
CANADA / JUDGMENT

Roy v. Kretschmer

2014 BCCA 429

COURT

British Columbia Court of Appeal

DECIDED

7 November 2014

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2014 BCCA 429 Roy v. Kretschmer

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Roy v. Kretschmer,

2014 BCCA 429

Date: 20141107

Docket: CA040482

Between:

Richard Roy and Diane Roy

Respondents

Appellants on Cross Appeal

(Plaintiffs)

And

Dennis Kretschmer

Appellant

Respondent on Cross Appeal

(Defendant)

And

1216393 Ontario Inc.

Respondent on Cross Appeal

(Defendant)

Before:

The Honourable Mr. Justice Chiasson

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Groberman

On appeal from: An order of the Supreme Court of British Columbia,
dated November 23, 2012 (Roy v. 1216393 Ontario Inc., 2012 BCSC 1752,
Kelowna Registry 76210).

Counsel for the Appellant and for
the Respondent on Cross Appeal:

D.J. Taylor and S.K. Sheena-Nakai

Counsel for the Respondents:

J.G. Hardwick

Place and Date of Hearing:

Vancouver, British Columbia

September 2, 2014

Place and Date of Judgment:

Vancouver, British Columbia

November 7, 2014

Written Reasons by:

The Honourable Mr. Justice Chiasson

Concurred in by:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Groberman

Summary:

The appellant, Dennis Kretschmer, represented 1216393 Ontario Inc. (the "vendor") in the sale to the respondents of a lot in a project on a lake near Vernon, B.C. in the summer of 2005. The sale was to complete after a subdivision plan for the project was approved and registered in the Land Title Office. The contract contained a provision limiting any damages payable by the vendor to the return of the respondents' deposit. The lot previously had been sold to other purchasers, the

Adams, but in July 2004, the vendor cancelled that transaction. The Adams advised that they did not agree the vendor had that right and in January 2005 noted on the cheque returning their deposit that it was cashed under protest. Mr. Kretschmer did not tell the respondents about the Adams' position. In January 2006, the subdivision plan was registered, but the respondents were not told that this had occurred and were not told the Adams had filed a certificate of pending litigation against the lot. Mr. Kretschmer advised them that the vendor was still having difficulty obtaining subdivision approval. The respondents learned the true facts in January 2007. The court ordered specific performance of the Adams' contract. The vendor could not complete the sale to the respondents. They sued the vendor for breach of contract and Mr. Kretschmer for deceit. The trial judge found Mr. Kretschmer liable in deceit and dismissed the claim against the vendor based on the limitation of liability provision. She awarded damages against Mr. Kretschmer of the difference in the value of the lot from August 2005 to January 2007. Mr. Kretschmer appealed and the respondents cross appealed.

Held: cross appeal allowed and the case remitted to the Supreme Court to assess damages based on the value of the lot as of the end of January 2007. The operative time for both the breach of contract and deceit claims was January 2006. The breach and tort were ongoing. In January 2007, the respondents were entitled to the lot or its value. In this case, damages for the vendor's breach and Mr. Kretschmer are the same. The conduct of Mr. Kretschmer on behalf of the vendor was egregious and went directly to the contractual obligations of the vendor. The exclusion clause should not be enforced.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

- [1] This is the second appeal in this most unfortunate case. At issue is a consideration of the timing of a breach of contract and the tort of deceit and the implications of a clause limiting contractual liability.

Background

- [2] The appellant, Dennis Kretschmer, is the developer of a real estate project on Kalamalka Lake which is south of Vernon, British Columbia. Strata lots in the development were sold by the respondent on cross appeal, 1216393 Ontario Inc. (the "vendor").
- [3] On September 10, 2003, Lot 33 in the development was sold by the vendor to Mr. and Mrs. Adams. They paid a deposit. The contract of purchase gave the vendor the right to cancel the contract if subdivision approval was not obtained by a specified date. On July 15, 2004, counsel for the vendor wrote to the Adams cancelling their contract, asserting this was done pursuant to the vendor's contractual right. In fact, the cancellation was out of time. The real reason was that the Adams had attempted to sell Lot 33 on the Internet, that is, to "flip" it.
- [4] On July 21, 2004, Mr. Adams responded, stating:

I am writing on behalf of my wife, Roxana Adams and myself regarding your letter dated July 15, 2004. We still want our transaction for lot #33 to go through. During the past year we received a number of promises when title could be registered. We have been patiently awaiting that event while regularly maintaining contact with the Vendor. It is my understanding that title will be registered very soon.

Based on promises made throughout this past year we believe that our agreement is valid and enforceable. If the Vendor persists in pursuing cancellation of our agreement then you will be hearing from our lawyer.

