

RALPH NEWCOMBE BARRICK and  
THERESA MAY FLORELLA BARRICK, EXECUTORS OF THE ESTATE OF ELI JAMES BARRICK, deceased, and WILLIAM HOHMANN (*Defendants*) .....

APPELLANTS;

1950  
\* May 18, 19  
\* Oct. 3

AND

FRANK J. CLARK (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN

*Contract by correspondence—Sale of Farm Land—Offer by Post—Acceptance—Reasonable Time.*

In negotiations for a sale conducted by correspondence an offer unlimited by its terms as to time must be accepted within a reasonable time.

*Held:* In the circumstances of this case the acceptance made on December 10 of the offer contained in the letter of November 15, was not made within a reasonable time.

*Per:* Estey J.—What will constitute a reasonable time depends upon the nature and character of the subject matter and the normal or usual course of business in negotiations leading to a sale thereof, as well as the circumstances of the offer including the conduct of the parties in the course of the negotiations. *Manning v. Carrique*, (1915) 54 O.L.R. 453.

APPEAL from a judgment of the Court of Appeal of Saskatchewan, (1) reversing the judgment of McKercher J. who dismissed the respondent's (plaintiff's) action for specific performance of an alleged contract for the sale of farm land. The facts of the case are fully stated in the reasons for judgment which follow.

*H. F. Parkinson, K.C.*, and *W. J. Anderson* for the appellants, Barrick.

*F. E. Jaenicke, K.C.*, for the appellant, Hohmann.

*G. H. Yule, K.C.*, for the respondent.

The judgment of the Chief Justice and of Kellock J. was delivered by

KELLOCK J.:—The first question which arises in this appeal is as to whether or not, treating the appellant Barrick's letter of the 15th of November, 1947, as an

\*PRESENT: Rinfret C.J. and Taschereau, Kellock, Estey and Locke JJ.

(1) [1949] 2 W.W.R. 1009; [1950] 1 D.L.R. 260.

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offer, the purported acceptance of the respondent was in time. The learned trial judge held that, having regard to the circumstances, it would be unreasonable for the respondent to expect that the appellant's offer was still open for acceptance on December 10th. In the view of the Court of Appeal, (1) the offer was still open for acceptance on the above date. This view was based on two grounds, first that in the correspondence which preceded the offer of November 15th no haste was shown, and therefore December 10th was a reasonable time for acceptance, and second that, as a matter of law, the offer continued in effect until it was actually received by the respondent on the day upon which he purported to accept it.

The letter of November 15th, 1947, reads as follows:

166 Briar Hill Ave.,  
 Toronto, Ont.,  
 November 15th/47.

Mr. F. J. Clark,  
 Luseland, Sask.

Dear Sir:

In reply to your recent letter, in which you offer \$14,500 cash for the  $\frac{3}{4}$  sections  $W\frac{1}{2}$  of 9 and  $SW\frac{1}{4}$  of 16-37-24 W of 3rd. I have delayed answering in order to consult with those interested in the Estate and thereby be in a position to give something concrete.

We are prepared to sell this land for \$15,000 cash. If this price is satisfactory to you, the deal could be closed immediately, by preparing an agreement for sale to be given you on receipt of initial payment of \$2,000—transfer of clear title to be given you on Jan. 1st, 1948, on receipt of balance of purchase price, \$13,000. The present tenant Kostresky's lease expires March 1st, 1948.

Trusting to hear from you as soon as possible.

Yours truly,

(Sgd.) R. M. Barrick.

Treating this letter as an offer, there are, I think, three indications in the letter itself which show that December 10th was beyond a reasonable time for acceptance. In the first place, the appellant states that if respondent were satisfied with the price, the transaction could be *immediately* closed by the preparation and delivery of an agreement of sale in exchange for \$2,000 to be paid by the respondent. It is true that the word "immediately" does not directly relate to the acceptance of the offer, but it indicates that, as regards the closing of the transaction which would follow acceptance of the offer, there should be no delay.

In the second place, the respondent is asked to give his answer "as soon as possible." It is true that this phrase is not an unusual one, but it is a circumstance indicating that promptness and not dilatoriness was expected.

