IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Walia v. Gandhi,***
2005 BCSC 314

Date: 20050307
Docket: S79820
Registry: New Westminster

Between:

Harinder Singh Walia

Plaintiff

And

Nirmal Singh Gandhi

Defendant

Before: The Honourable Madam Justice Fisher

Reasons for Judgment

Counsel for the Plaintiff	A.H. Mohamedali K. S. Taunk
Counsel for the Defendant	A. Mattoo
Date and Place of Trial/Hearing:	February 16, 22 2005 New Westminster, B.C.

Introduction

[1] The plaintiff, Harinder Singh Walia, brings this action seeking specific performance, or alternatively, damages for breach of contract against the defendant, Nirmal Singh Gandhi. The defendant counterclaims for damages for breach of contract. The parties agree that they entered into a binding contract, but each alleges that the other breached the contract.

[2] The plaintiff alleges that the parties entered into a contract of purchase and sale of a tractor-trailer on or about November 16, 2002. This contract was conditional upon the plaintiff being approved and hired by a company known as Versacold Group Warehouse and Transportation Services (“Versacold”). The defendant leased a tractor-trailer and had recently, since the beginning of November 2002, been employed by Versacold as a dependent contractor/owner-operator. The agreed price for the tractor-trailer was $50,000.

[3] The defendant agrees that the parties entered into a binding contract on November 16, 2002. He says that the contract was for the purchase and sale of the tractor-trailer, the agreed price was $50,000, but the contract was not conditional upon the plaintiff obtaining employment. The contract included the opportunity for employment with

Versacold. In any event, the plaintiff did obtain employment with Versacold.

Narrative and Findings of Fact

[4] In early November 2002, the defendant obtained employment with Versacold and on November 1, 2002 he entered into a lease agreement with Sovereign Leasing Corporation (“Sovereign”) for a 1992 International Tractor and a 1980 trailer (the “tractor-trailer”). The lease included an option to purchase the tractor-trailer for $3,000 after 36 months. The defendant’s lease payments were $1,374 per month, including taxes.

[5] The defendant found the work at Versacold quite difficult and after two weeks he considered leaving. He was able to obtain another job with Gulf Islands Cartage Co. Ltd. (“Gulf Islands”). In order to obtain that job, the defendant was required to purchase a different kind of vehicle. He then took steps to sell his interest in the tractor-trailer, and to purchase another vehicle.

[6] In mid-November 2002, the defendant placed an advertisement on Radio India for the sale of the tractor-trailer and the opportunity to obtain employment with Versacold. The plaintiff heard the ad, was interested, and contacted the defendant, who he knew previously.

[7] The plaintiff had been employed by Diamond Delivery for approximately seven years. In November 2002, he was on leave from that position and was working temporarily for another company.

[8] On Friday, November 15, the plaintiff went with the defendant to Versacold and drove with the defendant for the day. He decided he would like the job and the following day, November 16, the plaintiff and defendant entered into an agreement whereby the plaintiff would purchase the defendant's interest in the tractor-trailer for $50,000, provided the plaintiff was able to obtain employment with Versacold. On Monday, November 18, the plaintiff and the defendant went to meet with Mr. Glen Slobodian, the Regional District Manager for Versacold. The defendant had advised Mr. Slobodian that his job with Versacold was not working out for him and he introduced the plaintiff to Mr. Slobodian as a proposed owner/operator who would purchase the defendant's tractor-trailer, if he were approved for employment.

[9] The plaintiff was required to submit an application to Versacold, who would screen the plaintiff and approve him for employment. The plaintiff made his application. On November 30, 2002, the plaintiff paid to the defendant a deposit for the purchase of the tractor-trailer in the amount of $7,500.

[10] From November 18 to December 5, 2002, the plaintiff drove with the defendant in the tractor-trailer, so that the defendant could train the plaintiff. On December 5, 2002, Versacold advised the plaintiff that he had been approved for employment.

[11] Meanwhile, on November 21, 2002, the defendant accepted a full-time position with Gulf Islands, which was to commence when the defendant purchased or leased a truck. This position was to pay the defendant $38 per hour and it was to involve less labour than the job with Versacold. On December 2, 2003, the defendant purchased a 1999 Ford Sterling truck for $50,000. In order to finance this purchase, the defendant obtained a loan from Canada Trust for $40,000. In addition to paying the balance of $10,000 plus taxes, the defendant's monthly loan payments were $666.67.

[12] On December 5, 2002, when the plaintiff's employment with Versacold was approved, the plaintiff paid the balance of the purchase price for the tractor-trailer. He also advised Diamond Delivery that he would not be returning to work as he had found other employment.

