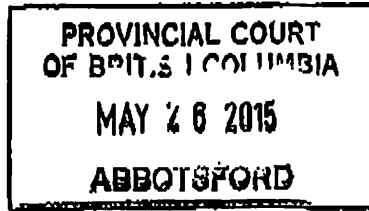


RFS # 26  
order # 27

Citation: ☼



Date: ☼  
File No: 21095  
Registry: Abbotsford

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA  
(SMALL CLAIMS COURT)**

**BETWEEN:**

**RAM SINGH CHOHAN**

**CLAIMANT**

**AND:**

**KHK HOLDINGS LTD. and VENUS LAW CORPORATION**

**DEFENDANTS**

**REASONS FOR JUDGMENT  
OF THE  
HONOURABLE JUDGE K. D. SKILNICK**

Counsel for the Claimant:

J. J. Klassen

Counsel for the Defendant:

C. D. Drinovz

Place of Hearing:

Abbotsford, B.C.

Date of Hearing:

February 27, 2014, May 21 and 22, 2015

Date of Judgment:

May 26, 2015

**Introduction**

[1] This claim concerns a dispute over the sum of \$15,000 that is being held back from the sale of a blueberry farm in Abbotsford, BC. The farm sold for \$2.7 million in April of 2012. However on closing, a dispute arose concerning a clause in the contract of purchase and sale which allowed for a possible deduction of \$15,000 from the purchase price. The parties did not agree as to who was entitled to that money and it has been held in trust by the Defendant Venus Law Corporation, pending resolution of this dispute. Although it has been named by the Claimant as a Defendant in this action, it should be clearly stated that the Defendant Venus Law Corporation has done nothing wrong in this matter.

[2] The trial of this matter commenced in February of 2014. Unfortunately, due to a number of circumstances beyond anyone's control, the matter was unable to continue until over a year later. Both counsel and their clients have been very reasonable and understanding throughout this matter. It also deserves mentioning that both counsel were well-prepared and organized for this trial and the quality of their advocacy was outstanding. Despite their dispute, the parties have conducted themselves respectfully towards one another, to counsel and to the court and for all of these reasons it has been a pleasure to hear this trial.

[3] Following is a summary of the evidence heard in this matter, the positions of the parties, a summary of the applicable law, and the reasons for making the order that is now being made.

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**Summary of Evidence**

[4] At the beginning of 2012, the Defendant KHK Holdings Ltd. (whom I'll refer to as "KHK" henceforth) was the owner of an operating blueberry farm located on Hopedale Road in Abbotsford, BC. The farm comprised about 49 acres. KHK decided to put the farm up for sale. The president of KHK is Kundan Singh Khela. KHK listed the property with Century 21 Coastal Realty Ltd. Harpreet Singh Khela, who is the son of the principal of KHK, was the listing broker for the property.

[5] Virbinder Malhi is a realtor with Landmark Realty Corporation. In October of 2011 he tendered an offer on behalf of a client shown as "Kulwinder Kaur", offering to purchase the property for \$2.6 million. A counter-offer of \$3.25 million was made and then another counter-offer of \$3.125 million, but the parties were unable to reach a deal. On November 27, 2011, Mr. Malhi tendered another offer to purchase the property for \$2.6 million, but this was not accepted or countered. A third offer was made by Mr. Malhi on January 30, 2012 with an offering price once again of \$2.6 million on behalf of a buyer shown as Surjit Singh Chohan. KHK made a counter-offer of \$3.05 million, but once again the parties could not reach a deal.

[6] The last mentioned offer has some significance because it contained a clause which was handwritten into the offer, which read as follows (with any grammatical or punctuation errors appearing below as they appeared in the offer):

**"The Buyer will walk through the subject property and will count the number of missing and dead blueberry plants. And the Seller agrees to provide the missing and dead plants by March 30, 2012. If Seller is unable to do so by Mar 30, 2012. The buyer will be credited \$15,000"**

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[7] On March 7, 2012, another offer to purchase this property was tendered by Mr. Malhi, this time on behalf of the Claimant in this action, Ram Singh Chohan. The offer was once again for a purchase price of \$2.6 million. KHK made a counter-offer of \$2.7 million, which was accepted. The accepted offer provided for a completion date of April 16, 2012 and a possession date of April 17, 2012. It contained the following clause, which was typewritten this time, and which is reproduced below as it appeared in the accepted offer, including any grammatical or punctuation errors:

The buyers will walk through the subject property and will count the total number of missing and dead blue berry plants. And the seller agrees to provide the total no. of missing and dead plants by Mar 30, 2012. If the seller is unable to provide these blue berry plants of the same varieties by Mar 30, 2012. The buyer will be credited by \$15000. from the purchase price.

