
CANADA / JUDGMENT

Phoenix Construction Systems Ltd. v. 682163 B.C. Ltd.

2009 BCSC 1510

COURT

Supreme Court of British Columbia

DECIDED

5 November 2009

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2009 BCSC 1510 Phoenix Construction Systems Ltd. v. 682163 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Phoenix Construction Systems Ltd.

v. 682163 B.C. Ltd.,

2009 BCSC 1510

Date: 20091105

Docket: S93144

Registry: New Westminster

Between:

Phoenix Construction Systems Ltd.

Plaintiff

And

682163 B.C. Ltd.

Defendant

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiff:

B. F. Schreiber

K.P. Hyde

Counsel for the Defendant:

D. R. Bennett

M.C. Lang

Place and Date of Hearing:

New Westminster, B.C.

October 15, 2009

Place and Date of Judgment:

New Westminster, B.C.

November 5, 2009

1. Introduction

- [1] This is an application by the plaintiff, Phoenix Construction Systems Ltd., for an order or direction that the sale of a townhouse site in Langley be completed in accordance with a consent order entered into between the plaintiff and the defendant on March 23, 2009, and pronounced by me on that day.
- [2] The consent order was in settlement of an action for specific performance relating to a contract of purchase and sale for the lands dated March 19, 2005. The defendant, the seller, resisted completion of the sale and the plaintiff, the buyer, brought proceedings for specific performance. The parties entered into the consent order of March 23, 2009 two days prior to the date set for the trial.
- [3] The consent order provided for the sale of the property from the defendant to the plaintiff. The parties agree that the effect of the order was that the transaction was to complete on September 21, 2009.
- [4] The defendant takes the position that the plaintiff was in breach of contract in failing to complete the transaction on September 21, 2009, or alternatively September 22, 2009, and that the defendant was therefore entitled to terminate the agreement, which it did. The defendant further takes the position that termination of the agreement, as embodied in the court order, has the same practical effect as setting aside the court order. Therefore, the defendant says, the plaintiff has no further right to purchase the land.

- [5] The primary position of the plaintiff is that neither party was ready, willing, and able to complete on September 21, 2009, due to an issue that arose between the parties. However, the plaintiff says that the parties resolved the issue through mutual agreement on the afternoon of September 22, 2009. The plaintiff says that the defendant is in breach of its agreement and the court order in failing to complete the transaction on September 23, 2009, or at any reasonable date thereafter.
- [6] The defendant relies upon a term of the court order making time of essence. The plaintiff says that time ceased to be of the essence when neither party was in a position to complete on September 21, 2009. Alternatively, the plaintiff says that the defendant waived compliance with the time of essence provision, or by its conduct disentitled itself from reliance on the time of the essence provision.
- [7] It will be necessary to set out the facts in some detail in order to analyze the issues adequately.
- [8] For the sake of clarity and consistency, I shall henceforth refer to the plaintiff as the "buyer" and the defendant as the "seller".

2. Background Facts

(a) Contractual terms and court order

- [9] Pursuant to a contract of purchase and sale dated March 19, 2005, the buyer agreed to purchase a development property situate in the Township of Langley. The property was part of a larger parcel being developed by the seller, or Sandhill Developments Ltd. ("Sandhill"), a company related to the seller. The seller or Sandhill was developing a single family subdivision on the remaining portion of the larger parcel.
- [10] Under the contract, the seller was required to subdivide the larger parcel and create title to the property sold. The seller also agreed to obtain a development permit for the subject property from the Township of Langley ("Langley" or "TOL") and to carry out certain site servicing obligations for Langley, related to the property. Once the requisite municipal approvals and zoning were in place the property sold would be developable by the buyer as a 62 unit townhouse site.
- [11] On August 16, 2005 Sandhill entered into a servicing agreement with Langley. The servicing agreement required Sandhill to carry out various works, including landscaping works, on the parcel being developed, which included the townhouse site sold to the buyer in the March 19, 2005 contract. The terms of the servicing agreement required Sandhill to put up a security deposit by way of cash or a letter of credit to secure performance of its obligations under the servicing agreement. The security provided by Sandhill would be released over time as Langley's Director of Engineering was satisfied with Sandhill's performance.
- [12] The buyer agreed to buy the property for a price of \$2,125,000. It paid the seller a deposit of \$100,000.

