

FIRST DIVISIONAL COURT.

APRIL 16TH, 1918.

MILLER v. YOUNG.

Vendor and Purchaser—Agreement for Sale of Land—Vendor's Ability to Make Title—Delay—Time for Making Title—Notice—Waiver by Subsequent Tender of Conveyance—Unreasonably Short Time—Specific Performance—Building Restrictions—Covenant—Objection to Title—Waiver.

Appeal by the plaintiff (purchaser) from the judgment of BRITTON, J., 12 O.W.N. 382, in an action for the return of money paid upon a contract for the sale of land. Upon the counterclaim of the defendant (vendor), the trial Judge awarded specific performance of the contract.

The appeal was heard by MACLAREN and HODGINS, JJ.A., LATCHFORD and SUTHERLAND, JJ., and FERGUSON, J.A.

Shirley Denison, K.C., for the appellant.

W. N. Tilley, K.C., for the defendant, respondent.

HODGINS, J.A., in a written judgment, said that the agreement for the sale of the land contained a provision to this effect: the vendor agreed to use all reasonable diligence to obtain title to the land, but the purchaser was to have no claim for damages against the vendor in the event of his failing to obtain such title, except for the return of the money paid under the agreement and the sum of \$8,700, equal to the property given in exchange; and that the vendor should not be required to produce any abstract of title, deed, or evidence of title, not in his possession. It was contended that, in order to establish the right to repayment, under that provision, it was necessary that conveyances to the appellant should be tendered for execution by the respondent or by his vendor, and that in tendering such conveyances the appellant did not waive or abandon his position that the time had elapsed during which the respondent could make title instead of payment. But the substitution of the return of the purchase-money without damages for the ordinary results flowing from non-performance of the contract in no way altered the legal position. The tender made on the 7th July, 1916, meant that, if the respondent could then convey or obtain a conveyance from the legal owner, the appellant would accept it. It was an acknowledgment by the appellant that the contract was still in force and would only be broken if the respondent should refuse or neglect to perform it.