COURT FILE NO.: 04-CV-279725CM1
DATE: March 16, 2006

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 917064 ONTARIO LIMITED (APPLICANT) v. ROBERT KENDALL HARGREAVES and BONNIE GERALDINE HARGREAVES (RESPONDENTS)

BEFORE: LAX J.

COUNSEL: *S. Brunswick & M. Sokolsky*, for the Applicant

C. Argiropoulos, for the Respondents

HEARD: March 14, 2006

ENDORSEMENT

[1] This Application and Cross-Application is to determine whether there is a valid and enforceable Agreement of Purchase and Sale between the applicant as seller and the respondents as buyers for a cottage property in the County of Peterborough. By consent order, the parties agreed that a caution registered against the property on October 29, 2004 would remain in effect pending the disposition of these applications, although it has now expired.

[2] The numbered company applicant is the registered owner of a property on Lower Buckhorn Lake.. Brian Lee is an officer and director of the company and planned to sell lots to buyers for a small cottage community development, comprising six lots with a common access roadway to be registered as a common elements condominium. Lee and his wife, Marilyn Lake have a cottage on one of the lots and agreed to sell Lot 3 to the respondents.

[3] In March 2002, the parties entered into an agreement of purchase and sale (the "first agreement") for a purchase price of $160,000. It was conditional upon the buyers and seller mutually agreeing in writing by a specified date on the restrictive covenants that would attach to

the property. By its terms, this agreement became null and void when the condition was not fulfilled.

[4] On July 18, 2003, the parties entered into another agreement of purchase and sale (the "July/03 agreement") for the same purchase price through Sutton Group All Pro Realty Inc. as broker and Frank Taylor and Marie Millard as sales representatives for both parties. The July/03 agreement contained a schedule with five restrictive covenants. The covenants addressed the location of docks, the protection of planting along side lot lines, the protection of shoreline and bird habitats, the materials to be used in the construction of buildings on the property and the design of cottages.

[5] The sale was to be completed on the earlier of August 29, 2003 or ten days following the date that the seller gave written notice to the buyers that the declaration and description of the condominium and the Plan of Subdivision were registered. It further provided that if the registrations were not completed by October 31, 2003, the agreement would be terminated and the deposit returned to the purchaser, unless the parties otherwise agreed. The registrations were not completed by this date. Although no written extension agreement was entered into, it is clear that neither party wanted to lose the opportunity to conclude the agreement on the same or substantially the same terms. The purchasers did not seek the return of the deposit of $2,000 and the vendor permitted them to use the property. After the condominium was registered on June 15, 2004, they began to work towards concluding their agreement.

[6] This process began on July 19, 2004 when Mr. Enfield, the vendor's solicitor, wrote to Mr. McVicar, the purchasers' solicitor, to advise him that the condominium had been registered. He enclosed a new agreement for his review, which he described as being "essentially on the same terms". This agreement (the "July/04 offer") was at the same purchase price, but added three further restrictive covenants and some additional provisions that Mr. Hargreaves was not prepared to accept. Unfortunately, from this point, Mr. Hargreaves became suspicious that he was being manipulated into making a new offer so that the applicant could escape liability under the agreement that had been signed a year earlier.

[7] In an email sent to Frank Taylor on August 7, 2003, he indicated that he was not happy with the revisions and regarded the July/03 agreement to be "in force and binding for completion of sale".

[8] As a result of discussions that took place between Hargreaves and Lee after Mr. Hargreaves received the July/04 offer, another offer was prepared and Mr. Lee forwarded a signed vendor's offer dated August 23, 2004 (the "August/04 offer"), which was responsive to Mr. Hargreaves' concerns. This offer is virtually identical to the July/03 agreement. It removed the three additional restrictive covenants. It included a right of first refusal in favour of the vendor if the Hargreaves' decided to sell the property within two years. This was acceptable to the purchasers. There were a few inconsequential changes to the language of the five restrictive covenants, but the substance and effect of the covenants is the same. There is no meaningful difference between the July/03 agreement that Mr. Hargreaves executed and regarded as "in force and binding" and the August/04 offer that he received from the vendor on or about August 26, 2004.

