

CANADA / JUDGMENT

Toor v. Dhillon

2020 BCCA 137

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 137 Toor v. Dhillon

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Toor v. Dhillon,

2020 BCCA 137

Date: 20200513

Docket: CA46056

Between:

Gurcharan Singh Toor and

Kulwant Kaur Toor

Respondents

(Plaintiffs)

And

Ranbir Kaur Dhillon and

Jarnail Singh Dhillon

Appellants

(Defendants)

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated April 2, 2019 (Toor v. Dhillon, 2019 BCSC 481, New Westminster Docket S173080).

Counsel for the Appellant:

W.J. McMillan

J. Les

Counsel for the Respondent:

H.S. Nirwan

Place and Date of Hearing:

Vancouver, British Columbia

March 13, 2020

Written Submissions received:

April 15, 24 and 29, 2020

Place and Date of Judgment:

Vancouver, British Columbia

May 13, 2020

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

Summary:

Appeal from an order granting specific performance in circumstances where the appellants had repudiated the agreement and the respondents had kept the contract alive but had not been ready to complete on the scheduled closing date. Held: Appeal dismissed. When neither party is ready to complete on the closing date, the contract remains alive and either party can set a new closing date. The appellants' argument that they had validly terminated the contract due to the respondents' failure to pay the deposit as required by the contract was rejected. Having repudiated the contract, the Vendors were not entitled to rely on the "time of the essence" provisions.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] The appellants appeal from a judgment requiring them to complete the sale of residential property pursuant to the agreement they made on June 9, 2015.
- [2] The two principal issues raised by the appellants are whether the trial judge erred in holding that they were not entitled to terminate the contract for purchase and sale on the basis that the respondents had failed to pay the deposit as required by the contract, and had erred in ordering specific performance when the respondents had not been ready, willing and able to close on the date set for completion of the agreement.
- [3] The trial judge held that the dual agent acting for both parties had waived the date for paying the deposit by one day, and accordingly the respondents had not failed to pay the deposit as required by the contract. Therefore, the appellants were not entitled to terminate the contract. As to the inability of the respondents to close on the designated closing date, the trial judge held that neither party was ready to close on the closing date and thus, following this Court's judgment in *Basra v. Carhoun* (1993), 82 B.C.L.R. (2d) 71, the contract remains in force and the respondents are entitled to set a new date for completion.
- [4] In my opinion, it was unnecessary for the trial judge to determine whether the dual agent had the authority to waive the date for paying the deposit. The respondents had paid the deposit and were in reasonable compliance with the contractual requirements. Having repudiated the agreement, it was not open to the appellants to rely on the "time of the essence" provisions of the agreement.
- [5] The trial judge was correct to follow this Court's judgment in *Basra*. Neither party was ready to complete on the closing date. In these circumstances, time ceases to be of the essence and the contract remains in force. The respondents are entitled to set a new completion date.
- [6] For the reasons that follow, I would dismiss the appeal.

Background Facts

- [7] The dispute concerns residential property (the "Property") in Surrey owned by the appellants, whom I will refer to as the Vendors. In February 2015, the Vendors entered into an informal arrangement with Mr. Heir, a real estate agent with Omaxwell Realty, whereby Mr. Heir could bring potential buyers to show the Property with a view to a possible sale of the Property.
- [8] The respondents, whom I will refer to as the Purchasers, owned a house in Surrey but wished to move into a larger house in the same general area as their old home. In May of 2015, they entered into a contract to sell their house. The sale of the house was to complete July 30, 2015, with a possession date of July 31. On June 16, 2015, the Purchasers received conditional approval for a mortgage for a new property in the principal amount of \$681,600. The only condition of importance to this appeal is that a full appraisal of the new property

was required.

- [9] In June, the Purchasers met Mr. Heir at an open house in their neighbourhood. Mr. Heir offered to show them the Vendors' house, and did so on two occasions, on June 8 and 9, 2015. After these viewings, the Purchasers decided to make an offer to purchase the Property and advised Mr. Heir of this.
- [10] Mr. Heir attended at the Purchasers' home on the evening of June 9, 2015, and wrote up an offer to purchase the Property. The offer was in the amount of \$840,000 with a \$20,000 deposit and was subject to two conditions, namely, the buyer obtaining a mortgage in the amount of \$750,000 by June 17, 2015, and the buyer obtaining an inspection report.
- [11] The completion and possession dates in the offer were July 30 and 31, 2015 so that they mirrored the completion and possession dates applicable to the Purchasers' sale of their own house. Mr. Heir presented the offer to the Vendors at their home. The Vendors counter-offered at \$860,000, which Mr. Heir then presented to the Purchasers, who made a further offer in the amount of \$848,000. Mr. Heir presented that offer to the Vendors, who counter-offered at \$852,000, which the Purchasers accepted.
- [12] At the time of this transaction (but no longer), real estate agents were permitted to act for both seller and buyer if an agreement was signed by the parties appointing the agent as a dual agent. During the course of the evening, the Purchasers and Vendors signed a Limited Dual Agency Agreement, appointing Mr. Heir as agent for each of them in respect of the purchase and sale of the Property. The Limited Dual Agency Agreement was set out on a printed B.C. Real Estate Association Form and specified that notwithstanding the provisions of the Real Estate Services Act, S.B.C. 2004, c. 42, the agent would deal with each of the buyer and seller impartially. The agent would have a duty of disclosure, but would not disclose the motivations of either party to the other, or the price which either party might be prepared to offer or accept.
- [13] The trial judge found that Mr. Heir read to both the Purchasers and Vendors the contract, the contract Addendum (together the "Contract"), the Property Disclosure Statement, and the Dual Agency Agreement. He also found that Mr. Heir fully explained to both parties the nature, purpose, and effects of those documents such that both parties knew and were aware they were signing documents to effect the sale of the Property from the Vendors to the Purchasers.
- [14] At trial, the Vendors testified that they did not understand they were contracting to sell their house, but the trial judge did not accept their testimony. The judge concluded that the parties entered into a purchase and sale agreement on June 9, 2015 on terms set out on documents that had been presented, signed, and initialled on Mr. Heir's Tablet.
- [15] The Contract was recorded on a standard form of the Real Estate Board of Greater Vancouver. Apart from the sales price and closing date, there were two provisions of importance to this appeal:

