Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada, [1995] 2 S.C.R. 187

Supreme Court Reports

Supreme Court of Canada
Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.
1995: March 1 / 1995: May 4.
File No.: 23914.

[1995] 2 S.C.R. 187 | [1995] 2 R.C.S. 187 | [1995] S.C.J. No. 37 | [1995] A.C.S. no 37

The Royal Bank of Canada, Doane Raymond Limited, Receiver and Manager of Pegasus Helicopters Incorporated, and Peat Marwick Thorne Inc., Trustee of the Estate of the Bankrupt, Pegasus Helicopters Incorporated, appellants; v. Mitsui & Co. (Canada) Ltd., respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Case Summary

Conditional sales — Leases — Options to purchase — Lessee having option to purchase helicopters for reasonable fair market value at end of lease — Leases not registered under Conditional Sales Act — Secured creditor appointing receiver for property after lessee defaulted on loan — Lessor claiming right to possession of helicopters pursuant to leases — Whether leases conditional sales — Whether leases had to be registered under Act — Conditional Sales Act, R.S.N.S. 1989, c. 84, s. 2(1)(b)(ii).

Pegasus leased two helicopters from Mitsui under two lease agreements. Under the leases it had the option to purchase the helicopters for reasonable fair market value on the expiry of the lease or any renewal thereof if it was in compliance with all its lease obligations. It had to give the lessor at least 120 days' notice in writing if it wished to exercise the option, and then would have 30 days in which to agree to the reasonable fair market value price as established by the lessor. The leases were not registered under the Conditional Sales Act. Under s. 2(1)(b)(ii) of the Act "conditional sale" means "any contract for the hiring of goods by which it is agreed that the hirer shall become, or have the option of becoming, the owner of the goods upon full compliance with the terms of the contract". When Pegasus defaulted on bank loans secured by a fixed and floating charge debenture, the bank appointed a receiver for the property. Mitsui, seeking priority, applied for a declaration that the leases were not conditional sales contracts and that it was entitled to possession of the helicopters pursuant to them. The chambers judge held the leases to be conditional sales contracts that had to be registered under the Conditional Sales Act and dismissed the application. The Court of Appeal by a majority judgment reversed this decision.

Held : The appeal should be allowed.

All leases containing an option to purchase fall within the scope of s. 2(1)(b)(ii) of the Conditional Sales Act. The Act applies not only to options which are to be exercised for a nominal sum, but also to options which are to be exercised at the fair market value of the leased goods. The leases in this case fall within the scope of s. 2(1)(b)(ii) of the Act, provided the purchase option they contain is truly an "option". The purchase option is not a right of pre-emption, or right of first refusal. The terms of the clause gave the lessee on signing the leases

the unilateral right to compel the lessor to sell. The two-step process whereby the lessee is to give the lessor notice at least 120 days prior to the expiry of the lease or lease renewal and again after the lessor values the helicopters does not fail to qualify as an option. The giving of the initial notice and the valuation of the helicopters are conditions precedent to the exercise of the option. The option could only be exercised by the lessee giving its written assent to the valuation performed by the lessor pursuant to the terms of the clause.

The conditions contained in the purchase option clause are simply conditions precedent to the exercise of the option, and not conditions precedent to the option per se. The parties had previously agreed that the option exercise price was to be the "reasonable fair market value" of the helicopters, which is not uncertain. The price is not subject to further negotiation, and is not an "agreement to agree". The law recognizes that agreements to purchase property in the future at a "reasonable price" or at "fair market value" are valid and enforceable. 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. The lessor here would be under a duty to act in good faith to take all reasonable steps to complete the valuation in order to allow the option to be exercised if the lessee chose.

Each of the leases in this appeal contains an option to purchase at fair market value and falls within the scope of the Conditional Sales Act. Since the lessor failed to register these leases as required by the Act, its reservation of title is void against the appellants.

Cases Cited

Approved: Ramsey v. Pioneer Machinery Co. (1981), 37 C.B.R. (N.S.) 193; Re Nishi Industries (1978), 28 C.B.R. (N.S.) 261; referred to: Mason v. Lindsay (1902), 4 O.L.R. 365; Canadian Long Island Petroleums Ltd. v. Irving Industries (Irving Wire Products Division) Ltd., [1975] 2 S.C.R. 715; Sudbrook Trading Estate Ltd. v. Eggleton, [1983] 1 A.C. 444; Roots v. Carey (1914), 49 S.C.R. 211; Shackleton v. Hayes, [1954] 4 D.L.R. 81; Talbot v. Talbot, [1968] 1 Ch. 1; Empress Towers Ltd. v. Bank of Nova Scotia (1990), 73 D.L.R. (4th) 400; Dynamic Transport Ltd. v. O.K. Detailing Ltd., [1978] 2 S.C.R. 1072.

