

CANADA / JUDGMENT

Subramaniam v. Gupta

2020 BCSC 889

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 889 Subramaniam v. Gupta

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Subramaniam v. Gupta,

2020 BCSC 889

Date: 20200616

Docket: S189086

Registry: New Westminster

Between:

Rajkumar Subramaniam

Plaintiff

And

Rajkumar Gupta and Harmadan Singh Gadhri

Defendants

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for the Plaintiff:

J.S. Shragge

The Defendant, Harmadan Singh Gadhri appearing in person:

H.S. Gadhri

Place and Dates of Trial:

New Westminster, B.C.

October 29-31, 2019

November 1 & 4, 2019

Place and Dates of Trial:

Vancouver, B.C.

January 7-10, 2020

Place and Date of Judgment:

New Westminster, B.C.

June 16, 2020

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[1] This trial concerned the completion of a transfer of a parcel of land at 6702 191A St., Surrey, B.C. which I will refer to as "Lot 23", pursuant to a 2011 written agreement made within the context of a joint business venture. Mr. Rajkumar Subramaniam is the plaintiff - purchaser of Lot 23 and the defendants, Mr. Raj Kumar Gupta and Mr. Harmadan Singh Gadhri, currently hold title to the parcel.

- [2] The action was commenced primarily as a claim of specific performance of the 2011 agreement, but during the course of the trial and particularly in the closing submissions, the plaintiff instead pursued a more straightforward remedy relying on an existing order of Madam Justice Burke. Prior to closing submissions, I granted the plaintiff's application to amend the notice of civil claim to reflect this change. In closing, the plaintiff submitted that the existence of the Burke J. order obviates the need for a specific performance analysis, and instead asked for the following orders:
- i. The plaintiff may fix a new completion date for the sale of Lot 23 on reasonable notice to the defendants;
 - ii. Alternatively, the defendants shall specifically perform the Contract for Lot 23;
 - iii. Further, if Mr. Gadhri refuses to sign the Form A transfer, the vendor's statement of adjustments, or any other document required to complete the conveyance of the Lands to the plaintiff, then upon production of satisfactory affidavit evidence to that effect, the Registrar of the Supreme Court shall sign in place of Mr. Gadhri;
 - iv. Further, the plaintiff shall have liberty to apply for such further orders, including a vesting order, as may be necessary to complete the sale and conveyance of the Lands to the plaintiff;
 - v. In the further alternative, a declaration that time ceased to be of the essence of the Purchase Contract, and that the plaintiff or the defendants may stipulate a new completion date on reasonable notice to the other party.
- [3] The present action follows complex, ongoing litigation involving, amongst others, Mr. Simranjeet Singh Dhanoa; the defendants to the present action Mr. Raj Kumar Gupta, Mr. Harmadan Singh Gadhri; and several numbered companies. The primary reasons for judgment of Burke J. following from the protracted trial were issued on March 24, 2016, indexed at Gadhri v. 0760815 B.C. Ltd., 2016 BCSC 521. On the same day, Burke J. made an order pertaining to the matter ("March 2016 Order"), the relevant portions of which are identical to the orders in the Gadhri reasons.
- [4] While the legal interests of Mr. Gupta and Mr. Gadhri appear to be aligned as they are co-defendants, it is noteworthy that one of the defendants, Mr. Gupta, did not contest the granting of any orders in the present action. There is animosity between the two defendants following the breakdown of business relations which led to the litigation. The plaintiff acknowledges Mr. Gupta has taken reasonable steps to meet the relevant obligations under Gadhri and the March 2016 Order and seeks no remedy against him.

Credibility of Witnesses

[5] The witnesses for the plaintiff were Mr. Ross Davidson, counsel for Mr. Gupta; Mr. Ron Gill from the City of Surrey; Mr. Subramaniam; and Mr. Dhanoa. Defence called Mr. Deepak Gautam, former counsel and conveyancing solicitor for Mr. Gadhri; and Mr. Avtar Dhinsa, the conveyancing solicitor to Mr. Dhanoa, as witnesses.

[6] *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A) outlines the approach to assess the credibility of witnesses:

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.

[Emphasis added.]

[7] Since *Faryna*, courts have developed a set of factors which may be used to apply the test for assessing credibility. This non-exhaustive list of factors was summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-87, *aff'd* 2012 BCCA 296:

- the capacity and opportunity of the witness to observe the events at issue;
- his or her ability to remember those events;
- the ability of the witness to resist being influenced by his or her interest in recalling those events;
- the internal and external consistency of the witness's evidence;
- did his or her testimony change between direct and cross-examination; are there inconsistencies in between prior statements, discovery evidence and his or her evidence at trial;
- whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence;
- whether his or her evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case; and
- the witness's demeanour, meaning the way he or she presents while testifying.

