
CANADA / JUDGMENT

Wanson (Bristol) Development Ltd. v. Sahba

2018 BCCA 260

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 260 Wanson (Bristol) Development Ltd. v. Sahba

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Wanson (Bristol) Development Ltd. v. Sahba,

2018 BCCA 260

Date: 20180625

Docket: CA44187

Between:

Wanson (Bristol) Development Ltd.

Respondent

(Plaintiff)

And

Farzsneh Sahba a.k.a. Farzaneh Sahba

Appellant

(Defendant)

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Harris

The Honourable Madam Justice Griffin

On appeal from: Orders of the Supreme Court of British Columbia, dated December 23, 2016 and November 23, 2017 (Wanson (Bristol) Development Ltd. v. Sahba, 2016 BCSC 2387 and 2017 BCSC 2140, New Westminster Registry Docket S162570).

Counsel for the Appellant:

J. Dubas

Counsel for the Respondent:

N.A. Mulholland

Place and Date of Hearing:

Vancouver, British Columbia

April 16, 2018

Place and Date of Judgment:

Vancouver, British Columbia

June 25, 2018

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Griffin

Summary:

The appellant seeks to overturn an order finding her liable, under an assignment, for failing to complete an underlying real estate contract. She says the trial judge erred in failing to find that the assignment was forged, and she seeks to adduce fresh evidence on appeal bolstering that submission. She also says the trial judge erred in awarding full indemnity costs, as contemplated under the assignment, for both the action below and for an earlier action related to the assignor's liability under the real estate contract. For the first time on appeal, the appellant also submits that the real estate contract is invalid, such that she took no obligations under the assignment for which she can be held liable. Held: Appeal allowed in part. The trial judge committed no legal error in rejecting the forgery submission, and the appellant has not demonstrated palpable and overriding error in his factual findings. The evidence sought to be adduced fails the test for fresh evidence on appeal. The appellant is not entitled to raise arguments related to the validity of the real estate contract for the first time on appeal in light of the insufficient factual record on that issue, and the fact that she could have raised those arguments at trial. However, the costs award

is reduced, as the respondent did not seek full indemnity costs against the appellant for the assignor's trial in its pleadings.

Reasons for Judgment of the Honourable Madam Justice Bennett:

I. BACKGROUND

Trial proceedings

- [1] Farzsneh Sahba appeals against two orders following a trial decision where she was found to have entered into an assignment agreement and then failed to complete the underlying real estate contract. The first order is for judgment for \$125,255.77, and the second order is for full indemnity costs in favour of Wanson (Bristol) Development Ltd., a real estate developer ("Wanson").
- [2] Wanson entered into a February 11, 2007 purchase contract with Dada Rod Bloor, who agreed to purchase a residential strata unit in a Burnaby development called "Cadence", which was then under construction (the "Purchase Agreement"). The agreed purchase price was \$521,900 plus GST. The Purchase Agreement provided that completion of the sale would take place ten days after the purchaser was notified that an occupancy permit had been issued for the unit. Mr. Bloor paid a deposit of \$26,095.
- [3] An occupancy permit was issued on August 29, 2008, and Wanson set the closing date for September 10, 2008. On September 8, Mr. Bloor extended the completion date to September 16, and he was later given an additional extension to complete by September 29. Ultimately, Mr. Bloor was either unwilling or unable to complete the purchase. He testified that he was upset with Wanson's conduct, and he decided to attempt to assign the Purchase Agreement.
- [4] Mr. Bloor entered into an "Assignment of Offer to Purchase and Agreement of Purchase and Sale" (the "Assignment") with Ms. Sahba on September 12, 2008. The Assignment transferred all of Mr. Bloor's right, title, interest in, obligations, and liabilities relating to the Purchase Agreement to Ms. Sahba, and it included a clause indemnifying Mr. Bloor against all losses, costs, and damages, including legal fees and disbursements, that Ms. Sahba might suffer or incur in connection with the Assignment. At trial, Ms. Sahba denied having executed the Assignment, and claimed that her signature on the document had been forged.
- [5] Between September 15 and 24, 2008, e-mails were exchanged between Karen Savage, formerly Karen Chung (a realtor for Wanson), and Iman Seifi (Ms. Sahba's son). In the e-mails, Ms. Savage asked Mr. Seifi for a completion date for the purchase, and he requested October 13, 2008. Ms. Savage then faxed him a Revised Closing Date Change Request Form indicating that interest would be charged for each day of delay starting from October 14, 2008. The signed form was sent to Wanson on September 25, 2007, and it appeared to have been signed by Ms. Sahba, though she denied having signed it.

