

CANADA / JUDGMENT

Walton v. Warren

2020 BCSC 19

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 19 Walton v. Warren

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Walton v. Warren,

2020 BCSC 19

Date: 20200109

Docket: S190720

Registry: Victoria

Between:

William James Robert Walton and Nikolas Sven Hill

Plaintiffs

And

Christopher Scott Warren aka Scott Warren and Antonia Camille Fantillo Warren aka Antonia Camille Fantillo

Defendants

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

Counsel for the Plaintiffs:

W.E. Pedersen

On Behalf of the Defendants:

C. Warren

Place and Date of Trial:

Victoria, B.C.

December 5, 2019

Place and Date of Judgment:

Victoria, B.C.

January 9, 2020

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Introduction

- [1] The plaintiffs seek judgment in the amount of \$44,774.30 for the costs they paid to remove an underground oil storage tank ("UST") on their property and to remediate the contaminated soil associated with it.
- [2] The defendant Mr. Warren represented his own interests and those of the defendant Ms. Fantillo Warren.

- [3] The action arises out of the plaintiffs' purchase of a home from the defendants in early 2016. The plaintiffs say that the defendants breached the contract of purchase and sale by failing to remove a UST before the sale of the property concluded. The UST was discovered by the plaintiffs in late 2018 during reparation work following a flood.

The Purchase

- [4] On December 28, 2015, the plaintiffs made an offer to purchase an older home at 1157 Bewdley Avenue in Esquimalt, BC (the "Property") from the defendants.
- [5] The contract of purchase and sale (the "Contract") was dated December 28, 2015, and was prepared by Ms. Di Castri, the plaintiffs' realtor. The sale of the Property was scheduled to complete on February 29, 2016 (the "Completion Date"). The Completion Date was set in the Contract. The Contract consisted of five pages setting out the usual terms with respect to a real estate sale and a number of other terms and conditions contained in several addendums, all of which formed part of the Contract.

The Plaintiffs' Evidence

The Negotiations and the Pre-completion Steps

- [6] In his affidavit, filed on behalf of both plaintiffs, Mr. Walton said that Ms. Di Castri warned him and Mr. Hill that many older homes in Victoria have buried oil tanks. Following her advice, the plaintiffs included an oil tank addendum (the "Addendum") in the Contract to protect them against any costs associated with removing a UST and remediation of resulting contaminated soil. The Addendum provided:

It is a fundamental term of this contract that the Seller shall ensure that any underground storage tank located on the property shall be removed by a qualified tank removal contractor and the surrounding soil remediated in accordance with any provincial or local government laws, including the British Columbia Fire Code 2006, where applicable.

The Seller shall remove the tank before the Completion Date.

The Seller shall be responsible for all costs associated with compliance, including any additional costs for environmental clean up and restoration of the property to its original condition.

The Seller shall provide to the Buyer on or before the Completion Date, written confirmation from the tank removal contractor and relevant Provincial or local government authority that the completed remediation complies with the Provincial or local government law as the case may be.

- [7] The Addendum was signed by the sellers, Antonia and Christopher Warren, when they countered the plaintiffs' original offer.

- [8] The Contract was subject to a number of conditions, including the plaintiffs obtaining and approving an inspection report before January 8, 2016. Crest Building Consultancy performed a general property inspection on behalf of the plaintiffs. In its report, it recommended that they have a "specialist company survey/sweep the property to determine the presence of any buried oil tanks."
- [9] Between January 2 and 8, 2016, Ms. Di Castri arranged for Victoria Tank Service Ltd. ("Victoria Tank") to scan the Property for a UST. This service was performed free of charge, and no written report was provided. Victoria Tank reported to Ms. Di Castri that it had not found any evidence of a UST.
- [10] On January 8, 2016, ScanPlus Locating Ltd. scanned the Property for a UST. Their report, dated January 8, 2016, stated that it had found no evidence of a UST.
- [11] The Contract completed on February 29, 2016, the agreed-upon Completion Date.

