

CANADA / JUDGMENT

Willson v. Angela Gibson Law Corp.

2008 BCSC 1081

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSc 1081err1 Willson v. Angela Gibson Law Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Willson v. Angela Gibson Law Corp.,

2008 BCSC 1081

Date: 20080808

Docket: S030339

Registry: Vancouver

Between:

Graeme Willson and

Sonia Willson

Plaintiffs

And

Angela Gibson Law Corporation

Formerly known as Gibson Geronazzo Law Corporation

And Angela Gibson

Defendants

Before: The Honourable Mr. Justice Goepel

Reasons for Judgment

Counsel for Plaintiffs

R.E. Breivik & M. Tweedy

Counsel for Defendants

P. Abrioux & E. Lundberg

Date and Place of Trial/Hearing:

July 7-11, 16 & 18, 2008

Vancouver, B.C.

INTRODUCTION

- [1] The plaintiffs, Sonia and Graeme Willson, who are mother and son, owned all of the shares in Golden Heights Estate Inn & Restaurant Inc. ("Golden Heights"). In the summer of 2002, they entered into an agreement to sell their shares to 653702 B.C. Ltd., whose principal was Mr. Brian Lee. Mr. Lee retained the defendant Angela Gibson (now known as Angela Ross) to act for him in the transaction.
- [2] On October 18, 2002, Ms. Ross, on behalf of Angela Gibson Law Corporation, gave two cheques drawn on the firm's pooled trust account to the Willsons, one for \$457,855.85 payable to Graeme Willson, the other for \$458,426.25 payable to Sonia Willson. Both cheques were post-dated to October 22, 2002. The cheques were in the amounts due to the Willsons on closing of the share sale.
- [3] When Ms. Ross gave the cheques to the Willsons, she had not yet received from her client the funds necessary to close the transaction. On the morning of October 22, 2002, the funds still not having been received, Ms. Ross stopped payment on the cheques before the Willsons could present them for payment.
- [4] The Willsons submit that the trust cheques constituted in law an unconditional undertaking for which Ms. Ross had assumed a personal obligation. They seek to recover against Ms. Ross the amount of the cheques. They submit that to relieve her of the consequences of her undertaking would erode the integrity of all lawyers' undertakings and the proper and appropriate role of lawyers in commerce generally.
- [5] The defendants submit that the cheques were delivered on the condition that the Willsons would only present them for payment if the proceeds of sale were received. The plaintiffs concede that if the cheques were delivered conditionally, their action must fail.
- [6] The issues for determination include whether or not a trust cheque is an undertaking, whether these cheques were delivered unconditionally and, if they were, whether the plaintiffs are entitled to recover the amount of the cheques against Ms. Ross.

BACKGROUND

- [7] The parties have significantly different recollections of many of the events in the months leading up to the delivery of the trust cheques. As the plaintiffs have now limited their claim to the alleged breach of undertaking, it is not necessary to resolve all of these differences or relate in finite detail all that took place. As credibility is however very much in issue, it is necessary to resolve some of the disputed factual issues in order to put the findings concerning the events of October 18, 2002 in context.
- [8] At the outset, it is important to know that Brian Lee, who is now deceased, was in fact a con man. He represented that he was the confidant and former employee of Dennis Washington, a prominent businessman, and that Mr. Washington and his company, Washington Corporation, were providing Mr. Lee with the funds to purchase Golden Heights. Neither Mr. Washington nor Washington Corporation knew anything of Mr. Lee's purchase of Golden Heights and when that became known on or around November 1, 2002, the sale collapsed.
- [9] The Willsons were the sole shareholders and officers of Golden Heights. Golden Heights owned a Victorian mansion located in Grand Forks, British Columbia. It had purchased the building and adjoining 3½-acre property in 1995. Graeme and Sonia Willson had restored the building and its grounds and in 1998 they began operating it as an inn and restaurant.
- [10] In the winter of 2000, Golden Heights listed the property for sale. In the summer of 2001, a prospective purchaser made enquiries concerning the property and Mr. Willson's realtor indicated that an offer would soon be forthcoming. Mr. Willson was subsequently advised that because of the events of September 11, 2001, the proposed purchaser had decided not to proceed.
- [11] In February 2002, Mr. Lee telephoned Mr. Willson and told him that he had been the person in charge of the group that had intended to make an offer to purchase Golden Heights in September 2001. He indicated that he was still interested in proceeding with the purchase.
- [12] On April 6, 2002, Mr. Lee and his wife went to Grand Forks to discuss their proposed purchase. Mr. Lee represented that he was being financially supported by his former employer, Mr. Dennis Washington, a wealthy American businessman and Mr. Washington's company, Washington Corporation.
- [13] Discussions between Mr. Willson and Mr. Lee continued into May 2002. Mr. Lee told Mr. Willson that he had been advised by Mr. Washington that he should work at Golden Heights for a month to ensure the soundness of the business. Mr. Lee and Mr. Willson agreed that Mr. Lee would work for a month as an independent contractor managing the kitchen. His first day at work was June 1, 2002.

