
CANADA / JUDGMENT

Marrello v. Okinshaw Water Company Ltd.

2017 BCSC 1618

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 1618 Marrello v. Okinshaw Water Company Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marrello v. Okinshaw Water Company Ltd.,

2017 BCSC 1618

Date: 20170913

Docket: S12143

Registry: Campbell River

Between:

Deborah Ann Marrello and Mike Marrello

Plaintiffs

And

Okinshaw Water Company Ltd.

Defendant

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiffs:

R.J. Lesperance

Agent for the Defendant:

W. Rutherford

Place and Date of Trial:

Campbell River, B.C.

February 15-17, 20-24, 2017

Nanaimo, B.C.

April 21, 2017

Place and Date of Judgment:

Campbell River, B.C.

September 13, 2017

Introduction

- [1] This matter involves a failed transaction for the purchase and sale of a water-bottling facility and related property located near Nelson, B.C. The plaintiffs, Deborah and Mike Marrello, who are married, were the vendors in the transaction and the defendant, Okinshaw Water Company Ltd. ("Okinshaw"), the intended purchaser.
- [2] The plaintiffs claim damages flowing from the failed transaction. The defendant has counterclaimed, alleging misrepresentations made by or on behalf of the plaintiffs and that the plaintiffs did not comply with the terms of closing by failing to deliver certain documents.
- [3] The case is somewhat unusual in that the defendant made a down payment and some additional payments towards the purchase of the property, as required under the contract of purchase and sale, and assumed possession of the property. However, it subsequently failed to make additional required payments and it was evicted from the property. When it left, it took equipment and other chattels from the water bottling facility, which forms the basis for much of the plaintiffs' damages claim.
- [4] The defendant was represented by counsel until shortly before trial. At trial, the defendant was represented by its president and principal shareholder, Mr. Wayne Rutherford.

Background

- [5] There was considerable evidence led by both parties about their dealings and there are numerous differences in their respective versions of events. I will provide a general overview of the background facts at the outset and then will deal with the evidence in greater detail, as needed, when addressing the issues that arise. As will be seen, it is not necessary to resolve all of the factual disputes between the parties as many do not bear on the outcome. Ultimately, the case turns largely on the uncontroverted facts.

- [6] The real property in issue is an approximately 5.75 acre parcel of land (the "Property") that was originally purchased by the plaintiffs in 1973. The Marrellos lived on the Property for many years.
- [7] In or about 2002, while drilling on the Property, the Marrellos discovered an aquifer located some 500 plus feet below the surface. By all accounts, the water in the aquifer has unique characteristics in terms of its mineral content, which make it particularly attractive for the purpose of bottling and selling.
- [8] Since the time the aquifer was first discovered, a number of attempts have been made to do just that. All have failed.
- [9] The specific details of the previous failed business attempts are not directly relevant to the issues that arise here, and the evidence about those ventures was minimal. What is relevant is that as a result of these various failed ventures, as of 2012, the Marrellos were heavily in debt; the Property was no longer registered in Ms. Marrello's name and it was heavily encumbered.
- [10] It was around that time that a member of the Marrellos' church introduced them to a man named Narvin Edwardson, who was described as someone with a business background that might be able to help them resolve some of the disputes surrounding the Property.
- [11] Mr. Edwardson is an 84-year-old man with a checkered past that includes both criminal convictions for fraud and securities offences that resulted in an order of the British Columbia Securities Commission prohibiting Mr. Edwardson from trading in securities or acting as a director or officer of any securities issuer.
- [12] The Marrellos both testified that they were made aware of Mr. Edwardson's past when he was first introduced to them and Mr. Edwardson acknowledged that past in his testimony, although few details were provided. Mr. Edwardson described himself as currently involved in various ministries in which he helps people in need, including people like the Marrellos.
- [13] In April 2012, Mr. Edwardson met Mr. Rutherford by chance on a ferry travelling between Nanaimo and Horseshoe Bay. They struck up a conversation which included a discussion about the Property. At the end of the ferry ride, they exchanged contact information.
- [14] Sometime after that initial meeting, Mr. Rutherford and Mr. Edwardson spoke again by phone. There is a dispute in the evidence about whether Mr. Edwardson phoned Mr. Rutherford or vice versa but nothing turns on who made the call. Thereafter, in July 2012, Mr. Edwardson arranged for Mr. Rutherford to meet the Marrellos at their home in Nanoose Bay.
- [15] As with most of their dealings, the Marrellos, Mr. Edwardson and Mr. Rutherford differ on the details of this meeting. Again, the specific details of what was discussed at the meeting are not particularly relevant.

