Privy Council Appeal No. 97 of 1914.

Charlotte Brickles, Executrix of the Estate of Isaac Brickles, deceased - - - - - *Appellant,*

v.

William H. Snell - - - - - - - - *Respondent,*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[*Delivered by* LORD ATKINSON.]

---

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated the 23rd February, 1914, allowing, by a majority of three to two, an appeal from an unanimous judgment of five members of the Appellate Division of the Supreme Court of Ontario dated the 18th March, 1913, setting aside the judgment at the trial dated the 26th November, 1912.

The action out of which the appeal arises was brought by the respondent against Isaac Brickles, since deceased, claiming specific performance of an agreement dated the 20th February, 1912, entered into between the respondent and Brickles acting through one G. W. Ormerod as his agent whereby Brickles agreed to sell and the respondent to purchase certain parcels of land in the township of Scarborough and county of York in the Province of Ontario for the sum of 7,500 dollars to be paid and secured as follows: 500 dollars as a deposit on entering into the agreement, 2,000 dollars on the acceptance of the title and the delivery of the deed of conveyance, and the balance 5,000 dollars to be secured by a mortgage executed by the respondent of the property purchased to "be drawn on the

vendor's solicitor's usual form" containing the three clauses specified.

This agreement contains several special clauses. It is only necessary to state the purport and effect of those bearing upon the questions upon which the appeal turns.

(1.) The vendor was not bound to furnish any abstract of title or, any title deed, or evidence of title, except such as he might have had in his possession.

(2.) The purchaser was left to search the title at his own expense, had ten days to examine it, and if he did not object in writing within that period he was to be deemed to have accepted the title.

(3.) If any valid objection was made to the title within that time the vendor was given a reasonable time to remove it.

(4.) If the purchaser should make default in completing the purchase "in the manner and at the time mentioned," *i.e.*, the 15th March, 1912, any money theretofore paid on account might at the option of the vendor be retained by him as "liquidated damages" and the contract, at his option, be put an end to, the vendor being entitled to resell the lands without reference to the purchaser.

(5.) Time was made in all respects strictly of the essence of the contract.

The purchaser's solicitors, Messrs. Proudfoot, Duncan, Grant, and Skeans, did not prepare the deed of conveyance, nor apparently did they claim or intend to do so. The vendor's solicitors, Messrs. Du Vernet and Co., took that matter in hand, and the purchaser and his solicitors apparently acquiesced in that arrangement. On the 21st February, 1912, the vendor's solicitors wrote to the solicitors of the purchaser to the following effect:—

"Dear Sirs,

"*Re* Brickles to Snell, Lots 1 and 2, Plan 412, Scarboro' "Township.

"We understand that you are acting for William H. Snell, who is "purchasing the above lands from our client, Isaac Brickles. Enclosed "please find draft deed for approval."

On the following day the vendor's solicitors again wrote to the purchaser's solicitors, enclosing a corrected description of the lands to be conveyed, and requesting them to detach the first page of the copy deed sent the previous day, and to replace it with the page enclosed. On the 27th February the vendor's solicitors sent to the same firm a third letter to the following effect:—

"Dear Sirs,

"Would you please return draft deed herein approved, with your "objections to title, as our client will be in the office on Saturday."

These, however, were not the only communications which passed between the two firms of solicitors touching the carrying

out of the contract. Mr. Melville Grant was the member of the firm of the respondent solicitors who had charge of the matter on behalf of his firm, and Mr. Ross the member of the other firm who had charge of the matter on behalf of the vendor.

Mr. Grant commenced to examine the vendor's title on the 22nd February, 1912, and had his examination practically completed on the 29th of that month, when he received the last-mentioned letter, dated the 27th February, 1912. By the first week in March he had completed the searches, and was ready to accept the title. There remained, however, one matter to be cleared up, in reference to which he spoke to Mr. Ross over the telephone on the 5th March, namely, the existence of an undischarged mortgage of the property sold. He then informed Mr. Ross that the title was satisfactory, but that there was a mortgage which should be discharged. To this Mr. Ross replied that he would have it discharged on closing. On the 12th March Mr. Ross telephoned to him that the vendor was in his—Mr. Ross's—office; that the 15th March was the day for closing, and asked him to return the draft deed. To this Mr. Grant replied that his firm were ready to close, that the only point they wanted cleared up was the question of the mortgage. Mr. Ross said he would have this done, and then Mr. Grant replied that he would return the draft deed.

