Case Name:

Fraser v. Houston

Between
Brian Fraser, plaintiff (defendant by counterclaim),
and
James Ralph Houston, Urban Projects Ltd., Urban Projects (Barbados) Ltd., Addwest Minerals, Inc. and Addwest Minerals International Ltd., defendants, and Marsden Trading Limited (formerly named 553358 B.C. Ltd.), John Doe No. 1, John Doe No. 2, Company No. 2, and Company No. 2, defendants by counterclaim

[2005] B.C.J. No. 1089

2005 BCSC 715

139 A.C.W.S. (3d) 253

Vancouver Registry No. S010060

British Columbia Supreme Court
Vancouver, British Columbia

Williamson J.

Heard: April 18 - 22 and 25 - 28, 2005.
Judgment: May 13, 2005.

(50 paras.)

Contracts -- Interpretation -- Breach of contract -- Remedies -- Damages.

Action for payment of monies owing under a settlement agreement and for damages. The plaintiff Fraser had brought an action for damages for loss of the right to participate in a corporate opportunity. The action was settled, but the defendants had not paid all amounts agreed to, and they had not delivered all of the corporate shares to Fraser as required under the settlement. The defendants did not dispute that they failed to make the payments or to transfer the shares. The settlement agreement provided that upon failure of the defendants to pay the amounts required, certain shares held in escrow may be transferred to Fraser in satisfaction of the monetary obligation. The defendants argued

that Fraser's recourse was limited to executing upon this security. The defendants counterclaimed that Fraser sold his shares which drove down the value of the shares, thus breaching the settlement agreement.

HELD: Action allowed. The counterclaim was dismissed. The defendants were ordered to pay the amounts owing under the agreement. Damages of $18,000 were awarded for the failure to deliver all of the required shares to Fraser. Fraser's remedy for the defendants' default was not limited to executing upon the security. The settlement established a security and stated that if that security was called upon, liability for the shortfall was limited. Such wording did not prevent Fraser from declining to execute upon the security. The unius est exclusio alterius maxim did not apply, since the settlement did not specify two options that were to apply upon default. The settlement was clear as to what the defendants' obligations were, and the defendants failed to fulfill these obligations. Fraser gave the defendants notice of the default. Fraser's activity of selling his shares had no significant impact upon the share value in the relevant period. Although Fraser failed to use his best efforts to obtain a release, as required by the settlement, there was no evidence that the defendants sustained damages as a result.

Statutes, Regulations and Rules Cited:

Securities Act, R.S.B.C. 1996, c. 418 s. 85(1)

Counsel:

Counsel for the Plaintiff: Daniel Barker

Counsel for the Defendants: Robert D. Holmes

---

1 **WILLIAMSON J.**:-- In July of 1996 Brian Fraser, the plaintiff ("Fraser"), brought an action against four of the defendants: James Ralph Houston ("Houston"), Urban Projects Ltd., Urban Projects (Barbados) Ltd., and Addwest Minerals Inc. ("Addwest Minerals"). The lawsuit arose, Fraser claimed, because he had brought a corporate opportunity to the defendant Houston. It involved the acquisition of the shares of Addwest Minerals, a company which held, among other things, the Gold Road Mine in Colorado. Eventually, the shares in Addwest Minerals were acquired by the first three defendants in this proceeding. Fraser sued them for the damages he claimed he sustained as a result of the loss of the right to participate in this corporate opportunity.

2 The action was settled. By way of the Release and Settlement Agreement (the "Settlement"), dated September 26, 1997, the defendants agreed to pay or deliver to Fraser the following:

a) $505,000 upon delivery of the Settlement,
b) $200,000 by March 17, 1998,
c) $5,000 U.S. each month for 48 months, and
d) 100,000 shares per month in Addwest Minerals International Limited ("Addwest International") for 20 months.

