NOVA SCOTIA COURT OF APPEAL
Citation: ***Wirvin v. DMT Properties Ltd.***, 2003 NSCA 12

Date: 20030122
Docket: CA 178420
Registry: Halifax

Between:

Theresa Mary Wirvin

Appellant

v.

DMT Properties Limited

Respondent

Judges:	Bateman, Saunders and Hamilton, JJ.A.
Appeal Heard:	November 14, 2002, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Bateman, J.A.; Saunders, J.A. concurring; Hamilton, J.A. dissenting.
Counsel:	Linda R. Hupman, for the appellant Ronald D. Richter, for the respondent

Reasons for judgment:

[1] This is an appeal by Theresa Mary Wirvin from a decision of Justice Merlin Nunn of the Supreme Court (reported as **Wirvin v. DMT Properties Ltd.**,[2002] N.S.J. No. 114 (Q.L.)).

BACKGROUND:

[2] Theresa Wirvin is the lessee of a large two bay garage located in Lower Truro and owned by DMT Properties Limited ("DMT").

[3] The Thompson brothers, owners of DMT, owned Thompson's Transfer Company Limited, which carried on a freight transfer and moving business. The garage in question, which is part of a larger piece of land, was used in that business until 1997 when the Thompson brothers sold the freight business to Cabana Kingsway Limited.

[4] Brian Wirvin, husband of the lessee, was the general manager and comptroller of Thompson's Transfer and, later, DMT.

[5] In 1999, at Brian Wirvin's suggestion, DMT bought back the garage property from Cabana. Mr. Wirvin was interested in purchasing the property from DMT although he was not able to immediately secure the financing to do so. DMT, upon re-purchasing the property, advised Brian Wirvin that he could buy it from the company for the price it paid ($50,000) plus $2,000 for expenses DMT incurred in having the property subdivided and obtaining title.

[6] Although Theresa Wirvin is the named lessee, all the negotiations for the lease and the option agreement, as well as the subletting, collecting and paying rentals were conducted, on her behalf, by her husband, Brian Wirvin ("the Wirvins").

[7] The Wirvins, at the time of leasing the property from DMT, made a down payment of about $9,000 which was credited against the ultimate purchase price. The balance due was the outstanding balance on a collateral mortgage on the property held by the bank ($43,000 approximately). That balance was to be paid by the Wirvins through a lease entered into between Theresa Wirvin and DMT The lease was for a term of seven years and five months commencing February, 2000. The rental was in an amount equal to the principal and interest on the collateral mortgage, plus H.S.T. The lease was "net" with the Wirvins responsible for all other costs of the property over its term. Included in the lease was an option to purchase the property, exercisable at any time during the term of the lease, for the outstanding

balance on the collateral mortgage. The Wirvins sublet the leased property to a third party.

[8] DMT's business was winding down. As a result, Brian Wirvin's employment with the company ended on September 4, 2000. Relations between Mr. Wirvin and the Thompson brothers soured over a dispute about monies allegedly owing to him on his job termination.

[9] In December of 2000 the Wirvins decided to exercise the option to purchase and arranged bank financing to do so. By solicitor's letter dated January 4, 2001, they advised DMT of their intent to purchase the property. On January 12, 2001, DMT's lawyer responded, taking the position that the Wirvins' attempted exercise of the option was not valid. DMT's solicitor advised, as well, that the company considered Theresa Wirvin to be in breach of the lease for non-payment of the October rent and, accordingly, the lease was terminated. The Wirvins' solicitor, by return letter that same date, urged DMT to change its position and defended the exercise of the option as valid. There was no further communication. The Wirvins did not tender the purchase price.

[10] On April 4, 2002, the Wirvins commenced this action seeking specific performance, or, in the alternative, damages. Their action was dismissed at trial with costs to DMT. The Wirvins now appeal.

ISSUES:

[11] The Wirvins say that the judge erred in finding that the fact that they did not tender the purchase price was fatal to recovery.

ANALYSIS:

[12] It is the Wirvins' position that tender of the purchase price was not required because DMT had repudiated the contract, thus relieving them of the obligation to tender.

[13] The option clause stated:

> 2.03 During the term of this Lease or any renewal hereof, the Landlord hereby grants to the Tenant an option to purchase the lands described in Schedule A hereto and premises located thereon on the following terms:

(a) the purchase price shall be an amount equal to the outstanding principal and interest owing on the existing collateral mortgage on the lands described in Schedule "A";

(b) the closing date shall be within 30 days of the Tenant notifying the Landlord in writing of her desire to exercise the within option;

(c) the transfer of the property shall be by way of warranty deed from the Landlord to the Tenant or her designate.

