Dynamic Transport Ltd. v. O.K. Detailing Ltd., [1978] 2 S.C.R. 1072

Supreme Court Reports

Supreme Court of Canada
Present: Laskin C.J. and Martland, Ritchie, Pigeon and Dickson JJ.
1977: November 24 / 1978: May 1.

[1978] 2 S.C.R. 1072 | [1978] 2 R.C.S. 1072

Dynamic Transport Ltd. (Plaintiff), Appellant; and O.K. Detailing Ltd. (Defendant), Respondent.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Case Summary

Real property — Agreement for sale of land — Action for specific performance — Land description — Failure of Statute of Frauds defence — Necessity for planning approval — Implied obligation resting on vendor — The Planning Act, R.S.A. 1970, c. 276, s. 19(1).

The respondent, as ultimate assignee of a purchaser's equity, was entitled to become the registered owner of a parcel of land in the City of Edmonton, consisting of 5.42 acres. The respondent carried on its business on the western part of the land and wished to sell the eastern part. To assist in effecting a sale the president of the respondent gave a realtor a sketch showing a three-acre parcel bounded on the east by the property line, and on the west by a wire fence running north and south across the property. The appellant made an offer on February 28, 1973, to purchase the three-acre parcel shown on the sketch for $30,000 payable on terms. The offer was refused. Further negotiations ensued as a result of which the respondent on March 1, 1973, offered to sell property described as "Part of SW-25-52-24-W4.....25 X 80--Bldg (4) four acres of land more or less." The price was $53,000, payable in cash. A printed form of offer and acceptance was used. This form was completed by filling in the land description and price, then the "Acceptance" portion as signed by the officers of the respondent. No sketch was prepared as part of this offer. The appellant accepted the offer on March 21, 1973. Closing date was April 30, 1973. The appellant, through its solicitors, wrote on April 6, 1973, requesting delivery of documents, but the respondent refused to convey and the appellant thereupon commenced an action for specific performance of the agreement.

The trial judge held in favour of the appellant. In allowing the respondent's appeal, the Appellate Division of the Supreme Court of Alberta found that "there was [not] that certainty of agreement between the vendor and the purchaser as to the description of the land to be sold so as to satisfy the Statute of Frauds", and also stated that there were "other difficulties facing the purchaser". Although the Appellate Division did not identify the other difficulties, it appeared to be common ground that they related to the necessity for planning approval.

Held: The appeal should be allowed, the judgment of the Appellate Division set aside and an order substituted therefor as directed.

The Land Description:

The quantity of land to be conveyed as stated in the written agreement is "four acres 'more or less'." In construing this language regard may be had to the following surrounding facts: (1) The map of the land recorded in the Land Titles Office, a public document to which the purchaser is led by the legal description of the land, reveals that the natural configuration of the 5.42 acre parcel is a four-acre rectangle attached to a smaller trapezium. This contributes to the certainty of description. (2) It is known that a warehouse is included in the property sold and that this building is located directly on the line dividing the rectangle from the trapezium. It may reasonably be inferred that the purpose of adding the words "more or less" after "four acres" was to allow the

western boundary to be determined by the western edge of the warehouse rather than by the exact limit of four acres. (3) It is known that all of the respondent's buildings and equipment are located in the trapezium portion to the west of the warehouse. This negates any suggestion that the north boundary, or the south boundary, or the west boundary of the 5.42 acre parcel should be the line from which to begin in finding the limits of the four acres agreed to be sold.

The only reasonable construction was that the four-acre parcel was intended to be sold with a slight adjustment to the west to encompass the warehouse. In this case, as distinguished from Turney v. Zhilka, [1959] S.C.R. 578, the agreement went beyond the negotiating stage and the inchoate.

Further, in seeking to determine whether there was difficulty in respect to land description, it was open to consider the conduct of the parties. On no occasion, neither in response to the appellant's letter of April 6, nor in earlier letters of March 22 and 28, nor in a telephone conversation of March 28 did the respondent take the position that imprecise formulation of the land description made completion impossible. Refusal to complete the transaction appeared to have been prompted by considerations other than difficulty in identifying the land agreed to be sold. The Statute of Frauds defence failed.

