

**Garrett v. Ayr Ventures Inc.; Triton
Masonry Ltd. et al., Third Parties
Ayr Ventures Inc. v. Triton Masonry Ltd. et al.**

[Indexed as: Garrett v. Ayr Ventures Inc.]

21 O.R. (3d) 407
[1995] O.J. No. 3520
Court File Nos. 4210/90 and 4210A/90

**Ontario Court (General Division),
Sills J.**

January 26, 1995

Sale of land — Breach of contract — Obligation to act in good faith — On date of closing subsearch disclosing construction lien against title — Vendor's solicitor offering undertaking to obtain removal of lien after closing — Purchaser seizing on opportunity to escape transaction and refusing to close unless lien removed — Purchaser not acting reasonably nor in good faith — Purchaser's claim for return of deposit dismissed — Vendor's counterclaim for forfeiture of deposit allowed.

Sale of land — Slander of title — Statutory claim for damages from registration of construction lien — Construction lien claim wrongly registered against lot being sold by developer — Proof of malice necessary element of claim for damages — Construction Lien Act, R.S.O. 1990, c. C.30, s. 35.

Torts — Slander of title — Statutory claim for damages from registration of construction lien — Construction lien claim wrongly registered against lot being sold by developer — Proof of malice necessary element of claim for damages — Construction Lien Act, R.S.O. 1990, c. C.30, s. 35.

CV and her brothers, one of whom was the third party MV, owned U-T Ltd., a masonry contractor. MV was also the president of the third party T Ltd., also a masonry contractor. By the end of 1989, T Ltd. had been paid for its masonry work on 43 of the 44 lots on a subdivision in the Township of North Dumfries being developed by the defendant A Inc. The masonry work for the last lot, lot 29, however, was done in May 1990 by U-T Ltd. under an oral agreement that incorporated the written agreement between T Ltd. and the defendant. That agreement included a term that prohibited the registration of a general lien against the subdivision.

After U-T Ltd. was not paid for its work on lot 29, CV instructed the corporation's solicitor to register a construction lien in the amount of \$16,920 on lot 29. In receiving instructions, the solicitor was provided with only a portion of the contract between T Ltd. and the defendant. Instead of preparing a lien claim for U-T Ltd. against lot 29, the solicitor mistakenly prepared a claim for T Ltd. against all the lots of the subdivision. This lien claim was signed by MV, who asked no questions and was simply complying with his sister CV's request.

Subsequently, the defendant paid 90 per cent of the lien, and U-T Ltd.'s solicitor prepared and had registered on August 1, 1991 a certificate of action for the outstanding balance of \$1,692.

While these events were happening, the plaintiff had purchased lot 35 of the subdivision and signed an agreement to purchase from the defendant the adjoining lot 36 for the purpose of a resale for profit. The

agreement for lot 36 was scheduled to close on August 2, 1990. However, the agreement did not close that day because a subsearch disclosed the lien. The subsearch did not disclose the certificate of action, which was still being abstracted by the registry office. The parties agreed to a one-day extension of the closing to obtain instructions.

On August 3, the plaintiff, through its solicitor, was aware that the lien was for not more than \$16,920 and possibly only \$1,692. The plaintiff, seizing upon the opportunity to get out of the purchase of lot 36, in light of a declining market and burdensome financial arrangements, gave instructions not to close unless the lien was removed. The defendant's solicitor did not obtain a removal of the lien and instead offered a personal undertaking to register a release of the lien and an order vacating the certificate of action. The sale did not close. The plaintiff sued for return of its deposit. The defendant counterclaimed for forfeiture of the deposit and issued a third party claim against T Ltd. and MV for slander of title, negligence, and damages under s. 35 of the Construction Lien Act.

Held, there should be judgment for the defendant, plaintiff by counterclaim; the action and third party claim should be dismissed.

The plaintiff was not proceeding in good faith and ought to have accepted the undertaking of the defendant. It was unreasonable, capricious, and arbitrary in the circumstances of this case for the plaintiff to refuse to co-operate with the defendant and to reject the offered undertaking or to agree to postpone closing to permit the defendant to remove the lien from title. There is an overriding duty to act reasonably to attempt to complete the contract, and because of its lack of good faith, the plaintiff could not rely strictly on the provisions of the agreement that title be free of encumbrances and that time be of the essence. Accordingly, the action should be dismissed, the counterclaim allowed, and the third party claim for contribution and indemnity dismissed.

As for the claims against the third party for slander of title or pursuant to s. 35 of the Construction Lien Act arising from the registration of the general lien, these claims should be dismissed. An essential element of these claims was malice or recklessness, and these elements did not exist in this case.

Cases referred to

100 Main Street Ltd. v. W.B. Sullivan Construction Ltd. (1978), 20 O.R. (2d) 401, 88 D.L.R. (3d) 1 (C.A.) [leave to appeal to S.C.C. refused 20 O.R. (2d) 401n, 88 D.L.R. (3d) 1n]; Carpet-Trend (Eastern) Inc. v. 519583 Ontario Inc. (1986), 43 C.L.R. 307; Green v. Kaufman, Ont. Gen. Div., Brockenshire J., December 8, 1992; LeMesurier v. Andrus (1986), 54 O.R. (2d) 1, 25 D.L.R. (4th) 424, 38 R.P.R. 183, 12 O.A.C. 299 (C.A.); Mason v. Freedman, [1958] S.C.R. 483, 14 D.L.R. (2d) 529; Morgan v. Lucky Dog Ltd. (1987), 45 R.P.R. 263 (Ont. H.C.J.); Watchfield Developments Inc. v. Oxford Elgin Developments Ltd. (1992), 25 R.P.R. (2d) 236 (Ont. Gen. Div.)

Statutes referred to

Construction Lien Act, R.S.O. 1990, c. C.30, ss. 35, 78(11), 80(6)

Authorities referred to

Belobaba, Special Lectures of the Law Society of Upper Canada (1985)

ACTION for return of a deposit in a contract for the sale of land and counterclaim for forfeiture of the deposit.