The Discovery of the Oil Tank on the Property and the Remediation Steps

- [12] On October 28, 2018, the basement of the home on the Property flooded, requiring replacement of the home's perimeter drain system. On November 6, 2018, more than two and a half years after the Completion Date, in the course of the drain system replacement, the plaintiffs' contractors discovered a UST.
- [13] On Ms. Di Castri's recommendation, the plaintiffs hired Victoria Tank to remove the UST. On November 12, 2018, the top of the UST was removed, the contents pumped out, and the UST removed for disposal. Ms. Di Castri was present when the work was carried out together with a representative of the Esquimalt Fire Department. The Fire Department Representative noted that the soil around the UST appeared to be contaminated.
- [14] Ms. Di Castri paid Victoria Tank's \$1,476.30 invoice for removing the UST. The plaintiffs say that they will repay her if they recover it in this action.
- [15] Because the soil appeared contaminated, and because of Victoria Tank's and the Fire Department's warnings, the plaintiffs hired an environmental remediation company to test the surrounding soil and, if necessary, to remediate the Property. They approached three remediation companies for proposals and received proposals from two of them, TerraWest Environmental Inc. ("TerraWest") and PGL Group. After considering the two proposals, the plaintiffs decided to proceed with TerraWest, the cheaper of the two. It proposed a phased approach to the remediation.
- [16] Initially, TerraWest proposed a site assessment, using hand-augered samples, to determine the presence and concentrations of hydrocarbons and metals in the soil. The samples would be sent to an accredited laboratory for testing. Once the extent of the contamination was roughly understood, TerraWest would consult with the plaintiffs on the next steps.
- [17] The plaintiffs authorized the initial site assessment.

- [18] Terrawest conducted initial soil sampling and, on December 4, 2018, reported that the area around the UST site contained concentrations of contaminants that exceeded of the Contaminated Sites Regulation, B.C. Reg. 375/96 (the "Regulation"), for residential Low-Density Land Use, the standard applicable to the Property.
- [19] On December 7, 2018, plaintiffs' counsel wrote to the defendants to advise them of the UST and the contamination that had been found. He asked them to contact him to discuss financing the remediation. Ms. Di Castri was also sent a copy of the letter and asked to forward it to the defendants' realtor, to be passed on to them.
- [20] TerraWest prepared a cost proposal for the further investigation of the soil contamination on the Property that included digging five test pits to determine the outer boundaries of the contamination. Groundwater monitoring wells were to be installed in two of the test pits to sample groundwater for contamination.
- [21] The plaintiffs authorized this next stage of investigation.
- [22] In a report dated January 14, 2019, TerraWest advised the plaintiffs that the extent of the contamination had been delineated. Lab results from the soil sampling disclosed contamination exceeding the lowest applicable standards for the Property. The groundwater test results were lower than the applicable standards. No further work was required with respect to groundwater.
- [23] On January 25, 2019, TerraWest recommended a remediation plan to remove the impacted soils around the UST. It included excavation and disposal of the soil and, once clean limits were achieved, backfilling the Property with clean soil to grade.
- [24] The plaintiffs authorized the soil remediation plan.
- [25] TerraWest carried out the excavation work on February 25 and 26, 2019, and collected samples from the site to confirm that the excavation work sufficiently removed contaminated material so that the remaining soil did not exceed the applicable standard. Testing showed that some contamination remained in the northeast wall and TerraWest's scope of work was expanded to include further removal of material using a Hydrovac system.
- [26] TerraWest removed the contaminated soil, including from the northeast wall, and completed their final testing on March 12, 2019. On April 5, 2019, TerraWest reported to the plaintiffs that the work was complete and that the soil, at the extent of the excavation, was below the applicable standards.

The Cost of the Remediation

- [27] TerraWest invoiced the plaintiffs for its work as follows:

Date of Invoice

Invoice Number

Amount

GST

Total

Nov. 30, 2018

1201

\$1,650

\$82.50

\$1,732.50

Jan. 9, 2019

1273

\$13,780

\$689

\$14,469

Apr. 9, 2019

1413

\$24,824.74

\$1,241.23

\$26,065.97

Apr. 23, 2019

1423

\$431.25

\$21.56

\$452.81

[28] The total amount invoiced by Terra West was \$42,720.28.

[29] In his affidavit, Mr. Walton says that the plaintiffs were unable to pay all of TerraWest's invoices when delivered and they incurred carrying charges of \$577.74.

