IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *McCully* v. *Osborne,* 2004 YKSC 26

Date: 20040401
Docket No.: S.C. No. 99-A0128
Registry: Whitehorse

Between:

MCCULLY CONTRACTING LTD.

Plaintiff

And

ART OSBORNE and 13183 YUKON INC.

Defendants

Before: Mr. Justice R.S. Veale

Appearances:
James Tucker — Counsel for the Plaintiff
Glen Thompson — Counsel for the Defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by McCully Contracting Ltd. (McCully) to extend the time limit for McCully to obtain "financing suitable to itself" from February 29, 2004 to March 16, 2004 in order to close a purchase and sale agreement of Lot 30 (the property) on April 1, 2004. Art Osborne and 13183 Yukon Inc. (Osborne) oppose the application and apply for removal of McCully's caveat and *lis pendens* from the property.

[2] Owing to the urgency of the matter, I ordered that the time limit for McCully to obtain suitable financing be extended to March 16, 2004. I reserved the right to give written reasons.

THE ISSUES

[3] There are two issues that arise in this application:

1. Are the words “the usual commercial terms” void for uncertainty?

2. Should McCully be granted an extension for obtaining financing?

THE FACTS

[4] The agreement of McCully to purchase the property from Osborne arose out of an alleged agreement between the parties in 1996 to become partners in the purchase of the property when the Government of Yukon offered it for sale on a competitive bid basis. McCully already owned the lot adjacent to the property.

[5] McCully performed certain work on the property with expectations. However, the property was in the name of Osborne who erected an industrial building on the property in 1998.

[6] McCully filed a Writ of Summons and Statement of Claim in 1999 seeking the transfer of the property to his company. He sought specific performance of a further alleged agreement to purchase the property from Osborne.

[7] Messrs McCully and Osborne reached an agreement to settle their litigation at a settlement conference with McIntyre J. on November 20, 2003. The agreement contained the following terms, among others:

(a) The Plaintiff will purchase Lot 30 from the Defendants for the purchase price of $188,500.00;

(b) The purchase and sale agreement will include the usual commercial terms including a right to inspect by nominees of the parties by December 4, 2003 at a date to be arranged and delivery of all permits and drawings etc. as soon as practical;

(c) The closing/possession date for delivery of vacant possession of lot 30 will be April 1, 2004;

(d) The purchase and sale agreement is conditional upon the Plaintiff obtaining financing suitable to itself by February 29, 2004. If the Plaintiff does not obtain financing by that date, the caveat filed by the Plaintiff will be removed immediately;

[8] These terms, plus others, were put into a consent order. It was not alleged by either party that an additional purchase and sale agreement was contemplated.

[9] McCully and Osborne negotiated the purchase price at the settlement conference on the basis of an appraisal of the property prepared by a professional appraiser. The appraiser valued the property at $220,000.00 on the following condition:

> No investigation has been undertaken with the local zoning office, the fire department, the building inspectors, the health department or any other government regulatory agency unless such investigations are expressly represented to have been made in this report. The subject property must comply with such government regulations and, if it does not comply, its non-compliance may affect the market value. To be certain of compliance, further investigation may be necessary.

[10] By letter dated January 27, 2004, the Chief Building/Plumbing Inspector advised the lawyer acting for McCully, that “occupancy and approval for the Building/Plumbing Permit issued in November 1997” had not been granted.

[11] The lawyer for McCully advised the lawyer for Osborne of this fact by letter dated February 3, 2004.

[12] McCully did not obtain “financing suitable to itself” by February 29, 2004. McCully was unable to obtain bank financing of the property without an occupancy permit. It did not pursue its own financial resources until after February 29, 2004.

[13] McCully now advises that as of March 16, 2004, it is able to finance the purchase of the property using the residence and other personal financial resources of Gerald McCully, the owner of McCully.

[14] A further deficiency list has been provided by the building inspector and counsel indicate that the cost of rectifying the deficiencies could be in the range of $10,000.00.

[15] The evidence of a local solicitor, with expertise in both residential and commercial agreements, confirms that an occupancy permit would be a customary term of most purchase and sale agreements, although the terms of agreement from transaction to transaction will vary.

