirmed on cross examination he understood an addendum is delivered only after there is an accepted contract and changes the terms only if it is endorsed by all parties. Otherwise, the terms of the accepted agreement remain binding.
- [63] There is nothing in that addendum two days after the Vahlas' agreement of January 21, 2009, that mentions Mr. Lee's position that the Khullar contract was not accepted in time or that there was any issue with the deposit monies being contrary to the Act.
- [64] Those positions were only raised after litigation was commenced by the Khullars.
- [65] Mr. Lee testified that it was Mr. Hooseman who cancelled the house inspection appointment for January 27, 2009. However, Mr. Abbink, the house inspector, attended at the Lee property on January 27, at 1:10 p.m. for the 1:30 p.m. appointment but was not given interior access by the vendors. So, he left at 1:50 p.m. He said there was also an earlier inspection appointment scheduled for January 22, 2009 at 11:00 a.m. but that inspection was cancelled by the vendors.
- [66] Mr. Dong Joo Park is the broker-manager, principal officer and shareholder of New Star Realty. He confirmed Mr. Lee is one of New Star's listing realtors under contract.
- [67] Mr. Park testified that Mr. Lee, on January 21, 2009, asked him the following three questions and he provided the following responses:
- a) Mr. Lee asked whether he could receive the deposit directly from the buyers. Mr. Park asked him if there was a separate written agreement and Mr. Lee said "No", and Mr. Park told him, without reviewing the agreed contract, that it was illegal because it was contrary to s. 27 of the Act, and Mr. Lee's license may be suspended.
 - b) Mr. Lee asked if there was no separate written agreement for the deposit, would the contract be binding. Mr. Park said he told him to get legal advice.

- c) Mr. Lee asked him if the offer was accepted on January 21, 2009, after the acceptance timeframe, would it be binding. Again, Mr. Park said he told him to get legal advice.
- [68] On January 22, 2009, Mr. Park said Mr. Lee told him about his contract with Mr. and Mrs. Vahlas for the property. He asked Mr. Lee if the contract with the Khullars was "clearly void or invalid", and Mr. Lee said "No", so Mr. Park told Mr. Lee to insert a time subject proviso clause of an earlier offer in the Vahlas contract. Mr. and Mrs. Vahlas understandably refused to endorse that clause in their contract.
- [69] Mr. Park testified he told Mr. Lee to permit the Khullars their requested house inspection. He acknowledged he understood the Khullars wanted the house inspection in order to complete their contract with Mr. Lee.
- [70] He also acknowledged that he was aware that Mr. Lee was dealing with Mr. Hooseman on behalf of the Khullars, while also trying to complete the contract with Mr. and Mrs. Vahlas.

Analysis

- [71] From the evidence, I am satisfied and find that there was indeed a binding accepted contract within the specified timeframe with the plaintiff Khullars.
- [72] The vendors were notified that the Khullars had initialled the changes to the accepted contract and that it was delivered to the vendors on January 17, 2009. The Khullars are certain of the date they endorsed the agreed contract as it was on the same day as their wedding anniversary.
- [73] Furthermore, Mr. Hooseman has always maintained that the vendors had delivery of the agreed contract endorsed by the Khullars on January 17, 2009.
- [74] While the Contract of Purchase and Sale may require that acceptance be made in writing, the accepting party may notify the offering party orally prior to the expiry of the acceptance period that the party has endorsed the document of its acceptance: *McCarthy v. Amiss* [1997] B.C.J. No. 2021 (B.C.S.C.) and *Dr. Gokul Bahnwath v. Business Development Bank of Canada* [2008] B.C.J. No. 1016 (B.C.S.C.).
- [75] Furthermore, the subsequent behaviour of Mr. Lee after January 17, 2009 indicates in his mind the acceptance of an accepted Khullar contract:
- 1) His confirming in writing in the Vahlas contract that there was "accepted contract", with the Khullars;
 - 2) His agreeing to dates for house inspection, namely, January 22 and 27, 2009;
 - 3) His delivering an addendum dated January 23, 2009 to the Khullars;
 - 4) His acknowledgement of subject removal by the Khullars;
 - 5) His repeated requests for payment of the deposit monies; and

6) His request of an addendum be prepared regarding an extra \$2,500 be paid to cover his closing expenses.