Planning Act Approval:

Both parties were aware that subdivision approval, pursuant to The Planning Act, R.S.A. 1970, c. 276, was required, but the agreement was silent as to whether vendor or purchaser would obtain this approval. However, the proposition that failure to fix responsibility for obtaining planning approval renders a contract unenforceable could not be accepted. The common intention to transfer a parcel of land in the knowledge that a subdivision pursuant to The Planning Act is required in order to effect such transfer must be taken to include agreement that the vendor will make a proper application for subdivision and use his best efforts to obtain such subdivision. This is the only way in which business efficacy can be given to their agreement. In the circumstances of this case, the only reasonable inference to be drawn is that an implied obligation rested on the vendor to apply for subdivision.

Cases Cited

Plant v. Bourne, [1897] 2 Ch. 281; Ogilvie v. Foljambe (1817), 3 Mer 53; Shardlow v. Cotterell (1881), 20 Ch. D. 90; McMurray v. Spicer (1868), L.R. 5 Eq. 527; Bleakley v. Smith (1840), 11 Sim. 150, referred to.

Hogg v. Wilken (1974), 5 O.R. (2d) 759; Wroth v. Tyler, [1974] Ch. 30; Northern Counties Securities Ltd. v. Jackson & Steeple Ltd., [1974] 2 All E.R. 625, applied; Barnett v. Harrison, [1976] 2 S.C.R. 531; Steiner v. E.H.D. Investments Ltd. (1977), 78 D.L.R. (3d) 449; Hargreaves Transport Ltd. v. Lynch, [1969] 1 W.L.R. 215; Brauer & Co. (Great Britain) Ltd. v. James Clark (Brush Materials) Ltd., [1952] 2 All E.R. 497; Société d'Avances Commerciales (London) Ltd. v. Besse & Co. (London) Ltd., [1952] 1 T.L.R. 644; Smallman v. Smallman, [1971] 3 All E.R. 717, referred to.

APPEAL from a judgment of the Supreme Court of Alberta, Appellant Division, allowing the respondent's appeal from a judgment of O'Byrne J. Appeal allowed.

J.T. Joyce, Q.C., and J.A. Hustwick, for the plaintiff, appellant. A.G. Macdonald, Q.C., for the defendant, respondent.

Solicitors for the plaintiff, appellant: Weeks, Joyce, Edmonton. Solicitors for the defendant, respondent: Macdonald, Spitz, Edmonton.

The judgment of the Court was delivered by

DICKSON J.

This is an action for specific performance brought by the appellant, Dynamic Transport Ltd., to enforce a contract in writing between the respondent, O.K. Detailing Ltd. as vendor, and the appellant as purchaser, for the sale of land in the City of Edmonton. The price was $53,000. The land is now said to be worth $200,000. The respondent refuses to complete, maintaining that the contract is unenforceable on two grounds: (i) the description of the land is so vague and uncertain as to make identification impossible; and (ii) the contract is silent as to which party will obtain the subdivision approval required under the terms of The Planning Act, R.S.A. 1970, c. 276.

At all material times the respondent, as ultimate assignee of the purchaser's equity, was entitled to become the registered owner of 5.42 acres of property, legally described as:

> ALL THAT PORTION OF THE SOUTH WEST QUARTER (1/4) OF SECTION TWENTY-FIVE (25), TOWNSHIP FIFTY-TWO (52), RANGE TWENTY-FOUR (24) WEST OF THE FOURTH MERIDIAN in the said Province shown as Parcel (A) on a Plan of record in the Land Titles Office for this land registration district as Plan 6568 E.R. and containing EIGHT and FORTY-TWO (8.42) HUNDREDTHS ACRES more or less;
>
> RESERVING THEREOUT all Coal.
>
> EXCEPTING THEREOUT:
>
> (A) TWO (2.0) ACRES MORE OR LESS as to surface only shown as Parcel (B) on filed Plan 1949 K.S.
>
> (B) ONE (1.0) ACRES MORE OR LESS as to surface only subdivided under Plan 5039 M.C.
>
> RESERVING THEREOUT all Coal and also RESERVING THEREOUT ALL OTHER MINES AND MINERALS.

