IN THE SUPREME COURT OF

THE NORTHWEST TERRITORIES

BETWEEN:

319232 ALBERTA LTD.

Plaintiff

- and -

NORTHWEST TERRITORIES BUSINESS CREDIT CORPORATION

Defendant

REASONS FOR JUDGMENT

OF THE HONOURABLE MR. JUSTICE E. A. MARSHALL

INTRODUCTION

[1] The Plaintiff claims that the Defendant breached an agreement with the Plaintiff for the purchase of a commercial building in Iqaluit. The Defendant raises two defences: it maintains that the negotiations which took place between the parties did not produce a binding agreement to sell the property; alternatively, it claims that it is a mortgagee of the property only. The registered owner was a

bankrupt whose Trustee was Miller McClelland Ltd. ("Miller"). It maintains that any negotiations that

took place between the parties could not produce a binding agreement when Miller was the only party with power to enter into a binding transaction to sell the property.

THE FACTS

[2] The Defendant held a first mortgage from the registered owner, Barsoum Drugs Ltd. In 1993 it fell into arrears. The owner filed a proposal under the Bankruptcy and Insolvency Act but that proposal failed, the registered owner abandoned the property and Miller became the Trustee in Bankruptcy in August 1993. A meeting of creditors approved the appointment. Miller agreed to share the maintenance costs for the building with the Defendant and to look after its upkeep until sale.

[3] In July 1993 the Defendant obtained an appraisal of the property. It was found to have a cash value of $575,000.00 and $606,000.00 on terms. At that time the debt to the Defendant was approximately $520,000.00. In September 1993 the Plaintiff, through its president and sole shareholder, Fernandes, made a written offer to purchase the property for $275,000.00. It was not accepted. On October 30, 1993 the Plaintiff made a further offer of $430,000.00. That offer was also rejected. I note that both of these written offers were addressed to: "Bankruptcy Trustee for

Barsoum Drugs Ltd." In January 1994 the property was nationally advertised in several newspapers. There were no inquiries or offers. Mr. Miller testified that after the advertising had produced no interest in the property he was satisfied that there was no equity in the property and that he could sell it without Court approval. He was in a legal position that required the Defendant, as mortgagee, to approve any offer less than the amount actually due on its security. The alternative would have been to obtain Court approval of any such sale. Miller also testified that sometime during this period he offered to quitclaim the property to the Defendant but the Defendant did not wish to take title. I am satisfied from the evidence of the Defendant's officer and employee, Gallant, that the Defendant did not wish to become involved in the administration of the property and also wished to save any Land Titles' fees involved in a transfer of the property to it. It contemplated having a transfer made directly from Miller to the eventual purchaser. Mr. Miller testified that by July 1994 he was prepared to do what the Defendant asked. There was clearly no equity in the property. He was prepared to accept any offer the Defendant agreed upon so long as Miller was indemnified.

[4] In July 1994 Fernandes spoke to Gallant, the Credit and Collections Officer of the Defendant. He was interested in making another offer and was told by

Gallant to direct any offer to him. On July 28th the Plaintiff submitted a written offer addressed to the Defendant, "Attention: Roger Gallant" for $270,000.00. On August 2nd a Credit and Collection Committee Meeting was held to consider the offer. The record of the meeting shows that except for a few minor amendments, the offer was acceptable in its present format. McNiven, legal counsel for the Defendant, was to approach Miller to facilitate the sale. He did, by letter of August 2nd. On August 4th he wrote to the Plaintiff stating the offer was accepted on what were described as three "conditions". The first simply clarified that the $10,000.00 deposit would be forfeited if the transaction did not close due to the action or inaction of the Plaintiff. The second matter stated that the transaction would be subject to trust conditions to be negotiated between lawyers of each party. The third matter dealt with the fact that there were builder's liens upon the property and the Defendant as vendor wished to utilize the purchase monies to pay sufficient amounts into Court to discharge the builder's liens and clear the property. In the letter McNiven referred to himself as "legal counsel for the corporation and Trustee". It is evident that the so-called conditions did not represent any significant change in the offer made by the Plaintiff. The clarification respecting the deposit merely confirmed that the deposit would be a true deposit in that it would be forfeited to the vendor if the purchaser failed to complete the transaction. The Plaintiff then retained counsel, Watson, who

responded to McNiven's letter of August 4th by a letter of August 5th. The letter expressed the opinion that McNiven's letter proposed certain changes to the terms of the Plaintiff's offer and did not amount to an acceptance of the offer. It confirmed that the Plaintiff still wished to purchase the property and clarified further the matter of the $10,000.00 deposit. The letter requested that counsel discuss the matter further. McNiven simply forwarded along his letter and that of Watson to Miller with the request that Miller retain counsel in Yellowknife to complete the conveyancing.