Issue 1: Are the words "the usual commercial terms" void for uncertainty?

[16] In *Charlwood Pacific Corp.* v. *Samoth Financial Corp. Ltd.,* [1989] B.C.J. No. 623 (B.C.S.C.), McLachlin C.J.S.C., as she then was, stated:

> The general approach of the courts to the construction and enforcement of contracts is that if the parties intended to enter into a bargain, that bargain will be upheld if at all possible. Only if the essential terms of the alleged contract lack certainty, either because they are vague or obviously incomplete, will the contract be void and unenforceable.

[17] She further stated:

> The approach of the courts in this process must necessarily be an objective one, examining the contract from the view of the objective reasonable bystander to determine whether the terms on which doubt is cast are essential to the bargain and, if so, whether they are reasonably clear. Subjective doubts of one party regarding the effect of a minor clause or the manner in which certain obligations will be fulfilled are not sufficient to render the contract unenforceable.

[18] Although this dispute is over the terms of an order, it really represents an agreement drafted by the parties. Thus, I find these principles appropriate for

interpreting the words of an order whose terms were drafted and consented to by the parties.

[19] Counsel for Osborne submits that the words “the usual commercial terms” are uncertain and do not clearly include an occupancy permit. He submits that the terms of each contract are determined on a deal by deal basis. He suggests that the principle in *Head* v. *Scott-Bathgate Ltd.,* [1994] B.C.J. No. 2175 (B.C.C.A.) should be applied so that the words are interpreted to make them “commercially rational” in such a way that if it had been discussed by the parties at the outset, they would have unanimously agreed on the interpretation of the words. Counsel suggests that this interpretation would have resulted in the property being purchased on an “as is, where is” basis.

[20] I cannot agree with this interpretation. On the evidence presented, I find that “the usual commercial terms” would include an occupancy permit. In this case, the prospect of purchasing a building without an occupancy permit does not strike me as being a “commercially rational” interpretation. In addition, the words to be interpreted are followed by a reference to “delivery of all permits”, again supporting the inclusion of an occupancy permit within “usual commercial terms”. In short, I find no support for the “as is, where is” meaning advocated by counsel for Osborne.

[21] The words “usual commercial terms” are not void for uncertainty. I find that, viewed objectively, they include an occupancy permit.

Issue 2: Should McCully be granted an extension for obtaining financing?

[22] The court has the discretionary power to extend a period of time in an order of the court as set out in Rule 3(2) of the Rules of Court:

> **Extending or shortening time**
>
> 3(2) The court may extend or shorten any period of time provided for in these rules or in an order of the court, notwithstanding that the application for the extension or the order granting the extension is made after the period of time has expired.

[23] The Court may exercise this discretion to vary the terms of an entered order. (See *Canada (Attorney General)* v. *Lau* (2001), 17 C.P.C. (5th) 153 (B.C.S.C.) at paras. 21 – 23, and *Marby Holdings Ltd.* v. *Slocan Forest Products Ltd.*, [2002] B.C.J. No. 206 (B.C.S.C.) at para. 8.)

[24] Counsel for Osborne submits that McCully did not act diligently in pursuing financing. He submits that it ran out of options at the last minute.

[25] Counsel for Osborne also submits that McCully's new financing proposal is not commercially viable and for that reason as well, it should not be granted an extension. In my view, it is not necessary to decide that the financial means available to McCully are commercially viable at this date as the closing date will be the time for that determination.

[26] I find that while McCully may have been slow to create its own "financing suitable to itself" by February 29, 2004, the lack of an occupancy permit combined with a significant deficiency list from the building inspector, made third-party financing from a bank impossible to achieve by February 29, 2004.

[27] While the lack of an occupancy permit did not make financing from his own sources impossible, it would be unreasonable to hold McCully to the date of February 29, 2004. I find that it was McCully's preference, in seeking "financing suitable to itself" to obtain bank financing. That was not possible because Osborne had not obtained an occupancy permit. McCully should not suffer from that failure.

[28] In all the circumstances of this property dispute, I find it appropriate to exercise my discretion in favour of extending McCully's date for obtaining financing suitable to itself to March 16, 2004.

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VEALE J.