Osgoode Hall Law Journal

Volume 4, Number 1 (April 1966)

Article 10

Re Moore and Texaco Canada Ltd., [1965] 2 O.R. 253, 50 D.L.R. (2d) 300

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RE MOORE AND TEXACO CANADA LTD., [1965] 2 O.R. 253, 50 D.L.R. (2d) 300 (Ont. C.A.)—MORTGAGE—OPTION TO PURCHASE TO MORTGAGEE—WHETHER INCONSISTENT WITH THE RIGHT TO REDEEM—WHETHER COLLATERAL TERMS OPPRESSIVE—MORTGAGE IRREDEEMABLE FOR 25 YEARS—STATUTORY RIGHT TO REDEEM.—In the recent case of *Re Moore and Texaco Canada Ltd.*,[1] the High Court of Ontario was confronted with a mortgage transaction involving terms and conditions which the courts have customarily viewed with suspicion when found in a mortgage document. Charles Moore agreed to purchase from Texaco Canada Limited a service station in the City of Ottawa and to perfect the transaction five documents were signed by him. First, he signed an offer to purchase the service station and by the terms of the offer he agreed to sell only Texaco products at the service station for 25 years.[2] Second, he completed an application to Texaco for a mortgage loan wherein he agreed to a tie-in provision for a term of 25 years and also agreed to grant Texaco an option to repurchase the service station for $29,200, and to grant Texaco a right of first refusal on any offer tendered to Moore. Third, Texaco granted the property to Moore in a deed made in pursuance of The Short Forms of Conveyances Act,[3] which contained no reservations or conditions. Fourth, by a mortgage granted by Moore to Texaco for the unpaid purchase price the mortgagor waived the provision of the Interest Act,[4] s. 10, and The Mortgages Act,[5] s. 16, and an agreement of even date was declared to be incorporated into the mortgage. On a page added to the back of the mortgage, Moore granted Texaco an option to purchase the property for $29,200. Fifth, by an agreement of even date with the mortgage Moore again agreed to a tie-in provision for twenty-five years, agreed that the mortgage was to be irredeemable for 25 years, that the property was to be used primarily as a service station and granted the company the right to

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[45] Since the case, the English High Court has decided *Holden v. Holden* (1965), 109 Sol. Journal 1028, (1965) 12 Current Law, No. 336a. A wife successfully obtained an interlocutory injunction prohibiting her husband from selling the matrimonial home after deserting her. The husband owned the land subject to a mortgage to a bank. *N.P.B. v. Ainsworth* did not deny the wife's personal right to stay in the home, and in the absence of any evidence that the bank might exercise its rights upon default of mortgage payments, the wife was entitled to the injunction while her application under the Married Woman's Property Act came on for hearing.

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1 [1965] 2 O.R. 253, 50 D.L.R. (2d) 300 (Ont. H.C.).
2 Hereinafter referred to as a "tie-in provision".
3 R.S.O. 1950, c. 360.
4 R.S.C. 1952, c. 156.
5 R.S.O. 1960, c. 245.

terminate the agreement at the end of every fifth year and the right to repurchase the property.

The mortgage provided for monthly payments over ten years and a final payment at the end of the twenty-fifth year which could not be paid before that time. Moore, however, paid the mortgage off in nine years, except for the last payment which Texaco would not accept until the twenty-fifth year. He applied to the court for:

(a) an order declaring the option in favour of Texaco to be null and void, and
(b) an order declaring that the provisions making the mortgage irredeemable for 25 years and the tie-in provision, were null and void.

