

[2008] O.J. No. 2948 | 70 R.P.R. (4th) 107 | 2008 CarswellOnt 4484

Between George Crossley Heintzman and Mary Claire Heintzman, Plaintiffs, and Lynne Catherine Poole, personally and in her capacity as Trustee to the Frederic Easton Hetherington Trust, Bruce John Frederick Hetherington personally and in his capacity as Trustee to the Frederic Easton Hetherington Trust, and John Hogarth, Defendants

(77 paras.)

Case Summary

Real property law — Sale of land — Agreement of purchase and sale — Right of first refusal — Validity — Incomplete formation — Certainty of contract terms — Application for order to convey property allowed — Hetherington and plaintiffs agreed to provide rights of first refusal to each other as to their islands — Hetherington had Deed of Trust registered on Saville Island with no mention of plaintiffs right — Trust entered into sale of Saville with Hogarths — Hogarths submitted that Right of First Refusal did not give the plaintiffs enforceable rights — Relevant documentation showed that right of first refusal on its face was intended to be in plaintiffs' favour — Right of first refusal created enforceable right with priority over claims by Hogarths.

Application by the Heintzmans for an order to convey property. Both Saville and Barley Island were owned by Fredericton Hetherington. In 1990, Hetherington decided to sell Barley Island to the plaintiffs, and each agreed to provide rights of first refusal to each other. Each would be allowed to transfer the islands to their own children without triggering the other's right of first refusal provided that the children were bound by the reciprocal rights. The rights to first refusal had been mistakenly switched on the titles. In 2003, Hetherington had a Deed of Trust registered on the Saville title, with the defendant children as trustees. The Deed of Trust made no mention of the plaintiff's right of first refusal, and title had been transferred to the defendants. After Hetherington died in 2005, the Trust entered into an Agreement of Purchase and Sale with the defendant Hogarths for the sale of Saville. The plaintiffs exerted their right of first refusal, claiming that the Hogarths had no valid claim to ownership of Saville. The Hogarths submitted that the Right of First Refusal Agreement did not give the plaintiffs enforceable rights, as it was registered on title to the wrong property. The Hogarths crossclaimed against the defendant children for general and specific damages, and specific performance. The defendant children crossclaimed against the Hogarths for damages caused by the delay in closing.

HELD: The question was which family would be allowed to own Saville.

Hetherington had granted the plaintiffs an enforceable right of first refusal over Saville, and the defendant children testified that they felt bound by the plaintiffs' right. A review of the relevant documentation showed that the right of first refusal on Saville on its face was intended to be in favour of the plaintiffs. An error so patently obvious as the mistake on the switching of the titles was not to be allowed to defeat important substantive rights.

The right of first refusal had been triggered in the moment before the Agreement for Sale and Purchase had been signed, which created an enforceable right with priority over any claims by the Hogarths. The crossclaims were dismissed, as both defendant children and the Hogarths had prior knowledge of the plaintiffs claim before closing.

Statutes, Regulations and Rules Cited:

Courts of Justice Act,

Land Transfer Act, [R.S.O. 1990, c. L.5, s. 62](#), s. 132

Trustee Act, s. 38(3)

Variation of Trusts Act, *R.S.O. 1990, c. V.1*,

Counsel

Mr. Ryan Stewart Breedon for the Plaintiffs.

Mr. John S. Contini, of counsel for the Defendants, Lynne Catherine Poole and Bruce John Frederic Hetherington.

Mr. R. Brian Foster for the Defendant John Hogarth.

REASONS FOR DECISION

M.A. SANDERSON J.

Introduction

1 Although they disagree about many aspects of this litigation, the Plaintiffs the Heintzmans, and the Defendants the Hogarths, do strongly agree that the subject of this litigation, Island B208 ("Saville Island" or "Saville") is a prize worth fighting for. They agree it is unique and irreplaceable. They love the area where it is located in Georgian Bay near Sans Souci, well known for its spectacular vistas, rugged rocky terrain and shimmering waters. Whoever loses the right to buy Saville will be sorely disappointed.

