2000

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Horne v. Shepherd, 2002 NSSC 4]

Date: January 31, 2002
Docket: SH 161161C

BETWEEN:

ROY HORNE

Plaintiff

- and -

IRENE J. SHEPHERD

Defendant

DECISION

HEARD: before the Honourable Chief Justice Joseph Kennedy, in the Supreme Court of Nova Scotia, Halifax, Nova Scotia, July 19, 20, 2001.

DECISION: January 31, 2002

COUNSEL: John D. Filliter, Q.C. for the defendant
Helen L. Foote for the Plaintiff

Kennedy, C.J.:

[1] This case is about the sale of real property. The issue being exactly what property was being sold.

[2] The defendant, Irene J. Shepherd (hereinafter referred to as 'Shepherd') is the vendor. In October of 1999, she decided to sell a commercial garage property in Dartmouth that had been her deceased husband's business location.

[3] She approached Andrew Higdon (hereinafter referred to as 'Higdon'), a real estate agent with Century 21 in Dartmouth, to list the property.

[4] A listing was accomplished and eventually the defendant, Roy Horne (hereinafter referred to as 'Horne'), made an offer to purchase, dated October 27, 1999 which resulted in a counter offer by Shepherd which was accepted by Horne the next day.

[5] In both the agreement of purchase and sale and the counter offer, the property is simply described as "561 Pleasant Street" without further details.

[6] I am satisfied that parol evidence can be considered to determine what property this civic number refers to. I rely on the decision of Dickson, J. (as he then was) in *Dynamic Transport Ltd. v. O.K. Detailing Ltd.* (1978), 85 D.L.R. (3d) 19 (S.C.C.) at p. 23:

> " The first contention advanced by the respondent is that the description of the land in the document, which it itself prepared, is not sufficiently certain to satisfy the *Statute of Frauds*, 1676, 29 Car. II, c. 3. It is argued that without parol evidence the four acres could be taken anywhere in the 5.42 acre parcel so long as the building was included. The appellant, on the other hand, argued that three of the boundaries of the parcel are fixed (being the north, east and south sides) and that the other boundary is simply a straight line, parallel to the eastern boundary, running immediately west of the west wall of the warehouse. The parcel thus delineated would comprise about four and one-thirteenth acres.
>
> On the issue of certainty of description of the land, Courts have gone a long way in finding a memorandum in writing sufficient to satisfy the *Statue of Frauds*. The Judges have consistently attempted to ascertain and effectuate the wishes of the parties, undeterred by lacunas in the language in which those wishes have been expressed. Thus, in *Plant v. Bourne*, [1897] 2 Ch. 281, the defendant agreed to buy a property described in a memorandum signed by him as "twenty-

four acres of land, freehold, at T., in the Parish of D". It was held by the Court of Appeal, following the principle of *Ogilvie v. Foljambe* (1817), 3 Mer. 53, 36 E.R. 21, and *Shardlow v. Cotterell* (1881), 20 Ch.D. 90, that parol evidence was admissible to show the subject-matter of the contract. Lindley, L.J., said, at p. 288:

> 'That there was an agreement is plain enough. What is it that the agreement refers to? The answer to that is, it was the twenty-four acres of freehold land which they were talking about. Evidence to shew that is admissible; and if that is once admitted, there is an end of the case.'

In *McMurray v. Spicer* (1868), L.R. 5 Eq. 527, the defendant agreed to purchase from the plaintiff 'the mill property, including the cottages, in Esher Village – all the property to be freehold'. In an action for specific performance, it was held that parol evidence was admissible to identify the property. And in *Bleakley v. Smith* (1840), 11 Sim. 150, 59 E.R. 831, the vendor, who had five houses and no other property in Cable St., drew up a memorandum in his own handwriting, reading: 'John Bleakley agrees with J.R. Bridges to take the property in Cable Street for the net sum of £248.10s.' It was held that the memorandum was sufficient under the *Statute of Frauds*. Parol evidence, of course, was necessary to show that the vendor had no property in Cable St. other than the property in question."

[7] The plaintiff, Horne claims that he understood that he was buying the garage property described as 561 Pleasant Street, which he believed was composed of three separate lots with frontage on Pleasant Street, one of which extends back to McKenzie Street, and a further separate abutting lot at the rear of the garage, which lot fronts on McKenzie Street. This separate McKenzie Street lot is referred to herein as Lot # 10, (a reference to a surveyors plan of some McKenzie Street Properties).

