Court of Appeal for British Columbia
First City Investments Ltd. v. Fraser Arms Hotel Ltd.
Date: 1979-06-27

F. H. Phippen, for appellant.

J. T. Steeves, for respondent First City Investments Ltd.

C. S. Bird, for respondent Cumberland Mortgage Corporation Ltd.

27th June 1979. The judgment of the court was delivered by

[1] HINKSON J.A.:— Cumberland Mortgage Corporation Ltd. (hereinafter called "Cumberland") and First City Investments Ltd. (hereinafter called "First City") brought separate actions against the appellant for fees alleged to be due as a result of agreements entered into between the appellant and Cumberland and the appellant and First City in May 1976. The separate actions were tried together and Cumberland and First City each recovered judgment against the appellant. From those judgments the appellant now appeals.

[2] In May 1976 the appellant retained Cumberland to negotiate on its behalf a loan of one million dollars net. The appellant and Cumberland entered into an agency agreement on 5th May 1976, which provided, inter alia:

> "Upon a binding commitment letter from an Investor being given during the term of this exclusive agency, we agree to pay you a service commission of ONE % of the amount of the loan committed exclusive of any fees which you may obtain from such Investor who agrees to fund the loan or upon a binding commitment letter being brought into being at any time in respect of which the efforts of you or your agents were an effective cause; or upon an investor being found ready, willing and able to lend on the aforesaid terms irrespective of whether such Investor is found by you or your agents or any other agent or by us. Such service commission shall become due and payable as follows:
>
> "ON RECEIPT OF COMMITMENT LETTER".

[3] Cumberland arranged with the respondent First City for the required mortgage loan.

[4] A formal application for mortgage was duly prepared and signed by the appellant and remitted by Cumberland to First City on 6th May 1976.

[5] On 4th June 1976 First City sent to the appellant a letter agreement providing for a loan of $1,028,875 to be made to the appellant by a lender to be selected by First City. The agreement stipulated that a fee in the amount of $28,875 "for the analysis of the feasibility of the Loan and arranging the Loan" would be paid by the appellant to First City, $10,000 to be paid immediately (and it was so paid) and the balance of $18,875 to be paid

immediately upon the advancement of the loan or forthwith upon the occurrence of certain stated events.

[6] The letter agreement of 4th June 1976 also provided that First City, at its option, might require Mortgage Insurance Corporation of Canada (M.I.C.C.) insurance coverage of the loan in the event audited financial statements of the appellant for the year ending 30th September 1976 did not show net income before income taxes, depreciation, and interest charges of at least $317,000. The audited financial statements for the 30th September year-end were to be provided to First City within 60 days after the 30th September year-end.

[7] The appellant wrote its acceptance and agreement on the letter agreement on 4th June 1976 and the document was delivered to First City. First City appointed as its nominee lender its associated company, City Savings & Trust Company (hereinafter called “City Savings”).

[8] On 25th June 1976 City Savings wrote a letter of instruction to its solicitors indicating the mortgage documentation that should be prepared and submitted to the appellant for signature. On 29th June 1976 those solicitors delivered a copy of that letter to the solicitor for the appellant together with their own letter of the same date requesting information in connection with the proposed transaction.

[9] On that same day, 29th June 1976, the solicitor for the appellant and the solicitor for City Savings had a telephone conversation during which the solicitor for the appellant informed the solicitor for City Savings that a 17-foot by 50-foot strip of land that had once formed part of the lots particularly described in the letter had been expropriated from the appellant for the approach to a bridge and that, although the land had never been used for the approach, title to this strip was held by the city of Vancouver. The solicitor for the appellant informed the solicitor for City Savings that a portion of the appellant’s kitchen, in which were situated a couple of coolers, was located on this strip. Subsequently, he advised the solicitor for City Savings that the appellant had an unregistered lease of this 17-foot strip from the city of Vancouver and that the lease would expire in November 1976.

[10] On 7th July 1976 the solicitor for City Savings remitted to the solicitor for the appellant documentation drawn pursuant to the letter of instruction of 25th June from City Savings.

