

 [Bhullar v. Dhanani, \[2008\] B.C.J. No. 1693](#)

British Columbia and Yukon Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.B. Gerow J.

Heard: April 21-24, May 8 and 9, 2008.

Judgment: September 4, 2008.

Docket: S071903

Registry: Vancouver

[2008] B.C.J. No. 1693 | 2008 BCSC 1202 | 171 A.C.W.S. (3d) 603

Between Sajjan Singh Bhullar, Sharanjeet Kaur Bhullar, plaintiffs, and Sadrudin Dhanani, Aamir Bharmal, Nixie Khanna, M & P Food Services Ltd., defendants

(70 paras.)

Case Summary

Contracts — Breach of contract — Action by plaintiffs for breach of share purchase agreement dismissed — Defendants counterclaimed and argued that plaintiffs breached by failing to properly manage bank loan to business — The plaintiffs breached the purchase agreement by defaulting on the bank loan — The defendants were entitled to terminate the purchase agreement and to repayment from the plaintiffs of the monies paid to the plaintiffs and to the Royal Bank.

Action by plaintiffs for breach of contract. The parties entered into a written share purchase agreement which provided that the plaintiffs would sell all shares in M & P Foods to the individual defendants for \$775,000. Part of the purchase price involved the individual defendants assuming a loan to M & P Foods which had a balance owing of approximately \$200,000. The plaintiffs alleged that the individual defendants breached the agreement by failing to make all of the agreed-upon payments for the purchase of the shares. The individual defendants denied that they were in breach and argued that the plaintiffs breached the agreement by failing to arrange for the Royal Bank's consent to the individual defendants assuming the loan. They counterclaimed against the plaintiffs on the bases of breach of contract and negligent misrepresentation, including the representation that the Royal Bank consented to the individual defendants assuming the loan.

HELD: The plaintiffs breached the purchase agreement by defaulting on the bank loan.

The individual defendants were entitled to terminate the purchase agreement and were entitled to repayment from the plaintiffs of the monies paid to the plaintiffs and to the Royal Bank, plus interest from the dates the payments were made.

Counsel

Counsel for the Plaintiffs: P.K. Sandhu.

Agent for the Defendant, Sadrudin Dhanani: Z. Dhanani.

The Defendant, Aamir Bharmal: In Person.

The Defendant, Nixie Khanna: In Person.

Reasons for Judgment

L.B. GEROW J.

1 The plaintiffs owned a Bread Garden franchise through the corporate entity M & P Food Services Ltd. On or about January 16, 2006, the plaintiffs and defendants entered into a written share purchase agreement (the "Agreement") that the plaintiffs would sell all of the issued and outstanding shares in M & P Foods to the defendants Sadrudin Dhanani, Aamir Bharmal and Nixie Khanna (collectively, the "individual defendants") for \$775,000. Part of the purchase price involved the individual defendants assuming a loan from the Royal Bank to M & P Foods which had a balance owing of approximately \$200,000 as of January 16, 2006. The plaintiffs allege that the individual defendants breached the Agreement by failing to make all of the agreed-upon payments for the purchase of the shares. They seek judgment on the Agreement and a promissory note entered into between the plaintiffs and individual defendants.

2 The individual defendants deny that they are in breach of the Agreement or the promissory note, and say that the plaintiffs breached the Agreement by failing to arrange for the Royal Bank's consent to the individual defendants assuming the loan. They say the only reason they entered into a share purchase agreement rather than an asset purchase agreement was that the plaintiffs represented to them that they could assume the loan. They have counterclaimed against the plaintiffs on the bases of breach of contract and negligent misrepresentation, including the representation that the Royal Bank consented to the individual defendants assuming the loan.

3 The issues are:

1. Did either the plaintiffs or the individual defendants breach the Agreement?
2. Are either the plaintiffs or the individual defendants entitled to terminate the Agreement?
3. Are either the plaintiffs or the individual defendants entitled to damages?

BACKGROUND

4 In 2005, the plaintiffs purchased the shares of M & P Foods for a price of \$805,000. The purchase price was paid in part by the plaintiffs assuming a Royal Bank loan.

