In the Supreme Court of Alberta Appellate Division

Citation: Greschuk v. Bizon, 1976 AltaSCAD 121

Date: 19760708
Docket: 10522
Registry: Edmonton

Between:

Annie Greschuk

Appellant
(Plaintiff)

- and -

Mitchell A. Bizon

Respondent
(Defendant)

And Between:

Mitchell A. Bizon

Respondent
(Plaintiff)

- and -

Annie Greschuk

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice McDermid
The Honourable Mr. Justice Sinclair
The Honourable Mr. Justice Haddad

Reasons for Judgment of The Honourable Mr. Justice Haddad
Concurred in by The Honourable Mr. Justice McDermid
And Concurred in by The Honourable Mr. Justice Sinclair

COUNSEL:

L. L. Decore, Esq., for the Appellant.

J. A. Hustwick, Esq., for the Respondent.

REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE W. J. HADDAD

[1] Prior to the 8th day of November, 1973 the respondent Bizon became interested in the purchase of farm lands belonging to the appellant Mrs. Greschuk. Before entering into negotiations to purchase the lands he enquired of the Industrial Development Bank to ascertain the likelihood of obtaining financial assistance.

[2] On November 8, he contacted Mrs. Greschuk and they agreed upon a selling price of $15,000.00. At the same time Mrs. Greschuk announced that she would have to consult her lawyer to attend to her interests. It was Bizon's proposal that to save expense they should employ the same solicitor. On that day the two of them, accompanied by Mrs. Greschuk's husband, attended at the law offices of Mrs. Greschuk's solicitor in Edmonton where the proposed transaction was discussed. Bizon was willing and Mrs. Greschuk was anxious that Bizon make an initial deposit of $3,000.00, which would apply on account of the purchase price, the balance thereof to be paid on the 15th of December, 1973. The solicitor explained to them that as the deposit would be subject to forfeiture in the event of the inability of the purchaser to complete the transaction on the completion date it would be prudent to reduce the amount subject to forfeiture to $500.00. The parties agreed and the proposed deposit of $3,000.00 was therefore divided into two payments consisting of the sum of $500.00 to be made on November 8, and an additional sum of $2,500.00 to be made on November 12, 1973. The solicitor also induced them to extend the time for the final payment of $12,000.00 to December 31, 1973 to ensure ample time for Bizon to arrange his financing. Subject to compliance of the terms of the agreement arrived at, Mrs. Greschuk undertook to deliver up possession on that date. The solicitor testified that on two occasions at least, he reminded them of the importance of the deposit and explained that if the amount due on December 31, 1973 was not paid at that time the deposit would be subject to forfeiture. A document entitled "Offer to Purchase and Interim Agreement" was prepared by the solicitor in the form of an offer and acceptance and duly executed by the parties. The following consists of the relevant portions of the agreement in respect of the issues raised:

> "I HEREBY OFFER TO PURCHASE the above described property, on the following terms:
>
> THE PURCHASE PRICE shall be the sum of $15,000.00 payable as follows:

A CASH PAYMENT of $500.00 on November 8th, 1973 and the balance as follows:

A further cash payment of $2,500.00 on November 12th, 1973.

The balance of $12,000.00 on or before December 31st, 1973.

TAXES, Interest and rents to be adjusted as at 12 o'clock noon on the 31 day of December 1973.

POSSESSION, subject to the terms hereof being complied with, to be given on the 31 day of December 1973 subject to the rights of the present tenants, if any.

I HEREBY AGREE TO PURCHASE THE SAID PROPERTY AS IT STANDS and as an indication of my good faith in making this offer, I herewith hand you the sum of $500.00 as a deposit, on the understanding that if my offer is accepted, this deposit shall be applied on account of the agreed cash payment, and IF MY OFFER IS NOT ACCEPTED, THE FULL DEPOSIT WILL BE REFUNDED TO ME, PROVIDED HOWEVER, if my offer is accepted and I fail to execute the required conveyances and formal documents promptly when prepared, or fail to make all cash payments required; then I agree that the said deposit shall be absolutely forfeited to the owner, whereupon this agreement shall be null and void, at the owner's option.

