ROLAND DOBSON (*Plaintiff*) .....APPELLANT;

AND

WINTON AND ROBBINS LIMITED (*Defendant*) ..... } RESPONDENT.

1959
Apr. 30
May 1
*Oct. 6

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Sale of land—Specific performance—Breach of contract—Vendor's claim for specific performance and damages—Vendor disposed of property while trial pending—Whether foundation for claim in damages gone—Right to elect remedy—Pleadings—Items of recoverable damages—The Judicature Act, R.S.O. 1950, c. 190.

The defendant agreed to purchase from the plaintiff a certain property for $75,000 and paid $4,000 as a deposit. The agreement was subject to a condition enabling the defendant to withdraw on giving notice within a defined time limit. The required notice was not given, and before the date of closing, the defendant advised the plaintiff of its repudiation of the contract. The plaintiff sued for specific performance and for damages for delay in carrying out the contract and in the alternative, for forfeiture of the deposit and punitive damages. While the trial was pending, the plaintiff sold the property for $70,000 to a third party. The trial judge dismissed the claim for damages and dismissed the counterclaim for the return of the deposit. Both decisions were affirmed by the Court of Appeal. The plaintiff appealed to this Court.

**Reporter's Note: On December 7, 1959, the judgment in this case was varied on consent to read: "The appeal is allowed with costs here and below, the Judgment of the Exchequer Court is set aside and the re-assessments for each of the years 1950 to 1954 inclusive are referred back to the Minister of National Revenue for further re-assessment by allowing as a deduction from the tax assessed in each of the said years the full amount of the tax paid by the Appellant to the Government of the United States of America in each of the said years on interest payments received from sources in the United States."

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Held: The action should be maintained and a reference directed to ascertain the damages.

The Supreme Court of Ontario has jurisdiction in every legal or equitable claim pursuant to s. 15(*h*) of *The Judicature Act*. The problem was not one of jurisdiction or substantive law but the narrow one of pleading, and this issue was decided wrongly against the plaintiff. The plaintiff's common law right of action was clear. On the purchaser's repudiation, the vendor could have forfeited the deposit and claimed for loss of bargain and out-of-pocket expenses. *The Judicature Act* gave him the right to join a claim of specific performance. At one stage of the proceedings he must elect which remedy he will take. But he is under no compulsion to elect until judgment, and the defendant is not entitled to assume that by issuing the writ for specific performance with a common law claim for damages in the alternative, the vendor has elected at the institution of the action to claim specific performance and nothing else. If a plaintiff sues in the alternative for specific performance or damages he must make sure that his claim for damages is identifiable as one at common law for breach of contract. The case of *Hipgrave v. Case*, 25 Ch. D. 356, was not authority for any principle that by doing this, the plaintiff has elected his remedy and is bound by his election. If the claim for specific performance alone is made, that constitutes an affirmation of the contract and, to that extent, an election to enforce the contract. But where the alternative common law claim is made, the writ is equivocal and there is no election. The pleading in the present case was clearly identifiable as a common law claim.

The plaintiff was entitled to the difference in price between the two sales against which the deposit must be credited. He was also entitled to the interest and the taxes payable during the period between the two sales. He was not entitled to punitive damages. It was a question of fact whether the course taken in mitigation of damages was reasonable. Having brought evidence showing a reasonable attempt to mitigate, it was up to the defendant to show that the steps taken were not reasonable. The plaintiff was not entitled to claim the real estate agent's commission since he was compensated on this head by the difference in price between the two sales. But he had a valid claim for the expenses of the second sale, including his solicitor's fee and any fee payable on the negotiation of that sale.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of McRuer C.J.H.C. Appeal allowed.

J. J. Robinette, Q.C., and *D. K. Laidlaw*, for the plaintiff, appellant.

H. H. Siegal, Q.C., and *L. S. D. Fogler*, for the defendant, respondent.

The judgment of the Court was delivered by

[1] (1958), 14 D.L.R. (2d) 110.