The clearest indication in the letter, however, as to the time for acceptance is the provision that after acceptance of the offer, a formal agreement of sale would be executed and exchanged for a payment of \$2,000, and that the balance of the purchase price would be paid on the 1st of January, 1948, when a conveyance would be given. I think it would be absurd to say that the appellant expected that the respondent could accept the offer as late as December 10th (of which the appellant would not learn until the 13th or 15th) and that thereafter an agreement would be prepared and sent out to the respondent to be exchanged for the \$2,000 payment. This would use up most of the little more than two weeks intervening between the receipt of the acceptance by the appellant and the 1st of January. In my opinion, the letter clearly indicates by its own terms that acceptance was to be made promptly if at all, and that December 10th was entirely outside the contemplation of the offerer. The only reason the offer was not in fact dealt with promptly was because the respondent was absent on a hunting expedition.

This view of the matter is borne out by the letter of the respondent's wife of the 20th of November, 1947, which acknowledges receipt that day of the appellant's letter. In her letter Mrs. Clark states that her husband was then out of town but was expected back in about ten days. She says that she will endeavour to locate him "in the meantime" and asks that the appellant "hold the deal open" until he hears from the respondent. It is clear, I think, that in the view of Mrs. Clark at least, unless the deal were so held open, the offer would expire of its own force within the ten days. Her letter was adopted by the respondent in his later correspondence.

The appellant in his letter of the 12th of December, 1947, states that he "held the deal open for you until December 6th when I received an offer from William Hohmann." This is in error for December 3rd, as Hohmann's offer was received and accepted by the appellant

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on that date. In his oral evidence Barrick said he had held the deal open from day to day, but I see no reason why he could not equally, from day to day, take the position that he would not continue to do so.

I see nothing in the earlier correspondence which is inconsistent with the view just expressed. The appellant was obtaining information as to the proper value of the farm in question, and he also had to consult his beneficiaries before he was in a position either to make or accept an offer. He was pursuing both lines of enquiry between September 8, 1947, and November 15, when he made the offer in question. In my opinion, the learned trial judge came to the correct conclusion.

Nor can I agree with the proposition laid down in the Court of Appeal that the offer must be considered as a matter of law as remaining open until the respondent actually received it on his return from his hunting trip. The authorities relied on do not establish such a proposition.

I would allow the appeal and restore the judgment of the learned trial judge. The appellants should have their costs in this court and in the Court of Appeal.

TASCHEREAU J.:—The plaintiff-respondent's claim is for specific performance. The action was dismissed by Mr. Justice McKercher, but the Court of Appeal for the Province of Saskatchewan, unanimously allowed the appeal, and ordered the appellants to execute and deliver to the respondent, a transfer of the land which is the subject of the present litigation.

On the 15th of November, 1947, the appellant, R. N. Barrick, acting also on behalf of Theresa May Florella Barrick, his co-executor of the estate of James Barrick, addressed the following letter to F. J. Clark of Luseland, Sask.:

166 Briar Hill Ave.,  
 Toronto, Ont.  
 Nov. 15, 1947.

Mr. F. J. Clark,  
 Luseland, Sask.

Dear Sir:

In reply to your recent letter, in which you offer \$14,500 cash for the  $\frac{3}{4}$  sections W $\frac{1}{2}$  of 9 and SW $\frac{1}{4}$  of 16-37-24 W of 3rd. I have delayed answering in order to consult with those interested in the Estate and thereby be in a position to give something concrete.

We are prepared to sell this land for \$15,000 cash. If this price is satisfactory to you, the deal could be closed immediately, by preparing an agreement for sale to be given you on receipt of initial payment of \$2,000—transfer of clear title to be given you on Jan. 1st, 1948, on receipt of balance of purchase price \$13,000. The present tenant Kostrosky's lease expires March 1st, 1948.

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Trusting to hear from you as soon as possible.

Yours truly,

(Sgd.) R. N. Barrick

The letter which was sent from Toronto, Ont. reached Luseland a few days later, at a time when Clark was away on a hunting trip, but the letter having been opened by Mrs. Clark, Barrick received the following answer dated November 20th:—

Lake & Clark

Luseland, Sask.