- [16] One point of disagreement between the parties is that Mr. Rutherford testified that his initial intention was to help the Marrellos sell the Property, rather than purchase it himself, whereas the Marrellos understood that Mr. Rutherford was interested in buying the Property from the outset. Regardless of the initial intention, there is no issue that ultimately it was Okinshaw that entered into the contract to buy the Property.
- [17] Another point of disagreement concerns the role of Mr. Edwardson. Mr. Rutherford testified that he dealt almost exclusively with Mr. Edwardson, who was acting as an agent or representative of the Marrellos. For example, Mr. Rutherford said that he negotiated the terms of the transaction, including the purchase price, with Mr. Edwardson. In contrast, the Marrellos and Mr. Edwardson characterized his involvement as that of a consultant to the Marrellos and that the Marrellos always maintained final decision-making authority.
- [18] After that meeting, Mr. Rutherford asked to tour the Property, which Mr. Edwardson arranged. Mr. Rutherford was accompanied on the tour by his wife, Tara Wood; his brother-in-law, Marvin Fenrich; and David Schwartz, a friend and former Coca-Cola employee. While Mr. Edwardson accompanied them to the Property, the tour was conducted by Brian (B.J.) MacKinnon, the plant manager of a previous operator, who at the time was living at the Property as a caretaker.
- [19] Mr. MacKinnon testified that during the tour of the Property, Mr. Rutherford stated that he wanted to produce bottled water on a large scale but Mr. MacKinnon told him that was not possible with the existing equipment. Mr. MacKinnon says that he told Mr. Rutherford that the water bottling plant had not been operational since 2009. He also told Mr. Rutherford that some neighbors had temporary access to the aquifer because a previous operator of the bottling facility had inadvertently dug up the neighbors' water line. Mr. Rutherford denies being told this.
- [20] On April 17, 2013, the Marrellos and Okinshaw executed the Agreement of Purchase and Sale of Assets (the "Contract") which provided in clause 1.1:
- 1.1 The Purchaser agrees to buy and the Sellers agree to sell to the Purchaser where is and as is, all the undertaking and assets owned by the Sellers including, without limiting the generality of the foregoing:
- a) The land and buildings more particularly described in Schedule "A" (the "property");
 - b) The furniture, fixtures and equipment more particularly described in Schedule "B" (the "equipment");
 - c) All saleable stock in trade (the "stock in trade");
 - d) All useable parts and supplies (the "parts and supplies");
 - e) All leasehold/rent interest in the property held by the Sellers (the "lease agreement" or "rent agreement");

- f) the goodwill and water rights of the business together with the exclusive right to the Purchaser to represent itself as carrying on business in succession to the Sellers and to use the business style of the business and variations in the business to be carried on by the Purchaser (the "goodwill and water rights").

[21] It is common ground, with respect to clause 1.1(b), that no Schedule "B" list of equipment was included with the Contract when it was signed.

[22] Clause 2.1 set out the purchase price, totalling \$4,000,000, to be paid by Okinshaw as follows:

2.1 The purchase price payable for the undertaking and assets to be bought and sold is the total of the amounts computed and allocated as follows:

- a) For the property-One Million and Three Hundred and Twenty Thousand Dollars (\$1,320,000.00);
- b) For the equipment-Six Hundred and Fifty Thousand Dollars (\$650,000);
- c) For the stock in trade-Five Thousand Dollars (\$5,000);
- d) For the parts and supplies-Twenty Five Thousand Dollars (\$25,000);
- e) For the goodwill and water rights included with the property-Two Million dollars (\$2,000,000.00);
- f) For all other assets sold (free and clear of all encumbrances) as is.

[23] Clause 3 dealt with the terms of payment:

3.1 The Sellers will acknowledge receiving a deposit in the form of a certified cheque, bank draft or bank transfer for Seventy Five Thousand Dollars (\$75,000.00) payable to Deborah Ann Marrello on or by April 17, 2013 from the Purchaser upon execution. This is non refundable in the event that the sale does not proceed due to non performance of Purchaser.

