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Lack of Written Notice Costs Real Estate Brokerage $120,000 in Commission

In what is perhaps a surprising recent decision from the Ontario Court of Appeal, the simple lack of the required written notice under a listing agreement cost a brokerage a hefty commission on a commercial transaction. The case is a good illustration of the court's willingness to strictly enforce contract terms as a means of affirming commercial certainty.

Ariston Realty Corp. ("Ariston") was the real estate brokerage; Elcarim E Legna Inc. ("Elcarim") owned property it wanted to sell. Under the holdover clause in their listing agreement, they agreed that Elcarim would pay Ariston 5% of the purchase price on completion of any sale effected within 6-months after the agreement's expiry. This would be triggered if the buyer was "introduced" to the property by Ariston within that period; however – and this is an important point – the agreement required Ariston to give Elcarim notice of that introduction in writing.

Ariston did introduce the eventual buyer, Context Development ("Context"), to the property within the initial 6-month term; however, Ariston never provided written notice to Elcarim as required under that contract. When Elcarim refused to pay Ariston its claimed commission – totalling more than $120,000 – Ariston sued.

Ariston succeeded at trial, but the ruling was later appealed. The main legal questions were: 1) whether the lack of written notice disentitled Ariston to its commission; and 2) whether Ariston was nonetheless entitled to be paid for its services based on the equitable principle of "unjust enrichment."

In allowing the appeal and overturning the award for commission in Ariston's favour, the Court of Appeal started by confirming basic contract law principles: that the standard form agreement "means what it says"; that the parties expect it to be honoured by a court; and that it was to be interpreted in keeping with the parties' intentions. That last element involved looking at the particular wording of the contract in light of its underlying context.

In this case, the holdover clause reversed what was standard in most other listing agreements, which was that the expiry terminates the listing contract entirely. Instead, it imposed a written notice requirement that was more than a mere formality. Rather, it required notice in writing by Ariston that it had introduced Context to the property and Ariston's entitlement to commission was contingent upon this being strictly complied with. If there was no notice given, then there was simply no commission earned within the clear meaning of the listing agreement's wording.

With that said, the Court of Appeal did partially accept Ariston's alternative argument: that it was entitled to be compensated based on the fairness principle of "*quantum meruit*" (which loosely translates to pay-for-work-performed). Although the Court could not innovate an implied contract to replace the one that governed the initial 6-month term, it could acknowledge the value of the services rendered by Ariston after the listing agreement expired, which included having its broker meet with Elcarim on several occasions, and offering other assistance which Elcarim freely accepted. This gave rise to an implicit contractual understanding that Ariston would be fairly paid for these services; otherwise, Elcarim would be unjustly enriched at Ariston's expense. In the circumstances, Ariston was awarded $20,000 in compensation. See *Ariston Realty Corp. v. Elcarim Inc.*, 2014 (ONCA).

Written Agreements for the Sale of Real Estate Not Always Required

While not a recent decision, a Court of Appeal case from a few years ago, called *Erie Sand and Gravel Limited v. Tri-B Acres Inc*. continues to provide important guidance on the difference between a valid oral agreement and merely an "agreement to agree".

The facts centered on the intended purchase and sale of 54 acres of farmland. Erie Sand was in the business of mining sand and stone aggregate, and its very existence depended economically on having a reliable source of it, despite a local shortage of supply. Certain farmland owned by the seller, Seres' Farms, contained about 50 percent of the remaining aggregate in the region, which would satisfy Erie Sand's needs for up to a decade. Erie Sand had already purchased other aggregate-rich land from Seres' Farms in the past, and the parties had known each other for more than 30 years.

When Erie Sand offered to buy Seres' Farms' land, it knew that the land was already subject to a right of first refusal in favour of Tri-B Acres ("Tri-B"). Still, over the course of four meetings, Erie Sand and Seres' Farms verbally agreed to all the essential terms of a purchase and sale, including price-per-acre and closing date; the parties shook hands and agreed that they had a deal. Seres' Farms then asked Erie Sand to give it a written offer reflecting those agreed terms, which would be presented to Tri-B to see whether it was willing to come up with a matching offer in terms of the same deposit, terms and conditions. Seres' Farms advised Erie Sand that it would get the land unless Tri-B did so.