2 All of the litigants have additional personal reasons for wanting to own Saville:

- (a) Saville is connected to and almost totally surrounds Barley Island ("Barley"), a smaller property already owned by the Heintzmans. When swimming near Barley, they came within feet of Saville. If water levels in Georgian Bay continue to drop as they have over the past 50 years [i.e., even if they drop another five feet], the present dockage on Barley will be compromised. The nearest deep water is on Saville's north side. Saville sits between Barley and another island already owned by Mr. Heintzman's brother. At the moment there are no cottages on Saville. In the near term, the

Heintzmans want it to remain a managed forest. In the long term, their children may build cottages on it.

- (b) Mr. Hogarth went to camp in the area as a child, and loves the area. Mrs. Hogarth also set her heart on owning property in the Sans Souci area after she emigrated from England in 1999. In 2000-2001, the Hogarths bought a part lot on Wahsouné Island, just "a long swim" from Saville, to "get a toehold" in the neighbourhood. When they could, they intended to buy a more private property. They have visited at least "a couple of dozen" in the area with the intent of a possible purchase.

3 Neither the Heintzmans nor the Hogarths are at fault for the circumstances and resulting confusion giving rise to this litigation.

4 The simple question to be determined here is which family will be allowed to own Saville. More specifically, should the Heintzmans be allowed to enforce a contract ("the 1990 first refusal agreement") they made with Frederic Easton Hetherington ("Senior") in 1990, or should the Hogarths be able to enforce a contract ["the May 2006 Agreement of Purchase and Sale"] they made with the Frederic Easton Hetherington Trust?

The Facts

5 Saville and Barley were his father's present to Senior on Senior's return from World War II.

6 In 1990, when Senior decided to sell Barley to the Heintzmans, the Heintzmans and Senior agreed they would provide rights of first refusal to each other (the "reciprocal rights.") In other words, the Heintzmans agreed to give Senior a right of first refusal on Barley and Senior agreed to give the Heintzmans a right of first refusal on Saville.

7 Mr. Heintzman ("Heintzman") gave evidence at trial about the discussions leading to the granting of the reciprocal rights. He said at Senior's request they agreed they would each be allowed to transfer their islands to their own children without triggering the other's right of first refusal, provided that those children would be bound by the reciprocal rights. Heintzman gave evidence that they wanted to be able to make transfers of their own islands to their own children but at the same time to ensure that such transfers would not be a means to circumvent the reciprocal rights.

8 "Schedule A" of the 1990 Agreement of Purchase and Sale for Barley Island between Senior and the Heintzmans included the following:

This Agreement of Purchase and Sale is to include a Right of First Refusal on the Vendor's [Senior's] Island B-208 which is approximately 14 acres and which surrounds Island B-206 [Barley] on both sides. Notice from the Vendor or his agent is to be sent by registered mail to the address of service for Island B-206 as shown in the Township office and to the Purchaser in care of Thomas G. Heintzman, Q.C., McCarthy Tétrault, P.O. Box 4700, Toronto Dominion Bank Tower, Toronto-Dominion Centre, Toronto, Ontario, M5K 1E6, together with a photocopy of the offer which the Vendor is willing to accept. The Purchaser shall have 30 days from receipt of such mailing to meet such offer. Failing which, the Vendor shall be at liberty to sell to the third party. This Right of First Refusal is to be registered on title.

The Right of First Refusal shall not apply to a transfer or sale to or between the Vendor's children provided that such transfer or agreement contains a similar enforceable right of first refusal in favour of the Purchaser herein from such purchaser or transferee.

The Purchaser and Vendor agree that the Vendor shall have the same Right of First Refusal on Island B-206. The name and address for the solicitor to receive the notice shall be given prior to closing.