[11] Shortly thereafter the solicitor for City Savings wrote to City Savings setting out the information he had received from the solicitor for the appellant in the telephone conversation of 29th June. On 13th or 14th July the solicitor for City Savings received instructions that City Savings required a mortgage of the lease of the 17-foot strip before it would advance the loan proceeds. On 14th July 1976 the solicitor for City Savings relayed these instructions to the solicitor for the appellant.

[12] Thereafter on 19th July 1976 the solicitor for the appellant wrote to the city of Vancouver regarding the lease of the 17-foot strip, and on 6th August he received a letter from the Deputy City Engineer recommending renewal of the existing lease due to expire in November 1976. Immediately on that date, the solicitor for the appellant prepared a letter, which he had delivered to the solicitors for City Savings and in which he enclosed a survey certificate as required by the letter agreement of 4th June 1976. At the same time, the solicitor for the appellant delivered a copy of the letter from the Deputy City Engineer and advised that it might be some six weeks before a lease was signed by city officials. He further suggested that the appellant post securities to the value of $10,000 and hypothecate same to the solicitors for City Savings on terms that the securities should be forfeited to City Savings in the event the lease from the city of the 17-foot strip was not mortgaged to the lender within six months from the date of the granting of the main mortgage. No immediate response to that proposal was received by the solicitor for the appellant.

[13] One of the purposes for which the appellant sought to borrow the sum of one million dollars was to retire a loan from the Royal Bank of Canada in the amount of $500,000. At the end of August 1976, some cheques issued by the appellant were dishonoured by the Royal Bank upon which they were drawn. The appellant was notified of this around 4th or 5th September.

[14] On 20th September 1976 the solicitor for City Savings wrote to the solicitor for the appellant to inform him that, although the full amount of the loan was to be funded, because of the encroachment by the hotel premises upon the 17-foot strip $50,000 thereof was to be held in trust pending either:

(a) the acquisition by the appellant of the 17-foot strip and the addition thereof to the lands charged by the mortgage; or

(b) the acquisition by the appellant of a lease from the city of the said land and the mortgage thereof to City Savings; or

(c) the relocation, at the expense of the appellant, of the encroachment on to land charged by the mortgage in favour of City Savings.

[15] In that letter, the solicitor for City Savings informed the solicitor for the appellant that City Savings would consider the appellant to be in breach of its obligations contained in the letter agreement of 4th June 1976 if the security documentation forwarded to the solicitor for the appellant on 7th July 1976 was not returned duly executed in a registerable form on or before 5:00 p.m. on 24th September 1976. The letter however ended with these words:

> "We would trust that the above indicates to you the position of our client, but if there are any questions, please do not hesitate to contact the writer."

[16] Towards the end of September 1976, the appellant approached the Bank of British Columbia to obtain a loan of one million dollars. On 28th September 1976 the solicitor for the appellant wrote to City Savings to inform it that the appellant had obtained financing elsewhere and demanded repayment of the $10,000 portion of the fee for the "feasibility study of the Loan".

[17] The first ground of appeal advanced on behalf of the appellant to defeat the claims of Cumberland and First City was that the letter agreement of 4th June 1976, the so-called commitment letter, was not a binding contract between the appellant and First City. It was submitted that the letter agreement was too vague or uncertain to be enforceable. It was contended that a number of terms that ought to have been included in the mortgage contemplated by the agreement were left undecided. It was submitted that if the alleged agreement failed to settle, with certainty, all the terms mentioned by counsel for the appellant the agreement was rendered too vague or uncertain to be enforceable. In particular, counsel for the appellant relied upon the decision in *Diamond Devs. Ltd. v. Crown Assets Disposal Corpn.*, [1972] 4 W.W.R. 731, 28 D.L.R. (3d) 207 (B.C.S.C.). In that case Wilson C.J.S.C. said at p. 740:

> "The terms of the mortgage were also left unsettled. Certainly, as to times of payment, they must conform to the terms of the agreement for sale. But there was here no agreement on a form of mortgage, no reference, for instance, to The Short Form of Mortgages Act, R.S.B.C. 1960, c. 358. A mortgage must include many other terms than dates of payment — would there, again for instance, be an acceleration clause on default of payment of an instalment? Must the mortgagor pay taxes and would failure to pay taxes or rates constitute a default? Must the mortgagor insure buildings in favour of the mortgagee? Will the mortgagee have immediate possession on default? The problem thus posed cannot be disposed of by saying that the mortgage would be in the usual form, even if that had been agreed to: see *Buyers v. Begg* (1951), 3 W.W.R. (N.S.) 673 (B.C.C.A.)."

