COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *A & G Investment Inc. v. 0915630 B.C. Ltd.*, 2014 BCCA 425

Date: 20141104
Docket: CA041193

Between:

A & G Investment Inc.

Appellant
(Plaintiff)

And

0915630 B.C. Ltd.

Respondent
(Defendant)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated September 27, 2013 (*A & G Investment Inc. v. 0915630 B.C. Ltd.*, 2013 BCSC 1784, Vancouver Docket No. S132980).

Counsel for the Appellant:	J.M. Webster, Q.C.
Counsel for the Respondent:	G.E. Sourisseau, I.E. Shieh
Place and Date of Hearing:	Vancouver, British Columbia September 8, 2014
Place and Date of Judgment:	Vancouver, British Columbia November 4, 2014

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Madam Justice Bennett

Summary:

The appellant, A & G Investment Inc., (the "Purchaser") contracted with the respondent, 0915630 B.C. Ltd. (the "Seller"), to purchase 31 lots of a proposed 34 lot subdivision for $9,000,000. It put down a deposit of $620,000. The contract provided that conveyance would not complete until the 31 lots were in a "ready-to-build" state. The lots were not ready by December 18, 2012, the specified completion date. The Purchaser eventually commenced this action for return of the deposit. It was heard by way of summary trial. The chambers judge found that the non-completion was not grounds for automatic termination of the contract. He also found that the Purchaser expressed a clear intention not to perform the contract, which constituted an anticipatory breach and a repudiation of the contract.

Held: Appeal dismissed. The appeal turns on the proper interpretation to be given to the contract. The clause in respect of the December 18, 2012 completion date does not provide for automatic termination. The Purchaser could have elected to treat the non-completion as a fundamental breach. It did not do so in a timely manner. It cannot rely on a December 18, 2012 breach on April 23, 2013 as a fundamental breach.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] The appellant, A & G Investment Inc. (the "Purchaser") entered into an agreement with the respondent, 0915630 B.C. Ltd. (the "Seller") for the purchase and sale of 31 of 34 building lots to be created by way of a subdivision by the Purchaser of three parcels of land located in Surrey, British Columbia (the "Contract"). The purchase price was $9,000,000. The sale did not complete as specified on December 18, 2012. On April 25, 2013, the Purchaser brought an action for the return of its $620,000 deposit.

[2] The matter was heard by way of summary trial for three days before Mr. Justice Leask. He dismissed the Purchaser's action. The Purchaser now appeals.

BACKGROUND

[3] On April 13, 2012, the parties entered into the Contract. The relevant portions of the Contract provide as follows:

3. DEPOSIT: A non-refundable deposit of $620,000.00 which will form part of the purchase price, will be paid directly to the seller upon acceptance of the Contract.

4. COMPLETION DATE AND CONDITION PRECEDENT: The Buyer shall complete the purchase of the Property on the earlier of:

   (a) December 18, 2012, or

   (b) the 21st day after the seller delivers written notice to the Buyer, by way of regular mail to the address of the Buyer as set out on page 1 of the Contract (which notice shall be deemed to be received on the third day following the date of mailing) or personal delivery to the Buyer, notifying the Buyer that:

      (i) the Subdivision Plan has been filed with L.T.O.;

      (ii) that the Seller has successfully concluded its pre-construction meeting with the Engineering Department of the City in respect of the Subdivision Servicing hereinafter defined; and

      (iii) the City will accept applications for a building permit for the Property;

      (iv) the lots are ready to build and Lot grading Plans have been registered at City of Surrey.

      provided that in the event that the L.T.O. is not open for business on such day, then the Completion Date shall be the next Business Day,

   (the "**Completion Date**").It is a condition precedent (the "**Condition Precedent**") of this Contract that items (b) (i), (ii), (iii) and (iv) above will be completed prior to the Completion Date, subject to extensions to the Completion Date pursuant to paragraph 5 and 6. In the event that the Condition Precedent has not been met by the later of December 31, 2013 (the "**End Stop Date**"), or such other revised Completion Date pursuant to paragraph 5 and 6, the Contract shall come to an end, the Deposit shall be refunded to the Buyer and neither party will have any further obligation to the other.

