Metropolitan Trust Co. of Canada et al. v. Pressure Concrete Services Ltd. et al., [1973] 3 O.R. 629

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HIGH COURT OF JUSTICE

HOLLAND, J.

23RD MAY 1973

[1973] 3 O.R. 629

Case Summary

Sale of land — Time of the essence — Date for closing passing without repudiation or tender — Vendor unable to complete on closing date — Whether vendor entitled to repudiate contract.

A vendor is not entitled to repudiate a contract for the sale of land where time is of the essence when the date for closing has passed without repudiation or tender and when the vendor cannot show that he was ready, willing and able to complete on the closing date. When the closing date passes with neither party able to close, the proper course for the vendor to adopt is to give reasonable notice of his intention to repudiate.

[Atkinson v. Ferland *(1908), 12 O.W.R. 1251*; Iwanczuk v. Center Square Development Ltd., *[1967] 1 O.R. 447*, *61 D.L.R. (2d) 193*; Rice v. Knight *(1920), 18 O.W.N. 393*; Lucifora and Lucifora v. Walfish, *[1955] O.W.N. 898*; Pagebar Properties Ltd. v. Derby Investment Holdings Ltd., [1973] 1 All E.R. 65, folld]

Sale of land — Conditions — Contract conditional upon mortgagee consenting to new head lease — Purchaser entitled to waive conditions — Vendor required to attempt to obtain consent but not so doing — Whether condition a true condition precedent — Whether vendor in breach of contract.

Contracts — Conditions — Sale of land — Contract conditional upon mortgagee consenting to new head lease — Purchaser entitled to waive conditions — Vendor required to attempt to obtain consent but not so doing — Whether condition a true condition precedent — Whether vendor in breach of contract.

Where a contract for the sale of land contains as a condition the obtaining of the consent of a mortgagee to a new head lease, the condition will be construed as a true condition precedent even though the purchaser is given the right under the contract to waive conditions. Such a condition is incapable of waiver. However, even though the condition is treated as a condition precedent, if the contract requires the vendor to attempt to obtain the consent and the vendor fails to use his best efforts in that regard, the vendor will be liable in damages to the purchaser.

[Davies v. Russell et al., *[1971] 2 O.R. 699*, *19 D.L.R. (3d) 23*; New Zealand Shipping Co. v. Societe des Ateliers et Chantiers de France, [1919] A.C. 1; Commissioner of Agricultural Loans v. Irwin, *[1940] O.R. 489*, *[1940] 4 D.L.R.*

338; affd [1942] S.C.R. 196, [1942] 2 D.L.R. 81; Mason v. Freedman, [1958] S.C.R. 483, 14 D.L.R. (2d) 529; Selkirk v. Romar Investments, Ltd., [1963] 3 All E.R. 994; Wroth et al. v. Tyler, [1973] 2 W.L.R. 405, folld; Franko et al. v. Olszewski et al. (1947), 25 N.W. 2d 593; Watson Bros. Transp. Co., Inc. v. Jaffa et al. (1944), 143 F. 2d 340; Renner et al. v. Crisman et al. (1964), 127 N.W. 2d 717, distd; Turney et al. v. Zhilka, [1959] S.C.R. 578, 18 D.L.R. (2d) 447; Barnett v. Harrison et al., [1971] 3 O.R. 821, 22 D.L.R. (3d) 29; affd [1973] 2 O.R. 176, 33 D.L.R. (3d) 272; O'Reilly et al. v. Marketers Diversified Inc., [1969] S.C.R. 741, 6 D.L.R. (3d) 631, 69 W.W.R. 251; Dacon Construction Ltd. v. Karkoulis et al., [1964] 2 O.R. 139, 44 D.L.R. (2d) 403; Jackson v. Executors of Farwell Estate, [1961] O.R. 322, 27 D.L.R. (2d) 275; Gilchrist v. Commodore (1931), 40 O.W.N. 577; Aldercrest Developments Ltd. v. Hunter et al., [1970] 2 O.R. 562, 11 D.L.R. (3d) 439, refd to]

ACTION for specific performance of an agreement of purchase and sale or, in the alternative, for damages.

S.G. Fisher, for plaintiffs.

R.N. Starr, Q.C., for defendants.

HOLLAND, J.

This is an action for specific performance of an agreement of purchase and sale between the Montreal Trust Company, as trustee, purchaser, and Pressure Concrete Services Limited, vendor, of certain real property described in the agreement of purchase and sale, which agreement is dated July 22, 1970. The action is, in the alternative, for damages for breach of the said agreement.

It will be helpful if I list the various companies, partnerships and individuals involved in the transactions or as witnesses. Following the full name of the company, partnership or individual, I will indicate in brackets the short name, if any, that I will use in these reasons for judgment. I will also briefly describe the various companies, partnerships and individuals.

(1) METROPOLITAN TRUST COMPANY OF CANADA:
(Metropolitan Trust), trustee referred to as the purchaser in the agreement of purchase and sale, ex. 7, above referred to, and also agent for the defendant Pressure Concrete Services Limited, pursuant to ex. 63.

(2) CANADA FONDS III LEHNDORFF, VERMOEGENSVERWALTUNG G. m.b. H. AND CO.:

(Canada Fonds), a limited partnership under West German law and cestui que trust of Metropolitan Trust.

(3) III LEHNDORFF (CANADA) LIMITED:
(III Lehndorff), nominee of Canada Fonds to hold real property as trustee.

(4) PRESSURE CONCRETE SERVICES LIMITED:
(Pressure Concrete), owner and vendor of the real property.

(5) ASSOCIATED FREEZERS OF CANADA LIMITED:
(Associated Freezers), proposed tenant on lease back and actual tenant at time of transaction with lease assigned to Capital Funds (I.A.C.) Ontario Limited, (second mortgagee) as additional security.

(6) BRITISH MORTGAGE AND TRUST CO.:

(British Mortgage), first mortgagee with interest subsequently taken over by Victoria and Grey Trust Company.

(7) CAPITAL FUNDS (I.A.C. ONTARIO):
(I.A.C.), second mortgagee.

(8) DOMINION STORES LIMITED:
(Dominion Stores), sublessee of part of the premises.