Determination of the Validity of the Option

The applicant asked for an order declaring the option void on the ground of the equitable maxium "Once a mortgage, always a mortgage",[6] and that consequently any stipulation restricting the equity of redemption is void as repugnant to the right of the mortgagor to redeem.[7] At equity, the right to redeem exists because it is of the essence of a mortgage transaction that the property is given as security for a loan only.[8] Grant J. in the present case restates the principle in the following words:

> An option given as a condition to the granting of a loan constitutes a clog on the equity of redemption and is repugnant to the right of the mortgagor to redeem if the transaction is one of loan only. The right to redeem and obtain a reconveyance of the property given as security exists because to hold otherwise would be repugnant to the principle of a loan and the true intentions of the parties.[9]

It was the intention of the parties which Grant J. seized upon to distinguish the present case from those decisions which had held that an option to purchase in a mortgage is void.[10] It was his opinion that the intention of the parties was to enter into a purchase and sale transaction, not a mortgage transaction.[11] There being no prohibition against a purchaser granting a vendor an option to repurchase, the present option was valid. He said:

> All the circumstances of the case indicate that the mortgage transaction as well as the option to purchase are parts of a vender and purchaser agreement and that therefore the equitable principle above referred to has no application and the option attached to such mortgage cannot on that ground be set aside or declared to be null and void.[12]

The decision of the learned judge was based on the judgment of Pickup C.J.O. in *Ottawa Construction Ltd. v. Barnhart-Cochrane*

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6 *Seton v. Slade* (1802), 7 Ves. 265, at p. 273.
7 *Newcomb v. Bonham* (1681), 1 Vern. 7.
8 E. H. Scammeel, Once a Mortgage, always a Mortgage (1961), 24 Mod. Law Rev. 385.
9 *Supra*, footnote 1, at p. 258.
10 The leading case is *Samuel v. Jarrah Timber and Wood Pairing Company Ltd.*, [1904] A.C. 323.
11 Grant J. applied the analysis of intention in *Wilson v. Ward*, [1930] S.C.R. 212, [1930] 2 D.L.R. 433.
12 *Supra*, footnote 1, D.L.R. at p. 307.

Ltd. et al.[13] wherein it was held that the intention of the parties must be looked at and given effect to, even if as part of the transaction the vendor takes back a mortgage to secure the unpaid portion of the purchase price and an option to repurchase. However, the *Ottawa Construction* case was a very different case from the present. There the lands were to all intents and purposes always under the control of the vendor who was given, not only a right to repurchase two thirds of the property conveyed to the purchaser, but a right to do so at the nominal consideration of one dollar within fourteen months of the conveyance, or as soon as the purchaser secured a building permit, whichever was sooner. In the words of Pickup C.J.O.:

> It was never the intention of the parties that the lands which, under the agreement for sale might revert to the appellant for a nominal consideration were to be vested in the appellant by way of security only.[14]

The sale in the present case was not such a transparent or artificial transaction as was the one in the *Ottawa Construction* case. The purchaser was clearly intended to get full and effective possession and ownership of the lands for a considerable period. Furthermore, the mortgage was clearly for security purposes and on the authorities "a mortgage can never provide at the time of making for any event or condition on which the equity of redemption shall be discharged and the conveyance made absolute."[15] It should therefore be immaterial that the mortgage is part of a larger transaction if, as in *Re Moore and Texaco,* the intention of the parties was to secure money by way of a purchase money mortgage.

Granting that the doctrine nullifying an option given to a mortgagee in a mortgage transaction is a technical one, nevertheless it would be more technical and confusing for the courts to develop over-subtle exceptions to the rule. An English court has recently refused to make such an exception in the case of an option granted by the mortgagor to a person willing to take a transfer of a mortgage and pay off the original mortgage.[16] Now that Grant J. has seen fit to make an exception to the general rule in the present case, we are left uncertain whether the exception applies in the case of all purchase money mortgages, or just in commercial transactions. The learned judge is at pains to point out that the granting of an option on the sale of a service station by a petroleum company is a necessary condition of the transaction to ensure that the station does not become the property of a competitor company and to enable the company to repurchase the property if the purchaser is, as

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[13] [1953] 4 D.L.R. 571 (Ont. C.A.). The Ontario Court of Appeal applied the short judgment of the English Court of Appeal in *Daires v. Chamberlain* (1909), 26 T.L.R. 138.

[14] [1953] 4 D.L.R. 571, at p. 575.