5. EXTENSION OF COMPLETION DATE: Notwithstanding the foregoing, the Seller may, at its option, exercisable by notice to the Buyer or the Buyer's solicitor or notary, elect to extend the Completion Date for up to 270 days (the "**Extension Option**"). In the event that the Seller exercised its Extension Option, then the Completion Date shall be extended to be the date set out by the Seller, at its sole discretion, as the Completion Date, provided that the Buyer shall be given seven (7) days notice of the said date. The parties acknowledge that the extension set out in this paragraph 5 shall be in addition to any extension pursuant to paragraph 6 below and whether or not any delay described in paragraph 6 has occurred.

...

> 9. SUBDIVISION: The Seller shall cause the Subdivision of the Parent Parcels because of the filing of the Subdivision Plan to create the Property.
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> ...
>
> 26. TIME: Time will be of the essence. In the event the Buyer fails to complete the purchase of the Property, the Deposit paid by the Buyer will be absolutely forfeited to the Seller in accordance with the *Real Estate Development Marketing Act*, on account of damages, without prejudice to the Seller's other remedies.

[4] The Purchaser paid the deposit of $620,000 directly to the Seller on April 13, 2012.

[5] From the time the Contract was made in April 2012 through to March 2013, the Purchaser undertook marketing activities to resell the lots it was purchasing. By March 2013 the Purchaser had found buyers for only seven of the 31 lots.

[6] The Contract required the Seller to file the subdivision plan and complete the other steps set out in clauses 4(b)(i)-(iv) of the Contract prior to the completion date (the "Conditions Precedent"). It was the Seller's responsibility to complete those steps. The conveyance would not complete until the 31 lots were in a "ready-to-build" state.

[7] By April 2012, the Seller had received a preliminary letter of approval from the City of Surrey for its subdivision plan. The Seller's contractor could not begin the work required to prepare the land until the subdivision plan passed fourth reading at the City. Fourth reading was not obtained until late November 2012.

[8] By November 2012, through no fault of the Seller, the lots had not yet been created and were not in a "ready-to-build" state. The Seller notified the Purchaser's agent that the lots would not be ready for the December 18, 2012 completion date and that completion would be delayed until about April 2013. The Seller did not, however, exercise its option to extend the completion date.

[9] Mr. Kumar, the principal of the Purchaser, deposed that he knew in advance of December 18, 2012 that the Contract would not close that day. He testified that he

did not know the legal status of the subdivision at that time but expected that the Seller would proceed with the subdivision as it was required to under the Contract. Neither party took any steps with respect to the December 18, 2012 completion date.

[10] After December 18, 2012, both the Purchaser and Seller continued to act as if the Contract was alive. The Seller continued to take the steps necessary to fulfill the Conditions Precedent. The Purchaser continued to market the lots to third parties.

[11] Subsequent to the subdivision passing fourth and final reading, meetings took place between the Seller's engineers, its contractor and representatives from the City's engineering department. The contractor was not given the final paperwork it needed to begin physical work on the site until late January or early February 2013.

[12] In January 2013 the subdivision plan received final approval and was signed by the City's approving officer. The Seller then registered the subdivision plan in the Land Titles Office to create the 34 lots.

[13] In March 2013, Mr. Kumar consulted a lawyer named Mr. Jaffer. On March 26, 2013, Mr. Jaffer sent the Seller a letter which said:

> We are the solicitors for A & G Investments Inc. and Satish Kumar, and have reviewed the Contract of Purchase and Sale dated April 13, 2012.
>
> It is our client's position and our considered opinion that the said Contract is in breach of the Real Estate Development and Marketing Act, and the Contract is void and unenforceable.
>
> We hereby demand the return of the Deposit of $620,000.00 within 7 days from this date.
>
> TAKE NOTICE that unless the said amount is returned to us within the prescribed time, we have instructions to commence a legal action against yourselves without any further notice to you.
>
> You are strongly urged to heed the contents of this letter and govern yourselves accordingly.

[14] On April 8, Mr. Jaffer, on behalf of the Purchaser, sent the Seller a Notice of Rescission in the following form:

> **TAKE NOTICE** that the undersigned, A & G Investment Inc. of 8193 - 149th Street, Surrey, B.C. V3S 8N3, the Buyer under a Contract of Purchase and Sale dated April 13th, 2012 with respect to 31 residential building lots as described in Schedule "A" attached to the said Contract, a copy of which is attached hereto, does hereby **RESCIND** the said Contract, pursuant to Section 21 of the *Real Estate Development Marketing Act*; and hereby **DEMANDS** an immediate release of the Deposit of $620,000.00 held by you.