(9) A. & P. FOOD STORES LIMITED:
(A. & P.), sublessee of part of the premises.

(10) MILLER, THOMPSON, BARRISTERS, ETC.:
(Miller, Thomson), solicitors for A. & P.

(11) LOUIS STRAUSS:
(Strauss), solicitor for the purchaser.

(12) BARRY SMITH:
(Smith), solicitor in the office of Louis Strauss.

(13) WILLIAM CUTTELL, Q.C.:
(Cuttell), solicitor for the vendor.

(14) JOSEPH ROBICHAUD:
(Robichaud), president, and beneficial owner of vendor and president and majority shareholder of Associated Freezers.

(15) LOUIS MATUKAS:
(Matukas), at material time supervisor of international division of Metropolitan Trust and instructing client to the solicitors for the purchaser.

(16) GARDINER, ROBERTS, BARRISTERS, ETC.:
(Gardiner, Roberts), solicitors for I.A.C.

(17) EAST LAKE EQUIPMENT COMPANY LIMITED:
(East Lake), lessor under lease dated April 15, 1965, of subject property with Dominion Stores and A. & P. as sublessees.

(18) ROBCO DEVELOPMENTS:
(Robco), a partnership and the original mortgagors under the second mortgage to I.A.C., which partnership was dissolved by Court order with the property in question being transferred to Pressure Concrete.

(19) MURRAY AND COMPANY LIMITED:
(Murrary and Company), shown as agent for the vendor under agreement of purchase and sale, ex. 7.

(20) WILLIAM TREMBLAY:
(Tremblay), allegedly an employee of Murray and Company.

(21) ROYAL BANK OF CANADA:
(Royal Bank), a debenture holder in the amount of $200,000, with debenture registered against title and also Robichaud's banker.

Pressure Concrete was at all material times the owner of real property known municipally as 3691 Weston Rd. upon which was erected a freezer plant. Robichaud was at all material times the president and beneficial owner of Pressure Concrete. Some time prior to July 8, 1970, Tremblay, who was familiar with the holdings of Robichaud and who had acted on prior occasions as a mortgage broker for Robichaud in his transactions, approached Robichaud with the suggestion that, in order to provide additional capital, Robichaud consider a sale of the property with a lease back. Robichaud was interested and, as a result, Tremblay entered into negotiations with Metropolitan Trust, who were at the time trustees for certain German interests and in particular Canada Fonds. As a result of these negotiations a memorandum of agreement was entered into, ex. 1, dated July 8, 1970, whereby Pressure Concrete agreed to sell to the client of Metropolitan Trust the above referred to real property at a price of

$1,830,000. The purchase price was made up of cash of $600,000, and the assumption of a first mortgage to British Mortgage and a second mortgage to I.A.C. The agreement further provided:

> Purchaser will enter into a lease upon completion of the sale with Associated Freezers of Canada Limited, for a period of 20 years at an annual rental of Two Hundred and Five Thousand, Three Hundred and Twenty ($205,320) Dollars calculated to yield the Purchaser nine and one-half percent (9 1/2%) on the amount of cash invested, in addition to principal and interest payments under the first and second mortgage loans.

The principle and interest payments under the first and second mortgage loans amounted to $148,320, giving a cash return of $57,000 on a cash investment of $600,000. The agreement provided for a cost of living increment on the cash return and further provided in part as follows:

> The Offer to Purchase will be ready for signature by July 17, 1970 and the transaction will close as soon as all the legal documentation including the drafting of the head lease are completed, but not later than July 31, 1970.

The words "but not later than July 31, 1970" were inserted by Robichaud after the memorandum has been executed by Matukas on behalf of Metropolitan Trust. This closing date was, however, accepted by Matukas. It is to be noted that the memorandum of agreement contemplated the preparation of an offer to purchase. Following execution of the memorandum of agreement Strauss was instructed to act on behalf of the purchaser. He testified that Canada Fonds was in the business of investing in businesses across Canada and at the material time Metropolitan Trust managed the affairs of Canada Fonds. He received instructions from Matukas on behalf of Metropolitan Trust and drafted the agreement of purchase and sale envisaged by ex. 1.

Certain paragraphs of the agreement of purchase and sale, ex. 7, are most important and are set out hereunder:

3. THIS OFFER by the Purchaser to purchase the Subject Property is conditional upon each of the following conditions, which conditions, having been inserted for the benefit of the Purchaser, may be waived by it at any time by notice to the Vendor. In the event that each of the said conditions has not been fulfilled and complied with within the time specified for fulfilment and compliance, or has not been waived by the Purchaser, then this Agreement shall be null and void, the deposit money shall forthwith be returned to the purchaser without deduction, and neither party shall have any further rights or obligations hereunder:

. . . . .

(e) The Vendor shall deliver to the Purchaser within ten (10) days of its execution of this Agreement, the consent of the mortgagee of the Second Mortgage to the surrender of the existing Lease of the Subject Property made the 1st, day of June, 1966, between Joseph Y. Robichaud, George L. Roberts and the Vendor, as lessors, and Associated Freezers of Canada Limited, as lessee, which consent shall be conditioned only upon the completion of the purchase of the subject property by the Purchaser.

. . . . .

5. If each of the conditions as set out in Paragraph 3 hereof shall have been fulfilled and complied with within the time limited for the satisfaction thereof, then, subject to the conditions set out in Paragraph 7 hereof, this Agreement of Purchase and Sale shall be completed on or before the 14th day of August 1970, (which day is herein referred to as the "Closing Date").

. . . . .

7. It IS A CONDITION of the closing of the sale and purchase of the Subject Property that a new Lease (hereinafter referred to as the "Head Lease") of the Subject Property be entered into by the Purchaser, as

landlord, and Associated Freezers of Canada Limited, as tenant, which Head Lease shall have effect from and after the Closing Date. It is a condition to the execution of the Head Lease by the Purchaser that the Vendor deliver to the Purchaser on or before the Closing Date a subordination of existing Leases to Dominion Stores Limited and A. & P. Food Stores Limited, in favour of the Head Lease.

. . . . .