W. Scott Gallagher, for plaintiff, Christopher Lorne Garrett.

Michael A. Handler, for defendant/plaintiff, Ayr Ventures Inc.

Keith Landy, for third parties, Triton Masonry Ltd. and Mario Vercillo.

SILLS J.: — The plaintiff, Christopher Lorne Garrett, in the first action, was the purchaser of Lot 36 Plan 1484, Township of North Dumfries, and the defendant, Ayr Ventures Inc., in the first action, was the vendor of the said property. Triton Masonry Ltd. was a masonry contractor which had done masonry work on a large number of lots in Plan 1484 under contract with the said defendant, and Mario Vercillo was the president of Triton Masonry Ltd.

The plaintiff Garrett had previously purchased from the defendant Ayr Ventures Inc. a home built by the defendant on Lot 35, Plan 1484. It is common ground that the said plaintiff entered into an agreement of purchase and sale (ex. 1, Tab 1) to purchase the adjacent Lot 36 with a completed home constructed on it, on a speculative basis, intending to resell the home at Lot 36 at a profit. The closing date for the purchase and sale of Lot 36 was, according to the said agreement of purchase and sale, to be November 30, 1989. There were extensions of that closing date granted by the defendant, firstly to January 1990, subsequently to February 1990, then July 20, 1990 and ultimately to August 2, 1990. Under the terms of the original contract the plaintiff Garrett paid the defendant two deposits of \$7,500 each for a total of \$15,000 and, in addition, in consideration of the granting of the first extension of the closing date, a further deposit of \$5,000 bringing the total deposits paid to the defendant to \$20,000. In addition, the plaintiff paid to the said defendant a further \$4,000 to \$5,000 for upgrades in the construction of the new home as set forth in para. (16) of the statement of claim.

As indicated, a final closing date was settled on between the plaintiff and the defendant at August 2, 1990 prior to which the plaintiff had been unable to resell the property and had organized mortgage financing involving a first mortgage on the property being purchased and a collateral third mortgage on the adjacent property where he was resident. There was some evidence that he had also attempted to put in place a potential tenant to occupy the property to be acquired, the rent from which was to assist in carrying the heavy financing to which the plaintiff would be subject on the newly acquired property and his existing residence. The plaintiff Garrett had engaged the services of a lawyer in Mississauga who had undertaken a title search in or about June of 1990 but whose services were terminated on or about July 26, 1990 and replaced by the services of Mr. Lawson of Kruse, Lawson and Haller in Kitchener. On August 2, 1990, Mr. Lawson sent a law student, James Kearns, to the registry office in Cambridge to close the agreement of purchase and sale with the firm of solicitors acting for the defendant. Mr. Kearns discovered, by way of his subsearch of title prior to closing, the existence of a construction lien claim filed by the third party Triton Masonry Ltd. in the amount of \$16,920. No certificate of action was apparent in the abstract book on the subsearch and no search was conducted in the day book at the registry office but Mr. Kearns brought to the attention of the conveyancer representing the solicitors for the defendant the existence of the claim for lien and notified Mr. Lawson of its existence. In fact, there existed a certificate of action which had been registered on August 1, 1990 indicating that the claim for lien was \$1,692 rather than the larger amount set forth in the registered claim for lien. The conveyancer representing the solicitors for the vendor (defendant in this action) communicated the existence of the claim for lien to her principal, Mr. Callahan of the law firm Tanzola, Sorbara, McClennan & Handler. Although there was some question as to whether or not Mr. Lawson and Mr. Callahan, as solicitors for their respective clients, were in touch with one another on August 2, 1990, it was clear from the evidence that the student from Mr. Lawson's office and the conveyancer representing Mr. Callahan were authorized to agree to an extension of closing of one day to August 3, 1990. This extension would permit

the solicitors involved to be in touch with their clients and receive instructions.

It transpired that the construction lien claim registered by the third party Triton Masonry Ltd. had been registered as a general lien on all 44 lots in Subdivision Plan 1484. In fact, it is common ground that the lien in question related only to work performed on Lot 29 of that plan. It further transpired that the masonry work performed on Lot 29 was done by a company called Uni-Tri Masonry (1989) Ltd. and not by the lien claimant, Triton Masonry Ltd. It is also common ground from the documentary evidence filed in these proceedings that the masonry work on the other 43 lots of Plan 1484 had been completed prior to the end of 1989 and that, in fact, all such work had been fully paid for including the masonry work on Lot 36.

The third party, Triton Masonry Ltd., had previously held a contract from the defendant Ayr Ventures Inc. or its subsidiary Cambryan Homes Ltd. by virtue of an agreement dated in March of 1989 and stated to expire December 31, 1989. As indicated, all work on 43 lots in Plan 1484 under that contract had been fully performed by the end of 1989. No work had been requested or performed on Lot 29. In or about the month of May 1990, the defendant asked the third party, Triton Masonry Ltd., to do the masonry work on Lot 29 but Triton declined since it was getting out of the masonry contracting and going into general house building contracting. Triton referred the defendant to Uni-Tri Masonry (1989) Ltd. Uni-Tri was a company unrelated to Triton but was operated out of the same office as Triton by Carmelina Vercillo, the wife of Aldo Vercillo who was one of the partners of Triton, Uni-Tri apparently was owned and operated by Carmelina and her three brothers. Uni-Tri was a new company, recently incorporated by the same solicitor, one Angelo Mancini, who was also the solicitor for Triton Masonry Ltd. and the Vercillo family.