5 Later that year, Mr. Bhullar and Zahir "Zip" Dhanani, Sadrudin Dhanani's son, discussed the individual defendants purchasing the franchise owned by M & P Foods from the plaintiffs. Mr. Bhullar and Mr. Zip Dhanani eventually agreed that the individual defendants would purchase the shares of M & P Foods from the plaintiffs. The sale was structured as a share purchase so that the individual defendants could assume a loan that M & P Foods had from the Royal Bank.

6 In January 2006, the Agreement was entered into. On January 16, 2006, the closing date for sale under the Agreement, various documents were executed, including a promissory note in favour of the plaintiffs for the amount of \$425,000.

7 On March 3, 2006, the Royal Bank wrote to the plaintiffs and M & P Foods demanding repayment of the loan. On May 18, 2006, the Royal Bank commenced an action against M & P Foods for repayment of the loan in the amount of \$178,698.70 and against the plaintiffs under a limited guarantee.

8 Mr. Bhullar's evidence is that he did not receive the demand letter from the Royal Bank until May 2006, and that he did not contact the individual defendants or Mr. Zip Dhanani when he received the letter. The only step he took was to give the letter to his lawyer. According to Mr. Bhullar, he did not take any further action or hear anything further about the loan until he received a default judgment in November 2007.

9 The individual defendants' evidence is that they became aware that the Royal Bank had demanded repayment of the loan sometime in April or May 2006. Mr. Zip Dhanani's evidence is that he contacted Mr. Bhullar to ask him about the default and that Mr. Bhullar provided assurances that he would deal with the Royal Bank.

10 As well, Mr. Zip Dhanani met with representatives of the Royal Bank after the demand letter was received by M & P Foods, and provided them with a year of postdated cheques for the monthly amount due under the loan, and the net worth statements of the individual defendants. Mr. Zip Dhanani's evidence is that he met with the representatives of the Royal Bank in an attempt to have the Royal Bank extend the loan to M & P Foods.

11 Despite having being provided with postdated cheques for the monthly amount due under the loan for the 2007 calendar year, the Royal Bank obtained a default judgment against M & P Foods and the plaintiffs in October 2007. Although it was receiving the monthly payments on the loan, the Royal Bank withdrew the amount of \$10,467.25 from M & P Foods' account on November 7, 2006 and a further amount of \$10,000 in November 2007 without notice to M & P Foods or the individual defendants. As well, Mr. Bharmal testified that at some point in time the Royal Bank unilaterally withdrew another \$7,000 from the account.

12 From the closing date of January 16, 2006 to December 31, 2007, the total amount the defendants paid to the Royal Bank was approximately \$144,837.40, including the monies unilaterally withdrawn from M & P Foods account by the Royal Bank.

13 The individual defendants stopped making payments to the plaintiffs in January 2007. Up to January 2007 the individual defendants had made the following payments in accordance with

the Agreement:

- * The sum of \$150,000 on the closing date;
- * The first lump sum payment of \$25,000; and
- * 11 monthly instalment payments totalling \$77,000.

14 The individual defendants did not pay the second and third lump sum payments of \$25,000 and \$50,000 respectively, or any of the monthly payments of \$7,000 after January 2007, up to and including the date of trial.

ANALYSIS

Did either the plaintiffs or the individual defendants breach the Agreement?

15 For the following reasons, I have concluded that the plaintiffs were in breach of the Agreement.

16 The Agreement contained the following terms:

2.3 "Loan" means the loan in favour of the Royal Bank of Canada with a balance of \$200,000.00 as of January 16, 2006;

...

3.4 Payment of Amounts to the Vendor

The Purchase Price shall be paid to the Vendors as follows:

- (a) on the Closing Date, the Purchaser will pay to the Vendor, through the Vendor's solicitor, the sum of \$150,000.00;
- (b) By assumption of the balance due and owing as of the Closing Date under the Mortgage;
- (c) The Purchaser will pay to the Vendor within six months of the Closing Date the sum of \$25,000;
- (d) The Purchaser will pay to the Vendor within twelve months of the Closing Date the sum of \$25,000;
- (e) The Purchaser will pay to the Vendor within fifteen months of the Closing Date the sum of \$50,000;
- (f) The sum of \$325,000.00 shall be payable in monthly instalments of \$7,000.00 (representing principal in the amount of \$5,000.00 and interest in the amount of \$2,000.00) commencing February 16, 2006 and continuing on the 16th day of each of the following 64 months when the balance, if any, together with all accrued interest shall be due and payable in full. The Purchaser has the right to prepay all or any part of the outstanding balance at any time without notice or penalty.