- [6] The sale did not complete by October 14, and on October 15, Wanson's solicitors sent a letter to Mr. Bloor via his solicitor advising of a default and of the forfeiture of his deposit as authorized under the Purchase Agreement. The unit was relisted for sale on November 5, 2008, at a listing price of \$545,000, and it sold for \$433,000 plus GST in June 2009.
- [7] Wanson then sued Mr. Bloor in May 2010 seeking damages for breach of contract, forfeiture of the deposit, interest, and costs (the "First Action"). On February 27, 2014, Justice Maisonville found that Mr. Bloor failed to complete the purchase and awarded damages to Wanson in the amount of \$91,867.38, the difference between the original sale price minus the eventual sale price received, plus interest and costs. Costs in the amount of \$33,358.39 were agreed to by the parties. Mr. Bloor, who was unrepresented, raised technical arguments related to notice and timing provisions in the Purchase Agreement, which Maisonville J. rejected.
- [8] Following this judgment, Mr. Bloor assigned into bankruptcy. Wanson has not succeeded in collecting any funds from Mr. Bloor. At Mr. Bloor's bankruptcy hearing, Registrar Cameron granted an order authorizing Mr. Bloor to begin proceedings against Ms. Sahba with respect to the indemnity provisions of the Assignment. On June 27, 2014, the trustee in bankruptcy of Mr. Bloor's estate assigned to Wanson the right to pursue judgment against Ms. Sahba with respect to the Assignment under s. 38 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. That led to the action that is now under appeal (the "Second Action").
- [9] The relevant provisions of the Purchase Agreement for the purposes of this appeal are as follow:

7.1 Assignment

No assignment by the Purchaser [Mr. Bloor] of the Purchaser's interest in the Strata Lot or this Agreement or direction of transfer to any other person shall release the Purchaser from any of the Purchaser's obligations or liabilities hereunder.

- [10] The relevant provisions of the Assignment for the purposes of this appeal are as follows:

1. Assignment

The Assignor [Mr. Bloor] hereby sells, transfers and assigns to the Assignee [Ms. Sahba] all of the Assignor's right, title and interest in and to the Agreement, including without limitation the Deposit, as and at the date hereof.

[]

4. Assumption

The Assignee will assume, observe and perform all of the Assignor's obligations and liabilities under the Agreement which are to be observed or performed thereunder as and from the date hereof, including the removal on a timely basis of any conditions precedent for the benefit of the Assignor.

[]

8. Indemnity by the Assignee

The Assignee will indemnify and save harmless the Assignor against and from any and all losses, costs and damages, (including legal fees and disbursements) which the Assignor may suffer or incur in connection with any non-observance by the Assignee of any of the provisions of this Assignment.

- [11] Ms. Sahba filed her response to civil claim without the assistance of counsel, and pleaded that Wanson was not ready, willing and able to complete its obligations under the Purchase Agreement; that, if she did breach the Assignment, her breach did not entitle Wanson to treat the Purchase Agreement as at an end; and asserted estoppel and limitations defences.
- [12] In an amended response to civil claim, drafted by counsel, Ms. Sahba pleaded that she did not sign the Assignment and thus could not have breached it, and that, in any event, the Assignment was never breached and thus Wanson did not suffer any loss. In the amended response to civil claim, Ms. Sahba removed from her pleadings all defences and other references which would necessitate her admitting that she had indeed signed the Assignment.
- [13] The Second Action came before Justice Jenkins. He rejected Ms. Sahba's defences, and found that Ms. Sahba did sign and execute the Assignment and that Wanson had proved its claim. He awarded to Wanson \$125, 255.77 CAD, representing the damages awarded of \$91,867.38 against Mr. Bloor in the First Action, plus costs that had been agreed to by Wanson and Mr. Bloor, in the amount of \$33,358.39, and, in addition, post-judgment interest.
- [14] Justice Jenkins summarized the evidence of the eight witnesses at trial: Mr. Li (Wanson's principal), Karen Savage, Mr. Bloor, Mr. Verdicchio (the lawyer who witnessed Mr. Bloor's signature), Ms. Sahba, Hossein Seifi (Ms. Sahba's husband), Mr. Kovacs and Mr. Purdy (two handwriting experts), and Mr. Perkins (a process server).
- [15] Mr. Kovacs testified that there was a "strong probability" that the signatures on the documents were Ms. Sahba's. The other expert, Mr. Purdy, stated that he was "on the fence" and there was insufficient evidence to reach a conclusion. The judge found the evidence of the two experts helpful but not determinative, and considered it only one factor in determining whether Ms. Sahba or another person executed the Assignment and the Closing Date Change Request Form.
- [16] The judge found that the onus to prove the forgery allegation was on Ms. Sahba, and concluded that she had fallen "woefully short" of proving her signature had been forged. While he found there was no direct evidence that she had executed the documents, the circumstantial evidence led him to conclude that she had executed both documents, including the form that showed a completion date of October 14, 2008.