- [8] Most of the facts in this action are not in dispute and are established by admissions by the defendants. Much of Mr. Gadhri's closing argument was based not on law but on questioning the veracity of the testimony provided by the plaintiff's witnesses and posing what he called "emergent questions" which are best characterized as challenging the credibility of the plaintiff's witnesses.
- [9] Contrary to Mr. Gadhri's emergent questions, I found the plaintiff's witnesses to be credible and forthcoming. Most importantly, the testimony of these witnesses was largely consistent, as well as consistent with the admissions of fact and with findings in the reasons of Burke J.
- [10] Like Burke J. in Gadhri at paras. 46-58, I found Mr. Gadhri not to be a credible witness. I note again that while Mr. Gupta and Mr. Gadhri seemingly have congruent legal interests in this action, Mr. Gupta does not contest the remedy and did his best to follow Burke J.'s orders. On the other hand, Mr. Gadhri was particularly difficult as a witness. As a witness, Mr. Gadhri made assertions about his opinions on matters rather than just reporting the facts. He misrepresented that he was willing to complete the purchase of Lot 23 on June 22, 2016 when it is abundantly clear there were encumbrances on title at that date and he did not explicitly communicate with anyone regarding the sale until months after June 22.
- [11] It is likely that the animosity between him and his former business associates, Mr. Gupta and Mr. Dhanoa, drove his testimony. As a result, where Mr. Gadhri's testimony conflicted with those of the plaintiff's witnesses, I favour the version provided by the plaintiff's witnesses.

Facts

Background: Gadhri v. 0760815 B.C. Ltd., 2016 BCSC 521

- [12] Gadhri arose from the breakdown of a joint venture initiated in 2006 to develop and sell a 79-lot residential subdivision created from four properties. Two of these properties were owned by Mr. Dhanoa's numbered companies, and the remaining two jointly owned by Mr. Gupta and Mr. Gadhri, operating as a partnership (Gadhri at paras. 18, 333). Burke J. found all of the agreements in the joint venture, including the agreement to sell Lot 23, to be enforceable (Gadhri at para. 206). Lot 23 was initially held by one of Mr. Dhanoa's numbered companies (Gadhri at para. 112), whereas Lots 78 and 79 were held by Mr. Gupta and Mr. Gadhri (Gadhri at para. 32).
- [13] Due to the way roads and lanes intersected, Lots 23 and 79 were composed of (Gadhri at para. 151):
- a full-size lot similar in size, shape, and proportion to the other lots in the development property; and
 - a separated smaller remainder portion on the other side of the road, often referred to in real estate development as a "hook lot."

- [14] The hook lot portions of Lots 23 and 79 were such that they could only be developed if they were merged with neighboring lands owned by third parties (Gadhri at para. 152). In accordance with the joint venture, Mr. Gupta and Mr. Gadhri agreed to exchange Lot 78 for Lot 23 (Gadhri at para. 153). Lot 78 contained more land than Lot 23, and in order to compensate the numbered company from the net loss of land arising from this exchange, a nominee for one of Mr. Dhanoa's numbered companies was granted the option, numbered BB912209, to purchase the hook lot portion of Lot 23 (Gadhri at para. 153). The option was signed on October 29, 2008 and registered on title on November 7, 2008 (Gadhri at para. 164). The business relations between Mr. Gupta and Mr. Gadhri began to deteriorate in 2009 (Gadhri at para. 42).
- [15] In January 2011, Mr. Gadhri attempted to sell Lot 79 to his son, Mr. Jasdeep Gadhri, without the knowledge of his partner, Mr. Gupta (Gadhri at para. 361). When Mr. Gupta learned of this attempted sale in March 2011, the sale was not completed (Gadhri at para. 362). Burke J. ordered at para. 367 that Mr. Gadhri would have to account to the partnership for the \$100,000 in profits he earned with regard to the sale of Lot 79 to his son.

August 5, 2011 Agreement

- [16] It is admitted that on August 5, 2011, Mr. Subramaniam entered into a written agreement with the defendant-vendors, Mr. Gupta and Mr. Gadhri, for the transfer of Lot 23 at a price of \$305,000 and with a completion date of October 12, 2011 ("August 2011 Agreement").
- [17] Mr. Dhanoa testified, and I accept, that in order to protect the interest of Mr. Dhanoa's numbered company in Lot 23, he used Mr. Subramaniam, the plaintiff, as an assignee, to purchase Lot 23. Mr. Dhanoa used an assignee since he feared that Mr. Gadhri would not sell to him due to the ongoing litigation between them. While the assignment form was never signed, the intention to assign was present and there is an express assignment clause in the contract of purchase and sale. In any case, the exact nature of the relationship between Mr. Dhanoa and Mr. Subramaniam is not material to the present action and is not an issue in this case.
- [18] Crucially for the purpose of this action, the contract states, "Sellers warrant to deliver free and clear title of all encumbrances, and registered option/s and C.P.L. prior to Oct 06. 2011."
- [19] In Gadhri, Burke J. found the following about Lot 23 and the registered option:
- [358] There is a contract of purchase and sale dated August 5, 2011, to sell Lot 23. This sale did not complete on October 12, 2011, because of the option registered on title in favour of Mr. Dhanoa's numbered company.
- [359] I have concluded above the option is valid and properly represents an interest in the lots held by these companies. I agree, as argued by Mr. Gupta and stated above, the Gupta/Gadhri partnership should pay the fair market value of the option to the numbered company in exchange for release of the option so this matter can be finalized.

