COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Attorney General) v. 51 Taylor Avenue, 2014 ONCA 396
DATE: 20140516
DOCKET: C56421

MacPherson, Cronk and Gillese JJ.A.

BETWEEN

Attorney General of Ontario

Applicant (Respondent)

and

51 Taylor Avenue, Chatham, Ontario (PIN: 00550-1103(R))

Respondent (Appellant)

Craig Bryson, for the appellant

William J. Manuel and Dan Phelan, for the respondent

Heard: February 25, 2014

On appeal from the order of Justice Bruce G. Thomas of the Superior Court of Justice, dated November 27, 2012, with reasons reported at 2012 ONSC 6355.

MacPherson J.A.:

A. INTRODUCTION

[1] The appellant, 51 Taylor Avenue, Chatham, Ontario ("51 Taylor" or the "Property") appeals from the forfeiture order of Thomas J. of the Superior Court of Justice dated November 27, 2012. The order provides:

> 1. THIS COURT ORDERS that, pursuant to section 8(1) of the *Civil Remedies Act*, the subject property, 51

> Taylor Avenue, Chatham, [PIN: 00550-1103(R)], is forfeited to the Crown in Right of Ontario.

[2] The appeal involves the interpretation of several sections of the *Civil Remedies Act*, *2001*, S.O. 2001, c. 28 ("*CRA*"), including the terms "responsible owner" and "interests of justice" in the context of possible exceptions to making a forfeiture order.

B. FACTS

(1) The parties and events

[3] 51 Taylor is a 12-unit residential apartment building in Chatham. The Property is owned by Marlowe and Patricia Van Dusen. The Van Dusens also own a number of other properties in the Chatham area.

[4] Marlowe purchased the Property on March 10, 1995 for $308,000. There is currently no mortgage on the Property and its present value is estimated at about $400,000.

[5] On May 1, 2002, Marlowe transferred the Property to his wife for two dollars and "natural love and affection". Marlowe's evidence was that this was done for estate planning and income tax purposes. In their evidence, both Van Dusens stated that Marlowe continued to be responsible for managing the Property. Marlowe asserted that his wife has a 50 per cent interest in the Property.

[6] Between 1989 and 1995, before Marlowe purchased the Property, the police attended at 51 Taylor on only two recorded occasions.

[7] Between March 10, 1995 and May 1, 2002, while Marlowe was the registered owner, there were 81 documented police occurrences. Between May 1, 2002 and August 13, 2007, when the respondent Attorney General of Ontario ("AGO") obtained a preservation order, there were 311 documented police occurrences. During the same period, 21 search warrants were executed at the Property, primarily at three apartments, resulting in 49 arrests, with 119 charges being laid. Most of the arrests related to drug charges.

[8] In contrast, two neighbouring properties that were similar multi-unit residential buildings had five and 12 police occurrences during the May 1, 2002 to August 13, 2007 period.

[9] On August 10, 2007, the AGO brought an application seeking forfeiture of 51 Taylor. In support of the application, the AGO filed affidavit evidence from property owners on Taylor Avenue. They deposed that the Property has had a negative impact on neighbouring owners and residents. They reported constant foot traffic on the Property, the continual presence of people who were slurring their speech and staggering and conducting what appeared to be drug transactions, incidents of vandalism and drug use, and threats, intimidation and violence.

(2) The application judge's decision

[10] The application judge held that the Property was an "instrument of unlawful activity" pursuant to s. 7(1) and (2) of the *CRA*. Indeed, he described the unlawful activity at the Property (mainly drug transactions) as "permeat[ing] the entire building inside and out."

[11] The application judge also held that Marlowe Van Dusen was not a "responsible owner" within the meaning of s. 7(1) and therefore could not avail himself of the forfeiture exception in s. 8(3) of the *CRA*.

[12] Finally, the application judge held that the appellant had not established, under s. 8 of the *CRA*, that it would "clearly not be in the interests of justice" to make a forfeiture order.

