SC CIV 70 003

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IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY,

Plaintiff,

- and -

NICK SOKOLOWSKI,

Defendant

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE W. G. MORROW

The plaintiff seeks return of ~~$800.00~~ a deposit and special damages in the sum of $3,000.00 arising out of an alleged failure to perform by the defendant. The defendant, in turn, takes the position that the alleged Agreement between the parties is a nullity because of ambiguity, or in the alternative, that the so-called Agreement was an option which had expired.

It is clear that in early 1967 the plaintiff corporation wanted to acquire land in Yellowknife to permit the expansion of its facilities. ~~As Ronald A. MacDonald,~~ Called as a witness for the plaintiff, Ronald A. Macdonald stated, this interest was almost co-incidental with Yellowknife becoming the capital of the Northwest Territories. The Company required a parcel of land the equivalent of two lots of ~~100~~ one hundred feet by ~~100~~ one hundred feet. This witness, who was assistant manager of real estate for the area for the plaintiff Company, began his search in Yellowknife in February, 1967, and although some four sites were considered, it is clear that the area with which the present action is concerned was the prime choice.

Two parcels were involved; one lot owned by a Mrs. Bolton, and the one owned by the defendant. The defendant's land is described as Lot 16, Block 23, Yellowknife, and had been purchased by the defendant for $8,000.00 under Agreement for Sale from one Jacob Isaac Glick. Some $3,000.00 was still owing on the Agreement, and the Agreement was in good standing. The witness MacDonald knew of this Agreement.

On February 20, 1967, MacDonald approached the defendant in respect of the lot. The defendant, a shoemaker, who had come from Poland in 1948, used the property as home and workshop. The defendant had learned to speak English and to write with the assistance of a dictionary. It was quite apparent in observing him in the witness box that he had some difficulty in understanding English, especially words that were not in everyday use, such as legal terms. It was equally clear that he was a man of high intellect.

During the February interview between MacDonald and the defendant a possible sale of the property was discussed, and MacDonald left with the impression that this man was satisfied with his property, and not anxious to sell, but would sell if he got $10,000.00 right away, and if he could move the building to some other site. It should be remarked that land values began to change quite rapidly about this time because Yellowknife had been designated as the capital.

Nothing further transpired between the two persons until March 3, 1967, when MacDonald returned to the defendant's place of residence and business. Serious negotiations took place at this time, resulting in lengthy discussions, and in MacDonald going to the Company's Yellowknife office at one point to seek further authority, and to have certain

rds typed into a document which he had brought from Edmonton. This document was eventually signed by the defendant.

The document (Exhibit 1) is described as Form 8273 and, according to MacDonald, is the usual form used by the Company in acquiring land. It is a printed or mimeographed form and begins with: "Know all men by these presents that I Nick Sokolowski of Yellowknife Northwest Territories hereby agree to sell and convey, ... to Canadian National Railway Company ..." It then goes on to describe the land, and there is next a space containing the price, in this case shown as $13,000.00. Next, the document contains the words: "payable on completion and acceptance of title by the Company, the said Company may in the meantime occupy said land and proceed with the construction of its works thereon or thereunder. I acknowledge that no promises of any kind or nature except as herein written have been made to me by any agent, ..."

A later paragraph, typed in, and not part of the Form, provides for the defendant to be allowed to remove the building. The last line before the date, also typed in, states: "This offer is open for acceptance to April 15th, 1967."

In a different type still, and with some of it in ink handwriting, the document next states: "In consideration of the granting of this option I agree to accept the sum of $800.00 dollars which amount is to apply on the purchase price if my offer is accepted. This cheque of $800.00 is to be mailed to me March 6/67 otherwise the offer is void." [The portions underlined are in ink.]

Next comes the signature of the defendant, and that of MacDonald, as witness. Below these signatures, at the bottom of the

paper, is a handwritten paragraph permitting the defendant to have "not less than six weeks" to move his building.