This agreement shall enure to the benefit of and be binding upon the heirs, executors, administrators and assigns of the parties hereto, and wherever the singular is used throughout this agreement, the same shall be construed as meaning the plural where the context hereto so required.

Time shall in every respect be of the essence of this offer and agreement."

[3] The cash payment of $500.00 was duly made on November 8, 1973 upon the execution of the offer and acceptance. The deposit of $500.00 which, according to that agreement, purported to accompany the offer is represented by the cash payment of $500.00. In substance, the cash payment of $500.00 was paid as a forfeitable deposit, notwithstanding that it was tagged with the label "cash payment". This money was paid directly to Mrs. Greschuk by Bizon by cheque while they were in the solicitor's office. The cash payment of $2,500.00 to have been made on November 12, 1973 was paid to the solicitor on November 14, 1973 and placed in his trust account to await the final payment of $12,000.00 to complete the transaction. Mrs. Greschuk was without knowledge of the delay in the making of that payment and there is no evidence that she accepted it. I am of the view that receipt of that payment by the solicitor, acting in a dual capacity, was not, in the circumstances, binding upon her. The learned trial Judge also expressed the same view. In *Cavaghan v. Edwards* (1961) 2 All E.R. 477 a solicitor acted for both the vendor and purchaser in a real estate transaction and his authority to bind one client to the other was considered. At p. 480 Danckwerts, L.J. speaking for the Court said:

> "There are cases where the conflict of interest between the two parties and the position, therefore, of a solicitor may be so difficult that he could not properly do something which would bind one party to the other."

Upon receipt of the $2,500.00 by the solicitor the interests of his two clients came into conflict. It is conceivable that if Mrs. Greschuk had been informed of the delinquent payment she may have chosen to take advantage of the default to declare the agreement at an end - to the prejudice of the solicitor's other client. In view of the difficulty posed by that position Mrs. Greschuk could not be bound by the act of her solicitor in taking payment from Bizon unless she did something to approve or acquiesce in his act - and she did neither.

[4] On December 31, following a telephone enquiry by Mrs. Greschuk, the solicitor telephoned Bizon to remind him of Mrs. Greschuk's insistence that in the event of his failure to come forth with the balance of the purchase price on that day the deposit of $500.00 would be declared forfeited and his right to purchase the land would terminate. On the evening of that day Bizon paid a personal visit to the home of Mrs. Greschuk to request an extension of time within which to pay the balance but Mrs. Greschuk refused to accede to that request. On instructions received from Mrs. Greschuk on January 2, 1974, the solicitor wrote a letter to Bizon dated January 4, 1974, advising him that Mrs. Greschuk considered the agreement terminated and the deposit of $500.00 forfeited. He also asked for instructions as to the disposition of the sum of $2,500.00 held in his trust account. In fairness to the solicitor it should be acknowledged here that he then withdrew his services and thereafter each of the parties retained separate solicitors.

[5] On January 22, 1974, Bizon's solicitor tendered the balance of $12,000.00 to Mrs. Greschuk's solicitor and this money was rejected. Actions were then commenced by both parties and the two actions were consolidated for the purposes of trial. The consolidation order recites the issues as follows:

> "(a) Is Mitchell A. Bizon entitled to relief in either of the herein actions, in the form of an Order or Judgment for a specific performance of that certain Agreement for Sale allegedly entered into between the parties hereto on the 8th day of November, A.D. 1973?
>
> (b) If not, is Annie Greschuk entitled to retain the sum of $500.00 received by her as an alleged deposit on the aforementioned Agreement?"