[20] Counsel for Mr. Subramaniam submits the matter to which Burke J. refers, at para. 359, as requiring finalization is the transfer of Lots 79 and 23 to Mr. Jasdeep Gadhri and the plaintiff, respectively. I agree.

[21] By letter of October 12, 2011, Mr. Dhinsa wrote to Mr. Davidson and Mr. Gautam, solicitors for the Defendants:

The Contract of Purchase and Sale dated August 5, 2011 (the "Contract") provided that the seller was to provide clear title by October 6, 2011 and deal with the issue of the Option to Purchase and Judgments. The Purchase was to complete today and your clients have failed to provide clear title even though our office has requested proof of same since October 6, 2011.

Our clients are ready, willing and able to complete this purchase today.

[22] As noted by Burke J. at para. 358 above, and listed in the admissions of fact, the defendants were unable to provide clear title to the plaintiff by October 12, 2011 per the August 2011 Agreement due to the option registered on Lot 23. Gadhri at para. 411, contained the following orders relevant to Lot 23:

- (2) With respect to the actions concerning Mr. Gupta and Mr. Gadhri, I order and declare:
 - (a) That Mr. Gupta and Mr. Gadhri are partners in respect to the 25-lot subdivision (the "Partnership") and shall share equally in respect to all obligations and liabilities incurred, as well as in respect to all revenues and benefits derived therefrom;
 - (b) The Partnership, especially Mr. Gadhri, shall cooperate to complete the joint venture accounting with Mr. Dhanoa and the Numbered Companies;
 - (c) The Partnership shall pay out and discharge the options over Lot 23 and Lot 79 at fair market values .
 - (e) The Partnership shall determine whether the buyers in respect to Lot 23 and Lot 79 are ready, willing, and able to complete under the existing contracts of purchase and sale and, if so, the Partnership shall complete the sales under the existing contracts. If either or both of the buyers are not willing to complete under either or both of the contracts, then Mr. Gupta and Mr. Gupta and Mr. Gadhri shall have joint conduct of sale with liberty to apply for further directions and orders;
 - (f) The net sale proceeds from the sale of Lots 23 and 79 shall form part of the Partnership funds;

[Emphasis added.]

[23] At para. 412, and in subparagraph (e) above, Burke J. noted that further orders or directions may be necessary due to the number of outstanding steps left in resolving the dispute, and remained seized of the matter in the event that this was required.

March 2016 Order

[24] On the same day as the release of the Gadhri reasons, Burke J. made an order with the following portions relevant to the present action:

THIS COURT DECLARES that:

3. The Joint Venture Agreement, the Option Agreements, the Pond Agreement, the November 2008 Agreement, and the Accounting Agreement are valid and binding contracts.
4. Raj Kumar Gupta ("Raj Gupta") and Harmadan Singh Gadhri ("Harmadan Gadhri") are partners in respect to a 25-lot subdivision at 19120 - 69th Avenue, Surrey, BC and 19140 - 68th Avenue, Surrey, BC (the "Partnership") to share equally in respect to all obligations and liabilities incurred, as well as in respect to all revenues and benefits derived therefrom.

THIS COURT ORDERS that:

11. The Partnership shall pay to 0760815 B.C. Ltd. the sum of \$157,000 in respect of Lot 23 and \$99,000 in respect of Lot 79 and 0760815 B.C. Ltd. shall discharge the Options to Purchase over those lots.
 16. The Partnership shall determine whether the buyers in respect to Lot 23 and Lot 79 are ready, willing and able to complete under the existing contracts of purchase and sale and, if so, the Partnership shall complete the sales under the existing contracts. If either or both of the buyers are not willing to complete under either or both of the contracts, then Raj Gupta and Harmadan Gadhri shall have joint conduct of sale with liberty to apply for further directions and orders.
- [25] I note para. 16 of this order is identical to para. 411(2)(e) of the Gadhri decision. It is clear from both the Gadhri trial and in the March 2016 Order that the defendants were declared to be operating as a partnership, and they were ordered to jointly discharge the option on Lot 23 and then arrange for the sale of Lot 23.

Events Following the Gadhri Trial

- [26] On March 13, 2016, Mr. Dhanoa paid \$310,000 into Mr. Dhinsa's trust account for the purposes of purchasing Lot 23. There is a Van City cheque to this effect. The funds remain there in trust as of the time of trial, which was confirmed by the testimony of Mr. Dhanoa and Mr. Dhinsa.
- [27] The parties agree that on April 5, 2016, Mr. Davidson sent a letter to Mr. Subramaniam's counsel, Mr. Dhinsa, requesting a date for completion of the sale of Lot 23 in accordance with Burke J.'s orders ("April 5 Letter"). As noted, Mr. Gadhri's counsel, Mr. Gautam, was copied on the letter:

We confirm that we continue to act for Mr. Gupta in relation to the above-noted matter.

