

CANADA / JUDGMENT

574409 B.C. Ltd. v. Spring Creek Aggregates Ltd.

2008 BCSC 978

COURT

Supreme Court of British Columbia

DECIDED

24 July 2008

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2008 BCSC 978 574409 B.C. Ltd. v. Spring Creek Aggregates Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

574409 B.C. Ltd. v. Spring Creek Aggregates Ltd.,

2008 BCSC 978

Date: 20080724

Docket: 16015

Registry: Terrace

Between:

574409 B.C. Ltd.

Plaintiff

And

Spring Creek Aggregates Ltd., Standard Paving Inc., and

Magnum Road Builders Inc. doing business as

Spring Creek Aggregates

Defendants

And

Spring Creek Aggregates Ltd., Standard Paving Inc., Magnum Road Builders Inc.

doing business as Spring Creek Aggregates and M & M Ventures Ltd.

Plaintiffs by Counterclaim

And

574409 B.C. Ltd.,

Oscar Corbin Farkvam

Defendants by Counterclaim

Before: The Honourable Mr. Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff

R. McGowan and

H. Gansner

Counsel for the Defendants

G. Crampton

Date and Place of Hearing:

July 19, 2008

Terrace, B.C.

- [1] On June 27, 2008 I handed down Reasons for Judgment in this action with respect to a variety of preliminary objections taken by the plaintiff and the defendants by counterclaim to the summary judgment application of the defendants and plaintiffs by counterclaim that was heard on April 24, 2008.
- [2] A formal order arising from those Reasons for Judgment has not been entered.

THE ISSUE

- [3] Mr. Crampton for the defendants has applied to reargue one of the issues that was determined in my Reasons for Judgment of June 27, 2008. The issue he seeks to revisit is whether an option to purchase property owned by the plaintiff granted to the defendant Spring Creek Aggregates Ltd. (SCA) was effectively assigned by SCA to the defendant M&M Ventures Ltd. (M&M), so that the option could effectively be exercised against the plaintiff.
- [4] Mr. Crampton argues that the decision contained in my Reasons for Judgment is based upon an interpretation of s. 59(3) of the Law and Equity Act, R.S.B.C. 1996, c. 253 (the "Act"). He says that because that section of the Act was not pled by the plaintiff or the defendants by counterclaim prior to April 24, 2008, he did not appreciate that it would be a focus in my decision, and thus did not have or take the opportunity to make full argument on the issue.

- [5] As no order arising from my Reasons for Judgment has been signed or entered, I am not functus officio. I have the discretion to reopen the issue, if to do so would avoid a miscarriage of justice: see *Clayton v. British American Securities Ltd.*, [1935] 1 D.L.R. 432 at 440, [1934] 3 W.W.R. 257 (C.A.) and *Aquiline Resources Inc. et al. v. Wilson et al.*, 2005 BCSC 1461, [2005] B.C.J. No. 2299 (QL). If I reopen the issue, I can also permit further evidence to be adduced.
- [6] At issue in this application is whether I should reopen the issue and permit further evidence to be adduced in order to avoid a miscarriage of justice.

ANALYSIS

(a) Did the Plaintiff Deliberately Avoid the Issue?

- [7] If I were of the view that Mr. Crampton made a deliberate tactical decision not to argue the issue at the hearing of the matter of April 24, 2008, I would refuse his application to reopen the matter pursuant to the reasoning in *Sykes v. Sykes* (1995), 6 B.C.L.R. (3d) 296, 58 B.C.A.C. 294.
- [8] While the requirement of written notice of an assignment of land was raised by Mr. Gansner for the plaintiff, and I made specific reference to the Act during the course of the hearing, Mr. Crampton says that he understood that the reference to the Act was to s. 36 of the Act. He says it is for that reason that he dealt only with s. 36 of the Act in his oral and written submissions, and refrained from making any submissions with respect to s. 59(3) of the Act. He says that it was not by any deliberate choice on his part, but rather through this misunderstanding.
- [9] Although Mr. McGowan concedes that the entire transcript of the proceedings of April 24, 2008 contains no reference to a specific section of the Act, and in particular no reference to s. 59(3), he argues that the importance of s. 59(3) to the submissions on April 24, 2008 should have been obvious to Mr. Crampton.
- [10] I accept that Mr. Crampton did not intentionally refrain from making submissions with respect to s. 59(3) of the Act, but instead believed that the only section of the Act to be addressed was s. 36, which he did address.
- [11] I am satisfied that Mr. Crampton did not turn his mind to s. 59(3) of the Act at any time prior to the filing of his written submissions that led to my Reasons for Judgment of June 27, 2008.
- ### (b) Would a Miscarriage of Justice Occur if the Case was not Reopened?
- [12] I would be prepared to reopen the issue of the effectiveness of the oral assignment of the option to purchase in question if I were persuaded that the arguments and evidence that Mr. Crampton wishes to present would, on a balance of probabilities, change the decision that I made as set out in my Reasons for Judgment of June 27, 2008.

