COURT OF APPEAL FOR ONTARIO

CITATION: Roalno Inc. v. Schaefer, 2024 ONCA 262
DATE: 20240411
DOCKET: COA-23-CV-0564

Trotter, Thorburn and Dawe JJ.A.

BETWEEN

Roalno Inc.

Plaintiff (Appellant)

and

Dale Schaefer, Maurice Freiburger, Brian Freiburger and Kenneth Freiburger

Defendants (Respondents)

AND BETWEEN:

Brian Freiburger and Kenneth Freiburger

Plaintiffs by Counterclaim
(Appellants by way of cross-appeal)

Roalno Inc, 691843 Ontario Limited and Sidney Wynton Semple

Defendants by Counterclaim
(Respondents by way of cross-appeal)

Simon Bieber, for the appellant/respondents by way of cross-appeal

Robert W. Scriven, for the respondents Dale Schaefer and Maurice Freiburger

Peter Loucks and Tetyana Ivanina, for the respondents/cross-appellants Brian Freiburger and Kenneth Freiburger

Heard: March 27, 2024

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice, dated April 14, 2023.

DAWE J.A.:

[1] This appeal arises out of a real estate transaction that failed after the parties both mistakenly came to believe that the property being sold and purchased was subject to a prescriptive easement. The would-be purchaser, the appellant Roalno Inc. ("Roalno"), refused to close unless the vendors either reduced the sale price or took steps to have the supposed easement extinguished. When the vendors refused to do either of these things, Roalno refused to close. It then sued for specific performance with an abatement. The trial judge refused this relief on the basis that Roalno had breached the agreement of purchase and sale by refusing to close. Roalno appeals from this decision.

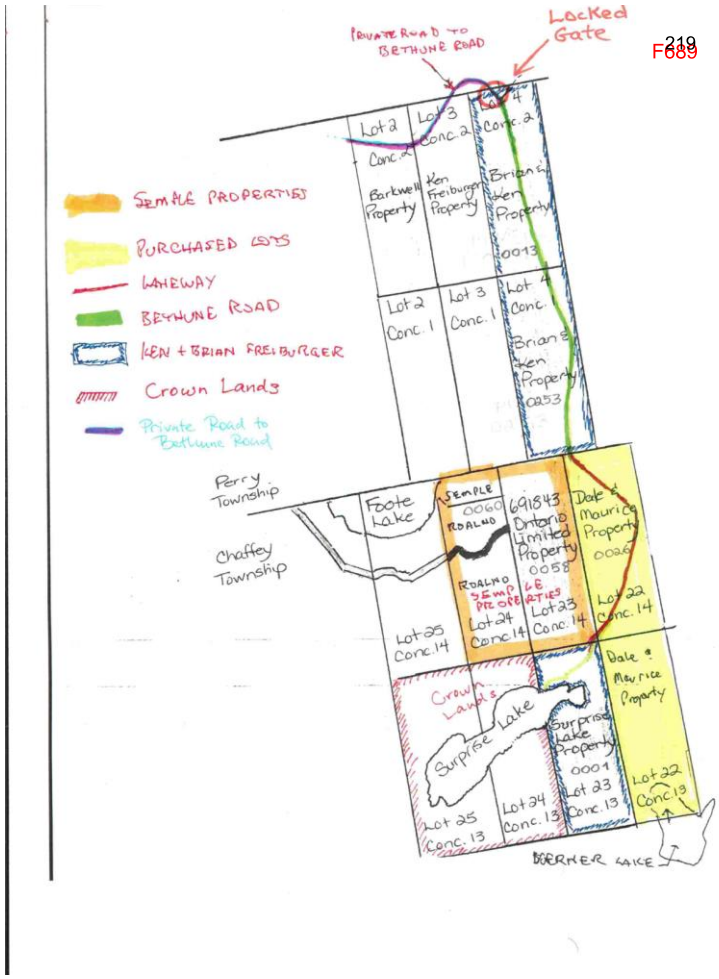
[2] As I will explain, I agree with the trial judge's finding that Roalno breached the contract and cannot now claim specific performance. This makes it unnecessary to address either Roalno's request for additional ancillary orders or the request for relief by Brian and Kenneth Freiburger on their cross-appeal, since both requests were contingent on Roalno being granted specific performance. I would accordingly dismiss Roalno's appeal, and dismiss the cross-appeal as moot.