- [5] The Adams' deposit was returned. They cashed the cheque on January 21, 2005. While nothing further was heard from them until they apparently sued the vendor in December 2005, the trial judge found that in the autumn of 2005, Mr. Kretschmer knew that the Adams protested the cancellation of their contract. He did not tell the respondents this was the case. The Adams filed a certificate of pending litigation ("CPL") against Lot 33 in January 2006.
- [6] The respondents were acquainted with Mr. Kretschmer. In early 2004 they became interested in the development. Also in 2004, Mr. Kretschmer told them that Lot 33 was available. The judge found that the respondents were told that Lot 33 was on the market because the contract with the prior purchasers had been cancelled because they attempted to sell the lot on the Internet. The parties came to an oral understanding that the respondents would purchase Lot 33 for \$184,700 in the spring or summer of 2004. Subsequently, on March 7, 2005, the respondents sold their family home.
- [7] In July 2005, the respondents signed a contract to purchase Lot 33 from the vendor. It contained the following relevant provisions:

1.2 Payment of the Deposit by the Vendor's Solicitor: In respect of the Deposit, the Vendor's Solicitor is authorized:

(b) unless precluded by Court order, to shall [sic] pay the Deposit:

(iii) to the Purchaser as liquidated damages and as the Purchaser's sole remedy without further recourse against the Vendor, if the purchase and sale contemplated by the Agreement is not completed by reason of the Vendor's default hereunder;

and

2.1 Completion Date: The completion of the purchase and sale of the Strata Lot will take place on the date (the "Completion Date") to be specified by the Vendor which is not less than 10 business days after the day the Vendor or the Vendor's Solicitor notifies the Purchaser or the Purchaser's Solicitor that the Strata Plan has been or, is expected to be fully registered in the Land Title Office prior to the Completion Date.

- [8] The subdivision plan was approved in December 2005 and registered in mid- January 2006. The respondents were not advised that the plan was registered and were not told that the Adams had sued and filed a CPL. Mr. Kretschmer told them the vendor could not complete because there were difficulties with obtaining subdivision approval.
- [9] In January 2007, the respondents learned that the subdivision had been approved and learned of the Adams' litigation. Mr. Kretschmer assured them that the Adams' claim would be dismissed. The respondents decided to wait and see what transpired.
- [10] In July 2007, the respondents sued the vendor and Mr. Kretschmer. Initially, Mr. Kretschmer was named as a defendant because he had filed a caveat against the property. A claim in deceit against him was added in April 2009.
- [11] In April 2011, Mr. Justice Josephson allowed the claim against the vendor and dismissed the action against Mr. Kretschmer on the basis that the respondents had not established reliance. This Court set the judgment aside.
- [12] This Court concluded that the trial judge had not undertaken the appropriate analysis of clause 1.2(b)(iii) of the contract which Mr. Justice Tysoe characterized as having the effect of an exclusion of liability clause because it entitles the respondents only to the return of their own deposit money. The respondents' cross appeal was allowed because the trial judge impermissibly imposed the burden of establishing reliance on the respondents.
- [13] Two subsequent trials were aborted.
- [14] The trial judge in the present appeal held Mr. Kretschmer liable for deceit and awarded the difference in the value of Lot 33 from August 2005 to January 2007 as damages. She concluded that clause 1.2(b)(iii) should be enforced and dismissed the claim against the vendor.
- [15] Mr. Kretschmer appeals the finding against him; the respondents cross appeal the dismissal of the claim against the vendor.

Trial Reasons

- [16] The trial judge reviewed the very lengthy course of dealings between the parties. She noted, at para. 24, that in a previous ruling she held that the vendor and Mr. Kretschmer were:

precluded from re-litigating and calling evidence to contradict the findings of the court [in a previous action] and that by mid-August 2005 [the vendor and Mr. Kretschmer] knew that approval of the subdivision plan by the District of Lake Country was imminent and, at the same time, Mr. Kretschmer misrepresented the truth to the purchasers [in the previous action] by advising them that the vendors could not proceed with their contracts due to government delay in the subdivision approval process.

She limited the scope of the ruling to original purchasers.

[17] The judge did admit evidence of other potential purchasers as similar fact evidence in the context of her consideration of the credibility of Mr. Kretschmer. While acknowledging there were inconsistencies, the judge preferred the evidence of the respondents.

[18] At para. 112, the judge stated:

Accordingly, I accept the plaintiffs' evidence that prior to January 2007 they had no knowledge of the Adams' claim to Lot 33; that prior to this date and, after the plaintiffs entered into the contract, Mr. Kretschmer falsely represented that the delay in completion of their contract was due to the District's failure to approve the subdivision plan when he knew this to be untrue; that Mr. Kretschmer falsely represented that the subdivision plan had not been registered when he knew that it had been in January 2006; that Mr. Kretschmer falsely represented that completion of their contract was delayed due to litigation with the District when he knew it was the Romfo Action that held up completion; and that Mr. Kretschmer fraudulently led the plaintiffs to believe that their contract was secure when he knew that the Adams had made a competing claim for ownership of Lot 33.

These findings track the allegations in the amended statement of claim.

[19] The judge addressed the law of deceit at para. 113:

In an action for deceit it is well established that the plaintiffs must prove on a balance of probabilities that Mr. Kretschmer made a false representation knowing that it was false; that he intended to deceive the plaintiffs by making the false statement; and that the false statement induced the plaintiffs to act to their detriment. In regard to the last element of the tort, the Court of Appeal concluded in *Sidhu Estate [v. Bains]*, [1996] 10 W.W.R. 590, 25 B.C.L.R. (3d) 41 (C.A.) at paras. 36 and 42, that the plaintiff is not required to prove the false statements were the sole inducement but only a material factor; and, further, once the intentional nature of the false statements, materiality and causation of the loss are proven, the burden of proof regarding non-reliance shifts to the defendant. The shifting of the burden of proof in these circumstances was confirmed by the Court of Appeal in this action: *Roy* [2011 BCCA 500] at paras. 38-39.

