Date: 19970716
Docket: S039303
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CONTINENTAL CATTLE CO. LTD.

PETITIONER

AND:

DOUGLAS MELVIN BRANDT
SANDRA JANE BRANDT
OCEAN PARK DEVELOPMENTS LTD.
THE CROWN IN RIGHT OF CANADA
CLOVERDALE NURSERY

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE A.W. MacKENZIE

Counsel for the Petitioner: David A. Critchley

Counsel for the Respondents: F.G. Potts

Place and Date of Hearing: New Westminster, B.C.
June 26 and 30, 1997.

[1] The Petitioner, Continental Cattle Co. Ltd., brings foreclosure proceedings pursuant to Rule 50(5) of the Rules of Court, against the Respondents, Douglas Melvin Brandt and Sandra Jane Brandt. (The remaining Respondents are not interested in the proceedings).

[2] The Brandts apply for an order pursuant to Rule 52(11)(d) that there be a trial on the issues raised in this proceeding.

[3] The question is whether there is a bona fide triable issue to justify referring this matter to the trial list. Put another way, is there a dispute as to facts or law which suggests there is a defence that deserves to be tried: Douglas Lake Cattle Co. v. Smith (1991), 54 B.C.L.R. (2d) 52 at 59 (C.A.).

BACKGROUND

[4] The Respondents granted the $60,000 mortgage on their home to the Petitioner as part of a total purchase price of $400,000 for nursery stock (which I will refer to as "trees") owned by the Petitioner, but located on land owned by Dr. Harry Nataros, president of the Petitioner.

[5] The parties to the agreement are the Petitioner as vendor and Roderick Nataros and the Respondent as the purchasers. Roderick Nataros is the son of Dr. Nataros. Neither Sandra Brandt, the wife of the Respondent Douglas Brandt, nor Dr. Nataros himself are parties to the agreement. I will refer to Douglas Brandt alone throughout as "the Respondent".

[6] Apart from the Respondent's mortgage of $60,000, the remainder of the purchase price of $400,000 is comprised of a promissory note for $60,000 from Roderick Nataros in favour of the vendor and a promissory note from Roderick Nataros and the Respondent together for $280,000. The agreement also stipulated the purchasers deliver a general security agreement.

[7] In addition, the agreement provides (clause 7.06) that the purchasers pay $l0 per tree for each tree they removed from Dr. Nataros' property. The purchasers further agreed to remove all the trees on or before November 30, 1996. Counsel for the Petitioner said during submissions there were approximately 40,000 trees in total, so that $l0 per tree removed is equivalent to the purchase price of $400,000. The agreement is silent as to whether the $l0 per tree cost is payment toward the total purchase price, so I find it confusing.

[8] In his affidavit in support of his application for an order under Rule 52(11)(d), the Respondent deposes that in a meeting before the agreement was signed, the arrangement was made that Roderick Nataros and he could buy trees from the Petitioner at $l0 a tree and that the Petitioner's nursery had approximately 40,000 trees. The Respondent understood from their discussions that the $l0 per tree was to make up the purchase price of the trees.

[9] It is common ground the Respondent made certain monthly payments of $536.70 per month on the mortgage and that but for the application under Rule 52(11)(d), the amount owing on the mortgage, including interest to March 25, 1997, is $73,386.42. The per diem on the total owed as at March 25, 1997, at 10% per annum, is $l9.99 per day.

[10] Certain significant terms of the agreement include:

5.03 Licence to Enter Property.
The Purchaser shall have the right to enter the Vendor's property during the period expiring November 30, 1996, so long as the Purchaser is not in default hereunder, under either the promissory notes or the mortgage. The Purchaser shall use their best efforts to keep members of the public from entering the Vendor's property.

...

6.01 Authority to Purchaser.
The execution and delivery of this Agreement by the Purchaser, shall constitute a legal, valid and binding joint and several obligation of the Purchaser enforceable against the Purchaser in accordance with its terms except as limited by laws of general application affecting the rights of creditors.

...

7.02 Covenants of Indemnity.
The Purchaser will jointly and severally indemnify and hold harmless the Vendor from and against:

...

(b) the Purchaser's failure to fulfil the terms of the agreement, the two promissory notes or the mortgage;

(c) the Purchaser's failure to insure the Vendor's property or provide Workers' Compensation Board coverage;

..

8.01 Vendor's Representations, Warranties and Covenants.
All representations, warranties, covenants and agreements made by the parties shall, unless otherwise expressly stated, survive the time of closing.

...