A. FACTUAL BACKGROUND

[3] Roalno is owned and controlled by Sidney Wynton Semple, who is a retired real estate lawyer. He also owns and controls a second corporation, 691843 Ontario Limited ("691"). Mr. Semple's corporations own two adjacent lots in the Muskokas ("the Semple properties"), which Mr. Semple and his family use for recreation. They have a cottage on one of the properties, on Foote Lake.

[4] The respondents Dale Schaefer and Maurice Freiburger ("the Vendors") are brother and sister. They own two lots that are adjacent to the Semple properties, to the east and south: Lot 22, Concession 13, and Lot 22, Concession 14 ("the Vendors' lots"). The Vendors' two brothers, the respondents/cross-appellants Brian and Kenneth Freiburger ("the Freiburger brothers"), own two more lots to the north of the Vendors' lands, and a third lot to the south of the Semple properties, on Surprise Lake, on which they have a cottage ("the Surprise Lake property"). The five lots now owned by the Vendors and the Freiburger brothers were originally all purchased in the 1970s by their father. The only motor vehicle access to the Surprise Lake property is a private road that crosses the northernmost of the Vendors' two lots (Lot 22, Concession 14), before cutting across the southeast corner of the Semple properties.

[5] The locations of all of these properties and the roadway are shown in the following sketch that was filed as an exhibit at trial:



[6] In the spring of 2018, the Vendors accepted Mr. Semple's offer, which he made on behalf of Roalno, to purchase their two lots for $195,000. When Mr. Semple made this offer, he was aware of the road that crossed the Vendors' northern lot and the corner of the Semple properties, and also knew that the Freiburger brothers used this road to get to and from their Surprise Lake property.

However, he did not know if they had any legal right to use this road, or if they had any other means of accessing the Surprise Lake property. Mr. Semple also maintains that he was unaware at the time of the existence of the *Road Access Act*, R.S.O. 1990, c. R.34.

[7] The agreement of purchase and sale ("APS"), which Mr. Semple drafted, included the following representations and warranties by the Vendors:

> 28.2. There are no unregistered easements, encroachments or rights-of-way affecting the Properties;
>
> …
>
> 28.4. No person or persons are entitled to make use of the Properties for hunting, fishing, logging or any other purpose.

[8] When Mr. Semple sent the draft APS to the Vendors' lawyer, Sean Kelly, he asked Mr. Kelly to:

> … [p]lease draw to [the Vendors] attention the rep and warranty relating to no unregistered easements. They may want to obtain confirmation from the adjacent property owners [the Freiburger brothers] that they are not entitled to cross the lots.

[9] Mr. Kelly confirmed with Dale Schaefer that her two brothers did not have an easement to cross the Vendors' land. On April 3, 2018, the Vendors accepted Roalno's offer and signed the APS. The transaction was scheduled to close on April 30, 2018. After the APS was signed, Mr. Semple, Mr. Kelly and Ms. Schaefer exchanged further emails in which Ms. Schaefer confirmed that, to the best of the

Vendors' knowledge, "[t]here has never been an easement or right [of] way on our properties".

[10] However, on April 12, 2018, Mr. Kelly emailed Mr. Semple and raised a new concern that the Freiburger brothers might have acquired an easement by prescription. Mr. Kelly explained in his email:

> I have done a thorough review of the property with Dale [Schaefer]. There is nothing registered, nothing in writing, and no hand-shake agreement in place; nevertheless Dale cannot definitively say there is no easement. There is a lane way that runs across this land that has been used periodically by her brothers to access property they own to the south. The family has owned the property for nearly 40 years, which I suspect may have created a prescriptive easement over the property.
>
> I know this has been your foremost concern to date, please let me know how you would like to proceed.

[11] As it happens, Mr. Kelly's concern that the Freiburger brothers might have acquired an easement by prescription was groundless, because a prescriptive easement *via* the doctrine of lost modern grant cannot be acquired over property that is in the land titles system: see *Land Titles Act,* R.S.O. 1990, c. L.5, s. 51; *1043 Bloor Inc. v. 1714104 Ontario Inc.*, 2013 ONCA 91, 114 O.R. (3d) 241, at para. 92, *per* Laskin J.A. (concurring). It was an agreed fact at trial that the properties at issue "were originally patented and registered in and remain under the Land Titles system and not the Registry system."