Statutes and Regulations Cited

Conditional Sales Act, R.S.N.S. 1989, c. 84, s. 2(1)(b)(ii). Instalment Payment Contracts Act, R.S.N.S. 1989, c. 230.

Authors Cited

Conference of Commissioners on Uniformity of Legislation in Canada (1921), 6 Proceedings of the Canadian Bar Association 338.
Cuming, R. C. C. "True Leases and Security Leases under Canadian Personal Property Security Acts" (1983), 7 Can. Bus. L.J. 251.
La Forest, G. V. "Filing under the Conditional Sales Act: Is It Notice to Subsequent Purchasers?" (1958), 36 Can. Bar Rev. 387.
Perell, Paul M. "Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land" (1991), 70 Can. Bar Rev. 1.

Ziegel, Jacob S. "Uniformity of Legislation in Canada: The Conditional Sales Experience" (1961), 39 Can. Bar Rev. 165.

APPEAL from a judgment of the Nova Scotia Court of Appeal (1993), 108 D.L.R. (4th) 342, 22 C.B.R. (3d) 95, 125 N.S.R. (2d) 297, 349 A.P.R. 297, reversing a decision of Cacchione J. dismissing the respondent's application for a declaration that certain leases were not conditional sales contracts. Appeal allowed.

Edward A. Gores and Paul C. Martin, for the appellants. George W. MacDonald, Q.C., and Harvey L. Morrison, for the respondent.

Solicitors for the appellants: Metcalf & Company, Halifax. Solicitors for the respondent: McInnes Cooper & Robertson, Halifax.

The judgment of the Court was delivered by

MAJOR J.

I. Facts

1 The appellants are respectively the secured creditor, receiver and trustee in bankruptcy of Pegasus Helicopters Incorporated ("Pegasus"), which leased two helicopters from the respondent Mitsui & Co. (Canada) Ltd. ("Mitsui") under two lease agreements ("leases") dated May 26, 1992.

2 Under clause 9 of the leases, the lessee did not acquire any right or title to the aircraft except the right to use them in accordance with the terms of the lease. Clause 32 gave the lessee the option to purchase the helicopters for reasonable fair market value. It provided:

> PURCHASE OPTION
>
> Lessee, if in compliance with all of its Lease obligations as to any helicopter, shall have the option to purchase said helicopter in its then condition, on the expiration of the term or any renewal under this lease agreement. Exercise of this option shall be by notification to Lessor in writing at least one hundred and twenty (120) days prior to the lease (or lease extension) expiration or this option shall cease. If this option is exercised, the purchase price shall be the reasonable fair market value of the helicopter as established by Lessor. In the event Lessee does not agree to such established price in writing within thirty (30) days of such notification, this option shall cease and neither party shall have any further obligation under this Section.

3 The leases were not registered under the Conditional Sales Act, R.S.N.S. 1989, c. 84, and the respondent was not registered under the Instalment Payment Contracts Act, R.S.N.S. 1989, c. 230.

4 The appellant Royal Bank is the holder of a fixed and floating charge debenture given by Pegasus to secure loans made by the Bank to Pegasus. Pegasus defaulted on the loans and the Royal Bank pursuant to the debenture appointed Doane Raymond Limited receiver of the property.

5 The respondent, seeking priority, made an application for a declaration that the leases were not conditional sales contracts under the Conditional Sales Act and that it was entitled to possession of the helicopters in accordance with the provisions of the leases. The chambers judge held the leases to be conditional sales contracts that had to be registered under the Act and dismissed the application. The Court of Appeal by a majority judgment disagreed and held that the agreements were true leases and not conditional sales contracts: (1993), 108 D.L.R. (4th) 342, 22 C.B.R. (3d) 95, 125 N.S.R. (2d) 297, 349 A.P.R. 297.

II. Legislation

Conditional Sales Act

2 (1) In this Act,

...

