Peter Pan Drive-In Ltd. v. Flambro Realty Ltd., [1978] O.J. No. 2732

Ontario Judgments

Ontario Supreme Court - High Court of Justice

Eberle J.

December 6, 1978.

[1978] O.J. No. 2732 | 22 O.R. (2d) 291 | 93 D.L.R. (3d) 221 | [1978] 3 A.C.W.S. 435 | 1978 CanLII 2160

(29 paras.)

Counsel

Bruce North, Q.C., for the plaintiff. John Broderick, Q.C., for the defendant.

EBERLE J.

1 In this action the plaintiff sued for recovery of money it had paid with respect to a certain mortgage given to Lincoln Trust Company. The defendant counterclaimed for repayment to it of the money it paid to Lincoln Trust with respect to the same mortgage. At the opening of trial the plaintiff, by its counsel, announced that it was discontinuing its action and expressly recognized its liability to pay costs in connection therewith. The defendant proceeded with its counterclaim and in these reasons where I refer to the plaintiff I mean the plaintiff by counterclaim, Flambro Realty Limited; and where I refer to the defendant I mean the defendant by counterclaim, Peter Pan Drive-In Limited.

2 The story begins with an offer to lease dated December 29, 1964, made by one Ronald Greenspan, a solicitor, as trustee on behalf of a group, to Flambro Realty Limited concerning a parcel of vacant land owned by Flambro on Ontario St., in St. Catharines. Greenspan's clients who subsequently became incorporated as Peter Pan Drive-In Limited proposed to lease the land from Flambro, erect a drive-in restaurant on it and go into business. Flambro did not accept the offer to lease but through its solicitor, John T. Clement, Q.C., negotiated further with Greenspan on behalf of his clients. The parties bypassed any further written offer to lease and proceeded directly to drafting a formal lease in a form satisfactory to both sides. Such formal lease was dated June 1, 1965, and registered in the Registry Office on September 29, 1965. In addition to seeking indemnity from Peter Pan for the amounts which Flambro paid to Lincoln Trust, Flambro also seeks rectification of the lease in this action.

3 During negotiations concerning the lease the Peter Pan group had gone to Lincoln Trust Company to borrow the necessary money to erect the restaurant. Lincoln Trust made it clear that it would not lend money on a leasehold interest only and suggested that the difficulty be gotten around in the following way: the land would first be conveyed by Flambro to Peter Pan, Peter Pan would secure its loan from Lincoln Trust by registering a land mortgage to the trust company; Peter Pan would reconvey to Flambro; and the lease from Flambro to Peter Pan would then be registered. This device is set out in a letter of March 11, 1965, from Lincoln Trust to Peter Pan (ex. 10). The documents were duly drawn, executed and delivered; and all were registered on September 29, 1965, as consecutive instruments.

4 It is perfectly clear that the above device was for the single purpose of facilitating the borrowing of money by the tenant, Peter Pan, for the purpose of erecting a restaurant; the lease was a ground lease only which permitted the lessee to erect buildings at its own expense; and it provided expressly for a reversion of the buildings to the landlord at the expiration of the lease for one dollar ($1).

5 The entire proceeds of the mortgage were paid by Lincoln Trust to Peter Pan whose principals all signed the mortgage as guarantors. It was a five-year mortgage on which Peter Pan made all the mortgage payments from 1965 to 1973. In the interval there was a change of shareholders and a renewal of the lease, which I will return to in more detail. Until 1973 Flambro was not involved in any way in making the mortgage payments.

6 In the conveyance from Flambro to Peter Pan the land transfer tax affidavit gives $1 as the value of the land and further states that no consideration passed; and in the reconveyance from Peter Pan to Flambro, the land transfer tax affidavit gives $1 as the value of the land. Nevertheless, because of the $80,000 mortgage that went on title between the registration of these deeds, the Land Registrar required land transfer tax to be paid on the sum of $80,000. Immediately after the closing Greenspan wrote to the appropriate authorities (ex. 13), explained the situation, and asked for a return of the money that had been paid in tax. He was successful.