3.2 The balance of the purchase price for the undertaking and assets agreed to be bought and sold shall be paid, subject to adjustments, as follows:

- a) Four Hundred Twenty Five Thousand Dollars (\$425,000.00) by certified cheque, bank draft or bank transfer on or about May 31, 2013. This money is to be used to pay court costs regarding CPL's, taxes and encumbrances on the property. Equipment, stock and supplies will be released by the Sellers to the Purchaser and used as collateral.
- b) One Million Five hundred Thousand Dollars (\$1,500,000.00) by certified cheque, bank draft or bank transfer within twelve months after closing once all liens, writs encumbrances of the property have been removed or when title is free and clear;
- c) One Million dollars (\$1,000,000.00) by certified cheque, bank draft or bank transfer on or before the anniversary date one (1) year after the date of the payment made for 3.2(b);

- d) One Million Dollars (\$1,000,000.00) by certified cheque, bank draft or bank transfer on or before the anniversary date two (2) years after the date of the payment made for 3.2(b);
- e) Ten Percent (10%) equity in Okinshaw Bottling Company Ltd. to be issued as non-voting shares within twelve (12) months after closing. The type and class are to be determined by the Purchaser.

[24] While there is some dispute in the evidence about the mechanics of how it was done, it is common ground that Okinshaw paid the \$75,000 deposit required by clause 3.1.

[25] Also in April 2013, Mr. Rutherford was introduced to representatives of Granite Falls Company ("Granite Falls"), a distributor that expressed interest in distributing Okinshaw's bottled water products. Mr. Marrello had been introduced to a representative of Granite Falls by a friend and he in turn introduced Granite Falls to Mr. Rutherford and Okinshaw.

[26] Mr. Rutherford testified that Granite Falls was presented to him as a well-established business with an existing distribution network that could be used to sell all of Okinshaw's production. In contrast, Mr. Marrello testified that he had no pre-existing relationship with Granite Falls and that he, along with Mr. Edwardson, simply facilitated the introduction to Okinshaw.

[27] A meeting was arranged between Okinshaw and Granite Falls that took place in Victoria on April 23, 2013. At that meeting, and in subsequent correspondence, Granite Falls represented to Okinshaw that it would be able to assist Okinshaw in developing markets for Okinshaw's products. It later became apparent that Granite Falls had significantly oversold itself and Okinshaw now alleges that Granite Falls' capabilities were misrepresented to it.

[28] On May 31, 2013, Okinshaw paid the Marrellos \$425,000 pursuant to clause 3.2(a) of the Contract. In conjunction with that payment, the Marrellos executed a document stating as follows:

Upon payment of \$425,000, this will confirm that Okinshaw Water Company Ltd. has clear title/ owns the equipment on Schedule "B" as well as the inventory on the Property.

[29] Also on May 31, 2013, an Addendum Agreement (the "Addendum") was signed which, among other things, added the Schedule "B" list of equipment that was included as part of the sale.

[30] Shortly thereafter, Okinshaw took possession of the Property.

[31] The Contract was then further amended by an agreement signed on December 12, 2013 (the "Amendment"), the principal provision of which eliminated the Marrellos' proposed 10% interest in Okinshaw, as provided for in clause 3.2 of the Contract, and instead provided for monthly payments of \$10,000 to the Marrellos to be credited against the purchase price. Okinshaw made these payments up until August 2014.

- [32] From May 31, 2013 to May 31, 2014, the date that the next payment of \$1.5 million was required under the Contract, the Marrellos took steps to clear the encumbrances off title and have title reinstated in Ms. Marrello's name.
- [33] Mr. Norm Evans, a solicitor retained by the Marrellos to act for them on the transaction, testified that clear title was achieved by May 30, 2014. Mr. Evans provided confirmation of that fact to Okinshaw's lawyer in a letter of that date.
- [34] Notwithstanding that the Marrellos were able to deliver clear title as of May 30, 2014, Okinshaw did not make the required payment of \$1.5 million on May 31, 2014.
- [35] Thereafter, Okinshaw, through Mr. Rutherford, made a number of proposals to salvage the transaction, however none of the proposals were acceptable to the Marrellos. Ultimately, the Marrellos concluded that the deal was dead and they commenced this action on December 2, 2014.
- [36] In June 2015, Okinshaw registered a certificate of pending litigation [CPL] against the Property.
- [37] In December 2015, the Marrellos entered into an agreement with a new purchaser who agreed to buy the Property for \$4,000,000 with an effective closing date of March 15, 2016, later extended to May 2016.
- [38] In February 2016, the Marrellos applied to have Okinshaw's CPL removed. The Court ordered removal of the CPL on the basis that the Marrellos post \$600,000 in security.
- [39] Okinshaw remained in possession of the Property until July 2016 when it was evicted by the new owner. When it vacated the Property, Okinshaw took with it the equipment from the water bottling plant.