[13] The appellant contests the application judge's second and third findings.

C. ISSUES

[14] The appellant raises two issues on the appeal:

(1) Did the application judge err by concluding that the Van Dusens were not "responsible owners" within the meaning of s. 7(1) of the *CRA*?

(2) Did the application judge err by concluding that the appellant had not established that it was "clearly not in the interests of justice" to order forfeiture of the Property?

D. ANALYSIS

(1) The responsible owner exception to forfeiture

[15] The appellant challenges the application judge's reasoning that the Van Dusens were not responsible owners on two bases.

[16] First, the appellant contends that the legal owner of the Property was Patricia Van Dusen, Marlowe's wife, and that the application judge failed to consider her interest in the Property and her conduct relating to the use of the Property.

[17] I do not accept this submission. In my view, the appellant is precluded from arguing on appeal that Patricia was *the* relevant responsible owner of the Property. The appellant's own evidence was that Patricia was a mere nominee owner and its counsel asserted that "it's a jointly held property … This was done for tax planning purposes… In Marlowe and Patricia's mind, they own the property equally." I also note that the appellant did not argue at the forfeiture hearing that forfeiture should be denied because of Patricia's interest in the Property. Instead, the appellant seeks to advance this argument for the first time on appeal.

[18] Second, the appellant submits that the application judge erred in finding that Marlowe did not take sufficient steps to evict the tenants who were engaging in criminal activities.

[19] I disagree. The application judge expressly rejected Marlowe's evidence that he did not know about the criminal activity taking place at the Property. In my view, there was strong, even overwhelming, evidence to support this conclusion. Given the volume of police occurrences at the Property and Marlowe's role as property manager, it was impossible that he did not know of the extensive criminal activity at the Property. Indeed, a police sergeant gave evidence that the police spoke to Marlowe after the execution of each of the 21 search warrants at the Property.

[20] Despite being aware of the criminal activity taking place at the Property, Marlowe took no meaningful steps to evict the problematic tenants. For example, he did not seek police assistance to evict any of the tenants. Accordingly, it cannot be said that Marlowe did all that could reasonably be done, in the language of s. 7 of the *CRA*, "to prevent the property from being used to engage in unlawful activity".

(2) <u>The interests of justice exception to forfeiture</u>

[21] The appellant submits that the application judge erred by concluding that the appellant could not bring itself within the language of the forfeiture exception in s. 8(1) of the *CRA*, namely, that it would "clearly not be in the interests of justice" to make a forfeiture order. In support of this position, the appellant points out that the owners, the Van Dusens, were not found to have committed any

crime on the Property, that the Property is a multi-unit residence where the criminal activity took place in only some of the units, and that the Property is worth $400,000.

[22] I do not accept this submission. The application judge explicitly addressed this court's interpretation of the interests of justice exception to forfeiture under the *CRA* in the leading case, *Ontario (Attorney General) v. 1140 Aubin Road, Windsor and 3142 Halpin Road, Windsor (In Rem) et al.*, 2011 ONCA 363, 279 O.A.C. 268, including the relevant factors to consider in the context of the exception. As relevant here, those factors were the connection between the property and the illegal activity, the reasonableness of the conduct of the party whose property is the subject of the forfeiture application, and the value of that party's interest in the property compared to the overall value of the property that is tainted by the unlawful activity.

[23] The reality here is that the Van Dusens are the exclusive owners of a relatively small apartment building where several units were used for a substantial amount of criminal activity over many years. In my view, the application judge was entitled to describe the unlawful activity as "permeat[ing] the entire building inside and out" and to conclude, as he did, that "the community, armed with the same information available to me, would see this as a deserving forfeiture".

E. DISPOSITION

[24] I would dismiss the appeal. I would award the respondent its costs of the appeal fixed at $10,000, inclusive of disbursements and HST.

Released: May 16, 2014 (“J.C.M.”)

“J.C. MacPherson J.A.”
“I agree. E.A. Cronk J.A.”
“I agree. E.E. Gillese J.A.”