Court of King's Bench of Alberta

Citation: Stephens v Sowiak, 2024 ABKB 583

Date: 20241003
Docket: 2303 20421
Registry: Edmonton

Between:

Colin Stephens

Plaintiff

- and -

Orest Sowiak and Marilyn Sowiak

Defendants
Plaintiffs by Counterclaim

- and -

Colin Stephens and Travis McKay

Defendants by Counterclaim

Memorandum of Decision
of
Applications Judge B.W. Summers

Introduction

[1] The Defendants made an application in morning chambers for an order summarily dismissing this action. They say that there is not a binding contract to sell their home to the Plaintiff as the Plaintiff never communicated that the buyer's conditions to the contract were satisfied or waived.

Facts

[2] On September 16, 2023 the Plaintiff made an offer to purchase the Defendants' home in the standard Alberta Real Estate Association Form ("AREA Form") at and for the price of $390,000. A series of emails were then exchanged between the real estate agents, as follows:

(a) the real estate agent for the Defendants sent an email to the real estate agent for the Plaintiff stating "I have reviewed the offer with my Seller he is countering the purchase price at $410,000.... I will await your response after speaking to your buyers";

(b) the Plaintiff's real estate agent responded to that email stating: "my client accepts the counter offer. I will make the changes and send it over to you";

(c) the Defendants' real estate agent sent a reply advising that "...I have received another offer, so the Sellers (sic) counteroffer is not available anymore. However, your Buyer is welcome to resubmit a new offer at the last price. I will way (sic) to receive your buyers (sic) revised offer before presenting both offers to my sellers;"

[3] The Plaintiff attempted to contact the Defendants' real estate agent. The Defendants' real estate agent sent an email to the Plaintiff's real estate agent on September 17, 2023 advising that "they had decided to work with the other offer" and wished the Plaintiff "all the best with his ongoing property search". The Plaintiff made further attempts to reach out to the Defendants, their real estate agent and the brokerage, but was ignored.

[4] On or about September 17, 2023 the Plaintiff registered a purchaser's caveat on the title to the Defendants' home. On September 20, 2023 the Plaintiff paid the deposit into his lawyer's trust account and his lawyer sent a demand letter to the Defendants demanding that they complete their contract with the Plaintiff.

[5] In or about that time, the Defendants entered into an agreement to sell their home to a different offeror. Conditions with respect to that offer were waived or satisfied.

[6] It is the Plaintiff's position that the original offer on the AREA Form and the emailed counteroffer accepted by the Plaintiff constitutes a valid and binding contract that incorporates all terms stated in the AREA Form. The Defendants respond that even if the Plaintiff is correct that these communications could collectively constitute a contract (which they do not accept, except for the purpose of this application), that the contract is at an end by virtue of conditions not being waived or satisfied. The pertinent parts of the AREA Form are as follows:

8. CONDITIONS

8.1 The seller and the buyer will:

(a) act reasonably and in good faith in trying to satisfy their own conditions, including making reasonable efforts to fulfill them; and

(b) pay for any costs related to their own conditions.

8.2 Buyer's Conditions

The buyer's conditions are for the benefit of the buyer and are:

(a) Financing

> This contract is subject to the buyer securing new financing, not to exceed ____% of the Purchase Price from a lender of the buyer's choice and with terms satisfactory to the buyer, before 9 pm on September 26, 2023 (Condition Day). The seller will cooperate by providing reasonable access to the Property on reasonable terms.
>
> **(b) Property Inspection**
>
> This contract is subject to the buyer's satisfaction with a property inspection, conducted by a license home inspector, before 9 pm on September 26, 2023 (Condition Day). The seller will cooperate by providing reasonable access to the Property on reasonable terms.
>
> ...
>
> **(d) Additional Buyer's Conditions**
>
> This contract is subject to the buyer's satisfaction to a sewer line inspection before 9 pm on September 26, 2023 (Condition Day).
>
> ...
>
> **8.4 Condition Notices**
>
> Each party will give the other written notice that:
>
> (a) a condition is unilaterally waived or satisfied on or before the Condition Day. If not, this contract will end after the time indicated for that Condition Day; or
>
> (b) a condition will not be waived or satisfied on or before its Condition Day. This contract will end upon that notice being given.

