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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MAHAIRHU FARMS LIMITED

PLAINTIFF

AND:

THE CORPORATION OF THE DISTRICT OF MATSQUI

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE WARREN

Counsel for the Plaintiff: S. T. Cope

Counsel for the Defendant: I. J. Stirling

Places and Dates of Hearing: Chilliwack, B.C.
October 2, 3 & 4, l995
Vancouver, B.C.
May 30 & 3l, and
November 9, l996

[1] It was berry harvesting time on the plaintiff's farm in the Fish Trap Creek valley when the defendant's foreman approached the plaintiff's president, Mr. Mahairhu, to have him sign a Temporary Right of Entry for work which was to be done on the Creek running through the plaintiff's property. The Temporary Right of Entry is a marvel of simplicity and lack of information. It simply permitted the defendant to temporarily enter onto the plaintiff's land for the purpose of cleaning the creek and placing a "burm [sic] on the east side of creek bank". There is no description of the extent of the excavation, the amount of materials to be removed, nor the dimensions of the berm which presumably was to be composed of the excavated materials. That information was, according to the foreman William Garbutt, provided to the plaintiff orally at the meeting of July 5, 1990.

[2] It is not without significance that Mr. Mahairhu [the plaintiff] was born in India and English is not his first language. While on the evidence, I cannot conclude that his English language skills are as rudimentary as he would have me believe, nevertheless I am satisfied that he lacks the fluency in and facility with the language which would be necessary for the defendant to rely so heavily upon the evidence of the discussions which took place between the plaintiff and the defendant's foreman. Mr. Garbutt's evidence of the meeting with the plaintiff was bolstered by rather precise details of the location of the meeting in the plaintiff's kitchen and the

presence of the plaintiff's wife and one of their daughters who served as a provider of a second opinion. Unfortunately for the defendant, there is sufficient extrinsic evidence [which I allowed to be called in rebuttal] to clearly establish that neither Mrs. Mahairhu nor a daughter was present on that day.

[3] Therefore the amount of information additional to the printed Temporary Right of Entry which was imparted to the plaintiff depends upon the testimony of the two witnesses: the plaintiff and the foreman. I prefer the evidence of the plaintiff, in part because his indignation at the work done by the defendant was expressed in writing very shortly after the defendant's workers and machinery finally left his property and in part by the circumstances surrounding the signing of the document. Further, his evidence is supported by that of his wife and daughters on some collateral, yet important matters, going to the reliability of the memory of the defendant's principle witness.

[4] The plaintiff's evidence was that Mr. Garbutt had come to his farm on one previous occasion and explained that the creek was going to be cleared using large machines but that "the way your property looks [now] is the way we will leave it, and we will not cause any damage." When Mr. Garbutt returned the next time on July 5th, 1990 the document was presented to him by Mr. Garbutt who said he had already explained it to him

and that he needed 50 feet but that the land would be returned in the same condition. This conversation took place in the plaintiff's driveway and the document was only cursorily explained to him before he signed on the hood of Mr. Garbutt's truck.

[5] Mr. Garbutt's evidence, briefly summarized for this point, was that he explained the nature of the work to be done likening it to work done on nearby property and that the document was in fact signed in the kitchen of the plaintiff with his daughter and wife present.

[6] I am satisfied on the evidence that Mrs. Mahairhu was not present on July 5, 1990 when the right of way was signed but rather she was at work at the cannery the entire day. Her place of employment is a 10 to 15 minutes drive away. Her time slips for July 5, 1990 clearly show she worked from 9:54 a.m. until 1:58 p.m. (taking a lunch break until 2:44 p.m.) working until 6:15 p.m. that afternoon. She denied returning home for lunch that day and I accept that evidence. Further, I accept the evidence of Mrs. Gill, one of the daughters who could have been present at the time, that on July 5, 1990 she was attending classes at S.F.U. The other daughter was busy in the fields supervising the work of 13 berry pickers. Her evidence was that she did not see Mr. Garbutt on that day as he says. Thus, either Mr. Garbutt is mistaken or he is lying. If the former, his reliability is not as strong as it should be on

the critical events surrounding the signing of this document and the extent of the information he gave to Mr. Mahairhu. Accordingly, I must treat with caution the evidence of Mr. Garbutt as to the details of what he said was discussed between them.

