

## Focus REAL PROPERTY

# Appeal court rules on validity of right of first refusal

Ontario decision addresses remarkable number of legal issues



**Steven Pearlstein**

The recent decision of the Ontario Court of Appeal in *Benzie v. Hania* 112 O.R. (3d) 481 is remarkable in the number of legal issues the court determines. On its face, the case deals with the validity of right of first refusal in land. However, it also makes important rulings on the enforceability of a contract on a deceased person's heirs, whether forbearance can constitute valid consideration for a contract, and the nature of interests that may be registered by notice under s. 71 of the *Land Titles Act*.

The facts of the case were not in dispute. The applicant, identified in the case as MB, purchased a property from her parents on the basis that it would remain in the family, and so she entered into an agreement with her two siblings that gave them a first right of refusal in the event that MB wanted to sell the property. The agreement provided that it would enure to the benefit of and be binding on the parties, their respective heirs, administrators and successors.

MB later married and her husband signed an undertaking in which he agreed with MB's siblings that he would be bound by the terms and conditions of the agreement. On this basis, MB transferred title to the property to herself and her husband as joint tenants and the siblings did not object to the transfer or attempt to exercise the right of

first refusal. The agreement, along with the husband's undertaking, were registered on title to the property and brought forward onto the Land Titles Parcel when converted by the province. After MB's death, her husband and her children brought an application to have the agreement deleted from title.

The first issue was whether the agreement could bind MB's heirs, as there was no privity of contract with those non-parties, or whether the agreement ran with the land. The court held that a death of a party does not terminate a contract unless the contract is based on personal considerations, skill or confidence, which they characterize as a "personal contract." Since the agreement relates to the sale of the property, it was determined that MB's presence was not essential to its performance and thus it was not a personal contract and would survive MB's death. Because the agreement survives death, MB's estate will be in the same position as MB, would be bound to deal with the property in accordance with the terms of the agreement, and would pass title to the property to MB's heirs subject to the agreement.

The court specifically held that heirs do not fall into the category of a bona fide purchaser for value without notice, and not only do they have actual notice of the agreement in this case, but as heirs they are volunteers in the sense they give no consideration for title to the property and as such could not stand in a better position than the estate.

The second issue was whether the husband's undertaking was a binding contract. An allegation

was made that the undertaking was made without consideration, since the only possible consideration was the siblings' forbearance from exercising their first right of refusal under the agreement, but the transfer to MB and her husband without the payment of any monetary compensation would not have constituted a sale under the agreement giving the siblings any rights to forbear from. The court confirmed that forbearance from enforcing an agreement or from litigating on it can be good consideration for a contract, regardless of whether the claim would have been successful if tried in the courts, so long as the forbearance was done in good faith and the party forbearing reasonably believed the claim to be valid. Therefore, in this case, the court held that whether or not the siblings would have been successful in challenging the transfer of the property to B and her husband as violating the agreement, the fact that they could have brought such a claim in good faith but refrained from doing so in exchange for the husband's undertaking to be bound by the agreement was sufficient consideration to make that undertaking an enforceable contract.

The third and last issue was whether the agreement was registerable under the *Land Titles Act*. After an analysis of the wording of s. 71(1) of the LTA, the court determined that, since the holder of the first right of refusal has "an interest in the unregistered equity that will arise at the point of conversion of the first right of refusal into an option, this was a sufficient interest to qualify for registration under that Section of the Act notwithstanding that the interest

then created by the first right of refusal was not at that point an interest in land."

It should be noted that this ruling in itself as it relates to registrations of rights of first refusal does not materially change the law, since the land registrar had previously prescribed those rights as expressly permitted for registration. However, the analysis by the court appears to have significantly broadened the scope of interest which may now be considered to qualify for registration generally

under s. 71, and a careful reading of this case may advantage those who may have felt that their interest was not registerable unless and until it actually created an interest in land.

In any event, this case has given us a richness of relevant rulings.

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