
CANADA / JUDGMENT

Nelson v. Gokturk

2021 BCSC 813

COURT

Supreme Court of British Columbia

DECIDED

30 April 2021

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2021 BCSC 813 Nelson v. Gokturk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nelson v. Gokturk,

2021 BCSC 813

Date: 20210430

Docket: No. S1911912

Registry: Vancouver

Between:

Scott Nelson

Plaintiff

And

Michael Gokturk

Defendant

Corrected Judgment: The content of these Reasons for Judgment has been further corrected on May 12, 2021.

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for the Plaintiff:

M.P. Good

The Defendant:

No appearance

Written submissions filed by the Plaintiff:

March 31, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 30, 2021

I. Introduction

- [1] The plaintiff applies for summary judgment under Rule 9-6 of the Supreme Court Civil Rules [Rules] and, alternatively, for summary trial under Rule 9-7. The matter is before me by way of written submissions pursuant to COVID-19 Notice #14. The defendant was duly served, but has not responded to the application.
- [2] The plaintiff claims for breach of contract and conversion regarding his sale and delivery of 50 bitcoins to the defendant.
- [3] The sale price was \$535,000. As of February 16, 2021, the 50 bitcoins were worth \$3,084,393 on the open market.
- [4] The central issue is the amount of damages. The plaintiff seeks judgment in the amount of \$3,084,393 or, alternatively, \$535,000 (plus interest under the Court Order Interest Act, R.S.B.C. 1996, c. 79 and costs).

II. Background

- [5] The notice of civil claim was filed on October 22, 2019. The defendant filed a response to civil claim on January 6, 2020.
- [6] The defendant was represented by counsel until November 2020, when his counsel withdrew. The defendant has not responded to communications from plaintiff's counsel since his counsel's withdrawal. He failed to attend an examination for his discovery in December 2020.
- [7] The application before me is supported by the plaintiff's affidavit evidence and by admissions under notices to admit.
- [8] In the notice of civil claim, the plaintiff also sought restitution or disgorgement under the doctrine of unjust enrichment. That claim is not pursued on this application. The plaintiff also sought punitive damages, but is not pursuing that claim either.

III. Facts

- [9] Bitcoin (or "BTC") is a form of cryptocurrency. A cryptocurrency is a digital asset that is designed to function as a medium of exchange using strong cryptography to secure financial transactions, control the creation of additional units, and verify the transfer of assets.
- [10] BTC are stored in digital "wallets", and they can be traded or sold for Canadian dollars ("CAD").
- [11] The plaintiff holds and trades BTC.
- [12] In 2019, the defendant was involved in trading cryptocurrency.
- [13] The plaintiff and defendant were introduced by a mutual acquaintance. On each of April 24, April 30, and May 31, 2019, the defendant agreed to buy, and the plaintiff agreed to sell, BTC. The defendant duly paid the plaintiff for the BTC provided in these transactions.
- [14] On June 7, 2019, the defendant contacted the plaintiff to inquire about buying between 25 and 50 BTC from him. A series of messages were exchanged using the Signal messaging application:

At 8:50 am, Gokturk wrote "Morning Scott, let me know if you have any interest in selling 25-50 BTC today".

At 8:52 am, Nelson wrote "Could do. What price are you offering for 25?"

At 8:52 am, Nelson wrote "And for 50??"

At 8:52 am, Gokturk wrote "10,500 could do 10,600 for 50".

At 9:43 am, Gokturk wrote "10700?"

At 9:46 am, Nelson wrote "Checking... Sec"

At 9:47 am, Gokturk wrote "done".

At 9:47 am, Nelson wrote "Yes can sell 50 at 10700".

At 9:48 am, Gokturk wrote "Yessir. Can do wire as well if you prefer due to size."

At 9:48 am, Nelson wrote "Bank draft?"

At 9:48 am, Gokturk wrote "Usual wallet: 3B5Djh4xNLFcTMdwEsWYoYdlGGSYrNorbg".

At 9:49 am, Nelson wrote "Will take me 30 minutes to transmit as I'm out at the moment".

At 9:50 am, Nelson wrote "Will send Wire instructions".

At 9:50 am, Gokturk wrote "Ok".