[8] There is a divergence in the evidence of the parties on a number of relevant matters in this action including the state of the farm and the blueberry plants on it, whether or not the Claimant attended onto the farm to count the number of missing and dead plants and if so, whether or not this was done with the consent of KHK, and whether or not the Claimant's realtor communicated the results of that count to KHK's realtor.

[9] The Claimant testified that at the time that he made his offers to purchase this property, he was concerned about the state of the plants on the property. On two occasions prior to making offers on the property, he had looked at it and noticed that there were a lot of weeds and a lot of missing plants. He testified that when he viewed the property in January of 2012, there were a lot of dead plants that he could see. It was for this reason that he insisted that a clause be put into the offer giving him the right to

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inspect the property before taking possession and requiring the seller to replace any dead or missing plants, or credit him on the purchase price.

[10] Two other witnesses testified that they too observed the field to be in poor condition. Barbara McClellan was a tenant on the property. She and her husband reside in a house on the property and her son has trucks on the property that are used to haul grain. The terms of her lease prohibit her from setting foot onto where the blueberries are or from allowing other persons access to the blueberries, unless she has the landlord's permission to do so. She testified that in March of 2012 she could see some dead plants on the property.

[11] The Claimant's realtor, Virbinder Malhi, also testified that there were a large number of dead or missing blueberry plants on this property. He testified that he contacted KHK's realtor by phone to arrange a time for the Claimant to attend on the property, in compliance with the clause in the contract, to count the number of dead and missing plants. He testified that on March 18, 2012, he attended on the premises along with the Claimant and his wife in order to perform the count. The Claimant recalls that they arrived sometime before noon and spent four or five hours performing the count. Mr. Malhi recalls that they began in the morning before noon and worked through lunch conducting the count. He testified that it took between three and four hours to complete the count. Mr. Malhi testified that they counted 7,450 missing or dead plants.

[12] Unfortunately, if this count was conducted (I say if, because KHK disputes that such a count ever took place), Mr. Malhi did not keep any written record of it. He says

~~that he likely wrote the number of dead or missing plants down on his hand with a pen.~~

No other record was kept and no photographs were taken of any of the dead plants or the areas in the field where plants were missing. In performing the count, Mr. Malhi noted that there were two types of blueberry plants in the field: Elliott and Duke.

[13] Mr. Malhi testified that on the following day, he phoned KHK's realtor, Harpreet Khela, and gave Mr. Khela the number of missing plants. According to Mr. Malhi's testimony, Mr. Khela responded by saying "don't worry, we would just rather credit you the fifteen thousand dollars." Mr. Malhi did not make any note or record of the conversation. He was asked in cross-examination if he told Mr. Khela how many of the plants which needed replacing were Duke and how many were Elliott. Mr. Malhi testified that he doesn't recall if he did this or not.

[14] Mr. Malhi testified that when the transaction was completed, he refunded the Claimant \$5000 of his commission. He testified that he did this as "a thank you" to his clients.

[15] Harpreet Khela denies that any conversation ever took place between Mr. Malhi and him about the number of dead or missing plants. He says that this is preposterous for a number of reasons. Firstly, he testified that from his inspection of the premises, it is not possible that there were that many dead or missing plants. Secondly, he testified that Mr. Malhi never contacted him to arrange permission to attend on to the property to conduct the count, or to report on the results of that count. He also says that he would not speak for his clients about what their response to the count would be without speaking with them first. Mr. Khela testified that he expected the count to be performed ~~by someone independent, with both parties being present at the time. Mr. Khela testified~~

that the first he learned of there being a problem with a potential holdback of \$15,000 from the purchase price was in April when it was time to disburse funds.

