TAB 9

1981 CarswellSask 111
Saskatchewan Court of Appeal

Carlson v. Big Bud Tractor of Canada Ltd.

1981 CarswellSask 111, [1981] 3 W.W.R. 237, 7 Sask. R. 337

CARLSON et al. v. BIG BUD TRACTOR OF CANADA LTD.

Brownridge, Hall and Bayda JJ.A.

Judgment: January 30, 1981
Docket: Saskatoon

Counsel: *R.D. Laing* and *B.W. Wirth* , for appellant.
D.A. Shapiro and *G.W. Sandstrom* , for respondents.

Subject: Contracts
Related Abridgment Classifications
Contracts
VIII Rectification or reformation
VIII.7 Bars to rectification
Headnote
Contracts --- Rectification or reformation — Bars to rectification
No mistake in recording parties' intentions.
Heavy onus not met.
Rectification not permitted where third parties affected.
Not entitled to avoidance or rescission.
The plaintiffs H. and C. together owned a majority of shares in two companies. The defendant company was granted an option to purchase the plaintiffs' shares on the condition that within 60 days it would arrange to have H. released from two guarantees he had given on behalf of the companies. This condition was not made a term of the agreement, but a representative of the defendant company assured H. that it was "understood".
The defendant company was unsuccessful in having the guarantees lifted. When the option was about to expire, H. agreed to transfer his shares to the defendant company to assist it in obtaining the necessary financing. C. also transferred his shares, and the defendant company assumed control of the two companies. The terms of the agreement were carried out except for the lifting of the guarantees.
Some time later, the defendant company entered bankruptcy and the plaintiffs commenced an action to recover their shares. At trial, it was held that lifting the guarantees was a condition precedent to exercising the option and that the acts of H. merely extended the time for performance of the condition precedent. Since the condition precedent was not performed, the agreement was found to be null and void and the shares were ordered to be restored to the plaintiffs. The defendant company appealed.
Held:
Appeal allowed.
Per Bayda J.A. (Hall J.A. concurring):
Rectification was inappropriate. As H. was aware of the omission, there was no mistake in recording the parties' intentions. It was not certain that the parties had a concluded common intention that the shares could be acquired only if the guarantees were

first lifted, and there was no strong, clear, convincing evidence to support rectification. Further, an equitable remedy could not be allowed where it would affect third parties, in this case the defendant company's creditors.

Even if the trial judge was right to permit rectification, the plaintiffs were not entitled to recover the shares. When H. transferred the shares and carried out the other terms of the agreement without requiring that the guarantees be lifted, that requirement ceased to be a condition precedent to the formation of a contract under the original unilateral agreement and instead became an internal condition of a new bilateral or synallagmatic contract. Thus H. could claim damages for breach of contract, but he was not entitled to have the agreement rescinded or declared void.

Per Brownridge J.A.:

As the defendant company deliberately omitted the condition to its own advantage, it was not entitled to resist rectification on the ground that the mistake was unilateral. The evidence supported the trial judge's finding that the transfer of the shares and the performance of the agreement did not constitute a waiver of the condition precedent but merely extended the time for its performance.

Table of Authorities

Cases considered:

Statutes considered:

Companies Act, R.S.S. 1978, c. C-23, s. 79.

Authorities considered:

Chitty on Contracts, General Principles, 24th ed. (1977), paras. 691, 693.

Fridman, The Law of Contract (1976), p. 624.

Snell's Principles of Equity, 25th ed. (1960), p. 569.

Appeal from order for rectification of written agreement.