3 The defendants delivered, as required, the $505,000 on execution of the Settlement. They failed to pay the $200,000 on March 17, 1998. They paid $5,000 U.S. a month for nine months only, and delivered only 800,000 of the agreed upon 2,000,000 shares in Addwest International.

4 As a result, in this action Fraser claims judgment for the $200,000 which was to be paid by March 17, 1998, $195,000 U.S. as a result of the unpaid monthly instalments, and damages for failure to deliver 1,200,000 shares in Addwest International.

5 On the first day of these proceedings, the third party claim against David Rennie was dismissed. The counterclaim against Marsden Trading Limited was adjourned generally.

The Parties' Positions

6 The defendants say Fraser has himself breached the Agreement and as a result his claim should be dismissed. In the alternative, they submit that if they were responsible for all of the above, only Addwest International and Addwest Minerals are liable to pay the $200,000 and the $195,000 U.S. owing pursuant to the Settlement.

7 They take the latter position because the Settlement required that the defendants deliver to Shapray Cramer, solicitors for Fraser, 600,000 shares in Addwest International to be held by Shapray as security. The Settlement specified that in the event the defendants failed to pay the $200,000 by March 17, 1998, and/or failed to make any of the $5,000 U.S. monthly payments required, Fraser could instruct Shapray to sell the shares in satisfaction or partial satisfaction of one or both of these debts. The Settlement also specified that if there was a shortfall after the sale of the shares, only Addwest Minerals and Addwest International would remain jointly and severally liable for that shortfall.

8 The defendants say that when reading the Settlement as a whole it is apparent that sale of the security shares is the plaintiff's sole recourse upon default. The plaintiff, on the other hand, submits that the defendants remain responsible for all of the liabilities in the contract and that the 600,000 shares held by Shapray were merely security upon which Fraser could, if he so chose, execute. Fraser is adamant the Settlement does not require him to do so. Rather, he submits, it remains open to him simply to sue the defendants upon the basis of the defendants' obligations in the contract.

9 Both sides say the Settlement is clear. Fraser says he can sue the defendants. The defendants say that all Fraser can do is execute upon the security provided for in the Settlement and go after the two Addwest companies for any shortfall. However, the defendants say that in the alternative, if there is some ambiguity, that when one looks at all of the circumstances there can be no doubt that the parties intended to limit liability for default and, if necessary, the Settlement should be rectified to reflect that.

The Law

10 In this trial, evidence was called with respect to the surrounding circumstances. Both counsel have emphasized, and I agree, that much of the evidence is relevant only to the issue of rectification. While the court may have regard to the factual matrix in construing this Settlement, many of the circumstances, and in particular the negotiating positions taken by the parties leading up to the Settlement, are not relevant except to the issue of rectification.

11 The law in this area is set out in the frequently cited case of Prenn v. Simmonds, [1971] 3 All E.R. 237 (H.L.).

12 In Prenn, Lord Wilberforce reviewed in considerable detail the issue of what is admissible in construing an Agreement. At p. 241, he observed that the only course is to try and ascertain "the natural meaning" of the words. He said the following:

> Far more, and indeed totally, dangerous is it to admit evidence of one party's objective - even if this is known to the other party. However strongly pursued this may be, the other party may only be willing to give it partial recognition, and in a world of give and take, men often have to be satisfied with less then they want.

13 Further on the same page, he said:

> In my opinion, then, evidence of negotiations, or of the parties intentions, and a fortiori of Dr. Simmonds intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction.