...

5.20 The performance of this Agreement will not be in violation of the Memorandum or Articles of the Company or of any agreement to which the Vendors or the Company is a

party and will not give any person or company any right to terminate or cancel any agreement or any right or restriction of any nature whatsoever in favour of a third party upon or against the assets of the Company or the Shares ...

17 The parties agree that the reference to the mortgage in clause 3.4(b) is to the Royal Bank loan.

18 Clause 5.20 is under the heading "Representations and Warranties of the Company". The plaintiffs owned all of the shares of M & P Foods and Mr. Bhullar signed the Agreement as the authorized signatory for the company.

19 The Loan Agreement between M & P Foods and the Royal Bank provided:

6. GENERAL COVENANTS

The Borrower covenants and agrees with the Bank that ...:

...

(d) if a corporation, it will give the Bank 30 days notice in writing of any intended change in the ownership of its shares.

7. EVENTS OF DEFAULT

Each of the following shall constitute an Event of Default which shall entitle the Bank, in its sole discretion, to cancel any commitment, demand immediate repayment in full of any amounts outstanding under the Credit Facility, together with any outstanding accrued interest ..., and to realize on all or any portion of any security given to secure the obligations of the Borrower hereunder (the "Security"):

...

(b) failure of the Borrower to observe any covenant, condition or provision contained in this Agreement or in any documentation relating hereto or to the Security.

20 Rahim Kurji, a commercial account manager from the Royal Bank, testified that he was responsible for M & P Foods' account with the Royal Bank up to March 2006. He started dealing with Mr. Bhullar regarding the loan when the plaintiffs assumed the loan in 2005. During February 2006, Mr. Kurji attempted to contact Mr. Bhullar but his calls were not returned. On March 1, 2006, Mr. Kurji was able to speak with Mr. Bhullar by telephone and found out that the plaintiffs no longer owned or operated M & P Foods. As a result, Mr. Kurji formed the opinion that the bank's security might be at risk and immediately transferred the file to the special loans group (the "SLG"). In the email Mr. Kurji wrote to Betty Higginson of the SLG on March 2, 2006, he stated the following:

Mr. Bhullar called back today. He said he never received the transition letter. I mentioned that the letter was sent to the Bread Garden. At that point I asked if he still owned the BG and he stumbled a little to finally say that the Franchisor owns it but he still owned some shares. Once again he stumbled to come up with 25%. I proceeded to tell him that he was to advise us of the change in ownership since he had a loan with us. He quickly responded by telling me that the new owners are getting financing from another institution, but he wanted to bring the new owners in to have them qualify for a loan at RBC. I mentioned that someone from RBC will contact him in regards to the loan.

21 On March 3, 2006, the Royal Bank sent a letter to the plaintiffs and M & P Foods demanding repayment of the loan by March 15, 2006.

22 Mr. Bhullar's evidence is that he did not take any steps to contact the Royal Bank, when he was negotiating the sale of M & P Foods to the individual defendants, to advise the Royal Bank of the proposed change in share ownership, even though the Loan Agreement required him to give the Royal Bank 30 days prior notice in writing of any intended change in the ownership of the shares.

23 Although the plaintiffs argue that the reason the loan was recalled was that the individual defendants did not make the monthly loan payments as required, the evidence is that the loan was recalled because the plaintiffs did not comply with their covenants under the Loan Agreement. It is apparent from Mr. Kurji's evidence and the email he wrote after his discussion with Mr. Bhullar that he had found Mr. Bhullar less than candid during their conversation. Mr. Kurji's evidence is that he transferred the loan to the SLG because he was concerned after his conversation with Mr. Bhullar that the bank's position was at risk. The evidence is that when the loan was transferred to the SLG all payments on the loan were up to date. The Royal Bank made the demand for repayment of the loan two days after it became aware there was a change of ownership in the shares of M & P Foods. The only reasonable inference that can be drawn from Mr. Kurji's evidence and the Royal Bank's documents is that the bank developed concerns that the loan might be at risk and demanded repayment of the loan as a result of the conversation with Mr. Bhullar.