The respondent carried on its business on the western part of the land and wished to sell the eastern part. To assist in effecting a sale, Andrew Kotun, president of the respondent, gave realtor George Christensen, of Christensen Agencies Ltd., a sketch showing a three-acre parcel bounded on the east by the property line, and on the west by a wire fence running north and south across the property. The appellant made an offer on February 28, 1973 to purchase the three-acre parcel shown on the sketch for $30,000 payable on terms. The offer was refused. Further negotiations ensued as a result of which the respondent on March 1, 1973 offered to sell property described as "Part of SW-25-52-24-W4 ... 25 X 80 -- Bldg (4) four acres of land more or less." The price was $53,000, payable in cash. The manner in which the offer was made was

somewhat unusual. A printed form of offer and acceptance was used. This form was completed by filling in the land description and price, then the "Acceptance" portion was signed by the officers of the respondent. No sketch was prepared as part of this offer. The appellant accepted the offer on March 21, 1973. Closing date was April 30, 1973. The appellant, through its solicitors, wrote on April 6, 1973, requesting delivery of documents, but the respondent refused to convey and the appellant thereupon commenced the present action.

The trial came on before O'Bryne J., who found for the appellant, and ordered specific performance of the agreement, or damages of $200,000 in lieu. The Appellate Division of the Supreme Court of Alberta allowed an appeal by the respondent in short judgment which reads:

> We are all of the opinion that in view of the Supreme Court of Canada's judgment in Turney v. Zhilka, [1959] S.C.R. 578, it cannot be said that there was that certainty of agreement between the vendor and the purchaser as to the description of the land to be sold so as to satisfy the Statute of Frauds. We are unable to say that it was agreed that the west boundary of the parcel was to be in the situation that counsel for the purchaser would have us place it. There are other difficulties facing the purchaser in proving a completed contract but we find it unnecessary to deal with them.
>
> Accordingly the appeal is allowed with costs to the appellant here and below.

Although the Appellate Division did not identify the "other difficulties facing the purchaser" it would seem to be common ground that they related to the necessity for planning approval.

The Land Description:

The 5.42 acres of land involved in this dispute is in the shape of a rectangle with a trapezium (i.e. an irregular quadrilateral with one pair of parallel sides) attached on the west side as in the following diagram:

[Ed. Note: Please see hard copy for diagram.]

The size of the eastern rectangular portion is exactly four acres. No physical boundary separates the two portions. The shape is clearly evident from visual inspection and from the plans recorded in the Land Titles Office. The respondent, as I have indicated, carries on business in the westernmost portion of the property, i.e. the 1.42 acre parcel. Its easternmost building, a long rectangular warehouse, lies directly on the line separating the rectangle from the trapezium. Without a survey it would be difficult to say in what portion the building lay. Following the signing of the sale agreement, the appellant ordered a plan of survey which disclosed that a line drawn parallel to the east boundary, allowing for four acres, would run midway through the warehouse. At first impression this seems to introduce a bizarre element, connoting uncertainty, but upon reflection it is apparent that the only real question is whether the building is included and the agreement in terms provides an affirmative answer to that question.

The first contention advanced by the respondent is that the description of the land in the document, which it itself prepared, is not sufficiently certain to satisfy the Statute of Frauds. It is argued that without parol evidence the four acres could be taken anywhere in the 5.42 acre parcel so long as the building was included. The appellant, on the other hand, argued that three of the boundaries of the parcel are fixed (being the north, east and south sides) and that the other boundary is simply a straight line, parallel to the eastern boundary, running immediately west of the west wall of the warehouse. The parcel thus delineated would comprise about four and one-thirteenth acres.