It will be seen, therefore, that this document, as it ~~presently~~ at present, stands, contains such contradictory terms as "agree to sell", "offer" and "option". It is also to be observed that the document nowhere bears the signature of the plaintiff Company, nor is ~~it~~ the latter bound in any way to complete or carry out its terms.

The ~~agent~~ witness MacDonald agreed that there was a great deal of discussion about the last paragraph; that the defendant was suspicious of the Company and wanted evidence of good faith; and that he, MacDonald, had no authority to commit the Company. Under cross-examination he agreed that on March 3 the Company did not really intend to purchase, but wanted to tie up the land in the event a purchase ~~was~~ were decided upon. This witness quite readily agreed that the defendant did not appear anxious to sell; that it was made clear to ~~him~~ MacDonald, that the unpaid balance of ~~the~~ $3,000.00 could not be paid except from the proceeds of this transaction; that the defendant mentioned he would have to acquire a lot to move his building onto; that he had no funds for this; and that the defendant made it clear that the dates of moving were very important because of the short building season in Yellowknife. ~~He~~ MacDonald agreed that ~~the~~ an additional document (Exhibit 2) was to reassure the defendant ~~wherein that document~~ by which provided that if the $800.00 was were mailed on March 6 then "the offer is legal." This witness said he read over the document (Exhibit 1) ~~over~~ to the defendant, and explained it carefully. He was aware that the defendant was not Canadian born, and that he had difficulty with English.

The defendant, in his testimony, agreed pretty much with the statements of MacDonald ~~as set out above~~ replied to. He explained that he understood it was an option, and that the $800.~~00~~ was to be for an option. He insisted that he must get the money by April 15~~th~~ so as to get the other lot, and so as to pay Glick off, and this witness insisted that he was assured that the money would come before April 15~~th~~.

I am satisfied that both witnesses were doing their best to give a truthful version of what transpired between them on March 3, 1967. I find that at the time the document (Exhibit 1) was signed by the defendant, ~~that~~ he signed on the assurance of MacDonald, whom he trusted, that the $800.~~00~~ would be forwarded on March 6, 1967, or there would be no deal, and, further, that he signed on the assurance that the balance of the money would be forthcoming by April 15, 1967, or very shortly thereafter, and that any final papers necessary to complete the transaction would be prepared by the Company and sent to him.

It now becomes necessary to consider what kind of ~~A~~agreement Exhibit 1 was, before reviewing the subsequent events: see *Jones v. Morris* (1910) 12 W.L.R. 651, particularly the remarks of Stuart, J. at page 653.

It is perhaps not without some significance that even in giving his testimony the witness MacDonald quite often used the term "option" in referring to Exhibit 1. When the $800.~~00~~ cheque was mailed to the defendant on March 6, 1967 the voucher which accompanied the cheque describes the cheque as "to cover option fee" (Exhibit 14). Again, on May 9, 1967 the plaintiff Company's solicitor used the phrase "the option was exercised" ~~(Exhibit 9)~~ in replying to a letter (Exhibit 9).

Both at the time of negotiating, and by subsequent behaviour,

both parties considered the Agreement as an option agreement, and I conclude that the contract between the parties, constituted as it is by Exhibits 1 and 2, is what is commonly called an option agreement. In argument, counsel for the plaintiff, treated it as an option.

It now becomes necessary to review the actions by both parties following the entering into the ~~option~~ Agreement for the option, and after it became effective on March 6, 1967 by the mailing of $800.~~00~~ by the plaintiff.

Mr. MacDonald explained that he followed normal practice in the present case, namely, by referring the matter to the legal department of this Company for finalization after he had obtained the option. At the time, it is his testimony, that he made the legal department aware of all documents; that all conditions had been met; and that the defendant had not employed a solicitor on his behalf.

Notwithstanding the above policy, the witness continued to act in connection with the property, and the lack of coordination ~~from this point of time onwards, as~~ between the real estate department and the legal department, from this point of time onwards could not help but add to the confusion that started with the peculiar wording of the Agreement for the option, and now continued through to the commencement of these proceedings.

