CA015739

Vancouver

Registry

Court of Appeal for British Columbia

BETWEEN:

INNOVEST DEVELOPMENT CORPORATION

PLAINTIFF

(APPELLANT)

AND:

LIN QUAY CHOW, TOM JOCK KOY, CHUNG YUEN
CINDY CHOW, MING CHONG, WAI MAN LIM,
TOM CHONG DICK and WON GOW KONG

DEFENDANTS

(RESPONDENTS)

AND:

JOSEPH WILLIAMS and
NRS BLOCK BROS. REALTY LTD.

THIRD PARTIES

(RESPONDENTS)

Before: The Honourable Mr. Justice Cumming
The Honourable Madam Justice Proudfoot
The Honourable Mr. Justice Wood

F.J. Potts and T.J. Delaney	Counsel for the Appellant
Patrick F. Lewis	Counsel for the Respondents (Vendors)
G.C. Blanchard	Counsel for the Third Parties Joseph Williams and NRS Block Bros. Realty Ltd.
Place and Date of Hearing	Vancouver, British Columbia September 28, 1994
Place and Date of Judgment	Vancouver, British Columbia November 29, 1994

Written Reasons by:

The Honourable Madam Justice Proudfoot

Concurred in by:

The Honourable Mr. Justice Cumming

The Honourable Mr. Justice Wood

Court of Appeal for British Columbia

Innovest Development Corporation

- v. -

Lin Quay Chow, Tom Jock Koy, Chung Yuen, Cindy Chow, Ming Chong, Wai Man Lim, Tom Chong Dick and Won Gow Kong

- and -

Joseph Williams and NRS Block Bros. Realty Ltd.

Reasons for Judgment of the Honourable Madam Justice Proudfoot

1 This is an appeal from a judgment of Mr. Justice Vickers pronounced May 25th, 1992, dismissing the plaintiff/appellant's claim against the defendants/respondents and the third parties and giving judgment in favour of the respondents against the appellant in the amount of $100,000 with interest.

2 The facts are fully covered in the judgment:

In the fall of 1989, the plaintiff, a real estate developer, decided it wanted to purchase and develop the defendants' property. Its president, Alan Yong contacted the third party Joseph Williams whose firm NRS Block Bros. Realty Ltd. had its sign on the property. Over a span of 19 years Williams had several listings of the subject property but it had not sold. When Yong contacted him he had no listing but his sign remained on the property. I find that at all material times Williams was the agent of the defendants for the purpose of this sale.

The property consists of approximately 60 acres along the Fraser River in the Municipality of Richmond. On the southern portion of the property, immediately to the south of a Canadian National Railway line, lies approximately 7.5 acres. Approximately 45.6% of the 7.5 acres which are zoned for light industrial use, is covered by a British Columbia Hydro Right-of-Way. The property to the north of the rail line is in the agricultural land reserve.

Yong told Williams that it was the plaintiff's intention to build commercial warehouses on the industrial portion of the property. Over time, the plaintiff would attempt to rezone the portion of the property which was in the agricultural land reserve. On November 4, 1989 the plaintiffs made an offer to purchase which was rejected by the defendants who counter-offered on November 25, 1989. Some negotiations followed between Yong and Williams. Eventually an interim agreement was executed by the parties. In that agreement the defendants agreed to sell the property to the plaintiffs for the sum of $3,600,000 upon the following terms:

1. Upon acceptance a deposit of $30,000;

2. Upon removal of the "subject to" clause, a further payment of $70,000;

3. $500,000 on closing, April 30, 1990;

4. On July 30, 1990, an instalment of $600,000 without interest; and

5. A mortgage back for the balance of $2,400,000.

The "subject to" clause gave the opportunity to the plaintiff to conduct feasibility studies, make municipal inquiries and undertake a survey of the property prior to December 27, 1989.

The clause relating to the mortgage back reads as follows:

> Vendor to accept balance via 1st mortgage, 1st payment one year from closing date $1,200,000. 2nd payment 2nd year from closing date $1,200,000.00. Interest on balance owing of $2,400,000.00 + 12% from closing date April 30, 1990.

