FRANCO-CANADIAN MORTGAGE COMPANY (DEFENDANT)..... } APPELLANTS;

AND

R. B. GREIG AND T. E. THIRLAWAY (PLAINTIFFS)..... } RESPONDENTS.

1917
*Feb. 7, 8.
*Feb. 19.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Principal and agent—Ostensible authority—Acts beyond scope of agency —Contract—Rescission of —Sale.

The respondents, both residing in Great Britain, were in the habit of speculating in lands in Canada, employing as their agent and attorney one Cassels, a solicitor practising at Edmonton. An agreement of sale was passed between the appellant and the respondents represented by Cassels for the purchase of certain lands situated in Alberta; and it was therein provided that, on payment of the price of sale, the appellants would transfer the lands to the respondents "free and clear of all liens, charges, mortgages and encumbrances." The lands were not then owned by the appellants, but by other parties whom they represented, and who had acquired the property with the exception of "all coal and minerals and the right to work same." The first instalment of the price of sale was paid at the signing of the agreement; but, when the second instalment became due, the respondents being then aware that the lands bought by them did not comprise the coal and minerals, brought an action against the appellants for the rescission of the contract of sale and for reimbursement of the payment made under it.

Held, Brodeur J. dissenting, that if Cassels, professing to act on behalf of the respondents, assented to an agreement to purchase the lands in question *minus* the coal and minerals, he was acting beyond the scope of his agency.

It is no answer to the action to say that the appellants were prepared to carry out the terms of the written agreement by conveying to the respondents a valid title to the coal and minerals: the appellants having declared their refusal to be bound by the obligations by

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

1917

FRANCO-CANADIAN MORTGAGE CO. v. GREIG.

which ex *hypothesi* they were legally bound, the respondents were entitled to treat the contract as rescinded and withdraw from it.

The appellants having contracted in the agreement of sale without qualification as principals, it is not open to them, as between themselves and the respondents, to allege that the moneys paid under the contract were paid to them as agents only.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of Hyndman J. at the trial (2) by which the plaintiffs' action was dismissed.

The material facts of the case are fully stated in the above head-note and in the judgments now reported.

Lafleur K.C. and *Wallbridge K.C.* for the appellants.

Tilley K.C. and *Woods K.C.* for the respondents.

THE CHIEF JUSTICE.—I concur with Mr. Justice Duff.

IDINGTON J.—I think this appeal should be dismissed with costs.

DUFF J.—I concur in the opinion upon which Mr. Justice Scott and Mr. Justice Stuart proceeded, that if Cassels professing to act on behalf of the respondents (plaintiffs) did enter into an agreement with the appellants (defendants) which both parties intended to be and which in fact was an agreement to purchase the land in question *minus* the minerals and subject to all the rights given by the lease executed by Brutinel in favour of the St. Albert Collieries Company, then Cassels in assenting to that agreement on behalf of the respondents was acting beyond the scope of his agency. There is no evidence in the record supporting the suggestion of a general agency for the purchase of land; and I

(1) 10 Alta. L.R. 44. (2) 23 D.L R. 860; 9 West. W.R. 22.

cannot agree that there is any ground upon which the question of the scope of Cassels' agency could properly be made the subject of further investigation. The issue of authority or no authority in Cassels to enter into the agreement which the appellants sought to enforce by their counterclaim was not overlooked at the trial and it appears to have been quite understood that the power of attorney under which Cassels professed to act was obtainable in the Land Titles Office. No suggestion appears to have been made in the Appellate Division that further evidence should be considered bearing upon the scope of Cassels' authority. Had such a suggestion been made, the Appellate Division would probably have examined this document.

The doctrine of ostensible authority has no application here. There is no evidence that Cassels was held out as a person having a general authority and, of course, no evidence that those who acted on behalf of the appellants were misled by a belief in the existence of such general authority resulting from any such holding out. See *Russo-Chinese Bank* v. *Li Yau Sam* (1).

The appeal must, however, be considered on the hypothesis that the contract between Cassels and the appellants was that which the respondents alleged it to have been, namely, a contract for the sale and purchase of the land in question subject only to such reservations as are expressed in the original grant from the Crown. On the assumption that this was the contract no question of Cassels' authority arises; but it follows that the appellants have undertaken an obligation which is the consideration for the payment of the purchase money to give to the respondents a

(1) [1910] A.C. 174, at p. 184.

1917

FRANCO-CANADIAN MORTGAGE CO. v. GREIG.

Duff J.

good title to the land including the minerals. I am not now alluding to their obligation to "make title" in the sense of shewing their title which it has been held the purchaser may require the vendor to do before he can be called upon to pay any part of the purchase money. I am now speaking of the main obligation of the vendor, namely, the obligation to convey to the purchaser a good title to the subject matter of the contract.

