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Electronic signature decision will look to Judge Sydney Robins

Court of Appeal Judge Sydney Robins wrote landmark fax decision

Judge Sydney Robins' many decisions included one in the real estate field which epitomizes his brilliant grasp of the law and its evolution in our modern society.

Robins, a judge of the Supreme Court of Ontario and later Ontario's Court of Appeal, passed away earlier this month. Over a career spanning more than 60 years, Robins served as a judge, lawyer, teacher and role model to thousands of lawyers. I was privileged to work with him when we both served as directors of the Law Society of Upper Canada in recent years.

His scholarship and influence touched virtually all areas of law, but I always recall the case of Rolling v. Willann Investments Ltd., a 1989 decision of a three-judge panel of the Court of Appeal written by Robins.

In 1974, William and Vera Rolling gave Willann Investments the first right to meet any offer, within 72 hours, to submit an identical offer to purchase a property they owned in Collingwood. If the offer was not made in time, the right lapsed.

On May 15, 1989, the Rollings received an offer to buy their land from Sam Spodek. Following receipt of the offer, the lawyers for the Rollings faxed a copy of the Spodek offer to Willann, putting the company on notice that it had 72 hours to match the offer. Eventually, Willann submitted an offer to Rollings to buy the land, but it was sent 29 hours past the deadline.

With two competing offers on the table, the Rollings then applied to court to determine whether Spodek or Willann had a binding agreement.

Willann argued that it was entitled to receive a signed, original copy of the Spodek offer by personal delivery or mail, and not a photocopy or faxed copy. It also argued that the form of delivery, by fax, did not comply with the terms of the 1974 option agreement, which could not have anticipated that fax would become ubiquitous.

When the matter reached the Court of Appeal, Justice Robins wrote that the issue to be decided in the case was whether what was then known as the "telephone transmission of a facsimile of an offer to purchase" amounted to "delivery" under the terms of the option agreement.

At the time it was the custom in the real estate community to deliver copies of agreements by hand and not electronically, and lawyers and real estate agents eagerly awaited the court's pronouncement on the validity of faxed documents.

A three-judge panel of the Court of Appeal unanimously declared that delivery of notice of the agreement by facsimile was perfectly valid, and that Willann's option had expired.

In his written decision, Justice Robins wrote, "Where technological advances have been made which facilitate communications and expedite the transmission of documents we see no reason why they should not be utilized. Indeed, they should be encouraged and approved.

"Nothing is to be gained in the circumstances of this case in requiring an attendance at Willann's offices to deliver the documents, and Willann suffered no prejudice by reason of the procedure followed. In our opinion, the transmission of a facsimile of the offer for the purpose of effecting delivery is not in violation of the option agreement."

From that day on, signed contracts could be exchanged by fax without any doubt as to whether what was essentially a photograph of a signature was valid and binding.

This decision paved the way for today's common practice of exchanging signed agreements by emailing scanned copies.

The industry today is struggling to establish a protocol for attaching electronic signatures to purchase agreements. When that puzzle is finally solved, it will rely on the wisdom and the foresight of Sydney Robins.

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Rolling v. Willann Investments Ltd. (Ont. C.A.), 1989 CanLII 4344 (ON CA)

Date:	1989-11-01
Parallel citations:	70 OR (2d) 578; 63 DLR (4th) 760; OJ No 1886
URL:	http://canlii.ca/t/g157z
Citation:	Rolling v. Willann Investments Ltd. (Ont. C.A.), 1989 CanLII 4344 (ON CA), <http://canlii.ca/t/g157z>
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Re Rolling et al. and Willann Investments Ltd. et al.
Indexed as: Rolling v. Willann Investments Ltd.
(Ont. C.A.)

70 O.R. (2d) 578

[1989] O.J. No. 1886

Action No. 649/89

ONTARIO

Court of Appeal

Zuber, Robins and McKinlay JJ.A.

November 1, 1989.

* A notice of discontinuance on an application for leave to appeal to the Supreme Court of Canada was filed February 8, 1990. S.C.C. File No.: 21695. S.C.C. Bulletin, 1990, p. 298.