15. At such time as the conditions contained in Paragraph 3 hereof have been fulfilled or complied with or have been waived by the Purchaser, this Agreement shall constitute a binding contract of purchase and sale.

It is important to note that I.A.C. approval to the new head lease was required because I.A.C. held an assignment of the existing lease. The existing lease was dated June 1, 1966, and appears as ex. 54. It was between Robichaud and a George L. Roberts and Pressure Concrete Services Limited, carrying on business under the firm name and style of Robco Developments, as lessors and Associated Freezers of Canada Limited as lessees. The partnership of Robco Developments was apparently dissolved by Court order and the property in question became the property of Pressure Concrete.

The agreement of purchase and sale, as drafted, was submitted by Strauss to his client, from his client to the vendor and was returned by Cuttell, the solicitor for the vendor, by letter dated July 21, 1970, ex. 5. A redraft, dated July 22, 1970, ex. 7, was executed by Metropolitan Trust, purchaser, Pressure Concrete, vendor, and Associated Freezers, the proposed tenant, on that date. Strauss also prepared the new head lease. Smith, a solicitor in his office, looked after the balance of the conveyancing in connection with the transaction. This head lease, ex. 23B, was dated August 14, 1970, and was forwarded to Cuttell on August 13, 1970. Cuttell actually received the head lease on August 13, 1970, a day before the closing date set out in the agreement of purchase and sale, ex. 7. Following receipt of this head lease, Cuttell telephoned Strauss and pointed out certain typographical errors and at this time or on the following Monday, which was August 17th made two objections to the lease:

(1) The cost of living price index was fixed as of June, see ex. 23B at the bottom of p. 3 and the top of p. 4, item 3.02.3. Cuttell took the position that it should be the month prior to closing and as such, assuming that the transaction would close in August, the month picked should have been July. Strauss explained that the July figures were not released and agreed that should the July index be published, then those figures could be substituted. According to Strauss, Cuttell appeared to accept this explanation, and

(2) there was an objection to cl. 7.09, which appears on pp. 25 and 26 of ex. 23B. The subclauses of 7.09 required deposits for repairs in the last five years of the lease. There was nothing in the agreement of purchase and sale, ex. 7, dealing with such deposits. Strauss took the position that this was a usual clause and pointed out the provisions of para. 7(xi) of the agreement, appearing on p. 10 of the agreement, which provides as follows: "The Head Lease shall contain such other provisions as the landlord may reasonably require, and which are not inconsistent with the foregoing." Strauss suggested that any objection should be discussed with Robichaud who might well discuss the matter with Matukas direct. Strauss testified that Cuttell appeared to accept this suggestion and further, that he never heard further from Cuttell concerning these terms of the proposed head lease.

The closing date was extended from August 14th to August 21st and this extension was confirmed by letter from Cuttell to Strauss, ex. 25, dated August 14, 1970 -- "all other terms of the contract to remain unchanged". The time was further extended by agreement between the solicitors to August 27th. This extension was confirmed by letter from Smith to Cuttell dated August 20, 1970, ex. 32, "time to continue of the essence". No further extension of time was agreed upon.

Smith wrote to Cuttell on August 26, 1970, ex. 35, as follows:

We understand from our telephone conversation of to-day's date that you will not be in a position to complete this transaction on August 27, 1970. We have been instructed by our client to advise you that unless this transaction is completed on or before September 1, 1970, then rent under the Lease will accrue as of that date and all adjustments on closing will be made as of September 1, 1970.

Smith wrote further to Cuttell on August 31, 1970, ex. 42, as follows:

> Further to our conversation of today's date, we confirm that you advised us that you were not in a position to complete this transaction today.
> The purchaser agrees to extend the closing of this transaction to September 1, 1970 to permit you to obtain the answers to the various requisitions raised by us with all other provisions of the Agreement of Purchase and Sale to remain the same and time to continue to be of the essence.

Smith wrote further to Cuttell on September 1, 1970, ex. 44, as follows:

> Our client advises us that your client's agent and representative, Mr. William Tremblay, has confirmed that Mr. Robichaud does not want to complete this transaction.
> We have previously advised you that our client has allocated the funds to complete this transaction and has had the funds available since the 14th day of August, 1970, the original Closing Date as set in the Agreement of Purchase and Sale. Our client has at all times been ready, willing and able to complete this transaction, and is still prepared to do so in accordance with the provisions of the Agreement of Purchase and Sale.

By letter dated September 2, 1970, ex. 45, Cuttell wrote to Strauss, as follows:

> The time for closing this transaction was extended by mutual agreement from the 14th of August, 1970 to the 21st of August, 1970 and then to the 27th of August, 1970. No further extension was agreed upon.
>
> The extensions were necessitated by your failure to produce the draft lease until the afternoon of the 13th of August. Since that date we had discussions by telephone concerning it, in which I stated that my client was not content with the draft and I asked for certain changes to be made.
> No lease was tendered upon me prior to or on the extended closing date, nor was any balance of money due offered. My client therefore exercised its right to terminate the agreement.

Smith wrote to Cuttell on September 2, 1970, ex. 46, advising that the purchaser expected to complete the transaction on September 4th and that he would attend at Cuttell's office on that date for the purpose of making tender. Smith outlined, in that letter, the documents that he expected to receive from Cuttell on closing. Tender was duly made on behalf of the purchaser on September 4th and at the time of tender art 7.09 of the head lease had been deleted. This was pursuant to the instructions of Matukas given to Smith on behalf of the purchaser, which instructions were given around September 2nd.

East Lake was a lessee under a lease dated June 9, 1964, between Robichaud, George L. Roberts and Pressure Concrete Services Limited as lessor, with a further lease dated April 1, 1965, between the same parties covering the same property. There was deposited on title a statutory declaration of a bailiff that he had delivered a notice terminating the lease for non-payment of rent. This lease had been assigned to British Mortgage and Trust Company and I.A.C. as additional security to the mortgages held by those companies. A. & P. and Dominion Stores were sublessees under the East Lake lease.

Strauss testified that he had instructions from his client to waive the requirement of the subordination clauses in connection with A. & P. and Dominion Stores, but did not advise Cuttell in case Cuttell could obtain subordination agreements. He said he was never advised by Cuttell that Cuttell had been unable to obtain a subordination agreement from A. & P. or that Cuttell had obtained a subordination agreement from Dominion Stores.