[13] The plaintiff paid $8,966.41 to the defendant and $35,023 to Sovereign. The plaintiff also paid an additional sum of $2,250 so that the defendant could pay the 7% provincial sales

tax payable on the transfer of the tractor-trailer from Sovereign to the defendant. In total, as of December 5, 2002, the plaintiff had paid to the defendant a total amount of $53,739.41. The defendant used the plaintiff's $8,966.41 payment for the down payment for his new truck.

[14] The parties then took steps to arrange for title to the tractor-trailer to be transferred from the defendant to the plaintiff. The plaintiff and the defendant obtained transfer papers from Sovereign and then attended at Gold Key Insurance Ltd. The insurance agent, Mr. Sandhu, advised them that Sovereign was required to transfer title first to the defendant and then the defendant would be able to transfer title to the plaintiff. The parties returned to Sovereign to obtain the proper transfer papers. By that time it was late in the day, and they agreed to do the transfer the following day.

[15] It is at this point that the evidence of the plaintiff differs with the evidence of the defendant. The plaintiff says that he called the defendant about the transfer the following day, and every day after that until December 11, but the defendant was putting him off. The defendant says that he was calling the plaintiff, but the plaintiff was putting him off. The cellular phone records of the plaintiff and of the

defendant confirm that each of them called the other numerous times between December 6 and December 11, 2002.

[16] During this time, the plaintiff was working at Versacold, using the tractor-trailer. On December 9, the defendant purchased new tires and a Gulf Islands decal for his new truck, and he worked at Gulf Islands on December 10.

[17] On the evening of December 11, the parties met at Gold Key Insurance. The plaintiff says that they met in the parking lot and that the defendant advised him that he wanted a further $5,000 for the tractor-trailer. The defendant did not like his new job. The plaintiff was upset by this demand, and refused to pay it. The parties did not go in to the insurance office and never affected the transfer.

[18] The defendant says that the parties went into the insurance office, but the plaintiff was worried that the computer did not show any clearance for the lease and he thought something was wrong. He says that the plaintiff refused to complete the transfer. The defendant told the plaintiff to make up his mind the following day. The next day, the parties met at the Versacold yard. The plaintiff told the defendant he wanted his money back, returned the keys to the tractor-trailer and left in his own truck.

[19] Mr. Sandhu testified in rebuttal that the plaintiff and the defendant came into the Gold Key office only once, on the day they sought to register the transfer, but were told they needed further papers from Sovereign. Mr. Sandhu, who knows the plaintiff, worked from 1:00 pm to 9:00 pm Monday to Friday, and he would have been in the office on the evening of December 11, 2002. He did not recall the parties coming back to the office and having a discussion about the transfer, as alleged by the defendant. He only saw the two of them together in the office on one occasion.

[20] On December 13 and 14, the defendant refunded the full amount to the plaintiff, which the plaintiff accepted. This is not in dispute.

[21] From December 5 to December 11, the plaintiff drove the tractor-trailer for Versacold. Because the defendant was still on title as the lessor of the tractor-trailer, all of the revenues for that work were paid to the defendant.

[22] After December 11, 2002, the plaintiff went back to speak to Mr. Slobodian at Versacold about obtaining employment. However, Mr. Slobodian advised him that the defendant had changed his mind and he had no need for a further owner/operator in addition to the defendant. The plaintiff did not want to return to Diamond Delivery; he said he had

lost his seniority. Instead, he looked for other work. He obtained a position with Strait Express on January 10, 2003. He worked there until August or September of 2003, after which he opened his own delivery business, purchasing several trucks. He ran this business until October 2004, when he closed it because he was not making any profit. More recently, the plaintiff obtained employment as a driver, earning $18.00 an hour.

[23] The defendant did not return to his job at Gulf Islands. He returned to his job at Versacold. He sold his truck back to the dealership for the same price he paid, less $7,466, the amount of sales taxes. He said he had no choice, because he could not sell the tractor-trailer quickly enough to retain his employment with Versacold. He said that Versacold would fire him with his tractor-trailer if he did not operate it. He also said that his wife had to quit her job because he had longer hours of work at Versacold.

[24] The plaintiff claims that subsequent to the dispute with the defendant, he became depressed and found it very difficult to obtain replacement employment.

[25] Mr. Mohamedali, counsel for the plaintiff, submits that the plaintiff’s evidence ought to be preferred over the defendant’s evidence. He says that it makes no sense for the

plaintiff to have not wanted to complete the transfer. He had paid the full purchase price, as well as an additional amount that the defendant was to re-pay, he had quit his previous employment, he had been trained and had been working at Versacold on his own since December 5. It is significant that Mr. Slobodian understood from the defendant that he had changed his mind about his agreement with the plaintiff. Further, Mr. Sandhu's evidence supports the plaintiff's evidence.