At 10:09 am, Nelson wrote "Here is what you need to send the wire to me" and attached a PDF document titled "Vancity_Wire_account.pdf".

At 10:10 am, Nelson wrote "Sending 50BTC to the above address in exchange for \$535,000CAD".

At 10:12 am, Gokturk wrote "Got it, setting up."

- [15] By this exchange, the parties agreed that the plaintiff would sell and the defendant would buy 50 BTC at the price of \$10,700 CAD each, for a total price of \$535,000 CAD, due upon closing (the "Contract"). The amount owing under the Contract was payable by wire transfer.
- [16] The plaintiff transferred 50 BTC to the defendant's BTC wallet shortly after the Contract was concluded. At 10:20 a.m. on June 7, 2019, the defendant acknowledged receipt: "BTC received! Thank you. Wire is being set up right now. Will send you confirmation."
- [17] The defendant has never paid the plaintiff under the Contract. He has also never returned any of the 50 BTC delivered to him back to the plaintiff.
- [18] The defendant has, however, acknowledged the debt under the Contract. On August 30, 2019, he wrote the plaintiff saying:

None of this is your problem and I owe you what I owe you.

Keep these text messages and email records as proof. I am sorry I have been avoiding you. This has been the absolute worst year of my entire existence. These are not excuses, I just don't know what to tell you besides the truth.

- [19] The BTC market was on the rise. By December 2, 2020, 50 BTC were worth \$1,242,322.50 on the open market. As of February 16, 2021, 50 BTC were worth \$3,084,393.15.
- [20] The plaintiff does not know whether (and if so, when) the defendant sold the 50 BTC, or whether the defendant still has some or all of the BTC in his possession. As already noted, the defendant failed to attend for examination for discovery.
- [21] In his response to civil claim, the defendant asserts that the plaintiff contracted with the defendant's company, Einstein Exchange, and not with the defendant.
- [22] The plaintiff denies signing an agreement with Einstein Exchange. The defendant has produced no written contract with Einstein Exchange. Nothing in the parties' message exchanges in evidence suggests the involvement of Einstein Exchange as a party.

IV. Decision

- [23] I am able to find the facts necessary, on the record before me, to determine the claim by summary trial under Rule 9-7(15).
- [24] I find the Contract exists, that its terms are as outlined above, and that it is a contract directly between the plaintiff and defendant. There is no evidence to support the defendant's assertion that Einstein Exchange was party to the Contract.
- [25] The plaintiff delivered the 50 BTC to the defendant on June 7, 2019, and the defendant has wrongfully breached the Contract in failing to pay the \$535,000 required by its terms.

[26] I accept the plaintiff's evidence that at no time since his delivery of the 50 BTC to the defendant's BTC wallet, have any BTC been returned to his possession.

A. Breach of Contract

[27] The elements of the cause of action are a contract and a wrongful breach of it. There has patently been a breach of Contract by the failure to make payment.

[28] As noted in *Peak Real Estate Marketing Ltd. v. 697604 B.C. Ltd.*, 2009 BCSC 634:

[26] The usual measure of damages for breach of contract is what is required to put the innocent party in the same position as though the contract had been carried out (*Robinson v. Harman* (1848), 1 Ex. 850 at 855, 154 E.R. 363; *Haack v. Martin*, [1927] S.C.R. 413 at 419, [1927] 3 D.L.R. 19).

[29] The law relating to the date of assessment for damages for breach of contract is as summarized by Justice Sigurdson in *De Cotiis v. Viam Holdings Ltd.*, 2009 BCSC 692:

[75] What is the general rule for the date for assessing damages for breach of contract?

[76] In *Mavretic v. Bowman* (1993), 76 B.C.L.R. (2d) 61 [C.A.], 23 B.C.A.C. 298, Madam Justice Proudfoot, for the majority, succinctly summarized the general rule at para. 9:

[9] In my view, the authorities seem to support the proposition that the normal or usual approach is to assess damages as at the date of the breach unless there are circumstances existing that make the assessment at that date inappropriate.

[77] What is the date of the breach?