Smith wrote a letter of requisitions dated August 10, 1970, ex. 16, and delivered this letter personally to Cuttell. They went over the requisitions together. The only requisition that appeared to pose any problem so far as Cuttell could see was requisition No. 21 which required a quitclaim deed from East Lake the former tenant. Smith reduced his requirements in this connection by letter of August 11, 1970, ex. 18. There were discussions between Smith and Cuttell from time to time. Smith testified that Cuttell did not at any time discuss the provisions of the draft lease with him and at no time was there any indication that the contract was going to be repudiated by the vendor until Smith received advice from Tremblay that Robichaud was not prepared to complete.

Matukas testified on behalf of the plaintiffs that the funds required to complete the transaction are still available and that the transaction was particularly attractive because the lease was a net lease and as such was free of any management problems. The transaction was also attractive because not only did it yield in excess of 9% on a cash basis, but the transaction also provided a valuable property fee and clear of encumbrance at the end of 20 years with the expectation of capital appreciation.

Cuttell testified that he was at all times anxious to get the transaction moving along quickly. He telephoned Strauss on July 9th with a request that the agreement of purchase and sale be prepared. Strauss allegedly told him that he could not have it for some time and Strauss became somewhat annoyed. It was not until a few days before July 22nd that he received the first draft of the agreement of purchase and sale. This was returned, as set out above, by his letter of July 21st and the agreement, ex. 7, was finally executed on July 22nd. He did not receive the lease until August 13th and immediately sent the lease out to I.A.C. in Montreal. The requirements of I.A.C. approval are set out in a letter of July 22, 1970, to Robco Developments, ex. 6. Such requirements were, in part, as follows: "... and in particular we must be satisfied that the original borrower and guarantors have not been relieved of their liability toward this Company ...".

George L. Roberts was one of the original lessors and from the evidence it is clear that his consent to any continuing liability on his part could not be obtained.

Cuttell in considering the necessity of obtaining the consent of George L. Roberts, may not have considered the provisions of the mortgage between Robco Developments and I.A.C. and particularly the provisions of cl. 9 appearing on pp. 8 and 9 of the mortgage which is marked as sch. E to the agreement of purchase and sale, ex. 7, which clause reads as follows:

> IX. The rights of the Mortgagee hereunder shall not in any way be impaired nor shall the liabilities of the Mortgagors hereunder be in any way reduced or discharged by the taking of any other security of any nature or kind whatsoever either at the time of execution of this mortgage or at any time hereafter. The Mortgagee may from time to time release or discharge any of the property hereby mortgaged or charged or any other security or any surety for the moneys hereby secured for such consideration as the Mortgagee shall think proper or without any or any sufficient consideration if the Mortgagee shall see fit and without being accountable for the value thereof or for any moneys except those actually received by the Mortgagee, and no such release or discharge shall release, diminish or prejudice this security or any other security as against any property remaining undischarged or release or prejudice any covenant contained herein or in any other security document or release any surety or guarantee for the indebtedness hereby secured or any other person whomsoever, and no security shall be deemed to be released or discharged save by a formal release or discharge executed by the Mortgagee, its successors or assigns.

Cuttell had two telephone conversations with Harry Roberts, a solicitor with Gardiner, Roberts. In the first conversation Harry Roberts advised that he had been instructed by I.A.C. but had not yet received the documents and advised that his fees would have to be paid by Cuttell's client. There is some conflict in the evidence concerning whether this advice was transmitted to Robichaud. However, I find, as a fact, that Cuttell did not transmit this information to Robichaud but that he did advise Harry Roberts that such an arrangement would probably be in order. There was a second telephone conversation around the first or second of September, initiated by Harry Roberts, when he advised that he had now received the documents and was advised in turn by Cuttell that the transaction was off. Cuttell was originally reasonably confident that I.A.C. would consent to the new head lease and this confidence is expressed in his letter to Strauss of July 13, 1970, ex. 3, which reads in part: "I have already been assured by telephone that such consent will be granted." This confidence was not shaken until he saw the letter to Robco Developments from I.A.C. dated July 22, 1970, ex. 6. Following receipt of this letter he advised his client of the contents of the letter, and, presumably, as a result of this advice Tremblay wrote to I.A.C., ex. 20, on August 12, 1970, with the answer that any decision of I.A.C. would be deferred until the documents had been considered. This is set out in the letter of August 19, 1970, to Murray and Company.

I think it is clear from the evidence of Cuttell that he was really not ready to close on August 27th not only because he was lacking the consent of I.A.C. but also because many of the documents required on closing had not been prepared, for example, a debenture dated June 8, 1970, from Pressure Concrete to Royal Bank, secured the

sum of $200,000 and was registered against title. Cuttell had had no communication with Royal Bank at all concerning the discharge of this debenture. No draft of the statement of adjustments had even been attempted. There is no doubt that Cuttell did not advise Smith of his inability to obtain the subordination agreement from A. & P. In fact he was not advised of the refusal of A. & P. to enter into a subordination agreement until after the transaction had been repudiated by his client. This lack of advice of the position of A. & P., however, gave to the purchaser no opportunity of waiving this condition of the agreement.

Cuttell sent a subordination agreement to Dominion Stores by letter dated August 17, 1970, ex. 39. This agreement was duly executed and returned by Dominion Stores by letter dated August 26, 1970, ex. 40. Cuttell, at no time, advised the solicitors for the purchaser that this agreement had been executed.

At the same time that the main transaction was in progress there was another transaction in progress that was coupled with the agreement of purchase and sale. Robichaud was clearly short of money and expected the transaction originally to close on July 31, 1970. He was frustrated in this expectation and when it appeared that this closing date could not be met he entered into discussions with Tremblay, as a result of which Metropolitan Trust deposited in a special escrow account at Royal Bank the sum of $250,000. The terms of this escrow agreement are set out in ex. 61, dated July 22, 1970. The terms are, in part, as follows:

> These funds are deposited on the condition that the offer to purchase entered into on July 22nd, 1970, between the Metropolitan Trust Company, as trustee and Pressure Concrete Services Limited will be completed on or prior to August 14th, 1970. Upon receipt of notice from Metropolitan Trust to the effect that the said transaction has been completed, the said sum of $250,000.00 is to be paid to Pressure Concrete Services Limited. Interest accruing on this account is to be paid out to Pressure Concrete Services Limited in any event.
> These funds are deposited with you on the express understanding that they are subject to recall by Metropolitan Trust at any time if the conditions contained in the Purchase Agreement have not been complied with or waived by the purchaser.