[20] She concluded that Mr. Kretschmer deceived the respondents and stated at para. 115:

In addition, I find the false representations regarding Lot 33 were a material factor behind the plaintiffs' decision to continue waiting to be notified of their completion date instead of seeking an alternate property on which to build their home. In my view, had the plaintiffs been advised of the true facts in the fall of 2005, it is highly likely they would have abandoned their contract and taken steps to find a comparable property before the market values had increased beyond the point that they could afford to do so.

[21] The judge noted at para. 17 that because the respondents had established false representation, materiality and causation of loss, "the burden shifts to Mr. Kretschmer to show that the [respondents] did not rely on his false representations to their detriment".

[22] The judge stated at para. 118:

While the deceit is related to the contract, it did not induce the contract thereby presenting the [respondents] with the option to sue for breach of contract. The [respondents'] claim against the [vendor] for breach of contract is not dependent upon the deceit perpetrated upon them by Mr. Kretschmer. The breach of contract claim is based on the [vendor's] failure to complete the transaction because the property had already been sold to the Adams.

She also observed at para. 129:

The [respondents] did not sell their home based on any false representations by Mr. Kretschmer. Their claim for deceit relates solely to false representations made after the contract was signed.

[23] The judge rejected Mr. Kretschmer's assertion that the respondents' conduct, after they learned the true situation, amounted to an election to forgo an action against him for deceit. She noted that they decided to wait for the results of the Adams' action because they could not afford to purchase another property at that time. In her view, it was not evident that they would have taken this approach had they been apprised of the true facts in the autumn of 2005.

[24] The judge assessed damages for deceit at para. 131:

Accordingly, I award damages against Mr. Kretschmer in the amount of \$300,000, which is the difference in the value of Lot 33 between August 2005 and late January 2007. Further, I award damages in the amount of \$2,000 for the design drawings.

[25] The judge then turned to the breach of contract claim against the vendor and set out the positions of the parties. The vendor admitted it could not complete the transaction because the Adams obtained an order for specific performance. The vendor relied on clause 1.2(b) (iii) and contended that the respondents were entitled only to the return of their deposit. The respondents agreed that the clause was applicable but contended that they were exempt "because the contract at its inception was unconscionable and to enforce it in the circumstances would be contrary to public policy" (para. 133).

[26] The judge summarized the decision of the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, stating at para. 134:

the exclusion clause will not be valid if it was unconscionable at the time the contract was made. If the clause is not unconscionable and therefore valid at the time of contract formation, the court may nevertheless refuse to enforce the limitation of liability clause because of an overriding public policy concern.

[27] She referred to this Court's previous decision in this case stating at para. 137:

the Court of Appeal summarized the two-pronged test of unequal bargaining power and contract unfairness at para. 29:

[29] The Vendor has cited several case and text authorities discussing the elements of unconscionability. It is sufficient for our purposes to set out the following from the reasons of Madam Justice McLachlin (as she then was) in *Principal Investments Ltd. v. Thiele Estate* (1987), 12 B.C.L.R. (2d) 258 at 263, 37 D.L.R. (4th) 398 (C.A.):

Two elements must be established before a contract can be set aside on the grounds of unconscionability. The first is proof of inequality in the position of the parties arising out of some factor such as ignorance, need or distress of the weaker, which leaves him or her in the power of the stronger. The second element is proof of substantial unfairness in the bargain obtained by the stronger person. The proof of these circumstances creates a presumption of fraud which the stronger must repel by proving the bargain was fair, just and reasonable: *Morrison v. Coast Fin. Ltd.* (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.).

[28] The judge held that the respondents:

[138] cannot succeed on the first prong of the test for an unconscionable bargain. While they had no knowledge of the Adams' challenge to the cancellation of their contract when they signed the agreement, there was no inequality of bargaining positions as contemplated by the doctrine of unconscionability. To render the contract or the limitation clause invalid there must be evidence that the aggrieved party was in the control or power of the other party to the extent that their will is overborne. Typical examples include ignorance of the contract terms due to illiteracy, blindness, and senility of the weaker party. Certainly the plaintiffs had limited choices available to them. They had sold their Hillside home and were living in a basement suite. However, they understood that they could choose not to sign the contract. They had an opportunity to read the contract and there is no evidence that they misunderstood its terms or even vigorously opposed them. It was a "take it or leave it" contract and the vendors would not negotiate changes to its provisions. Nevertheless, the plaintiffs could still have walked away from the contract without any further obligation to the defendants.

[139] I am also satisfied that the plaintiffs cannot succeed on the second prong of the test for unconscionability. As Dickson C.J. says in *[Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426]* at 461, exclusion clauses are an accepted part of commercial contractual relationships. It is good business practice to contract regarding the consequences of deficient performance and, like all other terms of the contract, clauses that limit a party's liability may be reflected in the price paid by the purchaser. Without a limitation of liability clause, the defendants were at risk of substantial economic loss in the event they were unable to complete the sale. The District of Lake Country could ultimately refuse their subdivision application or the banks could decide to call their loans. This is not a case where the plaintiffs were unaware of the terms of the contract they signed.