On the issue of certainty of description of the land, courts have gone a long way in finding a memorandum in writhing sufficient to satisfy the Statute of Frauds. The judges have consistently attempted to ascertain and effectuate the wishes of the parties, undeterred by lacunas in the language in which those wishes have been expressed. Thus, the Plant v. Bourne [[1897] 2 Ch. 281.], the defendant agreed to buy a property described in a memorandum signed by him as "twenty-four acres of land, freehold, at T., in the Parish of D." It was held by the Court of Appeal, following the principle of Ogilvie v. Foljambe [(1817), 3 Mer. 53.] and Shardlow v. Cotterell [(1881), 20 Ch.D. 90.], that parol evidence was admissible to show the subject matter of the contract. Lindley L.J. said, at p. 288: "That there was an agreement is plain enough What is it that the agreement refers to? The answer to that is it was the twenty-four acres of freehold land which they were talking about. Evidence to show that is admissible and if that is once admitted there is an end of the case." In McMurray v. Spicer [(1868), L.R. 5 Eq. 527.], the defendant agreed to purchase from the plaintiff "the mill property, including the cottages, in Esher Village -- all the property to be freehold." in an action for specific performance, it was held that parol evidence was admissible to identify the property. And in Bleakley v. Smith [(1840), 11 Sim 150.], the vendor, who had five houses and no other property in Cable Street, drew up a memorandum in his own handwriting, reading: "John Bleakley agrees with J.R. Bridges to take the property in Cable Street for the net sum of 248.10 pounds [Sterling]". It was held that the memorandum was sufficient under the Statute of Frauds. Parol evidence, of course, was necessary to show that the vendor had no property in Cable Street other than the property in question.

The Alberta Appellate division rested its decision solely and firmly upon the judgment of this Court in Turney v. Zhilka, supra, in which it was said at p. 580:

> On this branch of the case the defence was non-compliance with s. 4 of The Statute of Frauds. If it had been intended to sell the whole of the lands owned by the vendor, the description in the contract would have been adequate. But the contract in this case does not show what is intended to be sold and what is intended to be retained by the vendor and no parol evidence can cure this defect because the admissibility of such evidence presupposes an existing agreement and sufficient certainty of description to enable the property to be identified once the surrounding facts are pointed to.

Although Turney v. Zhilka was relied upon in the lower Court, in my view that decision is readily distinguishable from the case at bar. In Turney v. Zhilka the description of the property contained in the offer to purchase made by Zhilka was in these terms:

> ... all and singular the land and not buildings situate on the East side of 5th Line west in the township of Toronto and known as 60 acres or more having frontage of about 2046 feet on 5th line more or less, by depth of about ... feet, more or less (lot boundaries about as fenced), being part of west 1/2 of lot 5 Con 5 west.

It was common ground that this description did not mean the buildings were to removed but that certain land around them was to be retained by the vendor. The exact size of the land to be retained was not specified. The vendor assumed at the time the contract was made that he had about 65 acres, as he discovered when he had a survey made. When the purchaser sued for specific performance, he defined his claim in such a way that he left the vendor with only one and a half acres and a barn, half on the land claimed by the purchaser and half on the land which the purchaser said the vendor might retain. The purchaser claimed 60.87 acres out of the total of 62.37 acres. After the Local Master had been unable to determine what was to be retained as a reasonable amount of land enclosing the buildings, the trial judge on appeal from

the Master's report decided that the retained parcel should be ten acres. There was no basis for this in the agreement between the parties and thus Judson J., speaking for this Court, found that there was not "sufficient certainty of description to enable the property to be identified once the surrounding facts are pointed to."