[12] When Mr. Semple responded to Mr. Kelly's email on April 13, 2018, he proposed two alternatives, both premised on his apparent belief that it was at least possible that the Freiburger brothers might claim a prescriptive easement to use the road across the Vendors' northern lot that connected the Freiburger brothers' northern properties to their Surprise Lake property.

[13] Mr. Semple's first proposal in his April 13, 2018 email was that the parties amend the APS by "deleting the representation and warranty relating to easements", while reducing the purchase price by $70,000, to $125,000. His second alternative proposal was to amend the APS to require the Vendors to "deliver on closing a quitclaim and release with respect to all claims for easements, rights of way and access rights" from the Freiburger brothers. Mr. Semple added that he was prepared in exchange to give the Freiburger brothers permission to use the road to access their Surprise Lake property for a nominal charge of $10/year.

[14] Mr. Semple also explained in his email why he thought any claim by the Freiburger brothers that they had acquired a prescriptive easement over the road was unlikely to succeed. Nevertheless, he stated his concern that Roalno "would be put to substantial trouble and expense in defeating such a claim".

[15] Ten days later, on April 23, 2018, Mr. Semple's real estate lawyer, Frank Gardner, wrote to Mr. Kelly and formalized these two proposals, with two

variations. First, his letter reduced the requested abatement in the purchase price under Mr. Semple's first proposal from $70,000 to $60,000. Second, the letter amended Mr. Semple's alternative proposal to have the Freiburger brothers give a quitclaim and release in exchange for an agreement that they could keep using the road for $10/year was varied to give Roalno the unilateral ability to terminate this arrangement at any time.

[16] Mr. Gardner stated in his letter that "[t]he use of the [S]urprise Access Route by the owners of the Surprise Lake Lot constitutes an unregistered easement, encroachment or right-of-way affecting Lot 22, Concession 14". He continued by stating:

> The Buyer will permit the owners of the Surprise Lake Lot to continue to use the Access Route for ingress and egress to the Surprise Lake Lot provided they enter into a written agreement in a form satisfactory to the Buyer which will provide that their use of the Access Road is:
>
> a) with the permission of the Buyer;
>
> b) is without liability to the Buyer for any damage to person or property of the guests or owners of the Surprise Lake Lot; and
>
> c) can be terminated at any time in the discretion of the Buyer or the owner from time to time of Lot 22, Con. 14.
>
> REQUIRED: On or before closing, that the Seller obtain and provide the Buyer with the agreement in writing of the owners of the Surprise Lake Lot as aforesaid. Or, in the alternative, an abatement of $60,000 in the purchase price for the Property.

[17] The next day, Mr. Gardner sent a second letter in which he clarified that Roalno was requiring:

> On or before closing, production and delivery of a quitclaim in registerable form executed by Brian Frieburger [*sic*], Kenneth Freiburger and Marvin Frieburger [*sic*], being the owners of the Surprise Lake Lot, releasing any claims they may have against the Property to be purchased herein. In consideration of the said parties quitclaiming their interest in the Property our client is willing to enter into an agreement with the said Surprise Lake Lot owners as above-mentioned. In the alternative, an abatement of $60,000 in the purchase price for the Property.

[18] On April 25, 2018, Mr. Kelly sent a reply letter in which he rejected both of these proposals. He stated that his clients had signed the APS "with the honest but mistaken belief that no easements existed", and that the Freiburger brothers "are not willing to enter into a written agreement on the terms proposed by your client". Mr. Kelly added that the Vendors "believe the agreed upon price is already below market value, and are not prepared to reduce the price further". He concluded:

> Accordingly, my clients are unable to satisfy the warranty as set out in section 28.2 of the agreement. If your client is prepared to purchase the land on the same terms and conditions, minus s. 28.2, my clients will complete the sale. If the easement issue is sufficiently important to your client and he would prefer to cancel the agreement entirely, my clients are prepared to execute a mutual release.

