
CANADA / JUDGMENT

Malhi v. Krahn

2008 BCSC 409

COURT

Supreme Court of British Columbia

DECIDED

8 April 2008

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2008 BCSC 409 Malhi v. Krahn

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Malhi v. Krahn,

2008 BCSC 409

Date: 20080408

Docket: S88986

Registry: New Westminster

Between:

Balbir Singh Malhi and Amarjit Kaur Malhi

Plaintiffs

And

Stanley Krahn

Defendant

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Plaintiffs:

Wayne R. Neufeld

Counsel for the Defendant:

Patrick J. Selinger

Meghan Maddigan

Date and Place of Trial:

February 26-29, 2008

New Westminster, B.C.

Introduction

- [1] Mr. Balbir Singh Malhi and his spouse, Ms. Amarjit Kaur Malhi, claim that Mr. Stanley Krahn has breached an agreement for the purchase and sale of farm property situated at 525 McCallum Road, Abbotsford, British Columbia. Mr. and Mrs. Malhi seek specific performance of the contract, or damages for breach of contract. Mr. Krahn denies that he entered into an enforceable contract for the sale of the land. He says that the document the parties signed amounted to an agreement to agree or was void for uncertainty. In the alternative, he says that if he entered a legally enforceable contract for the sale of property to the plaintiffs, then a term of the agreement, namely subdivision of the property, did not occur by the date specified in the contract with the result that the contract lapsed and ceased to bind the parties.
- [2] At a pre-trial hearing, D. Smith J. ordered the trial of a discrete issue, namely, whether a document the parties signed in June 2004 was a binding agreement. That is the only issue with which this trial was concerned.

Background

- [3] The McCallum Road property consists of approximately 5 hectares or 12.35 acres of land on which are situated two homes and four barns or out-buildings. The land lies within the Agricultural Land Reserve and has been used for the propagation of raspberries over several decades. Mr. Krahn now owns the land, which was previously owned by his parents and grandparents. The family has farmed the land for several decades. Both Mr. Krahn and his mother were residing on the property in June 2004 and continued to reside thereon through the summer and fall of 2004 when the events giving rise to this action took place.
- [4] The Agricultural Land Commission will permit the subdivision of property within the land reserve in conformity with the Commission's Homesite Severance Policy, the purpose of which is to permit the severance of a homesite on which the owner can remain, and the sale of the remainder. On January 20, 2003, the Commission advised Mr. Krahn and his mother that it would permit the subdivision of one lot of approximately 0.5 hectares or 1.28 acres situated at the northeast corner of the property abutting McCallum Road subject to the following conditions:
- the removal or demolition of one of the older dwellings at the time of the registration of the subdivision plan;

- a commitment not to sell the homesite for five years except in the case of an estate settlement;
- Commission approval of any increase in the size of the homesite lot, or change in its location, deemed necessary by other approval agencies; and
- compliance with applicable acts, regulations, and bylaws of the local government, and decisions and orders of any person or body having jurisdiction over the land under any enactment.