[13] In assessing whether or not a miscarriage of justice would occur if a case was not reopened, Spencer J. said in *Vance v. Vance* (1982), 34 B.C.L.R. 209 at 211, [1982] 2 W.W.R. 472:

[The onus is] upon the applicant to satisfy [the Court] on the balance of probabilities that a miscarriage of justice would probably occur without the rehearing and that the evidence or argument he now wishes to present would probably change the result of the trial. That is not to say that at this stage the applicant must satisfy me that that a change in the result would be inevitable. [Emphasis added.]

[14] Mr. Crampton argued that the pre-contract conduct of Mr. Farkvam, the plaintiff's principal, constitutes a waiver of the requirement for written notice. In their affidavits sworn following my decision of June 27, 2008, Mr. and Mrs. Scott each say that Mr. Farkvam made it clear in discussions prior to the conclusion of the contractual arrangements between the parties that he was not concerned about which of the defendant companies would receive the option to purchase from the plaintiff.

[15] Accepting for the purposes of the defendant's application that this is true, it ignores the fact that after those discussions, the parties entered into contractual commitments which the plaintiff is entitled to rely upon. In particular, the plaintiff and SCA entered into an option to purchase which granted SCA "the sole and exclusive option" to purchase the lands in question, for a specified period of time.

[16] Although the option to purchase was assignable by SCA to a corporation associated to or affiliated with it, or to a corporation controlled by a shareholder of SCA, this does not detract from or address the statutory requirements in s. 59 of the Act.

[17] Sections 59(3) of the Act provides:

(3) A contract respecting land or a disposition of land is not enforceable unless

- (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
- (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
- (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

[18] This section of the Act is a direct descendent of the much amended Statute of Frauds (1677). In *Gill v. Grant* (1988), 30 E.T.R. 255 at 263-264, [1988] B.C.J. No. 1705 (QL) (S.C.) [Gill cited to E.T.R.], Rowles J., as she then was, stated that s. 59(3)(b) and (c) codified the doctrine of part performance:

By virtue of ss. 3(b) and 3(c) a contract relating to land or a disposition thereof is no longer unenforceable simply because it does not exist in written form. These subsections are the statutory embodiment of the equitable doctrine of part performance, developed by the Courts of Chancery to overcome the use of the Statute of Frauds as an instrument of fraud by refusing to allow a defendant to rely upon the technical defence of the statute.

[19] However, in *Schild v. Staud Estate (Official Administrator)*, [1993] B.C.J. No. 1604 (QL) (S.C.), Cashman J. conducted a thorough review of the case law and disagreed with the finding in *Gill* that s. 59(3)(c) was also a statutory embodiment of the doctrine of part performance at paras. 89-90:

Section 54 [now s. 59] replaced the Statute of Frauds, R.S.B.C. 1979, c. 393, which was repealed by the Law Reform Amendment Act, S.B.C. 1985, c. 10. What was formerly found in the Statute of Frauds is now to be found in s. 54(3) of the Law and Equity Act with the additions of s-ss (4) and (5). It appears to me that s. 54(3)(b) is an attempt to codify the doctrine of part performance. The Report on The Statute of Frauds (1977) of The Law Reform Commission of British Columbia at pp. 69-73 appears to indicate that that was the intention of the drafters

The meaning to be attached to s. 54(3)(c) [now s. 59(3)(c)] is less clear. With respect to the view expressed in *Gill v. Grant*, supra, I am not persuaded that that subsection is as well a statutory embodiment of the doctrine of part performance. In fact, it may be that that section embodies the concept of estoppel.