[8] Horne had reason to understand that the property included Lot # 10 because the property is described in the addendum to the listing agreement dated the 19th of October, 1999, in part as follows:

> " Great location. High Traffic Area - 105'. of frontage on Pleasant Street with separate lot on MacKenzie Street... "

[9] The defendant, Shepherd claims that the separate lot on McKenzie Street (Lot # 10) was never intended to be part of the property she was selling. She testifies that the real estate agent, Higdon, included that lot in the listing without her knowledge or authorization.

[10] As a result Shepherd has refused to convey the separate McKenzie Street lot (Lot # 10) to Horne as part of the 561 Pleasant Street package.

[11] Shepherd's solicitor tendered a warranty deed to the 561 Pleasant Street property, not including the McKenzie Street Lot # 10, on the closing date. The document was not accepted by the plaintiff.

[12] The plaintiff Horne, brings this action for a specific performance asking that this Court cause the defendant to complete the transaction by conveying the McKenzie Street Lot #10 as part of the 561 Pleasant Street package.

[13] I am satisfied that, in this specific, evidence pertaining to the circumstances of the listing, can properly be considered by this Court in order to determine whether a mistake was made and if so, its effect on the validity of the agreement of purchase and sale, *Feltner v. Nova Scotia* (1972), 27 D.L.R. (3d) 630.

[14] The communication between the defendant, Shepherd and the real estate agent is central to this matter.

[15] The agent, Higdon, testified that he had known Shepherd for years prior to her coming to see him about listing the "garage property."

[16] He said they discussed price and listed it at $139,900.00.

[17] Higdon testified that Shepherd disclosed the description of the property for listing purposes, by providing him with a page from a listing agreement which had been prepared when the property was previously listed with another realtor in 1994.

[18] Also provided by Shepherd was a plan showing the property.

[19] The 1994 listing document provided to Higdon by Shepherd is in evidence (Exhibit 1 Tab 65).

[20] In that document the property is described in part as follows:

> "Established auto repair on large commercial lot with frontage on Pleasant (105') and also on McKenzie (70'). Very high traffic count on Pleasant."

[21] The plan provided by Shepherd is also in evidence (Exhibit 1 Tab 3 Page 2). It does not distinguish a separate McKenzie Street lot, but does show that the land described thereon as belonging to "Irene Shepherd" has a frontage on the Eastern Passage Road (Pleasant Street) of 105 feet and at the back of the property, 70 feet on McKenzie Street.

[22] The frontage on Pleasant Street is composed of the three separate connecting lots, each with a frontage of 35 feet, totalling the 105 feet. The one of the three lots that extends back as far as McKenzie Street follows that street

boundary for 35 feet; half of the McKenzie Street boundary of 70 feet (as set out in the description given Higdon).

[23] Higdon testified that he made notes as to what was included in the garage property package during the meeting with Shepherd.

[24] These written notes were produced in evidence (Exhibit 1 Tab 7 Page 3). They read in part: "3 Pleasant" "1 McKenzie".

[25] Higdon says that when the addendum to the listing agreement was filled out and then signed by Shepherd on October 19, 1999, the description of the property for advertizing purposes was not filled in, in the space provided on the preprinted document. The description was added to that document later, back at the real estate office, when Shepherd was not present.

[26] Higdon testified that he was not concerned about this process because he knew what the property contained as a result of the information provided to him by Shepherd. Higdon testified that in addition to the documentation, Shepherd kept saying "it includes a lot on McKenzie Street".

[27] When the property was advertised for sale and Horne expressed interest, Higdon visited him at his place of work, and told Horne what the property encompassed – including, the 70 feet on McKenzie Street.

[28] I am satisfied that when he did so, Higdon was acting on behalf of Shepherd.

[29] After the offer, counter offer and acceptance, Higdon said that he thought that there was an agreement in place. A condition was, that Horne had until November 30, 1999, to accomplish an environmental assessment of the property with an anticipated "closing" on December 30, 1999.

[30] There was a problem with the environmental condition of the property, nevertheless, Horne continued to be a willing purchaser and in fact asked Higdon if the "closing date" could be advanced.