[18] As well, counsel for the appellant relied upon the decisions in *Skagit Holdings Ltd. v. Imahashi,* B.C.S.C., 1973 (unreported); *Schultz v. Chekoski,* [1975] W.W.D. 134 (B.C.S.C.); and *Arnold Nemetz Enrg. Ltd. v. Tobien,* [1971] 4 W.W.R. 373 (B.C.C.A.).

[19] What terms are essential in a contract for the sale of land has been considered in a number of cases on the Statute of Frauds, and it appears to me that those cases are relevant when considering whether such a contract is void for uncertainty. I shall refer to two of the cases.

[20] In *McKenzie v. Walsh,* 54 N.S.R. 26, 53 D.L.R. 234, reversed 61 S.C.R. 312, [1921] 1 W.W.R. 1017, 57 D.L.R. 24, the agreement read [at p. 235]:

> "Halifax, N.S.,
>
> February 5th, 1919
>
> "Received from A.C. MacKenzie the sum of two hundred dollars on the purchase of house, No. 33 Spring Garden Road. Purchase price ten thousand five hundred dollars. Balance on delivery of deed.
>
> "(Sgd.) Hattie Walsh".

In his dissenting judgment Harris C.J. said at p. 238:

> "It is not an essential term of a contract of sale that a time for the completion of the purchase or for possession should be fixed in the contract. The contract is a good contract within the Statute of Frauds ordinarily, if nothing is said about time. See 25 Hals. 291; *Gray v. Smith* (1889), 43 Ch. D. 208, *per* Kekewich, J., at pages 214 and 215, affirmed 43 Ch. D. 217 (C.A.).

In the Supreme Court, Davies C.J. concurred with Harris C.J.'s judgment, Duff J. (as he then was) concurred on the whole with that judgment, Anglin J. (as he then was) concurred in it and Mignault J. said at pp. 1025-26:

> "On the question of the sufficiency of the memorandum, the judgment of the learned Chief Justice of Nova Scotia, who dissented in the Court below, is so complete that I rely on his reasoning and do not find it necessary to repeat it here."

All five members of the court — Idington J. was the fifth — held that the agreement was a sufficient memorandum under the statute. In addition to agreeing with Harris C.J.'s judgment, Davies C.J. said at p. 1017:

> "… I have reached the conclusion that the memorandum or receipt is sufficient. That it must contain all the essential terms of the contract and must show that the parties have agreed to those terms is conceded by both sides. That it does do so, I conclude. The essential terms are the parties, the property and the price."

[21] In *Peterson v. Bitzer* (1920), 48 O.L.R. 386, 57 D.L.R. 325, reversed 62 S.C.R. 384, [1922] 1 W.W.R. 141, 63 D.L.R. 182, Meredith C.J.O. dissented in the Appellate Division

of the Ontario Supreme Court. He held that the contract was comprised in an agreement signed by the vendor that read [at p. 325]:

> "Kitchener, Ont., December 29th, 1919. Received from Clayton Peterson the sum of $100 on deposit for house at No. 62 St. George street — $1,400 payable 1st May, 1920, and balance of $2,300 on five year mortgage. Adeline Bitzer";

and in a cheque signed by the purchaser that read [at p. 325-26]:

> "Kitchener, Ont., December 29th, 1919. To Canadian Bank of Commerce, Waterloo, Ont. Pay to the order of Mrs. Adeline Bitzer $100.00, one hundred dollars, deposit on 62 St. George street at purchase-price of $3,800 — $1,400 payable on May 1st, 1920, and assume a 5 yr. mtg. of $2,300. C. Peterson."