The Parties' Positions

- [40] The Marrellos submit that Okinshaw breached the Contract by failing to make the payment of \$1.5 million on May 31, 2014 and further by discontinuing the monthly payments of \$10,000 required under the Amendment in August 2014. They claim damages totalling \$232,000, consisting of the value of the equipment taken by Okinshaw plus lost rental income from two duplexes on the Property during the period in which Okinshaw remained in possession, less the amounts paid by Okinshaw.
- [41] Okinshaw submits that the Marrellos made a number of misrepresentations, some of which induced it to enter into the Contract and that, had it known the truth about a number of key matters, it would have negotiated a different deal. Okinshaw submits further that the Marrellos breached the Contract by failing to provide it with important closing documents which impeded its ability to obtain financing and, in turn, caused it to be unable to make the payments required by the Contract.

Credibility

- [42] Before addressing the claims advanced by the parties, I will touch briefly on the issues of credibility and reliability, since each of the parties took issue with the evidence provided by the witnesses for the other party.
- [43] In *Sohi v. Sohi*, 2015 BCSC 1043, Mr. Justice Armstrong said the following about assessing credibility, at paras. 96-97:
- [96] Credibility cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The task is to assess the reliable evidence given by each witness and weigh the inherent probabilities and improbabilities of their versions of the events. The test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions: *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.) at para. 11.
- [97] The distinction between reliability and credibility can be important. It is not the witness's belief in the truth of their evidence or their sincerity that must be considered but the reliability of that evidence is paramount: *R. v. Norman*, 87 C.C.C. (3d) 153 at 14; *R. v. W.S.*, 90 C.C.C. (3d) 242; *R. v. C.J.S.*, [1996] P.E.I.J. No. 8 at para. 35.
- [44] Mr. Justice Armstrong went on to cite the well-known decision of Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 [Bradshaw], *aff'd* 2012 BCCA 296, leave to appeal *ref'd* [2012] SCCA No. 392, where she held that conflicting testimony should be assessed in light of the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Bradshaw* at para. 187, citing *Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)).
- [45] Credibility and reliability are not all or nothing propositions. A trier of fact may believe all, part or none of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. R.(D.)*, [1996] 2 S.C.R. 291 at para. 93).
- [46] This latter principle has particular application in this case where there were significant problems with the evidence of many of the lay witnesses. However, there were also aspects of the evidence of many of the witnesses that were believable and that accorded with the "preponderance of probabilities" when considered in the context of the evidence as a whole.
- [47] For that reason, rather than making a sweeping determination of each witness's credibility, I have approached their evidence on the various issues in accordance with the framework set out in the above-noted cases.
- [48] I would again add that, for the most part, it is not necessary to resolve the various factual disputes because the issues can largely be determined on the basis of the uncontested facts.

Liability

Did Okinshaw Breach the Contract?

- [49] There is no issue that Okinshaw failed to make the payment of \$1.5 million on May 31, 2014 as required by clause 3.2(b) of the Contract. The clause required payment "within twelve months after closing once all liens, writs, encumbrances of the property have been removed or when the title is free and clear". Again, Mr. Evans testified that title to the Property was cleared by May 30, 2014.
- [50] I am satisfied that the failure pay a significant portion of the purchase price constitutes a fundamental breach or, to use the language preferred by Cromwell J. in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 [Potter] at para. 148, a breach of a "sufficiently important term" so as to permit the Marrellos to treat the Contract as at an end and to sue for damages.
- [51] Mr. Rutherford testified that he was led to believe that title to the Property would be cleared well in advance of May 31, 2014 and that Okinshaw required clear title in order to obtain financing to make the further payments required under the Contract. He said he made that clear to the Marrellos and Mr. Edwardson.
- [52] In my view, clause 3.2(b) is clear on its face and does not permit the interpretation advanced by Mr. Rutherford and Okinshaw. Specifically, the clause does not provide for a gap in time between title being cleared and Okinshaw making the payment, nor does it make the payment conditional on Okinshaw obtaining third party financing.
- [53] Okinshaw also argues that the Marrellos failed to negotiate in good faith to find a solution to salvage the transaction after Okinshaw had failed to make the payment. However, once it became apparent that Okinshaw could or would not pay the purchase price, the Marrellos were under no obligation to negotiate a different deal from that agreed to in the Contract.
- [54] The Marrellos have therefore established that Okinshaw breached the Contract. In the circumstances, it is unnecessary to consider the Marrellos' alternative argument that Okinshaw breached the amendment to the Contract by discontinuing the monthly payments of \$10,000.
- [55] I will return to the issue of damages after addressing Okinshaw's claims.

