Date: 20020121
Docket: CA 172162

NOVA SCOTIA COURT OF APPEAL
[Cite as: Cameron v. MacLennan, 2002 NSCA 13]

Roscoe, Hallett and Bateman, JJ.A.

BETWEEN:

ELIZABETH CAMERON

Appellant

- and -

MARGARET MacLENNAN

Respondent

REASONS FOR JUDGMENT

Counsel: David L. Parsons, Q.C. for the appellant
Gerald A. MacDonald for the respondent

Appeal Heard: January 18, 2002

Judgment Delivered: January 21, 2002

THE COURT: Appeal allowed per reasons for judgment of Hallett, J.A.; Roscoe and Bateman, JJ.A. concurring.

HALLETT, J.A.:

[1] The issue on this appeal is whether Justice Simon MacDonald erred in law in concluding that the appellant had agreed to sell her one-half interest in the MacKinnon property to her sister, the respondent. The property had been conveyed to them as joint tenants by their mother on March 5th, 1997. It was not long before they were fighting over the property, the contents and other matters.

[2] In the year 2000, the parties, through their solicitors, negotiated for several months. The solicitors exchanged correspondence which commenced with the appellant's solicitor, Mr. Parsons, writing to Mr. MacDonald, the respondent's solicitor on June 19th, 2000, as follows:

> Re: RE: ELIZABETH CAMERON AND MARGARET MACLENNAN
>
> Further to our telephone conference on June 16, 2000, my client makes a "without prejudice" proposal to your client as follows:
>
> 1. My client would pay to your client $40,000.00 for all her interest in the property;
>
> 2. Brian would pay $5,000.00 to my client for the lot as proposed by my client;
>
> 3. Your client would give my client $2,000.00 to equalize the division of household goods;
>
> 4. There would be an adjustment that each party would pay half the taxes, utilities and insurance up to the date of closing.
>
> Please review this proposal with your client and advise.

[3] Pursuant to this letter, the appellant was offering to buy the respondent's interest in the MacKinnon property.

[4] On June 30th, 2000, Mr. MacDonald responded by making a counteroffer that would have the respondent buying out the appellant's interest in the MacKinnon property upon terms which include the requirement that the appellant

also execute a deed in favour of the respondent in respect of the MacLennan property. The letter states:

> Re: Elizabeth Cameron and Margaret MacLennan
>
> I have the benefit of your letter of June 19th, and I have gone over it in some detail with my client. My client is prepared to match your offer and we would pay you $40,000.00 in return for your client's interest in the property. We would make no additional adjustments for other items.
>
> There is the left over matter of the monies that are in the joint account at the bank which are held in trust for Brian MacLennan. We would have to have a written Release from these monies. We would also like a written Release of the mower and other items.
>
> We also ask for a deed for the so called MacLennan property back to Margaret MacLennan.
>
> If your client is not interested in this offer, I suggest that we carry on and under the Partition of Lands Act have inspectors appointed to do a report and do a division of the land on that basis. Would you please propose who you suggest would be a suitable inspector for your side. We will suggest someone and give the authority to both of them to appoint a third and we should also obtain a court Order making the decision of such inspectors final and binding on both sides.
>
> I would stress that this correspondence, communication and protracted negotiations are to very little purpose. Let us bring this to a conclusion. Perhaps if you would exercise some direction with your client and I will undertake to do the same as well. We could bring it around so that this time next year we are not still communicating on the matter.
>
> May I hear from you as soon as possible.

[5] On August 4th, Mr. Parsons wrote Mr. MacDonald as follows:

> RE: ELIZABETH CAMERON AND MARGARET MACLENNAN

> My client has instructed me to advise you that she is prepared to convey her interest in exchange for $45,000.00. Please review this with your client and advise us.

[6] I would interpret this offer as indicating a willingness to convey the MacKinnon property for $45,000 as it was the MacKinnon property the solicitors were discussing in the June correspondence.

[7] On August 22nd, 2000, Mr .MacDonald responded to Mr. Parsons as follows:

> Re: Elizabeth Cameron and Margaret MacLennan
>
> I apologize for being so tardy in getting back to you. There was some vacation period and I have had to consult with my client.
>
> Our original offer was for $40,000.00 to purchase your client's interest in the so called MacKinnon property. I repeat that offer herewith. The appraisals that have been done have shown the property to have a value of less than $80,000.00 and therefore our offer of $40,000.00 is very reasonable. Please ask your client to reconsider this proposal.
>
> In other respects, we are also looking for the items that were named in my letter of June 30th, including the MacKinnon property which is the subject of our continuous correspondence, the so called MacLennan property to be transferred over to Margarete MacLennan or her nominee, the funds that are on deposit at the bank which are in an account which cannot be touched but which are Brian's money, and we also require the bedroom set which includes a bed, box spring, mattress, commode and bureau, a dining room set, a couch, a revolver and an old crib. Also the tractor mower.

