

CANADA / JUDGMENT

Kuhn v. Union Securities Ltd.

2003 BCCA 683

COURT

British Columbia Court of Appeal

DECIDED

10 December 2003

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2003BCCA0683 COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Kuhn v. Union Securities Ltd., 2003 BCCA 683 Date: 20031210 Docket: CA029980 Between: Brian Kuhn and Dana Ratzlaff Appellants (Plaintiffs) And Union Securities Ltd. and Rex Thompson Respondents (Defendants) Before: The Honourable Madam Justice Ryan The Honourable Madam Justice Saunders The Honourable Mr. Justice Oppal R.E. Breivik Counsel for the Appellants H.W. Wiebach Counsel for the Respondents Place and Date of Hearing: Vancouver, British Columbia 31 October 2003 Place and Date of Judgment: Vancouver, British Columbia 10 December 2003 Written Reasons by: The Honourable Mr. Justice Oppal Concurred in by: The Honourable Madam Justice Ryan The Honourable Madam Justice Saunders Reasons for Judgment of the Honourable Mr. Justice Oppal:

Introduction

- [1] This is an appeal by the plaintiffs from an order of the Supreme Court that largely dismissed their claims for damages for wrongful conversion of money and shares. The defendants/respondents are stockbrokers who sold shares from the accounts of the appellants and applied the proceeds to deficiencies in their accounts.
- [2] There was a conflict in the evidence. Accordingly, credibility was central in the trial.

Background

- [3] The appellant Brian Kuhn was at all material times a stockbroker. In September 1996 he commenced employment with the defendant, Union Securities Ltd. ("Union"). The terms of employment were negotiated with the respondent Rex Thompson who was a principal of Union. The trial judge found that the parties signed a number of documents. On 27 September 1996 the parties signed a "letter agreement" that set out Mr. Kuhn's terms of employment. The letter made reference to the establishment of a "reserve account" but did not define that term. The relevant part of the letter agreement reads as follows:
1. We will pay to you \$6,000.00 (after taxes and deductions) per month for eleven (11) months commencing with the month of October, 1996. All funds paid above and beyond the monthly earned commissions will be paid as a taxable interest free loan from Union Securities. If commissions earned by you create a monthly take home pay in excess of \$6,000.00, the extra

amount earned will be non taxable and retained by Union to offset any of the outstanding loan. As of September 1997, 75% of all monthly commissions earned above and beyond \$4,500.00 net will be held back as non taxable until the loan is paid back in full. Once the loan is fully paid off, 10% of all monthly commissions will be set aside in a reserve account. [Emphasis added.]

- [4] On 1 November 1996 Mr. Kuhn signed a memorandum of agreement which said:
4. The Registered Representative hereby covenants and agrees with the Broker that he will at all times be personally responsible for and liable to the Broker for all sums of money or securities owing to the Broker by any of its clients in respect of any sale or purchase order obtained by the Registered Representative, and the Registered Representative hereby guarantees the due payment of any such amount or the due delivery of any such securities, and further covenants to indemnify and save harmless the Broker against due payment of all such amounts or due delivery of all such securities. The Broker shall have and is hereby granted the right to deduct from the amount of the commissions or bonus payable as hereinbefore mentioned, whether credited to the books of the Broker to the Registered Representative or not, all such amounts as may be due and owing to the Broker or all such amounts as may be calculated or determined to be owing in respect of undelivered securities. (emphasis added)
- [5] On 12 June 1997 Mr. Kuhn signed another memorandum of agreement identical to the one signed on 1 November 1996. Just as under the first memorandum of agreement, it permitted Union to make deductions from his commissions in order to cover his client bad debts.
- [6] Prior to working at Union, Mr. Kuhn had been employed as a broker by Wolverton Securities. When Mr. Kuhn moved to Union he purchased shares on margin. Sometime after Mr. Kuhn's purchase, the value of the stock fell. As a result, Mr. Kuhn's account with Union was in a debit position. Union eventually paid the bad debt from his reserve account. At trial, Mr. Kuhn alleged that this was a wrongful conversion on Union's part.
- [7] In November 1997 the appellant Dana Ratzlaff opened an account with Union. Her broker was Mr. Kuhn. They became romantically involved and were married in August 1998. Ms. Ratzlaff signed a standard client agreement that the trial judge found allowed Union to "retain securities held in her account in order to secure indebtedness and sell securities held in her account in order to cover indebtedness".
- [8] In early 1998 Ms. Ratzlaff's account with Union had an accumulated debt of approximately \$196,000. Stock was placed in her Union account as security for the debt.
- [9] In September 1999 Ms. Ratzlaff approached Mr. Thompson in order to discuss the state of her account. She told Mr. Thompson that she was arranging to obtain the funds necessary to satisfy her debt to Union. She testified that she and Mr. Thompson orally agreed that Union would not sell certain shares to satisfy her debt until they became free-trading. Mr. Thompson denied that there was any such agreement. She also told him that she wished to