[140] I thus find that the exemption clause was not unconscionable and is therefore valid and enforceable.

[29] The judge continued:

[141] The question remains whether the court should exercise its discretion to refuse to apply the limitation clause due to an overriding public policy concern. This discretion must be exercised rarely and only in the most egregious circumstances, which "approach criminal behaviour or egregious fraud". The public policy concerns must be clear and unambiguous and give rise to an unquestionable duty on the court to curb the abuse perpetrated by the party seeking to hide behind the limitation clause.

[30] She addressed the implications of the conduct of Mr. Kretschmer as follows:

[142] In this case, Mr. Kretschmer, as agent for the Company, withheld important information from the plaintiffs prior to the signing of the contract. At this time Mr. Kretschmer knew that the Adams had objected to the cancellation of their contract and had threatened legal action. This fact was not disclosed to the plaintiffs before they signed the contract. In my view, although Mr. Kretschmer's lack of disclosure could amount to fraud, it cannot be said that Mr. Kretschmer's conduct amounted to egregious fraud. Had the Adams commenced legal proceedings before the plaintiffs signed the contract, and Mr. Kretschmer failed to disclose this information to the plaintiffs, it would be a far more serious case of fraud warranting intervention by the courts. It is readily apparent that there are strong public policy reasons for precluding a developer from escaping liability when he knowingly sells property that is subject to litigation alleging a competing claim to ownership without disclosing this information to an unsuspecting purchaser.

[143] The more serious misconduct in this case occurred after the contract was executed. Mr. Kretschmer deceived the plaintiffs regarding his inability to complete the transaction throughout the balance of 2005 and 2006. Again, although serious misconduct, Mr. Kretschmer's actions do not approach criminal behaviour or constitute egregious fraud. His conduct is not of the same nature or quality as the examples used by Binnie J. in *Tercon* at paras. 118-119 to illustrate situations in which the court would refuse to apply a limitation clause.

[31] The judge stated at para. 144:

The court cannot routinely exercise its discretion to exempt an innocent party from a clause such as 1.2(b) where there has been fraud in the inception of a contract or in its breach. This discretion must only be exercised in the rarest of cases to reflect the importance of freedom of contract and certainty in business relationships. This is not one of those rare cases.

[32] She concluded that the vendor was entitled to rely on clause 1.2(b)(iii) and that the respondents were limited to the return of their deposit.

Discussion

Introduction

- [33] It is important to note what this case is not about: it is not about pre-contract misrepresentation. The respondents did not allege pre-contract misrepresentation. The judge found specifically that they did not enter the contract as a result of a misrepresentation and that their claim arose only out of post-contract conduct.
- [34] It is not apparent on the pleadings that the respondents claimed against the vendor for deceit. The case has proceeded throughout on the basis that the claim for deceit is against Mr. Kretschmer only. The implications of his conduct on the liability of the vendor are raised only in the context of the enforceability of clause 1.2(b)(iii).
- [35] Completion was to take place on a date to be specified by the vendor which was not less than 10 days after the day the vendor notified the respondents that the subdivision plan was or was expected to be registered. The vendor had control of the registration. In my view, it had an implied contractual obligation to inform the respondents when the plan was registered and, of course, a specific obligation to complete.
- [36] As noted, clause 1.2(b)(iii) was described by Mr. Justice Tysoe as an exclusion of liability provision in its operation. The sole basis on which the respondents attack the enforceability of the clause is that the clause is against public policy.
- [37] Based on a finding in previous litigation, the judge was satisfied that in the summer of 2005, Mr. Kretschmer told prospective purchasers that subdivision approval was "imminent". In my view, little turns on this. Approval occurred four or five months later in December 2006. The battle for subdivision approval had been ongoing for many years.
- [38] The trial judge also took into account comments Mr. Kretschmer made to other prospective purchasers who testified at the trial in this action. These comments were introduced as similar fact evidence.
- [39] It is difficult to draw any legal conclusions in this case from Mr. Kretschmer's comments to other purchasers, but the trial judge was entitled to take them into account in assessing his credibility. I add that even if the similar fact evidence was excluded, it clearly was open to the judge to prefer the evidence of the respondents over that of Mr. Kretschmer. She gave extensive reasons for so doing.
- [40] The trial judge based her finding of deceit by Mr. Kretschmer on the fact that he did not disclose the existence of a claim to the property by the Adams to the respondents and that he "falsely represented that the delay in completion of their contract was due to the District's failure to approve the subdivision plan when he knew this to be untrue" (at para. 112).

- [41] The initial representations to the prospective purchasers were pre-contractual. Whether approval was imminent was not relevant to the respondents. Their contract would not complete until at least 10 days after the day they were notified that the plan was registered or was expected to be registered in the Land Title Office. The respondents took the risk of the implications of a rising market from the date of contracting to the date of completion.
- [42] Even after the contract was formed, until December 2005, any representation by Mr. Kretschmer that the vendor could not complete because the subdivision plan was not approved was correct. The lack of approval prevented completion. The position of the Adams did not. Their position prevented completion only when they filed a CPL in January 2006.
- [43] From when the CPL was filed until the subdivision plan was registered - also in mid-January 2006 - there were two reasons the vendor could not complete: the absence of registration and the CPL. Until the subdivision plan was registered, the Adams' CPL was irrelevant legally; the vendor was not obliged to complete.