Carmelina Vercillo was present when Mr. Posocco, president of Ayr Ventures Inc., was having his initial discussion with the president of Triton with respect to the masonry work to be done on Lot 29. When the matter of this work was referred to her, she and Mr. Posocco agreed upon the same terms as were contained in the original contract with Triton. The evidence is that Carmelina was insistent that payment for the work be made within 30 days in accordance with those terms and she was assured by Mr. Posocco that there would be no problem. The contract for the masonry work on Lot 29 was constituted by those discussions and nothing was committed through writing. Subsequently, Posocco provided Carmelina with the necessary specifications and the work was done on Lot 29 between May 3 and May 7, 1991. When the work was completed by Uni-Tri on Lot 29, an invoice dated May 7 was issued by Uni-Tri to Cambryan Homes for \$16,920.

The invoice for work done on Lot 29 was not paid within the 30-day period and Carmelina placed a telephone call to Cambryan Homes (Ayr Ventures Inc.) requiring immediate payment and threatening registration of a construction lien.

Simultaneously with her other attempts at collection, Carmelina contacted the office of her solicitor, Angelo Mancini, with respect to the placing of a lien on Lot 29. Mr. Mancini was out of the office at the time of her call and she spoke with Mr. Mancini's associate, Mr. Salvati. Carmelina testified that she instructed the lawyer that she wished to file a lien on Lot 29 and the lawyer asked her to provide him with a copy of her contract and a copy of the invoice for the work done. In response to that request, Carmelina sent to Salvati a copy of the original Triton contract, save and except for the reverse side of the first page of that document. Obviously, Carmelina intended that the Triton agreement be provided solely for the purpose of letting the lawyer know what the terms of the agreement were because it is perfectly clear from her evidence that the contract for the work on Lot 29 was with Uni-Tri and the Triton contract was provided only to illustrate the terms which had been agreed upon. It was perfectly clear from all of the evidence that Triton did not contract for the work on Lot 29 and there was no evidence of any subcontract from Triton to Uni-Tri although it was urged upon me that I should infer such a subcontract from the

course of conduct of Posocco and the officer of Triton at the time that Triton declined to do the work and referred the work to Uni-Tri. There are no grounds to infer such a subcontract, notwithstanding the evidence of Posocco that he really did not know who was going to do the masonry work, and that he did not care since it was being done out of the same office from which the earlier masonry work had been done in the subdivision.

It became clear from the evidence of Mr. Mancini that upon his return to the office and being briefed by Salvati, Mancini alone determined that a general lien should be placed on all 44 lots in the subdivision by way of aggressively pursuing collection of the balance owing and he did not consult with or seek instructions in any way from Carmelina in that regard. It should be noted that on the reverse side of the original Triton contract, there were general conditions of the contract which expressly prohibited a general lien and provided specifically for the collection of moneys owing under the contract on a lot-by-lot basis. Mancini testified that had he seen that part of the contract, he would not have put a general lien on the subdivision but since that page of the old Triton contract had not been made available to him, he was unaware of that prohibition and, assuming that he had the entire contract and being unaware that the contract for the work and the doing of the work on Lot 29 was with Uni-Tri, he proceeded to register a general lien on all 44 lots of the subdivision.

Mr. Mancini or his secretary contacted Carmelina to arrange for an officer of Triton to attend at his office to sign the lien claim and Carmelina simply accepted those instructions and asked Mario Vercillo, president of Triton, to stop by the office of Mancini and sign the document. Mario Vercillo acknowledged that he received instructions from Carmelina to attend to sign the lien and it was arranged that, although he was very busy, Mario would drop into the law office fully expecting the papers to be made available for his signature and he would sign and he did so. He asked no questions but simply signed where Mr. Mancini's secretary told him to sign.

In the result, a lien claim for \$16,920 was registered on all 44 lots in the subdivision including Lot 29 where Uni-Tri had done the work, Lot 36 which was the property being purchased by the plaintiff herein and also Lot 35 which is the property owned and occupied by the plaintiff adjacent to Lot 36. At or about the same time as the lien was being signed and registered, Cambryan Homes (Ayr Ventures Inc) paid to Uni-Tri 90 per cent of the amount of the May 7, 1991 invoice leaving a balance outstanding of \$1,692.

Carmelina advised Mancini's office that they had received the cheque for 90 per cent of the amount claimed but told Mancini to leave the lien on until the balance of the moneys owing had been paid. The result of this conversation was that Mancini started his lien action as required by the Construction Lien Act, R.S.O. 1990, c. C.30, and obtained a certificate of action for registration in which the amount owing was stated to be \$1,692 (as opposed to the \$16,920 claimed in the lien claim itself). The certificate of action was registered on August 1, 1991 but by August 2, 1991, the certificate of action had not been abstracted at the registry office although the lien claim itself appeared in the abstract book.

In the normal course, Mancini wrote a letter to the defendant Ayr Ventures Inc. and Cambryan Homes Ltd. notifying those entities of the registration of the lien and the reference line of that letter clearly stated that the lien had been registered on all 44 lots. Upon receipt of this letter, Mr. Posocco on behalf of the defendant, asked his secretary, Maxine Russell, to make inquiries of Carmelina and she was assured by Carmelina that the lien only applied to Lot 29. The defendant accepted this assurance and failed to realize that, in fact, the lien was still registered against all the lots including lots 35 and 36. This assurance was given by Carmelina in July 1990. Apparently Carmelina was not alerted by this, to make any inquiry at Mr. Mancini's office and failed to even suspect that the lien had been registered against lots in the subdivision other than lot 29. Although the plaintiff, through his solicitor, had shown up at the scheduled closing on August 2, apparently ready and willing to complete the transaction, the closing was postponed for one day upon discovery of the lien claim.

Mr. Lawson, solicitor for the purchaser of Lot 36 (the plaintiff herein) could not really recall whether he had talked to Mr. Callahan, solicitor for the vendor (the defendant herein) but expressed the thought that he had contacted Callahan in order to confirm the extension for one day. On the evidence, I find it more probable that the extension for one day had been arranged between the student and the conveyancer attending for the respective parties at the closing, with instructions from their respective principals, and that no contact occurred on August 2 between Lawson and Callahan.