- [13] On June 30, 2005 the buyer commenced an action for specific performance of the March 19, 2005 contract. The issues in that action are no longer material because as noted above, on March 23, 2009, two days prior to the scheduled commencement of trial, the parties settled the action and entered into the consent order.
- [14] The order of March 23, 2009 provided that the sale price of the property would be \$2,175,000, that is, \$50,000 more than the amount set out in the original contract of purchase and sale.
- [15] The order set out various terms relating the sale of the property. The sale was to complete on September 20, 2009, which as it turns out was a Sunday, or at the buyer's option, on a date before that. Time was of essence of this sale. Various other terms relating to the property and to the conveyance of the property were set out.
- [16] It will be convenient to set out the material terms of the consent order here:
1. The defendant shall sell and transfer to the plaintiff and the plaintiff shall purchase, the 62 unit townhome site property situate at 72nd Avenue and 200th Street, Langley, British Columbia, which is the subject of the herein action having the following legal description:
PID 026-451-522 Lot 37, Section 22, Township 8 NWD Plan 20221 (hereinafter referred to as the "Site")
for a total price of \$2,175,000.00 (the "Purchase Price");
 2. Subject to paragraph 8 herein, the completion of the purchase and sale of the Site (hereinafter referred to as the "Sale") shall be on September 20, 2009, or sooner, at the Plaintiff's option, upon 21 days notice in writing to the defendant or to the defendant's address for delivery in the hereinafter action (hereinafter referred to as the "Completion Date");
 3. Time shall be of the essence of the Sale;
 4. If the plaintiff is relying upon a new mortgage to finance the Purchase Price, the plaintiff, while still required to pay the Purchase Price on the Completion Date, may wait to pay the Purchase Price to the defendant until after the transfer and new mortgage documents have been lodged for registration in the appropriate Land Title Office, but only if, before such lodging, the plaintiff has: (a) made available for tender to the defendant that portion of the Purchase Price not secured by the new mortgage, and (b) fulfilled all the new mortgagee's conditions for funding except lodging the mortgage for registration, and (c) made available to the defendant, a Lawyer's or Notary's advance by the mortgagee of the mortgage proceeds pursuant to the Canadian Bar Association (BC Branch) (Real Property Section) standard undertakings (the "CBA Standard Undertakings");

5. If the defendant has existing financial charges to be cleared from title, the defendant, while still required to clear such charges, may wait to pay and discharge existing financial charges until immediately after receipt of the Purchase Price, but in this event, the defendant agrees that payment of the Purchase Price shall be made by the plaintiff's Lawyer or Notary to the defendant's Lawyer or Notary, on the CBA Standard Undertakings to pay out and discharge the financial charges, and remit the balance, if any, to the defendant;
- ...
7. The plaintiff shall cooperate with the defendant and shall sign such documents as may reasonably be required in order to assist the defendant in obtaining an extension of the redemption period in those foreclosure proceedings in S.C.B.C. Vancouver Registry Action Number H080802 between the Westminster Savings Credit Union as petitioner and the defendant herein and others as respondents (the "Foreclosure Proceedings") to allow the Sale to occur on the Completion Date;
8. In the event that the redemption period under any order pronounced in the aforesaid Foreclosure Proceedings is not extended to the Completion Date or the petitioner in the aforesaid Foreclosure Proceedings does not stay or forbear from further steps therein to allow the Sale to occur on the Completion Date, then the plaintiff shall pay out the mortgage which is the subject of the Foreclosure Proceedings (the "Mortgage") either by redemption of the Mortgage with the consent of the defendant herein or, at the plaintiff's option, by seeking an assignment of the interests of the petitioner in the aforesaid Foreclosure Proceedings to the plaintiff, provided that:
 - a. the defendant shall provide reasonable cooperation and assistance to the plaintiff in pursuing such steps; and
 - b. the plaintiff shall be entitled to credit for the amount paid to redeem the Mortgage, or in the event of assignment, for the amounts secured by the Mortgage, and the Purchase Price shall be reduced accordingly;
- ...
10. The defendant shall sign such documents as the plaintiff may reasonably require and provide such reasonable assistance to enable the plaintiff to proceed with the development of the Site and as may reasonably be required to carry out the terms and intent of this Order;
11. The plaintiff shall provide such reasonable assistance and shall sign such documents as the defendant may reasonably require to effect the transfer to the defendant of any credit for any building permit application with the Township of Langley ("TOL"), or any bond, or letter of credit paid or posted by the defendant in favour of the TOL in respect of the Site;
12. The defendant shall be solely responsible for any fees, costs or charges owing to the TOL and incurred to date with respect to Site or with respect to the single family lot subdivision and related lands adjacent to the Site;

