FREDERICK GINTER (*Defendant*) .....APPELLANT;

1967
*May 18
June 26

AND

SAWLEY AGENCY LTD. and STAN STAGG and CENTRE CITY DEVELOPMENT LTD. (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Construction—Option agreement patently ambiguous—Two time periods provided within which option could be exercised—Whether acceptance within time limited in agreement.

On January 24, 1964, the defendant signed a document granting an option on certain property in Prince George, B.C. The document was prepared by one S on behalf of an undisclosed principal. The option read in part: "The term of the option is to be for *176* days from the date hereof expiring at the hour of 11:59 P.M. on the *24* day of *July 1964*."

S purported to exercise the option on July 23, 1964, by mailing an acceptance to the defendant. The following day, July 24th, a deed was presented to the defendant for signature. He refused to sign the deed. S assigned his rights to the plaintiffs who brought action for specific performance and for damages. The trial judge ordered specific performance but made no award of damages. The defendant took an appeal to the Court of Appeal for British Columbia which Court, by a majority judgment, dismissed the appeal and upheld the order for specific performance. On appeal to this Court, the only ground advanced was that the option was not accepted within the time limited in the option agreement.

Held: The appeal should be dismissed.

The reasoning of the majority in the Court of Appeal was adopted. The ambiguity in the option agreement was patent since it provided two time periods within which the option could be exercised. Taking 176 days as the term of the option the time for acceptance would have expired on July 19, 1964. But the contract fixed the exact minute, hour and day that the period of 176 days, and therefore the option, was to end. That circumstance dominated the clause and controlled its meaning. The erroneous description of the term as one of 176 days must therefore be rejected as being inconsistent with the declared intention.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Branca J. Appeal dismissed.

John Laxton, for the defendant, appellant.

G. A. Armstrong, for the plaintiffs, respondents.

*PRESENT: Cartwright, Martland, Ritchie, Hall and Spence JJ.

[1] (1966), 57 W.W.R. 561, 58 D.L.R. (2d) 757.

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GINTER v. SAWLEY AGENCY LTD. *et al.*

The judgment of the Court was delivered by

HALL J.:—On January 24, 1964, the appellant signed a document granting an option on certain property in Prince George, British Columbia. The document was prepared by one Dudley Sawley on behalf of an undisclosed principal. Sawley purported to exercise the option on July 23, 1964, by mailing an acceptance to the appellant. The following day, July 24th, a deed was presented to the appellant for signature. He refused to sign the deed. His reasons for refusing to complete on that date were:

(i) That the sale price was too low;

(ii) That title deeds to the lands were in the possession of his bank;

(iii) That he may have difficulty relocating the buildings;

(iv) That he did not have sufficient time in which to give notice to his tenants;

(v) That he objected to certain alterations made on the document, *viz.* "20,000 net to the Vendor" which he had refused to initial and therefore thought it would vitiate the option.

Sawley assigned his rights to the respondents who brought action for specific performance and for damages.

The appellant defended the action on a number of grounds, including the following:

13. In answer to the whole of the Statement of Claim herein the Defendant says that on or about January 24th, 1964, one Dudley Sawley representing the Plaintiff, Sawley Agency Ltd., called upon the Defendant and requested him to employ the said Plaintiff as agent to list and sell the Defendant's property situate at the South East corner of the intersection of 7th Avenue and Brunswick Street in the City of Prince George, Province of British Columbia, and secured the Defendant's signature to a document which the said Dudley Sawley represented to the Defendant to be an agreement to list the said property for sale. The Defendant further says that if his signature was obtained by the Plaintiff, Sawley Agency Ltd., to any other document in relation to the said lands then it was obtained fraudulently.

14. Alternatively and in answer to the whole of the Statement of Claim herein the Defendant says if he signed the agreement in writing referred to in Paragraph 5 of the Statement of Claim herein, he did so upon the fraudulent misrepresentation by the said Dudley Sawley on behalf of the Defendant, Sawley Agency Ltd., that the said

document was an agreement to list the property described therein with the said Sawley Agency Ltd. for sale as agent on the Defendant's behalf.

15. Alternatively and in answer to the whole of the Statement of Claim herein the Defendant says that if he signed the alleged agreement of January 24th, 1964, which is not admitted but specifically denied, the said agreement at the time of signature was not in the same condition as it now is and that additions were made to the said agreement after his signature thereto and without his knowledge or consent.

The action came on for trial before Mr. Justice Branca in the Supreme Court of British Columbia who, in a judgment dated August 23, 1965, dealt with these defences as follows:

In reference to the plea of *non est factum*, I do not consider this allegation to be made out at all. I accept Sawley's evidence as to what occurred at the initial meeting when exhibit 1 was signed. I find Sawley to be perfectly trustworthy and that he did as stated read over the option word for word to Ginter and that there were no additions or alterations to the document after Ginter had signed, except as stated by Sawley. Wherever Sawley's evidence is in conflict with that given by Ginter, I without hesitation accept the evidence given by Sawley in preference to and reject the evidence given by Ginter.

I consequently find that there was a complete and full understanding of the contents of exhibit 1 on the part of Ginter when he signed the same.

I also reject the plea that Ginter thought the document exhibit 1 was a listing and, on the contrary, I find that Ginter was fully aware of the contents of exhibit 1, that he knew it was an option and that he knew of all the terms therein set forth and their true meaning and effect before he signed the document.

I find against the allegation that the plaintiff Sawley concealed from the defendant Ginter the fact that he was acting for another person or persons and, on the contrary, I find it clear that Sawley did tell Ginter that he was acting for an undisclosed principal whom he was not at liberty to disclose and also that he, Sawley, could not disclose to Ginter what the property was wanted for.

He concluded by ordering specific performance but made no award of damages. The appellant took an appeal to the Court of Appeal for British Columbia which Court, by a majority judgment, dismissed the appeal and upheld the order for specific performance. In the Court of Appeal Norris J.A. dissented.

The only ground now advanced is that the option was not accepted within the time limited in the option agreement. In this regard the option ex. 1 read:

2. The term of the option is to be for *176* days from the date hereof expiring at the hour of 11:59 P.M. on the *24* day of *July 1964*.

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Hall J.

As stated, Sawley purported to exercise the option to purchase on July 23, 1964. The real difficulty is that if 176 days is taken as the term of the option the time for acceptance would have expired on July 19, 1964, and on that basis Sawley's acceptance on July 23rd was not in time. The respondents contend that the option continued in force until 11:59 P.M. July 24, 1964.

The ambiguity in the option agreement is patent since it provides two time periods within which the option could be exercised.

Faced with this ambiguity, Davey C.J.B.C., with whom McFarlane J.A. concurred, said:

> It is impossible to say from the document itself whether the term of the option was intended to be 176 days and the terminal date of July 24, 1964, was fixed by miscalculating their number, or whether it was intended to end on that date, and the number of intervening days was miscalculated. But the contract does fix the exact minute, hour, and day that the period of 176 days, and therefore the option, is to end. About that there can be no doubt. That circumstance, in my opinion, dominates the clause and controls its meaning. The erroneous description of the term as one of 176 days must therefore be rejected as being inconsistent with the declared intention. This approach leads to a result that in my opinion makes good sense, and has the advantage of construing this business document in the way that businessmen would understand it.
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> In concluding I should note the fact that no claim for rectification was advanced at the trial.

I agree with this reasoning and with the conclusion arrived at by the majority of the Court of Appeal.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: Thomas R. Berger, Vancouver.

Solicitor for the plaintiffs, respondents: K. L. Brawner, Vancouver.