[15] On April 11, counsel for the Seller replied to Mr. Jaffer in the following terms:

> We are counsel for 0915630 B.C. Ltd. We have been provided with a copy of your correspondence of April 8, 2013 and the enclosed Notice of Rescission. It is our clients position that your clients have no basis for rescission of the subject contract. The delivery of the Notice of Rescission is an anticipatory breach and repudiation of the contract. Our clients accept that repudiation.
>
> The contract is now at an end for all parties. Our clients are entitled to retain the deposit paid and, if any additional damages are suffered, our client will look to yours for compensation for those damages.

[16] It is common ground that Mr. Jaffer was wrong and the provisions of the *Real Estate Development and Marketing Act*, S.B.C. 2004, c. 41, did not apply to the Contract.

[17] The Purchaser retained new counsel who, on April 23, 2013, wrote to the Seller's counsel and conceded that the Purchaser's claim for rescission was without merit. In that letter, the Purchaser took a new position. It now alleged that the Contract had automatically terminated on December 18, 2012 because the Conditions Precedent had not been fulfilled by the completion date. The Purchaser demanded an immediate return of the deposit.

[18] By letter dated April 24, 2013, Seller's counsel opined that the letter of April 23, 2013 evidenced the Purchaser's intention not to be bound by the Contract and that the letter amounted to repudiation of the Contract. Seller's counsel advised that his client accepted the repudiation of the Contract and that the Contract was now at an end.

[19] Shortly thereafter the Purchaser commenced these proceedings for return of the deposit. The chambers judge rejected its claim. He found that the Contract did not contain a true condition precedent that could have resulted in an automatic

termination of the Contract on December 18, 2012. He found that the Purchaser did not have a proper basis for claiming termination of the Contract on December 18, 2012. At most, it might have had a claim for damages.

[20] The chambers judge rejected the Purchaser's submission that it had not repudiated the Contract. He found that the Purchaser's correspondence indicated a clear and express intention not to perform the Contract that constituted an anticipatory breach and repudiation that the Seller was entitled to accept. In the result he dismissed the Purchaser's action.

ISSUES ON APPEAL

[21] The Purchaser submits that the trial judge committed the following errors:

> A. The trial judge erred in law in assuming that because the clause at issue was not a "true condition precedent", it was simply ineffective and amounted to no more than a warranty. In particular:
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> (i) The trial judge failed to consider that the condition precedent suspended the obligations of the parties only until the Completion Date and thereafter must be read to automatically terminate the Contract if the conditions, particularly as to existence of title and ability to convey the lots subject of the Contract, were not met; or,
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> (ii) In the alternative, the trial judge failed to consider whether the failure to meet the conditions by the Completion Date, including the existence of title capable of conveyance, amounted to a fundamental breach of the Contract entitling the purchaser to elect to rescind.

DISCUSSION

[22] This appeal turns on the proper interpretation to be given to the Contract and the consequences that flow from the fact that as of December 18, 2012 the Conditions Precedent had not yet been fulfilled. This Court in *Kingsway General Insurance Co. v. Lougheed Enterprises Ltd.*, 2004 BCCA 421 at para. 10, set out the governing principles of contractual interpretation:

> ... It will, I hope, suffice to note that in terms of contractual interpretation, the same principles of construction applicable to other commercial contracts apply to insurance contracts ...; that the "court must search for an interpretation from the whole of the contract which promotes the true intent of the parties at the time they entered into the contract" ...; that the plain

> meaning of the words used should be given effect unless it would bring about an unrealistic or commercially unreasonable result ...; that evidence of the factual background or setting of the contract known to the parties at or prior to the date of the contract may be considered even in the absence of an ambiguity ...; that at the same time, the words of the contract "must not be overwhelmed by a contextual analysis" ...; and that in cases of true ambiguity or doubt as to the meaning of the words used, the *contra proferentem* rule of interpretation may be applied .... [Citations omitted.]