7 In 1968 the shareholders in Peter Pan sold their shares to the Jolly Buccaneer Root Beer Company Limited pursuant to an option agreement (ex. 16) which was subsequently exercised on July 22, 1968 (ex. 17). After the new owners took over Peter Pan they continued making the mortgage payments from 1968 to 1970 and when the mortgage fell due in 1970, they negotiated a renewal of it with Lincoln Trust for a further five years at an increased interest rate of 113/4% in place of the earlier 8% rate. Significantly, the new owners of Peter Pan personally guaranteed the renewed mortgage. It was not suggested in the evidence that Flambro was involved in any way with the renewal of the mortgage.

8 The evidence discloses that in 1973 Peter Pan was in financial difficulties and was advised by their solicitor, Hornsby, that there was no agreement by which they were liable to make the mortgage payments and so Peter Pan stopped making the payments. The solicitor was also a guarantor of the mortgage. When Flambro learned that Peter Pan had ceased to make the mortgage payments and unsuccessfully attempted to get Peter Pan to resume making the payments, Flambro itself made them and paid off the balance of the mortgage at maturity. It has made total payments of $77,667.83 (ex. 24).

9 The issue that emerges may be stated as follows: was it the intention of the parties to the lease, namely, Peter Pan and Flambro, that as between them Peter Pan should be responsible for repaying the mortgage to Lincoln Trust or was Peter Pan, after borrowing the money from Lincoln Trust and using it for its own purposes, entitled to require Flambro to repay to Lincoln Trust money which Flambro had never received?

10 All the witnesses confirmed that the mortgage money was borrowed from Lincoln Trust by Peter Pan for its own purposes of erecting a restaurant and that Flambro was not in any way involved with that loan. It is clear from the evidence that it was Lincoln Trust who suggested the conveyancing method used to give the lender a mortgage of real estate and not merely of leasehold. I accept unreservedly the evidence given by all of Flambro's witnesses, including the solicitors for itself and for Peter Pan, and the principals of the two companies. No viva voce evidence was called by Peter Pan.

11 In accepting the evidence of the plaintiff's witnesses I hold that all of the parties to the transaction in 1965 were of one mind, namely, that Peter Pan, the borrower, was the one responsible for repayment of the mortgage. The witnesses admitted frankly that it did not occur to them to put a clause to this effect in the lease but it is beyond argument that if the point had been raised (and the witnesses admitted that it had not been raised in their discussions) the Peter Pan group would have agreed at once to the inclusion in the lease of a term expressing clearly that Peter Pan was responsible for the mortgage repayment. The parties were clearly ad idem on this matter. Their conduct in the ensuing eight years is entirely consistent with this finding: Peter Pan made all the payments and its principals personally guaranteed payment; Flambro had nothing whatever to do with payment.

The fact that the method of conveyancing adopted would give Lincoln Trust the right to sue Flambro as well as Peter Pan for the repayment of the mortgage is beside the point.

12 Let me make it clear that in coming to this conclusion I have ignored the letter written by Greenspan to the land transfer tax authorities which resulted in a return of the tax insisted upon by the Local Land Registrar. In that letter Greenspan, who was the solicitor for Peter Pan, wrote in express terms that Peter Pan was, notwithstanding the reconveyance of the land to Flambro following the mortgage, solely responsible to the trust company for the payment of the mortgage and further pointed out that the payment of the mortgage was guaranteed by the shareholders of Peter Pan. The evidence in this regard was admitted over the objection of counsel for Peter Pan who argued that the evidence did not show that Greenspan had any authority to write that letter and further that the party interested in the return of the tax was not Greenspan's client, Peter Pan, but the party who appeared as transferee in the second deed registered, namely, Flambro, for whom Greenspan did not act. I would hold that the letter is admissible, but am satisfied by the other evidence as to the true state of affairs between the parties in 1965. And if that letter be considered, it clearly confirms the other evidence given at the trial.

