IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cooperstone v. Huszti,*
2024 BCSC 1450

Date: 20240618
Docket: S138551
Registry: Kelowna

Between:

Mark Cooperstone and Ryan Seitz

Plaintiffs

And

Laszlo Huszti

Defendant

Before: The Honourable Justice Gomery

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:	A. Prior C. Janzen
Counsel for the Defendant:	J. Frame
Place and Date of Trial/Hearing:	Kelowna, B.C. June 18, 2024
Place and Date of Judgment:	Kelowna, B.C. June 18, 2024

Introduction

[1] **THE COURT:** The plaintiffs contracted to sell to the defendant residential property in Kelowna for $2.5 million. The contract was in writing in the standard form promulgated by the British Columbia Real Estate Association and the Canadian Bar Association. The defendant paid a $100,000 deposit that is held in trust by realtors.

[2] The contract is dated April 13, 2023. As drafted, it contains the following condition for the buyer's benefit to be fulfilled by April 29, 2023:

> 2) FIRE AND PROPERTY INSURANCE: subject to the Buyer(s) arranging and approving suitable fire and property insurance for the Property.

[3] It does not contain a condition making the buyer's obligations subject to obtaining financing.

[4] On April 29, 2023, the defendant waived all conditions for the buyer's benefit, including the insurance condition. At this point the defendant's obligation to purchase became unconditional.

[5] The parties agreed to amend the closing date from June 24, 2023, to August 24, 2023. Unfortunately, by the time the closing date arrived, forest fires in the South Okanagan had led property insurers to place a moratorium on the placement of new policies, and the defendant found himself unable to secure insurance as he had expected. He had intended to finance the purchase, but without insurance he was unable to satisfy the conditions attached to a loan pre-approval and secure a mortgage loan. The defendant found himself unable to close.

[6] Consistent with clauses in the contact, the parties agreed to extend the closing date to September 21, 2023, but the defendant remained unable to obtain insurance to secure a mortgage loan and tender funds to close the purchase. On September 25, 2023, the plaintiffs declared the contract terminated by reason of the defendant's failure to close and sought forfeiture of the deposit. The defendant would not agree. This lawsuit is the result.

[7] The plaintiffs seek summary judgment, specifically a declaration that the defendant breached and repudiated the contract and that they are entitled to the deposit. They further seek dismissal of the defendant's counterclaim.

[8] The defendant maintains that there is a triable issue as to whether the contract was frustrated by the unexpected establishment by insurers of a moratorium on new fire insurance coverage at the time of closing. He submits that:

> The moratorium against insurance radically altered the contract into something totally different than what the parties intended. It became a cash sale for over $2 million of an uninsurable property.

Test for summary judgment

[9] This matter comes before the court on an application for summary judgment pursuant to *Supreme Court Civil Rule 9-6*. Pursuant to subrule 5(a), I must pronounce judgment if I am satisfied that there is no genuine issue for trial with respect to the plaintiffs' claim. I may pronounce judgment if I am satisfied that the only genuine issue is a question of law (subrule 5(c)).

[10] The plaintiffs bear the burden of showing on the evidence that there is no genuine issue of material fact requiring the trial; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, at para. 11. I am not permitted to weigh evidence beyond determining whether it is incontrovertible; *Beach Estate v. Beach*, 2019 BCCA 277, at para. 49. I may draw inferences of fact based on the undisputable facts before the court so long as the inferences are strongly supported by the facts; *Lameman* at para. 11.

Test for frustration

[11] There are many appellant authorities addressing the doctrine of frustration, including *Naylor Group Inc. v. Ellis Don Construction Ltd.*, 2001 SCC 58, at para. 53; *KBK No. 138 Ventures Ltd. v. Canada Safeway Limited,* 2000 BCCA 295; *Blackmore Management Inc. v. Carmanah Management Corporation*, 2022 BCCA 117; *Interfor Corporation v. Mackenzie Sawmill Ltd.*, 2022 BCCA 228; and *Aldergrove Duty Free Shop Ltd. v. MacCallum*, 2024 BCCA 28. The essential requirements of the doctrine are well-settled. In *Aldergrove Duty Free*, Justice

DeWitt-Van Oosten, speaking for the court, concisely summarized them in the following, passage:

> [36] In light of the above-cited authorities, this Court has held that to prove frustration, a party must establish each of the following elements:
>
> a) a qualifying supervening event that was not contemplated by the parties when they entered into the contract;
>
> b) the supervening event is not the fault of either party; and,
>
> c) the supervening event rendered performance of the contract something radically different from that which was undertaken.

Analysis

[12] Considering that this is an application for summary judgment, I assume for present purposes that the defendant will be able to establish at trial that he was hampered in his ability to close and complete the purchase by an unanticipated moratorium on fire insurance implemented by insurers doing business in the South Okanagan. On this basis, he satisfies the first two requirements of the doctrine of frustration. The moratorium qualifies as a supervening event that was not contemplated by the parties when they entered into the contract. It is not the fault of either party. The remaining question is whether the moratorium rendered performance of the contract something radically different from that which was contemplated and undertaken in the contract.

