

CANADA / JUDGMENT

Toor v. Dhillon

2020 BCCA 309

COURT

British Columbia Court of Appeal

DECIDED

9 November 2020

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2020 BCCA 309 Toor v. Dhillon COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Toor v. Dhillon, 2020 BCCA 309 Date: 20201109 Docket: CA46056 Between: Gurcharan Singh Toor and Kulwant Kaur Toor Respondents (Plaintiffs) And Ranbir Kaur Dhillon and Jarnail Singh Dhillon Appellants (Defendants) Before: The Honourable Mr. Justice Willcock The Honourable Madam Justice Fenlon The Honourable Mr. Justice Hunter Supplementary Reasons to Toor v. Dhillon, 2020 BCCA 137. Counsel for the Appellants (appearing via videoconference on October 27, 2020): A. Randhawa Counsel for the Respondents (appearing via videoconference on October 27, 2020): H.S. Nirwan Place and Date of Hearing: Vancouver, British Columbia March 13, 2020 Written Submissions received: April 15, 24 and 29, 2020 Place and Date of Original Judgment: Vancouver, British Columbia May 13, 2020 Written Submissions received: October 26, 2020 Place and Date of Supplemental Hearing: Vancouver, British Columbia October 27, 2020 Place and Date of Judgment (Written Reasons to follow): Vancouver, British Columbia October 27, 2020 Place and Date of Written Reasons: Vancouver, British Columbia November 9, 2020 Supplementary Reasons of the Court Summary: The respondents obtained an order for specific performance of a contract of purchase and sale of residential property. The appeal by the appellants was dismissed. This Court ordered that the respondents were entitled to set down a completion date within 90 days of the judgment of the Court. The respondents attempted to do so with the consent of the appellants, but no agreement was reached on a completion date. The respondents now apply for an order fixing the completion date for the specific performance of the contract. Held: Application granted. The judgment of the Court is varied by setting a completion date of November 13, 2020, with a possession date of November 14, 2020. Supplementary Reasons for Judgment of the Court:

- [1] On May 13, 2020, in reasons for judgment indexed as 2020 BCCA 137, this Court dismissed the appeal of the appellants from a decision ordering specific performance of a contract of purchase and sale of residential property. As the completion date of July 30, 2019 had passed, this Court ordered that the respondents were at liberty to schedule a new completion date in the following manner:

- [88] I agree with the trial judge that the appropriate remedy is an order for specific performance of the Contract. That was the order made in both *Shaw Industries [v. Greenland Enterprises Ltd.]* (1991), 54 B.C.L.R. (2d) 264], where the order enabled either party to set a new closing date, and *Basra [v. Carhoun]* (1993), 82 B.C.L.R. (2d) 71] (at paras. 48-49) when a new date was set by the Court. To assist the parties, I will set a procedure now for the determination of the new closing date, as was done in *Guraya v. Kaila*, 2019 BCCA 367 at para. 55.
- [89] I would dismiss the appeal and direct that the respondents are entitled to set a closing date for the Contract within 90 days of the publication of these reasons, provided they give the appellants at least three weeks' notice of the closing date. The parties may vary these dates by agreement.
- [2] The completion date has not been set, and the respondents applied to this Court for an order varying the order of May 13, 2020 to set the date for completion of the contract at November 2, 2020. The appellants opposed the application on the basis that the 90-day period for setting a completion date had passed, and the Court had no jurisdiction to fix a date outside that period or, if it had jurisdiction, should not exercise that jurisdiction in the circumstances of this case.
- [3] The respondents' application was heard by this division on October 27, 2020. At the conclusion of the application, we ordered that a completion date be fixed as November 13, 2020, with a possession date of November 14, 2020, with reasons to follow. These are those reasons. *Efforts to Set a Completion Date*
- [4] Following the judgment of this Court, the respondents made efforts to set a closing date by mutual agreement. On June 24, 2020, counsel for the respondents, Mr. Nirwan, wrote to counsel who had represented the appellants in this Court enclosing a draft order and also stating the following: I intend to canvas completion dates with my clients, and rather than impose a date on your clients, I would ask that the parties come to an agreement on a mutually agreeable completion date. Of course my clients are sensitive to the current circumstances involving the pandemic which adds added complexity to the property changing hands. A completion date set by mutual agreement reflects the best course of action in my view in terms of convenience and safety. Please review and advise on your clients' proposed completion date.
- [5] Appellants' counsel returned the formal order of the Court duly approved by letter dated July 9, 2020, but did not respond to the request for a mutually convenient completion date.
- [6] On July 9, 2020, Mr. Nirwan again asked counsel for the appellants for a convenient date for the completion of the contract. On July 11, 2020, counsel for the appellants responded that he expected the appellants would be filing a notice of intention to act in person, and that Mr. Nirwan should deal directly with them.