[14] The exchange of correspondence between the parties is central to the issue here. The Wirvins' letter purporting to exercise the option follows:

January 4, 2001

Durling, Gillis, Parker & Richter
74 Commercial Street
Middleton, Nova Scotia
B0S 1P0

Attention: Ronald D. Richter

Re: DMT - Wirvin

3705 Highway 236 Lower Truro

I represent the buyer in the noted transaction.

I enclose a deed for completion by your client, if satisfactory. Please forward the signed deed to me in escrow. On receipt of the deed, I will instruct the buyer to pay out the existing Royal Bank collateral mortgage and confirm payout to you at which time the deed will be recorded. I will obtain and record a release of the Royal Bank mortgage.

There are no adjustments as the buyer is responsible for all costs associated with the property in accordance with the existing lease agreement between the parties.

I trust these arrangements are satisfactory.

BURCHELL MACDOUGALL

Signed by

James W. Stonehouse

[15] And the reply:

January 12, 2001

Mr. James W. Stonehouse
Burchell MacDougall
P.O. Box 1128
710 Prince Street
Truro, NS B2N 5H1

Dear Mr. Stonehouse:

Re: DMT - Wirvin - 3705 Highway 236 Lower Truro

I am writing to advise as follows:

1. We do not consider your offer to purchase pursuant to the option granted in the Lease dated January 25, 2000 to be validly made in accordance with clause 2.03 of the Lease. In your letter of January 4, 2001 you propose that DMT deliver a deed and you will instruct your client to payout the existing mortgage on the property. The option requires a closing date within 30 days of the Tenant notifying the Landlord of her desire to exercise the option. In addition, the option requires the tender of the purchase price to the Landlord in an amount equal to the outstanding principal and interest on the existing Collateral Mortgage. Therefore, we do not consider your letter of January 4, 2001 as a valid exercise of the Tenant's option.

2. The Tenant, Theresa Wirvin is in breach of the terms of the January 25, 2000 Lease. Among other breaches, she is in default of payment of the October 2000 rent. Therefore on today's date we have delivered written notice to the Tenant that the Landlord has terminated the Lease and re-entered the property.

3. I will be writing you within the next several days to advise what amounts we consider due and owing by Mrs. Wirvin under the terms of the Lease up to the date of termination.

Yours very truly,

DURLAND, GILLIS, PARKER & RICHTER

Signed by
RONALD D. RICHTER

(Emphasis added)

[16] And in response from the Wirvins' counsel:

January 12, 2001

Durling, Gillis, Parker & Richter
74 Commercial Street
Middleton, Nova Scotia
B0S 1P0

Attention: Ronald D. Richter

Re: DMT - Wirvin 3705 Highway 236 Lower Truro

I acknowledge receipt of your letter by fax today, subsequent to our brief telephone conversation.

Our position with respect to the points noted in your letter is as follows:

1) my letter of January 4, 2001, is clearly and implicitly an exercise of the option. Your client's position to the contrary is patently unreasonable.

I suggested a reasonable procedure for closing. There is no closing procedure prescribed in the lease. Our proposal was to make the closing process as simple and convenient as possible for your client. Therefore, the deed was prepared and forwarded. A proposal for paying out the mortgage (purchase price) was made which would have involved your client only minimally (to receive verification of the payout). As my letter indicates "I trust these arrangements are satisfactory"; if the arrangements were not satisfactory, I would have expected a proposal from you with respect to other arrangements for transfer of funds and title documents.

Contrary to your letter, the option does not specifically require tender of the purchase price. I note your comment with respect to a closing date within 30 days of notification, as contained in the lease, but I fail to understand the relevance of that provision regarding your position that the option has not been validly exercised.

We suggest the option has been exercised, and to suggest otherwise is untenable. Suggested closing procedures are apparently not agreeable; however, that is no justification for declaring that the option has not been validly exercised.

2) It is acknowledged that the October rent was not paid. The rental for November was invoiced and paid, as was the December rental invoice which was recently received and paid, I believe, today. The non-payment of the October rent was the subject of discussion and agreement between Brian Wirvin and Graham Thompson. There was no previous demand for payment of the October rental and subsequent rentals have been invoiced and paid. It is not only unfair (given the financial investment of the tenant in the property to date) but unreasonable in the circumstances to purport to terminate the lease and advise the sub-tenants (thereby impairing their business relationship with the tenant) all resulting in aggravation, expense and economic interference to my client.

