Fred Morton Holdings Ltd. (*Defendant*) *Appellant*;

and

Harvey Davis as Administrator of the estate of Ralph Zilberman, deceased, and the said Harvey Davis as Administrator of the estate of Esther Zilberman, deceased (*Plaintiffs*) *Respondents.*

1978: December 6; 1978: December 21.

Present: Laskin C.J. and Pigeon, Dickson, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Interest — Contract for sale of land — Claim for interest on unpaid purchase money — Closing of contract and consequent right of possession dependent on rezoning — Purchaser giving option to third party before closing date — Nothing changed by reason of option — Interest claim dismissed.

The plaintiffs claimed interest on unpaid purchase money, under a contract for the sale of land, for the whole or part of the period between the stipulated date for adjustments and the later date of closing, which depended upon the defendant purchaser obtaining a variation in zoning to permit it to proceed with a commercial development. The date of the contract, as finally negotiated was July 26, 1971 (the date of the original contract later replaced) and the date fixed for adjustments (retained from the original contract) was September 1, 1971. Rezoning was obtained by the purchaser on May 31, 1973.

The purchase price (raised to $660,000 from the original contracted price of $650,000 and finally adjusted to $679,000) was payable on the following terms: $100,000 when rezoning approval was obtained, and the balance to be secured by a first mortgage with interest at 8 per cent per annum payable monthly from the first month following the exchange of documents and funds to complete the transaction. No issue arose here as to closing; the purchaser paid $100,000 on June 27, 1973, and by October 13, 1973, the vendors received the balance of the principal so that the mortgage provisions were by-passed.

In allowing an appeal from the dismissal at trial of the plaintiffs' claim, the Court of Appeal for Manitoba gave equitable relief, grounding it on the fact that the purchaser, by giving an option to a third party on February 22, 1972, to purchase part of the land had in

effect taken possession, constructively or notionally, although not physically. It was held that the purchaser made itself liable for payment of interest from the date it granted the option. Matas J.A., speaking for the Court, purported to apply the principle stated by the Privy Council in *International Railway Co. v. Niagara Parks Commission*, [1941] 3 D.L.R. 385, in these terms: "The true rule is that if in cases where Courts of Equity would grant specific performance the purchaser obtains possession of the subject-matter of the contract before the payment of the purchase-price he must in the absence of express agreement to the contrary pay interest on his purchase-money as from the date when he gets possession until the date of payment because it would be inequitable for him to have the benefit of possession of the subject-matter of the contract and also of the purchase-money." With leave, the purchaser appealed from the decision of the Court of Appeal to this Court.

Held: The appeal should be allowed.

Constructive possession could not arise from the granting of an option to purchase any more than it could arise from an assignment by the purchaser of the benefit of its contract. Nothing changed by reason of the option; the closing of the contract and consequent right of possession still depended on the rezoning. In the circumstances the equitable principle of the *Niagara Parks* case could not be applied here. This conclusion was supported by the fact that there could be no right to specific performance here until rezoning was obtained.

As to the contention that the choice of the February 22, 1972 date by Matas J.A. was really an exercise of discretion in the application of the equitable principle as to interest by reference to constructive possession as of the date for adjustments, namely, September 1, 1971, whatever might be said of this contention under a straightforward contract of sale, say of a residence, this could not be said here, having regard to the renegotiation of the contract as originally executed and to the provision for 10 per cent interest on $650,000 for extension of time to secure the rezoning. Moreover, the reasons of Matas J.A. in selecting the February 22, 1972 date were not read as being a discretionary relaxation in favour of the purchaser of the September 1, 1971 date for adjustments.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], allowing an appeal from a judgment of Solomon J. dismissing an action for interest claimed under a contract for the sale of land. Appeal allowed.

[1] [1978] 1 W.W.R. 61, 79 D.L.R. (3d) 641.

C. K. Tallin, Q.C., for the defendant, appellant.

V. Simonsen, for the plaintiffs, respondents.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—The issue in this appeal, which is here by leave, is a narrow one. It concerns a claim for interest on equitable grounds on unpaid purchase money, under a contract for the sale of land, for the whole or part of the period between the stipulated date for adjustments and the later date of closing, which depended upon the purchaser obtaining a variation in zoning to permit it to proceed with a commercial development. The date of the contract, as finally negotiated was July 26, 1971 (the date of the original contract later replaced) and the date fixed for adjustments (retained from the original contract) was September 1, 1971. Rezoning was obtained by the purchaser on May 31, 1973.

Under the terms of the contract, as actually made on February 25, 1972 and later varied by a memorandum of November 16, 1972, the purchaser agreed to the following terms:

1. The purchase price of the property, consisting of about 48 acres, was $660,000 (raised from the original contracted price of $650,000), subject to adjustment after survey at the purchaser's expense. The adjusted price turned out to be $679,000.

2. A deposit of $10,000 was to be made upon execution of the contract.

3. The completion of the contract was dependent on the obtaining of a zoning variation by the purchaser who agreed to pay

   (a) a non-refundable sum of $10,000, not to be credited as part of the purchase price, as consideration for extension of time to obtain rezoning up to April 30, 1972;

   (b) if rezoning was not obtained by that time, the purchaser was to pay interest monthly on $650,000 at the rate of 10 per cent per annum as consideration for

extension of time to obtain it up to and including July 15, 1973, or until the rezoning change was obtained, whichever should first occur, but payable in any event for the period from January 15, 1973 (the date limited under the agreement as signed on February 25, 1972) to April 15, 1973.

(c) The agreement was to be null and void if rezoning was not obtained by July 15, 1973.

(d) The interest payments aforesaid were also not refundable nor to be credited to the purchase price.

