IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Bastionhost Ltd. v. Colchester Regional Development Agency, 2007 NSSC 334

Date: 20071122
Docket: SH-286508
Registry: Halifax

Between:

Bastionhost Limited

Applicant

v.

Colchester Regional Development Agency

Respondent

Judge: The Honourable Justice John M. Davison

Heard: November 6, 2007 in Chambers, Halifax, Nova Scotia

Written Decision: November 22, 2007

Counsel: Peter Bryson, Q.C. and David Fraser, for the applicant

Dennis James and Ann Levangie, for the respondent

Davison, J.:

[1] The applicant seeks an order in chambers to determine whether the respondent was in breach of a purchase and sale agreement by refusing the tender payment made by the applicant on counsel for the respondent on September 28th, 2007. The originating notice (application inter parties) states the question is made under the *Vendors and Purchasers Act* (the Act) R.S.N.S. 1989 c.487 and in particular s. 4 of that *Act* which states:

> 4 A vendor or purchaser of any interest in land or his representative may, at any time and from time to time, apply in a summary way to a judge or local judge of the Trial Division of the Supreme Court in respect of any requisition or objection or any claim for compensation, or any other question arising out of or connected with the contract and the judge or local judge may make such order upon the application as appears just, and refer any question to a referee or other officer for inquiry and report.

[2] Quite apart from the *Act*, a change can be affected by virtue of Civil Procedure 37.10(e) which states:

> 37.10 On a hearing of an application, the court may on such terms as it thinks just,
>
> (e) notwithstanding rule 9.02, order the application to be continued in court as if the proceeding had begun by an originating notice (action) and order the notice and affidavits to stand as pleadings, with liberty to any party to amend or add

> thereto or apply for particulars thereof, and to give any other direction as is applicable;

[3] *Civil Procedure Rule* 9.02 states:

> 9.02 A proceeding, other than a proceeding under rule 57 and rules 59 to 61,
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> (a) in which the sole or principal question at issue is, or is likely to be, a question of law, or one of construction of an enactment, will, contract, or other document;
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> (b) in which there is unlikely to be any substantial dispute of fact;
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> (c) which may be commenced by an originating application, originating motion, originating summons, petition, or otherwise under an enactment;
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> shall be commenced by filing an originating notice (application inter partes) in Form 9.02A in a proceeding between parties, and by an originating notice (ex parte application) in Form 9.02B in an ex parte proceeding.

[4] On April 27, 2007 the applicant as purchaser entered into an agreement of purchase and sale (the agreement) with the respondent as vendor for the purchase of three properties in Colchester Park, Colchester County.

[5] The three properties are separately described in the agreement and the properties are known as the Hangar Property, the Bunker Property and the Debert

Hospitality Centre. The price for the properties was $1.5 million dollars payable by way of a $75,000.00 deposit and the balance on closing. The purchase price on the Hangar Property was $850,000.00. The purchase price on the Bunker Property was $150,000,00. and the purchase price for the Debert Hospitality Centre was $500,000.00. On May 22, 2007 the $75,000.00 deposit was paid. The closing date was set for September 30th, 2007.

[6] Colchester Park was a former Canadian Forces Station Debert constructed in 1964 by the Department of National Defence as a Regional Emergency Headquarters and command centre to serve as a seat of government, military and civilian coordination centre in the event of nuclear war or similar catastrophic events.

[7] The applicant is planning to offer a data centre, remote data hosting and information technology - related services to clients in the financial services sections in New York and London. Paragraph 19 of the October 9, 2007 affidavit of Anton E. Self, the Chief Executive Officer of the applicant reads:

> The purpose for the Applicant offering to purchase the Hangar, the Hospitality Centre, the Bunker and the lands between them was to establish a secure campus

on which to initially develop a data centre and network operations centre in the Bunker and then expand its data centre plant throughout the campus. If the "preferred roads" are not transferred to the Applicant, the campus is bisected by public thoroughfares, it no longer has a secure perimeter and the value of the Hangar and the Hospitality Centre to the Applicant's business is significantly diminished.

[8] Relevant portions of the agreement are 5(c) and 5(g) and 6 and they read as follows:

5 This agreement is conditional, for the benefit of the Purchaser, upon:

(c) The Purchaser satisfying itself, at its own expense and after due diligence (including environmental assessments, engineering reviews and legal due diligence), that the Properties and the buildings are suitable for use and occupancy by employees as a "closed system" data centre with a secure perimeter and "hot parking" facility without unreasonable cost of upgrading and/or remediation (including remediation related to asbestos, UFFI, PCBs, mould and other environmental hazards);

...

