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Can a Proposed Amendment to an APS be Deemed Notice of Termination if not Accepted?

In a recent decision, the Ontario Court of Appeal confirmed that a buyer of land had forfeited a hefty deposit to the seller, after failing to adhere strictly to the terms of their agreement respecting notice.

The buyer agreed to purchase three properties from the seller for a price of $27,250,000, and paid $400,000 as a deposit. The agreement contained several conditions of closing, all in the buyer's favour.

First, it set 5 p.m. on a specified "Condition Date" as the deadline by which: (1) any conditions were to be satisfied; or else (2) the buyer could waive any conditions "by written notice to the Vendors". That written notice called for "delivery, facsimile transmission, electronic mail in PDF format or other means of electronic communication" to certain specified persons.

The agreement went on to provide that if the buyer did not give such written notice by the Condition Date, then the conditions were "deemed to have been satisfied and waived". At that point the parties were required to complete the closing pursuant to its terms.

On the other hand, if the buyer did give timely notice that it considered the conditions unsatisfied and not waived, the agreement would be terminated and the deposit returned. The exception was if the deal failed to close because of the buyer's own default, in which case the entire deposit would be forfeited to the seller.

In these scenarios, the contract stipulated that time was to be "of the essence," which in law means that any time limits would be strictly adhered to.

Yet the deal failed to close as scheduled, because the parties disagreed on the legal effect of the buyer's unilateral attempt to extend the Condition Date. Although the deadline had been mutually set for April 15, 2014, at 5 p.m., on that date the buyer threatened to abort the deal if the seller did not grant a further 2-week extension of the conditional period. The buyer sent the demand to the seller's real estate agent by text message, and then by forwarding a Draft Extension Agreement. The buyer made no attempt to comply with the agreement provisions relating to the waiver/satisfaction of the conditions, nor with the requirements for written notice to be given in the stipulated manner.

The seller refused to grant the extension, and the buyer refused to close. The seller purported to keep the $400,000 deposit, claiming it was the buyer's own breach that had scuttled the deal.

By way of an initial court application, the seller was successful in obtaining a court declaration confirming the buyer's default and the forfeiture of the deposit.

The Court of Appeal confirmed that prior ruling. The Condition Date had clearly lapsed without the buyer giving written notice that it considered the conditions satisfied or waived. At that point, the deeming provision was triggered, along with the buyer's obligation to complete the deal. The buyer's Draft Extension Agreement had no effect on this outcome: it was merely a new offer. It did not serve the "dual purpose" of both extending the deadline and giving the required written notice, as the buyer claimed.

This was a significant agreement reached by sophisticated parties with the benefit of legal advice. The seller was entitled to insist on strict compliance and there was nothing to suggest it had breached its good faith obligations by standing firm while the buyer ignored the clear contractual terms. The buyer had been obliged to give written notice in a specified manner by a stipulated deadline, which it failed to do. Its subsequent refusal to complete the deal put it in breach, entitling the seller to retain the deposit. See: *2260695 Ontario Ltd. v. Invecom Associates Ltd*., 2017 ONCA 70.

Limitation Period for Environmental Contamination Claim Driven by Knowledge of Actual Claim (Not Potential Claim)

The dispute in *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc*. centered around a landowner's deadline to sue for environmental contamination migrating from an adjacent former gas station.

In early 2012, the now-owner first became interested in purchasing the land next to the gas station.

After making an offer, and as part of its due diligence, the owner hired a consulting firm to investigate for environmental contamination. A Phase I environmental assessment report, delivered in early March 2012, was inconclusive. Shortly afterwards, the owner chose to waive the environmental due diligence conditions and close the deal. A Phase II report was delivered in September 2012, long after

the closing that took place in April 2012. That second report showed conclusively that the soil and groundwater on the owner's land were environmentally contaminated.

About two years after the purchase date, on April 28, 2014, the owner launched an action for damages against the current and former owners of the adjacent gas station. In the pleadings, the new owner claimed it was unaware of soil and groundwater contamination on its property until September 2012 when the Phase II report was formally delivered.