Contracts -- Interpretation -- Option to purchase land -- Right of first refusal -- Option holder allowed 72 hours from date offer "delivered" -- Transmittal of offer by fax machine amounts to delivery.

By the terms of an agreement in 1974 R. gave to W. "the first right to meet any offer to purchase that [R] may receive ... [W] shall have 72 hours from the date such offer is delivered to it by [R] within which to exercise this option by submitting ... an offer on terms identical to those contained in the first mentioned offer. Failing which this option shall terminate and [R] may accept such first mentioned offer." R. received an offer from S. to purchase property, and on May 19, 1989, sent a copy to W. by fax machine. Over 100 hours later W. submitted an identical offer. In proceedings to determine W.'s rights, an order was made in favour of W.

On appeal by S. to the Ontario Court of Appeal, held, the appeal should be allowed.

It was not necessary for R. to deliver the signed original offer, and transmission of a copy by fax, though not specifically contemplated in 1974, was sufficient. Accordingly, the fax transmission amounted to delivery of the offer, and W.' s response was out of time.

Civil procedure -- Costs -- Party and party -- Entitlement -- Counsel for one party not appearing at first instance -- That party successful on appeal -- Costs awarded to respondent.

APPEAL from an order of Chadwick J. determining the rights of the grantee of an option to purchase land.

J.B. Berkow and R.L. Youd, for appellant.

J.S. McNeil, Q.C., for respondent, Willann Investments Limited.

W.A. McLauchlin, for respondents, William Nelson Rolling and Vera Mae Rolling.

The judgment of the court was delivered orally by

ROBINS J.A.:-- The point in issue in this appeal is whether the telephone transmission of a facsimile of an offer to purchase

constitutes "delivery" pursuant to the provisions of an option agreement between the respondents in this appeal.

In 1974, as part of a real estate transaction between the respondents, William Nelson Rolling and Vera Mae Rolling (the Rollings), as vendors, and the respondent, Willann Investments Limited (Willann), as purchaser, the Rollings gave Willann the first right to meet any offer to purchase that the Rollings might obtain for certain property owned by them in the Town of Collingwood. This first right of refusal was engrossed in an option agreement and registered on title. It provided as follows:

> The vendors [the Rollings] agree to give to the purchasers [Willann] the first right to meet any offer to purchase that the vendors may receive or give with respect to the said property. The purchaser shall have 72 hours from the date such offer is delivered to it by the vendors within which to exercise this option by submitting to the vendors an offer on term identical to those contained in the first mentioned offer. Failing which this option shall terminate and vendors may accept such first mentioned offer.

On May 15, 1989, the Rollings received an offer to purchase the propert from the appellant, Sam Spokek (Spodek), which they accepted on May 17, 1989. The outstanding option in favour of Willann had been disclosed to Spodek. He acknowledged in his offer that he was aware of the option under which Willann had 72 hours to submit an identical offer and agreed that, should that right of first refusal be exercised, his agreement would become null and void.

For the purpose of satisfying the requirements of the option agreement, the solicitors for the Rollings took the following steps on May 19, 1989:

(1) They faxed a message to Willann stating "we have documents for your attention -- could you fax back we correctly have your fax number". Willann replied: "fax # correct, please send documents through".

(2) Following the confirmation of the fax number, the solicitors, at about 2:12 p.m., transmitted a facsimile of the Spodek offer to Willann together with a covering letter which made reference to the terms of the first right of refusal and put Willann on notice that if the Rollings did not receive an offer to purchase on terms identical to those contained in the Spodek offer within 72 hours the Spodek offer would be accepted unconditionally and Willann's rights under the option agreement would terminate and be of no further force or effect.

It is common ground that the 72-hour time period within which Willann might exercise its first right of refusal would begin running upon delivery of the Spodek offer. Assuming the transmission of the facsimile constituted delivery, time would then run from 2:12 p.m. on May 19, 1989.