It is our position that your client's conduct in termination of the lease, in the circumstances is unwarranted, unreasonable and actionable. Proceedings will be commenced unless your client is prepared to immediately retract its position.

Please advise.

BURCHELL MACDOUGALL

Signed by
James W. Stonehouse

[17] Also critical to the disposition of this case were the concessions made by DMT at the commencement of trial. DMT admitted that the lease was valid on January 4, 2001, thus the option was available for exercise and that the Wirvins were ready, able and willing to complete the purchase. DMT admitted, contrary to their position in the letter of January 12, 2001, that the Wirvins had, in the January 4th letter, validly exercised the option to purchase contained in the lease. In view of this admission it was not necessary for the trial judge to consider whether the Wirvins' letter of January 4, 2001 was, in fact, a valid exercise of the option.

[18] In reaching his decision the judge was critical of the correspondence between counsel.

¶ 27 Turning to the letters, Mr. Richter, on behalf of the Defendant, at trial, indicated that there was no issue as to validity of the January 4th letter of Mr. Stonehouse, as notice under the lease nor as to service of the landlord. I cannot

help but say that this letter is most inadequately worded, for what is intended to be a notice of exercise of an option under a lease, which requires notice in writing, and where the lease sets out the Landlord's address for service of a notice.

¶ 28 Essentially, the letter is a suggested manner of completing a purchase though it makes no reference to a completion date, which is a fundamental part of the option.

¶ 29 Since validity for notice and service are not in issue, a willing vendor could merely reply indicating dissatisfaction with the proposed arrangements and suggest an alternative approach.

¶ 30 Instead, in this action, came Mr. Richter's letter of January 12, a troublesome letter, because it takes a very different position than that at trial. Essentially, it indicates that the January 4th letter is not a valid exercise of the option and sets out reasons; one of which, ie. "the option requires tender of the purchase price" is clearly wrong as there is no reference to tender in the option, and the Plaintiff's had 30 days from the date of the notice to complete the purchase. Then the letter indicates the lease is being terminated. This letter is unresponsive to any request for setting up a closing of the purchase.

¶ 31 Then comes Mr. Stonehouse's letter of reply. It defends the valid exercise of the option, the procedure he had suggested for completing the transaction, challenges the issues expressed by Mr. Richter, but completely fails to set forth any procedure which would facilitate the completion of the sale in accordance with the option. A mere suggestion of arranging a closing date within the option, requesting a deed to be prepared and requesting a mortgage payout figure would have put the issues between the parties at rest and forced the Defendant to either complete the sale or clearly refuse.

¶ 32 A refusal then would require the Plaintiff to do what would be required to entitle her to the remedy of specific performance.

¶ 33 Unfortunately, the January 12th Stonehouse letter does nothing to force the completion of the sale and nothing further is done until this action is started on April 4.

¶ 34 The remedy of specific performance is available to enforce the transfer of real property, but there are certain requirements. First, the property in question must be unique. Here I am satisfied that the leased premises here is, indeed, unique. Basically, it is a one of a kind property in this area, especially unique to the Plaintiff because of the special agreement, the lease and the option. It certainly meets any test as to whether another suitable substitute is readily

available. I need not deal with this further, as it was not a real issue between the parties and there was no evidence that damages would be an adequate remedy.

¶ 35 Secondly, the remedy requires strict compliance with the terms of any agreement relating to the land. Here is where the Plaintiff has significant problems. There is no doubt, and I so find, that there was a valid notice given to the Defendant that the option was being exercised. As well, the Plaintiff had access to sufficient funds to complete the purchase.

¶ 36 The next requirement of this remedy requires a time for completion of the sale, and evidence that the Plaintiff was ready, willing and able to complete. Here the Plaintiff fails, as no time for closing was ever set by the respective counsel and there is no evidence that, absent any date set by counsel, the Plaintiff made any effort to tender the purchase price within the time set in the option. Tender would be required, in any event, but here that requirement of tender is referred to in the letter of January 12th and, even if tender was not necessary with the notice, the letter did indicate that tender was required. Failure to tender is fatal to obtaining the remedy of specific performance, unless it can be shown that the conduct of the vendor was such to render any tender an obviously useless exercise.