[9] Nonetheless, Mr. Hargreaves took the view that if there was to be a new agreement, he did not wish to be bound by at least three of the five restrictive covenants and communicated this to Mr. Taylor. On September 2, 2004, he spoke with Mr. Taylor and deposes that he came away from that conversation believing that the vendor was no longer requiring the inclusion of covenants 1, 4 and 5. This was inaccurate and entirely inconsistent with the vendor's position from the beginning and with the discussions that had taken place between Lee and Hargreaves when Mr. Lee agreed to remove the three additional covenants that had appeared in the July/04 offer. Mr. Hargreaves knew or ought to have known that any new agreement would contain the same five restrictive covenants that he had agreed to a year earlier.

[10] Mr. Lee was willing to conclude an agreement with Mr. and Mrs. Hargreaves as is evident from his conduct on September 2, 2004. Over the course of that day, Mr. Hargreaves suggested small changes to the wording of covenants 2 and 3 through an exchange of email with Mr. Lee. At approximately 8:00 p.m. that evening, Mr. Lee forwarded by email to Mr. Hargreaves a revised Schedule incorporating the agreed amendments to the wording of covenants 2 and 3 as well as covenants 1, 4 and 5 as they appear in the signed August/04 offer.

[11] At approximately 11:00 p.m. that evening, Mr. Hargreaves sent an email to Mr. Lee, which I am certain he now regrets. It was motivated by anger and frustration, but there is no ambiguity in what he said. He denied having signed any document committing himself or his wife to be bound by any covenants, although he clearly had. He accused Mr. Lee of having failed to negotiate in good faith, when he clearly had. He said that he would be instructing Mr. Taylor and his lawyer "that I and Bonnie will only purchase the property without any covenants" and then offers eight reasons for this. The eighth reason states:

> 8. Both Bonnie and myself have supported the purchase of this property for over three years and have made irretraceable steps to build our home there and will take any means and measures necessary to make sure that the property will be sold to us under the original agreement sans covenants, as we still hold the original Offer to Purchase Agreement, and the July 2003 offer that is still in effect (with covenants not signed and agreed to).

[12] Mr. Hargreaves was correct that the original Offer to Purchase Agreement had no covenants that were agreed to. However, the July/03 agreement clearly did. He had not initialled his copy of the Schedule to the July/03 agreement. This led him to believe that he could require Mr. Lee to sell the property to him on terms that excluded the covenants. He viewed this as a "loophole" and on his own evidence, was quite prepared to take advantage of it in order to be released from all of the restrictive covenants or at least, from all except two of them.

[13] Repudiation of a contract occurs where by words or conduct a party evinces an intention not to be bound by the contract, even though the party refusing mistakenly thinks that he is exercising a contractual right: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] S,C.J. No. 60 (S.C.C.) at para. 41.

[14] In my view, there can be little doubt that the email of September 2, 2004 was a clear and unequivocal repudiation of an agreement to purchase the cottage property on terms that included five restrictive covenants Mr. Hargreaves had bound himself to this in the agreement of purchase and sale that he and his wife executed in July 2003. He was offered the opportunity to purchase the property on the same terms in August 2004, but refused to accept the terms.

[15] The effect of a repudiation depends on the election made by the non-repudiating party. If the non-repudiating party accepts the repudiation, the contract is terminated and the parties are

discharged from future obligations: *Guarantee Co. of North America v. Gordon Capital Corp.* at para. 41. By letter dated September 22, 2004, Mr. Enfield, acting on behalf of the vendor accepted the repudiation, putting the agreement to an end. The purchasers were offered the opportunity to present an offer to purchase the property, but none was ever forthcoming.

[16] The respondents submit that the July/03 agreement remained in effect, subject only to a closing date. This does not assist them. Having taken the position that they would not agree to purchase the property with the restrictive covenants, they repudiated this agreement. Alternatively, the parties never reached agreement on the essential terms of the purchase and there is no agreement to enforce.

[17] For these reasons, there will be a declaration that there is no valid agreement of purchase and sale between the applicant and the respondents. The deposit is to be returned to the respondents as well as the land transfer tax that they paid on registration of the caution.

[18] If the parties cannot agree on costs with ten days, they are to exchange costs outlines and provide these to me together with brief written submissions, so that I am in a position to fix the costs of the applications should I determine that costs are to be awarded.

LAX J.

DATE: March 16, 2006

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