On the next day, Wednesday, the 13th, he brought out the deed from, presumably, his safe or some such place for the purpose of returning it, when he found he had nobody in his office to whom he could dictate the letter he intended to send with the deed. He therefore postponed the sending of it till the next day, Thursday, the 14th. He was, however, suddenly taken ill on that day, and was ill and unable to attend to the matter till Monday, the 18th. He then telephoned to Mr. Ross, stating his firm were ready to close the matter and he would like to get it closed, and asking him if they could close. To which Mr. Ross replied that his client had been in with him and that as the matter had not been closed on the 15th, had refused to carry out the agreement. On the 18th of March the vendor's solicitors wrote to the purchaser's solicitor a letter in the terms following:—

"Dear Sirs,

"*Re* Sale—Brickles to Snell, parts of Lots 1 and 2, Plan 412, York.

"The vendor called at our office to-day to ascertain whether this "sale had been closed, as the date for closing was the 15th instant. "We had to inform him that we had not heard from you, that you had "not returned the draft deed, nor put in any objections to title. Under "the agreement, 'in every respect time is to be strictly of the essence "thereof.' The vendor has now instructed us to write you informing "you and your client that on account of your default he will not carry "out the contract, and the same is now rescinded."

These facts are all admitted. There is no controversy or dispute about them. From them it is clear that all parties concerned were anxious to carry out the sale, and that the delay

was due mainly, if not entirely, to the sudden and unexpected illness of Mr. Grant. It is quite true that he might, on Wednesday, the 13th, have himself written the letter he desired to send to the vendor's solicitors accompanying the deed, and not have postponed matters till next day. And it may well be he would have done so if he had apprehended his illness. If that be a fault it is certainly a trivial one; but, even so, the vendor is still entitled to stand upon "the letter of his bond." The writ was issued by the purchaser on the 23rd April, 1912. The only specific relief it claims is specific performance of the agreement of the 20th February, 1912. There is a claim for such further relief as the nature of the case may require, but that can only mean such further relief as is ancillary to the main specific relief claimed.

It is, their Lordships think, very unfortunate that a claim in the alternative was not inserted for a return of the deposit of 500 dollars, or that, if not originally claimed, liberty should not have been asked to amend the pleadings by inserting such a claim, so that there might have been a complete adjudication on all matters in dispute between the parties, and all further litigation have been prevented. That, however, has not been done, and their Lordships therefore can only deal with the issues raised by the pleadings as they stand. The Trial Judge held that the purchaser, the plaintiff, was not in default so as to entitle the defendant, the vendor, to rely upon the clause as to time being the essence of the contract, and granted a decree for specific performances. The Supreme Court of Ontario set aside this decree, and ordered and adjudged that the action should be dismissed. The Supreme Court of Canada, the Chief Justice, and Anglin J. dissenting, reversed this decision, and ordered that the judgment of the Trial Judge should be restored.

Davies and Duff, JJ., expressly held that the case was governed by the decision of this Board in the case of *Kilmer* v. *British Colombia Orchard Lands*, (1913) A. C. 319, and Brodeur, J., concurred with them. The Court had not, of course, the advantage of having before it the judgment of this Board in the more recent case of *Steedman* v. *Drinkle and Another*, delivered on the 21st December, 1915 ((1916) A. C. 275), in which the former case was explained, and it was pointed out that in it their Lordships must have been of opinion that the stipulation as to time being of the essence of the contract did not apply as the facts stood, since the defendant company had themselves agreed to extend beyond the day fixed the time for the payment of the instalment of the purchase-money, the non-payment of which by Kilmer they relied upon as entitling them to enforce the forfeiture.

This was the feature which distinguished that case from the later case of *Steedman* v. *Drinkle and Another*. In the latter, the purchaser made default in the payment of an instal-

ment of the purchase-money. The vendor did not give any further time for the payment of it; on the contrary, he took advantage of the default immediately and cancelled the agreement. The Board decided that as time was expressly made the essence of the contract, specific performance of it could not be decreed in favour of the purchaser who was in default; but held that the forefeiture of the money paid under the contract was a penalty from which relief might be granted on proper terms. Faced with these difficulties, Mr. Tilley, counsel for the respondent, abandoned the grounds upon which the decision appealed from was based by the Supreme Court, but stoutly contended that the vendor was not entitled to treat the purchaser's omission to close the transaction on the 15th March, 1912, as a default giving him, the vendor, the right to rescind, as the latter was not at that time ready (*i.e.*, able) and willing to convey to the purchaser the fee of the property sold, inasmuch as, first, he had not before that day paid off and discharged the then existing mortgage on the land, and procured the legal estate in the lands to be revested in him; and, second, as the vendor's solicitors' form of mortgage had never been delivered or tendered to the purchaser to enable his own solicitors to prepare the mortgage deed, by which the balance of the purchase-money was to be secured to the vendor.