In the present case, the quantity of land to be conveyed is stated in the written agreement. It is "four acres 'more or less'." This is one clear difference from Turney v. Zhilka. The language need not be construed in vacuo. We may have regard to the "surrounding facts." What are the surrounding facts which may properly be pointed to? First, the map of the land recorded in the Land Titles Office, a public document to which the purchaser is led by the legal description of the land, reveals that the natural configuration of the 5.42 acre parcel is a four-acre rectangle attached to a smaller trapezium. This contributes to the certainty of description. Secondly, it is known that the warehouse is included in the property sold and that this building is located directly on the line dividing the rectangle from the trapezium. Its position would be apparent to anyone inspecting the property. It could not have been the intention of the parties to have the boundary cut through the building. I think it may reasonably be inferred that the purpose of adding the words "more or less" after "four acres" was to allow the western boundary to be determined by the western edge of the warehouse rather than by the exact limit of four acres. Finally, it is known that all of the respondent's buildings and equipment are located in the trapezium portion to the west of the warehouse. This negates any suggestion that the north boundary, or the south boundary, or the west boundary of the 5.42 parcel should be the line from which to begin in finding the limits of the four acres agreed to be sold.

I confess that during argument I had considerable doubt as to the sufficiency of the land description in this case, but after further consideration I have concluded that the only reasonable construction is that the four-acre parcel was intended to be sold with a slight adjustment to the west to encompass the warehouse. It must be remembered that we are dealing here with experienced and successful businessmen. The officers of the respondent company prepared the land description. In so far as that was concerned nothing was left to further negotiations of the parties. Agreement went beyond the negotiating stage and the inchoate. That is the critical difference between this case and that of Turney v. Zhilka.

Further, in seeking to determine whether there is difficulty with respect to land description, it is open to consider the conduct of the parties: McMurray v. Spicer, supra. On March 22, 1973, following acceptance of the offer by the appellant, Mr. Kotun, president of the respondent, wrote to Christen Agencies in these terms:

> This letter is to inform you that the counter proposal for the sale of 4 acres of land for the sum of $53,000 made by O.K. Detailing Ltd. is no longer in effect.
>
> We feel that sufficient time has elapsed for the counter proposal to expire.
>
> Thank you for your efforts, and we hope that you may be of service at a later date.

On March 28, Mr. Kotun telephoned the president of the appellant to say that the respondent was not going to sell the property as it was going to be needed for expansion purposes. On the same date, Mr. Kotun wrote another letter to Christensen Agencies Ltd., with a copy to the appellant, in which he said:

> Further to our conversation of March 20, 1973, and our letters of March 22, the offer to purchase approximately 4 acres of land has been cancelled.

> Firstly, as per conversation in our office on March 20 when I definitely stated that we were not going to sell, and secondly, by letter on March 22.
>
> We are returning your offer to purchase agreement and consider the matter close.

At trial, the respondent sought to show that the offer to sell had been withdrawn on March 20 prior to acceptance, but the trial judge held otherwise and that line of defence was not pursued in this Court. On April 6, 1973, the solicitors for the appellant wrote to the respondent advising that the appellant was ready, willing and able to perform, and requesting the respondent to provide a registerable transfer of the lands sold, together with duplicate Certificate of Title and statement of adjustments. On no occasion, neither in response to the letter of April 6, nor in its earlier letters of March 22 and March 28, nor in the telephone conversation of March 28 did the respondent take the position that imprecise formulation of the land description made completion impossible. Refusal to complete the transaction would appear to have been prompted by considerations other than difficulty in identifying the land agreed to be sold.

> In my view the Statute of Frauds defence fails.

Planning Act Approval:

Both parties were aware that subdivision approval, pursuant to The Planning Act, was required, but the agreement is silent as to whether vendor or purchaser would obtain this approval. The statutory prerequisite became an implied term of the agreement. The obtaining of subdivision approval was, in effect, a condition precedent to the performance of the obligations to sell and to buy (see Turney v. Zhilka, supra; Barnett v. Harrison [[1976] 2 S.C.R. 531.]). The parties created a binding agreement. It is true that the performance of some of the provisions of that agreement was not due unless and until the condition was fulfilled, but that in no way negates or dilutes the force of the obligations imposed by those provisions, in particular, to obligation of the vendor to sell and the obligation of the purchaser to buy. These obligations were merely in suspense pending the occurrence of the event constituting the condition precedent.