The Plaintiffs' Expert Evidence

- [30] The plaintiffs filed a May 22, 2019 expert report prepared by Derek Stewart, an applied science technician and technologist (the "Report"). Mr. Stewart is employed by TerraWest and he supervised the soil testing and remediation steps on the Property. He confirmed that the applicable regulatory standards are those set by the Environmental Management Act, S.B.C. 2003, c. 53, and the Regulation.
- [31] I admitted the Report as an expert report. It had been filed within the time for such a report in the Supreme Court Civil Rules, B.C. Reg. 168/2009. It contained relevant evidence that was necessary to my determination of the issues, particularly as they related to the remediation efforts and the applicable provincial or local government laws, as that was the standard of remediation required in the Addendum. I was satisfied that Mr. Stewart was qualified to give the evidence he provided and that his opinion was reliable.
- [32] There was very little about the Report which was controversial. The subjective facts on which the Report was based were not really open to challenge.
- [33] There was no applicable exclusionary rule which would prevent consideration of the Report and considering the issues of proportionality, the Report was straight forward and an efficient way in which to have the evidence before the Court.
- [34] Finally, Mr. Stewart gave the necessary undertaking as to objectivity.
- [35] The Report confirmed that:
- (a) the soil around the UST was contaminated in excess of the standards set by the Regulation;
 - (b) the soil contamination was confined to the area around the UST; and
 - (c) following TerraWest's remediation program, the soils tested within the applicable standards set out in the Regulation.

The Defendants' Evidence

- [36] There is no suggestion that, prior to the Completion Date, the defendants had any knowledge of the UST. In fact, Mr. Warren says in his affidavit that, when he and Ms. Fantillo-Warren purchased the Property, they received a property disclosure statement from the vendors indicating that there were no USTs on the property. In addition, the defendants had Victoria Tank scan the Property for USTs and received an oral report that there was no evidence of the existence of USTs.
- [37] Mr. Warren also said that, in or about the fall of 2012, the basement of the home on the Property flooded on the east side (the opposite side to the flood that led to the discovery of the UST that is the subject of this claim). Through an insurance claim, Victoria Tank and other contractors replaced the drainage tiles and the downstairs suite was repaired. No UST was discovered in that process.

[38] Mr. Warren said that the defendants disclosed the existence of vermiculite insulation in the attic of the home on the Property and agreed that, prior to the Completion Date, they would have it removed, replaced with other insulation, and tested. The defendants complied with their obligations under that addendum to the Contract.

[39] I accept that the defendants were surprised to learn of the UST on the Property.

The Issue

[40] The primary issue before me is the interpretation of the defendants' obligations under the Addendum.

[41] The plaintiffs argue that the Contract required the defendants to remove any UST prior to the Completion Date and that the defendants were in breach of the Contract when the transaction closed without the defendants having removed the UST. They seek damages for the costs associated with removing the UST and remediating the surrounding soil.

[42] The defendants argue that their obligation under the Addendum was satisfied as of the Completion Date. They argue that the plaintiffs completed the purchase after being satisfied with the condition of the Property.

Suitability for Summary Determination

[43] Both parties agreed that the interpretation issue was suitable for summary determination. However, the defendants submitted that the interpretation of the Addendum should be severed from the issue of damages which, they submitted, are not suitable for summary determination. The defendants said they required time to request further documents from the plaintiffs and conduct examinations for discovery.

[44] I concluded that all aspects of the dispute between the parties were suitable for summary determination. The parties did not rely on conflicting evidence and there were no credibility issues in dispute. The primary issue is one of contractual interpretation.

[45] Rule 9-7 of the Supreme Court Civil Rules permits a party to apply for judgment by way of summary trial. Summary trial applications are governed by Rule 9-7(1) which provides, in part:

(15) On the hearing of a summary trial application, the court may

(a) grant judgment in favour of any party, either on an issue or generally, unless

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application,

(b) impose terms respecting enforcement of the judgment, including a stay of execution, and

(c) award costs.

- [46] In *Gichuru v. Pallai*, 2013 BCCA 60, the Court set out the factors to be considered when determining whether a matter is suitable for disposition by summary trial. These include: the amount involved, the complexity of the matter, any prejudice likely to arise by reason of delay, the cost of taking the matter to a conventional trial, whether credibility is a critical factor in the determination, whether summary trial will cause unnecessary complexity, and whether the application would result in litigating in slices: at paras. 28-31.
- [47] In this case, the amount involved is not high. The plaintiffs seek judgment in the amount of \$44,774.30. Their claim is not complex; it involves interpretation of the Addendum and, if interpreted in the way the plaintiffs suggest, the plaintiffs will be entitled to damages. A summary trial will result in an earlier and less expensive resolution of the dispute, which will benefit both parties. If the plaintiffs' arguments about interpretation of the Addendum are unsuccessful, the litigation will come to an end.
- [48] Credibility is not determinative as there is no dispute that the parties entered into the Contract, which contained the Addendum. There is also no dispute that, after completion, a UST was discovered on the Property. Finally, there is no dispute that the plaintiffs had the UST removed and the soil remediated. In this case, there is no concern about litigation in slices.
- [49] With respect to the defendants' submission that damages should only be dealt with after a determination of the interpretation issue, I was advised that this issue was raised for the first time in argument. It was not set out in the response to the application. I was also advised that, while the defendants were represented by counsel, documents were requested from the plaintiffs and were disclosed. The defendants never requested discovery of the plaintiffs.
- [50] As the Court of Appeal explained in *Gichuru*:
- [32] All parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that he or she is unable to find the facts necessary to decide the issues or is of the view that it would be unjust to decide the issues in this manner. This requirement was underscored by Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275:
- [34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988) 27 B.C.L.R. (2d) 378 (B.C.C.A.) at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of viva voce evidence, 'something might turn up'

[Emphasis added in *Gichuru*.]