Meredith C.J.O. also rejected an argument "that two material terms of the bargain are not evidenced by the writing, viz., the term as to possession and the term as to interest, and that therefore the documents do not constitute a sufficient memorandum of the agreement to satisfy the Statute of Frauds." In the Supreme Court, Davies C.J. and Mignault J. adopted the reasons of Meredith C.J.O. Brodeur J. said at p. 145:

> "The receipt of $100 signed by Mrs. Bitzer on December 29, 1919, and handed over to the plaintiff Peterson, is a document which contains all the essential terms of a contract for the sale of the property therein mentioned. The parties, property and price are all included … This Court, which had to construe lately an almost similar document in the case of *McKenzie v. Walsh* [supra] came to the conclusion that such a receipt complied with the requirements of *The Statute of Frauds."*

[22] In my view, the approach adopted by Wilson C.J.S.C. in the *Diamond Devs.* case, supra, is not appropriate. Rather the approach to be adopted is that set out by Bull J.A. in *Marquest Industs. Ltd.* v. *Willows Poultry Farm Ltd.* (1968), 66 W.W.R. 477, 1 D.L.R. (3d) 513 (B.C.C.A.). He said at p. 482:

> "… if the real intentions of the parties can be collected from the language within the four corners of the instrument, the court must give effect to such intentions by supplying anything necessarily to be inferred and rejecting whatever is repugnant to such real intentions so ascertained."

[23] That passage was cited with approval by McFarlane J.A. in the *Nemetz Enrg.* case, supra.

[24] I feel that I should say something further about the *Diamond Devs.* case. If by the words [at p. 740],

> "A mortgage must include many other terms than dates of payment — would there, again for instance, be an acceleration clause on default of payment of an instalment? Must the mortgagor pay taxes and would failure to pay taxes or rates constitute a default? Must the mortgagor insure buildings in favour of the mortgagee? Will the mortgagee have immediate possession on default?",

Wilson C.J.S.C. means — and I assume that his use of the word “must” and his giving of specific instances necessarily do mean — that, if a purported agreement to give a mortgage is silent on any of those things, or a purported mortgage itself fails to refer to any one of them, the purported agreement or mortgage is void for uncertainty, I must respectfully disagree with him. No one of those things is an essential term of a mortgage. If it were, then a document expressed to be made according to the form in the First Sched. to the Short Form of Mortgages Act, R.S.B.C. 1960, c. 358, which omitted the form of words in col. I of the Second Sched. that is numbered 15 (“Provided that in default of the payment of the interest hereby secured, or taxes as hereinbefore provided, the principal hereby secured shall become payable.”) would be so void. The same applies to the form of words numbered 11 (“And that the said mortgagor will insure the buildings on the said lands to the amount of not less than currency.”). If there is no reference in an agreement to give a mortgage, or no reference in a mortgage itself to any one of the terms that Wilson C.J.S.C. has used as instances, the result is not that the document is unenforceable, but that the mortgagee will not have the benefit of such a term.

[25] There is no single form of words that must be used in a deed of land — vide the variety of forms to be found in the precedent books — and yet countless decrees have been pronounced for the specific performance of contracts that contain no more details than these:

> “This Memorandum of Agreement made this day of between AB and CD witnesseth that AB agrees to sell, and CD to buy, at a price of $ (or £) the freehold in fee simple, free from encumbrance, of Blackacre.”

It is only the lack of a term that is so essential to the contract that without it the court cannot collect the real intentions of the parties from the language within the four comers of the instrument and so cannot give effect to such intentions by supplying anything necessarily to be inferred that will render the contract unenforceable.

[26] I have written thus at length because I think that the approach in the *Diamond Devs.* case, supra, is of a kind which has prompted the submission of a number of arguments that have reached this court which have had no merit in them.

[27] Finally, I do not suggest that the *Diamond Devs.* case was wrongly decided: other deficiencies than those referred to as instances in the passage I have cited clearly brought the case within the authority of the *Nemetz Enrg.* case, supra, which was decided on the absence of specification of “the manner in which that deferred balance is payable” [p. 374].