transfer her account to Canaccord Capital, another brokerage house. It should be noted that by this time Union had terminated Mr. Kuhn's employment. Thus the relationships between the parties were not entirely amicable.

- [10] Mr. Thompson told Ms. Ratzlaff that Union would not transfer her account even if she satisfied her own debt because she had cross-guaranteed Mr. Kuhn's debts. The trial judge found that assertion was false. There was no such cross-guarantee. The trial judge found that the appellants "actively misled Mr. Thompson" allowing him to believe she had signed such a guarantee. Union eventually liquidated shares held in Ms. Ratzlaff's account in order to cover her indebtedness and it used \$9,417 from the sale of her shares to satisfy Mr. Kuhn's debt. At trial, Ms. Ratzlaff claimed that Union's liquidation of her shares constituted a wrongful conversion. Mr. Kuhn's Claim
- [11] The first issue at trial related to the nature and scope of the employment agreement between Union and Mr. Kuhn, and specifically, whether it permitted Union to deduct client bad debts from commission earnings in Mr. Kuhn's reserve account.
- [12] The trial judge found in part as follows:
- [21] I am satisfied that the Memorandum of Agreement signed by Mr. Kuhn on November 1, 1996, containing the guarantee clause, together with the September 27, 1996 letter constitute the hiring documentation. I have reached that conclusion for several reasons.
- [22] I accept the evidence of Mr. Wolverton and Mr. Thompson that a reserve account in their industry includes a provision that the Registered Representative guarantees client bad debts. I am unable to accept the evidence of Mr. Kuhn that he did not know this. His contractual arrangement at Wolverton provided for such a reserve account.
- [23] The September 27, 1996 letter is incomplete. It does not describe the nature of the reserve account. The November 1, 1996 Memorandum does, in a manner consistent with industry practice. Mr. Kuhn signed the first Memorandum without hesitation, and without even reading it. He did so 33 days after September 27th, a relatively short period of time. Not only did he sign it, but the evidence disclosed that he permitted client debts to be paid out of his reserve account in accordance with the terms of the Memorandum of Agreement. These actions support the conclusion that Mr. Kuhn expected to sign a document containing such a guarantee as part of his employment arrangement.
- [24] Therefore, Union was entitled to pay Mr. Kuhn's client debts out of the reserve account. Mr. Kuhn's claim for conversion is dismissed.

