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Buyer Aborts Sale; Is Liable for Seller's $100K Re-Sale Deficit Due to Market-Shift

The buyer, Cabral, failed to close on an agreement to buy the seller's Hamilton home. Although the seller re-sold the property to a new buyer only a month later, she sued Cabral for more than $100,000, being the difference between his offer and the price she ultimately received. The court prefaced its judgment in the matter by stating this was "one of a number of cases that have come before this Court recently as a result of the overheated real estate market in the spring of 2017 that then fell off significantly and quickly during that summer."

The original sale to Cabral was arranged after the seller put her home on the market for $399,900. She set this price relying solely on the advice of her real estate agent, and did not have an appraisal done. Within six days she received 16 offers that far exceeded the listing price – including Cabral's, which was the highest. She accepted his offer of $551,000.

When Cabral failed to close at the end of July 2017 as scheduled, she immediately re-listed for the same $399,900, again on her agent's advice. Within six days, she received three new offers – all of them in the low- to mid-$400,000 range. She accepted the highest bid of $450,000, with an August 10, 2017 closing. According to evidence of experts, the large decline in the offer prices was due to a drastic drop in the Hamilton housing market immediately after July 12, 2017, when the provincial *Fair Housing Act* was passed.

The seller sued Cabral for the difference between his bid and the eventual selling price to the new buyer, which was over $100,000 including carrying costs.

Cabral conceded that he had breached the agreement, but complained he should not be liable for the price difference since the seller did not reasonably mitigate her damages. He claimed she should have obtained an appraisal and re-listed the property for at least 30 days, at a much higher price than the $399,900 originally used in the first round. She should also have waited longer than six days before accepting the highest bid to-date. Cabral claimed that had she done these things, as a matter of common sense she would have received offers that were better than $450,000, and likely much closer to the $551,000 he had agreed to pay.

After hearing evidence from experts on both sides, the court sided with the seller. Despite conflicting evidence on whether a 30-day re-listing might have been appropriate, Cabral offered nothing to suggest that a longer period would have elicited a price higher than $450,000, much less something close to $551,000. The only evidence tendered was that the new offers were all $450,000 or under, and Cabral admitted that he thought this was still higher than the true market value of the property in August of 2017.

This admission by Cabral was telling, and the court noted that he provided no expert evidence of the home's market value at any of the relevant dates. The reasonable conclusion was his $551,000 offer was an inflated price. The experts for both sides were agreed that in the summer of 2017 the prices of homes in Hamilton reflected an overheated marketplace.

The court turned to the legal principles governing the calculation of the seller's damages. In a falling market, the general rule is that they are equal to the difference between the contract price and the highest price the seller obtained within a reasonable time after Cabral's breach, after making immediate and reasonable efforts to re-sell. The re-sale price was good evidence of the market price.

In this context, the seller had a duty to mitigate by obtaining the best price possible; it was up to Cabral to establish she had done otherwise. The seller was only required to act reasonably, not perfectly, and was not obliged to take *any and all* possible steps to reduce her losses.

In these circumstances, the court concluded that the seller had acted reasonably in re-selling for $450,000 even though her home had been re-listed for only six days. She was therefore entitled to be put in the same financial position as if the contract with Cabral had been performed. The court granted her summary judgment for damages of $100,000. See: *Degner v. Cabral*, 2019 ONSC 1610.

Sale of Building Without Land Breaches *Planning Act*

In novel scenario, the court was asked to declare that the sale of an office building – without the land beneath it – did not contravene the subdivision control provisions of the Ontario *Planning Act*, because the sale did not convey an "interest in land."

BRL Realty Limited ("BRL") tentatively agreed to sell a physical office building to Equinix Canada Ltd. ("Equinix"). The $142 million arrangement called for Equinix to purchase "the building and all other structures, fixtures and improvements constructed or affixed to" lands, but *not* the land on or under it, nor any of the air rights above it. The ownership would be transferred to Equinix by way of a Bill of Sale, and the parties would enter into a Ground Lease for 49 years. The transaction would not be

registered on title, and while Equinix would have exclusive possession, ownership would remain with BRL. The deal was conditional on obtaining an order or declaration by an Ontario Superior Court judge that the transaction did not contravene section 50 of the *Planning Act*. BRL went to court to try to obtain one.