November 20, 1947.

R. N. Barrick, Esq.,  
 TORONTO, Ont.

Dear Sir: Re W $\frac{1}{2}$  9 and S.W. 16-37-24 W 3rd

Your letter of the 15th was delivered today and in reply would say that Mr. Clark is out of town at present but expects to be home in about ten days; in the meantime I shall endeavour to locate him and request that you hold the deal open until you hear from him.

Yours respectfully,

(Mrs. F. J. Clark)

(Sgd.) M. M. Clark

Upon his return to Luseland on December the 10th, Clark accepted to pay the sum of \$15,000 for the land, forwarded a cheque for \$2,000, and he agreed to pay the balance of the purchase price, namely, \$13,000 on or before January 1, 1948, upon production of a clear title and a properly completed transfer.

The appellant then informed Clark that upon receipt of Mrs. Clark's letter, he understood that Clark would be away for about ten days, and he therefore kept the offer open until December the 6th, (should be 3rd) date on which he sold the land to a Mr. Hohmann from whom he had received an offer of \$15,000, and returned the cheque for \$2,000. I do not think that the other correspondence exchanged between the parties previously to the letters above referred to, have any bearing on the case.

I have reached the conclusion that the appellants are not bound to give effect to Clark's acceptance of their offer, and that they were within their right to sell the land to Hohmann. The offer to sell at \$15,000 contained in

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the letter of November the 15th, was subject to a prompt acceptance by Clark. The words in the offer "the deal could be closed immediately" and "trusting to hear from you as soon as possible", clearly imply Barrick's desire to receive an answer without delay. More than a reasonable time had elapsed when the appellants sold to Hohmann. Moreover, Mrs. Clark's letter written on November the 20th, saying that she expected her husband "in about ten days", justified Barrick to dispose of the land on the 3rd of December as he did.

In view of my conclusion, I think that the *caveat* which has been registered by the respondent should be vacated.

I would allow the appeal, and restore the judgment at trial with costs throughout.

ESTEY J.:—This is an appeal from a judgment of the Court of Appeal in Saskatchewan reversing a judgment at trial and directing specific performance of an agreement for sale against the appellant estate, as vendors, in favour of respondent Clark, as purchaser, and further directing that the appellant Hohmann may assess damages against the appellant estate for breach of contract to sell to him the same land.

The appellant executors of the estate of Eli James Barrick, deceased, at all times material hereto have been the registered owners of the three quarter sections here in question described as W $\frac{1}{2}$  of 9 and SW $\frac{1}{4}$  of 16, both in Township 37, Range 24, West of the Third Meridian. The executors of this estate reside in Toronto and throughout the negotiations for sale on their behalf have been conducted by R. N. Barrick of Toronto.

On September 8, 1947, respondent Clark, who resides at Luseland, Saskatchewan, by letter addressed to R. N. Barrick, Toronto, inquired if the estate would be interested in a sale of these three quarter sections. Barrick, under date of October 10, 1947, acknowledged Clark's letter, apologized for his delay in answering and, in turn, inquired what this land would be worth. Clark, in his reply of October 16, 1947, did not answer Barrick's inquiry. He made it clear that cash was available if the price was reasonable and asked "what the price would be." On October 24,

1947, Barrick replied that he would recommend for acceptance any satisfactory cash offer and that Kostrosky, a very satisfactory tenant over a period of years, was anxious to buy this land upon terms. He then intimated that he was endeavouring to ascertain "what a fair cash price would be," but, if, in the meantime, Clark would care to make an offer he would see that it "got immediate attention." Clark, on October 30, 1947, offered \$14,500, possession any time between January 1 and March 1, 1948. In making this offer Clark requested that if Barrick decided to recommend it he wire to that effect and estimate how long would be required to obtain a final decision. Barrick did not decide to recommend this offer but, under date of November 15, 1947, made a counter offer which read:

We are prepared to sell this land for \$15,000 cash. If this price is satisfactory to you, the deal could be closed immediately, by preparing an agreement for sale to be given you on receipt of initial payment of \$2,000—transfer of clear title to be given you on Jan. 1st, 1948, on receipt of balance of purchase price \$13,000. The present tenant Kostrosky's lease expires March 1st, 1948.