- [14] At the end of June 2002, Mr. Lee advised Mr. Willson that he had spoken further to Mr. Washington and told him that Golden Heights was an excellent business opportunity that he wanted to own. Mr. Lee told Mr. Willson that Mr. Washington would finance Mr. Lee's purchase of Golden Heights at a price of \$1.8 million.
- [15] Mr. Willson made his own enquiries about Mr. Washington and determined that the information Mr. Lee had given him about Mr. Washington's background and business ventures were true. Mr. Willson had called Mr. Washington's office in Montana and had spoken to a person there who confirmed that Mr. Lee had worked for them and there were no negative things they could tell him about Mr. Lee. Mr. Willson believed that Mr. Lee was a bona fide purchaser with the financial backing of Mr. Washington.
- [16] Mr. Lee told Mr. Willson that he had arranged a job for him as Mr. Washington's personal assistant at a salary of \$100,000 per year. In Mr. Willson's presence, Mr. Lee made a telephone call to a person who Mr. Willson believed to be Mr. Washington and provided to him certain personal information about Mr. Willson, including his social security number, so that Mr. Willson could be set up in the Washington Corporation's records as an employee.
- [17] In July 2002, Mr. Willson retained Mr. Daniel Geronazzo, a Grand Forks lawyer, to prepare purchase and sale documents. Initially the parties contemplated an asset purchase. Ultimately, it was decided to proceed by way of a share purchase agreement.
- [18] Mr. Lee ultimately retained Ms. Ross to act for him on the transaction. Ms. Ross was called to the bar in May 1992. She practised with three small firms in Vancouver, Abbotsford and Kelowna before moving to Grand Forks in September 1996. In December 1996, she and her husband Stephen Gibson purchased an existing law practice in Grand Forks. They practised together until the summer of 2002. At the time of the Golden Heights transaction Ms. Ross and Mr. Gibson were in the process of a difficult and less than amicable separation.
- [19] Ms. Ross said she was first retained on August 21, 2002 when she was asked to review the then existing share purchase agreement that Mr. Geronazzo had prepared. Mr. Lee told Ms. Ross that money to complete the transaction was coming from Dennis Washington or Washington Corporation. Mr. Lee told her that Mr. Washington was a wealthy businessman with whom he had a father/son like relationship. He subsequently told her that Russell Dumoulin, a Vancouver law firm, had been retained to protect Mr. Washington's interest in the transaction.
- [20] Mr. Willson testified that Ms. Ross was retained long before August 21, 2002. At different times in his evidence or in affidavits filed in these proceedings, he has indicated that she was retained either on July 7, 2002 or sometime in early August.
- [21] Ms. Ross' time records and documents all commence on August 21, 2002. Her written notes of August 21, 2002 are consistent with that being the date of her initial involvement. I accept her evidence as to the date she was initially retained and I find that she was in fact retained on August 21, 2002.

- [22] Having reviewed the proposed documentation, Ms. Ross believed the existing share purchase agreement was not appropriate for the transaction. On August 23, 2002, she sent Mr. Lee a detailed letter setting out her criticisms of the proposed agreement.
- [23] During the last week of August, Ms. Ross had numerous meetings with Mr. Lee. On August 29, 2002, she incorporated 653702 B.C. Ltd., which would be the company Mr. Lee would use to complete his purchase. On September 3, 2002, she prepared a letter of intent that was then executed by Mr. Lee and the Willsons.
- [24] After the letter of intent was signed, Ms. Ross set about drafting a share purchase agreement and preparing all the documents that would be required to close the transaction. The proposed share purchase agreement was forwarded to Mr. Geronazzo and went through several drafts before it was finalised.
- [25] The share purchase agreement, which is dated September 16, 2002, consists of 28 pages plus 18 schedules. Under the agreement, all accounts were to be adjusted as of August 1, 2002 with Mr. Lee being responsible for all liabilities accruing after that date, including interest accruing on Golden Heights' liabilities. Pursuant to the terms of the agreement, on closing the purchaser's solicitor was to pay from the purchase price the outstanding encumbrances and charges with the balance being paid to the vendors once the liabilities had been discharged.
- [26] The Willsons dismissed Mr. Geronazzo prior to the share purchase agreement being finalised. On September 16, 2002, Ms. Ross sent a letter to the Willsons enclosing for signature the share purchase agreement and numerous other documents that needed to be signed to complete the transaction. The opening paragraph of the letter read:
- We confirm that you have terminated the services of Mr. Geronazzo and are now acting on your own behalf. We act only for the purchaser in this matter.
- [27] In due course, the Willsons signed the various documents and returned them, together with an initialled copy of the September 16, 2002 letter, to Ms. Ross.
- [28] After Mr. Geronazzo's services were terminated, Ms. Ross agreed that on completion of the transaction she would pay out the various charge holders to whom the Willsons were indebted and who had to be paid in order to complete the transaction. Her September 16, 2002 correspondence included an account to the Willsons for those services. She says that her retainer with the Willsons was limited to providing those services.
- [29] Mr. Willson claims that on the firing of Mr. Geronazzo, Ms. Ross agreed to become his solicitor for all purposes in regards to this transaction. He denied ever being informed by Ms. Ross that she was acting only for the purchaser. When confronted with the September 16, 2002 letter, he claimed that he had never seen it, even though he had initialled a copy of the letter and did agree that he had received all of the documents enclosed with the correspondence.

