IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *RStyle Enterprises Ltd. v. 1308879 B.C. Ltd.,* 2024 BCSC 2226

Date: 20241209
Docket: 254032
Registry: New Westminster

Between:

RStyle Enterprises Ltd.

Plaintiff

And

1308879 B.C. Ltd.

Defendant

Before: The Honourable Justice Taylor

Reasons for Judgment

Counsel for the Plaintiff:	J. Singh J.P. Scouten
Counsel for the Defendant:	S.A. Turner B.S. Khatra
Place and Date of Hearing:	New Westminster, B.C. November 21, 2024
Place and Date of Judgment:	New Westminster, B.C. December 9, 2024

Introduction

[1] The defendant, 1308879 B.C. Ltd., seeks an order directing the Registrar of Land Titles to cancel the certificate of pending litigation (the "CPL"**)** registered by the plaintiff, RStyle Enterprises Ltd., on June 20, 2024, under registration number CB1388897 against title to the properties located at 16753 and 16779 Edgewood Drive, Surrey, British Columbia (the “Lands”) with the following legal descriptions:

a. PID: 032-068-221

Legal Description: Lot 2 Section 13 Township 1 New Westminster District Plan EPP 125370

b. PID: 032-068-239

Legal Description: Lot 3 Section 13 Township 1 New Westminster District Plan EPP 125370

c. PID: 032-068-247

Legal Description: Lot 4 Section 13 Township 1 New Westminster District Plan EPP 125370

d. PID: 032-068-255

Legal Description: Lot 5 Section 13 Township 1 New Westminster District Plan EPP 125370

e. PID: 032-068-328

Legal Description: Lot 12 Section 13 Township 1 New Westminster District Plan EPP 125370

f. PID: 032-068-336

Legal Description: Lot 13 Section 13 Township 1 New Westminster District Plan EPP 125370

g. PID: 032-068-344

Legal Description: Lot 14 Section 13 Township 1 New Westminster District Plan EPP 125370 -

h. PID: 032-068-352

Legal Description: Lot 15 Section 13 Township 1 New Westminster District Plan EPP 125370

i. PID: 032-068-361

Legal Description: Lot 16 Section 13 Township 1 New Westminster District Plan EPP 125370

(the "Lots").

Background Facts

[2] The defendant is in the process of developing the Lands, which includes a division into individual lots.

[3] In May 2023, the plaintiff entered into a contract with the defendant to purchase the Lots for a purchase price of $11m (the “Contract”). Upon entering into the Contract, the plaintiff paid a deposit in the amount of $1.1m (the “Deposit”), which was 10% of the $11m purchase price.

[4] Under the terms of the Contract, the defendant was required to provide certain services, including sanitary, storm drain, water and hydro services on the Lands, to the boundaries of the lots (the "Services"). Within 30 business days of receiving written notice from the defendant that the Services had been installed, the plaintiff was required to complete the purchase of the Lots.

[5] The defendant delivered written notice of completion of the Services to the plaintiff on or about March 23, 2024, and set the completion date for the sale and purchase of the Lots for April 22, 2024 (the "Completion Date").

[6] A dispute arose between the parties as to when, and whether, the Services were fully installed, and also whether the defendant had given the plaintiff the proper length of notice to complete the purchase of the Lots.

[7] On April 22, 2024, the defendant delivered notice to the plaintiff that it was ready, willing and able to complete the sale of the Lots. The plaintiff refused to complete and said that the notice of the Completion Date given to it by the defendant was defective.

[8] The defendant subsequently accepted the plaintiff's failure to compete the purchase of the Lots as a repudiation of the Contract and elected to treat the Deposit as absolutely forfeited to it.

[9] The plaintiff commenced this action by filing a Notice of Civil Claim on June 19, 2024 (the “Original NOCC”), seeking specific performance of the Contract and

damages. On the strength of the Original NOCC, the plaintiff registered the CPL as described above.

[10] On September 6, 2024 the defendant filed this notice of application seeking an order that the CPL be discharged.

[11] On October 16, 2024, before this application could be heard, the plaintiff filed and served an Amended Notice of Civil Claim (the "Amended NOCC"). The Amended NOCC abandoned the claim of specific performance and, instead, asserted that the plaintiff has accepted the defendant's refusal to complete the sale of the Lots as a repudiation of the Contract and that the plaintiff has elected to terminate the Contract. In the Amended NOCC, the plaintiff asserts that, in those circumstances, it is entitled the return of the Deposit and to a purchaser's lien against the Lots to secure its claim for the amount of the Deposit.