In his evidence, Mr. Lawson clearly indicated that he made contact with his client (the plaintiff herein) and got instructions to extend for one day until he could arrange to meet with his client and discuss the matter further and obtain instructions. Lawson testified that he did meet on the morning of August 3, 1991 with his client, that they discussed the existence of the lien registration and that the plaintiff herein gave Lawson instructions not to close unless the lien was removed.

The evidence of Mr. Callahan, solicitor for the vendor (defendant herein) was that he contacted his client and told him about the lien. He also testified that he called Mancini about the registration of the lien against all of the lots in the subdivision and said that Mr. Mancini's reaction was that it was an error for the lien to be registered on all of the lots, that he was going to look into it and that he would get an appropriate discharge. Callahan testified that Mancini was aware of the urgency because he knew the transaction was to close the next day. Mancini did not tell Callahan when he would obtain the discharge for Lot 36 and Callahan gave no evidence as to whether the existence of the lien on Lot 35 was even discussed. Callahan testified that basically, on August 2, 1991, Mancini had said that he would get a discharge on Lot 36. Callahan knew that the sale of the completed house on Lot 29 had closed some time earlier. Callahan had a conversation on the morning of August 3, 1991 with his client and explained about the lien and that there was no dispute but that the lien was intended to be filed on Lot 29 only and that he would give an undertaking on behalf of the firm to the purchaser to discharge the lien and vacate the certificate of action. Callahan acknowledged in his evidence that Lawson told him that if the lien was not removed that he (Lawson) had instructions not to close. This conversation occurred late in the morning of August 8, 1991. Callahan testified that he was surprised at this reaction from Lawson in not accepting the proposed undertaking. Callahan knew about the registration of the certificate of action. Nevertheless Callahan testified that he did not get back to Mancini. Callahan said that Lawson was emphatic that the lien was to be removed or there would be no closing and that Lawson was not open to any other suggestions. He said he did not call Mancini back after his discussion with Lawson on August 8, 1993, and that he could not get the paper work for removal of the lien down to the Cambridge registry office prior to the close of the registry office that day. Callahan indicated that he told his conveyancer in Cambridge that the purchaser was not going to close and instructed her to have an undertaking ready to give on closing by way of tender.

In the course of his evidence, Callahan testified that he had not looked at the agreement of purchase and sale for many months and that he did not refer the purchaser's solicitor to para. (6) of Schedule "F" in that agreement which contained a covenant in favour of the vendor requiring the purchaser to close in circumstances such as existed on August 3, 1991. Callahan felt that the best way to deal with the closing was to provide the personal or firm undertaking to release the lien and vacate the certificate of action. In cross-examination, Mr. Callahan acknowledged that he was aware and had been aware since June 28 that his client was taking back a mortgage for \$110,000. This mortgage back to the vendor was not referred to in the original agreement of purchase and sale but had been arranged between the vendor and the purchaser essentially as an accommodation to the purchaser in financing the purchase but it was also conceded to be a benefit to the vendor in attempting to dispose of this property in a fading real estate market.

It was perfectly clear from the evidence that the purchaser, in being required to close the purchase of Lot 36 on August 2, had undertaken a very heavy debt load and the plaintiff clearly stated in his evidence

that he used the existence of the lien to repudiate the contract of purchase and sale and subject to removal of the lien from title he was prepared to close and had the financing in place. It should be noted that the undertaking proposed to be given by Callahan to release the lien and vacate the certificate of action referred only to Lot 36 and did not refer to Lot 35 which would also have to be cleared before the solicitor for the purchaser (the plaintiff herein) would be in a position to register the arranged first mortgage (and collateral third mortgage on Lot 35) and release the funds.

Lawson testified that, in acting on behalf of the purchaser (the plaintiff herein), had the defendant invoked the "Vendor's clause" set forth in para. (6) of Schedule "F" of the agreement of purchase and sale, that the plaintiff would have been compelled to close the transaction and he would have so advised his client.

It is not clear whether the plaintiff and his solicitor were fully aware of discussions that had occurred between the defendant and the third party and/or their respective solicitors with regard to the nature and details of the lien claim but the plaintiff did know through his solicitor that the lien claim was for not more than \$16,920 and possibly only \$1,692. It is also clear that the plaintiff instructed his solicitor not to close the transaction unless the lien was cleared off title. The tender on all accounts was proper as between the purchaser and the vendor (the plaintiff and defendant herein) and the defendant did not have the documents available to release the lien and vacate the certificate of action.

The agreement of purchase and sale with respect to Lot 36 did not close on August 3, 1991 and the plaintiff (purchaser) brought action against the defendant for the return of his deposits. The defendant counterclaimed against the plaintiff for damages for the failure of the plaintiff to close the transaction and he brought a claim against the third party for indemnity, having advised the third party in writing after the abortive closing that he was holding the third party responsible.

It appears from the evidence that very little, if anything, was done by the defendant herein to insist upon the removal of the lien and the vacating of the certificate of action by the third party with respect to Lot 36. The solicitor for the defendant (Callahan) testified that he fully expected the plaintiff's solicitor to accept the undertaking offered. As indicated, the defendant has also claimed in a separate action against the third party for damages for slander of title and in negligence with respect to the registration of the lien.

It is perfectly clear to me that the root cause of all of this litigation is to be found in the conduct of the solicitor for the third party in registering the general lien, particularly on Lots 35 and 36, Plan 1484. The issues to be determined are as follows:

1. As between the plaintiff Garrett and the Defendant Ayr Ventures Inc., should the plaintiff have accepted the undertaking of the defendant to obtain and register a release of the lien claim and an order vacating the certificate of action?
2. If the plaintiff Garrett was not obligated to accept the undertaking as aforesaid, is the defendant entitled to indemnity against the third parties, Triton Masonry Ltd. and Mario Vercillo?
3. Is Ayr Ventures Inc. (the plaintiff in the separate action against Triton Masonry Ltd. and Mario Vercillo, defendants), entitled to damages for slander of title or otherwise?