[7] It is common ground between the parties that the Plaintiff provided no notice, written or oral, to the Defendants with respect to the Buyer's Conditions. The Plaintiff made no request for an inspector to inspect the Defendants' home.

Discussion of the Legal Issues

The failure to satisfy or waive a condition

[8] The Defendants cite the cases of ***Leasing Group Inc v Prospect Developments (2003) Inc,*** 2011 ABCA 83, ***Fenyes v Nellipudi et al,*** 2021 ONSC 3913 and ***Armstrong v Gula,*** 2024 ABKB 358 as examples where courts have found that a contract for purchase and sale of real property failed for failure to have conditions satisfied or waived, as required under the respective contracts. That is a basic principle of law that is not contested.

The doctrine of "prevention of performance"

[9] The Plaintiff relies on the doctrine of "prevention of performance" which he says is set out in the decision of the British Columbia Court of Appeal in ***Whitehall Estates Ltd v MacCallum et al,*** 1975 CanLII 1017 ***("Whitehall")***. This was a unanimous decision of a three Justice panel. McIntyre JA wrote the majority opinion, with Taggart JA writing a concurring opinion, with additional reasons.

[10] In ***Whitehall*** an agreement was reached for the sale of land subject to a buyer's financing condition. Prior to the due date for the condition to be satisfied or waived, the property was sold to a third party. The defendant vendor argued that there was not a binding contract because the financing condition was not satisfied or waived.

[11] McIntyre JA cited the following passage from *Halsbury's Laws of England*, 4th ed, volume 9, at p 358 and paragraph 518 with approval:

> 518. *Prevention of performance.* The performance of a condition precedent is excused where the other party has prevented its performance, or has done something which puts it out of his power to perform his part of the contract or has intimated that he does not intend to perform his part. In such cases he will have made himself liable for breach of contract and dispensed with performance of any promise which was originally a condition to his liability.

[12] McIntyre JA also relied upon ***Mackay v Dick*, (1881) 6 A.C. 251** where a contract to purchase a machine had a clause allowing the purchaser to test the machine before purchasing, and the vendor prevented the purchaser from performing that test. He quoted from that case, as follows:

> I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.

[13] McIntyre JA held that the vendor "made it impossible for the appellant to perform the condition and indicated clearly he would not himself perform the contract in any event". As such, the appellant was freed from the requirement of compliance and was entitled to sue.

[14] The Defendants suggest that the doctrine of prevention of performance is not good law in Alberta at this time. They note that ***Whitehall*** is almost 50 years old. They also note that *Halsbury's Laws of Canada* makes no mention of the doctrine and no Alberta case has followed ***Whitehall***.

[15] CanLII indicates that ***Whitehall*** has been cited 35 times in Canada. I have been unable to find a case that says that ***Whitehall*** is bad law. Rather, there are cases that have followed the reasoning in ***Whitehall: North West Value Partners Inc v Vancouver Hong Kong Properties Ltd***, 2004 BCSC 768, ***Cameron v Albrecht***, 1981 CarswellBC 664, [1981] B.C.J. No. 427 ***("Cameron")*** and ***Salama Enterprises (1988) Inc v Grewal***, 1992 CarswellBC 90, [1992] 4 W.W.R. 126 (BCCA) ***("Salama").***

[16] This reasoning was also adopted in the BCSC case ***Chan v Cavezza***, [1981] BCJ No. 981 (retrieved from Lexis) ("***Chan").***

[17] Although ***Salama*** is a case primarily dealing with a "time is of the essence" clause it is an important precedent as ***Whitehall*** is a foundation to the decision and ***Salama*** is very often quoted and followed in Canada. Despite ample opportunity to challenge or criticize the fundamental principles stated in ***Whitehall*** every time ***Salama*** is relied upon, such criticism has not occurred.