On March 29~~th~~ one J. H. Tilley, ~~M~~anager of real estate for the Company, the plaintiff, wrote the defendant advising that, "On behalf of C.N. I hereby accept agreement", and stating further that, "Our solicitors will forward the necessary documents together with the consideration very shortly." While the name "Tilley" may not have been known to the defendant, the language of the letter was at least consistent

with his understanding, namely, that the Company would prepare the papers and would pay promptly.

The defendant had already sent in his copy of the Glick Agreement for Sale, and by letter dated April 3rd Mr. Tilley again wrote him, acknowledging ~~the above~~ receipt and stating that, "Our building plans are a little indefinite ... We will be in touch with you as soon as our plans are definitely known." This letter also invited the defendant to continue in occupancy past the move date subject to ~~30~~ thirty days' notice, but stating he would be "responsible for the costs, such as taxes, beyond May 27th." In the final paragraph of this letter ~~he~~ Mr. Tilley mentions that the matter had been referred to the Law Department for finalization and stated that, "they will be in contact with you in the near future." ~~He~~ And the Defendant is finally asked if he intends to have a solicitor to act in the closing. Again, it should be observed that the letter is generally consistent with the defendant's understanding of the ~~A~~agreement.

On April 5th the defendant wrote to Mr. Tilley in connection with the construction season and suggested July 1st, ~~and~~ stated that he would be prepared to pay the taxes for the period of occupancy. He closed by saying that if the season ~~was~~ were favourable he ~~may~~ might not need the extension to July 1st. He also mentioned he had not engaged a lawyer and stated in closing that he would "await your reply with interest."

There was no reply to the above letter, and nothing further was done by the plaintiff Company until May 8th.

~~The 15th of April meanwhile~~ Meanwhile, April 15 arrived and passed with no money and no documents sent to the defendant, and no further word from the Company. Remembering the importance that the defendant placed on

on getting his money by ~~the 15th of~~ April 15, it is not surprising therefore, to find the defendant employing a lawyer to write a letter to the Company on April 25th. ~~to the company.~~

This letter (Exhibit 7) refers to the "Option" of March 3rd, 1967, recites its terms, and proceeds to state:

(Exhibit 5)

> "It is apparent that the above mentioned Option has now expired and that a new agreement or option will have to be entered into between the parties to the above mentioned Option."

The letter then goes on to say that Mr. Sokolowski "wishes to have a new agreement ... if satisfactory terms can be arranged." The Company was to contact either the defendant or the lawyer.

The defendant's evidence, and I accept it, is to the effect that the letter of April 5th was written for him by another person, for which he paid a consideration. Again, he paid A. E. Williams, a solicitor at Yellowknife, to write Exhibit 7 above. Mr. Williams was not retained in any other capacity.

As of April 25th, therefore, the defendant has taken the position that the option has gone by default, but he will consider a new agreement if satisfactory terms can be negotiated. From the plaintiff's side, there has been a letter back in March accepting the Agreement and stating that the Company solicitors will forward the necessary documents, together with the consideration shortly. There had been one later letter on April 3rd referring to the matter being referred to the law department for finalization and promising they would be in touch with the defendant "in the near future."

We now come to an interesting phase in the relations between the parties. One cannot help but marvel at how a major corporation, such as the plaintiff, with its many years of experience in handling land purchases, seems to have gone out of its way to make what should have been a perfectly straight forward transaction into the confused and complicated affair that it became, making it almost inevitable that the end result would be a lawsuit. If the mixed up document which became the option was not enough to confuse, then the manner in which it was handled by the Company certainly added to the confusion.

Although Mr. MacDonald's evidence was that once the acceptance was made his department turned the matter over to the legal department, it is to be observed that his department under Mr. Tilley continued to correspond with the defendant. The lawyer's letter to the plaintiff indicating that the option had expired was apparently in the hands of the legal department of the Company, unbeknown to the real estate department. Each department, in fact, appears to have acted independently of the other and without any liaison.