This letter was delivered in Luseland November 20, when Clark was absent. Mrs. Clark opened the letter and wrote Barrick that her husband was out of town, but expected back in about ten days, that she would "endeavour to locate him," and requested "that you hold the deal open until you hear from him." Barrick made no reply to this letter from Mrs. Clark.

Clark returned on December 10, when he wrote in part:

Owing to various circumstances I am not going to ask the Estate to split the difference between my offer and their figure though I think \$14,750 would be a fair compromise. I am enclosing a cheque for \$2,000 drawn on my account at the National Trust Co. Edmonton. The transfer and necessary papers I wish made out in the name of Frank J. Clark. I agree to pay the balance of the purchase price on or before Jan. 1st upon production by the Estate of evidence of a clear title and a properly completed transfer. It may be inconvenient for you to secure a Sask. transfer form and if so I would be glad to prepare the necessary transfer on the proper Sask. form upon receipt of your request.

I presume you have a written lease with Kostrosky and note it expires on Mar. 1st next. Is there the customary cancellation clause providing for notice of cancellation after Dec. 1st? If there is I would expect the Estate to serve the necessary notice of cancellation on Kostrosky. If there is no such cancellation clause I am prepared to assume the lease upon or under assignment from the Estate.

Kindly acknowledge receipt of this letter by return mail.

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In the meantime the appellant William Hohmann, also of Luseland, but without knowledge of Clark's correspondence, under date of November 28, inquired of Barrick with regard to this land and Barrick, on November 30, offered him the land for \$15,000 cash. Hohmann accepted this offer on December 3 and both Hohmann and Barrick desire that this contract be carried out.

The day after writing his letter of December 10 respondent Clark heard of Hohmann's purchase and on that date wired Barrick as follows:

RETURNED HERE YESTERDAY MORNING FROM BIG GAME HUNTING TRIP AIRMAILED LETTER TO YOU LAST NIGHT ENCLOSING TWO THOUSAND DOLLARS THIS MORNING TOWN GOSSIP CLAIMS WILLIAM HOHMAN HAS BOUGHT THE THREE QUARTERS PRESUME YOU RECEIVED MRS CLARKS LETTER NOVEMBER TWENTIETH TRUST THAT REPORT IS NOT CORRECT WOULD APPRECIATE REPLY BY WIRE

Barrick received this wire on December 12 and on that date wrote Clark as follows:

I received your wire today. I received Mrs. Clark letter of Nov. 20th in reply to mine of Nov. 15. Mrs. Clark informed me that as you would be away for ten days and requested me to hold the deal open until your return. I held the deal open for you until Dec. 6th when I received an offer from Wm. Hohmann of \$15,000 all cash which I accepted having had no reply from you. My solicitor is preparing Transfer of title to Mr. Hohmann and if he comes across with \$15,000 he will be given same. If he fails to do so, I shall be at liberty to sell to some one else.

I am very sorry this hitch has occurred and I shall return your \$2,000 immediately on receipt of same.

Upon the assumption that Clark's letter of December 10 otherwise constituted an acceptance of Barrick's counter offer of November 15, the question arises: was it within a reasonable time? The parties had throughout conducted their negotiations by letters and, as Barrick's counter offer did not specify a time for an acceptance other than a suggestion of a reply as soon as possible, Clark had a reasonable time within which to make his acceptance by the posting of a letter to that effect. *Adams v. Lindsell* (1); *Household Fire Insurance Company v. Grant* (2). What will constitute a reasonable time depends upon the nature and character of the subject matter and the normal or usual course of business in negotiations leading to a sale thereof, as well as the circumstances of the offer including

(1) (1818) 1 B. & A 681.

(2) (1879) 4 Ex. D. 216.

the conduct of the parties in the course of negotiations. *Dunlop v. Higgins* (1); *Manning v. Carrique* (2) and 7 Hals. 2nd ed., p. 93, par. 129.

