DIMENSIONAL INVESTMENTS LIMITED ..... APPELLANT;

1967
May 16, 17
Oct. 3

AND

HER MAJESTY THE QUEEN .... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Sale of land—Indian lands—Contract for sale by Crown of Indian lands—Time of essence—Provision for termination of contract and forfeiture of money in the event of default—Whether penalty clause or pre-estimate of damages—Whether unconscionable penalty —Exchequer Court Act, R.S.C. 1952, c. 98, s. 48—Indian Act, R.S.C. 1952, c. 149, ss. 37 et seq.

By a contract dated March 14, 1959, the appellant company arranged to purchase Indian lands which had been surrendered to the Crown for sale on behalf of the Indians, in accordance with ss. 37 to 41 of the *Indian Act*, R.S.C. 1952, c. 149. The price was $6,521,946 to be paid by instalments over a period of two years. A sum of $323,763 was made payable to individual Indians on the execution of the contract, as well as a sum of $750,000 to the Crown. So long as the appellant was

*PRESENT: Cartwright, Abbott, Martland, Ritchie and Hall JJ.

1967

DIMENSIONAL INVESTMENTS LTD. v. THE QUEEN

not in default, it was entitled to obtain grants of portions of the land on making certain additional payments calculated on the property to be conveyed. The last payment required under the agreement was not paid. The contract contained a clause stipulating that time was of the essence and that upon default the Crown could terminate the contract and retain "any moneys paid under this agreement as liquidated damages and not as a penalty". The Crown having terminated the contract, the appellant, by its petition of right, sought to recover the moneys which it had paid in excess of what it had been required to pay for land which it had been granted. The trial judge reached the conclusion that but for s. 48 of the *Exchequer Court Act*, R.S.C. 1952, c. 98, the appellant would have been entitled to relief from forfeiture in respect of the moneys which remained in the hands of the Crown at the time of the presentation of the petition of right. The company appealed to this Court.

Held: The appeal should be dismissed.

Section 48 of the *Exchequer Court Act* afforded a complete defence to the Crown. That section provides that a clause in a contract with the Crown in which a drawback or a penalty is stipulated on account of non performance of any condition or neglect to complete any public work shall be construed as importing an assessment of damages by mutual consent.

Whether a provision in a contract is penal or not depends upon the construction of the contract but the question of unconscionability depends upon the circumstances of each case at the time when the clause is invoked. There was no evidence as to the value of the lands retained by the Crown and it therefore did not appear to be possible to say with any degree of certainty that the appellant's breach would not result in damage to the Crown to the approximate amount which it had retained.

Couronne—Vente de terres—Terres des Indiens—Contrat pour la vente par la Couronne de terres des Indiens—Le temps étant de l'essence du contrat—Clause prévoyant la terminaison du contrat et la forfaiture des argents dans le cas de défaut—La clause impose-t-elle une peine ou est-elle une évaluation préalable des dommages—La peine est-elle déraisonnable—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 48—Loi sur les Indiens, S.R.C. 1952, c. 149, arts. 37 et seq.

En vertu d'un contrat en date du 14 mars 1959, la compagnie appelante a convenu d'acheter des terres d'Indiens qui avaient été cédées à la Couronne pour être vendues au profit des Indiens, conformément aux arts. 37 à 41 de la *Loi sur les Indiens*, S.R.C. 1952, c. 149. Le prix était de $6,521,946 et devait être payé par versements sur une période de deux ans. Une somme de $323,763 était payable aux Indiens individuellement lors de la signature du contrat, ainsi qu'une somme de $750,000 à la Couronne. En autant que la compagnie appelante ne manquait pas à ses engagements, elle avait droit d'obtenir l'octroi de parties de ces terres en payant des montants additionnels calculés sur la valeur de la propriété transférée. Le dernier paiement dû en vertu du contrat n'a pas été fait. Le contrat contenait une clause stipulant que le temps était de l'essence et que, sur défaut, la Couronne pouvait mettre fin au contrat et retenir tous les argents

payés en vertu du contrat comme étant les dommages convenus et non pas comme étant une peine. La Couronne ayant mis fin au contrat, la compagnie appelante, par sa pétition de droit, a tenté d'obtenir la remise des argents qu'elle avait payés en surplus de ce qu'elle était tenue de payer pour les terres qui lui avaient été octroyées. Le juge au procès en est venu à la conclusion que si ce n'eut été de l'art. 48 de la *Loi sur la Cour de l'Échiquier*, S.R.C. 1952, c. 98, la compagnie appelante aurait pu recouvrer les argents qui étaient encore entre les mains de la Couronne lorsque la pétition de droit fut présentée. La compagnie en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

L'article 48 de la *Loi sur la Cour de l'Échiquier* était une défense complète en faveur de la Couronne. Cet article porte qu'une clause dans un contrat avec la Couronne stipulant une retenue ou imposant une peine pour l'inexécution d'une condition ou pour la négligence de parfaire un ouvrage public, doit être interprétée comme impliquant une évaluation, de consentement mutuel, des dommages.

