

Real Estate

Appeal Court ruling in long-running land litigation beckons SCC scrutiny, says lawyer

By **John Schofield**

(April 16, 2021, 8:48 AM EDT) -- Land deals gone sour involving a suburban Toronto property have reaped a long-running harvest of litigation and a voluminous Appeal Court decision laden with legal lessons. But the battle may not be over, says a lawyer involved in the case.

"Frankly, I think most counsel would think the decision cries out for SCC (Supreme Court of Canada) intervention," McCarthy Tétrault partner Sarit Batner said of the April 1 Ontario Court of Appeal decision, which involved multiple appeals and competing claims to a 275-acre parcel of undeveloped land in Markham, Ont.



Sarit Batner, McCarthy Tétrault

"There are at least four issues of public importance which the SCC should be interested in," she added in an e-mail to *The Lawyer's Daily*.

In the 183-page decision in *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited* 2021 ONCA 201, delivered with its own table of contents, the Ontario Court of Appeal overturned a lengthy September 2019 decision by Superior Court Justice Nancy J. Spies and declared that an August 2005 contract between the respondent, Romandale Farms Inc., and developer Jeffrey Kerbel is valid and enforceable. The Appeal Court ordered specific performance of Romandale's obligations under the agreement, but dismissed Fram's request for damages.

The case illustrates "the perils associated with a landowner selling interests in the land to more than one party in more than one transaction," Court of Appeal supernumerary Justice Eileen Gillese wrote for the majority, including Justice Mary Lou Benotto.

"The appeals raise many legal issues, one of which is the little-known equitable doctrine of estoppel by convention," she added. "In Canada, this doctrine finds its roots in *Ryan v. Moore* 2005 SCC 38. As you will see, estoppel by convention plays a critical role in the resolution of these appeals."

In concurring reasons, however, Justice Peter Lauwers concluded that the facts of the case did not support the legal basis for estoppel by convention and determined instead that the trial judge erred in using the doctrine of repudiation to decide that Kerbel repudiated the August 2005 agreement.

According to facts detailed in the decision, Romandale Farms Limited was the sole owner of two neighbouring farms in Markham known as the McGrisken Farm and the Snider Farm, but entered into agreements regarding the land in 2003 and 2005 that resulted in years of litigation.

In 2003, Romandale sold an undivided five per cent interest in the land to Fram in a deal stipulating that Fram would build houses on the land, sell them and share the profits with Romandale. Romandale and Fram entered into a number of agreements relating to the land, including co-owners agreements (COAs). Under the COAs, with limited exceptions, neither party could dispose of its interest in the lands. The COAs also contained a buy-sell mechanism that was generally available only after obtaining secondary planning approval (SPA), which would open the way for development.

In August 2005, Romandale and Kerbel entered into an agreement consisting of several transactions related to the Markham land. One of the transactions was the sale of Romandale's 95 per cent interest in the land to Kerbel. This was to be achieved in two steps. In the first step, Romandale sold Kerbel five per cent of its interest in the land. In the second step, Romandale agreed to sell its remaining interest in the land to Kerbel, conditional on either Fram's consent to the sale or Romandale's exercise of the buy-sell provisions in the COAs.

The decision noted that all of the transactions under the August 2005 agreement have been completed with the exception of the sale of Romandale's remaining interest in the land to Kerbel.

"Whether Romandale is bound by the 2005 August Agreement — and its obligations respecting the sale of its remaining interest in the Lands — is the driving force behind these appeals," wrote Justice Gillese.

In the years following the 2005 agreement, litigation, settlement efforts and shifting circumstances continued to occupy the parties.

In 2007, Fram sued Romandale and Kerbel, claiming that the August 2005 agreement was an impermissible disposition of Romandale's interest in the land under the COAs. In 2008, Fram and the development manager for the land sued Romandale and Kerbel, alleging that the 2005 agreement amounted to a breach of the construction management agreements between Fram and Romandale.

In 2010, the three parties reached a settlement agreement concerning the 2007 and 2008 actions, but Romandale later withdrew, leaving only Fram and Kerbel as signatories to the settlement. Then, in 2014, Romandale sued Kerbel claiming Kerbel breached the August 2005 agreement by taking steps to reduce the amount of developable acreage on the land.

