Metropolitan Trust Co. of Canada et al. v. Pressure Concrete Services Ltd. et al., (1976), 9 O.R. (2d) 375

Ontario Reports

ONTARIO

COURT OF APPEAL

SCHROEDER, ARNUP

and MacKINNON, JJ.A.

22ND MAY 1975

(1976), 9 O.R. (2d) 375

Case Summary

Sale of land — Conditions — Contract conditional upon mortgagee consenting to new head lease — Vendor obligated to obtain consent but not doing so — Whether specific performance or damages can be granted.

Where a contract is conditional upon the obtaining of the consent of a mortgagee to a new head lease, and where the vendor fails to obtain the consent although obligated to do so under the contract, the purchaser will not be entitled to specific performance. The performance of the contract is dependent upon a third party and the failure to obtain his consent prevents the granting of a decree of specific performance even though the vendor may be liable in damages for its failure to obtain the consent.

[Wroth et al. v. Tyler, *[1973] 2 W.L.R. 405*, apld]

APPEAL from the judgment of Holland, J., *[1973] 3 O.R. 629*, *37 D.L.R. (3d) 649*, dismissing a claim for specific performance but awarding damages.

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

S.G. Fisher, for plaintiffs, respondents.

The judgment of the Court was delivered orally by

SCHROEDER, J.A.

The defendants appeal from a judgment pronounced by the Honourable Mr. Justice Holland on May 23, 1973, after trial of the action without a jury in May, 1973, whereby it was ordered and adjudged that the matter be referred to the Master at Toronto to inquire into and assess the damages sustained by the plaintiffs, and it was further ordered and adjudged that the Master should determine and include in his assessment of damages any increase in the value of the property referred to in the statement of claim from August 31, 1970, to the date of the judgment. The order also provided that the Court was reserving further directions and the question of costs until after the Master should have made his report.

The learned trial Judge has set out the material facts in his reasons for judgment fully and accurately and it is not necessary to repeat them here.

The action was brought upon a contract entered into on or about July 22, 1970, by the Metropolitan Trust Company as trustee and the defendants whereby the Metropolitan Trust Company, as trustee, agreed to purchase and the defendant, Pressure Concrete, agreed to sell certain lands and premises, known for municipal purposes as 3691 Weston Rd., as more fully described in the statement of claim.

By the terms of the contract the defendant Associated Freezers had agreed to lease from the purchaser the lands in question in accordance with the terms and conditions set out in the contract. The action was brought for a declaration that the contract was binding, valid and subsisting, for specific performance thereof, for a reference to the Master to take all necessary and consequential accounts, to order directions and inquiries, and to supervise the completion of the transaction. Alternatively, the plaintiffs claimed damages for breach of contract in the sum of $200,000.

In his judgment the learned trial Judge refused to grant specific performance, having concluded that it would not be appropriate in the circumstances to grant such relief. He held, among other things, that the obligation to close was subject to a true condition precedent which was not performed, that any judgment for specific performance could be defeated by the actions of I.A.C., the second mortgagee under a large mortgage, in refusing to consent to the surrender of the then existing lease which had been assigned to it as security for repayment of the mortgage principal and interest. It was contended before the learned trial Judge that he might grant specific performance under the direction of the Master of the Court and require the vendor to attempt to obtain the consent of I.A.C. and permit the purchaser to assist in obtaining that consent. In refusing to grant specific performance despite the vendor's obligation to obtain such consent he adopted the principle which he extracted from Fry, A Treatise on the Specific Performance of Contracts, 6th ed. (1921), at p. 466, reading as follows:

> Subsection 999. 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.

That was the real ground upon which the learned trial Judge refused to grant specific performance, stating "in my view, for the above reason alone specific performance should be refused". He then added, "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" [*[1973] 3 O.R. 629* at p. 648, *37 D.L.R. (3d) 649* at p. 668]. We do not share his view that these problems constituted any impediment to the granting of specific performance; clearly they are all practical problems which could have been worked out under the practice and procedure of the Court.

The learned trial Judge mentioned two other grounds which he took into consideration in refusing to exercise his discretion to grant the relief sought by the plaintiffs. He stated that there was considerable delay on the part of solicitors for the purchaser that at least, in part, led to the "feelings of frustration" experienced by Robichaud (the controlling shareholder of both defendants), for example, the delay in the preparation of the original agreement of purchase and sale, ex. 7, their delay in sending out their letter of requisitions, which was sent out on the last day, and their delay in sending out the draft head lease which was only delivered on August 13, 1970, the day before the original date fixed for closing.

The evidence has been reviewed at length by counsel for the appellants and we do not agree that it supports the learned Judge's findings of delay on the part of the solicitors for the purchasers. This was a contract dealing with a

very valuable piece of property, it involved many complex problems which had to be considered and dealt with by the solicitors for the purchaser, and the day fixed for closing should have been advanced far beyond the date originally mentioned which, to us, was a wholly unrealistic provision. A further ground was mentioned by the learned trial Judge in the terms following [at p. 649 O.R., p. 669 D.L.R.]. He referred to "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". In our view this point is entirely irrelevant in the particular circumstances.

The learned trial Judge granted an award of damages for breach of contract in lieu of specific performance and directed that such damages should be determined on a reference to the Master. He also gave a direction as to the measure of damages to be applied on the reference. He stated in his reasons [at p. 651 O.R., p. 671 D.L.R.]: "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." In so doing he adopted and applied the principle enunciated by Mr. Justice Megarry in Wroth et al. v. Tyler, *[1973] 2 W.L.R. 405*.

Having regard to our view that the only real and substantial ground for the refusal of the relief sought by way of specific performance was the one first stated by the learned trial Judge, namely, that performance of the contract was dependent upon the consent or action of a third party, the circumstances of this coincide with the circumstances existing in Wroth et al. v. Tyler. The learned trial Judge was therefore justified in giving such direction as to the measure of damages to be applied by the Master.

We are respectfully of the opinion that on the facts and circumstances disclosed in Wroth et al. v. Tyler, the principle there enunciated was valid and was appropriately applied in the present case.

We have been requested by counsel for the appellants to order that a certificate of lis pendens filed by the plaintiffs against the property in question should be vacated. We do not feel disposed to accede to this request on the ground that the substantial deposit paid by the plaintiff is still in the hands of the vendor's agent and, in any event, this matter is one which should be dealt with by the learned trial Judge or by the Master on the reference.

In the result, therefore, the appeal is dismissed with costs.

Appeal dismissed.

End of Document