Applicable Law

[12] The defendant argues that the CPL should be set aside on the primary basis that the Amended NOCC does not set forth a sufficient basis for an interest in land. In the alternative the defendant argues that the CPL should be set aside on the basis of hardship.

[13] Section 215(1) of the *Land Title Act*, R.S.B.C. 1996, c. 250 [the *Act*] permits a party to a proceeding who is "claiming an estate or interest in land" to register a certificate of pending litigation against the land. The courts have made it clear that a certificate of pending litigation may be cancelled on an application if the pleaded claim does not meet the threshold criterion under s. 215(1)(a) of the *Act* of claiming an "interest in land".

[14] In *Treasure Bay HK Limited v. 1115830 B.C. Ltd.,* 2024 BCSC 294 [*Treasure Bay*], Justice Walker described the applicable analysis as follows:

> [39] A pleading must disclose an interest in land in order to register a CPL against real property.
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> [40] A CPL serves to preserve a clam to an interest in land before trial by preventing it from passing to an innocent third party prior to the determination of the claim. An interest in land is either a legal or equitable proprietary

> interest: *LTA*, s. 215; *Save-A-Lot Holdings Corp. v. Christensen*, 2021 BCSC 2540 at para. 52, rev'd 2022 BCCA 39 [*Save-A-Lot 39*].
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> [41] This court has inherent jurisdiction to cancel a CPL that does not meet that precondition. A discharge application brought under s. 215 of the *LTA* is determined solely on an examination of the pleadings; no evidence is adduced. The outcome of the application succeeds or fails on the current state of the pleading. Unlike an application brought per Rule 9-5 of the *Supreme Court Civil Rules,* the application under s. 215 may not be adjourned to allow the party who filed the CPL to amend their pleading. If the pleading fails to disclose an interest in land, the CPL must be discharged since it was never valid: *LTA*, *s.* 215*; Beach Estate v. Beach*, 2021 BCCA 238 at para. 56*; Xiao* at para. 27; *Canada Long Investment Group Corporation v. Russo*, 2023 BCSC 884 at paras. 22–26; *1267070 B.C. Ltd. v. 1208471 B.C. Ltd.,* 2021 BCSC 2310 at paras. 45–47; *Nouhi v. Pourtaghi*, 2019 BCSC 794 at para. 30; *1119727 B.C. Ltd. v. Bold and Cypress (Grange) GP*, 2020 BCSC 1435 at para. 46.
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> [Emphasis added.]

Analysis

[15] As is made clear in *Treasure Bay*, this application must be resolved on the basis of the "current state of the pleading" alone, without reference to evidence.

[16] On this application the current state of the pleading is the Amended NOCC. Although the CPL was obtained on the basis of the Original NOCC, it is obviously the Amended NOCC which must govern on this application, not the Original NOCC. Otherwise any party would be unfairly incentivized to obtained a CPL on the basis of a NOCC disclosing an interest in land and then to amend the pleadings subsequently to remove the interest in land while purporting at the same time to preserve the CPL.

[17] In the Amended NOCC, the plaintiff struck out many of the paragraphs that supported an interest in land in the Original NOCC, including deleting the following:

- the original claim for specific performance of the Contract;
- the statement that the plaintiff was ready willing and able to complete the purchase in accordance with the Contract;
- The statement that the plaintiff entered into the Contract because the Lots were unique and that an alternative property would not be suitable; and

- the paragraph claiming an interest in the title for the Lots for the Deposit already paid.

[18] In lieu of these claims and material facts in the NOCC, the plaintiff in the Amended NOCC asserted a new and very different claim and supporting material facts, namely:

- that the defendant had anticipatorily breached the Contract;
- that the plaintiff by letter dated October 11, 2024 had accepted the defendant's refusal to complete as a repudiation of the Contract and communicated to the plaintiff its election to terminate the Contract;
- that the plaintiff was entitled to a return of the Deposit; and
- that the plaintiff claims a resulting trust, unjust enrichment and a purchaser's lien.