- [17] The judge found that the Assignment was binding, as Mr. Bloor's deposit was never returned, and Ms. Savage confirmed that the deposit continued to be held to the credit of the purchase and that Ms. Sahba would have had the benefit of the deposit had she completed the purchase. The Revised Closing Date Change Request Form, which set out a specific completion date, was also valid and binding.

Costs

- [18] The judge permitted the parties to make submissions on costs within 30 days of releasing his reasons.
- [19] Wanson filed its submissions on costs before the deadline. Ms. Sahba claims she hired new counsel in January 2017, who applied for an extension to file submissions on costs but was denied. On November 23, 2017, the trial judge released his costs order, granting a full indemnity to Wanson, pursuant to the Assignment, for costs incurred in the Second Action as well as full indemnity of costs made against Mr. Bloor in the First Action, despite the consent costs order already being included in the award of \$125, 255.77.
- [20] The judge determined the entitlement to a full indemnity for both Actions was a question of general contractual interpretation. He found that there was a clear intention that Ms. Sahba would indemnify Mr. Bloor for costs, including legal fees and disbursements, that he incurred as a result of her failure to purchase. Pursuant to Registrar Cameron's order, Wanson was entitled to pursue those costs directly from Ms. Sahba.
- [21] Wanson sought and received full indemnity costs for the Second Action against Ms. Sahba, relying on s. 8 of the Assignment. He found: (1) the clear intention of the Assignment was for Ms. Sahba to indemnify Mr. Bloor from any costs, including legal fees, resulting from Ms. Sahba's failure to complete the purchase; (2) Mr. Bloor retained his obligations vis-à-vis Wanson under s. 7.1 of the Contract, and he incurred damages and costs resulting from Ms. Sahba's failure to complete in the First Action; and, accordingly, (3) Wanson could collect against Ms. Sahba under the Assignment pursuant to the s. 38 Order.

II. ISSUES ON APPEAL

- [22] Ms. Sahba raises seven grounds of appeal:
- conflating the Appellant's evidentiary burden with respect to the forgery issue with the persuasive (legal) burden underlying the Respondent's claim and including but not limited to failing to properly consider the evidence in front of him leading to an improper conclusion that the Appellant had signed the Assignment Agreement and the extension agreement;
 - shifting the persuasive (legal) burden from the Respondent to the Appellant;
 - failing to give consideration to the validity and enforceability of the assignment agreement and contract of purchase of sale between the Respondent and Appellant and/or Mr. Bloor;

- d. failing to give the Appellant an opportunity to be heard on the issue of costs;
 - e. failing to give consideration to the fact that the procedure employed by the Respondent and/or Mr. Bloor resulted in an increased amount of costs that were costs that were not incurred by the Appellant but solely by the actions of the Respondent and Mr. Bloor;
 - f. failing to give consideration to the fact that given the prior trial judgment in 2012, the proceeding against the Appellant was an abuse of process as the rights of the Respondent alone or through Mr. Bloor had merged with respect to all issues including costs; and
 - g. given there was an entered order of costs with respect to the first trial matter of Justice Maisonneville as of March 10, 2014 by agreement on March 31, 2014 on entry and January 30, 2017 with respect to the judgment of December 23, 2016 and as such further opportunities to award costs wasn't open to the Trial Judge and if this appeal otherwise succeeds, costs should be granted to the Appellant in this court and the court below.
- [23] Ms. Sahba also applied to adduce fresh evidence on appeal. She has filed an affidavit from her son, Iman Seifi, where he deposes that he drafted her first statement of defence, denies speaking with Karen Savage, denies being involved in any purchase of the property on behalf of his mother, and denies knowing Dada Rod Bloor. The next affidavit is from counsel's assistant, wherein she appends documents from "faxauthority.com" purporting to show that a fax machine has to have the header information programmed into it. Also appended is a letter from former counsel and a memo from the trial judge regarding costs, and the trial judge's refusal to extend the time to provide submissions on costs.

III. DISCUSSION

Fresh evidence

- [24] I propose to first address the application to adduce fresh evidence. The test for the admission of fresh evidence was stated in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775:
- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
 - (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
 - (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
 - (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
- [25] This test has been applied in the civil law context: *Spoor v. Nichols*, 2001 BCCA 426 at para. 16. The evidence of Mr. Seifi was clearly available at trial. The application does not approach meeting the requirement for due diligence, and I would not admit this affidavit. The affidavit

of the legal assistant also fails the Palmer test. The "faxauthority.com" documents appended to it are hearsay. Inadmissible evidence, including hearsay, will not meet the fourth prong of the Palmer test: *R. v. Lopez*, 2015 BCCA 294 at para. 57. The letter from counsel and the memorandum from the court, in my view, already form part of the record in relation to the costs application, and there is no need to apply to adduce those documents as fresh evidence.

