

CANADA / JUDGMENT

Singh v. Sidhu

2019 BCSC 1551

COURT

Supreme Court of British Columbia

DECIDED

13 September 2019

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2019 BCSC 1551 Singh v. Sidhu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Singh v. Sidhu,

2019 BCSC 1551

Date: 20190913

Docket: S177269

Registry: New Westminster

Between:

Gurvail Singh and Ranjeet Ghuman

Plaintiffs

And

Karamjit Kaur Sidhu and Hardev Singh Sidhu

Defendants

And

Century 21 Coastal Realty Ltd. and

Tarlochan Sidhu aka Terry Sidhu

Third Parties

- and -

Docket: S202292

Registry: New Westminster

Between:

Sukhpal Singh Sran

Plaintiff

And

Hardev Singh Sidhu and Karamjit Kaur Sidhu

Defendants

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Plaintiffs in Action No. S177269, G. Singh and R. Ghuman:

H. Nirwan

The Defendants, appearing in person:

K. Sidhu and H. Sidhu

Counsel for the Third Parties:

K. Murray

S. Hamilton

The Plaintiff in Action No. S202292, appearing in person

S. Sran

Place and Dates of Trial:

New Westminster, B.C.

November 19 and 20, 2018

August 12-16, 2019

Place and Date of Judgment:

New Westminster, B.C.

September 13, 2019

Introduction

- [1] These two actions are being heard together pursuant to an order made at a trial management conference.

- [2] On the first day of trial in November 2018, I raised certain matters concerning the pleadings with the result the matter was adjourned with liberty granted to the plaintiffs in Singh v. Sidhu to amend their pleadings to conform to the cross-examination that occurred of the plaintiff Mr. Sran and to define the issue as between the plaintiffs in the two actions.
- [3] At the conclusion of the evidence, the plaintiffs in the Singh action sought a further amendment to the pleadings to include reference to provisions of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA]; specifically ss. 20, 22 and 31 which refer to the priority of charges and certificates of pending litigation.
- [4] While not certain an amendment is necessary to rely on the provisions of the LTA, I allow the amendment given. I find there is no prejudice to the defendants. For reasons that will become apparent, I conclude Mr. Sran's remedy, if any, lies in damages.
- [5] Both plaintiffs seek specific performance of the respective contracts of purchase and sale respecting the defendants' property at 12697 92nd Avenue, Surrey, B.C. (the "property").
- [6] Further orders were made following the November 2018 adjournment relating to the production of documents by parties in each action and an order was made that the evidence received would be received as evidence in both actions.
- [7] For the sake of ease, I shall refer to the two actions as the "Sran Action" and the "Singh Action".
- [8] The underlying conflict between the plaintiffs and the defendants, Mr. and Mrs. Sidhu, is over the alleged sale of the property by the Sidhus to both Mr. Sran in September 2015 and Mr. Singh and Ms. Ghuman in November 2015.
- [9] The defendants, the Sidhus, acknowledge in their response to civil claim in the Sran Action the validity of Mr. Sran's contract to purchase the property and offer no defence to Mr. Sran's claim for specific performance. However, during submissions, Mrs. Sidhu suggested both plaintiffs be confined to damages and the property not be the subject of an order for specific performance in either action.
- [10] In the Singh Action, the Sidhus' response to civil claim put in issue the validity of the Singh/Ghuman contract for the purchase of the property. However, at the close of the evidence, Karamjit ("Rani") Sidhu, who conducted the defence of both actions, did not argue that the contract was deficient or that those plaintiffs were unable or unwilling to complete on the completion date. Instead, the defendants asserted that the Singh/Ghuman offer accepted by them in November 2015 was intended as a backup offer and that the defendants' realtor, Terry Sidhu, negligently or in breach of his fiduciary duty to them failed to include relevant terms in the offer so as to make it subject to the collapse of the Sran offer. As at the date of the removal of the subject clauses in the Singh action, Mr. Sran had not yet removed the subject clauses in his accepted offer.

- [11] As a result, third-party proceedings were initiated by the defendants against Terry Sidhu and his employer, Century 21 Coastal Realty Ltd.
- [12] The defendants acknowledge that Terry Sidhu was, at all times, acting as their agent in the Singh transaction.