13 I turn now to a consideration of the main point at issue in this case, namely; is it necessary for the plaintiff claiming rectification to show that there was "an actually concluded agreement", antecedent to the instrument sought to be rectified, or is it sufficient if such plaintiff establishes a common continuing intention in regard to the particular provision in question? After a review of many of the cases dealing with this vexed area of the law, it is my conclusion that the latter is the better view. In reaching this conclusion I rely particularly on Joscelyne v. Nissen et al., [1970] 2 Q.B. 86 (English C.A.), and Bercovici v. Palmer *(1966), 59 D.L.R. (2d) 513*, *58 W.W.R. 111* (Saskatchewan C.A.). In Joscelyne v. Nissen the Court of Appeal in England reviewed a large number of cases on this point and concluded, as expressed shortly in the headnote:

> ... that a Court had jurisdiction to rectify an agreement if there was a common continuing intention in regard to a particular provision of the agreement, but that an outward expression of accord and convincing proof that the concluded instrument did not represent the parties' common intention were required.

With this conclusion, I agree, and find it particularly helpful in resolving the issue in the present case. On the evidence I have heard and accepted, there was clearly "a common continuing intention in regard to a particular provision of the agreement" and further, from the same evidence, it is clear that there was "an outward expression of accord and convincing proof that the concluded instrument did not represent the parties' common intention". The fact that Peter Pan and its principals from time to time looked after all mortgage payments for a period of eight years is a course of conduct which speaks very loudly of the understanding on their part that they were required to make the mortgage payments and that Flambro was not. The conduct of the parties is a weighty consideration.

14 In Bercovici v. Palmer it was held, and I again quote from the [W.W.R.] headnote:

> There must be evidence which leaves no fair and reasonable doubt that there was an intention in the minds of the parties which continued down to the time of execution of the instrument but which, by error, did not appear in the writing.

15 I must confess that I am somewhat troubled with Glascar Ltd. et al. v. Polysar Ltd. *(1975), 9 O.R. (2d) 705*, *61 D.L.R. (3d) 577*, a decision of my brother, R. E. Holland, J., in which at p. 713 O.R., p. 585 D.L.R., in dealing with an argument that the agreement in issue there should be rectified, he said:

> "This requires a finding that there was an antecedent agreement prior to the preparation of ex. 11 between the parties ...". As I have said before, in my view it is not necessary to show that there was an expressed antecedent agreement in order to found a successful claim for rectification. In the case at bar the evidence was that there was no discussion about the respective obligations to pay the mortgage payments. It seems obvious to me that the point was so clear, i.e., that Peter Pan alone was responsible for the mortgage payments, that discussion was unnecessary. In support of the view of R. E. Holland, J., he refers to H. F.

Clarke Ltd. v. Thermidaire Corp. Ltd., [1973] 2 O.R. 57, 33 D.L.R. (3d) 13, 9 C.P.R. (2d) 203, and quotes from Brooke, J.A., delivering the judgment of that Court at pp. 64-5 O.R., pp. 20-1 D.L.R., as follows:

> In order for a party to succeed on a plea of rectification, he must satisfy the Court that the parties, all of them, were in complete agreement as to the terms of their contract but wrote them down incorrectly. It is not a question of the Court being asked to speculate about the parties' intention, but rather to make an inquiry to determine whether the written agreement properly records the intention of the parties as clearly revealed in their prior agreement. The Court will not write a contract for businessmen or others but rather through the exercise of its jurisdiction to grant rectification in appropriate circumstances it will reproduce their contract in harmony with the intention clearly manifested by them, and so defeat claims or defences which would otherwise unfairly succeed to the end that business may be fairly and ethically done ...

16 Considering the whole of that extract, it is my view that the most important statement is the one in the last sentence. Stress is here laid on the "intention" of the parties and on the fact that it must "be clearly manifested by them". If these conditions are met, in my view, it is not necessary that it further be shown that there was any expressed agreement in so many words on the point.

17 I am somewhat comforted by the views of the authors of two textbooks on the law of contract, namely, Waddams on The Law of Contracts (1977), and Fridman, on The Law of Contracts in Canada (1976), that the principle enunciated in Joscelyne v. Nissen should be followed in Canada.