[19] Neither of these counterproposals were acceptable to Mr. Semple. On the scheduled closing date, Mr. Gardner wrote to Mr. Kelly to advise that Roalno "is not willing to close without an abatement as previously advised". He added that "[w]e are in funds to complete the purchase for the abated purchase price", but recognized that the Vendors were not willing to close "on any amount less than the original purchase price". The transaction accordingly did not close.

[20] On July 10, 2018, Roalno commenced its action seeking specific performance and an abatement, naming the Vendors as defendants. On October 11, 2019, Roalno amended its Statement of Claim, adding the Freiburger brothers as defendants. The Freiburger brothers counterclaimed against Roalno and added Mr. Semple and 691 as additional defendants by counterclaim.

B. THE TRIAL JUDGE'S DECISION

[21] At the conclusion of a four-day trial, the trial judge gave brief oral reasons dismissing Roalno's action, which made it unnecessary for her to address the Freiburger brothers' counterclaim.

[22] The trial judge found that Roalno was not entitled to an order for specific performance, either with or without an abatement, because it had breached the contract by refusing to close on April 30, 2018. Although Mr. Semple and the Vendors had both come to believe that the Freiburger brothers might have a prescriptive easement to use the road over the Vendors' property, they were

mistaken about this. Accordingly, the Vendors were not in breach of their representation and warranty in para. 28.2 of the APS that there were "no unregistered easements, encroachments or rights-of-way affecting the Properties".

[23] The trial judge also rejected Roalno's argument that the Vendors were in breach of the para. 28.4 "basket clause", under which they had represented and warranted that:

> No person or persons are entitled to make use of the properties for hunting, fishing, logging or any other purpose.

[24] She concluded that even if the Freiburger brothers had a "right not to be charged with trespassing that arises under the *Road Access Act*", this did not qualify as "using [the properties] for a purpose" within the meaning of para. 28.4.

C. ANALYSIS

[25] On appeal, Mr. Bieber makes two principal arguments on behalf of Roalno. First, he takes issue with the trial judge's statement in her reasons that "Mr. Semple should have closed and argued about the interpretation of the agreement later". He argues that this conflicts with decisions of this court holding that a purchaser who seeks specific performance with an abatement is not required to close at the original purchase price in order to preserve the right to seek this remedy.

[26] In his oral submissions, Mr. Bieber focused on a second argument: namely, that the trial judge erred by finding that Roalno breached the contract when it

refused to close on April 30, 2018. In particular, he argued that the trial judge erred by not finding that the Vendors had anticipatorily breached the contract themselves five days earlier, on April 25, 2018, when their lawyer wrote to Roalno's lawyer and stated that the Vendors were "unable to satisfy the warranty as set out in section 28.2 of the agreement".

[27] I would not give effect to either of these arguments.

[28] With respect to the first argument, I accept that in situations where a purchaser of land is entitled to claim the remedy of specific performance with an abatement, because "there is a discrepancy between what the vendor has agreed to convey and what the vendor can convey", the purchaser is not required to close at the original purchase price as a precondition for obtaining this remedy: see e.g., *3999581 Canada Inc. v. 1394734 Ontario Inc.,* 2007 ONCA 312, 282 D.L.R. (4th 461, at para. 16.

[29] However, I do not think this principle assists Roalno. I am prepared to assume for the purpose of my analysis that Mr. Semple meant for the para. 28.2 "representation and warranty" to be a condition, and that if there had in fact been an unregistered easement over the property, Roalno would have had the option of either terminating the contract or seeking specific performance with an abatement. However, everyone now agrees that there never was any such easement. In my view, Roalno cannot rely on Mr. Semple's legally erroneous belief that an

easement by prescription might exist to justify its refusal to close at the agreed-on purchase price.

[30] I am also not persuaded that Roalno can retroactively justify its refusal to close by invoking the possibility of the Freiburger brothers relying on the *Road Access Act*. I reach this conclusion for two main reasons.

[31] First, Mr. Semple's evidence is that he only learned about the existence of the *Road Access Act* months later, once litigation was underway. I am not persuaded that he can justify Roalno's refusal to close based on a consideration that was not in his mind at the time. Indeed, Mr. Bieber acknowledged in oral argument that the *Road Access Act* issue would not have justified the substantial abatement in the purchase price that Mr. Semple demanded when he believed the Freiburger brothers might have a prescriptive easement.