[20] The Supreme Court of Canada considered the doctrine of part performance where a plaintiff sought to enforce an oral assignment of an interest in land in *McNeil v. Corbett* (1907), 39 S.C.R. 608, [1907] S.C.J. No. 73 (QL), stating at 611-612:

A condition of the application of that doctrine is thus stated by Lord Selborne, in *Maddison v. Alderson* (1), at page 479:

All the authorities shew that the acts relied upon must be unequivocally, and in their own nature, referable to some such agreement as that alleged;

i.e. to an agreement respecting the lands themselves; and, as further explained in that case, a plaintiff who relies upon acts of part performance to excuse the non-production of a note or memorandum under the Statute of Frauds, should first prove the acts relied upon; it is only after such acts unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject of the agreement sued upon have been proved that evidence of the oral agreement becomes admissible for the purpose of explaining those acts

[21] Mr. Crampton argues that the requirements of s. 59(3)(a) of the Act were met because an agreement existed between SCA and M&M whereby SCA was left charged to assign its interest in the option to purchase to M&M. Mr. Crampton says that he, as agent for both SCA and M&M, indicated this in writing by his letter to the plaintiff of November 13, 2007 (which was copied to Mr. Gansner) that such a disposition had been made.

[22] The relevant portion of the letter states:

1. We are the lawyers for the Optionee and have been instructed to give you notice that M & M Ventures Ltd., a corporation which is associated to or affiliated with the Optionee or controlled by a shareholder of the Optionee (paragraph 1.12 of the Option), will exercise the Option set out in the Option to Purchase Agreement made between you dated April 1, 2003 (the "Option") for the purchase of the following properties:

[23] I do not consider that Mr. Crampton's letter of November 13, 2007 is any indication of an assignment. While the contractual obligations did not require proof of the status of any assignee, clause 1.7 of the option to purchase obliged the defendants to notify the plaintiff in writing of any election relating to the option to purchase. If the letter was an indication of an assignment, then the letter would have been clear that an assignment to M&M had already occurred, or that notice of an assignment to M&M had already occurred. The letter does not so indicate, and the terms and extent of the assignment are not even hinted at. In my view, this letter is not a notice of the assignment of the option to purchase: see *Ostrikoff v. Vancouver Finance Co. Ltd.* (1955), 1 D.L.R. (2d) 179, [1955] B.C.J. No. 143 (QL) (C.A.) at para. 17. As I stated in my previous judgment, I find that this letter represents only written notice of M&M's intent to exercise the option, and not written notice of SCA's assignment of the option to M&M.

[24] I am not satisfied that SCA can be considered a "party charged" as the term is used in s. 59(3) (a) of the Act. For the purposes of this case, the party that is sought to be charged is the plaintiff, as vendor of the property: see *Gyurcsek v. Morrow*, [1982] B.C.J. No. 233 (QL) (S.C.) at para. 12.

[25] The second argument that Mr. Crampton says would probably change the result of my earlier decision is based upon the comments of the Levine J.A. for a unanimous British Columbia Court of Appeal in *Johnson v. Breitzkreuz*, 2006 BCCA 30, 51 B.C.L.R. (4th) 305 [Johnson cited to BCCA], and an analysis of subsections (b) and (c) of s. 59(3) of the Act.

[26] In *Johnson*, the parties orally agreed to the terms of the sale of a house owned by the defendant, who later expressed to the plaintiffs that he was going to otherwise sell the house. The plaintiffs relied on s. 59(b) and (c) of the Act, arguing that the defendant acquiesced to certain acts that were not inconsistent with the alleged agreement for sale between them, such as signing a joint account card and increasing the payment to the amount specified in the mortgage. The plaintiffs also claimed that they changed their position in reasonable reliance on the agreement by increasing their monthly payments and performing extensive work on the house.

[27] Madam Justice Levine upheld the trial judge's application of subsections (b) and (c) of s. 59(3) of the Act and inferred that the trial judge, by enforcing the agreement for sale, accepted the plaintiffs' arguments that acts done or acquiesced to by the defendant, or the plaintiffs' change in position, satisfied those subsections of the Act. She also accepted the view of the trial judge with respect to s. 59(3) of the Act and observed at para. 32 that:

"the courts have recognized for several hundred years that the statute cannot [be] the basis for avoiding an agreement": see the discussion of the manner in which courts of equity acted to prevent the Statute of Frauds to be used "as an instrument of fraud" in *Steadman v. Steadman*, [1976] A.C. 536 at 540, 551, 558 (H.L.). The wording of ss. 59(3)(b) and (c) provides relief in broader terms than the courts, indicating the intention of the Legislature to codify the basis on which agreements for the sale of land would be enforced, not to track the common law.

[28] Mr. Crampton alleges, and the plaintiff does not dispute, that the defendants' contractual relationships with the plaintiff permitted the assignment of the option to purchase from SCA to an associated or affiliated company, or one controlled by a shareholder of SCA, and that M&M was such a company.

