1968

*Feb. 5, 6
Apr. 29

ARTHUR D. WILSON (*Defendant*) .....APPELLANT;

AND

JOAN DELANCEY JONES (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—By-law restricting use of lands—Interpretation —Designated area restricted to "private residences" or "duplex dwellings"—Whether building containing 17 apartments a permitted use.

Under By-law 1275 of the Town of Niagara, enacted in 1950, a defined area in the town was designated as a residential area and it was provided in s. 4(a) that all land within the said area "shall be used [subject to certain exceptions] for private residences...". By an amending by-law, enacted in 1951, the words "or duplex dwellings" were added after the words "private residences" in the said s. 4(a). In 1965 the building inspector for Niagara issued to the defendant a permit to erect a 2½-story building to contain 17 separate suites. The building was to have two entrances, one at the front and the other at the rear, and these were to open into corridors. Each apartment was to have its own private entrance into the corridors.

An action for an injunction restraining the construction of the proposed building was dismissed by the trial judge, who was of the view that the various apartments were "private residences" and that therefore the erection of the building was not prohibited by By-law 1275 as amended. The Court of Appeal allowed an appeal and directed the issuing of an injunction. An appeal by the defendant from the judgment of the Court of Appeal was then brought to this Court.

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

Held: The appeal should be dismissed.

The words to be construed were "private residences" or "duplex dwellings" and the standard to be used was to "construe in an ordinary or popular and not in a legal or technical sense". These were ordinary words which were easily understood by everyone in the business of building, buying, or selling housing accommodation.

What was contemplated in the erection of the proposed building was not private residences but many private residences under one roof plus communal accommodation, *i.e.*, in plain and ordinary terms, an apartment house. Such a building was not within the by-law.

Rogers v. Hosegood, [1900] 2 Ch. 388, applied.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Grant J. Appeal dismissed.

B. James Thomson, Q.C., for the defendant, appellant.

John J. Robinette, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on November 2, 1966. That Court, by a majority judgment, allowed an appeal from the judgment of Grant J. pronounced on January 11, 1966. In the latter judgment, Grant J. had refused the respondent, a ratepayer, an injunction which she had sought under the provisions of s. 486 of *The Municipal Act,* R.S.O. 1960, c. 249, which reads as follows:

> 486. Where any by-law of a municipality or of a local board thereof, passed under the authority of this or any other general or special Act, is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such contravention may be restrained by action at the instance of a ratepayer or the corporation or local board.

The Town of Niagara, in the Province of Ontario, had on December 12, 1950, enacted By-law 1275 purporting to be a by-law to restrict the use of lands and to regulate and restrict the construction and use of buildings and structures within a defined area. Section 2 of that by-law provided:

> 2. THAT the use of land or the construction or use of buildings or structures within Zone "A", other than for such purposes as may be permitted by this by-law, is hereby prohibited.

---

[1] [1967] 1 O.R. 227, 60 D.L.R. (2d) 97.

1968

WILSON v. JONES

Spence J.

And in s. 4 provided, in part

4. THAT Zone "A" shall be and it is hereby designated as a residential area and the following provisions and restrictions shall apply:

(a) All land lying within Zone "A" shall be used except as hereinafter provided, for private residences and the use of such land for trade, business, commercial or industrial activity is prohibited.

(b) The erection or use of any building or structure within the said Zone, for any trade, business, commercial or industrial activity or purpose, except as hereinafter provided, is hereby prohibited and such buildings or structures shall be used for private residences only.

(c) Nothing in this paragraph shall be deemed to prohibit the erection or use of any residence in the said Zone by a physician, surgeon or dentist for the purpose of carrying on the practice of his profession, or the use of any residence in the said Zone as a boarding house, lodging house or house furnishing meals, or by a mortician as a funeral home.

The Town of Niagara amended that by-law by By-law 1294 enacted on June 5, 1951, and for the purpose of this decision the only portion of the amendment with which we are concerned is the addition of the words "or duplex dwellings" after the words "private residences" in s. 4, para. (a) of the said By-law 1275.

The appellant applied for the issuance of a building permit to allow him to build in Zone "A" a certain building which is outlined on floor plans produced and marked as an exhibit, and which is further delineated as being similar to the photograph of the building which he had built in another municipality also produced and marked as an exhibit.

The building inspector of the Town of Niagara on June 16, 1965, issued to the appellant a building permit to erect the said building in accordance with the plans filed and which had been approved by the said building inspector.

At the trial of the issue, counsel agreed that if By-law 1275 as amended were valid and prevented the erection and use of the building in question then the building permit was of no legal significance and it had been issued illegally.

