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Forfar v. The Township of East Gwillimbury

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Forfar v. *The Township of East Gwillimbury*
EVASION OF SUBDIVISION CONTROL LEGISLATION

The recent Supreme Court of Canada decision in *Forfar* v. *The Township of East Gwillimbury*[1] appears to have confirmed the fact that the death knell has finally rung on the various schemes devised to circumvent subdivision control legislation in Ontario. Before turning to the facts of the case, some reference to the background of the present legislation is in order.

Controls over the subdivision of land in Ontario have only been imposed since the enactment of the Planning Act 1946.[2] This Act provided that areas of subdivision control could be established by municipalities on a local option basis. Once established, no division of land was permitted other than by the registration of a plan of subdivision. An amendment made in 1947[3] established additional methods by which land could be divided, including a system of individual consents by local planning boards. In 1964, authority to grant consents was transferred from the planning board to the committee of adjustment.[4] Jurisdiction over subdivision control is now found in s.29(2) of the Planning Act.[5]

The Courts in *Forfar* were concerned with the interpretation of s.26(1),[6] a predecessor to the present s.29(2). The facts of the *Forfar* case can be set out briefly. H. Bruce Forfar, the husband of the applicant, held some 20 acres of property in the Township under a grant to uses. In a series of transactions completed in his solicitor's office within a brief period of time, he executed a deed to himself in fee simple and a deed from himself to his solicitor's secre-

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[1] (1972), 28 D.L.R. (3d) 512, aff'g. (1971), 3 O.R. 337 (C.A.), 20 D.L.R. (3d) 377, rev'g order of Osler J., October 20th, 1970 (unreported). The text of the Supreme Court of Canada decision is reproduced later in this comment. For a fuller report on the proceedings, see the Toronto Globe & Mail, October 13th, 1972.

[2] S.O. 1946, c. 71. It is not the purpose of this comment to trace the development or the need for subdivision control. See e.g. J. B. Milner, *An Introduction to Subdivision Control Legislation* (1965), 43 Can. Bar Rev. 49; G. Adler, *Land planning by administrative regulation* (Toronto: University of Toronto Press, 1968) at 11; W. S. Rogers, *Practice Before Committee of Adjustment*, Law Society of Upper Canada Special Lectures (1970), at 217.

[3] S.O. 1947, c. 75, s. 9.

[4] The Planning Amendment Act, S.O. 1964, c. 90, s. 1.

[5] R.S.O. 1970, c. 349.

[6] R.S.O. 1960, c. 296 as amended by 1960-61, c. 76, s. 1 and 1968-69, c. 95, s. 3. At the time of the transactions under review that section read in part as follows:
"26(1) The council of a municipality may by by-law designate any area within the municipality as an area of subdivision control and thereafter no person shall convey land in the area by way of a deed or transfer, or mortgage or charge land in the area or enter into an agreement of sale and purchase of land in the area, or enter into any agreement that has the effect of granting the use of or right in land in the area directly or by entitlement to renewal for a period of twenty-one years or more unless,
(a) the land is described in accordance with and is within a registered plan of subdivision; or
(b) the grantor, mortgagor or vendor does not retain the fee or the equity of redemption in any land abutting the land that is being conveyed or otherwise dealt with;
(e) the consent
(i) of the committee of adjustment is given to convey, mortgage, charge or enter into an agreement with respect to the land. . . ."

tary to uses, reserving to himself a general power of appointment. On June 10th, 1970, he executed a series of deeds exercising the power of appointment in favour of himself, Mrs. Forfar and H. B. Forfar Limited, a corporation controlled by him in a "checkerboarding" fashion, with the result that no two contiguous lots or parcels on this unregistered plan were vested in any one person or corporation. Mrs. Forfar sought a mandamus to compel the issuance of a building permit covering a single family dwelling on one of the parcels of land vested in her.