(b) "conditional sale" means

(i) any contract for the sale of goods under which possession is or is to be delivered to the buyer and the property in the goods is to vest in him at a subsequent time upon payment of the whole or part of the price or the performance of any other condition, or

(ii) any contract for the hiring of goods by which it is agreed that the hirer shall become, or have the option of becoming, the owner of the goods upon full compliance with the terms of the contract;

III. Judgments

Supreme Court of Nova Scotia

6 The chambers judge held that the leases gave Pegasus the option of becoming the owner of the helicopters at the expiration of the lease term. The terms of clause 32 gave the lessee the unilateral right to compel the lessor to sell, and hence gave the lessee the option of becoming the owner. He declared the two leases were conditional sales contracts within the meaning of both the Conditional Sales Act and the Instalment Payment Contracts Act, and dismissed the respondent's application.

Nova Scotia Court of Appeal

Freeman J.A. for the majority

7 Freeman J.A. held that upon fulfilling all of the obligations under the leases, it was not intended that Pegasus become the owner of the helicopters automatically or for nominal consideration. The respondent remained the owner of the helicopters throughout. Pegasus simply had the right to require the respondent to establish a reasonable fair market value at

which it was prepared to sell the helicopters. Pegasus was at liberty to reject that price. There was no mechanism for determining a price binding on both parties. He held that the overriding intention of the parties was to create a lease and not a contract of conditional sale. Clause 32 created a right of pre-emption which was not the kind of arrangement that the legislature intended to be covered by s. 2(1)(b)(ii) of the Act. The respondent was entitled to the helicopters free of any claims of the appellants.

Jones J.A. (dissenting)

8 Jones J.A. held that s. 2(1)(b)(ii) of the Act applied to leases containing an option to purchase. The leases contained an option to purchase because clause 32 gave the lessee the unilateral right to compel the lessor to sell. It was open to the parties to set the terms by which the price would be fixed, and the courts would enforce the "fair market value" provision contained in clause 32.

IV. Issue

1. Whether the leases are conditional sales agreements as that term is defined in s. 2(1)(b)(ii) of the Conditional Sales Act.

V. Analysis

Introduction

9 This appeal raises the interpretation of s. 2(1)(b)(ii) of the Conditional Sales Act, which defines a "conditional sale" for the purposes of the Act. Whether the leases fall within the scope of that definition is the issue in dispute. If the leases are conditional sale agreements under the definition in the Act, then the respondent loses its priority because of its failure to register. Conversely if the leases are leases only then the respondent is entitled to possession and priority. Two questions arise: does a lease with an option to purchase at fair market value fall within the ambit of s. 2(1)(b)(ii) the Act; and is clause 32 a true option?

The Conditional Sales Act

10 A conditional sale agreement is a contract where the parties agree that while the purchaser takes possession, the title will not pass until the purchase price has been paid. In order to protect its title, the vendor must register the conditional sale agreement in a public registry within the prescribed time.

11 In Canada, the Conference of Commissioners on Uniformity of Legislation adopted a uniform Conditional Sales Act in 1922. Nova Scotia adopted this Act in 1930. The registration requirements in the Act were intended to protect third parties from being "misled into dealing with the goods or ... extend[ing] credit to the conditional buyer on the strength of his ostensible ownership, by requiring registration of the agreement" (Jacob S. Ziegel, "Uniformity of Legislation in Canada: The Conditional Sales Experience" (1961), 39 Can. Bar Rev. 165, at p. 207). The effect of the Act was that unregistered agreements which reserved title in the vendor were void against subsequent purchasers, mortgagees and certain creditors (G.V. La Forest, "Filing under the Conditional Sales Act: Is It Notice to Subsequent Purchasers?" (1958), 36 Can. Bar Rev. 387, at p. 396).

12 The Act by its terms is applicable to leases which contain an option to purchase. This is different from the more modern Personal Property Security legislation currently enacted in many of the provinces. That legislation is based on Article 9 of the American Uniform Commercial Code, and deals with concepts such as "security interest" and "security agreement" which are foreign to the Conditional Sales Act. The issue of whether a lease is intended by way of security or whether it is in substance a security agreement arises under Personal Property Security legislation. Cases decided under Personal Property Security legislation have no application to the case at bar as this appeal turns on the provisions of the somewhat antiquated Conditional Sales Act.

