Inland Feeders Ltd. v. Virdi, [1981] B.C.J. No. 2090

British Columbia and Yukon Judgments

British Columbia Supreme Court

Kamloops, British Columbia

Hinds J.

Oral judgment: January 20, 1981.

Kamloops Registry No. 2364

[1981] B.C.J. No. 2090 | 18 C.C.L.T. 72

Between Inland Feeders Limited, plaintiff, and Harbhajan Singh Virdi and Thompson-Nicola Regional District, defendants

(12 paras.)

Counsel

R. Robinson, for the plaintiff. W. Blair, for the defendants.

HINDS J. (orally)

1 This action came on for trial before Mr. Justice Anderson on December 3rd and 4th, 1979. He delivered written reasons for judgement dated February the 6th, 1980 [5 W.W.R. 346]. He found the Defendants liable to the Plaintiff in damages and directed that the issue of damages be dealt with at a later date. As a result of the appointment of Mr. Justice Anderson to the British Columbia Court of Appeal an order was made by Chief Justice McEachern dated the 28th of October, 1980, directing that the action be continued with respect to the determination of damages before me.

2 The matter came before me in December 1980 when I was sitting in Kamloops but because of the exigency of the trial list and because an application was made by the Defendant for an adjournment I acceded to the application and the matter was set over to be heard by me when I returned to Kamloops. The matter was heard by me today.

3 The evidence heard by me today consisted first of all of the viva voce evidence of Mr. Calvin Arthur Adcock. I will refer later in these oral reasons for judgment to some of the evidence given by Mr. Adcock. In addition Mr. Robinson, Counsel for the Plaintiff, read in certain portions of the evidence heard before Mr. Justice Anderson which pertained to the question of damages. The Defence evidence heard by me today consisted of Mr. Blair, Counsel for the Defendants, reading in extracts of the transcript of the evidence heard by Mr. Justice Anderson as it pertained to the question of damages.

4 As I understand the Plaintiff's claim for damages it is set out in Exhibit 5A which was entered in the proceedings at the trial before Mr. Justice Anderson. Exhibit 5A consists of statement of the various accounts allegedly incurred by the Plaintiff in connection with the acquisition of approximately 70 acres of the Harper Ranch, which the Plaintiff

intended to use as a cattle feeding lot, and a list of accounts allegedly incurred by the Plaintiff with respect to the organization of the Plaintiff,of the improvements or alterations made to the property, and accounts received by the Plaintiff from three of its directors with respect to their expenses or services rendered to the company with regard to the development of the property as a cattle feeding lot. The accounts listed on Exhibit 5A total $308,440.94, and subject to what I shall say later in these reasons with respect to the question of mitigation of damages, I am satisfied on the evidence that the Plaintiff is entitled to recover for the accounts listed on Exhibit 5A save and except the following: (1) the account of J. Baird, for director's expenses in the amount of $224, and a similar account from him for his travelling expenses in the amount of $224, in other words both accounts are for the same amount but they total $448; (2) the director's fee of J.L. McKinnon, $4,600; (3) the director's fees of W. Everett in the amount of $1,366; (4) the payment of the purchase price to Harper Ranch Ltd. in the amount of $140,000.

5 I disallow the accounts for Messieurs Baird, McKinnon and Everett, because I am not satisfied on the evidence placed before me that the Plaintiff itself agreed to pay those accounts. I recognize there is evidence before me from Messieurs McKinnon and Everett that they had submitted their accounts and that they had not been paid and they anticipated they would be paid if the company had sufficient funds, but in my view there is a distinction between a director of a company giving evidence that he has submitted an account and anticipates that it will be paid, on the one hand, and evidence of a resolution or an agreement or some other understanding entered into by a company that it will, in fact, pay accounts submitted by its directors. Furthermore, to a lesser extent, the account of Mr. McKinnon appears to include a charge of, I believe it was $2600, for the preparation of a plan and I am not satisfied on the evidence placed before me that the charge of $2600 was an account which the Plaintiff reasonably could be expected to be prepared to pay. I disallowed the account of Harper Ranch Ltd. of $140,000 because that was not advanced by the Plaintiff to be an account for which it should now receive payment by way of damages. If the accounts that I have disallowed are added they come to $146,414; if that account is deducted from the figure of $308,440.94 shown on Exhibit 5A the balance amounts to $162,026.94. If my arithmetic is incorrect I would be grateful if Counsel would draw it to my attention. I have therefore concluded that the Plaintiff is entitled to payment in the sum of $162,026.94 subject to my consideration of the question of whether any of that figure should be reduced on the basis of the alleged failure of the Plaintiff to mitigate its loss.

6 In Banco De Portugal v. Waterlow and Sons Ltd, 1932, All E.R., Reprints, at P.204, Lord Sankey had this to say with respect to mitigation of damages:

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment, the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after the emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of a breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

That principle annunciated in the Banco De Portuga case was considered and approved by the decision o Chief Justice Morrison in Austrialian Dispatch Line (Inc) v. Anglo Canadian Shipping Company Limited, *(1939) 1 W.W.R. 421*.