[23] The parties are in agreement that the Conditions Precedent in this case are of the kind discussed by Lambert J.A. in *Wiebe v. Bobsien*, 64 B.C.L.R. 295 (C.A.) at 299:

> But there is a third class of condition precedent. Into that class fall the types of conditions which are partly subjective and partly objective. An example would be "subject to planning department approval of the attached plan of subdivision". This looks objective, but it differs from a truly objective condition in that someone has to solicit the approval of the planning department. Perhaps some persuasion of the planning department will be required. Can the purchaser prevent the condition from being fulfilled by refusing to present the plan of subdivision to the planning department? This type of case has been dealt with by implying a term that the purchaser will take all reasonable steps to cause the plan to be presented to the planning department, and will, at the proper time and in the proper way, take all reasonable steps to have the plan approved by the planning department.

[24] In this case, the Conditions Precedent were objective only up to a point. The Seller was required to take various steps that required the approval of a third party to move the process along. There is no suggestion that the Seller acted in other than an expedient manner in moving to fulfill the Conditions Precedent.

[25] The Contract stated that the completion date would be the earlier of December 18, 2012 or 21 days after the Seller delivered written notice to the Purchaser that the Conditions Precedent had been fulfilled. The Contract gave the Seller the option to extend the completion date for up to 270 days. The Contract required that the Conditions Precedent be completed prior to the completion date and went on to state "in the event that the Condition Precedent has not been met by later of December 31, 2013 (the "**End Stop Date**"), or such other revised Completion Date pursuant to paragraph 5 and 6, the Contract shall come to an end, the deposit

shall be refunded to the [Purchaser] and neither party will have any further obligation to the other."

[26] The Purchaser submits that the Contract automatically came to an end on December 18, 2012 when the Seller was not in a position to complete because the Conditions Precedent at that date remained outstanding. With respect, I do not accept that submission. Such an interpretation would bring about an unrealistic and commercially unreasonable result. If the proposition was sound, it would mean that in a rising real estate market, the Seller could escape the consequences of the agreement simply by not exercising its right to extend the completion date, leaving it free to resell the property at a higher price to other parties. Such an interpretation would not promote the true intent of the parties.

[27] This case has some similarities to *Peier v. Cressey Whistler Townhomes Limited Partnership*, 2012 BCCA 28. That case concerned a purchase of a newly constructed townhouse in Whistler, British Columbia. The purchase agreement included a provision that certain power/hydro lines would be buried prior to completion. The contract was signed in May 2007 with an estimated completion date of December 1, 2008. If the completion date had not occurred by December 1, 2009, referred to as the outside date (which the vendor could for any reason extend for up to 120 days) the purchase agreement would be terminated.

[28] In discussing the contract the Court described the completion date as follows:

> [26] Under the purchase agreement, with the power lines clause, the burial of the lines prior to completion can be said to have been essential to the purchaser but the time of completion was clearly not. Indeed, the agreement contained no more than an estimated completion date (December 1, 2008) with the choice of the actual date for completion being entirely at the discretion of the vendor. Though the agreement provided time was of the essence, the date for completion was by no means of the essence. The only date on which the purchaser could rely was the Outside Date (March 1, 2010 as extended) on which the agreement would be terminated if the completion date had not occurred.
>
> [27] What can be seen to have been important to someone in the purchaser's position was a condition that he did not have to pay the purchase price until the lines were buried, such that his leverage in that regard was preserved. If they could not be buried, or if they could be buried but were not

> buried prior to the Outside Date, the purchase price would never have to be paid and the deposit would be returned. There was a condition precedent that suspended the purchaser's obligation to pay the purchase price, but the suspension was not open-ended. The Outside Date served to give certainty to the agreement.

[29] Similar reasoning applies in this case. The parties bargained for the transfer of "ready-to-build" lots in return for moneyed consideration. The lots did not exist at the time of contract formation. The Contract suspended full payment of the purchase price until the lots were in a "ready-to-build" state, preserving the leverage and interest of the Purchaser. What was important to the Purchaser was not the exact date of completion but rather that the Conditions Precedent were satisfied prior to the transfer so that the Purchaser would acquire "ready-to-build" lots as it intended. The Contract was not open ended, notwithstanding the temporary suspension of the purchase price. The End Stop Date served to give certainty to the Contract. If the Conditions Precedent had not been met by that date the Contract was to end.

[30] The parties were well aware of the numerous steps that had to take place before the Seller would be in a position to transfer "ready-to-build" lots. Indeed, the requirement that the lots were in a "ready-to-build" state was a handwritten addition to the Contract. The completion date set a deadline for these steps, but the date of December 18, 2012 was not essential to the bargain. What was essential was that the steps be completed within a reasonable period of time from formation. This is evidenced by the absolute deadline specified in the End Stop Date.