The court case of Gupta v. Gadhri (New Westminster Registry No. S130642) has been concluded and the trial judge, being Madam Justice Burke, has ordered the partnership of Gupta and Gadhri is to determine whether or not your client Subramania[m] wishes to complete the purchase and sale of the above-referenced property. Can you please advise, providing us with a completion date within the next 30 days. If your client is not of the mind to complete, then our suggestion is that the partnership will return the deposit.

We are counsel only for one of the partners, being Mr. Gupta. The other partner, Mr. Gadhri, is represented by a lawyer named Deepak Gautam. We are sending him a copy of this letter and he can advise as to w[h]at instructions he has from his client concerning the deposit and sale.

- [28] On April 22, 2016, Mr. Davidson sent a letter to Mr. Dhinsa in which he informed him that due to the lack of response to the April 5, 2016 letter, he was going to advise his client to list Lot 23 for sale. In his closing, Mr. Gadhri submitted that Mr. Subramaniam unequivocally repudiated the contract prior to the April 22, 2016 email sent by Mr. Davidson to Mr. Dhinsa, and that the April 22 email was Mr. Gupta's acceptance of the repudiation.
- [29] On April 27, 2016, Mr. Dhinsa responded by email, stating the plaintiff wished to complete, and proposed June 22, 2016 as the completion date. Mr. Dhinsa explained the delay as follows: "As this was an old file, it took us time to locate and contact our client."
- [30] Mr. Gadhri asserted there is no evidence filed in this action regarding anything that happened between April 28, 2016 and July 12, 2016, what he called a long gap which is unexplained and unaccounted for. The evidence contradicts these assertions. Mr. Davidson and Mr. Dhinsa clearly took steps after the April 27, 2016 letter to list Lot 23 for sale; most notably there were attempts by Mr. Davidson to discharge the option on Lot 23 and communicate this to Mr. Dhinsa. This is clear from some of the following events.
- [31] On May 4, 2016, Mr. Davidson forwarded Mr. Dhinsa's April 27, 2016 email to Mr. Gautam. Mr. Gautam testified he had never responded to this email.
- [32] On May 13, 2016, Burke J. ordered that the proceeds of sale from Lots 23 and 79 be held in trust until this Court could determine how to allocate those proceeds. On June 17, 2016, Burke J. made a further order upon application by Mr. Gupta, directing, among other things, that \$128,000 of the proceeds of the sale of Lots 79 and 23 which were held in trust, be paid to counsel for Mr. Dhanoa and his numbered companies. Reasons for this order are indexed at 2016 BCSC 1128.
- [33] Mr. Dhinsa testified that in accordance with standard practice of an experienced conveyancing solicitor, he would have run a title search in the week prior to the completion date of June 22, 2016 and noticed that Lot 23 still had the option registered on it. In October 2011, he delivered the results of the search to Mr. Davidson upon request, but Mr. Davidson did not demand these documents in June 2016.

- [34] Instead, on June 20, 2016, Mr. Davidson communicated to Mr. Dhinsa that the numbered company in favour of which the option on Lot 23 was granted had failed to make corporate filings, and was therefore dissolved by the Registrar of Companies. As a result, the Land Title Office could not discharge the option on Lot 23. Mr. Davidson advised in this email that five weeks would be necessary to restore the company and discharge the option, and made a request to extend the completion date beyond June 22, 2016 by asking, "We do have a court order for the discharge of the option - in the circumstances is your client prepared to extend further the completion date?" Mr. Gautam was copied on the June 20 email, and he testified he never responded to it.
- [35] It is clear from the testimony, emails, and Burke J.'s May 2016 and June 2016 orders that contrary to Mr. Gadhri's assertions about an unexplained gap in communication, concrete steps were taken by counsel for Mr. Subramaniam and Mr. Gupta to finalize the sale of Lot 23 between April 28, 2016 and July 12, 2016. The same cannot be said about Mr. Gadhri.
- [36] On July 13, 2016, Mr. Davidson wrote to Mr. Dhinsa requesting a new completion date and indicating that he expected the option on Lot 23 to be discharged by the end of July 2016. Mr. Gautam was copied on the July 13 letter via email, and he testified as having never responded to it. On July 19, 2016, Mr. Dhinsa responded, requesting a completion date in the second week of August, since Mr. Subramaniam was out of the country until the end of July.
- [37] The options on Lots 23 and 79 were discharged on August 12, 2016.
- [38] On August 18, 2016, Mr. Davidson wrote to Mr. Dhinsa, confirming that the discharge of the options on Lot 23 and 79 were accepted by the registrar and the releases would be finalized any day. Mr. Davidson suggested one week would be a reasonable time within which to complete. Mr. Gautam was copied on this email, and he testified he never responded to the email.
- [39] On August 24, 2016, the sale of Lot 79 to Mr. Jasdeep Gadhri was registered on title.
- [40] On August 25, 2016, Mr. Dhinsa suggested the completion date of September 12, 2016 for the sale of Lot 23 ("August 2016 Agreement"). The parties agree Mr. Gautam was forwarded this email by someone from Mr. Davidson's office, and on August 26, 2016, Mr. Davidson verbally informed Mr. Gautam of this completion date.
- [41] On August 31, 2016, Mr. Davidson emailed Mr. Gautam, again communicating the completion date of September 12, 2016, and enquiring about whether the conveyancing documents should be sent to Mr. Gautam for Mr. Gadhri's signature, once they were provided by Mr. Dhinsa. These closing documents were provided to Mr. Gautam on September 8, 2016.

