

Case Name:
1390957 Ontario Ltd. v. Acchione

Between
1390957 Ontario Limited, applicant (appellant), and
Valerie Acchione and Royal LePage Real Estate Services Ltd.,
respondents (Valerie Acchione, respondent in appeal)

[2002] O.J. No. 22

Docket No. C35569

Also reported at: 57 O.R. (3d) 578

Ontario Court of Appeal
Toronto, Ontario

Catzman, Carthy and Rosenberg JJ.A.

Heard: October 11, 2001.
Judgment: January 11, 2002.

(22 paras.)

On appeal from the order of Justice Bonnie L. Croll dated December 12, 2000.

Counsel:

Paul H. Starkman, for the appellant.
James M. Wortzman and K. Dhirani, for the respondent in appeal.

The judgment of the Court was delivered by

1 ROSENBERG J.A.:-- This appeal from an order of Croll J. concerns the interpretation of a provision of the Planning Act, R.S.O. 1990, c. P.13 that permits an owner to convey the remaining part of a parcel of land where the other part or parts of the parcel have been the subject of a consent by the Committee of Adjustment. The appellant and respondent in this appeal are

the purchaser and vendor respectively of the remaining part of the parcel. The purchaser argues that because of the order in which the vendor's predecessor in title dealt with the parts of the parcel of land, the vendor did not have a valid title to the part. The purchaser therefore submits that it was entitled to repudiate the transaction and to the return of the deposit. Croll J. dismissed the purchaser's application for a declaration that the vendor was in breach of the agreement of purchase and sale for failing to comply with the Planning Act. Her reasons are now reported at (2000), 51 O.R. (3d) 635. For the reasons that follow, I would allow the appeal.

THE FACTS

2 The agreement of purchase and sale between the appellant and the respondent concerned part of a parcel of land in the Town of Richmond Hill. I will refer to it in these reasons as Part 1. The respondent Valerie Acchione acquired Part 1 in the following circumstances.

3 The respondent's predecessor in title is Bridget Orfi. She owned Parts 1 and the abutting lands, which I will refer to as Parts 2 and 3. On December 10, 1992, the Committee of Adjustment of the Town of Richmond Hill gave its consent to a conveyance of Parts 2 and 3. On March 7, 1995, an official provided a Certificate of Official certifying this consent. Under s. 53(43) of the Act that consent lapsed at the expiration of two years from the date the certificate was given "if the transaction in respect of which the consent was given is not carried out within the two-year period". On January 23, 1996, Ms. Orfi executed a transfer of Parts 2 and 3 (the consented part) to herself, purportedly to effect a severance of the parcel. As I understand it, the purpose of this transaction was to ensure that Ms. Orfi would be able to transfer Parts 2 and 3 although she still held the abutting lands after the expiration of the two-year period. See S.H. Troister, *The Law of Subdivision Control in Ontario*, 2nd ed. (1994), at 262-64. On February 27, 1996, Ms. Orfi executed a transfer of Part 1 (the remaining part) to the respondent Ms. Acchione. The appellant submits that this transaction violated the Act and that the respondent therefore did not acquire title to Part 1.¹

4 In May 2000, the respondent and the appellant entered into an agreement of purchase and sale in respect of Part 1. The transaction was to close on July 26, 2000. On June 30, 2000, the appellant's solicitor submitted a number of requisitions to the respondent's solicitor. The solicitor stated his opinion that the transfer from Orfi to the respondent was invalid and therefore required on or before closing that the Transfer be stamped with the consent of the Committee of Adjustment. The respondent's solicitor was unable to satisfy the appellant that the consent was not necessary. There was a flurry of correspondence between the lawyers in the days before the closing. In the end, the appellant's solicitor took the view that the respondent was in anticipatory breach of the Agreement of Purchase and

Sale as she could not convey good and marketable title on the closing date. He therefore required the return of the deposit with interest. The respondent refused and this litigation ensued.

5 A number of other events occurred after closing in which the respondent's solicitor attempted to extend the closing date and remedy the alleged defect in title. They are the subject of pending or proposed litigation between the parties and nothing in these reasons is intended to dispose of any issue other than the Planning Act question that was decided by Croll J.

THE PROBLEM

6 While I will set out the applicable provisions of the Act below, the problem raised by this appeal can be stated in simple and general terms. Section 50 of the Act prohibits any person from conveying land except in certain circumstances. The exceptions in issue in this case are the following:

- (i) The person does not own abutting land [(3)(b)];
- (ii) The person has a consent from the Committee of Adjustment [(3)(f)];

7 The appellant says that neither exception applies here because when Orfi conveyed Part 1 to Acchione she still owned abutting land (Parts 2 and 3). The consent exception does not apply because the consent was for the conveyance of Parts 2 and 3, not Part 1. In the result, s. 50(21) of the Act applies. Section 50(21) provides that a conveyance made in contravention of the section does not create or convey an interest in land.