[26] I would dismiss the application to adduce fresh evidence on appeal.

Burden of proof

[27] The first two errors raised by the appellant relate to the burden of proof. The appellant submits that the trial judge misunderstood that, while Ms. Sahba had an evidentiary burden in relation to the allegation of forgery, he failed to appreciate that the legal burden of proof remained on Wanson throughout the claim. Ms. Sahba argues that the judge failed to consider all of the relevant evidence, and thus drew the wrong inferences. This resulted in the second alleged legal error, the shifting of the legal burden to Ms. Sahba. I will address these two grounds together.

[28] The trial judge stated, at para. 71:

"Where allegations of forgery are made, the onus is on the person making the allegations to prove them on a balance of probabilities, and the onus will not be met except with clear and cogent evidence." (*DeCotiis v. Petromin Resources Ltd.*, 2016 BCSC 364 [DeCotiis] at para. 6, quoting from *Bank of Montreal v. Chan*, 2004 BCSC 841 at para. 24.

[29] The judge quoted *DeCotiis*, which relied on *Bank of Montreal v. Chan*, 2004 BCSC 841. In *Chan*, the court relied on *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 at 169-70, where the Supreme Court discussed proof on a balance of probabilities. None of these cases refer to the burden of proof shifting to a defendant to demonstrate forgery on a balance of probabilities. They all discuss the burden of proof when a party in a civil proceeding alleges morally blameworthy or criminal conduct. What these cases stress is that the party with the burden of proving a fact in issue must prove it on a balance of probabilities and on no higher standard, even if the fact involves criminal or other moral blameworthy conduct. This concept was affirmed in *F.H. v. McDougall*, 2008 SCC 53 at paras. 39-40, 49.

[30] It is an error in law to apply the wrong standard of proof. In *F.H.*, the Court also stresses that where a trial judge expressly states the correct standard of proof, it will be presumed that it was applied (at para. 54). This Court may only interfere with factual findings when a party shows that the trial judge committed a palpable and overriding error, or made factual findings that were clearly wrong, unreasonable or unsupported by the evidence. Additionally, where there is evidence to support an inference drawn by a trial judge, the appellate court will be hard pressed to find palpable and overriding error (at para. 55).

- [31] It is important to review what the trial judge said, and how he reached his conclusion. The judge, in reference to his assessment of the two handwriting experts said:
- [70] I find that the evidence of these two experts is thus helpful but not determinative in deciding on a balance of probabilities whether Ms. Sahba or another executed the crucial documents and must be considered as but one factor in determining whether Ms. Sahba executed the Assignment and the Closing Date Change Request Form.
- [32] The trial judge concluded that Ms. Sahba fell "woefully short" of proving a forgery of her signature. He acknowledged that there was no direct evidence of Ms. Sahba signing the documents. Such evidence is not necessary where there is a web of circumstantial evidence that proves the fact in issue. The judge carefully examined the circumstantial evidence that led him to his conclusion:
- [73] I am satisfied beyond a balance of probabilities that Ms. Sahba executed the Assignment and Closing Date Change Request Form because:
- a) It is apparent from a review of the email correspondence between Ms. Savage, Ms. Sahba and Iman Seifi on September 24, 2008 that Ms. Sahba received the Revised Closing Date Change Request Form following an exchange of email messages between Ms. Savage and Iman Seifi. On September 25, 2008, the Revised Closing Date Change Request Form was, according to the facsimile header, sent from 604-XXX-2893, a telephone/fax number assigned to Ms. Sahba to Ms. Savage;
 - b) One of the email messages sent on September 24, 2008 was from Ms. Sahba's son, Iman Seifi, to Ms. Savage seeking an extension for closing to October 13, 2008 and stated "Could you please also provide me the change of the date for closing to send in to the bank" (Ex. 4, Tab 14). The only logical explanation for Iman Seifi to seek that information on behalf of his mother would be if she intended to finance and close the transaction contemplated in the Assignment;
 - c) Although she did not know who provided her with Ms. Sahba's contact information, Ms. Savage was given Ms. Sahba's email address, home address and telephone number as evidenced by the entries in the Assignment. There is no other logical explanation as to how Ms. Sahba's contact information came to the attention of Ms. Savage other than it was given to her by either the assignor, Mr. Bloor, or Iman Seifi with whom she was in telephone and email contact. Although Ms. Savage did not recall preparing the Assignment, on all of the evidence I find that it is likely she did prepare the same or instructed counsel to do so;
 - d) Contrary to the evidence of Hossein Seifi, the documentary evidence is consistent with Ms. Sahba having had the telephone number 604-XXX-2893 and sending documents relating to the transaction to the plaintiff from that number by fax. Hossein Seifi's evidence that he and his wife did not have that number until after 2008 is not believable and is inconsistent with Ms. Sahba's evidence. It would be a remarkable coincidence if Ms. Sahba and Mr. Seifi were assigned that number well after the events in issue in this case;