[13] One way to address the presence or absence of a radical change is to ask whether what has occurred has altered the nature or purpose of the contractual obligation; *Wilkie v. Jeong*, 2017 BCSC 2131, at para. 38; *UPG Property Group Inc. v. Access China Tours, Inc.*, 2023 BCSC 2303, at para. 37 and 39; *Fifth Avenue Holdings Ltd. v. Rocky Mountain Chocolate Factory Canada Ltd.*, 2024 BCSC 928, at paras. 51 to 52.

[14] The moratorium did not change the nature of the defendant's obligation to pay the balance of the purchase price. It did not change the legal nature of what he would receive in exchange. Title to the property was unaffected by the moratorium. The physical state of the property was unaffected by the fires in the area.

[15] What the moratorium did was to affect the defendant's ability to finance the purchase by obtaining a mortgage loan, but the contract never contemplated a financing transaction. So far as the plaintiffs were concerned, they were dealing with a buyer who would tender cash on closing. There is no evidence that they were made aware of his intention to obtain financing.

[16] I think I must decide whether the contract was frustrated without reference to the defendant's unrevealed personal circumstances. It cannot be that the contract with this defendant is frustrated if it would not be frustrated in the case of a buyer who had the funds in hand, but just did not want to pay $2.25 million for a property that had proved uninsurable, at least for the time being.

[17] Turning to that question, the essential difficulty for the defendant is that the contract, as drafted, expressly contemplated the question of insurability. The defendant had from April 23 to April 29 to satisfy himself on this front. He expressly waived the condition as to insurability that was included in the contract for his benefit. In so doing, he assumed the risk that an unexpected difficulty might arise when it came to actually obtain insurance. That difficulty having arisen, I do not think it qualifies as the kind of radical change required under the authorities to frustrate the contract.

[18] I would observe that the defendant was in a position to mitigate the risk by negotiating a binding contract of insurance or otherwise to protect himself in April before he waived the condition as to insurability. The plaintiffs were not.

[19] The contact contains a *force majeure* clause and both sides devote submissions to addressing its implications, the defendant arguing that it does not oust availability of the doctrine of frustration, and the plaintiffs finding some support in the clause for their submission.

[20] The clause contemplates a *force majeure* event resulting in a single 30-day extension of the closing date. I agree with the defendant that the clause does not necessarily exclude the possibility of a frustrating event such as, for example, the complete destruction of the property by some natural disaster, in which case

changing the closing date would not address the difficulty that had arisen. My acceptance of this possibility does not lead me to accept the defendant's main submission that the insurance moratorium brought about a radical change of rights and obligations that frustrated the contract. I am satisfied that it did not.

[21] The defendant analogises this case to *Buckwheat Enterprises v. Shiu*, 2001 BCSC 1727. *Buckwheat* is not a frustration case. It involved an action for specific performance of a contract for the purchase of residential property where the house suffered fire damage after the contract was made. Justice Henderson found that both parties behaved unreasonably and effectively repudiated the contract. The action was dismissed with both parties to bear their own costs.

[22] The defendant relies on Justice Henderson’s review of the law governing the position where a property that is the subject of a contract of sale is damaged prior to closing. In such circumstances, the purchaser is entitled to proceed with an abatement of the purchase price and the parties are both obliged to deal reasonably and in good faith to negotiate the abatement and an extension of the time for closing.

[23] The law set out in *Buckwheat* is of no assistance in this case because it engages different legal principles and addresses a different legal problem. This is not a case in which the property suffered damage warranting an abatement of the purchase price. The property was not touched by fire. It is not a case in which the contract remains in existence and the question is what is to be done to give effect to the essential bargain and changed circumstances. It is not in dispute that the plaintiffs treated the defendant's failure to close as a repudiation that brought the contract to an end. The defendant, for his part, relies on the termination. In part 3 of his response to civil claim he pleads:

> 5. By unilaterally terminating the contract the plaintiffs have breached the terms of the contract and must return the defendant's deposit with interest and are liable to pay costs or damages because of their refusal to return the said deposit.

[24] In sum, on the evidence, there is no room for doubt that the defence of frustration fails. The material facts are not in issue. It is clear that the insurance moratorium on which the defendant relies did not render performance of the contract something radically different from that which was contemplated and undertaken in the contract.

[25] Accordingly, the defendant's failure to pay the purchase price was a breach of contract which the plaintiffs were entitled to accept. Clause 12 of the contract provides for the forfeiture of the $100,000 deposit to the plaintiffs on account of damages. The plaintiffs have undertaken to accept the deposit in full satisfaction of other claims against the defendant advanced in this action.

Disposition

[26] For these reasons I make the following orders:

a) I declare that the defendant breached and repudiated the contract of purchase and sale entered into on April 13, 2023;

b) I declare that as between the parties, the plaintiffs are entitled to recover the $100,000 deposit held by Sotheby's International Realty Canada;

c) in the event of difficulty in recovering the $100,000, the plaintiffs may apply for such further relief as is necessary on notice to Sotheby's;

d) the plaintiffs' claim for the relief sought in paragraphs 1(c), 2 and 4 of part 2 of the notice of civil claim is dismissed;

e) the counterclaim is dismissed; and

f) the plaintiffs are entitled to costs of this action, including the counterclaim.

“Gomery, J.”