14 The law is concisely stated in the case of Delisle v. Bulman Group Ltd. (1991), 54 B.C.L.R. (2d) 343 (S.C.), a decision of Ryan J. as she then was. At p. 345 she said:

1. Evidence of facts mutually known to the parties prior to the execution of a contract are admissible to identify the meaning of a descriptive term if they are relevant and not excluded by other evidentiary tests. Ambiguity is not a pre-condition to a consideration of the factual matrix. (Prenn v. Simmonds, [1971] 1 W.L.R. 1381, [1971] 3 All E.R. 237 (H.L.); ACLI Ltd. v. Cominco Ltd. (1985), 61 B.C.L.R. 177 (C.A.))
2. In examining the factual matrix the court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract. Viva voce evidence as to what the parties intended is inadmissible in interpreting a written contract. "Evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the genesis' and objectively the aim' of the transaction." (Prenn, supra; Elkiw v. Harris, February 1, 1990, Doc. CA006367 (B.C.C.A.) [now reported 39 C.P.C. (2d) 121])
3. If, after examining the agreement itself in its factual matrix, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then additional evidence may be admitted. This evidence includes evidence of the facts that led up to the making of the agreement, evidence of the circumstances as they existed at the time the agreement was made, and evidence of subsequent conduct of the parties to the agreement. The two existing reasonable interpretations may be the result of ambiguity arising from doubt, uncertainty or difficulty of construction. (C.N.R. v. C.P. Ltd., [1979] 1 W.W.R. 358, 95 D.L.R. (3d) 242 (B.C.C.A.))

15 Similarly, the law with respect to rectification of a contract is concisely set out by Binnie J. in Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., [2002] 1 S.C.R. 678, at para. 31. Given the findings I make below, I need not review this law.

Is The Settlement Clear?

16 Taking into account the genesis and aim of this contract, and the wording used in this context, I turn to whether the Settlement is sufficiently clear on its face. I conclude that it is.

17 The genesis of the Settlement is the litigation between the parties which I described in para. 1 above. The aim of the settlement was to resolve that dispute and end the litigation "fully and finally". Fraser and Houston are both experienced businessmen. They retained counsel in the original lawsuit. The Settlement was drawn on their instructions by their solicitors. It was executed by them in the presence of their solicitors. The Settlement sets out, unambiguously, that "the defendants shall" make the payments and transfer the shares as described above. The plaintiff settled the case with all of the defendants.

18 Thus it is the defendants, plural, who are obligated to make all of the cash payments discussed above to Fraser or his designee. Further, the Settlement specifies, in para. 11, that Addwest International, a company not involved in the original lawsuit:

> Shall be jointly and severally liable for the performance or the consequences of non-performance of any and all of the obligations of the DEFENDANTS, or any of them, as set out in this Agreement.

19 It is not disputed that the defendants failed to make the payments, or to transfer the shares, as set out above in para. 2 above.

20 Para. 5 of the Settlement states that:

> On or before October 21, l997, the DEFENDANTS shall deliver to Shapray 600,000 shares, which shall be free trading and without restriction or legend in Addwest International (the "Security"). The security is to be held by Shapray subject to the following trust conditions:
>
> ...

21 Following that introduction are two sub-paragraphs. The first, para. 5(a), refers to the security for the $200,000 March 17, 1998 payment. Para. 5(b) refers to the $5,000 U.S. per month payments. Other then the reference to the item for which the security is held, and the number of shares involved, the sub-paragraphs are the same. I reproduce one of them, para. 5(a), here:

> Subject to para. 6, in the event that the DEFENDANTS fail to make the payment referred to in para. 4(c) above, Shapray may as and when instructed by DESIGNEE deliver 200,000 of the Escrow Shares ["the 4(c) Shares"] to FRASER in satisfaction or partial satisfaction, as the case may be, of the payment obligation set out in para. 4(c) above, until such time as the earlier of (i) net proceeds of $200,000 CDN has been realized by or for DESIGNEE from the sale of the 4(c) Shares by FRASER using the facilities of any exchange on which the shares of ADDWEST INTERNATIONAL are listed and traded, at which time FRASER shall deliver the unsold balance if any of the 4(c) Shares to Camp, or (ii) all of the 4(c) Shares have been sold by FRASER using the facilities of any exchange on which the shares of ADDWEST INTERNATIONAL are listed and

> traded and net process of less than $200,000 CDN has been realized, in which case Addwest Minerals, Inc. ("AMI") and ADDWEST INTERNATIONAL alone shall remain jointly and severally liable for the unpaid portion of the payment referred to in para. 4(c) above.