Williams gave Yong certain maps which clearly indicate the presence of B.C. Hydro transmission lines on the property. As well, the lines could be observed by anyone who chose to walk upon the property.

. . . . .

In December 1989 Yong asked Williams for some further information on the property. On December 7, 1989 Williams sent Yong a fax message which said "I don't have any exact acreage on Lot 19. You should have your lawyer search the property". Yong did not consult his solicitor and did not conduct a survey of the property. On December 27, 1989 the "subject to" clauses were removed and the following term

added to the agreement:

Should the purchaser fail to complete this agreement, then the deposit of $100,000.00 shall become non-refundable and payable to the vendor as liquidated damages and no further action shall be commenced against the purchaser.

3 The appellant in his factum sets out three grounds of appeal:

(a) Did the statements of Mr. Williams to Innovest concerning site coverage for the Property constitute a misrepresentation;

(b) Did Innovest act and rely upon the misrepresentations by the Vendors' agent, Mr. Williams, concerning the site coverage for the Property;

(c) Is the interim agreement void for uncertainty.

4 Dealing with Grounds (a) and (b), the trial judge covered those issues on pages 13 to 17 of the judgment:

2. Is the plaintiff entitled to recover on the grounds of misrepresentation?

The plaintiff complains the defendants:

a) failed to disclose the British Columbia Hydro & Power Authority Right-of-Way or alternatively failed to disclose its size and that it covered a substantial portion of the industrially zoned section of the property;

b) in the alternative misrepresented that the right-of-way would not affect the amount of building development that could cover the site of the industrially zoned portion of the property;

c) failed to disclose the property was under review as an important natural area; and

d) failed to advise the property zoning was under Court challenge.

I have already noted and I find as a fact that at all material times the plaintiff knew of the British Columbia Hydro & Power Authority Right-of-Way. I find Yong was advised by Williams that the right-of-way was on the industrial portion of the property.

The second aspect to the right-of-way complaint arises out of what was said by Williams. In that regard I have no difficulty in finding that Williams advised Yong what he thought to be the case namely, that if any buildings were constructed on the property the right-of-way could be used for parking and further, that the right-of-way land could be used in determining site coverage for building purposes and therefore did not restrict the useable land. The Industrial Zoning Bylaw for Richmond permits buildings to cover 60% of the property. The plaintiff says it was mislead. The right-of-way cannot be taken into account in determining site coverage and given the size of the right-of-way it does have an effect on the maximum site coverage available for development. The professional evidence of a land surveyor is that the right-of-way covers approximately 46% of the property. Accordingly 60% is not available for site development.

The defendants relied upon the authority of ***Price et al. v. Malais et al.***(1982), 37 B.C.L.R. 121. That was a case in which a prospective purchaser was shown property by an agent and at the time the presence of a water line and gas easement was mentioned. The executed interim agreement provided for clear title with no mention of any easement. When the prospective purchasers learned of the easements they repudiated and their claims were allowed by the Court.

That case can be distinguished upon the facts because the vendors covenanted in the interim agreement to convey free from all encumbrances. In this case the interim agreement called for the conveyance of title clear of encumbrances except for inter alia, rights-of-way. The document was specifically drawn so as to allow the plaintiff to conduct a survey and to make such inquiries as it considered relevant with the municipality concerning the zoning. Even if Williams was mistaken concerning the land available for development it was not information given to the plaintiff upon which the plaintiff either acted or relied upon.

I find the plaintiff was an experienced real estate developer. Indeed, it had another project underway in the immediate area. It did not rely upon the information it received from Williams. However, it was extremely careless, in the manner in which it set about to pursue the project. It failed to consult its solicitor prior to the removal of the "subject to" clause, failed to make any inquiries with the local municipality and failed to conduct a survey. Because of its lack of diligence it now seeks to avoid legal obligations incurred.

When I consider all of the evidence I can only conclude that Yong knew of the right-of-way at all material times. He was also aware that he could not build on the right-of-way. Yong's evidence on the right-of-way is equivocal. He says today that he had no recollection of discussions concerning the right-of-way and in that regard I am satisfied the evidence of the agent Williams is to be preferred over that of Yong wherever there is a conflict. It would be fair to say that Yong did not know the precise extent of the right-of-way. But the burden of having it properly surveyed rested with him and he chose not to follow that course of action.