[7] In any event it seems to me that where a municipal authority purports to exercise its rights under an enabling statute or by permission of a land owner, it has a duty to explain in complete and understandable detail the nature and scope of the work and the likely consequences of the work to all likely affected parties. This explanation need not be lengthy but it must be complete in its details. When the authority fails to provide these details it does so at its peril.

[8] That the plaintiff knew of the efforts to clean out the creek is apparent. The Municipality had written to him by way of his solicitor in March 1989 enclosing the plans for the work contemplated for his area of the creek. Fish Trap Creek had been the source of some flooding difficulties historically, apparently exacerbated by inattention south of the border and by neglect and imprudent land clearing north of the border. The defendant had obtained the permission of the necessary provincial and federal authorities to carry out the clearing/cleaning from the border north to the 401 freeway but the work had to be completed by September 15, 1990. The

Approval from the Ministry of the Environment [Ex. 20] granted under the ***Water Act*** permitted the removal of sediment and the widening of the channel and required the defendant to take reasonable steps to avoid damaging property and to make full compensation to owners where there was any damage. Further, all excavated materials were to be removed or placed above the high water mark and all work had to comply with earlier approved profile plans and cross section plans. These plans had been delivered to the plaintiff through his lawyers in March of the previous year although the plaintiff in his evidence said that he had never received these plans. The plans themselves however, do not show any berm. It does not appear that the plaintiff was ever shown a copy of the Approval. For that matter, no copy of the Temporary Right of Entry was left with the plaintiff either.

[9] Therefore, the defendant has not shown that the plaintiff received any of the documentary evidence and was thus alert or ought to have been alert to the fact that the excavated materials would be left on his property. The evidence of that knowledge rests upon the evidence of Mr. Garbutt of the conversation he had with Mr. Mahairhu. In direct he stated that he went to the plaintiff's farm on July 5, 1990 unannounced and spoke directly with Mr. Mahairhu. He told him that it was the plaintiff's lucky day as the work cleaning the creek would not cost him anything but there were a few conditions the plaintiff had to agree to before the work

would start. Mr. Garbutt stated he told Mr. Mahairhu they would need 50 feet beside the creek to place a berm or a dyke and that there would be trucks bringing in rip rap. He explained to the plaintiff that a berm was a dyke and his evidence was:

> Then I said, "Well, it's just a mound of dirt" and he kind of looked at me and I said "well, it is" -- I showed him by hand. I said, "You know, it'll be sloped up and have a flat top." I said, "I'll need about 50' on the bottom, about 6 feet on the height and about 20, 25 foot top" and I said "You know, you can see it to the south from Huntington [Road]" where we'd done it two years prior. He said he'd already seen that.

Later in his evidence Mr. Garbutt denied that the plaintiff ever said he did not want a berm or that Mr. Garbutt ever said he would remove all excavated materials from the property. Mr. Garbutt did tell the plaintiff that he would clean up any mess..."that would be all cleaned up. It would be sloped, levelled, replanted back to grass and any trees that we moved would be transplanted." It was only after this conversation that Mr. Garbutt said the plaintiff signed and then only after he had handed the document to his daughter who in turn appeared to read it through and then say: "It looks O.K. to me dad."