8 The respondent says that the Orfi to Acchione conveyance did not violate s. 50 and relies upon s. 50(6). That subsection provides that the remaining part of a parcel (here Part 1) may be conveyed before the parts subject to the consent (Parts 2 and 3) are conveyed, provided that the remaining part is conveyed before the consent lapses. In this case, the Orfi to Acchione conveyance occurred well before the consent to convey Parts 2 and 3 lapsed.

9 The appellant submits that s. 50(6) is no answer because when Ms. Orfi conveyed Parts 2 and 3 to herself, this exhausted s. 50(6). The applications judge was of the view that the appellant's interpretation and application of s. 50(6) would lead to an absurd result. She held that the provision could be interpreted in a manner that avoided this absurdity and avoided the alleged violation of the Act. She held that s. 50(6) is permissive, that the remaining part "may" not "must" be conveyed before the consented to part.

THE LEGISLATION

10 The relevant provisions of the Planning Act, omitting unnecessary words, are the following:

Section 50

(3) No person shall convey land by way of a deed or transfer, ... unless,

...

(b) the grantor by deed or transfer, ... does not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment in respect of, any land abutting the land that is being conveyed ...;

...

(f) a consent is given to convey ... the land ...;

...

(6) Despite subsections (3) ... where land is the remaining part of a parcel of land, the other part or parts of which parcel have been the subject of a consent given under clause (3)(f) ..., the whole of the remaining part may be conveyed or otherwise dealt with before the other part or parts are conveyed or otherwise dealt with, provided that the remaining part is conveyed or otherwise dealt with before the consent mentioned above lapses under subsection 53(43).

...

(12) Where a parcel of land is conveyed by way of a deed or transfer with a consent given under section 53, subsections (3) ... of this section do not apply to a subsequent conveyance of, or other transaction involving, the identical parcel of land ...

(21) [A] conveyance, ... made, ... in contravention of this section ... does not create or convey any interest in land.

Section 53

(1) An owner of land ... may apply for a consent as defined in subsection 50(1) and the council ... may, subject to this section, give a consent if satisfied that a plan of

subdivision of the land is not necessary for the proper and orderly development of the municipality.

...

- (43) A consent given under this section lapses at the expiration of two years from the date of the certificate given under subsection (42) if the transaction in respect of which the consent was given is not carried out within the two-year period, ...

ANALYSIS

11 In *The Law of Subdivision Control in Ontario*, supra, at p. 175, the author states that it was a "classic question" whether an owner who obtained a consent to convey parcel A while intending to retain abutting Parcel B could rely on the consent to convey parcel B for which no consent was given. Section 50(6) resolves the issue and permits the owner of the remaining land to convey parcel B, provided that the consent has not lapsed. Where the planning authority has given its consent to severance by allowing the conveyance of one of two parcels, it makes no sense to require that the conveyances take place in any particular order, provided that the severance is effected before the consent expires. Nevertheless, as Troister points out at pp. 175-6 the subsection is "fraught with practical problems" and "has not been well-drafted". This case presents one of these problems.

12 Unless the case falls within the terms of s. 50(6), the prohibition in s. 50(3) and (21) applies. Ms. Orfi's attempt to convey the remaining part while she retained abutting land would be a conveyance in contravention of the section. In my view, s. 50(6) cannot apply. The critical part of the subsection is the following: "the whole of the remaining part may be conveyed or otherwise dealt with before the other part or parts are conveyed or otherwise dealt with". As the applications judge observed, this subsection is permissive. The owner is not required to convey the remaining part before the consented to part, but s. 50(6), by its terms, only applies where the remaining part is conveyed before the consented to part. In this case, the remaining part was conveyed after the conveyance by Orfi to herself of the consented part. Subject to the possible application of s. 50(12), with which I will deal with shortly, no other exception in s. 50 is relied upon to permit the conveyance of the remaining part while Orfi held the abutting land.

13 In *Re Baker et al. and Belleville Collectors Market Ltd.* (1987), 60 O.R. (2d) 157 (Dist. Ct.), Lally D.C.J. reached the same conclusion. Baker was an application under the Vendors and Purchasers Act, R.S.O. 1980, c. 520. The facts were identical to the facts in this case. With considerable reluctance, Lally D.C.J. concluded that the provision was clear and applied only where

the proposed conveyance of the remaining part is made before the conveyance of the consented part. He concluded his reasons at p. 160 with this comment:

I reserved on this matter hoping that s. 49(6) [now s. 50(6)] could be interpreted in such a manner that the requisition has been satisfactorily answered. However, in order to do so I would have to ignore that the Legislature has stated that s. 49(6) is applicable only where the conveyance of the part without the consent takes place before the property which has the consent is conveyed or otherwise dealt with. I cannot interpret it in any way other than the interpretation that [counsel for the purchaser] suggests, since the language is clear and unambiguous.

