In the Court of Appeal of Alberta

Citation: Simmonds v. Northwards Airlines Ltd., 1984 ABCA 97

Date: 19840308
Docket: 15267
Registry: Calgary

Between:

Vernor C. Simmonds

(Appellant)

- and -

Touche Ross Ltd., trustee of the estate of Northwards Airlines Ltd., a bankrupt

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The Court:

The Honourable Mr. Justice McDermid
The Honourable Mr. Justice Kerans
The Honourable Mr. Justice Hope

Memorandum of Judgment
Delivered from the Bench

COUNSEL:

W.L. Severson, Esq. & W.M. Leclair, Esq, for the Appellant

E.L. Bunnell Esq. & R.C. Secord, Esq.

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

KERANS J.A. (for the Court):

[1] The appellants, Touche Ross Ltd. is trustee in bankruptcy of Northward Airlines Limited. In 1979, Northward agreed to buy all the shares in Gateway, another aviation company. The respondent represents the sellers, being all the shareholders in Gateway. They say that the sale was never completed and therefore title never passed. The sole issue put before the learned trial judge for decision was whether the contention of the respondents

was right. The significance of their contention is that, if title passed, the sellers are unsecured creditors for the balance of the purchase price. If title did not pass, they retain that asset subject to any claims by the trustee arising from the fact of non-completion.

[2] The contention of the respondents is based upon this term in the offer to purchase prepared by Northward and accepted by the Gateway shareholders:

> "In the event of such acceptance, then it is agreed between us that all documentation required to complete this transaction by your solicitors and ours shall be completed and executed no later than April 30, 1979, or such later date as agreed to by the parties including the delivery of your shares to be sold pursuant to an escrow agreement."

[3] The appellant asserts that the "escrow agreement" refers to an arrangement among the selling shareholders whereby each would hand over his share certificates to one of them to be released only if all did so. If the expression bears this meaning, the existence or not of an escrow agreement has no bearing on the sale between Northward and the sellers because in fact all of them did hand in their share certificates. It is contended for the respondent sellers, on the other hand, that the reference is an indication that there was to be some further agreement which would offer the sellers the Gateway shares as a security for the payment of the balance of the purchase price.

[4] As both versions are rational the term is ambiguous and resort to extrinsic evidence to determine the true agreement between the parties was required. A lengthy trial was conducted in which the learned trial judge was told about the negotiations leading up to the offer and the events subsequent to the offer being accepted. This evidence includes some dubiously valuable evidence of declarations of intent by the parties and their agents. The question of fact before him was: what was the true agreement of the parties? The learned trial judge clearly rejected the contention of the appellant and preferred that of the respondents. He said:

> "It is obvious that the only way to determine what was intended by the parties to be contained in an escrow agreement would be to, in fact, have such an agreement completed and that until such time as there was a completed escrow agreement there could be no completed or effective sale of shares to Northward.

[5] We understand him there to say that the words in question could not be given the innocuous interpretation offered by the appellant. On the other hand, he seems to have concluded that he was uncertain as to what further obligations were created by these words and, indeed, he concluded that the parties themselves never did come to an agreement on

the point. In other words, he found that the document was void for uncertainty and that there was no consensus. After having heard a lengthy review of the evidence by counsel for the appellant, we are not persuaded that this conclusion was a wrong conclusion. We cannot interfere.

[6] The learned trial judge then mentions that the term in question was a “condition precedent”. We are not certain precisely what he meant by this except perhaps to indicate that the term requiring an escrow agreement was a true condition in the contract and fundamental to the contract and that therefore it could not be severed and it could not be said of it that the failure to make a further agreement did not vitiate the agreement for sale.

[7] It is argued that the sellers were guilty of waiver. But counsel was unable to point to an unequivocal assertion by any representative of the seller which amounts to a giving up of a right to a further security. It is argued further that there was acquiescence. Again, counsel has been unable to point to word or deed by Northward which amounts to an unequivocal assertion of a position which is inconsistent with the position now advocated by the sellers and in which the sellers acquiescenced. Accordingly these grounds must fail and the appeal must be dismissed with costs.

[8] The application of the respondents to have costs ordered to be paid personally by the trustee is denied.

[9] Apparently the parties at one point agreed to sell the Gateway shares to a third party and to put the proceeds in trust by a consent order and on the basis that they would be disbursed in a manner consistent with the resolution of this litigation. In order to leave these funds frozen while the parties consider any further steps they may wish to take, we stay the judgment now confirmed for 20 days from the day of pronouncement of our judgment.