[19] It is significant in my view that the plaintiff, in the relief sought in the Amended NOCC, now seeks a declaration that the Contract has been terminated and judgment for the return of the Deposit in lieu of the former claim for specific performance of the Contract and an interest in the title to the Lots.

[20] As a result of all the above amendments, I have reached the conclusion that the Amended NOCC does not disclose a sufficient interest in land to register (or in this case maintain) a CPL against the Lots. In this respect, I am heavily influenced by the decision of Justice Francis in *1332404 B.C. Ltd., v. 1266685 B.C. Ltd.,* 2024 BCSC 592 [*1332404*], a case very similar on its facts to this case.

[21] In *1332404* Justice Francis cancelled a certificate of pending litigation in a context where the plaintiff, as in this case, had claimed an interest in land based upon an assertion in the pleading of a purchaser's lien and remedial constructive trust.

[22] Justice Francis began her analysis by noting that "return-of-deposit" cases do not generally give rise to an entitlement to file a CPL:

> [23] At first glance, this proceeding appears to be a monetary claim of the kind commonly seen in these courts in which two parties enter into a real estate deal, the deal falls apart, and the proposed purchaser sues for return of his or her deposit. Such claims do not generally give rise to an entitlement for the plaintiff to file a CPL on the land because in seeking a return of a deposit to purchase land, the purchaser is not asserting an interest in land. If a claim cannot give rise to an interest in land, cancellation of the CPL will be ordered: *Bilin v. Sidhu* 2017 BCCA 429, at paras. 54-56, *RVS Investments Inc. v. HH Maple Investments Ltd.*, 2021 BCSC 2412 , at paras. 11-12.

[23] However, Justice Francis noted that the plaintiff in that case sought to distinguish the situation from a return-of-deposit case by emphasizing the assertion of a purchase's lien and constructive trust in the pleading (as in the Amended NOCC in this case).

[24] Justice Francis reasoned that it is "conceivable" in some circumstances that an assertion of a purchaser's lien and constructive trust in a pleading could amount to an assertion of an interest in land. However, significantly in my view, she also emphasized that this cannot be the case where the facts and remedies pleaded in the claim are inconsistent with an interest in land. Justice Francis reasoned as follows:

> [27] However, this is not the end of the inquiry. If the plaintiffs have simply asserted a purchaser's lien or claimed unjust enrichment and sought a remedial constructive trust, while pleading facts and seeking other remedies that are inconsistent with an assertion of a proprietary interest in land, they cannot be found to have genuinely asserted an interest in land. The facts pleaded in the claim must support an assertion of a proprietary interest in land, and they must not be inconsistent with one. To hold otherwise would be to encourage parties to simply add inconsistent assertions of liens or of trust interests to otherwise straightforward monetary claims as a way to obtain a CPL to gain financial leverage, which is an improper use of this important litigation tool. As Justice Macintosh noted in *Drein v. Puleos*, 2016 BCSC 593, the parties must not be allowed to use CPLs as:
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> > A bargaining tool to extract prejudgment payment for financial claim. That is not what CPLs are intended to protect. They are designed to preserve land claims pre-trial by preventing the land from passing to innocent third parties pre-trial, thereby undermining the claim. If the claim is essence is not for an interest in land, CPLs are not intended to be one of the weapons in the claimant's war chest.

> [28] In this case, the facts pled in the notice of civil claim, if proven, will establish that the plaintiff and defendant disagreed about a particular term in the October 2021 Contract. Specifically, 131 asserts that the parties contemplated and indeed anticipated changes to the individual lot sizes as the development plans for the Property worked their way through the municipal approval process. 133 asserts that properly construed, the October 2021 Contract and Addendum bound 131 to ensuring that the individual lot sizes as set out in the drawings attached to the October 2021 Contract would not significantly change. 133 says that 131 fundamentally breached the contract, and it wishes to have the October 2021 Contract rescinded and its deposit returned.
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> [29] There is a clear inconsistency between the primary remedy sought in this lawsuit, namely rescission and return of deposit, and the notion that the plaintiff seeks an interest in land.