- [30] I do not accept Mr. Willson's evidence that he was not told by Ms. Ross that she was acting only on behalf of Mr. Lee. I find that he did receive the September 16, 2002 letter and knew that Ms. Ross was acting only for the purchaser, save and except for the limited purpose of facilitating the payments of the outstanding encumbrances for which she was going to charge a fee.
- [31] By September 16, 2002, all documentation necessary to complete the transaction had been prepared and executed. All that was needed to complete the transaction were the funds. Those funds never arrived.
- [32] Ms. Ross initially understood that Mr. Lee was going to obtain the money directly from Mr. Washington or Washington Corporation and he would then forward the funds to her. Subsequently, she was advised that the money would be wired to her account from Harris Bank in the United States. Ultimately, she was told that a Washington Corporation representative would personally deliver a bank draft to Grand Forks for deposit. Each time the money was supposed to arrive, it did not and Mr. Lee always had an explanation. Ms. Ross never attempted to call Mr. Washington, Washington Corporation, or Russell Dumoulin to confirm if what Mr. Lee was saying was true. She simply took Mr. Lee at his word.
- [33] Difficulty with the funds had begun even before Ms. Ross was retained. On August 20, 2002, Mr. Geronazzo had received a cheque from Mr. Lee in the sum of \$1.8 million. On that cheque being deposited in Mr. Geronazzo's trust account, Mr. Willson gave Mr. Lee access to Golden Heights' credit card and debit card accounts. The cheque did not clear. Mr. Willson accepted Mr. Lee's explanation and allowed Mr. Lee to continue to run the restaurant.
- [34] On September 27, 2002, Mr. Lee wrote a cheque for \$458,450.16 to Mr. Willson and a cheque for \$458,450.17 to Sonia Willson. The cheques did not clear. Mr. Willson again accepted Mr. Lee's explanation as to why the funds were not available.
- [35] On October 8, 2002, Mr. Lee told Ms. Ross that the funds necessary to close the transaction had been deposited in the Central B.C. Credit Union for transfer to her account in the local credit union. Ms. Ross advised Mr. Willson that the money was in transit and she would call him as soon as it arrived. Mr. Lee told Ms. Ross that Mr. Willson was insisting on seeing evidence that the cheques were physically ready. Ms. Ross then had two trust cheques prepared in favour of the Willsons, which she gave to Mr. Lee to show to the Willsons. At the time the cheques were prepared, the funds had not been received. Ms. Ross said the purpose of showing Mr. Willson the cheques was to assure him that she was ready to close the transaction as soon as the money was received.
- [36] Mr. Willson said that on numerous occasions, commencing prior to August 21, 2002, Ms. Ross told him she had the money in trust to close the transaction. Mr. Willson says that when the August 20, 2002 cheque to Mr. Geronazzo and the September 27, 2002 cheques to the Willsons failed to clear, he relied on Ms. Ross' advice to him that the money was in her trust account. While Ms. Ross acknowledges having the trust cheques of October 8, 2002 prepared, she said that throughout the transaction she always advised Mr. Willson that she

was awaiting receipt of the funds and never told him the funds were in her trust account.

- [37] Again, I prefer Ms. Ross' evidence to that of Mr. Willson. If Ms. Ross had the money required to close the transaction in her trust account, there would be no reason for Mr. Lee to be writing the cheques that failed to clear. Further, there is evidence of telephone calls from Mr. Willson to Ms. Ross' office enquiring about when the money would be available and responses to those telephone calls. Mr. Willson's journal entry of October 14, 2002, in which he wrote that Brian had told him that a man was arriving that day with the certified cheque, also contradicts his evidence that Ms. Ross told him the money was in her trust account. None of the surrounding evidence is consistent with Ms. Ross having told Mr. Willson that the money was in her trust account. I find that she never told Mr. Willson that she had the funds in her trust account.
- [38] There were three mortgages on the Golden Heights' property. By mid-October some of the mortgages were in arrears and the mortgage holders were threatening to foreclose. Ms. Ross was constantly speaking to the mortgage holders and assuring them that the sale would close shortly.
- [39] On October 16, 2002, Ms. Ross met with Mr. Lee and Mr. Willson. Prior to the meeting, Mr. Lee had advised that a representative from Washington Corporation was going to be hand delivering the bank drafts. The representative did not arrive and in the presence of Ms. Ross and Mr. Willson, Mr. Lee made a cell phone call which both Ms. Ross and Mr. Willson believed to be to Mr. Washington. Mr. Lee demanded that Mr. Washington fix the problem.
- [40] On October 1, 2002, Ms. Ross had forwarded Mr. Lee's cheques to two of Golden Heights' mortgage holders, being Interior Equities and the Business Development Bank. At the time of the October 16, 2002 meeting, Ms. Ross knew that the Interior Equities cheque had not cleared. Mr. Lee wanted to keep that information from Mr. Willson. At the meeting, Mr. Willson wanted to know what money had been paid to the mortgage holders. Ms. Ross showed him the two letters but did not disclose that the cheque to Interior Equities had not cleared. She felt that in the context of the meeting, with the deal near collapse, she had to follow Mr. Lee's instruction not to disclose the bounced cheque.
- [41] By October 18, 2002, Mr. Willson was becoming understandably frustrated over the failure of the sale to close. He and Ms. Ross continued however to believe Mr. Lee and his explanations as to why the funds had not arrived. In hindsight, it is difficult to understand how they could have continued to maintain such belief, but it is clear from the evidence and contemporaneous documents that they did. Both badly wanted the transaction to close and were blind to the warning flags that were there to be seen.
- [42] Mr. Lee promised delivery of the funds on October 18, 2002. Ms. Ross arranged for a meeting to take place that day for the purpose of closing the transaction. The documents necessary to close had already been long signed. What was necessary to close was the money to pay out the various encumbrances and the Willsons.