22 Before reviewing this sub-paragraph, it is essential to note that there is no security set out with respect to the original payment of $505,000, nor for the transfer of the 2,000,000 shares. As well, nowhere in the Agreement, which obliges the defendants to do a number of things, is it stated expressly that the remedy for default is limited to executing upon the security held pursuant to para. 5. If there were such a clause, it would have to take into account that the security was to be held for only two of the four principal obligations of the defendants. That being so, it is necessary to look closely at these sub-paragraphs to determine whether there is anything in those paragraphs which suggests that the remedies available to the plaintiff in case of default are limited to executing upon the security. I conclude there is not.

23 One key is found in the fourth last sentence of the sub-paragraph. Taken as the whole, the paragraph states that the lawyer who holds these security shares in trust, Shapray, when instructed by Fraser, may deliver 200,000 of the shares (in the case of sub-para. (a)) to Fraser in satisfaction or partial satisfaction of the obligation of the defendants. Once enough of the shares have been sold to satisfy the debt, the unsold shares, if any, are to be returned to the defendant's solicitor. If there is a shortfall, Addwest Minerals and Addwest International "alone" shall remain jointly and severally liable for the unpaid portion.

24 But the statement that those two companies alone remain liable follows the words "in which case". "Which case" is the circumstance of shortfall following upon delivery and sale of the shares. That is to say, if Fraser were to exercise his right to have his solicitor deliver the shares for sale, and if that sale realized an amount of money that was insufficient to pay off the debt, in that "case" liability would be limited to the two companies.

25 There is nothing in the Settlement to suggest that the two Addwest companies alone remain liable in any other "case".

26 The Settlement is clear as to what are the defendant's obligations. They have not fulfilled their obligations. Fraser has chosen to sue them. He has not chosen to exercise the rights he has under para. 5 to call in the shares. There is nothing in this Settlement which would suggest he was limited to that remedy. If that is what the parties had intended, it would have been a simple thing to say so. They did not.

Standing

27 The defendants submit that Fraser has no standing to bring this action, for pursuant to the terms of the Settlement he designated a company, Marsden Trading, as his "designee". I do not find that argument persuasive. Where Fraser directed the settlement funds or shares to go was of no moment to the defendants. In any case, the Settlement itself states in para. 4(b) that payment is "to be made to FRASER or his designee (collectively, "the DESIGNEE"). Designee, then, includes Fraser.

Reasonableness

28 Counsel for the defendants submitted that it would not make sense that responsibility for the shortfall which might arise upon a sale of the shares be limited to the companies, but that responsi-

bility for a potentially larger liability upon suit remain with all the defendants. I do not accept that. A party may well elect to access owed monies by sale of shares already in the hands of his solicitor rather than embark upon a lawsuit with all of its vicissitudes. It would not be unreasonable in order to have access to that shortcut to accept certain limitations should that course be utilized. One of the original solicitors for the defendants as much as agreed with this in cross-examination.

Specified Alternatives

29 Further, the defendants submit the rule of construction expressio unius est exclusio alterius, which in this context may roughly be said to mean where certain alternatives are set out in a contract, it may be that the contract limits the parties to those alternatives. They rely upon VSA Highway Maintenance Ltd. v. British Columbia, [2002] B.C.J. No. 248, 2002 BCSC 205, aff. [2004] B.C.J. No. 718, 2004 BCCA 199. In that case, the contract contained an "election clause" which set out that if repair work to a highway was required, the province could retain the plaintiff contractor to undertake it, or use another contractor. The question was whether the province could do the work itself. The court found it could not. Lysyk J., at para. 24, observed that given an opportunity "to elect to do either this or that, one would not ordinarily conclude that additional options are available". On appeal, the appellant province did not contend that the trial judge had erred on that point.