24 Clause 5.20 of the Agreement provides that the performance of the Agreement will not be in violation of any agreement to which the vendor is a party and will not give any third party the right to terminate or cancel any agreement or right enjoyed by the Company or result in the creation or imposition of any encumbrance or restriction upon or against the assets of the Company. The plaintiffs' non-compliance with the general covenants of the Loan Agreement entitled the Royal Bank to terminate the loan with the plaintiffs (the vendors) and M & P Foods, and unilaterally withdraw monies from the account of M & P Foods in repayment of the loan. As a result, the plaintiffs breached the Agreement.

Are the individual defendants entitled to terminate the contract?

25 The individual defendants seek rescission or termination of the contract. For the following reasons, I have concluded that the individual defendants are entitled to terminate the contract.

26 A contract may be discharged in a number of ways, including by performance, by agreement and by repudiatory or fundamental breach: ***Jedfro Investments (U.S.A.) Ltd. v. Jacyk***, [\[2007\] 3 S.C.R. 679](#) at para 14.

27 The question to be answered in determining whether there has been a fundamental breach of the contract is: does the breach go to the root of the contract such that it makes further commercial performance of the contract impossible? In other words, has the failure of one party to perform his contractual obligation destroyed the commercial purpose of the contract? The breach must be so severe as to deprive the innocent party of substantially the whole benefit which the parties intended should be obtained from the contract: ***Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*** [\(2007\), 65 B.C.L.R. \(4th\) 1](#) (C.A.) at para 89-92; ***Hunter Engineering Co. v. Syncrude Canada Ltd.***, [\[1989\] 1 S.C.R. 426](#) at pp. 499-500.

28 As stated by Bruce MacDougall in *Introduction to Contracts* (Markham: LexisNexis, 2007) at p. 287:

Termination of the contract is a remedy that depends on there being a breach of contract sufficiently serious to justify the remedy. This remedy depends, therefore, on there being a breach of a term in a contract and that term being a condition or an intermediate term (where the consequences of the breach are serious) ... Where there is such a breach of an important term in a contract, the party in breach is said to have repudiated the contract because such a breach makes the result of the contract essentially different from that which was contemplated when the parties made their bargain.

29 Mr. Bharmal and Mr. Zip Dhanani both testified that the reason that the purchase was structured as a share purchase rather than an asset purchase was so that the individual defendants would have the benefit of the Royal Bank loan to M & P Foods. They both testified that they would not have entered into the Agreement if they could not assume the loan. Mr. Bharmal's evidence is that it is very difficult to obtain financing for \$200,000 for a restaurant when your initial cash investment is \$150,000, and that the individual defendants could not have purchased the franchise if they could not assume the loan.

30 Mr. Bharmal's evidence is that he was shocked when he received the demand letter to M & P Foods as all of the payments on the Royal Bank loan were up to date. Both Mr. Bharmal and Mr. Zip Dhanani testified that when they received the demand letter they contacted Mr. Bhullar and that Mr. Bhullar gave them assurances that he would deal with the Royal Bank.

31 I accept the evidence of Mr. Bharmal and Mr. Zip Dhanani that they contacted Mr. Bhullar immediately after receiving the demand letter from the Royal Bank, and that Mr. Bhullar gave assurances that he would deal with the Royal Bank. In my view, the evidence of Mr. Bharmal and Mr. Zip Dhanani is more consistent with commercial reality than Mr. Bhullar's evidence that the parties never discussed the Royal Bank loan, either prior to entering into the Agreement or when the demand letter was received.

32 Mr. Bhullar's evidence that the individual defendants did not contact him and that he did not have discussions with Mr. Zip Dhanani or Mr. Bharmal after they learned that the Royal Bank was demanding repayment of the loan to M & P Foods in full shortly after the closing date is not credible. The evidence is that Mr. Zip Dhanani and Mr. Bhullar were friends prior to entering the Agreement. Mr. Bhullar's evidence that he just listened Mr. Zip Dhanani and made no comments regarding the loan or the profitability of the franchise during the negotiations leading up to the Agreement does not ring true in the context of negotiating a business deal, especially one which includes the purchasers assuming a debt from the vendors. It also does not make sense that the individual defendants would continue to make monthly instalment payments to the plaintiffs under the Agreement, and yet not mention they had received a letter from the Royal Bank demanding that M & P Foods immediately repay an amount in excess of \$185,000 shortly after the Agreement's closing date.

