

CANADA / JUDGMENT

Tully v. Haber

2016 BCCA 399

COURT

British Columbia Court of Appeal

DECIDED

30 September 2016

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2016 BCCA 399 Tully v. Haber COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Tully v. Haber, 2016 BCCA 399 Date: 20160930 Docket: CA43137 Between: Arlene Susan Tully Appellant (Claimant) And Robert Jeffrey Haber Respondent (Respondent) Corrected Judgment: The front cover was corrected on October 21, 2016. Before: The Honourable Madam Justice Saunders The Honourable Madam Justice A. MacKenzie The Honourable Madam Justice Fenlon On appeal from: an order of the Supreme Court of British Columbia, dated September 10, 2015 (Tully v. Haber, Vancouver Registry No. E132783) Oral Reasons for Judgment Counsel for the Appellant: M.R. Slay K. Simington Counsel for the Respondent: L.A. Kahn, Q.C. Place and Date of Hearing: Vancouver, British Columbia September 29, 2016 Place and Date of Judgment: Vancouver, British Columbia September 30, 2016 Summary: The parties settled family law proceedings by an agreement that was incorporated into a consent order. They differed on the burden of the real estate commission payable on sale of property. The appellant, by the order was to receive a lump sum from the "net sale proceeds". Provision in the agreement was made elsewhere for sharing tax expenses 50/50 and staging and conveyancing costs 25/75. The judge ordered the appellant to pay 25% of the real estate commission. Held: appeal allowed. The term "net sale proceeds" is not ambiguous and means after deductions. Nothing in the order addresses commissions. Further there is no basis to imply a term for commission sharing and no basis for rectification.

- [1] SAUNDERS J.A.: By order dated September 10, 2015, Mr. Justice Leask ordered that the burden of the real estate commission arising from the sale of the former family home is to be allocated between the parties 25% to the appellant Ms. Tully and 75% to the respondent Mr. Haber. In this appeal Ms. Tully contends that the judge erred in law and in fact in finding she is required to bear the burden of any portion of the commission. She says the judge erred in his interpretation of the contract and in finding it ambiguous in respect to the commission issue, erred in applying the principle of contra proferentem in favour of the interpretation advocated by Mr. Haber (particularly as that principle was never addressed in the hearing by the parties) and erred in implying a term that is not within the terms of the consent order.

- [2] The parties were married. Following their separation they engaged in settlement discussions and reached an agreement covering matters concerning their child and property issues. The agreement was incorporated into a consent order made on February 27, 2015, by Madam Justice Baker. It makes no mention of real estate commission.
- [3] The order provides for sharing of certain expenses in relation to the child in a ratio of 30% by the appellant to 70% by the respondent, provides for disposition of proceeds from sale of property, sale of the former family home and other property matters, and provides for sharing the costs of preparing a Section 211 Report and mediation in a ratio of 25% by the appellant and 75% by the respondent.
- [4] In particular, concerning monies and property, the order provides:
17. On or before February 17, 2015, the Claimant shall receive \$140,000.00 from the remaining net sale proceeds of 8493 Portside Court, Vancouver, British Columbia ("Portside Property"), currently held in trust by the Respondent's counsel. The Respondent shall receive the balance of these net sale proceeds. 20.
 - a. Pending the sale of the West 8th Property, the Claimant shall have sole and exclusive occupancy of the West 8th Property and sole use of all personal property located at said property.
 - b. The Claimant shall be responsible for all expenses for the West 8th Property while she remains in possession until its sale.
 - c. Notwithstanding sub-paragraph (b) above, property taxes for the West 8th Property shall be shared equally between the Parties, which costs shall be adjusted upon the sale of the West 8th Property.
 21. The parties shall share the conveyancing and staging costs of the West 8th Property, if any, on a split of 25 percent to the Claimant and 75 percent to the Respondent.
 22. Each party shall have liberty to apply to this Court for further direction concerning the sale of the West 8th Property or the disposition of the net sale proceeds.
 23. From the net sale proceeds of the West 8th Property, the Claimant shall receive a lump sum payment of \$1,470,000 for her interest in the West 8th Property, and the bank accounts held joint names at Cypress Capital Management; and the balance of the net sale proceeds then remaining shall be paid out of the Respondent.
- [5] It is paragraph 23 that is the center of the dispute now before us.
- [6] The matrimonial home was sold as contemplated. Ms. Tully and Mr. Haber, together as seller, signed a contract for purchase and sale of the property which provided that as between them and the purchaser, the seller would bear the real estate commission. Before the sale was complete the parties identified a disagreement between themselves as to the burden of the real estate commission - Mr. Haber took the position Ms. Tully was

responsible for half of the commission; Ms. Tully took the position she was not responsible for any of it. The parties agreed to place the amount of the commission in trust in save the transaction. The sale closed as planned.