[32] Second, even if Mr. Semple had been aware of the *Road Access Act,* I am not persuaded that this knowledge would have justified Roalno's refusal to close the transaction.

[33] As a starting point, the parties now agree that the roadway at issue is an "access road" within the meaning of s. 1 the *Road Access Act,* since it provides the only vehicular access to the Freiburger brothers' Surprise Lake property.

[34] Importantly, however, the *Road Access Act* does not create "any right in respect of ownership of land on persons using an access road to get to their

property": *Whitmell v. Ritchie* (1994), 20 O.R. (3d) 424 at p. 427. Rather, it restricts property owners' ability to close access roads without first obtaining a court order, with notice to any landowners "who would, if the road were closed, be deprived of motor vehicle access to and from [their] land": *Road Access Act*, s. 2(3).

[35] In short, if Roalno had proceeded with the purchase and acquired the Vendors' land, it would not have been able to close the road without first applying to the court for a closing order, on notice to the Freiburger brothers, unless they agreed to the closure in writing: *Road Access Act,* s. 2(1). The application judge would then have been required to apply the test in s. 3(1) of the *Act*, which provides:

> 3. (1) The judge may grant the closing order upon being satisfied that,
>
> (a) the closure of the road is reasonably necessary to prevent substantial damage or injury to the interests of the applicant or for some other purpose in the public interest;
>
> (b) in the case of an access road that is not a common road, persons described in subsection 2 (3) do not have a legal right to use the road; or
>
> (c) in the case of a common road, the persons who use the road do not have a legal right to do so.

[36] Since the road at issue here was not a "common road", the governing provisions in this case would have been ss. 3(1)(a) and (b).[1] These provisions

[1] Section 1 of the *Act* defines a "common road" to mean "an access road on which public money has been expended for its repair or maintenance".

operate disjunctively: see *Margettie v. Snell*, 2009 ONCA 838, 256 O.A.C. 69, at paras. 23-32. It would accordingly have been open to the application judge to make a closing order under s. 3(1)(b), on the basis that the Freiburger brothers did not have a "legal right" to use the road. However, the application judge would also have had the discretion to decline to make a closing order even though the Freiburger brothers had no legal right to use the road: *Margettie v. Snell,* at para. 42.

[37] In summary, the Freiburger brothers' statutory rights under the *Road Access Act* were limited. At most, the *Act* gave them a statutory right to keep using the road until such time as Roalno obtained a closing order. If Roalno had applied for such an order, the Freiburger brothers could have tried to persuade the application judge not to make the order even though they had no legal right to use the road.

[38] In my view, these limited statutory rights did not engage the representation and warranties in either paras. 28.2 or 28.4 of the APS. They fall short of granting the Freiburger brothers an "easement, encroachment or right-of-way" within the meaning of para. 28.2 of the APS. Moreover, in the absence of a court decision declining to make a closing order, I do not think the Freiburger brothers can be said to have had any "entitlement" to use the road that engaged para. 28.4 of the APS.

[39] In summary, even if Mr. Semple had been aware of the *Road Access Act* in April 2018, I am not persuaded that any concern he might have had about the Freiburger brothers possibly blocking a future attempt by Roalno to close the road would have entitled Roalno to refuse to complete the transaction.

[40] I turn now to Mr. Bieber's second argument, which is that the Vendors anticipatorily breached the agreement first, before Roalno, when Mr. Kelly stated in his April 25, 2018 letter that the Vendors were "unable to satisfy the warranty as set out in section 28.2 of the agreement", and were therefore seeking to either have this term removed from the APS or cancel the transaction.

[41] As Gillese J.A. explained in *Spirent Communications of Ottawa Limited v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, 88 O.R. (3d) 721, at para. 37, leave to appeal refused, [2008] S.C.C.A. No. 151:

> An anticipatory breach sufficient to justify the termination of a contract occurs when one party, whether by express language or conduct, repudiates the contract or evinces an intention not to be bound by the contract before performance is due.

I accept that Mr. Kelly's April 25, 2018 letter can be understood as indicating the Vendors' intention not to be bound by the APS because they mistakenly believed that they would be unable to fulfil one of its terms.