[18] The *Halsbury's Laws of England* excerpt from ***Whitehall*** has been followed in Canada separately as well. In ***Nicola Valley Lumber Co v Meeker***, 1916 CarswellBC 148, [1917] 1

WWR 556 (SCC) at paragraph 41 and in ***Imperial Veterans in Canada v Eastern Freighters Ltd***, 1927 CarswellBC 140, 39 B.C.R. 17 (SC) at paragraph 3, the courts relied on this excerpt in their decisions.

[19] Prevention of performance is an equitable principle of contract law that applies in defence of any breach, not just breaches of alleged conditions precedent. There are several cases that rely on the prevention principle for breaches of the main obligations under a contract, particularly in meeting deadlines under construction contracts. The following are instances where this equitable principle is applied without any reference to ***Whitehall***.

[20] In ***Mee Hoi Bros Company Ltd v Borving Investments (Canada) Ltd.***, 2017 BCSC 1910 at paragraph 310 ***("Mee Hoi***"), the Court cited *Chitty on Contracts*, 29th ed., 8. Vol. 1 (London: Sweet & Maxwell, 2004) at p. 1389 *("Chitty")*:

> **Co-operation and prevention of performance**. It has been noted that the court will readily imply a term that each [party to the contract] will co-operate with the other to secure performance of the contract and that neither party will, by his own act or default, prevent performance of the contract. If one party is in breach of his duty to co-operate, so that performance of the contract cannot be effected, the other party will be entitled to treat himself as discharged (emphasis in original).

[21] The Court held that where "performance of a contractual obligation by one party is dependent on another party to the contract, the latter's breach, preventing the former's performance, provides a complete defence" (at paragraph 309).

[22] ***Mee Hoi*** also relied on ***Perini Pacific Ltd v Greater Vancouver Sewerage & Drainage District***, 1966 CarswellBC 182, 57 D.L.R. (2d) 307 (CA) ***("Perini").*** In ***Perini***, a contractor failed to complete a building project on time due to the owner failing to install machinery in a timely manner. The Court held at para 38:

> Accordingly, it is my respectful view that it can be fairly said that the respondent acted in a manner in breach of its contract that *actually prevented or made it impossible for* the appellant to perform its obligation at the proper time. To hold that despite this absolute prevention, the appellant under the circumstances could not have so performed, would, I suggest with respect, have the effect of permitting the respondent to take full advantage of its own wrong (emphasis in original).

[23] The Court found that the contractor should be relieved of its obligation to complete the project on the specified date.

[24] The excerpt from *Chitty* in ***Mee Hoi*** at paragraph 310 was also relied upon in the case ***Kean v Metropolitan Life Insurance Company (1984)***, [1984] O.J. No. 584, [1985] I.L.R. 7137 (ONSC) ***("Kean")***. ***Kean*** cited more from *Chitty* than ***Mee Hoi*** did, adding:

> It has also been said to be a general principle of law that, **where performance of a condition precedent is prevented by the act or default of one party, the contract is taken to have been duly performed by the other even though the condition has not been satisfied**. Thus, in ***Mackay v. Dick*** where a contract of sale of goods was subject to a condition precedent to be performed by the buyer, but which he neglected to perform, the seller was held entitled to sue for the price. This principle, however, is by no means always applicable, and the party not in

> default may be compelled to treat the prevention of performance as a repudiation of the contract and to sue for damages for the breach (emphasis added).

[25] I conclude that the doctrine of prevention of performance referenced in *Halsbury's Laws of England* is good law in Canada.