Counsel was, having regard to the terms of the fifth paragraph of the plaintiff's reply and joinder of issue, quite entitled to raise these points. The second is easily answered. It was the duty of the intended mortgagor, the respondent, to have the mortgage deed prepared. Neither he nor his solicitors ever asked the vendor or his solicitors to furnish him or them with the form prescribed. It was the business of the purchaser or his solicitors to procure it, and neither the vendor nor his solicitors were in any default in having omitted to furnish this form unasked. The first point is the more substantial. The mortgage to be discharged bore date the 1st November, 1904. It was made by Isaac Brickles to one Lucy Male, a married woman, wife of one George Male, to secure the repayment of a sum (not specified in the case) by instalments of 100 dollars each on the 1st November in every year until the entire debt with interest at 5 per cent. was paid. In the spring of 1912 something over the trifling sum of 200 dollars remained due on this mortgage. The entire sum due about the 1st November, 1912, for principal and interest was 300 dollars, which was then paid in full, and a discharge signed by the mortgagee. The hearing did not take place till the 26th November following. The vendor was at that date undoubtedly ready, *i.e.*, able, to convey the interest purchased. It is quite true that the vendor had not on or before the 15th March any legal power to compel Mrs. Male to accept against her will the unpaid balance of the mortgage debt with the interest thereon, so as to vest in himself the interest in the lands he had contracted to sell, but a written

statement, signed by her husband, George Male, dated in the month of November, 1912, and an affidavit of the same date made by his wife, were, by consent, received in evidence at the trial as proof of the facts stated in them. From the first it appeared that Brickles about the time the sale was contemplated told George Male that he was about to sell these lands, and asked Male if he would consent to receive the mortgage money; he replied in the affirmative and afterwards informed his wife of the offer, and she was satisfied.

Mrs. Male in her affidavit stated that she was prepared at any time, upon payment of the principle and interest due under the mortgage, to execute a discharge therefor in favour of Isaac Brickles; and that had she been called upon on or before the 15th March, 1912, to do so would have done so. It is to be borne in mind that on the 5th March Mr. Ross informed Mr. Grant over the telephone that he, Ross, would have "a discharge of this mortgage on closing." Mr. Grant did not suggest that this would be too late. On the contrary, he apparently acquiesced in the arrangement. That assurance was repeated by Mr. Ross on the 12th March, 1912. And again no objection was made to it by Mr. Grant.

A very simple procedure for the discharge of mortgages and the revesting in the mortgagor of his former estate in the property mortgaged is provided by the 62nd and 67th sections of the Registry of Deeds Act, Ch. 124 of the Statutes of Ontario of (1914) Vol. 1. A form of document called a discharge has merely to be filled up and authenticated in the manner prescribed. On this being duly registered the mortgage debt is discharged, and the legal estate revested in the mortgagor.

Their Lordships are clearly of opinion that the vendor was not bound to have the mortgage dischaged, and the legal estate revested in him before the 15th March, 1912. It would have been quite sufficient to have had these things done immediately before the closing of the transaction on that day, and so the solicitors for the parties obviously understood and intended. Mr. Tilley, however, urged that even though the documents admitted should be taken as satisfactory proof that Male and his wife had consented before that date to the discharge of the mortgage, they might at any moment up to the signing of the discharge have changed their minds and refused to sign it, and as Brickles could not have compelled them not thus to change their minds he was not in point of law ready on the 15th March to complete. No reason was suggested why they should change their minds. In fact they apparently had not done so, as they were paid off in full before the 1st November, 1912. There was no evidence given to suggest that they ever contemplated such a change; and the question is; must it be held, in the absence of such evidence, that the vendor was disabled from conveying the interest sold, owing to the bare possibility that a contingent and improbable event might conceivably occur? No authority was cited which went to such a length as that.