18 In passing, I observe that some of the cases have suggested that the onus of proof on a party seeking rectification is "proof beyond a reasonable doubt" although others have placed the onus at an apparently lower level with the use of such language as "convincing proof" or "irrefragable". It does not appear to be wise to import from the criminal law a phrase such as "beyond all reasonable doubt". I prefer the phrase "convincing proof" as used in the Joscelyne case, for it imports the notion that the evidentiary standard is high in keeping with the seriousness associated with a claim for rectification.

19 I have canvassed a number of other cases in connection with the main point in the case at bar including Lloyd v. Stanbury, [1971] 1 W.L.R. 535, which followed Joscelyne v. Nissen, and Scragg v. Perseverance Banking, [1973] 2 Lloyd's Rep. 101; Australian Performing Rights Ass'n Ltd. v. Austarama Television PTY Ltd., [1972] 2 N.S. W.L.R. 467; and in Canadian Courts, in addition to the cases already referred to, Stepps Investments Ltd. et al. v. Security Capital Corp. Ltd. (1976), 14 O.R. (2d) 259; 73 D.L.R. (3d) 351; Coderre (Wright) v. Coderre, [1975] 2 W.W.R. 193; Augdome Corp. Ltd. v. Gray et al. (1974), 49 D.L.R. (3d) 372, [1975] 2 S.C.R. 354, 3 N.R. 235 (S.C.C.). A case particularly relied on by counsel for Peter Pan was Fuhr et al. v. Davidson, [1948] 1 W.W.R. 1057, a decision of the Alberta Supreme Court [varied [1949] 1 W.W.R. 221]. Here the plaintiffs sued for rectification asserting that the written agreement contained the words "reserving thereout all mines and minerals" which they said had been inserted by a common mistake. The plaintiffs admitted there had been no discussion respecting the mines and minerals and it was found that the agreement was prepared with the intention of stating the terms agreed upon by the parties. The trial Judge said [at p. 1058]:

> There was no discussion between the parties with regard to the mineral rights in the said lands and no instructions were given to the solicitor as to the disposition of the said mineral rights.

He went on to hold that it was necessary for a party claiming rectification to show first that there was an actually concluded agreement antecedent to the instrument which was sought to be rectified, and that since the plaintiffs failed to show there was an actually concluded contract respecting mines and minerals inaccurately represented in the written agreement, there could be no rectification. I do not quarrel with that decision on its facts, but I do dissent from the view that it is necessary to show an actually concluded antecedent agreement. Even though in the present case there was no discussion on the point in question the evidence of both parties to that agreement and their conduct amount to convincing proof of a common intention.

20 It was also argued for the defendant Peter Pan that the Statute of Frauds, R.S.O. 1970, c. 444, is an obstacle to success by Flambro. The authorities do not support this position and I need only refer to United States of America v. Motor Trucks Ltd. (1923), 25 O.W.N. 78 at pp. 79-80, [1923] 3 D.L.R. 674 at p. 687, [1924] A.C. 196 at pp. 200-1; and to Glascar Ltd. et al. v. Polysar Ltd. (1975), 9 O.R. (2d) 705 at p. 713, 61 D.L.R. (3d) 577 at p. 585, where it is said:

> The Statute of Frauds, R.S.O. 1970, c. 444, s. 4, which requires the agreement or some note or memorandum thereof to be in writing, would offer no defence since the agreement as rectified, would comply with the statute.

21 Counsel for Peter Pan further argued, founded on Blackley v. Kenny (1889), 16 O.A.R. 522, that there was a doubt as to the validity of the Lincoln Trust mortgage because Lincoln Trust advanced the proceeds of its mortgage to Peter Pan at a point in time which was, to the knowledge of Lincoln Trust, after the property had been reconveyed by Peter Pan to Flambro. In Blackley v. Kenny a husband mortgaged his property and then with the concurrence of the mortgagee conveyed the property to his own wife. Subsequently, the mortgagee advanced more money to the husband and sought to obtain security against the wife's property for the subsequent advances. It was held that the later advances did not affect the wife's interest in the property. That case was a dispute between the mortgagee and the purchaser of the property. In the case at bar there is no dispute between the mortgagee, Lincoln Trust and the transferee of the property, Flambro Realty Limited. The dispute here is between the transferor, Peter Pan Drive-In Limited and the transferee, Flambro Realty Limited, and I am unable to see that the Blackley case has any application to the present situation.