The Scope of the Conditional Sales Act

13 There are three types of agreements which fall within the scope of s. 2(1)(b) of the Act. The first are "true" conditional sales agreements, where the purchaser agrees to pay the vendor instalments over a period of time, and the vendor retains title until all such payments have been made. It is clear from the outset that unless the purchaser defaults, title will be transferred to the purchaser at the end of the term.

14 The second type of agreement covered by the Act is a lease-option agreement, where the option is for nominal consideration; it is plain from the terms of the lease that the option will be exercised, and that the "lease" payments are in reality going to pay for the goods. When this type of lease-option agreement is initially executed, the parties intend that the goods will be transferred to the "lessee". These agreements have been referred to as disguised conditional sales agreements and fall within the scope of the Act.

15 It appears that the inclusion of the lease-option agreement within s. 2(1)(b)(ii) was an express attempt by the Commissioners drafting the Uniform Conditional Sales Act to ensure that disguised conditional sales contracts were covered by the Act. The Commissioners, in drafting the Uniform Act, intended to reverse the effect of earlier decisions such as Mason v. Lindsay (1902), 4 O.L.R. 365 (Div. Ct.), which held that the Act could not apply to a lease where the lessee merely had the option of becoming the owner, but where he was not legally obliged to do so, even though the parties may well have intended that the "lessee" become the eventual owner at the end of the "lease". The broad definition of "conditional sale" in s. 2(1)(b)(ii) of the Act ensures that parties cannot avoid the registration requirements simply by changing the form of the conditional sales contract to look like a lease.

16 The third type of agreement covered by the Act is a "true" lease-option agreement. This type of agreement is not a disguised conditional sales contract. The rental payments are made strictly for the use of the goods rather than being instalment payments towards the eventual purchase of the leased goods. The option amount at the end of the lease is for fair market value, and not for some nominal sum.

17 The leases in the present case fall within the third category, which the majority in the Court of Appeal held did not fall within the scope of the Act.

18 The wording and history of the Act demonstrate that any lease containing an option to purchase falls within the scope of s. 2(1)(b)(ii) of the Act. The Act itself does not make any distinctions between options that are to be exercised at a nominal amount and those that are to be exercised at fair market value. All leases containing an option to purchase fall within the

scope of the Act. This conclusion is bolstered by looking at the history of the section. The original version of s. 2(1)(b) provided, in part:

> ... any contract for the hiring of goods by which the hirer contracts to pay as compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the hirer shall become, or have the option of becoming, the owner of the goods upon full compliance with the terms of the contract; [Emphasis added.]
>
> (Conference of Commissioners on Uniformity of Legislation in Canada (1921), 6 Proceedings of the Canadian Bar Association 338.)

This was not the final version because the Commissioners deleted the underlined words, thereby declining to follow the American model, and confirming that the Act was intended to apply to all lease-option agreements, and not just those which were disguised conditional sales contracts. This interpretation is supported by the commentary of R. C. C. Cuming in "True Leases and Security Leases under Canadian Personal Property Security Acts" (1983), 7 Can. Bus. L.J. 251. Professor Cuming noted that the drafters of the conditional sales legislation faced the challenge of characterizing leases. The drafters included in the legislation a "detailed description of those leases which were to be treated as conditional sales contracts for the purposes of the legislation" (p. 259). He explained the effect of s. 2(1)(b)(ii) of the Act as follows at p. 260:

> Accordingly, all leases with purchase options were deemed conditional sales contracts. All leases without options and without provisions for vesting ownership in the lessee were outside the scope of the Act.
>
> It is clear that the drafters of this legislation were not employing a purely conceptual approach when determining what types of leases were to be regulated by conditional sales legislation. A lease under which the lessee, without more, becomes the owner of the chattels upon compliance with the terms of the contract is, no doubt, universally recognized as a sales transaction. But, the definition also includes all leases containing purchase option clauses, even those leases under which the option to purchase involves payment of a sum of money which is equal to or greater than the market value of the goods. There is no basis in the common law of bailment or in business practice for the conclusion that all leases with purchase options should be treated as instalment sales contracts. One may speculate that the definition was designed primarily to ensure that some of the more commonly encountered leases are registered in a central registry.

Professor Cuming correctly noted that the Act did not differentiate on the basis of an "economic reality" test. That is, the mere presence of a purchase option in a lease was conclusive: any lease with an option would fall within the definition of a "conditional sale" even though in economic terms it was merely a lease. The result is that the Act applies to all lease-option agreements, including agreements which specify that the option is to be exercised at fair market value.