The matter at issue was whether or not the technique employed by Mr. Forfar for subdividing the 20 acres escaped the prohibition contained in s.26(1) and fell within the exception set out in s.26(1)(b) thereof. If not, the land would have to be described in accordance with a plan of subdivision or the consent of the committee of adjustment to the conveyances would have to be obtained.[7]

When the matter came on for hearing before Osler J.,[8] counsel for the applicant frankly admitted the land in question had been subdivided in accordance with the method described by Fraser J. in *Re Carter and Congram.*[9] There, the vendor, in a prior conveyance, granted and conveyed a power of appointment to himself and in the same deed granted to one J to uses. The vendor proposed to sell part of this land and complete the transaction by exercising the power of appointment by appointing to the purchaser to her own use in fee simple. Fraser J. considered that the effect of the original grant to uses to J was that J, the grantee, held the fee and the use pending exercise of the power of appointment by the grantor. The grantor having retained only the power of appointment, he did not "retain the fee or the equity of redemption in any land abutting the land that is being conveyed . . ." and fell within the exception in s.26(1)(b). Accordingly, no consent of the committee of adjustment was required to the sale of the part of the land in question.

After discussing the cases and textbook authorities, he concluded:

"A fee is a special kind of real property. A power is not a property interest; much less is it a fee".[10]

Although Osler J. in *Forfar* recognized that the various amendments made to s.26 were intended to make that section all-encompassing, he agreed with the reasoning of Fraser J. in *Re Carter and Congram* and allowed the

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[7] Neither would have been desirable for Mr. Forfar. The procedure to be followed in registering a plan of subdivision can be lengthy, costly and cumbersome. See s. 33 of the Planning Act (*supra*, note 5) for the procedure and some of the considerations in the registration process. The committee of adjustment has the power to impose conditions on any consent to a severance. It may only give its consent "provided that the committee is satisfied that a plan of subdivision . . . of the land described in the application is not necessary for the proper and orderly development of the municipality". See s. 42(3) and (10) of the Planning Act (*supra*) and W. S. Rogers (*supra*, note 2) at 216.

[8] *Supra*, note 1.

[9] (1970), 9 D.L.R. (3d) 550, [1970] 1 O.R. 800.

[10] *Id.*, at 807. A grant to uses is most often used as a device to avoid the attachment of a dower interest.

application. In so doing, he declined to accept the argument of the respondents that the word "fee" should be interpreted liberally as including the power of appointment retained by Mr. Forfar.[11]

Schroeder J.A. delivered the judgment of the Court of Appeal reversing Osler J.'s decision.[12]

His Lordship referred to[13] *Re Redmond and Rothschild*[14] and quoted the following from the judgment of Kelly J. A. speaking for the Court of Appeal:

> As used here, the word "fee" is not a word which is precisely appropriate and must be interpreted in the light of the context in which it is used.
> The purpose of that part of the Act is to prevent, otherwise than with the approval of the Minister given after consultation with the local municipal authorities, the severance into two or more independent ownerships of land held under one ownership, if the portions into which it is sought to be severed form part of the holding of one owner, and if the external boundaries of that holding however described, form a continuous line....
> Having in mind the purpose of part II of the Planning Act and the context of the portions of the Act in which the words appear, it is my opinion that the retention of which the Legislature sought to prohibit by s.26 was that of the power to dispose of the abutting lands as distinguished from an interest in those lands; 'fee' must accordingly refer to such an interest in the abutting lands as confers on the holder thereof the absolute right to dispose of the lands.[15]

After reviewing the legislative history of the Planning Act, Schroeder J. A. considered that s.26(1) of the Act, as it read both before and after an amendment made in 1970,[16] "had for its object the prevention of the unrestricted subdivision of land and had no reference to any particular mode of conveyance."[17]

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[11] Counsel had urged him to follow the so-called "liberal" aproach that he was said to have taken in *Re Cait and Lemrac Holdings Ltd.*, [1969] 2 O.R. 544. The device whereby two simultaneous conveyances, each of one-half of the property, were delivered in the same envelope to the same solicitor, was found by him not to be "bona fide" and was held not to fall within the exception in s. 26(1) (b). Subsection (5a) was added to s.26 to deal with simultaneous conveyances. See s.1(1) of An Act to Amend The Planning Act S.O. 1971 c.2, which came into effect April 28th, 1971.

[12] *Supra,* note 1.

[13] *Id.*, at 344.

[14] (1971), 15 D.L.R. (3d) 538, [1971] 1 O.R. 436. Osler J.'s decision in *Forfar* and this decision were rendered respectively on October 20th and October 21st, 1970. Schroeder J. A. *supra,* note 6 at 341 noted that *Re Carter and Congram* was not referred to in *Re Redmond and Rothschild* except apparently by counsel in argument.