It is abundantly evident that at the trial and in the Appellate Division there was no dispute that in October, 1914, when the question of the title to the minerals was first raised by Mr. Woods, the position was taken on behalf of the appellants that the contract with the respondents was that which they afterwards alleged it to be by the statement of defence, namely, a contract for the sale and purchase of the land minus the minerals. It was not then suggested that the vendors would or could procure a conveyance of the minerals to the purchasers. Their attitude was that this was no part of their contract and they required from the purchasers the fulfilment of the bargain as they alleged it to be by payment of the instalment of the purchase money then due according to the terms of the writing. I think the conduct of the vendors at this stage was such as to justify the purchasers in treating it as a repudiation of the principal obligation of the vendors arising *ex facie* from the terms of the written agreement; and that the respondents were consequently entitled to accept and act upon the repudiation by declaring the contract to be at an end and by taking the proceedings which they did take in the following month.

In these circumstances it is no answer to the action to say that the appellants if held to be bound by the

terms of the written agreement are prepared to carry them out by conveying a good title to the minerals to the purchasers. The appellants having declared that they refused to be bound by the obligations by which *ex hypothesi* they were legally bound, the purchasers were on that refusal entitled to treat the contract as rescinded and withdraw from it. *Frost* v. *Knight*(1); *Hochster* v. *De La Tour*(2); *Mersey Steel Co.* v. *Naylor* (3); *Cornwall* v. *Henson* (4); *Rhymney Railway* v. *Brecon & Merthyr Tydfil Junction Railway* (5).

The point must be briefly noticed that the moneys already paid, having been paid to the appellants in their character of agents and having by them been paid over to their principals, cannot now be recovered back.

Assuming, for the purpose of dealing with this argument only, that the relation between Barbey and Bureau on the one hand (the so called principals) and the appellants on the other was truly that of principal and agent, there is nothing to shew that Cassels, when he executed the agreement of purchase, was aware of the existence of this relation. On the contrary, the correspondence in evidence between Cassels and the respondents would indicate that Cassels believed the appellants to be the beneficial owners of the property. By the agreement itself, which is under seal, the appellants contract without qualification as principals for the sale of the land and covenant to convey it to the purchasers; in these circumstances it is not open to the vendors as between themselves and the purchasers to allege that the moneys paid under the contract were

(1) L.R. 7 Ex. 111.
(2) 2 E. & B. 678.
(3) 9 App. Cas. 434, at pages 434, 442 and 443.
(4) [1899] 2 Ch. 710; [1900] 2 Ch. 298, at page 303.
(5) 69 L.J Ch. 813.

1917

FRANCO-CANADIAN MORTGAGE CO. v. GREIG.

Duff J.

paid to them as agents only, in other words, that the moneys paid under the contract were paid not to the appellants but to Barbey and Bureau through the appellants as conduit pipe.

I have fully considered the question whether in view of the alleged knowledge of Cassels touching the state of the title the appellants have any defence on equitable grounds in respect to the moneys already paid. I think there are no such grounds. The appellants being fully aware of the fact that Cassels was acting as agent, took no steps to inform themselves of the extent of his authority; and although they intended, as they alleged, to enter into a contract for the sale of a limited interest only in the lands in question, they executed an agreement which on the face of it was an agreement to convey a title to the fee simple to the purchasers; a document which they must have known would be sent forward by Cassels to his principals as containing the authentic record of the transaction into which he had entered on their behalf.

The difficulty in which the appellants find themselves must be ascribed to their own carelessness

ANGLIN J.—I concur with Mr. Justice Duff.

BRODEUR J. (dissenting) — This was originally an action by the respondents as purchasers on an agreement of sale to rescind the contract on the ground that the vendors, the appellants, were unable to carry out the sale and to give title.

The action was dismissed by the trial judge but the Appellate Division of the Supreme Court decided that there had been no contract and that the defendants-appellants should refund the sums paid on account on the purchase money.

The main point at issue is whether the mines and minerals did form part of the sale of land stipulated in the agreement.

The circumstances of the case are as follows:

The plaintiffs-respondents reside in England and Scotland and had been for some time speculating in lands in Canada and mostly in Edmonton and its vicinity. They had as agent in the city of Edmonton Mr. R. W. Cassels, a solicitor of that locality, who was looking after those speculations and was keeping them posted as to the advisability of making some new deals.

On the 10th of October, 1912, the agent, Cassels, cabled his principals, the respondents in this case, advising them to purchase a quarter section at $425.00 an acre. No description was given of the land, except that it was adjoining a railway; and he told them in the same cable that an immediate payment of $20,000 would be required, that the property was increasing in value rapidly and that they could sell all at a large profit very soon; telling them also that if they approved they could telegraph the money.

Greig, one of the respondents, answered that he could purchase only 140 acres.

But Cassels advised them by cable to take the whole quarter; and the money was cabled.