[31] Higdon testified that Shepherd had expressed to him that she thought the property had sold too quickly and asked that the agency reduce its commission down from 6% to 4% which it did agree to do.

[32] When Higdon contacted Shepherd to inquire as to an advance of the closing date, she said that she would not close early and added that the property did not include the McKenzie Street lot (Lot # 10). "I didn't put it on paper".

[33] Higdon said he was shocked and simply told her that she better contact her lawyer.

[34] Higdon testified that he had a happenstance meeting with Shepherd in a mall on December 2nd , and she caused him to believe that she would not have made an issue over the McKenzie Street lot, had she not gotten "terrible" letters from Horne's lawyer as to the environmental issue.

[35] Kathy Gulliver is another agent with Century 21 who is “partnered” with Higdon in the Dartmouth office.

[36] She testified that she was present with Higdon at the Shepherd home when they “got the listing”.

[37] She said that while Higdon was doing the paperwork, she talked to Shepherd about the property.

[38] She testified that the conversation involved the likely “saleability” of the property, because it also had a back entrance from McKenzie Street.

[39] Gulliver testified that Shepherd told the agents that “everything was the same” as the description in the 1994 listing.

[40] Gulliver says that all present agreed that the agents would add the advertisement “cut” back at the office so that it could be “worded carefully”.

[41] The purchaser, Horne testified that the McKenzie Street lot (Lot # 10) was essential to the purchase, because otherwise he would be unable to operate his business on the property. He runs a “mobile wash” operation that services Irving Oil trucks. The location is ideal for that purpose, because it is proximate to the Irving facility in Dartmouth, however, without the McKenzie Street lot (Lot # 10) included, the property would not be large enough to accommodate the business.

[42] The defendant, Irene Shepherd testified. She disputes the agent’s testimony as to the circumstances of the listing.

[43] She testified that she did not list the property at her home and further, she said she had no conversation concerning the property with Kathy Gulliver. She says that Gulliver was not present when the listing was accomplished at the real estate office.

[44] Shepherd acknowledged that she gave Higdon the 1994 listing to get “some” of the details of the property from that source.

[45] She claims, however, that the McKenzie Street lot (Lot # 10) was never intended to be sold as part of the parcel and that she did not know that the agent had included it as part of the package until after the counter offer had been accepted.

[46] Shepherd acknowledged her signature on the listing agreement, but stressed that the description of the property was not filled in when she signed. She said she did not get a copy of the document after the description was added.

[47] The McKenzie Street lot (Lot #10) was purchased by Shepherd and her husband in January of 1984. It was a house property that abutted their commercial property. Shepherd said they rented out the house on the property for awhile, but then had it torn down.

[48] As indicated, the frontage on McKenzie Street in the "listing" description used herein is 70 feet. That total is a combination of 35 feet on McKenzie Street that is the back end of one of the three Pleasant Street lots and 35 feet that is this McKenzie Street lot (Lot # 10).

[49] It is of significance that Shepherd admitted on cross-examination that she thought that there was 70 feet on McKenzie, without including the McKenzie Street lot (# 10). This demonstrates that Shepherd knew that she was conveying 70 feet on McKenzie Street.

[50] She testified further, that the previous 1994 listing description, the one she gave to Higdon, was also in error to the extent that it included the McKenzie Street lot.

[51] I find that Shepherd gave Higdon the 1994 listing description to be used in the 1999 listing, and she did so knowing that it included 70 feet on McKenzie Street.

[52] I find that if Shepherd did not realize that the 70 foot frontage included the separate McKenzie Street Lot (Lot # 10), this misunderstanding was not communicated to Higdon, and so not communicated by Higdon to Horne.

[53] There is evidence that indicates that Shepherd knew that the property included Lot # 10 when she listed and consciously reneged on the agreement. I do not find this as fact. However, I do find that she should have known that she was listing the McKenzie Street Lot as part of the package.

[54] Had Shepherd taken reasonable care to examine the plan (Exhibit 1 Tab 3 Page 2) that she gave Higdon to assist in preparing the listing, she would have noted that the 70 feet on McKenzie Street exhausted all of the property that she owned facing on that street, including the separate McKenzie Street lot.