[15] *Samuel v. Jarrah, supra,* footnote 10, at p. 327 *per* Lord MacNaghten. As the quotation indicates, an option to purchase granted when the mortgagee is already on foot and by a separate and distinct transaction entered into after the creation of the Mortgage is perfectly valid although granted to the mortgagee: *Jesle v. Reeve,* [1902] 1 Ch. 53 (H.C.).

[16] *Lewis v. Frank Love Ltd.,* [1961] 1 W.L.R. 261, [1961] 1 All E.R. 446 (H.C.).

events turn out, an unsuccessful service station operator.[17] While it may well be argued that such an option is a necessary condition in certain commercial contracts of the present day,[18] one cannot help but have reservations, on two accounts, with the manner in which this new departure is advanced in the present case. First, is it possible to make the distinction between commercial and non-commercial transactions in the case of purchase-money mortgage and yet not apply the same distinction to other sorts of mortgages? There is no suggestion in the case that the result would have been the same in a non-purchase money mortgage situation; indeed, the distinction between purchase and non-purchase money mortgages is the explicit, if not the implicit, reason for the decision. Second, is not the purchaser of a service station the proverbial "little guy" who requires the protection of the court of equity when dealing with a corporation the size of Texaco? Commercial transactions involving two commercial entities may deserve a more restrained supervision by the courts than commercial transactions between corporate giant and an individual embarking on his first business venture. When dealing with options given in these latter transactions, it is suggested that the court should look to the relative bargaining strength of the parties and the terms upon which the option has been extracted[19] before declaring a hands-off policy.

Whether collateral terms are oppressive and unconscionable

The terms which the applicant alleged to be unconscionable and oppressive were: (i) the term making the mortgage irredeemable for 25 years; (ii) the tie-in provision; (iii) the right of first refusal in case of a sale by the mortgagee; (iv) the mortgagee's sole right to cancel the agreement; and (v) the mortgagee's right to repurchase the property.

Originally any collateral terms were held void[20] under the usury laws as they were considered an evasion of the law limiting the rate of interest. Since the repeal of the usury laws[21] collateral advantages will only be struck down if they are unconscionable or clog the equity of redemption.[22] In his judgment, Grant J. refers to *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.*,[23] the leading case establishing that if it is the intention of the parties to enter into a contemporaneous but collateral contract contained in the same document as the mortgage, that contract will not be struck down unless

[17] [1965] 2 O.R. 253, at pp. 260, 261.

[18] P. V. Baker, Options as clogs on the equity of redemption (1963), 77 L.Q.R. 163. G. L. Williams, The Doctrine of Repugnancy—III: "Clogging the Equity" and Miscellaneous Applications (1944), 60 L.Q.R. 190.

[19] In the present case, the option was granted to the mortgagee-vendor to repurchase the station at the same price at which the purchaser was buying the station.

[20] *Jennings v. Ward* (1705), 2 Vern. 520.

[21] In 1854.

[22] *Biggs v. Hoddinott*, [1898] 2 Ch. 307 (C.A.); *Kreglinger v. New Palagonia Meat and Cold Storage Co. Ltd.*, [1914] A.C. 25 (H.L.); *Barrett v. Hartley* (1866), L.R. 2 Eq. 789.

[23] *Supra*, footnote 22.

it is oppressive and unconscionable, or unless the right to redeem is abrogated. This doctrine was applied in *Knightsbridge Estates Trust v. Byrne*[24] to find a term of forty years not oppressive, and in *Clark v. Supertest Petroleum Company*,[25] a case with substantially the same setting as the present, Jarvis J. held that a term of 25 years was not oppressive. He states that:

> If the mortgagee showed that the petroleum company charged him for its products a price that was considerably higher than the price charged by other petroleum companies, I think possibly he would be in a position to show that a term of 20 years was unconscionable and oppressive.[26]

In view of this case, Grant J. had no trouble in holding that a term of 25 years was not unfair, particularly in view of the purchaser's full awareness of all the terms and the commercial circumstances of the transaction.

