Mason v. Freedman, [1958] S.C.R. 483

Supreme Court Reports

Supreme Court of Canada
Present: Kerwin C.J. and Rand, Cartwright, Martland and Judson JJ.
1958: April 30, May 1 / 1958: June 26.

[1958] S.C.R. 483

Franklin Irvine Mason (Defendant), Appellant; and Sidney Freedman (Plaintiff), Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Sale of land — Unconditional promise by vendor — Refusal of vendor's wife to bar dower — Rights of purchaser — Specific performance with compensation — Effect of clause in contract permitting rescission by vendor in case of objections to title.

One who has contracted to convey the legal title to land in fee simple cannot excuse himself from performance on the ground that he is unable to secure the necessary bar of dower from his wife. The purchaser cannot be forced to take such a title but he has the option of requiring the vendor to convey all the interest that he has without the bar of dower but with an appropriate provision for the payment into court of a sum of money out of the purchase-price as security against the claim for dower.

The usual clause in an agreement for sale entitling the vendor to treat the contract as null and void if the purchaser makes any valid objection to title "which the Vendor shall be unable or unwilling to remove and which the Purchaser will not waive" does not avail a vendor in such circumstances. It does not enable a person to repudiate a contract for a cause which he himself has brought about, nor does it enable a vendor to repudiate the contract "at his sweet will". Hurley v. Roy (1921), 50 O.L.R. 281 at 285, approved. His duty is at the very least to make a genuine effort to obtain what is necessary to carry out his contract, and if it is not established that he has made such an effort the purchaser will be entitled to specific performance.

The judgment in such circumstances should provide for a reference to ascertain the amount to be paid into court as security against the widow's claim for dower, which should not exceed one-third of the purchase-price; the interest on these moneys should be paid to the vendor during his wife's lifetime; if the wife predeceases him, the fund in court is to be paid out to the vendor; if the vendor dies before his wife, and the wife then claims her dower in possession, the purchaser will be entitled to the interest on the fund until the wife's death, and on her death the fund will go to the vendor's estate. Re Woods and Arthur (1921), 49 O.L.R. 279, approved.

APPEAL from a judgment of the Court of Appeal for Ontario [[1957] O.R. 441, 9 D.L.R. (2d) 262.], reversing a judgment of McRuer C.J.H.C. [[1956] O.R. 849, 4 D.L.R. (2d) 576.]. Appeal dismissed.

F.A. Brewin, Q.C., and L.M. Freeman, for the defendant, appellant. John J. Robinette, Q.C., and S.G.M. Grange, for the plaintiff, respondent.

Solicitors for the defendant, appellant: Freeman, Miller & Draper, Toronto. Solicitors for the plaintiff, respondent: Freedman, Cohl, Murray & Osak, Toronto.

The judgment of Kerwin C.J. and Rand, Martland and Judson JJ. was delivered by

JUDSON J.

The appellant was the owner in fee simple, free of encumbrance, of a farm in the township of Scarborough. He accepted an offer to purchase from the respondent's assignor for the sum of $136,000, of which $20,000 was to be paid in cash and the balance secured by a mortgage. At the time of closing, he asserted that he was unable to secure a bar of dower from his wife, tendered a deed without such a bar and claimed payment in accordance with the terms of the contract. The purchaser refused to close on these terms and also rejected a tender of the return of his deposit. His action for specific performance of the contract was dismissed at the trial but on appeal he was granted specific performance with compensation by providing for payment into court of a sum to be fixed by the Master to serve as security to the purchaser in case the wife's inchoate right to dower should ever become consumate. The vendor now appeals and seeks the restoration of the judgment as given at the trial and the dismissal of the action.

The contract contains the usual clause providing for requisitions on title and for the right of the vendor to declare the contract null and void if requisitions which he is "unable or unwilling" to remove are made within a stated time. The appeal turns upon the effect that is to be given to this clause, for in its absence there can be no doubt of the purchaser's right to specific performance with compensation. A vendor who has contracted to convey the legal title in fee simple cannot excuse himself from performance on the ground of inability to secure a necessary bar of dower from his wife. The purchaser cannot be forced to take such a title (Bowes v. Vaux [(1918), 43 O.L.R. 521.]), but he has the option of requiring the vendor to convey all the interest that he has, without the bar of dower, but with appropriate provision for the payment into court of a sum of money, out of the purchase-price, as security against the claim for dower. The doctrine of specific performance with compensation against a vendor who had contracted to sell an estate as his own and who had in fact only a partial interest was well settled in England by Lord Eldon's time and is clearly stated in Mortlock v. Buller [(1804), 10 Ves. 292 at 315-6, 32 E.R. 857.]. It was followed in Ontario in Kendrew v. Shewan [(1854) 4 Gr. 578.], and VanNorman v. Beaupre [(1856), 5 Gr. 599.], both of them dower cases, where specific performance was granted with an abatement in the purchase-price for lack of a bar of dower. In Skinner v. Ainsworth [(1876), 24 Gr. 148.], the order in Wilson v. Williams [(1857), 3 Jur. N.S. 810.] was followed and instead of allowing an abatement, the remedy of payment into court as security was adopted. This principle was followed in Re Woods and Arthur [(1921), 49 O.L.R. 279, 58 D.L.R. 620.], and by the Court of Appeal in the present case [[1957] O.R. 441, 9 D.L.R. (2d) 262.]. I will set out the precise from the order should take later.

