IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Clem v. Hants-Kings Business Development Centre, 2004 NSSC 114*

Date: 20040611
Docket: SH 218441
Registry: Halifax, NS

Between:

Darrell Clem and Joanne Comeau

Applicant

v.

Hants-Kings Business Development Centre Ltd., a body corporate

Respondent

Judge: Associate Chief Justice Michael MacDonald in Chambers

Heard: April 21, 2004, in Halifax, Nova Scotia

Decision Released: June 11, 2004

Counsel: Michael Wood, Q.C., *Burchell Hayman Parish*
for the Applicant

Patrick Saulnier, *TMC Law*
for the Respondent

[1] This Application raises an interesting conveyancing question. What happens when a judgement is secured and recorded against the vendor after an agreement of purchase and sale is signed, but before the deed is tendered and recorded?

BACKGROUND

[2] On August 24, 2002, the Applicants, Darrell Clem and Joanne Comeau, contracted to purchase property located at Millville, Kings County, from Elmer and Viola Dupuis. After the agreement of purchase and sale was signed, but before the deed was tendered, Viola Dupuis had a judgement recorded against her by the Respondent, Hants-Kings Business Development Centre Ltd.

[3] The Applicants, as third party purchasers, maintain that the judgement does not attach to the property, because the agreement of purchase and sale pre-dates the judgement. They seek a declaration accordingly.

[4] The Respondent creditor on the other hand, seeks to execute against the property because title was still in Viola Dupuis' name at the time the judgement was recorded.

ISSUE

[5] The Applicants' position is based on the law of trusts. Their view is simple. Upon signing the agreement of purchase and sale, they, as purchasers, became the beneficial owners of the property. In other words, the Dupuis' held the property for the Applicants in trust, upon certain conditions. As such, the subsequent judgement could not attach to the property because Viola Dupuis' beneficial interest had been divested.

[6] The Respondent's position appears equally simple. It registered its judgement before Viola Dupuis actually deeded the property to the Applicants. Furthermore, the agreement of purchase and sale was never recorded. As such, the Respondent relies on what it terms the clear wording of the *Registry Act*, R.S.N.S.,1989, c. 392 (as it was in the summer of 2002). Specifically, s. 18 required that an instrument (i.e. the agreement of purchase and sale) to be effective must be registered. By virtue of s. 20, a judgement, once registered, became a charge upon the judgement debtor's property:

> 18 Every instrument shall, as against any person claiming for valuable consideration and without notice under any subsequent instrument

> affecting the title to the same land, be ineffective unless the instrument is registered in the manner provided by this *Act* before the registering of such subsequent instrument.
>
> 20 A judgment, a certificate of which is registered in the manner by this *Act* provided in the registry of any district, shall from the date of such registry, bind and be a charge upon any land within the district of any person against whom the judgment was recovered, whether such land was acquired before or after the registering of such certificate, as effectually and to the same extent as a registered mortgage upon such land of the same amount as the amount of such judgment.

[7] At the same time, the Respondent readily acknowledges that, s. 20 has been narrowly interpreted in this Province over the years. For example, it is now settled that a judgement attaches only to that property interest held by the judgement debtor at the time of registration. As a result, judgements have been declared ineffective against prior unregistered deeds and mortgages. See *Royal Lepage Relocation Services v. Ross* (1986), 77 N.S.R. (2d) 190 (N.S.S.C.) and *Pat King Limited v. Moore, et al.* (1970), 1 N.S.R. (2d) 837 (S.C.T.D.).

[8] However, the Respondent maintains that, while an unrecorded deed or mortgage may have the effect of conveying a property interest, an agreement of purchase and sale does not. To hold otherwise it submits, would be an unprecedented step in this Province.

[9] The ultimate issue, therefore, involves the nature of the property interest retained by a vendor upon the execution of an agreement of purchase and sale. It is something upon which a judgement could attach?

ANALYSIS

[10] I begin my analysis by considering the trust relationship between vendor and purchaser after the agreement of purchase and sale is signed. I will then compare situations where the proposed conveyance was aborted to those circumstances where the agreement is completed as contracted. This involves an examination of the so-called "relation-back" theory.

The Vendor As Trustee

[11] This trust relationship between vendor and purchaser dates back to the 19th century. In *Lysaght v. Edwards* (1876), 2 Ch.D. 499 (Ch.D.) Jessel, M.R. developed the principle this way:

> [The] moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the

> purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of the purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money... "Valid contract" means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser - a contract binding upon both parties...

[12] This approach has been followed in several Canadian courts. See *Buchanan v. Oliver Plumbing & Heating Ltd.* (1959), 18 D.L.R. (2d) 575 (Ont.C.A.), *Re: Huxley Catering Ltd.* (1982), 134 D.L.R. (3d) 369 (Ont. C.A.) and *Martin Commercial Fishing Fueling, Inc. v. Virtanen,* [1993] B.C.J. No. 2842 (S.C.) at para. 70; affirmed (1997), 144 D.L.R. (4th) 290 (B.C.C.A.).