The fact that I do not fully understand the reason for the insertion of the words in s. 49(6), "before the other part or parts are conveyed or otherwise dealt with", and feel that their application in this instance works an injustice to the vendor, does not provide sufficient reason to hold that the requisition is invalid. [Emphasis added.]

14 I agree with Lally D.C.J.'s interpretation² of the provision. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, Iacobucci J. set out the fundamental approach to statutory interpretation:

Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [Emphasis added.]

15 There is no mystery to the ordinary meaning of the word "before". To adopt the interpretation favoured by the respondent would require the court to ignore the word or interpret it as bearing its ordinary meaning and its antonym. In other words, the court would have to interpret "before" as meaning "before or after". The provision cannot fairly bear such an interpretation.

16 Section 10 of the Interpretation Act, R.S.O. 1990 c. I.11 instructs the court to adopt "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit". But it is one thing for the court to adopt an interpretation that takes into account the object or intention of the legislature and the context in which the words are used. It is quite another to ignore the plain meaning of an ordinary English word and interpret it as if it means the opposite of what it says.

17 Giving "before" its plain and ordinary meaning does no great harm to the scheme of the legislation and does not undermine the policy behind the legislation. It simply means that s. 50(6) does not cover all cases where the conveyance would not cause any mischief. That, however, must be a matter for the Legislature. That said, the Legislature could hardly be blamed for failing to anticipate that an owner would deprive herself of the benefit of the provision by making a conveyance to herself, a result that could so easily have been avoided had the owner simply conveyed the consented part to a nominee. See Troister *supra* at p. 275.

18 Counsel for the respondent made one further submission to avoid the effect of the plain meaning of s. 50(6). He submitted that a transfer by an owner to herself was not a "conveyance" within the meaning of the subsection. Thus, he argued that s. 50(6) could still apply when Orfi made the subsequent transfer of the remaining part to the respondent. In my view, the provisions of the Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34 are a complete answer to that submission. Section 1 of that Act defines "conveyance" in the widest terms to include:

an assignment, appointment, lease, settlement, and other assurance, made by deed, on a sale, mortgage, demise, or settlement of any property or on any other dealing with or for any property and "convey" has a meaning corresponding with that of conveyance

19 Section 41 of the Act authorizes the very transaction that occurred in this case in terms indicating that it is a conveyance. Marginally headed "Conveyance of property to self", it provides:

41. A person may convey property to or vest property in the person in like manner as the person could have conveyed the property to or vested the property in another person.

20 In my view, the conveyance by Orfi to Orfi was a conveyance within the meaning of s. 50(6).

21 In their factum, counsel for the respondent submitted that s. 50(12) of the Act applied. That subsection provides that where a parcel of land has been conveyed with consent, s. 50(3) does not apply to subsequent conveyances or other transactions "involving the identical parcel of land". The respondent relies upon *Re Allin and Harvey et al.* (1985), 50 O.R. (2d) 798 (Dist. Ct.). In my view, subs. (12) can apply only to conveyances of the consented part, being the "identical parcel of land". In the present case, the consented part is Parts 2 and 3, not Part 1, the land that is the subject of the agreement of purchase and sale between the parties to this appeal. I prefer the reasoning of Leitch J. in *Royal Bank of Canada v. Barletta*, [1993] O.J. No. 3013 (Gen. Div.), which held that a conveyance of the abutting parcel is not a conveyance of or other transaction involving the identical parcel of land.

DISPOSITION

22 Accordingly, I would allow the appeal and grant a declaration that the conveyance from Orfi to Acchione violated s. 50 of the Planning Act. Croll J. ordered that there be no costs of the application before her, and I would not disturb that order. In this court, however, the appellant is entitled to its costs of the appeal.

ROSENBERG J.A.

CATZMAN J.A. -- I agree.

CARTHY J.A. -- I agree.

cp/e/nc/qlsar/qlhjk

1 This transfer did not contain the statements from the grantor and the grantor's solicitor as permitted by s. 50(22) of the Planning Act. Where subs. (22) applies any contravention of s. 50 "shall be deemed never to have had the effect of preventing the conveyance of any interest in the land".

2 I note that Troister *supra* at p. 178 agreed that the court's conclusion in Baker "seems to be a correct interpretation of subs. (6)", even if a different interpretation might have led to a more practical result. As he notes at 275, "it seems ludicrous to require the owner of two abutting parcels to be able to deal in all ways with the previously consented parcel and be restricted in all ways from dealing with the abutting unconsented parcel".