22 Counsel also relied on s. 72 of the Registry Act, R.S.O. 1970, c. 409. As I read this section it too deals with priorities between a mortgagee (in this case Lincoln Trust) and a subsequent transferee of the property (in this case Flambro) and is for the same reason unhelpful and inapplicable to the present case.

23 A further argument advanced on behalf of Peter Pan was that certain agreements and documentation in connection with the sale of the shares of Peter Pan from the original group of shareholders to a second group of shareholders in 1968 do not mention any liability on a land mortgage and that the Court should, therefore, conclude that the witnesses who said that the mortgage liability was Peter Pan's and not Flambro's should not be believed. The same argument was made with respect to two agreements which amended the lease in 1967, without making any provisions for an amendment as to the liability on the mortgage. The short answer to these submissions is that I do accept the evidence of the witnesses as herein before indicated.

24 A further submission made on behalf of Peter Pan was that rectification of the lease could not be granted if the effect of it was to prejudice a third party. This argument was founded on the only evidence put in by Peter Pan; namely, an abstract of the title and a copy of a mortgage shown on the abstract of title from Peter Pan to the Jolly Buccaneer Rootbeer Company Limited and registered on title in 1973. I believe this was very close to the time when Peter Pan refused to make any further mortgage payments to Lincoln Trust. The face value of the mortgage is $135,000.

25 No evidence was called as to whether or not Jolly Buccaneer did in fact advance any money under that mortgage at any time. From the timing of the mortgage one might surmise that its real purpose was to give Jolly Buccaneer a priority over ordinary creditors of Peter Pan in case Peter Pan should become bankrupt at some time later, for the evidence was that in late 1973 Peter Pan was in financial difficulty. It is also to be remembered that up until approximately the date of the aforesaid mortgage Peter Pan (through the instrumentality of its officers and directors who were personally liable on the mortgage) had been making the payments on the Lincoln Trust mortgage. In the complete absence of any evidence that any money whatever was advanced under or secured by the Jolly Buccaneer mortgage, and in the complete absence of any evidence that any money was advanced by Jolly Buccaneer to Peter Pan on the strength and faith of Peter Pan not being liable on the Lincoln Trust mortgage, I am unable to see any substance in the submission.

26 In the result, therefore, judgment will go for Flambro for rectification of the lease (ex. 8) at the trial to add to p. 3

thereof a clause as follows:

> (c) To pay all mortgage payments due to Lincoln Trust Company and to save the lessor entirely harmless from all liability with respect thereto.

27 There will further be judgment for Flambro against Peter Pan for the sum of $77,667.83 together with interest thereon at the legal rate from October 21, 1975. It is no doubt true that Flambro is entitled to interest on payments made prior to that date as from the date of each and every payment and if it desires to make the necessary calculations the judgment may provide for interest accordingly. Flambro is further entitled to a declaration entitling it to indemnification from Peter Pan for all amounts paid by Flambro or to be paid by Flambro to Lincoln Trust Company, whether for principal or interest, necessary to secure a discharge of the said mortgage which was registered in the Registry Office for the Registry Division of Lincoln as No. 128353. It is clear from the evidence that Peter Pan has failed to make the mortgage payments since approximately November, 1973, and I find that Peter Pan is in breach of the lease. Accordingly, Flambro is at liberty to take such action as it may be advised with respect to the said breach.

28 As to costs, Flambro having been entirely successful, costs should follow the event, and is entitled to the costs of the counterclaim against Peter Pan as well as the costs of Peter Pan's discontinued action, both on a party-and-party basis to be taxed.

29 If there is any difficulty in drafting the formal judgment or if I have overlooked any points, I may be spoken to.

Judgment for defendant on counterclaim.

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