[6] The learned trial Judge pointed out that Mrs. Greschuk based her case on Bizon's default in making the final payment of $12,000.00 as a failure to make one of the "cash payments" required pursuant to that certain clause of the agreement, which I repeat, as follows:

> ".....this deposit shall be applied on account of the agreed cash payment……, PROVIDED HOWEVER, if my offer is accepted and I fail to……make all cash

payments required; then I agree that the said deposit shall be absolutely forfeited to the owner, whereupon this agreement shall be null and void, at the owner's option."

The learned trial Judge, however, did not accept the premise of Mrs. Greschuk's claim. In his opinion the final payment of $12,000.00 should not be labelled as "cash payment" as it represented the balance of purchase price and was in fact described in the agreement as "the balance" - whereas the payments of $500.00 and $2,500.00 were particularly identified in the agreement as "cash payments". He considered the two "cash payments" of $500.00 and $2,500.00 as together comprising the down payment, and basing his reasoning on the distinction he drew he held that the failure to pay "the balance" of $12,000.00 on the day stipulated therefor by the agreement was not a failure to make a "cash payment" enabling Mrs. Greschuk the option to declare the contract at an end and the deposit forfeited. In effect, he held that the agreement was an agreement for sale subject to the provisions of s. 19 of *The Judicature Act* R.S.A. 1970, Ch. 193 and, accordingly, he decreed specific performance. Section 19 says:

"19.(1) The Court has jurisdiction and shall grant relief from the consequences of the breach of any covenant or the non-payment of principal or interest by a mortgagor or purchaser in any case in which the mortgagor or purchaser, his heir or assigns remedies the breach of covenant or pays all the arrears due under the mortgage or agreement for sale with lawful costs and charges in that behalf.

(a) at any time before a judgment is recovered, or

(b) within such time as by the practice of the Court relief therein could be obtained.

(2) The mortgagor or purchaser may, by notice in writing, require the mortgagee or vendor to furnish him with a statement in writing

(a) of the nature of the breach of any covenant, or

(b) of the amount of principal or interest with respect to which the mortgagor or purchaser is in default,

and of the amount of any expenses necessarily incurred by the mortgagee or the vendor.

(3) The mortgagor or purchaser may, not more than once a year by notice in writing, require the mortgagee or vendor to furnish him with a statement in writing of the amount of principal or interest still owing on the mortgage *or* agreement for sale.

(4) The mortgagee or vendor shall answer a notice given either under subsection (2) or subsection (3) within 15 days after he receives it, and, if without reasonable excuse he fails to do so or his answer is incomplete or incorrect, any rights that he may have for the enforcement of the mortgage or for the cancellation or specific performance of the agreement for sale shall be suspended until he has complied with the notice.

> (5) Notice by a mortgagor or purchaser to the mortgagee or vendor may be given personally or may be sent to the mortgagee or vendor by ordinary mail to the address where moneys owing under the mortgage or agreement for sale are payable."

[7] With deference it seems to me that the distinction made by the learned trial Judge is not a valid distinction in these circumstances. The fallacy of not giving the required payment of $12,000.00 the same label as the other two payments is that there is no reason whatsoever why the draftsman could not have also described "the balance of $12,000.00" as a "cash payment" without in any way altering the context of the agreement. Notwithstanding the descriptive words given to that payment, it was in substance a "cash payment". The whole transaction was in substance a cash transaction.

[8] The distinction made by the trial Judge was influenced by a statement made by Mr. Justice Strong in *McIntyre v. Hood* 9 S.C.R. 556. In that case a land owner wrote a letter offering to sell his land for a stated price. In stipulating the terms of payment he asked for "one-third cash, balance in one year at 8 per cent per annum". The offer did not speak of a deposit. The words used by Strong, J. to construe the offer are as follows (p. 565):

> "The expression one-third cash, I construe as an elliptical form of expression for 'one-third cash down at the time of acceptance of the offer'."

It is also interesting to note that in the next sentence he continued by saying:

> "And if the proposal had been expressed in this way, there could be no doubt that the stipulation for the payment of one-third of the purchase-money would … have been a payment in the nature of a deposit to be made immediately on the acceptance of the offer."