Qu'une clause dans un contrat soit pénale ou non dépend de l'interprétation du contrat, mais la question de savoir si elle est déraisonnable dépend des circonstances dans chaque cas au moment où la clause est invoquée. Il n'y avait pas de preuve de la valeur des terres retenues par la Couronne, et alors il ne semble pas être possible de dire avec un degré quelconque de certitude que les dommages subis par la Couronne et occasionnés par la rupture du contrat ne s'élevaient pas au montant approximatif retenu par la Couronne.

APPEL d'un jugement du Juge Thurlow de la Cour de l'Échiquier du Canada[1], sur une pétition de droit. Appel rejeté.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], on a petition of right. Appeal dismissed.

W. B. Williston, Q.C., and *R. J. Rolls*, for the appellant.

D. S. Maxwell, Q.C., and *N. A. Chalmers*, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Thurlow of the Exchequer Court of Canada[1] by which he ordered that the present appellant was not entitled to any of the relief which it had claimed in its petition of right.

---

[1] [1966] Ex. C.R. 761.

1967

DIMENSIONAL INVESTMENTS LTD. v. THE QUEEN

Ritchie J.

The appellant is a company which was created solely for the purpose of entering into the transaction which is the subject matter of the present litigation. The appellant's principals were land speculators and had arranged for the purchase of certain Indian lands which had been surrendered to Her Majesty for sale on behalf of the Sarnia Band of Indians in accordance with ss. 37 to 41 of the *Indian Act*. This arrangement was made the subject of an agreement dated March 14, 1959, which was executed on behalf of the Crown and the appellant and each page of which was signed by the solicitor for the Indian Band. The provisions of this agreement have been thoroughly analyzed by Mr. Justice Thurlow and it is only necessary for me to say that it provided for the total purchase price of $6,521,946 to be paid by instalments over a period of two years. The sum of $323,763.63 was made payable to individual Indians on the execution of the agreement and so long as the appellant was not in default under the agreement, it was entitled to obtain grants of portions of the land on making certain additional payments calculated on the area and location of the property to be conveyed. The last payment required under the agreement, which amounted to $4,198,549.15, together with interest in the amount of $107,408.28, fell due on March 15, 1961, and was not paid within 30 days after notice had been given to the appellant by the Minister in accordance with para. 10 of the agreement which reads as follows:

> The Purchaser convenants and agrees that if default be made in payment of the said purchase price and interest, or any part thereof, upon the days and times hereinbefore provided, or if default be made in the performance or observance of any of the covenants, agreements and stipulations to be performed and observed by the Purchaser, the Minister shall be entitled to give the Purchaser thirty days' notice in writing requiring it to remedy such default, and upon such notice having been given and such default not having been remedied, this agreement shall, at the option of the Minister, be terminated and all rights and interest hereby created or then existing in favour of the Purchaser or derived by it under this agreement with respect to the lands not already granted to the Purchaser shall cease and determine and the Minister shall be entitled to retain any moneys paid under this agreement as liquidated damages and not as a penalty.

This paragraph must be read in conjunction with para. 13 which provides:

> It is agreed by and between the parties hereto that time shall be of the essence of this agreement, and that no extension of time for any payment by the Purchaser or for rectification of any breach of any covenant,

agreement or stipulation herein contained shall operate as a waiver of this provision with respect to any other payment or rectification or extension of time, except as specifically granted in writing by the Minister.

1967

DIMENSIONAL INVESTMENTS LTD. v. THE QUEEN

Ritchie J.

It seems to me to be important to note that in dealing with the appellant the Crown was from the outset dealing with a company which never at any time had assets which were equivalent to the balance required at the end of the term of the agreement, and that at least from August 1959, it ceased to have backers who had any such assets. In view of this situation, it is not surprising that the appellant never at any time sought specific performance of the agreement, and that six months after default it was still not prepared to seek this remedy unless it was given a further two years in which to raise the money.

The position at the time of the default was that the appellant had paid $2,323,396.85 which, it is agreed, was $1,350,000 in excess of what it was required to pay for land which had been granted to it or its nominees. Of this $1,350,000 however, $375,000 had been paid out by the Crown to individual members of the Indian Band in accordance with the provisions for surrender and the learned trial judge has found that at the time of the commencement of these proceedings, at least $975,000 of the amount paid by the appellant remained in the hands of the Crown as trustee for the Indian Band.