[15] *Id.*, at 438-39.

[16] This amendment was contained in s.1(2)(b) of An Act to Amend the Planning Act, S.O. 1970, c.72 which received Royal Assent June 26th, 1970. S.26(1) was amended to include a person granting, assigning or exercising a power of appointment. The amendment appears to have been made to plug the loophole created by the *Re Carter and Congram* decision.
By s.1 of this Act subdivision control was made to apply to the whole of the Province by the force of the Act alone.

[17] *Supra,* note 1 at 343-44.

He pointed out that here Mr. Forfar clearly had dominion over the fee to exercise as he saw fit, and went on:

> It is against the retention of such power of control over alienation of the property abutting the land conveyed or otherwise dealt with that the prohibitory provisions of s. 26 are aimed. Adopting the construction placed upon the word "fee" in *Re Redmond and Rothschild*, . . . I come inevitably to the conclusion that H. Bruce Forfar has subdivided his holding in contravention of the township's subdivision control By-law 510 and thereby infringed the provisions of s. 26(1) of the Planning Act.[18]

In the Supreme Court of Canada, Martland J. delivered the oral judgment for the Court.

> We are all in agreement with the reasons delivered on behalf of the Court of Appeal by Mr. Justice Schroeder. We think that, fairly construed, the words 'retain the fee' embrace not only the holder of the fee, but as well, the holder of the power over the fee, and we also think that the term 'grantor' must have a concordant meaning.
> Accordingly, the appeal is dismissed with costs.

At first blush, when considering the broad interpretation given to the word "fee" one might think of what was said by Humpty Dumpty to Alice in *Through the Looking-Glass:*

> When I use a word it means just what I choose it to mean — neither more or less.

In fact, the opposite is true. Schroeder J. A. in *Forfar* did no more than give effect to a most basic canon of statutory interpretation. Where the language used is capable of more than one meaning, the court's duty is to construe the language in accordance with the objects of the statute in mind.[19]

As His Lordship pointed out, the word "fee" was given a restricted technical meaning by Fraser J. in *Re Carter and Congram,* while in *Re Redmond and Rothschild* the Court of Appeal had given it an enlarged meaning more in keeping with the intent of the Act. The determining factor was that of dominion or control over the power of disposal.

It was this latter view that was adopted by the Court of Appeal in *Forfar* and confirmed by the Supreme Court of Canada.

This view was once again applied recently in *229822 Realty Ltd.* v. *Reid.*[20] Here the parties entered into an agreement of purchase and sale for some 148 acres of land. Before closing, the Township of Chinguacousy notified the vendor of its intention to expropriate a strip of the land adjacent to a highway amounting to some three-quarters of an acre. The vendor as agent for the purchaser negotiated compensation, and ultimately conveyed

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[18] *Id.*, at 344.

[19] *G.T.R.* v. *Hepworth Silica Pressed Brick Co.* (1915), 51 S.C.R. 81 at 85. S. 10 of the Interpretation Act R.S.O. 1970, c.225 is also support for this proposition. It reads as follows:
"Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive 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."

[20] (1973), 30 D.L.R. (3d) 542, [1973] 1 O.R. 194.

to the Township what was thought to be the desired strip. By reason of a mis-description, this deed did not cover any of the vendor's land and this was discovered by the purchaser's solicitor on the day of closing. The vendor then tendered a deed covering the land under the agreement less the land intended to be deeded to the township. The purchaser's solicitor refused to close on the basis that the vendor still had title to the abutting lands. The vendor sued for a declaration that the purchaser had defaulted and the purchaser counterclaimed for the return of its deposit and damages. At trial Keith J. held for the purchaser.

The Court of Appeal reversed the decision at trial. McGillivray J. A. in delivering the Court's judgment referred to *Re Redmond and Rothschild,* which he noted had not been cited to Keith J. He considered that the township had an equitable title to the strip of land, and following *Re Redmond and Rothschild,* concluded that the vendor "had no longer the right to dispose of the said strip of land."[21] This being so, the purchaser's solicitor wrongly refused to carry out the transaction. *Forfar* was not referred to in the decision although McGillivray J.A. was a member of that court.

