

CANADA / JUDGMENT

Silverhill Homes Ltd. v. Borowski

2019 BCCA 227

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 227 Silverhill Homes Ltd. v. Borowski

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Silverhill Homes Ltd. v. Borowski,

2019 BCCA 227

Date: 20190624

Docket: CA45287

Between:

Silverhill Homes Ltd. and Kanaka Creek Development Ltd.

Appellants

(Plaintiffs)

And

Rafal Borowski, Zbigniew Borowski, Borrow Investments Ltd.,

1062057 B.C. Ltd., 1062055 B.C. Ltd., Amarjit Dhindsa and Jagraj Sidhu

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia,
dated April 19, 2018 (Silverhill Homes Ltd. v. Borowski, 2018 BCSC 630,
Vancouver Docket S164281).

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Place and Date of Hearing:

Vancouver, British Columbia

May 23, 2019

Place and Date of Judgment:

Vancouver, British Columbia

June 24, 2019

Written Reasons by:

The Honourable Mr. Justice Tysoe

Concurred in by:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Harris

Summary:

The corporate plaintiffs sold their interests in a land development company by way of share purchase agreements. They commenced an action seeking to rescind the agreements on the basis that the principals of the plaintiffs signed the agreements under coercion. The trial judge did not accept the evidence of the plaintiffs' principals, finding they were not credible witnesses,

and he dismissed the action. On appeal, the plaintiffs contend the judge committed a palpable and overriding error in finding the principals were not coerced into signing the agreements. Held: Appeal dismissed. The judge gave cogent reasons why he did not find the principals of the plaintiffs to be credible and why there was a rational explanation for them to have voluntarily signed the agreements. The judge's finding that the plaintiffs' principals were not coerced into signing the agreements is entitled to considerable deference, and his conclusion was not unreasonable.

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

- [1] The trial judge in this case was required to make findings of fact in a situation where he had concerns about the credibility of all the major witnesses. He concluded that the principals of the corporate plaintiffs were not credible witnesses, and he did not accept their evidence that they signed certain documents under coercion. As a result, the judge dismissed the plaintiffs' action seeking to have the documents rescinded and claiming conspiracy by the defendants.
- [2] The plaintiffs appeal the order dismissing their action on the ground that the trial judge made a palpable and overriding error in his finding that the principals of the plaintiffs were not coerced into signing the documents.

Background

- [3] The trial judge set out the background facts in considerable detail in his reasons for judgment dated April 19, 2018 and indexed as 2018 BCSC 630. Those facts related to complicated dealings in relation to four contiguous development properties in Mission, BC. A brief summary of those facts will suffice for the purposes of this appeal.
- [4] The corporate plaintiffs are in the business of home construction. Each plaintiff is owned and operated by one principal. A man by the name of Mr. Braich owned one of the four properties and had agreements to purchase the other three properties. Mr. Braich was introduced to the principals of the plaintiffs by a lawyer, the defendant, Amarjit Dhindsa. The principal of one of the plaintiffs expressed concern about the bad name of the Braich family in the community, but Mr. Dhindsa assured the principal that there would be no problem with Mr. Braich. Mr. Dhindsa also brought in his cousin, the defendant, Jagraj Sidhu, to be involved in the development of one of the properties.
- [5] A company was incorporated under the name of 1059919 B.C. Ltd. (the "Development Company") to acquire one of the properties Mr. Braich had under contract to purchase ("Property No. 1"). Each of the plaintiffs and Mr. Sidhu were to invest \$1 million in the Development Company and, apart from a small interest to be given to Mr. Dhindsa for his efforts, the three of them were to own the shares in the Development Company equally.