- [7] Ms. Tully applied for an order that she receive 50% of the money held back (\$41,160), in effect, taking the position that the lump sum she is entitled to by paragraph 23 of the order was to be remitted to her without deduction for commission. Mr. Haber responded with the submission that he was entitled to payment of that sum, that is, on the view that 50% of the commission was to be deducted from the paragraph 23 lump sum.
- [8] The judge held against both positions, finding the answer at the mid-way point. He said:
- [3] I am not going to read them, but there are several other paragraphs later in the order where costs are divided in the same fashion - 25 percent to the claimant and 75 percent to the respondent.
- [4] After hearing clear and sensible submissions from both sides, it is my considered view that the expression "net" in paragraph 23 modifying sale proceeds is an ambiguity in the drafting and, based on the submissions made to me, it is my understanding that that paragraph was originally in a first draft prepared by counsel for the claimant and never modified although there were a number of succeeding drafts.
- [5] One of the bases for interpreting contractual documents, of which a consent order is an example, is that ambiguities are construed against the drafter. On that basis I believe that the interpretation urged on the court by counsel for the claimant should be rejected and some portion of the real estate commission should be apportioned to her.
- [6] I also reach my final view on this matter by interpreting the last phrase in paragraph 22, which I will repeat here. Each party shall have the liberty to apply to this Court . . . Leaving out the language that does not matter, . . . for further direction concerning "the disposition of the net sale proceeds."
- [7] I am satisfied that an equitable result of this dispute is that 25 percent of the real estate commission should be charged to the claimant and 75 percent to the respondent. In my view this represents a divided result today and each party should bear their own costs of today's application.
- [9] As noted by counsel for the respondent, our task on this appeal is governed by the observation that most cases of interpretation of a contract engage questions of mixed fact and law: *Sattva Capital Corporation v. Creston Moly Corporation*, [2014] S.C.R. 633, and we are governed in our task by the standard of review that is commensurate with the issue under consideration. In respect to the legal principles, the standard is correctness but in respect to matters engaging context or evidence, the deferential standard applies, always recognizing that the task of the judge in respect to interpreting the agreement, as to which a consent order is a species, is to search for the common "intent of the parties and the scope of their understanding" (para. 47 *Sattva*).

[10] With that in mind, and notwithstanding the able submissions of counsel for the respondent, I am unable to sustain the order appealed. In my view the judge erred in imposing the commission obligation of 25% on Ms. Tully; the obligation was not contained in the bargain the parties struck and thus was not in the consent order, and there was not a common intention that would allow the judge to imply such a term to effectively rectify the contract. I reach this conclusion for the following reasons:

1. there is, in my view, nothing ambiguous in the phrase "net sale proceeds". The key word in that phrase is the adjective "net", a common word found in any dictionary as meaning "after deductions" in contrast to the adjective "gross". Legal dictionaries provide parallel meanings. Applying that meaning leads to the initial proposition that unless otherwise provided by the agreement, Ms. Tully is to receive \$1,470,000 on the basis deductions have been made already. In other words, there is nothing in paragraph 23 which by itself diminishes the amount to which she is entitled in satisfaction of her claims relating to the former family home and bank accounts;
2. the structure of the agreement does not support the conclusion; there is no term in the agreement requiring Ms. Tully to pay commissions, whereas there is an express term, para. 20(c), requiring her to shoulder 50% of the taxes and an express term, para. 21, requiring her to shoulder 25% of the conveyancing and staging costs;
3. there was no evidence before the court from which the judge could conclude that Ms. Tully would have agreed to pay any portion of the commission, and there was evidence to the contrary;
4. the judge has not pointed to anything inherent in the circumstances of the formation of the contract or its background, which sheds light on the parties' intention in respect to the burden of the commission - the only guide is the agreement itself;
5. in his paragraph 3 the judge referred to paragraphs following paragraph 23 that provide for sharing expenses on a 25%/75% basis. By this he is referring to paragraphs 32 and 33 that deal with cost sharing in respect to a Section 211 Report and Mediation Costs, both expenses deriving from the litigation itself. I observe, however, that paragraph 14 provides for sharing of Section 7 expenses associated with their child on a 30%/70% basis, and paragraph 20(c) as earlier noted provides for equal, that is on a 50%/50% basis, of sharing taxes. Read as a whole, the contract does not demonstrate a consistent intention on apportioning expenses;
6. the conclusion of the judge weighs against the goal of certainty which is implicit in the lump sum provision found in paragraph 23; and
7. the conclusion is contrary to common sense in that any increase in the sale price would only benefit Mr. Haber but at the same time penalize Ms. Tully. I say this considering that the order appealed has the perverse effect that a greater sale price would generate less money for Ms. Tully because the commission naturally rises with the price and the respondent is not required to share any price increase with Ms. Tully.

- [11] The root of the problem with the order appealed is that although the judge couched his decision in the language of interpretation, what really happened is he built an additional term into the contract, not unlike paragraphs 20(c) and 21, providing for cost sharing of the commission. It is plain, however, that an implied term is not required in order to give efficacy to the agreement or to avoid an absurd result. In this the excellent discussion of Mr. Justice Low in *Zeitler v. Zeitler Estate*, 2010 BCCA 216, explains the occasions in which a term may be implied, none of which exist here. Nor could he build a term based on mutual intention, because the evidence simply does not support that route.
- [12] Mr. Kahn has said all that properly may be said in support of the order appealed. Even having heard those submissions, however, I have no hesitation in concluding that the order must be set aside and an order made that Ms. Tully is entitled to the portion of the commission amount not yet paid to her. I would allow the appeal on those terms.
- [13] MACKENZIE J.A.: I agree.
- [14] FENLON J.A.: I agree.
- [15] SAUNDERS J.A.: The appeal is allowed on the terms I have described. "The Honourable Madam Justice Saunders"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/16/03/2016BCCA0399cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/tully-v-haber-2016>

Prepared on 25 October 2026 · Esheria