To what extent is the right of the purchaser affected by the proviso just mentioned? In full it reads:

> PROVIDED the title is good and free from all encumbrances except as aforesaid and except as to any registered restrictions or covenants that run with the land providing that such are complied with. The Purchaser is not to call for the production of any title deed, abstract or other evidence of title except such as are in the possession of the Vendor. The Purchaser is to be allowed 15 days from the date of acceptance hereof to examine the title of his own expense. If within that time any valid objection to title is made in writing

> to the Vendor which the Vendor shall be unable or unwilling to remove and which the Purchaser will not waive this agreement shall, notwithstanding any intermediate acts or negotiations in respect of such objections, be null and void and the deposit shall be returned by the Vendor without interest and he and the Agent shall not be liable for any costs or damages. Save as to any valid objection so made within such time the Purchaser shall be conclusively deemed to have accepted the title of the Vendor to the real property.

This proviso does not apply to enable a person to repudiate a contract for a cause which he himself has brought about; New Zealand Shipping Company, Limited v. Société des Ateliers et Chantiers de France [[1919] A.C. 1 at 12.]. Nor does it justify a capricious or arbitrary repudiation. I am content to adopt the words of Middleton J. in Hurley v. Roy [(1921), 50 O.L.R. 281 at 285, 64 D.L.R. 375.], that the provision "was not intended to make the contract one which the vendor can repudiate at his sweet will". By signing this contract the vendor undertook to deliver a deed containing a bar of dower. He tried to excuse himself by pleading inability to obtain such a bar. His duty was, at the very least, to make a genuine effort to obtain what was necessary to carry out his contract and there can be no doubt in this case that he made no such effort. Immediately after the acceptance of the offer by the husband--and the wife was present when he signed--they both regretted the bargain. They consulted a solicitor the same night and a little later the wife sought independent advice. The evidence of what they said and did is reviewed in detail in the reasons for judgment of the learned Chief Justice of the High Court [[1956] O.R. 849, 4 D.L.R. (2d) 576.] and of the Court of Appeal [[1957] O.R. 441, 9 D.L.R. (2d) 262.], and repetition here is unnecessary. The learned Chief Justice concluded that the husband was willing to carry out the contract as far as he could without the concurrence of his wife and that the wife, acting upon independent legal advice, had refused to bar dower as a result of her own conclusion and determination arrived at independently of her husband. The opinion of the Court of Appeal was that husband and wife were acting in concert to secure better terms or to avoid the contract if they could not get them. It seems to me to make no difference which view of their conduct one takes. The plain uncontradicted fact is that the husband made no genuine attempt to obtain a bar of dower. He cannot take advantage of his own default and use the clause to escape his obligation. His duty was, as stated by Esten V.C. in Kendrew v. Shewan, supra, at p. 580, "to ascertain, bona fide, whether his wife was willing to bar her dower, and to induce her by any reasonable sacrifice on his own part to do so".

I do not intend to review in detail the many cases in which the application of the clause has been discussed. The problem has arisen in a variety of situations. A vendor contracts to convey in fee simple and when he has no title to the mineral rights (In re Jackson and Haden's Contract [[1906] 1 Ch. 412.]); or when he needs the concurrence of his trustee and has contracted without reasonable assurance that it will be forthcoming (In re Des Reaux and Setchfield's Contract [[1926] Ch. 178.]); or when he is owner in joint tenancy with his wife (Hurley v. Roy, supra; Dubensky et al. v. Labadie [[1944] O.R. 500, [1944] 4 D.L.R. 253, varied [1945] O.R. 430, [1945] 3 D.L.R. 262.]); or when there is a representation of ability to give a non-existent right of way, as appurtenant to the lands contracted to be sold (Lavine v. Independent Builders Ltd. [[1932] O.R. 669, [1932] 4 D.L.R. 569.]); or when the vendor is unable to obtain a bar of dower (Shuter v. Patten [(1921), 51 O.L.R. 428, 67 D.L.R. 577.]); or where there is a deficiency in the land contracted to be sold (Bowes v. Vaux, supra). In all these cases the purchaser was able to obtain specific performance with compensation.