Option to Purchase at Fair Market Value

19 The conclusion that the Act applies to the leases in this appeal is supported by Canadian jurisprudence. In Ramsey v. Pioneer Machinery Co. (1981), 37 C.B.R. (N.S.) 193 (Alta. C.A.), the bankrupt had concurrently executed a lease and an option agreement covering certain equipment. The lease and option agreements were not registered in accordance with the

provisions of the Conditional Sales Act. (The Alberta Act did not contain the same wording as the Nova Scotia Act, but the import and effect of the legislation are the same.) The option provided that if the lessee performed the terms of the lease, it would have the option of continuing to rent the equipment, or purchasing it for $9,000, which was the forecasted fair market value at the expiry of the lease.

20 Stevenson J.A. recognized that there were different types of agreements which could be covered under the Act. These included the typical conditional sales contract which binds the purchaser to buy, but the Act could also cover lease-option agreements, which were often conditional sales contracts in disguise. However, he found that the lease-option agreement in question was not a disguised conditional sales contract because it was not necessarily intended by the parties that the option would be exercised. He held that the Act applied even though it was not intended that the lessee would be bound to purchase the equipment under the lease-option agreement. The Act did not exclude a lease where the lessee had it within his power to acquire ownership; it only excluded pure leases. Thus a lease-option agreement where the option could be exercised at fair market value was held to fall within the ambit of the Act. In the result the lessor-optionor lost his right to priority for failure to register the agreement.

21 A similar approach was adopted by the British Columbia Court of Appeal in Re Nishi Industries (1978), 28 C.B.R. (N.S.) 261. There, the appellant (Canadian Acceptance Corporation) had leased two forklift trucks to Nishi Industries. The leases included a right to purchase the equipment at the end of the term for its fair market value. That fair market value could not be less than 25 percent of the original purchase price that the lessor had to pay for the forklift trucks. Hence Nishi had the option of becoming the owner of the trucks upon payment of the fair market value for the trucks, which was anticipated to be a substantial sum of money. The Court of Appeal recognized that the wide definition of "conditional sale" is sufficient to transform a chattel lease into a conditional sales contract. As long as the lessee had the option of becoming the owner, the lease-option agreement fell within the ambit of the Act. In Re Nishi, it was found that the lessee had the option of becoming the owner upon executing the lease. Hence, the agreement was a conditional sales contract even though the option was to be exercised at fair market value. The appellant lost the right to repossess the trucks for failure to register the agreements.

22 In my opinion these cases were decided correctly and lead to the conclusion that the Act was intended to encompass all lease agreements where the lessee-optionee is given the option of becoming the owner of the leased goods. The Act applies not only to options which are to be exercised for a nominal sum, but also to options which are to be exercised at the fair market value of the leased goods. The leases here fall within the scope of s. 2(1)(b)(ii) of the Act, provided the option in clause 32 is truly an "option".

Options and Rights of Pre-emption

23 The meaning of an option to purchase was considered in Canadian Long Island Petroleums Ltd. v. Irving Industries (Irving Wire Products Division) Ltd., [1975] 2 S.C.R. 715, per Martland J. at pp. 731-32:

> An option gives to the optionee, at the time it is granted, a right, which he may exercise in the future, to compel the optionor to convey to him the optioned property....

> In other words, the essence of an option to purchase is that, forthwith upon the granting of the option, the optionee upon the occurrence of certain events solely within his control can compel a conveyance of the property to him.

In that case, it was held that the agreement in question created a right of pre-emption and not an option to purchase. The difference between an option and a right of pre-emption is that an option gives the optionee the unilateral right to exercise the option and thereby require the optionor to sell the subject-matter of the option upon pre-arranged terms. A right of pre-emption, or right of first refusal, does not give the grantee the unilateral power to compel the grantor to sell the property in question. Instead, the grantor has the sole power to decide whether to make an offer. It is only at that point that the grantee (or lessee) is given the opportunity of purchasing the property. A right of first refusal is a commitment by the grantor to give the grantee the first chance to purchase should the grantor decide to sell.