The Background

- [13] The plaintiff in the Sran Action, Sukhpal Sran, is a builder/developer who had been active in the Surrey area for over twenty years prior to the transaction which is the focus of this litigation.
- [14] Gurvail Singh is a friend and work mate of Jasvir Ghuman, who is the husband of the co-plaintiff in the Singh Action, Ranjeet Ghuman.
- [15] Mr. Singh and Mr. Ghuman are both labourers. Ms. Ghuman works as a cleaner at a hotel.
- [16] The defendants, Rani Sidhu and Hardev Sidhu are, respectively, an insurance agent and labourer. Regrettably, Mr. Sidhu has experienced health problems which are severe in nature and preclude him from ongoing work.
- [17] In the fall of 2015, the defendants were the owners of the property that is the subject of both claims. The property can be best described as a two-level corner lot single family dwelling divided into four separate suites. There are two two-bedroom suites on the bottom, a four-bedroom living space on the top floor and one additional one-bedroom suite on the top floor.
- [18] The Sidhus and their family lived in the more spacious quarters on the top floor and the remainder of the suites were rented to other persons.
- [19] Owing to economics, the plaintiffs in the Singh Action were attempting to buy a home suitable for occupancy by both the Singh family and the Ghuman family. At the time of the offer to purchase in November 2015, Mr. Singh was living with his family in a basement suite. It is unclear as to the number of occupants. The Ghumans were living with extended family and their two daughters in rental premises. Nine of them together lived in a home with four or five bedrooms.
- [20] By agreement, the Singh family and the Ghuman family were pooling resources to get into the housing market. To facilitate that, a home with separate living quarters and the additional potential of revenue was required, given the budgetary constraints of the plaintiffs in the Singh Action.

- [21] Mr. Sran was formerly employed by the defendant, Mr. Sidhu. As noted, he is a builder and the developer of properties in the Surrey area. His purpose in acquiring the 92nd Avenue property was for development. One of the conditions underlying his offer was preapproval by Surrey for subdivision of the subject property as his long-term purpose was to tear the house down and build two houses on the lot.
- [22] In each action the plaintiffs seek specific performance or, alternatively, damages.
- [23] The defendants acknowledge in their response to the Sran notice of civil claim the entitlement of the plaintiff to specific performance; in the Singh action, they argue if a contract was breached, the remedy is damages.

The Contracts

- [24] The 92nd Avenue home had been listed for sale, off and on, for a number of years. Prior to Mr. Sran's offer on September 21, 2015, the most recent listing proximate to the disputed contracts before me expired in July 2015. The listing price was \$700,000.
- [25] Mr. Sran said he approached the defendants with an offer to purchase the property for \$675,000. The contract was prepared, or filled in, by the defendant Rani Sidhu. No realtor was involved in the offer or preparation of the contract upon which Mr. Sran relies.
- [26] The Sran offer contained three subject clauses as follows: (1) that he obtain preapproval for subdivision from Surrey; (2) that the Sidhus would authorize him to submit applications to Surrey for the purposes of obtaining preapproval; and (3) that if satisfied of the development potential for the property, Mr. Sran would provide a non-refundable deposit within three months of the offer, up to December 24, 2015. The completion date was June 30, 2016.
- [27] In the meantime, the Sidhus were looking for other accommodation to purchase. In late September, it is not clear whether before or after September 21, the Sidhus, in the company of Mr. Sran and the male defendant's father, viewed a property on 128th Street in Surrey.
- [28] Mr. Sran, given his experience in development, accompanied the defendants to the showing and offered advice concerning the lot's potential for subdivision. The 128th Street premises were shown to the Sidhus by their cousin, Terry Sidhu, who for reasons I will come to, then obtained a listing agreement for the property on October 3, 2015.
- [29] The Sran contract was signed by the purchaser and both vendors on September 21, 2015. No realtor was involved and Rani Sidhu filled in the terms of the standard form contract of purchase and sale.
- [30] Following the Sidhus' inspection of the property at 128th Street, there is controversy as to who approached whom about the listing of the property. Mrs. Sidhu testified that Terry Sidhu approached her husband telling him that he, Terry Sidhu, could obtain up to \$750,000 for the Sidhus' residence and that he had buyers ready and willing to make offers.