With respect to the information concerning site coverage Yong was aware of the municipal requirements. In addition, I am satisfied that with respect to these development issues he did not rely upon the agent Williams in any way.

The plaintiff relied upon a judgment of Spencer, J. in ***Tunner v. Novak***, Vancouver Registry C893872, October 10, 1991. In my opinion that case can be distinguished on its facts. In that case the purchaser thought what it was buying was fundamentally different from that offered because of a bylaw restriction. There was an innocent misrepresentation. In the view I take of the evidence in this case there has been no misrepresentation. If there was an innocent misrepresentation concerning site coverage it was not relied upon by the

plaintiff.

In ***Arthur v. Bassett Enterprises Ltd.***, Vancouver Registry C835850, March 21, 1985, Finch, J. in dismissing a purchaser's claims made against the vendors and the real estate agent found the plaintiffs had a responsibility to inspect and inquire into the property they proposed to purchase. In my opinion the same can be said of the purchasers in this case.

With respect to the environmental issue and the issue relating to the zoning bylaw Court challenge there is no evidence to suggest these are events which were discussed at all by the plaintiff and Williams. They are matters which could have been discovered by the plaintiff had it been diligent in the pursuit of its own interests, well before the "subject to" clause was removed.

5 From these reasons one can readily see that the trial judge analyzed the evidence of all the parties carefully and concluded that the appellant knew about the Hydro right-of-way, and knew it was in the industrial portion of the property. The trial judge made reference to the examination for discovery of Mr. Yong, a representative of the appellant, which makes it abundantly clear that the appellant knew about the right-of-way. In addition, he had some drawings and was told the use to which that right-of-way could be put. Furthermore, it ill-behooves the appellant to complain about his lack of knowledge when he had a "subject to" clause inserted in the interim agreement which read: "subject to feasibility, municipal and survey studies".

6 The trial judge went on further and said this:

In this case the interim agreement called for the conveyance of title clear of encumbrances except for inter alia, rights-of-way. The document was specifically drawn so as to allow the plaintiff to conduct a survey and to make such inquiries as it considered relevant with the municipality concerning the zoning. Even if Williams was mistaken concerning the land available for development it was not information given to the plaintiff upon which the plaintiff either acted or relied upon.

I find the plaintiff was an experienced real estate developer. Indeed, it had another project underway in the immediate area. It did not rely upon the information it received from Williams. However, it was extremely careless, in the manner in which it set about to pursue the project. It failed to consult its solicitor prior to the removal of the "subject to" clause, failed to make any inquiries with the local municipality and failed to conduct a survey. Because of its lack of diligence it now seeks to avoid legal obligations incurred.

When I consider all of the evidence I can only conclude that Yong knew of the right-of-way at all material times. He was also aware that he could not build on the right-of-way. Yong's evidence on the right-of-way is equivocal. He says today that he had no recollection of discussions concerning the right-of-way and in that regard I am satisfied the evidence of the agent Williams is to be preferred over that of Yong wherever there is a conflict. It would be fair to say that Yong did not know the precise extent of the right-of-way. But the burden of having it properly surveyed rested with him and he chose not to follow that course of action.

With respect to the information concerning site coverage Yong was aware of the municipal requirements. In addition, I am satisfied that with respect to these development issues he did not rely upon the agent Williams in any way.

7 The trial judge had ample evidence to support his conclusion that there was no misrepresentation. Not to be forgotten is the fact that had the interim agreement as drawn been followed by the appellant, all inquiries considered relevant and necessary concerning zoning, etc., would have been completed.

8 The first and second grounds of appeal cannot succeed.

9 The third ground is, whether the interim agreement was void for uncertainty. The trial judge found it was not, and his judgment covers this on pp. 7 to 12. The appellant alleges uncertainty for the following reasons:

(d) **The interim agreement was void for uncertainty.**

40. It is respectfully submitted that the interim agreement drafted by Mr. Williams was uncertain because:

(a) it is uncertain whether the mortgage was to be open or closed;

(b) it is uncertain how and by what method interest on the balance of the TWO MILLION FOUR HUNDRED THOUSAND DOLLARS ($2,400,000.00) would be calculated;

(c) it is uncertain when the interest on the TWO MILLION FOUR HUNDRED THOUSAND DOLLARS ($2,400,000.00) was to be paid; and

(d) it was uncertain as to the parties' remedies upon default.