On May 8 Mr. Tilley wrote the defendant in reference to the defendant's April 5th letter and stated that, "I am still not able to advise you of when we are likely to require the property in question." Meanwhile, Mr. J. F. Redgwell, solicitor of the Company, wrote the lawyer Williams, acknowledging his April 25 letter and stating, "Actually the option was exercised and I am enclosing our cheque in your favour for $12,200.00 being the balance of the purchase price ...." The cheque was sent in trust on condition Williams provide a registrable transfer to the Company. The letter also enclosed the Glick Agreement for Sale and a search.

It will be seen from the ~~above~~ foregoing that, although the documentation was to have been done by the Company, its legal department was now asking Mr. Williams to provide it.

The cheque was negotiated by the lawyer Williams, but none of the money was received by the defendant, who consistently refused to accept it from the lawyer. Eventually, the money went back to the Company.

By letter of May 12 the defendant again wrote Mr. Tilley. In this letter he states he is confused by the letter of May 8, and he refers to the April 25 letter wherein he pointed out that the "Option" expired on April 15~~th~~ ~~,~~ and that the purchase monies were not paid by that date, adding "and in fact have not been paid yet,". The letter goes on to say it is now necessary for a new agreement or offer to be made.

The final letter in the matter is from Mark M. de Weerdt, a Yellowknife lawyer. It is dated May 27~~th~~ and is addressed to the defendant. In it this lawyer reviews some of the transaction, and sets forth the position that the Company had an option; that it had not expired; and that he was bound to complete the ~~A~~greement. He states further that the $12,200.~~00~~ would be paid as soon as a satisfactory transfer and title ~~was~~ were forthcoming.

No transfer was ever produced. On the contrary, the defendant was approached in late May by Mr. Glick, his unpaid vendor, and after being given an indemnity (Exhibit 18) by Glick, was persuaded to sell the property to him for $15,000.~~00~~. Mr. Glick, in turn, sold the property to the plaintiff Company on June 15~~th~~, 1967 for $16,000.~~00~~

he contract of June 15th (Exhibit 12) contains a covenant from Glick to the effect that he will on or before closing to produce and deliver to the purchaser a release executed by Nick Sokolowski of all his right, title and interest in the above premises property. Glick was also to have the building off by August 15, 1967, and he Mr. Glick was also requested to obtain a document signed by the defendant, (and did obtain it) ~~(Exhibit 13)~~ which was a certificate that the defendant had no further interest in the land; that he would remove the building; and that "any and all rights as tenant, permitee or licensee shall terminate as of that date." This document was prepared by the Company and is addressed to the Company. (Exhibit 13).

From the foregoing facts, therefore, it becomes necessary to decide two legal questions.

Firstly, was the option agreement properly exercised in law so as to give the plaintiff an enforceable contract, or was it a contract where time must be taken to be of the essence, and, consequently, became of no effect on default of payment and tender of documents on April 15th? And

Secondly, even if the ~~above document as an option~~ Agreement was properly exercised, did the subsequent behaviour of the parties bring its effectiveness to an end? Did the Company elect to treat it as at an end when the new contract was made with Glick?

Counsel for the defendant argued that the Agreement was so misleading and ambiguous as to constitute a nullity. While the document leaves much to be desired, I cannot agree that it is a nullity.

In the view I have taken of the evidence as set out ~~above~~ herein, the ~~option~~ agreement for the option (Exhibits 1 and 2) includes the oral agreement that the purchase price was to be paid at or about the time of the acceptance and as part of the acceptance, and that any documentation was to come from the plaintiff Company. Both the oral and the written agreements must be read together to form the option: ~~See~~ Cheshire ~~and~~ Fifoot, *Law of Contract*, 5th Edition, page 101.

It is clear from the facts that the plaintiff did not tender, or offer to pay the balance of the purchase price, nor tender the necessary conveyance for signature within the proper time. In fact, the letter from A. E. Williams advising that the option was at an end was received before the Company made any effort to pay. Even then, the money was sent to a person who had no authority to accept. ~~When~~ Later, when the Company, through the solicitor Mark de Weerdt, wrote the defendant offering to pay the money, the Company still requested documents to be submitted by the defendant. In the view I take of the evidence there was never any proper tender of the money or of the documents as called for under the ~~option~~ agreement for the option.