With respect to the first issue, both the defendant and the third parties take the position that the defendant properly undertook to obtain and register a release of the construction lien and an order vacating the certificate of action and that the plaintiff is estopped from repudiating the agreement of purchase and sale, that the plaintiff was not proceeding in good faith and was not, in law, entitled to

repudiate the agreement or to rely on any provision in the agreement of purchase and sale making time of the essence. The position of the plaintiff is that, in the face of the registration of the construction lien and certificate of action, he was not bound to accept the undertaking of the solicitors for the defendant and was not bound to complete the contract.

The plaintiff purported to argue further that he was justified in refusing to accept the aforementioned undertaking from the solicitors for the defendant on the basis that certain priorities would have been created in favour of the lien claimant and, potentially, subsequent lien claimants. He posed the position that although a home buyer is exempt from any obligations for holdbacks pursuant to s. 78(11) of the Construction Lien Act, the plaintiff might not come within the definition of "home buyer" by virtue of the fact that there was no "issuance of a municipal permit authorizing occupancy" or "the issuance, under the Ontario New Home Warranties Plan Act, of a Certificate of Completion and Possession". The only evidence offered throughout the trial in this regard was that a municipal "occupancy permit" was not issued and that the township in question did not issue such permits but verbally authorized occupancy. In addition, it was clear that at the time of closing the defendant had available and tendered the required certificate (ex. 2, Tab 45). In any event, I do not think that this question raised by the plaintiff is well-founded.

The main issue as between the plaintiff Garrett and the defendant Ayr Ventures Inc., is the determination of whether or not, in the circumstances of this case, the plaintiff was obligated to accept the solicitor's undertaking with respect to the discharge of the construction lien on Lot 36. The defendant called as an expert witness Garth Manning, Q.C., a solicitor from Metropolitan Toronto whose qualifications as an expert in real estate and conveyancing matters were acknowledged by all parties to this litigation.

Mr. Manning testified to the following:

1. There was no standard of practice imposed upon the solicitor for the vendor herein (Callahan acting for the defendant Ayr Ventures Inc.) to search the title to the property being conveyed by him, prior to the closing date but that where the vendor was taking a mortgage back on the closing, it would be part of the duties of the solicitor for the vendor to subsearch the property at the time of closing to ensure that the mortgage being taken back acquired the appropriate priority;
2. That in the circumstances of this case, it was reasonable for the solicitor for the vendor to agree to postpone the closing from August 2, 1991 to August 3, 1991. Mr. Manning indicated that this postponement was one of several reasonable alternatives which he listed as:
 - (a) Vendor/solicitor could offer an undertaking to obtain and register the release of a lien where the lienor was claiming a small amount;
 - (b) Vendor's solicitor could provide a personal undertaking to make an ex parte motion to pay into court and obtain the release of the lien;
 - (c) Vendor's solicitor could undertake a rapid action between himself and the other solicitors involved to get the necessary documents completed to remove the lien from title; and,
 - (d) In this particular case, the vendor could have invoked the special vendor's clause of the agreement of purchase and sale found in Sch. "F", para. (6).
3. The wording of the undertaking provided by the conveyancer for the vendor on instruction from the vendor's solicitor was satisfactory. In this regard, Mr. Callahan as solicitor for the vendor exhibited the appropriate standard of care in offering the undertaking and it would have been good and normal practice for the lawyer for the purchaser to accept the personal undertaking of Callahan;

4. There was a duty between the solicitors for the purchaser and vendor to act reasonably in respect to the closing and a further duty on the solicitor for the purchaser to explain to his client the obligations of the client to act reasonably in the circumstances;
5. The purchaser's solicitor in the instant case need not have suggested or brought to the attention of the solicitor for the vendor the "vendor's clause" contained in the agreement of purchase and sale, Sch. "F", para. (6).

The position of the defendant, Ayr Ventures Inc., and the third parties vis-à-vis the plaintiff, Garrett, is that the said defendant, through its solicitor, acted reasonably in offering to the purchaser its solicitor's undertaking to obtain and register a discharge of the construction lien and the removal of the lien and certificate of action from title and, in view of the minor nature of the lien, the plaintiff ought to have accepted that undertaking and either closed the transaction or further extended the closing of the transaction to provide a reasonable opportunity for the solicitor for the vendor to put together the necessary documentation to remove the lien and certificate of action from title.

The position of the plaintiff is that he was faced with the existence of a construction lien, stated in the lien claim itself to be \$16,920 but in the certificate of action to be in the amount of \$1,692, that this constituted an encumbrance against the title and that he was entitled to rely on the conditions in the contract that, on closing, title be free from encumbrance and that time be of the essence.

The defendant/vendor relied on the aforementioned evidence of Mr. Manning that it was appropriate for the vendor's solicitor to offer the said undertaking and that it would have been good and normal practice for the lawyer for the purchaser to accept the personal undertaking of the solicitor for the vendor in this regard. As well, the defendant relied on the opinion of Mr. Manning that there was a duty on the part of the solicitor for the plaintiff/purchaser to act reasonably in the circumstances and accept the said undertaking.

The defendant, Ayr Ventures Inc., also relied on a number of authorities referred to me.

Firstly, the case of *Mason v. Freedman*, [1958] S.C.R. 483, 14 D.L.R. (2d) 529, is a decision of the Supreme Court of Canada involving the inability of a vendor to produce on closing a bar of dower. At the time of closing, the vendor asserted that he was unable to secure a bar of dower from his wife, tendered a deed without such a bar and claimed the deed to be in accordance with the terms of the contract. The purchaser refused to close on those terms and also rejected a tender of the return of his deposit. The purchaser's action for specific performance was dismissed at trial but the Ontario Court of Appeal granted to the purchaser specific performance of the contract with compensation by providing for payment into court of a sum to be fixed by the Master to serve as security to the purchaser in case the wife's inchoate right to dower should ever become consummate. The contract in that case contained the usual clause providing for requisitions on title and for the right of the vendor to declare the contract null and void if requisitions which he "is unable or unwilling" to remove are made within a stated time. *Judson J.* at p. 486 S.C.R., pp. 532-33 D.L.R., stated:

This proviso does not apply to enable a person to repudiate a contract for a cause which he himself has brought about. . . . Nor does it justify a capricious arbitrary repudiation.