Considered by majority:

Dom. Bank v. Marshall, 63 S.C.R. 352, (sub nom. *Marshall v. Can. Pac. Lbr. Co.)* [1922] 2 W.W.R. 266, 65 D.L.R. 461 — *referred to*

Trans Trust S.P.R.L. v. Danubian Trading Co., [1952] 2 Q.B. 297, [1952] 1 All E.R. 970 (C.A.) — *applied*

Turney v. Zhilka, [1959] S.C.R. 578, 18 D.L.R. (2d) 477 — *considered*

United Doms. Trust (Commercial) Ltd. v. Eagle Aircraft Services, [1968] 1 W.L.R. 74, [1968] 1 All E.R. 104 (C.A.) — *applied*

Considered in dissent:

Bercovici v. Palmer (1966), 58 W.W.R. 111, 59 D.L.R. (2d) 513 (Sask. C.A.) — *applied*

Saint John Tug Boat Co. v. Irving Refinery Ltd., [1964] S.C.R. 614, 49 M.P.R. 284, 46 D.L.R. (2d) 1 — *referred to*

Smith v. Hughes (1871), L.R. 6 Q.B. 597 (D.C.) — *applied*

***Brownridge J.A.* (dissenting):**

1 This is an appeal from the judgment of MacPherson J. in which he ordered rectification of a written agreement dated 25th April 1978 between Big Bud Tractor of Canada Ltd., Richard Hettrick, Bernard Carlson, Wesley Carlson, Ronald Thorstad, Eston Dodge-Chrysler Ltd. and Prairie Palace Motel Ltd.

2 As of the date of this agreement, Hettrick owned 51 per cent of the issued shares of Eston Dodge-Chrysler Ltd. and 26 per cent of the shares of Prairie Palace Motel Ltd., both located in Eston, Saskatchewan.

73 It is noted the respondents, in para. (a) of their prayer for relief, claim a declaration that the 25th April agreement was null and void. The learned trial judge made such a declaration. In my respectful view such a remedy was not available to the respondents in any event. For, even if the agreement contained a condition precedent respecting the lifting of guarantees, the failure to perform that condition precedent would not render the agreement containing it null and void but simply would preclude the ipso facto formulation of a new synallagmatic contract obliging Mr. Hettrick and Mr. Bernard Carlson to transfer their shares. But, as noted, that result became irrelevant once the parties voluntarily chose to enter into a new synallagmatic contract.

74 The relief claimed in para. (b) is a rescission of the 25th April agreement on the ground of "non-performance". Fridman, at p. 608, after briefly dealing with rescission as a common law remedy and with certain exceptional cases where the court's equitable jurisdiction may be invoked to rescind a contract, correctly states the law as follows:

> More frequently the jurisdiction of the court to rescind a contract on equitable grounds is invoked in three main instances. The first is where the contract resulted from some fraud, which induced a mistake on the part of the defrauded party. The second is where the mistake in question was the result of an innocent, non-fraudulent misrepresentation. The third, which comprehends a somewhat mixed variety of instances, though sharing a general underlying character, is where the contract was procured, without fraud in the common law sense, but as a consequence of what in equity is regarded as fraud, *i.e.* , by the use of undue influence, or where there has been some unconscionable conduct which renders the bargain questionable on equitable grounds, even though it may be perfectly valid at common law.

In the present case fraud was not alleged or proved. "Non-performance" is not one of the grounds entitling the respondents to equitable rescission. It follows the respondents are not entitled to rescission.

75 The relief claimed in paras. (c) and (d) is totally dependent upon the relief being granted under either paras. (a) or (b). Since no relief can be granted under these latter paragraphs, no relief can be granted under the former.

76 The respondents are left only with the right to claim damages. This claim was not pursued at trial nor did counsel at the hearing of this appeal assert any rights in this respect. Accordingly, subject to the suspension hereinafter directed, the appeal is allowed with costs. The judgment at trial is set aside and the appellant will have its costs of the trial. The judgment of this court will be suspended for 30 days, and if the respondents decide to pursue their claim for damages, they will have leave, during that period, to advise the court of their decision, whereupon the court will fix a time for counsel to address the court on the question of whether or not the respondents should be allowed to pursue their claim for damages at this time and, if so, on what terms and conditions.

Appeal allowed.