10 The question of the interest calculation was set out in the purchase agreement in this form:

51. The impugned clause is as follows:

"Vendor to accept balance via 1st mtge

1st paym't one year from closing date

$1,200,000

2nd paym't 2nd year from closing date

$1,200,000

Interest on balance owing of $2,400,000 + 12% from closing date April 30/90"

How that interest is to be calculated and how that interest was to be paid was dealt with by the trial judge in this passage:

A number of authorities were cited to me by counsel with respect to whether the interim agreement was void for uncertainty because it failed to stipulate how interest was to be calculated and when the payments were to be made. It is clear from a reading of the examinations for discovery and the evidence filed by counsel on these motions that the parties were never in any doubt as to how the mortgage would be drawn. It was to be drawn in precisely the fashion that it was drafted by the plaintiff's solicitor some time prior to the collapse of the transaction. I am invited to ignore the evidence because counsel for the plaintiff says it is not what the parties thought they had agreed to but whether the words in the agreement themselves are so uncertain that they will make the document void. That argument highlights the true issue in this case. If the B.C. Hydro Right-of-Way and the two pieces of information concerning the property, drawn to the attention of the plaintiff's solicitor by the Municipality of Richmond, had not become concerns of the plaintiff, the transaction would have completed. The document would not have been uncertain because the parties knew precisely what it was they had agreed upon. I do not propose to allow the plaintiff to escape its responsibility by complaining of something which never was an issue.

11 I agree with the trial judge's assessment of the situation. Indeed the evidence is quite clear that the parties knew exactly what interest was to be paid and how and when it was to be paid.

12 The evidence of the respondent vendor is as follows:

10. I did not discuss with Mr. Williams how the 12% rate of interest would be calculated prior to Exhibit "B" being signed; it was obvious to me that we were referring to a simple, annual rate of interest to be applied to the sum of $2,400,000.00 in the first year and the sum of $1,200,000.00 in the second year. Similarly, I did not discuss with Mr. Williams the specific matter of when the interest would be paid; it was obvious to me that the interest on $2,400,000.00 which accrued during the first year would be paid on April 30, 1991 and the interest on $1,200,000.00 which accrued during the second year would be paid on April 30, 1992. In other words, I understood and intended that interest payments would be made along with principal on the two payment dates and would simply cover the interest which had accrued to the date of each payment.

13 Mr. Yong, the representative of the appellant, in his examination for discovery answered these questions:

241 Q Mr. Yong, could you turn to plaintiff's document number 7; do you have that in front of you now?

A Yes.

242 Q That document is an interim agreement contract of purchase and sale addendum or amendment form, correct?

A Yes.

I interject to point out document number 7, which can be found at A.B. p. 269, is the final offer the parties made, and came after several offers and counter-offers.

14 Mr. Yong's discovery then goes on:

243 Q And that document sets out the agreement that the plaintiff and the vendor came to relating to the mortgage back to the vendors, correct?

A Sorry, can you repeat that again, please.

244 Q Sure. Document number 7 on the plaintiff's list of documents sets out the agreement which the plaintiff and the defendant vendors came to on the terms of the mortgage back to the vendors, correct?

A Yes.

245 Q Your understanding of what is meant by the words on plaintiff's document number 7 is that there would be a mortgage back to the vendors in the amount of $2,400,000, correct?

A Yes.

246 Q And that --

A Sorry, can I have a minute just to --

247 Q Sure. Go ahead and read it over.

A Are you saying that there is $2.4 million that is --

248 Q My question to you, Mr. Yong, is that your understanding --

A Uh-huh.

149 Q -- of what is stated on plaintiff's document number 7 is that the vendor will accept a mortgage, a vendor take-back mortgage of $2.4 million --

A Uh-huh.

250 Q -- is that correct is that your understanding?

A I think there is more than that because there is also a few hundred, I think $600,000, that's non-interest bearing.