Contract

- [44] Once the subdivision plan was registered, Mr. Kretschmer's representation that the vendor could not complete due to problems with subdivision approval was false. The vendor was in breach of contract because it failed to inform the respondents of the registration and failed to take steps to complete. The respondents are entitled to be put into the same position they would have been in had they been told that the subdivision plan was registered in January 2006.
- [45] There is no doubt that had the respondents been told that the subdivision plan was registered, they would have pressed for completion. This would have revealed the CPL and the fact that the vendor could not complete. Had they known this, the respondents could have affirmed the contract and insisted on completion or accepted the vendor's breach, terminated the contract and sued for damages. The measure of damages then would have been the value of Lot 33, less the purchase price.
- [46] In my view, the vendor's failure to tell the respondents that the subdivision plan was registered and its failure to complete were ongoing breaches of contract from January 2006 until the respondents learned the truth in January 2007. Prior to that point the respondents did not know that they were entitled to enforce their contractual rights. Subject to the enforceability of clause 1.2(b)(iii), they are entitled to be put into the same position as if the contract then had been performed. In January 2007, the respondents were entitled to Lot 33 or its value. The measure of contract damages is the value of Lot 33 as of the end of January 2007, minus the purchase price.

Deceit

- [47] In tort, the respondents are entitled to be put into the same position they would have been in had the tort not been committed. Mr. Kretschmer's deceit deprived the respondents of the option of requiring the vendor to complete the contract or electing to treat the contract as at an end and suing for damages.
- [48] Mr. Kretschmer asserts that the respondents did not rely on his deceit, that is, they would not have terminated the contract and attempted to re-enter the market because they could not afford to do so. He relies heavily on the evidence of Mr. Roy who testified that, as of the autumn of 2005, the respondents could not re-enter the market because the cost of properties had risen beyond their reach. That evidence was not consistent with the evidence of Mrs. Roy.
- [49] At trial, the judge found that had the plaintiffs been advised of the relevant information in the fall of 2005, they would likely have tried to purchase another property. Put otherwise, the judge found that the respondents' reliance on Mr. Kretschmer's false representations prevented them from abandoning their contract, and pursuing other properties:
- [115] In addition, I find the false representations regarding Lot 33 were a material factor behind the plaintiffs' decision to continue waiting to be notified of their completion date instead of seeking an alternate property on which to build their home. In my view, had the plaintiffs been advised of the true facts in the fall of 2005, it is highly likely they would have abandoned their contract and taken steps to find a comparable property before the market values had increased beyond the point that they could afford to do so.
- [116] I am also satisfied the plaintiffs have suffered a loss that was caused by Mr. Kretschmer's false representations. In particular, the plaintiffs lost the opportunity to purchase another property comparable to Lot 33 in 2005 when the prices were significantly lower. They lost the opportunity to seek legal advice with respect to their rights under the contract in a timely way. Lastly, they lost the benefit of their time, efforts and \$2,000 by committing these to design plans for a house on Lot 33 when the viability of those plans was seriously in doubt.
- [50] The conclusion that it is "highly likely" that that the respondents would have abandoned their contract had they been told of the Adams' claim in the autumn of 2005 is not consistent with the evidence of Mr. Roy. His evidence at trial suggests that prices had already risen steeply by the fall of 2005, and that the respondents would not necessarily have taken steps to purchase an alternate property even if they had learned about the Adams' looming action.
- [51] The judge also commented on the respondents' adoption of a "wait and see" approach because they could not afford to re-enter the market in January 2007 when they learned of the Adams' litigation. She observed at para. 122:

This significant change in circumstances precludes any retrospective inference that the plaintiffs would have adopted the same wait and see approach had they learned of the Adams' claim to Lot 33 in the fall of 2005. The fact they did not purchase another lot was due to their inability to afford the increased prices of property and construction. It is not [evident] that the [respondents] would have taken no different steps had they known the true facts in the fall of 2005.

This conclusion is based on the evidence of Mrs. Roy and is not consistent with the testimony of Mr. Roy.

- [52] The findings of fact of a trial judge are entitled to considerable deference, but an appellate court may intervene if it is apparent that the trial judge ignored or was misdirected in considering relevant evidence: *Van de Perre v. Edwards*, 2001 SCC 60 at para. 15. In this case, there is nothing in the reasons to suggest that the judge considered Mr. Roy's evidence and nothing to support an inference that the judge weighed the disparate evidence of Mr. and Mrs. Roy.
- [53] The proposition that the respondents would have abandoned the contract and purchased another lot does not reflect the fact that legally they were not entitled to do so.
- [54] Both respondents testified that, as of January 2007 when they learned the truth, the market was such that they could not purchase a comparable property and build their planned home.
- [55] The relevant starting date of Mr. Kretschmer's misrepresentations was January 2006. Apart from the fact that the judge's conclusion on reliance appears not to have taken into account the evidence of Mr. Roy and the respondents' legal position, there is no direct evidence of what the respondents would have done in January 2006 if they had been told that the subdivision plan was registered, but the vendor could not complete the transaction because a CPL had been registered against the property and could only do so if the claim of the Adams was defeated in court.
- [56] One could extrapolate from the evidence of the respondents that focused on the early autumn of 2005, but the message then would have been very different than it would have been in January 2006. In 2005, the respondents would have been told that in July 2004 the Adams wrote to the vendor's lawyer stating they did not accept the cancellation of their contract and that in January 2005 they cashed a cheque returning their deposit with a notation "Cashed Under Protest". Nothing further had transpired. The time for completion had not arrived. As of January 2006, the time for completion had arrived; the Adams had sued and they had filed a CPL making it impossible for the vendor to complete.
- [57] In my view, the judge's findings of fact regarding reliance cannot be sustained, but the analysis of reliance was misplaced.