- [6] The Development Company took an assignment of Mr. Braich's purchase contract for Property No. 1. In addition to setting out the purchase price for the assignment, the assignment documentation provided that the Development Company was to lend Mr. Braich the sum of \$1 million (which was referred to as "bump" money and was intended to be Mr. Braich's profit on the transaction), with the loan to be secured by a mortgage which was understood to be registered against two of the other properties Mr. Braich had under contract to purchase ("Properties Nos. 2 and 3"). Mr. Braich was responsible for obtaining a preliminary lot layout approval from the District of Mission and for submitting an application to amend the official community plan. The documentation also provided that Mr. Braich had the option to buy back Property No. 1 "for any breach of the Buyer's obligation".
- [7] The plaintiffs attempted to get financing for the development of Property No. 1 from a credit union but were declined. Mr. Dhindsa then arranged for two loans of \$500,000 each to be made to the Development Company and secured by mortgages against Property No. 1. One loan was made by a company called DevAm Holdings Ltd., and the other was made by the defendant, Borrow Investments Ltd. The latter company is owned by the defendants, Rafal and Zbigniew Borowski. In preparing the mortgages, Mr. Dhindsa included the interest accruing during the term of each mortgage as part of the amount to be paid on maturity, with the result that the amounts of the mortgages were expressed to be \$560,000 and \$570,000.
- [8] Around the same time, it became known that Mr. Braich did not have the financing to complete the purchase of Properties No. 2 and 3. The Development Company reached an agreement with Mr. Braich that it would complete the purchase of the two properties, one of which would be held in trust by it for Mr. Braich and would act as security for the "bump" money due to him. It was a term of the agreement that the Development Company would not encumber Property No. 1 for more than \$1.1 million.
- [9] Approximately a month later, on February 17, 2016, Mr. Braich sent an email to Mr. Dhindsa claiming that the Development Company had breached one of the terms of its agreements with him and that he was electing his right to buy back Property No. 1. This alleged breach was the encumbering of Property No. 1 for more than \$1.1 million because the face amounts of the mortgages in favour of DevAm Holdings Ltd. and Borrow Investments Ltd., which included the interest accruing under the mortgages, totalled \$1,130,000. On February 23, 2016, Mr. Braich filed a caveat against Property No. 1 claiming a right to buy it back.
- [10] The plaintiffs retained a new lawyer to act for the Development Company around the time the caveat was filed. The new lawyer took court proceedings to obtain the Development Company's corporate records from Mr. Dhindsa.
- [11] On March 10, 2016, Mr. Dhindsa signed a document giving Mr. Sidhu his interest in the Development Company because he decided to "walk away" from the development.

- [12] The Borowskis learned about the caveat filed by Mr. Braich and were apparently concerned about it. Mr. Dhindsa testified that the Borowskis wanted to meet with the principals of the plaintiffs to see if they could get their mortgage paid back or, alternatively, they would buy the development. On March 21, 2016, acting on the instructions of the Borowskis, Mr. Dhindsa drafted share purchase agreements for the purchase of all of the shares in the Development Company owned by the plaintiffs and Mr. Sidhu by the defendant numbered companies which are owned by the Borowskis. The purchase price was expressed to be the release of the two mortgages held by DevAm Holdings Ltd. and Borrow Investments Ltd., the sum of \$386,849.73 to each of the plaintiffs (being their investment in the Development Company) payable upon the sale of all of the subdivided lots in Property Nos. 1, 2 and 3, and payment of shareholder loans (the evidence is unclear whether this last item was intended to represent the repayment of Mr. Sidhu's investment in the Development Company but, in any event, he testified that it was orally discussed that his investment would be repaid).

The March 22, 2016 Meeting

- [13] On March 22, 2016, Rafal Borowski telephoned the principal of one of the plaintiffs and requested a meeting with the principals of the plaintiffs later in the day. The meeting was originally scheduled to take place at a Tim Hortons restaurant in the late afternoon but was changed to a restaurant in a strip mall for 8:00 p.m.
- [14] The principals of the plaintiffs testified that the restaurant was empty of other customers when they entered the restaurant with the Borowskis. There was questioning by the Borowskis about why the plaintiffs were suing the lawyer (presumably referring to the court proceedings taken by the new lawyer to obtain the Development Company's corporate records from Mr. Dhindsa). They testified that one of the principals told the Borowskis that the new lawyer had expressed the opinion that the caveat filed by Mr. Braich would not withstand judicial scrutiny and could be easily removed. They testified that Rafal Borowski became more aggressive and said words to the effect of, "We did not give money to you. We gave money to the lawyer. And now you are suing the lawyer. The lawyer said you were good people but now you fucked up. We are going to take over the project and I have already called your other partner".
- [15] The principals testified that Mr. Sidhu then arrived with three other men, two of whom sat between the principals and the entrance to the restaurant. Zbigniew Borowski then produced a number of documents, saying words to the effect of, "Our organization does not go to court. You guys have taken this to court, so now you do not get to do this project. We are taking over this project". The principals asked Mr. Sidhu to read the documents, and he explained to them that the Borowskis were taking over the project and paying them out. Mr. Sidhu then signed the documents.
- [16] The principals testified that Rafal Borowski gestured with a fork towards them and said the only reason they were still alive was because he was a gentleman and that Zbigniew Borowski added that, if they wanted to leave the restaurant alive and to have their families

stay in BC, they should sign the documents. They then signed the documents on behalf of the plaintiffs. The Borowskis then produced photocopies of the driver's licences of the principals and compared the signatures on them to the signatures on the documents. The Borowskis asked one of the principals to re-sign a document because his signature was shaky.