When a vendor seeks to avoid a contract under this clause, which is obviously introduced for his relief, his conduct and his reasons for seeking to escape his obligations are matters of interest to the Court. There is a general principle to be deduced from the cases and it is the one

I have already stated incidentally. A vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner. This measure of his duty is the minimum standard that may be expected of him, and there are cases where a cause which might otherwise be valid as justifying rescission will not be available to him if he has acted recklessly in entering into a contract to convey more than he is able.

I would not characterize the conduct of the vendor in this case in entering into this contract as reckless, but his attempted rescission was arbitrary and capricious and there was complete and deliberate failure on his part to do what an ordinarily prudent man having regard to his contractual obligations would have done. I doubt whether it is possible to formulate in the abstract and apart from the actual conditions of a case the precise limits within, which the clause may enable a vendor to rescind. In Louch v. Pape Avenue Land Company Limited [[1928] S.C.R. 518, [1928] 3 D.L.R. 620.], where the vendor's right to rescind was upheld, the judge in Weekly Court stated that there was no suggestion of bad faith on the part of the vendor. In Ashburner v. Sewell [[1891] 3 Ch. 405.], which was followed in the Louch case, the existence of a latent right of way unknown to the vendor justified a rescission. The facts of the present case remove it entirely from the scope of these decisions.

I would dismiss the appeal with costs. The reference to the Master should provide that in ascertaining the amount to be paid into court, he should not exceed one-third of the purchase-price. The interest on these moneys will be paid to the vendor as long as his wife is alive. If the wife predeceases him, the fund in court is to be paid out to the vendor. If the vendor dies before his wife and the wife then claims her dower in possession, the purchaser will be entitled to the interest on the fund until the death of the wife and then the fund will go to the estate of the vendor.

CARTWRIGHT J.

For the reasons given by my brother Judson I agree with his conclusion that a decree of specific performance should be granted on the terms which he proposes, unless the appellant is entitled to treat the agreement as null and void under the proviso which is quoted in full in the reasons of my brother.

I agree also that this proviso does not entitle the appellant to repudiate the contract capriciously and that it is a condition of its application that the objection to title which the purchaser will not waive must be one which the vendor is genuinely unable or unwilling to remove. In the case at bar what was relied upon by the appellant was a genuine inability to obtain a bar of dower from his wife; and it is unnecessary to consider in what circumstances the proviso would apply to an objection which a vendor was able but, for sufficient reasons, was unwilling to remove.

In my opinion the fact that a wife's inchoate right of dower in lands is outstanding is a matter of title and not a mere matter of conveyance; it was so held by Roach J.A., speaking for the Court of Appeal, in Ungerman et at. v. Maroni [[1956] O.W.N. 650 at 652.], and the same view is expressed, in the case at bar, by McRuer C.J.H.C. [[1956] O.R. 849, 4 D.L.R. (2d) 576.] and by MacKay J.A. who delivered the unanimous judgment of the Court of Appeal [[1957] O.R. 441, 9 D.L.R. (2d) 262.], although the latter was of opinion that, as a matter of construction, the proviso contemplated only such objections to title as would appear in the course of the usual searches made by a purchaser's solicitor.

The question to be decided is whether the appellant was, as he alleged, genuinely unable to obtain a bar of dower from his wife. If he was, in my opinion, the appeal should be allowed.

The learned Chief Justice of the High Court who had the advantage of seeing and hearing the witnesses has expressly absolved the appellant of the charge of bad faith and, after a careful consideration of the evidence, it is my view that that finding should not be disturbed. It is, however, clear from the appellant's own evidence that from the time when he and his wife first learned from the solicitor, whom they consulted at the wife's suggestion, that she was not compellable to bar her dower, the appellant made no effort to persuade her to do so. The learned Chief Justice has found that the appellant's wife was acting on independent advice in refusing to bar her dower and that "she was the sort of woman who would make up her own mind"; but neither expressly, nor, I think, by necessary implication has he found that a reasonable attempt at persuasion made by the appellant would have been unsuccessful. On all the evidence, I find myself unable to say that the Court of Appeal were wrong in reaching the conclusion that it had not been shown that the appellant was genuinely unable to obtain the bar of dower.

For these reasons I concur in the disposition of the appeal proposed by my brother Judson.

Appeal dismissed with costs.