Where does the law now stand as a result of the *Forfar* decision? It appears to be a distinct possibility that if a court is satisfied that an artificial series of transactions was entered into as part of a scheme devised to circumvent the provisions of the Act, the court might find the attempt abortive.[22] If this were so, the effect of the Supreme Court of Canada's pronouncement in *Forfar* may be to put to rest the best laid plans of lawyers to assist clients in evading the intention of the legislature to control the subdivision of land in Ontario.

The courts have long been dealing with efforts to evade statutes. As was said over 350 years ago:

> The office of the judge is to make such construction as will suppress the mischief and advance the remedy and to suppress all evasions for the continuance of the mischief.[23]

Will the decision in *Forfar* have retroactive effect so as to put in jeopardy the titles of those land-owners who have subdivided their lands in accordance with the technique approved in *Re Carter and Congram?*[24] On this question, Schroeder J.A. in *Forfar* was of the view that this was not a consideration for the Court. He said:

> Any person whose property rights are thus prejudiced must seek his relief in the appropriate quarter.[25]

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21 *Id.,* at 198.

22 At the time of writing, the Court of Appeal had only just concluded its hearings which commenced February 12th, 1973, on various hypothetical questions referred to it by the Lieutenant-Governor by Order in Council 2858/71 dated September 19, 1971. The questions referred to the Court are set out at page X of the Ontario Reports January 5th, 1973. The questions were referred to the Court following the questioning of the "checker-boarding" scheme adopted by Whiterock Estates Development Corporation Ltd., which subdivided land in rural Ontario. The question raised by me is a paraphrase of question no. 9.**

23 Magdalen College Case (1616) 11 R.E.P. 71(b).

24 *Supra,* note 9.

25 *Supra,* note 1 at 346.

This appears to be a reference to the solicitors who acted in the various transactions.

In the Supreme Court of Canada, Spence J. asked counsel during argument in *Forfar*:

> If John Brown chooses to rely on a single court judgment that holds valid a scheme and is avowedly worked out to go around the statute, don't you think he was pretty bold?[26]

What follows now? The writer's view is that the Legislature has no choice in the first instance but to introduce appropriate remedial legislation to validate the titles of those affected by the *Forfar* decision.[27]

That the Legislature will do at least this is virtually certain, but what form any remedial legislation will take is not so certain.

The Legislature should realize by now that the way in which the legislation is framed and the piece-meal amendments made to the Act over the past 25 years have only led to constant litigation. The inadequacy of the present system was clearly brought home by Kelly J. A. in *Re Redmond and Rothschild*. In discussing the purpose of s.26(1) of the Act, as it then stood, he said:

> While in my opinion it was not the intention of the Legislature to place any restriction upon dealings with lands where such lands comprised the entire holdings of the owner or owners attempting to deal therewith, a difficult question is presented arising from the mode which the Legislature employed and the language which it used to carry out that purpose.[28]

A fresh approach to subdivision control legislation in Ontario is obviously warranted.

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The writer of this comment wishes to express his appreciation to Allen Weinberg, student-at-law, who assisted in its preparation.

***Addendum*

Unfortunately for the writer but fortunately for the profession, on March 22nd, 1973 the Court of Appeal rendered its opinion on the questions referred to it. *Supra,* note 22. The Court's answer to question no. 9 is rather circumspect but it does indicate that if it is the type of transaction "which constitutes a deceit upon the public administration, a fraud upon The Planning Act . . . . . the transaction would be held invalid." See p. 48 of the judgment (unreported). At p. 49 the Court explained Forfar in these words: ". . . . . while admittedly Forfar employed a scheme devised to circumvent s.26 of The Planning Act, the fact that such a scheme was concocted and applied was entirely irrelevant. The transaction was bad because it fell squarely within the prohibitory words of the Act." A full analysis of the Court's opinion as it might relate to this case comment is not possible, but students are urged to read the entire opinion for an exhaustive review of the relevant cases on property law and statutory interpretation.

26 As reported in the Globe & Mail, *supra,* note 1.

27 Remedial legislation is not new. S.10(3) of The Planning Amendment Act, S.O. 1967, c.75 stated that the contravention before June 15, 1967 of s.26 or its predecessor "does not have and shall be deemed never to have had the effect of preventing the conveyance or creation of any interest in land."

28 *Supra,* note 14 at 439.