As a result of this deposit Royal Bank loaned to Robichaud the sum of $100,000. The $250,000 was withdrawn on September 8, 1970, after the sale fell through and ex. 62 deals with the advice from Metropolitan Trust to Pressure Concrete of such withdrawal. It is to be noted that Metropolitan Trust charged Pressure Concrete 9 1/2%, for a total of $3,122.88, during the period of the deposit.

Robichaud testified that he entered into a commission agreement on behalf of Pressure Concrete with Metropolitan Trust dated July 2, 1970, ex. 63, wherein Metropolitan Trust was described as agent and whereby in consideration of the agent's services in obtaining an executed agreement of purchase and sale between the vendor (Pressure Concrete) and the Metropolitan Trust Company as trustees, the vendor agrees to pay the agent a commission of $54,900, payable only if, as and when the transaction has been completed. I must say that I was shocked and surprised when this agreement was produced, since it seemed to me that at one and the same time Metropolitan Trust was acting as trustee for certain German interests as purchaser and at the same time was acting as agent for substantial consideration for the vendor. No evidence was led as to the knowledge of the purchaser of this commission agreement. However, I was assured by counsel on behalf of the plaintiffs that the contents of this commission agreement had been made know to the cestui que trust of Metropolitan Trust.

Robichaud testified that the date of closing was of the utmost importance to him. He needed funds to complete another transaction. The original date of July 31, 1970, set out in the memorandum of agreement, ex. 1, went by and a new date of August 14th was set in the agreement of purchase and sale, ex. 7. This date was extended by agreement and, presumably with his consent, on two occasions to August 27, 1970. By August 28, 1970, Robichaud was fed up with the delay and over that weekend made up his mind not to go through with the transaction. On Monday, August 31, 1970, he so advised Tremblay and Cuttell. Robichaud was particularly concerned with the provisions of the new draft head lease, paras. 7.09.1 through 7.09.6. As indicated above these clauses provided for a cash deposit in the last five years of the lease against repairs. Robichaud was of the view that this type of clause would result, or could well result, in five separate law suits. He complained concerning the draft lease to Tremblay on many occasions, so he said. Initially, this term of the lease did not seem to him particularly important because he thought it would be changed. When the lease was not changed it became a considerable irritant.

The evidence of some of the witnesses is in conflict with the evidence of others and some of the testimony of a particular witness is in conflict with evidence that that witness may have given earlier on examination for discovery. It is necessary for me to resolve these conflicts by making certain findings of fact.

Strauss wrote a letter to Cuttell dated August 27, 1970, ex. 37, above referred to, which read in part, as follows: "I have attempted to reach you by telephone both yesterday and today but have received no response to my calls." I find as a fact that such is not the case. I accept the evidence of Cuttell and his secretary Madge Myall in this regard that no such telephone calls were made.

Cuttell testified that he complained frequently to Smith concerning the terms of the draft head lease following its receipt and was continually asking for a new draft head lease. I do not accept this evidence. This evidence is not supported by any of the correspondence. He forwarded the draft lease as submitted to A. & P., Dominion Stores and I.A.C. and never advised A. & P., Dominion Stores or I.A.C. that the draft was not acceptable. Certainly, the clauses may not have been acceptable to his client, and in this connection I accept the evidence of Robichaud that he complained to Tremblay concerning the clauses, but I do not accept the evidence of Cuttell that he continued to complain practically on a daily basis concerning these clauses. My finding is, to some extent, supported by ex. 60, which is a memorandum of Cuttell in his handwriting dealing with a telephone call with Smith on August 26, 1970. The only advice that he noted was that no word had come from I.A.C. and there was no complaint noted as to the lack of a redrafted lease.

There is really little conflict generally in the evidence and I accept the evidence of Robichaud, except that I prefer his evidence given on discovery that he was not advised by Cuttell as to any request concerning the payment of fees by the solicitors for I.A.C. to his evidence given later at trial that he was so advised by Cuttell.

It may be helpful at this point to summarize the main facts, which facts are really uncontradicted:

(1) The parties entered into an agreement of purchase and sale dated July 22, 1970, with the transaction to close on August 14th.

(2) The time for closing was extended from August 14th to August 21st and again to August 27th.

(3) Neither party was ready to close on August 27th and that date went by without repudiation or tender.

(4) Robichaud on behalf of the vendor repudiated the contract on August 31st.

(5) The solicitors for the purchaser fixed a date for closing, being September 4th and on that date tendered all documents necessary to complete the transaction and this tender was refused.

(6) I.A.C., whose consent was required to the surrender of the existing lease did not, in fact, consent, although I.A.C. had submitted the necessary documents for an opinion to their solicitors. The solicitors did not receive those documents until about the time of the repudiation by Robichaud of the agreement.

Time was not made of the essence by the terms of the agreement, although one of the letters, extending the date for closing from Smith to Cuttell, ex. 32, referred to time continuing to be of the essence. Even though time was not made of the essence by the terms of the agreement, I am of the view that the nature of the transaction and the conduct of the parties themselves was such as to show that time was in fact of the essence of the agreement. It was certainly vitally important to the vendor to close the transaction as quickly as possible and this is shown not only by the original closing date, set in ex. 1 as July 31st, but also by fact that he had to negotiate a special agreement with Metropolitan Trust whereby $250,000 would be placed in an escrow account so that he could receive a further advance of $100,000 and this because the contract was not closed on August 14th: see Atkinson v. Ferland *(1908), 12 O.W.R. 1251*.

