CV 03664

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LA RONGE AVIATION SERVICES LTD.

Plaintiff

- and -

YVONNE QUICK

Defendant

Trial of a claim and counterclaim flowing from the failure of the parties to complete an agreement of purchase and sale. Judgment for plaintiff.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. E. RICHARD

Heard at Yellowknife, Northwest Territories
on April 22 - 23, 1996

Reasons filed: August 7, 1996

Counsel for the Plaintiff: Paul A. Bolo, Esq.

Counsel for the Defendant: Robert F. Roddick, Q.C.

CV 03664

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LA RONGE AVIATION SERVICES LTD.

Plaintiff

- and -

YVONNE QUICK

Defendant

REASONS FOR JUDGMENT

1 In this lawsuit the plaintiff says the defendant breached her agreement to purchase certain property from the plaintiff and the plaintiff seeks damages flowing from that breach of contract.

2 The plaintiff is a privately-owned corporation engaged in the aviation business. It operates both a charter and scheduled service in Saskatchewan and Manitoba, and also, for a period of about twenty years prior to 1990, operated in the Northwest Territories. Its main base is in Laronge, Saskatchewan and, while it operated in the Northwest Territories, it had an additional base at Yellowknife.

3 The defendant, a resident of Yellowknife, has been involved in the aviation business for twenty-five years.

4 The subject-matter of the 1990 agreement between the parties is certain waterfront property in Yellowknife on the shores of Great Slave Lake upon which the plaintiff

conducted its float plane operation. The defendant wished to acquire this property for the purpose of conducting a similar enterprise, i.e., a charter aircraft service.

5 The original agreement was in writing (Ex 1-1) and executed by the parties. It is dated April 30, 1990. It was prepared by the plaintiff's lawyer V.J. Longworth of Prince Albert, Saskatchewan. There was conflicting evidence as to whether Mr. Longworth was acting for both parties or only the vendor in preparation of this document. While I am satisfied that he was acting only for the plaintiff at the time, nothing turns on this point.

6 The document is entitled "Option to Purchase" and the parties are referred to as Optionor and Optionee. There were extensive submissions by trial counsel as to whether the agreement between the parties was an option to purchase or an agreement for sale, as the documentation throughout, including Ex 1-1, is unclear on this issue.

7 (I pause here to make a necessary comment on the pleadings filed on behalf of the defendant by her original solicitors - not trial counsel - , i.e. a statement of defence and a counterclaim. The Rules of Court state that pleadings are to contain only a summary statement of the material facts on which the party relies. The Rules require that the statement be brief. In this lawsuit, the material facts on which the defendant relies are not complex, yet her pleadings are prolix to the point of being virtually incomprehensible. The submissions of her trial counsel, on the other hand, were both clear and concise).

8 Returning to Ex 1-1, the original written agreement, pertinent excerpts are as follows:

"...

WITNESSETH that in consideration of the sum of $30,000.00 to be paid by the Optionee to the Optionor on or before the 15th day of May, A.D. 1990 and in consideration of the Optionee paying to the Optionor the sum of $3,825.00 on the 1st day of May, A.D. 1990, and a like sum on the 1st day of each and every month thereafter, to and including the 1st day of October, A.D. 1990 and in consideration of the Optionee paying to the Optionor the sum of $1,912.50 on the 1st day of November, A.D. 1990, the Optionor hereby gives to the Optionee an Option irrevocable within the time for acceptance herein limited, to purchase the Optionor's entire interest in the aforesaid land, together with all buildings and/or improvements thereon. The purchase price for the Vendor's interest in the said lands and the improvements situate thereon shall be the sum of $300,000.00 and in the event of the acceptance of the within Option as herein provided, the Optionor hereby agrees to credit the Optionee with the sum of $30,000.00 to be paid by the Optionee to the Optionor as aforesaid, as consideration for the securing of this Option. The balance of the purchase price of $270,000.00 shall then be paid as hereinafter set forth:

1. Provided that the Optionee has paid to the Optionor the sum of $30,000.00 required to be paid as hereinbefore set forth, and provided that the Optionee has paid to the Optionor the sum of $3,825.00 on the 1st day of May, A.D. 1990 and the like amount on the 1st day of each and every month thereafter to and including the 1st day of October, A.D. 1990 and the sum of $1,912.50 on the 1st day of November, A.D. 1990, then this Option shall be open for acceptance from the 1st day of November, A.D. 1990 to the 15th day of November, A.D. 1990 and this Option shall be exercised solely by the payment of the sum of $270,000.00 by way of certified cheque or bank draft payable to the Optionor's solicitors, Messrs. Harradence, Longworth, Logue & Harradence, Barristers & Solicitors, 1102 1st Avenue West, P.O. Box 2080, Prince Albert, Saskatchewan, S6V 6V4, and delivered to the said law firm on or before 12:00 hours on the 15th day of November, A.D. 1990.