[5] It is apparent that after the August 5th letter was received by McNiven that he discussed its contents with Gallant. He agreed with the position adopted by the Plaintiff in the letter. It is also evident that counsel for the Plaintiff and McNiven had spoken to each other and agreed to prepare a formal offer to embody the various details in the correspondence and discussions. It also appears to me of significance that in the fax letter of August 9, 1994 to Miller McClelland from McNiven he requested Miller to retain counsel in Yellowknife "to complete whatever conveyancing may be required to close this transaction." A copy of that letter was forwarded to counsel for the Plaintiff.

[6] Pursuant to the discussions between counsel the Plaintiff executed a formal offer on August 12, 1994 embodying the same terms - a $10,000.00 deposit, full price of $270,000.00, closing and adjustment date September 6, 1994.

[7] From the testimony of McNiven it is evident he believed that the Defendant had accepted the offer of July 28, 1994. That was still his opinion on August 15, 1994 when he faxed Miller a letter with a copy to the solicitor for the Plaintiff. After referring to other matters, he went on to say in the letter:

> "Finally, we have not yet received an indication of who your counsel will be in Yellowknife respecting the conveyance of the property to 3519232 Alberta Ltd. The solicitors for the said Company are McLennan Ross in Edmonton and the lawyer responsible is Scott Watson.
>
> Please contact Mr. Watson to ensure that the conveyance takes place according to the Letter of Offer and the Acceptance from BCC."

McNiven agreed on discovery that the Letter of Offer and Acceptance referred to the July 28th offer letter and the August 4th and 5th letters.

[8] The August 12th re-drafted offer, after being signed by Fernandes in Edmonton, was delivered by him to Miller's office in Edmonton. Miller forwarded it along by fax to McNiven. Miller raised certain questions about the terms of the offer in a memo to McNiven. McNiven was not in his office on August 12th and the weekend intervened. On August 15th he sent the fax I have quoted above to Miller before receiving the August 12th fax from Miller which raised questions about the Plaintiff's re-drafted offer. It is also apparent that Mr. Miller had told McNiven during this time that the offers had to be accepted by him and this may in part explain why the re-drafted offer was forwarded along to him. On the morning of August 15th Miller received an offer from a third party for $351,000.00. Miller forwarded the offer by fax to the Defendant. On the afternoon of August 15th the Defendant held a meeting to consider the competing offer and spoke by speaker phone to Mr. Miller. Mr. Miller felt he was free to accept the highest offer since he had given no formal acceptance of the Plaintiff's offers. He took the position that he alone, on behalf of Miller, could accept any offer made. The members of the Defendant considering the matter were concerned about their obligation to accept the highest offer. The first issue the committee considered was whether they were in a position to consider a second offer. McNiven advised them that they could do so inasmuch as the re-drafted offer called for a response by August 16th. The committee determined to ask

the Plaintiff if it wished to submit a higher offer. On August 16th, through its counsel, the Plaintiff submitted a higher offer of $340,000.00 but this offer was rejected by the Defendant who accepted the third party offer and sold the property to the party for $351,000.00.

WAS THERE AN ACCEPTANCE OF
THE JULY 28, 1994 OFFER?

[9] This issue resolves itself as to whether there can be found an acceptance of the July 28, 1994 offer of the Plaintiff. The Plaintiff relies on McNiven's reply of August 4th, setting out an acceptance and his letter to Miller of August 9th copied to the Plaintiff's lawyer. In that letter he instructed Miller to retain counsel "to complete whatever conveyancing may be required to close the transaction." The Defendant, while maintaining that no agreement was possible here without the Trustee's consent, maintains that no agreement was arrived at because counsel agreed to redraft a formal agreement and in addition, after the competing offer was received on August 15th, the Plaintiff submitted a higher offer for consideration. This is said to be evidence of a lack of consensus regarding the July 28th offer.

[10] Fridman on the Law of Contract 3rd Ed. Carswell 1994 at 44-45 states:

> "Acceptance means the signification by the offeree of his willingness to enter into a contract with the offeror on the terms offered to him by the latter....
>
> The response of the offeree must be a clear indication that the offer has been accepted. It must be unconditional, clear and absolute.... Although acceptance may be by way of an oral or written statement, there can be acceptance by conduct. Not all conduct will amount to an acceptance. It must be clear that what the offeree has done is meant by way of acceptance of an offer that has been made.... Whether or not there has been an acceptance depends upon whether the offeree has so conducted himself that a reasonable man would believe that he has accepted, or is accepting, the offer in question, at least as long as the offeror has acted on such belief. The generally adopted theory of offer and acceptance is that the parties' behaviour must be viewed objectively, in terms of how the reasonable man, if he were a bystander, would describe the effect of what he had seen or heard."