The appellant's case is that in spite of the express language contained in the last line of the above paragraph, the provisions entitling the Minister "to retain any moneys paid under this agreement as liquidated damages" did not constitute an agreement for a genuine pre-estimate or assessment of the damages which were likely to result from breach of the agreement, but that it was in the nature of a penalty and that in the circumstances of the case it was unconscionable for the Crown to terminate the suppliant's rights in the land and also to retain the money which remained in its hands and which had been paid by the appellant. The appellant sought the return of the money by way of relief against the forfeiture which it contended had been wrongly imposed upon it by the terms of para. 10 of the agreement.

In dismissing the appellant's claim, the learned trial judge found s. 48 of the *Exchequer Court Act* to be applicable to the circumstances. That section, which applies to

1967

DIMENSIONAL INVESTMENTS LTD. v. THE QUEEN

Ritchie J.

claims over which the Exchequer Court has jurisdiction which arise out of "any contract in writing" reads as follows:

> 48. No clause in any such contract in which a drawback or penalty is stipulated for on account of the non-performance of any condition thereof, or on account of any neglect to complete any public work or to fulfil any covenant in the contract, shall be considered as comminatory, but it shall be construed as importing an assessment by mutual consent of the damages caused by such non-performance or neglect.

I am in full agreement with Mr. Justice Thurlow in holding, for the reasons which he has stated, that this section applies to the contract here in question and affords a complete defence to the respondent. It accordingly follows that I would dismiss this appeal and it would be unnecessary to deal with the matter further were it not for the fact that Mr. Justice Thurlow in his most thoughtful judgment, has considered the question of whether the appellant would have been entitled to relief if s. 48 did not apply to the agreement here in question, and has reached the conclusion that but for s. 48, the appellant would have been entitled to relief from forfeiture in respect of the $975,000 which remained in the hands of the Crown at the time of the presentation of the petition of right. In reaching this conclusion, Mr. Justice Thurlow has rested his reasoning primarily on the decision of the majority of the Court of Appeal in *Stockloser v. Johnson*[2] (hereinafter referred to as the *"Stockloser" case*) in which case Denning L.J. summarized the view of the majority at page 489 in the following terms:

> *But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause),* then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. That is, I think, shown clearly by the decision of the Privy Council in *Steedman v. Drinkle* (1916) 1 A.C. 275, where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Sumner.
>
> The difficulty is to know what are the circumstances which give rise to this equity, but I must say that I agree with all that Somervell L.J. has said about it, differing herein from the view of Romer L.J. Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money.

---

[2] [1954] 1 Q.B. 476, [1954] 1 All E.R. 630.

Although he does not expressly say so, it is clear to me from Mr. Justice Thurlow's reasons for judgment that he was of opinion that the Crown's retention of the moneys as well as the lands in the present case was "unconscionable" and that it is for this reason that he would have granted relief from forfeiture had it not been for the provisions of s. 48 of the *Exchequer Court Act*.

The *Stockloser case, supra,* is characterized by a sharp difference of opinion between Romer L.J., who spoke for himself alone, and Somervell L.J. with whom Denning L.J. agreed. Lord Justice Romer concluded that "in the absence of some special circumstances, such as fraud, sharp practice or other unconscionable conduct of the vendor" no intervention was permissible except to allow an extension of time for payment. Somervell and Denning L.JJ. on the other hand, thought that the province of equity was not so circumscribed and that it permitted more general relief whenever the forfeiture clause was of a penal nature—where, that is, the sum forfeited was wholly disproportionate to the damage suffered—provided that in the circumstances it was unconscionable for the money to be retained. The opinion of the majority, which was adopted by Thurlow J., is set forth at length elsewhere in these reasons, but I do not find it necessary for the purposes of this case to adopt either view because even if the opinion of the majority were to prevail, it would not, in my opinion, entitle the appellant to succeed in the circumstances of the present case.

The portion of Lord Somervell's judgment which is italicized and expressly adopted by Mr. Justice Thurlow occurs at page 487 and reads as follows:

> *I think that the statements of the law in the cases to which I will refer indicate a wider jurisdiction. I think that they indicate that the court would have power to give relief against the enforcement of the forfeiture provisions, although there was no sharp practice by the vendor, and although the purchaser was not able to find the balance. It would, of course, have to be shown that the retention of the instalments was unconscionable, in all the circumstances.*

Mr. Justice Thurlow expresses the opinion that this view follows logically from what was said by Mr. Justice Duff in this Court in *Snell v. Brickles*[3], and in this regard

[3] (1914), 49 S.C.R. 360 at 371, 20 D.L.R. 209.