Scope of the doctrine of prevention of performance

[26] The doctrine of prevention of performance operates to protect a party from suffering penalties for a breach that was caused by the opposite party preventing them from performing. As discussed above, this can manifest as allowing the party to sue for damages or removing their obligation to complete the condition and allow them to sue for specific performance.

[27] The only aspect of the doctrine of prevention of performance that requires further clarity is determining when the performance has been prevented.

[28] In ***Whitehall***, McIntyre JA held that selling the property to a third party and informing the Plaintiff that they would not sell to them "rendered the performance of the condition impossible from a practical point of view and made it clear that he would not perform his obligation in any event" (at para 58). McIntyre JA clarified, at para 59:

> The concurrence of the respondent vendor in the raising of the mortgage was necessary here **at least to the extent of maintaining title to the property and assuring to the appellant the effective right to grant the mortgage when procured**. His rejection of the whole arrangement made compliance with the condition by the appellant impossible in any practical sense (emphasis added).

By selling the property to another party, it became impossible for the plaintiff to acquire financing as the proposed security for the financing was no longer available. This prevented the plaintiff from completing the financing condition.

[29] The same reasoning was seen in ***Chan*** and ***Cameron***.

[30] In ***Humphries v Werner,*** 1977 CarswellBC 294, 2 R.P.R. 1 (SC) ***("Humphries")*** the Court relied on ***Whitehall***, but found the case distinguishable. In ***Humphries***, an agreement was reached for the purchase of land that included a true condition precedent requiring the purchaser to acquire a neighboring lot and make it vacant (the lot had a tenant renting it at the time of the agreement).

[31] Before the condition precedent could be completed, the defendant sent a letter declaring their agreement void for uncertainty, and informed the plaintiff that they would not be completing their contractual duties. The plaintiff purchaser did not complete the condition precedent and sued for specific performance. The plaintiff tried to rely on ***Whitehall*** to excuse their obligations to complete the condition precedent.

[32] The Court found that the defendant declaring the contract void was not enough by itself to prevent the Plaintiff from at least partially completing the condition (by making arrangements to secure the vacant lot, even if they could not finalize it without the defendant's cooperation). The Court held that this case was not like ***Whitehall*** where a sale to a third party actually prevented the purchaser from ever being able to secure financing.

[33] ***Humphries*** is distinguishable from the case at Bar as in that case the defendant only backed out of the contract, but did not sell to a third party, making completion of the contract impossible.

Application of the doctrine of prevention of performance to the case at Bar

[34] The facts in the ***Whitehall*** case are very similar to the facts in this case. The only distinguishing feature is that in this case, in addition to a financing clause, there is also a satisfactory inspection clause.

[35] The Defendants say that they did nothing to prevent the Plaintiff from satisfying the buyer's conditions. They say that the Plaintiff could have sent an inspector to inspect the Defendants' home but did not.

[36] The Plaintiff responds that he made many attempts to reach out to the Defendants and their realtor and all attempts to discuss the matter were rebuffed. I agree with the Plaintiff that under the circumstances it was very reasonable for him to assume that sending his home inspector (who had already bee picked out by the Plaintiff) would have been futile. The Defendants had not only repudiated the contract with the Plaintiff (if there was one), but also frustrated performance by selling to a third party.

[37] In my view, the doctrine of prevention of performance is applicable in this case to excuse the Plaintiff from satisfying or waiving the buyer's conditions.

Conclusion

[38] The Defendants' application to dismiss the action is dismissed. The Plaintiff is entitled to costs of the application. If there is not an agreement between the parties as to the scale of costs, an application may be made before me in morning chambers within thirty days of this Memorandum of Decision.

Heard on the 13th day of August, 2024.
Dated at Edmonton, Alberta this 3rd day of October, 2024.

B.W. Summers
A.J.C.K.B.A.

Appearances:

George Samia
Forum Law LLP
for the Plaintiff

Mikkel J. Arnston and Case W. Littlewood
Reynolds Mirth Richards & Farmer LLP
for the Defendants