13. The defendant shall receive the benefit of any credits from the TOL for any expenses that the defendant has paid to date including credit for any development cost charges or credit for improvements that the defendant has constructed on the Site or on the single family lot subdivision and related lands adjacent to the Site, such credit or rebate to be paid to the defendant or its nominee;
14. The plaintiff shall be solely responsible for any fees, costs or charges to be incurred in future for the future development of the Site, and for any development permit or building permit application to be made in connection with the Site;
15. The parties shall provide such reasonable assistance and shall sign such documents as may reasonably be required to cause the TOL to cancel or waive any requirement of the defendant to lodge or maintain a letter of credit or other security with the TOL in the sum of \$130,000.00 (the "Security") to secure the projected expense for landscaping work on the Greenway, provided that in the event that the TOL refuses to cancel such Letter of Credit or other Security, then the parties agree to assign the letter of Credit or other security to the plaintiff and the plaintiff shall compensate the defendant accordingly;

...

18. The parties herein shall bear their own costs of the herein Action;
 19. The parties may apply to this Honourable Court for further directions to give effect to this order herein.
- [17] As can be seen, both parties entered into various obligations to carry out the intent of the settlement. For example, paragraphs 7 and 8 refer to how the parties were going to deal with a foreclosure proceeding which had been commenced against the seller and which related to the property. Under paragraph 11 the buyer agreed to provide assistance and sign documents to provide the seller with credits that might be available from Langley.
- [18] Paragraph 15 related to the remaining portion of the security deposit lodged with Langley by Sandhill for its obligations under the servicing agreement. This paragraph was the source of problems between the parties at the time set for completion of the contract.
- [19] The parties seem to have ignored the fact that the security was provided by Sandhill, not the seller.
- [20] Because the date stipulated for completion in the order, September 20, 2009 was a Sunday, pursuant to s. 25 the Interpretation Act, R.S.B.C. 1996, c. 238, the date for performance became the next day, Monday, September 21, 2009.
- (b) Arrangements for completion

- [21] The arrangements and negotiations for completion of the agreement and court order are largely set out in the correspondence between the solicitors for the buyer and seller. The buyer was represented by Mr. Gregory P. van Popta, and the seller was represented by Mr. Harry Crosby.
- [22] On September 1, 2009 Mr. van Popta provided conveyancing documents to Mr. Crosby and proposed completion on Friday, September 18, 2009.
- [23] On September 15, 2009 Mr. Crosby wrote to Mr. van Popta concerning the matter of the security deposit with Langley, as reflected in paragraph 15 of the order.
- [24] As to this Mr. Crosby's letter of September 15, 2009 advised that the amount of the security deposit was \$128,040, and that it was secured by way of a letter of credit. He also stated:
- Arrangements must be made by way of undertaking to (1) replace the letter of credit or alternatively (2) the adjustments should reflect payment of a \$128,040 to Sandhill Development Ltd. on account of the letter of credit and Sandhill Developments should assign its existing letter of credit to the purchaser. [I think this might cause a problem with the lending institution and foreclosure and is an option that should not be pursued].
- [25] It is common ground that the future landscaping works secured by the letter of credit were the buyer's obligation.
- [26] On September 17, 2009 Mr. van Popta advised Mr. Crosby that the buyer was arranging a letter of credit to be posted with Langley in replacement of the seller's letter of credit, and the buyer would hold back from the purchase price \$128,040 in cash for that purpose.
- [27] Mr. van Popta reasoned that once the buyer's replacement letter of credit was posted with Langley, or the landscaping works carried out by the buyer, Langley would release the letter of credit, and the seller would obtain the benefit of whatever security it had provided to its financial institution for the issuance of the letter of credit. He therefore reasoned that there should be a holdback of \$128,040 against the price. Ultimately the seller accepted this reasoning.
- [28] However, on the same day, September 17, Langley advised Mr. van Popta that it would not be possible to replace the Sandhill letter of credit with a letter of credit from the buyer, as the servicing obligations under the servicing agreements were with Sandhill, not the buyer.
- [29] Mr. Crosby wrote to Mr. van Popta twice on September 18.
- [30] Together with what I take to be the first piece of correspondence from Mr. Crosby sent on September 18, Mr. Crosby enclosed a transfer document signed by the seller and enclosed proposed "draft" undertakings between the solicitors for the purpose of completing the transaction.