[42] It is admitted that the plaintiff had the funds to complete through a numbered company, and Mr. Dhanoa confirmed this in his testimony. Since March 13, 2016 to the time of the trial, there have been funds in Mr. Dhinsa's trust account set aside specifically for the purpose of purchasing Lot 23, and bank statements of the numbered company show funds exceeding the purchase price of Lot 23 between June 6, 2016 and September 30, 2016. Mr. Gupta had already signed the closing documents, but Mr. Gadhri would not sign them.

[43] On September 12, 2016, Mr. Davidson sent the following email to Mr. Dhinsa:

Further to my voice-mail message left with you, Mr. Gaut[a]m who acts for Mr. Gadhri has assured me that he will get Mr. Gadhri to sign the sale documents and return them to our office tomorrow. Unfortunately, we will not be able to complete today.

[44] While referring to this email and a few other communications by Mr. Davidson, Mr. Gadhri suggested in closing that Mr. Davidson was acting beyond his professional responsibility by speaking for both him and Mr. Gupta. In no correspondence did Mr. Davidson imply or expressly state that he was representing anyone but Mr. Gupta. In the first email, he clearly stated he was "counsel only for one of the partners, being Mr. Gupta. The other partner, Mr. Gadhri, is represented by a lawyer named Deepak Gautam."

[45] Mr. Davidson diligently copied Mr. Gautam, who represented Mr. Gadhri, on each letter and email correspondence with Mr. Dhinsa, despite receiving no replies. It is rather odd, then, that Mr. Gautam claimed in an email on September 13, 2016 that he "did not receive most of this correspondence especially the September 12 completion date selection by the buyer."

[46] In reply on September 13, Mr. Davidson once again sent to Mr. Gautam all the correspondence from the past few months regarding the completion of the sale of Lot 23. Mr. Gautam then said by email:

I have been trying to get a hold of my client without success. But when I last spoke to him yesterday he mentioned that the value of Lot 23 has significantly increased and if it was sold in the open market it will likely fetch \$450,000.00. This will result in your client getting more money and is in the mutual interest of our respective clients. Since the buyer of the Lot 23 was not ready to complete before September 12, 2016 we must now cancel that contract and return the deposit forthwith. I hope Mr. Gupta will agree to this course of action please advise.

[47] September 13, 2016 was the first time Mr. Gadhri communicated he believed Mr. Subramaniam had repudiated the agreement. Then, on September 21, 2016, Mr. Gautam wrote to Mr. Dhinsa, purporting to accept the plaintiff's alleged repudiation of the contract. Until that time, Mr. Gadhri had in no way communicated his rejection of the September completion date to Mr. Subramaniam, Mr. Gupta, or their counsel.

[48] Mr. Gautam agreed in cross-examination that many of the factual and legal allegations in the September 21, 2016 letter were inaccurate or irrelevant.

Issues

[49] The issues to be determined are:

- a) What is the correct interpretation of the order made in March 2016 and in Gadhri?
- b) Is the August 2016 Agreement enforceable?
- c) Did Mr. Gadhri breach the August 2016 Agreement by failing to sign the conveyancing documents on September 13, 2016?
- d) Is the plaintiff ready, willing, and able to complete the transfer?

Effect of Burke J.'s Orders

[50] The plaintiff argues the March 2016 Order and portions of the Gadhri trial judgment, properly interpreted, require the defendants to complete the sale of Lot 23, if the plaintiff wishes to do so. Mr. Gadhri seemed to submit that contrary to the plaintiff's submission, Burke J.'s words in this order and para. 411(2)(e) of Gadhri are better interpreted as alternative propositions, in which the partnership of Mr. Gupta and Mr. Gadhri had to take one of two routes, and if one was not open then the other route could be pursued.

[51] In *Warde v. Slatter Holdings Ltd.*, 2016 BCCA 63 at para. 65, the Court of Appeal described the correct approach to interpreting a court order (citing *Sutherland v. Reeves*, 2014 BCCA 222 at para. 31):

[31] court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (*Yu v. Jordan*, 2012 BCCA 367 at para. 53, Smith J.A.):

[53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.