33 In my view, defaulting on the loan was a fundamental breach of the Agreement by the plaintiffs which constituted a repudiation of the contract.

34 In *McMillan v. Ludlow* (1995), 6 B.C.L.R. (3d) 148 (S.C.), which also involved a purchase of shares, the issue of what constitutes a fundamental breach was considered. In that case, the

vendor withdrew a significant sum from the company as a management fee and declared a sizeable dividend. As a result, the company's financial position was materially and adversely changed such that it moved from being a company with substantial equity and a cash-full bank account to one with a negative net worth barely able to meet payroll. Saunders J. (as she then was) held that this amounted to a fundamental breach of the contract, stating at para 38:

The declaration of a management fee of such magnitude and the declaration of a dividend roughly equal to the retained earnings of the company put it into a negative net worth position and deprived the shares of most of their underlying value. In my view, these changes destroyed the commercial purpose of the contract whereby Mr. Ludlow agreed to pay \$575,000 for the shares. Would he have offered so much for a 50% interest in a company with a negative net worth? The answer is clearly no. I find there was a breach on the vendor's part of a fundamental term of the contract, thereby entitling Mr. Ludlow to relief from the obligation to complete the sale.

35 Similarly, in this case the plaintiffs' breach of contract placed M & P Foods in an adverse financial position. As a result of the plaintiffs' actions, M & P Foods had an obligation to repay the full amount of the loan shortly after the sale of the shares, rather than in fixed monthly instalments over a period of three years. M & P Foods now has a judgment registered against it in favour of the Royal Bank. The individual defendants have not had access to or use of the Royal Bank account into which the Bread Garden's credit card and debit sales were automatically deposited, and the Royal Bank has unilaterally seized funds contained in that account on three occasions to satisfy its demand for repayment of the loan. In my view, the result of the plaintiffs' breach was to destroy the commercial purpose of the contract. I find that the plaintiffs breached a fundamental term of the contract. In my opinion, the effect of Mr. Bhullar's conduct was that the breach was a continuing one and amounted to continuing repudiatory conduct, thereby entitling the individual defendants to terminate the Agreement.

36 Where a party repudiates a contract, the innocent party may elect to accept the repudiation and treat the contract as at an end, or may elect to treat the contract as ongoing. Acceptance of the repudiation must take place promptly, or the contract will be said to continue such that both parties are required to perform their obligations: *Celgar Ltd. v. Star Bulk Shipping Co.* (1979), [12 B.C.L.R. 62](#) (C.A.) at pp. 67-68; *Doman Forest Products Ltd.* at para 112-13.

37 The issue of what constitutes an ongoing repudiation was considered in *Doman Forest Products Ltd.* There is a distinction between a single act of repudiation and a continuing refusal to perform the contract. Where there is a continuing refusal to perform, each day the refusal continues there is a new repudiation of the contract. Where there is a single act of repudiation and the innocent party ignores it, the contract continues. To establish a continuing repudiation when an extended period of time has elapsed following affirmation of an agreement, it must be clear that there is a continued or repeated refusal to perform. As stated at para 109: "[t]he refusal may be manifest in different ways, which may include silence in response to a request for performance at the time the request is made, but the refusal must be clear for it is that refusal which is the repudiation to be accepted."

38 Mr. Zip Dhanani's evidence is that following the breach, the individual defendants gave the plaintiffs the opportunity to remedy the breach. They continued to pay the plaintiffs, and continued to hold the plaintiffs to their side of the bargain. Although the individual defendants continued to fulfill their obligations under the Agreement and requested that the plaintiffs perform their obligations, the plaintiffs refused to perform. Mr. Zip Dhanani's evidence is that it was only

when it was clear that Mr. Bhullar was not going to take any steps to deal with the Royal Bank loan that the individual defendants ceased paying the plaintiffs pursuant to the Agreement.

39 It is apparent from Mr. Bhullar's evidence that as of the time the defendants ceased paying the plaintiffs, the plaintiffs had done nothing to remedy the breach, even though the individual defendants had given them the opportunity to do so and Mr. Bhullar had given assurances that he would remedy the breach. By their conduct in stopping payment to the plaintiffs, the individual defendants accepted the plaintiffs' repudiation of the Agreement. In my opinion, the individual defendants were entitled to accept the ongoing repudiation and terminate the Agreement.