(g) The transfer of ownership of preferred roads from the Municipality to the Purchaser, which condition shall be the sole responsibility of the Purchaser;

6 Any of the conditions in Section 5 with the exception of the notice provisions with respect to financing in Section 5(d), may be waived, in whole or in part, by the Purchaser. In the event that any such condition in Section 5, other than 5(d), is not satisfied and has not been waived by the Closing, this Agreement shall be null and void and the deposit paid shall be refunded to the Purchaser with interest. <u>If any condition is not satisfied with respect to a Property or two of the Properties and has not been waived by Closing, the Purchaser may elect to proceed to</u>

> purchase the remaining Property or Properties at the price allocated to such Property or Properties. Where the Purchaser has failed to give notice in accordance with Section 5(d) and does not complete this Agreement, the Purchaser's deposit in Section 1 shall be forfeited to the Vendor. [Emphasis added.]

[9] During the course of his argument, Mr. Bryson, counsel for the applicant stated that the "closed system" was essential to the operation of the applicant's business and stated the roads which the Municipality held cut directly through the properties.

[10] Several affidavits were filed with the court. There were two affidavits of Anton E. Self and an affidavit of Jo Ann Fewer who is the Executive Director of Colchester Regional Development Agency (CORDA). There was filed the affidavit of Ramesh Ummat, Director of Public Works for the Municipality of the County of Colchester, and two affidavits of Ron Smith, the Director of business development for CORDA. None of these affiants were cross-examined on their affidavits.

[11] Counsel for the applicant wrote counsel for the respondent by letter dated September 19, 2007 and advised that the Municipality intends to keep Ventura as a public street in that it will carry traffic to a new subdivision. It was also said a road

will cut directly through and across the campus and that the emphasis has been put on the need for the facility to be a highly secured property, “a closed system”. It is stated that it is not a closed system if there’s a public access through the middle of the campus. It was stated that the applicant may, pursuant to s. 6 of the Agreement, proceed with the purchase of the Bunker Property only. The letter goes on to say that no election has been made by the applicant and the letter was only intended for information.

[12] By correspondence dated September 28th, 2007 the counsel for the applicant advised the counsel for the respondent that the applicant had elected to proceed with closing on the Bunker Property on September 30th, 2007 but would not close the Debert Hospitality Centre and Hangar Properties as the conditions with respect to same had not been met. He tendered an amount of $78,582.83 and demanded a warranty deed for the Bunker Property. The letter went on to state:

> Pursuant to the Agreement, the conditions for the benefit of the Purchaser set out in Section 5(c), 5(g) and 5(h) have not been satisfied with respect to the properties defined in the Agreement and known to the parties as the Hangar Property and the Debert Hospitality Centre. As is provided for under Section 6 of the Agreement, the Purchaser has elected to proceed to purchase the Bunker Property at the price allocated to it in the Agreement and unconditionally tenders the enclosed cheque in connection therewith.

> Pursuant to your statement of adjustments provided yesterday, I have calculated the amount payable by the Purchaser to be $78,582. I deducted the deposit amount of $75,000 from the purchase price allocated to the Bunker Property in Section 2(b) of the Agreement, being $150,000, to arrive at a figure of $75,000 to which I have added the pre-paid taxes with respect to the Bunker Property of $3582,83.

[13] According to the submission of counsel for the applicant, the tender was rejected by the respondent.

Vendors & Purchasers Act R.S.N.S. 1989 c.487

[14] There have been cases decided by the Nova Scotia Court of Appeal which have expressed misgivings concerning interpretations of the meaning of section 4 of the *Act*. In **Ritchie et al. v. Sackett** (1979), 36 N.S.R. (2d) 597 Justice Coffin rendered the decision for the Court of Appeal. Justice Coffin during his practice of law was noted as a first class conveyancing lawyer. The case involved a claim by a purchaser of property. The description of the land and an agreement for sale did not cover the land the buyer intended to buy. Justice Coffin referred to **Re Pitrie & Lee**, [1951] 4 D.L.R. 604 where Chief Justice McRuer gave a narrow interpretation to a clause which was similar to section 4 of the Nova Scotia *Act*. Justice Coffin formed his conclusion as follows:

> 28 In my opinion this is not a proper case for an application under s. 3 of the *Vendors and Purchasers Act*.
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> 29 In reaching this conclusion, I am not basing it on the appellant's argument that His Honour Judge Clements gave his decision as a Judge of the County Court, whereas the section provides that the application shall be made to "a judge or an *ex officio* master of the Supreme Court". The argument is not without relevance.
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> 30 I am basing it on the more fundamental question of the Court to deal with the facts in this case by the summary procedure set out in the statue.
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> 31 The authorities which I have mentioned make it abundantly clear that the summary method should not be extended.
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> 32 The question here is not merely a question of a title defect. It is a question of interpretation of the agreement based largely on the conduct of the parties.