¶ 37 In this case, there can be no doubt that there was an apparent unwillingness to cooperate in the completion of the sale on the part of the Defendant, but there is not sufficient evidence to conclude there was a refusal to sell. The Plaintiff did nothing to establish that fact. The evidence is, nothing was done after January 12th and there still was 21 days left under the option. The burden was on the Plaintiff to perform all that would be required to complete the purchase and, at least, to tender the money, at least, within the 30 day period. This was not done. (Emphasis added)

[19] It is the Wirvins' position that DMT's letter of January 12, 2001, rejecting their purported exercise of the option coupled with the statement that the lease was at an end amounted to repudiation of the contract by DMT and relieved the Wirvins of the obligation to tender as a pre-condition to specific performance. There is no doubt, as evidenced by the Wirvins' further letter of January 12, that they did not accept the contract as being at an end.

[20] Whether repudiation occurred in a given case is a question of fact as was stated by Kerwin, J., for the Court, in **Wellington Oil & Gas Co. v. Alberta Pipeline Co.,** [1936] 2 D.L.R. 335, affirming [1934] 2 D.L.R. 440:

It is always a question of fact whether any particular letter or conduct amounts to a repudiation, and as to whether such repudiation is acquiesced in so as to effect a rescission of an agreement by mutual consent. *Consorzio Veneziano Di*

> *Armamento E Navigazione v. Northumberland Shipbuilding Co. Ltd.* (1919), 88 L.J.K.B. 1194. . . .

[21] Here the judge concluded that, while there was an unwillingness to co-operate on the part of the Thompsons, there was not sufficient evidence that DMT refused to sell the property. It is my view that in so finding he erred. At trial, Graham Thompson had testified that he remained prepared to sell the property to the Wirvins, notwithstanding his solicitor's letter of January 12. The judge could only have concluded that there was an unwillingness to sell, short of refusal, by wrongly taking into account this evidence. What was in Mr. Thompson's mind, which was not communicated to the Wirvins, was irrelevant. The Wirvins had no knowledge of DMT's true intentions regarding sale of the property. The question for the court was whether DMT's letter of January 12 constituted a repudiation of the contract containing the option. In my view it did. It was a palpable and overriding error for the judge to have found otherwise. The effect of the letter was to say: (1) you have not properly exercised the option; and (2) you cannot now exercise it because the lease is at an end for non-payment of rent.

[22] The Wirvins, as was subsequently admitted, had validly exercised the option, which converted the lease to an agreement of purchase and sale. The only reasonable interpretation of DMT's letter was as an expression of a firm intention not to complete the sale.

[23] The terms of the agreement of purchase and sale, as set out in the lease, required only that the transaction be completed within 30 days and that the purchase price be the balance outstanding on the collateral mortgage (see ¶ 15 above). While it would have been preferable for the Wirvins to have specified a closing date, it was admitted by DMT and accepted by the judge that they had validly exercised the option.

[24] Repudiation (also called anticipatory breach) of a contract for the sale of land by a vendor relieves a purchaser of the obligation to tender as a prerequisite to specific performance. In **Whittal v. Kour** (1970), 8 D.L.R. (3d) 163 (B.C.C.A.), Bull J.A., writing for the court, said:

> I did not understand that the appellant submitted that specific performance should not be granted in appropriate cases to a purchaser who at no time before trial had actually tendered the purchase price payable by him. There would be no validity to such a proposition. Tender is not a *sine qua non* for a claim by a person to enforce a defaulting party to complete his bargain. It may be, of course, most cogent evidence that the party claiming enforcement was ready, able and willing to perform his part of the bargain and without which a Court would not order

> specific performance. In this case, the fact that no tender was made is of but little consequence, because the learned Judge found, on uncontradicted and unassailed evidence, that the respondent was at all times up to and including the day of trial so ready, able and willing. It is significant that the respondent commenced his action within days after the appellant's repudiation. I am in full accord with the findings of the learned trial Judge in the Court below with respect to this phase of the matter.
>
> In summary, I am of the opinion that, strict compliance with the provisions for time of completion having been waived by the appellant, the respondent carried out all his obligations under the bargain within a reasonable time until the wrongful repudiation of the transaction by the appellant. I agree that it was clearly demonstrated that the respondent was always ready, able and willing to carry out the bargain, and had not disqualified himself from being given the relief of specific performance, which, in my view, was properly ordered.
> (Emphasis added)

(See also **Hobart Investment Corp. Ltd. v. Walker et al** (1977), 76 D.L.R. (3d) 176 (B.C.C.A.)).