Are the individual defendants entitled to damages?

40 For the reasons that follow, I have concluded that the individual defendants are entitled to be placed in their pre-contractual position. They are entitled to the repayment of the monies they paid to the plaintiffs and to the Royal Bank, plus interest from the dates those payments were made. The individual defendants will transfer the shares of M & P Foods back to the plaintiffs, and the plaintiffs will receive a set-off for any profits received by the individual defendants while they operated the Bread Garden.

41 In my view, this remedy provides the only fair and equitable result for the individual defendants in the circumstances, and may be granted where a contract is terminated for fundamental breach.

42 As noted in S.M. Waddams, ***The Law of Contracts***, 5th ed. (Aurora: Canada Law Book, 2005) at para 629:

The innocent party in the case of a repudiatory breach may seek to recover damages not according to the ordinary measure of the value of expected performance but according to the measure of the out-of-pocket loss. That is, the party may say not: "put me in the position I would have been in if you had performed", but: "put me in the position I was in before the contract was made". The choice of the latter rather than the former measure of damages is often referred to as "rescission" but quite clearly it is a different choice altogether from the others mentioned above. The innocent party on receiving notice of the repudiation may choose, first, to stop performance rather than to perform and seek damages, secondly, to sue at once rather than to wait for the date fixed for performance, and thirdly, to seek damages measured by the loss rather than by the expectation.

43 Where the innocent party elects to terminate the contract, it may pursue an alternative claim for restitution rather than for damages for breach of contract: Peter D. Maddaugh & John D. McCamus, ***The Law of Restitution***, looseleaf (Aurora: Canada Law Book, 2007). There need not be a total failure of consideration in order to advance a claim for restitution. As stated at s. 19:200:

As a matter of Canadian law, it seems doubtful that the total failure of consideration requirement would be applied to money claims. Certainly, it is clearly established in the context of contracts for the sale of goods that interim enjoyment of the goods will not preclude the buyer from "rescinding" for repudiatory breach and claiming to recover moneys paid. In one such case, where the interim enjoyment was substantial, an appropriate deduction from the award was made.

44 Waddams advocates the same approach at para 599:

If, however, the party can restore the benefits, or their monetary equivalent, there would seem to be no insuperable objection to termination and restitution of money paid. Any benefits received by the party seeking restitution should be valued and brought into account. There appears to be no insuperable obstacle to making such valuations. Equity has had less difficulty than the common law with the notion of a monetary adjustment in lieu of specific restoration of benefits, and there seems no reason why the modern court should not adopt the flexible rules of equity in this respect.

45 Examples of cases involving a fundamental breach of contract in which the court allowed the innocent party to terminate the contract and to be returned to the its pre-contractual position include **Road King Asphalt & Aggregate Ltd. v. Farr Fabricating (1985) Ltd.**, [2005 BCSC 911](#), **Gibbons v. Trapp Motors Ltd.** (1970), [9 D.L.R. \(3d\) 742](#) (B.C.S.C.), and **Lightburn v. Belmont Sales Ltd.** (1969), [6 D.L.R. \(3d\) 692](#) (B.C.S.C.).

46 The plaintiffs assert that the onus was on the individual defendants to take steps to assume the Royal Bank loan after the Agreement was entered into. They say that it is as a result of the individual defendants' own actions that the Royal Bank did not allow them to assume the loan. As well, the plaintiffs argue that the individual defendants have failed to establish that they suffered any damages as a result of not being able to assume the Royal Bank loan. The plaintiffs point to the fact that the individual defendants have continued to operate the Bread Garden, even though they have failed to make any of the payments due under the Agreement since January 2007.

47 The innocent party is under a duty to mitigate damages. As stated by G.H.L. Fridman, **The Law of Contract in Canada**, 5th ed. (Toronto: Thomson Carswell, 2006) at p. 778: "The innocent injured plaintiff, who claims damages for breach of the contract, is not entitled to sit back, after the breach, and place all the blame on the defendant for what happens thereafter, even if it comes within the **Hadley v. Baxendale** principles."