The existence of a condition precedent does not preclude the possibility of some provisions of a contract being operative before the condition is fulfilled, as for example, a provision obligating one party to take steps to bring about the event constituting the condition precedent: see, for example, the recent decision of the Appellate Division of the Alberta Supreme Court in Steiner v. E.H.D. Investments Ltd. [(1977), 78 D.L.R. (3d) 449.] (leave to appeal to this Court denied December 14, 1977). No issue concerning waiver arises in the present case, and therefore nothing touches the rule in Turney v. Zhilka, supra, that a true condition precedent cannot be waived by either party without express reservation of a power of waiver.

In appropriate circumstances the courts will find an implied promise by one party to take steps to bring about the event constituting the condition precedent: see Cheshire and Fifoot's Law of Contract, 9th ed. (1976), at pp. 137-8:

> Where there is a contract but the obligations of one or both parties are subject to conditions a number of subsidiary problems arise. So there may be a question of whether one of the parties has undertaken to bring the condition about ... There is a clear distinction between a promise, for breach of which an action lies and a condition, upon which an obligation is dependent. But the same event may be both promised and conditional, when it may be called a promissory condition. A common form of contract is one where land is sold 'subject to planning permission'. In such a contract one could

> hardly imply a promise to obtain planning permission, since this would be without the control of the parties but the court have frequently implied a promise by the purchaser to use his best endeavours to obtain planning permission.

There are many cases in which provisions of a contract were subject to the condition precedent of an approval or a licence being obtained, and one party was by inference in the circumstances held to have undertaken to apply for the approval or licence: see Hargreaves Transport Ltd. v. Lynch [[1969] 1 W.L.R. 215.]; Brauer & Co. (Great Britain) Ltd. v. James Clark (Brush Materials) Ltd. [[1952) 2 All E.R. 497.]; Société d'Avances Commerciales (London) Ltd. v. Besse & Co. (London) Ltd. [[1952] 1 T.L.R. 644.]; and Smallman v. Smallman [[1971] 3 All E.R. 71.]. This type of case is merely a specific instance of the general principle that "the court will readily imply a promise on the part of each party to do all that is necessary to secure performance of the contract": 9 Hals. (4th ed.), p. 234, para. 350: see also Chitty on Contracts, "General Principles", (23rd ed.) p. 316, para. 698, where it is said: "The court will also imply that each party is under an obligation to do all that is necessary on his part to secure performance of the contract."

> Section 19(1) of The Planning Act of Alberta provides:
>
> 19. (1) A person who proposes to carry out a division of land shall apply for approval of the proposed subdivision in the manner prescribed by The Subdivision and Transfer Regulations.

"Subdivision" is defined in s. 2(s) as follows:

> (s) "subdivision" means a division of a parcel by means of a plan of subdivision, plan of survey, agreement or any instrument, including a caveat, transferring or creating an estate or interest in part of the parcel.

In a purchase and sale situation, the "person who proposes to carry out a subdivision of land" is the intending vendor. It is he who must divide his parcel of land, which has hitherto been one unit, for the purpose of sale. If a purchaser carried out the actual work in connection with the application, he could only do so in the vendor's name and as his agent. The vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale. I cannot accept the proposition that failure to fix responsibility for obtaining planning approval renders a contract unenforceable. The common intention to transfer a parcel of land in the knowledge that a subdivision is required in order to effect such transfer must be taken to include agreement that the vendor will make a proper application for subdivision and use his best efforts to obtain such subdivision. This is the only way in which business efficacy can be given to their agreement. In the circumstances of this case, the only reasonable inference to be drawn is that an implied obligation rested on the vendor to apply for subdivision. In making a similar finding on the facts in Hogg v. Wilken [(1974), 5 O.R. (2d) 759.], Lerner J. said at p. 761:

> In this contract the only inference to be drawn is that it was the vendors' obligation to make the application. An application for such consent would have to be carried out in good faith to its logical conclusion by presentation of same to the committee, the necessary appearance before the committee and furnishing any answers or material that would be reasonably within the power of the vendors to supply if requested by that committee.

In Hogg v. Wilken a mandatory order was made in these terms.