14. FURTHER ASSURANCES

The parties hereto shall execute such further and other documents and do such further and other things as may be necessary to carry out and give effect to the intent of this Agreement.

...

16. ENTIRE AGREEMENT

This Agreement constitutes the entire Agreement between the parties and there are no representations or warranties, express or implied, statutory or otherwise and no agreements collateral hereto other than as expressly set forth or referred to herein.

[11] The Respondent signed the agreement without independent legal advice. He deposes that Dr. Nataros told him prior to the agreement, that his lawyer would draw up a simple agreement. The Respondent says that their discussions were about the purchasers buying the Petitioner's approximately 40,000 trees at $l0 per tree and only paying as they removed the trees.

[12] The Respondent deposes that Dr. Nataros advised they could take the document to a notary public to be signed. This would be a formality. The Respondent says Dr. Nataros assured him there was no need for the Respondent to involve a lawyer as he, the Respondent, would be going into partnership with Dr. Nataros' son and that he, Dr. Nataros, was not about to take advantage of the Respondent and his son who would be equal partners.

[13] The Respondent deposes that Dr. Nataros told him he should feel at ease with the arrangement. As a result, the Respondent says he signed the agreement.

[14] The Respondent further says he did not realize when he signed the agreement he was also executing a general security agreement.

[15] Strains developed in the Respondent's relationship with Roderick Nataros.

[16] Because of a down-turn in the market, the Respondent and Dr. Nataros reached a verbal agreement in l995 that the Respondent would only pay the Petitioner $5 per tree. This arrangement lasted through 1995 and l996. From l994 to l997, the Respondent says he removed 4,106 trees from the nursery and it is not disputed he paid Dr. Nataros, on behalf of the Petitioner, $43,934.20.

[17] While the Petitioner asserts the mortgage was granted as a "down-payment" for the purchase of nursery stock pursuant to the December l, 1993 agreement, the Respondent denies the mortgage was a "down payment" for the trees. Instead, he deposes the mortgage was granted as security only just as Roderick Nataros gave security in the form of a promissory note for the same amount of $60,000.

[18] While conceding he has made no payments directly under the mortgage since 1994, the Respondent deposes that he understood that those mortgage payments would be applied to the purchase price under the agreement, which would include the mortgage.

[19] When it became apparent in early l996, that the business was not going to be successful, the Respondent says he attempted to negotiate a modification of the agreement with Dr. Nataros who gave him several verbal assurances he would extend the time for removal of the trees beyond November 30, l996.

[20] In December 1996, he and Dr. Nataros agreed to defer meeting again until early 1997. The Respondent says he removed 639 trees in 1997 after the expiry date of November 30, l996. On January 19, l997, the Respondent, his wife, Roderick and Dr. Nataros, met and discussed the fact Roderick Nataros could not continue with the tree removal business because he had a bad back. Dr. Nataros wanted the Respondent and his wife to release Roderick Nataros from the agreement and to completely

take over the business.

[21] The parties were unable to agree to a further modification of the agreement. On about March ll, or l2, 1997, the locks at the nursery were changed and the Respondent was denied access to the nursery, apparently by Dr. Nataros. He received a letter of notice March 13, 1997, that the Petitioner was terminating the agreement. The Respondent deposes there was a great deal of equipment on the property some of which he owned and some of which was owned by another company. The Respondent demanded access to the property to recover his equipment but when he attended on March 26, 1997, to do so, he was denied access.

[22] The Respondent understands the Petitioner has taken possession of the trees at the nursery but does not know whether any have been sold. The Respondent believes that during 1996, Dr. Nataros allowed a Mr. McTavish to remove and sell some of the trees, but the Respondent has not been provided with such an accounting. Nor does the Respondent know how many trees Roderick Nataros has removed and sold.

[23] The Respondent is concerned that Dr. Nataros has released his son, Roderick Nataros, from any obligations under the agreement even though the Respondent and Roderick Nataros are jointly and severally liable under it.

[24] The Respondent intends to claim against the Petitioner for failing to deliver his equipment on request. He wishes to deal with that at the same time as the issue of his liability under the agreement. While the Respondent understands some of the equipment has been removed by Workers' Compensation Board, some remains on the property. He has not been provided with an accounting to know whether it has been applied against his alleged indebtedness to the Petitioner.

[25] The Respondent further wishes to claim against Roderick Nataros for contribution and indemnity under the agreement on their joint and several liability.