- [31] Pursuant to the terms of Mr. Crosby's letter, the transfer could not be registered until such time as the parties had settled the respective solicitors' undertakings. A further requirement of completion was that the seller approves the seller's statement of adjustments.
- [32] The second letter from Mr. Crosby to Mr. van Popta of September 18, 2009 confirmed that he, like Mr. van Popta, had been advised by Langley that Langley would not release the letter of credit. His letter states:

I also understand that there is a letter of credit for \$106,700 plus 20% for work services and landscaping (\$128,040) with the Township of Langley.

- (a) Dave Anderson, who was the supervisor of the department told me that there is no swap out permitted and that Phoenix and 682163 B.C. Ltd. will have to work out separately with respect to the arrangements to this.
 - (b) How will my client get the funds
 - (c) What about any ongoing interest on the Letter of Credit
- [33] What follows is a continuing series of correspondence and communications between legal counsel concerning matters required to effect completion of the transaction, and notably, the issue of the letter of credit.
- [34] By letter dated September 18, Mr. van Popta proposed that the buyer would hold back from the purchase price the sum of \$128,040, and that it would seek to enter into a new separate servicing agreement between the buyer and Langley in relation to the landscape works. Once Langley released the seller's letter of credit, then the hold back would be released from the trust account or paid into court.
- [35] On September 21, 2009, the date set for closing, Mr. Crosby wrote to Mr. van Popta criticising Mr. van Popta's proposal. He added:

Your client has had from March to September to investigate and make such arrangements, and according to my understanding, has taken no steps to put such a mechanism in place (to have the subject landscape work removed from the sellers servicing agreement).

- [36] He took the position that due to Langley's refusal to cancel the letter of credit, the latter part of clause 15 of the order became operative, and there would have to be an assignment of the letter of credit to the buyer, and compensation by the buyer to the seller for the assignment.
- [37] Later that same day, September 21, 2009, Mr. van Popta proposed a modified agreement concerning the Langley letter of credit problem. He also pointed out that clause 15, as written in the consent order, was unworkable. He stated:

You will understand that the second half of paragraph 15 of the Court Order, starting with the words, "provided that..." is not workable strictly according to its terms. Letters of Credit are not by their very nature, assignable. An LOC is an unconditional liability of a specific debtor to a specific lender. At best, an LOC is replaceable; however, even if our client were to tender a replacement LOC, the Township would not accept it from our client as our client is not privy to the Servicing Agreement pursuant to which it would have to be posted.

The foregoing is supported, I submit, by the Seller not having tendered any document that effectively assigns its letter of credit to the Buyer pursuant to which the Seller should be compensated.