The Alleged Misrepresentations

- [56] Many of the misrepresentations alleged by Okinshaw were made by Mr. Edwardson. Thus, a preliminary issue arises as to whether Mr. Edwardson was acting as an agent of the Marrellos. Mr. Rutherford testified that most of his dealings related to the transaction were with Mr. Edwardson, who, in his view, was clearly acting on behalf of the Marrellos. For their part, the Marrellos say that Mr. Edwardson was a consultant for both parties and that he never had authority to bind them, except in relation to certain of the encumbrances on

the Property and related debts.

- [57] The Marrellos executed two limited powers of attorney in favour of Mr. Edwardson: one dated April 22, 2013 to deal with the encumbrances and one dated April 25, 2013 to deal with credit card debt. These powers of attorney were subsequently rescinded and on May 31, 2013, the Marrellos wrote to Okinshaw and stated that Mr. Edwardson "is not a signing officer nor empowered to represent us in any regards as all Agreements must be signed by us only".
- [58] Despite the protestations of the Marrellos and Mr. Edwardson to the contrary, it is clear on the evidence that Mr. Edwardson was in fact acting as agent for the Marrellos, at least during the period leading up to May 31, 2013. For example, as early as July 5, 2012, the Marrellos referred to Mr. Edwardson as the "project manager" in correspondence with Mr. Rutherford. It is also clear that much of the negotiation over the terms of the Contract was carried out between Mr. Rutherford and Mr. Edwardson.
- [59] Further, the Marrellos executed a document dated May 2, 2013 in which they agreed to pay Mr. Edwardson, through his wife's company, a significant "finder's fee" once title to the Property was cleared and Okinshaw had made its required payment of \$1.5 million on May 31, 2014. Clearly Mr. Edwardson was being paid for his services in connection with the transaction.
- [60] I am satisfied that, based on all of the evidence, Mr. Edwardson exercised both actual and apparent authority on behalf of the Marrellos, as those concepts are defined in cases like *Keddie v. Canada Life Assurance Co.*, 1999 BCCA 541 at paras. 20-24. Ultimately however, little turns on this finding given my conclusions on liability as set out below.
- [61] While Okinshaw's allegations of misconduct on the part of the Marrellos are broad and far-reaching, the principal claims of negligent misrepresentation are as follows:
- a) that title to the Property would be cleared in a timely manner so as to permit Okinshaw to obtain third party financing. A related allegation is that the Marrellos failed to disclose that they could have transferred title sooner than May 31, 2014;
 - b) that Granite Falls had in place an existing distribution network;
 - c) that no one else had access to the aquifer; and
 - d) that the values set out in the Contract for the Property, equipment and other assets were fair and accurate.
- [62] In my view, none of these allegations can stand in the face of the specific language used in the Contract, including, in particular, the entire agreement clause found at clause 11.5:

There are no representations, warranties, conditions, terms or collateral contracts affecting the transaction contemplated in this agreement except as set out in this agreement.

- [63] Similar provisions are found in the Addendum and the Amendment.
- [64] Further, and in any event, Okinshaw has failed to establish that the various representations alleged satisfy the test for an actionable negligent misrepresentation.
- [65] I will deal first with the entire agreement clause.
- [66] Pre-contractual representations not subsequently included in the terms of a contract may be enforceable if it is established that they constitute a binding collateral contract or alternatively, depending on the circumstances, they may support a claim for damages for negligent misrepresentation. This, however, is subject to any express limitations adopted by the parties in the contract.
- [67] In *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, Justices La Forest and McLachlin (as she then was), writing for the majority, said at 26-27:

In our view, the general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147, is that where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or [negate] the right to sue in tort. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility.

Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering - the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished. The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon

- [68] Our Court of Appeal has confirmed that parties to a commercial contract may agree to exclude any liability in tort: see *No. 2002 Taurus Ventures Ltd. v. Intrawest Corp.*, 2007 BCCA 228 at paras. 47-59 [Intrawest]. At para. 48, the Court in *Intrawest* cites *Antorisa Investments Ltd. v. 172965 Canada Ltd.*, [2006] O.J. No. 3427 (Ont. S.C.J.) at para. 41, where the Court said:

It is now settled that the fact that parties have dealt with matters in a contract does not mean that they intended to exclude the right to sue in tort ("it all depends on how they have dealt with it" [*BG Checo* at 27]). Commercial parties may order their affairs and allocate risks as they like. However, if they arrange their rights and duties in a different way than would be done by the law of tort, the tort duty must give way.

[Underlining in original.]