[29] However, unlike in *Johnson*, there were no acts done by or acquiesced to by the plaintiff to indicate that an assignment of the option had been made consistent with what is contained in the option to purchase, and I have concluded that s. 59(3)(b) therefore has no application to the facts of this case.

[30] Similarly, I do not see any indication that SCA changed its position in reasonable reliance on a contract with the plaintiff for s. 59(3)(c) to apply.

[31] In his written submissions on this application, Mr. Crampton argued:

In reasonable reliance on [his letter to the plaintiff's counsel of November 13, 2007] as notice of the assignment [of the option to purchase from SCA to M&M], no further notice was given and the lease came to an end without notice of the exercise of the Option being given by the subsidiary SCA. Thus, both companies [M&M and SCA] changed their position to their detriment in reliance on what was obviously believed to be effective notice of the assignment.

[32] There are at least four difficulties with this argument. First, the reliance that Mr. Crampton asserts is not based upon a contract or disposition that differs from the option to purchase between the parties, but rather is based upon an oral agreement that is alleged to have been reached between his own clients, without the knowledge of the plaintiff.

[33] The plaintiff in this case is not seeking to rely upon the Act in order to avoid an agreement in the sense observed by Levine J.A. in *Johnson*, as here the defendants are unable to point to any agreement between them and the plaintiff that precluded them from adhering to the provisions of the Act or from abiding by the written requirements of the notice of any election pursuant to the option to purchase.

- [34] Second, I am unable to conclude that it was reliance on the purported assignment of the option to purchase that led the defendants SCA and M&M to act as they did in accumulating expenses, in the same way as the plaintiffs did in Johnson by renovating the house in reliance on their agreement for sale.
- [35] While Mr. Crampton argued that the defendants SCA and M&M expended monies to continue the operation of their businesses including the cost of commissioning an environmental study and various legal expenses, he conceded that these expenses would likely have been incurred anyway, albeit by SCA, if SCA, who was entitled under the option to exercise it, had done so.
- [36] There was no evidence before me as to when the oral assignment is said to have occurred, either vis a vis these expenses, or at all. At best, I consider that all that can be said of these expenses is that they were incurred in anticipation of the assignment and exercise of the option to purchase.
- [37] Third, it is my view that the defendants cannot contend that the letter of November 13, 2007 was even implicit notice of the assignment, for the reasons I have expressed in para. 23 above.
- [38] Fourth, while the contractual obligations between the parties did not require proof of the status of any assignee, clause 1.7 of the option to purchase did oblige the defendants to notify the plaintiff in writing of any election relating to the option to purchase. Even if Mr. Crampton's letter of November 13, 2007 could be seen as inferential notice of a possible assignment, it could not be notice of the terms or conditions of the assignment.
- [39] If the plaintiff transferred the property based on Mr. Crampton's letter of November 13, 2007, without knowing that an assignment of the option to purchase had in fact occurred, it would face the risk of having made a transfer of the property contrary to the terms of the option to purchase.
- [40] If the plaintiff took that risk, it next would have to take the further risk of assuming that the assignment was unconditional. In the event that there were conditions to the assignment for the benefit of SCA, and the plaintiff acted on the letter as an effective assignment without knowledge of those conditions, it would do so at its risk of transferring the property without complying with the necessary conditions imposed on the assignment.
- [41] I do not consider that the plaintiff was obliged to assume these risks based upon what I have previously determined to be only notice of an intention to exercise the option to purchase by M&M, as opposed to written notice of the assignment of that option by SCA.

[42] I am unable to conclude that the equities in the circumstances can only be met by enforcing a disposition or contract between the parties that ignores the clear wording of the option to purchase that the parties agreed to and which incorporates a term that obliges the plaintiff to act at its' potential peril by assuming that an assignment of the option to purchase had occurred when the written notice relied upon by the defendants does not so state.

CONCLUSION

[43] The defendants have not satisfied their onus of persuading me that the result in this case would probably be different even if I were to permit them to adduce the new evidence that they produced in support of their motion. I do not find that the result I reached in my decision of June 27, 2008 would probably be different if I were to allow the defendants to adduce the new evidence set out in the affidavit of Mr. and Mrs. Scott, or if I were to reopen the issues addressed in that decision. I am therefore not satisfied that a miscarriage of justice would probably occur if I do not reopen the issues that I previously decided.

[44] The defendant's motion is dismissed.

"Hinkson J."

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