30 That reasoning is distinguishable on the facts. The relevant clause in the VSA contract states that should certain specified emergencies arise:

> ... then the following will apply:
>
> ...
>
> and either
>
> (iii) the Province may elect to cause another contractor to complete the work; or
> (iv) the Province may elect to cause the Contractor to complete the work...

31 The Settlement, in contrast, does not say that upon default "the following will apply" and then specify two options. Rather, it establishes the security and states that if that security is called upon, liability for the shortfall is limited. Such wording does not, I conclude, prevent the plaintiff from declining to execute upon the security, but instead to proceed to sue the defendants if they fail to meet their contractual obligations. The unius maxim does not govern in these circumstances.

Notice

32 The defendants also submit that the plaintiff is barred from succeeding on this action because para. 6 of the Settlement stipulates that if the defendants fail to pay the $200,000 by March 17, l998, or any of the $5,000 U.S. monthly payments, the designee shall give written notice of the default and the defendants will have five calendar days to make up the deficit. They say no such notice was given. However, the evidence discloses that Fraser discussed the default with representatives of the defendants. On July 14, l998, Mr. Charles Williams, the President of Addwest Minerals, wrote to Fraser acknowledging the default and stating:

> ... Addwest is unable to pay the amount due to you in a timely manner. We are attempting to secure financing that will enable Addwest to pay you in full. This is

> a very difficult time for all gold companies and Addwest Minerals in particular. Please be patient with us as we work through these difficulties.

33 Thus it is evident the defendants had notice of the default.

34 Eventually, further notice was given by the filing of the Writ and Statement of Claim, if not earlier. The defendants did not within five days make up the default.

35 The defendants also submit that Fraser had a scheme to use an offshore designee to evade taxes and creditors, thus bringing the concept of ex turpi causa action non ortur into play, and as a result barring recovery on his part. The evidence is that Fraser did not use the offshore company. In any case, there is no evidence Fraser's alleged scheme caused damage to the defendants. I reject this submission.

Result

36 In the result, I conclude that there is nothing in this Settlement which denies the plaintiff the usual right to sue upon an agreement should the defendants fail to meet their contractual obligations. I find the defendants liable to the plaintiff for the $200,000 which should have been paid March 17, 1998, and for $195,000 U.S. which should have been paid in the 39 months commencing July 1997.

Damages

37 They are also liable to the plaintiff for damages for the failure to deliver the shares as stipulated in the Settlement. As noted above, the defendants delivered only 800,000 of the 2,000,000 shares which they were obligated to deliver.

38 A chartered accountant, Gary Mynett, filed a report on behalf of the defendants estimating the damages which Fraser sustained as a result of the non-delivery of 1,200,000 shares. He estimated that the loss sustained between September 1998 and August 1999 was $18,000. The plaintiff does not seriously question that estimate.

39 However, the plaintiff points out that while he received three instalments of 100,000 shares each in the fall of 1997, there was then, in breach of the contract, a hiatus until August, 1998, when he received a further 500,000 shares. The plaintiff submits that in addition to the losses set out in the Mynett report, he should be compensated for the losses he sustained in the first half of 1998 when he should have been receiving 100,000 shares per month, but did not.

40 I am not persuaded. While there is some evidence of a few sales of shares in that period, it was a time when the plaintiff neither sold all of the shares that he had nor sought the immediate forwarding of the 100,000 shares per month to which he was entitled. In the circumstances, I accept that the appropriate assessment of damages for the loss sustained by the plaintiff as a result of the defendant's failure to deliver all of the shares is the $18,000 proposed by Mr. Mynett.

Counterclaim

41 The defendants counterclaim against the plaintiff on the grounds, they allege, that he breached para. 15 of the Settlement. That paragraph reads:

> Each of the parties agrees that each of them and respective employees, agents, representatives and solicitors, will refrain from interfering with or obstructing the

> activities of the other parties and releases in all matters associated with, or arising out of, the Action of the subject matter of the Action.

