COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Deissner v. Boorsma,*
2023 BCCA 476

Date: 20231219
Docket: CA48961

Between:

Pascal Gunther Deissner and
Sally Elizabeth Deissner

Appellants
(Plaintiffs)

And

Wypkje Nynke Boorsma

Respondent
(Defendant)

Before: The Honourable Madam Justice Fenlon
The Honourable Madam Justice Fisher
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated December 29, 2022 (*Deissner v. Boorsma*, 2022 BCSC 2265, Vancouver Docket S2013423).

Counsel for the Appellants:	G. Allen C. Trudel K. Chaudhary, Articled Student
Counsel for the Respondent:	R. Clark, K.C.
Place and Date of Hearing:	Vancouver, British Columbia October 10, 2023
Place and Date of Judgment, with Written Reasons to follow:	Vancouver, British Columbia October 10, 2023
Place and Date of Reasons:	Vancouver, British Columbia December 19, 2023

Written Reasons of the Court

Summary:

The appellants signed an agreement to buy the respondent's house with a two-year lease back to her. When the appellants insisted on the respondent signing a lengthy lease containing terms not in their original agreement, she refused to complete. The appellants took the position at the time and at the summary trial that the respondent had repudiated the contract, and sought specific performance of the sale without any lease-back, arguing that the lease-back terms of the contract were nothing more than an "agreement to agree", and therefore unenforceable and severable from the sale terms. The judge found that the lease-back clause was unenforceable, but not severable, and dismissed the appellants claim for specific performance. On appeal, the appellants argue that the judge erred in finding the lease-back unenforceable. They submit the lease-back is enforceable and that they did not repudiate the agreement by insisting on additional terms. They seek specific performance of the sale and lease-back. Held: Appeal dismissed. It would be an abuse of process to allow the appellants to raise on appeal arguments entirely inconsistent with the position taken at trial.

Written Reasons for Judgment of the Court:

Introduction

[1] At the end of the hearing, we dismissed the appeal with reasons to follow, having concluded that the appellants should not be permitted to take a position on appeal inconsistent with the position taken at trial. These are our reasons for that decision.

Background

[2] This case arose out of a failed real estate transaction between old family friends. The respondent Wypkje Boorsma is a Dutch citizen in her 70s. She purchased the property in issue (the "Property") in the early 1990s when she "fell in love with Gibsons" on a visit to British Columbia. Ms. Boorsma lived in Holland, but travelled to Gibsons four to five times each year. By 2020, she was finding the travel more difficult, a situation exacerbated by pandemic restrictions then in place. She decided to sell the Property but wanted to spend a few more years visiting Gibsons, so she listed the Property for sale on the basis that it would be leased back to her for two years.

[3] Ms. Boorsma received two offers for the Property. She decided to accept the lower offer from the appellants, Pascal and Sally Deissner, because they were friends and because their mother lived in the house next to the Property. The parties signed an Agreement of Purchase and Sale which included the following terms:

> The Buyer and Seller agree to enter into a Residential Tenancy Lease at a rate of $1000 a month, for a term of 24 months, commencing December 16th, 2020, and ending December 16th, 2022. The [S]eller will provide the [B]uyer a damage deposit of $1000 at the time of completion. The lease is to include a clause restricting a sub-lease of the property during the lease term.
>
> Tenant is to be responsible for Hydro, Natural Gas & Internet Services. Landlord will be responsible for Municipal Property Taxes and Utilities.

The contract provided for a completion date of December 15, 2020 and a possession date of December 18, 2020.

[4] Tensions began to develop between the parties after the Agreement of Purchase and Sale was signed. For the purposes of this appeal, it is sufficient to focus on the conflict over the terms and form of the lease. The dispute began when a lawyer retained by the appellants prepared a lease agreement with a ten-page addendum containing, among others, the following terms:

i. A rent increase of 5%;

ii. Tenant to be responsible for any damage or injury occurring at the time of moving out, regardless of cause;

iii. The lease could be terminated for numerous reasons, including, for non-payment of utilities, for disturbing the neighbours, for conduct or neglect causing any damage, for smoking, for activities that “might constitute a nuisance to others”, for failure to obey a bylaw, and for failure to obey the provisions concerning locks and keys;

iv. Landlord to be responsible for drain blockages only for the first three months of the lease;

v. Landlord would never be liable for damage or injury to the tenant, a guest, or other occupant, no matter the cause of that damage or injury and the tenant was required to carry insurance for that potential liability and to agree to indemnify the landlord with respect to it;

vi. Tenant to be restricted from using a portion of the driveway in order to permit the appellants to park their RV.