- [51] The obligation on a party responding to a summary trial application is to take every reasonable step to complete those pre-trial procedures they believe necessary to answer the application.
- [52] Here, the burden is on the plaintiffs to prove damages as a part of their summary trial application. If the defendants required discovery on that issue, it should have occurred in advance of the summary trial. The defendants' failure to conduct examinations for discovery cannot form a basis for an argument against suitability. The defendants should have come prepared to argue the whole case. They have led no evidence which challenges the plaintiffs' remedial steps or to question their damage calculation. I have all I need to decide the issues.

The Interpretation of the Addendum

- [53] The plaintiffs submit that the Addendum is clear in its meaning. It required the defendants to remove any UST on the Property prior to the Completion Date, and to remediate as necessary.
- [54] The defendants submit that the Addendum should be interpreted as only requiring them to remove and remediate any UST that was discovered prior to the Completion Date.

The Principles of Contractual Interpretation

- [55] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Court discussed how the interpretation of contracts had evolved towards "a practical, common-sense approach not dominated by technical rules of construction": at para. 47.
- [56] The Court explained that the overriding concern is to determine the intent of the parties and the scope of their understanding. Decision-makers should read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time the contract was formed. With respect to the surrounding circumstances, the Court said that contracts are not made in a vacuum: there is always a setting in which they have to be placed.
- [57] The meaning of the words in a contract may be derived from a number of contextual factors, including the purpose of the agreement and the relationship created by the agreement: para. 48.
- [58] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never overwhelm the words of the contract and the words must be grounded in the text and read in light of the entire contract. The court must not use the surrounding circumstances to deviate from the text, thereby effectively creating a new contract: para. 57.

- [59] The nature of the evidence which may be relied upon with respect to surrounding circumstances will vary from case to case. However, it should only consist of objective evidence of the background facts at the time of the execution of the contract; that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting; para. 58.
- [60] The defendants rely on the principle of *contra proferentem*, a principle that provides that where a contractual provision is ambiguous, it should be constructed against the party who drafted it. *Contra proferentem* is tool of last resort. It applies only "when all other rules of construction fail": *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada*, 2008 SCC 66 at para. 33.

Applying the Law in the Circumstances of This Case

- [61] In my view, the wording of the Addendum is not ambiguous. It obliges the defendants to remove "any" oil tank on the Property and to remediate prior to the Completion Date. As an oil tank was discovered some years after the Completion Date, the defendants had not complied with the terms of the Addendum on the Completion Date. They were in breach of the Addendum.
- [62] There is no language in the Addendum which could be interpreted as limiting the defendants' obligations only to those USTs that were discovered prior to the Completion Date or to those USTs of which they were aware.
- [63] The Addendum does not include any conditional language. For example, it does not say that the defendants are to remove and remediate "any oil tank that is discovered prior to the Completion Date" or "any oil tank that they are aware of prior to the Completion Date".
- [64] Conditional language is used elsewhere in the Contract. For example, at paras. 1-5 on page 6 of the Contract, the wording "Subject to the Buyer" precedes clauses dealing with financing, property inspection, state of property title, fire and property insurance, and property disclosure. The Addendum could have been drafted as a conditional obligation, but it was not.
- [65] As I have said, the defendants' subjective intentions are not determinative. The words in the Contract must be looked at objectively in the context of the Contract as a whole. The Contract was an agreement for the purchase of the Property. It was worded so as to protect the plaintiffs from the risk and cost associated with USTs.
- [66] Thus, the defendants' submission that they did not intend to be responsible in perpetuity for removal of a UST and for remedial work, and that such an obligation would have to be clearly expressed, is not the issue. In any event, the Addendum does not require an obligation in perpetuity. On its face and plainly read, the contract required the defendants to remove any UST on the Property prior to the Completion Date. Because the defendants had not done so, as evidenced by the subsequent discovery of a UST, they were in breach of a

contractual term on the Completion Date. Their breach was not discovered until the subsequent flood of the Property. The plaintiffs' right to sue on the breach of Contract arose on the discovery of the breach.