2. DEPOSIT: A deposit of \$20,000 which will form part of the Purchase Price, will be paid within 24 hours of acceptance unless agreed as follows:

way of Bank draft on all the subject removal

All monies paid pursuant to this section (Deposit) will be paid in accordance with section 10 or by uncertified cheque except as otherwise set out in this section 2 and will be delivered in trust to Omaxwell Realty in Trust and held in trust in accordance with the provisions of the Real Estate Services Act. In the event the Buyer fails to pay the deposit as required by the Contract, the Seller may, at the Seller's option, terminate this Contract

12. TIME: Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreements to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract,

[The underlined portions indicate typed additions to the printed form]

- [16] The Contract also contained an Addendum stating that the agreement was subject to two conditions for the sole benefit of the Buyer, availability of mortgage financing and a satisfactory inspection report, both to be removed by June 17, 2015. The Seller committed to allow access to the property for the inspection report on reasonable notice. No provision required the Seller to provide access for mortgage appraisal purposes.
- [17] On June 12, 2015, Mrs. Dhillon advised Mr. Heir that the Vendors did not want to sell the Property because they would have to pay a mortgage penalty and their daughter did not want them to sell. Mr. Heir testified that he telephoned the Purchasers to advise them of this but the Purchasers wanted to proceed with the purchase. Then on June 15, 2015, Mr. Heir tried to make an appointment with Mrs. Dhillon for the mortgage appraiser to inspect the house for an appraisal, but Mrs. Dhillon refused to agree to the appraiser entering the Property because they did not want to sell the Property.
- [18] On June 17, 2015, the Purchasers met with Mr. Heir and signed a document titled "Removal of 'Subject to Clause' and Appointment of Conveyancer", stating as follows:

The Buyer has agreed to remove the subjects without doing property inspection and without the bank appraisal for financing. This is due to the fact that the Seller has not and will not give access to the property for these purposes even when given reasonable notice. The Buyer at his sole discretion is removing the above noted subjects and will hold Omaxwell Realty and Harjit Heir harmless for any and all resulting consequences.

- [19] At the same time, the Purchasers presented to Mr. Heir a bank draft in the amount of \$20,000 in payment of the Deposit for the purchase of the Property. The bank draft, however, was made out to "Omax Real Estate Services" instead of Omaxwell Realty in Trust. Mr. Heir told the Purchasers not to worry and asked them to have the draft corrected the next day. The corrected draft was delivered to Mr. Heir on June 18, 2015 and deposited in Omaxwell Realty's trust account on June 19.

[20] On June 22 and July 9, 2015, the Purchasers' solicitor wrote to the Vendors in reference to the position of the Vendors that they did not wish to complete the sale and would not sign the conveyancing documents. The Purchasers' solicitor advised the Vendors that the Purchasers remained ready, willing and able to complete the transaction. The Vendors' solicitor responded by letter dated July 15, 2015 purporting to terminate the sales agreement for failure by the Purchasers to pay the Deposit by June 17, 2015.

[21] The Purchasers' solicitor responded by letter dated July 20, 2015 taking the position that the Deposit was properly paid:

You state in your letter that the deposit was paid late and therefore by way of provision 2 of the Contract of Purchase and Sale that the Contract is terminated. I enclose herewith a copy of the deposit paid in full on July [sic] 17 in the amount of \$20,000.00. Our clients made an error in the spelling of the Real Estate Agencies name. As you will see from the attached copy our clients spelt "OMAX REAL ESTATE SERVICES". The error was rectified the following morning and our clients forwarded the amended bank draft with the correct spelling "Omaxwell Realty in Trust" to the Real Estate Agency.

[22] One week later, on July 27, 2015, the Purchasers' solicitor forwarded the closing documents to the Vendors' solicitor for signature. The Vendors' solicitor responded on July 29 that:

Our client does not intend to complete on this deal. We have previously corresponded the same to your office in our letter dated July 15, 2015. Our clients position remains the same.

[23] The closing documents were never executed by the Vendors. The Purchasers' solicitor did not have the full amount of the purchase funds in his trust account on July 30, 2015, the intended closing date.

[24] On July 30, 2015, the Purchasers filed this action for specific performance of the Contract.

The Trial Judgment

[25] At trial, the Vendors took the position that the parties had not entered into a valid contract, and if they had, the contract was unenforceable by the Purchasers. The trial judge summarized the issues in this way:

- a) Was there a valid contract between the parties for the purchase and sale of the Property?
- b) Does the defence of non est factum apply?
- c) Did the plaintiffs breach the contract by failing to pay the deposit on the required date?
- d) Did the defendants breach the contract?
- e) Were the plaintiffs ready, willing, and able to close the transaction?
- f) Are the plaintiffs entitled to specific performance or damages?