[Emphasis in original.]

[52] The text of the order at issue is identical in both the March 2016 Order at para. 16 and in Gadhri at para. 411(2)(e):

The Partnership shall determine whether the buyers in respect to Lot 23 and Lot 79 are ready, willing and able to complete under the existing contracts of purchase and sale and, if so, the Partnership shall complete the sales under the existing contracts. If either or both of the buyers are not willing to complete under either or both of the contracts, then Raj Gupta and Harmadan Gadhri shall have joint conduct of sale with liberty to apply for further directions and orders.

- [53] It is clear from the wording of the first sentence that if Mr. Subramaniam is ready, willing, and able to complete under the existing contract, the Partnership had a continuing obligation to sell Lot 23 to him under the August 2011 Agreement. This interpretation is sensible given the general circumstances of the Gadhri trial and the 79-lot development with which it was concerned, the specific circumstances of the August 2011 Agreement to sell the parcel to Mr. Subramaniam, and the arguments considered by Burke J.
- [54] The alternative route suggested by Burke J., that the defendants could have joint conduct of the sale is therefore available only if Mr. Subramaniam was not willing to complete under the August 2011 Agreement. As a result, while Burke J. considered two possible outcomes, the Partnership did not have the right to choose an alternative course of action as long as Mr. Subramaniam wished to complete the purchase of Lot 23 on the completion date.
- [55] Mr. Gupta and his counsel, Mr. Davidson, have had no difficulty in interpreting the order as above and, as is evidenced from their proactive exchanges with Mr. Dhinsa, taking steps to fulfil their obligation to follow Burke J.'s orders. Their acknowledgment and understanding of this obligation is seen through repeated references to the order in the April 5 Letter and in following correspondence.
- [56] The plaintiff's counsel submits, and I agree, that absent fundamental breach of the contract or repudiation by Mr. Subramaniam, the defendants were not at liberty to elect not to complete the sale of Lot 23 to the plaintiff.

Enforceability of the August 2011 Agreement

Repudiation by Mr. Subramaniam

- [57] Mr. Gadhri claims that Mr. Davidson's April 22 email, in which he informed Mr. Dhinsa that he was going to advise his client to list Lot 23 for sale due to lack of a response to Mr. Gupta's April 5 email, counts as unequivocal communication of the repudiation of the contract.
- [58] Without anticipatory or fundamental breach, Mr. Gupta and Mr. Gadhri were simply not at liberty to communicate any unequivocal repudiation of the contract. There is no evidence pertaining to communications or actions by Mr. Subramaniam or his counsel, Mr. Dhinsa, that they wished not to purchase Lot 23. While it would have been helpful for Mr. Subramaniam to respond with a closing date before Mr. Davidson's urging on April 22, I cannot treat a simple failure to respond to an email as a breach, especially because this was many days prior to the 30-day deadline to provide a completion date provided by Mr. Davidson on April 5. Moreover, nothing Mr. Dhinsa or Mr. Davidson communicated after

April 27, 2016 suggests that Mr. Subramaniam had repudiated the contract.

- [59] In addition, a letter from Mr. Davidson simply urging the Plaintiff to respond to an earlier email and reminding them that Burke J.'s order allowed the Partnership to list Lot 23 and to sell to another buyer if they did not respond by the date in the earlier email cannot amount to effective communication that the Partnership treated the contract as having ended. In the April 22 email, Mr. Davidson was simply being a diligent solicitor by following the Burke J. order in ascertaining if Mr. Subramaniam wished to complete. It is abundantly clear Mr. Gupta himself did not treat the contract as repudiated at the time. Mr. Gupta is to this day ready to fulfil his obligation to sell Lot 23 to Mr. Subramaniam and certainly wished to do so on June 20, 2016, when Mr. Davidson proposed that the completion date be moved five weeks due to issues with discharging the option on Lot 23. This was after hearings with Burke J. in May and June 2016, in which Mr. Gupta and Mr. Dhanoa applied for further orders to wind up the litigation and finalize the sale of Lot 23 and Lot 79.
- [60] Mr. Gadhri himself, through his counsel, waited until September 21, 2016 to communicate his clear acceptance of Mr. Subramaniam's purported repudiation.
- [61] Even if the initial lack of response to the April 5 email could be treated as communication accepting a repudiation, Mr. Gadhri was himself obligated to speak up promptly and clearly to communicate his irrevocable election to treat the contract as at an end: *Louie v. Solitude Investments Ltd.*, 2019 BCSC 428 at paras. 14-15. This communication by the innocent party acknowledging that the contract is at an end is crucial because it has an important effect on the residual contractual obligations of all parties. Madam Justice Warren summarized the principles applicable in the event of a breach in *Dosanjh v. Liang*, 2014 BCSC 162, *aff'd* 2015 BCCA 18 at para. 33:
- [50] The consequences of a repudiation, whether by anticipatory breach or breach of a fundamental term, are well established. They are referred to in *Sethna v. 350 Kingsway Development Ltd.*, 2011 BCCA 434, at para. 24, and *Homestar Industrial Properties Ltd. v. Philips* (1992), 72 B.C.L.R. (2d) 69 (C.A.), at para. 13, and may be summarized as follows:
- A party to a contract has two alternatives if the other party repudiates the contract: the innocent party may accept the repudiation or affirm the contract.
 - If the innocent party accepts the repudiation, the contract is at an end, both parties are relieved of their obligations under it, and the innocent party may sue for damages immediately without waiting for the time that the contract should have been performed.
 - If the innocent party affirms the contract, the contract remains alive in all respects for both parties, and the risk exists that the party beginning as the innocent party will subsequently commit a breach of its own.
 - If the innocent party wishes to accept the repudiation, he or she must make his or her election known.

