Metropolitan Trust Co. of Canada v. Pressure Concrete Services Limited

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Commentary
Metropolitan Trust Co. of Canada v. Pressure Concrete Services Limited

By Hartley R. Nathan*

Conditional Contracts — Waiver of a True Condition Precedent — Damages

An interesting decision has been rendered by Holland J. of the Ontario High Court in the case of Metropolitan Trust Co. of Canada v. Pressure Concrete Services Limited raising three important questions. The first is whether a purchaser, having reserved a general right of waiver in a conditional contract is free to waive what has become known as “a true condition precedent”. The second and third questions concern the right of a vendor, on whom the obligation to satisfy a true condition precedent rests, to repudiate a contract because the condition has not been fulfilled, and whether the court may award damages against him on account of breach of this obligation.

The facts of the Metropolitan Trust case were somewhat complicated, but can be summarized briefly. Metropolitan Trust, as purchaser, had entered into an agreement of purchase and sale with Pressure Concrete, as vendor, with respect to certain real property upon which was erected a freezer plant under lease to Associated Freezers of Canada Limited. This lease had been assigned to I.A.C., a mortgagee, as additional security.

The transaction was conditional upon the following: the vendor delivering to the purchaser I.A.C.’s consent to the surrender of the present lease with Associated within ten days of execution of the agreement (paragraph 3); and a new lease being entered into between the purchaser and Associated effective from and after the closing date (paragraph 7). (The transaction was in effect a sale of the property with a lease back, as the vendor and Associated Freezers were related companies.)

Paragraph 15 of the agreement read as follows:

15. At such time as the conditions contained in Paragraph 3 hereof have been fulfilled or complied with or have been waived by the Purchaser, this Agreement shall constitute a binding contract of purchase and sale.

The agreement was executed on July 22nd, 1970 and the closing date was set for August 14th, 1970 (paragraph 5).

Prior to the execution of the agreement the vendor’s solicitor had advised the purchaser’s solicitor by letter that I.A.C.’s consent was reasonably assured. Subsequently, however, I.A.C. had decided to defer its decision until it had considered the relevant documents. The purchaser’s solicitor delivered a draft lease to the vendor’s solicitor on August 13th, 1970 which was then forwarded to I.A.C. in Montreal.

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Case Comment

Considerable correspondence passed between solicitors confirming a number of extensions of the closing date, the last being to August 27th, 1970. I.A.C. had not yet consented to the surrender of the existing lease but had submitted the necessary documents to its solicitors for an opinion. On August 31st, 1970, the vendor purported to repudiate the contract: on September 2nd, 1970, the vendor's solicitor notified the purchaser's solicitor that as no lease in satisfactory form had been presented to him prior to the last extended closing date (August 27th, 1970), and since no further extension had been agreed upon, the vendor was terminating the agreement.

The purchaser's solicitor then unilaterally fixed September 4th, 1970, as the closing date, tendered and the tender was refused. The purchaser thereupon issued a writ claiming specific performance and, in the alternative, damages for breach of contract. A preliminary point came up for consideration, namely, whether the vendor could repudiate without reasonable notice once the agreed closing date had passed. While the agreement was silent, Holland J. was of the view that the parties originally intended time to be of the essence; however, he held that since the vendor was not himself in a position to close (apparently he had not prepared the necessary documentation) and since the closing date had been extended on a number of occasions by mutual consent, it was unfair to categorically demand closing on August 27th. Time could be re-established to be of the essence only upon reasonable notice to the purchaser; only thereafter could the vendor repudiate if the purchaser would still be unable to close. In Holland J.'s words:

The vendor was not ready to close on August 27th for many reasons, quite apart from the lack of consent of I.A.C. to the new head lease. The time having gone by with neither party being in a position to close, the vendor could not give immediate notice of repudiation but should have given reasonable notice of his intention to repudiate should the conditions referred to in the contract not be complied with or waived: see Iwaneczuk v. Center Square Developments Ltd., [1967] 1 O.R. 447, 61 D.L.R. (2d) 193, and the authorities therein referred to at p. 452 O.R., p. 198 D.L.R. A party who is himself in default cannot rely upon time being of the essence to terminate the agreement.2

The vendor, having lost the preliminary point, then argued that since the condition precedent had not been fulfilled up to the date of trial, no agreement came into being. From the fact of tender by the purchaser and from the discussion of the relevant cases in the judgment, one can infer that the purchaser was taking the position that it had waived the fulfillment of the condition precedent. The agreement explicitly reserved his right of waiver. Holland J. denied the purchaser's right to waive:

This provision as to waiver, in my view, does not assist the purchaser since I do not see how the purchaser could waive, or purport to waive, this particular condition.3

If Holland J. meant to say by this that in no circumstances can a party waive a true condition precedent where a general right of waiver has been reserved, it is respectfully submitted he is wrong in law. A brief review of the relevant authorities would appear to be in order.

