

***Tabensky v. Hope*, 2008 NSCA 116**

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The Court of Appeal's reasoning in *Tabensky v. Hope*, 2008 NSCA 116 represents an unusual application of the *Statute of Frauds*¹ in Nova Scotia, and demonstrates how our Courts will view the flow of title to lands through a business partnership.

Factual Background²

Tabensky, supra, involved two married couples who entered into a partnership whose purpose was to acquire land and property from time to time, for the mutual use and enjoyment of the partnership's members.

The first couple, Marie Tabensky and John Tabensky, acquired a parcel of land in Inverness County, Nova Scotia, in 1982. In 1983, they invited the second couple, Donald Hope and Rosamond Hope, to enter a partnership called "A Group of Friends."

The partnership was governed by a partnership agreement that set out the partnership's purpose, and stipulated the manner in which the partnership's assets would be held among the partners. The partnership agreement referred to "Partner A" and "Partner B." "Partner A" was defined to mean the Tabenskys, while "Partner B" was defined to mean the Hopes.

After the partnership agreement was executed, Marie Tabensky and John Tabensky signed a deed transferring the Inverness County lands to "A Group of Friends." That deed was never registered.

In 1984, the Hopes built a cottage on the land, without a building permit, and occupied it ever since.

The partners paid taxes equally until the recent years leading up to the trial.

John Tabensky died in 2003. On August 11, 2005, Marie Tabensky sought to have the Hopes vacate the property and remove their cottage by November 2 of that same year.

Nova Scotia Supreme Court

The Hopes eventually brought an action to determine the extent of their interest in the lands. They alleged that they were entitled to an ownership interest in the lands. Marie Tabensky raised the Statute of Frauds in her defence, stating that there was no writing that evidenced a transfer of any interest to the Hopes.

The trial judge defined the issues at trial to be whether the deed conveyed title to the Hopes, and the nature of the title conveyed. The parties submitted questions for the court to determine, and expressly asked whether the Statute of Frauds applied to eliminate the Hopes' interest.

The trial judge noted that Marie Tabensky testified at examinations for discovery that she and her deceased husband discussed the Inverness County property with the Hopes before the Tabenskys acquired it. Rosamond Hope's discovery evidence generally confirmed Marie Tabensky's evidence on this point, and stated that the Tabenskys approached the Hopes about buying half of that property.

The trial judge went on to note that the terms of the partnership agreement governing the treatment of partnership assets were consistent with joint tenancy, both between the members of each defined partner, and between Partners A and B.

On this basis, he concluded that the parties intended that the Hopes would become co-owners of the property.

His Lordship then went on to state, without authority, that partnerships in Nova Scotia cannot hold title to real property, but that the deed purporting to transfer the land into the partnership, when read together with the partnership agreement, were sufficient to satisfy the requirements of the Statute of Frauds. In the result, the Hopes were found to hold a one-half interest in the land in joint tenancy with Marie Tabensky.

Court of Appeal

The Notice of Appeal contained only one ground: it alleged that the trial judge erred in law by deciding that the 1983 deed met the requirements of the Statute of Frauds.

Fichaud J.A., speaking for the unanimous Court, restricted his reasoning to this ground. His Lordship made reference to *Deacon v. Adams*³, and *Carvery v. Fletcher*⁴ as authority for the circumstances under which a memorandum will satisfy the requirement under the Statute of Frauds for the conveyance of land, and for the doctrine of part performance, and proceeded to find that the trial judge did not err in finding that the deed was sufficient.

The Statute of Frauds

The purpose of the original 1677 legislation, when first enacted in England, was to prevent the use of perjured testimony under the procedural rules in force at the time. It did so by requiring certain contracts to be reduced to writing, and signed by the person against whom they were enforced, in order to establish the necessary evidentiary basis that the undertakings alleged were actually given.⁵

In the typical case involving a dispute over whether a “writing” complies with the Statute, however, the central argument revolves around whether the documentation is sufficient to support a conveyance to the plaintiff directly. *Tabensky* is unique in that the plaintiffs’ success stemmed from the flow of title to the lands through the partnership, and then subsequently to the plaintiffs personally.

Partnerships

Although neither the trial court’s reasons, nor those of the Court of Appeal are clear on the point, it appears that implicit in Marie Tabensky’s position was an assertion that the documentation in this case was insufficient because it did not demonstrate a transfer directly to the Hopes. This would require the Court to adopt a view of partnerships more in accordance with the “unity theory,” which regards the partnership as a separate legal entity.

This, however, is inconsistent with the present state of the law, which has long held that a partnership does not have a legal identity separate from its constituent members.

It might be argued that the partnership in this case could not be a partnership within the meaning of the *Partnership Act*, because it does not appear to have been carried on with a view of profit, as required by section 4. This, however, was not necessary to the result. The facts clearly suggest that

the partnership was effectively in dissolution, with the remaining partners in litigation over how what appears to have been the only remaining partnership asset was to be distributed.

The intent of the parties

In the end, both the Supreme Court, and the Court of Appeal looked to the parties' intent as evidenced by the relevant documentation; namely the deed and the partnership agreement. Here, the Tabenskys prepared a deed purporting to transfer title to the lands into an arrangement between the parties governed by its own written agreement. That agreement addressed directly the manner in which land would be treated.

This approach is consistent with the Courts' approach in the corollary situation – where joint title is severed. There, too, the Court will consider various factors to discern whether the intent of one of the parties was to deal with the lands in a manner inconsistent with joint tenancy.⁷ That the approach in both situations should be consistent is sound policy.

Conclusion

Case law involving land often has implications that extend to ordinary business dealings. Courts should seek to facilitate ordinary business dealings by creating a stable legal environment that is consistent with the reasonable expectations of the ordinary business person.

In this regard, the decision of the Court of Appeal in *Tabensky* is to be applauded. The decision is consistent with the principle that partnerships have no separate legal identity, but are comprised of their individual members. Thus, when land is transferred to a partnership, title effectively vests in the partners.

The decision also stands for the proposition that a partnership agreement is sufficient to comply with the Statute of Frauds when considering how title to land will flow upon dissolution.

In the event of dissolution, the land will be dealt with in accordance with the partners' intent, as evidenced by the partnership agreement. This is consistent with the courts' approach when dealing with other aspects of land tenure, including severance of a joint tenancy.

Counsel involved in drafting partnership agreements should take care to carefully draft provisions dealing with land, as those portions of the agreement can be expected to carry significant weight should a dispute arise with the disposition of partnership lands.

(Endnotes)

- 1 R.S.N.S. 1989, c. 442 (as amended S.N.S. 2001, c.6, s. 126).
- 2 *Hope v. Tabensky*, 2007 NSSC 214, paragraphs 1 through 5.
- 3 (1982), 55 N.S.R. (2d) 218 (T.D.)
- 4 (1987), 76 N.S.R. (2d) 307 (T.D.)
- 5 John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), Chapter 6, reproduced in QuickLaw. See also, John Swan, *Canadian Contract Law*, 1st ed. + Supplement (Toronto: Butterworths, 2006), Chapter 5, reproduced in QuickLaw.
- 6 R.S.N.S. 1989, c. 334 (as amended S.N.S. 2002, c. 37, s. 1, 2; S.N.S. 2007, c. 17, s. 20)

7 See, for example, *Levy v. Levy Estate*, [1981] N.S.J. No. 555 (S.C.), and *Roby Estate v. Buley*, [1989] N.S.J. No. 482 (S.C.)