- Once made, the election is irrevocable.

[Emphasis added.]

[62] In the Dosanjh appeal, Groberman J.A. articulated the following about the innocent party's communication of the acceptance of a repudiation:

[37] I accept that, where a party has repudiated a contract, the opposite party is entitled to a reasonable period of time in which to decide whether to affirm the contract or accept the repudiation. I also accept that, at least until that reasonable period of time has elapsed, a court should be slow to treat equivocal statements or acts as affirmations of the contract. The court's solicitude toward the innocent party, however, must not extend to ignoring unequivocal acts or statements of affirmation made by a party that is aware of its legal rights.

[63] While he has minor difficulties with English, Mr. Gadhri has significant business experience and is able to understand commercial relations. Burke J. came to a similar conclusion in Gadhri at para. 141. In *A & G Investment Inc. v. 0915630 B.C. Ltd.*, 2014 BCCA 425 at para. 38, the Court of Appeal highlighted the importance of prompt and clear communication by the innocent party in the event of a breach by the other party:

An election between inconsistent rights must, however, be made promptly and communicated to the other side. Parties cannot adopt a "wait-and-see" approach to fundamental breach, as their election simultaneously determines the position of the counterparty to the contract.

[64] Too much time had passed and too much work had been completed towards fulfilling the contractual obligations by Mr. Subramaniam and Mr. Gupta between Mr. Subramaniam's alleged breach and Mr. Gadhri's purported acceptance on September 21, 2016, for the acceptance of the repudiation to have been made within a reasonable time. It bears noting again that Mr. Gadhri was informed of all the developments in the intervening time and at no instance in the three months did he take the simple step of sending a letter through his counsel stating he believed the contract was repudiated.

[65] In the absence of such communication, it was reasonable for the parties to assume that Mr. Gadhri would follow an order of this Court and finalize the sale. It also bears noting that Mr. Gadhri had taken similar steps requiring the completion of the sale of Lot 79 to his son, a transfer which was registered on August 24, 2016.

[66] In these circumstances, the absence of an acceptance of the repudiation by Mr. Gadhri within a reasonable time, "the contract remains effective and both parties remain subject to the provisions in that contract": *Kent v. Kalyk*, 2017 BCSC 1074 at para. 34.

[67] Mr. Gadhri's closing submissions questioned whether the plaintiff was ready, willing, and able to complete the purchase of Lot 23 on the June 22, 2016 completion date, and what he asserted was the nebulous second completion date of the "second week of August" resulting from Mr. Dhinsa's July 19, 2016 email. In particular, he states there is no evidence Mr.

Subramaniam held the funds to complete the purchase. This submission by Mr. Gadhri ignores the evidence in the form of the bank account balance and the cheque held in trust by Mr. Dhinsa showing that Mr. Subramaniam had the funds to complete the transaction at all material times.

[68] In any case, as with the purported April 2016 repudiation, Mr. Gadhri was obligated to communicate promptly and clearly to Mr. Subramaniam that he treated this contract as at an end due to Mr. Subramaniam's inability to pay, which he did not do within a reasonable time. I note again that this was after Mr. Gadhri's counsel had been routinely informed of all correspondence between Mr. Davidson and Mr. Dhinsa.

[69] In any case, whether Mr. Subramaniam had funds on those earlier dates is not dispositive of this issue since the option on Lot 23 would also have to be discharged for the Defendants to meet their contractual obligations and follow Burke J.'s orders. As stated in *Gross v. Cottier* (1992), 71 B.C.L.R. (2d) 1 at para. 19 (C.A.), a case relied on by the plaintiff:

The obligation to clear title and transfer title free and clear of financial encumbrances and the obligation to pay the purchase monies are mutually dependent obligations. Where covenants are mutually dependent and are expected to be carried out contemporaneously, neither party need actually perform their obligations unless the other side shows its ability or willingness to perform its part of the bargain.

[70] As a result, Mr. Gadhri is unable to rely on the simple assertion of Mr. Subramaniam's lack of funds as an excuse for the Partnership's inability to provide the title to Lot 23 free of encumbrances.