[31] It cannot have been the intention of the parties for the Contract to have two automatic termination provisions, each triggered by identical circumstances, but simultaneously operating to end the Contract on two different dates more than a year apart. The true intention of the parties, as revealed by the terms of the Contract, must have been to include only one automatic termination provision for failure to satisfy the Conditions Precedent. This automatic termination provision is the End Stop Date of December 31, 2013 and not the December 18, 2012 completion date.

[32] The agreement did not automatically end on December 18, 2012. I would dismiss the first ground of appeal.

[33] This conclusion, however, does not answer the second ground of appeal. I agree with the Purchaser that the chambers judge erred by failing to consider whether the failure to meet the conditions by the completion date amounted to a fundamental breach of the Contract.

[34] For the reasons that follow, I find that the error does not ultimately assist the Purchaser or lead to a different result.

[35] The Contract was to complete December 18, 2012. While the Seller had the option to extend the completion date, it did not do so. Pursuant to the terms of the Contract time was of the essence. The Seller's failure to complete on December 18, 2012 was a fundamental breach of the Contract and gave to the Purchaser the right to accept the breach and put the Contract to an end. I do not agree with the trial judge's analysis that the failure to complete on December 18 was a mere breach of warranty leading to a possible remedy in damages.

[36] In *Gulston v. Aldred*, 2011 BCCA 147, this Court set out the options open to an innocent party when there was a breach of a fundamental term:

> [50] Where there is a breach of a fundamental term, the innocent party has two options. As this Court stated in *Morrison-Knudsen Co. Inc. v. British Columbia Hydro and Power Authority*, (1978) 85 D.L.R. (3d) 186 at para. 130:
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> > ... However, it is not every breach which determines a contract and puts an end to contractual obligations. There are breaches compensable in damages only and breaches called fundamental breaches which can bring the contractual relationship to an end and free the parties from further performance. When faced with a fundamental breach the innocent party is put to an election. He may elect to affirm the contract and to hold the other party to the performance of his obligations and sue for damages as compensation for the breach. He may, on the other hand, elect to treat the breach as a fundamental breach and accept it as such. Thus he would terminate the contract and thereafter be relieved of any further duty to perform and he could sue at once for damages or *quantum meruit* for performance to that point. It is essential that such election, an election between inconsistent rights, be made promptly and communicated to

> the guilty party. Once made, the election is binding and cannot be changed. [Emphasis added.]

[37] On December 18, 2012, when the Contract did not complete, the Purchaser had an election. It could affirm the Contract and hold the Seller to the performance of its obligation or it could elect to treat the breach as a fundamental breach and accept it as such. If it elects to terminate the Contract, then it would be entitled to return of the deposit.

[38] An election between inconsistent rights must, however, be made promptly and communicated to the other side. Parties cannot adopt a "wait-and-see" approach to fundamental breach, as their election simultaneously determines the position of the counterparty to the contract. Either the contract is not repudiated and the rights and obligations under it still exist, or the contract is rescinded because of an accepted repudiation and then very different rights come into being in respect of a cause of action. In either case, parties must have prompt notice of their position. In this case, the Purchaser did nothing on December 18, 2012 to indicate it had made an election. Indeed, through to March 2013, it continued its attempt to resell the lots while the Seller continued the work necessary to fulfill the Conditions Precedent.

[39] The Purchaser did not suggest the Contract was at an end until its counsel's letter of March 26, 2013, and then for reasons unrelated to the failure to complete the Contract on December 18, 2012. It was not until April 23, 2013 that the Purchaser first alleged that the Contract had come to an end because the Conditions Precedent had not been fulfilled by the completion date.

[40] April 23, 2013 was much too late to put the Contract to an end for a failure to complete on December 18, 2012. An election must be made promptly. In this case it was not. By April 23, 2013 the Purchaser could no longer rely on the Seller's December 18, 2012 breach as a fundamental breach of contract.

[41] In its letter of April 23, 2013, the Purchaser indicated it would not complete the Contract. The Seller had the right to accept that letter as an anticipatory breach

of contract and declare the Contract at an end. In these circumstances the Purchaser is not entitled to the return of its deposit.

[42] I would dismiss the appeal.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Madam Justice Bennett"