

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *A & G Investment Inc. v. 0915630 B.C.  
Ltd.,*  
2013 BCSC 1784

Date: 20130927  
Docket: S132980  
Registry: Vancouver

Between:

**A & G Investment Inc.**

Plaintiff

And

**0915630 B.C. Ltd.**

Defendant

Before: The Honourable Mr. Justice Leask

## **Reasons for Judgment**

Counsel for the Plaintiff:

D.S. Parlow  
D.P. Lucas

Counsel for the Defendant:

G.E. Sourisseau

Place and Date of Trial:

Vancouver, B.C.  
August 19 to 21, 2013

Place and Date of Judgment:

Vancouver, B.C.  
September 27, 2013

**Introduction**

[1] This is a lawsuit by the plaintiff company to recover a \$620,000 deposit paid by the plaintiff as buyer to the defendant as seller regarding the purchase of 31 lots in a proposed Surrey subdivision. The total purchase price was \$9 million. The case was heard as a summary trial on August 19 to 21, 2013. Both the real estate agents for the buyer and the seller were cross-examined before the Court.

[2] The plaintiff argued that it was entitled to the return of its deposit on two bases:

1. The Seller had breached a condition precedent in the contract by failing to complete, or extend the completion date, by December 18, 2012; or,
2. In the alternative, the seller's purported acceptance of repudiation by the buyer was ineffective because the buyer had not repudiated the contract.

[3] At the conclusion of the argument, I dismissed the plaintiff's claim, with reasons to follow. These are my reasons.

**Facts**

[4] On April 13, 2012, the plaintiff and defendant entered into a contract for the purchase of 31 residential building lots to be created by way of a subdivision of three parcels of land located in Surrey, B.C. The purchase price of the lots was \$9 million.

[5] Section 3 provided:

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.

[6] The plaintiff paid the deposit of \$620,000 direct to the defendant on April 13, 2012. Also relevant to the present dispute between the parties are clauses 4 and 5 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
- (b) the 14<sup>th</sup> 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")

5. 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 21, 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.

6. 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.

[7] Based on the evidence provided to the Court, I find as a fact that Mr. Munday, the seller's real estate agent, informed Mr. Jagga, the buyer's real estate agent, that the lots would not be ready for a December 18, 2012 completion date. This information was given some time in the last two weeks of November 2012. Mr. Jagga informed Mr. Kumar, the principal of the plaintiff, shortly after receiving the information. In Mr. Kumar's affidavit, he stated:

I did not know the legal status of the subdivision, although I expected that the seller would proceed with it as it was a fundamental requirement of the contract...

[8] When cross-examined about his conversation concerning the delay in completion, Mr. Jagga testified that Mr. Kumar said "Let's see what happens." Neither party took any further steps with respect to the December 18, 2012 completion date.

[9] By March 2013, the plaintiff had only found buyers for 7 of the lots. In March, 2013 Mr. Kumar consulted a lawyer named Mr. Jaffer. Mr. Jaffer advised Mr. Kumar that the contract was in breach of the *Real Estate Development and Marketing Act*, S.B.C. 2004, c. 41("REDMA"). On March 26, 2013 Mr Jaffer sent the defendant a letter which said:

We are the solicitors for A & G Investments Inc. and Satish Kumar, and have reviewed tire 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.

[10] On April 8, Mr. Jaffer, on behalf of the plaintiff, sent the defendant a Notice of Rescission:

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.

[11] On April 11, counsel for the defendant 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.

[12] In front of the Court, counsel were in complete agreement that Mr. Jaffer was wrong and REDMA had no application to this contract.

**Issues**

1. Did the contract terminate when the sellers were unable to complete on December 18, 2012?
2. Was the Notice of Rescission a repudiation?

**1. Conditions precedent and contract termination**

[13] Counsel for the plaintiff submits that where a condition precedent is not fulfilled within the time specified, the contract is terminated. He argues that failure to complete by December 18, 2012 or extend the completion date at the seller's option as provided in Clause 5 of the contract means that this contract terminated on December 18, 2012 and the buyer is entitled to have his deposit refunded. In support of this submission he cites *Sun-Kahn Investments Ltd. v. Dalton*, 143 D.L.R. (3d) 310 (B.C.S.C.).

[14] Counsel for the defendant says that the legal proposition advanced by plaintiff's counsel only applies to true conditions precedent as described in *Turney v. Zhilka*, [1959] S.C.R. 578. Counsel for the plaintiff concedes that the provisions of their contract do not amount to a true *Turney v. Zhilka* condition precedent. Defence counsel further relies on *Peier v. Cressey Whistler Townhomes Limited Partnership*, 2012 BCCA 28.

