JOHN WINDHAM O'REILLY and JOHN WINDHAM O'REILLY, Executor of the Will of MARY BERESFORD O'REILLY, Deceased, (*Defendants*) ..... APPELLANTS;

1969
*Apr. 29, 30
June 30

AND

MARKETERS DIVERSIFIED INC. (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Sale of land—Purchaser suing for specific performance—Agreement subject to condition of purchaser being able to purchase adjacent lot—Non-performance of condition—Whether condition precedent may be waived unilaterally.

The purchaser company sued for specific performance of an agreement to sell a certain parcel of land. The contract was subject to the condi-

*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

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tion of the "purchaser being able to purchase" an adjacent lot. The action was dismissed at trial on the ground that the purchaser had failed to prove performance of a condition precedent. The Court of Appeal reversed this decision and decreed specific performance. They held that the condition was a stipulation simply and solely for the benefit of the purchaser, that the purchaser might waive performance of the condition and that it was entitled to specific performance of the contract. The vendor appealed from the judgment of the Court of Appeal to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

When there is a stipulation or term in a contract non-fulfilment of which would render the contract incomplete and hence unenforceable, but which is for the benefit of the purchaser and severable, then the purchaser is entitled to waive it in order to be able to obtain a decree of specific performance. However, this is far removed from the case where the agreement is subject to a condition precedent. The vendor in the present appeal had no enforceable contract without performance of the condition. Neither had the purchaser. With the consent of the vendor, he could have introduced a term permitting him to waive the condition.

The case throughout was argued on the narrow ground of non-performance of the condition. If it had been pleaded and proved that performance of the condition precedent had been prevented by the act of the vendor, the result here might have been different.

Turney v. Zhilka, [1959] S.C.R. 578; *F. T. Developments Ltd. v. Sherman*, [1969] S.C.R. 203, followed; *Hawksley v. Outram*, [1892] 3 Ch 359; *Morrell v. Studd & Millington*, [1913] 2 Ch 648, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a decision of Wootton J. dismissing an action for specific performance of a contract for the sale of land. Appeal allowed and judgment at trial restored.

J. S. de Villiers, for the defendants, appellants.

A. N. Patterson, for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—Marketers Diversified Inc. sued John Windham O'Reilly, in his personal capacity and as executor of the Will of Mary Beresford O'Reilly, for specific performance of an agreement to sell Lot 7, James Bay, Prevost Island, Cowichan District, British Columbia. The contract was subject to the following condition:

Purchaser being able to purchase Lot No. 8 (described as adjacent to Lot 7, James Bay, Prevost Island,) owned by Mr. DeBerg on terms and conditions satisfactory to purchaser prior to September 1, 1966.

[1] (1968), 1 D.L.R. (3d) 387.

The action was dismissed at trial on the ground that the purchaser had failed to prove performance of a condition precedent. The Court of Appeal[1] reversed this decision and decreed specific performance. They held that the condition was a stipulation simply and solely for the benefit of the purchaser, that the purchaser might waive performance of the condition and that it was entitled to specific performance of the contract.

I would allow the appeal and dismiss the action.

The judgment under appeal is in direct conflict with two judgments of this Court: *Turney v. Zhilka*[2], and *F. T. Developments Ltd. v. Sherman*[3]. It is insecurely founded upon a passage in Fry on Specific Performance, 6th ed., p. 175:

> Where a contract contains stipulations which are simply and solely for the benefit of the purchaser, and are severable, the purchaser may waive them, and obtain judgment for specific performance of the rest of the contract.

The passage is supported by the authority of two cases: *Hawksley v. Outram*[4] and *Morrell v. Studd & Millington*[5]. But they are not authority for the proposition that a condition precedent may be waived unilaterally. They are illustrations of the principle that a plaintiff, seeking specific performance of a contract, may elect to take less than the promised performance from the other side. In the one case it was the right to use the name of the vendor partnership; in the other, it was the right to security for the unpaid balance of the purchase price. This was explained in *Turney v. Zhilka.*

In the chapter from which this passage was taken, the learned author was dealing with the subject of incompleteness of the contract. He had this to say:

> 368. (iv) It is of course essential to the completeness of the contract that it should express not only the names of the parties, the subject-matter, and the price, but all the other material terms. What are, in each case, the material terms of a contract, and how far it must descend into details to prevent its being void as incomplete and uncertain, are questions, which must of course be determined by a consideration of each contract separately. It may, however, be laid down that the Court will carry into effect a contract framed in general terms, where the law will supply the details; but if any details are to be supplied in modes which cannot be adopted by the Court, there is then no concluded contract capable of being enforced.

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[1] (1968), 1 D.L.R. (3d) 387.
[2] [1959] S.C.R. 578.
[3] [1969] S.C.R. 203, 70 D.L.R. (2d) 426.
[4] [1892] 3 Ch. 359.
[5] [1913] 2 Ch. 648.

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In the passage relied upon as the foundation for the judgment of the Court of Appeal the learned author is saying that when there is a stipulation or term in a contract non-fulfilment of which would render the contract incomplete and hence unenforceable, but which is for the benefit of the purchaser and severable, then the purchaser is entitled to waive it in order to be able to obtain a decree of specific performance. The authorities quoted and reviewed in *Zhilka* support this proposition. However, this is far removed from the case where the agreement is subject to a condition precedent.

The vendor in the present appeal had no enforceable contract without performance of the condition. Neither had the purchaser. With the consent of the vendor, he could have introduced a term permitting him to waive the condition. Such terms are common.

Throughout the British Columbia Courts and on this appeal, the case was argued on the narrow ground of non-performance of the condition. I am not overlooking the fact that soon after the contract was executed, O'Reilly wrote to his neighbour, the owner of Lot 8, regretting the fact that he had agreed to sell and notifying him that the contract was subject to a condition. There is very little evidence on this point. A representative of the purchaser company did go to see the neighbour. There is no evidence that he made any offer. The neighbour was not called as a witness.

The case was not put in and not argued on the basis that performance of the condition precedent had been prevented by the act of the vendor. If this had been pleaded and proved, the result here might have been different.

I would allow the appeal with costs here and in the Court of Appeal and restore the judgment at trial dismissing the action.

Appeal allowed and judgment at trial restored; with costs.

Solicitors for the defendants, appellants: de Villiers, Jones & Marsden, Victoria.

Solicitors for the plaintiff, respondent: Clay, Macfarlane, Ellis & Popham, Victoria.