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Under Roman law, a condition was distinguished from an actual term of the contract and was considered an external fact upon which the existence of the obligation depended. At common law, an obligation or right suspended until the happening of a stated event was said to be subject to a condition precedent.

In *Tuney v. Zhilka*, an agreement for the purchase of real property contained a proviso that "the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision". Neither party undertook to fulfill this condition and neither reserved any power of waiver. The vendors repudiated the contract because the annexation condition had not been complied with; the purchaser sued for specific performance. At trial, Spence J., considering the condition to be simply and solely for the purchaser's benefit, referred to the following statement of the law in *Fry on Specific Performance*:

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.

He held that the condition could not be of any possible advantage to the vendor and the purchaser had the power to waive the condition without a reservation of such right. In his view, the test was "at whose instance and demand the stipulation was included in the contract." However, in the Supreme Court of Canada, Judson J., delivering the judgment of the Court held that the purchaser could not waive this condition. He went on:

The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party — the Village council. This is a true condition precedent — an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise, there can be no breach of contract until the event does occur.

To the same effect is the case of *F. T. Developments Limited v. Sherman*. Here, without any reservation of waiver, an offer was conditional on the approval of North York Council to a rezoning. It was held following the *Tuney* case that there was no unilateral right to waive the true condition precedent.

In *Gener Investments Limited v. Back*, the facts were similar to those in *Tuney* and *F. T. Developments*, save that the purchaser had reserved a

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5 Id.


11 (1968), 70 D.L.R. (2d) 426.

right of waiver. Here Hartt J. considered that the existence of this right of waiver meant that there was a “bilateral or agreed right of waiver” which distinguished Turney and F. T. Developments; as such, the purchaser could waive the condition. In his view:

The agreement itself expressly gave the purchaser a right of waiver and the contract was thereby made conditional upon the municipality rezoning the land unless so waived by the purchaser . . . this power of waiver takes the condition outside the realm of a true condition precedent for the purchaser was given an express right by the vendor to relinquish that benefit. . . . [T]he rezoning condition did not form the basis for the completion of a contract because the parties consented to the possibility of its waiver by the purchaser.13

In Barnett v. Harrison14 Thompson J. considered a situation where an agreement was made conditional upon approval of land services, rezoning and a site plan. The purchaser had reserved the right of waiver with respect to only approval of land services. Referring to the condition subject to waiver, he distinguished both the Turney and F. T. Developments cases, on the basis that in both cases no right of waiver had been reserved. However, speaking of the other conditions, Thompson J. stated:

Had it been desired by the parties that the right to waive the conditions by any of them should exist, it would have been a simple matter to express the reserve of such right in terms inserted into the contract, as was the situation in the case of Gener Investments Limited v. Back . . . .15

On appeal, the majority of the Court agreed with Mr. Justice Thompson’s disposition of the action; Jessup J.A. in dissent considered that the contract contained an implied right of waiver for these remaining conditions. It is clear from the majority judgment that the conditions referred to in the agreement of purchase and sale were “true conditions precedent” within the definition enunciated in the Turney case and in the absence of a specific right of waiver could not be unilaterally waived by the purchaser. Conversely, the result of the case is that it would have been possible for the purchaser to reserve a right of waiver for even these “true conditions precedent”.

It is respectfully submitted that, based on the above authorities, since the purchaser in Metropolitan Trust had expressly reserved the right of waiver, he could have waived fulfillment of both conditions referred to in paragraphs 3 and 7 and insisted on taking the property subject to the old tenancy arrangements. On the other hand, Holland J.’s statement may not have been intended to be of general application, but rather confined to the facts before the court. It appears that the purchaser had no intention of waiving the condition as to I.A.C. consent. The transaction was desirable to the purchaser only if it could be carried out in accordance with the offer, that is, with the new lease arrangements. This implication is borne out by two factors. First, a representative of the purchaser gave evidence16 that the transaction was attractive because of the nature of the new lease (a net

13 Id. at 699-700.
lease with no management problems), the yield to be expected on its investment and the fact that within 20 years the property would be owned free and clear. The situation would have been vastly different if the present tenancy were accepted with no change. Second, the purchaser asked the court to order specific performance under court direction to require the vendor to attempt to obtain I.A.C.'s consent (which the court refused to order). Our conclusion is that what Holland J. really meant to say concerning the waiver of a condition precedent was that the purchaser could not adopt a posture incompatible with the remedy requested by purporting to waive the I.A.C. consent and then asking the court for specific performance of the transaction, including I.A.C. consent.