Before the appellant could commence to build, the respondent applied for an injunction under the provisions of the aforesaid s. 486 of *The Municipal Act*. The building as delineated on the said plans and as illustrated in the said photograph is one of two and a half-storeys, that is, there is a ground floor which is partially below ground level and partially protruding above the ground, and there

are two storeys above that ground floor. The ground floor is to contain five apartments, some of one bedroom and some of two. Both upper floors are to contain six apartments each, that is, there will be a total of seventeen apartments. Each apartment, so far as the living-room, dining-room, kitchen and bedroom are concerned, is totally separated from the other apartments, but there is one entrance in about the centre of the front of the building and another entrance at the rear of the building. Both of these entrances open into corridors. Each apartment has its own private entrance into these corridors. There would seem to be no entrance whatsoever directly to any apartment whether on the first or other floors except from the corridors. In addition, at the rear of the ground floor, there is a large space which is to be occupied by lockers and another large space which is designated as a laundry, as well as space used for housing the heating plant.

It was the view of the learned trial judge upon a consideration of *Rogers v. Hosegood*[2] that the various apartments were "private residences" and that therefore the erection of the building was not prohibited by By-law 1275 as amended. The learned trial judge, therefore, dismissed the plaintiff's action for an injunction.

The Court of Appeal for Ontario[3] allowed the appeal and directed the issuing of the injunction which the respondent had claimed, interpreting By-law 1275 as amended as prohibiting the erection of the building outlined in the respondent's application for a permit.

The late Chief Justice of Ontario giving judgment for the majority also dealt with *Rogers v. Hosegood* pointing out that the part of that decision which governs this litigation was the finding in reference to the 1876 covenant between the parties and adopted the reasons of Collins L.J. at p. 409 as follows:

> We think that residential flats, involving the use of a public entrance and staircase, do not answer the description of private residences contemplated by the words quoted. The covenant must, we think, be construed in an ordinary or popular, and not in a legal and technical, sense; and we do not think that residential flats, though for many purposes separate dwelling-houses, come within the popular description of the class of buildings which it was intended to permit.

---

[2] [1900] 2 Ch. 388.

[3] [1967] 1 O.R. 227, 60 D.L.R. (2d) 97.

1968

WILSON v. JONES

Spence J.

The appeal from the majority judgment of the Court of Appeal for Ontario should be dismissed. I am of the opinion that the standard used by Collins L.J. in *Rogers v. Hosegood* for the interpretation of a covenant in a conveyance is equally proper in the interpretation of a by-law restricting the use of lands and that standard is as stated by the learned Lord Justice to "construe in an ordinary or popular and not in a legal or technical sense". The words to be construed are "private residences" or "duplex dwellings". With respect, I differ from the late Chief Justice of Ontario when he finds himself unable to utilize the amendment wrought in 1951 by By-law 1294 to construe By-law 1275 as enacted in 1950. I am of the opinion that when the council in 1951 enacted the amending By-law 1294 they must have had in consideration the by-law which they were amending and which had been enacted only the previous year and have considered the words I have quoted as they appeared after the amendment. Therefore the council believed that they had enacted a by-law which would permit only something which could be better described as a single, one-family residence, determined to widen the permitted use so that there could be erected a building which could consist of two one-family residences placed one on top of the other. In enacting the by-law first and its amendment later they have used ordinary words, *i.e.*, private residences, and duplex dwellings, which were easily understood by everyone in the business of building, buying, or selling housing accommodation.

I therefore regard it as an important aid to the construction of the words "private residences" that the council in their next year should have widened it only so far as to permit a building of two family residences one on top of the other, and in my view impliedly held fast to the determination that it would not permit a building of three, four, or, as in the present case, seventeen residences. It is to be noted that the apartment house in addition to containing the number of private residences far beyond the two which are contained in the duplex contained other accommodation which is for the communal use of the occupants of seventeen of the private residences, to wit, the corridors, the lockers and the laundry in the proposed building.

I am, therefore, of the view that what was contemplated in the erection of the proposed building was not private

residences but many private residences under one roof plus communal accommodation, *i.e.*, in plain and ordinary terms, an apartment house, and that an apartment house is not within the by-law any more than the apartment house was in *Rogers v. Hosegood.* I have come to this conclusion realizing that a by-law restricting the use of land must be strictly construed and that any doubt as to the application of the by-law to prevent the erection of a specific building should be resolved in favour of such proposed use. No authority need be cited for each of these propositions. These principles, however, need only be applied when upon the reading of the whole by-law there is an ambiguity or difficulty of construction. Reading the whole by-law, I have, for the reasons which I have outlined, come to the conclusion that there is no such ambiguity or difficulty in interpretation and therefore the two canons are not applicable. Both the learned trial judge and MacKay J.A. have pointed out that the municipal authorities issued a permit for the construction of the said building and MacKay J.A. remarks that this indicates the view of the municipal authorities that the building falls within those permitted by the by-law. As I have pointed out, the two by-laws were enacted by the council of the Town of Niagara in 1950 and 1951. The permit was issued by the building inspector in 1965. There is no indication that it was considered by council. The parties have agreed that if the erection of the building is prevented by the by-laws then the building permit was issued illegally. I can obtain little assistance in interpreting the by-laws enacted by council in the year 1950 and 1951 from the view of the building inspector in 1965.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Reid, McNaughton, Martin & Zabek, St. Catharines.

Solicitors for the plaintiff, respondent: Fleming, Harris, Barr, Hildebrand, Geiger & Daniel, St. Catharines.