48 The requirement for mitigation imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and bars him from claiming in respect of any part of the damage which is due to his neglect to take such steps: **British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited**, [1912] A.C. 673 (H.L.) at p. 689. However, a party is only expected to mitigate reasonably, not perfectly: **Nu-West Homes Ltd. v. Thunderbird Petroleums Ltd.** (1979), [59 D.L.R. \(3d\) 292](#) (Alta. S.C. (A.D.)) at p. 308; **Banco De Portugal v. Waterlow and Sons, Limited**, [1932] A.C. 452 at p. 506.

49 The onus is on the party who has breached the contract to prove the other party has failed to mitigate: Fridman at p. 779; **Yamaha Canada Music Ltd. v. Macdonald and Oryall Ltd.** (1990), [46 B.C.L.R. \(2d\) 363](#) (C.A.).

50 As stated earlier, the failure of the plaintiffs to give 30 days' notice to the Royal Bank of the change in the share ownership of M & P Foods was an act of default under the Loan Agreement which allowed the Royal Bank to demand repayment of the loan. The Royal Bank demanded repayment of the loan within two days of learning about the sale of the M & P Foods' shares to the individual defendants.

51 After the closing date, the individual defendants immediately started making the monthly loan payments to the Royal Bank. When they became aware of the demand letter from the Royal Bank, Mr. Zip Dhanani took steps to contact the Royal Bank. He met with representatives of the Royal Bank and provided them with postdated cheques for the loan payments and net worth statements of the individual defendants.

52 Although the plaintiffs assert that the reason the Royal Bank did not allow the individual defendants to assume the loan after it was in default was because of the actions of the individual defendants, they provided no evidence that the bank would have allowed anyone to assume the loan after it was in default. The plaintiffs have referred to a document emanating from Ms. Higginson of the Royal Bank and the bank statements of M & P Foods, and argue that I should infer from those documents that it was the individual defendants' fault that the Royal Bank did not allow them to assume the loan. The plaintiffs say that it is evident from the documents that the individual defendants did not provide sufficient information in a timely fashion to the bank, and that they did not use the Royal Bank account as the operating account for the business. They argue that it was as a result of those actions by the individual defendants that the Royal Bank refused to allow them to assume the loan.

53 However, the plaintiffs did not call Ms. Higginson or anyone else from the Royal Bank to establish that the reason why the bank did not allow the individual defendants to assume the loan after it was in default was because the actions of the individual defendants, rather than the default of the plaintiffs. In the counterclaim, the individual defendants allege that the plaintiffs were in breach of the Agreement because they did not arrange for the Royal Bank to allow the individual defendants to assume the loan and that there was a demand made on M & P Foods to repay the loan in full. As well, the individual defendants pleaded that the plaintiffs were in breach of the Agreement because as a result of the plaintiffs' actions the Royal Bank refused to permit the individual defendants access to, or use of the Royal Bank account, and seized funds from the account. As a result of the pleadings, the plaintiffs knew that the individual defendants were taking the position that the Royal Bank did not allow them to assume the loan because of the actions of the plaintiffs. In the circumstances, it is reasonable to draw an adverse inference against the plaintiffs for failing to call any witnesses from the Royal Bank to establish that it was the result of the individual defendants' own actions that they could not assume the loan.

54 Mr. Bharmal and Mr. Zip Dhanani testified that the reason they did not use the Royal Bank account as the operating account of the Bread Garden was that they did not have access to the account, and could not withdraw funds from the account. In my view, that is a reasonable explanation. As stated in *British Westinghouse Electric and Manufacturing Company, Limited* at p. 689, the principle of mitigation does not impose an obligation on the wronged party "to take any step which a reasonable and prudent man would not ordinarily take in the course of his business."

55 The evidence is that despite not having access to the Royal Bank account, the individual defendants continued to make the monthly loan payments up to and including December 2007. It was only when they realized that the Royal Bank was continuing to unilaterally withdraw lump sum amounts from the account to satisfy the loan that they stopped making payments on the loan.

56 In the circumstances, the plaintiffs have not established that the individual defendants failed to act reasonably to mitigate the damages they suffered as a result of the plaintiffs' breach of the

Agreement, or that the individual defendants should be responsible for any additional expenses incurred as a result of the loan being in default.

57 As stated earlier, the individual defendants have paid the following amounts pursuant to the terms of the Agreement:

- * The sum of \$150,000 for the down payment;
- * The sum of \$25,000 for the first lump sum payment; and
- * The sum of \$77,000 in monthly 11 instalments.