So far, the respondents had no other information with regard to the land in question, except what was mentioned in the telegrams of Cassels.

On the 22nd October Cassels agreed to purchase the property for the respondents. The beneficial owners of the property were two Frenchmen by the name of Bureau and Barbey and a Belgian by the name of Kimpe. As those people were not in Canada

1917

FRANCO-CANADIAN MORTGAGE CO. v. GREIG.

Brodeur J.

they were being represented by the respondent company, the Franco-Canadian Mortgage Company.

The titles were passed to Cassels to be investigated and those titles shewed that the mines and minerals that could be found on the property had been leased or sold to a Montreal Mining Co. It did not prevent, however, Cassels to carry out the agreement and moreover it is in evidence that the situation of the property with regard to mines and minerals was discussed with Cassels and it was found by the trial judge that Cassels knew, at the time of the agreement, that the minerals were not handed by the vendors and that the plaintiffs-respondents were not purchasing the same.

The agreement of sale was prepared by Cassels himself. He knew that the vendors were not the owners of those mines and minerals, that they had been leased or sold to a mining company and besides it is evident that he had in view in this contract purely and simply the purchase of the land for subdivision purposes, because in a letter which he wrote to his principals on the 22nd of October, 1912, the same day that the agreement was signed by him as agent of the purchasers, he declared that at some future date the deal will be a proposition for subdivision. He speaks also of the title and he says that the title is in perfectly good order. He tells his principals also that he got a commission of $2,000.00 on that sale from the real estate agent who carried it through and that the taking of such a commission will give him the advantage of not charging the purchasers with any proportion of their profits when they come to resell the property.

Mr. Thirlaway, one of the respondents with whom he was communicating at the time, said that the charge was very reasonable.

Everything seemed to be satisfactory. The first

payment was made evidently after the title had been investigated by Cassels.

In 1913 those principals seem to be dissatisfied with Cassels and instead of sending him direct the money for the second payment they sent it to Mr. Woods, a solicitor of the city of Edmonton. The reasons why they were dissatisfied with Mr. Cassels are not in evidence but it must be with reference to some money matter and were likely referring to some other transaction, since in the agreement of sale in question in this case there was no money matter which could arise between Cassels and the respondents.

Mr. Woods investigated the matter and it was found by the trial judge, a finding which was not disturbed by the Court of Appeal, that he examined and perused the document of title before paying over the 1913 instalment and must have been aware of the state of the title at that time and must have been satisfied with the position of things. The payment then due in October, 1913, as I said, was made by Mr. Woods after making all the inquiries and examining the titles.

Another instalment became due in October, 1914.

The war had then been going on for some months: the money market was in a very bad condition and then the purchasers, for the first time, thought of repudiating the contract because the mines and minerals could not be handed over to them.

I am quite convinced, after reading the whole evidence, that this question of mines never entered into their minds. They never purchased the property on account of those minerals; they were simply buying the property for subdivision purposes and land speculation. Besides, we do not know whether those mines and minerals could then have been exploited.

1917

FRANCO-CANADIAN MORTGAGE CO. v. GREIG.

Brodeur J.

The sum which was to be paid each year during the existence of the lease was $160 and was naturally a very small sum compared with the $68,000, which was the purchase price of the property agreed upon by the respondents.

The respondents had given to Cassels authority to look after their land speculations in Edmonton; they are bound as regards third persons by every act done by their agent, which is necessary for the proper execution of that authority. They never contemplated the minerals in connection with those speculations, but whether or not the lands could be easily disposed of on the land market at a good profit. They were relying on the honesty of their agent as to the price at which those lands could be purchased or sold. The act done by Cassels with regard to the minerals was incidental to the ordinary scope of the business entrusted to him. Halsbury, vo. Agency, p. 201. It seems to me that the respondents are not exempt from liability in the circumstances of the case.

The knowledge that their agent received as to the minerals was their knowledge. Cassels was standing in their own name and the information conveyed to him was also binding upon them. If Cassels had been a purchaser for himself he could not complain about those minerals not being conveyed to him. The respondents are in the same position as Cassels himself. They cannot repudiate the agreement.

The trial judge granted the prayer of the appellant vendors to the effect that the agreement of sale should be amended in such a way that the mines and minerals would be excluded. I think this amendment is in conformity with the agreement made by the parties, accepted by the respondents' agent.

1917

FRANCO-CANADIAN MORTGAGE CO. v. GREIG.

Brodeur J.

I am, on the whole, of the opinion that the judgment of the Court of Appeal should be reversed, that the appeal should be allowed and the judgment of the trial judge restored with costs of this court and of the court below.

Appeal dismissed with costs.

Solicitors for the appellant: *Wallbridge, Henwood, Gibson & Mills.*

Solicitors for the respondents: *Wood, Sherry, Collisson & Field.*