Justice Coffin went on to say: "These are matters of fundamental importance going to the root of the whole agreement, and could only be tried in an action and not by this summary procedure."

[15] Justice Hallett, sitting as a judge of the Supreme Court, in *Atlantic Wholesalers v. Rainbow Realty et al.* (1980), 41 N.S.R. (2d) 18 made reference to **Ritchie v. Sackett** *(supra)* and wrote as follows:

12 The scope of an application pursuant to Section 3 of the *Vendors and Purchasers Act* was recently considered by the Appeal Division of the Supreme Court of Nova Scotia in *Ritchie et al. v. Sackett* (1979), 36 N.S.R. (2d) 597; 64 A.P.R. 597. That proceeding involved an application under Section 3 of the Act for an order directing the return of a deposit to the purchaser. Mr. Justice Coffin's decision for the court reviewed a number of authorities and concluded that the summary form of application was not available to the purchaser as the *Act* was clearly intended to deal with title matters and the jurisprudence to which he referred indicated that the summary method available under the *Act* should not be extended. He went on to hold that the question that was before the learned County Court judge was not merely a question of title defect but a question of the interpretation of the agreement based largely on the conduct of the parties, which should be tried in an action and not by way of summary procedure.

13 In the case of *Re Vrees et al. and River Dell Holdings Ltd.* (1974), 45 D.L.R. (3d) 683, Holland, J., of the Ontario High Court took a similar approach to an application for an order that the vendor was estopped from objecting to an assignment of the agreement by the purchaser. At p. 686 he stated:

> In my view, the question of estoppel in a case of this type should not be dealt with on a summary application under the *Vendors and Purchasers Act*. It will be necessary to hear all the evidence and the proper way for such a question to be decided is an action and not on an application of this type, even though a judge on an application of this type has the power under Rule 613(1) to give directions for the trial of any questions arising upon the application.

14 Similar views were expressed by Grossberg, Co. Ct. J., in *Re Northview Construction Company Ltd.and Jonbar Construction Co. Ltd.* (1971), 15 D.L.R. (3d) 399. In that case, the court held that the scope of the *Vendors and Purchasers Act* of Ontario does not encompass the adjudication of controversial disputes arising from conflicting claims to real property. Such controversies should be resolved at a trial upon oral evidence. In his decision, Grossberg, Co. Ct. J., made reference to a number of authorities which indicate a cautious aproach to the utilization of the *Vendors and Purchasers Act* and made reference to the case of *Re Pitrie and Lee et al.*, [1951] 4 D.L.R. 604, which was approved by Coffin, J.A. in *Ritchie et al. v. Sackett.*

[16] It should be noted s. 4 of the present *Act* was formerly s. 3.

[17] In *Roman Catholic Episcopal Corp. of Halifax v. Denson* (1998), 168 N.S.R. (2d) 356 (S.C.) there was a decision of Justice Kelly of the Supreme Court with respect to the use of section 4 of the *Vendors and Purchasers Act*. In his decision Justice Kelly stated:

> 17 ...in this type of an application, the court cannot make a decision regarding the quality of a title of a grantor against the world, in part because the court cannot make a decision that will affect the right of title of any other person not a party to the application.

[18] Justice Freeman wrote for the Nova Scotia Court of Appeal((1999), 173 N.S.R. (2d) 199) and stated that the opinion of the trial judge was correct and he went on to say:

> 4 ...The **Vendors and Purchasers Act** is a convenient vehicle for disposing of title objections that lack merit, but when they are found to be of substance it does not provide a means of curing the defects. The language in question is vague and problematical and as Justice Kelly point out, could well involve the interests of others. If the remedy is to sell the property and apply the money to purposes of a church or cemetery the vendor should seek the certainty of a court order to vary the purported trust...

[19] The cases of *Ritchie v. Sackett (supra), Atlantic Wholesalers v. Rainbow Realty (supra),* and *The Roman Catholic Episcopal Corp. v. Denson (supra)* were not referred to me by counsel and I have not been referred to any case decided by the Nova Scotia Court of Appeal which dealt with the issue of the scope of the *Vendors and Purchasers Act (supra)* or the extent to which the summary proceedings can be used on matters of law. I was referred to *London Life Insurance v. W.L.M. Constructions Limited* (1995), 147 N.S.R. (2d) 312 which was an appeal from the ruling of a judge of the Supreme Court made under s. 4 of the *Vendors and Purchasers Act*. The decision of the Court of Appeal was written by Justice Freeman three years before his reference in *Roman Catholic Episcopal Corp. Of Halifax v. Denson* to the *Act* having "language vague and problematical". The decision in the *London Life Case* makes no reference to indicate the use of the *Vendors and Purchasers Act* was being questioned.