- [31] Rani Sidhu originally testified that she never spoke directly with Mr. Terry Sidhu until the date the listing agreement was signed, which was October 3, 2015. She says that her husband told her that he had made clear to Terry Sidhu that the property was subject to the Sran offer but did not remember the offer being discussed at the October 3 meeting when the listing agreement was signed by both defendants.
- [32] On the same date as the signing of the listing agreement, the Sidhus signed a document which set out the obligations and role of Mr. Terry Sidhu as their realtor in respect of the sale of the property. Rani Sidhu testified she signed both documents without reading them and relied upon her husband's advice to sign despite the fact his English is poor and he does not read English. Mrs. Sidhu was proficient in English both as to the written word and verbally.
- [33] Nowhere in the listing agreement or other documents executed on October 3, 2015 is there reference to a pre-existing offer with subject clauses as were contained in Mr. Sran's offer to purchase.
- [34] Terry Sidhu proceeded to market the house. He did a comparable market analysis, put up signage on the property and prepared advertising brochures setting out the qualities of the property. While Mrs. Sidhu could not recall open houses, Mr. Terry Sidhu testified that open houses were held and, indeed, one offer was received in advance of the offer made by the parties in the Singh Action.
- [35] That offer was made in late October by Nachattar Singh Kang for the sum of \$690,000. The document in evidence indicates that the vendors responded with a counter-offer of \$750,000. The defendants each initialled the counter-offer and signed where required. The counter-offer was presented to the agent acting for the prospective buyer but no further negotiations took place and the Kang offer collapsed.
- [36] The Kang offer contained no reference to Mr. Sran's offer and it did not contain language making its acceptance subject to the collapse of the Sran offer. Indeed, the closing date, agreed to by the defendants, preceded the date for the removal of the subject clauses in the Sran offer.
- [37] Mr. Singh testified that he and Mr. Ghuman were out looking for houses suitable for the two families to buy in combination. They saw the signage at the property and made arrangements to view it.
- [38] Mr. Ghuman then took the plaintiff, Ranjeet Ghuman, for a drive-by and explained to her the attributes of the home's interior, including the four separate living spaces. One living space, the larger suite, was intended for occupation by the Ghuman family while one of the smaller suites downstairs was intended for Mr. Singh and his family. The other two suites would provide rental income to defray the cost of owning the house.

- [39] The plaintiffs in the Singh action contacted Terry Sidhu shortly following the viewing and instructed him to make an offer at \$710,000. That offer was presented by Terry Sidhu as the Singh plaintiffs did not have their own realtor. The effect of that would be that Terry Sidhu would be entitled to both the buyers' and sellers' commission.
- [40] I should note the plaintiffs in the Singh Action never met the defendants until well after the counter-offer of \$715,000 was accepted by the Singh plaintiffs and the subject clauses in their offer had been removed. The offer signed by the defendants contained no reference to the Sran offer. Each defendant signed the contract and initialled salient portions of it.
- [41] Terry Sidhu testified that he reduced his commission as part of the defendants' acceptance although it is unclear whether a specific amount was discussed as the counter-offer was being formulated.
- [42] The subject clauses, all for the benefit of the purchasers in the Singh action, were removed in writing by the plaintiffs on November 21, 2015. The completion date was set for December 29, 2015. As at November 21, 2015, Mr. Sran had not removed the subject clauses in his offer.
- [43] On December 14, 2015, Rani Sidhu requested that Terry Sidhu provide copies of the documents respecting the listing agreement and he complied. Terry Sidhu testified he provided the defendants with all relevant documents as they were signed but complied with Rani Sidhu's request for copies promptly.
- [44] Prior to completion, but after removal of the subject clauses in the Singh contract, Terry Sidhu was contacted by Rani Sidhu who advised him they, the defendants, had not yet found a place to move and they wanted to extend the date for completion to the end of January. Terry Sidhu approached the plaintiffs for an extension of the closing date until January 29, 2016 and the plaintiffs agreed. The extension was reduced to writing and signed by all parties.
- [45] I note following removal of the subject clauses, Terry Sidhu began sending listings to Hardev Sidhu of properties that he, Terry Sidhu, thought met the defendants' needs.
- [46] Mrs. Sidhu said that by the date she and her husband sought the extension of the closing on the Singh transaction, she had read the Singh contract and was aware that it was not a back-up offer.
- [47] On December 21, 2015, Mr. Sran paid the deposit and removed the subject clauses contained in his offer.
- [48] Sometime following December 21, Rani Sidhu attended at the Ghuman residence to try and persuade firstly, Ms. Ghuman, then later, Mr. Ghuman to cancel the contract for purchase and sale. Both Ghumans testified that Rani Sidhu did not mention the existence of an earlier contract for purchase and sale of the property but rather referred to a family situation causing the sellers to change their mind.

- [49] Ms. Ghuman referred the matter to her husband. Mr. Ghuman testified that he made clear the Ghumans were not prepared to abandon the offer.
- [50] A series of emails followed. Rani Sidhu, in a letter dated "5/2015", advised the defendants wished to cancel the contract. She testified she thought the date was January 5, 2016 but, in any event, it does not appear to have been faxed to Terry Sidhu until January 17, 2016.
- [51] That said, Terry Sidhu testified that he first learned of the defendants' reluctance or unwillingness to complete on January 9, 2016 after being invited to the defendants' residence for a 9:00 a.m. meeting.
- [52] Terry Sidhu testified that he was summoned to the meeting the day before. He attended at the Sidhu residence on January 9 at 9:00 a.m. and, in an emotional, one-half hour meeting was told that family problems had arisen and that there was unhappiness amongst the Sidhu family about the sale of the property and they wished to cancel the agreement. Mr. Sidhu, as their agent, indicated to them he would convey their request to the purchasers. He said he did so but was told by the purchasers they intended to proceed with the transaction.
- [53] A series of emails between Rani Sidhu and Terry Sidhu were admitted into evidence. As well, several handwritten letters were referenced. For reasons which I shall come to, I am uncertain as to dates upon which the letters were prepared only when they were received.
- [54] On Monday, January 18, 2016, Rani Sidhu emailed Mr. Terry Sidhu noting:

As per today's phone conversation with both of you our final decision same as we told you many times since last month. We are not selling our house because our family is first priority for us, our both sons are upset in their study. We hope you will be consider our request again.