[78] The plaintiffs were kicked out of the business by the end of 1991, and by early 1992 there was litigation. The breach of the agreement, I find, was by early January 1992. The date of the breach is also relevant to the fixing of the start date for the running of pre-judgment interest, which I will deal with shortly. If that is the date of the breach, or shortly thereafter, should another date be fixed by the Court to assess damages? Is there flexibility in fixing the date? In other words, should the Court fix another date in order to properly assess damages in this case?

...

[88] In *Mavretic v. Bowman* the court described the general rule and the court's authority to fix another date to avoid an injustice:

[7] In *Johnson v. Agnew*, [1980] A.C. 367, [1979] 1 All E.R. 883, [1979] 2 W.L.R. 487 at 489 (H.L.), Lord Wilberforce had earlier made these comments:

The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach, a principle recognised and embodied in s. 51 of the Sale of Goods Act 1893. But this is not an absolute rule; if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

[8] In a later judgment, Anderson, J.A. in *Ansdell v. Crowther* (1984), 34 R.P.R. (B.C.C.A.) referred to the normal rule when he made reference to the judgment of Megarry, J. in *Wroth v. Tyler*, [1974] Ch. 30, [1973] 1 All E.R. 897:

It was common ground that the normal rule is that the general damages to which a purchaser is entitled for breach of a contract for the sale of land are basically measured by the difference between the contract price and the market price for the land at the date of the breach, normally the date fixed for completion.

[30] The plaintiff says that due to the defendant's failure to participate in examination for discovery, it is unknown as to whether he retains the delivered BTC or sold it, in whole or part, at some intervening point in time. The plaintiff submits that it would work an injustice to deny him the benefit of the precipitous rise in BTC value since June 2019, and asks the Court to assess the damages for breach at present market value and in the amount of \$3,084,393.15.

[31] The breach occurred on June 7, 2019, when the defendant failed to pay on delivery. The damages at the date of breach equalled the contracted amount of \$535,000. On June 7, 2019, \$535,000 may have been the value of 50 BTC on the open market--or it may have been more, or it may have been less.

[32] In the circumstances, using the date of breach to assess the damages puts the plaintiff in the position he would have been in had the Contract been fulfilled.

[33] The fact that BTC is worth more now than it was at the time of the Contract does not result in an injustice.

[34] BTC is a currency: both parties were well aware that 50 BTC could be worth more or less than the Contract amount on the open market within a short time of the exchange. That expectation was - and generally is with regard to currency trading as a commodity transaction - the animating reason for entering into the transaction at all. The parties' positions entering the Contract reflected their respective assessments of which form of currency it would be of benefit to have in hand as of June 7, 2019. That the defendant turned out to have held the better hand by date of trial is not sufficient to cloak his breach of contract with an air of oppression or injustice: *Mavretic v. Bowman* (1993), 76 B.C.L.R. (2d) 61 (C.A.) at para. 13.

[35] I am satisfied that the date of breach is the appropriate date for the assessment of damages.