- [69] Here, numerous drafts of the Contract were exchanged between the parties as they negotiated the terms. Mr. Rutherford, on behalf of Okinshaw, was a sophisticated businessman who had previously sold a large, public company and who, on his own evidence, had signed many contracts. In the circumstances, I am satisfied that the parties intended that the whole of their agreement would be captured by the written Contract, as amended in writing by the Addendum and the Amendment, and that the effect of the entire agreement clause is to preclude any claims for negligent misrepresentation.
- [70] Further, as noted, I am not satisfied that any of the alleged representations satisfy the test for negligent misrepresentation, as established in cases like *Queen v. Cognos*, [1993] 1 S.C.R. 87. Given my conclusion above about the effect of the entire agreement clause, I will deal only briefly with the alleged misrepresentations.
- [71] The principal misrepresentation alleged by Okinshaw concerns the title to the Property. Mr. Rutherford says that he made it clear to the Marrellos and to Mr. Edwardson that Okinshaw needed three to six months once title was cleared in order to obtain additional financing and that Mr. Edwardson assured him that would occur. The second element of the alleged misrepresentation, which is more in the nature of a misrepresentation by reason of a failure to disclose, is that the Marrellos could have used an order dated August 12, 2012 of Mr. Justice G.C. Weatherill to obtain clear title at that time.
- [72] I am satisfied on the evidence that Mr. Rutherford and Okinshaw were aware at all material times that the Property was heavily encumbered and that it would take some time to obtain clear title. While it may well be that Okinshaw would have liked clear title sooner, I am not satisfied that Mr. Edwardson or the Marrellos represented that it was likely or even possible. Moreover, had that been critical to Okinshaw's ability to proceed with the transaction, it could have negotiated a term to that effect in the Contract. It failed to do so and, in my view, the allegation that Okinshaw needed, and would have, three to six months to obtain financing once title was cleared cannot stand in the face of the clear language in s. 3.2(b) of the Contract (see para. 52 above).
- [73] The August 2012 order relied on by Okinshaw was granted as part of a default judgment obtained by the Marrellos against a former business partner who had been granted title to the Property as part of one of the previous failed attempts to develop the water bottling business. One term of the order directed that the Property "be transferred forthwith to Deborah Ann Marrello". Okinshaw relies on that term to argue that title could have been transferred to Ms. Marrello, and cleared, well before May 31, 2014 which would have given Okinshaw ample time to obtain financing.

- [74] However, I agree with the Marrellos that the order was not sufficient to enable immediate transfer of title to Ms. Marrello. The order did not comply with s. 34 of the Land Title Act, RSBC 1996, c. 250, and did not account for the fact that there were certificates of pending litigation registered against the Property that were not removed until May 31, 2014. It is apparent that the order was granted on a default basis without full knowledge of all of the encumbrances registered against the Property.
- [75] In any event, the evidence does not establish that Okinshaw relied on the alleged misrepresentations of the Marrellos concerning title to the Property. Okinshaw conducted its own review of the title to the Property and negotiated the terms of the Contract, which again did not make payment of the purchase price conditional on Okinshaw obtaining third party financing.
- [76] Taking account of all of the evidence, Okinshaw's allegations of misrepresentation concerning title to the Property cannot stand.
- [77] There is similarly no basis for the allegation that the Marrellos misrepresented that Granite Falls had an existing distribution network in place. I accept Mr. Marrello's evidence that he simply put Okinshaw in contact with Granite Falls, who he had been introduced to through a friend. At the time that Okinshaw met with Granite Falls, no bottled water had been produced at the Property for a considerable length of time, thus there was nothing for Granite Falls to distribute.
- [78] Further, there was considerable evidence led at trial about communications flowing between Granite Falls and Okinshaw and it is apparent that Okinshaw had full opportunity to investigate Granite Falls and its ability to distribute any products that Okinshaw would produce, including at a face to face meeting that took place in Victoria on April 19, 2013. Frankly, many of the communications coming from Granite Falls were, on their face, full of hyperbole and should have given Okinshaw pause about Granite Falls' actual capabilities.
- [79] However, Okinshaw pressed ahead and entered into a "Broker and Sales Agreement" dated June 11, 2013 with Granite Falls. In doing so, I am satisfied that it was acting on its own initiative and knowledge and not on anything done or said by the Marrellos.
- [80] Okinshaw also alleges that it was misled about having sole access to the aquifer when, in fact, two neighboring properties were connected. On this point, I accept the evidence of Mr. MacKinnon that he told Mr. Rutherford about the neighbors when they toured the Property in July 2012. Further, the Addendum, which was dated May 31, 2013, implicitly acknowledged that there were other users of the aquifer. It stated at clause 6:

The water bottling plant requires a sole source from the water well; therefore any and all other users of the well not related to the property shall be disconnected.