The procedure for application is set forth in detail in The Planning Act and the Regulations promulgated thereunder. There is no problem in determining the mechanics of what is to be done. The planning approval point was not raised as a possible defence in the statement of defence nor, it would seem, at trial. After delivering oral judgment the trial judge, in discussion with counsel, spoke of this matter as a "practical problem which I am sure you will be able to resolve without difficulty."

This issue was discussed by Megarry J. in Wroth v. Tyler [(1974) Ch. 30.], at p. 50, as follows:

> The matter is perhaps summed up as well as is possible by Lord Redesdale L.C. in Costican v. Hastler (1804), 2 Sch & Lef. 160, 166:
>
> > "When a person undertakes to do a thing which he can himself do, or has the means of making other do, the court compels him to do it, or procure it to be done, unless the circumstances of the case make it highly unreasonable to do so."
>
> See also Howell v. George 1 Madd. 1, 11, when Plumer V.C. cited this passage with approval A vendor must do his best to obtain any necessary consent tot he sale; if he has sold the vacant possession he must, if necessary, take proceedings to obtain possession from any person in possession who has no right to be there or whose right is determinable by the vendor, at all events if the vendor's right to possession is reasonably clear; but I do not think that the vendor will usually be required to embark upon difficult or uncertain litigation in order to secure any requisite consent or obtain vacant possession.

In Northern Counties Securities Ltd. v. Jackson & Steeple Ltd. [[1974] 2 All E.R. 625.], as part of a decree of specific performance of an agreement for the issue of shares, a company was required "forthwith at their expense to apply for and to use their best efforts to obtain quotation for and permission to deal on the London Stock Exchange" in the shares concerned.

In Steiner v. E.H.D. Investments Ltd., supra, McGillivray C.J.A., speaking of circumstances akin to those in the present case, said, at p. 455:

> The Court obviously cannot supervise such application, and in the result, in the event the defendant does not complete such application in accordance with this judgment, the plaintiffs will have damages for the loss of their bargain in an amount to be assessed. The circumstance that the defendant has failed to make application might, of itself, be regarded by a trial Judge as evidence of the fact there was a substantial probability of the application succeeding.

In the case at bar, the trial judge said:

> The plaintiff is entitled to an order for specific performance, and that order will go. In the alternative, the plaintiff is entitled to damages in the sum of $200,000 which I find is the present value of the land.

The judge overlooked the fact of the purchase price of $53,000. Therefore, the correct figure would be $147,000.

In my opinion, the appellant is entitled to a declaration that the contract between the parties mentioned above is a binding contract in accordance with its terms, including the implied term that the respondent will seek subdivision approval. The appellant is further entitled to an order that the respondent make and pursue a bona fide application as may be necessary to obtain registration of the approved plan of subdivision, including registration of the approved plan with

the Registrar of the North Alberta Land Registration District if approval is obtained. Such application shall be at the expense of the respondent and shall be made within sixty days following delivery of this judgment, or such extended period as may be ordered by a judge of the Trial Division of the Supreme Court of Alberta in Chambers. In the event that the respondent does not make such application within the time stated, or does not pursue such application with due diligence, the appellant shall be entitled to damages for loss of its bargain in an amount of $147,000. Upon the application for subdivision being successfully made and completed, including registration of the approved plan, the remaining provisions of the agreement, concerning the actual sale and purchase of the land, shall be specifically performed and carried into effect. The date of closing, date of adjustments, and any other matters incidental to closing the transaction shall be as ordered by a judge of the Trial Division of the Supreme Court of Alberta in Chambers. In the event that the respondent makes and pursues a bona fide application as aforesaid, and such application is rejected, then the appellant's claim for specific performance of the provisions concerning sale and purchase stands dismissed, as does the claim for damages in the alternative, and the caveat filed by the appellant shall be discharged. Until that time, the caveat may be maintained.

I would allow the appeal, set aside the judgment of the Appellate Division and substitute therefore an order as aforementioned.

The appellant should have its costs throughout.

Judgment accordingly.

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