



No. C812830
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

RONALD FRASER, DAVID LAM,
DONALD FIELDS

PLAINTIFFS

AND:

GURDEV SINGH GILL

DEFENDANT

REASONS FOR JUDGMENT
OF THE HONOURABLE
MR. JUSTICE LOCKE

Peter Watts

for the plaintiffs

D.D.G. Milne

for the defendant

Date of Trial:

October 5 and 6, 1981

This is an action for specific performance concerning property owned by the defendant and purportedly sold by an interim receipt dated May 27, 1981 for the sum of \$152,000.00.

Counsel have been able to agree on many of the facts: Gill was approached on May 26 by salesmen for A. E. LePage Western Ltd., real estate agents, and presented with a first offer for the house and land at 1840 West 1st Avenue in Vancouver which he declined to sign. The following day he was presented with a second offer for \$152,000 with a \$10,000 down payment which Gill accepted. In between the two offers Gill had asked

his own accountant to get an appraisal of the property, but signed the last May 27 document without waiting for the results. Subsequently there was an appraisal valuing the property as of June 30, 1981 at the sum of \$215,000 and in June further offers of \$225,000 and \$240,000 were received which were not accepted.

The interim receipt in this action states in part (the underlining is mine):

"MAY 27, 1981.

RECEIVED FROM DAVID LAM AND RONALD FRASER AND NOMINEE
4644 WEST 15TH AVENUE, VANCOUVER.

THE SUM OF TEN THOUSAND ONLY-----/100 DOLLARS ...

BEING DEPOSIT ON ACCOUNT OF PROPOSED PURCHASE PRICE OF
1840 WEST 1ST AVENUE, VANCOUVER, B.C.

FOR THE PRICE OR SUM OF ONE HUNDRED FIFTY-TWO THOUSAND ONLY

PAYABLE ON THE FOLLOWING TERMS, NAMELY ALL CASH

OF WHICH THE DEPOSIT SHALL FORM A PART. THE BALANCE AS FOLLOWS:

VENDOR TO DELIVER TITLE FREE AND CLEAR OF ALL FINANCIAL
ENCUMBRANCES, OR

ASSUME EXISTING 1ST MORTGAGE APPROXIMATELY \$45,000. TO
\$48,000 AT 10-1/2% WITH ROYAL TRUST DUE WITHIN 2 or 3
YEARS FROM MAY 27TH, 81.

The purchaser will bear all costs of the conveyance and if applicable any costs related to arranging a mortgage and the owner will bear all costs of clearing title.

The purchaser hereby offers to purchase the above described property for the price and on the terms and subject to the conditions herein set forth.

Balance of cash payment to be made and sale completed by
June 30, 1981.

This offer shall be open for acceptance up to 7 o'clock p.m.
on May 27th, 1981"

The signatures on the bottom of the offer appear as:

"DAVID LAM"	"RONALD FRASER"
Purchaser(s)	
"CHARTERED ACCOUNTANTS"	
Occupation(s)	

It is to be noted there are three plaintiffs in the action and the agreed facts state that they instructed the solicitor Alexander Jeletzky to complete the necessary conveying of the property in question. The defendant got word to the agent that Mr. Volmar Nordman, a barrister and solicitor of New Westminster, would act for him and on June 19 Jeletzky delivered a letter to Nordman asking for execution of the documents, being:

- (1) a transfer of land in duplicate;
- (2) a vendor's statement of adjustments together with copies of tax statement and mortgage statement;
- (3) a collateral agreement concerning assumption of mortgage.

Nordman replied, saying that he had no instructions but as a courtesy had personally delivered the documents to Gill. Gill never did engage another solicitor and Jeletzky attempted to deliver a further letter with the same enclosures to Gill at the latter's office on June 26, 1981 but it is agreed that Gill never received the letter or the enclosures.

On June 29, 1981 Jeletzky delivered a further letter to Gill's residence containing the same documents and indicating he would attend at the Vancouver Land Registry Office at 2:15 p.m. June 30 to complete. It is again agreed that the letter and documents did not come to Gill's attention until July 2, two days after the closing date. From the standpoint of the plaintiffs, apart from intimations that Gill would likely not go through with the deal, they never received any communication from him or on his behalf since the last one from Nordman.

On June 30 Jeletzky obtained the sum of \$141,850 from the Bank of British Columbia and, together with Lam and the plaintiff Fields, attended at the Land Titles Office at 2:30 p.m. and carried other money to make what he regarded as appropriate tender. He remained at the Land Titles Office until after 3:00 p.m. and repeatedly called Gill's name. Gill did not show, and a lis pendens was registered against the property at 3:10 p.m. on June 30, 1981. The action was subsequently started.