The defendant neighbours countered that the action was out of time, since the two-year limitation period under the *Limitations Act, 2002* (the "**Act**") had already expired. Pursuant to the Act, a party has 2 years from the date when a claim is ***known or ought to be known*** to commence an action. In this regard, the neighbours claimed that the owner knew of the contamination long before the September 2012 Phase II report, and that the clock on the two-year limitation period had started to run at that earlier time. To prevail in raising this defence, the defendant neighbours had to show that the owner knew or ought to have known that it had a claim at some point prior to April 28, 2012.

On appeal, the Ontario Court of Appeal overturned the motion judge's earlier ruling that the owner was out of time to bring a claim. In doing so, the Appeal Court examined the basis for the motion judge's misapprehension that the owner knew or ought to have known of the claim more than two years prior to the lawsuit.

First, the motion judge had concluded that the owner ***knew of potential*** (rather than actual) claim, as revealed by the Phase I report delivered in early March 2012, was the same as knowledge of an actual claim for the purposes of the two-year limitation period. That was the motion judge's initial error.

Secondly, the motion judge erred in assessing the impact of the information leading up to the Phase II report. Although the final version was delivered in September 2012, certain laboratory results and groundwater sampling results were "made available" to the owner at the end of March 2012, and delivered in May 2012. The motion judge had incorrectly presumed that by having the information "available" the owner must have been actually aware of its impact for limitation period purposes.

The Appeal Court added that in making this incorrect assumption, the motion judge completely ignored the relevant circumstances of the owner's purchase of the property, which was part of a multi-property transaction. Specifically, in March 2012, the owner had waived all conditions (not just environmental ones) relating to 22 different properties, and that context should have informed the motion judge's assessment of the owner's state of knowledge.

In failing to apply the correct test to the facts, the motion judge made palpable and overriding errors as to when the owner knew of its claim, and concluded incorrectly that the limitation period had expired. The Appeal Court set aside the dismissal of the plaintiff's action, which would allow the trial of the damages claim to proceed. See: *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.* 2017 ONCA 16.

Court Clarifies "Easement of Necessity" Remedy

A man named Ben Wise owned lakefront property that he subdivided into Parts 1 and 2. After his death in 2002, Part 1 was conveyed to Ben's daughter, and Part 2 was conveyed to his wife Sheila, in keeping with the terms of his Will.

Sheila used Part 2 to secure two mortgages with a lender Bank, both of which went into default. When the Bank took steps to sell Part 2 under its power of sale, the court was asked to rule on an issue relating to access to the property.

Specifically, Part 2 was landlocked – with no access other than by water – unless the court could be persuaded to declare an "easement of necessity" to exist over Part 1 (now owned by the daughter), in favour of Part 2 (belonging to Sheila). While still alive, Ben neglected to reserve such a right-of-way in his estate plans. The Bank, now poised to sell Part 2 under a power of sale, asked for such a declaration to make the property's sale more viable.

At a first hearing, the application judge agreed to declare that an easement existed over Part 1 in favour of Part 2. The judge found that although there was technically access to Part 2 from the direction of the lake, the water access was "impractical". Based on that inconvenience, an easement of necessity could legally be granted over Part 1. The judge emphasized that "[p]ublic policy must trump the intentions of individual landowners", adding that the common-law requirement of absolute or strict necessity had developed into a rule of "practical necessity". A separate trial was directed to determine the easement's location if the parties could not agree.

The daughter appealed the application judge's decision. The Appeal Court granted the appeal.

Whether there is a current need for an easement of necessity was to be determined at the time of Ben's initial grant. The test was not whether access would be inconvenient without the easement; rather, the implied easement must be necessary to use or access the property. In other words, the test in Ontario is not one of "practical necessity", but rather one of "strict necessity", as assessed at the time of Ben's grant.

The Court of Appeal emphasized a key legal principle: Water access to property, no matter how inconvenient or impractical, defeats a claim of necessity. It is irrelevant that water access had never actually been used before; all that matters is that it is available as a means of access. At the time of Ben's grant, there was water access to Sheila's Part 2, and it allowed for the reasonable enjoyment of the property. The application judge had failed to apply the test of strict necessity, so the prior ruling declaring an easement to exist was overturned. See: *Toronto-Dominion Bank v. Wise*, 2016 ONCA 629.