[42] However, Mr. Kelly sent this letter in response to Mr. Semple's earlier April 13, 2018 email and Mr. Gardner's April 23 and 24, 2018 letters, all of which

in my view made it equally clear that Roalno had no intention of fulfilling its own end of the bargain.

[43] Mr. Semple began his April 13, 2018 email by stating that he saw "2 alternatives" – namely, an abatement in the purchase price, or an amendment to the APS to require the Freiburger brothers to provide a "quitclaim and release with respect to all claims for easements, rights of way and access rights". Likewise, Mr. Gardner's two letters presented these alternatives as "requirements".

[44] Conspicuously missing from any of this correspondence was any mention of the third option of the parties completing the transaction in accordance with the existing terms of the APS, with Roalno assuming the risk that the Freiburger brothers might choose to make and litigate a claim that they had an easement to use the road to access their Surprise Lake property. In his April 13, 2018 email, Mr. Semple had expressed skepticism that such a claim could succeed. However, when Mr. Gardner sent his April 23, 2018 letter ten days later, he characterized the Freiburger brothers' use of the road as "an unregistered easement, encroachment or right-of-way" that violated the representation and warranty in para. 28.2 of the APS.

[45] The question of whether a party's words or actions demonstrate an intention not to be bound by a contract must be determined objectively. As Gillese J.A. noted in *Spirent Communications,* at para. 37, "the court is to ask whether a reasonable

person would conclude that the breaching party no longer intends to be bound by [the contract]". In my view, Mr. Semple and Mr. Gardner's correspondence would have left a reasonable person in the Vendors' position with no doubt that Roalno did not intend to complete the transaction according to the terms of the APS.

[46] When Mr. Kelly's April 25, 2018 letter is situated in this context, I am not persuaded that it can be properly characterized as an anticipatory breach of the APS by the Vendors. To the contrary, I am satisfied that it was Roalno who anticipatorily breached the contract when Mr. Semple sent his April 13, 2018 email, and that this anticipatory breach was then reaffirmed by Mr. Gardner's subsequent letters ten days later. It was up to the Vendors to decide whether to either accept or reject Roalno's repudiation of the contract: *Spirent Communications,* at para. 53. I am satisfied that when Mr. Kelly sent his April 25, 2018 letter, he was communicating his clients' decision that they would accept the repudiation, unless the parties agreed to amend the APS to remove para. 28.2. Since Roalno did not accept this counterproposal, Mr. Kelly's letter had the effect of bringing the contract to an end.

[47] In summary, I would find that the trial judge did not err in concluding that Roalno was the party who breached the contract. In my view, it was Roalno who repudiated the APS first, and the Vendors who then accepted Roalno's repudiation, which brought the contract to an end. This disentitles Roalno from now being granted specific performance, either with or without an abatement.

Moreover, as the innocent party in the breach, the Vendors are entitled to keep Roalno's $5,000 deposit.

[48] This conclusion makes it unnecessary to address Roalno's request for a declaratory order that the road running over the Freiburger brothers' northern properties is an "access road" under the *Road Access Act* in relation to the Vendors' properties, and for an order under the *Act* prohibiting the Freiburgers from obstructing this road, since these requests were both contingent on Roalno being granted specific performance.

[49] My conclusion that Roalno's appeal should be dismissed also makes it unnecessary for me to address the Freiburger brothers' cross-appeal, since the relief they seek is also contingent on Roalno's appeal being allowed and it being awarded specific performance.

D. DISPOSITION

[50] In summary, I would dismiss Roalno's appeal, and would also dismiss the Freiburger brothers' cross-appeal as moot.

[51] On the issue of costs, I would encourage counsel to come to an agreement on costs. If they are unable to do so, they may serve and file brief written submissions, of no more than two pages in length for each of the two groups of jointly-represented respondents, and four pages in total for Roalno. The respondents' costs submissions and bills of costs should be served and filed within

two weeks of the release of this judgment, and Roalno's submissions and bill of costs filed within a further two weeks.

Released: April 11, 2024 "G.T.T."

"J. Dawe J.A."
"I agree. Gary Trotter J.A."
"I agree. Thorburn J.A."