[25] Under the terms of the lease, upon exercise of the option, the Wirvins had thirty days within which to close the transaction. On their part, this meant having funds available to discharge the outstanding balance on the collateral mortgage. There was clear evidence, accepted by the trial judge, that the Wirvins had arranged financing. Additionally, DMT admitted that the Wirvins were, at all times, ready, willing and able to close. As this was a "net" lease, no other closing adjustments were required. A deed for signature was forwarded with the January 4th letter and funds were available. The Wirvins had done all that there was to do in the circumstances.

[26] It was not until the commencement of the trial that DMT retreated from the position that the option had not been validly exercised and that the lease, due to non-payment of the October rent, was at an end. That position taken by DMT was reiterated in its Defence.

[27] It is my view that the Wirvins are entitled to an order for specific performance.

DISPOSITION:

[28] Accordingly, I would allow the appeal and order that DMT specifically perform the contract to sell the land to the Wirvins, in compliance with the terms of the lease. The closing shall take place within 30 days of the date of the order herein.

[29] DMT shall pay to Theresa Wirvin costs in the amount of $2000.00 plus disbursements as taxed or agreed.

Bateman, J.A.

Concurred in:
Saunders, J.A.

Dissenting Reasons for Judgment:

[30] I have had the advantage of reading Justice Bateman's decision and I respectfully disagree with her conclusion in paragraphs 22 and 23, that the trial judge made a palpable and overriding error when he found there was not sufficient evidence to conclude that DMT had refused to sell.

[31] Justice Bateman focuses on the wording of the January 12 letter from DMT's counsel, and concludes the trial judge could only have found there was no refusal to sell in light of this letter, by wrongly taking into account the testimony of Graham Thompson, that he remained willing to sell the property to the Wirvin's after this letter. She concludes in paragraph 23 that the only reasonable interpretation of DMT's January 12 letter is that it shows a firm intention not to complete the sale, hence making the trial judge's conclusion that there was not sufficient evidence of a refusal to sell, a palpable and overriding error.

[32] I am not satisfied this conclusion of the trial judge was unreasonable, amounting to a palpable and overriding error. The evidence before the trial judge included all three letters, Graham Thompson's testimony that the Wirvins were unable to finance the purchase of the property when DMT purchased it in late 1999, early 2000 and were unable to arrange a car lease the year before, and the antagonism between the parties at the time. The trial judge weighed all of this evidence in determining what a reasonable person would conclude as to DMT's intention to sell.

[33] The trial judge noted specifically the complete inadequacy of the closing details set out in the January 4 letter from the Wirvin's counsel, which was not improved in his letter of January 12. The January 4 letter lacked specific details of closing, necessary to ensure the protection of both parties in a purchase and sale transaction. The January 4 letter asks that the deed be signed by DMT and returned to the Wirvin's counsel to be held in escrow, without the terms of the escrow being set out. It states the Wirvin's counsel will instruct the Wirvin's to pay out the mortgage, in effect the purchase price. The Wirvin's counsel does not say he will pay out the mortgage, which might have suggested the money was available. There is no indication the Wirvin's had the money available to pay out the mortgage, which is not surprising in light of the evidence that they made the application to the bank for financing the day before, on January 3. The absence of any indication in the letter that the Wirvin's had the money available is significant given DMT's knowledge of the Wirvin's difficulty in arranging the money to buy the property in the first place and in arranging a car lease a year before.

[34] In the January 4 letter, the Wirvin's counsel states he will confirm the payout of the mortgage and register the deed. There is no provision for delivery of the deed to DMT. If the building had burned down the day the mortgage was paid off and prior to registration and delivery of the deed to DMT, what would the parties interests have been? There is no time set in the letter for the completion of the sale, the signed deed could have been in the hands of the Wirvin's counsel for days, weeks or years.

[35] DMT's letter of January 12, in response, was not very clear, but dealt mainly with the inadequacy of the closing provisions, referring to both the need for a closing date to be set and the need for the payment of the purchase price. I accept it also attempted to terminate the lease.

[36] The Wirvin's second letter of January 12 did not help, because it did not propose any details of the closing, only noting that the closing procedures proposed in the January 4 letter were not agreeable to DMT.

[37] With this evidence before him, I am not satisfied the trial judge's conclusion that there was not sufficient evidence to conclude there was a refusal to sell was unreasonable or amounted to a palpable and overriding error.

Hamilton, J.A.