42 It is the allegation of the defendants that Fraser, or someone acting on his behalf, sold shares in the winter and spring of 1997/1998; sales which had the effect of interfering with and in fact driving down the value of the shares. It is to be noted that the principle asset of Addwest Minerals, the Gold Road Mine, closed down in June of 1998. Fraser began to sell some of his own shares in August, by which time the defendants were admittedly in breach of the Settlement.

43 I am not persuaded that Fraser's activity had any significant impact upon the shares of Addwest International in the relevant period. First, his trading in the market was minimal. Second, a woman with whom he had had a relationship, and to whom he gave 100,000 of the shares, traded on the market. I am not satisfied, upon a balance of probabilities, that he controlled those shares once he had given them to her, nor that her activities had a significant impact. Third, there is no evidence the defendants would have bought shares in that period. Fourth, I am satisfied that the overwhelmingly most important factor in the precipitous fall in the value of Addwest shares in the relevant period, and in the closure of the Gold Road Mine, was the decline in the price per ounce of gold from 1997 through 1998. This can be seen in the Mynett report referred to above, and in other documents documenting the decline in share value and referring to the closure of the mine.

44 Further, on June 22, 1998, Addwest International filed with the Vancouver Stock Exchange a material change report pursuant to section 85(1) of the Securities Act, R.S.B.C. 1996, c. 418, stating that it "has decided to temporarily suspend operations at the Gold Road Mine effective Friday, June 26, 1998". In the July 14, 1998 letter, referred to in para. 32 above, the President of Addwest wrote to the plaintiff saying that the company was forced to close the Gold Road Mine "due to the extended period of low gold prices". There is no suggestion in this letter of any fault on the part of Fraser.

45 Another component of the counterclaim is the defendant's assertion that Fraser failed to live up to a promise he made on the same day as the Settlement Agreement to use his best efforts to obtain a release from Marsden. The document executed by Fraser reads as follows:

> I refer to the above Release and Settlement Agreement (the "Release") to which each of us is a party. I confirm that as part of the consideration for you each entering into the Release, I have agreed to use my best efforts to obtain a release from Marsden Trading Limited ("Marsden") releasing each of you and the "Proposed Defendants", as that term is defined in the Release, from any claims in connection with any of the factual matters raised or which could have been raised in British Columbia Supreme Court Action No. C963803 (the "Action"). The Release will be in substantially the same form as the release in the Release.
>
> In the event that I am unable to obtain a release from Marsden, I hereby agree to indemnify each of you and each of the Proposed Defendants from any damages, costs, losses etc. suffered by any of you or any of the Proposed Defendants as a result of legal actions which would otherwise be the subject of the Release, commenced against any of you or any of the Proposed Defendants by Marsden, such indemnity to include all legal fees on a solicitor and own client

> basis as incurred by any of you as a direct result of the defence of such legal actions.

46 It appears Fraser took no steps to obtain such a release. But there is no evidence the defendants sustained damages as a result. Marsden has made no claim against the defendants. The indemnification in the second paragraph quoted subsists. If such a claim did arise, the defendants could rely upon the indemnification clause.

47 I do not find upon a balance of probabilities that the counterclaim has been made out. It is dismissed.

48 In the circumstances, I need not consider rectification.

Summary

49 The plaintiff will have judgment for:

1) $200,000 Canadian with court ordered interest from March 17, 1998;
2) $195,000 U.S. in the equivalent Canadian funds at the exchange rate pertaining at the time of each monthly payment, with interest from the date of each monthly payment; and
3) damages for failure to deliver shares in the amount of $18,000.

50 Counsel will have liberty to apply with respect to costs. If no application is necessary, costs will follow the event.

WILLIAMSON J.

cp/i/qlemo/qlbrl