- [17] In their testimony, the Borowskis denied making any threats. They said that other customers were in the restaurant. They testified that, after Mr. Sidhu arrived, Rafal Borowski stated that he did not think his money was safe as a result of the caveat filed by Mr. Braich and questioned whether the plaintiffs could pay off the mortgage in one or two months when they had been declined financing by the credit union. The Borowskis testified that Rafal Borowski suggested that the solution might be for him and his brother to buy out the others and release the mortgages. The documents were produced, and Mr. Sidhu explained them to the principals of the plaintiffs. The Borowskis testified that the principals said they did not want to wait until all of the subdivided lots were sold before being repaid their money, and that Rafal Borowski agreed to pay \$400,000 the next day and the balance in a month or two. The documents were then signed.
- [18] The testimony of Mr. Sidhu was similar to the testimony of the Borowskis. He denied that other men accompanied him to the restaurant or that any threats were made by the Borowskis. He said there were other customers in the restaurant.
- [19] The owner of the restaurant also gave evidence. He testified that there were other customers in the restaurant, that the volume of the conversation at the Borowski table was normal and that he did not overhear what was said at the table. He testified that there were police in the parking lot of the strip mall on an unrelated matter when the group left the restaurant.
- [20] There was also testimony at the trial about events which took place after the March 22 meeting. I will refer to these events only to the extent that they were relied upon by the trial judge in assessing the credibility of the witnesses.

Reasons of the Trial Judge

- [21] The trial judge began his analysis by reiterating his earlier comment that either the defendants or the principals of the plaintiffs were lying and the issue was one of credibility. He observed that the burden of proof was on the plaintiffs.
- [22] The judge referred to the well-known decision of *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.), in which Justice O'Halloran stated the following (at 357):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case 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.

The judge noted that a major difficulty with this case was that much of the evidence from both sides belied commercial and general common sense. He found that the credibility of all the major witnesses suffered from the improbability of their evidence.

[23] After discussing some of the improbabilities presented by the evidence, the judge turned to the credibility of the principals of the plaintiffs. He had the following difficulties with the credibility of the principal of Silverhill Homes Ltd.:

- (a) he stated in court that he lied to Mr. Dhindsa by telling him that the Development Company had sold the subdivided lots in the development of Property No. 1, but the judge found that the principal had actually lied in court in saying that the land had not been sold and that a \$50,000 deposit in the bank account of the Development Company related to a loan to a friend; and
- (b) he testified that he bought baseball bats after the March 22 meeting on the advice of a security expert but he had continually interrupted counsel when asked three times at his examination for discovery about a security expert, and the judge concluded that he lied about seeing a security expert and that he had bought the bats for his children six weeks after the March 22 meeting.

[24] The judge had the following difficulties with the credibility of the principal of Kanaka Creek Development Ltd. ("Kanaka"):

- (a) he testified at his examination for discovery that he and his companies had not been involved in any other litigation but, at trial, he admitted that he had been involved in over 30 lawsuits and that his companies had been involved in a similar number; and
- (b) the judge concluded that, in testifying at trial through a Punjabi interpreter, he was underplaying his ability to speak English.

[25] The judge also had difficulties with both of the principals' testimony in several respects. He did not accept their testimony that they had no problem in arranging financing for the project and that it had been agreed that they could mortgage Property No. 1 for the funds they had agreed to invest in the Development Company. There was evidence that the principals had secretly recorded two meetings and one voicemail message prior to the March 22 meeting, but they denied recording the March 22 meeting itself; the judge considered it to be an inescapable inference that they had recorded the March 22 meeting and concluded that they did not produce the recording because it did not support their version of the meeting. The judge found that, if threats had been made at the meeting, it did not accord with common sense that they would attend a meeting a week later with Rafal Borowski at his request and take no precaution other than having one of their wives sit in the car in the parking lot outside the meeting place.