[20] It seems to me I am bound by the decision in *Sackett v. Ritchie et al. (supra)* that the "summary method should not be extended" and to refer to the decision of Justice Hallett in *Atlantic Wholesalers v. Rainbow Realty (supra)* who said that after reviewing a number of authorities, Justice Coffin concluded the summary form "was clearly intended to deal with title matters".

[21] Mr. Bryson, counsel for the applicant, advances the position the key facts are not in dispute and the relevant facts take place shortly before the September 30, 2007 closing date. Counsel submitted there was a breach of condition 5(c) and 5(g) of the Agreement. 5(c) expresses the property would be "...suitable for use and occupancy by employees as a 'closed system' data centre with a secure perimeter and 'hot parking' facility without unreasonable cost of upgrading and/or remediation..." Counsel for the applicant argue the closed system was essential for the operation of the applicant's business. Furthermore 5(g) of the Agreement makes it conditional that there be a transfer of preferred roads from the Municipality to the purchaser. It is said in the supplemental affidavit of Mr. Self that the Municipality "intended to keep title to the portion of Ventura Drive that cuts through the campus".

[22] The conditions to which reference has been made were for the benefit of the purchaser and, counsel submits, because the conditions were not satisfied the purchaser, by reason of condition 6, can elect to purchase only one of the properties. This is what the purchaser intended to do when it tendered funds to counsel for the respondent.

[23] Counsel for the applicant states certain conditions under s. 5 of the agreement were not satisfied and he refers to paragraph 13 of the affidavit of Jo Ann Fewer which reads:

> In paragraph 18, Mr. Self indicates that the preferred roads and wells were not likely to be transferred to Bastionhost. This is contrary to information I received from Ramesh Ummat of the Municipality of the County of Colchester who indicated that the municipality would be willing to transfer the ownership to Lockheed Crescent, Hawker Road and Fairchild Place to Bastionhost. They would also transfer three wells that provide water to the bunker including the well buildings and a reasonable amount of walk space around them to Bastionhost. They also indicated that Vicker's Street could be considered for transfer, without payment. Further the Municipality would consider the transfer of Venture Drive provided Bastionhost would pay to provide an alternate connector road. The Municipality indicated Venture Road is an important connector road identified in the design plans for the former CFS Debert. The only remaining issue between Bastionhost and the Municipality was the cost of building an alternate route.

[24] Mr. Bryson refers to the words of Ms. Fewer as an acknowledgement the roads would not be conveyed to the applicant by the Municipality.

[25] Mr. James on behalf of the respondent advances a number of submissions in support of the request to convert the application into an action to go to trial.

[26] Counsel for the respondent state that there is need to convert the application to an action because there are “numerous factual disputes that are at issue”. Reference is made to an affidavit of Anton Self including conversations he had with representatives of the respondent which “go to the heart of whether the applicant acted in good faith” and with due diligence in completion of the contract. Counsel states the respondent will enter a counter claim against the appellant for failure to act in good faith.

[27] I will dismiss the application made under the *Vendors and Purchasers Act* and the application advanced under Rule 37.10. The main reasons I take this step are the findings of Justice Coffin, Justice Hallett and Justice Freeman in the cases to which I have made reference.

[28] This is a dispute which involves large claims, some of which have not been advanced, but it is not the size of the claims on which I base my decision but, as stated by Justice Coffin, it is the fundamental question whether the court should deal with this case by the summary procedure set out in the *Act*. To do so would certainly extend the summary method. In my view all of the matters raised in the application renders it necessary for the court to hear all of the evidence. That

which occurred, to quote Justice Coffin, goes “to the root of the whole agreement and could only be tried in an action and not by their summary procedure”. The court and the parties should have the whole of the evidence before them.

[29] That which took place could involve the interest of others including the Municipality of the County of Colchester.

[30] On the question of costs I normally award costs to the party who was successful in chambers but I am inclined, in this case, to award cost as cost in the cause. I have not heard counsel on the question of costs and would do so if requested.

[31] The order of the court should also deal with the question of pleadings. I would suggest a proper statement of claim may be more decisive on the issues than to have the affidavits stand as pleadings as set out in Rule 37.10(c). If there is not agreement between counsel I would hear submissions on this point.

J.