LAW AND SURVEYING

Legal Surveys Branch
Ministry of Consumer & Commercial Relations

A persual of recent issues of the Ontario Reports disclosed a number of Court decisions which should be of interest to Surveyors. Two of these decisions have been summarized below, but for a detailed account of the facts and points of law refer to the particular issue of the Ontario Report as cited.

Further, as these are recent decisions, they may be subject to further appeal.

(a) Frontenac Condominium Corp. No. 1 v. Joe Maccocchi and Sons Ltd., (1976) 11 O.R. (2d) 649, (C.A.).

This case concerns The Condominium Act, and whether a superintendant's apartment which was indicated in the description and declaration as a unit was, in fact, part of the common elements. The case was decided by a majority of the three Justices of Appeal, but note the dissenting opinion by MacKinnon, J.A. Following is the head note of the case as reported:

"The defendant, who was the developer of an 11 - storey, 70-unit condominium, registered a declaration pursuant to the Condominium Act, 1967 (Ont.), c. 12, now R.S.O. 1970, c. 77, and thereby created the plaintiff condominium corporation. The defendant then sold units to the public. Following the sale of the units a number of problems arose which ultimately led to litigation. The parties could not agree as to the ownership of the superintendent's apartment. The defendant took the position that the superintendent's apartment was not a common element and that it was the real and registered owner of the unit. The plaintiff took the position that the superintendent's apartment formed part of the common elements.

The building was of the size that required a full-time, live-in superintendent and when most of the members of the condominium bought their units, the superintendent was already on the job and occupying the apartment in question. The superintendent's apartment displayed a sign identifying the premises as the superintendent's suite. The evidence of the unit purchasers was that they assumed that the suite in question was a common element. An employee of the defendant testified that upon being asked specifically by the purchasers as to the status of the suite she said she understood at that time that eventually the suite was to become part of the common elements. On appeal from a judgement dismissing the plaintiff's action for a declaration that it was the owner of the suite, held, MacKinnon, J.A., dissenting, the appeal should be allowed.

Per Brooke, J.A.: The evidence established that it was the intention of the defendant that the purchasers of the various units should believe that the superintendent's suite was a common element or would belong to the condominium corporation. It was also established that this was, in fact, the belief of the unit purchasers at the time of their purchase. Accordingly, the fact that the respondent registered the unit at the time when it registered all of the other units made little difference.

Per Zuber, J.A.: Each party had put forward a different view as to the meaning of the words "common elements" contained in the various sales contracts. The statement made by the sales representative of the defendant was not a representation but rather was evidence of the meaning of the term "common elements" as used at the time. Each prospective purchaser was provided with an estimate of expenses and this estimate set out a detailed list of costs, including the janitor's salary, but contained no reference either to any rent for a superintendent's apartment or to capital expenditure to buy it. That omission was a strong indication that the suite was to be a common element. Moreover, at a later date the plaintiff corporation began to make mortgage payments on the suite in question. The failure of the defendant to pay the mortgage payments and demand rent was hardly consistent with an understanding by the defendant that it retained the suite as its own property. Although s. 1 (1) (e) of the Condominium Act defines "common elements" as all of the property except the units, and although the defendant had designated the apartment in question as a unit, the statutory definition could not be imposed upon a purchaser who knew nothing of the definition and in circumstances where the definition was contrary to ordinary understanding. The Act simply states that "common elements" are those things which are not designated as units and units are whatever the developer so designates. The Act itself does not extend its definition of common elements beyond its own limits and that definition cannot furnish the meaning of the term for all purposes, especially when this could produce absurd results. Accordingly, the meaning attributed to the words "common elements" in the contracts of purchase and sale was the meaning put forward by the plaintiff and the appeal should be allowed.

Per MacKinnon, J.A., dissenting: The evidence fell far short of establishing any fraud or misrepresentation on the part of the defendant. There was no suggestion that anyone relied on the statement of the sales representative of the defendant. The unit in issue was registered as a unit, and when the required declaration and description is registered under the Act, it can only be effectively amended by a registered agreement executed by all the owners and by all persons having registered encumbrances against the units and common interests. To adopt the plaintiff's argument would be effectively to amend the definition of common elements as found in the Act. Accordingly, the appeal should be dismissed."

(b) The following case could be interpreted as supportive of the need for more up-to-date surveys.