- [5] On August 5, 2003, the Fraser Health Authority advised the City of Abbotsford that it had no objection to the proposed subdivision. On August 15, 2003, the City of Abbotsford granted Mr. Krahn preliminary layout approval of the homesite severance subdivision subject to: each lot complying with Abbotsford Zoning Bylaw 1996; a site survey verifying that all buildings and structures on both lots complied with building setback provisions; the removal of one of the existing dwellings as the Agricultural Land Commission required; and the dedication of a ten metre strip to roads on the McCallum Road frontage of both lots if such a dedication had not already been made. The preliminary layout approval specified that each lot was to be serviced with City water connections in conformity with the Abbotsford Subdivision and Development Bylaw and that the Engineering Department approve any new driveway crossing culverts required for access to the property.
- [6] In the spring of 2004, Mr. Krahn listed the property, exclusive of the homesite, for sale. He received one offer during the currency of the listing at a price of \$950,000, which he was prepared to accept. No agreement was concluded, however, because Mr. Krahn was unwilling to accept the buyer's requirement that the offer be subject to sale of property the buyer owned, and the buyer was concerned that the subdivision process might take too much time. The listing eventually expired.
- [7] In early June 2004, Mr. and Mrs. Malhi told Mr. Pargat Sidhu, a licensed agent working with Lighthouse Realty Ltd., that they were interested in the purchase of property in the Abbotsford area. Mr. Sidhu identified a number of farm properties which the Malhis looked at. They told Mr. Sidhu that they were interested in making an offer on the McCallum Road property. Mr. Sidhu approached Mr. Krahn to advise that he had a party interested in purchasing the land, and to inquire whether it was available for purchase. Mr. Krahn responded affirmatively. Mr. Sidhu told Mr. Krahn that before he brought an offer forward, he required an exclusive listing for sale and execution of a dual agency agreement which would permit Mr. Sidhu to represent both the seller and the buyer. Mr. Krahn, Mr. and Mrs. Malhi, and Mr. Sidhu signed a dual listing agreement on June 7, 2004.
- [8] Mr. Sidhu prepared a contract of purchase and sale dated June 7, 2004 in which Mr. and Mrs. Malhi offered to purchase the residual 11.07 acres at a price of \$930,000 with a completion date of July 15 and an adjustment date of July 16. The offer provided that the buyers would pay a deposit of \$30,000 within 24 hours of the removal of the following "subject" clauses set forth in an addendum to the offer:

Subject to a new first mortgage being made available to the Buyer by 24th June 2004 on terms and conditions satisfactory to themselves. This condition is for the sole benefit of the Buyer.

Subject to the Buyer, at the Buyer's expense, obtaining and approving an inspection report by 24th June 2004. This condition is for the sole benefit of the Buyer. The Seller will allow access to the property for this purpose on reasonable notice.

Subject to the Buyer obtaining and approving a title search on the property by 24th June 2004. This condition is for the sole benefit of the Buyer.

Subject to the Buyer approving the Property Disclosure Statement by 24th June 2004. If approved, such statement will be incorporated into and form part of this contract. This condition is for the sole benefit of the Buyer.

This offer is subject to the Buyer obtaining approval for fire/property insurance, satisfactory to the Buyer, on the property located at 525 McCallum Rd, Abbotsford by 24th June 2004. This condition is for the sole benefit of the Buyer.

Subject to the Buyer receiving and approving more information on the second dwelling. This will be on or before 24th June 2004. This is for the sole benefit of the Buyer.

Seller warrants that the property is exactalely is 11.07 acres [sic].

Seller warrants that he will put poles and wires in raspberry and will look after the planted raspberry till the new owner takes over [sic].

Seller warrants to give some more information on the subdivided portion of the said land weather it is completed or not yet [sic].

[9] The first five terms were part of the standard form offer Mr. Sidhu's firm used. Mr. Sidhu handwrote the last four. The offer did not stipulate a date by which the buyers were to remove the last four "subjects".

[10] Mr. Sidhu presented the offer to Mr. Krahn who made a counter-offer at \$960,000 with a completion date of August 31, 2004 and an adjustment date of September 1, 2004. Mr. Krahn made a small modification to the subject relating to "poles and wire", but did not otherwise alter any of the terms contained in the addendum.

[11] Mr. Sidhu presented the counter-offer to Mr. and Mrs. Malhi who accepted the change to the completion and adjustment dates, but amended the purchase price to \$950,000. Mr. Sidhu presented that counter-offer to Mr. Krahn who advised Mr. Sidhu that the price was acceptable, but he wished to reflect overnight on the terms. On June 9, 2004, Mr. Krahn returned the offer to Mr. Sidhu. Mr. Krahn had revised the offer to include the following term in the addendum:

Subject to the Buyer and Seller agreeing to the conditions relevant to the second title (severance) and the second house before June 24/04.

[12] Mr. Krahn initialled the addition, and Mr. and Mrs. Malhi did likewise on June 9, 2004.

[13] While the question is whether the parties were bound, in any manner, by the documentation they had signed by June 9, certain events and conduct of the parties bear on that determination as they assist in assessing the parties' intentions and understanding at June 9, 2004.

[14] On June 23, 2004, the parties agreed as follows:

All the subject removal dates be changed from June 24th 2004 to August 12th, 2004, with the acceptance of both parties (buyer & seller).