So please notify to the buyer ASAP again. Thanks, regards, Karamjit and Hardev Singh Sidhu. [Sic]

- [55] Mr. Terry Sidhu responded with an email on January 20 advising Rani Sidhu that the buyers told him they had been notified of the Sidhus' request but were moving forward with completion. He advised them to seek legal advice.
- [56] Rani Sidhu responded on January 21, 2016, with an email advising Terry Sidhu:
- This is your responsibility to explain our family situation to buyer. We hope and believe you understood better our family circumstance. Please tell the detail about our family situation to buyer again.
- [57] In a handwritten letter directed to the attention of the manager of Century 21 and Terry Sidhu, Rani Sidhu wrote, and here I paraphrase, that the defendants had advised Mr. Terry Sidhu many times that they are unable to sell their house. A date of January 2, 2016 is referenced. Further, she advised Terry Sidhu that she had attended at the Ghumans' residence on 94 Avenue and told them very clearly of the dispute raised by the house transaction in the family. She requested that the deposit be returned to the buyers and

referenced the fact that "our family circumstance is totally bad since we signed the MLS to realtor. I am totally under pressure".

- [58] It goes on to refer to the Sidhus' sons being upset and unable to focus on their studies and that there was fighting in the house every day. Finally, it noted that the defendant, Hardev Sidhu, had diabetes and other health problems.
- [59] The date on that communication is "05/15". It was faxed from the defendant Rani Sidhu's place of work on January 17, 2016.
- [60] A further handwritten letter purporting to be written January 5, 2016, was stated to be hand-delivered by Rani Sidhu to the offices of Mr. Terry Sidhu on the date it was written, January 5, 2016, and then later faxed to him on February 5, 2016.
- [61] In her evidence and in her questioning of Mr. Terry Sidhu, Rani Sidhu was emphatic that she hand-delivered it on January 5, 2016 despite the fact the letter refers to the certificate of pending litigation ("CPL") placed on the property in the Singh action. That action was not commenced until January 29, 2016.
- [62] Terry Sidhu testified that the first time he became aware of the existence of another offer, although not specifically the Sran offer, was upon receipt of correspondence dated January 27, 2016. In that correspondence, for the first time, according to Terry Sidhu, the subject matter of another contract arose and Rani Sidhu suggested that he and Century 21 would be liable for all legal expense or consequences arising from the Singh offer.
- [63] Terry Sidhu testified he would never have listed the Sidhu property and invested the time and money he did to secure offers had he been advised of an existing accepted offer by Mr. Sran or any other person.
- [64] At or near the time of the January 27 letter to Terry Sidhu advising of the earlier offer, Rani Sidhu wrote A.S. Mattoo advising that the defendants had no intention of completing a sale on the completion date. Mr. Mattoo was counsel for the plaintiffs who had, after learning of the defendant's recalcitrance, engaged counsel rather than a notary to act on their behalf.
- [65] I am satisfied on the evidence before me that the plaintiffs were ready, willing and able to complete the purchase of the property on the completion date of January 29, 2016. This conclusion is based on the evidence consisting of the deposit originally made and held by Century 21, the drafts deposited with the notary making up the difference in purchase price between the total of the drafts, the deposit and the mortgage proceeds arranged with TD bank.
- [66] There is no evidence that funds were tendered by the plaintiffs but, in the circumstances, such would have been fruitless given the position of the defendants as stated in correspondence to Century 21 advising of their unwillingness to complete and to the plaintiffs' lawyer in a setting of same.