It is agreed between the parties that the defendant Gill realized within two days of accepting the \$152,000 offer of May 27 that the property had a significantly greater market value but it has been agreed that Gill's position was that, if he were legally obligated to complete the sale of the property to the plaintiffs, he would do so.

The plaintiff's position was simple enough: he said he had a valid interim agreement, that he had made tender, that the documents proffered had not been executed and he should have his decree.

The defendant's position was more complex:
he argued

- (1) No proper tender had been made;
- (2) In any event, the interim agreement was void for uncertainty as to parties because the interim receipt was taken in the name of "David Lam and Ronald Fraser and Nominee" as purchaser (singular) and Fields's signature never appeared on any document in any capacity, though he appeared as a plaintiff. Evidence was not admissible dehors the document to identify who might be the nominee and the document failed for uncertainty as to parties or, alternatively, did not satisfy the Statute of Frauds.
- (3) Apart from any uncertainty as to parties, the document itself was uncertain due to the apparent alternative methods of completing the purchase price (cash to mortgage or assumption of the mortgage).

The brevity of these reasons indicate no disrespect to Mr. Watts who has made every reasonable argument on behalf of his clients. In my view, the action fails and I deal only with the first two grounds.

As to tender, the law is clear and it is agreed that it is the duty of the purchaser to present the vendor with proper documents and that a successful plea of tender must also encompass evidence of an offer of the specific sum, unqualified by any circumstance or condition whatsoever and the burden of proof is on the person alleging the tender. The maximum de minimis has no application in the law of tender. At p. 496 of the second edition of Di Castri, Law of Vendor and Purchaser the learned author says:

. . . At the outset it may be noted that, generally speaking, in a contract for the sale of land, the promise to pay and the promise to convey are mutually dependent and conditional. In order for one party to such a contract to place the other in default he must tender performance of the concurrent conditions required to be performed on his part.

While the significance of tender may be as proof that the party tendering is ready, willing and able to complete his part of the contract, this evidence is best manifested by an offer of performance, "otherwise both parties might be ready and willing, but each stay at home waiting for the other to come forward". What is essential is that it shall appear to the Court and shall have been made clear to the other party that the exchange agreed upon would be carried out immediately if the latter would do his part; there must be both ability on the part of the plaintiff to perform and an indication of that ability to the other party. . . .

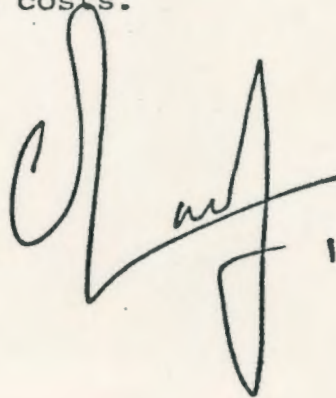
An examination of the statements of adjustments and mortgage assumption agreement attempted to be presented to Gill shows that they required many further acts on the part of Gill other than those required by the interim receipt, and in fact are really extensive counter-offers. As there was therefore no tender and no anticipatory breach or other waiver, the action must fail on this ground alone.

Mr. Watts admitted his difficulty on the documents but urged in support of his position Bayshore Investments v. Wilson (1965), 66 D.L.R. (3d) 208 and D. K. Investments v. Hammersley (unreported - Meredith J. - Vancouver Registry No. C763148). These cases really deal with a different point as to whether a purchase is necessarily disqualified from a decree of specific performance on ground of lack of tender where the purchaser has indicated no clear intention to complete. But here the statement of agreed facts say that Gill was prepared to complete if he were legally obligated to do so, and an examination of the Bayshore Investments case shows (as would be expected) that any tender made must include the "required documents" and, as I have found this was not done, these cases cannot apply.

While this disposes of the action, I will also say that in my opinion it fails for uncertainty of parties. Causeway Shopping Centre v. Muise (1967), 63 D.L.R. (2d) 26, affirmed in the Supreme Court of Canada, [1969] S.C.R. 274, deals with

a case where it was sought to hold Thomas Muise liable on a lease in which he was said to be described as a party "Thomas C. Muise or his nominee". The authorities were thoroughly gone into and the contracting parties found uncertain and, therefore, no agreement had been made. To the same effect, Mr. Justice Murray of this court in Samoth Financial Corporation Ltd. v. Todd (1979), 14 B.C.L.R. 266 found the memorandum too vague to satisfy the Statute of Frauds, and incapable of being cured by the operation of the parol evidence rule. I cannot ascertain who are the contracting parties within the four corners of the memorandum in question and, for this reason also, the action fails.

The defendant shall have his costs.

A handwritten signature in black ink, appearing to be 'D. J. Murray', is written over the text 'The defendant shall have his costs.'

Vancouver, B. C.

14 October, 1981.