- [43] Ms. Ross and the Willsons have very different versions as to what took place on the afternoon of Friday October 18, 2002. Mr. Willson says he, his mother and Mr. Lee arrived at Ms. Ross' office at about 4:00 p.m. They were escorted into a meeting room. He says that Ms. Ross arrived shortly after 4:30, excited and smiling. He said she indicated that she had just spoken with Dennis Washington and the sale could now close. At the meeting, Ms. Ross produced a trust reconciliation document together with the two cheques, one payable to Mr. Willson and one payable to his mother.
- [44] Mr. Willson says that Ms. Ross had the trust cheques in her possession at the start of the meeting. There was no suggestion at the meeting that the money was not in her trust account. He said that the cheques were handed over without any conditions. Ms. Ross did not mention that the cheques were post-dated.
- [45] Mr. Willson said that it was only as he was leaving the meeting that he noticed that the cheques were post-dated to October 22, 2002. He said Ms. Ross then explained that it was now too late to deposit the cheques as the credit union was closed that Saturday, and the funds would be available the following Tuesday. She told him that Dennis Washington required that the funds be paid on October 22, 2002. Mr. Willson says he accepted her explanation and was not disappointed with the delay. He testified that it was a happy meeting and at no time during the meeting was he angry or threatening.
- [46] Ms. Willson's evidence was similar to that of her son's, except that she did testify her son was upset when he discovered the cheque was post-dated. She denied however that his voice was raised. At her examination for discovery, Ms. Willson had testified that Mr. Willson was very upset when he learned that the cheques were post-dated.
- [47] Ms. Willson said the meeting was a joyous occasion. She believed that Ms. Ross and Mr. Lee had a private meeting sometime prior to the start of the meeting. She said that at the meeting they went through and signed the various closing documents. Ms. Willson said that when Mr. Willson got upset when he realised the cheques were post-dated, Ms. Ross told him that the cheques "are as good as gold - take them to the credit union on Tuesday and cash them".
- [48] Ms. Ross testified that she expected Mr. Lee to bring a bank draft to the meeting. She said that at the beginning of the meeting Mr. Lee told them he had not yet received the bank draft. She said that Mr. Willson then became very angry as he wanted his cheque. Mr. Lee was also upset and told her she should give the Willsons cheques to hold.
- [49] Ms. Ross says that she and Mr. Lee then left the meeting and she told him that she could not give the Willsons their cheques without funds in her account. She said that Mr. Lee became very agitated when she told him she could not issue the cheques. She says that he was seething and telling her the money was going to arrive the next morning. Ms. Ross said she felt quite physically intimidated.

- [50] To resolve the impasse, Ms. Ross told Mr. Lee she was prepared to give the Willsons trust cheques post-dated to Tuesday, October 22, 2002. This calmed down Mr. Lee. She then instructed her legal assistant, Ginnelle Guthrie, to prepare the two trust cheques post-dated to October 22, 2002 for her signature.
- [51] Ms. Ross knew when she signed the cheques that there was no money in her trust account. She believed Mr. Lee when he said the money was coming on Saturday morning. She believed that there was little risk in giving the cheques to the Willsons because she intended to stop payment on the cheques if the funds did not arrive. She believed that the delivery of the cheques would resolve her immediate problem and at that point in time she feared for her safety from both Mr. Lee and Mr. Willson.
- [52] Ms. Ross testified that when she returned to the meeting she handed the cheques to Mr. Willson and to his mother. She said she told them the cheques were being provided in anticipation of closing the transaction on October 22, 2002. She told them that the cheques were post-dated because she had to ensure that the money actually arrived. She told the plaintiffs that they should not take the cheques to the credit union until she had confirmed to them that the cheques could be cashed. She said that both Graeme and Sonia Willson accepted the cheques on the condition they could only be cashed as part of the closing.
- [53] Ms. Ross prepared no notes of the October 18 meeting. She did not put the conditions she imposed on the delivery of the cheques in writing. She did however, for billing purposes, prepare a note that was entered into the pre-bill summary, which references preparing the post-dated cheques and attending the October 18, 2002 meeting.
- [54] Ms. Guthrie also testified about the events of October 18, 2002. Ms. Guthrie has been a legal secretary since 1974. She presently lives in Fort St. John where she is employed as the office manager in the Crown counsel office. She has not worked for Ms. Ross for several years.
- [55] Ms. Guthrie was very experienced in conveyancing matters. She commenced work on the Golden Heights file in early September. During the course of the transaction, she occasionally spoke to Mr. Willson. She said that he was difficult, volatile and demanding. She found him somewhat intimidating.
- [56] Ms. Guthrie understood that Ms. Ross' client on the transaction was Mr. Lee. She knew that on closing Ms. Ross was going to pay the encumbrances on behalf of the Willsons.
- [57] With regard to the events of October 18, 2002, Ms. Guthrie recalls that somewhat late in the day the Willsons and Mr. Lee came to the office to meet Ms. Ross. She overheard raised voices, arguing and yelling. After some time, Ms. Ross left the meeting and asked her to prepare the post-dated trust cheques.