[76] Mr. Lee's behaviour overall seemed to imply that he intended to complete the contract with the Khullars while he was also trying to complete with the Vahlas.

[77] See also s. 59(3)(b) of the Law and Equity Act for a similar conclusion and result that a contract was made with the Khullars

[78] The vendors in this case breached the Khullar contract by:

- 1) Failing or refusing to complete the agreed contract;
- 2) Failing or refusing the plaintiffs' access to the property for purposes of conducting an inspection of the property; and
- 3) Selling the property to a third party.

[79] On the evidence, the Khullars were ready, willing and able to complete the sale and purchase of the property in accordance with the contract and the Khullars removed all subject clauses, including early payment of the deposit monies except for the inspection as the vendors had failed to provide access.

[80] The defendants contend the Khullars breached the agreed contract by failing to remove all the subject clauses, paying the deposit monies contrary to the requirements of s. 27 of the Real Estate Services Act, and by failing to pay the deposit monies to the vendor.

[81] Plaintiff's countered that a defendant may not repudiate a contract on the basis of default by a plaintiff where the alleged default is directly attributable to the actions of the defendant: *Boone v. The King* [1934] S.C.R. 457.

[82] It was submitted that the conduct of the vendors, namely refusing to permit access to the property for the inspector of the Khullars, is what caused the Khullars from being able to remove all the subject clauses.

[83] The Khullars removed all the subjects that they were able to do so and expressed a clear intention to complete the agreed contract by delivering the deposit monies to their lawyer prior to all subjects being removed.

[84] Therefore, the Khullars did not breach the agreed contract by refusing to remove all the subjects.

[85] Section 27 of the Real Estate Services Act deals with payment into trust and states:

Payment into trust account

27 (1) A licensee engaged by a brokerage must promptly pay or deliver to the brokerage

- (a) all money held or received from, for or on behalf of a principal in relation to real estate services, and
 - (b) all money held or received on account of remuneration for real estate services, including a share of remuneration received from another brokerage and whether or not the remuneration has already been earned.
- (2) A brokerage must promptly pay into a brokerage trust account
- (a) all money held or received from, for or on behalf of a principal in relation to real estate services, and
 - (b) all money held or received on account of remuneration for real estate services, including a share of remuneration received from another brokerage.
- (3) For the purposes of this section, if money referred to in subsection (1) or (2) is held or received by a person who is
- (a) an officer, director, controlling shareholder or partner of a brokerage,
 - (b) an employee of a brokerage or of a related licensee of a brokerage, or
 - (c) a person acting in an independent contractor relationship with a brokerage or with a related licensee of a brokerage,
- the money is deemed to be held or received by the brokerage or related licensee, as applicable.
- (4) Subsections (1) and (2) do not apply to money held or received by a licensee providing trading services in relation to a trade in real estate if,
- (a) by written agreement that is separate from any agreement giving effect to the trade in real estate, all principals in relation to the trading services agree that subsections (1) and (2) do not apply, and
 - (b) any conditions established by the rules are met.
- (4.1) Despite subsection (2) (b), remuneration that has already been earned, as determined in accordance with the rules, by a brokerage may be paid,
- (a) if none of the remuneration is payable to another brokerage, into a commission trust account maintained by the brokerage, or
 - (b) if none of the remuneration is payable to either another brokerage or a related licensee, into a brokerage account other than
 - (i) a brokerage trust account, or
 - (ii) a commission trust account maintained by the brokerage.
- (4.2) [Repealed 2007-7-82.]