JUDSON J.:—The appellant, as vendor, sued the respondent, as purchaser, for specific performance of an agreement for the sale of vacant land. The agreement was subject to a condition enabling the respondent to withdraw on giving notice within a defined time limit that he did not wish to proceed. The respondent failed to give this notice both within the time and in the manner specified and the agreement, therefore, became unconditional and this aspect of the case needs no further consideration.

The date of closing was September 30, 1956. Before that date the defendant notified the plaintiff of its repudiation of the contract. Both at the trial and on appeal this notice has been so construed and the necessary inference drawn that it excused tender by the plaintiff. September 30 was a Sunday and the plaintiff tendered on Monday, October 1. In view of the repudiation of the purchaser, it is unnecessary to consider the validity of the tender either as to time or the sufficiency of the documents. The position taken by the parties at the date of closing was not in doubt. The contract made time of the essence, the vendor insisted on closing and refused an extension of time, and the purchaser had repudiated its obligation. Within a few days the vendor issued a writ for specific performance and damages.

The action came on for trial on October 31, 1957, and evidence was given by the first witness called by the plaintiff that a few days before, on October 18, 1957, the plaintiff had accepted an offer to sell the property for $70,000, which was $5,000 less than the purchase price provided for in his contract with the defendant. This transaction was actually closed on November 8, 1957, a few days after the trial. Any claim for specific performance had, therefore, disappeared and the action, if properly constituted, had become one for damages. The real question in the litigation emerged only at this time—whether the plaintiff, by selling as he did, could go on with a claim for damages and whether his pleading was adequate for this purpose.

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The plaintiff did ask for leave to amend his pleadings when the question was raised against him late in the trial. I have already mentioned that it became apparent early in the trial that there could be no claim for specific performance in view of the second contract. Both the trial judge and the Court of Appeal[1], McGillivray J.A. dissenting on this point, refused the amendment. Whether this discretion was properly exercised or whether it is reviewable in this Court is of no importance for counsel for the vendor is content to rest his appeal on the pleading as framed.

The trial judge dismissed the claim for damages but also dismissed the counterclaim for the return of the deposit, and both decisions were affirmed on appeal. The plaintiff appeals from the dismissal of his action and the defendant on appeal argued that his counterclaim for the return of the deposit should have been allowed.

The difficulty that the learned trial judge and the Court of Appeal found in this case is largely of historical origin. A plaintiff who elected to issue a Bill in Chancery for specific performance could get no damages in that Court until the *Chancery Amendment Act, 1858 (Lord Cairn's Act)*, which provided for the award of damages "either in addition to or in substitution for" specific performance. This legislation is still retained in *The Judicature Act*, R.S.O. 1950, c. 190, s. 18. Its application was never as wide in the Court of Chancery as might possibly have been expected. It did not confer upon the Court of Chancery the common law jurisdiction in an action for damages. The prerequisite in the Court of Chancery to the exercise of jurisdiction under this legislation in contract cases was the right to relief by way of specific performance. If, for any reason, a litigant was before the Court without any such right to relief, damages could not be awarded and the plaintiff was still left to his remedy, if any, in a court of law.

This jurisdictional difficulty disappeared with *The Judicature Act*. The Supreme Court of Ontario has jurisdiction in every legal or equitable claim and the purpose of the

[1] (1958), 14 D.L.R. (2d) 110.

legislation as expressed in the concluding words of s. 15(*h*) of the Act is that "all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." The problem now is not one of jurisdiction or substantive law but the narrow one of pleading, and it is this issue that has been decided in this case adversely to the plaintiff. Both Courts have held that, as pleaded, this case contained nothing more than a claim for specific performance and that with the disappearance of this claim as a result of the second sale, the foundation of the action had gone and the Court could not award damages in addition to or in substitution for specific performance. The submission that an alternative common law claim for damages was pleaded was rejected and the application for amendment refused.

