SEVERANCE - LIFE OF CONSENT

Adjacent property in common ownership - earlier consent has "life of its own" - enactment retro-active

October 2, 1986, the Honourable Judge E. O. Fanjoy, District Court of Ontario, Brantford.

Re. R & R Eastern Estates Ltd. and Van Heurn.

P. A. Giles for the applicant — L. E. Parkhill for the respondent.

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REASONS FOR JUDGEMENT

THIS IS an application under the *Vendors and Purchasers Act* by the vendor who seeks an order that ss.49(12) of the *Planning Act*, S.O., 1983, exempts a conveyance from the requirements of ss.49(3) and (5) of the Act where a prior consent has been obtained.

I will not set out the full details of the relevant events. In summary form, they are as follows: In 1974, Treffry and Guite were the registered owners of a parcel of land in the County of Brant. Part of this parcel (part one) was conveyed to Treffry with the stamped consent of the Committee of Adjustment. The remainder of the parcel was conveyed to Guite (part two).

After a number of conveyances, both parts were registered in the name of R & R Eastern Estates Limited (Eastern) in 1981. Eastern has now entered into an Agreement of Purchase and Sale with Van Heurn to sell part one. Van Heurn has submitted the following requisition:

"Instrument No. A254562 is a deed from John Hoflein in favour of R & R Eastern Estates Ltd. of the subject lands and premises, registered August 20, 1981:

"The current registered owner of the immediately adjacent property is R & R Eastern Estates Ltd. pursuant to a deed from Colin Anderson and Carol Anderson dated July 6, 1981, and registered July 31, 1981 as No. A254090;

"It is our submission that on account of these two deeds and the ownership of the subject lands and premises, the immediately adjacent property to the east (Part 2, Deposited Plan 2R-315) that the properties have merged for 'Planning Act' purposes."

Eastern replied as follows:

"On June, 1974, the City of Brantford Committee of Adjustment gave its unconditional consent to severance of Part 1, Deposited Plan 2-R315 being part of Lot 39, Concession 4, City of Brantford, County of Brant."

The question is simply whether, a consent by the Committee of Adjustment having been given in 1974, is it now necessary to obtain a further consent with respect to the same lands?

Subsection 49(12) reads:

"Where a parcel of land is conveyed by way of a deed or transfer with a consent given under this section, subsections (3) and (5) do not apply to a subsequent conveyance of, or other transaction involving, the identical parcel of land unless the committee of adjustment, the land division committee or the Minister, as the case may be, in granting the consent, stipulates either that subsection (3) or subsection (5) shall apply to any such subsequent conveyance or transaction."

This section was enacted in March 1979, as ss.29(7) of the Act, and there are some reported decisions on the issue. In *Re Ord and Ramsden*, (1981), 9 A.C.W.S. 113, McNeely, Co. Ct. J., found that a further consent was not required, and he concluded that ss.49(12) is a curative section which was enacted to avoid the necessity of repeatedly having to obtain consent for identical parcels for which a previous severance had been granted.

In *Re Brankston and Wright*, (1985) 50 O.R. (2nd) 666, Mr. Justice DuPont came to the same conclusion on somewhat different facts, and stated at page 671,

"Under the circumstances, the object of the Act was satisfied by the executors' obtaining the appropriate consent when they transferred Part A to Blakely. It is therefore contrary to good sense and the apparent intention of the legislature to require another consent with respect to a transfer of the same property. Once the parcel is approved by the giving of a consent, as here, the conveying of that parcel in the future, regardless of the ownership of abutting lands, will comply with s.49 of the Act."

In *Re Allin and Harvey et al*, (1985) 50O.R. (2nd) 798, Carter, D. C. J., came to the same conclusion and referred to *Re Ord and Ramsden* favourably, stating at page 799 as follows:

"I am of the view that ss.49(12) relieves the vendor from obtaining another consent for parcel "A" for which a consent had already been obtained.

"It would seem to me that, if I were to decide otherwise, I would be depriving the consent granted by the Huron County Land Division Committee of a 'life of its own', as it were, in making its efficacy dependent on extraneous factors. It does not seem to me to be logical that the consent would not have been required had Mr. Allin predeceased his wife and required if she predeceased him. Nor would it have been required had they both lived."

On the other hand, in *Bank of Montreal vs. Thordahl*, 27 R.P.R. 24, Lane, Co. Ct. J., expressed, obiter, some reservations as to whether ss.49(12) exempted conveyances where consents were given prior to enactment of that section.

Decisions where courts have found that further consent was not necessary appear to be based on logic, practicality and common sense, and not on any

analytical consideration of the retrospectivity of ss.49(12). I agree with this approach. If parts one and two had remained registered in the names of different owners, the issue would not have arisen; the 1974 consent would have been sufficient. Why then should the result be different simply because in the circumstances the same party became seised of both parts? The distinction is completely artificial and to recognize it would, in my view, be contrary to the goal and spirit of the *Planning Act*.

Furthermore, I am of the view that the legislature intended that ss.49(12) be retroactive. I recognize that the section uses the present tense, "is conveyed", and does not use the past tense, "has been conveyed", however, section 4 of the *Interpretation Act* reads as follows:

"The law shall be considered as always speaking and where a matter or thing is expressed in the present tense, it is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part of it according to its true intent and meaning."

There is a presumption of course against retroactivity of a statute. However, as indicated by Scarman, J. in *Carson vs. Carson* (1964) 1 W.L.R. 511,

". . . the rule against the retrospective effect of statutes is not a rigid or inflexible rule but is one to be applied always in the light of the language of the statute and the subject matter with which the statute is dealing."

Here the statute does not eliminate or even encroach upon an opinion, be interpreted "in accordance with the judicially presumed parliamentary concern for common sense and justice." (*Maxwell on Interpretation of Statutes*, 12th ed., p. 208). It would be an artificial anomoly to distinguish between consents given before the enactment and those given after and would be contrary to the "true meaning" of the enactment.

I conclude that ss.49(12) should be interpreted as being retrospective. Accordingly, I find that the purchaser's acquisition has been satisfactorily answered by the vendor. In light of the unsettled law on this issue, the purchaser was demonstrably justified in making the requisition and there will therefore be no order as to costs. ●