[15] I agree with Defence Counsel's submissions. Wallace, J. (as he then was) found in *Sun-Kahn* the existence of a true condition precedent and hence the termination of the contract in that case. Here there is admittedly no true condition precedent. At most, the plaintiff might have a claim for damages but it does not have a proper basis for claiming termination of the contract on December 18, 2012.

## 2. Repudiation

[16] The plaintiff makes an alternate submission that its Notice of Termination was not a repudiation and that the defendant could not "accept" it and terminate the contract on April 11, 2013. This submission is based on the House of Lords decision in *Woodor Investment Development Ltd. v. Wimpey Construction U.K. Ltd.*, [1980] 1 All E.R. 571 (H.L.) in which Lord Scarman stated:

In this case the contract provided for the possibility of rescission by the defendants. But the notice of rescission, which the defendants gave, was not, in the circumstances which existed when it was given, one which the defendants had any contractual right to give. But they honestly believed the contract did give them the right. When one examines the totality of their conduct and its impact upon Mr. Cornwell it is plain, as shown by my noble and learned friend's analysis of the facts, that the defendants, though claiming mistakenly to exercise a power given them by the contract to bring it to an end, were not evincing an intention not to be bound by the contract. On the contrary, they believed they were acting pursuant to the contract.

(emphasis in original)

[17] Plaintiff's counsel also relied on a decision by Hall, J. in *North Vancouver (District) v. Progressive Contracting (Langley) Ltd.*, (1992) 49 C.L.R. 298 (B.C.S.C.) aff'd (1993) 26 B.C.A.C. 74 (B.C.C.A.). After citing the paragraph from Scarman, L.J.'s reasons quoted above, Hall, J. said:

It seems to me that Lord Scarman was emphasizing that a party must act honestly and in good faith, and if it does so and is acting in good faith in putting forward its interpretation of a term of a contract, that party is not necessarily "repudiating" the contract, A party will not be allowed to adopt a position that would wholly frustrate the due performance of its obligations under a contract, but a legitimate and honestly held difference of opinion by a party concerning a term of a contract is not necessarily repudiation by that party.

(emphasis in original)

[18] A potential distinction between the case at bar and the cases in *Woodar* and *Progressive Construction* is that in those cases, a contracting party was mistaken as to its rights and obligations under the relevant contract, whereas in this case, the plaintiff was mistaken as to its statutory rights. It is the plaintiff's submission that this distinction bears no weight upon the determination of whether or not the Notice of Rescission constituted a repudiation of the Contract.

[19] Counsel for the defendant distinguished Hall, J.'s judgment in *North Vancouver (District) v. Progressive Contracting (Langley) Ltd.* on its facts. More importantly, he says the *Woodar* case is not the law in Canada. For that proposition he relies on Southin, J.A. dissenting in *MacNeill Industrial Inc. v. Posnikoff*, [1991] B.C.J. No. 343 (C.A.):

If a contracting party to a synallagmatic contract purports to terminate or cancel or rescind a contract pursuant to a term containing such a power when, upon the facts, the right to do so has not arisen, he is, in my opinion, repudiating that contract and the other party, as I have said, has a right either to reject or accept the repudiation. Whether such a purported rescission or termination can constitute a repudiation was the issue in *Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.*, [1980] 1 All E.R. 571 (H.L.). Lord Wilberforce, Lord Keith of Kinkel and Lord Scarman said it was not. Lord Russell of Killowen and Lord Salmon said that it was. No useful purpose would be served by my discussing the judgments. As the judgment of the majority has not been adopted either in the Supreme Court of Canada or in this Court -- and indeed I do not think it has even been discussed -- I simply say that I prefer the opinion of the minority.

[20] Counsel for the defendant submits that the law in Canada is clear that notices indicating a clear and express intention not to perform a contract, or not to perform as agreed, will constitute anticipatory breach and repudiation (even if sent pursuant to the sender's honestly held, but mistaken belief that he or she was simply invoking a right): *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] S.C.J. No. 60 (S.C.C.) at paras.: 45-46; *Lam v. Sumner Estate*, 2006 BCCA 427; *Geteam Investments Ltd. v. Richards*, 2013 BCSC 1478 at para. 21.

[21] I accept that counsel for the defendant has stated the law correctly and hence the plaintiff's Notice of Rescission was an anticipatory breach and repudiation of the contract.

**Conclusion**

[22] The plaintiff's application for judgment on this summary trial is dismissed and judgment may be entered for the defendant.

"Leask, J."