[5] Ms. Boorsma's lawyer was taken aback by the proposed draft. He was of the view that the proposed lease was not what the Agreement of Purchase and Sale provided for, and he so advised the lawyer for the appellants, saying:

> I have reviewed your RTA. I was frankly quite taken aback. I do not believe it is appropriate in a situation like this. And it does not accord with the rental terms the parties have agreed to in the contract of purchase and sale. I see no basis for the buyer to require the seller to accept the lengthy addendum you have sent to me. In my opinion what you have sent me is tantamount to a counter offer by the buyer.
>
> I have no problem whatsoever with the standard RTA form. As far as an addendum goes, it should only express the matters set out in the contract of purchase and sale. Tenant is responsible for hydro, natural gas, internet. Landlord responsible for municipal taxes and utilities. Tenant will not sub-let the premises during the term. These are the only matters acceptable in an addendum of the RTA form – subject to my following comments regarding the RV pad and insurance.
>
> [Emphasis added.]

[6] Ms. Boorsma's lawyer proposed significant changes to the draft lease, only a few of which were accepted by the appellants—they insisted on the lease being signed largely in the same form. After discussing the matter with Ms. Boorsma, on December 7, 2020, her counsel again wrote to the appellants' lawyer saying in part:

> I am writing to advise you that after due consideration, my client elects to cancel the contract of purchase and sale dated September 10, 2020 (the "Contract"). The Buyers have chosen to unilaterally alter the contract by imposing material terms which are unacceptable to the Seller. The Contract makes it abundantly clear that the sale of the property and the lease back to the seller are inextricably linked. The lease terms contained in the Contract, coupled with the BC Residential Tenancy Act statutory conditions contained all the essential elements of a residential lease. Nothing more was needed nor was agreed to by the Seller. The Seller never agreed to be a party to, and be bound by a detailed prescriptive written lease agreement that unilaterally imposes terms and conditions not expressed in the Contract …
>
> …
>
> The actions of the Buyer have fundamentally altered the nature and intent of the Contract. The Seller does not accept these unilateral changes. The Seller repudiates the Buyers' attempt to do so and elects to cancel the Contract.
>
> [Emphasis added.]

[7] The appellants' counsel replied a few minutes later emphasizing that her clients remained ready to complete the purchase. She asserted that the lease-back

clause in the Agreement of Purchase and Sale was not a condition of the contract and was not enforceable in any event because it was nothing more than an "agreement to agree". The appellants took the position that they were entitled to purchase the Property without signing a lease with Ms. Boorsma.

[8] Ms. Boorsma's lawyer responded: "My client would never have accepted your client's offer without the tenancy. It is not severable as you suggest." The transaction did not close and the appellants sued for breach of contract and specific performance.

At Trial

[9] The matter proceeded by way of summary trial. The appellants continued to take the position that the lease-back clause in the Agreement of Purchase and Sale was nothing more than an "agreement to agree", and was neither binding nor enforceable. They also maintained that the clause was severable from the obligation to sell the Property at the specified price. They sought specific performance of the sale agreement and conveyance of the Property to them free of any obligation to lease back to Ms. Boorsma.

[10] Ms. Boorsma took the position that the lease-back clause was a valid and binding agreement containing all of the essential terms necessary to create a binding lease both at common law and under the *Residential Tenancy Act*, S.B.C. 2002, c. 78. She asserted that because the lease-back clause was a condition of the agreement to sell, with the rent payable "baked into" the purchase price, it was an essential term and could not be severed from the Agreement of Purchase and Sale. Since the appellants refused to adhere to the terms of the bargain, they had repudiated the contract—a repudiation that Ms. Boorsma accepted.

[11] The judge addressed the issues as framed by the plaintiffs, now appellants. She began by determining whether the parties had made a binding agreement to lease-back the Property to Ms. Boorsma, or only "agreed to agree". The judge found that the parties had different expectations and intentions and that there was no

meeting of the minds on this essential term; therefore, a binding agreement had not been reached: at paras. 106–108.

[12] Next, the judge considered whether the lease-back of the Property was a term severable from the remainder of the Agreement of Purchase and Sale. In this regard she said:

> [110] It is clear from the negotiations between the parties that the actual purchase price of the property was a function of the duration of the lease and the monthly rent amount; as such, the terms of the rent and the sale price of the Property were inextricably intertwined.
>
> …
>
> [113] Again, the evidence does not establish it was ever Ms. Boorsma's intention or agreement that the lease-back arrangement was a minor part of the Property's sale. Ms. Boorsma certainly did not see the lease-back component of her agreement to sell her Property as a minor matter, and she made that very clear. The plaintiffs themselves admitted that Ms. Boorsma was not interested in selling the Property to them if she could not lease the Property back for a two-year period. The price of the Property itself reflects this fact.
>
> [Emphasis added.]

