Alberta District Court
Luscombe v. Mashinter
Date: 1978-01-24

H. A. Lamoureux, for plaintiffs.

T. D. Bosse, for defendant.

(Edmonton No. 209447)

24th January 1978.

[1] STEVENSON D.C.J.:—This is an action for damages brought against a purchaser for breach of an interim agreement for the sale of land. The purchaser failed to execute the necessary conveyances or pay the required cash consideration. He had paid a deposit which the plaintiffs retained, and he has counterclaimed for the return of that deposit. Upon his failure, indeed, refusal, to comply, the plaintiffs re-sold the land, and the damages claimed are for expenses in connection with the abortive sale and the loss occasioned by the delay in connection with that resale. As the plaintiffs sold the property for the same net sale price, no claim for damages for loss of the bargain is made.

[2] The threshold question is whether or not the action is barred by s. 34(17) of The Judicature Act, R.S.A. 1970, c. 193. The subsection reads as follows:

> "(17) In an action brought upon a mortgage of land whether legal or equitable, or upon an agreement for the sale of land, the right of the mortgagee or vendor thereunder is restricted to the land to which the mortgage or agreement relates and to foreclosure of the mortgage or cancellation of the agreement for sale, as the case may be, and no action lies
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> "(*a*) on a covenant for payment contained in any such mortgage or agreement for sale, or
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> "(*b*) upon any covenant, whether express or implied, by or on the part of a person to whom the land comprised in the mortgage or agreement for sale has been transferred or assigned subject to such mortgage or agreement for the payment of the principal money or purchase money payable under any such mortgage or agreement or part thereof, as the case may be, or
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> "(*c*) for damages based upon the sale or forfeiture for taxes of land included in the mortgage or agreement for sale, whether or not the sale or forfeiture was due to, or the result of, the default of the mortgagor or purchaser of the land or of the transferee or assignee from the mortgagor or purchaser."

[3] Three issues in relation to the section suggest themselves:

(1) Is this an action on the contract?

(2) Is the contract an agreement for the sale of land within the section?

(3) Does the section apply so as to bar anything more than an action on the covenant?

[4] The second question was raised and, I think, left open by *Greschuk v. Bison,* 1 Alta. L.R. (2d) 163, [1977] 2 W.W.R. 262 (C.A.). The third question was raised by Tavender D.C.J. in *Bell v. Robutka* (1964), 48 D.L.R. (2d) 755, and on appeal, 55 W.W.R. 367, 55 D.L.R. (2d) 436 (Alta.), was said by McDermid J.A. (dissenting in the result) to have been already decided by the decision of the Appellate Division in *Laboret v. Szabo* (1962), 39 W.W.R. 139, 35 D.L.R. (2d) 662 (Alta.).

[5] In this case the contract has clearly been repudiated and the plaintiff has, by his act of resale, accepted that repudiation. The precise effect of the acceptance of a repudiation is by no means clear. It is sometimes said that the contract is rescinded and it is sometimes said that it is terminated (as is discussed in Cote, An Introduction to the Law of Contract, p. 215).

[6] The terminological difficulty is illustrated in an analysis of the majority judgment in the *Robutka* decision, upon which the plaintiff relies. It is clear that on the facts of that case there was a repudiation and an acceptance of it. Mr. Bosse argues that the case was one of misrepresentation and the court was applying the equitable doctrine of rescission. His position appears strengthened by the fact that Porter J.A. in discussing an indemnity for expenses relied on a case which was indeed one of equitable rescission. In his dissent, McDermid J.A. characterized the claim as a claim for damages for breach of contract. That was what was pleaded. Porter J.A. acknowledged that it was pleaded but said that it was, in substance, an action for “indemnification”, consequent upon a declaration of rescission.

[7] I am bound by the majority decision although I have considerable difficulty with the expressed reasoning in the light of *Moschi v. Lep Air Services Ltd.,* [1972] 2 W.L.R. 1175, [1972] 2 All E.R. 393 (H.L.), and *Highway Properties Ltd. v. Kelly, Douglas & Co.,* [1971] S.C.R. 562, [1972] 2 W.W.R. 28, 17 D.L.R. (3d) 710, to which I shall later refer. It is clear that it was not a case of equitable rescission for misrepresentation. The only misrepresentation that was made in that case was a representation that the purchaser would complete the transaction and therefore want possession on the date fixed for possession. That was after the contract was made and could not have induced it, nor was it a representation of fact, which would have led a court of equity to intervene. No other grounds for equitable rescission could be found in that case. The term “rescission” is also used by the House of Lords in *Moschi v. Lep Air Services Ltd.,* supra. The House of Lords in that case found that once there is an accepted repudiation all the obligations in the

contract come to an end and they are replaced, by operation of law, by an obligation to pay damages.

[8] Is the defendant entitled to a return of his deposit? In the *Robutka* case, supra, the court found that the contract was rescinded and awarded "indemnification". That sounds of retrospective cancellation and would seemingly entitle the defendant to the return of his deposit. But such is not the legal effect of an accepted repudiation as is made clear in *Highway Properties Ltd. v. Kelly, Douglas,* supra, where, at p. 35, Laskin J. (as he then was) said:

> "(I agree with the opinion of such text-writers as Cheshire and Fifoot, The Law of Contract, 7th ed., 1969, p. 535, that it is misleading to speak of the result as rescission When there is no retrospective cancellation ab initio involved.) Termination in such circumstances does not preclude a right to damages for prospective loss as well as for accrued loss."

[9] There is therefore no cancellation, and no right to return of the deposit.

[10] If the obligation to pay damages arises outside the contract it cannot, in my view, be caught by s. 34(17). That is the clear result of a majority decision in the *Bobutka* case and, as is said by Martland J. in *Krook v. Yewchuk,* [1962] S.C.R. 535, 39 W.W.R. 13, 34 D.L.R. (2d) 676, as the section derogates from the common law it is not to be extended beyond its terms. I am of the view that the framers of of s. 34(17) were concerned primarily with the enforcement of the covenant, because the section talks in terms of specific performance, a remedy consistent with the affirmation of the contract.

[11] I note that the *Highway Properties* case may justify a reconsideration of the *Bobutka* decision insofar as it is based on a right of "indemnification" for "rescission". It appears preferable to speak of "damages" arising out of the obligation imposed by law on termination. In the case at bar it appears to me the result is the same regardless of the characterization. The plaintiff is entitled to damages, not in enforcement of the contract, but in pursuance of his right arising as a consequence of the contractual determination assessed with reference to the original obligations.

[12] I turn now to those damages. There is no claim for commission and I gather from the evidence that it was absorbed in the deposit. There is no claim for damages for loss of the bargain, and there was no such loss. Had the contract been performed, the plaintiff would have been quit of his costs of maintaining the property on 1st June. He moved promptly to mitigate the damages and effected a resale effective 1st July. I am satisfied that he is entitled to recover one month's taxes, the condominium fees, the utility

charges and the interest upon the mortgage for one month. He cannot recover the mortgage payment because it included principal for which he got the benefit by reason of the reduced amount of the mortgage indebtedness on closing. He also claimed interest on the amount necessary to close and this I find to be recoverable as a cost of “carrying property”. There is a claim for solicitor’s fees and while these would also be recoverable they were not properly proven and cannot be allowed.

[13] The plaintiff will have a judgment for the items I have allowed as proved at trial. Subject to any further representations that may be made, the plaintiff will recover the costs on the appropriate column, R. 609 not to apply, and the counterclaim will be dismissed but without costs.