- e) Considering all the evidence surrounding the execution of the Assignment, it would be remarkably coincidental that Mr. Verdicchio was chosen randomly as the lawyer to witness signatures. I find it most likely that Mr. Verdicchio was chosen by Hossein Seifi to witness the signature of at least Mr. Bloor;
 - f) Iman Seifi did not testify at the trial but due to his involvement in the correspondence and discussions with Ms. Savage and Mr. Bloor's acquaintance with him at the time, he may have had evidence which could have clarified the circumstances surrounding the transaction. I therefore draw an adverse inference against the defendant. No explanation was given at trial as to why Iman Seifi did not testify when he is the son of the defendant and involved in the real estate/mortgage business;
 - g) In 2008, Hossein Seifi was connected to M&M Dargahi International as a client of that firm and likely one associated with or very familiar with the operators of that business. Therefore, it is likely that he or his wife sent the signed Assignment form through M&M Dargahi International; and
 - h) On September 24, 2008 the executed Assignment was sent by facsimile transaction to the plaintiff from telephone/fax number 604-XXX-1286, which appears to have been assigned to M&M Dargahi International. Once again, the likelihood of that document being sent to the plaintiff from a number assigned to persons with whom Hossein Seifi was conducting business contributes to the position of the plaintiff that the signed document was returned from persons associated directly or indirectly with Ms. Sahba.
- [33] Ms. Sahba submits that the judge erred by not concluding that the evidence she tendered was "relatively equal" in suggesting that she did not sign the documents.
- [34] She submits that that judge overlooked material evidence that should have led him to the conclusion that Mr. Bloor signed the documents, or even that Ms. Sahba's husband did so without her knowledge. (Although she suggested it as a possible factual inference, Ms. Sahba also denies that her husband signed the documents.) She argues there was no need for her to use a fax machine belonging to her husband's business when she had her own fax machine at home. She says that she did not know Mr. Bloor. She argues that no one saw her sign the documents. She submits that the judge erred in drawing an adverse inference against her for not calling her son, Iman Seifi. Mr. Seifi's e-mail address was used to correspond with Ms. Savage regarding the Assignment.
- [35] The thrust of Ms. Sahba's argument is that this Court should re-examine the evidence, reweigh it and come to a conclusion in her favour. Yet, she does not point to any alleged palpable and overriding error by the judge, other than that, in her view, he came to the wrong conclusion.

[36] The judge's articulation of the burden of proof was not particularly clear. However, what is clear is that the circumstantial evidence convinced him, on a balance of probabilities, that Ms. Sahba signed the documents. He was not persuaded on any standard that the signatures were a forgery.

[37] I see no error in his reasons when they are read as a whole.

Failing to consider the validity and enforceability of the Purchase Agreement

[38] Ms. Sahba submits that even if she is not successful on the issue of whether her signature is forged, she should succeed on the appeal because there was in fact no binding Purchase Agreement. As noted above, all defences relating to the contract, save the allegation of forgery, were removed in her amended pleadings.

[39] She argues that Wanson failed to communicate to her the acceptance of changes to the underlying Purchase Agreement and to properly extend its completion to September 29, 2008. Despite claiming she did not sign the Purchase Agreement, there was some cross-examination on the issue of whether the acceptance of the changes was communicated to her. The trial judge found as a fact Ms. Sahba received the Revised Closing Date Change form, in para. 73(a) noted above.

[40] She also argues that there was no evidence that Wanson complied with the Real Estate Development and Marketing Act, S.B.C. 2004, c. 41 ("REDMA") by forwarding Ms. Sahba copies of disclosure statements, which, she submits, would invalidate the Purchase Agreement. This argument was not raised before the trial judge, and thus, no evidence on this point was tendered.

[41] During the hearing of the appeal, questions arose regarding whether Wanson could have or should have sued Ms. Sahba directly. In my view, it could not.