[16] Both realtors produced their phone records in an effort to confirm or dispute that such a call ever took place. The table below shows the date, time and length of phone calls that took place between the two realtors between March 16 and 20. Mr. Malhi's phone records show the length of the call as rounded up to the next minute, while Mr. Khela's phone records break the call down to the nearest second. In the table below, "Malhi's Time" and "Khela's Time" refers to the length of the call as shown on that person's phone bill. Times are shown in minutes and seconds. The asterisk indicates who made the call. A bracketed number in the time of day column indicates that a different time is shown on the two bills, with the time in brackets being that shown on Mr. Khela's bill. Here is what the records show:

Date	Time of Day	Malhi's Time	Khela's Time
March 16	4:42 p.m.	1:00*	0:48
March 16	8:07 p.m.	1:00*	0:39
March 17	10:22 a.m.	2:00	1:22*
March 17	11:52 (54) a.m.	2:00*	1:43
March 17	12:28 (29) p.m.	1:00*	0:43
March 19	4:45 (42) p.m.	1:00*	0:53
March 19	7:12 p.m.	2:00*	1:18
March 20	2:44 p.m.	11:00	10:22*
March 20	3:51 (45) p.m.	1:00*	0:23
March 20	4:44 p.m.	1:00	0:23*

March 20	5:06 p.m.	8:00*	3: 7:41
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[17] The interesting thing that the phone records show is that no calls were made between the realtors on March 18, the day the count took place. It is not clear why Mr. Malhi did not call Mr. Khela on the day that the count was made, or why he waited until late in the afternoon of the following day to relay this information. The record also show that Mr. Malhi placed perhaps as many as 15 phone calls, and received another 9 during the time that he was conducting the count of the blueberry plants.

[18] During her testimony, Barbara McLellan recalls seeing some people performing what looked to be a count of the plants in mid-March of 2012. She testified that there were three people, two of which were the Claimant and his wife. She did not recognize who the third person was.

[19] Kundan Singh Khela, the president of KHK, testified that it is not possible that there were 7,400 missing of dead plants on the farm in March of 2012. He testified that he had replaced about 2,500 in the fall of 2011. This was done by a company called MGB Enterprises Ltd. Gurbhej Brar, the president of that company, also testified to this. Mr. Brar testified that he inspected the farm in March of 2012 and no plants needed to be replaced at that time, and certainly not 7,400.

[20] If the parties did discuss and agree to a reduction in the purchase price of \$15,000 in lieu of plants that needed to be replaced, as Mr. Malhi says they did, this does not seem to have been recorded in any document. The initial statement of adjustments prepared by the Venus Law Corporation did not show this adjustment to



the funds to be paid on closing at first. The statement of adjustments was subsequently amended to reflect the fact that \$15,000 was being held in trust "as per agreement of the parties."

### **Position of the Parties**

#### **1. The Claimant's Position**

[21] On behalf of the Claimant, Mr. Klassen notes that the insertion of the clause allowing the buyer to inspect the blueberry plants and have any dead or missing plants replaced was of vital importance to the Claimant, so much so that it was inserted into two offers to purchase. He argues that it is clear that the Claimant did inspect the premises and that the "tipping point" of any question about whether or not such an inspection ever took place comes from the evidence of the tenant, who is independent in the conflict between the parties. He also argues that the evidence of Mr. Malhi should be preferred to that of Harpreet Khela because, unlike KHK's realtor, Mr. Malhi is not related to any of the parties.

[22] Mr. Klassen notes that the clause required KHK to either replace any dead or missing plants, or alternatively to reduce the purchase price by \$15,000. On KHK's own evidence, no plants were ever replaced after the fall of 2011, and therefore, according to the terms of the contract, the Claimant is entitled to the credit on the purchase price.

#### **2. KHK's Position**

[23] On behalf of KHK, Mr. Drinovz argues firstly that the clause is unenforceable because it is meaningless. The grammar and punctuation do not give the partial

sentences any meaning, the clause speaks of "blue berry" plants in one sentence and "plants" in another. The contract was drafted by the buyer and so any ambiguity is to be construed against the interests of the party on whose behalf it was drafted (in this case the Claimant). If the clause is valid, it still required the Claimant to communicate to KHK the number of dead or missing plants, according to variety, something that did not happen here. The Claimant's failure to do this robbed KHK of its opportunity to attempt replacement of the plants. The Claimant never communicated this information to KHK. Mr. Drinovz says that this is supported by the lack of any documentation of the count or of its communication and from the fact that it wasn't until after the first statement of adjustments was prepared that this issue was first mentioned. He notes the absence of any record of the appointment for the inspection, and of any email, text message or other recording of the inspection and its result.