- [38] He went on to point out that in the circumstances it was necessary that the parties should work out a mutually acceptable agreement that gave effect to the intent of paragraph 15 of the court order; namely, that the buyer be responsible for the landscape works and any applicable bonds. He suggested refinements to his proposed mechanism for dealing with the problem.
- [39] The parties continued to negotiate the matter through correspondence and telephone communications, and that the transaction did not close on September 21, 2009. The parties did not reach any agreement on that day as to how to deal with the problem.
- [40] In his affidavit, Mr. Crosby states that at about 2:00 p.m. on September 21, 2009 he spoke with Mr. van Popta by telephone and that there was verbal agreement on the wording of the undertaking for the letter of credit issue, and that there was verbal agreement that the sale would close on September 22, 2009. In his responding affidavit Mr. van Popta has denied that there was verbal agreement during this telephone conversation that the transaction would close on September 22, 2009.
- [41] Late in the day on September 21, 2009 Mr. van Popta sent a further letter to Mr. Crosby with revised proposed undertakings to deal with the letter of credit problem.
- [42] In correspondence sent to Mr. van Popta on the morning of Tuesday September 22, 2009, Mr. Crosby agreed with the substance of Mr. van Popta's proposal of September 21, but added some further modifications.
- [43] He did so by way of faxing to Mr. van Popta a copy of Mr. van Popta's letter to him of September 21, on which Mr. Crosby made a various hand written modifications. He also wrote on the letter: "We agree that the closing date will be extended to September 22, 2009 and time shall remain of the essence."
- [44] After receiving this letter by fax on the morning on September 22, 2009, Mr. van Popta spoke to Mr. Crosby by telephone. Mr. van Popta advised Mr. Crosby that he was not in a position to agree to the revised undertakings until the buyer's lender agreed to them. Therefore, he stated there was still no agreement between the parties as to how to deal with the letter of credit problem.

- [45] At 1:49 p.m. on September 22, Mr. van Popta received approval from the buyer's mortgage lender concerning the proposed undertakings relating to the letter of credit. He so advised Mr. Crosby by email at 1:58 p.m.
- [46] At 2:16 p.m. Mr. van Popta sent Mr. Crosby a letter setting out the finalized undertakings. He proposed completion to take place the following day, September 23, 2009.
- [47] The land title office in New Westminster closed at 3:00 p.m.
- [48] Later that afternoon at about 5:00 p.m., Mr. Crosby wrote to Mr. van Popta, stating: "At all times I stipulated the transaction had to fund today as set out in my fax first thing this morning".
- [49] Mr. Crosby sent a further letter on September 22, 2009 in which he alleged various failures on the part of the buyer, including failure to complete the transaction that day, and he advised that the seller had elected to terminate the agreement.
- [50] The buyer, through its solicitor, continued to advise that it was ready, willing, and able to complete on September 23rd. It also confirmed that it had the funds on hand on September 23, 2009 to complete the transaction.

Issues

[51] The issues are as follows:

- 1) Was the buyer in breach by not completing the transaction on September 21, 2009, or alternatively, September 22, 2009?
- 2) Was the seller in breach by repudiating the agreement, and refusing to complete the transaction?
- 3) What is the effect of the court order?

3. Analysis

- 1) Was the buyer in breach by not completing the transaction on September 21, 2009, or alternatively, September 22, 2009?

[52] The letter of credit posted with Langley is not in evidence. I infer that the letter of credit is given on behalf of Sandhill by Sandhill's financial institution. The servicing agreement for which the letter of credit stands as security is between the Township of Langley and Sandhill. Mr. Crosby's letter of September 15, 2009 refers to a Sandhill Developments letter of credit. The identity of the financial institution is also not in the evidence. Sandhill is not the seller.

[53] A letter of credit has been described as follows:

A letter of credit is a letter or notice addressed by the issuer to a beneficiary setting out an undertaking to honour a specified demand for payment made by the beneficiary. In modern practice, the letter of credit transaction involves as the issuer a bank or financial institution which issues the credit upon the instructions of the applicant for credit, usually the bank customer, or account party, for the benefit of the third party recipient or beneficiary. The application and issuance of the credit relates to the financing of an underlying contract between the applicant for credit and beneficiary, frequently involving a contract for the sale of goods.

(Lazar Sarna, *Letters of Credit, the Law and Current Practice*, 2d ed. Toronto: Carswell 1986 at 1.)