- [58] The request concerned Ms. Guthrie because she knew that there were no funds in trust. While it is not apparently uncommon in a busy conveyancing practice to prepare trust cheques in advance of closing, it was most unusual to deliver them before funds are deposited. Given the history of this transaction, it was particularly perilous. Ms. Guthrie queried Ms. Ross as to whether or not she was sure she wanted to do this. Ms. Ross instructed her to prepare the cheques.
- [59] Ms. Guthrie prepared the two cheques and gave them to Ms. Ross. She also prepared an entry for the billing summary recording her preparation of the cheques. Sometime after preparing the cheques, she saw all of the parties in the reception area, which was near her desk. She heard Ms. Ross say to the Willsons, "Remember you are not to cash these cheques on Tuesday until I call you and say everything is okay." Ms. Guthrie testified that it was a great relief to her to learn that Ms. Ross had put conditions on the delivery of the cheques.
- [60] Mr. Lee assured Ms. Ross that the Washington Corporation representative was coming to Grand Forks on Saturday October 19, 2002 with a bank draft. Ms. Ross arranged to meet Mr. Lee at the credit union to deposit it. On Saturdays, the credit union closes at 1:00 o'clock. After several telephone calls that day, Mr. Lee advised Ms. Ross that the representative would not arrive before the credit union closed. They agreed that Mr. Lee, the Washington Corporation representative and Ms. Ross would meet at Ms. Ross office first thing on October 22, 2002.
- [61] On October 22, 2002, Mr. Lee met Ms. Ross at her office and told her that the representative had not yet arrived. Ms. Ross then went to the credit union to stop payment on the cheques. While Mr. Lee and Ms. Ross were at the credit union, Mr. Lee received a call, which Ms. Ross believed was from the Washington Corporation representative, saying that he was still an hour away. Ms. Ross advised she could not wait and had to stop payment to ensure the cheques were not negotiated. Mr. Lee then called Mr. Willson and told him payment had been stopped because the representative had not arrived.
- [62] Over the next few days, Mr. Lee continued to represent that the funds would be forthcoming and tentative closing dates were arranged. On October 25, Mr. Willson demanded that if the agreement did not close that day, that the purchasers pay an additional \$10,000 per day until closing. Mr. Lee agreed.
- [63] Needless to say, the agreement never closed. On or about November 1, 2002, Ms. Ross received a telephone call from a lawyer at Bull Housser & Tupper who represented Mr. Washington. He advised her that Mr. Washington knew nothing of the transaction. Shortly thereafter, the mortgage holders of Golden Heights commenced foreclosure proceedings and ultimately went into possession. The Willsons lost their entire investment.

HISTORY OF PROCEEDINGS

- [64] The Willsons commenced this litigation on January 21, 2003. Their initial claim was for payment of the cheques.

- [65] On July 4, 2003, an amended statement of claim was filed. The amended claim alleged that Ms. Ross had made various representations to induce the Willsons to proceed with the transaction without legal representation and to induce them to proceed with the transaction. The plaintiffs allege that Ms. Ross was either negligent or fraudulent in making those representations. Paragraph 21 of the amended statement of claim alleged that because of the defendants' negligent misrepresentations, fraudulent misrepresentations, breach of contract, breach of trust, fraudulent breach of trust, breach of fiduciary duty and negligence, and the plaintiffs suffered loss and damage.
- [66] A further amended statement of claim was filed on April 19, 2005. At this time, the Willsons were self-represented. This pleading added a claim for judgment in the sum of \$100,000, being the penalty for non-completion, and judgment for \$10,000 per day beginning October 25, 2002 as per the agreement of October 25, 2002.
- [67] A second further amended statement of claim was filed on February 2, 2006. It repeated the allegations and added additional claims for an accounting of monies, profits and benefits made and received by the defendants in the course of the transaction.
- [68] On June 3, 2008, a third further amended statement of claim was filed. The new statement of claim, which is the claim upon which the trial proceeded, was limited to a claim that the trust cheques were unconditional undertakings and that their dishonour was a breach by Ross of her undertaking. The claims based on misrepresentation, fraud and negligence were abandoned.

POSITION OF THE PLAINTIFFS

- [69] The plaintiffs submit that this case concerns the integrity of lawyers' undertakings and the proper role and duty of lawyers as officers of the court and participants in commerce. The plaintiffs submit that they were the recipients of unqualified and unconditional trust cheques that, in law, constitute unconditional undertakings. The plaintiffs submit that by giving an unconditional undertaking, Ms. Ross voluntarily assumed a personal obligation, which this court should enforce. The plaintiffs submit that to do otherwise would severely undermine the integrity of lawyers' undertakings and introduce a great level of uncertainty and dysfunction into commerce generally.
- [70] The plaintiffs submit that the enforcement and the undertaking would not represent a windfall to the plaintiffs because the plaintiffs lost the restaurant in the subsequent foreclosure proceedings. Even if the enforcement of the undertaking would lead to a windfall, such was a necessary by-product of upholding the integrity of lawyers' undertakings and the proper role of lawyers in commerce generally, which considerations must be considered to be paramount.
- [71] The plaintiffs concede that if cheques were delivered conditionally, their action must fail. They submit that I should not accept the evidence of Ms. Ross or Ms. Guthrie as to the events of October 18, 2002. They submit that Ms. Ross' evidence concerning the meeting is not

credible and her failure to document the meeting or the trust conditions is strong evidence that the matters did not take place in the manner that she described. They submit that Ms. Guthrie's evidence is not supported by any of the other witnesses and that she is mistaken as to her recollections. They note that the Willsons have no recollection of Ms. Guthrie being present in the office on October 18, 2002 and Ms. Ross has no recollection of Ms. Guthrie being there when any discussions took place.