[26] Mr. Mattoo, counsel for the defendant, submits that it is improbable that the defendant breached the contract. He had taken a new job and purchased another truck in reliance on the contract. The new job with Gulf Islands was a better job, and his monthly payments were considerably less than the monthly payments under the lease for the tractor-trailer. As a result of the breach, he had to quit his new job and return to his old job at Versacold. He had to borrow money from his relatives to re-pay the plaintiff.

[27] The plaintiff clearly relied on the contract. As soon as the plaintiff obtained the approval of Versacold for employment, he quit his previous employment, paid the balance of the purchase price and began working full-time at Versacold. All of his conduct is consistent with his

understanding of the terms of the contract – i.e. that it was conditional upon the plaintiff obtaining employment with Versacold. His evidence was consistent. The job was important to him. I find it improbable that he would suddenly change his mind because he was concerned about whether the defendant had title to the tractor-trailer. He knew that the defendant was the lessor and not the registered owner.

[28] The defendant also relied on the contract. He says, however, that the contract was not conditional upon the plaintiff obtaining employment with Versacold. After the plaintiff paid the $7,500 deposit, but before the plaintiff had been approved for employment at Versacold and had paid the balance of the purchase price, the defendant purchased another truck. After the plaintiff paid the balance, and had started working at Versacold on his own, the defendant began working for Gulf Islands. However, he only worked one day, December 10. His explanation as to why he did not work on December 11 did not make sense. The parties had agreed to meet at Gold Key Insurance in the evening, just before the office closed at 9:00 p.m. There was no need for the defendant to take that day off to attend to the transfer.

[29] Although the defendant testified that the Gulf Islands job was his “dream” job, he adduced no evidence from Gulf

Islands about the terms of his employment, other than his hourly rate of pay. The defendant said nothing to Mr. Slobodian about his new job, instead telling him that he had family issues. His explanation as to why he had no choice but to quit this new job and return to Versacold did not make sense. There was no evidence that Mr. Slobodian would have fired him if he did not run his tractor-trailer immediately. He made no effort to look into his options but instead, suddenly cancelled his new arrangements and re-paid the plaintiff the purchase price. The defendant told Mr. Slobodian that he had changed his mind and had sorted out his family issues. It appears that he did have a change of mind, despite the loss he incurred in the amount of the sales tax monies he had paid on the purchase of the truck.

[30] Further, the defendant’s evidence about the plaintiff’s reasons for not wanting to complete the transfer makes little sense, and is inconsistent with the evidence of Mr. Sandhu.

[31] For all of these reasons, I prefer the evidence of the plaintiff to the evidence of the defendant.

[32] I make the following findings of fact:

a) the contract between the parties was conditional on the plaintiff obtaining employment with Versacold;

b) the contract became unconditional and binding on December 5, 2002, when the plaintiff was approved by Versacold;

c) the defendant breached the contract by failing to complete the transfer of his interest in the tractor-trailer.

[33] Accordingly, the plaintiff's claim is allowed and the defendant's counterclaim is dismissed.

Remedy

a) Specific performance

[34] The plaintiff claims that he is entitled to specific performance of the contract on the basis that the tractor-trailer was unique because it was connected to employment with Versacold. He relies on a number of cases where specific performance was awarded for breach of contract involving the sale of land, as well as ***Jessen v. Holloway Estate***, [1994] B.C.J. No. 1709 (S.C.), which involved the sale of a fishing boat and licences.

[35] The defendant says that the plaintiff was made whole by the repayment of the purchase price within several days of the breach and further, that the contract did not involve the

purchase of a chattel that is unique. Accordingly, the plaintiff is not entitled to specific performance. Counsel relies on ***Semelhago v. Paramadevan***, [1996] 2 S.C.R. 415.

[36] In my view, the plaintiff is not entitled to specific performance, primarily because he accepted the defendant's repudiation by accepting a return of the purchase price within several days after the defendant failed to transfer the title of the tractor-trailer to the plaintiff. The plaintiff treated the contract as being at an end. In this situation, both parties are relieved from performing any outstanding obligations and the plaintiff may commence an action for damages.

[37] In order to claim specific performance, the plaintiff should have refused to accept the defendant's repudiation, in which case the contract would have continued in force and neither party would have been relieved of his obligations under the agreement. In this regard, see ***Semelhago v. Paramadevan***, *supra*, at para. 15.

[38] Further, the tractor-trailer was not a chattel that was unique such that an order for specific performance should be granted. In order to establish that the property is unique, the plaintiff must show that it has a quality that relates to the proposed use of the property, which cannot be readily

duplicated elsewhere: ***John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.*** (2003), 223 D.L.R. (4th) 541 (Ont. C.A.).

[39] The tractor-trailer was not sold along with a saleable licence, such as the vessel and fishing licence in ***Jessen v. Holloway Estate***, *supra*. It was sold along with an opportunity to obtain employment from a third party. The defendant did not have the authority to grant employment to the plaintiff. The plaintiff was able to obtain the employment in December 2002. However, that may not be the situation today. Mr. Slobodian testified that the plaintiff would have to make a new application and Versacold would proceed afresh to determine whether or not he would be approved. The approval for employment was a condition precedent for the benefit of the purchaser. It was not a licence or thing of value that could be sold by the defendant.