It is true there was no phrase in the ~~option~~ Agreement spelling out in so many words that time was of the essence, but the peculiar facts of this case make it clear that there was an urgency about completion of the transaction that imports this as part of the Agreement.

The law respecting this type of agreement, viz. an option, requires strict compliance with all the terms, such as the payment of money and tender of ~~the~~ documents: ~~See~~ *Hare v. Nicoll*, [1966] 2 Q.B. 130;

Dibbins v. Dibbins, [1896] 2 Ch. 348; *Stopforth v. Bergwall*, [1944] 1 W.W.R. 477, [1944] 1 D.L.R. 603, and *Carey v. Roots and Brown* (1914), 6 W.W.R. 27; *Jones v. Morris* (1910), 12 W.L.R. 651.

In *Pierce v. Empey*, [1939] S.C.R. 247, Duff, C.J. at page 252 states:

> It is well settled that a plaintiff invoking the aid of the court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed.

The basic principle followed down through the years in the construction of this type of document is set forth at pages 628-629 in *Lord Ranelagh v. Melton*, 2 D.R. (1964) & SM. 277, 62 E.R. 627, where Sir R. T. Kindersley, V.C. sums it up as follows:

> "... the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified. The Court regards it as the case of a condition on the performance of which the party performing it is entitled to a certain benefit; but in order to obtain such benefit he must perform the condition strictly."

There is nothing in the behaviour of the defendant subsequent to April 15th that could be in any way construed as a waiver of the strict provisions called for. Accordingly, I conclude that the option was never properly exercised, and the action by the plaintiff Company is ~~accordingly~~ dismissed.

In reaching the foregoing ~~above~~ conclusion, while I have not seen fit to base my judgment on the principles enunciated therein, nevertheless, I am aware that the line of authorities discussed by Lord Denning, M.R. in the recent case of *Mendelssohn v. Normand, Ltd.*, (1969) 3 W.L.R. 139;

1969] 2 All E.R. 1215, suggests another basis on which I could have ~~on the facts before me~~ found for the defendant on the facts before me.

As there may be an appeal, I should perhaps assess what damages I would have awarded to the plaintiff Company had it succeeded. The measure of damages is the difference between the price agreed upon and the actual value of the land at the time the conveyance should have been forthcoming. See *Bennett v. Stodgell* (1916), 36 O.L.R. 45; 28 D.L.R. 639; *McClement v. Lovatt* (1954), 13 W.W.R. (N.S.) 695, (1955) 15 W.W.R. (N.S.) 426. The Company contracted to pay $13,000.~~00~~ and eventually paid $16,000.~~00~~. At about the same time as ~~they~~ it contracted for this land ~~they~~ it acquired the adjacent property for $14,500.~~00~~. ~~When~~ Later, when ~~they~~ it ~~were~~ was required to pay Glick $16,000.00 for ~~the present~~ this land, it seems to me this was not a "market value" price, but one special to ~~them~~ the Company, it being necessary for it to ~~make utilization of~~ utilize the Bolton lot. It would seem that $14,500.~~00~~ was perhaps closer to market value. Because the ~~C~~company had some additional expense that would form part of a claim for damages I would have fixed the total damage claim at $2000.~~00~~, ~~plus a~~ and ordered refund of the $800.~~00~~ deposit.

In the result, the plaintiff's claim is dismissed. Since the defendant in the result is able to retain the $800.~~00~~ and, at the same time was able to sell to Glick at an enhanced price, and obtained an indemnity from Glick, this is not a proper case to award him costs.

W. G. Morrow,
J.T.C.

15 May, ~~1970~~,
Yellowknife, N.W.T.

~~Counsel~~: D. H. Bowen, Q.C., ~~Counsel~~ for the Plaintiff.
T. H. Miller, Q.C., ~~Counsel~~ for the Defendant.