- [26] The trial judge disposed of the first two issues on credibility grounds. He rejected the Vendors' claims that they thought they were signing a listing agreement, not a sales contract, and fully explained the basis on which he concluded that the contract for purchase and sale of the Property had been made as alleged by the Purchasers. No appeal is taken from these findings of fact.
- [27] The trial judge also held that the Vendors repudiated the Contract on June 12, affirmed the repudiation on June 15, and further confirmed their repudiation on July 15 and 27, 2015 through their solicitors. He then addressed the central issue that has been raised on this appeal, whether the Purchasers are foreclosed from enforcing the Contract, either because they did not pay the deposit on the due date of June 17 or because they had not drawn down the mortgage funds in order to complete the purchase on July 30.

Payment of the Deposit

- [28] The position of the Vendors at trial was that the effect of the error in the description of the payee in the June 17 bank draft was that the Purchasers had failed to pay the Deposit on the due date, entitling the Vendors to terminate the Contract, which they did by their solicitors' letter of July 15, 2015. They relied on the contractual provision that time was of the essence.
- [29] The trial judge held that as a dual agent, Mr. Heir had the actual or ostensible authority of the Vendors to waive or alter the date by which the Deposit had to be paid. He also cited the decision in *Cheema v. Chan*, 2004 BCSC 1342, for the proposition that a seller's agent has the authority to waive compliance with a clause specifying when the deposit must be paid.
- [30] Accordingly, the trial judge held that the Purchasers did not deliver the Deposit late and were not in breach of the Contract.

Purchasers' Ability to Close

- [31] The Vendors' second argument to prevent enforcement of the Contract was based on the inability of the Purchasers to close on the contractual closing date, July 30. It was common ground that the Purchasers could not have closed on that date because they had not drawn down the mortgage funds that had been conditionally approved. The reason they did not have the funds in hand was that they had been unable to satisfy one of the conditions of the mortgage, a full appraisal of the Property, since the Vendors had refused to allow the Bank's appraiser access to inspect the Property for an appraisal. Relying on this Court's judgment in *Norfolk v. Aikens* (1989), 41 B.C.L.R. (2d) 145, the Vendors argued that the Purchasers could not enforce the contract unless they were ready, willing and able to close on the scheduled closing date.

- [32] The trial judge dealt with this issue in two ways. First, he concluded that since the reason the Purchasers could not complete was the refusal of the Vendors to allow access to the appraiser, it was not open to the Vendors to defeat the claim for specific performance on that account.
- [33] In addition, the trial judge relied on this Court's judgments in *Shaw Industries Ltd. v. Greenland Enterprises Ltd.* (1991), 54 B.C.L.R. (2d) 264 and *Basra v. Carhoun*, for the proposition that:
- [120] where both parties are unable to complete the contract on the completion date, there is an implied waiver of the time of the essence provision and a plaintiff seeking specific performance need only prove it will be ready, willing, and able to complete on the date to be set by the court if specific performance is granted.
- [34] The judge concluded that both factors prevented the Vendors from avoiding liability for breach of the Contract:
- [126] In conclusion, the plaintiffs were not ready, willing, and able to complete on the completion date but their inability to complete was due solely to the conduct of the defendants and the defendants cannot rely upon their own breach and repudiation of the contract to defeat the plaintiffs' right to specific performance. In any event, in the circumstances of this case, the plaintiffs need only prove, and have proved, they will be ready, willing, and able to complete the transaction on whatever date is set by the Court if specific performance is granted.
- [35] Finally, the trial judge considered whether the Purchasers were entitled to the remedy of specific performance in light of the principles in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, and concluded that they were. That conclusion is not challenged in this Court.

Issues on Appeal

- [36] On appeal in this Court, the Vendors submit that the trial judge erred in three respects:
- (i) by concluding that Mr. Heir had the authority to waive the time for payment of the Deposit, an issue not pleaded by the Purchasers although argued at trial;
 - (ii) by implicitly holding that the Contract contained an implied term requiring the Vendors to permit access to the appraiser so that the Purchasers could satisfy the conditions of their mortgage approval; and
 - (iii) by granting the remedy of specific performance when the Purchasers were not ready, willing and able to complete on the scheduled closing date.

Analysis

Payment of the Deposit

- [37] In their Response to Civil Claim, the Vendors asserted that the Deposit to Omaxwell Realty in Trust had not been paid until June 18, 2015, that time is of the essence under the Contract, and that the Defendants were entitled to terminate the Contract as a result of the failure of the Plaintiffs to pay the Deposit to Omaxwell Realty in Trust by June 17, 2015.
- [38] At trial, the Plaintiffs took the position that they had complied with the Contract by tendering a bank draft in the correct amount on June 17 and correcting the payee the next day. In final argument, they advanced two alternative submissions concerning the payment of the Deposit. Their first position was that Mr. Heir in his capacity as dual agent for both parties, had waived the date for payment of the Deposit by one day. Their alternative position was the position they had been advancing throughout, that they had complied with the Contract concerning payment of the Deposit.
- [39] The trial judge accepted the argument that Mr. Heir had the authority, actual or ostensible, to waive strict compliance with the date for paying the Deposit, and did so. Accordingly, the judge did not address the argument that the actions of the Purchasers complied with the contract requirements.
- [40] On appeal, the Vendors say that the judge should not have addressed waiver as it had not been pleaded, and further that in any event, the judge erred in concluding that Mr. Heir had the authority to waive the date for paying the Deposit.
- [41] Before addressing waiver, I propose reviewing the question whether the actions of the Purchasers complied with the contractual requirements, without the necessity of a waiver of the date for payment.
- [42] The Contract specifies that the amount of the Deposit was to be \$20,000, was to be paid by bank draft and was to be delivered in trust to Omaxwell Realty in Trust. The parties agreed that the time for payment of the Deposit set out in the Contract was June 17, 2015, the day the subject clauses were removed. The Contract further provided that if "the Buyer fails to pay the deposit as required by the Contract, the Seller may, at the Seller's option, terminate this Contract".
- [43] The trial judge found that the Purchasers delivered a bank draft in the amount of \$20,000 on June 17 to Mr. Heir, the representative of Omaxwell Realty, but inadvertently recorded the payee as "Omax Real Estate Services". Mr. Heir asked them to reissue the draft under the name Omaxwell Realty in Trust, which they did on June 18, the next business day. There is no suggestion that any party gained a benefit or suffered a detriment because of this sequence of events. The question is whether this sequence of events constituted a failure by the Purchasers "to pay the Deposit as required by the Contract".