In 2015, Romandale took the position that, as a result of the settlement agreement, Kerbel had repudiated the August 2005 contract, and it announced that it no longer considered itself bound by that agreement. In 2016, Kerbel sued Romandale to compel it to perform its remaining obligation under the August 2005 agreement. The four actions involving the land were tried together in the fall of 2018, with Justice Spies ruling in September 2019 that, through the settlement agreement, Kerbel had repudiated the August 2005 agreement and that Romandale had accepted the repudiation, bringing the agreement to an end. Romandale was excused from performing its remaining obligations under the 2005 agreement.

In ruling on Fram and Kerbel's consolidated appeals, however, the Court of Appeal's majority ruled that the 2005 agreement was saved under estoppel by convention.

But Batner, who served as counsel for Romandale with McCarthy Tétrault partner Kosta Kalogiros and former McCarthy associate Avi Bourassa, said the Court of Appeal's divided opinion on estoppel by convention clearly warrants Supreme Court of Canada intervention. Justice Lauwers, she noted, stated that the doctrine is "under-theorized" and that "there has been little jurisprudence."

The decision also raises questions about three other legal principles, she added: what constitutes a breach of the duty of good faith; when specific performance should be ordered; and when the law of frustration ought to apply.

For example, "previous SCC law had said specific performance was not available for mere

investments/commercial operations, which these admittedly were for Kerbel/Fram," said Batner. "This case will likely be of great interest to the commercial real property bar, and to land developers more generally."



Tom Curry, Lenczner Slaght LLP

On the law of frustration, she noted, the trial judge found that a key part of the deal was an expeditious closing. But changes in legislation after the 2005 contract helped change the time horizon for the development from years to decades — a development not contemplated by the original contract. "Frustration is another doctrine which needs clarification from the SCC," said Batner.

Tom Curry, managing partner with Toronto-based Lenczner Slaght LLP, called the decision both "fascinating" and "surprising" because long trial decisions — 104 pages in this case — are not commonly overturned by the Court of Appeal. He noted that the Court of Appeal found that the trial judge ignored some evidence that the land was unique and misapplied a test from a Supreme Court of Canada decision about the availability of substitute land. "That is a question that is really tough to overturn on appeal," he said, "and yet this court changed the remedy."

"One other complication about this case, which is maybe unique, is the Court of Appeal didn't like that if specific performance wasn't granted, then the two parties would remain co-owners of the land, and that was really not desirable," Curry told *The Lawyer's Daily*. "They would have been in litigation. And the Court of Appeal thought that meant that damages were not an adequate remedy. And so there was some power in that conclusion, too."



Jeffrey Haylock, Polley Faith LLP

Jeffrey Haylock, a partner with Toronto-based Polley Faith LLP said that, while the decision does not change any laws, it could become a "touchstone for a lot of different doctrines."

"You've got estoppel by representation," he told *The Lawyer's Daily*, "you've got estoppel by

convention, you've got some things with law of repudiation, as well as frustration, the doctrine of mistaken contract, laches and specific performance. It's all there and it lays out the doctrines fairly simply and clearly."

On specific performance, for example, Haylock said the courts have been moving away from that finding, opting instead to award damages. "What the Court of Appeal shows, though, is that in considering a specific performance claim regarding the purchase of land, the court really has to delve into the specific facts of the case," he added.

The doctrine of estoppel by convention holds that it may be unfair in certain circumstances for a party to back away from a common understanding if the parties have been operating on the basis of that understanding, he explained.

"The Court of Appeal said that the parties had basically conducted themselves throughout the various pieces of litigation as if the buy-sell provision didn't come into effect until the secondary planning approval was granted," said Haylock. "It turns out that the contract didn't actually say that, but the parties demonstrated that they understood that that was in fact the case. And because of that, the one party, Romandale, wasn't allowed later to take an opposite position.

"I think that that is something for litigation lawyers to take to heart," he added. "This idea that you can take a position in litigation, but if that is contributing to the idea that both sides have a common understanding, then you may not be able to back away from that later."

Chris Paliare, a partner with Toronto-based Paliare Roland Barristers who served as co-counsel for Kerbel, declined to comment. Sheila R. Block, a partner with Torys LLP who served as co-counsel for Fram Elgin Mills 90 Inc. also declined to comment.

If you have any information, story ideas or news tips for The Lawyer's Daily please contact John Schofield at john.schofield@lexisnexis.ca or call 905-415-5891.

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