B. Conversion

- [36] The elements of conversion were summarized by Justice Savage (as he then was) in *Stelmaschuk v. Lui*, 2013 BCSC 765 as follows:
- [30] The tort of conversion requires the wrongful taking, using or destroying of goods or the exercise of control over them in a manner which is inconsistent with the title of the owner. There must be an intentional exercise of control over the right of the true owner: see the decision of Rouleau J. in *Shibamoto & Co. v. Western Fish Producers*, [1991] 3 F.C. 214 at para. 25, followed by Sewell J. in this court in *Jarvie v. Banwait*, 2013 BCSC 337 at para. 45.
- [31] Clerk & Lindsell on Torts, 20th Edition, at page 1115 lists seven principal ways in which conversion can occur: (1) when property is taken or received by someone who is not entitled to take it or receive it; (2) when property is wrongfully parted with; (3) when it is lost by a bailee in breach of the duty to the bailor; (4) when property is wrongfully sold; (5) when property is wrongfully retained; (6) when property is wrongfully misused or destroyed; and (7) when access by the owner of property is wrongfully denied. The learned authors do not suggest this is a closed list, but the circumstances here do not require any different analysis.
- [37] The plaintiff asserts that title never passed to the defendant because he did not meet the terms of the Contract. I will assume, without deciding, that the plaintiff can establish the tort of conversion regarding the delivered BTC. Unless the plaintiff would receive increased damages by claiming in tort rather than contract, there is no benefit in advancing alternative claims.
- [38] Under the tort of conversion, the plaintiff must prove the value of the goods converted to establish the damages suffered: *Stelmaschuk* at para. 35. The plaintiff has put in evidence that the at-trial market value of 50 BTC is \$3,084,393, and he seeks that amount in damages.
- [39] The long-established starting point for damages in conversion is the date of conversion: see, for example, *R.F. Fry & Associates (Pacific) Ltd. v. Reimer* (1993), 83 B.C.L.R. (2d) 199 (C.A.). There, Chief Justice McEachern, writing for the Court, stated as follows:
- [23] Conversion is any wrongful interference with chattels which is inconsistent with the rights of the owner. Conversion is distinguished from detinue which is a wrongful failure or refusal to deliver up someone's property upon demand being made. Generally speaking, damages are assessed for conversion as of the date the property is taken, and at the date of the trial for detinue: *Asamera Oil Corp. v. Sea Oil and Gen. Corp.*, [1979] 1 S.C.R. 633 at pp. 652 and 653. The theory of the law is that in conversion the owner is deprived of property and its value at that date is the proper measure of damages. In detinue, on the other hand, the law assumes the owner can obtain replacement chattels for their then value at the date of non-delivery. In addition, consequential damages are often awarded according to the circumstances of the case.

[24] The leading authority is *Solloway v. McLaughlin*, [1938] A.C. 247 (P.C.), which was a case of fraudulent conversion by a broker where the market value declined after the conversion. In giving the opinion of the Board, Lord Atkin said at p. 247:

If the shares had been converted and not returned there can be no question that the client would have been entitled to receive the proceeds of the conversion though he himself had planned and thought he had succeeded in holding the shares until a time when the value was nothing...

[25] In *Asamera Oil Corp. v. Sea Oil and Gen. Corp.*, [1979] 1 S.C.R. 633 at pp. 652-53, Esty J. writing for the Court, said:

In conversion, the measure of damages had been said to be the value of the shares at the date of conversion, and in addition, consequential damages represented by the loss of the opportunity to dispose of the shares at the highest price attained prior to the end of trial.

[Emphasis added.]

[40] For the same reasons set out above in relation to damages for breach of contract, there are no compelling reasons to depart from the usual tort rule here. Nor is there evidence here to support a claim for additional consequential loss.

[41] The damages are the same here whether awarded in tort or contract, which is unsurprising given the nature of the claims. As noted in *Royal Bank of Canada v. W. Got Associates Electric Ltd.*, [1999] 3 S.C.R. 408:

[25] Where a claim is made for the same wrongful acts under different heads of liability, compensatory damages will generally be similar, subject to adjustment for the particular wrong targeted by a particular cause of action. This position was clearly stated in *BG Checo [International Ltd. v. British Columbia Hydro and Power Authority]*, [1993] 1 S.C.R. 12], where a majority of this Court held, at p. 38, that:

In situations of concurrent liability in tort and contract, however, it would seem anomalous to award a different level of damages for what is essentially the same wrong on the sole basis of the form of action chosen, though, of course, particular circumstances or policy may dictate such a course.

In this case, there are no special features which call for different damages for contract and tort. The conversion action is concerned with damages for the appropriation of goods; the breach of contract action is concerned with damages for the same wrong. Therefore, compensatory damages in this case are the same. The trial judge did not err in assessing damages for conversion. It follows that in considering this matter on the basis of contract, there is no reason to interfere with the trial judge's determination or to send the matter back for reassessment.

[Emphasis added.]

[42] That being the case, there is no need to further consider the merit of the conversion claim: *Royal Bank of Canada*, at paras. 22-24.

V. Disposition

[43] The plaintiff's application for summary trial is granted, with orders in favour of the plaintiff against the defendant for breach as contract as follows:

- a) judgment in the amount of \$535,000 (CAD);
- b) interest under the Court Order Interest Act, running from June 7, 2019; and
- c) costs.

"Tucker J."

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