Repudiation and "Time of the Essence" Clauses

[44] The Vendors rely on the provision in the Contract that "time shall be of the essence".

However, the trial judge found that appellants repudiated the Contract on June 12, when they advised the dual agent that they would not complete, and affirmed their repudiation on June 15, when they refused the Bank appraiser access to inspect the Property for an appraisal. Since the date for payment of the deposit occurred after the Vendors had advised the respondents they would not close, the question arises whether the appellants were nonetheless entitled to rely on the "time of the essence" clause to terminate the Contract.

[45] This question was addressed most clearly by Arnup J.A. in *King et al. v. Urban & Country Transport Ltd. et al.*, (1974), 1 O.R. (2d) 449 (C.A.):

I think it is sufficiently established that a "time of the essence" provision, and non-compliance with it by a plaintiff, can be set up as a defence only by a party who was himself ready, willing able to close on the agreed date. The line of cases supporting this view includes *Foster v. Anderson* (1908), 16 O.L.R. 565; affirmed, without reasons, (1909) 42 S.C.R. 251; *Consolidated Press Ltd. v. Gibson et al.*, [1933] O.R. 458 (C.A.), [1933] 3 D.L.R. 64; *Thomson Groceries Ltd. v. Scott*, *supra*, and *Shaw & Shaw v. Holmes and Holmes*, [1952] O.W.N. 267 (C.A.), [1952] 2 D.L.R. 330. The exception is the case of the defendant who was precluded by the plaintiff's earlier default from being able to carry out his obligations. Such a defendant is not really in default at all.

There are cases that say that a plaintiff cannot get specific performance if he does not show that he was able, ready and willing to close; *LeBel, J.*, quoted from and followed them in *Watts v. Strezos*, [1955] O.R. 615, [1955] 4 D.L.R. 126 (S.C.). If applied literally, they cannot be reconciled with cases holding that the contract still subsists if neither party is ready to close, and in my view cannot be applied at all in such cases.

Essentially, I think Mr. Laidlaw is taking the principle expressed in *Mills v. Haywood* (1877), 6 Ch. D. 196, and followed in the *Shaw and Shaw* case, *supra*. [at p. 270 O.W.N., p. 334 D.L.R.]: "Time may be insisted upon as of the essence of the agreement by a litigant, (a) who has shown himself ready, desirous, prompt and eager to carry out his agreement ..." and is seeking to turn it into the proposition that a plaintiff cannot get specific performance at all unless he has shown himself ready, desirous, etc. The very principle I have quoted is the one which defeats his argument, for the converse of the principle is equally true, viz., time may not be insisted upon as of the essence of the agreement by a litigant who has shown himself not to be ready, desirous, etc.

[Emphasis added.]

[46] In *Norfolk v. Aikens*, Southin J.A. cited portions of this passage from King and concluded at p. 159:

I take this passage to mean that where neither [party] is ready, willing and able to close according to the terms of the contract, time, although expressed in the contract to be of the essence ceases to be.

[Emphasis added.]

[47] The principle that time may be insisted upon as the essence of the agreement only by a litigant "who has shown himself ready, desirous, prompt and eager to carry out his agreement" has been accepted by the Alberta Court of Appeal in *Bowlen v. Digger Excavating* (1983) Ltd., 2001 ABCA 214 at para. 18, the Saskatchewan Court of Appeal in *Blackstock v. Jeamen Farms Ltd.* (1981), 13 Sask. R. 119 at para. 8 and the Yukon Court of Appeal in *Eisenman v. Dodge* (1985), 32 A.C.W.S. (2d) 277 at para. 16.

[48] In *Domicile Developments Inc. v. MacTavish* (1999), 45 O.R. (3d) 302 (C.A.), Laskin J.A. expressed the rule in this way:

A time is of the essence provision means that on the closing date an innocent party may treat the contract as ended and sue the defaulting party for damages or it may keep the contract alive and sue for specific performance or damages. In order to take advantage of a time of the essence provision the innocent party must itself be "ready, desirous, prompt and eager" to carry out the agreement. A time of the essence provision can be raised as a defence only by a party who is ready, willing and able to close on the agreed date

[Emphasis added.]

[49] More recently, the Court commented in *Di Millo v. 2099232 Ontario Inc.*, 2018 ONCA 1051 at para. 34 that "only a party who is ready to perform can rely upon a 'time is of the essence' clause to terminate the contract for the other party's non-compliance with the provision"; see also *AgriMarine Holdings Inc. v. Akvatech AS*, 2018 ONSC 7768 at paras. 86-88, *aff'd* 2019 ONCA 713; *DiCatri*, *The Law of Vendor and Purchaser*, 3rd ed. (Toronto: Carswell, 1989) at para. 445; *1050438 B.C. Ltd. v. Penguin Enterprises Ltd.*, 2019 BCSC 2138 at paras. 75-76.