[9] In giving his interpretation of the expression "one-third cash", Mr. Justice Strong did no more than explain the obvious context in which those words were used in the offeror's letter. That interpretation is not one which can be universally applied to every contract for the sale of land using similar expressions. Each and every contract using words of that kind has to be looked at to ascertain the context in which they are employed and the meaning to be conveyed thereby. With respect, I am of the opinion that the words "cash payment" used in the agreement before the Court when read in context, do not permit the same interpretation as that given by Strong, J. of the words he construed in *McIntyre v. Hood (supra).*

[10] The submission of appellant's counsel is that the agreement is not in the nature of an agreement which is within the contemplation of s. 19. He contends that although the sum of $500.00 formed part of the payment of $3,000.00 proposed by Bizon to bind the deal it was also paid and received as a deposit in the event that Bizon defaulted in

payment of the balance of the purchase price on the day stipulated therefor. Accordingly, these payments did not bring about a concluded sale so as to convey to Bizon some measure of proprietary rights in the land.

[11] Bizon testified that "I gave Mrs. Greschuk $2,500.00 in good faith to show that I meant business and that I intended to go through with the purchase". Bizon's position, as I see it, is that he agreed to put out $3,000.00 to assure Mrs. Greschuk as to the sincerity of his intentions to complete a sale and it would seem that on the strength of that proposal she was induced to accept his offer.

[12] The decision in *Kolacz et at v. Munzel* (1971) 5 W.W.R. 757, on which the learned trial Judge leaned to assist him in making the decision under appeal, also dealt with the application of s. 19 of *The Judicature Act.* There the form on which the agreement was written is similar to the form of agreement in this case. It is a form of agreement in common use by all real estate agents. With deference, that decision has distinguishing features. The facts reported are brief. They disclose that the offeror (defendant) paid a deposit. He undertook a further payment of $27,500.00 on a specific date - the balance of the purchase price to be paid by annual instalments which would have extended the balance over a period of about eight years. The defendant defaulted on the payment of $27,500.00. The plaintiff then sued for cancellation of the agreement thereby giving recognition to the agreement as being the kind of agreement for sale to which s. 19 would apply. The defendant paid the arrears after the plaintiff was granted an order *nisi.* In the present appeal the appellant by her action has not recognized the agreement with Bizon as an agreement for sale coming within the ambit of s. 19. It is the status of that agreement that is here put in issue.

[13] There is no definition of agreement for sale in *The Judicature Act.* In the broad sense, the agreement in question is an agreement for sale for as said by Freedman, C.J.M. in *Rose v. Dever* (1972) 2 W.W.R. 431 (appeal to Supreme Court of Canada, 42 D.L.R. (3d) 160, dismissed) at p. 436:

> "An offer in writing for the sale of homestead property, duly accepted in writing by the owner, surely constitutes an agreement of sale of that property."

See also Di Castri, *Canadian Law of Vendor and Purchaser'* at pp. 2 and 3.

[14] However, the question is whether the agreement, even though it falls under the broad definition of an agreement for sale expressed in *Rose v. Dever (supra),* is the kind of agreement for sale to which the legislation intended the Courts should apply s. 19, until such time as a payment, in addition to deposit money, is made on the purchase price.

[15] The giving of a deposit on a cash deal is a common practice in securing land. In addition to providing pledges by the purchaser and vendor to buy and sell, it affords the purchaser a space of time within which to raise the whole of the purchase monies. It also affords the purchaser's solicitor an opportunity to examine the status of the vendor's title before preparation and completion of final documents and for the parties to make those adjustments which are usually necessary to close a real estate transaction. A forfeitable deposit affords the vendor a measure of security sufficient to induce him to bargain with a purchaser on an interim basis.