[55] If Shepherd meant to except that McKenzie Street house lot from this sale, it would have been reasonable to expect that she would have said so when listing. She would have made it clear to the agent that she owned an abutting lot on McKenzie Street that was not to be part of the transaction. Shepherd testified that she understood that the tenant operating the garage at the time may have used Lot # 10 to park cars. This knowledge would have enhanced the necessity of clearly informing Higdon of her intention not to include that lot in the package to be sold. I find that she did not do so.

[56] Rather, I am satisfied that Shepherd, unequivocally communicated to Higdon by providing the previous 1994 listing description and the plan that

the property contained 70 feet frontage on McKenzie Street and the property was described for listing purposes accordingly.

[57] I find that Shepherd informed the agent that she was selling the same property that Horne understood that he was purchasing.

[58] If she did so mistakenly, she did not communicate the error until after the agreement was accomplished.

ARGUMENT

[59] The defendant, Shepherd cites the Statute of Frauds pointing out that the agreement of purchase and sale, as modified by the plaintiff's counter offer, did not make reference to the separate lot on McKenzie Street, but, rather, described the property by the Pleasant Street civic number only, without any explanation as to what property is meant to be included under that minimum description.

[60] The defendant argues therefore, that the description contained in the documentation is not sufficiently certain to satisfy that statute.

[61] I find that when the civic number description is supplemented by parol evidence concerning this transaction, there is certainty as to what is meant by "561 Pleasant Street" and the Statute of Frauds is not a defence hereto. *(Dynamic Transport, supra)*

[62] The defendant, Shepherd argues *non est factum*, claiming that there was a mutual material misunderstanding between the parties as to the extent of the property being sold and therefore the agreement of purchase and sale is not a valid contract.

[63] The defendant cites the Nova Scotia cases, *Costin v. Blois* (1988), 84 N.S.R. (2d) 126 (N.S.T.D.) and *Bower v. Harlow* (1982), 51 N.S.R. (2d) 217 (C.A.) in which the courts would not enforce agreements that were uncertain as to the land being conveyed.

[64] I do not find that there was a mutual misunderstanding in this matter.

[65] The purchaser herein was not confused about what he was getting and had no reason to be.

[66] The listing clearly set out that 561 Pleasant Street was a property that included a 70 foot frontage along McKenzie Street at the back of that property.

[67] The vendor, Shepherd testified that it was she who misunderstood what she was selling and blamed the real estate agents for the confusion. She acknowledged though, that she knew that she was selling a property that was bounded on McKenzie Street for a distance of 70 feet.

[68] Victor Di Castri, *The Law of Vendor and Purchaser* (2nd Ed.), (Toronto: Carswell, 1976) in dealing with the subject matter of misunderstanding, states at p. 126:

> " There is no contract unless and until the parties are *ad idem* on every point of the proposed bargain. Accordingly, in the absence of a successful plea of estoppel being raised, which precludes one of the parties from denying he has assented to the terms of the other, no specifically enforceable contract arises where there is a material misunderstanding between the parties which negatives any consensus and the memorandum is equivocal or silent as to the term in issue.
>
> But it is only a *bona-fide* misunderstanding that binds the conscience of the court; a plaintiff simply rueing his bargain has no status in a court of equity. Likewise, a vendor company cannot escape specific performance on the ground of unilateral mistake in that it intended, by the use of the word 'land' in the memorandum, to reserve or except minerals in accordance with the general practice of the company. A contrary view, in the absence of misrepresentation or a nullifying ambiguity, would permit an unwilling party, who was also unscrupulous, to evade the performance of his contract."

[69] If the vendor was mistaken as to what property she was conveying, it was a unilateral mistake that should not reasonably have been made, and unknown to the purchaser until disclosed after the contract was complete.

[70] In *Chitty on Contracts*, Twenty-eight Ed., Vol. 1, General Principles (London: Sweet & Maxwell, 1999) at p. 333, para. 5-089:

> "**Unilateral mistake**. A contract which is otherwise valid at common law will very rarely, if ever, be rescinded on the ground of unilateral mistake. If there has been a misrepresentation, whether fraudulent or otherwise, it may be rescinded; but in the absence of such a misrepresentation it seems that the defendant must have in some way contributed to the mistake, and it must be inequitable for him to avail himself of the legal advantage so obtained."