- [58] The trial judge's consideration of the law of reliance was correct: the onus shifted to Mr. Kretschmer, who failed to establish non-reliance. Much was said in argument about the onus of proof of reliance. At paras. 113-114, the judge stated:
- [113] In an action for deceit it is well established that the plaintiffs must prove on a balance of probabilities that Mr. Kretschmer made a false representation knowing that it was false; that he intended to deceive the plaintiffs by making the false statement; and that the false statement induced the plaintiffs to act to their detriment. In regard to the last element of the tort, the Court of Appeal concluded in *Sidhu Estate* at paras. 36 and 42, that the plaintiff is not required to prove the false statements were the sole inducement but only a material factor; and, further, once the intentional nature of the false statements, materiality and causation of the loss are proven, the burden of proof regarding non-reliance shifts to the defendant. The shifting of the burden of proof in these circumstances was confirmed by the Court of Appeal in this action: *Roy* at paras. 38-39.
- [114] I have found that Mr. Kretschmer made false representations to the plaintiffs knowing that they were untrue at the time. Further, it is apparent that due to the nature of the false statements concerning the reason for the delay in the completion of the plaintiffs' contract, Mr. Kretschmer intended to deceive the plaintiffs as to the true state of affairs concerning title to Lot 33.
- [59] Having reviewed both *Sidhu Estate v. Bains*, [1996] 10 W.W.R. 590, 25 B.C.L.R. (3d) 41 (C.A.), and *Roy v. 1216393 Ontario Inc.*, 2011 BCCA 500, I agree with the trial judge and am satisfied that the burden of proof shifted to Mr. Kretschmer. Having been told falsely that the subdivision plan had not been registered, the respondents believed that they had no legal basis on which to require completion in January 2006. The statement was false, it was material and induced the respondents to act to their detriment (that is, not to insist on their right to completion) and loss was occasioned, in that the respondents could do nothing until they learned of the true facts.
- [60] It is clear that the respondents' inaction from January 2006 until January 2007 was based on their reliance on Mr. Kretschmer's false representations. It was because of the continuing deceit of Mr. Kretschmer that the respondents failed to consider or exercise their rights. They did not know the subdivision plan was registered and did not know that the vendor could not complete because of the CPL registered by the Adams. They relied on this state of affairs until January 2007. In my view, speculation about what they might have done had they known the true facts in the circumstances of this case is not relevant.
- [61] Although detriment was not addressed specifically in this appeal, it might be characterized as an aspect of reliance. In *XY, LLC v. Zhu*, 2013 BCCA 352, this Court considered whether carrying on under a contract until the discovery of fraud may constitute reliance and concluded that acceptance of payments under the contract on the basis of false reports was reliance for the purposes of the tort of deceit (at paras. 39 and 41). The Court also referred to *Firbank's Executors v. Humphreys* (1886), 18 Q.B.D. 54 (C.A.), as an example of reliance

through forbearance. In the present case, the respondents accepted the continuing representations of Mr. Kretschmer that there were problems with subdivision approval and did not seek to exercise their legal rights.

- [62] Mr. Kretschmer's deceit was continuing. It ended only when the respondents learned the true facts in January 2007. The respondents are entitled to be put into the position they would have been in had there been no deceit. As of January 2007, they were entitled to obtain Lot 33 or its value. Clause 1.2(b)(iii) is not relevant to the liability of Mr. Kretschmer. The measure of damages for deceit in this case is the same as it is in contract. The respondents are entitled to the value of Lot 33 as of the end of January 2007, minus the purchase price.

Clause 1.2(b)(iii)

- [63] Clause 1.2(b)(iii) is troubling conceptually. It appears to concern the deposit, but also addresses liquidated damages: two different concepts. As Tysoe J.A. noted, in its operation the clause is an exclusion of liability provision. By its nature, a deposit is returned if a vendor cannot complete. As noted by the trial judge, the respondents got nothing except the return of their own money.
- [64] The issue at trial and on appeal is whether it would be unconscionable to enforce clause 1.2(b)(iii), or if it should not be enforced on public policy grounds.
- [65] This Court in Roy addressed the basic principles applicable to considering whether an exclusion clause should be enforced:
- [21] The Supreme Court of Canada had occasion to reconsider the topic of exclusion clauses in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69. The majority of the Court held that the exclusion clause, properly interpreted, did not exclude the plaintiff's claim for damages but agreed with the analytical approach set out in the dissenting reasons of Mr. Justice Binnie and, in particular, agreed that the doctrine of fundamental breach in relation to exclusion clauses should be laid to rest (para. 62).
- [22] The analytical approach set out by Binnie J. was as follows:
- [121] The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.
- [122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of

unequal bargaining power between the parties" (Hunter, at p. 462). This second issue has to do with contract formation, not breach.