Mr. Gadhri's Breach

[71] Since there was no repudiation at any stage by Mr. Subramaniam, the agreement for the purchase and sale of Lot 23 was alive, and time ceased to be of the essence until more concrete steps were taken to discharge the option on the parcel. As noted by Madam Justice Southin in *Shaw Industries Ltd. v. Greenland Enterprises Ltd.* (1991), 54 B.C.L.R. (2d) 264 at 271 (C.A.):

Normally, in this situation, when both parties let the time go by, and one of the parties wishes to reinstate time as of the essence, it is necessary to serve a notice upon the other party, fixing a new date for closing, which must be reasonable, and stating that time is to be of the essence with respect to the new date.

[72] Therefore, the communication on August 25, 2016 which stipulated a new closing date of September 12, 2016 is enforceable. This closing date was two weeks from the date of the agreement, which is reasonable in the circumstances. In addition, given that Mr. Gadhri had received the conveyancing documents by September 8, 2016 and had failed to communicate with Mr. Subramaniam or Mr. Gupta about the agreement from April 5, 2016 until September 13, 2016, I find the new completion date of September 13, 2016, set on the

previous day, was also reasonable.

- [73] It is clear from Mr. Gautam's email on September 13, 2016 that Mr. Gadhri had been unwilling to sign the documents for no other reason than to improve his financial position by selling Lot 23 for a greater price than was agreed to in 2011. It is all too suspicious that the sale of Lot 79 to Mr. Gadhri's son was completed on August 24, 2016, soon after the options on both Lot 23 and Lot 79 were discharged.
- [74] By failing to close on September 12, 2016, Mr. Gadhri breached the agreement of purchase and sale and failed to act in accordance with an order of this Court.

New Completion Date

- [75] Since the August 2011 Agreement subsists, Southin J.A.'s statements in Shaw at 272 are relevant to this situation:

From the proposition that the contract still subsists, it follows that neither party is relieved of his own contractual obligation to complete by the failure of performance of the other. He cannot treat that failure as a repudiation. In order that he may do so, he must himself first give such a notice and must at the time thereby fixed for completion be himself ready, willing and able to perform.

- [76] Mr. Subramaniam continues to possess funds to complete the purchase of Lot 23 and is willing to do so. Mr. Gadhri was not willing to sign the completion documents even though they were sent to him in a timely manner by September 8, 2016 and he never communicated anything to suggest he was not willing to perform.
- [77] Therefore, the balance of the March 2016 Order, that the Partnership must complete the sale of Lot 23 to Mr. Subramaniam if he wishes to do so, is operative. Mr. Gupta and Mr. Gadhri continue to be bound by the August 2011 Agreement and by Burke J.'s order to finalize the sale of Lot 23 to Mr. Subramaniam and he is entitled to set a new, reasonable completion date for the sale of Lot 23.

Conclusion and Costs

- [78] I have not dealt with the plaintiff's alternative argument on specific performance because it is superfluous in the circumstances.
- [79] I grant the following orders in favour of the plaintiff, Mr. Subramaniam:
- a) The plaintiff may fix a new completion date for the sale of Lot 23 on reasonable notice to the defendants.
 - b) If, by the new completion date, Mr. Gadhri refuses to sign the Form A transfer, the vendor's statement of adjustments, or any other document required to complete the conveyance of the Lands to the plaintiff, then upon production of satisfactory affidavit evidence to that effect, the Registrar of the Supreme Court shall sign in place of Mr. Gadhri.

c) The plaintiff may apply for such further orders, such as a vesting order, as may be necessary to complete the sale and conveyance of the Lands to the plaintiff.

[80] This Court has the discretion to assess special costs where warranted: Supreme Court Civil Rules, B.C. Reg. 168/2009, R. 14-1. The standard warranting special costs is whether the behaviour in question is "reprehensible," which encompasses milder forms of misconduct deserving of rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at para. 17 (B.C.C.A.).

[81] The plaintiff will have his costs. There will be no costs award against Mr. Gupta as he is blameless in this matter.

[82] The parties may make submissions as to the scale of costs. However, it is my view that Mr. Gadhri's conduct throughout this litigation should attract some form of increased costs. Mr. Gadhri has proved himself to be obstructive throughout the entire saga so that he could delay the completion of this transaction and both thwart Mr. Dhanoa and increase his profit by breaching the contract of purchase and sale.

[83] Mr. Gadhri mentioned in closing that he is judgment-proof and thus has no concern about being punished in costs. In light of his past behaviour and in the interest of resolving this matter without further delay, an amount from Mr. Gadhri's share of the proceeds of the sale of Lot 23 will be withheld until the final determination of costs is made. \$50,000 will be held as security for, and as credit toward, costs against Mr. Gadhri pending the Registrar's assessment after a judge has heard submissions on the issue of costs.

[84] I leave the determination of the scale of increased costs to be awarded against Mr. Gadhri to the decision of a judge after hearing from the parties.

"Russell J."

The Honourable Madam Justice Russell

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