At p. 486 S.C.R., p. 533 D.L.R., *Judson J.* stated:

By signing this contract the vendor undertook to deliver a deed containing a bar of dower. He tried to excuse himself by pleading inability to obtain such a bar. His duty was, at the very least, to make a genuine effort to obtain what was necessary to carry out his contract and there can be no doubt in this case that he made no such effort.

He stated further at pp. 487-88 S.C.R., p. 534 D.L.R.:

When a vendor seeks to avoid a contract under this clause, which is obviously introduced for his relief, his conduct and his reasons for seeking to escape his obligations are matters of interest to the court. There is a general principle to be deduced from the cases and it is the one I have already stated incidentally. A vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner. This measure of his duty is the minimum standard that may be expected of him, and there are cases where a cause which might otherwise be valid as justifying rescission will not be available to him if he has acted recklessly in entering into a contract to convey more than he is able.

I would not characterize the conduct of the vendor in this case in entering into this contract as reckless but his attempted rescission was arbitrary and capricious and there was complete and deliberate failure on his part to do what an ordinarily prudent man having regard to his contractual obligations, would have done.

(Emphasis added)

The appeal was dismissed leaving in place the order of the Court of Appeal granting specific performance with compensation by providing for payment into court of a sum to serve as security and to satisfy the wife's claim for dower if such were to arise.

Even greater reliance was placed by the defendant/vendor herein on a decision by Brockenshire J. dated December 8, 1992 at Toronto (unreported), in *Green v. Kaufman*. In that case, Brockenshire, J. followed a decision of the Ontario Court of Appeal in *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1, 25 D.L.R. (4th) 424. In *Green*, the vendor/plaintiff had entered into an agreement of purchase and sale with the defendant Kaufman to sell an expensive home. After the signing of the agreement, but before closing, there were a number of intervening incidents between the vendor and the purchaser but, most significantly, a dispute developed between the vendor and his gardener who registered a construction lien against the property for a relatively small amount in the range of \$2,000. That construction lien was not discovered until the closing day when the purchaser's conveyancer found the construction lien registered. The vendor's solicitor offered his personal undertaking to see the lien removed and alternatively proposed a one-day extension to get the lien matter taken care of. The purchaser's solicitor rejected both of these alternatives on the instructions of his purchaser/client. The purchaser testified at that trial that he had been advised that a problem had arisen and he asked his solicitor what his legal rights were. The purchaser's information was that the inability of the vendor to remove the lien on the closing date constituted a breach of contract and he was not required to close the transaction and, accordingly, the purchaser instructed his solicitor not to close.

For the vendor's part, in that case, he was committed to a move out of the country and desperately wanted the transaction to close and on the day following the aborted closing, the vendor's solicitor had on hand cash of approximately double the amount of the claim for lien. For the part of the purchaser, the position was adopted that time was of the essence, that the time for closing had passed and the deal did not close. A few days after the aborted closing, the purchaser, having already tied up a deposit of \$125,000, proposed a new offer for \$200,000 less than the original purchase price. *Green*, as vendor, rejected this, having found that there was another party interested in the property and eventually resold the property to that other party directly for \$169,000 less than the original purchase price to Kaufman.

Mr. Manning, who also provided expert evidence in the present case, testified as an expert in *Green* to the effect that time was of the essence in the *Green* case and, quoting from the reasons of Brockenshire J. in *Green*:

That good, marketable title means that any defect is a defect which blows the deal, and

while there is that view of the legalities of real estate transactions, there is also a recognition of the practicalities.

In *Green*, Brockenshire J. expressed the view that there has been imported into the field of conveyancing a law of equity, "that in the interpretation and enforcement of contracts an implied term is one of good faith and acting in good faith". Although the learned justice recognized that the intervention of the construction lien in the *Green* case was the action of a third party over which the purchaser (Kaufman) had no control, he said that:

The test of *LeMesurier* is applicable to this case even though the subject matter is somewhat different. In *LeMesurier* they are talking about a slight deficiency in land, that is an area which the courts have over at least a hundred if not hundreds of years looked to making an abatement to equalize the position of the parties. What we are looking at here is instead a construction lien for a very small amount which in my view, is even less material than the absence of a small amount of property because clearly that lien could be removed, could be removed easily. There is a statutory provision under which it can be removed, taken away from title so it is no longer an objection to title, no longer interferes with title and is replaced by cash. The amount involved here was very small and because of the statutory provision do not even require the Greens to negotiate with their gardener or their solicitor. They can make an *ex parte* application to the court and have the lien removed. What was being done here by Mr. Kaufman on a spur of the moment decision based on the legal advice he received was to arbitrarily repudiate the contract, and the quotations contained in *LeMesurier* make it clear that a vendor who seeks to take advantage of an escape clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner.

Brockenshire J. went on to quote:

In my view, on the facts here, in view of the minor nature of the construction lien, in view of the ease of its removal, in view of the undertakings which were being offered to either personally guarantee by the solicitor the removal would take place or as an alternative to extend it to the next day to see if the lien could be in effect cleared off or dealt with, in view of those offers, the purchaser was then not acting reasonably or in good faith in repudiating the agreement. In my view the purchaser then is in a position that he cannot rely upon the black letter law of a contract because of the overriding duty to attempt to honestly and reasonably complete a contract which has been entered into. I find it makes no difference whether the defect which shows up is in the nature of a lien or an execution or a misdescription if it can be dealt with in a simple, easy matter so as to not unduly inconvenience the parties. The reasonable approach in the interpretation of the contract is to carry on and do what is necessary to complete.

