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Can Court Rectify Purchase Price Based on the Intention of the Parties?

In a recent Ontario Court of Appeal decision called *McLean v. McLean*, the issue was whether a court has the power to rectify an agreement if the parties reached consensus on *all* its details, but merely made an error when reducing them to writing.

In 1989, Helen agreed to sell her farming business and assets to her son Melville and his wife, Maureen. The memorandum of agreement outlined the terms, including a vendor take-back mortgage on the land-related part of the deal. Melville and Maureen operated the farm successfully until 2005, when they separated.

At that time, Helen became concerned about her interests. The vendor take-back mortgage remained unpaid, and she realized that numbers on the farm sale "did not add up" since the recorded purchase price was about $115,000 less than what she thought they had agreed to at the time.

Helen took the matter to court, asking that the memorandum of agreement be formally rectified to add $115,000 to both the purchase price and the related mortgage. (Her son Melville did not oppose her claim, but his former wife Maureen did). Helen claimed that all parties had intended that the farming business would be sold at fair market value, which was appraised at $733,255.

Maureen, in contrast, recalled the total purchase price was to be $625,000. From a legal standpoint, she said, this meant that the court had no power to intervene by rectifying the agreement, since that remedy was only available if the parties clearly had a "common intention" that had been incorrectly recorded. Here, given that there had been no consensus on the purchase price, rectification was simply not available. The trial court agreed, and dismissed Helen's claim.

The Court of Appeal later reversed that decision. It confirmed that courts have a general power to rectify an agreement in the right circumstances, to correct a document and bring it in line with the parties' true agreement. This power is designed to cure situations where one party would otherwise be unjustly enriched at the expense of the other.

For a rectification order, Helen was only required to provide: 1) "convincing proof" of a common intention; 2) proof that it still existed at the time the documents were signed; and 3) evidence that, by mistake, the parties signed a document that did not reflect it. Further, the assessment was an objective one, to determine whether on the balance of probabilities it could be said that an agreement was in place, but that there was simply an error in recording it.

Here, the trial judge had erred in refusing to rectify the farm sale agreement in Helen's favour. Specifically, the judge had not given proper consideration to all the evidence on the agreed purchase price, preferring to accept Maureen's verbal account instead. Yet when viewed as a whole, that evidence – consisting of the documentation itself, other related documents pertaining to farm grants and the testimony of witnesses – showed a clear consensus as to the fundamentals of the transaction.

Admittedly, this was not a case where one party knew of the other's mistake and sought to take advantage of it. Still, were the trial judge's decision allowed to stand, Maureen would be unjustly enriched at Helen's expense, without any legal justification.

On all the evidence, the only reasonable conclusion was that the transaction was mutually intended to be at a fair market value of $733,255. The Court allowed the appeal, rectified the agreement and ordered that the vendor take-back mortgage be amended correspondingly. See *McLean v. McLean*, 2013 (ONCA).

Oppression: Condo Owner Blocked from Selling Parking Together with Unit

A developer built a condominium project consisting of two buildings side-by-side. A couple bought a residential unit in one building, but were forced to buy a parking space and storage unit in the adjacent building since there were none available in their own. They were the only owners who had to resort to this arrangement, but nothing in the condominium declaration prevented it at the time.

About five years later – in response to residents' concerns about parking area safety – the condominium declaration was amended to prevent parking and storage units from being used or owned by anyone who was a non-resident. The practical effect was that these two particular owners were prevented from selling their parking and storage units in the adjacent building to anyone who wanted to buy their residential unit.

Although the condominium corporation grandfathered these owners' existing use of the parking/storage while they lived there, problems arose when they wanted to sell: In light of the amended declaration,

their only option was to try to sell the residential unit separately from the parking and storage units.

For almost two years the owners tried to do so, but without success. In fact, they did not receive even a single offer. Other units in the same building were marketed and sold within that same time-period.

The owners took the condominium corporation to court, claiming they had been unfairly prejudiced or oppressed by the amended declaration. In good faith, they had bought the residential unit in one building and the parking/storage in another, reasonably expecting to be able to sell them later as a single package. They therefore asked the court to order the condominium corporation to amend the declaration to remedy this impasse.