[50] In my view, this principle applies in British Columbia. As a result, a party who is not prepared to perform an agreement cannot rely on a "time of the essence" clause to terminate the contract for the other party's failure to comply strictly with the time provisions in the contract.

[51] The vendors submit that while this principle may apply at the time of completion, it has no application to an anticipatory breach. They rely on the proposition that an unaccepted repudiation has no legal effect. I agree that a party cannot rely on an unaccepted repudiation to justify its failure to perform its contractual obligations, but the question of reliance on a time of the essence clause is narrower. The principle that a party cannot rely on a time of the essence clause when it is not prepared to perform its own obligations does not relieve the innocent party of its contractual obligations; it simply relieves the innocent party of the requirement to comply strictly with time requirements in the contract when performing these obligations, if it wishes to affirm the contract. In the case at bar, the position of the vendor constituted a continuing repudiation in the sense explained in *Dosanjh v. Liang*, 2015 BCCA 18, at paras. 41-46. Accordingly, it is not necessary to consider whether the time of the essence principle would be affected by a single act of repudiation.

- [52] An analogy may be drawn to the well-settled law that when one party has made it clear that it will not complete a transaction, the other party is not required to tender closing documents or the purchase price on the agreed upon completion date: *Norfolk* at p. 19. Similarly, when one party has made it clear that it will not complete a transaction, and the other party wishes to affirm the contract, the innocent party is not relieved of its obligation to pay the deposit, but is relieved of its obligation of strict compliance with the time requirements for payment.
- [53] In this case, the continuing position of the Vendors reflected by their repudiation of the Contract on June 12 and June 15 demonstrates that the Vendors were not "ready, desirous, prompt and eager" to carry out the agreement on July 15 when they purported to rely on the "time of the essence" clause to terminate the Contract; their position continued through the repudiation by their solicitor on July 29. Accordingly, they were not entitled to rely on strict compliance with the time provisions in the Contract. The question then is whether the Vendors were entitled to treat the Contract as at an end for failure by the Purchasers to comply with the contractual requirements concerning payment of the Deposit without reliance on the "time of the essence" clause.

Standard of Performance of Time Requirements

- [54] If time is of the essence, strict compliance with time limitations is necessary; however, in the absence of a time of the essence clause, substantial performance may suffice: *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265. In the context of the present case, contractual requirements as to time will be interpreted strictly when time is of the essence, but in the absence of a time of the essence clause, such requirements will be interpreted reasonably in accordance with normal contract interpretation principles.
- [55] Here, the only contractual requirement that is at issue is the precise time of payment. The amount paid was correct; the method of payment (bank draft) was correct; the payment was made to the correct person, and was tendered on June 17, the day the subject clauses were removed. The sole issue is whether the clerical error in the name of the payee on the June 17 bank draft constituted a failure to pay the Deposit "as required by the Contract" in circumstances where the "time of the essence" clause may not be relied upon by the party asserting non-compliance.
- [56] The nature of the contractual obligation to pay a deposit was discussed by K. Smith J.A. in *Hundley v. Garnier*, 2012 BCCA 199. One of the issues was whether the buyer had failed to pay the deposit as required by the contract because the deposit had been paid by personal cheque instead of certified cheque as apparently required by section 10 of the contract. Justice Smith began his analysis with a comment that would apply directly to the circumstances at bar:

[73] It is not disputed that Ms. Hundley paid the deposit - she delivered her personal cheque in the requisite amount to the real estate agent, the cheque was duly honoured by her banker, and the deposit was thereafter held in trust by the real estate brokerage pending completion of the sale in accordance with the agreed terms and with s. 28 of the Real Estate Services Act, S.B.C. 2004, c. 42. It is the form of payment of the deposit that, the appellants contend, put an end to their obligation to complete the contract. I agree with my colleague that this submission puts form over substance

[Emphasis in original.]

[57] Justice Smith went on to cite the following proposition from Professor S.M. Waddams in *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book Inc., 2010) at para. 582,

... Where the obligation consists of paying money, or otherwise transferring property, it cannot, of course, be fully effected by the obligor alone, but the obligor will be considered to have sufficiently indicated willingness and ability to perform on making a formal tender of performance. Such a tender must be made by actually offering the money, or the goods, or the deed, as the case may be.

[58] Although the Court in *Hundley* ultimately concluded that section 10 (requiring payment by certified cheque) did not apply to the payment of the deposit, the approach taken by the Court assists in considering the requirements of the Contract at bar.

[59] Here, payment of the deposit could not be effected by the Purchasers alone; the agent Mr. Heir had to accept the draft. He did so by asking the Purchasers to correct the name of the payee on the next business day, telling them not to worry and accepting the revised draft. Whether Mr. Heir requested the correction in the name of the payee on behalf of the Vendors or for the convenience of the brokerage is not clear. In either case, on any reasonable interpretation of the Contract, the obligation to pay the Deposit on June 17 was met by the presentation of the bank draft in the amount of \$20,000 to the Vendors' agent on June 17 and the revised draft with the corrected payee on June 18.

[60] This conclusion is consistent with the conduct of the parties at the time. Mr. Heir does not seem to have thought that the time for payment of the Deposit had been missed when he asked the Purchasers to correct the name of the payee. He did not fill out the Late Deposit Form used by his brokerage to document deposit payments that were made contrary to section 2 of the Contract. The trial judge referred to his testimony that he did not fill out the form because the original bank draft was "just being corrected". The Vendors, who were advised by the dual agent that the subject clauses had been removed, did not take the position that the circumstances of the payment entitled them to terminate the Contract until nearly a month later. Finally, the formal tender of the bank draft on June 17 alone demonstrates both the willingness and the ability of the Purchasers to pay the Deposit as required by the Contract.