9 The Heintzman purchase of Barley closed on October 17, 1990. In accordance with the terms of the Agreement of Purchase and Sale, the Heintzmans and Senior attempted to register the reciprocal rights on title. The Right of

First Refusal in favour of the Heintzmans reads as follows:

Right of First Refusal

Hetherington [Senior] agrees that, subject to the exception in the last sentence of this paragraph, he will not sell all or part of [Saville] Island, except pursuant to a written offer to purchase acceptable to Hetherington; and that if Hetherington receives an offer to purchase that he would be willing to accept, he will forward a photocopy of the offer to Heintzman by registered mail to the address of Heintzman for Island Q, other wise known as Island B-206, as shown at the municipal offices of the Archipelago Township, district of Parry Sound, and also to Heintzman in care of Thomas B. Heintzman, Q.C. [sic] McCarthy Tetrault, P.O. Box 4700, Toronto Dominion Bank Tower, Toronto-Dominion Centre, Toronto, Ontario, M5K 1E6. Heintzman will have 30 days from the receipt of such mailing in which to notify Hetherington that they are willing to purchase the Island or part of the Island, as the case may be, at the price and on the same terms and conditions as are contained in the offer to purchase whereupon there will be considered to be an agreement of purchase and sale between Hetherington as the vendor and Heintzman as the purchaser as if Heintzman had submitted the offer to purchase and Hetherington had accepted it. If Heintzman does not so notify Hetherington within the 30 day period, Hetherington may accept the offer and complete the sale to the offeror. If Hetherington does not accept the offer, the foregoing provisions of this paragraph will continue to apply to any subsequent sale of the Island or part thereof. Nothing in this paragraph applies to a transfer or sale of the Island or part thereof to or between the children of Hetherington, but only if each transfer or agreement of purchase and sale contains an obligation requiring the transferees to be bound by the same terms as the terms of this paragraph in favour of Hetherington [sic].

10 Unfortunately, the Heintzmans' Right of First Refusal in respect of Saville, intended to have been registered on title to Saville, was mistakenly registered on title to Barley. Senior's Right of First Refusal in respect of Barley, intended to have been registered on title to Barley, was mistakenly registered on title to Saville. It is unclear how that came about or who made the error, although it appears on the face of the documents that someone at the Land Titles office may have made handwritten changes to the documents, changing the 8 in 208 to a 6, changing Island Q to Island R, resulting in the cross-registration.

11 Whatever the reason for the error in registration, I note that despite the inclusion of the wrong Right of First Refusal, the Document General LT 182217 registered on title to Saville does make reference to the Heintzmans having an estate right interest or equity in the above land of which [Senior] is the registered owner.

12 In 2003, when Senior was 85 years old, he retained lawyer Douglas Macpherson, Q.C. ("Macpherson") to do some estate planning.

13 Macpherson drafted documents on Senior's behalf creating the Frederic Easton Hetherington Trust ("the Trust.") A Deed of Trust was registered on the Saville title on June 10, 2003. Senior, the settlor, and two of his children, Lynne Poole ("Lynne") and Bruce Hetherington ("Bruce") were named as trustees. The beneficiaries of the Trust were to be Senior and his three children, Lynne, Bruce and Joanne Margaret Hetherington ("Joanne") [who is handicapped.] The Deed of Trust provided in clause 2(b) that on Senior's death, his three children would share equally in the capital and income of the Trust.

14 The Deed of Trust made no mention of the Heintzmans' right of first refusal. In 2003, Lynne and Bruce, who had no involvement in the preparation and registration of the reciprocal rights between Senior and the Heintzmans in 1990, were unaware that they existed. [They did not learn about them until 2006.]

15 Section 62 of the *Land Transfer Act* provides that a Trust shall not be entered on the register. Accordingly, on June 30, 2003, by Transfer/Deed of Land LT 253078, title to Saville was transferred from Senior to Lynne, Bruce and Senior as joint tenants. That document includes the following at page 2:

"Transfer to Trustees for Alter Ego Trust Beneficial Owner to Trustees: The transfer is from the beneficial owner to the trustees for the same beneficial owner"

16 On October 30, 2005, Senior died.

17 On March 21, 2006, Macpherson filed a Survivorship Application on behalf of Lynne and Bruce, deleting Senior's name from the register.

18 The 2003 Deed of Trust provided that if Lynne so decided, she could receive Saville [with its value to be appraised.] After she elected not to do so, the Trustees decided to sell Saville, in part because proceeds were needed for Joanne's support.