- [123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

[Emphasis in original.]

- [66] The respondents rest their cross appeal on the third ground, overriding public policy. The judge addressed their contention stating:

- [141] The question remains whether the court should exercise its discretion to refuse to apply the limitation clause due to an overriding public policy concern. This discretion must be exercised rarely and only in the most egregious circumstances, which "approach criminal behaviour or egregious fraud". The public policy concerns must be clear and unambiguous and give rise to an unquestionable duty on the court to curb the abuse perpetrated by the party seeking to hide behind the limitation clause.

- [142] In this case, Mr. Kretschmer, as agent for the Company, withheld important information from the plaintiffs prior to the signing of the contract. At this time Mr. Kretschmer knew that the Adams had objected to the cancellation of their contract and had threatened legal action. This fact was not disclosed to the plaintiffs before they signed the contract. In my view, although Mr. Kretschmer's lack of disclosure could amount to fraud, it cannot be said that Mr. Kretschmer's conduct amounted to egregious fraud. Had the Adams commenced legal proceedings before the plaintiffs signed the contract, and Mr. Kretschmer failed to disclose this information to the plaintiffs, it would be a far more serious case of fraud warranting intervention by the courts. It is readily apparent that there are strong public policy reasons for precluding a developer from escaping liability when he knowingly sells property that is subject to litigation alleging a competing claim to ownership without disclosing this information to an unsuspecting purchaser.

- [143] The more serious misconduct in this case occurred after the contract was executed. Mr. Kretschmer deceived the plaintiffs regarding his inability to complete the transaction throughout the balance of 2005 and 2006. Again, although serious misconduct, Mr. Kretschmer's actions do not approach criminal behaviour or constitute egregious fraud. His conduct is not of the same nature or quality as the examples used by Binnie J. in *Tercon* at paras. 118-119 to illustrate situations in which the court would refuse to apply a limitation clause.

- [67] In *Tercon*, Mr. Justice Binnie stated:

- [120] Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. In the present case, for the reasons discussed below, I do not believe Tercon has identified a relevant public policy that fulfills this requirement.
- [68] After referring to an extreme situation, Binnie J. provided a further example of where an exclusion clause was not enforced:
- [119] A less extreme example in the commercial context is *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650. The Alberta Court of Appeal refused to enforce an exclusion clause where the defendant Dow knowingly supplied defective plastic resin to a customer who used it to fabricate natural gas pipelines. Instead of disclosing its prior knowledge of the defect to the buyer, Dow chose to try to protect itself by relying upon limitation of liability clauses in its sales contracts. After some years, the pipelines began to degrade, with considerable damage to property and risk to human health from leaks and explosions. The court concluded that "a party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause" (para. 53). (See also *McCamus*, at p. 774, and *Hall*, at p. 243.) What was demonstrated in *Plas-Tex* was that the defendant Dow was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court. The public policy that favours freedom of contract was outweighed by the public policy that seeks to curb its abuse.
- [69] In *Niedermeyer v. Charlton*, 2014 BCCA 165, this Court considered the effect of *Tercon*. Madam Justice Garson observed at para. 76, "the Court rejected the notion that the heads of public policy were closed to all but those well recognized in the jurisprudence". She continued at paras. 77 and 79:

The examples given in *Tercon* illuminate the high threshold a party must meet in order to defeat an otherwise valid exclusion clause. A court should not allow the party responsible to escape civil liability simply because the relevant contracts included waiver clauses. Binnie J. made clear that the conduct resulting in a breach of contract 'need not rise to the level of criminality or fraud to justify a finding of abuse' the Court recognizes in *Tercon* that the nature of the breach or the contract itself could give rise to a public policy interest capable of overriding freedom of contract.

[Emphasis in original.]

[70] In my view, the judge erred in stating that the conduct must "approach criminal behaviour of egregious fraud". In fact, Binnie J. stated that the scenarios he outlined were "but examples" and that:

the contract breaker's conduct need not rise to the level of criminality or fraud to justify a finding of abuse.

[71] Although not strictly following a Tercon framework, a number of courts have refused to enforce limitation clauses for reasons not approaching criminal behaviour or egregious fraud.

[72] In *Solway v. Davis Moving & Storage Inc.* (2002), 166 O.A.C. 370, the plaintiff asked the court not to enforce a contractual clause limiting the liability of the defendant moving company. The basis of the dispute was whether the defendant should be held liable for household goods belonging to the plaintiff which were stolen while in the defendant's possession. According to the plaintiff, the defendant represented that it would provide safekeeping of the goods by parking the trailer containing the goods in a locked lot, which it failed to do. The goods were stolen. The court accepted the plaintiff's argument that the limited liability clause should not be enforced.

[73] In a fact scenario more similar to the present case, the Saskatchewan Court of the Queen's Bench chose not to enforce a limited liability clause in *Martel v. Mohr*, 2011 SKQB 161. In April 2007, the plaintiffs signed an Agreement to purchase the defendant's house. The Agreement contained a clause providing that if the vendor broke the Agreement, the buyer was entitled to the return of the deposit and the Agreement otherwise would be void. Relying on the Agreement, the plaintiffs sold their house. Later in 2007, the vendor decided to break the Agreement and the plaintiffs never took possession of the property. In ordering specific performance of the Agreement, the court held that the limited liability clause should not be enforced both because it was *prima facie* unfair and unreasonable and because, in the totality of the circumstances, it would be unfair to enforce it.