What then is the legal position when time being of the essence the date for closing goes by without repudiation or tender, and did the expiration of the time in these circumstances give the right to Robichaud to repudiate the contract on August 31st. It seems clear that time being of the essence does not mean that if either party fails to complete the transaction the agreement is at an end. The vendor in this case, if he desired to take advantage of time being of the essence of the agreement, must show that he was ready, desirous, prompt and eager to carry out

the agreement on the closing date. The vendor was not ready to close on August 27th for many reasons, quite apart from the lack of consent of I.A.C. to the new head lease. The time having gone by with neither party being in a position to close, the vendor could not give immediate notice of repudiation but should have given reasonable notice of his intention to repudiate should the conditions referred to in the contract not to be complied with or waived: see Iwanczuk v. Center Square Developments Ltd., *[1967] 1 O.R. 447*, *61 D.L.R. (2d) 193*, and the authorities therein referred to at 452 O.R., p. 198 D.L.R. A party who is himself in default cannot rely upon time being of the essence to terminate the agreement: Rice v. Knight *(1920), 18 O.W.N. 393*; Lucifora and Lucifora v. Walfish, *[1955] O.W.N. 898*; Pagebar Properties Ltd. v. Derby Investment Holdings Ltd., [1973] 1 All E.R. 65. I therefore conclude that Robichaud, on behalf of the vendor, was not entitled to repudiate the agreement on the basis of time being of the essence of the agreement on August 31, 1970.

The position taken by counsel for the vendor on his motion for non-suit, at the end of the plaintiff's case, and in his argument, in addition to an argument based on time being of the essence, is that the obligations under the contract, on both sides, depended upon the consent of I.A.C. to the new head lease and that this consent was a true condition precedent. This type of condition was dealt with by Mr. Justice Judson in the Supreme Court of Canada in Turney et al. v. Zhilka, *[1959] S.C.R. 578*, *18 D.L.R. (2d) 447*. In that case the condition was the annexation of the property to the Village of Streetsville and the approval of a plan by the Village Council for subdivision. Mr. Justice Judson, at p. 450 S.C.R., pp. 583-4 D.L.R., said this:

> This is a true condition precedent -- an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side.

There is support for this argument, in my view, in the wording of the agreement of purchase and sale, ex. 7, and particularly para. 15, quoted above.

I am of the opinion that the consent of I.A.C. was a true condition precedent and, to use the words of Mr. Justice Judson, "[it was] an external condition upon which the existence of the obligation depends". I must bear in mind, however, that the agreement of purchase and sale imposed a positive obligation on the vendor to obtain the consent of the mortgagee of the second mortgage to the surrender of the existing lease and as such consent to the terms of the new head lease. In Turney et al. v. Zhilka no obligation was imposed on either party to seek the annexation of the property to the Village of Streetsville or to seek approval of the plan by the Village Council for subdivision. In addition, in the Turney case there was no provision for waiver of any condition. This provision as to waiver, in my view, does not assist the purchaser since I do not see how the purchaser could waive, or purport to waive, this particular condition. The purchaser could, however, of course waive the subordination agreement of A. & P. and Dominion Stores. The question remains: Did the vendor, in the circumstances of this case, have the right to repudiate the contract because this condition (I.A.C.) had not been fulfilled? The Turney et al. v. Zhilka decision has been followed recently in Ontario in Barnett v. Harrison et al., *[1971] 3 O.R. 821*, *22 D.L.R. (3d) 29*, upheld by an unreported decision in the Court of Appeal on January 17, 1973 [since reported *[1973] 2 O.R. 176*, *33 D.L.R. (3d) 272*]. In that case again, the conditions referred to were true conditions precedent, the non-fulfillment of which rendered the agreement null and void. The obligation in that case to obtain compliance with the conditions rested on the purchaser, with the vendors agreeing and undertaking to give all help and cooperation required by the purchaser. Various proposals and applications were made to the municipal authorities but none of the projects were accepted. The purchaser purported to waive the condition and the Court was of the view that since the conditions were true conditions precedent there was no right of waiver that could be applied. The Turney et al. v. Zhilka decision was further considered by the Supreme Court of Canada in O'Reilly et al. v. Marketers Diversified Inc., *[1969] S.C.R. 741*, *6 D.L.R (3d) 631*, *69 W.W.R. 251*. Mr. Justice Judson in that case, at p. 744 S.C.R., p. 633 D.L.R., indicated that the result might have been different had the performance of the condition precedent been prevented by the act of the vendor in that case: see also Dacon Construction Ltd. v. Karkoulis et al., *[1964] 2 O.R. 139*, *44 D.L.R. (2d) 403*; Jackson v. Executors of Farwell Estate, *[1961] O.R. 322*, *27 D.L.R. (2d) 275*.

In Gilchrist v. Commodore *(1931), 40 O.W.N. 577*, offers for the purchase of land were subject to the condition of the offeror being able to obtain a permit to erect a dairy building on the property. Subsequent to the date set for closing the plaintiff, by his solicitor, wrote to the defendant's solicitor, that he had been unable to obtain a permit and demanding return of the deposit. There was a counterclaim for specific performance or damages. The trial Judge found in favour of the defence and decreed specific performance. Mr. Justice Mulock, with whom Mr. Justice

Grant agreed, concurred with the finding of the trial Judge holding that the plaintiff's failure to obtain a permit was wholly owing to his own neglect and default and upheld the decree of specific performance. Mr. Justice Riddell, apparently, wrote a judgment (which is not recorded) in which he reached the same conclusion.