- [61] In these circumstances, I have no difficulty in concluding that the actions of the Purchasers did not constitute a failure to pay the Deposit "as required by the Contract". In my view, the presentation of the bank draft in the amount of \$20,000 on June 17 combined with the presentation of the corrected draft on June 18 amounted to reasonable compliance with the contractual requirements. Having come to this conclusion it is unnecessary to decide whether the bank draft would constitute strict compliance with the Contract.
- [62] Since the Purchasers did not fail to pay the Deposit as required by the Contract, it was not open to the Vendors to terminate the Contract on July 15. The purported termination was itself a repudiation of the Contract, as the trial judge found. Payment of the deposit had the effect of rejecting the repudiation and affirming the contract, putting the Purchasers in the position to seek specific performance of the agreement.
- [63] It follows from this analysis that it was unnecessary for the trial judge to consider the question whether the agent had the authority to waive the time requirements for paying the Deposit. There may well be force to the argument that once the Vendors had advised the agent that they would not complete the sale, as they did on June 12, any authority the agent might have had to waive conditions of the agreement must be regarded as having been withdrawn. But I consider it unnecessary to consider the waiver issue further, in light of my conclusion that the Purchasers complied with their contractual obligations to pay the Deposit as required by the Contract, based on a reasonable interpretation of the Contract.

The "Implied Term" Ground

- [64] The second ground of appeal is that the trial judge erred in implicitly holding that the Contract contained an implied term that the Vendors would permit access to the Property prior to June 17 to permit an appraisal to be conducted for mortgage purposes.
- [65] This ground of appeal would require careful consideration if the trial judge had reached his conclusion that the Purchasers were entitled to specific performance solely because the Vendors had breached an implied term that they would permit access for an appraisal, but I do not consider that a fair reading of the judgment. The trial judge did not use the expression "implied term" in his judgment. The Vendors' argument stems from the judge's comments concerning the effect of the Vendors' conduct:
- [118] With respect to the condition in the Mortgage Approval Letter that an appraisal of the Property be obtained, the evidence is clear that this condition was not satisfied. The evidence is equally clear that this condition was not satisfied because the defendants refused access to the mortgagee's appraiser.
- [119] Thus, it was the conduct of the defendants, and only the conduct of the defendants, that prevented the plaintiffs from having the mortgage funds to close the transaction. In my opinion, the defendants cannot rely upon their own conduct to defeat the plaintiffs' right to specific performance.

[66] After further discussing the Purchasers' ability to close, the trial judge concluded as follows:

[126] In conclusion, the plaintiffs were not ready, willing, and able to complete on the completion date but their inability to complete was due solely to the conduct of the defendants and the defendants cannot rely upon their own breach and repudiation of the contract to defeat the plaintiffs' right to specific performance. In any event, in the circumstances of this case, the plaintiffs need only prove, and have proved, they will be ready, willing, and able to complete the transaction on whatever date is set by the Court if specific performance is granted.

[67] As I understand this passage, the trial judge is stating that the defence that the Purchasers were not ready, willing and able to complete on the closing date fails for two independent reasons. First, the Vendors could not rely on their own breach and repudiation of the Contract to argue that the Purchasers were not ready, willing and able to complete and accordingly should be denied specific performance; and second, that in the circumstances of this case, it was not necessary for the Purchasers to establish that they were ready, willing and able to complete on the closing date, as long as they are ready, willing and able to complete on a date subsequently established by the Court.

[68] Neither of these conclusions rests solely on the failure of the Vendors to permit access for an appraisal. The overall conclusion rests on the basis that the Vendors were in breach of the Contract as of the closing date and accordingly were not in a position to bring the Contract to an end due to the Purchasers' inability to close. I will explain in addressing the third ground why I consider that conclusion to be sound.

Ability of the Purchasers to Close

[69] At the time of the first repudiation on June 12, the next act of repudiation on June 15, and on the subsequent repudiations identified by the trial judge on July 15 and July 27 (perhaps more precisely July 29), the Purchasers were entitled to elect whether to accept the repudiation as an anticipatory breach, end the Contract and sue for damages, or reject the repudiation and keep the Contract alive. Their conduct throughout indicated a desire to keep the Contract alive and purchase the Property on the terms of the Contract. Thus, as the closing date set out in the Contract approached, the Contract was in full force and effect. However, on the closing date, neither party was ready, willing and able to close.

[70] The Vendors were not willing to close; they had already repudiated the Contract, and when the closing documents were forwarded to their solicitor for execution, not only were they not executed but the Vendors' solicitor confirmed that the Vendors would not close.

[71] The Purchasers were willing to close, but they were not able to close because they had not satisfied the mortgage condition that a full appraisal be obtained. As a result, they did not have the purchase funds in a solicitor's account to demonstrate their ability to close.