Farm lands, apart from evidence to the contrary (not here adduced), are not subject to frequent or sudden changes or fluctuations in price and, therefore, in the ordinary course of business a reasonable time for the acceptance of an offer would be longer than that with respect to such commodities as shares of stock upon an established trading market. It would also be longer than in respect to goods of a perishable character. With this in mind the fact, therefore, that it was land would tend to lengthen what would be concluded as a reasonable time, which, however, must be determined in relation to the other circumstances.

While the correspondence between Clark and Barrick commenced with the letter of September 8, much of the time was spent by Barrick in ascertaining the current selling value of the land. Even in his letter which induced Clark to make his offer of October 30, Barrick indicated that he had not satisfied himself as to that current selling value. Clark himself, in his offer of October 30, asked "for the estate's decision as fast as possible" and, if Barrick had decided to recommend his offer, to wire accordingly. Barrick, apparently appreciating Clark's desire to conclude this matter, as he explained in his counter offer, consulted with those interested in the estate and made a concrete reply in the nature of a counter offer. Clark had obviously made up his mind at least on October 30 as to the current selling value of the land. This is not only evidenced by his offer of that date, but when he returned upon December 10 he immediately accepted the counter offer.

Under the circumstances of this case, the offer must be taken to have been received by Clark on November 20. It was addressed to him and received at his usual address and opened by his wife who, though she did not care to take the responsibility to deal with the counter offer, had been appraised of these negotiations and, upon his own

(1) (1848) 1 H.L.C. 381;  
9 E.R. 805.

(2) (1915) 34 O.L.R. 453.

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evidence, she had at least authority to receive the offer, if not to deal therewith. Clark was asked in reply:

Q. When you went away on this hunting trip, expecting this reply from Mr. Barrick any moment, and you not knowing how long you were going to be away exactly, why didn't you speak to Mr. McKenzie, and give him instructions as to what he should do in the event of your offer being accepted or rejected, or a counter-offer being received? A. It was not necessary. I had done that with my wife.

The offer of Barrick remained open for acceptance and in that sense as being renewed every moment until a reasonable time elapsed. While this time may be expressly enlarged by an act on the part of the offeror, a letter to him asking that the offer be kept open does not enlarge this reasonable time if the offeror elects, as he did, to not make reply. In that event the rights of the parties remain unchanged.

The offeree has the right, within a reasonable time, to accept and it is only by such an acceptance that he is given any rights against the offeror. What Barrick did or intended to do does not alter that time. If, when he accepted Hohmann's offer, a reasonable time had not elapsed, it would only be in the event that Clark's acceptance was within a reasonable time that the latter would have any right to take exception thereto.

It was particularly pointed out that there had been no sale for this land over a period of years. Possession could not be had until March 1 and, in any event, no farming operations could take place until spring conditions permitted. These are factors to be considered. However, there was, at the time material to these negotiations, a demand for this land. The owner, desiring to sell, would wish to avail himself of these conditions and those negotiating, other than the successful purchaser, would, no doubt, desire to consider other land or other possible courses that might be open to them. Clark, by his offer of October 30, because of his insistence upon reply by wire, must have had these latter considerations in mind rather than the date of possession or spring operations on the farm. Barrick, while he did not perhaps evidence as much concern as to the date of concluding the transaction, did, in his offer of November 15, in appreciation of Clark's desire, intimate that "the deal could be closed immediately" and concluded

with what might be accepted as the expression of a hope that Clark would reply "as soon as possible." A review of all the authorities submitted as well as others reviewed leads me to conclude, with great respect to those learned Judges who hold a contrary opinion, that Clark did not accept Barrick's offer within a reasonable time.

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The appeal should be allowed with costs throughout.

LOCKE J.:—The letters which passed between the appellant R. N. Barrick and the respondent appear in the reasons for the judgment from which this appeal is taken and it is unnecessary to repeat them. It was the opinion of the learned trial judge that the offer made by the said Barrick on behalf of the executors of the estate of Eli James Barrick by the letter of November 15, 1947, had lapsed prior to December 10th of that year, when the respondent assumed to accept it. This finding has been reversed by the unanimous judgment of the Court of Appeal.