[42] Assignments do not create privity of contract between the vendor (Wanson) and the assignee (Ms. Sahba) in the absence of an express agreement providing for Ms. Sahba's liability under the Contract: Victor Di Castri, *The Law of Vendor and Purchaser: The Law and Practice Relating to Contracts for Sale of Land in the Common Law Provinces of Canada*, loose-leaf (Toronto: Thompson Reuters, 1988) at 491.

[43] In this case, the Purchase Agreement was between Wanson and Mr. Bloor, and the Assignment was between Mr. Bloor and Ms. Sahba. Further, s. 7.1 of the Purchase Agreement obviated the need for Wanson to be concerned with an assignee's failure to complete the purchase, as s. 7.1 ensures Mr. Bloor retained his own responsibility to perform.

[44] Mr. Bloor declared bankruptcy only after the First Action. Subsequently, the court granted Wanson, as a creditor to Mr. Bloor, a right to pursue Ms. Sahba under the Assignment for her liability to Mr. Bloor's estate-in-bankruptcy under s. 38 of the BIA, which allows a creditor to "stand in the shoes of the trustee" if the trustee is unwilling or unable to pursue

an estate's debtor: *Indcondo Building Corporation v. Sloan*, 2012 ONCA 502 at paras. 24, 29; Frank Bennett, *Bennett on Bankruptcy*, 20th ed. (Toronto: LexisNexis, 2018) at 150-51. In this case, Mr. Bloor's trustee was unable to pursue Ms. Sahba under the Assignment because the estate-in-bankruptcy could not fund that litigation.

[45] The next question that arose during the hearing was whether Mr. Bloor was obligated to add Ms. Sahba as a third party to the First Action.

[46] In my view, Mr. Bloor was not obligated to serve Ms. Sahba with a third party notice in the First Action. The relevant provision of the Supreme Court Civil Rules permits, but does not require, a defendant to serve a third party notice against someone against whom the defendant "is entitled to contribution or indemnity" regarding the action.

[47] Rule 3-5(1) of the Supreme Court Civil Rules directs that:

- (1) A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that
 - (a) the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,

[]

[48] In *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.), Justice McLachlin (as she then was) discussed some of the history of the rule governing third party proceedings at 21:

Third party pleadings function as a special type of statement of claim. Indeed, the claim they embody could be brought by separate action. But to avoid a multiplicity of proceedings, the rules permit the claim to be made in the action which has been commenced against the defendant. The object of permitting third party proceedings to be tried with the main action is to provide a single procedure for the resolution of related questions, issues or remedies, in order to avoid multiple actions and inconsistent findings, to provide a mechanism for the third party to defend the plaintiff's claim, and to ensure the third party claim is decided before a defendant is called upon to pay the full amount of any judgment. The avoidance of a multiplicity of proceedings is fundamental to our rules of civil procedure. This has been the case since the reforms effected by the Judicature Acts in the nineteenth century. As Cotton L.J. stated in *Searle v. Choat* (1884), 25 Ch. D. 727: "the whole tenor of the Judicature Acts is to require all proceedings as far as possible to be taken in one action" (emphasis added).

[49] In *The Owners, Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192 at para. 90, the Court framed the inquiry on an application for leave to file a third party notice as follows:

The fundamental question on the applications should have been whether greater injustice and inconvenience would arise from allowing the contribution claim to continue as a third party proceeding, or from striking it and leaving it to be pursued in a separate future action