In the case of *In re Head's Trustees and Macdonald,* 45 Ch. D., 310, a testator, after giving to his wife a life estate in his real and personal estate authorised, but did not direct his trustees to pay his debts, and did not charge his real estate with the payment of his debts so that the trustees had not, during the lifetime of the widow, any power to sell the real estate, but he did empower them to sell the real estate after her death and divide the proceeds amongst his children. The trustees entered into a contract to sell some portion of the real estate, the contract to be completed on the 24th of January, 1890. On that day the vendors had not obtained the concurrence of the beneficiaries, and the purchaser repudiated the contract and asked for a return of the deposit. On the 29th of January the solicitor for the vendors wrote to say that he could make a good title with the concurrence of the beneficiaries which the vendors would procure, and the Lords Justices Fry and Lopes certainly seem to have endorsed the opinion that if the vendors had at once, when the objection to the title was made, offered the concurrence of the beneficiaries, shown that they could and would concur, and gave an opportunity of investigating their title the trustees might have forced the purchaser to take the title. In argument in that case it was urged on behalf of the purchaser, on the familiar authority of *Forrer* v. *Nash,* 35 Beavan, 167, that the vendors not having been able to convey, nor to force the concurrence of the beneficiaries, the purchaser was not bound to wait to see whether that concurrence could be obtained, but Fry, L. J., at p. 317, said: "Objection having been taken to the title, the vendors said they would have to obtain the concurrence of the beneficiaries. Now if that had been done at an early stage of the proceedings, and if the trustees had been in a position to show that the beneficiaries did in fact consent to join, and an opportunity had been given of investigating their title, and it had been shown they would concur in a reasonable time, it is by no means clear to me that the vendors might not have enforced their contract. It is not necessary to decide the point." In the present case the purchaser's solicitors knew of the existence, and presumably of the nature, of this mortgage, they apparently satisfied themselves as to that. They never made any requisition as to proof of the mortgagee's title. They merely required that the mortgage should be discharged. It could only be discharged with the consent of the mortgagee or her assigns. He was assured it would be discharged. The vendor had obtained the legal power and authority to discharge it. There is no suggestion that that power and authority, if unrevoked, would not be sufficient, the only infirmity about it was that it was revocable at the option of those who conferred it. This case seems a much stronger one in favour of the vendor's ability to convey than that of *In re Head's Trustees.*

In *Esdaile* v. *Stephenson,* 6 Mad., 366, the master reported that the vendor could make a good title if a widow would release

her jointure, which was secured by a term. The vendor undertook by parole before the master to procure her to release it This was held to be insufficient. But that case is quite distinguishable from this. The widow was not shown to have ever given her consent to release her jointure. The respondent cited several authorities, amongst others the following: *Brewer* v. *Broadwood*, 22 Ch. D., 105. In that case the purchaser had bought an agreement for a lease. He repudiated on the ground that the agreement was voidable at the will of the lessor unless certain works were completed on the land within a certain time; the work had not been completed within the time, and the agreement was therefore voidable, but on the day on which the contract was repudiated the lessor consented, in case certain rent was paid up within a week, to extend the time for finishing the incompleted work to over seven months. Here the purchaser bought a valid agreement for a lease. The vendor had never that to sell. He had only a voidable lease to sell. The rent stipulated for was never paid, the condition on which further time was given was never performed. The purchaser was held to have been entitled to repudiate. That case does not establish that a consent to a certain thing which, if unrevoked, would validate a vendor's title, is ineffectual for that purpose if, though unrevoked in fact, it is revocable in character.

In *Bellamy* v. *Debenham* (1891) 1 Ch. 412 the plaintiff sold a house but on copyhold land, subsequently enfranchised, the mines, &c., being reserved to the Lord of the Manor, and never vested in the vendor. On the purchaser discovering that the vendor was not entitled to the mines he repudiated before the day fixed for completion, the 24th June, 1889. He persisted in that, and though the vendor before that date began to negotiate for the purchase of the mines, he did not till after action brought and long after the 24th June, 1889, acquire the mines. It was held that the vendor was not entitled either to a decree for specific performance or for damages. The case of *Sprague* v. *Booth* (1909), A. C. 576, does not apply to the present case.

These authorities do not, in their Lordships' opinion, support the respondent's contention on this point. They think he has failed to show that the vendor was not, in fact, on the 15th March, ready, *i.e.*, able, to convey the property purchased. They think, therefore, on the whole, that the appeal succeeds, that the decree appealed from was erroneous and should be reversed, and the decree of the Supreme Court of Ontario dated the 18th March, 1913, restored. And they will humbly advise His Majesty accordingly. The respondent must pay the costs here and in the Supreme Court of Canada.

In the Privy Council.

CHARLOTTE BRICKLES

v.

WILLIAM H. SNELL.

DELIVERED BY LORD ATKINSON.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1916.