[74] The Ontario Superior Court of Justice adopted a similar approach in *Gallant v. Fanshawe College of Applied Arts & Technology* (2009), 180 A.C.W.S. (3d) 753, in choosing not to enforce a liability waiver signed by the plaintiff before her participation in a motorcycle training course. According to the court, the plaintiff signed the waiver with the understanding that the course would be taught in a safe environment with competent instruction. Instead, the course was taught in an unsafe manner. As a result, the court found that it would be unfair "in all the circumstances to give effect to this waiver and thereby exonerate the defendants from responsibility as a result of their failure to live up to the very promises they gave at the time of signing the waiver" (at para. 49).

[75] The judge noted that Mr. Kretschmer was acting as the vendor's agent when he misrepresented the situation in January 2006. That is, the vendor told them it could not complete because of subdivision approval problems and did not complete. This was fraud. It led directly to the respondents' damages. In my view, the vendor should not be allowed to hide behind the exclusion clause to avoid the effect of fraudulent conduct that masked its breach of contract and caused injury to the respondents.

[76] In my view, clause 1.2(b)(iii) is unenforceable in the circumstances of this case.

Damages

[77] Although the breaches of contract and the deceit occurred initially in January 2006, in order to put the respondents into the positions they would have been in had the contract been performed or the tort not committed, damages must reflect the value of Lot 33 as of January 2007. It is then that the rights of the respondents crystalized.

[78] The principal evidence of damages addressed the value of Lot 33 as of the date of purchase and as of November 2007. The appellant asserts that this did not allow the judge to fix the value as of January 2007. I agree.

[79] The evidence established that the value of Lot 33 changed over time and that an assessment of value was date specific. For example, concerning the value as of January 2006, the appraiser testified:

Q Would you agree with me that it would be somewhere between 220 and 250, 220,000 and 250,000, in January of 2006, even if property values were starting to very much shoot up?

A I wouldn't make that commitment to agree with you, no.

Q Well, you've had a chance --

A I would have to do another appraisal as of that effective date --

A Well, during the time period thereafter it increased, properties increased probably a hundred percent. So you can't pin it down to a particular time and say, well, it may have gone up four percent in this month and two percent in this and seven percent in that, unless you do a thorough analysis. I would have to go back to that particular piece of property and look at the information that's taken place since August up to the day you're talking about January.

Q Okay.

A Before I would commit and say yes, you're right.

Q Okay. Would you agree with me that the figure I have given, that is a figure between 220, 220,000 to \$250,000 in January of 2006 is a reasonable view of what you --

A I don't know whether that's reasonable or not without doing the work again or looking at that time.

Q Okay. Well --

A You're trying to tell me to agree with something that I have no idea without actually doing my appraisal job.

[80] In my view, it is not possible on the evidence to establish the value of Lot 33 at a time relevant to the assessment of damages.

Conclusion

[81] In my view:

1. the operative time for the initial breach of contract by the vendor and deceit by Mr. Kretschmer is mid-January 2006;
2. the vendor had a contractual obligation to inform the respondents that the subdivision plan had been registered and to complete the contract as of January 2006;
3. the vendor breached these contractual obligations by failing to do so; the breaches were continuing;
4. the respondents are entitled to be placed into the position they would have been in had there been no such breaches;
5. subject to the exclusion of liability clause, the measure of damages for the vendor's breach of contract is the value of Lot 33 as of the end of January 2007, minus the purchase price;
6. in late January 2006, the respondents were deceived by the vendor's agent, Mr. Kretschmer, telling them the subdivision plan was not registered; this was compounded by the assertion that this was because of problems with municipal authorities and by not telling the respondents that the Adams had sued and filed a CPL against title;
7. this conduct was egregious; it went directly to the contractual obligations of the vendor; the exclusion of liability clause should not be enforced; the respondents are entitled to damages for breach of contract against the vendor;
8. the ingredients of the tort of deceit are established; it was ongoing;
9. Mr. Kretschmer has the burden to establish that the respondents did not rely on his false statement and omission;
10. they clearly did so until January 2007;
11. what the respondents might have done had they known the truth is not relevant in the circumstances of this case;
12. the measure of damages for deceit is the value of Lot 33 at the end of January 2007, minus the purchase price;

13. the judge's finding on damages cannot stand because it focuses on the wrong time and is based on an appreciation of reliance that is not relevant; there is no evidence of the value of Lot 33 as of January 2007;
 14. although the respondents are entitled to damages from the vendor for breach of contract and from Mr. Kretschmer for the tort of deceit, they cannot recover in total more than the value of Lot 33 as of the end of January 2007, minus the purchase price.
- [82] I would allow the cross appeal and declare that clause 1.2(b)(iii) is unenforceable. On the appeal, I would remit this matter to the Supreme Court to assess damages based on the value of Lot 33 as of the end of January 2007 and otherwise would dismiss the appeal.

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Mr. Justice Groberman"

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Prepared on 29 October 2026 · Esheria