Position of the Parties

- [67] The plaintiff, Mr. Sran, argues that he is entitled to specific performance of his contract for the purchase of the property. He says the property has unique characteristics suitable for future development including its potential for subdivision, the desirable street frontage (it is a corner lot) and its proximity to desirable amenities such as banks, retail outlets and a park.
- [68] He argues his offer was first and therefore deserves priority over the Singh contract.
- [69] The plaintiffs in the Singh action note: (1) that they have an enforceable contract for purchase that pre-dates the removal of the subject clauses from the Sran offer; (2) the CPL filed by them in January 2016 pre-dates the filing of the CPL in the Sran Action in May 2018; (3) the property is not unique to Mr. Sran given the evidence discloses he bought other development properties similar to the subject property post-January 2016 and Mr. Sran has no intention of residing in the house but rather levelling it for new construction; and, finally (4) the property was unique to these plaintiffs because of its suitability to house both families while still providing an income to assist with the mortgage payment, its proximity to the school(s) the Ghuman daughters attend and to the residences of the Ghumans' in-laws who provide baby-sitting services to the Ghumans from time to time.
- [70] The defendants claim damages should be confined to \$10,000, while acknowledging during submissions that the evidence discloses the plaintiffs in the Singh Action have a valid, enforceable contract that they were ready and able to complete on the completion date but for the defendant's unwillingness to complete. This amount is the difference between the purchase price and the appraisal conducted by McIntosh Appraisals of the property as at the completion date. The appraisal, I note, was served by the defendants the morning of the trial's commencement.
- [71] As for Mr. Sran, the defendants in their response to civil claim acknowledged the entitlement of Mr. Sran to specific performance but now assert Mr. Sran is entitled to damages of \$50,000 being the difference between the contract price of \$675,000 and the appraised value (by McIntosh Appraisals) of \$725,000 as at the closing date for the Singh Action.
- [72] Damages as assessed in the Sran Action should be assessed as against the third parties given, according to the defendants, the personal third party's negligent handling of the transaction and/or breach of his fiduciary duty to the defendants. Specifically, the claim against the realtor is that he failed to address the defendants' advice to him of the Sran offer and his failure to put forward back-up offers only.
- [73] The third parties argue that Terry Sidhu acted in accordance with information made known to him and that I should find the Sran offer was never referenced to Terry Sidhu, let alone produced to him, until well after the defendants had accepted the offer to purchase and all subject clauses were removed in the Singh offer.

Discussion

- [74] As between the defendants, Mr. and Mrs. Sidhu, and the plaintiff Mr. Sran, it is acknowledged that there was an enforceable contract for purchase and sale between the parties. The completion date was extended twice, once in June 2016 and once in June 2017. The ostensible reason for the extension was that the defendants were unable to pass good title to Mr. Sran because of the existence of the CPL filed in the Singh Action.
- [75] Originally, the defendants acknowledged the entitlement of the plaintiff, Mr. Sran, to the remedy of specific performance. On the face of the pleadings, but for the Singh Action arising from what is alleged to be the misfeasance of the realtor Terry Sidhu, the defendants would have completed the sale of their property for \$675,000 despite the almost nine-month gap between the date of the offer in September 2015 and the completion date of June 2016.
- [76] Despite the acknowledgement in the pleadings as to the validity of the Sran contract of purchase and sale, I am dubious that this contract existed in September 2015 for the following reasons: first, the defendants, from all indications, needed the funds from the sale of the property to purchase alternate accommodation and were actively looking for such when they viewed the property with Mr. Sran that led to their attendance upon Terry Sidhu. It is equally apparent from remarks made by Rani Sidhu to Terry Sidhu when she sought an extension of the completion date in the Singh action.
- [77] Secondly, despite suggestions that the only parties present when the contract of purchase and sale as between Mr. Sran and the defence was drafted were the defendants and Mr. Sran, the document was witnessed, or at least Mr. Sran's signature was witnessed, by an employee of his, Mr. Johal. Mr. Johal did not testify as to when he affixed his signature on the document.
- [78] Lastly, there is Mr. Sran's prior connection to the defendants. He was Mr. Sidhu's employer. Subsequent to learning of the Singh contract of purchase and sale he affected renovations to the Sidhu's home to accommodate Mr. Sidhu's wheelchair; a home that he planned to level.
- [79] Mr. Sran's notice of civil claim states he only became aware of the same contract of purchase and sale and the legal action when he was contacted in April 2017 by counsel for the plaintiffs in the Singh Action. In an affidavit filed by him after he commenced his action, in the application seeking to join the two actions together, he swore the following to be true:

On June 14, 2017, the parties mutually agree to extend the completion date from June 15, 2017 to June 15, 2018. The possession and adjustment dates were agreed to as June 16, 2018. A copy of this contract is attached as Exhibit E. These extensions were agreed to due to severe health concerns including hospitalization of Hardev Singh Sidhu during this time.

Later, I came to know that there is an ongoing litigation between the sellers and another prospective buyer namely Gurvail Singh and Ranjeet Ghuman when I received a letter of offer for \$25,000 from the counsel for the plaintiffs (Gurvail Singh and Ranjeet Ghuman) in this action I give up my entitlement to this property under my contract.

[80] Mr. Sran testified at trial that he came to know of the CPL filed in the Singh Action early on in January 2016 or shortly thereafter. His testimony is in direct conflict on this material point. While pleadings are simply that, not testimony under oath, the statement in Mr. Sran's affidavit is at direct odds with his statements at trial. Both were under oath.

[81] That said, the pleadings between Mr. Sran and the defendants define the issues. The enforceability of the contract in the Sran Action is not one of them except insofar as the issue of the appropriate remedy.