[16] Upon examination of s. 19, it seems to me that by its very terms it is not intended to apply to an agreement where money is deposited to bind the parties to await something required to be done by one of them to make the sale crystallize. The section must be read as a whole. Subsection (1) must be considered in relation to subsections (1) and (2). It will be noted that subsection (2) provides that a vendor may require a purchaser to furnish a statement in writing of the nature of the breach of any covenant or the amount of principal and interest with respect to which the purchaser is in default, and the amount of any expenses necessarily incurred by the vendor. By subsection (3) it is provided that a statement in writing as to the amount of the principal or interest owing can only be demanded once a year. These provisions make it clear that the Legislature did not have in mind that s. 19 should be applied to an "interim agreement" such as this where earnest money has been deposited to show good faith by the purchaser.

[17] If the deposit, instead of being a true deposit, is in fact a payment of principal, then the section would apply. By clothing a payment with a descriptive word, the payment cannot be changed into other than what in substance it is; here in fact the $500.00 was a deposit and the payment of $2,500.00 was never accepted by Mrs. Greschuk.

[18] The term "agreement for sale" is used in other sections of *The Judicature Act.* The restriction that I have applied in this case to the phrase would not necessarily apply in the case of the other provisions where the term is used.

[19] I conclude, therefore, that it was not intended that s. 19 be applied to agreements of this kind whenever a failure to perform its terms follows a deposit of money to guarantee its performance. As s. 19 was not available to assist the respondent Bizon, specific performance should not have been decreed.

[20] I turn now to the disposition of the deposit money. In *Howe v. Smith* 27 Ch. D. 89, the plaintiff Howe agreed in writing to purchase premises owned by the defendant Smith and on the signing of the agreement Howe paid Smith £500, as a deposit, as well as

in part payment of the purchase price. The agreement made no mention of what should be done with the deposit in the event of Howe's failure to pay the balance of the purchase price on the day stipulated for payment thereof. It was held by the Court that a deposit was given as a guarantee that the agreement be performed. Cotton, L.J. at p. 95 said:

> "The deposit, as I understand it, and using the words of Lord Justice James, (in *Ex parte Barrell* Law Rep. (10 Ch. 512)) is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it was deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit."

[21] In the same case, Lord Justice Bowen made this observation:

> "The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract. In principle it ought to be so, because of course persons may make exactly what bargain they please as to what is to be done with the money deposited. We have to look to the documents to see what bargain was made."

[22] At page 98 Lord Justice Bowen described the term "deposit" as "a security for the completion of the purchase price".

[23] As regards to disposition of the deposit in *Howe v. Smith* the essence of the reasoning of the judgments delivered by their Lordships in that case is that where a purchaser by his conduct fails to complete the contract and that conduct amounts on his part to a repudiation he should not be permitted to recover his deposit.

[24] Bizon's delay was due to his own conduct. Notwithstanding the deadline of December 31, 1973, set for the $12,000.00 payment, he did not provide the Industrial Development Bank with the documents required to process his request for a loan until November 26, 1973. About one week thereafter he received word from that institution that before his applications could be approved he would have to amend his proposal to provide for an increase of his equity in the land. Bizon failed to submit the amended proposal until January 15, 1974. He admitted his neglect and acknowledged that had he acted more promptly he could have raised the sum of $12,000.00 before December 31, 1973. In the meantime, on January 10, 1974 he made an attempt to recover the two payments of $500.00 and $2,500.00. This conduct, in my view, is tantamount to repudiation. Moreover, the agreement provides for the forfeiture of the deposit. The intention of the parties in respect thereof is explicit.

[25] I would allow the appeal and direct that the order for specific performance be vacated and that Bizon's action be dismissed. I would further direct that the deposit of $500.00 be forfeited to Mrs. Greschuk and that the sum of $2,500.00 paid to the solicitor be returned to Bizon. It follows that Bizon's caveat ought to be removed from Mrs. Greschuk's title and I would make an order accordingly.

[26] Mrs. Greschuk will be entitled to costs of both appeal and trial.

DATED at Edmonton, Alberta,

this 8th day of July, 1976.