19 After listing Saville for sale, the Trust entered into an Agreement of Purchase and Sale with the Hogarths dated May 2, 2006 for the sale of Saville for \$1,100,000. Paragraph 8 provided for a Requisition Date of May 18, 2006. Paragraph 10, headed "TITLE," included the following:

... If within the specified times referred to in paragraph 8 any valid objection to title ... is made in writing to Seller and which Seller is unable or unwilling to remove, remedy or satisfy ... , and which Buyer will not waive, this Agreement notwithstanding any intermediate acts or negotiations in respect of such obligations, shall be at an end and all monies paid shall be returned without interest or deduction and Seller, Listing Broker and Co-operating Broker shall not be liable for any costs or damages. ...

The transaction was to close May 31, 2006.

20 The Hogarths did not arrange for a title search before they made their May 2, 2006 offer. Some time between May 2 and May 16, their lawyer ("Keeley") did so. By letter to Macpherson [acting for the Vendor] dated May 16, 2006, she requisitioned the deletion of the Hetherington right of first refusal against Barley Island that had been mistakenly registered on the title to Saville.

21 Shortly after he received that requisition letter, Macpherson contacted the Heintzman lawyer at McCarthy's, who in turn notified Macpherson of the Heintzmans' right of first refusal on Saville and further indicated their intention to exercise it.

22 On May 25, 2006, Macpherson advised Keeley that (1) the Heintzmans were asserting a right of first refusal on Saville that they intended to exercise; and (2) the Trust was unable to comply with the requisition with respect to the right of first refusal mentioned in her May 16, 2006 letter.

23 On May 26, 2006, a caution was registered on title to Saville Island on behalf of the Hogarths.

24 At trial, Mrs. Hogarth conceded that she knew about the Heintzmans' claim prior to the closing date of May 31, 2006.

25 On that day, the Heintzmans tendered the deposit and full purchase price and the Hogarths tendered the balance of the purchase price in accordance with the terms of the May 2, 2006 Agreement of Purchase and Sale. They remain ready, willing and able to complete the purchase.

26 Counsel for the Trust has indicated it will comply with any direction given by this Court.

Position of the Parties

The Heintzmans

27 Counsel for the Heintzmans submitted that the Hogarths have no valid claim to ownership of Saville.

28 In doing equity, this Court must consider all of the circumstances. Justice requires this Court to make an order directing Bruce and Lynne/the Trust to convey Saville to the Heintzmans.

29 The Heintzmans are entitled to specific performance for a number of reasons:

- (a) In 1990 Senior granted them an enforceable right of first refusal over Saville - there is no dispute on this point. Under the terms of that right of first refusal, Senior could only transfer Saville to his children without triggering the right of first refusal if the transfer contained a "similar enforceable" right in favour of the Heintzmans.
- (b) When Senior conveyed Saville to himself and his children by Deed of Trust in 2003, Lynne and Bruce took the property subject to the Heintzmans' right of first refusal. Bruce and Lynne have conceded they feel bound by the Heintzman right. As Senior could only have conveyed Saville to his children in the Trust without triggering the right of first refusal if the transferees were bound to its terms, the Court should imply such an obligation in order to give effect to Senior's intention and to ensure that the beneficiaries will receive the benefit of the transfer [\$1,100,000.]
- (c) As settlor, Senior could have revoked the Trust at any time before he died. He remained contractually bound to honour his contract with the Heintzmans.
- (d) The Trust benefited only Senior's children. The right of first refusal allowed a transfer to Senior's children without triggering of the Heintzman right. If under the Deed of Trust Senior/Bruce/Lynne did not take Saville subject to the Heintzman right of first refusal, then Senior's transfer to the Trust would have triggered the Heintzman right of first refusal in 2003.
- (e) Had the right been triggered in 2003, it would have been converted at that time into an option to purchase. The Heintzmans would have an equitable right running with the land that they would be entitled to enforce after 2003 [i.e., they could force the Trust to sell Saville to them for \$1.] That option would have priority in law over any claims the Hogarths might have under the May 2006 Agreement of Purchase and Sale.
- (f) There is no need to rectify the Trust Deed to give effect to Senior's intentions. This Court should conclude that Senior bound himself and his children to the terms of the right of first refusal in favour of the Heintzmans. That interpretation accords with the intention of Senior and the Heintzmans, and protects the interests of the beneficiaries of the trust, including Senior's handicapped daughter, Joanne. However, if the Court disagrees, there is good reason to do so in the best interests of the beneficiaries. If Bruce/Lynne/the Trust were not bound by the Heintzman right, the 2003 transfer would have triggered the Heintzman right and entitled them to a transfer of Saville for \$1.00; Senior could not have intended that result.
- (g) All the trustees and beneficiaries consent [if necessary] to rectification of the Trust Deed binding them to the terms of the Heintzman right of first refusal.
- (h) In *Re Slocock's Will Trusts* [1979] 1 All E.R. 358 at p. 361, Graham J. set out the general principle that the Court can rectify an agreement to make it accord with the true intention of the parties.
- (i) Under the *Variation of Trusts Act, R.S.O. 1990 c. V.1*, this Court has jurisdiction to change, modify or vary trust terms in the best interests of the beneficiaries. That power should be exercised [if necessary] to ensure that the beneficiaries receive its benefit.
- (j) The Hogarths are not bona fide purchasers for value without notice. Neither the typographical error in the right of first refusal [i.e., in favour of Hetherington] nor the cross-registration of the reciprocal rights should affect the outcome. Document LT 182217 registered on title to Saville did mention a Heintzman right, title or interest in Saville. Had the Hogarths searched title before entering into the May 2006 Agreement of Purchase and Sale, they would have had notice of an unspecified Heintzman claim. Moreover, they concede that, prior to the closing date, they did have actual