- [26] The judge considered why the plaintiffs would have been willing to sign the documents at the March 22 meeting. He concluded that there was an advantage to them in signing the documents in view of their financial difficulties, the uncertainties of removing the caveat filed by Mr. Braich and the fact that the development would require the cooperation of Mr. Braich. He also referred to a meeting with Mr. Sidhu ten days prior to the March 22 meeting (which had been recorded) at which the principal of Kanaka stated he would not have gone into the project if he had known it would become as complicated as it had. The judge observed that, if threats had been made at the meeting, it was unlikely the Borowskis would have agreed to deviate from the pre-prepared documents and to offer repayment of the plaintiffs' investment before all of the subdivided lots were sold.
- [27] The judge concluded that the principals of the plaintiffs had not been credible in several key regards and that there was a rational explanation for them to voluntarily sign the documents at the March 22 meeting. He did not accept their evidence that threats had been made at the meeting and, therefore, he dismissed the action.
- [28] In subsequent reasons on costs indexed as 2019 BCSC 446, the judge departed from the usual rule that costs follow the event. He ordered each party to bear their own costs because he had found in his earlier reasons that, in addition to the principals of the plaintiffs not being credible, Mr. Dhindsa, Mr. Sidhu and the Borowskis (or, at least, Rafal Borowski) had not been honest in giving some of their evidence.

Discussion

- [29] Findings of fact made by a trial judge have long attracted a highly deferential standard and may be disturbed by appellate courts only in limited circumstances: see *Stein v. The Ship "Kathy K"* (1975), [1976] 2 S.C.R. 802 at 807-808. The policy reasons for this deferential standard were recently summarized in *Benhaim v. St-Germain*, 2016 SCC 48:
- [37] Deference to factual findings limits the number, length and cost of appeals, which in turn promotes the autonomy and integrity of trial proceedings. Moreover, the law presumes that trial judges and appellate judges are equally capable of justly resolving disputes. Allowing appellate courts free rein to overturn trial courts' factual findings would duplicate judicial proceedings at great expense, without any concomitant guarantee of more just results. Finally, according deference to a trial judge's findings of fact reinforces the notion that they are in the best position to make those findings. Trial judges are immersed in the evidence, they hear viva voce testimony, and they are familiar with the case as a whole. Their expertise in weighing large quantities of evidence and making factual findings ought to be respected.

- [30] The deferential standard is commonly expressed in terms of whether the trial judge made a palpable and overriding error: see *Housen v. Nikolaisen*, 2002 SCC 33 at para. 1. A palpable error is one that is plain to see or so obvious that it can easily be seen or known: *Housen* at para. 5. An overriding error is one that is "determinative in the assessment of the balance of probabilities with respect to that factual issue": *Schwartz v. Canada*, [1996] 1 S.C.R. 254 at para. 35.
- [31] Although the standard is usually stated in terms of a palpable and overriding error, there are other formulations of the standard which are more appropriate in certain circumstances. This was explained by Justice Fish in *H.L. v. Canada (Attorney General)*, 2005 SCC 25:

55 "Palpable and overriding error" is at once an elegant and expressive description of the entrenched and generally applicable standard of appellate review of the findings of fact at trial. But it should not be thought to displace alternative formulations of the governing standard. In *Housen*, for example, the majority (at para. 22) and the minority (at para. 103) agreed that inferences of fact at trial may be set aside on appeal if they are "clearly wrong". Both expressions encapsulate the same principle: an appellate court will not interfere with the trial judge's findings of fact unless it can plainly identify the imputed error, and that error is shown to have affected the result.

56 In my respectful view, the test is met as well where the trial judge's findings of fact can properly be characterized as "unreasonable" or "unsupported by the evidence". In *R. v. W. (R.)*, [1992] 2 S.C.R. 122, McLachlin J. (as she then was) explained why courts of appeal must show particular deference to trial courts on issues of credibility. At the same time, however, she noted (at pp. 131-32) that

it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

Although there were dissenting reasons in the result in *H.L.*, no issue was taken in the dissenting reasons with the above comments and a summary of the comments contained at para. 4 of *H.L.* was subsequently endorsed in a unanimous decision of the Supreme Court of Canada: see *F.H. v. McDougall*, 2008 SCC 53 at para. 55.

- [32] In the present case, the plaintiffs do not say that a particular finding made by the trial judge was contrary to the evidence or was unsupported by the evidence. Rather, they challenge the judge's conclusion that his concerns about the credibility of the principals of the plaintiffs properly resulted in his refusal to accept their evidence about threats being made at the March 22 meeting. In these circumstances, rather than using the standard of palpable and overriding error, it is my view that it is preferable to express the standard of review in terms of whether the judge's finding in this regard was unreasonable.