In Aldercrest Developments Ltd. v. Hunter et al., *[1970] 2 O.R. 562*, *11 D.L.R. (3d) 439*, a contract for the sale of land was subject to the obtaining of the necessary planning board consents to the transfer of the land under the Planning Act. The decision of the Court was delivered by Mr. Justice Laskin and reads, in part, as follows (at p. 568 O.R., p. 445 D.L.R.):

> A writ had been issued on December 27, 1966, but without the required consent to a severance the Court was powerless to grant specific performance. The trial Judge held, however, that if he was wrong in his view of the need of strict compliance with the conditions precedent then it would be his opinion that the defendants "were in breach of an implied condition of the agreement to proceed with the application for consent to land severance or to give authority to the plaintiff so to proceed"; and they could not by their own default defeat the plaintiff's right to damages.
>
> I do not regard the present case as governed in its result by Turney and Turney v. Zhilka, *[1959] S.C.R. 578*, *18 D.L.R. (2d) 447*. The principle in that case is applicable here in that neither party promised the other to procure the consent to severance, but the similarity ends at this point. Having regard to the legislation which became effective on May 3, 1965, and to the correspondence between the solicitors, I am of the opinion that the defendants undertook to seek consent to severance, apart entirely from any implication in the agreement to that effect, and that they cannot rely on their failure to do so as a ground for avoiding the contract. They had, through their solicitor, treated it as subsisting up to the time they suddenly purported to cancel it. The plaintiff had been exploring the necessary consents and approvals under the other conditions, but these depended ultimately on the consent to severance which was the key to any successful conclusion of the transaction. Counsel for the vendors contended that consent to severance would not have been granted and hence the plaintiff suffered no damage. This contention was based on the indications in correspondence with the municipal authorities that they preferred to have the entire Hunter farm become the subject of a registered plan of subdivision. This did not appear clearly until after the repudiation and then only in the letter of January 24, 1967, conveying the resolution of the Planning Board to that effect. It was not the authority responsible for giving consent to severance. In the absence of a formal application to the Committee of Adjustment (or, if in fact there was no such committee, then to the Minister) by Hunter, or on the written authority of Hunter, made before the purported cancellation, it is mere speculation to conclude that severance consent would inevitably have been withheld.

See also Davies v. Russell et al., *[1971] 2 O.R. 699*, *19 D.L.R. (3d) 23*.

In New Zealand Shipping Co. v. Societe des Ateliers et Chantiers de France, [1919] A.C. 1, it was laid down that a stipulation in a contract that it shall be void in a certain event is to be construed according to its natural meaning subject to the principle of law that a party shall not take advantage of his own wrong, or of an event brought about by his own act or omission. This proposition was quoted with approval by Chief Justice rose in Commissioner of Agricultural Loans v. Irwin, *[1940] O.R. 489*, *[1940] 4 D.L.R. 338*; affirmed *[1942] S.C.R. 196*, *[1942] 2 D.L.R. 81*. See also to the same effect Mason v. Freedman, *[1958] S.C.R. 483*, *14 D.L.R. (2d) 529*. The exercise of power of rescission must not be arbitrary or capricious or unreasonable: see Selkirk v. Romar Investments, Ltd., [1963] 3 All E.R. 994, and particularly Viscount Radcliffe at p. 999:

> It has frequently been analysed, and frequently applied, by Chancery judges, and, although the epithets that describe the vendor's offending action have shown some variety of expression, they are all related to the same underlying idea, and their variety is only due to the fact that, as each case is decided according to the whole context of its circumstances and the course of conduct of the vendor, one may illustrate more vividly than another some particular aspect of that idea. Thus, it has been said that a vendor, in seeking to rescind, must not act arbitrarily, or capriciously, or unreasonably. Much less can he act in bad faith. He may not use the power of rescission to get out of a sale "brevi manu", since by so doing he makes a nullity of the whole elaborate and protracted transaction.

To further simplify the facts of this particular case it seems to me that it is as if A agreed to sell to B, with the transaction to close within, say, 30 days and which agreement was subject to a true condition precedent. A then, prior to the expiration of the 30 days, unilaterally repudiates the contract because the condition has not been complied with in spite of the fact that the obligation to obtain compliance was an obligation which rested upon him. It is true that some efforts were made by Cuttell and the purchaser to obtain the consent of I.A.C. but these efforts were really minimal and when the documents were finally received by the solicitor for I.A.C. he was advised, before he even had an opportunity of considering the documents, that the transaction was at an end. It seems to me that Cuttell could well have taken the documents across the street to Mr. Roberts rather than waiting for mail delivery from Montreal and it seems to me also that Robichaud could not unilaterally repudiate the contract in the circumstances. In my view, he was under an obligation to fix a new date for completion for a reasonable time ahead and in the meantime use his best efforts to obtain the consent of I.A.C. to the new head lease and, if necessary, invite the solicitors for the purchaser to lend their assistance in obtaining the necessary consent.

I therefore come to the conclusion that when Robichaud repudiated the contract on August 21, 1970, the vendor was in breach of its obligation under para 3(e) of the agreement of purchase and sale, ex. 7, to deliver the consent of I.A.C. to the surrender of the existing lease and was in breach of an implied obligation to use its best efforts to obtain such consent. Having come to this conclusion there remains the question of remedy for the breach of these obligations. It was urged upon me that I should grant an order for specific performance. In my view, judgment for specific performance would not be appropriate in the circumstances of this case for the following reasons:

(1) The obligation to close was subject to a true condition precedent which was not performed. Any judgment for specific performance could be thwarted by the actions of I.A.C. in refusing to consent to the surrender of the existing lease. It was urged upon me that I grant specific performance under the direction of the Master of this Court and require the vendor to attempt to obtain the consent of I.A.C. and permit the purchaser to assist in obtaining such consent. Counsel for the purchaser stated that he could find no case in Canada or in England where this type of order had been made. I was referred, however, to three American authorities: Franko et al. v. Olszewski et al. (1947), 25 N.W. 2d 593; Watson Bros. Transp. Co. Inc. v. Jaffa et al. (1944), 143 F. 2d. 340; Renner et al. v. Crisman et al. (1964), 127 N.W. 2d 717. These American authorities can be distinguished on their facts. The situation was discussed by Megarry, J., in Worth et al, v. Tyler, *[1973] 2 W.L.R. 405* at p. 418, where the following appears:

It seems to me that where a third party has some rights over the property to be sold, there are at least three categories of cases. First, there are those cases where the vendor is entitled as of right to put an end to the rights of the third party, or compel his concurrence or co-operation in the sale. Second, and at the other extreme, there are cases where the vendor has no right to put an end to the third party's rights, to compel his concurrence or co-operation in the sale, and can do no more than to try to persuade him to release his rights or the concur in the sale. An example of the first category would be the vendor's right, as mortgagor, to pay off a mortgage, or his right, as a mortgagee, to obtain possession from the mortgagor. An example of the second category would be when the third party is entitled to an easement over the land.