- [7] Mr. Nirwan then attempted to schedule an appearance before Justice Giaschi, who had been the trial judge, to seek an order setting the completion date. On July 14, 2020, a hearing date was requested before Justice Giaschi. That same evening, the appellants sent an email to Mr. Nirwan stating, "August 28 works for us to complete the sale and discuss completion dates."
- [8] A telephone hearing was then scheduled before Justice Giaschi for August 28, 2020.
- [9] On July 30, 2020, the appellants' new counsel, Mr. Randhawa, contacted Mr. Nirwan to request that the appearance before Justice Giaschi be adjourned as he was unavailable on August 28. Mr. Nirwan did not agree to adjourn the appearance, and it went ahead by telephone with the appellants' daughter appearing for the appellants. Justice Giaschi quite properly expressed the view that he could not amend or vary orders made by this Court, and no order was made.
- [10] Following this appearance, on August 28, Mr. Nirwan wrote to Mr. Randhawa to unilaterally set the completion date for October 1, 2020. On September 29, 2020, Mr. Randhawa advised Mr. Nirwan that his clients had not given him any instructions to complete the sale. On October 1, 2020, Mr. Randhawa advised Mr. Nirwan that his clients would not complete the sale because the respondents had not complied with the 90-day timeline for scheduling the completion date set by this Court.
- [11] The respondents then brought an application in chambers in this Court for an order setting the completion date. That application was referred to this division for resolution. Discussion
- [12] A threshold question is whether this Court has the jurisdiction to reopen the appeal to vary the provision for setting the completion date in light of the fact that the formal order of the Court has been entered. The principle of *functus officio* prevents a court from reopening an entered order with respect to the issues resolved in the formal order: *Harrison v. Harrison*, 2007 BCCA 120 at para. 29; *Bajwa v. Habib*, 2020 BCCA 230 at para. 46.
- [13] The *functus officio* principle is not absolute in respect of procedural or housekeeping issues. For example, this Court has consistently held that an entered order may be varied to address costs when the formal order failed to do so: *Envirocon Environmental Services, ULC v. Suen*, 2020 BCCA 201.
- [14] In *Camaso Estate v. Saanich (District)*, 2013 BCCA 370, this Court was asked to vary an entered order to direct the return of monies paid to the unsuccessful respondents as a condition of a partial stay of execution on the trial judgment, which had been set aside by the Court. The doctrine of *functus officio* was held not to apply:
- [10] We do not consider that we are being asked to revisit our order determining the appeal or to adjudicate upon any issue that should have been addressed at the hearing of the appeal. We are being asked to give a procedural remedy arising out of a process that was initiated and ran its course in this court alone. We are not being asked to rehear or to reconsider any aspect of this appeal. No variation of our order allowing the appeal is sought. This is merely a housekeeping matter that arises out of the proceedings in this court. Therefore, the

doctrine of *functus officio* has no application.

- [15] In our view, similar considerations apply to the application at bar. This Court has the jurisdiction to vary the entered order in order to fix a date certain for the performance of the contract.
- [16] That being so, in our opinion, this is an appropriate case to vary the entered order to fix a specific completion date. The 90-day period imposed by this Court was not the subject of argument in the appeal, and was included in our order to give some direction to the parties so that this litigation could come to an end. While the respondents could have, and probably should have, set a date down unilaterally within the 90-day period when the appellants did not reply to their first request for an agreed completion date, it is apparent that they were attempting to act in a reasonable manner.
- [17] When the respondents' counsel contacted the appellants on July 15 (which, we note, was still within the 90-day period) to confirm a date before the trial judge to set the completion date, the appellants' reply was, "August 28 works for us to complete the sale and discuss completion dates." After failing to obtain a closing date from the trial judge, the respondents finally fixed a date themselves, only to have the appellants take the position that it was too late.
- [18] In these circumstances, we would not give effect to the appellants' submission now that the respondents ran out of time to complete the transaction. The communication by the appellants on July 14 that they would be available on August 28 to discuss completion dates and complete the sale is tantamount to an agreement to fix a date outside the 90-day period, which was a circumstance contemplated by the May 13 order. As the appellants have now taken the position that they will not complete the contract, it is necessary for this Court to fix a date in order to give effect to the dismissal of the appeal.
- [19] The order of May 13, 2020 is varied and the completion date for the purchase and sale is fixed at November 13, 2020, with the possession date at November 14, 2020. The matter is remitted to the Supreme Court of British Columbia for resolution of any issues that might arise in connection with the completion of the transaction on November 13, 2020.
- [20] The respondents have asked for their costs of this application but in our view, each party should bear their own costs. The respondents ought to have set the completion date within the 90-day period, unilaterally if necessary, thereby avoiding this issue. However, the appellants have taken an unreasonable approach to compliance with this Court's order, including failing to respond to reasonable requests, then advising respondents' counsel on July 15 that they would attend the August 28 appointment before the trial judge "to complete the sale and discuss completion dates" and finally taking the position that it was too late after August 28 to set a completion date.
- [21] For these reasons, we vary the order made May 13, 2020 and entered July 30, 2020 to delete the 90-day provision and replace it with the following terms:

- (a) The date for completion of the purchase and sale of the appellants' property at 13251-89A Avenue, City of Surrey, Province of British Columbia (the "Property") shall be November 13, 2020.
- (b) The appellants are ordered to execute the transfer documents upon receipt of the purchase price of \$852,000, subject to necessary adjustments, or upon receipt of appropriate undertakings to ensure that the purchase price will be delivered to the appellants upon registration of the transfer.
- (c) The appellants shall deliver vacant possession of the Property on November 14, 2020.
- (d) The parties are at liberty to apply to a judge of the Supreme Court of British Columbia for further directions necessary to give effect to this order.
- (e) Each party will bear their own costs of this application. "The Honourable Mr. Justice Willcock" "The Honourable Madam Justice Fenlon" "The Honourable Mr. Justice Hunter"

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