knowledge of the specific nature of the claim under the alleged right of first refusal being asserted by the Heintzmans.

- (k) The Hogarths' Agreement of Purchase and Sale expired under its own terms when the Vendors were unable or unwilling to provide clear title. Paragraph 10 of the May 2006 Agreement of Purchase and Sale provided that if the purchaser presented an objection to title that the Vendors were unable or unwilling to satisfy/remove and the Purchasers were unwilling to waive, the agreement would be at an end. On May 17, 2006, the Hogarths' lawyer Keeley requisitioned removal of a right of first refusal that the Vendors were unable or unwilling to satisfy/remove and the Hogarths were unwilling to waive.

The Hogarths

30 Counsel for the Hogarths submitted that the Right of First Refusal Agreement on its face and as registered does not give the Heintzmans any enforceable rights. On its face, it is expressed to be in favour of Hetherington. It is registered on title to the wrong property.

31 In any event, it does not apply to a transfer by Senior to a Trust or by a Trust to the Hogarths. The Trust is not obliged to honour a 1990 right of first refusal agreement between Senior and the Heintzmans. The Hogarth Agreement of Purchase and Sale in May 2006 did not trigger the 1990 right of first refusal.

32 Before a right of first refusal is triggered, it is a personal contractual right. (*Recent Developments in Rights of First Refusal*, Paul M. Perell, Six Minute Real Estate Lawyer, Law Society of Upper Canada Continuing Legal Education 2000 at page 1-2.) The Right of First Refusal obtained by the Heintzmans from Senior in 1990 was a personal contractual right that did not run with the land. Any claim for breach of the 1990 right of first refusal agreement could only be made against Senior while alive or his estate after his death. No claim for breach of the 1990 right of first refusal agreement was made against Senior or his estate. Since Senior died on October 30, 2005, any such claim is now time-barred by s. 38(3) of the *Trustee Act*.

33 While he was alive, Senior never received a bona fide market offer for Saville that he was prepared to accept. The Heintzman right was never triggered during his lifetime.

34 Bruce and Lynne were not parties to the 1990 agreement and could not breach it. As trustees they had no notice of the 1990 right of first refusal agreement. The Hogarths had no notice of it until after they entered into the May 2006 Agreement of Purchase and Sale. This Court should give the Hogarths' claims precedence over the Heintzmans'.

Re Crossclaims

The Vendors Against the Hogarths

35 The Vendors initially took a neutral position in this dispute. In August 2007 they amended their Statement of Defence to add a Crossclaim against the Hogarths.