251 Q Yes.

A So it would be more than 2.4.

252 Q Well, let's just be clear on this, Mr. Yong.

A Yeah.

253 Q Under the terms of the contract of purchase and sale which --some of which are set out on plaintiff's document number 7 --

A Uh-huh.

254 Q -- in addition to the hundred thousand dollars deposit which had been previously -- that would have been previously paid by the plaintiff --

A Uh-huh.

255 Q -- the plaintiff agreed to pay a hundred thousand dollars on the closing date April 30, 1990, correct?

A Yes.

256 Q On July 30, 1990 the plaintiff agreed to pay an additional $600,000, correct?

A The plaintiff is Innovest?

257 Q Correct.

A Yes.

258 Q You agree with what I have said?

A Yes.

259 Q Mr. Yong, directing your attention to plaintiff's document number 7 --

A Uh-huh.

260 Q -- would you agree with me that you understand this document to set out that the vendor, the defendants in this lawsuit, would take back a mortgage in the amount of 2.4 million dollars?

A Yes.

261 Q And that was your understanding at the time that you signed document number 7?

A Yes.

262 Q Did you understand at the time that you signed document number 7 that the mortgage would be paid in two payments, two principal payments of $1.2 million each?

A Yes.

263 Q Did you also understand at the time that you signed document number 7 that there would be interest pursuant to vendor take-back mortgage at an annual rate of 12 percent?

A Yes.

264 Q And did you understand that the interest -- let me start again, did you understand that you signed document number 7 that the interest would be paid at the same time as the two payments of principal?

A Yes.

265 Q And that the interest payable on each of those occasions would be calculated on the balance owing?

A Yes.

266 Q And that would be the balance owing at the time that the payments were to be made, correct?

A When you say balance owing you mean if I paid 1.2 million in the first -- let's say, I have two payments, first one I said 1.2, then the year after that would be the interest on the remainder 1.2.

267 Q That's correct. And that's what you understood --

A Yeah.

268 Q -- when you signed document number 7, correct?

A Yeah.

269 Q And that's what you intended those words that are set out in document number 7 to mean, correct?

A Uh-huh.

270 Q Is that yes?

A Yes.

15 The respondent submits, and I agree with that submission, Mr. Williams' affidavit is "in perfect accord as to what was understood and intended by the terms of the mortgage back". The trial judge had ample evidence to come to the conclusion he did. I see no error, and therefore the arguments advanced in grounds (b) and (c) of paragraph 40 of the appellant's factum, dealing with uncertainty relating to interest calculation and the time of payment, cannot succeed.

16 As a final ground of appeal, the appellant argues the mortgage is uncertain because it does not specify whether it is an open or closed mortgage. The trial judge dealt with that argument in the following passage:

Whether a mortgage is open or closed is not an essential term. If a mortgage is open for prepayment at any time then such a provision is a clause negotiated for the benefit of the mortgagor. The presence or absence of such a clause is not fatal to the document. The absence of such a clause simply means that the mortgagee expects payment in accordance with its terms. In my opinion the presence or absence of a clause stating whether the mortgage will be open or closed does not result in the document becoming unenforceable. It simply means that one or other of the parties will not have the benefit of such a term. ***First City Investments Ltd. v. Fraser Arms Hotel Ltd.; Cumberland Mortgage Corporation Ltd. v. Fraser Arms Hotel Ltd.*** (1979), 13 B.C.L.R. 107 at 116. Yong, not a lawyer but an experienced real estate developer was also of the same opinion. He gave this evidence at his examination for discovery on January 7, 1992:

317 Q You're saying that if you had wanted prepayment privileges on the mortgage, you would have insisted on that being included; right?

A Yes.

The respondent argues that it is not necessary to state whether a mortgage is closed or open.