24 Clause 32 is not a right of first refusal, or right of pre-emption. The respondent did not have the right to decide whether or not it was going to give Pegasus the first chance to purchase the helicopters. The choice was with Pegasus, by virtue of the leases, to decide whether it wished to purchase the helicopters. It alone had the ability to compel the sale of the helicopters. As stated by the Chambers judge, the terms of clause 32 gave the lessee on signing the leases the unilateral right to compel the lessor to sell. I respectfully cannot agree with the Court of Appeal's conclusion that clause 32 was merely a right of pre-emption.

25 The respondent argued that the wording of clause 32 is such that the lessee appears to be obligated to "exercise" its option twice: once upon giving notice at least 120 days prior to the expiration of the lease or lease renewal, and once again after the respondent values the helicopters. Since an option is intended to provide an exclusive period for acceptance of a definite offer, the two-step process, it is argued, on its face fails to qualify as an option. I disagree.

26 Paul M. Perell, in "Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land" (1991), 70 Can. Bar Rev. 1, at p. 3, lists the three principal features of an option, all of which are present in clause 32:

1. exclusivity and irrevocability of the offer to sell within the time period specified in the option;
2. specification of how the contract of sale may be created by the option holder; and
3. obligation of the parties to enter into a contract of sale if the option is exercised.

27 An option contract is an antecedent contract because it precedes the contract of purchase and sale that will result if the opportunity provided by the option is "seized upon" or exercised. Once an option is exercised, the parties discharge their obligations under the option contract by entering into the contract of purchase and sale. The exercise of an option is the election to buy property on the terms specified in the option agreement, and is the equivalent of accepting the irrevocable offer made in the option. One cannot exercise the same option twice. The exercise of the option must mean the acceptance of the offer. That acceptance must be unconditional, must only be made once, and must be made in accordance with the terms of the option.

Characterization of the Option in Clause 32

28 The exercise of an option must lead to a binding contract of purchase and sale. The mechanism of converting an option to purchase into a contract of purchase and sale has been described by Lord Diplock in Sudbrook Trading Estate Ltd. v. Eggleton, [1983] 1 A.C. 444 (H.L.), at pp. 476-77:

> The option clause cannot be classified as a mere "agreement to make an agreement." There are not any terms left to be agreed between the parties. In modern terminology, it is to be classified as a unilateral or "if" contract. Although it creates from the outset a right on the part of the lessees, which they will be entitled, but not bound, to exercise against the lessors at a future date, it does not give rise to any legal obligations on the part of either party unless and until the lessees give notice in writing to the lessors, within the stipulated period, of their desire to purchase the freehold reversion to the lease. The giving of such notice, however, converts the "if" contract into a synallagmatic or bilateral contract, which creates mutual legal rights and obligations on the part of both lessors and lessees.

The "giving of notice" in Sudbrook Trading was all that was required to exercise the option. Once the option was exercised, no further notice or consent was needed, as a fully enforceable contract of purchase and sale arose. To draw the analogy to the case on appeal, an enforceable contract of purchase and sale would have been concluded upon the lessee exercising its option (i.e. accepting the offer) within 30 days of the lessor performing its valuation of the helicopters as required under clause 32. The giving of the initial notice at least 120 days prior to the expiry of the lease or lease renewal could not qualify as an "exercise" of the option, regardless of the wording used in clause 32 itself. If Pegasus wanted to exercise its option, it could only have done so after the respondent had determined the "reasonable fair market value" of the helicopters. Hence the giving of the initial notice and the valuation of the helicopters are conditions precedent to the exercise of the option. The option could only be exercised by the lessee giving its written assent to the valuation performed by the lessor pursuant to the terms of clause 32.

29 This conclusion is consistent with earlier decisions of this Court. In Roots v. Carey (1914), 49 S.C.R. 211, Duff J. explained that an acceptance of the offer in an option (i.e. the exercise of an option), in order to be effective, must be an unconditional acceptance in the sense that the offeree must declare his "present intention" to enter into a contract with the offeror on the terms of the offer. In the present case, the giving of the initial notice could not constitute the acceptance of the offer because the lessee, in giving notice, would not be entering into a binding contract of purchase and sale. A mere indication of a potential willingness to accept an offer, but not an unconditional acceptance of an offer, cannot amount to the exercise of an option so as to create a binding contract of purchase and sale (Shackleton v. Hayes, [1954] 4 D.L.R. 81 (S.C.C.), at p. 90 per Cartwright J.). All that the lessee would be doing by giving the initial notice is expressing an interest in buying the helicopters. That cannot constitute an acceptance and hence cannot be an "exercise" of the option.