36 Their counsel, citing s. 132 of the *Land Titles Act* (Ontario), *R.S.O. 1990, c. L.5* as follows:

Liability where caution improperly registered

132. A person who registers a caution without reasonable cause is liable to make to any person who may sustain damage by its registration such compensation as is just, and the compensation shall be deemed to be a debt due from the person who has registered the caution to the person who has sustained damage. [R.S.O. 1990, c. L.5, s. 132.](#)

submitted that the Hogarths registered the caution without reasonable cause resulting in the damages they claimed.

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He also cited *Captain Developments Ltd. v. Nu-West Group Ltd.* ([1982](#)) [37 O.R. \(2d\) 697](#) (Ont. H.C.J.), ([1983](#)), [45 O.R. \(2d\) 213](#), [6 D.L.R. \(4th\) 179](#) (Ont. C.A.)

37 The Vendors' cross-claim against the Hogarths includes a claim for damages caused by the delay in the closing, including interest that should have been earned on the \$1,100,000 purchase price and the expenses and municipal taxes paid in connection with the ownership of Saville between May 31, 2006 and the date of judgment, summarized as follows:

Summary of Damages of the Defendants

Lynne Catherine Poole and Bruce John

Frederic Hetherington

(Excluding Legal Costs of the Action)

1. Municipal Taxes - Township of the Archipelago

2006 Assessment \$6,982.24

Purchaser's Share
of 2006 Assessment
(May 31 to December
31, 2006) \$4,112.83

2007 Assessment 7,216.41

2008 Interim Assessment 3,608.19

TOTAL \$14,937.43

2. Lost Interest on Sale Proceeds

Purchaser Price \$1,100,000.00

Deduct Realtor Fees (5%) (55,000.00)

Deduct Closing Costs

(estimated) (5,000.00)

Net Proceeds \$1,040,000.00)

Interest on \$1,040,000
 @ 4% per annum from
 May 31, 2006 to June 3,
 2008 (734 days) \$83,655.89

Per diem interest after
 June 2, 2008 \$113.97

38 It also includes a claim for indemnification for costs.

39 The rationale for the use of a 4% interest rate in the calculation [not the prejudgment interest rate prescribed under the *Courts of Justice Act* (Ontario) in the quarter in which the Statement of Claim was issued (3.8%)], is that the average rate in the interim has been approximately 4.5%.

40 In defence of the registration of the Caution, counsel for the Hogarths submitted that prior to May 31, 2006, the Vendors seemed to be siding with them, advising them that the right of first refusal mentioned on title to Saville applied to Barley, not Saville, and suggesting that the 1990 right of first refusal agreement between Senior and the Heintzmans was a personal contract, not expressly binding on Senior's heirs, executors, administrators, and assigns. It was not until later that the Vendors took the position that they were bound by the Heintzman Agreement.

The Hogarths' Cross-claim against the Vendors

41 The Hogarths have cross-claimed against the Vendors for general damages of \$100,000, special damages "in an amount yet to be determined," specific performance of the May 2, 2006 Agreement of Purchase and Sale, and costs. They also seek damages for the disappointment caused by their failure to mention the Heintzman right of first refusal in their marketing documents and in the May 2, 2006 Agreement of Purchase and Sale.

42 Although they allege that the failure to advise of the existence of the right of first refusal and complete the

transaction have caused them to incur expenses, they adduced no evidence on discovery or at trial to substantiate those claims.

43 The Hogarths also allege they will suffer a loss of benefit from the May 2006 Agreement of Purchase and Sale, delay in enjoyment, and if specific performance is not granted, will incur additional expenses to find another property.

44 The Hogarths had actual notice of a Heintzman claim before the May 2006 Agreement of Purchase and Sale was executed, and actual notice of the right of first refusal before the closing date.

45 The Vendors submit that s. 10 of the May 2, 2006 Agreement of Purchase and Sale is a complete answer to any claim made against them by the Hogarths on the basis that they were unable or unwilling to provide title to Saville free of the Heintzman claim. The Hogarths were seeking clear title and were not prepared to take title to Saville subject to the Heintzman claim. In those circumstances, pursuant to s. 10, the May 2, 2006 agreement came to an end and absolved the Vendors of any possible liability for costs or damages.