- (5) Subject to the rules, a brokerage must ensure that no money, other than money referred to in subsection (1) or (2), is paid into its brokerage trust accounts.
- [86] Nowhere in the section does it state that the separate written agreement for deposits paid directly to the vendors must be endorsed at the time the contract is entered into as testified by Mr. Park.
- [87] The section is dealing with payment of deposit monies and as such, the intention of the section is to ensure that appropriate protective steps are taken prior to payment of the deposit monies.
- [88] Messrs Setter and Hooseman testified that the separate document must be endorsed prior to subject removal and deposit monies being paid and there is no requirement that it be endorsed at the time the contract is entered into. They said this was the standard practise in the industry for compliance with s. 27 of the Act. Furthermore, they testified the purpose of the section is to warn buyers of the risk of the deposit monies being paid directly to the vendors and not being held by a stakeholder.
- [89] Furthermore, the consequence of violating s. 27 results it being an offence under the Act and subject to penalties. This is a regulatory provision dealing with the conduct of real estate agents and would not have any application with respect to the enforceability of a contract if the parties of the contract have agreed to payment of deposits in a manner inconsistent with the Act.
- [90] Therefore, s. 27 of the Act was not breached by the payment of the deposit monies.
- [91] Where a contract of purchase and sale requires that a deposit be paid in a certain way, but the deposit is paid in a different way, the court may also find that the deposit has been effectively paid, even though technical compliance with the contract has not been conducted: *Kaler v. Scales* [2009] B.C.J. No. 681, (B.C.S.C.) at paras. 81-84. i.e. If substantial compliance has been fulfilled, the payor should be relieved from terms of strict fulfillment on equitable grounds.
- [92] It was the position of the Khullars that the deposit monies were not payable until all of the subjects had been removed and it was the conduct of the vendors, namely not permitting access to the inspector of the Khullars, that stopped the Khullars from removing all the subjects. However, the Khullars attended to delivery of the deposit monies, as agreed by the respective broker-managers, to show their intention to complete the agreed contract.
- [93] Furthermore, the vendors never elected to terminate the agreed contract because of non compliance of the Khullars regarding the deposit monies payment.
- [94] As such, at all material times, the Khullars were ready, willing and able, but the vendors breached the agreed contract.

- [95] In summary, it was the position of the Khullars that the vendors breached the agreed contract and there is no merit to the allegations of the defendants that the Khullars breached the agreed contract.
- [96] I agree.
- [97] The plaintiffs also submitted that New Star Realty is vicariously liable for the actions of Mr. Lee.
- [98] Alternatively, the plaintiffs also submitted that New Star Realty, through Mr. Park, either participated in Mr. Lee's breach of the Khullar contract or was a co-conspirator with the object of inducing a breach.
- [99] Mr. Lee's relationship with New Star Realty was as an independent contractor operating as a licensed realtor listed with the office of New Star Realty. He was not an employee.
- [100] The imposition of vicarious liability is a concept foreign to the law of contract. Contract law would generally say that vicarious liability cannot be imposed for a breach of contract because the vicarious party has no privity. Absent any privity to the contract, the company cannot be held liable for subsequent breach by another party to that contract. Absent an employee-employer relationship of agency, I have not been referred to any authority holding a non privity to a contract vicariously liable for a breach of contract.
- [101] The law of vicarious liability only applies to employers for tort claims against employees committed within the scope of their employment.
- [102] Cases on vicarious liability do not support imposing liability for the torts of an independent contractor. If a real estate agent in an independent contractor, as in this case, liability for his wrongs will not attach to the realty company who employed him.
- [103] I have concluded that Mr. Park neither induced a breach of the Khullar contract nor was he an intentional participant to thwart completion of the Khullar contract.
- [104] Mr. Park only became aware of two ongoing sale contracts on the same property after disclosure by Mr. Lee. He tried to resolve and salvage an extraordinary and difficult situation by suggesting Mr. Lee insert an addendum time clause in the Vahlas contract giving priority to the earlier Khullar contract providing the Khullars complete their end of the bargain. To that end, Mr. Park also suggested to Mr. Lee that he grant inspection access to Mr. Khullar.
- [105] Mr. Park may have misunderstood the non-application of s. 27 of the Real Estate Services Act to the validity and enforcement of a real estate sales contract between parties, but he did not intentionally thwart Mr. Khullar's attempts to complete the contract. Any attempts to delay and thwart completion by Mr. Khullar were done solely by Mr. Lee.

- [106] Mr. Park ultimately agreed with Mr. Setter, the Re/Max broker-manager, that Mr. Khullars' deposit monies of \$80,000 should be held by Mr. Khullar's solicitors rather than direct payment to Mr. Lee as vendor. Mr. Park omitted disclosure to the Khullars of the Vahlas contract, but the damage was already done by Mr. Lee.
- [107] The allegation of intentional interference and conspiracy to interfere with the Khullar contract against New Star Realty by inaction on the part of Mr. Park therefore must fail. That action is dismissed.