Conditions Precedent to the Exercise of the Option

30 Clause 32 is an option to purchase subject to three conditions precedent. First, in order to be able to exercise its option, the lessee must be in compliance with all of its lease obligations. Second, the lessee must give the lessor notice in writing at least 120 days prior to the expiry of the lease or a renewal thereof. Third, the lessor becomes obligated, at that point, to perform a

valuation of the helicopter in order to determine its reasonable fair market value. This is not an offer that is to be made by the lessor to the lessee. It is a contractual obligation undertaken by the lessor to determine the reasonable fair market value of the helicopter at the time the initial notice is given by the lessee. These three conditions are simply conditions precedent to the exercise of the option; they are not conditions precedent to the option per se (Re Nishi, supra, at p. 264).

31 The parties had previously agreed that the option exercise price was to be the "reasonable fair market value" of the helicopters. That price is not uncertain. It is not subject to further negotiation; it is not an "agreement to agree". The price has been set to be the reasonable fair market value. As noted by the British Columbia Court of Appeal in Re Nishi, an option to purchase at "fair market value" is enforceable. This is not a situation where the price or some other material term of the option has yet to be agreed upon. The law recognizes that agreements to purchase property in the future at a "reasonable price" or at "fair market value" are valid and enforceable.

32 In Talbot v. Talbot, [1968] 1 Ch. 1 (C.A.), a testator gave two of his sons the option of purchasing the farm on which they lived together "at a reasonable valuation". There was no provision in the will for the mode of valuation. However, the court held that it would itself undertake the task of valuation and direct a special inquiry as to what is a reasonable price for the farm. An option to purchase at a "fair valuation" or at a "fair price" is an option which the courts will enforce. Similarly, in Sudbrook Trading, supra, the House of Lords held that an option contained in a lease to sell land at a price to be fixed by valuers was enforceable, and that the lessee's rights could not be defeated by the lessor's refusal to appoint a valuer. The House of Lords construed this option as an option to sell at fair market value; the court could itself direct that the fair market value be established and order specific performance. An agreement to sell at fair market value is valid and enforceable. The enforceability of options at fair market value was recognized by the majority of the court in Empress Towers Ltd. v. Bank of Nova Scotia (1990), 73 D.L.R. (4th) 400 (B.C.C.A.). That case involved a commercial tenancy with an option to renew. In the course of his reasons, Lambert J.A. said that if an agreement provides that a tenant can renew at the market rental prevailing at the commencement of the renewal term, such an agreement can be enforced. The market rental can be determined on the basis of valuation and, if necessary, a court can determine the prevailing market rents, since this is an objective matter capable of discernment. An option to be exercised at "fair market value" is valid and enforceable.

33 The duty to act in good faith to comply with stipulated conditions precedent was recognized in Dynamic Transport Ltd. v. O.K. Detailing Ltd., [1978] 2 S.C.R. 1072. Dickson J. (as he then was), speaking for the Court, noted that the existence of a condition precedent does not necessarily preclude the existence of a binding agreement. Certain obligations to be performed under the contract may not be due unless and until the condition precedent is fulfilled. Thus, obligations are held "in suspense" pending the occurrence of the event constituting the condition precedent. Applying this reasoning, the lessee's right to exercise its option would be held "in suspense" until the lessor properly performed its valuation.

34 In Dynamic Transport, supra, Dickson J. also recognized that 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. This would involve the party upon whom the obligation rests to use its best efforts to fulfil the condition precedent. The lessor here would be under a duty to act in good faith to take all reasonable steps to complete the valuation in order to allow

the option to be exercised if the lessee chose. Clearly, the lessor is not in a position, by virtue of clause 32, to make any offer that it may feel is appropriate. It is contractually bound to act in good faith to determine the reasonable fair market value of the helicopters, which is the price that the parties had initially agreed would be the exercise price of the option. As clause 32 gives the lessee the unilateral right to compel the lessor to sell the helicopters at their reasonable fair market value, it is an option. The fact that it is subject to conditions precedent does not alter its nature.

35 Each of the leases in this appeal contains an option to purchase at fair market value. The leases fall within the scope of s. 2(1)(b)(ii) of the Act. The respondent failed to register these leases as required by the Act and consequently its reservation of title is void against the appellants.

36 The appeal is allowed with costs throughout.

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