- [54] There are two parties to the letter of credit itself. The issuer, typically a financial institution, and the beneficiary, in this case the Township of Langley.
- [55] As Mr. van Popta's correspondence of September 21 noted, the reference in clause 15 of the order to the letter of credit being assigned to the buyer was unworkable. It was not possible for the seller to assign the letter of credit to the buyer. Indeed, as seems clear, the letter of credit was not even given on behalf of the seller.
- [56] There is in fact no evidence that the letter of credit was assignable from the seller to the buyer in any sense whatsoever. No form of "assignment" was ever provided by the seller to buyer.
- [57] I note that the consent order did not expressly stipulate that clause 15 was a term that had to be satisfied as a condition of completion. Nevertheless, both parties clearly agreed that some arrangement to give effect to the underlying intention reflected in clause 15 was required as a condition of completion. The overall intent of clause 15 was simply that the seller would be relieved of its remaining obligations under the letter of credit. Interpreting this broadly it could be taken to mean that the buyer should relieve the seller's related company, Sandhill, of its obligations under the letter of credit.
- [58] Contrary to the position taken by Mr. Crosby, the obligations under clause 15 were not solely those of the buyer. They were mutual. Neither party anticipated the problem with the letter of credit.
- [59] In the circumstances the parties were required to reach an agreement for dealing with the letter of credit issue.
- [60] The parties intended to complete the transaction based upon solicitor's undertakings. This is apparent from clauses 4 and 5 in the order and the correspondence between the parties.
- [61] I find that the parties agreed that the transaction could not close without an agreement between them for dealing with the letter of credit issue, and that the agreement they intended to reach would be reflected in the solicitors' undertakings.

- [62] On the evidence I find that the only reason the transaction did not complete on September 21, 2009 was that the parties had not agreed on the terms necessary to deal with the letter of credit issue.
- [63] I find that the parties mutually agreed to allow the September 21, 2009 date for completion to come and go without completing the contract. Neither party was in a position to complete the transaction on September 21 because they both required a further agreement. Therefore on September 21, 2009 neither party was ready, willing, and able to close the transaction.
- [64] Moreover, when the transaction failed to complete on September 21, 2009, there was no agreement between the parties as to a new completion date. Although Mr. Crosby says there was a verbal agreement reached by telephone at about 2:00 p.m. on September 21, 2009 to complete the transaction on September 22, Mr. van Popta has denied such an agreement. The correspondence is a reliable guide as to what the parties originally agreed, and when. The chain of correspondence shows that there was no binding legal agreement to complete on September 22, 2009. I can accept that there may have been some mutual expression of intention to close on September 22, if possible. That is not a binding agreement.
- [65] Where time is of the essence but neither party is ready, willing and able to complete on the date set for completion, time of the essence can be reinstated by either party serving a notice fixing a new date for closing. The new date must be reasonable, and the notice should state that time is to be of the essence for this new date: *King v. Urban and Country Transport Ltd.* (1973), 1 O.R. (2d) 449, 40 D.L.R. (3d) 641 (Ont. C.A.); applied and approved in *Shaw Industries Ltd. v. Greenland Enterprises Ltd.* (1991) 54 B.C.L.R. (2d) 264 (B.C.C.A.) at para. 39-43; Paul M. Perell, "Putting Together the Puzzle of Time of the Essence" (1990), *Canadian Bar Review* 417 at 453.
- [66] The original completion date of September 21 came and went without any agreement fixing a new completion date. In Mr. Crosby's faxed letter dated September 21, 2009 but sent to Mr. van Popta on the morning of September 22, 2009, he indicated that the seller agreed to closing on September 22, 2009. If Mr. Crosby's letter could be interpreted as a stipulation for a new closing date, the new date was unreasonable. At that point there was still no agreement between the parties concerning how they were going to deal with the letter of credit. There was also no agreement finalizing the undertakings between the solicitors.
- [67] These things were not agreed to until later that day at 2:00 p.m. At that point, it was not reasonable to expect that the transaction could complete on September 22.
- [68] There was no agreement by Mr. van Popta on the morning of September 22, 2009 to close on that day. Clearly, he was not in a position to make such an agreement, as he still needed to obtain the concurrence of the buyer's lender.