The judge concluded that the lease-back clause was not severable because it went "to the heart of Ms. Boorsma's choice to sell the Property": at para. 115. As a result, the judge determined that since the lease-back clause could not be severed, the Agreement of Purchase and Sale was unenforceable. She dismissed the appellants' claim for specific performance.

On Appeal

[13] The appellants identify a single ground of appeal, contending the judge erred by basing her analysis of the enforceability of the lease-back clause on the subjective intentions of the parties, rather than on their objective intentions as demonstrated by the words used in the contract. They submit that when the appropriate objective analytical framework is applied, it becomes clear that the lease-back clause contains all of the essential terms necessary to form a contract and is therefore enforceable. The appellants say that the real issue is whether they repudiated the contract when they insisted on Ms. Boorsma signing the form of lease

drafted by their lawyer—a question that was not addressed by the summary trial judge in light of her conclusion that the lease-back clause was not enforceable and could not be severed from the contract as a whole.

[14] The appellants now ask this Court to recognize that the lease-back clause is enforceable, to find that the appellants did not repudiate the contract, and to conclude that Ms. Boorsma repudiated or breached the contract by refusing to complete the sale of the Property. They seek an order for specific performance with a new completion date.

[15] Ms. Boorsma objects to the appellants raising a new argument on appeal, and in particular an argument that is inconsistent with the position taken at trial.

[16] The appellants acknowledge the general rule that new issues should not be raised on appeal, subject to certain exceptions. This Court considered the rule in *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457, saying:

> [44] … [T]his court generally does not consider submissions that were not advanced in the proceeding giving rise to the order appealed. The general advisability of a restrained approach has long been recognized. So in *S.S. "Tordenskjold" v. S.S. "Euphemia"* (1908), 41 S.C.R. 154, citing *The "Tasmania"*, 15 App. Cas. 223, Justice Duff observed that an issue not raised at trial but presented for the first time on appeal "ought to be most jealously scrutinized". In *Quan v. Cusson*, 2009 SCC 62, the Supreme Court of Canada addressed the circumstances in which a new issue may be raised on appeal, referring with approval at para. 36 with Justice Duff's observation in *Lamb v. Kincaid* (1907), 38 S.C.R. 516:
>
> > A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

[17] The appellants also acknowledge that their position concerning the enforceability of the lease-back clause "has shifted" from the position they advanced at the summary trial. They concede that they did not advance the new position even as an alternative argument. However, they argue that the position they now wish to

take on appeal is consistent with their position throughout the litigation because at all times they sought specific performance of the contract.

[18] Respectfully, we do not find this submission to be tenable. The question is not whether a party seeks the same remedy on appeal. It is, rather, whether the claim as pleaded, and the issues raised thereby, are consistent with the position taken on appeal. In any event, the appellants do not seek the same remedy. At trial they sought specific performance of the sale of the Property only, whereas on appeal they seek specific performance of both the sale and the lease-back clause in the Agreement of Purchase and Sale—notably a lease quite different from the lease they insisted on at closing.

[19] Further, it is a matter of some significance that the argument the appellants seek to raise is not simply a new argument. It is, rather, one that is entirely inconsistent with the position they took in the court below. As Groberman J.A. stated in *Argo Ventures Inc. v. Choi*, 2020 BCCA 17:

> [31] A distinction is to be made between raising a new issue on appeal and resiling from a position deliberately taken in the tribunal of first instance*: VIH Aviation Group Ltd. v. CHC Helicopter LLC*, 2012 BCCA 125 at para. 44. Generally, this court has not permitted a party that has chosen a particular position in the trial court to abandon that position on appeal*: Sahlin v. The Nature Trust of British Columbia, Inc.*, 2011 BCCA 157 at para. 38. Furthermore, taking inconsistent positions in legal proceedings can constitute an abuse of process: *Fortinet Technologies (Canada) ULC v. Bell Canada*, 2018 BCCA 277 at para. 23.

[20] Relying on *R. v. Vidulich*, 1989 CanLII 231 (B.C.C.A.), 37 B.C.L.R. (2d) 391, the appellants say it is generally permissible to raise a new supplementary argument on appeal. However, it is evident from a comparison of their trial and appeal strategies that the position the appellants wish to take on appeal cannot be characterized as supplementary.