The court refused BRL's request. It noted that the purpose of section 50 is to prevent the unrestricted division of land in Ontario. In this case, the pertinent clause was subsection 50(5), which prevents a person from entering into an agreement of sale that "has the effect of granting the use of or right of in a part of any lot directly, or by entitlement to a renewal for a period of 21 years or more" unless certain conditions are fulfilled. One of those conditions is that the grantor (in this case BRL) did not retain a power to grant or otherwise deal with property abutting the land conveyed. The putative arrangement with Equinix breached those provisions.

In making this determination, the court considered BRL's novel argument that the office building was an "improvement" or "fixture" on the land, but was not part of the land itself. Without the required "interest in land", BRL claimed that it was entitled to convey the building separately without offending the *Planning Act*.

The court rejected this argument. In law, a building is typically viewed as a fixture. Admittedly, BRL and Equinix could agree that – *as between themselves* – the building was to be owned separately from the land. This did not affect the reality that the building was legally still a fixture that formed part of the land nor would it change the rights of third parties that may arise from that fact. As the court explained:

While the parties' characterization of the Office Building as a chattel binds them, it does not as a matter of law transform the Office Building into a chattel as such agreement does not alter the degree and object of the annexation of the Office Building to the subject land and thus the Office Building remains part of the subject lands.

As such, and notwithstanding that the agreement between BRL and Equinix purported to say otherwise, the building was still considered part of the "land" for *Planning Act* purposes, and the proposed transfer was in breach of s. 50(5). The court refused to grant BRL's application for a declaration or order endorsing the transaction. See: *BRL Realty Limited v. Equinix Canada Ltd.*, 2019 ONSC 3080.

Property Fails "Uniqueness" Test for CPL

Under Canadian law, where a person wants to obtain a Certificate of Pending Litigation ("CPL") and have it registered against real property in anticipation of an upcoming full trial, he or she must show among other things that the property was "unique". In a recent case, the court rejected a developer's bid for a CPL in an unsuccessful purchase of a gas station because its features "could likely be duplicated elsewhere, or built, as needs be."

The intended buyer was a developer who agreed to buy a gas station from the seller. After the negotiations during a 10-day conditional period failed, the deal fell through with the buyer asserting the seller did not allow the conditions to be fulfilled. Both parties blamed the other, and the seller sold to a third party for the same price. This prompted litigation, with the buyer registering a caution and then bringing a motion before the court to have a CPL registered on title.

In assessing the merits of the buyer's motion, the court first summarized the law. The court had the statutory authority to issue a CPL if it was satisfied that certain preliminary tests had been met, which included the buyer showing that it had a reasonable claim to an interest in the gas station land. This test was easily met here.

The next hurdle required looking at other factors, including whether the land was unique. The intent of the buyer at the time of the purchase had to be considered, along with the question of whether damages were a satisfactory alternative remedy to compensate him for the deal falling through. In other words, the court could only grant a CPL if the land was unique, if substitute land is not readily available, and where damages were inadequate. The onus of establishing these rested with the buyer.

Over many years this particular buyer had developed, operated, and bought-and-sold more than 70 gas stations. Currently, he still owned 40 of them. While he claimed that this specific gas station was "extremely rare" and "very well suited" to a project that he had envisioned for some time, the court found that it was not unique to the area. It was admittedly large, with a two-story building, convenience store and restaurant, but this did not cause it to "rise to the required level of uniqueness".

This did not mean that a commercial property could never be unique, but the circumstances and intent of the buyer were both relevant. In this case there was no evidence that it would be rare or impossible for the buyer to construct a suitable building on another property. "After all, that is all part of what Developers typically do", the court said.

The court also noted that the buyer had sold some of his 70 properties in the past, which suggested that he did not have any personal attachment to them, as might be the case with a buyer of a unique residential property. In fact, this failed deal was only one of many projects the buyer had pursued in the course of his successful career as developer, with the court noting that it was obvious he had "not been waiting for just this one piece of property." The court added that the seller would likely incur harm if the re-sale of the property to the third party was blocked by the existence of the CPL.

As for showing the inadequacy of damages as an alternative remedy, this required more than just a bald assertion on the buyer's part. Ideally, the buyer should have tendered the evidence of a chartered accountant or valuator, but he failed or omitted to do so here. In any event, the court found the buyer's putative losses for the seller's breach were capable of being quantified in damages in the usual way, at the pending trial. The court therefore refused to issue the requested CPL. See: *Shcolyar v. 1241 Scaw Inc*., 2019 ONSC 3701.

The statements of law and comments contained in this Newsletter are of a general nature. Prior to applying the law or comments to any specific problem, please obtain appropriate legal advice.