In between those two categories there is a third category, namely, where the vendor cannot as of right secure the requisite discharge or concurrence, but if it is refused he can go to the court, which has power, upon a proper case being shown, to secure the release or concurrence.

And further at p. 419:

The modern doctrine seems to me to be stated in Fry at p. 466:

> :"As the consent of a third party is, or may be, a thing impossible to procure, a defendant who has entered into a contract to the performance of which such consent is necessary, will not, in case such consent cannot be procured, be decreed to obtain it, and thus perform an impossibility."

In my view, for the above reason alone specific performance should be refused and in addition there would also be many practical problems in closing this transaction under the supervision of the Court, for example, the fees of Gardiner, Roberts, the fees of Miller, Thomson, the A. & P. subordination agreement, and the Canadian Pacific Railway right of way agreement;

(2) there was considerable delay on the part of the solicitors for the purchaser that, at least in part, led to the feelings of frustration experienced by Robichaud, for example, the delay in the preparation of the original agreement of purchase and sale, ex. 7, the delay in sending out the letter of requisitions, which letter was sent out on the last day and the delay in sending out the draft head lease, which lease was only delivered on August 13, 1970, the day before the orginal date fixed for closing in ex. 7;

(3) the fact that Metropolitan Trust was trustee for the purchaser at the same time that it was the agent for the vendor. Although there is no allegation of fraud or improper conduct on the part of Metropolitan Trust, it does seem to me that Metropolitan Trust was put in a most difficult and really improper position and in equity specific performance should not be granted to Metropolitan Trust in the circumstances.

The plaintiff, not being entitled to specific performance, is entitled to damages for breach of the obligations undertaken by the vendor above referred to. The question remains whether the damage flowing from the failure of the vendor to perform its obligation under para. 3(e) of the agreement of purchase and sale, and to perform its implied obligation to use its best efforts to obtain the consent of I.A.C. to the surrender of the existing lease, is the same as the damage flowing from breach of an obligation to complete the transaction. It appears to me that had the vendor used its best efforts to obtain the consent of I.A.C., bearing in mind the telephone assurance that the consent would be granted, as set out in ex. 3, and the provisions of cl. 9 of the mortgage, marked as sch. E to the agreement of purchase and sale, referred to above, such would have been forthcoming. I am therefore of the opinion that the damages for the breach of the obligation to obtain the consent of I.A.C. in this case should be assessed on the same basis as if the vendor had breached its obligation to complete the transaction. There was some rather vague evidence as to damage adduced before me indicating that the property had increased in value since 1970 and there was also evidence that the solicitors for the purchaser who, presumably, would be entitled to claim for legal fees, had not submitted an account for such fees or disbursements. There is insufficient evidence before me upon which I can make an assessment of damages and the matter will therefore have to be referred to the Master to assess damages. It is necessary, however, to give the Master some direction as to the assessment, with particular reference to any claim for damages for loss of the bargain in that the value of the property has increased since 1970.

A helpful decision in this connection is Worth et al. v. Tyler, supra. In that case the defendant agreed to sell his house, where he lived with his wife, with vacant possession and completion to take place on October 31st. The vendor's wife entered on the land register a notice of her right of occupation under the English Matrimonial Homes Act, 1967. Claim was made for specific performance and damages in the alternative. The agreed evidence showed that the purchase price was $6,000, the bungalow was worth $7,500 at the date of completion and $11,500 at the date of the hearing and the question as to damages was whether the damages were limited by the rule in Bain v. Fothergill (1874), L.R. 7 H.L. 158, and if not, how were they to be assessed. The judgment was written by Megarry, J., and at pp. 412-3, the following appears:

> There is, however, an acute conflict as to the measure of damages. The primary contention of the defendant is that the damages are limited by the rule in Bain v. Fothergill (1874) L.R. 7 H.L. 158, so that the defendant need only release the deposit to the plaintiffs and pay their costs of investigating title, and is not liable to them for more than nominal damages for loss of their bargain. Is this contention sound? If Bain v. Fothergill does not apply, then the defendant accepts that damages for loss of the bargain are payable; but there is a dispute as to the computation of those damages. The defendant says that the damages must be assessed as at the date of the breach, in accordance with the normal rule; the plaintiffs say that this is a case where damages must be assessed as at the date of assessment, that is, today, if I assess the damages.

And at p. 424:

> I turn to damages. The fourth main point is whether the damages are limited to those recoverable under the rule in Bain v. Fothergill, L.R. 7 H.L. 158. The rule is conveniently stated in Williams' Contract of Sale of Land (1930), p. 128:
>
> > "Where the breach of contract is occasioned by the vendor's inability, without his own fault, to show a good title, the purchaser is entitled to recover as damages his deposit, if any, with interest, and his

> expenses incurred in connection with the agreement, but not more than nominal damages for the loss of his bargain."

What is said by Mr. Lyndon-Stanford is, quite simply, that the statutory charge in favour of the defendant's wife is a defect in title within the rule, just as much as any other charge would be, whether legal or equitable, and so the rule applies.

In Bain v. Fothergill itself, a distinction was drawn between matters of conveyancing and matters of title. Lord Hatherley said, at p. 209:

> "Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance."

Megarry, J., applied the common law principle that when a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed and assessed the damages as the difference in value from the date of the breach to the date of the judgment: see also Horsnail v. Shute (1921), 62 D.L.R. 199, *30 B.C.R. 189*, *[1921] 3 W.W.R. 270*; Day v. Singleton, [1899] 2 Ch. 320; Harvey Foods Ltd. v. Reid *(1971), 18 D.L.R. (3d) 90*, *3 N.B.R. (2d) 444*; Remer Bros. Investment Corp. v. Robin, *[1966] S.C.R. 506*.

I am of the opinion that in this case the plaintiffs are entitled as part of their damages to any increase in the value of the property from August 31, 1970, to the date of this judgment.

There will therefore be judgment for the plaintiffs with damages to be assessed by the Master on a reference. I can anticipate that there may well be problems in connection with such assessment and I will therefore retain the matter so that the Master may refer the matter back to me for further directions should such be necessary. The Master will report to me following the assessment of damages and I will then deliver judgment and deal with the question of costs.

Judgment accordingly.

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