Application of the Law to the Facts

The Main Action

46 Counsel for the Hogarths relies on errors (1) in the right of first refusal [in favour of *Hetherington*, instead of in favour of the Heintzmans]; and (2) in its registration.

47 My review of the relevant documentation including LT 182217 has led me to the conclusion that the right of first refusal on Saville Island on its face was intended to be in favour of the Heintzmans [not Senior.] An error so patently obvious should not be allowed to defeat important substantive rights.

48 Senior and the Heintzmans clearly intended the reciprocal rights of first refusal to be registered on the title to the islands they did not already own [not on the title of the islands they did already own], so that potential buyers would be alerted to the existence of the reciprocal rights.

49 After a review of the handwritten changes on Document General LT182217 and LT182218, I would be prepared, if necessary, to infer that someone in the Land Registry Office mistakenly altered those documents resulting in their registration against title to the wrong properties.

50 In my view, the incorrect registrations are of no significance given that the existence of some Heintzman interest in Saville is evident on the face of the document that was registered, and given that the Hogarths had actual notice of the precise nature of the Heintzman claim during the requisition period and before closing.

51 It is abundantly clear from the wording of the right of first refusal itself and from Schedule A to the 1990 Agreement of Purchase and Sale between Heintzman and Hetherington [even apart from Mr. Heintzman's uncontradicted evidence], that Senior and the Heintzmans intended and agreed in 1990 that were Senior or the Heintzmans to transfer or sell Saville or Barley respectively to anyone but their own children, Senior in the case of Barley and the Heintzmans in the case of Saville would have the right to compel the transfer to them on the same terms. If Senior or the Heintzmans sold or simply transferred their respective islands to their children, they agreed to ensure that such children would be bound by the reciprocal rights. In other words, for example, if Senior were to sell or transfer Saville to Bruce, Bruce would agree that if he were to sell Saville to a third party, he would give the Heintzmans the right to buy it on the same terms. If the Heintzmans were to transfer or sell Barley to one of their children, that child would agree that if he/she were to transfer/sell Barley to a third party, he/she would give Senior the right to buy it on the same terms.

52 Senior was the one who first requested the inclusion of the proviso that a transfer to one or all of the children would not trigger the right of first refusal, provided that they would be bound by the same reciprocal right. That term

was obviously intended to prevent the parties from avoiding their obligations by transfers to the children in order to make further transfers to third parties.

53 I accept Mr. Heintzman's evidence that he agreed to that term because he knew the children would be bound by the reciprocal rights.

54 Does the fact that Senior created a Trust in 2003 defeat the Heintzman right?

55 I find the use of a trust to effect a mechanical transfer of Saville to Senior's children was within the spirit and intent of the 1990 Agreement.

56 What is the effect of the failure to specifically include a provision in the Trust Deed specifying that the Trust was bound to honour Senior's obligation to the Heintzmans?

57 When Senior directed the creation of the Trust for estate planning purposes, it is obvious he intended and assumed that the Trust would be bound by the Heintzman right. During his lifetime, he had control of the Trust and continued to be personally bound by his contract with the Heintzmans. At the time of the transfer to the Trust, Senior knew he would be at liberty to transfer Saville to his children without triggering the Heintzman right of first refusal only if they were bound to honour its terms. When he created the Trust, he knew he would be transferring Saville to himself and his children for \$1.00. He knew that if he triggered the right of first refusal, the Heintzmans would be able to enforce a transfer of Saville to them on the same terms. It is obvious that he would not have wanted the Heintzmans to be able to enforce a transfer of Saville to them for \$1.00.

58 Bruce and Lynne conceded on examination for discovery and in answers read into the trial record that they feel bound both in their personal capacities and as trustees by that obligation to the Heintzmans.

59 Had rectification of the Trust Deed been required, I would have been prepared to order it to make the Trust Deed accord with Senior's clear intention that the Trust would be bound by the 1990 right of first refusal agreement and to protect the interests of the beneficiaries [i.e., to receive fair market value (\$1,100,000) rather than \$1.00.]