[24] Mr. Drinovz also argues that even if the information was communicated to KHK, KHK was never told what amounts of each variety (e.g. Elliot or Duke blueberry plants) needed to be replaced, and this is confirmed by Mr. Khela's own evidence. Failure to provide that information frustrated any opportunity that KHK had to replace the blueberry plants.

### **Applicable Law**

#### **1. Burden of Proof**

[25] The burden of proof in a civil case rests with the Claimant to prove his case on a balance of probabilities. As the Supreme Court of Canada stated in *F. H. V. McDougall* 2008 SCC 53; [2008] 3 S.C.R. 41, at para. [49]:

"[I]n civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."

## **2. Construction of Contracts**

[26] In *Despotovski v. Abattis Biocentials Corp. et. al.*, 2015 BCPC 68, I recently reviewed the law regarding the interpretation of disputed contracts. I will restate that summary as follows:

1. A contract must be read as a whole, giving the words used in the contract their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the making of the contract. While the surrounding circumstances will be considered in interpreting the terms of the contract, they must never be allowed to overwhelm the words in the agreement. *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53; *Robb v. Walker* 2015 BCCA 117.

2. If there is an ambiguity in the terms of an agreement, the subsequent conduct of the parties can be taken into account to assist in resolving the ambiguity. *Silver Standard Mines Ltd. (N.P.L.) v. Granby Mining Company Ltd.* (1971) 10 D.L.R. (3d) 578 (B.C.C.A.)

3. A party cannot take advantage of and benefit from a state of affairs produced by its own wrong. Within the context of contract law, a party cannot use its own breach or default as a basis for being relieved of its contractual obligation. *Barclays Bank PLC v. Trustee of Devonshire Trust* 2013 ONCA 494.

4. In cases of ambiguity, language should be construed against the party who prepared the contract. This is often referred to as the contra proferentem rule. *Arthur Anderson Inc. v. Toronto Dominion Bank* (1994) 17 O.R. (3d) 363

[27] I would add to these the general principle that agreements are to be interpreted in such a manner as to give effect to the agreement of the parties as can best be determined from the entirety of the agreement. *BG Checo International Ltd. v. British*

[28] In *Consolidated-Bathurst Export Ltd. v. Mutual Boller & Machinery Insurance Co.* [1980] 1 S.C.R. 888 the Supreme Court of Canada gave further guidance on how terms of a contract should be interpreted where ambiguity may be said to exist. Justice Estey wrote:

[T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated... Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

### Analysis

[29] It is clear from the evidence that it was important to the Claimant that he should have the opportunity to inspect the farm to ascertain the number of dead and missing blueberry plants. His insistence on including the clause affording him this right in two offers to purchase the property, including the one that was ultimately accepted, makes it more likely than not that he would actually follow through and conduct such an inspection. The evidence satisfies me that such an inspection actually took place, despite the suggestion on the part of KHK's realtor that it did not. I accept the evidence of the tenant Barbara McLellan that the Claimant, his wife, and another man, likely Mr. Malhi, attended to the farm on March 18, 2012, to inspect the blueberry plants.

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[30] What is less clear is whether or not the information obtained from the count was communicated to KHK and if so, precisely what was communicated. Everyone recognizes that this lawsuit would likely have not been commenced if only the Claimant's realtor had made some sort of more tangible record of the count of the blueberry plants that took place (other than writing it on his hand), of how he communicated that information to KHK's realtor, and what it was he said. In an age of email, text messages, and other means of instantaneous communication, it is baffling why no reasonably contemporaneous written record was kept of the results of the count and of the communication of that information to KHK's realtor. It is also hard to understand why, when the only record which was kept was some writing on Mr. Malhi's hand, he waited at least 24 hours before phoning that information to KHK's realtor. A mistake could (and may) cost the Claimant \$15,000 and it is surprising therefore that Mr. Malhi would be as cavalier about this responsibility as he has been.