The learned judge held that no rule of equity prohibited the granting to Texaco of the right of first refusal because "it does not prevent the mortgagor from selling but only obligates him to give the respondent the first opportunity of purchasing at a price suitable to the mortgagor".[27] As far as the other terms in the transaction, Grant J. holds that:

> The terms of the agreement are somewhat more restrictive as to the use of the premises and more onerous as to the obligation of the mortgagor than those that have existed in prior reported cases but in view of the practices that now exist in the production and marketing of such products I am not prepared to find the said terms either unconscionable or unreasonable and the applicant is therefore not entitled to succeed on this basis.[28]

No assessment of the vulnerability of the purchaser or the strength of the vendor is made by Grant J. No real attempt is made to determine whether the terms on which these conditions were extracted were fair. The commercial necessities of one party to the contract become the sole test of the validity of the conditions.

The Statutory Right to Redeem

S. 16 of The Mortgages Act[29] gives a mortgagor the right to tender to the mortgagee the principal and interest due on the mortgage, with three months further interest in lieu of notice, at any time after the fifth year of the mortgage, and if he does so, "no further interest is chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage".[30] The applicant sought to combine s. 16 of The Mortgages

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24 [1939] Ch. 441 (C.A.).
25 [1958] O.R. 474, 14 D.L.R. (2d) 454 (Ont. H.C.).
26 *Ibid.*, O.R. at p. 483.
27 *Supra*, footnote 1, at p. 260.
28 *Ibid.*, at pp. 265, 266.
29 *Supra*, footnote 5. The Interest Act, s. 10, *supra*, footnote 3, is in substantially the same wording as s. 16 of The Mortgages Act.
30 There is no mention in s. 16 of a right to redeem except for the marginal note which states, "Right to redeem after 5 years". The Interpretation Act, R.S.O. 1960, c. 191, s. 9 states that a marginal note is not part of the Act and is only inserted for convenience.

Act with s. 68(7) of The Registry Act[31] which provides that a person entitled to redeem a mortgage may apply to a Judge for an order directing a person who has a duty to register a discharge to so register it, in order to create a statutory right to redeem. Unfortunately, as Grant J. points out, nothing in s. 16 of The Mortgages Act entitles the mortgagor to redeem as of right and so no statutory right could be relied upon by the present applicant. In the usual case, if money is tendered by the mortgagor to a mortgagee, it will be accepted by the mortgagee as it would be futile for him to have his money tied up in a mortgage that is not earning interest. If the mortgagee accepts the full amount due under the mortgage, he is obliged to discharge the mortgage and can be forced to do so by the mortgagor under s. 68(7) of The Registry Act[32] and s. 10(8) of The Mortgages Act.[33] Where, however, the mortgagee is a merchandising company and derives from the mortgage collateral advantages far outweighing the value of interest charges on the mortgage, he will not accept tender and, although the mortgage will not thereafter bear interest, the mortgagor is not entitled to redeem until the mortgage term expires.

No one can doubt that there is great value to be attached to freedom of contract in commercial transaction. Nevertheless, the implications of *Re Moore and Texaco* ought to be made clear:

(1) a merchandising company desiring to effect the result arrived at by Texaco, has a full set of precedents at his disposal in the present case,

(2) a merchandising company may validly attach to a purchase-money mortgage transaction conditions as to use of products and premises for indeterminate periods of time, but for at least twenty-five years,

(3) a merchandising company may validly attach an option to repurchase to a purchase-money mortgage with the result that before the mortgage term expires the company may repurchase the property. The advantages to the company of this method of dealing with service stations over the leasing method is obvious. The company can ensure that it retains control over profitable service stations which have increased in value by exercising its option to repurchase before the mortgage term expires. It need not repurchase the property if the station is unprofitable or decreasing in value. The company stands to gain everything and lose nothing.

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31 R.S.O. 1960, c. 348.
32 *Ibid.*
33 *Supra*, footnote 5.
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