In the case of *LeMesurier v. Andrus*, the vendors were unable to convey an area of 12.09 square feet and the Ontario Court of Appeal held that the purchaser was not entitled to repudiate because had the action been for specific performance the vendors could have obtained specific performance with an abatement since on an objective test they could convey substantially what the purchaser contracted for. Further, the purchaser could not use the standard title clause to repudiate in those circumstances and the purchaser's reliance upon that standard title clause was capricious and arbitrary. In that case, the purchaser had given the basic reason for the transaction not closing as the failure of the vendors to deliver "the property which we believed we had bought" in addition to which there was some evidence to the effect that the purchaser feared that the loss of the 12.09 square feet would adversely affect the ability to obtain a building permit for a garage. The trial judge had found against the purchaser in this latter regard but found that the loss of the 12.09 square feet was beyond the *de minimis* rule and material to the transaction. In the Court of Appeal, Grange J.A. said at p. 6:

On any objective test the deficiency is very minor indeed. The materiality cannot be determined on a subjective basis; otherwise, no purchaser could ever be subject to specific performance . . . The only reason specifically stated by the purchaser was rejected by the trial judge. It follows that on an objective test the loss is not substantial; that the purchaser would obtain substantially what she contracted for and would have had to submit to specific performance with an abatement.

Grange J.A. then turned to the standard clause in agreements of purchase and sale dealing with timely requisitions as to objections to title. The trial judge had accepted the purchaser's position that objections to title had been raised within the appropriate time which the vendors had not been able to remove, remedy or satisfy and which the purchaser would not waive and found, therefore, that specific performance was not available to the vendors and the contract was at an end. Grange J.A. said at pp. 6-7:

. . . I do not think the purchaser can rely upon that clause to repudiate the contract in the circumstances of this case. First of all I would not give the clause any special importance as apparently the trial judge did. It was part of the printed form of contract and it cannot be said that it was in any way special or chosen or adverted to by either of the parties.

Grange J.A. quoted the words of Judson J. in *Mason v Freedman*, supra [at p. 487 S.C.R., p. 534 D.L.R.]:

A vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner.

In *LeMesurier*, Grange J.A. at p. 7 said:

I think the purchaser's reliance upon this clause can be described as "capricious or arbitrary" where the vendors had removed the curb and replaced it within the lot line so that it did not encroach on the adjacent lot, and I cannot find her action to be "reasonable and in good faith". If we were to give the clause the meaning and force ascribed to it by the trial judge, there would be very few contracts for the sale of urban land that could survive. It would be a rare case where a careful survey would not disclose some minor discrepancy. Vendors and purchasers owe a duty to each other honestly to perform a contract honestly made.

Counsel for the defendant also referred me to the lecture of Professor Belobaba, Special Lectures of the Law Society of Upper Canada (1985), and I have noted the reference to that same lecture in *LeMesurier*.

A final case referred to me by counsel for the defence is a decision by the Court of Appeal, *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401, 88 D.L.R. (3d) 1. In that case, the Ontario Court of Appeal confirmed that there is an implied obligation on the purchaser to co-operate with the vendor in obtaining the consent of the mortgagee where the agreement is conditional on the obtaining of such consent and that the obligation extends to disclosure of the purchaser's confidential financing statements to the mortgagee. Refusal to disclose his financial statements constitutes a breach of contract. The purchaser's failure thus to satisfy the mortgagee as to its financial capability prevented the vendor from complying with the condition of sale that the vendor obtain a consent of the mortgagee. At p. 410, Morden J.A. wrote:

This is, accordingly, a case for the application of the well-established principle that a party cannot take advantage of his own default as a basis for alleging that he is relieved of any further contractual obligations which principle is applicable in cases where the default results in a condition precedent not being met . . .

The third party, in arguing the issue between the defendant and the plaintiff, referred me to the case of *Morgan v. Lucky Dog Ltd.* (1987), 45 R.P.R. 263 (Ont. H.C.J.). The purchaser of a commercial property sued the vendor for specific performance where the vendor, regretting entering into the contract, instructed his solicitor to complete the contract only in strict accordance with its terms and deliberately delayed delivering relevant documents relative to a lease of the property to the purchaser. Catzman J. decided that the vendor was disentitled from relying on time being of the essence and from refusing to extend the closing date. At p. 289 it was stated:

In these circumstances, the law precludes the vendor from relying on the provision making time of the essence of the agreement . . . and from taking advantage of the existence of a state of affairs which it itself produced . . . particularly where as here, it is acting contrary to good faith in its performance of the contract . . .

In *Watchfield Developments Inc. v. Oxford Elgin Developments Ltd.* (1992), 25 R.P.R. (2d) 236 (Ont. Gen. Div.), a purchaser sued a vendor for a declaration that an agreement was terminated because of the defendant's breach and, inter alia, sought a return of its deposits. The vendor counterclaimed for a declaration that the plaintiff was in default, that the deposits be forfeited and for damages for breach of contract. The closing of the transaction had been extended on two occasions, letters exchanged by the solicitors confirming that time would remain of the essence. On the third and final extension the correspondence between solicitors failed to maintain that time remained of the essence and the action of the purchaser was dismissed and the counterclaim allowed. Ground J., in dealing with the question of whether the purchaser was entitled to rely on "time of the essence" provisions, said at the bottom of pp. 244-45:

In order to rely on a "time of the essence" provision in a contract, the party so relying must show that but for the other party's conduct, it would have completed the transaction. Further, at the middle of p. 245, the learned judge said:

The obligation on the party relying on such clause was stated as follows in *Leung* . . . and he went on to extract the following principles:

- (a) The exercise of the power of rescission by a vendor of land must not be arbitrary, capricious or unreasonable nor can he act in bad faith;
- (b) The vendor is under a duty to act in good faith and to take all reasonable steps to complete the contract;
- (c) The duty to act in good faith to complete the contract extends to cases involving minor omissions or defects.