60 Did the 2003 transfer of Saville to the Trust trigger the Heintzman right of first refusal? Since I am prepared to treat the transfer to the Trust as a transfer to the children, and since I have held that the children/Vendors/Trustees were contractually bound by the 1990 agreement with the Heintzmans, I am of the view that the right of first refusal was not triggered in 2003.

61 Had I held that the children/Vendors/Trustees were not bound by the 1990 Agreement with the Heintzmans, I would have held that in the moment before the transfer of Saville to the Trust in 2003, the Heintzman right of first refusal was triggered and converted to an option to purchase Saville for \$1.00, an equitable right running with the land.

62 Had I not considered the transfer to the Trust in 2003 to be a transfer to the children, I would have held that in the moment before the transfer to the Trust, the Heintzman right was triggered and converted into an option to purchase for \$1.00, an equitable right running with the land.

63 In either case, the Heintzmans would have been entitled to enforce a transfer of Saville to them on the same terms as Senior's transfer to the Trust [i.e., for consideration of \$1.00.]

64 In my view, the right of first refusal was not triggered until 2006, in the moment before the May 2006 Agreement of Purchase and Sale was signed. It was then that the Heintzman right was converted into an option to purchase Saville on the same terms. In my view, that created enforceable rights with priority over any claims the Hogarths had under that Agreement.

65 Had the Hogarths instructed Keeley to arrange for a title search before they made their offer to purchase

Saville, they would have been alerted to a Heintzman claim to some interest in Saville. That would have put them on inquiry and prompted them to learn the precise nature of the Heintzman claim. In any event, they had actual notice of the Heintzman right of first refusal before the May 31, 2006 closing date.

66 For all these reasons, I am of the view that the equities in this case clearly favour the Heintzmans.

The Crossclaims

The Vendors' Cross-claim against the Hogarths

67 I do not accept the submission of counsel for the Vendors that the Hogarths unreasonably pursued this litigation by registering a caution on the Saville title.

68 Although I have not held in their favour in the main action, it cannot be fairly said that their registration of a caution was unreasonable. The 2003 Trust Deed did not contain an express term making it clear that the Trust was bound to honour the Heintzman right of first refusal, as it should have done. The listing documents and the Agreement of Purchase and Sale made no mention of the Heintzman right of first refusal.

69 I have also considered that around the date the Hogarths registered the caution, the Vendors' solicitor seemed to be supportive of their claim.

The Hogarths' Cross-claim against the Vendors

70 Undoubtedly the Hogarths were disappointed when they were unable to close the purchase of Saville. They might have been less disappointed had they known before they made their May 2, 2006 offer that someone else allegedly had a pre-existing right of first refusal on Saville that he/she might attempt to exercise.

71 However, had they requisitioned a title search prior to May 2, 2006, LT182217, a Document General that was registered on the Saville title did make reference to a Heintzman interest or claim in Saville and would have alerted them to the existence of some claim. The Hogarths had actual notice of the specific nature of the Heintzman claim within two weeks of signing the Agreement of Purchase and Sale and before closing.

72 I have held that the Vendors were unable or unwilling to provide title free and clear of the Heintzman claim and that the Hogarths were unwilling to take title subject to it.

Disposition of the Claim and Cross-claims

The Main Action

73 An Order will go directing the Vendors to convey Saville Island to George and Mary Claire Heintzman; and vacating any cautions registered by either of the Hogarths or the Heintzmans on title to Saville Island.

The Cross-Claims

74 In all the circumstances of the case, I am of the view that the Trust should bear the expenses of the delay in closing. Had the Trust Deed specifically mentioned the Heintzman right and clearly bound the Trustees to its terms, and had the listing documents and the May 2, 2006 Agreement of Purchase and Sale mentioned the Heintzman Right of First Refusal, this litigation would have been unnecessary.

75 At the same time, I have held that the Hogarths had actual notice of the specific nature of the Heintzman claim before closing.

76 On all the law and equities here, I dismiss both cross-claims.

77 Counsel may make submissions on costs in writing on or before September 2, 2008.

M.A. SANDERSON J.

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