The plaintiff's common law right of action on the facts of this case, as found by both Courts, is clear. On the purchaser's repudiation of the contract, the vendor could have forfeited the deposit and claimed for loss of bargain and out-of-pocket expenses. *The Judicature Act* gives him the right to join this claim with one of specific performance. At some stage of the proceedings he must, of course, elect which remedy he will take. He cannot have both specific performance and a common law claim for loss of bargain. But he is under no compulsion to elect until judgment, and the defendant is not entitled to assume that by issuing the writ for specific performance with a common law claim for damages in the alternative, the vendor has elected at the institution of the action to claim specific performance and nothing else. The present position is clearly summarized in Fry on Specific Performance, 6th ed., p. 604, in these words:

> Accordingly, a plaintiff may now come to the Court and say, Give me specific performance, and with it give me damages, or in substitution for it give me damages, or if I am not entitled to specific performance give me damages as at Common Law by reason of the breach of the agreement.

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The judgment at trial is based in part upon the proposition that a claim for specific performance must be deleted by amendment before the alternative claim for damages for breach of contract can be considered. The foundation for this theory must be that by issuing a writ for specific performance the plaintiff has elected this remedy and that no other is open to him. *Hipgrave v. Case*[1], is cited in support of this principle and the plaintiff's action has failed in this case largely because of the construction which the Courts have put upon that decision. There the plaintiff sued for specific performance with a claim in damages under *Lord Cairn's Act* "in addition to or in substitution for specific performance". No common law claim for damages was pleaded in the alternative. By selling the property after the commencement of the action and before judgment, the plaintiff disentitled himself to specific performance and with it fell his claim for damages as framed under *Lord Cairn's Act*. The case is of narrow scope. No application was made at trial to amend the pleadings and the Court of Appeal refused to entertain the application. The case was, therefore, decided on the principles applicable under *Lord Cairn's Act* and the Court of Appeal refused to turn the action into a common law action for damages.

Taken at its face value, the case does emphasize the importance of practice and pleading. If a plaintiff sues in the alternative for specific performance or damages, he must make sure that his claim for damages is identifiable as one at common law for breach of contract. Otherwise he is in danger of having his claim for damages treated as if it were made in substitution for or as an appendage to the equitable remedy of specific performance and then his claim may be defeated by anything which may bar the equitable remedy, unless an amendment is permitted. This is the advice given by the learned editor of Williams on Vendor and Purchaser, 4th ed., p. 1025.

[1] (1885), 28 Ch. D. 356.

The case, however, is not authority for any principle that by issuing a writ for specific performance with an alternative common law claim for damages, the plaintiff has elected his remedy and is bound by the election. If the claim for specific performance alone is made, that constitutes an affirmation of the contract and, to that extent, an election to enforce the contract. But where the alternative common law claim is made, the writ is equivocal and there is no election. The distinction was clearly pointed out by Luxmoore L.J. in *Public Trustee v. Pearlberg*[1]. The matter is summarized in Williams on Vendor and Purchaser, 4th ed., p. 1054, as follows:

> Thus, if a purchaser of land makes default in carrying out the contract, and the vendor sues to enforce it specifically, it will be a good defence that the vendor has *subsequently* made some sale or other disposition of the land, which effectually prevents him from completing the contract. This would be no defence to a claim by the vendor for damages for the purchaser's breach of contract.

In view of the character of the pleading in this case, it is unnecessary to say much more about the decision in *Hipgrave v. Case, supra.* It is obviously a case of narrow application and one that should be confined strictly within its limits. Within a few years it was referred to as a "remarkable decision" by Kay J. in *Gas Light & Coke Company v. Towse*[2]. It appears to be out of line with the authorities, decided under *Lord Cairn's Act* and referred to in *Elmore v. Pirrie*[3], which held that where there was an equity in the bill at the commencement of the suit, the fact of its disappearance before judgment would not disentitle a plaintiff to relief in damages. *Davenport v. Rylands*[4] and *White v. Boby*[5], are to the same effect. Further, it appears to be unduly restrictive of the change brought about by *The Judicature Act.* Both *Elmore v. Pirrie, supra,* and *Tamplin v. James*[6] held that under *The Judicature Act,* whether or not the court could in a particular case grant specific

[1] [1940] 2 K.B. 1 at 19.
[2] (1887), 35 Ch. D. 519 at 541.
[3] (1887), 57 L.T. 333 at 335.
[4] (1865), L.R. 1 Eq. 302, 307.
[5] (1877), 26 W.R. 133, 134.
[6] (1880), 15 Ch. D. 215.