- [72] The plaintiffs candidly acknowledge that some of Mr. Willson's recollections may not be accurate, but that he should be believed as to the events of October 18, 2002. They submit the pre-bill summary confirms that the trust cheques were prepared prior to the commencement of the meeting, consistent with the evidence of the Willsons.

POSITION OF THE DEFENDANTS

- [73] The defendants submit that the court should accept the evidence of Ms. Ross and Ms. Guthrie as to the circumstances upon which the cheques were delivered. They submit that the cheques were not unconditional orders to pay and did not in the circumstance constitute undertakings. They submit that the evidence of Graeme and Sonia Willson both in regards to October 18, 2002 and throughout these matters is entirely lacking in credibility and should not be believed.
- [74] The defendants submit that even if the trust cheques do constitute an undertaking, in the unusual circumstances of this case, Ms. Ross was justified in stopping payment on the cheques. Ms. Ross delivered the cheques believing that funds would be delivered sufficient to cover those cheques. They submit that in the circumstances that she was entitled to stop payment.

DISCUSSION

- [75] The plaintiffs' case is premised on the October 18, 2002 cheques constituting a lawyer's undertaking. In *Kutlin v. Auerbach* (1988), 34 B.C.L.R. (2d) 23 (C. A.), Esson J. A. for the court summarised the nature of a lawyers' undertakings at 28-29:

The nature of a lawyer's undertaking has frequently been considered by the courts, generally in the context of summary proceedings taken to enforce the undertaking. Many of the authorities are discussed and considered in two decisions of this court: *Re Solicitors* (1916) 32 D.L.R. 387 and *Bank of British Columbia v. Mutrie* (1981) 24 B.C.L.R. 49 rev'ing 18 B.C.L.R. 113. The law governing this matter has come to us from England and it is to the English authorities that we have generally looked for guidance. I adopt as a concise statement of the nature of an undertaking this language in *The Professional Conduct of Solicitors*, The Law Society, London, 1986:

15.01 Definition

An undertaking is any unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by:

- a) a solicitor in the course of his practice, either personally or by a member of his staff; or
- b) a solicitor as 'solicitor', but not in the course of his practice;

whereby the solicitor (or in the case of a member of his staff, his employer) becomes personally bound.

[76] Solicitors must observe scrupulously the terms of any undertaking they give, an obligation which the court has the power to enforce summarily if need be: 115 Place Coop Housing Association v. Burke (1994), 94 B.C.L.R. (2d) 60 (C.A.). The rationale for the judicial enforcement of solicitor's undertakings is stated in *Re Hilliard* (1845), 2 Dow. & L. 919 where Coleridge J. at 920-21 said:

... [T]he Court does not interfere against one of its own officers, merely with a view of enforcing in a more speedy and less expensive mode contracts in which actions might be brought, but does so with a view of securing honesty in the conduct of its officers in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers. This principle applies equally whether the undertaking be to appear, to accept declaration, or other proceeding in the course of the cause, or to pay the debt and costs. The interference is not so much between party and party to settle disputed rights, as criminally to punish misconduct or disobedience in its officers. In this view the objection relied on does not apply. I have no desire to restrain the jurisdiction of the Court as to the undertakings of its officers on any such ground as the present; they are very often most beneficially made for both parties in a cause, and there would be great injustice in allowing the attorney to get free from them, after the party has foregone the advantage, or paid the price which was the consideration of the undertaking; while on the other hand, there is no hardship on the attorney in enforcing them, for he is never compelled to enter into them; if he does, he should secure himself by an arrangement with his client, and he must be taken to know the legal consequences of his own act.

[77] Undertakings and trust cheques are the subject of comment in Chapter 11 of the Professional Conduct Handbook (the "Handbook") published by the Law Society of British Columbia. The relevant provisions are:

Undertakings and trust conditions

- 7. A lawyer must
 - (a) not give an undertaking that cannot be fulfilled,
 - (b) fulfil every undertaking given, and
 - (c) scrupulously honour any trust condition once accepted.

7.1 Undertakings and trust conditions should be

- (a) written, or confirmed in writing, and
- (b) unambiguous in their terms.

Trust cheques

- 8. Except in the most unusual and unforeseen circumstances, which the lawyer must justify, a lawyer who withdraws or authorizes the withdrawal of funds from a trust account by cheque undertakes that the cheque
 - (a) will be paid, and
 - (b) is capable of being certified if presented for that purpose,

Real estate transactions

8.1 If a lawyer acting for a purchaser of real property accepts the purchase money in trust and receives a registrable conveyance from the vendor in favour of the purchaser, then the lawyer is deemed to have undertaken to pay the purchase money to the vendor on completion of registration.

Conditional undertakings

- 9. If a lawyer gives an undertaking conditional on something else happening or in respect of which the lawyer does not intend to accept personal responsibility, this must be stated clearly in the undertaking itself.
- [78] While the Handbook sets out the professional standards that lawyers are supposed to follow, the Handbook is not in itself the law: Kutilin, *supra*.
- [79] The Handbook does not support the basic premise of the plaintiffs' case that a trust cheque constitutes an undertaking. The Handbook deals with undertakings and trust cheques under separate paragraphs. Different rules are applied. The Handbook sets out that a lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given. No exceptions are allowed. This is in distinction to the provisions concerning trust cheques. In regards to such cheques, it is said that a lawyer undertakes, "except in most unusual and unforeseen circumstances", that the cheque will be paid. In other words, the promise is not unconditional and, depending on the circumstances, the lawyer may choose not to honour the cheque.
- [80] Courts enforce undertakings because they represent a lawyer's unconditional promise to do some act. The courts' jurisdiction comes from its power to require its officers to observe a high standard of conduct. In many cases, a trust account cheque is the instrument by which a lawyer fulfills an outstanding undertaking. Indeed, because the Law Society Rules require that any monies held in trust must be deposited into a trust account, in almost any case in

which the lawyer has undertaken to pay money to a third party the payment must be made by trust account cheque. That however does not make the trust cheque itself an undertaking.