[40] Counsel for the plaintiff submits that an order for specific performance may be made subject to Versacold approving the plaintiff for employment. He referred the court to two cases from Ontario, where the court awarded specific performance in circumstances where a condition precedent to the purchase and sale of land was dependant upon regulatory approval: ***Orchard v. Fournie*** (1982), 139 D.L.R. (3d) 144 (Ont. C.A.) and ***Ludlow v. Beattie*** (1978), 87 D.L.R. (3d) 561 (Ont.

H.C.). In both cases, the land being sold was part of a larger parcel and compliance with the ***Planning Act*** required that consent be obtained for severance.

[41] In ***Orchard v. Fournie***, the vendors had obtained the consent, but it had lapsed. It was held that "[n]ormally, the court will not order specific performance of a contract which remains to be approved by a regulatory tribunal, but in the present circumstances it can be assumed that consent will be given again." Further, the purchasers had at no time repudiated the contract on the ground of that defect. The vendors were therefore entitled to have until the date fixed for closing to obtain a new consent.

[42] In ***Ludlow v. Beattie***, the contract did not refer to the need for compliance with the ***Planning Act***. The parties disagreed as to which party had undertaken the responsibility to make the necessary application. The purchaser sought rectification of the agreement, a declaration that it was binding and specific performance. The court granted the relief, adding terms that the contract was conditional upon compliance with the ***Planning Act*** and the vendor was responsible for obtaining the necessary severance. The contract was to be specifically performed upon the application being successfully made.

[43] In my view, the circumstances in these cases involving the sale of land are quite different from the present case. The subject matter of those contracts was land that was to be severed or sub-divided from a larger parcel. Clearly, the severance approval was a condition precedent to the vendor being able to transfer title to the land. In this case, the subject matter of the contract was a tractor-trailer. The only third party approval required for the defendant to be able to transfer title was that of the lessee, Sovereign, and that approval was given.

[44] The condition in this case involves employment. A significant amount of time has passed since the breach of contract. The defendant has continued to be employed by Versacold. If Versacold were to approve the plaintiff for employment on the same basis is it did in December 2002, it would be put into a position requiring it to terminate the employment of the defendant. In these circumstances, I would decline to make an order for specific performance conditional upon Versacold approving the plaintiff for employment.

[45] In any event, the plaintiff’s acceptance of the defendant’s repudiation of the contract disentitles him to an order for specific performance.

b) Damages

[46] The plaintiff claims damages in the alternative. His counsel submits that the damages should be the difference between what the plaintiff would have earned at Versacold and what he would have earned had he retained his employment at Diamond Delivery.

[47] The defendant says that the plaintiff was made whole when he received a full refund of the purchase price, which occurred on December 13 and 14, 2002. He also says that the plaintiff is estopped from claiming damages by accepting a return of the purchase price, citing ***Fraser Valley Credit Union v. Siba***, 2001 BCSC 744.

[48] In my view, the doctrine of estoppel, either representative or promissory estoppel, has no application in this case. Further, because of the nature of the contract and the importance to the plaintiff of the Versacold employment, the plaintiff was not made whole when he received the refund of the purchase price.

[49] This was not a standard contract for the sale of goods. The plaintiff had obtained the employment that was connected to the tractor-trailer, and in reliance on this, he quit his employment with Diamond Delivery. In order to put the

plaintiff into the position he would have been in had the contract been performed, his damages should be based upon the difference between what he would have earned at Versacold and what he would have earned at Diamond Delivery had he retained his job, for the period from December 12, 2002 to the date of trial. This eliminates the need to consider issues of mitigation.

[50] The plaintiff is also entitled to receive the net earnings that Versacold paid to the defendant for the period from December 5 to and including December 11, 2002, when the plaintiff worked at Versacold in accordance with the terms of the contract with the defendant and his employment with Versacold.

[51] The parties did not present evidence specific to the net earnings of the plaintiff and the defendant. I therefore direct that an assessment be conducted by the Registrar to determine the amount of damages incurred by the plaintiff, based on the calculation formula outlined above, unless the parties otherwise agree. The Registrar will have the authority to award costs for the assessment and to include interest under the ***Court Order Interest Act***, R.S.B.C. 1996, c. 79. The results of the assessment are to be certified by the Registrar.

[52] Both parties also sought punitive damages against the other but neither counsel cited authorities to support such an award. I do not find any basis to make an award for punitive damages in the circumstances of this case.

[53] The plaintiff will have his costs at Scale 3.

"B. Fisher, J."
The Honourable Madam Justice B. Fisher