[28] Thus, it is necessary to consider the letter of commitment of 4th June 1976 to determine whether it constituted a binding agreement between the parties. The appellant asserted that it is deficient in the following particulars:

(a) There was no agreement on the form of the mortgage; there was no reference, for instance, to the Short Form of Mortgages Act.

(b) There was no reference as to whether the mortgage would contain an acceleration clause on default of payment of any instalments.

(c) It did not specify whether the mortgagor or the mortgagee was to pay taxes.

(d) It did not provide whether failure to pay taxes or rates would constitute a default.

(e) It did not specify whether the lender was entitled to take immediate possession on default.

(f) It did not state whether the monthly payments of $11,525 were to be of blended principal and interest.

[29] In my view, the intention of the parties with respect to each of the foregoing matters can clearly be determined within the four corners of the agreement. In the commitment letter, the borrower covenanted, inter alia:

> "… the Borrower agrees to give to the Lender such other documents, assurances, information, and covenants as the solicitors for Lender may reasonably require with regard to the Loan or the security documents to be given thereunder.''

Pursuant to that provision, the solicitors for the lender were entitled to insert in the mortgage document such provisions as they may reasonably have required.

[30] With respect to the monthly payments, the commitment letter provided that interest was to be paid "at the rate of 13¼ per cent per annum calculated semi-annually not in advance".

[31] The agreement further provided:

> "The Loan shall be secured by: …
>
> "3) A fixed and floating debenture or mortgage, as the Lender may elect, in the amount of $1,028,875 bearing interest at the rate of 13¼ per cent amortized over 25 years, and have a term of 5 years constituting a fixed charge over …
>
> "From the advance of the proceeds of the Loan, there shall be deducted the interest due and payable from the date of such advance to the Interest Adjustment Date of June 30, 1976 and thereafter the Loan shall be repaid at the rate of $11,525 monthly,

commencing August 1, 1976, for a period of 5 years, whereupon the balance of principal and interest remaining shall become due and payable in full."

[32] Again, within the four corners of the agreement, it seems to me that the parties clearly expressed their intention as to how the loan was to be repaid with respect to both principal and interest.

[33] In the result, I conclude that the letter agreement of 4th June 1976 was a binding agreement between the appellant and First City.

[34] In those circumstances Cumberland was entitled to its fee of $10,000. Therefore, the appeal involving Cumberland should be dismissed.

[35] Even if the court concluded that the commitment letter was a binding contract, nevertheless counsel for the appellant contended that the demands of the solicitors for City Savings constituted a breach of contract of such a kind as justified the appellant in regarding itself as absolved or discharged from further performance on its side of the contract.

[36] With respect to the fee payable to First City, the commitment letter provided:

> "A fee shall be payable in the amount of $28,875 for the analysis of the feasibility of the Loan and arranging the Loan of which $10,000 has been paid and is hereby acknowledged received by First City. This fee shall be non-refundable, shall be earned by First City upon acceptance by Fraser Arms of the terms and conditions of this commitment letter, and the balance of $18,875 shall be payable immediately upon advancement of the Loan or as hereinafter provided.
>
> In the event that Fraser Arms does not proceed with the Loan; or if the security documents are not registered by June 15, 1976; or if Fraser Arms has not drawn down the Loan by June 30, 1976; or if Fraser Arms has misrepresented or misstated any facts; or if Fraser Arms is unable or unwilling to remove any title defect from the lands to be mortgaged, Fraser Arms agrees that the $10,000 previously referred to shall be retained by First City and that First City will be paid forthwith an additional $18,875. If any of the above events occur, the Lender, at its election, will have no obligation to make any advances under the Loan …
>
> "Upon acceptance of this commitment by the Borrower, creating a binding agreement, the Borrower confirms the entitlement of First City to the fee of $28,875 previously referred to and acknowledges that such sum was determined as a reasonable amount based on the reasonable judgment of the parties to ascertain the sum that would equate the minimum agreed amount that would be due to First City arising from the issuance of this commitment and the efforts made by or on behalf of First City to arrange funds for the Loan and other work and costs incidental thereto."