[82] Both actions seek the same remedy, specific performance. This joins issue as between the two plaintiffs as to which of them, if any, is entitled to specific performance.

[83] Here, I note that the contract in the Singh Action was first in time. It became an enforceable contract of purchase and sale once the subject clauses were removed by the plaintiffs on November 21, 2015.

[84] Mr. Sran's contract did not become a binding contract as between he and the defendants until the payment of the deposit and removal of subject clauses on December 21, 2015.

[85] Additionally, and more compelling, in my view, is the operation of ss. 20(1), 22 and 31(a) of the LTA.

[86] Those sections read as follows:

Unregistered instrument does not pass estate

20 (1) Except as against the person making it, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act.

Operation of instrument as from time of registration

22 An instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land passes the estate or interest, either at law or in equity, created or covered by the instrument at the time of its registration, irrespective of the date of its execution.

Priority of caveat or certificate of pending litigation

31 If a caveat has been lodged or a certificate of pending litigation has been registered against the title to land,

- (a) the caveator or plaintiff, if that person's claim is subsequently established by a judgment or order or admitted by an instrument duly executed and produced, is entitled to claim priority for that person's application for registration of the title or charge so claimed over a title, charge or claim, the application for registration, deposit or filing of which is made after the date of the lodging of the caveat or registration of the certificate of pending litigation, .
- [87] I agree with the plaintiffs Mr. Singh and Ms. Ghuman that the combined effect of ss. 20, 22 and 31 gives the plaintiffs in the Singh Action priority over that of Mr. Sran as the plaintiffs protected their interest in the property by registering a CPL earlier than did Mr. Sran.
- [88] For reasons unknown, Mr. Sran waited until May 2018 to begin his action. The plaintiffs commenced this action immediately upon the defendants' repudiation of the contract of purchase and sale.
- [89] In *Willoughby Residential Development Corp. v. Bradley*, 2002 BCCA 321 [Willoughby], the above-described sections of the Land Title Act were interpreted by the Court of Appeal so as to provide the party first filing a CPL with priority over other interests.
- [90] At paras. 20 and 21, the Court stated as follows:
- [20] The trial judge viewed the priority issue retrospectively as at the time when the contract was made. The appellant's interest was then unregistered and Willoughby had no knowledge of his interest. If the appellant had failed to protect his interest by registering a CPL, then Willoughby could have relied on s. 29. If the defence of fraud was raised in relation to Willoughby's later knowledge of the appellant's unregistered claim, the timing issues canvassed in *March* and *Central Station* could arise. I incline to the view expressed in *March* that the completion of the contract through payment and delivery of the conveyance is the critical time rather than the making of the contract, but it is unnecessary to answer that question definitively in view of the fact that the appellant registered his CPL prior to Willoughby having any registered interest in the Langley property.
- [21] In my respectful view, the learned trial judge erred in applying s. 29. The appellant's registration is first in time and entitled to priority on the proper application of s. 20 and s. 22 of the Act.
- [91] Willoughby was followed in *Sihota v. Soo*, 2010 BCSC 886 [Sihota] at paras. 37-39.
- [92] As such, insofar as the relative positions of the plaintiffs is concerned, it is my conclusion that the plaintiffs in the Singh Action and priority of their claim and the remedy sought over the claim of Mr. Sran.
- [93] Obviously, specific performance is a remedy only one plaintiff can achieve and then only upon satisfying the legal criteria which I shall shortly come to.

- [94] Even were I wrong on the issue of the application of the LTA establishing priority to the claim of the party first filing a CPL in the land title office, the Singh contract was first in time despite the Sran offer preceding it.
- [95] In any event, rendering all of that academic is that, in my view, Mr. Sran has not established, despite the pleadings, his entitlement to specific performance of the contract.
- [96] The remedy of specific performance is available only where the plaintiff can establish that damages alone would not be an adequate remedy for them. As was stated in *Ali v. 656527 B.C. Ltd.*, 2004 BCCA 350 at para. 23, the plaintiff must provide "a fair, real and substantial justification" for the claim of specific performance.
- [97] Mr. Justice Lowry stated at para. 29 of *Ali*:
- 29 In my view it is particularly significant that what the purchasers seek to acquire is not the subject of a commercial venture; it is to be their home. It is a house as opposed to one of many suites in a high-rise building, or one unit in a row of similar townhouses. That is not to say that such homes could not be unique, but a house will often have characteristics, if only in appearance, that tend to be unique. It may be that only one aspect of a home will render it unique to a prospective purchaser in the sense that it is unlikely that a substitute will be readily available, but it is more likely that a number of features, viewed in combination, will do so. The determination can be based on both objective factors and the subjective considerations of the purchaser seeking the equitable relief.
- [98] While there is no question commercial properties could also be significantly unique to warrant specific performance, business persons are expected to mitigate their losses by investing elsewhere: see *Hundley v. Garnier*, 2011 BCSC 414, *aff'd* 2012 BCCA 199, leave to appeal *ref'd* [2012] S.C.C.A. No. 310.
- [99] Indeed, the evidence discloses Mr. Sran did exactly that by purchasing other corner lots not unlike the defendants' subsequent offer to purchase prior to the completion date as extended by the parties.
- [100] In *Sihota*, Madam Justice Bruce awarded specific performance to the plaintiffs for the property in question had specific attributes and amenities the plaintiffs testified were important to them. Additionally, there was the significance of the location of the property, the size of the lot and its proximity to various community centres, parks, shops and medical facilities.
- [101] Here, the plaintiffs and Mr. Ghuman testified as to the desirability and peculiarity of the property which fulfilled their specific needs.