POSITION OF THE PARTIES
[26] The Respondent says the following issues arise on the facts and the law which justify an order under Rule 52(11)(d):

(a) By the agreement, the purchasers each guaranteed the indebtedness of the other. If this matter were transferred to the trial list, the Respondent could counterclaim against Roderick Nataros or make him a third party for indemnity on the mortgage.

(b) Under the agreement, a failure by the purchasers to provide Workers' Compensation Board coverage results in the purchasers indemnifying the loss, but does not provide the vendor with the remedy of refusing access to the purchasers.

(c) The $l0 per tree cost to remove 40,000 trees appears under the agreement to allow the vendor to recover double the purchase price of $400,000 satisfied by the Respondent's $60,000 mortgage, Roderick Nataros' $60,000 promissory note and the remaining promissory note of $280,000 granted by both purchasers.

(d) There has been no accounting for the undisputed $43,934.20 paid by the Respondent for trees he removed. It is not clear to what portion of the purchase price it is applied. There has been no accounting of the trees removed by the other purchaser, Roderick Nataros, nor of any of the Respondent's equipment left on the property and not seized by Workers' Compensation Board.

(e) Because Roderick Nataros and the Respondent are jointly and severally liable for all the indebtedness under the agreement, a release by Dr. Nataros of his son would constitute a release of the Respondent.

(f) Dr. Nataros, on behalf of the Petitioner company, allegedly made a collateral oral agreement with the Respondent by which the Petitioner reduced the price of removal from $l0 to $5 per tree for a significant

period and extended the time by several months by which all the trees were to be removed. Dr. Nataros then, without notice to the Respondent, denied access to the Respondent to continue to remove the trees.

[27] In short, the Respondent argues the Petitioner is trying to separate into pieces the $400,000 purchase price by electing to pursue the Respondents on the mortgage.

[28] The Respondent raises an interesting argument whether the Petitioner has elected to pursue the remedy of damages for repudiation of the agreement rather than specific performance and whether the Respondent has mitigated his damages by selling trees to third parties.

[29] The Petitioner does not dispute that the term providing for removal of all the trees by November 30, l996, was extended, or that the Respondent was denied access to the property. Nor does the Petitioner dispute that the Respondent paid $43,934.20 for trees removed and that the two purchasers, the Respondent and Roderick Nataros, each guaranteed the indebtedness of the other and are jointly and severally responsible under the agreement.

[30] However, the Petitioner takes the position there is no triable issue in this matter. It says the petition is simply a common action on a mortgage. It matured in December 1996, and has not been paid. The Petitioner argues the mortgage stands alone to create an independent obligation to pay $60,000 to the Petitioner. The Petitioner is simply seeking foreclosure of the mortgage, and not damages for breach of contract. The Petitioner agrees there may well be issues between the Respondent and Roderick Nataros, but those are irrelevant, he says, to the Respondent's mortgage for $60,000.

[31] The Petitioner submits that while the Respondent complains about the agreement, there is nothing to link it to the purchase of the trees under the agreement.

[32] The Petitioner says that clause 16 of the agreement (which provides that there are no express or implied agreements collateral to the agreement other than as expressly set out), is an insurmountable hurdle as the Respondent is seeking to vary or contradict the written agreement without establishing the terms of such an oral agreement.

[33] With respect to some of the Respondent's equipment remaining on the property, the Petitioner says that could only offset the purchaser's joint and several liability on the whole $400,000, rather than on the mortgage.

[34] In summary, the Petitioner submits the mortgage operates independently of the agreement. While the Respondent complains the Petitioner is "piecing-off" the purchase price under the agreement, the Petitioner says that is exactly what the agreement permits.

CONCLUSION

[35] On the submissions of the Respondent, I am persuaded this matter raises several bona fide triable issues of fact and law. Any doubt on whether it is manifestly clear that the Respondent is without a defence that deserves to be tried must be resolved in favour of the Respondent. Further proceedings are required to resolve the triable issues.

[36] It is inappropriate in all the circumstances to deny the Respondent his "day in Court". There is a triable issue whether the mortgage, which is the subject of the petition, can be severed from issues which arise under the agreement as the mortgage forms an integral part of the agreement. There is a bona fide issue particularly on the matter of an accounting for the money paid by the Respondent and the ability of the Respondent to claim against Roderick Nataros on the indebtedness arising under the mortgage.

[37] I exercise my discretion to make an order under Rule 52(11)(d) and refer this litigation to the trial list. The parties will exchange pleadings and the usual pre-trial procedures will apply.

[38] Costs will be in the discretion of the trial Judge.

"A.W. MacKENZIE J."

A.W. MacKENZIE J.