The offer did not state a time within which it might be accepted and the matter to be determined is as to whether the respondent accepted it within a reasonable time, having regard to the nature and circumstances of the offer. After the preliminary letters of September 8th and October 10th and 16th the appellant R. N. Barrick by his letter of October 24th advised the respondent that he was prepared to recommend the executors of the estate to accept any satisfactory offer to buy the land for cash, saying that the tenant of the property was anxious to buy but only upon terms, and concluded: "If in the meantime you would care to make an offer I would see that it got *immediate* attention." To this the respondent replied in writing on October 30th by making a cash offer of \$14,500, asking for the estate's decision "as fast as possible" and that Barrick wire him if he decided to recommend acceptance of the offer by the estate. It was in answer to this letter that R. N. Barrick made the offer of November 15th saying that if the price of \$15,000 was satisfactory the deal could be closed immediately and concluded by saying: "Trusting to hear from you as soon as possible." In my view, this correspondence indicates, as found by the learned trial judge, that it was proposed and that both parties intended

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that the matter should be dealt with promptly. It was on November 20th that Mrs. Clark in her husband's absence wrote the letter saying that the latter was out of town but expected to be home in about ten days and asked that the deal be held open until Barrick should hear from him. Apparently this letter was received in Toronto on November 23rd and it was not until seventeen days afterwards that Clark mailed from Luseland the letter which was intended as an acceptance of the offer.

In reversing the judgment at the trial MacDonald J.A., who delivered the judgment of the Court, finding that the offer had been accepted within a reasonable time lays stress on the evidence given by the respondent R. N. Barrick at the trial, that upon receipt of Mrs. Clark's letter he had let the matter go from day to day and that he "was not in such a hurry as he admitted (sic) in his previous correspondence", that he had sold to Hohman instead of Clark because the former was the first man who "accepted my proposition" and that he had decided to leave the offer open from day to day. With great respect, I think this evidence does not affect the question to be determined. An intention not expressed or communicated to the other party is immaterial in deciding the question as to whether there was an agreement. The law appears to me to be accurately summarized in Leake (8th Ed.) p. 2, where it is said that the law judges the intention of a person by outward expressions only and judges of an agreement between two persons exclusively from those expressions of their intention which are communicated between them unless there is a duty to speak, in which event a party may become bound by his silence. Unless the appellant's position is altered by the fact that R. N. Barrick made no response to the letter of November 20th received from Mrs. Clark, the question should, in my opinion, be determined by considering only the communications which passed between the parties. It is fairly arguable on behalf of the respondent that by his silence Barrick should be held to have consented to the offer being treated as being made at the expiration of a ten day period from November 20th, but I think this contention cannot be sustained. There was, I think, no duty resting upon Barrick to say or do anything

upon receipt of the letter and the appellant's right to insist that the acceptance was not made within a reasonable time after the offer was received at Luseland on November 20th is not impaired. The passage referred to from the judgment of Lord Cottenham L.C. in *Dunlop v. Higgins* (1), is a quotation from the judgment of the Court in *Adams v. Lindsell* (2), and appears to have been made merely in reference to the facts of that case and not as a general statement of the law. It cannot have been intended to qualify what had been said by Lord Eldon L.C. in *Kennedy v. Lee* (3), that the acceptance of an offer unlimited by its terms as to time must be within a reasonable time after the offer is made.

I think the proper construction has been placed upon this correspondence by the learned trial judge and I agree with his conclusion and would allow this appeal with costs.

*Appeal allowed and the judgment at trial restored. Costs in this Court and the Court of Appeal in favour of the appellants.*

Solicitor for the appellants, Barrick: *Howard McConnell*.

Solicitors for the appellant, Hohmann: *Makaroff, Carter and Carter*.

Solicitor for the respondent: *Gilbert H. Yule*.

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(1) (1848) 1 H.L.C. 381 at 400.

(3) (1817) 3 Mer. 441 at 454.

(2) (1818) 1 B. & A. 681.