Docket No.: CA 162164
Date: 20001012

NOVA SCOTIA COURT OF APPEAL

[Cite as: Prince Edward Holdings Inc. v. Jomar Holdings Ltd., 2000 NSCA 119]

Chipman, Freeman and Flinn, JJ.A.

BETWEEN:

PRINCE EDWARD HOLDINGS INC.

Appellant

- and -

JOMAR HOLDINGS LIMITED

Respondent

REASONS FOR JUDGMENT

Counsel:	Douglas B. Shatford, Q.C., for the appellant Beryl A. MacDonald, for the respondent
Appeal Heard:	October 12, 2000
Judgment Delivered:	October 12, 2000
THE COURT:	Appeal dismissed with costs and disbursements as per oral reasons for judgment of Flinn, J.A.; Chipman and Freeman, JJ.A. concurring.

FLINN, J.A. (Orally):

[1] The appellant and respondent are the vendor and purchaser, respectively, in a real estate transaction. They were unable to agree on the closing adjustments with respect to that transaction. Following the trial of the issue, Justice Scanlan of the Supreme Court fixed those adjustments, including pre-judgment interest, and the vendor appeals his decision.

[2] The purchaser's business, a Pizza Delight operation, was located in rented premises on property where the vendor wished to construct a Superstore. The vendor persuaded the purchaser to move his business across the street so that the Superstore could be constructed. To accomplish this, the vendor purchased a lot and building for the purchaser. Initially, the agreement between the two provided that the vendor would complete certain expansion and renovations to that building to enable the purchaser to have a turn-key Pizza Delight operation. That agreement was subsequently amended to provide that the purchaser would complete the renovations and expansion to the building, himself, and the vendor would provide the purchaser with $260,000.00 to accomplish that.

[3] The transaction was to have been completed on September 1, 1997, on which date the vendor would convey the land and buildings to the purchaser, and the purchaser would pay to the vendor the sum of $200,000.00.

[4] There are three clauses in the agreement between the vendor and purchaser

which gave rise to their inability to agree on the closing adjustments.

(a) Clause 5A(a) and (b) of the agreement provide the purchaser with the option of paying the purchase price in full on the date of closing, or giving back to the vendor a mortgage for $200,000.00 at 9%. Clause 5 A(a) and (b) provide as follows:

> 5A. On the closing date, the Purchaser shall pay to the Vendor the sum of $200,000.00 (hereinafter called "the purchase price") plus its pro-rated share of 1997/98 real property taxes. The purchase price shall be payable by either of the following two options:
>
> a. By certified cheque, bank draft, or solicitor's trust cheque;
>
> b. The Vendor shall provide to the Purchaser a mortgage back for $200,000.00 at 9% interest calculated semi-annually not in advance for ten (10) years, amortized over twenty (20) years with the right to the Purchaser to prepay at any time or times the whole or any part of the indebtedness secured by this mortgage without notice, penalty or bonus.

(b) Clause 5C of the agreement requires the vendor to pay all costs incurred in relocating utilities included but not limited to telephone service and electrical hook ups. Clause 5C of the agreement provides as follows:

> 5C. On the closing date, the Vendor shall pay to the Purchaser the sum of $10,000.00 the purpose of which is to cover the Purchaser's cost of moving its equipment, for example: coolers, freezers, ovens, computers and reinstallation in the premises. <u>The Vendor shall pay all costs incurred in relocating utilities included, but not limited to: telephone service and electrical hook-ups</u>. (Emphasis added)

(c) Clause 7(b) required the vendor to pay the purchaser's legal fees in connection with the agreement. It provided as follows:

> 7. The Vendor covenants and agrees that:
>
> (b) all legal fees incurred by the Purchaser in any way relating to the terms of this Agreement, including the financing shall be paid by the Vendor;

[5] The purchaser completed the renovations to the new premises, occupied those premises, and was ready to close the transaction on August 25, 1997. The purchaser communicated with the vendor indicating his intention to exercise the option of financing the purchase price ($200,000.00) with a mortgage back to the vendor. He requested that the mortgage be prepared so that it could be executed and he could get a deed to the property. The vendor did not respond. The purchaser, repeatedly, over the next several months requested the vendor to have the mortgage documentation prepared, and to have the deed prepared so that they could close the transaction. The vendor did not respond.

[6] In July 1998, 11 months later, the purchaser decided to obtain his own financing to complete the purchase of this property. He advised the vendor, accordingly, and indicated that he wished to obtain title. The vendor voiced no objection to the purchaser arranging his own financing.