Ground J. held in that case that "time was no longer of the essence on the closing day. In any event, the purchaser could not claim to rely on such a provision, as it was not 'ready, willing and able' to close. The purchaser cannot be said to have acted 'in good faith' nor to have taken 'all reasonable steps to complete the contract' as it would not agree to a short extension of closing, it would not close in escrow and would not accept tender". Further, at p. 246 the learned judge said:

It would appear that in our case, if the purchaser had indeed been willing to close the transaction, it would have agreed to close in escrow pending the vendor obtaining and delivering the town's consent, or would have agreed to a short extension of the time for closing to enable the vendor to have the town's consent available at closing. It is apparent that the condition precedent to obtaining the town's consent had been fulfilled by the conveyance of the easterly block of land to an adjoining owner, and that the town's consent was readily obtainable. Accordingly, even if time had remained of the essence at the extended closing, in my view the purchaser would not have satisfied the onus that it was

"ready, willing and able" to close the transaction, and therefore entitled to rely on such a provision.

Counsel for the plaintiff sought to distinguish LeMesurier, supra, on the basis that while, in that case, the loss of .16 per cent of land area was not substantial, in the case at bar, the existence of a lien, even for \$1,692, created a fundamental problem of priorities with respect to any unregistered liens (Carpet-Trend (Eastern) Inc. v. 519583 Ontario Inc. (1986), 43 C.L.R. 307) and, therefore, that the plaintiff was justified in refusing to accept the undertaking of the solicitor for the defendant and refusing to close.

The first issue for determination is whether the plaintiff was obligated to accept the offered personal undertaking from the solicitor for the defendant. The plaintiff was seeking to avoid the contract and recover deposits paid. By contract, the plaintiff had agreed to complete the transaction and to pay the balance due on closing to the defendant subject to the proviso that title shall be good and free from encumbrance.

On the day ultimately agreed upon for closing, title was not free from encumbrance because of the registration on title of the construction lien in the amount of \$1,692. The law is as stated in Mason v. Freedman, supra, that a party seeking to escape his obligations under the contract must act "reasonably and in good faith and not in a capricious or arbitrary manner".

The evidence is clear that the plaintiff herein was purchasing the property as a speculative endeavour intending to contract for its resale before being required to take title himself. It is also clear that such resale was adversely impacted by a down-turn in the real estate market by virtue of which such resale was not accomplished. Further, it is clear that the plaintiff would be required to assume a significantly large and onerous debt load if he was required to close and that he was prepared to take advantage of any valid reason he could find to avoid his obligation. He was advised that he need not close if the lien was not removed from title before the established closing date and time and he determined to take advantage of that opportunity to avoid his obligations.

I find on the evidence of Mr. Manning that the alternatives open to the defendant in having the lien removed from title made it reasonable for the solicitor for the defendant to provide his personal undertaking to rid the title of the lien claim in which case the plaintiff could acquire title free of any unregistered liens by virtue of s. 80(6) of the Construction Lien Act. It was unreasonable, capricious and arbitrary in the circumstances of this case for the plaintiff to refuse to co-operate with the defendant and reject the offered undertaking or agree to postpone closing to permit the defendant to remove the lien from title. The principles derived from Mason v. Freedman, LeMesurier and 100 Main Street Ltd., are applicable here and the plaintiff's claim for return of deposits paid is dismissed.

It follows that the defendant is entitled to succeed in its counterclaim for a declaration that the deposit moneys and additional moneys paid by the plaintiff to the defendant pursuant to the terms of the agreement of purchase and sale are forfeited.

In respect of the third party proceedings, the claim of the defendant against the third party for contribution and indemnity is dismissed.

With respect to the separate action by Ayr Ventures Ltd. as plaintiff against Triton Masonry Ltd. and Mario Vercillo, defendants, the plaintiff claimed damages against the defendants for slander of title. The alleged slander of title claimed against the corporate defendant arises as a result of registration of the construction lien of all 44 lots in the plan of subdivision of which Lot 36, the subject matter of the other action herein, was one. The alleged claim against the individual defendant arises from the facts that he was president of the corporate defendant and signed the lien claim and affidavit of verification which

were registered on title to the 44 lots in the subdivision. This plaintiff alleges that the acts of the defendants were intentional, wrongful, unjustified and malicious and designed to impede the sale of houses in the subdivision. Alternatively, it is alleged that registration of the lien claim was reckless. It is claimed that s. 35 of the Construction Lien Act provides for relief to the plaintiff in the circumstances of this case. The defendants plead good faith and that they were acting in accordance with their rights under the Construction Lien Act.

An essential element of a claim for slander for title is malice. That element does not exist in this case. Although there is evidence that the solicitors for the defendants in this action were the root cause of the litigation here and in the companion action because of their aggressive approach to the collection of funds on behalf of their client, it is clear that they had been provided with erroneous information by Carmelina Vercillo in respect of the proper lien claim and the precise contract under which the masonry work was being performed. The individual defendant, relying on Carmelina's instruction, asked no questions and did as he was told in executing the lien documents. Again I can find neither malice nor the degree of recklessness in his conduct that would give rise to a claim for damages for slander of title.

Section 35 of the Construction Lien Act provides for liability in damages against any person who exaggerates the amount of a claim for lien or who preserves a claim for lien knowing that he does not have a lien. This statutory tort is similar in many respects to a claim for slander of title and requires proof of elements of lack of justification, intent and malice. None of these elements are established in this case.

In the result, this action is dismissed but in the circumstances without costs.

Counsel were not provided with an opportunity to address the issue of costs in the action brought by Garrett or in the third party proceedings therein. Submissions as to costs in that case may be made in writing within 15 days of release of these reasons through the trial co-ordinator at Kitchener.

Judgment accordingly.