[10] A berm, as opposed to a berm-bank, is a term most frequently applied to fortifications, at least according to the 1971 Compact Edition of the Oxford English Dictionary, Vol. 1

quarto page 812. I would venture to believe that the term is not one with which most people not commonly involved with excavations would ordinarily be familiar. Clearly, even by Mr. Garbutt's evidence, the term caused the plaintiff some difficulty and for that reason Mr. Garbutt said he substituted the word dyke and used his hands to aid in the description. This may well have been sufficient to satisfy whatever questions the plaintiff may have had as to what a berm was but the description of what the defendant's workers would do must have left the plaintiff with the clear impression that the land would be returned to its normal state. Thus, even if I were to accept that there was a conversation between the plaintiff and Mr. Garbutt as he described it, the details of the work to be done and the condition in which the property was to be left were far from the standard of clarity required.

[11] The defendant relies upon the decision of this Court in ***Lafontaine v. Prince George Auto Racing Assn.***, [1994] B.C.J. No. 176 Prince George (21 January, 1994) and particularly this passage:

> In general principles of contract law, where a party signs a document which he knows affects his legal rights the party is bound by the document in the absence of fraud or misrepresentation, even though he may not have read or understood the document.

In ***Lafontaine*** the action arose out of an accident at a raceway which injured the plaintiffs and killed their father. The deceased was an active member of the racing association and had signed applications for membership which included a release and waiver of liability which was included in the rule book which itself set out in considerable detail the responsibilities of members when engaged in the sometimes hazardous pastime of racecar driving. To say the least, the amount of information contained in both the waiver and the rules was as complete as the information available to Mr. Mahairhu in the case at bar is not. As was pointed out by McLachlin C.J.S.C. [as she then was] in ***Karroll v. Silver Star Mountain Resorts Ltd. et al.*** (1988), 33 B.C.L.R. (2d) 160, there are three reasons not to enforce the terms of a contract: first, where the circumstances would indicate it was not the act of the signer, that is, *non est factum*; second, where the agreement was induced by fraud or misrepresentation; and third, where the party seeking to enforce its terms knew or ought to have known of the other's mistake as to the terms. As to this third exception McLachlin J. stated:

> ...Where a party has reason to believe that the signing party is mistaken as to a term, then the signing party cannot reasonably have been taken to have consented to that term, with the result that the signature which purportedly binds him to it is not his consensual act. Similarly, to allow someone to sign a document where one has reason to believe he is mistaken as to its contents is not far distant from active misrepresentation.

I would extend this last exception to those situations where one has reason to believe the signer may be mistaken. No party to an agreement ought to be able to take unfair advantage of another. There is a duty to make available sufficient particulars so as to enable a signer the full opportunity to comprehend the terms and their significance. If the signer may not be fluent with the language used in the contract, then there should be clear evidence that it was explained to him. That evidence is not clear before me.

[12] In the case at bar, in my view, the document does not begin to approach the minimal standards required to support the defence that the berm was left on the plaintiff's property in accordance with the agreement and with the plaintiff's full knowledge and consent. At the least the Temporary Right of Entry should have contained the dimensions of the earth to be left behind, and, preferrably have the maps attached and the outline of the proposed berm clearly marked.

[13] I hold that where work is to be carried out that is of the degree and permanency as was carried out on the plaintiff's property, the defendant had a duty to provide the plaintiff with clear precise written particulars in order to ensure that the plaintiff was fully informed. Anything less could not have resulted in the plaintiff giving his informed consent.

[14] In the statement of defence the defendant pleads sec. 755 of the ***Municipal Act***, R.S.B.C. 1979, c. 20 that the plaintiff failed to provide written notice of its claim within the time limit. That section permits the court to relieve against that time limitation and I do. Here, the last work was performed some time in September and the plaintiff's solicitor wrote to the defendant on October 24, 1990. In my view, while strictly speaking out of time, there was no prejudice to the defendant.

[15] Accordingly, the plaintiff succeeds on the only issue which was before me and the defendant is liable for the damage done to the plaintiff's property flowing from the deposit on it of the soil excavated from the creek bed.

[16] The plaintiff is entitled to its costs.

"T. P. Warren J."

T. P. Warren J.