- [102] Those are as follows: (1) the property had four self-contained units within it, two suitable for residency by the families of the two plaintiffs and two rental units which would assist with the payment of the mortgage; and (2) its proximity to the schools where the Ghuman children were attending as well as to the in-laws of the Ghumans who provided free daycare to the Ghumans as needed.
- [103] Further, the price of the property was at the outer edge of the affordability of the plaintiffs' combined ability to buy a property.
- [104] I am satisfied on the evidence of the plaintiffs in the Singh Action and of Mr. Ghuman that they continued to look for similar properties at a similar price following the defendants' refusal to complete but were unable to find a property with similar attributes at a price they could afford. It is clear from the appraisals that have been put in evidence they were caught in a rising market. While the rise might not be significant to all, I find that on the tight budget of the plaintiffs in the Singh Action, it was significant enough to effectively price them out of the market of homes suitable for their unique requirements.
- [105] Hence, in my view, the plaintiffs in the Singh Action have established an enforceable contract of purchase and sale repudiated by the defendants shortly prior to the closing date and that in the circumstances the appropriate remedy is specific performance.
- [106] Accordingly, I make such an order and will hear the parties at the end of these reasons on the terms they sought. In my view, 60 to 90 days is reasonable for closing. I suggest the latter, longer period, is only appropriate given my knowledge of the health concerns of Mr. Sidhu and my concerns that the transition affect him as little as possible.
- [107] In the Sran Action, Mr. Sran attempted to introduce an appraisal as at November 2018, the commencement of trial. He served that effectively the day the trial commenced on both the plaintiffs in the Singh Action and the defendants. The defendants did not object but the plaintiffs in the Singh Action and third parties did.
- [108] I excluded the appraisal from evidence because (1) it was not properly served in accordance with the Rules; and (2) the date of June 2018 and the value set out there bore no relationship to when the damages of the plaintiff, Mr. Sran, crystallized.
- [109] As a matter of law, his entitlement to damages crystallized on the date he learned of the enforceable offer of the plaintiffs in the Singh Action and the defendants' repudiation of it.
- [110] Mr. Sran clearly learned of the ongoing litigation well before the extension in June 2016. That was still a mystery to me because of the conflicting evidence given by the defendant, Rani Sidhu and Mr. Sran. The only benchmarks I have for the value of the property are the two appraisals I received in evidence: that of the plaintiffs in the Singh Action appraising the property at \$745,000; and that of the defendants appraising the property as at the closing date in the Singh Action at \$725,000.
- [111] Hence, I am unable to determine with clarity the damages to which Mr. Sran is entitled.

[112] Further, because of my earlier statement as to my scepticism as to whether Mr. Sran ever truly intended to buy the property, I adjourn the matter of the damages to be assessed before me if Mr. Sran chooses to set the matter down and provide proper evidence and proper submissions as to the date upon which the damages are to be assessed and evidence as to the value of the property on or near that date.

[113] That leaves only the third-party proceedings.

Third-party proceedings

[114] The claim against the third parties, Tarlochan (Terry) Sidhu and Century 21, is founded on the proposition that Terry Sidhu knew, at all material times, of the existence of the Sran offer dated September 21, 2015.

[115] For the following reasons, I reject the premise that either of the defendants told Terry Sidhu of the offer, if it, indeed, existed prior to the removal of the subjects contained in the Singh offer on November 21, 2015.

[116] Hardev Sidhu was unable to recall much of anything that happened during the time period from the date on the Sran offer to his hospitalization. He was apparently in a coma for a lengthy period in 2016 and I accept the limitations on his memory are medically explained.

[117] Nonetheless, his evidence adds little, if anything, to the narrative involving both contracts for sale which includes the discussions with Mr. Sran or, more importantly as regards the third party proceedings, discussions between himself, his wife and Terry Sidhu respecting the listing agreement and eventual contract for sale for the property with the plaintiffs in the Singh Action.