The Actions of Mr. Lee

- [108] The behaviour of the defendant vendor, Hwang Soo Lee was shocking. Combined with the fact that he was also a licensed realtor, his acts of duplicity and deceit in regards to the Khuller contract was beyond belief.
- [109] Saddled with mortgage payments which he lately could not maintain, Mr. Lee was anxious to unload his house. Over the course of two years, his house was listed for sale at various times for over \$1 million which he was unable to sell.
- [110] Finally, in January of 2009, he listed his house with New Star Realty as vendor/realtor for \$799,900.
- [111] Mr. Lee at that time also needed substantial cash to either purchase a condo or to invest in a start-up health food business venture with other persons. He also had previous lending sources from either family or friends in Korea.
- [112] Anxious to sell his house, Mr. Lee agreed to a price of \$740,000. That price would leave him \$36,000 short at completion date for transfer of title to the Khullers. However, the plus side was the arrangement of direct payment to him of \$80,000 deposit monies on removal of all subject provisos by the buyer. Mr. Lee would then have a confirmed sale and early access to \$80,000.
- [113] I assume Mr. Lee then encountered difficulties in borrowing additional funds from Korea. Without those anticipated funds, he would not be able to close with the Khullars.
- [114] On January 21, 2009, Mr. and Mrs. Vahlas, without a realtor appeared, liked his house and immediately offered to pay him \$779,000, with a closing date of January 30, 2009.
- [115] Mr. Lee rashly decided to accept the Vahlas' offer. He then asked Mr. Hooseman whether the Khullars were prepared to walk away from the purchase, citing his regret at the low agreed upon price. The answer was no.

- [116] Mr. Lee was now in a pickle. He had two outstanding sales contracts on the same property. He tried to persuade the Vahlas to be in a secondary position to the Khullars. They refused. That explains why he started to stall and delay the Khullars' house inspections. If he was able to complete the sale and transfer of the house to the Vahlas by month's end, that would frustrate the Khullar deal. In the meantime, he continued to demand payment of the deposit monies from the Khullars.
- [117] To discourage and frustrate the Khullars from closing their deal, Mr. Lee even had the temerity to suggest in a proposed addendum that the closing price was now going to be \$80,000 more. (i.e. \$820,000).
- [118] Desperation deceit and duplicity were now manifest. Mr. Lee's behaviour was outrageous.
- [119] Ultimately, the Vahlas sale completed and they took title. The Khullars lost their opportunity. There is nothing in the evidence to suggest that the Vahlas were complicit in frustrating the Khullar contract. They were innocent purchasers in good faith.
- [120] For an extra \$39,000, Mr. Lee was prepared to scuttle the prior Khullar contract.

Damages

- [121] As a result of Mr. Lee's breach of contract, the Khullars lost their opportunity to purchase their desired home. They purchased alternative property in the same neighbourhood which was inferior in terms of space and features. The opportunity loss and comparative functional difference between the two homes according to the appraiser, Mr. Cheng, is \$81,000, which I accept and fix as part of the damage award.
- [122] The Khullars also incurred an additional sum of \$177,000 to purchase their present alternative home. This is a consequential loss arising also from the breach of Mr. Lee. Total damages is therefore fixed at \$258,000.
- [123] Court order interest on \$81,000 will run from January 31, 2009 and on the sum of \$177,000 from September 30, 2009.
- [124] Counsel for the plaintiffs also requested punitive or exemplary damages. Although that may be warranted in this case, I propose to have that reflected by way of special costs against the defendant Lees.

Costs

- [125] Mr. Lee's duplicitous behaviour was high-handed and outrageous. Since he was also negotiating in his role as a realtor in the sale of his own property, his actions were not only surprising and unprofessional, it was simply dishonest, with extreme disappointing results to the Khullars.
- [126] The Court's disapproval of such behaviour should be reflected by way of special costs against the defendant Lees.

[127] Costs to Mr. Park on behalf of New Star Realty will be restricted to out-of-pocket disbursements.

"Wong J."

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