[15] The reason for the amendment was Mr. Krahn's concern that subdivision would not be finalized by the date specified for the removal of subjects.

[16] On August 3, 2004, the Malhis delivered a bank draft drawn by Envision Credit Union payable to Lighthouse Realty in the amount of \$30,000. On August 4, 2004, the Malhis signed a document stating that they removed a number of the "subjects" in the original agreement. The removal document made no reference to the handwritten clauses in the addendum to the offer Mr. Sidhu drafted, but did reference the last clause Mr. Krahn drafted.

[17] Mr. Sidhu presented the removal document to Mr. Krahn and advised he had the deposit cheque in hand. Mr. Krahn declined to acknowledge the waiver saying that his condition regarding the parties' approval of the subdivision plan and the removal of a dwelling had not been satisfied, and he required more time in order to deal with the City. Neither party tendered sufficient evidence to permit any finding regarding what was done with the Credit Union cheque.

[18] On August 11, 2004, the parties agreed to a further amendment as follows:

All the subject removal dates be changed from 12th Aug. 2004 to 15th Sept. 2004, with the acceptance of both parties (buyer & seller)

The completion date be changed to from 31st. Aug. 2004 to 30th Sept 2004.

The possession date be changed from 1st Sept 2004 to 1st Oct 2004.

The adjustment date be changed from 1st Sept 2004 to 1st Oct 2004

As per original agreement [sic]

[19] On August 12, 2004, Mr. Krahn delivered the final application for subdivision, including the land survey, to the City. I accept Mr. Krahn's evidence and find that there was no change in lot size or location from that identified in the Agriculture Land Commission letter of permission, or the preliminary layout approval the City granted in January 2003.

- [20] I do not find any justification for the delay from June 9 through August 12, 2004 in submitting the subdivision plan for final approval. The only details which required attention were completion of a formal survey of the property and approval of actual siting of the dwelling on the homesite lot. There is no evidence from which I can conclude that municipal or provincial authorities, rather than Mr. Krahn, delayed any decisions on these matters or completion of the survey.
- [21] On September 14, 2004, the Malhis signed a "removal of subjects" document in the same form they provided on August 4. Mr. Sidhu presented the document to Mr. Krahn who declined to sign saying that the subdivision had not been formalized. September 15 passed without the City formally approving the subdivision. Thereafter, Mr. Krahn regarded the dealings with the Malhis to be at an end.
- [22] Other conduct of the parties in the period from June 9 through September 14, 2004 is relevant.
- [23] Mr. Krahn and his mother testified that they granted the Malhis permission to water and weed new raspberry canes that Mr. Krahn had planted in the spring of 2004. The Malhis did so with the assistance of hired help. The Malhis engaged a contractor who drilled a water well on the property. The Krahns had relied on obtaining water from a neighbour.
- [24] A pump was installed in the well. One of the out-buildings on the property that was the subject of the dealings between the parties provided electric service to the well. The Malhis installed underground irrigation pipe to provide water to the canes. The Malhis expended in excess of \$50,000 in the period from June through the end of July for these purposes.
- [25] The Krahns testified that they did not permit the installation of the irrigation equipment or the drilling of the well, and say that they instructed the Malhis to refrain from doing what they did. I do not find their evidence in this regard to be reliable. It is inconsistent with their conduct. Mr. Krahn agreed to two extensions of the subject removal, closing and adjustment dates. He did so when he was fully aware of the Malhis' activities on the property. He did not insist on any terms or restrictions regarding the Malhis' use of the land. He did not care for, or make any arrangements for the care of, any of the canes planted on the property from and after June 9, 2004.
- [26] I find as a fact that all of the Malhis' activities on the land were permitted by Mr. Krahn and, if her consent should be required, by his mother.

Analysis

- [27] This trial of an issue is only concerned with the question of whether the parties were bound by the "offer" and "acceptance" which they had signed by June 9, 2004, or whether the documentation reflected nothing more than an agreement to agree. In the event the document bound the parties in some manner, the question of the consequences that flow by virtue of subsequent events must be resolved by the trial of another issue or issues.