- [69] The seller argues that its insistence on closing the transaction on September 22, 2009 was reasonable because the property was in foreclosure and the foreclosing creditor had obtained an order for conduct of sale which would become effective on September 22, 2009.
- [70] After the transaction failed to complete the seller promptly paid out the mortgage on September 24, 2009, using funds borrowed from elsewhere.
- [71] There was no suggestion that the buyer was in any way responsible for the seller being in default of its mortgage obligations. These were problems of the seller's own making.
- [72] There was no evidence presented at the hearing to suggest that there would have been any actual negative consequences to the seller if the transaction had closed on September 23, 2009 as Mr. van Popta suggested on September 22.
- [73] I am not satisfied that the foreclosure was a genuine pressing concern of the seller at any time. There is no evidence that the mortgagee was anxious to sell the property in the foreclosure. Indeed the evidence is to the contrary. The redemption period had expired August 2, 2009 and the mortgagee had agreed to wait until completion of the sale to be paid. It then further agreed not to take steps in the foreclosure proceeding pending payment of the amount due by the seller on September 24.
- [74] I conclude that the buyer was not in breach in failing to complete the transaction on September 21, 2009, and was also not in breach for failing to complete on September 22, 2009.
- [75] This conclusion makes it unnecessary for me to deal with the buyer's alternative submissions that the seller waived compliance with the time of essence provision or that the seller by its conduct disentitled itself from alliance on the time of the essence provision.
- 2) Was the seller in breach by repudiating the agreement, and refusing to complete the transaction?
- [76] It is common ground that on the afternoon of September 22, 2009 the parties were in agreement as to all matters required to complete the transaction except for the completion date.
- [77] The seller's insistence on completion on September 22 was not reasonable and was therefore ineffective in setting a new date for completion.
- [78] Conversely, Mr. van Popta's proposal to complete on September 23, 2009 was reasonable.
- [79] There was no justification for the seller's repudiation, which was in breach of the contract, and the court order.
- [80] The buyer has not accepted that repudiation and has continued to be ready, willing, and able to complete. It has continued to insist on performance.
- 3) What is the effect of the court order?

- [81] I have found that on ordinary contractual principles the seller is in breach of the contract and remains obliged to complete the transaction.
- [82] There is the further matter of the seller's non-compliance with the consent order directing the sale of the property. The seller has not applied to set aside the order, which therefore remains in effect.
- [83] The seller takes the position that the court order has no greater force than the contract underlying it. Therefore, the seller says, if it could validly terminate the contract on the basis of the buyer's failure to complete on the date specified for completion, then the court order would also be of no further force and effect, at least insofar as the sale provisions in it are concerned.
- [84] It is clear that a consent order may be set aside by the court on the same grounds as the agreement giving rise to the order, where the grounds go to formation of the agreement, or in other words, to its essential validity.
- [85] But the seller's argument goes much further than this. It argues that it effectively has the power to nullify the consent order on the basis of any failure to perform by the other party to the contract that would allow the seller to terminate the contract. This argument is not supported by the authorities and is in my view unsound.
- [86] In *McCowan v. McCowan* (1995) 24 O.R. (3d) 707 (Ont. C.A.), Osborne J.A. for the court stated as follows, at 712-713:

In my view, it is well established that a consent judgment may be set aside on the same grounds as the agreement giving rise to the judgment. These grounds go to the formation of the agreement, not to its subsequent performance. Evidence of non-performance may, however, be relevant to the issue whether the underlying agreement was so tainted in its formation that it should be invalidated.

- [87] The Court of Appeal in British Columbia expressed a cautious view about setting aside consent orders in *Shackleton v. Shackleton*, 1999 BCCA 704, at para. 12:

A consent order is a formal expression of an agreement between the parties. Where parties intend to finally dispose of the issues between them, a consent order will operate as a final judgment: *Campbell v. Campbell* (1954), 1 D.L.R. 304 (B.C.S.C.). For the same reason that courts enforce settlement agreements, to provide certainty to parties settling disputes, consent orders are not easily altered. Subject to statutory provisions otherwise a consent order may be set aside or altered in substance only in circumstances which justify the same treatment to the underlying contract: *McCowan v. McCowan* (1995), 14 R.F.L. (4th) 325 (Ont. C.A.); *Monarch Construction Ltd. v. Buildvco Ltd.* (1988), 26 C.P.C. (2d) 164 (Ont. C.A.); *Huddersfield Banking Company Limited v. Henry Lister & Son Limited* (1895), 2 Ch. 273 (C.A.); *Dawe v. Dawe* (1985), 45 R.F.L. (2d) 254 (B.C.S.C.); *aff'd* (1986), 2 R.F.L. (3d) 430 (B.C.C.A.); and *T.(T.L.A.) v. T.(W.W.)* (1996), 24 R.F.L. (4th) 51 which leaves unanswered the issue of reopening a consent order under s. 68 of the Family Relations Act.