The purchase price was payable on the following terms: $100,000 when rezoning approval was obtained, and the balance to be secured by a first mortgage with interest at 8 per cent per annum payable monthly from the first month following the exchange of documents and funds to complete the transaction. No issue arises here as to closing; the purchaser paid $100,000 on June 27, 1973, and by October 13, 1973 the vendors received the balance of the principal so that the mortgage provisions were by-passed.

The adjustments to be made as of September 1, 1971, were covered by a clause which stipulated that "all adjustments of taxes, rentals, insurance premiums and other adjustments" were to be made as of that date. There was rental property on the land yielding a small rental of $75 per month. There were concurrent findings below that this clause did not embrace interest so as to entitle the vendors to claim it from September 1, 1971, to May 31, 1973, as a legal entitlement under the terms of the contract. I would not disturb this finding based as it was on construction of the adjustment clause in the context of the contract as a whole.

The trial judge, Solomon J., dismissed the claim for interest, rejecting the vendors' contentions based, respectively, on (1) the adjustment clause above-mentioned; (2) a claim for rectification on the ground of an alleged oral agreement to pay interest; (3) the application of s. 38 of *The Law of*

Property Act, R.S.M. 1970, c. L 90 (which so far as material, provides, *inter alia*, for adjustment of interest as of date of closing, unless otherwise stipulated); and (4) on equity. In the Manitoba Court of Appeal, Matas J.A., speaking for the Court, affirmed the trial judge's position on the first three grounds, noting only a misconstruction of s. 38 of *The Law of Property Act*, but concluding that the stipulation for adjustments as of September 1, 1971, did not convert that date to the date of closing.

The Court of Appeal did, however, give equitable relief, grounding it on the fact that the purchaser, by giving an option to a third party on February 22, 1972, to purchase part of the land had in effect taken possession, constructively or notionally, although not physically. Two paragraphs of the reasons of Matas J.A. are relevant on this point, as follows:

> Defendant argues that since the taxes exceeded the rents, resulting in a net loss to defendant of about $1,000.00, it would be inequitable to take the adjustments into account. In my view, if the only factor were the adjustments having been made as of September 1, 1971, exercise of the court's discretion in favour of the plaintiffs would not be warranted. The amounts are so small in relation to the interest claimed that it would be inequitable to assess interest against the defendant only because of the earlier date for adjustments.
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> But the question of adjustments must be considered in light of the action of the defendant in granting an option to BACM Ltd. It is not enough for defendant to argue that if it had failed to close with the plaintiffs it might have had an action for damages on its hands from BACM Ltd. and that this was no concern of the plaintiffs. I think it was very much the concern of the vendors, that its prospective purchaser, on February 22, 1972, acted as the beneficial owner and as if the land were already its asset and not that of the vendors. No doubt the shopping centre project was facilitated by the exchange of properties with BACM Ltd., resulting in great commercial convenience for the defendant. Defendant had effectively arrogated to itself the "fruits of possession" if not the physical possession of the land and made itself liable for payment of interest from the date it granted the option.

The learned justice purported to apply the principle stated by the Privy Council in *International Railway Co. v. Niagara Parks Commission*[2], at p. 394, in these terms:

> ... The true rule is that if in cases where Courts of Equity would grant specific performance the purchaser obtains possession of the subject-matter of the contract before the payment of the purchase-price he must in the absence of express agreement to the contrary pay interest on his purchase-money as from the date when he gets possession until the date of payment because it would be inequitable for him to have the benefit of possession of the subject-matter of the contract and also of the purchase-money.

The *Niagara Parks* case concerned the right to interest on compensation to which the appellant was entitled by statute upon the cessation of the operation of a railway under an expired franchise, the railway with its associated property being thereby vested in the Commission. The actual operation by the company ceased on September 12, 1932, on which date the Commission took possession. It was held that the company was entitled to interest from that date to the date of payment on the amount of compensation awarded to it in prescribed arbitration proceedings.

In my view, the present case does not, on its facts, invite the application of the principle of the *Niagara Parks* case. I do not see how constructive possession or the "fruits of possession" (to use Justice Matas' phrase) can arise from the granting of an option to purchase any more than it could arise from an assignment by the purchaser of the benefit of its contract. Nothing changed by reason of the option; the closing of the contract and consequent right of possession still depended on the rezoning. Indeed, there was evidence that the vendor wished to occupy part of the property in anticipation of the rezoning and as a result of the option agreement and permission to do so was refused by the vendors. In the circumstances I do not see how the equitable principle of the *Niagara Parks* case can be applied here. I am fortified in this conclusion by the fact that there could be no right to specific performance here until rezoning was obtained.

[2] [1941] 3 D.L.R. 385.

Respondent's counsel contended, however, that the choice of the February 22, 1972 date by Matas J.A. was really an exercise of discretion in the application of the equitable principle as to interest by reference to constructive possession as of the date for adjustments, namely, September 1, 1971. Whatever might be said of this contention under a straightforward contract of sale, say of a residence, I cannot see how this can be said here, having regard to the renegotiation of the contract as originally executed and to the provision for 10 per cent interest on $650,000 for extension of time to secure the rezoning. Moreover, I do not read the reasons of Matas J.A. in selecting the February 22, 1972 date as being a discretionary relaxation in favour of the purchaser of the September 1, 1971 date for adjustments.

I would, accordingly, allow the appeal, set aside the judgment of the Manitoba Court of Appeal and restore the judgment at trial dismissing the claim for interest, with costs to the appellant throughout.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Tallin & Kristjansson, Winnipeg.

Solicitors for the plaintiffs, respondents: Scarth, Simonsen & Co., Winnipeg.