[21] Both at the time of closing and at trial, the appellants took the position that:

1) The lease-back clause was not binding but was only an agreement to agree;

2) The tenancy agreement was severable from the Agreement of Purchase and Sale; and

3) The remaining terms of the Agreement of Purchase and Sale were enforceable and entitled the appellants to conveyance of the Property without granting a tenancy to Ms. Boorsma.

On appeal, the appellants now wish to argue that:

1) The lease-back clause is a complete and binding contract;

2) The lease-back clause is not severable from the Agreement of Purchase and Sale; and

3) They are entitled to conveyance of the Property with a lease-back to Ms. Boorsma on the terms in the lease-back clause.

[22] As we stated in dismissing the appeal at the end of the hearing, we are of the view that the appellants should not be allowed to take a position entirely inconsistent with the position taken at trial. In our view, to permit them to do so would not be in the interests of justice. To the contrary, it would amount to an abuse of process.

[23] First, the argument the appellants now wish to advance is inconsistent with the case pleaded in the notice of civil claim. The appellants acknowledge that they should have raised the new argument in their pleading in the alternative. Setting aside the difficulty of pleading entirely inconsistent positions, the failure to raise the new argument at the beginning of the proceeding is not a mere technicality. Pleadings are a foundational aspect of the litigation process. They put the other side on notice of the case that must be met and the evidence that must be led: *Abstract Developments Inc. v. Margolis*, 2017 BCCA 44. Permitting the appellants to raise an entirely different position on appeal would be highly prejudicial to the respondent who, for two-and-a-half years, has defended the case as pleaded by the appellants.

[24] Second, permitting the appellants to raise an entirely new position on appeal would go against the principle of finality of litigation and the role of an appellate

court. A party is not entitled to try one strategy at trial, and if it proves to be unsuccessful, to adopt a different strategy on appeal, effectively seeking a "do over". The new position the appellants wish to take would require this Court to consider for the first time whether the contract was repudiated by the appellants when they insisted on additional terms in the tenancy agreement. That is a question that should first be addressed by the trial court.

[25] Third, if the appellants on closing had taken the position they now wish to take on appeal, the deal would have closed and there would not have been any litigation. The appellants would now adopt the very position that Ms. Boorsma took before the transaction fell apart. She agreed to sell the Property with a lease-back clause on the terms set out in the Agreement of Purchase and Sale. That is precisely the contract that the appellants would now ask this Court to enforce.

[26] Fourth, the appellants offer no explanation as to why this position was not adopted earlier. Counsel on appeal was not counsel at trial, but a change of counsel and a re-thinking of strategy does not give a party license to change tack on appeal. As Madam Justice Southin said in *Protection Mutual Insurance Co. v. Beaumont* (1991), 58 B.C.L.R. (2d) 290 (C.A.) at para. 26, "[a] litigant who deliberately adopts, for whatever reason, a position in the court below must live with it in this Court".

[27] Finally, even if the appellants were permitted to raise the new argument on appeal, they could succeed only by proving that they did not repudiate the contract when they insisted on the extended form of lease agreement prepared by their lawyer. That would be a difficult argument to make given the appellants' acknowledgment that the lease-back clause in the Agreement of Purchase and Sale was binding and contained all of the terms necessary to create a residential tenancy agreement.

[28] Before concluding, we wish to address briefly the appellants' submission that, even if the argument they now wish to advance is inconsistent with the position taken at trial, it is in the interests of justice to grant them leave to do so. They contend that, in light of the clear error of law in the summary trial judge's analysis of

the enforceability of the lease-back clause, a miscarriage of justice would result if the trial judgment were to stand.

[29] We agree that the judge erred in using the parties' subjective intentions to determine whether they had reached an agreement on the lease-back instead of considering the objective words in the contract (*Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at paras. 324–25). Although that error had no impact on the order ultimately made by the judge on the case as argued by the appellants at trial—they accept that they could not have succeeded in any event on the issue of severability—it would bear on the new argument the appellants now wish to make. However, the existence of the error is not determinative of the threshold question before us, which is whether it is in the interests of justice to allow the appellants to raise the new argument on appeal. The appellants' interest in a judgment free of legal error may be a relevant consideration, but it is only one factor to be weighed along with all of the other considerations, discussed above, that we have found to weigh heavily against allowing the appellants to resile from the position taken at trial and to advance an inconsistent position on appeal.

Disposition

[30] For these reasons, we were not prepared to grant leave to the appellants to raise the new argument. The appeal was therefore dismissed.

"The Honourable Madam Justice Fenlon"

"The Honourable Madam Justice Fisher"

"The Honourable Madam Justice Horsman"