Erie Sand prepared a written offer as requested, and presented it to Seres' Farms, which forwarded it on to Tri-B. Tri-B did come up with its own offer, but one that fell short of the one put forward by Erie Sand. Nonetheless, Seres' Farms decided to accept Tri-B's less-favourable offer anyway. Erie Sand then immediately sued, claiming that it had a binding agreement to buy Seres' Farms' land, and that the court should enforce that deal by granting specific performance.

In order to resolve the dispute, the court first considered whether there had been compliance with the *Statute of Frauds*, which requires that any contract for the sale of land must be in writing. An exception, however, is if there has been "part performance" of a verbal contract, to the point that the parties' conduct is "unequivocally referable" to their dealing.

Ultimately, the Court of Appeal confirmed an earlier trial ruling that Erie Sand and Seres' Farms had a valid deal, and that ownership of the land should be transferred from Tri-B to Erie Sand.

It was found that Erie Sand and Seres' Farms had indeed reached verbal consensus on all the essential terms, which were intended to be incorporated into a formal written document that could be presented to Tri-B for its consideration. This was not merely an "agreement to agree". Instead, Erie Sand had made it clear that it would not present a written version until all the terms had concluded verbally, and neither party expected that a written document was necessary. To the contrary, they each felt they had reached a verbal deal. More to the point, by taking Erie Sand's written version of the offer to Tri-B, Seres' Farms demonstrated its own acceptance of that offer, whether it was in writing or not. As the Court of Appeal explained:

> *...where parties have agreed on all the essential provisions to be incorporated into a formal document and they intend the agreement to be binding, a valid and binding agreement exists -- the existence of the agreement does not depend on the formal written document. The fact that a formal written document is to be prepared and signed does not alter the binding validity of the original contract.*

Also, Seres' Farms was now precluded from raising a *Statute of Frauds* argument. There had been sufficient acts of "part performance" of the verbal agreement by both parties, which lent themselves to no other explanation than that a verbal deal had been struck. This included Erie Sand preparing a written offer, providing a certified cheque as "deposit" for the full $1.2 million purchase price, and delivering these to Seres' Farms.

Finally, the trial judge had been correct in granting specific performance rather than merely damages: the land was both unique and special to Erie Sand since it contained a significant amount of the remaining aggregate in the region. In short, there was no other land of this type for sale and no readily-available substitute. Damages were therefore an inadequate remedy and the award of specific performance in Erie Sand's favour was confirmed. See *Erie Sand and Gravel Limited v. Tri-B Acres Inc.*, 2009 (ONCA).

Can Developer's Hand Picked Condo Board Limit its Liability for Deficiencies?

In a recent Ontario Court of Appeal case, the question was whether it was appropriate and legal for a condominium Board of Directors to agree to limit the condo developer's liability for common element repairs and maintenance, and whether it mattered that the Board was appointed by the developer itself.

A new condo development was completed in 2010 and in the ordinary course, the developer appointed the first Board of Directors. Together they entered into an agreement to limit the developer's financial exposure for common element repairs and maintenance to only those minimum warranty-covered items allowed under the Tarion Warranty program. That agreement also purported to prohibit the condo corporation from suing the developer for such items, and stipulated that the corporation's only remedy would be through the New Home Warranty process. To bolster this arrangement, the Board enacted a by-law to the same effect, registered it on title, and disclosed it to all buyers.

Later, the developer-appointed Board of Directors was replaced by a newly-elected Board consisting of unit-owners. This second Board decided that the agreement between the developer and the former Board was both unreasonable and in breach of the *Condominium Act*. It claimed that by agreeing to limit the developer's liability, the first Board had tied the hands of the second Board in terms of its ability to force the developer to do repairs and maintenance to the common elements. Moreover, the second Board contended that the agreement was a patently self-serving arrangement orchestrated by the developer to limit its own legal and financial liability, given that the first Board had been chosen by the developer itself.

At both the trial and appeal levels, the second Board failed to have the agreement overturned. Even though the first Board had been hand-picked by the developer, there was nothing to suggest that its choice of Directors breached its duty under the *Condominium Act* to act with reasonable care and honesty nor was there anything illegal in the developer limiting its liability in this way. Rather, the first Board had acted within its Act-imposed mandate to "arrange the affairs of the corporation"; the agreement and by-law did not overstep those parameters. It was also noteworthy that the condo corporation's recourse under the Tarion Warranty program was still preserved, and the existence of the by-law and agreement had been disclosed to buyers. The agreement was upheld. *See Toronto Standard Condominium Corp. No. 2095 v. West Harbour City (I) Residences Corp.*, 2014 (ONCA).