[88] Both McCowan and Shackleton were cited by the Supreme Court of Canada in *Rick v. Brandsema*, 2009 SCC 10 at para. 64.

[89] *Shackleton* was applied in *Verma v. Verma*, 2007 BCCA 566, 74 B.C.L.R. (4th) 243, where Smith J.A. wrote at para. 28:

Consent orders represent an agreement of the parties and will not generally be set aside or varied unless grounds can be shown that would justify setting aside the underlying contract: see *Shackleton v. Shackleton*. Grounds would include such things as duress, undue influence, fraud, misrepresentation, mistake, and unconscionability. Nothing of the sort has been suggested here and, in my view, the appellant remains bound by the agreement and by the order that incorporated it.

I note that all of the grounds listed by Smith J.A. are matters that go to the essential validity of the contract, not to its subsequent performance.

[90] Where the ground alleged does not go to the essential validity of the contract, and thus the court order, the court may not be so easily moved to set aside the order. In *Mahil v. Johal*, [1991] B.C.J. No. 560, Scarth J. noted, after referring to *Fraser v. Gill* (1981), 32 B.C.L.R. 132 (S.C.):

The point of distinction between that case and the one at bar is that an order of this Court has directed that the defendants, Basawa Singh Johal and Narvinder Johal, do specifically perform all terms and conditions of the interim agreement, except with respect to the sale price and the dates for adjustments and completion. The cause of action on the agreement for sale and purchase is merged in the judgment. The legal effect of that, in my view, is that the subsequent conduct of the plaintiff relating to the exchange of funds and documents would not relieve the defendants of their obligations to comply with the terms of the order unless it could be said that the plaintiffs have prevented the defendants from complying with the terms of the order by failing to carry out fundamental terms of the agreement, such as paying the sale price or executing documents essential to the completion of the transaction.

[91] Here, the point raised by the seller does not go to the essential validity of the contract for sale of the property. The consent order is in effect the final judgment of the court by way of settlement of an action. As noted in *Shackleton*, the consent order, as both an order of the court and the embodiment of a settlement between the parties, should not be lightly set aside. The court has an interest both in enforcing settlements and in enforcing court orders, unless the circumstances are such as to render enforcement inappropriate. In this case, where there are no grounds made out or even alleged that go to the validity of the agreement and the court order, the principle set out by Scarth J. in *Mahil* should apply: the defendant, the seller, would not be relieved of its obligation to comply with the terms of the order unless it could be said that the plaintiff, as buyer, had prevented the seller from complying with the terms of the order by failing to carry out fundamental terms of the agreement, such as paying the sale price or executing documents essential to the completion of the transaction.

[92] No such circumstances occurred in this case.

[93] I therefore conclude that even if the buyer had failed to complete the transaction in accordance with its contractual obligations on September 21 or 22, 2009, that fact alone would be insufficient to set aside the court order, which remains in effect, and must be complied with.

4. Disposition

[94] There will be an order directing that the sale complete in accordance with the terms agreed upon between the parties on September 22, 2009.

[95] I direct that the transaction will complete on a date that the parties may agree to, or failing agreement, seven days following this decision, or such other date as may be directed by the court upon application of the parties.

[96] There will be a further order that the parties do all things necessary to carry out the completion of the sale of the property to the plaintiff in accordance with the court order made March 23, 2009.

[97] The parties will remain at liberty to apply concerning any further matter required to give effect to the order of March 23, 2009, or of this decision.

[98] The parties may make submissions with respect to other consequences if any of the breach of contract and breach of the court order on the part of the seller.

[99] The parties may make submissions with respect to costs within 45 days. In the absence of such submissions, the plaintiff will have costs of the application on Scale C.

___ "Verhoeven J." _____

The Honourable Mr. Justice Verhoeven

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