[8] There was no response from Mr. Parsons to this counteroffer which speaks for itself.

[9] On September 28, 2000, Mr. MacDonald wrote Mr. Parsons as follows:

> Re: Margaret MacLennan - Elizabeth Cameron

> I refer to your earlier correspondence to me where your client has agreed to settle all outstanding issues in return for $45,000.00.
>
> My client has capitulated and is agreeable to paying this amount. We would ask for you to be responsible for drafting the conveyancing documents, arranging for their execution and tender to me in escrow. I, in return, will arrange for funding.
>
> I also require by separate cover a letter of authorization directed to the Royal Bank from your client where she gives up her interest in the Bank account as referred to in previous correspondence. We also want to know about the return of items mentioned.
>
> Kindly confirm your position as soon as possible.

[10] The September 28th letter suggests that the appellant in the August 4th, 2000, letter had agreed to "settle all outstanding issues" in return for $45,000. That is an incorrect statement. Pursuant to the August 4th letter the appellant had agreed to sell her interest in the MacKinnon property for $45,000. That is the only reasonable interpretation to put on that August 4th letter; that would not settle all issues.

[11] On October 20th, 2000, Mr. Parsons wrote Mr .MacDonald as follows:

> RE: ELIZABETH CAMERON AND MARGARET MACLENNAN
>
> My client hereby gives notice that she is withdrawing her offer to sell the MacKinnon property.

[12] As is clear from the correspondence, the parties were negotiating respecting, not only the transfer of their respective interests in the MacKinnon property, but a division of personal property in and about the MacKinnon property and sharing of expenses associated with that property. There were also proposals from the respondent: (i) that the appellant execute a deed for the MacLellan property; and, (ii) a release of any interest in monies in the Royal Bank which are apparently held in trust for Brian MacLellan.

[13] On November 27th, 2000, the respondent filed an originating notice (application *inter parties*) seeking "an order for specific performance of an agreement reached between the plaintiff and the defendant through their solicitors." The evidence presented on the application was by way of affidavits. There was no cross-examination of the deponents.

JUSTICE MACDONALD'S DECISION:

[14] Justice MacDonald concluded that the September 28th, 2000, letter from Mr. MacDonald to Mr. Parsons was an effective acceptance of the August 4th offer Mr. Parsons had made on behalf of the appellant to convey her interest in the MacKinnon farm for $45,000.00. An order issued requiring the appellant to convey her interest in the property in exchange for the sum of $45,000.00.

DISPOSITION OF THE APPEAL:

[15] The appeal is allowed. Justice MacDonald erred in law in failing to understand that the August 22nd letter from Mr. MacDonald to Mr. Parsons, viewed objectively, rejected the terms of the August 4th letter and constituted a counteroffer. It was a rejection and a counteroffer because Mr. MacDonald, on behalf of the respondent, offered to buy the appellant's interest for $40,000.00, a reduction of $5,000.00 in the price that had been offered by the appellant as the price she would accept for her interest in the MacKinnon farm. This was a substantial change in an essential term of the contract.

[16] Therefore, by law, the August 4th offer was terminated. There was no offer from the appellant to sell for $45,000.00 which was open for acceptance by Mr. MacDonald's letter of September 28th, 2000. The respondent could not revive the August 4th offer by tendering an acceptance of it at a date subsequent to the rejection contained in the letter of August 22nd (**Hyde v. Wrench** (1840), 3 Beav. 334; 4 Jur. 1106, 49 E.R. 132; **T. Eaton Co. v. Adam Martini's Ltd.**, [1971] O.J. No. 757 (Q.L.)(Ont. C.A.) at para. 16; *Halsbury's Laws of England*, (4th Edition) Volume 9, paras. 645 and 663; S.M. Waddams *"The Law of Contracts"*, 3rd Edition (Toronto, Canada Law Book Inc., 1993) at paras. 56 and 111; *Chitty on Contracts* (27th Edition, 1994) at para. 2-063; **Sinanan v. Woodyer** (1999), 176 N.S.R. (2d) 201at paras. 22-23).

[17] In addition, it is apparent from the correspondence that the parties never reached a consensus as to the terms of an agreement respecting the transfer of the MacKinnon farm or a settlement of all issues.

[18] The MacDonald letter of September 28th, vague as it is, constitutes a new offer which has not been accepted by the appellant.

[19] Parsons' withdrawal, on October 20th, 2000, of the offer contained in his letter of August 4th, 2000, was redundant and, no doubt, written out of unnecessary caution.

[20] MacDonald, J.'s order for specific performance dated May 29th, 2001, ought not to have been made. Therefore, it is set aside. The appellant shall have costs of the proceedings before MacDonald, J. in the amount of $400.00 plus disbursements to be taxed and the costs of this appeal in the amount of $1,000.00 plus disbursements to be taxed or agreed.

Hallett, J.A.

Concurred in:

Roscoe, J.A.

Bateman, J.A.