- [50] In *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2014 BCCA 17 at para. 17, this Court confirmed that the reasoning in *McNaughton* and in *Scott Management* is an "accurate and complete" overview of R. 3-5 of the current Supreme Court Civil Rules. In *Tyson Creek* at para. 20, the Court reiterated "the fundamental principle that third party proceedings are intended to avoid a multiplicity of proceedings".
- [51] Either through inactivity, a positive decision on a defendant's part not to serve a third party notice, or through dismissal of an application for leave to serve a third party notice (when leave is required under R. 3-5(4)(a)), there are situations where what could otherwise be a third party claim proceeds in a "separate future action". While the purpose of the rule is to avoid a multiplicity of proceedings if at all possible, the text of the rule directs only that a party "may" serve a third party notice - they are not required to do so. As *McLachlin J.A.* highlighted in *McNaughton*, declining to serve a third party notice also raises the risk of inconsistent findings in a subsequent action.
- [52] Mr. Bloor did not serve Ms. Sahba with a third party notice regarding the indemnity provision in the Assignment during the First Action. In cross-examination during the Second Action, Mr. Bloor gave as a reason for not third partying Ms. Sahba into the First Action that "of course first I was trying to defend myself everything I had in my 40 some years of my life was in line [sic]". At the hearing of this appeal, Wanson's counsel also suggested that Mr. Bloor chose not to serve Ms. Sahba with a third party notice to make Wanson's collection efforts more difficult. In my opinion, this suggestion is not borne out in the record.
- [53] In any event, the authorities above are clear that, while third party proceedings under R. 3-5 are strongly preferred to avoid a multiplicity of proceedings and potentially inconsistent verdicts, they are not mandatory. Accordingly, Mr. Bloor was not required to serve Ms. Sahba with a third party notice in the First Action, although it likely would have been to his benefit.
- [54] However, as noted, Ms. Sahba had notice of the First Action, as she was subpoenaed as a witness, despite her evidence that she did not receive a subpoena. The trial judge accepted the evidence of the process server who testified that she was served.
- [55] The question also arose as to whether Ms. Sahba could have attacked the trial judge's findings in the First Action during the Second Action. Ms. Sahba may have had an interest in attacking the validity of the underlying Purchase Agreement during the Second Action, but she did not do so at trial.
- [56] There is an arguable case that the Assignment was a nullity if the underlying Purchase Agreement was for some reason void from the outset. An assignee "takes only the rights of his assignor subject to any defences that may be made against his assignor": *Di Castri* at 481, cited in *Zhang v. Davies*, 2017 BCCA 371 at para. 33 (emphasis added); *Costco Wholesale Canada Inc. v. Cazalet*, 2008 BCSC 952 at para. 22; *Canadian Bank of Commerce v. Yorkshire & Canadian Trust Ltd.*, [1939] S.C.R. 85 at 100 (per Hudson J., concurring in the result).

- [57] In *Credit Foncier Franco-Canadien v. Bennett* (1963), 43 W.W.R. 545 (B.C.C.A.) at 551, this Court applied that general proposition to rebut the presumption of a chargeholder's deemed entitlement, through registration, to the interest housed in a charge, under s. 41 of the former Land Registry Act, R.S.B.C. 1960, c. 208. The presumption in *Credit Foncier* was rebutted because the interest (in that case, a mortgage), which passed to the plaintiff chargeholder by way of an assignment, was "a nullity by virtue of forgery and remained a nullity notwithstanding the registration of the assignment and the further assignment to the plaintiff".
- [58] The difficulty with this argument is that Ms. Sahba did not try to raise any of these issues before the trial judge. She proceeded on the basis that the documents were forged, and did not put forward any alternative defence. This no doubt was a strategic decision. The question of whether those arguments would be *res judicata* does not need to be answered in this appeal, as in my view, the ground may be disposed on the basis that they were not raised at trial, and it is too late to raise them now.
- [59] This Court will sometimes consider new issues raised on appeal, however, that consideration is governed by the principles set out in *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 456 at paras. 44-46.
- [60] The test in *Gorenshtein* requires the Court to ask whether: (1) the issue is truly "new"; (2) whether the evidentiary record is sufficient; and (3) in light of the potential prejudice, the interests of justice support granting an exception to the general rule. There is no question that the issues Ms. Sahba seeks to raise (such as Wanson's compliance with REDMA) are "new" to this appeal.
- [61] I agree with Wanson that the evidentiary record is insufficient to determine the new issues raised on appeal, as it could have led evidence at trial to address those questions. In light of that prejudice, and the fact that those arguments would have been available to Ms. Sahba at the time of trial (subject to a potential plea of *res judicata*), the interests of justice do not support an exception from the general rule, especially in light of the "restrained approach" to hearing new issues on appeal: *Gorenshtein* at para. 46.
- [62] I would not give effect to this ground of appeal.

Costs

- [63] There are a number of grounds of appeal relating to the issue of costs. The first is whether the judge erred in refusing to grant an extension of time for submissions on costs.
- [64] In the final paragraphs of the reasons for judgment, the trial judge said the following:

[79] There can be no question that the plaintiff has been substantially successful in this action and would in most circumstances be entitled to its costs. However, in the event that there are factors of which I am not aware and after noting that the defendant has not made submissions on costs in response to those made by the plaintiff, I will receive further submissions in writing on costs by no later than 30 days from the date of this judgment.

[80] Noting that the plaintiff has already given me case authority regarding costs, counsel may wish to rely on those submissions and supplement the same in light of these reasons for judgment.

[65] On February 23, 2017, the trial judge sent counsel the following memo:

In my reasons for judgment of December 23, 2016, I sought submissions in writing from the parties on costs by no later than 30 days after issuance of the reasons for judgment.

I have received submissions from counsel for the plaintiff but have no recollection of having received any submissions on behalf of the defendant.

Before proceeding with reasons on costs, I wish to make certain that no submissions have been received from the defendant. It is possible that the same may have been delivered but have not reached me. Can counsel confirm that no submissions on behalf of the defendant were filed or if they were, please provide me with a copy of the same?