Since the purchaser herein could not waive the condition precedent, the next question is faced squarely by Holland J.:

Did the vendor in the circumstances of this case, have the right to repudiate the contract because this condition (I.A.C.) had not been fulfilled?17

The vendor had the obligation to deliver I.A.C.'s consent to the surrender of lease (paragraph 3) and until this was done, there was no "binding contract of purchase and sale" (paragraph 15). After considering the relevant cases (mostly on exercise of a power of rescission) His Lordship, concluding that the vendor could not repudiate on this ground, remarked:

... a party shall not take advantage of his own wrong, or of an event brought about by his own act or omission.18

Holland J. came to this conclusion analogizing to the so called “doctrine of the fundamental obligation”19 which makes it clear that a party who has by his conduct destroyed the whole of the contract can no longer rely on one of its component parts, for example, an exemption clause in a contract. Admittedly, the analogy is incomplete. The doctrine presupposes that a contract is in existence; in the Metropolitan Trust case the agreement was a conditional one only, depending for its existence on the satisfaction of a “true condition precedent”, namely, the I.A.C. consent to be obtained by the vendor. To overcome this discrepancy, we must treat the cases involving conditional agreements as having two distinct stages: first, the “pre-agreement” stage where a defined obligation or promise has been undertaken or given and must be satisfied before the contract comes into effect (obtaining of I.A.C.'s consent by the vendor); second, on completion of the first stage, the carrying out of the remaining obligations under the contract, normally the conveyancing aspects of a real estate transaction. A party having an obligation to perform in either stage may not take advantage of his own wrong, i.e. his own non-performance, in an attempt to end the contractual relations between the parties. (The situation is substantially different where neither side promises to perform, e.g. the Turney case). In cases like Metropolitan Trust the appropriate party is obliged to use his best efforts to perform the

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condition; otherwise, he will be in breach of his obligations. Holland J. specifically alludes to the minimal efforts made by the vendor to obtain I.A.C.'s consent\(^{20}\) and refers at length to the Court of Appeal decision in \textit{Aldercrest Developments Ltd. v. Hunter}.\(^{21}\) Here, a transaction was conditional on Committee of Adjustment approval to a severance. The court found that the vendor who had undertaken to seek the necessary consent, was liable in damages for breach of an implied obligation to proceed with the application for consent to land severance, or to give authority to the purchaser so to proceed.

The Court seems prepared to award damages against a party who expressly or impliedly undertakes an obligation even in the pre-agreement stage, and fails to accomplish or use his best efforts at performance.

Holland J. awarded damages on the basis of the increase in the value of the property from the date of the purported repudiation of the contract to the date of judgment. He refused to limit damages to those prescribed by \textit{Bain v. Fothergill}\(^{22}\) which would have given the purchaser only nominal damages. Judgment was thereupon given for the purchaser with damages to be assessed by the Master on a reference, with reference back to his Lordship if further direction should be necessary.

The vague terms of the award raise the interesting question whether damages were to be calculated upon the value of the land subject to the present lease arrangements or what would have been the leasing arrangements had the contract been performed. Unfortunately, we are not given details of the lease with Associated. Yet, it was clear from the evidence that the purchaser was not prepared to purchase the property on the old lease basis. It would, therefore, be anomalous to give damages based on the present lease arrangements. Possibly His Lordship was considering only straight land values: the difference would represent the quantum of damages without consideration to any particular leasing arrangements.

In conclusion, the \textit{Metropolitan Trust} case shows that the party who undertakes performance of an obligation must at any stage in the contractual relationship be prepared to use his best efforts to perform such obligation, failing which he may be held liable in damages. The measure of damages in a case such as this should be the same as if he had performed all of his obligations up to the date of closing and had simply refused to complete.


As a matter of interest, in the \textit{Aldercrest} case it appears that the local Planning Board wrote to the vendor's solicitor after initial inquiries had been made to the effect that there had been a resolution of that Board that in the event an application were made for severance it would be their view that the subject land would be better developed by an overall plan of subdivision. In effect, the Planning Board was saying consent to severance would not be granted. No actual formal application to the Committee of Adjustment had been made by the Vendor.

\(^{22}\) (1874), L.R. 7 H.L. 158.