[7] On August 13, 1998 the vendor's lawyer sent a deed to the purchaser's lawyer, to be held in escrow, pending delivery of the purchase price. The vendor's lawyer requested that the purchaser calculate the closing balance. There is no mention in this letter of interest owing to the vendor from the date of the purchaser's occupancy. The purchaser's lawyer responded on August 20, 1998 with suggested closing adjustments. The vendor did not accept the purchaser's calculations.

[8] There were three items in dispute:

(a) Notwithstanding that the mortgage from the purchaser to the vendor never came to fruition, the vendor wanted the purchaser to pay interest on the purchase monies at 9% (the rate that would have been charged on the mortgage) from September 1, 1997 to the actual date of closing. The purchaser did not agree to pay such interest.

(b) Pursuant to clause 5C of the agreement, the purchaser deducted from the purchase price the sum of $12,893.73 representing "costs incurred in relocating utilities." The vendor disputed these deductions. At the trial of the action the purchaser agreed that one of the items included in this amount (well drilling - $5,175.00) should not have been included; leaving the purchaser's claim for costs incurred in relocating utilities at $7,718.73. The vendor agreed with some, but not all of these deductions.

(c) Pursuant to clause 7(b) of the agreement the purchaser deducted from the purchase price a bill for legal services in the amount of $1,840.00. With respect to this specific item, the trial judge allowed the purchaser's claim for legal fees, but only to the extent of $500.00. This item is not in dispute in this appeal.

[9] On the issue of costs incurred in relocating utilities, there were three items which the vendor disputed; namely, a requirement of Nova Scotia Power that a cap be

installed on the outside electric transformer ($327.75), the cost of piping from the propane tank on the outside of the building to the inside of the building, where it could be hooked up to the propane appliances ($4,530.34) and the electrical contracting fee for the outside hook-up on the exterior of the premises ($3,191.25). The trial judge questioned whether there was any ambiguity in clause 5C of the agreement, and that these costs clearly involved utilities within the meaning of the clause. He further noted that if there was any ambiguity in the meaning of the word “utilities” in clause 5C, he would resolve it in favour of the purchaser. The purchaser was moving to accommodate the vendor. He was concerned about hook-up costs, and, in the initial discussions the vendor agreed to provide the purchaser with a turn-key operation in the new premises. The trial judge allowed the purchaser’s claim for those costs of $7,718.73.

[10] On the issue of pre-judgment interest, payable on the net balance of the purchase price, the vendor claimed interest at 9%, the same rate in the mortgage which was initially to have been provided to the purchaser from the vendor. The vendor also claimed that interest from the date the purchaser occupied the premises through to the date of the order for judgment.

[11] The trial judge noted that the agreement provides for no interest rate other than that provided for in the mortgage which the parties had contemplated. That mortgage transaction was never completed, solely through the fault of the vendor in repeatedly failing to respond to the purchaser’s request in that regard. The trial judge

decided, that, absent any specified interest rate, the legal rate of interest should apply (5%).

[12] As for the period for which pre-judgment interest should be paid, the trial judge took into account the fact that the closing was delayed through the fault of the vendor, as was the trial of the action. He awarded pre-judgment interest from the date the closing was to have taken place (September 1, 1997) to the date the purchaser arranged his own financing (July 7, 1998). After the purchaser had arranged his own financing, the further delay in closing was as a result of the vendor not agreeing to the purchaser's adjustments, the majority of which the trial judge decided were valid.

[13] Since the vendor, after repeated requests of the purchaser over a period of 11 months, refused to provide the purchaser with the mortgage documentation in accordance with clause 5A(b) of the agreement, the purchaser was justified in acting as he did to obtain his own financing. In fact, the vendor had no objection to the purchaser arranging his own financing. The purchaser was, therefore, entitled to treat clause 5A(b) as at an end, leaving the agreement without any provision for interest payable on the purchase price.

[14] In fixing the rate of pre-judgment interest, the trial judge made no error in law by ignoring the interest rate in clause 5A(b) of the agreement. The awarding of pre-judgment interest on the balance of the purchase price, and the period for which it was

awarded, in the circumstances was largely an exercise of discretion. In our opinion, the trial judge applied no wrong principle of law in the exercise of that discretion which would warrant the intervention of this court.

[15] Further, in setting the amount which the purchaser was entitled to deduct from the purchase price for utility costs, the trial judge made no error in his interpretation of clause 5C of the agreement.

[16] The appeal is dismissed. Costs are fixed at $1,200.00 plus disbursements.

Flinn, J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A.