[66] In response, Mr. Galambos, new counsel for Ms. Sahba, replied the same day advising that they were recently retained and sought an extension of time to file submissions on the question of costs.

[67] On February 24, 2017, the trial judge sent the following memo:

I have reviewed correspondence from both Mr. Galambos and Mr. Mulholland dated February 23, 2017 and advise I will not be extending the period of time to file submissions on costs beyond the date originally set by me. The defendant was given 30 days from the release of my reasons for judgment and now effectively seeks a further 60 days which is not reasonable in the circumstances. My Memorandum to Counsel of February 23, 2017 was to inquire whether I had overlooked any submissions out of concern the same may have been filed but not brought to my attention. It is clear the defendant has not complied with my direction and I will be proceeding to prepare reasons on the issue of costs.

[68] The reasons for judgment on costs were issued November 23, 2017, indexed as 2017 BCSC 2140. He concluded, as a matter of contractual interpretation, that Ms. Sahba was required to pay costs for the Second Action on a full indemnity basis, as well as full indemnity costs as against Mr. Bloor for the First Action.

- [69] Ms. Sahba submits that the judge improperly assumed she had disrespect for his judgment, and as a result refused to hear her on costs. She further submits that since the costs judgment came nine months after the refusal to permit an extension to file submissions, there would have been no prejudice in extending the deadline. She says that the refusal to grant an extension goes to the "root of the administration of justice" and that this Court should show little or no deference when reviewing the costs order.
- [70] The trial judge gave the parties 30 days, from issuance of the reasons for judgment on December 23, 2016, to file submissions on the question of costs. Wanson filed its submissions on January 20, 2017. After the judge issued his memorandum on February 23, 2017 confirming that no further submissions had been filed, Ms. Sahba sought additional time to file further submissions, but was refused. There is no basis to interfere with this exercise of discretion. This is not the equivalent of failing or refusing to hear from a party. This is simply the refusal to grant more time to file submissions, a month after the expiry of the allotted time. This was a decision within the discretion of the trial judge, and I see no basis upon which to interfere with the exercise of his discretion.
- [71] The next argument is that by failing to "merge" the proceedings, costs were twice what they should have been had Mr. Bloor joined Ms. Sahba in the First Action. That may be, but since Mr. Bloor was not required to join Ms. Sahba (and Ms. Sahba knew about the trial), this does not seem to me to be a basis on which to deny Wanson the costs of the First Action.
- [72] The next argument is that the trial judge should not have gone beyond the order of costs from the First Action. She argues *res judicata*, as the order from the costs for First Action is already entered. In my view, she is correct, but not on the basis argued. The answer is in the pleadings, which clearly state that the only claim for costs from the First Action is that in the Certificate of Costs. There was no claim for costs for the First Action in the pleadings beyond that amount, which is \$33,358.39. Accordingly, the trial judge erred in awarding full indemnity costs against Ms. Sahba for the First Action.
- [73] In the final argument raised by Ms. Sahba, she says that Wanson is not entitled to full indemnity costs in the Second Action.

[74] Clause 8 of the assignment reads as follows:

8. Indemnity of the Assignee

The Assignee will indemnify and save harmless the Assignor against and from any and all losses, costs and damages, (including legal fees and disbursements) which the Assignor may suffer or incur in connection with any non-observance by the Assignee of any of the provisions of this Agreement.

[75] The bankruptcy order made by Registrar Cameron permits Wanson to step into the shoes of Mr. Bloor for the purpose of the litigation:

[8] On May 16, 2014, at Mr. Bloor's bankruptcy proceeding in this court, Registrar Cameron granted the following order:

The applicant is authorized to commence and prosecute proceedings in its own name and at its own expense and risk against Farzsneh Sahba a.k.a. Farzaneh Sahba (the "Assignee") with respect to the indemnity provisions of an Assignment of Offer to Purchase and Agreement for Purchases and Sale dated September 12, 2008 between the Assignee and the Bankrupt (the "Proposed Action").

[76] In my view, the trial judge correctly considered this aspect of the costs award as a matter of contractual interpretation of the Assignment. He turned his mind to the correct authorities, and there is no error in his reasoning. I would not give effect to this ground of appeal.

[77] In conclusion, I would allow the appeal only to the extent of substituting the order for full indemnity costs with respect to the First Action with an order for payment of costs of \$33,358.39, as noted in the Certificate of Costs, and included in the judgment for \$125,255.77.

[78] In my view Wanson is substantially successful and is entitled to full indemnity costs for the appeal on the same basis that it is entitled to full indemnity costs for the Second Action.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Griffin"

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