[13] Courts in Nova Scotia have, as well, alluded to this principle on several occasions. For instance, in *Lawrence v. Halifax Herald Ltd. et al.* [1985] N.S.J. No. 414 (A.D.) Lawrence entered into an agreement to [re]purchase land from one Claymor, a real estate company. Claymor, at the time, had the property mortgaged. Before the actual [re]conveyance, several judgements were registered against Claymor. At paragraph 16, Jones, J.A. declared that the judgements did not attach to the subject property. At paragraph 16, he noted:

> In the present case Claymor does not even have the legal title as it conveyed it to the mortgage company. It would have no right to acquire the title unless there was a default by Lawrence. It has been paid fully under the terms of the agreement. Whatever interest it has, and even assuming it acquires the legal estate upon a release of the mortgage, it holds as trustee for Lawrence and must give a reconveyance free from encumbrances in accordance with the terms of the agreement. The right or lien of a vendor is with respect to the purchase price. The price having been paid he has no interest remaining in the property which could be subject to the judgments. The judgments are not binding on Claymor's interest in the property as it will have none once the agreement is completed.

[14] In *V. Rankin's Mechanical Contracting Ltd. v. First City Developments Ltd.* [1985] N.S.J. No. 94, Hallett, J. (as he then was) referred to the *Lysaght* principle (albeit in a different context). At paragraph 27, he noted:

> The cases establish that there is an equitable relationship (akin to a trust) between a vendor and a purchaser in an ordinary real property transaction in the period between sale and closing. It has the earmarks of a constructive trust because the obligations on the vendor are imposed by the Court (*Waters' Law of Trusts in Canada*, p. 20).

The "Relation-Back" Theory

[15] For its part, the Respondent views the relationship between a vendor and purchaser as something significantly less than that of a trustee and beneficiary. Specifically, it relies on the 1892 Supreme Court of Canada decision of *Harris v. Robinson* (1892), 21 S.C.R. 390. At paragraph 21, Strong, J. for the majority noted:

> A purchaser under an executory contract is sometimes said, in loose phraseology, to have an equitable title, but the distinction as regards equitable title between his rights under such a contract before payment of the purchase money, and a true equitable title, is well marked.... Whilst his rights under such a contract are incomplete owing to the non-payment of his purchase money, a purchaser has an undoubted right to assign his contract, but he cannot sell the land itself, and cannot properly be called the equitable owner of it.

[16] Furthermore, the Respondent also refers to the 1916 Ontario Supreme Court Appeal Division decision of *Robinson v. Moffatt*, 31 D.L.R. 490 (Ont. S.C.-A.D.) which declared that a judgement registered after an agreement of purchase and sale, but before the conveyance did in fact attach to the subject property.

[17] Yet, both the above cases have an important distinction from the *Lysaght* cases relied on by the Applicants. Both *Harris* and *Moffatt* dealt with agreements of sale that were eventually aborted. In other words, while the trust relationship between vendor and purchaser may be dubious before closing, once the agreement is completed the trust relationship is solidified retroactively. This has been referred to as the "relation-back" theory.

[18] This theory was first professed in dissent by James L.J. in *Rayner v. Preston* (1881), 18 Ch.D. 1 (C.A.). At page 13 the learned Justice noted:

> [T]he relation between the parties was truly and strictly that of trustee and *cestui que trust.* I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust*.

[19] This passage was approved by Duff, J. in the Supreme Court of Canada decision of *R. v. Caledonian Insurance Co.* [1924] S.C.R. 207 at pp. 5-6 (QL).

[20] Di Castri, in the *Law of Vendor and Purchaser*, Vol 2, 3rd Ed. (Toronto: Carswell, 1989) states the theory succinctly at page 13-16:

> (4) it is inaccurate, while the contract is *in fieri*, to call the relationship between vendor and purchaser that of trustee and *cestui que trust*. "But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri.* But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust".*

[21] In the case at Bar, the final conveyance was completed according to the terms of the agree of purchase and sale. Therefore, the "relation-back" theory applies.

Based on this theory, the vendors, Dupuis, from the date of the original agreement, held the property in trust for the Applicants. The judgement, therefore, could not attach to the land in question because the judgement debtor had disposed of her beneficial interest by the time the judgement was registered.

[22] In reaching this conclusion, I understand the Respondent's dismay over the fact that the purchase agreement was never registered. The Respondent, therefore, could do no more to protect its interest. Furthermore, they note that in both *Lawrence* and *Virtanen, supra* the purchase agreements were, in fact, registered before the judgements; thereby affording the judgement creditors effective notice. In the case at Bar, the Respondent received no such benefit.

[23] That having been acknowledged, I return, however, to the key issue before me: What property interest remained with the judgement debtor by the time the judgement was recorded. Based on the above jurisprudence, the judgement debtor, once the purchase agreement was signed, was left with no beneficial interest to attach. In this way, Ms. Dupuis was was no different from those judgement debtors who had signed prior unrecorded deeds or mortgages. In other words the ultimate issue does

not involve registration. It involves the nature of the interest held by the debtor at the time the judgement was recorded.

[24] The Application is, therefore, granted.

[25] I trust the parties can agree on the issue of costs. However, should they be unable to agree, I invite written submissions from counsel for the Applicant on or before June 21, 2004 and, in response, by counsel for the Respondent on or before June 30, 2004.

[26] In any event, when the issue of costs is settled, I direct the Applicants' counsel to present the Order to me after the Respondent's counsel has consented as to form.

Michael MacDonald
Associate Chief Justice