7 The evidence before me indicates that following the decision of Chief Justice McEachern dated the 25th day of May, 1979, as a result of an application made before him by the Thompson-Nicola Regional District for the determination of its Bylaw 57, the Plaintiff ceased the expenditure of any further money in connection with the subject property and specifically the creation of a cattle feeding lot on that property. The evidence before me indicate that the directors of the company were then in some quandary as to their appropriate course of action. They were concerned about three matters; first, that if the company applied to have the subject property rezoned to an industrial use which would have enabled the property then to be used as a feed lot the level of taxes assessed

against the property would be increased substantially. Two, the directors of the company were concerned that if the property were rezoned to industrial usage the subject property might be included in an enlargement of the area covered by the City of Kamloops with resultant additional problems with respect to sanitary standards and things of that nature which they were fearful would mitigate against the desirability of the subject property being used as a feed lot. Third, the directors of the Plaintiff were concerned over the public further objecting to the creation of a feed lot on the subject property.

8 As a result of those considerations the Plaintiff did not attempt to have the property rezoned but instead in October 1979 it listed the property for sale for $300,000 through a local real estate agent. At the date of trial before Mr. Justice Anderson in December of 1979 it was apparent that no offers had been made for the subject property at that price. In the evidence I heard today from Mr. Adcock it appears that his company, Rocky Point Developments Ltd., in the year 1980 agreed to buy the property from the Plaintiff for $400,000 subject to the condition precedent that the zoning of the property be changed to industrial and that the property be released from the agricultural land reserve by December 31st, 1980. His evidence indicates that as an agent of the Plaintiff he applied to the Regional District which dealt with the application with expedition and the Regional District concurred in the rezoning application and the matter was then referred to the British Columbia Land Commission, but the Land Commission did not grant its approval prior to December 31st, 1980, and as I of today's date still has not made a decision. From the evidence of Mr. Adcock it appears that if the British Columbia Land Commission would grant the application to have the property released from the Agricultural Land Reserve the matter would then be returned to the Thompson-Nicola Regional District and it would be required to hold a public hearing in order to hear representations by various persons who would have an interest in the rezoning. Following the public hearing, as I understand it, the Regional District would then make a decision as to whether or not to allow the rezoning. In my view the question of whether or not the B.C. Land Commission would approve the release of the subject property from the Agricultural Land Reserve and the question of whether or not the Thompson-Nicola Regional District would, following a public hearing, agree to the rezoning of the subject property is speculative. I acknowledge that there is a possibility that the Plaintiff might obtain approval from the Land Commission and subsequently the approval for the rezoning from the Regional District but there is no evidence placed before me which satisfies me that there is a probability or a likelihood that the foregoing approvals will be obtained.

9 In my view the action of the Plaintiff in not applying for the rezoning of the property up to the date of the original trial in December of 1979 and indeed in not making an application through an agent until some time in mid 1980, for the reasons expressed by the Directors of the Plain-tiff, was reasonable, particularly when I consider the course of business of the Plaintiff, that being the desire to develop and operate a cattle feed lot as distinct from being in the business of a land developer.

10 Furthermore I do not consider the possibility that the property might, at some date in the future, be rezoned for industrial purposes to be a factor upon which I can rely with respect to the issue of the Plaintiff having taken insufficient steps to mitigate its loss. The evidence before me today included an appraisal prepared by Project Development Services Ltd. and that appraisal expressed the opinion that as of December 1979 the subject property had a market value of $120,000. That appraisal indicates that the highest and best use of the subject property was for a hobby farm. It indicates that the improvements made to the subject property by means of levelling and altering the terrain, the cost of which was included in the accounts listed in Exhibit 5A, is offset by the costs to any purchaser of the property as a hobby farm in reseeding the subject property where the terrain was levelled. If I take the value based upon its highest and best use in December 1979 to be $120,000, and if I were to add an inflation factor of which there was no specific evidence entered before me, but in any event adding an inflation factor of say 10%, the value of the subject property as of today would be in the vicinity of $132,000 to perhaps $135,000. Giving some acknowledgement to the question of inflation, that figure is still less than the purchase price paid by the Plaintiff to Harper Ranch Ltd., namely $140,000.

11 For the foregoing reasons I am unable to accede to the argument of Counsel for the Defendants that the Plaintiff failed to take reasonable steps to mitigate its loss. Accordingly I grant judgment to the Plaintiff in the amount of $162,026.94. In addition the Plaintiff is entitled to interest under the Court Order Interest Act, R.S.B.C.

1979, c. 76, at the rate of 12% per annum from the 25th day of May, 1979, to today's date. Furthermore the Plaintiff is entitled to its costs.

(COURT ADJOURNED)

(COURT RECONVENED ON THE 20th of JANUARY 1981)

HINDS J.

12 I shall exercise my discretion and award the Plaintiff one and one half times its costs of the trial before Justice Anderson and the continuation of that trial before me.

HINDS J.

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