[33] The position of the plaintiffs on appeal is that, as the trial judge had difficulties with the credibility of all the major witnesses, it was particularly incumbent on him to adhere to the approach mandated in *Faryna* by examining the consistency of the testimony of the witnesses "with the probabilities that surround the currently existing conditions". They say the judge should have weighed the testimony of all the witnesses against the "probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". They assert that the judge erred in this task and reached an unreasonable conclusion in finding that they executed the documents at the March 22 meeting without any threats having been made by the Borowskis.

[34] The plaintiffs say, "in a nutshell", there was nothing in the circumstances to suggest that the plaintiffs were anything but eager to proceed with the development. They say that they had distanced themselves from Mr. Dhindsa, and were actively working on the development, which they expected to be profitable. The new lawyer for the Development Company said the caveat had no merit. They rely on the following points about the March 22 meeting:

- the mortgage held by the Borowskis' company did not call for any payments for another ten months and, despite the fact the plaintiffs told them that they could pay out the mortgage in a couple of months, the Borowskis focused only in acquiring the shares in the Development Company;
- the documents the plaintiffs signed represented a bad deal for them, with no security for the amounts to be paid to them in the future, and the documents were presented in a "take it or leave it" fashion; and
- it was unusual for the signatures on the documents to be compared to the signatures on the driver's licences of the plaintiffs' principals.

They say that these circumstances would not make it reasonable for the plaintiffs to have signed the documents at the March 22 meeting unless threats were made against them. The difficulty with the plaintiffs' submission is that not all of the circumstances they rely upon accord with the judge's findings.

[35] The assertion that the plaintiffs were eager to proceed with the development was not accepted by the judge. He noted that the Kanaka principal had recently expressed regret over becoming involved in the development because it had become so complicated.

[36] The judge specifically addressed the points about the caveat filed by Mr. Braich and whether the transaction was a bad deal for the plaintiffs. He noted that even if the caveat could be removed, the Development Company still required the cooperation of Mr. Braich (whose reputation concerned the plaintiffs) in connection with rezoning applications. He also noted the financing difficulties experienced by the Development Company. He concluded that there was an advantage in the plaintiffs selling their interest in the Development Company.

- [37] Although the documents were presented in a "take it or leave it" fashion, the judge found that the Borowskis agreed at the March 22 meeting to deviate from the documents by offering to make quicker payments to the plaintiffs. He found it unlikely that the Borowskis would have done this if they had made the threats alleged by the plaintiffs.
- [38] There are two other objective or independent aspects of the circumstances that militate against the plaintiffs' case. First, as noted by the trial judge, if the circumstances were so obvious that the plaintiffs would not have voluntarily signed the documents, it is not likely that the meeting would have been scheduled in a public place. Second, the judge found the owner of the restaurant, who was an independent witness, to be credible, and his evidence contradicted the evidence of the plaintiffs as to the state of the restaurant at the time of the meeting, and nothing in his evidence supported the plaintiffs' version of the evidence.
- [39] It is also noteworthy that the judge drew the inference that the plaintiffs had recorded the March 22 meeting but did not produce the recording because it did not support their testimony. As noted in para. 55 of the above-quoted passage from H.L., appellate courts should interfere with inferences of fact made by a trial judge only if they are clearly wrong. The plaintiffs do not attempt to persuade us on appeal that the judge was clearly wrong in drawing this inference and, in my view, there is no proper basis for reaching such a conclusion. This finding significantly undermined the plaintiffs' case when considered in conjunction with the judge's conclusion that both of the plaintiffs' principals lied under oath and were not credible.
- [40] The trial judge's determinations on the credibility of the witnesses are entitled to considerable deference. He observed them when they gave their evidence, and he experienced the dynamics of the trial first hand. It is not the function of this Court to retry the case and make its own determinations on credibility. This Court should interfere with the judge's credibility determinations only if it is clear that they are unreasonable.
- [41] The judge gave cogent reasons why he did not find the principals of the plaintiffs to be credible. He addressed the reasons why the plaintiffs would have voluntarily signed the documents. He referred to circumstances that would be unlikely if the Borowskis were intending to make threats or had made threats to the principals of the plaintiffs. In my opinion, the judge's refusal to accept the principals' evidence about threats being made at the March 22 meeting was not unreasonable in all of the circumstances before him, and his finding should not be disturbed by this Court.
- [42] I would add that, even if this had been a situation where the trial judge did not know whom to believe as a result of the parties' lack of credibility, it would still have been appropriate for the judge to have dismissed the action because the burden of proof was on the plaintiffs to prove their case.

Conclusion

[43] I would dismiss the appeal with costs to the defendants (respondents on appeal).

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Harris"

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