[11] I have no difficulty in concluding that the Defendant accepted the July 28th offer to purchase by McNiven's written responses and his conduct instructing Miller to retain counsel to close the transaction. The essential terms were agreed upon. With respect to the drafting of the formal agreement the law provides that no binding agreement exists if the tentative agreement is conditional on a formal agreement being made. In the present case there was no evidence that this was the

basis for a formal contract being prepared. Indeed, it appears to have occurred only because counsel wished to combine the terms of the various letters into one document. Once there is offer and acceptance, the contract is complete even if a formal contract is contemplated (Zipursky and Zipursky v. Bursteen (1946) 1 D.L.R. 746 at 751-752 (Man. Q.B.)).

[12] Miller, J. in Kevel Holdings Ltd. v. 408230 Alberta Ltd. (1994) 148 A.R. 286 said the dictum of Parker, J. in VonHatzfeldt-Wildenburg v. Alexander (1912) 1 Ch. 284 at 289 remains applicable:

> "It is a question of construction whether the execution of the further contract is a condition or term of a bargain or whether it is mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through."

[13] I find nothing in the evidence that indicates that the execution of a formal contract was a part of the bargain between the parties.

[14] Similarly, it appears to me that on the facts, the fact of the purchaser submitting a further offer after a competing offer was being considered by the

Defendant does not give rise to the conclusion that the parties had never entered into a binding agreement. It is evident that the Plaintiff was advised that the Defendant was considering the higher offer from a third party and attempted to salvage the transaction by submitting a further offer. This is not really relevant to the issue of whether or not a binding agreement had been arrived at respecting the July 28th offer.

IS THE FACT THAT THE DEFENDANT WAS NOT THE REGISTERED OWNER BUT THE MORTGAGEE OF THE PROPERTY A DEFENCE?

[15] I am satisfied on the facts that the Defendant led the Plaintiff to believe that it was in a position to enter into a binding agreement. I accept Fernandes' evidence that he was told by Gallant in July prior to the July 28th offer that the offer should be submitted to him. I do not accept the evidence of Gallant that he told Fernandes that the Trustee must accept the offer. When the offer was submitted, it was sent to Gallant's attention and it is clear from the subsequent conduct of the Defendant's committee and actions of McNiven that the Defendant had no concerns about the offer being submitted to the Defendant. This is all consistent with Mr. Miller's testimony that he was prepared to carry out the instructions of the Defendant in transferring the property.

[16] The law appears settled that the vendor is not required to have a good title at the time of closing. What is required is that the vendor must be in a position to compel a conveyance at the time of closing (259202 Alberta Ltd. v. Barnieh Investments Ltd. (1984) 9 D.L.R. (4th) 519 (Alta. C.A.) Stevenson, J.A.). This has evolved from the decision of Goodchild v. Bethel (1914) 7 W.W.R. 832 (Beck, J.A.). In the present case it is clear on the facts that Miller had offered to quitclaim and transfer the property to the Defendant some months prior to the time of the offer. Miller was entirely prepared to convey the property as directed by the Defendant. While Mr. Miller gave some advice to the Defendant about the terms of the redrafted offer, these were in the nature of gratuitous assistance and are not a demonstration of his asserting any real authority over the ownership of the property. He had clearly advised the Defendant that he would convey as requested by it and their correspondence to him in August confirms that agreement. In these circumstances the Defendant was in a position to compel a conveyance to it due to its agreement with Miller.

[17] The Defendant points to s. 71(2) of the Bankruptcy and Insolvency Act but that merely states that title of a bankrupt vests in the trustee on a receiving order or assignment in bankruptcy being made. With respect to secured creditors, Houlden

and Morawetz state in Bankruptcy and Insolvency Law in Canada (3rd ed.) Toronto: Carswell, 1997 at 3-166:

> "The effect of ss. 70(1) and 71(2) with respect to secured creditors is that the interest of a secured creditor in the property of the bankrupt never loses its priority over the claims of other creditors, never passes into the hands of the trustee and never becomes a part of the property in the hands of the trustee to be divided among the creditors proving the bankruptcy, unless the trustee redeems the property by paying out the claim of the secured creditor as permitted by s. 128(3)."

[18] It appears to me that the effect of the legislation is to displace any interest in the property that the trustee possessed once the trustee acknowledged that there was no equity in the property. This occurred when Miller advised that he would convey the property as requested by the Defendant. This appears to be a further reason to find that the fact the Defendant was not the registered owner does not prevent it having the power to enter into an agreement to sell.

DAMAGES

[19] The best measurement of damages is the difference in value between what the Plaintiff contracted to pay and actual sale price of the property to the third party- $81,000. There was no other evidence before me of the property value other than the 1993 appraisal that all parties felt was not realistic. The measurement of

damages is the difference between the contract price and the price ultimately received on the subsequent sale Bigam v. Yewchuk 36 A.R. 148 (Q.B.).

JUDGMENT

[20] There will be judgment for damages of $81,000.00 together with pre-judgment interest from September 6, 1994. The Plaintiff is entitled to costs. If counsel cannot agree on costs, I request they arrange to speak to me within 30 days.

_____
J. C. Q. B. A.

DATED at the City of Edmonton,
this day of September, A. D. 1997.

Counsel:

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CV 05714

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