- [72] On these facts, the Vendors say that the action should have been dismissed. They accept that it was not necessary for the Purchasers to tender the purchase funds, but argue that to obtain specific performance, it is imperative that the claimant establish that it is in a position to do so, relying on this Court's judgment in *Norfolk v. Aikens*.
- [73] *Norfolk* also involved a conveyance of property. A closing date of April 29 was fixed in the agreement and time was said to be of the essence. Prior to April 29, the Vendor advised the Buyer that he did not wish to complete. The Buyer did not accept this repudiation and accordingly the contract remained in force. However, on April 29, the Buyer did not have sufficient funds to close. There were communications from the Buyer's solicitor that the Court was prepared to assume constituted notice at common law to complete on May 2, but the Court stated that the Buyer was not ready, willing and able to complete on that day either.
- [74] Writing for the Court, Southin J.A. cited *King v. Urban & Country Transport* for the proposition (at p. 22) that "where neither [party] is ready, willing and able to close according to the terms of the contract, time, although expressed in the contract to be of the essence ceases to be." She then considered an English judgment, *Quadrangle Ltd. v. Jenner*, [1974] 1 All E.R. 729 at 731, where no completion date had been specified in the agreement but one party had issued a notice specifying a completion date. That party had been unable to complete on the noticed date and thus failed in his action for specific performance, Southin J.A. concluded as follows at pp. 23-24:

Applying that approach to the case before us, I am of the opinion that this plaintiff must fail for these reasons:

1. He was not ready, willing and able to complete on the 29th April.
 2. Assuming, without deciding, that the oral communications from the plaintiff's solicitor on the 2nd May, can be said to constitute a proper notice to complete at common law, the plaintiff was not ready, willing and able to complete that day either.
 3. Thus, the plaintiff was in essential default.
 4. A plaintiff who is in essential default at the material time cannot succeed in an action for specific performance. The present plaintiff is unlike the plaintiff in *King v. Urban* who was ready, willing and able to close on the 4th July [the second closing date set by the plaintiff].
- [75] The Vendors rely on *Norfolk* for the proposition that a party to a contract who is not ready, willing and able to complete on the closing date cannot obtain an order for specific performance, but the operative principle is somewhat more nuanced than that. This is made clear by the subsequent judgment of this Court, also written by Southin J.A., in *Shaw Industries Ltd. v. Greenland Enterprises Ltd.* This case concerned another conveyance where time was of the essence, but neither party was ready, willing and able to complete on the specified closing date. The trial judge dismissed the plaintiffs' action for specific performance on the basis that they were not in a position to complete on the closing date:

(1990), 21 A.C.W.S. (3d) 903 (B.C.S.C.):

Time was of the essence of the contract. The plaintiffs failed to perform their obligations in a timely fashion and accordingly it was open to the defendants to repudiate the contract as they did.

[76] This Court reversed. After some preliminary comments concerning the obligation to prepare closing documents, Southin J.A. addressed the question that arises at bar:

So, therefore, we arrive at this question: What is the legal position when both sides are in breach of obligations under a contract in which time is of the essence?

The answer Miss Satanove propounds is that, as a matter of law, time ceases to be of the essence and either side can then give to the other a notice to complete the transaction at a new time.

She relies on *King v. Urban & Country Transport Ltd.* (1973), 1 O.R. (2d) 449 (C.A.) which was cited with approval by this Court in *Norfolk v. Aikens*, *supra*.

There, the closing date (and I take "closing" to mean completion) of 30th June set out in the contract was a Sunday and the following day was, of course, Dominion Day (as it then was). Time was said to be of the essence.

The court obviously concluded that the closing date pursuant to the contract was 2nd July. The judgment does not indicate that a place of closing was specified.

The court having held that neither party was ready to close on the contractual date i.e. 2nd July, said at 455-6:

There are cases that say that a plaintiff cannot get specific performance if he does not show that he was able, ready and willing to close; LeBel, J., quoted from and followed them in *Watts v. Strezos*, [1955] O.R. 615, [1955] 4 D.L.R. 126 (S.C.). If applied literally, they cannot be reconciled with cases holding that the contract still subsists if neither party is ready to close, and in my view cannot be applied at all in such cases.

* * *

It has been found as a fact that the defendants were neither ready nor willing to close on July 2nd. Therefore, the argument based upon time being of the essence fails. Normally, in this situation, when both parties let the time go by, and one of the parties wishes to reinstate time as of the essence, it is necessary to serve a notice upon the other party, fixing a new date for closing, which must be reasonable, and stating that time is to be of the essence with respect to the new date. Neither side did this in this case. However, the findings of the trial Judge as to the efforts of B to close on July 2nd, July 3rd and July 4th lead inevitably to the conclusion that it was entirely reasonable to insist upon a closing on July 4th and that there was no reason in law for the vendor to refuse to close on the basis of the documents which B then had and which he tendered to D.

[Emphasis by Southin J.A.]

I accept this as a correct statement of the law and it follows that I agree with Miss Satanove's answer.

[77] Justice Southin concluded as follows:

From the proposition that the contract still subsists, it follows that neither party is relieved of his own contractual obligation to complete by the failure of performance of the other. He cannot treat that failure as a repudiation. In order that he may do so, he must himself first give such a notice and must at the time thereby fixed for completion be himself ready, willing and able to perform.

The underlying reason for this is that a party to a contract for the sale of land, who is in essential default, cannot be heard to complain of the wrongdoing of the other until he has given the other the opportunity to do right and is himself ready to do right. To cast stones, one must be without sin or at least have expiated one's sin.

[Emphasis added.]

[78] Shaw Industries was followed by this Court in *Basra v. Carhoun*, a judgment relied upon extensively by the trial judge. In *Basra*, Cumming J.A., writing the lead judgment, cited the passage from *Shaw Industries* I have quoted and continued as follows:

[28] In the case at bar, then, it is clear that time ceased to be of the essence on February 28, 1990 when neither party was ready to close the transaction, but on that date the contract still subsisted. Therefore, the purchasers were entitled to give the vendor reasonable notice that they wanted to complete. In my opinion, such notice was given when the plaintiffs commenced this action. Indeed, the respondents conceded in their factum that the purchasers satisfied the notice requirement by promptly commencing their action.