[25] Justice Francis also referred in *1332404* to the decision of Master Harper (now Associate Judge Harper) in *Kang v. Steveston Public Market Inc.*, 2017 BCSC 544, where the plaintiff had sought a return of a deposit on a failed real estate deal and also asserted a purchaser's lien. Justice Francis summarized the ratio of that decision as follows, emphasizing the key fact that the contract was alleged to have lapsed:

> The plaintiff submitted that the purchaser's lien claim was an assertion of an interest in land and that it was therefore entitled to maintain a CPL on the Property. Master Harper rejected this argument, finding that the contract in that case had lapsed when neither party extended it. Because the contract had lapsed, the plaintiff ceased to have an interest in the land. As such, there was no equitable claim to assert.

[26] Justice Francis further reasoned as follows:

> [32] In this case, I need not determine whether a pleading of a purchaser's lien could in certain circumstances ground the filing of a certificate of pending litigation. In this case, it appears clear that the plaintiff's claim has nothing to do with asserting an interest in land. 133 seeks to rescind its contract and get its deposit money back. Such a claim is inconsistent with the assertion of an interest in land.
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> [33] As such, I find that the CPL was improperly registered, and it must be cancelled without conditions.

[27] In my view the situation described in *1332404* is directly analogous to the situation that pertains in this case and the two factual situations are materially indistinguishable. As in *1332404*, the plaintiff in this case argues that the defendant fundamentally breached the Contract by failing to deliver the Services and failing to

give adequate notice. As in *1332404* the plaintiff in this case seeks to have the Contract terminated and seeks the return of the Deposit.

[28] As reasoned by Justice Francis in *1332404*, to the extent that the plaintiff in this case asserts that it had elected to accept the defendant's repudiation of the Contract on October 11, 2024, and that the Contract has therefore been terminated, such a claim is inconsistent with the assertion of an ongoing interest in land. As explained by the Court of Appeal in *A & G Investment Inc. v. 0915630 B.C. Ltd.,* 2014 BCCA 425 [*A&G*], an election by an innocent party following a fundamental contractual breach by the other party is a choice between "inconsistent rights":

> [35] The Contract was to complete December 18, 2012. While the Seller had the option to extend the completion date, it did not do so. Pursuant to the terms of the Contract time was of the essence. The Seller's failure to complete on December 18, 2012 was a fundamental breach of the Contract and gave to the Purchaser the right to accept the breach and put the Contract to an end. I do not agree with the trial judge's analysis that the failure to complete on December 18 was a mere breach of warranty leading to a possible remedy in damages.
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> [36] In *Gulston v. Aldred*, 2011 BCCA 147, this Court set out the options open to an innocent party when there was a breach of a fundamental term:
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> > [50] Where there is a breach of a fundamental term, the innocent party has two options. As this Court stated in *Morrison-Knudsen Co. Inc. v. British Columbia Hydro and Power Authority*, (1978) 85 D.L.R. (3d) 186 at para. 130:
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> > > ... However, it is not every breach which determines a contract and puts an end to contractual obligations. There are breaches compensable in damages only and breaches called fundamental breaches which can bring the contractual relationship to an end and free the parties from further performance. When faced with a fundamental breach the innocent party is put to an election. He may elect to affirm the contract and to hold the other party to the performance of his obligations and sue for damages as compensation for the breach. He may, on the other hand, elect to treat the breach as a fundamental breach and accept it as such. Thus he would terminate the contract and thereafter be relieved of any further duty to perform and he could sue at once for damages or *quantum meruit* for performance to that point. <u>It is essential that such election, an election between inconsistent rights, be made</u>

> promptly and communicated to the guilty party. Once made, the election is binding and cannot be changed. [Emphasis added.]
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> [37] On December 18, 2012, when the Contract did not complete, the Purchaser had an election. It could affirm the Contract and hold the Seller to the performance of its obligation or it could elect to treat the breach as a fundamental breach and accept it as such. If it elects to terminate the Contract, then it would be entitled to return of the deposit.
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> [38] An election between inconsistent rights must, however, be made promptly and communicated to the other side. Parties cannot adopt a "wait-and-see" approach to fundamental breach, as their election simultaneously determines the position of the counterparty to the contract. Either the contract is not repudiated and the rights and obligations under it still exist, or the contract is rescinded because of an accepted repudiation and then very different rights come into being in respect of a cause of action.