[118] The evidence of Terry Sidhu and Rani Sidhu is irreconcilable. Mrs. Sidhu testified that Terry Sidhu was advised on many occasions of the Sran agreement and directed to ensure any offer presented was a "back up" offer subject to the collapse of the Sran offer.

[119] Terry Sidhu testified the first time he became aware of a previously accepted offer was on January 27, 2016. I believe him.

[120] I accept Mr. Terry Sidhu's testimony that he would have been ill advised from a business standpoint to accept a listing and the consequent costs associated with advertising and listing the property on the multiple listing service, together with the time extended for open houses, and drafting contracts etc., had he known there was an accepted offer which would eliminate his entitlement to compensation regardless of the amount of work done by him to bring forward what Rani Sidhu said was a back-up offer.

- [121] Terry Sidhu testified and I accept that exceptions can be written into listing agreements which provide for the alteration of commission arrangements where a potential vendor already has expressions of interest which might culminate in an offer not brought about by the realtor's efforts. However, there is no suggestion that the Sidhus attempted to exclude Mr. Sran's accepted offer from the multiple listing contract.
- [122] Rani Sidhu testified that her husband had all the discussions with Mr. Terry Sidhu and constantly informed him that any offer received was to be a back-up offer. When it became apparent that Mr. Hardev Sidhu was unable to recall any of the events with sufficient clarity to make his evidence reliable (and this she advised the court prior to her giving testimony), Rani Sidhu's evidence became filled with references to discussions at which she was present where the question of the Sran offer arose. None were specific but it is clear to me that she was backfilling her evidence by references that I find simply did not occur.
- [123] My reasons for not accepting the evidence of Rani Sidhu where it conflicts with that of Terry Sidhu are as follows: (1) her insistence that she hand-delivered a letter of January 5, 2016 to Terry Sidhu's office when in fact it contained references to events which did not occur until January 29, 2016, when the CPL was filed, is incredulous. She testified as to that and cross-examined Terry Sidhu on the same proposition. She submitted the same even when confronted with the fact that the CPL had not been filed as at the date she stated she wrote the letter and delivered it.
- [124] The January 5, 2016 letter was, I find, a contrivance designed solely to be used later in time.
- [125] Further, and even more compelling, is the fact that none of the correspondence predating January 27, 2016 make reference to any other reason but family troubles as the reason for the Sidhus' reluctance to complete.
- [126] Terry Sidhu advised the defendants to get legal assistance. While Mrs. Sidhu did not testify the same, it became apparent to her either from Terry Sidhu's advice to her or other advice received, that her family troubles were not sufficient to vitiate the contract between her and the plaintiffs in the Singh Action.
- [127] Throughout her evidence, she was non-responsive to clear questions and had to be reminded to answer them, she often strayed from the question asked to offer a non-responsive narrative favourable to what she perceived to be Mr. Terry Sidhu's failure to include a back-up term in the contract.
- [128] Mrs. Sidhu is fluent in English and is an insurance agent. She described how important it was to her to have the contract for listing the property and any offers reference the fact of the Sran agreement but says she read neither at the time she signed them. Later, she said she read the agreements shortly after they were prepared but took no steps to draw to Mr. Terry Sidhu's attention the errors contained therein.

- [129] Wherever her evidence conflicts with that of Terry Sidhu or the plaintiffs to whom she said she spoke (Mr. and Ms. Ghuman), I reject it and prefer the evidence of the other party.
- [130] Numerous allegations are made against Terry Sidhu and the third-party realty company, Century 21. Century 21 would be vicariously liable if in fact Mr. Sidhu was guilty of any of the breaches alleged.
- [131] It is unnecessary to deal with each individually as they all center on the allegation that Terry Sidhu knew he was being engaged only to bring back-up offers and knew of the Sran offer.
- [132] I find that Mr. Sidhu was engaged to list and sell the property and he accepted the listing at the \$750,000 price suggested by the defendants despite recommending a listing price of \$715,000 to \$725,000.
- [133] Further, I find that at no time prior to January 2016 did he become aware of any accepted offer predating or antedating his listing agreement or, more importantly, the accepted offer for Mr. Singh and Ms. Ghuman.
- [134] Further, I find Terry Sidhu performed his duties as a realtor properly and in conformity with the reasonable expectations of the parties and that he followed his obligations contractually and ethically to the defendants who sought to change the rules of the game retrospectively when they decided, for whatever reason, they no longer wanted to go through with the sale with the plaintiffs in the Singh Action.
- [135] Accordingly, the third-party proceedings are dismissed.

Costs

- [136] The plaintiffs are entitled to costs as against the defendants at Scale B. Similarly, the third parties are entitled to costs against the defendants at Scale B.
- [137] Costs in the matter of the Sran Action will be reserved until the conclusion of the assessment of damages.

"Harvey J."

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Prepared on 27 October 2026 · Esheria