On May 23, 1989, Willann submitted an offer to Rollings in terms identical to the Spodek offer. At the same time, Willann asserted, in essence, that Rollings had not acted properly in compliance with the option agreement and that it remained open to it, notwithstanding the expiration of the 72-hour period, to submit an offer at that time. The Willann's offer was submitted at 7:00 p.m. on May 23rd, some 101 hours after the company had been put in receipt of the Spodek offer. Again, assuming that delivery had properly been effected, this offer was obviously tendered beyond the time allowed for the exercise of the first right of refusal.

Confronted with adverse claims to purchase the property, the Rollings brought these proceedings for a determination of the rights of Spodek and Willann in the property. In both weekly court and this court, the Rollings simply submitted their rights to the court and sought only a declaration as to which of Spodek or Willann had a binding agreement of purchase and sale. For reasons which have not been adequately explained, counsel for Spodek, who was not counsel on this appeal, did not appear on the application in weekly court. An order was made without argument in favour of Willann. Spodek now appeals that order.

As indicated, under the terms of the option agreement, Willann was given 72 hours from the date the Spodek offer to purchase was delivered to it within which to exercise its option. In Spodek's submission, the Rollings fulfilled their obligations under the option agreement; Willann did not exercise its option in time and, therefore, has no right to purchase the property. Willann, on the other hand, takes the position that the Rollings did not satisfy the requirements of the option agreement. It advances two grounds in support of that position.

First, Willann contends that it was entitled to receive a signed original copy of the Spodek offer and not merely a photocopy or facsimile thereof. We do not agree. We see no reason, practical or commercial, why the option agreement should be construed so as to require the Rollings to deliver their original signed copy and, indeed, none has been suggested. The copy received by Willann was clearly a true copy of the offer and, we think it manifest, is in a form that satisfies the provisions of the option agreement.

Willann next contends that the facsimile transmission of the offer could not constitute "delivery" under the terms of the option agreement. Given that the agreement was entered into in 1974, the parties could not have intended or contemplated that delivery would be made in this manner and, it is argued, this form of delivery is not in compliance with the contract. In Willann's submission, delivery to it could be effected only by personal service or by mail.

While it is true that the parties to the option agreement could not have anticipated delivery of a facsimile of the offer by means of a telephone transmission at the time the agreement was executed, they did not limit or restrict or, indeed, specify the way in which delivery was to be made for the purposes of their agreement. The purport of the agreement is that Willann is to be placed in receipt of a copy of the offer and is to exercise his option within a specified time following receipt. The manner in which delivery is to be made in order to place Willann in receipt of the document is of no real importance. What is important is whether and when Willann was in fact put in receipt of the offer or, put another way, whether and when the document was in fact delivered to him.

Where technological advances have been made which facilitate communications and expedite the transmission of documents we see no reason why they should not be utilized. Indeed, they should be encouraged and approved. Nothing is to be gained in the circumstances of this case in requiring an attendance at Willann's offices to deliver the documents, and Willann suffered no prejudice by reason of the procedure followed. In our opinion, the transmission of a facsimile of the offer for the purpose of effecting delivery is not in violation of the option agreement. It follows that Willann properly received delivery of the offer. For whatever reason, the

company failed to exercise its option within the strict time period granted by the option agreement and, consequently, has no existing rights under that agreement.

In the result, the appeal will be allowed. The order of Chadwick J. will be set aside and in place thereof a declaration will issue that Willann has no agreement of purchase and sale with the Rollings with respect to the property and on the closing of the sale of the property to Spodek its right of first refusal shall be of no further force and effect. The closing date of the agreement of purchase and sale between the Rollings and Spodek shall be December 13, 1989, and adjustments, including the adjustment of interest, shall be made as of October 13, 1989. There will be no costs of the application in the court below. With respect to the costs in this court, we are of the view that had the appellant appeared and the case been argued in the court below, this appeal may not have been necessary. Accordingly, notwithstanding the appellant's success, it shall pay the respondents their costs of the appeal.

Appeal alllowed.

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