[29] In this case, the plaintiff similarly had a choice between inconsistent rights and elected in the Amended NOCC to treat the alleged breach by the defendant as a fundamental breach, accept the breach, terminate the Contract and seek a return of the Deposit. This election created exactly the same inconsistency with an interest in land identified by Justice Francis in *1332404*. While the plaintiff in this case was certainly legally entitled to make that election, the election, as noted in *A&G*, also brought "very different rights" into being in respect of a cause of action. In particular, the election relieved the plaintiff of any obligations under the Contract to purchase the Lots which, of course, was a fundamental supporting basis for the plaintiff's claim to an ongoing interest in land. In this respect it is significant in my view that Amended NOCC, despite asserting a purchaser's lien, does not also plead specific performance of the Contract. This is because termination of the Contract is directly inconsistent with specific performance of the Contract. As the expression goes: "you cannot have your cake and eat it too".

[30] The plaintiff argues that *1332404* is distinguishable on the basis that it involved a claim for "rescission" of the contract rather than termination, as in this case. I am not persuaded by this argument. While it is true that the plaintiff in *1332404* argued that the defendant had failed to comply with certain requirements set out in the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 [*REDMA*], and that the contract was not enforceable against the plaintiff on that basis, it is also clear that the plaintiff further argued in *1332404* that the defendant had

fundamentally breached the contract and sought a return of the deposit on that basis. It was the fundamental breach aspect of the pleading, and not the *REDMA* claim, that Justice Francis identified at paras. 28 and 29 of her reasons as the key basis for the inconsistency.

[31] While it is true that Justice Francis used the word “rescission” in para. 29 (which is technically a remedy that applies only in the context of a misrepresentation) as opposed to “termination” as in this case, I am satisfied, reading the reasons as a whole, that Justice Francis was referring to “rescission” in the context of the acceptance of a repudiation of a contract rather than in the true technical sense of the word. As noted by Justice Fleming in *Karimi v. Gu*, 2016 BCSC 1060, the relatively imprecise use of the word “rescission” in the jurisprudence is a relatively common occurrence:

> [195] It would appear that rescission, or voiding the contract *ab initio* is not what occurs when a fundamental breach is accepted by the innocent party, although the word is sometimes used to describe the consequences of an accepted repudiation (*Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423). In *Guarantee*, the Court discussed the distinction between repudiation and rescission at some length. The headnote provides an accurate summary of that discussion:
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> > Problems have arisen from misuse of the word “rescission” to describe an accepted repudiation. To use these terms synonymously can only lead to confusion and should be avoided. Rescission is a remedy available to the representee, *inter alia*, when the other party has made a false or misleading representation. Repudiation, by contrast, occurs by words or conduct evincing an intention not to be bound by the contract. Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of repudiation depends on the election made by the non-repudiating party. If the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations, although rights and obligations that have already matured are not extinguished. If the repudiation is not accepted, the contract remains in being for the future and each party has the right to sue for damages for past or future breaches. Courts must be sensitive to the potential for misuse of the term rescission and must analyse the entire context of the contract and give effect, where possible, to the parties’ intent. Where, as in this case, the misrepresentation becomes a term of the contract, rescission will be available if the misrepresentation is “substantial”, “material” or “goes to the root of the contract”. Here the bond

> specifically provided that misrepresentations of "material fact" would be grounds for rescission. …
>
> [196] To reiterate, the effect of an acceptance by the innocent party of a fundamental breach is that it brings the contractual relationship to an end, or terminates the contract prospectively and frees the innocent party from any future obligation under the contract.

[32] The claim in *1332404* did not involve a misrepresentation and indeed the word "misrepresentation" is not found in the decision. I am therefore confident in concluding that Justice Francis' use of the word "rescission" was intended to refer to the acceptance of a fundamental breach that frees the innocent party from any future obligation rather than a representation entitled the innocent party to treat the contract as void *ab initio*. For this reason, the principal basis upon which the plaintiff seeks to distinguish the decision in *1332404* falls away, and the two cases are in my view materially indistinguishable.

[33] For the judicial comity reasons long recognized in *Hansard Spruce Mills Limited (Re)*, [1954] 4 D.L.R. 590 (B.C.S.C.) and the cases that follow, and because I also am of the view that the reasoning of Justice Francis was sound in principle, I conclude that the CPL in this case must be cancelled without conditions. The order sought by the defendant is therefore granted.

[34] As I have found that the CPL must be cancelled, I find it unnecessary to address the defendant's argument on hardship.

[35] The parties have leave to speak to the issue of costs. If the parties decline to speak to costs, the defendant shall have its costs in the cause.

"M. Taylor J."