[71] In *Arns v. Halliday* (1981), 36 Nfld. & P.E.I.R. 337 (NFSC) is a case with a similar fact situation. In that case the plaintiff intended to sell only two lots, while the defendant honestly believed they were purchasing three and refused to close.

[72] It was the vendor in *Arns* that sued for specific performance, the defendant purchaser responding that it was a case of mutual mistake and the contract was not valid and should not be enforced.

[73] Lang, J. the trial judge, found the purchaser's mistake was unilateral. He states at p. 351:

> "I find there was a contract of purchase and sale modified by the counteroffer which was clear and unambiguous. This contract is free of any unconscionable dealing and there was a unilateral mistake on the part of the defendants in assuming they were buying three pieces of land.
>
> I find also that there has been a breach of the contract of purchase and sale by the defendants. There was a lack of care, diligence and reasonable prudence on the part of the defendants. The land was only checked by Mr. Halliday on May 14, 1981, the day before the agreed date of closing."

[74] In *Arns* the trial judge found a binding contract, but awarded damages finding it inequitable to grant specific performance in that specific.

[75] There was in this matter, as in *Arns*, no evidence of unconscionable dealing on the part of the purchaser.

[76] I find herein, that the agreement of purchase and sale as modified by the counter offer and acceptance, is a complete and valid contract that is binding in law.

[77] I find that the vendor, Shepherd breached the contract when she refused to convey the McKenzie Street Lot # 10 as part of the property described as "561 Pleasant Street".

AS TO THE REMEDY

[78] The question remains whether this is a case in which this Court should grant the purchaser specific performance against the vendor or provide a remedy in damages.

[79] *Chitty, supra,* at p. 1357, para. 28-005:

> "**Generally**. The historical foundation of the equitable jurisdiction in granting a decree for specific performance of a contract is that the party seeking it cannot obtain a sufficient remedy by the common law judgment for damages. Hence the traditional view was that specific performance would not be ordered where damages were an 'adequate' remedy. Typically, this would be the case where the claimant could readily make a substitute contract for a performance equivalent to that promised by the defendant: the claimant would then be adequately compensated by damages based on the difference between the cost (or market price) of the substitute, and the contract price. Some of the early authorities approach this problem by asking whether damages would *in fact* adequately compensate the claimant. At a larger stage in the development of the subject, the courts tended rather to ask whether damages were *likely* to be an adequate remedy for breach of the particular *type* of contract before the court. But more recently the courts have reverted to the earlier approach, by focusing attention on the appropriateness of the remedy of specific performance in the circumstances of each case. The question is not whether damages are an 'adequate' remedy, but whether specific performance will 'do more perfect and complete justice than an award of damages.' "

[80] Specific performance, being a discretionary remedy, may be refused, although a contract is binding if it would cause severe hardship to the defendant. *Chitty, supra,* at p. 1370 para. 28-028:

> " **Severe hardship to defendant**. Specific performance may be refused on the ground that the order will cause severe hardship to the defendant. Thus in *Denne v. Light,* (1857) 8 D.M. & G 774, the court refused specific performance, against the buyer, of a contract to purchase farming land wholly surrounded by land which belonged to others and over which the buyer would have no right of way. Specific performance may also be refused where the cost of performance to the defendant is wholly out of proportion to the benefit which performance will confer on the claimant; and where the defendant can

> put himself into a position to perform only by taking legal proceedings against a third party (especially if the outcome of such proceedings is in doubt.)"

[81] I find that this is a case in which specific performance is the just remedy.

[82] I find that this property has added value because of its location that is unique to this purchaser and I accept his testimony that value is removed if he cannot obtain Lot # 10 as part of the garage property package. Damages cannot adequately address this reality.

[83] Although the order for specific performance may cause the defendant some hardship, it is not "severe hardship" of a nature that would cause this Court ro refuse the remedy that is otherwise equitable in this matter.

[84] The plaintiff will have his remedy of specific performance. The defendant, Shepherd will convey as soon as reasonably possible to the plaintiff, or his designate, the property known as 561 Pleasant Street, Dartmouth, Halifax Regional Municipality, which property includes the McKenzie Street Lot (Lot # 10).

[85] I have considered the question of additional damages and do not consider such to be appropriate herein.

[86] The plaintiff shall have his party/party costs to be taxed.

Chief Justice Kennedy

Halifax, Nova Scotia