2. The Optionee does hereby promise, covenant and agree to execute and deliver to the Optionor, post-dated cheques in the sum of $3,825.00 for the months of May 1st, 1990 to and including October 1, 1990, and a post-dated cheque for the sum of $1,912.50 payable on the 1st day of November, A.D. 1990.

3. If the Option is not so exercised, the consideration paid for this Option shall be forfeited.

4. If the Option is exercised, the taxes in respect of the said lands are to be adjusted as of the 15th day of November, A.D. 1990.

...

7. The Optionor agrees that if the Option is so exercised as aforesaid, it will forthwith place a registrable transfer in the hands of the Optionee or the Optionee's solicitors, which transfer shall be in favour of the Optionee or her order.

...

10. As further consideration for the Optionee having paid to the Optionor the sum of $30,000.00 as aforesaid, and in further consideration of the Optionee paying to the Optionor, the sum of $3,825.00 on the 1st day of May, A.D. 1990 and on the 1st day of each and every month thereafter to and including the 1st day of October, A.D. 1990, and in consideration of the Optionee paying to the Optionor the sum of $1,912.50 on the 1st day of November, A.D. 1990, the Optionor does hereby demise and lease to the Optionee and the Optionee by these presents, does hereby lease from the Optionor, the Optionor's entire interest in the aforesaid lands together with the buildings and improvements situate thereon, which Lease shall commence on the 1st day of May, A.D. 1990 and shall end on the 14th day of November, A.D. 1990.

...

12. Possession:

Provided that the Optionee makes payment of each and every sum to be paid by the Optionee to the Optionor as aforesaid, and provided that the Optionee exercises the Option as hereinbefore set forth, then the Optionee shall be entitled to possession of the lands herein as Purchaser on the 15th day of November, A.D. 1990.

...

22. Final Agreement:

When this Agreement is executed by the Parties, a binding contract of purchase and sale is hereby constituted which expresses the entire and final agreement between the Parties, and both the Optionor and Optionee agree that the execution of this Agreement has not been induced by, nor has either Party relied upon or regarded as material any representation or promise whatsoever, oral or written, by whomsoever made, except such as are herein expressly agreed; nor shall any such misrepresentation, oral or written, have the effect of varying or altering the terms of this Agreement.

...

26. Each party shall bear its and her own legal fees in connection with this Option and the Lease contained herein."

9 Thus, whereas most of the text of Ex 1-1 makes express reference to it being an option agreement and a lease, paragraph 22 expressly terms it a "binding contract of purchase and sale".

10 Pursuant to the "lease" portion of the agreement, the defendant went into possession of the property on May 1, 1990. She paid the "rental" payments of $3,825.00/month for May, June, July, August, September and October, and $1,912.50 for the first half of November. The defendant sought financing from a lending institution and a government grant program in order to complete her transaction with the plaintiff. She was not able to obtain the financing prior to November 15, 1990. Through a series of conversations and written communications, the parties agreed to extend the closing date of the transaction a number of times. The last proposed closing date was late August 1991.

11 At trial *viva voce* evidence was given by the defendant personally and by Pat Campling, Sr, the principal of the plaintiff company. Conflicting testimony was presented with respect to certain aspects of the post - November 15, 1990 events. In consideration of all of the evidence, including the documentation presented, I find Mr. Campling to be a more credible witness and I prefer his evidence where it conflicts with that of the defendant.

12 Subsequent to November 15, 1990 the defendant gave repeated assurances to the plaintiff that the balance of the purchase price would be paid shortly, stating she just needed a little more time. A sampling from some of her written communications:

November 13, 1990	most of the financing is in place
November 14, 1990	it looks like you will have the full amount by the end of December
November 21, 1990	all monies will be paid by January 15

December 31, 1990	part of the application has been approved
	everything will be in place by January 20
January 31, 1991	the money will be released on February 21
February 14, 1991	the grant has been approved, the loan should be approved by February 25
March 21, 1991	hope to have the money to you next week
April 8, 1991	everything has been approved

13 For his part, Mr. Campling was — reluctantly — agreeing to the extensions. He made it clear that the plaintiff required payment of lease payments of $3,825.00/month beyond November 15, 1990. The defendant, in her various written communications (e.g. Ex 1-15, Ex 1-19) acknowledged her obligation to make these lease payments pending the final closing and the payment of the full purchase price.