- [81] No authority was cited to me, nor could I find one in my own research, in which a trust account cheque was found to be in and of itself an undertaking. The nearest case I could locate was *Damodaran v. Choe Kuan Him*, [1980] A.C. 497 (P.C.). *Damodaran* involved a real estate transaction. The purchaser's solicitor had received a signed deed on his undertaking to pay the vendor the purchase price on registration. After registration, a cheque for the balance due was forwarded to the vendor. The solicitor stopped payment on the cheque when he learned of a caveat placed on title. He sought to pay the proceeds into court. The court ordered the solicitor to honour his undertaking and to pay the funds to the vendor. There was no suggestion in the report that the cheque itself was an undertaking.
- [82] A lawyer must fulfill all undertakings. If a trust account cheque is the instrument by which a lawyer purports to honour an undertaking, the lawyer continues to remain liable for that undertaking if the cheque is not honoured. He is liable not because he paid by way of a trust cheque, but because of his undertaking.
- [83] In this case, Ms. Ross, as solicitor for the purchaser, had a duty to pay the funds over to the vendors on completion. At their highest, the trust cheques were the instrument by which Ms. Ross intended to honour her undertaking to pay to the Willsons the proceeds on closing. Ms. Ross did not personally undertake to pay the Willsons if the purchaser failed to provide the funds necessary to complete the transaction.
- [84] This conclusion is consistent with *Bank of British Columbia v. Mutrie* (1981), 24 B.C.L.R. 49 (C.A.). In *Mutrie*, the plaintiff bank loaned money to a Mr. Horton. Ms. Mutrie was his counsel. The bank and Ms. Mutrie believed that Mr. Horton was due certain monies from the U.S. Department of Immigration. Ms. Mutrie undertook to pay the bank from that fund. Both the bank and Ms. Mutrie believed that Mr. Horton was a man of substance. Like Mr. Lee in this case, he was not. The trial judge, in reasons reported at 18 B.C.L.R. 113, held Ms. Mutrie liable on her undertaking.
- [85] The Court of Appeal reversed. It held that to suggest that Ms. Mutrie was guaranteeing that in the event no such funds existed she would pay out of her own pocket was to "accept the shadow and not the substance of the transaction".
- [86] A similar situation exists here. On October 18, 2002, both the Willsons and Ms. Ross erroneously believed that Mr. Lee was a man of substance. Ms. Ross provided the trust cheques on the understanding that Mr. Lee would deposit the funds necessary to close the transaction. She did not guarantee that result. She never agreed to pay the Willsons from her own account, nor did the Willsons expect that she would.

- [87] Even if the trust cheques constituted an undertaking, the Willsons would not be entitled to be paid the face value of the trust cheques. No authority supports such a conclusion. As officers of the court, solicitors are expected to abide by their undertakings and if they do not they may be called upon to honour them. Where a solicitor has it in his or her power to do the act he or she undertook to do, the court may order the solicitor to do what was undertaken. An example of such a case is *McCarthy Tetrault v. Lawson, Lundell, Lawson & McIntosh* (1991), 58 B.C.L.R. (2d) 310 (S.C.). Where however the solicitor is no longer able to perform the undertaking, the solicitor may be ordered to pay the loss flowing from the failure to perform the undertaking: *John Fox v. Bannister King*, [1987] 1 All E.R. 737 (C.A.).
- [88] In this case, the Willsons suffered no loss as a result of the delivery of the cheques. Pursuant to the share purchase agreement, the Willsons were obliged to pay Golden Heights' encumbrances before receiving their share of the purchase price. The encumbrances were never paid. On October 18, 2002, the Willsons owned the Golden Heights shares and they continued to own them on October 22, 2002. Subsequent to October 22, 2002, they continued to negotiate with Mr. Lee. They did not repudiate the contract until November 1, 2002. Their loss arose not from a breach of Ms. Ross's undertaking, but from the failure of Mr. Lee to complete the sale and their subsequent failure to find another buyer.
- [89] Alternatively, if I am incorrect and a trust cheque can constitute an undertaking, I find on the facts of this case that the trust cheques were delivered conditionally. I do not accept the Willsons' evidence as to the events that took place on October 18, 2002. Mr. Willson was not a credible witness. Mr. Willson's evidence throughout the trial was entirely inconsistent with the preponderance of probabilities: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.). I have already noted several instances in which I have found his evidence unreliable including his allegation that Ms. Ross told him on several occasions that the money was in her trust account, his evidence that Ms. Ross never disclosed that she was acting only for Mr. Lee and his evidence concerning when Ms. Ross was initially retained to act for Mr. Lee on the transaction.
- [90] Ms. Willson was also not a credible witness. Her evidence in chief was limited to the events of October 18, 2002. In cross-examination, she was also asked about being shown trust cheques on October 8, 2002.
- [91] Concerning the events of October 18, 2002, Ms. Willson's evidence mirrored that of her son. Before giving her evidence, she had been present in court while her son testified.
- [92] Concerning the events of October 8, 2002, Ms. Willson testified that Mr. Lee on that day had shown her two trust cheques. She gave similar evidence when examined for discovery. On March 25, 2005, however, she swore an affidavit in these proceedings in which she said: "I attended for examination for discovery on January 7, 2005, where the defendant's counsel, Mr. Patrice Abrioux, presented as evidence copies of trust cheques written on October 8, 2002 and suggested that these were the trust account cheques we were shown to prove the defendant had the funds in trust to complete the sale. They are fabricated evidence which I

never saw before that day in discovery". When pressed during cross-examination, she could not explain the contradiction in her evidence. I am unable to rely on her evidence.