Bouskill v. Campea et al (1976) 12 O.R. (2d) 265 (C.A.) which is an appeal from a judgement of the High Court dismissing an action for damages for breach of contract.

The head note states:

"A vendor agreed to sell, and a purchaser to buy, a piece of land described as having a depth of 172 ft. "more or less". The boundaries of the land were not marked. The depth proved to be 11 ft. short, and the purchaser, who was planning to subdivide the lot, refused to complete. The vendor resold and brought an action for damages. The action having failed at trial the vendor appealed. Held, dismissing the appeal, the deficiency did not fall within the words "more or less" since the boundaries of the lot were not apparent on inspection, and since the exact measurement might be important to a purchaser planning to subdivide."

Per Wilson, J.A. at pages 266 and 267

"The issue before the trial Judge was very clear-cut: Was the shortfall of 11' ¼" in the depth of the property too substantial to be encompassed by the words "more or less" in the description in the agreement of purchase and sale? If it was, then the respondent was entitled to avoid the transaction and receive his deposit back. If it was not, then he was guilty of a breach of contract and must be held liable to the appellant in damages.

Mr. Justice Donnelly held that the deficiency in the quantum of the property was too substantial to be encompassed by the words "more or less". He therefore dismissed the appellant's action with

costs and ordered the return of the deposit to the respondent. He was obviously influenced by the fact that, although the respondent did not at the time disclose this to either the vendor or her real estate agent, he had offered to purchase the property with a view to attempting to having it rezoned and developed for high-rise apartments or townhouses. An expert witness testified at the trial that the deficiency would be significant to a purchaser contemplating subdivision.

The trial Judge was also influenced by the fact that, due to the total absence of any stakes or markers, the boundaries of the property were not readily ascertainable upon inspection. In this respect the case was distinguishable, so the trial Judge found, from the case on which counsel for the appellant principally relied in argument, namely, Wilson Lumber Co. v. Simpson (1910), 22 O.L.R. 452, affirmed on appeal 23 O.L.R. 253. In that case the property was described as

> *. . . the premises situate on the north side of Richmond Street in the City of Toronto, and known as No. 250 Richmond Street, having a frontage on Richmond Street of 36 feet more or less by a depth of 110 feet more or less to a lane, together with a right of way over said lane.*

The sale was for a lump sum which was not arrived at by an estimate of the value of property at a price per foot. There was an error of 11' 6" in the measurement of the depth of the property. The property, however, was bounded on two sides by streets and in the rear by a lane so that its limits on three sides were readily apparent on even the most casual inspection. Chief Jusice Meredith at trial, after an exhaustive review of the authorities in England, Massachusetts and New York, held that the plaintiffs (the purchasers) were not entitled to specific performance with an abatement for the deficiency, the measurement of the depth of the property being controlled by the words "more or less" and the deficiency not being so substantial as to raise a presumption of fraud or gross mistake."

And further, at pages 268 and 269

"It will be convenient at this point to refer to the alternate ground on which the appellant puts her case. She pleads that any inaccuracy in the measurement of the property may be disregarded because the property was also described as No. 943 Southdown Rd. and the maxim **falsa demonstratio non nocet** applies. I do not think the appellant can succeed on this basis in view of the finding of fact of the trial Judge that the limits of the property could not be ascertained by visual inspection. It was not a sale of 943 Southdown Rd. but was expressed to be a sale of parts of certain lots on which house No. 943 Southdown Rd. was situate. I think that if the appellant is to succeed on this appeal, it must be on her primary submission that the defiency is covered by the phrase "more or less".

The interpretation placed on the words "more or less" in Wilson Lumber Co. v. Simpson, supra, are not of assistance to the plaintiff because that case dealt with the sale of property, not only by its municipal street address, but the limits of which were readily apparent. Moreover, little assistance is to be obtained from other cases. The question whether the deficiency is substantial enough to entitle the purchaser to avoid the the transaction is a question of fact and depends upon all the circumstances of the case. Bowes v. Vaux, supra per Middleton, J., at p. 525.[1] The trial Judge accepted the evidence of the respondent that it was material to him because he accepted his testimony, corroborated by that of his brother, that they were purchasing the property with a view to rezoning and redevelopment. I see no reason to disturb that finding."

FOOTNOTE

(1) Bowes v. Vaux (1918), 43 O.L.R. 521.

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