[67] Adding terms to the Contract that would make the obligation conditional on discovery prior to the Completion Date would distort the plain terms of the Contract.

[68] An example of such a conditional covenant was at issue in *Livco Developments v. Dworschak*, 2019 BCPC 45, a case relied on by the defendants. Livco Developments involved the sale of a parcel of land in Saanich, BC.

[69] In that case, the agreement included a term which provided that:

The seller shall grant access for oil tank scan. If tank found the seller will remove along with any environmental issues as per municipal standards before completion.

[Emphasis added.]

[70] The Addendum in this case does not have such conditional language.

[71] With respect to the defendants' argument that the Addendum expired or ceased to bind them after the Completion Date, the applicable principles are set out in *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720, the leading case on the survivability of covenants in a real estate sale contract after completion. At 734-35, the Court said:

Essentially, a deed of conveyance is a mere transfer of title, and it is not to be supposed that the whole contract between the parties is incorporated in the deed. Many provisions found in a contract of sale are not repeated in the deed; for example, an obligation to construct or finish a house in the future, or to install fixtures, or to make improvements or repairs. Where the sale agreement creates rights or imposes obligations or stipulations collateral to, or independent of, the conveyance, the question of whether those stipulations are extinguished by merger is to be treated as one of intention: *Hashman v. Anjulin Farms Ltd.*, [1973] S.C.R. 268. In the absence of evidence on the point, there is no presumption that the purchaser intended to surrender or abandon the rights acquired by him under the sale agreement.

[72] There is no evidence in this case that the parties intended for the Addendum to expire and have no effect after the Completion Date. In fact, the Contract signed by the parties provides that its terms survive the Completion Date:

18. REPRESENTATIONS AND WARRANTIES: There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale.

[Emphasis added.]

Conclusion

- [73] For the reasons given, I have concluded that the defendants are in breach of their obligation to remove any UST prior to the Completion Date and that the plaintiffs have suffered damages as a result.
- [74] I am satisfied that the amounts claimed in the notice of civil claim are appropriately awarded to the plaintiffs. The cost of the removal of the tank and the remediation costs were contemplated in the Contract. The defendants have not filed any evidence suggesting that the remediation steps undertaken by the plaintiffs were unnecessary. The plaintiffs proceeded cautiously and with a phased approach which was appropriate in the circumstances. The fact that the plaintiffs incurred an interest cost arises as a result of the defendants' breach of the contract and is also recoverable. In my view, it was foreseeable that the plaintiffs might incur a relatively minor financing cost to cover the cost of remediation.
- [75] The plaintiffs are entitled to damages in the amount of \$44,774.30, inclusive of the cost of the removal of the UST and the remediation of the Property.

Costs

- [76] Costs should follow the event. The plaintiffs have been entirely successful in this action, and they ask me to fix their costs summarily.
- [77] Rule 14-1(15) permits the court to fix an amount for costs.
- [78] I have concluded that I am in at least as good a position as the registrar to assess the costs in this case.
- [79] In this case, the plaintiffs seek lump sum costs of \$8,000 pursuant to the fast track rule, R. 15-1, and disbursements of approximately \$2,000. It would be disproportionate to require the parties to engage in another proceeding and prepare additional filings to determine costs. The amount claimed is at the low end of the range, and it is in these parties' interests to deal with the matter without requiring a further hearing before the registrar: *Harrison v. Law Society of British Columbia*, 2015 BCSC 521 at para. 6.
- [80] In *Affleck v. Palmer*, 2011 BCSC 1366, the court confirmed that in accordance with R. 14-1(1) (f), costs are calculated in accordance with R. 15-1 even when the matter proceeds by way of a summary trial. Rule 15-1(15)(a) provides that a party in a fast track action is entitled to \$8,000 in costs, exclusive of disbursements, if the time spent on the hearing is one day or less, unless the court orders otherwise or the parties consent. In this case, there is no basis for ordering otherwise. The one-day hearing was an efficient and expeditious way to deal with the issues in this case.

[81] The plaintiffs submitted a bill of costs for the disbursements they incurred and attached a computer generated list of disbursements. I have reviewed the disbursements, and allow them in the amount claimed with the exception of a file storage fee in the amount of \$25.00, which, in my view, properly forms part of the firm's overhead. I have also deducted the taxes on this amount. I therefore allow costs of \$10,655.03.

"MacNaughton J."

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