- [81] It is clear that Okinshaw and Mr. Rutherford knew of the other users. Moreover, the evidence established that the neighbors' connections to the aquifer were temporary in nature and there is nothing to suggest that those connections interfered in any way with Okinshaw's ability to operate the water bottling facility or to obtain financing for the operation.
- [82] Finally, Okinshaw alleges that the Marrellos misrepresented the values set out in the Contract for the equipment and other assets. However, on his own evidence, Mr. Rutherford acknowledged that the values were set through discussions between him and Mr. Edwardson. In fact, the values are clearly nominal values set solely for the purpose of allocating the total purchase price. I agree with the Marrellos' submission at para. 266 of their written argument as follows:

what Okinshaw alleges to be representations as to the value of the Property and other assets are actually statements of opinion or estimates and are not statements of existing fact and are not actionable as misrepresentations.

- [83] For all of these reasons, Okinshaw's claims for negligent misrepresentation are dismissed.

The Alleged Breach of Contract

- [84] Okinshaw alleges that the Marrellos breached the Contract in two respects: i) they failed to provide Okinshaw with a bill of sale and other closing documents and ii) they failed to use the \$425,000 paid by Okinshaw on May 31, 2013 to remove the encumbrances on title to the Property. Neither claim has any merit.

- [85] With respect to the bill of sale issue, Okinshaw relies on clause 9.1 of the Contract which states:

The Sellers shall deliver to the Purchaser, in registered form where applicable, the following closing documents (the "closing documents"), prepared or obtained at the Sellers expense, on or before closing:

- a) Duplicate, properly executed Bills of Sale of the property, equipment, stock in trade and parts and supplies

- [86] Okinshaw says that the failure of the Marrellos to provide proper closing documents, including a bill of sale, impeded its ability to obtain investors and third party financing.

- [87] I am satisfied in the evidence that the Marrellos did not provide a bill of sale as contemplated in the Contract, however to the extent that this constitutes a breach of the Contract, it is not a breach of a "sufficiently important term" (per Cromwell J. in Potter at para. 148) so as to permit Okinshaw to treat the Contract at an end. At best, it would have permitted Okinshaw to sue for damages.

[88] However, I agree with the Marrellos that Okinshaw has failed to prove that it suffered damages as a result of the absence of a bill of sale. Specifically, Okinshaw did not establish that its inability to obtain investors or third party financing resulted from the Marrellos' failure to provide a bill of sale. While Mr. Rutherford testified that this was a significant issue for investors, there was no corroborating evidence. Moreover, if proof of the sale was so critical to obtaining financing, it is difficult to see how a bill of sale would be more compelling than the actual Contract of sale itself.

[89] In any event, Okinshaw waived its right to a bill of sale by closing the deal on May 31, 2013. This is in fact what Mr. Justice Thompson found in his Reasons for Judgment on the Marrellos' application to remove the certificate of pending litigation filed by Okinshaw (*Marrello v. Okinshaw Water Company Ltd.*, 2016 BCSC 453 at para. 35):

The evidence does not disclose why Okinshaw chose to close the transaction without compliance by the Marrellos with the closing documents condition stated by the contract to be in Okinshaw's favour. A purchaser may choose to waive subject conditions that are in its favour. I agree with the Marrellos' submission that Okinshaw must be taken to have waived this condition by electing to close without insisting on compliance with the closing documents condition.

[90] I agree with Justice Thompson's finding.

[91] The second breach alleged by Okinshaw is that the Marrellos breached s. 3.2(a) of the Contract by failing to apply the \$425,000 paid by Okinshaw to removing the encumbrances on the title to the Property. Clause 3.2(a) provides:

The balance of the purchase price for the undertaking and assets agreed to be bought and sold shall be paid, subject to adjustments, as follows:

a) Four Hundred and Twenty Five Thousand Dollars (\$425,000) by certified cheque, bank draft or bank transfer on or about May 31, 2013. This money is to be used to pay court costs regarding CPL's, taxes and encumbrances on the property. Equipment, stock and supplies will be released by the Sellers to the Purchaser and used as collateral.

[92] The Marrellos' evidence was that, with the exception of \$35,000, which was used for personal expenses with the express approval of Okinshaw, the \$425,000 was in fact applied to remove encumbrances. In fact, the \$425,000 was not sufficient because the Marrellos were required to post \$300,000 security in order to remove one of the CPL's. According to Ms. Marrello, their intention was to use some of the funds due from Okinshaw on May 31, 2014 to pay that security. Thus, there is no basis for Okinshaw's allegation that the Marrellos breached clause 3.2(a).