17 In ***Marquest Industries Ltd. v. Willows Poultry Farms Ltd.***, [1968] 66 W.W.R. 477 at 482 (B.C.C.A.), Mr. Justice Bull said this:

In the first place, consideration must be given to the duty of a court and the rules it should apply, where a claim is made that a portion of a commercial agreement between two contracting parties is void for uncertainty or, to put it another way, is meaningless. The primary rule of construction has been expressed by the maxim, "*ut res magis valeat quam pereat*" or as paraphrased in English, "a deed shall never be void where the words may be applied to any extent to make it good." The maxim has been basic to such authoritative decisions as ***Scammell & Nephew Ltd. v. Ouston***[1941] AC 251, 110 LJKB 197, [1941] 1 All ER 14; ***Wells v. Blain*** [1927] 1 WWR 223, 21 Sask LR 194 (C.A.); ***Ottawa Elec. Co. v. St. Jacques*** (1902) 31 SCR 636, reversing 1 OLR 73, as well as many others, which establish that every effort should be made by a court to find a meaning, looking at substance and not mere form, and that difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted. In other words, every clause in a contract must, if possible, be given effect to. Also, as stated as early in 1868 in ***Gwyn v. Neath Canal Navigation Co.*** (1868) LR 3 Exch 209, 37 LJ Ex 122, that if the real intentions of the parties can be collected from the language within the four corners of the instrument, the court must give effect to such intentions by supplying anything necessarily to be inferred and rejecting whatever is repugnant to such real intentions so ascertained.

18 That test has subsequently been applied in several cases. Mr. Justice Hinkson in ***First City Investments Ltd. v. Fraser***

Arms Hotel et al (1979), 13 B.C.L.R. 107 (B.C.C.A.), when dealing with the judgment of ***MacKenzie v. Walsh***, 54 N.S.R. 26, 53 D.L.R. 234 said (at p. 115):

> I feel that I should say something further about the ***Diamond Devs.*** case. If by the words [at p. 740], "A mortgage must include many other terms than dates of payment - would there, again for instance, be an acceleration clause on default of payment of an instalment? Must the mortgagor pay taxes and would failure to pay taxes or rates constitute a default? Will the mortgagee have immediate possession on default?".
>
> Wilson C.J.S.C. means - and I assume that his use of the word "must" and his giving of specific instances necessarily do mean - that, if a purported agreement to give a mortgage is silent on any of those things, or a purported mortgage itself fails to refer to any one of them, the purported agreement or mortgage is void for uncertainty, I must respectfully disagree with him. No one of those things is an essential term of a mortgage. If it were, then a document expressed to be made according to the form in the First Sched. to the ***Short Form of Mortgages Act***, R.S.B.C. 1960, c. 358, which omitted the form of words in col. I of the Second Sched. that is numbered 15 ("Provided that in default of the payment of the interest hereby secured, or taxes is hereinbefore provided, the principal hereby secured shall become payable.") would be so void. The same applies to the form of words numbered 11 ("And that the said mortgagor will insure the buildings on the said lands to the amount of not less than currency."). If there is no reference in an agreement to give a mortgage, or no reference in a mortgage itself to any one of the terms that Wilson C.J.S.C. has used as instances, the result is not that the document is unenforceable, but that the mortgagee will not have the benefit of such a term.

I adopt that passage and conclude that in the circumstances of this case the lack of inclusion of an "open or closed mortgage clause" indeed does not matter. It falls into the category of clauses spoken of by Wilson C.J.S.C. in ***MacKenzie v. Walsh***, *supra*. The fact that the clause was not there did not make it uncertain what would occur; what would occur would be that the purchaser, the appellant, would not get the benefit of such a clause.

19 Furthermore, I find this argument somewhat surprising in view of the appellant's position at the time of the purchase. In his evidence he said that if he had wanted that clause inserted he would have asked for it. His argument on that point is not impressive.

20 Mr. Justice Lambert in a more recent case in ***Forrest v. Smith*** (Unreported, December 16, 1988, Vancouver CA008573 (B.C.C.A.)) made this comment:

> In my opinion, when the question of whether an agreement is void for uncertainty is being considered it is proper to look to everything that comes within the four corners of the agreement and, of course, as in every question of contractual interpretation, it is desirable to look at the factual matrix against which the agreement came into being.

I agree with that comment. The final ground of appeal fails.

21 The appeal is dismissed.

"The Honourable Madam Justice Proudfoot"

I AGREE: "The Honourable Mr. Justice Cumming"

I AGREE: "The Honourable Mr. Justice Wood"