[29] Thus, the case at bar is like *Shaw*, where the contract still subsisted and the purchaser, by bringing its action for specific performance, made it clear that that it was ready, willing and able to perform. No date being specified it is up to the court to fix a reasonable time for completion if a decree for specific performance is granted. See *Hanson v. Cameron*, [1949] S.C.R. 101.

[30] More problematic is the issue of when must it be proved that the purchasers were ready, willing and able to complete. To use the vernacular, the plaintiffs are "between a rock and a hard place". On the one hand, it is part of their claim that they are entitled to treat the "time is of the essence" clause as vitiated that they, like the vendors, were in substantial default on February 28, 1990. On the other hand, in order to succeed in a claim for specific performance the purchasers must prove that they were ready, willing and able to complete. But when?

[34] With regard to when readiness, willingness, and ability to perform must be proved to exist it is my view that, in these circumstances, it is not necessary for the plaintiffs to prove these elements as at the original completion date, but only as at the new, later completion date to be set by the order of the court.

[45] On the basis of Shaw and King it is apparent that a plaintiff can succeed in an action for specific performance despite not being ready, willing and able to perform at the original completion date if the plaintiff is ready, willing and able to perform at some later date, to be determined by the giving of reasonable notice or fixed by the court.

[79] The principle emerging from Shaw Industries and Basra is that when neither party is ready, willing and able to close on the agreed closing date, the contract subsists and a new date can be fixed for completion, either by one of the parties or by the Court. The Vendors have characterized Basra as an "outlier" that should be confined to its specific facts, but I cannot agree with that characterization.

[80] In *The Law of Contracts*, 7th ed., (Toronto: Thomson Reuters, 2017) at para. 603, Professor Waddams cites King, Shaw Industries and Basra uncritically for the proposition that:

where the closing date in a land sale agreement has passed with neither party ready to close, either may reinstate a closing date with time of the essence, by giving reasonable notice to the other.

[81] Similarly, King and Shaw Industries are referenced in DiCasteri, *The Law of Vendor and Purchaser* (3rd ed.) at para. 445, for the following proposition:

Neither is the contract terminated where both parties are unable to close on the contractual date for closing. Either party can apply for specific performance. The rule requiring a plaintiff seeking specific performance to show his willingness and ability to perform on the designated day does not apply in these circumstances.

[82] In my view, the principle that only a party who is ready to perform can assert a "time of the essence" clause to terminate a contract explains why the rule requiring a plaintiff seeking specific performance to show his willingness and ability to perform on the contractual closing date does not apply when the defendant is unwilling or unable to perform.

[83] A defendant who is ready to perform is entitled to rely on the "time is of the essence" clause to bring the contract to an end if the plaintiff seeking performance is not able to perform on the specified date; the corollary of this is that a plaintiff who is not ready to perform on the closing date when the defendant is in compliance with the contract will not be able to obtain specific performance for some future date. But a defendant who is not ready to perform cannot invoke the "time is of the essence" clause to bring the contract to an end. Accordingly, if neither party is ready to complete on the closing date, neither can be said by the other to be in breach of the contract and the contract continues until one of the parties sets a new closing date and is in a position to complete the contract on that date.

- [84] This distinction can be illustrated by the recent judgment in *Ingarra v. 301099 Ontario Limited* (Previn Court Homes), 2020 ONCA 103. In *Ingarra*, a contract for purchase and sale of residential property was entered into with what was described as a Firm Closing Date. On the Firm Closing Date, neither party was in a position to close, the vendor because it could not provide an occupancy permit as required under the contract, the purchaser because he was not in funds. The Court of Appeal described the legal status of the parties as of the Firm Closing Date in this way:
- [20] The failure to close on the Firm Closing Date of January 11, 2018 had the effect of leaving either party free to specify a new closing date on reasonable notice and restore the force of the "time of the essence" provision: see *Domicile Developments Inc. v. MacTavish* (1999), 45 O.R. (3d) 302 (C.A.) and *King v. Urban & Country Transport Ltd.* (1973), 1 O.R. (2d) 449 (C.A.).
- [85] The parties did specify a new closing date. By then, the vendor had the occupancy permit and was in a position to close. The purchaser, however, was still not in funds. The vendor refused to grant a further extension and terminated the contract. The purchaser's action for damages was unsuccessful. The purchaser's inability to close was the same on both closing dates, but the consequences were different. On the first date, the defendant also could not close and so the contract continued in force. By the second date, the vendor was in a position to close, and accordingly in a position to terminate the contract in light of the purchaser's inability to complete.
- [86] The case at bar is an example of the first scenario in *Ingarra*. Neither party was in a position to close on the closing date, and accordingly the Contract remains in force, and the Purchasers are entitled to set a new closing date. That is the effect of the order made by the trial judge.
- [87] For these reasons, in my opinion the trial judge was correct to conclude that the Purchasers were not disentitled from obtaining specific performance by the fact that they were not ready to close on July 30, in light of the fact that the Vendors were in default of their obligations on that date. The Contract subsists and the Purchasers are entitled to set down a date for completion of the agreement.
- [88] I agree with the trial judge that the appropriate remedy is an order for specific performance of the Contract. That was the order made in both *Shaw Industries*, where the order enabled either party to set a new closing date, and *Basra* (at paras. 48-49) when a new date was set by the Court. To assist the parties, I will set a procedure now for the determination of the new closing date, as was done in *Guraya v. Kaila*, 2019 BCCA 367 at para. 55.

Disposition

[89] I would dismiss the appeal and direct that the respondents are entitled to set a closing date for the Contract within 90 days of the publication of these reasons, provided they give the appellants at least three weeks' notice of the closing date. The parties may vary these dates by agreement.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice Fenlon"

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