[93] It should also be noted that, in any event, Okinshaw received value for the \$425,000 in the form of title to the equipment in the bottling facility. As noted above in paragraph 28, on May 31, 2013, the Marrellos executed a document granting Okinshaw title to the equipment upon payment of the \$425,000.

[94] Okinshaw's claim for breach of contract therefore fails.

Conclusion on Liability

[95] Based on the above, the Marrellos have established that Okinshaw breached the Contract by failing to pay \$1.5 million on May 31, 2014 pursuant to clause 3.2(b). Conversely, Okinshaw has not established that the Marrellos made negligent misrepresentations or that they breached the Contract. Okinshaw's counterclaim is therefore dismissed.

[96] It is worth noting one additional point with respect to Okinshaw's claims against the Marrellos. A consistent theme running throughout Okinshaw's evidence was the allegation that the Marrellos failed to act in good faith and that their objective all along was to use Okinshaw's money to clear title and have the Property returned to Ms. Marrello, without any intention of ever actually completing the transaction and conveying the Property to Okinshaw. Okinshaw went so far as to allege that the subsequent transaction in which the Property was sold to a new purchaser was in fact a sham.

[97] These claims were not pleaded and indeed, shortly before trial, Okinshaw's application to adjourn the trial in order to permit it to amend its pleadings to include the claims was dismissed. For this reason, much of the evidence that Okinshaw sought to adduce on these issues was ruled inadmissible. While Okinshaw and Mr. Rutherford no doubt feel hard done by and believe that they were in effect "robbed" of the Property, the reality is, as established by the evidence, that Okinshaw failed to pay the purchase price when required by the Contract and thus forfeited any claim to the Property.

Damages

[98] As noted above, the Marrellos claim damages in the amount of \$232,000, which is comprised of \$680,000 for the equipment removed by Okinshaw plus \$67,200 in foregone rent for the duplexes during the period in which Okinshaw remained in possession of the Property, less the \$515,000 already received from Okinshaw (\$425,000 paid on May 31, 2013 and nine payments of \$10,000 per month paid pursuant to the Amendment from December 2013 to August 2104).

[99] There are a number of difficulties in the Marrellos' quantification of their damages.

[100] With respect to the equipment claim, it ignores the fact that they expressly agreed to transfer title in the equipment to Okinshaw in exchange for the payment of \$425,000 on May 31, 2013 (see para. 91 above). It is not open to the Marrellos to now claim damages for the loss of that equipment, having already transferred title to Okinshaw.

[101] Further, there is no admissible evidence before the court about the value of the equipment. The Marrellos simply rely on the \$680,000 value assigned to the equipment in the Contract, however as they themselves submitted in response to Okinshaw's misrepresentation claim, the values in the contract are "are actually statements of opinion or estimates and are not

statements of existing fact". Moreover, the nominal values set out in the Contract belie the evidence of the Marrellos' own witnesses, for example Mr. MacKinnon, who testified that the equipment in the bottling facility was in poor condition.

[102] The Marrellos have not established that they suffered any loss as a result of Okinshaw removing the equipment.

[103] With respect to the claim for foregone rent, the Marrellos testified that they could expect to rent the duplexes on the Property for \$1,400 per month each, or \$2,800 in total. However, they provided no evidence about the rental market in the area or the availability of possible tenants.

[104] Further, the Marrellos' calculation of their damages does not include the \$75,000 deposit paid by Okinshaw. While that deposit was forfeited to the Marrellos when Okinshaw failed to complete, pursuant to clause 3.1 of the Contract, it must still be accounted for.

[105] When the deposit is factored in, it is apparent that Okinshaw paid a total of \$590,000 to the Marrellos. Considering that they subsequently re-sold the Property for \$4 million, the same price as set out in the Contract, it is clear that they more than mitigated any damages they might have suffered.

Conclusion

[106] The Marrellos have established that Okinshaw breached the Contract by failing to pay \$1.5 million on May 31, 2014 however they have failed to prove any damages. Their claim is therefore dismissed.

[107] Okinshaw has failed to establish that the Marrellos made negligent misrepresentations or breached the Contract and its counterclaim is also dismissed.

[108] The Marrellos are entitled to an order releasing the \$600,000 in security currently held in trust by their solicitor.

[109] As success has been divided, the parties will bear their own costs.

"Skolrood J."

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