58 Pursuant to the Agreement, the individual defendants were to assume and make payments on the Royal Bank loan which the parties understood to have a balance of approximately \$200,000 as of January 16, 2006. The evidence is that the total amount the individual defendants paid in monthly loan payments and the amounts seized from M & P Foods' account is \$144,837.40.

59 In my opinion, the individual defendants are entitled to be repaid the purchase price. As well, they are entitled to repayment of the amounts they paid on the Royal Bank loan plus the funds that were unilaterally withdrawn from the account by the Royal Bank after January 16, 2006.

60 The individual defendants also claim damages against the plaintiffs for losses suffered as a result of not having access to M & P Foods' account and the unilateral withdrawal of funds from the account. Credit card sales from the Bread Garden were automatically deposited into the Royal Bank account. Mr. Bharmal testified that as a result of the seizure of funds by the Royal Bank and the lack of access to the Royal Bank account there was a deficiency in working capital which affected the individual defendants' business plan for the franchise. The business plan included expanding into a catering business. One of the other Bread Garden stores had increased sales by 15 per cent by expanding into catering. Mr. Bharmal testified that the business plan was delayed for approximately six months. He estimates that the loss for the delay in implementing this plan is approximately \$30,000, using a figure of 5 per cent of the monthly sales. The restaurant's monthly sales are approximately \$100,000.

61 As well, Mr. Bharmal's evidence is that M & P Foods' credit rating has been affected by the Royal Bank's judgment against the company. However, he was unable to estimate the amount of loss suffered as a result of the impact on its credit, apart from saying it affected the working capital.

62 The defendants also seek reimbursement for training new employees. The Agreement provided that the vendors would terminate all of the employees on the closing date and that upon termination the purchasers would be at liberty to rehire them. After termination, the individual defendants were only able to rehire three of the employees. Mr. Bharmal's evidence is that it was a scramble to hire and train a high number of employees. Eleven new employees had to be hired and trained at a cost of approximately \$11,000. According to Mr. Bharmal it costs approximately \$1,000 to train an employee. Apparently the individual defendants expected to be able to rehire more of the employees at the closing date, as the plaintiffs had not advised them of any problem with rehiring the employees. Mr. Bharmal testified that if they had been told by the plaintiffs that so few employees would be available for rehiring, they would have had enough time to hire and train employees.

63 It is apparent from the evidence that as a result of the plaintiffs' default on the Loan Agreement resulting in the demand for repayment, the individual defendants have suffered losses. As well, they suffered losses as a result of having to hire and retrain new employees. In my view, these losses are properly factored into the assessment of what profit the plaintiff is entitled to in set-off.

64 The individual defendants are entitled to the following amounts from the plaintiffs:

- * The \$150,000 paid on the closing date;
- * The \$25,000 they paid for the first lump sum payment;
- * The \$77,000 that they paid in 11 instalments;
- * The \$144,837.40 they paid towards the Royal Bank loan;
- * Pre-judgment interest on those amounts from the date the payments were made to the date of the judgment; and
- * Post-judgment interest until the plaintiffs take over the operation of the restaurant.

65 The plaintiffs are entitled a set-off for the profits received by the individual defendants from the operation of the business from January 16, 2006 to the date when they take over the operation of the Bread Garden. In the event the parties cannot agree as to the amounts, they are entitled to attend before the registrar.

66 The individual defendants will take whatever steps are necessary to transfer the shares of M & P Foods to the plaintiffs.

CONCLUSION

67 The plaintiffs are in breach of clause 5.20 of the Agreement by defaulting on the Loan Agreement, thereby allowing the Royal Bank to demand immediate repayment of its loan from M & P Foods.

68 The individual defendants are entitled to terminate the Agreement and are entitled to repayment from the plaintiffs of the monies paid to the plaintiffs and to the Royal Bank, plus interest from the dates the payments were made. The individual defendants will take whatever steps are necessary in order to transfer the shares of M & P Foods to the plaintiffs.

69 The plaintiffs are entitled to a set-off for the profits received by the individual defendants as a result of the operation of the Bread Garden from January 16, 2006 to the time the plaintiffs resume the operation of the Bread Garden. In the event agreement cannot be reached regarding the amount of the profits, there will be a reference to the registrar.

70 The individual defendants are entitled to the costs of the action at Scale B.

L.B. GEROW J.

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