14 By the defendant's repeated assurances that the full purchase price would be paid, and by continuing in possession after November 15, 1990, she was clearly communicating to the plaintiff that she was intending to complete the transaction; i.e. was exercising her option (if indeed it was merely an option). By his acceptance of the requests for an extension of the closing date of the transaction, Mr. Campling on behalf of the plaintiff corporation was acknowledging that she exercised her option to purchase the property. Thereafter, i.e., on and after November 15, 1990, the option became an enforceable agreement of purchase and sale. *364021 Alberta Inc. v 361738 Alberta Ltd.* (1990) 78 Alta. L.R. (2d) 120 (Q.B.), affirmed (1994) 17 Alta. L.R. (3d) 381 (C.A.); DiCastri, Law of Vendor and Purchaser (3d ed.) para. 214.

15 The plaintiff allowed the defendant to continue in possession of the property after November 15, 1990 upon exercise of the option, as contemplated by paragraph 12 of Ex 1-1.

16 Although the defendant did not exercise the option in the precise manner stipulated by the original agreement, it was open to the parties to mutually waive strict compliance with those provisions, as they did. *Pierce v Empey* [1939] 4 D.L.R. 672 (S.C.C.); *Université de Moncton v Frizzell* (1978) 24 N.B.R. (2d) 533 (Q.B.); *Antifave v Tisnic* (1981) 7 Sask. R. 169 (C.A.); DiCastri, supra.

17 The option agreement was thus converted into an enforceable agreement of sale. Also, there was a clear agreement between the parties that the defendant was to continue to make lease payments pending finalization of the sale transaction.

18 The evidence indicates that in June and July of 1991 the defendant was indeed closer to having the necessary funds to finalize the transaction. Her Yellowknife lawyer had received instructions to prepare the security documentation to protect her lender. On June 7 her Yellowknife lawyer (Mr. Fuglsang) wrote to the defendant's Saskatchewan lawyer (Mr. Longworth) confirming the manner in which the defendant wished to take title to the property. The evidence further indicates that in the month of July the defendant and Mr. Campling reached agreement on a closing date in August, and on the amount of money that the defendant was to pay on closing, in addition to the $270,000.00 balance of the purchase price, on account of the unpaid lease payments.

19 By letter of July 31, 1991 (Ex 1-43 — a document heavily relied upon by the defendant at trial) Mr. Longworth forwarded to Mr. Fuglsang registerable transfer documents in trust for completion of the transaction. That letter specifically stated that the documentation:

> "...is sent to you in trust on condition that you will not use the same until such time as you are in a position to assure payment to this office, as quickly as possible, and, in any event, no later than thirty days from the date of this letter, of the following sums:
> (a) the balance of the purchase price of $270,000.00
> (b) the sum of $30,600 being the balance owed to the end of July 1991 as lease rental and/or interest, such amount having been agreed to between Yvonne Quick and Mr. Campling, plus G.S.T. of $1,874.25.
>
> ...
>
> If, for any reason, you cannot accept any of the within documentation, or the documentation to come from Mr. Vertes, in trust subject to the above trust conditions the above documentation shall forthwith be returned to the writer's office on the request of the writer, unused."

20 The defendant and her lawyer thus had until August 30, 1991 to (a) give the requested assurances (b) register the transfer documents and (c) pay the requested funds to Mr. Longworth's office.

21 Ex 1-43 (including the transfer documents) was received in Mr. Fuglsang's office on or about August 8, 1991. There is no evidence that the requested assurances were given by Mr. Fuglsang at any time. The transfer documents were never registered. No funds were forwarded to Mr. Longworth's office on, before or after August 30, 1991.

22 In the defendant's testimony at trial she stated that she attended at Mr. Fuglsang's office on August 26, 1991 and signed the transfer documents and all other necessary papers. Yet the only copies of the transfer documents tendered as exhibits at trial do not

contain the defendant's signature. No other evidence was tendered to indicate that the defendant indeed signed the transfer documents, or on what date.

23 In her testimony she also stated that as at August 29, 1991 she had approximately $34,000.00 in Mr. Fuglsang's trust account and "I was to get a grant of $95,000.00 and a loan of $183,000.00". No other evidence was offered to indicate that the defendant on August 30, 1991 indeed had at hand the necessary funds to forward to Mr. Longworth on that day. One would have thought that her lawyer's trust account records would be readily available.

24 On the evidence I find that the defendant did not tender the balance of the purchase price on August 30 as required by the agreement between the parties and equally important, I find that the defendant was not in a position to do so on that date.

25 It is submitted on behalf of the defendant that the plaintiff, by its actions in re-taking possession of the premises on the morning of August 30, repudiated the agreement between the parties, thereby relieving the defendant from her obligation to tender the purchase price.