- [93] The Willsons describe the meeting of October 18, 2002 as being low key and celebratory. They say no voices were raised in anger. The Willsons claim that Ms. Ross came into the office and said she had just finished speaking to Dennis Washington and everything was a go. She had the cheques in hand.
- [94] This evidence is to be contrasted with that of Ms. Ross. She testified that she only learned from Mr. Lee when she came into the meeting that he had not yet received the funds, albeit they were expected the following day. She said that Mr. Willson became angry and upset, as did Mr. Lee. Ms. Ross's evidence is consistent with that of Ms. Guthrie who says she heard loud yelling and angry voices coming from the meeting.
- [95] Ms. Guthrie said that Ms. Ross came to her during the meeting and asked her to prepare the trust cheques. Ms. Guthrie was clearly reluctant to do so and was greatly relieved when she overheard the discussion in the reception area, which indicated that the cheques were not to be cashed until the money was received. That Ms. Guthrie prepared the cheques is confirmed by her pre-billing note.
- [96] I am troubled by Ms. Ross' lack of detailed notes concerning the October 18, 2002 meeting. She wrote voluminous notes in relation to many of the events surrounding this transaction, including the events of October 17, October 19 and October 22. The lack of notes for October 18 is inconsistent with her practice. Ms. Ross explains her lack of notes on the basis that she was intimidated. It is a difficult explanation to accept, particularly when she did prepare a pre-billing summary for the events of that day.
- [97] The evidence leads me to conclude that by October 18, 2002, Ms. Ross had lost her objectivity concerning the transaction. She was most anxious for the sale to complete and was prepared to go to almost any length to facilitate that result. By this time, she had a significant personal financial stake in the transaction. Her pre-billing summary indicates potential fees in excess of \$30,000.
- [98] When Mr. Lee first asked her on October 18 to give cheques to the Willsons, she quite properly refused. She knew that she should not issue the cheques before receiving funds. Faced, however, with the angry demands of both Mr. Lee and Mr. Willson, she resiled and attempted to appease them by having Ms. Guthrie prepare the post-dated trust cheques. She did so in the vain hope that Mr. Lee would in fact come up with the funds as promised, knowing that she could stop payment on the cheques if the funds were not received.
- [99] Ms. Guthrie confirms that Ms. Ross delivered the cheques with conditions. Ms. Guthrie is an independent witness who was both credible and reliable. She has been a legal secretary in excess of 35 years and presently holds a responsible position as an administrator of a Crown counsel office. She remembers the events of October 18, 2002. This transaction and its aftermath were memorable.

[100] Ms. Guthrie knew that the trust account cheques should not have been delivered to the Willsons absent funds in the account. She recognised the potential for disaster and attempted unsuccessfully to dissuade Ms. Ross from issuing the cheques. As she testified, her concerns were assuaged and she breathed a sigh of relief on learning that the cheques were being delivered on condition.

[101] I accept the evidence of Ms. Guthrie as to what happened on October 18. I find that the trust cheques were prepared by Ms. Guthrie in the course of the meeting. I further find that Ms. Ross delivered the cheques on condition that the Willsons would not present the cheques for payment until they were told that the funds to complete had been deposited. Accordingly, even if the trust account cheques are considered to be undertakings, the trust cheques in this case were delivered subject to condition and the plaintiffs' claim must fail.

COSTS

[102] The defendants seek special costs. They submit that the allegations of fraud made by the Willsons were reprehensible. They also point to unsubstantiated allegations of lying made by the Willsons against Ms. Ross throughout the trial. In the normal course, allegations of that nature made against a solicitor might well lead to special costs. This is not however a normal situation. Throughout this transaction, Ms. Ross took steps that one would not expect a solicitor to take. She clearly lost control of the situation. If she had acted otherwise, this action might never have been commenced. I appreciate that Ms. Ross was at the time under severe stress in her personal life and that stress may well have impacted and affected her judgment. Her actions were such, however, that it is my tentative conclusion it would not be appropriate to award her special costs, or any costs whatsoever, for the defence of this action.

[103] The action is dismissed without costs. If either side seeks a different order as to costs they should file written submissions within 21 days of release of these reasons. The other side will have 14 days to respond.

Mr. Justice R.B.T. Goepel

May 19, 2009 - Revised Judgment

Please be advised that the attached Reasons for Judgment of Mr. Justice R.B.T. Goepel dated August 8, 2008 have been edited.

· The first sentence in paragraph 36 on page 11 should read:

"Mr. Willson said that on numerous occasions, commencing prior to August 21, 2002, Ms. Ross told him she had the money in trust to close the transaction. "

· The first sentence in paragraph 76 on page 22 should read:

"Solicitors must observe scrupulously the terms of any undertaking they give, an obligation which the court has the power to enforce summarily if need be "

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Prepared on 29 October 2026 · Esheria