In considering their claim, the court confirmed its power under the *Condominium Act, 1998* to remedy situations where the corporation's conduct is oppressive or unfairly prejudicial to an owner. In this context, oppressive conduct is anything considered "burdensome, harsh and wrongful" or an "abuse of power"; it is also conduct that undermines the owners' reasonable expectations or unfairly disregards their interests.

The court found that: 1) without parking and storage, the owners' residential unit was virtually unsellable; 2) the owners had purchased in good faith; and 3) they would not have done so had they known that they would be unable to sell later on.

While the condominium corporation may not have specifically *intended* to harm these owners with the amendment, this was still the net effect. They were the only ones with a residential unit in one building and parking/storage in another and became the only ones unable to sell them together as a package. Ultimately, this meant they did not have the same rights as other owners.

After finding that the amended declaration was oppressive, prejudicial and unfairly disregarded the owners' interests, the court ordered a further amendment to allow the sale of the residential unit and parking/storage to a single new buyer. See *Grigoriu v. Ottawa-Carleton Standard Condo. Corp. No. 706*, 2014 (ONSC).

Right-of-Way Interrupted for 10 Years, Then Reduced in Size – What Damages?

Fountas Corp. ("F") owned a building with four stories, three of which had been renovated to form 15 residential apartments. A vacant lot in the rear, which was landlocked, was used by tenants for parking at an average fee of $60 per month. The parking lot also contained a garbage dumpster for tenants' use.

Access to the rear parking was gained *via* an 11-foot-wide right-of-way over property owned by another corporation. Under the specific wording of the grant, F was given the right "to go, return, pass and re-pass with or without automobiles, horses, carts, wagons, trucks and other vehicles laden or unladen, in, through, along and over" the right-of-way. There was no height restriction in that grant.

When the other corporation made its property available for a proposed hotel development, the resulting demolition work interrupted F's access to the parking lot *via* the right-of-way. The corporation and F reached an agreement: The existing right-of-way would be closed for four months due to construction and would cease to exist in its old form. In its place, the new building would contain "a new and fairly direct route" from the street to the rear of the property. F would also be provided with temporary parking for 22 vehicles and an alternate garbage dumpster.

As it happened, the proposed hotel construction did not take place for almost 10 years. The contemplated four months of suspended access to the right-of-way turned into four years; the hotel developer was then placed into bankruptcy and the bank foreclosed. As the court put it: "The now excavated property was left as a gaping hole which prevented all access to the parking lot."

In 1995, Melo Corp. ("M") bought the property on which the contentious right-of-way and hotel were situated. As before, there were delays in construction and the "gaping hole" remained for another four years. Eventually, however, F's right-of-way was restored shortly before the hotel officially opened for business in 2000.

However, the right-of-way had changed drastically: Essentially it was now a tunnel through the newly-constructed hotel building, was only 9'11" in width and included a new inherent height restriction. This meant that F had to re-grade parts of the parking lot and that front-end loaders could no longer access the garbage dumpsters.

In considering the damages owed by M to F, the court noted that the limits of any right-of-way were to be determined by looking at the language of the express grant creating it. If the language gave rise to a reasonable doubt as to their nature and extent, then the court could also look at the circumstances at the time. Certain "ancillary rights" – meaning those reasonably necessary for the use of the right-of-way – could also be relevant.

Here, the right-of-way agreement between M and F envisioned a 4-month interruption in F's use of the parking lot; it turned out to be almost a decade. When it was eventually restored, the access had been reduced in dimension and was subject to a new height restriction. In short, the new hotel clearly represented an interference with the right-of-way as originally granted, for which M was liable in damages.

In calculating the time-period for which M was accountable, the court observed that M knew or should have known when it bought the property in 1995 that it was subject to a right-of-way in F's favour. M should have made arrangements for F's access at the time. But even allowing for a 1-year grace period, M was still liable for damages from 1996 until 1999 when the right-of-way was reopened. Those damages, amounting to about $450,000 (less $10,000 for F's failure to mitigate some of its lost parking revenues) included the loss of parking and apartment/commercial rental income, plus the costs for alternative garbage pickup. See *Fountas v. Melo*, 2014 (ONSC).