- [28] The Malhis claim that the essential elements of a contract for the sale of land, namely parties, property and price, are identified with sufficient certainty to create an agreement that binds the parties.
- [29] Mr. Krahn claims that the condition which he inserted in the offer and acceptance requiring the parties to agree on the "conditions relevant to the second title (severance) and the second house" creates such uncertainty as to render the document that the parties signed nothing more than an agreement to agree.
- [30] In a case such as this, the court should strive to recognize and uphold the reasonable expectations of the parties as derived from the documentation they sign and their conduct in relation to it: see *Boult Enterprises Ltd. v. Bissett* (1986), 67 B.C.L.R. 273, 21 D.L.R. (4th) 730 (C.A.), and *G.S.B. Developments Ltd. v Chiulli* (1980), 15 B.C.L.R. 381 (S.C.), *aff'd* at (1981), 28 B.C.L.R. 157.
- [31] As the Court of Appeal stated in *Fraser v. Van Nus* (1986), 22 D.L.R. (4th) 459 at 466, 67 B.C.L.R. 285, "[t]he cases have gone a long way in imposing upon a party an obligation to make a genuine effort to perform a condition, where failure to do so will result in there being no enforceable agreement."
- [32] Finally, in *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072, 85 D.L.R. (3d) 19, the Supreme Court of Canada said the following in relation to a vendor's obligations regarding subdivision:

In a purchase and sale situation, the "person who proposes to carry out a subdivision of land" is the intending vendor. It is he who must divide his parcel of land, which has hitherto been one unit, for the purpose of sale. If a purchaser carried out the actual work in connection with the application, he could only do so in the vendor's name and as his agent. The vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale. I cannot accept the proposition that failure to fix responsibility for obtaining planning approval renders a contract unenforceable. The common intention to transfer a parcel of land in the knowledge that a subdivision is required in order to effect such transfer must be taken to include agreement that the vendor will make a proper application for subdivision and use his best efforts to obtain such subdivision. This is the only way in which business efficacy can be given to their agreement. In the circumstances of this case, the only reasonable inference to be drawn is that an implied obligation rested on the vendor to apply for subdivision. In making a similar finding on the facts in *Hogg v. Wilken et al.* (1974), 5 O.R. (2d) 759 Lerner J. said at p. 761:

In this contract the only inference to be drawn is that it was the vendors' obligation to make the application. An application for such consent would have to be carried out in good faith to its logical conclusion by presentation of same to the committee, the necessary appearance before the committee and furnishing any answers or material that would be reasonably within the power of the vendors to supply if requested by that committee.

- [33] I do not understand counsel for Mr. Krahn to dispute the principles I have set forth. Rather, his position is that the clause he inserted and required is so vague as to impose no binding obligation on either party. With respect, I cannot agree.
- [34] The authorities counsel for Mr. Krahn cited are fact specific. In a similar vein, this case is fact specific.
- [35] Mr. Krahn had obtained preliminary layout approval from the City. The regulatory authorities had approved the proposed subdivision. The parties knew of the land which Mr. Krahn intended to sell and the Malhis intended to purchase. The price was settled. All that remained to be done was to obtain a final survey of the subdivision, and to settle on the removal of one of the residences from the site to be sold and its placement on the homesite.
- [36] Given the point to which the subdivision proposal had proceeded with the authorities, the clause Mr. Krahn drafted must reasonably be regarded as a means of permitting minor adjustments in price and acreage in the event the final survey plan indicated that the subdivided lot which was the subject of the sale was greater or less than 11.07 acres. The clause did not accord Mr. Krahn the right to refrain from using his best efforts to formalize the subdivision in order that the sale could be completed.
- [37] The fact the parties intended to be bound by the document they signed is evidenced by their conduct. The Malhis entered on the land they were to acquire in order to care for the growing crop on the land. Mr. Krahn did not participate in that task. The Malhis took steps to obtain a water supply for the property that was not dependent upon any neighbour. Mr. Krahn did not restrain them from doing so. Instead, he acquiesced to amendments to the offer and acceptance document when fully aware of the Malhis' activities on the land, and after a well had been drilled and made operational for use in conjunction with a newly installed irrigation system.
- [38] The offer and acceptance signed June 9, 2004 were binding on the parties.
- [39] The parties may speak to costs.

"Pitfield, J."

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Prepared on 29 October 2026 · Esheria