1967

DIMENSIONAL INVESTMENTS LTD. v. THE QUEEN

Ritchie J.

I think it should be noted that the latter case was one in which specific performance was sought and granted and was not one in which "the purchaser was not able to find the balance". This distinction appears to me to be fundamental.

It was strongly urged by counsel on behalf of the appellant that the last line of para. 10 of the agreement made provision for a penalty and that it could not be treated as providing for a genuine pre-estimate of damages. In this regard it is perhaps desirable to refer to the difference between "a penalty" and "liquidated damages" as it was succinctly expressed by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.*[4], where he said:

> The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

In considering the agreement at issue in the present appeal, it must, as I have said, be remembered that the appellant was a land speculator and the Crown was exposed to a very real commercial danger which it would have suffered had the appellant failed to make its payment after having drawn down and sold the more valuable lands leaving the respondent with less commercially attractive and possibly closed in lands and thereby seriously reducing such assets as remained. Under these circumstances, any exact determination of the damage flowing from a breach of the agreement was almost an impossibility and it appears to me to be not at all unreasonable to view the provisions of para. 10 of the agreement as reflecting a genuine pre-estimate of the damage to which both parties had agreed.

As has been indicated, even if para. 10 had been found to impose a penalty rather than a genuine pre-estimate of damage, it does not follow from the *Stockloser* case, *supra*, that this would have constituted a ground for granting the relief claimed. It is clear that the majority of the Court of Appeal in the *Stockloser* case subscribed to the view that in order to afford such relief it must also

[4] [1915] A.C. 79 at 86.

be found to "be unconscionable for the seller to retain the money". As this was the view adopted by Mr. Justice Thurlow, it appears to me to be desirable to take note of what was said by Lord Radcliffe in this connection in *Campbell Discount Co. Ltd. v. Bridge*[7]. In that case the members of the House of Lords were unanimous in holding that a provision in a hire purchase agreement for a second-hand car constituted a penalty from which the purchaser should be relieved. In the course of his reasons for judgment, Lord Radcliffe, however, had occasion to say, at page 626:

> Even such masters of equity as Lord Eldon and Sir George Jessel, it must be remembered, were highly sceptical of the court's duty to apply the epithet 'unconscionable' or its consequences to contracts made between persons of full age in circumstances that did not fall within the familiar categories of fraud, surprise, accident, etc., even though such contracts involved the payment of a larger sum of money on breach of an obligation to pay a smaller sum (see the latter's judgment in *Wallis v. Smith* 21 Chancery Division 243).

In the same case and at the same page, Lord Radcliffe said:

> 'Unconscionable' must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other, and equity lawyers are, I notice, sometimes both surprised and discomfited by the plentitude of jurisdiction, and the imprecision of rules that are attributed to 'equity' by their more enthusiastic colleagues.

Whether a provision in a contract is penal or not depends upon the construction of the contract but the question of unconscionability must depend upon the circumstances of each case at the time when the clause is invoked. In the present case I do not think that the invoking of the provisions of para. 10 of the agreement was unconscionable. There is no evidence as to the value of the lands retained by the Crown and it therefore does not appear to me to be possible to say with any degree of certainty that the appellant's breach would not result in damage to the respondent to the approximate amount which it retained.

In this Court Mr. Williston raised an argument which had not been mentioned in the Court below to the effect that the notice of termination of the agreement was defective in that it was dated March 15, 1961, and the appellant

[7] [1962] A.C. 600.

1967

DIMENSIONAL INVESTMENTS LTD. v. THE QUEEN

Ritchie J.

could not be said to have been in default under the provisions of para. 1(*c*) of the agreement until the end of that day.

The carbon copy of the notice in question which was produced by the appellant bears the notation "signed and mailed on March 16th, 1961" and it is to be noted that para. 14 of the agreement reads as follows:

> Wherever in this agreement it is required or permitted that notice or demand be given or served by either party to this agreement to or on the other, such notice or demand shall be given or served in writing and forwarded by registered mail addressed as follows: . . .

I take it from these provisions that the date of mailing is to be treated as the date of the giving of the notice and that the notice in question is accordingly to be taken as having been given on March 16, 1961.

Quite apart from the fact that until the argument in this Court the appellant's case was conducted on the basis that the Crown had terminated the contract in accordance with its strict legal right and that the appellant was seeking equitable relief, I am in any event of opinion that the notice was in accordance with the terms of the agreement.

For all these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Starr, Allen & Weekes, Toronto.

Solicitor for the respondent: D. S. Maxwell, Ottawa.