26 It was Mr. Campling's testimony that on August 29 he spoke by telephone with the defendant. He was frustrated that he did not yet have his money, and he was threatening to terminate their transaction and to sue her for his losses. He testified that she stated that she had signed all the papers and wanted to conclude the deal. He

testified she had been saying that for a year and he simply didn't believe her any more, didn't trust her. He was satisfied that the funds would not be transferred on August 30.

27 On the morning of August 30 Mr. Campling had the locks changed on the premises by the plaintiff's Yellowknife agent and sent the following fax to the defendant:

> "As you may have realized by now we have locked up the waterbase due to no response to my repeated phone calls for lease payments. I can assure you that anyone who enters the building will be prosecuted. The R.C.M.P. and Transport Canada have been informed."

28 It is argued on behalf of the defendant that, in law, this amounts to a repudiation of the contract by the vendor, thus relieving the purchaser from any further obligations under that contract and disentitling the vendor from claiming damages for breach of contract. I respectfully disagree. As stated earlier, I find that the defendant, as purchaser, was unable to tender the purchase price on August 30, the closing date. That fact was obvious to Mr. Campling. It was not unreasonable for him to consider the contract as having been breached, and to secure his position as he did on August 30.

29 Further, in my view the plaintiff's conduct on the morning of August 30 did not terminate the "agreement of purchase and sale" but merely the interim lease arrangements. This is evident in the contents of Mr. Campling's fax message. There was nothing to prevent the defendant from tendering the balance of the purchase price before the close of business on August 30. The defendant failed to do so, thereby breaching her contract with the plaintiff.

30 I therefore find that the plaintiff has established the existence of an enforceable agreement of purchase and sale, and that the defendant seriously breached that agreement in her failure to pay the purchase price. Consequent on that breach, the plaintiff has clearly suffered damage, as the plaintiff was deprived of the value of the agreed purchase price and was also deprived of the use of the property from November 15, 1990 to August 30, 1991, a period of 9.5 months.

31 Subsequent to August 30, 1991 the plaintiff sought to mitigate its losses by placing the property on the market for sale. In March 1992 it was successful in selling the property for $250,000.00. It thus suffered a loss of $50,000 in the purchase price (less the $30,000.00 already paid by the defendant in May 1990), and the agreed rental payments of $3,825.00 for 9½ months.

32 Before concluding these reasons I am compelled to address two additional issues raised on behalf of the defendant. Each of these is, with respect, a red herring.

33 Firstly, it is submitted that the plaintiff was not, at material times, legal registered owner of the property and was therefore unable to give valid consideration in return for the purchase price. This is a reference to the fact that in 1974 when the plaintiff purchased the property from the previous owner through inadvertence one of the titles was not transferred to the plaintiff. This discrepancy was noted in April 1991 and rectified prior to the final scheduled closing date of August 30, 1991. *A fortiori*, Ms. Quick acknowledged in her testimony that she was aware of this discrepancy and that it was being rectified, and that she was desirous of completing the transaction

notwithstanding such knowledge. Accordingly, no relief accrues to the defendant on this account.

34 Second, it is submitted that when the parties executed the original agreement they operated under a mutual mistake as to the actual physical boundaries of the property and that therefore the contract is void *ab initio*. This is a reference to the fact that the defendant discovered that there may be a problem with encroachments from/to one or both neighbouring properties. Although Ms. Quick made some mention of this item in her direct examination, she conceded in cross-examination that in the summer of 1990 she became well acquainted with the possible encroachments but was nevertheless desirous of concluding the transaction with the plaintiff as agreed, and with the property, as is. Thus, nothing of relevance can turn on this point.

35 In conclusion, I find for the plaintiff. The counterclaim is dismissed. Judgment will issue for the plaintiff as follows:

(a) $20,000.00, being the net loss of the agreed purchase price, after mitigation.

(b) $38,479.50 being the unpaid lease payments from November 15, 1990 to August 30, 1991, ($36,337.50) plus applicable G.S.T. of $2,142.00.

(c) pre-judgment interest on both sums from September 1, 1991 to the date of judgment, pursuant to s.57 of the Judicature Act.

36 In addition, the plaintiff shall have its costs. No costs shall be allowed for setting the matter down for trial (no trial record filed) nor for preparation of trial brief (not filed on timely basis as required by Rules).

J. E. Richard

J.S.C.

Dated at Yellowknife, Northwest Territories
this 7th day of August, 1996.

Counsel for the Plaintiff: Paul A. Bolo, Esq.

Counsel for the Defendant: Robert F. Roddick, Q.C.

CV 03664

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LA RONGE AVIATION SERVICES LTD.

Plaintiff

- and -

YVONNE QUICK

Defendant

Reasons for Judgment of the Honourable Mr. Justice J. E. Richard

---