[37] Counsel for the appellant contended that the letter agreement, even if binding on the appellant, ceased to be enforceable because, first, the documents prepared by the solicitor for City Savings did not conform to the terms of the commitment letter of 4th June

1976. He pointed to particular items contained in the documents which were not contained in the letter agreement. The answer of counsel for City Savings, with which I agree, was to rely upon the provisions of the covenant of the appellant contained in the letter agreement to give to the lender "such other documents, assurances, and covenants as the solicitors for Lender may reasonably require". Counsel for the appellant did not contend that such requirements were unreasonable in the circumstances.

[38] The second ground upon which counsel for the appellant contended that the commitment letter was not enforceable against the appellant was that the requirement of City Savings with respect to the 17-foot strip of land, as set forth in the letter from the solicitor on 20th September 1976, amounted to a repudiation of the letter agreement of 4th June 1976. This submission was based upon the contention of counsel for the appellant that the letter agreement of 4th June 1976 covered only the property registered in the name of the appellant and that City Savings was not entitled to demand security in respect of the 17 feet upon which part of the improvements was constructed.

[39] The letter agreement of 4th June 1976 provided as follows in dealing with the security for the loan:

> "The Loan shall be secured by: …
>
> "3) A fixed and floating debenture or mortgage, as the Lender may elect … constituting a fixed charge over:
>
> "a) the property known as 1450 South West Marine Drive, Vancouver, B.C., and more particularly known and described as:
>
> "Lots 16 to 20 and 23 to 27, Block 1, District Lot 318, and Lot 31, Block 1, District Lot 318, Plan 12844, Vancouver
>
> "(the 'Property')…".

[40] The first part of the description of the property based on the street address is broad enough to include the whole of the hotel premises. There appears to be some discrepancy in the second part when the descriptions in the letter agreement of 4th June 1976, the plan prepared by Matson, Peck & Topliss and the certificate of encumbrance of 9th June 1977 are compared. It seems clear that the money was being loaned primarily on the security of the Fraser Arms Hotel as a going concern. At the outset of negotiations between Cumberland and First City, Cumberland had written a letter on 3rd May 1976 remitting a copy of a recent appraisal on the hotel prepared as of 4th March 1976, together with financial statements on the operation of the hotel for the year ended 30th September 1974 and the year ended 30th September 1975. As well the most recent interim statements as of 29th February 1976, together with the owners' projections for the year-end of 30th

September 1976, were also remitted to First City. It seems clear that the money was being lent on the security of the whole hotel.

[41] The respondent First City contended that the fact that the appellant did not own the 17-foot strip constituted, in these circumstances, a defect in title. Counsel submitted that the efforts throughout the summer months of 1976 by the solicitor for City Savings were directed to resolving this problem so that the defect in title could be removed or dealt with in a manner satisfactory to City Savings.

[42] On the other hand, counsel for the appellant contended that the “legal” description of the property which was to be security for the loan did not involve the 17-foot strip and that the fact the appellant did not own it did not constitute a defect in title.

[43] In my view, the fact that the appellant was purporting to furnish security on the hotel as a going concern and the fact that a portion of that going concern operated on property the title to which was in the city of Vancouver constituted “a title defect” within the meaning of that phrase as contained in the letter agreement.

[44] Through the summer months of 1976 the solicitor for the appellant made some efforts to resolve the title defect, but as the negotiations with the city of Vancouver became protracted he offered to City Savings an alternative solution, namely, the deposit of the sum of $10,000. City Savings did not accept that solution and ultimately responded with a different proposal as set forth in the letter of 20th September 1976. It is apparent from the last paragraph of that letter, to which I have already referred, that, contrary to the contention of counsel for the appellant, City Savings was not repudiating its agreement with the appellant, but was inviting further discussion. Thereafter the appellant sought financing elsewhere. Its conduct in doing so was evidence that it was unable or unwilling to remove the defect in title from the property to be mortgaged.

[45] At that point the balance of the fee became payable to First City.

[46] In the result, I would dismiss the appeal against First City.

Appeal dismissed.