- [13] It is not in dispute that client debts were paid out of his reserve account only after September 1997 and on that limited point the above paragraphs reveal an error. The error does not, however, undermine the basis of the trial judge's conclusion on the nature of the agreement. The real question is whether the trial judge erred in finding that the terms of the November 1996 memorandum were terms of an agreement binding upon Mr. Kuhn. Ms. Ratzlaff's Claim
- [14] At trial, the central question concerning Ms. Ratzlaff's conversion claim was whether she had entered into an oral agreement with Mr. Thompson that her shares would not be sold until they became free-trading. Again, the issue was one of credibility because Mr. Thompson denied any such oral agreement.
- [15] The trial judge agreed with Ms. Ratzlaff that Union's application of funds from the sale of her shares to Mr. Kuhn's account was wrongful. However, the judge dismissed the balance of her claim. The judge rejected her contention that the general account agreement was orally amended. In her reasons the trial judge stated in part as follows:
- [41] The alleged agreement was a one-sided agreement in favour of Ms. Ratzlaff. It would give complete control to her as to when the shares would be sold. It would permit her to speculate at Union's expense. By its terms Union's best position would be to recover the debt with interest. It runs the risk of not being repaid. Therefore, it takes all of the risk with no prospect of reward. This is not the kind of agreement that a prudent business person like Mr. Thompson would enter into. The Appeal
- [16] The appellants have raised the following issues on this appeal:
1. whether the trial judge erred in failing to find a lack of consideration for Mr. Kuhn's guarantee of bad client debts; and
 2. whether the trial judge erred in finding that Ms. Ratzlaff failed to prove conversion in the absence of formal tender by her to Union of the amount required to retire her debt. Issue 1
- [17] The appellants' argument with respect to the first issue has two aspects, that the memoranda of 1 November 1996 and 12 June 1997 were not binding upon Mr. Kuhn because they were not part of the employment contract and were not independent contracts as they lacked consideration (it is contended that Mr. Kuhn's continued employment was not consideration), and that in any event they were not agreements that bad debts would be paid from the reserve account.
- [18] The appellants' argument on the first aspect must fail. In my view the trial judge did not err in concluding that the 27 September 1996 letter agreement and the 1 November 1996 memorandum constituted the full employment agreement. The term "reserve account" was not defined in the 27 September 1996 letter agreement, but rather, left to be defined in the 1 November 1996 memorandum. In effect the 1 November 1996 memorandum completed the 27 September 1996 letter agreement.

- [19] On the second point, the appellants argued that there was, in any event, no agreement to guarantee bad debts from the reserve account. Again that argument cannot succeed on appeal. The wording of the 1 November 1996 memorandum is plain and includes a guarantee of bad debts. Second, Mr. Kuhn signed a similar agreement with Wolverton Securities in 1995 and must be taken to be familiar with the concept of an obligation to guarantee bad debts from a reserve account. And third, the practice of guaranteeing bad debts from reserve accounts is standard in the industry. Issue 2
- [20] The second issue relates to the alleged conversion of Ms. Ratzlaff's shares. The trial judge found in favour of Ms. Ratzlaff on the issue of the cross-guarantee, and concluded that Union's transfer of \$9,417 from her account to Mr. Kuhn's account was improper. Ms. Ratzlaff's claim in conversion otherwise centred on her contention that Mr. Thompson agreed orally not to sell her shares until they became free-trading. The trial judge did not accept Ms. Ratzlaff's evidence and preferred the evidence of Mr. Thompson to the contrary, as she was entitled to do.
- [21] The conversion claim was based upon the proposition that Ms. Ratzlaff was ready, willing and able to retire the indebtedness in her account. The trial judge held against her, relying in part on his assessment of credibility which included his conclusion that the appellants had misled Mr. Thompson in the matter of the cross-guarantee. The appellants contend that his conclusions on the matter of the cross-guarantee cannot reasonably be supported on the evidence.
- [22] Upon review of the testimony of the appellants and Mr. Thompson, and considering that the trial judge had the opportunity to observe the witnesses, I see no basis with which to interfere with her conclusion. Nor does her conclusion that Mr. Thompson "could easily have determined whether or not there was a cross-guarantee by examining the file" and that Union "therefore had constructive knowledge" that there was no cross-guarantee, undermine her conclusion on credibility.
- [23] In the circumstances it was open, in my view, to the trial judge to conclude that Union's behaviour did not impede Ms. Ratzlaff's ability to be ready, willing and able to perform, or otherwise excuse her from tendering payment for the debt.

Conclusion

- [24] For these reasons I would dismiss the appeal. "The Honourable Mr. Justice Oppal" I AGREE: "The Honourable Madam Justice Ryan" I AGREE: "The Honourable Madam Justice Saunders"

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Prepared on 26 October 2026 · Esheria