[31] In the final analysis, the issue of whether or not the information from the count was ever communicated by the Claimant's realtor comes down to one man's word against the word of another. Both counsel have suggested reasons why the credibility of the other side's realtor should be called into question. Mr. Chohan is the son of the principal officers of KHK, and a lack of objectivity on his part is a reasonable possibility. The lack of professionalism on the part of Mr. Malhi, who purports to be very experienced in the sale of blueberry farms and the fact that he paid the Claimant \$5000 from his commission, also give reason to question his version of events. Even on his evidence, he is unsure if he communicated to KHK's realtor how many of each variety of  
~~blueberry-plant-needed-to-be-replaced.~~

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[32] On a consideration of this evidence, I find that both versions of events are possible, though it seems more likely that if in fact events had occurred as described by Mr. Malhi, some written or electronic record of this would have been kept. On this issue, I find that the Claimant has not met the burden of proof of showing that any information from the count was ever communicated to KHK's realtor.

[33] Counsel for the Claimant argues that this is not fatal to the claim. All that the disputed clause required was for the Claimant to walk through the property and count the dead and missing plants (which occurred) and for KHK either to replace the dead and missing plants or credit the Claimant \$15,000 off of the purchase price. Counsel for KHK says that the clause is unenforceable because it is meaningless. Alternatively, it is implicit in the clause that the Claimant was to provide the number of dead and missing plants to KHK so it would know how many plants and what kind of plants it had to replace. By failing to communicate this, he argues that the Claimant has frustrated the operation of the clause.

[34] In interpreting the disputed clause, I note the problems with punctuation which cause difficulty with its interpretation. For example, the last sentence in the clause simply states "The buyer will be credited by \$15000 from the purchase price." This is clearly not what the parties intended, otherwise they would have simply reduced the purchase price by that amount and left the clause out. This sentence only makes sense if it is recognized that the period before this phrase was intended to be a comma. The law of construction of contracts requires that the clause be read in a reasonable manner, such that a result in accordance with the intention of the parties follows.

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[35] I don't agree with Mr. Drinovz that the entire clause should be struck from the contract. This clause should be read to accord with what the parties intended, taking into account what a fair and reasonable result would be. The evidence is clear that the Claimant was concerned about there being missing or dead plants and wanted the opportunity to inspect the field. I find that he did perform such an inspection. The clause also required KHK to either replace the dead or missing plants with the same varieties, or to give the purchaser a \$15,000 credit on the purchase price. In order to fairly decide which option it would pursue, it was essential for KHK to know how many plants the Claimant believed to be missing. Such construction is, in the words of the Supreme Court of Canada, "the more reasonable one, that which produces a fair result." Unless that information is communicated to KHK, the clause is meaningless. For reasons previously stated, I find that the Claimant has not proven that this information was ever communicated to KHK, and therefore KHK was denied the opportunity to replace any missing plants.

[36] It is incumbent on the Claimant to prove that there were in fact missing or disputed plants. This is not proven merely because the Claimant deems it so. The evidence as to whether or not there were any missing or dead plants is unclear on this point. The Claimant and his realtor have testified that there were missing plants, and Barbara McDougall (who was contractually bound to stay off of the field) says that she saw some dead plants as well. Conversely, Mr. Khela and his son, as well as Mr. Brar have testified that there were not any missing or dead plants. Either version may be the truth. KHK's version is more plausible, given the lack of any sort of documentation or

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tangible record of the count performed by the Claimant. In the final result, the Claimant has failed to prove his claim on a balance of probabilities. His Claim is dismissed.


[37] No submissions were made by either party as to costs. Pursuant to Section 19 of the *Small Claims Act* and Rule 20 of the *Small Claims Rules*, KHK is entitled to recover its filing fees in the sum of \$50.

 **Order**

[38] For the foregoing reasons the Claim brought by Ram Singh Chohan against KHK Holdings Ltd. is dismissed. The Defendant Venus Law Corporation is directed to pay the sum of \$15,000. together with any interest it has earned thereon, to the Defendant KHK Holdings Ltd. at the expiration of the 40 day appeal period set out in section 6 of the *Small Claims Act* (i.e. on July 6, 2015) or sooner if it has the consent of the Claimant to do so.

[39] The Claimant shall also pay to the Defendant KHK Holdings Ltd. its filing fees in the sum of \$50.00.

Dated at the City of Abbotsford, in the Province of British Columbia, this 26<sup>th</sup> day of May, 2015.

  
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(The Honourable Judge K. D. Skillnick)