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performance, it could give damages for breach of the agreement. In *Tamplin v. James,* Cotton L.J., at p. 222, stated the effect of *The Judicature Act* as follows:

> It has been urged that if specific performance is refused the action must simply be dismissed. But in my judgment—and I believe the Lord Justice *James* is of the same opinion—as both legal and equitable remedies are now given by the same Court, and this is a case where, under the old practice, the bill, if dismissed, would have been dismissed without prejudice to an action, we should, if we were to refuse specific performance, be bound to consider the question of damages.

I turn now to the prayer for relief, which I set out in full:

> (*a*) Specific performance of the written contract entered into between the parties dated July 23rd, 1956.
>
> (*b*) Damages in the amount of $5,000 for delay in the defendant's performance of the contract.
>
> (*c*) In the alternative to (*a*) and (*b*), forfeiture of its deposit and punitive damages for failure to perform the contract.
>
> (*d*) In any event his costs of this action.
>
> (*e*) Such further and other relief as this Honourable Court deems meet.

Clause (*a*) disappears from the action. Clause (*b*) seems to me equally applicable to a common law claim as one for specific performance in the circumstances of this case. The plaintiff was selling vacant land and until he was able to mitigate his damages by a re-sale, he lost the interest on the purchase price that he should have received and he had to pay taxes that the defendant should have paid. The interest should be calculated at the rate of 5 per cent. on $71,000 from the date of closing, September 30, 1956, until October 18, 1957, the date of the re-sale, and he is entitled to the taxes.

In spite of the obviously untenable claim for punitive damages—a claim that could not mislead any pleader—clause (*c*) is clearly identifiable as a common law claim for breach of contract. The measure of damages in this case is the difference between the price provided for in the first contract, $75,000, and the price provided for in the second contract, $70,000. Counsel for the appellant admits that

against the difference of $5,000 must be credited the deposit of $4,000; (Mayne on Damages, 11th ed., p. 234; 29 Hals., 2nd ed., p. 378).

Both the learned trial judge and the Court of Appeal have held that the plaintiff failed to prove these damages. The evidence is that after the repudiation by the purchaser, he listed the property with two real estate agents who had special experience in the field of vacant commercial property. They submitted no acceptable offers. He then sold the property through his own efforts and negotiations. What is held against him is that he did not bring expert evidence of value from the real estate agents and did not show what efforts they had made to sell the property. In a common law action there is a duty upon the plaintiff to mitigate his damages and whether the course taken is a reasonable one is a question of fact; (Mayne on Damages, 11th ed., pp. 147-8). It is difficult to understand what more the plaintiff could have done in this case and he did adduce a considerable volume of evidence showing a reasonable attempt to mitigate his damages and, having done so, it is for the defendant to show that those steps were not such as a reasonable man would have taken in mitigating his damages and in disposing of the property; (Mayne on Damages, 11th ed., p. 150). The defendant made no such attempt in this case but was content to rely upon the pleadings and upon his opposition to any amendment. Neither party had examined for discovery and the defendant made no application for an adjournment to enable it to meet this claim. However, because a reference is necessary on the next point, I would give leave to the defendant to re-open this matter with the burden on it of showing that the plaintiff has failed in his duty to mitigate his damages.

The plaintiff also claims $3,500 for the real estate agents' commission. He is not entitled to this because if he gets damages for the difference in price between the first and second contracts, he is fully compensated on this head. But he has a valid claim for the expenses of the second sale, including his solicitor's fee and the fee, if any, payable on the negotiation of the sale. There must be a reference to

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ascertain these amounts and to this extent the plaintiff must pay the costs of the reference. I would leave any further costs of the reference to be dealt with on confirmation of the report.

I would allow the appeal with costs throughout and direct a reference to ascertain the damages in accordance with these reasons. Judgment should be entered for the plaintiff, on the confirmation of the report for the amount so found. The direction for the reference may also provide that the defendant shall have the option to question the reasonableness of the plaintiff's efforts in mitigation of damages, provided it so elects before the issue of this judgment.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: L. S. Evans, Toronto.

Solicitor for the defendant, respondent: H. H. Siegal, Toronto.