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## Trailer Park Was a Post-Closing "Lemon" – Can Buyer Rescind?

The buyers paid $3.5 million for a trailer park purchased from the seller, a 76-year old man who had been operating the park for 16 years. Although he had the help of a resident manager, the seller did some maintenance work himself, and was generally aware of the property's condition and maintenance/repair issues.

Based on that knowledge, together with the available financial data, the seller provided the buyers with information about the property they were considering. It included various details: that all but one of the 39 parking pads for each Recreational Vehicle ("RV") were occupied by long-term, rent-paying tenants; that such nearly-full occupancy would continue for years, generating an income of almost $400,000; and that it was a well-established, profitable trailer park, with reliable revenues, stable operating expenses and good potential for growth. Representations were also made about the condition of the 40-year old underground water pipe system. Nonetheless, the property was being sold on an "as is" basis.

The buyers decided to proceed with the deal. But literally within days after closing, their problems with the property began. By way of a letter from the City, they learned that some of the RVs were partially situated on City-owned property, and most were occupied by long-term residents contrary to City by-laws. Also, some of the RV pads were on unstable soil and had to be closed, while others were not serviced by water. The buyers soon realized that because of the new information from the City, the trailer park would generate significantly less income after the sale, than it had before.

On this basis, the buyers asked the court to have the agreement rescinded, claiming misrepresentation by the seller.

The buyers did not succeed at trial. The type of representations they were complaining about – including the trailer park's profitability, ease of management and water system facilities – were not covered by the list of written conditions contained in the contract. Also, the agreement contained standard clauses relating to the buyers' right to inspect, and clarified that there were no representations being made other than the ones expressly contained in the document. The purchase of the property on an "as is" basis was also a key consideration.

In rejecting the buyers' specific examples of the alleged misrepresentations, the court pointed out that financial statements provided by the seller were neither inaccurate nor false at the time they were given. All of the equipment the buyers purchased as part of the deal was in good working order, even if some repairs and maintenance were later needed. There was no evidence that the seller knew prior to closing that there were siting problems with some of the RV pads, that there were problems relating to soil stability or that the City took issue with the long-term rentals. Indeed, none of these post-closing issues were foreseen by either of the parties. Had the buyers been concerned with any of the verbal information they were receiving about the equipment, they could have undertaken a dedicated inspection or have had the representations included in the written agreement. The "as is" nature of the purchase meant it was up to the buyers to make sure any important matters were expressly addressed and added to the written contract if necessary.

In this case (and leaving out those that had been expressly waived), all of the conditions mentioned in the written agreement had been satisfied. There were no misrepresentations nor breaches of warranty or contract.

The court pointed out that even if there had been, rescission of the agreement would not be available as, in light of the City's various concerns and other unexpected changes after closing, it was no longer possible to restore the parties to their pre-contract situations. *0817967 B.C. Ltd. v. 0343936 B.C. Ltd.*, 2013 (BCSC).

## If it is Not a Gift, is it Always an Investment?

In a recent case called *Nishi v. Rascal Trucking Ltd.*, the Supreme Court of Canada turned its focus to a long-established legal concept known as the "purchase money resulting trust", which aims to provide clear rules in situations where money is transferred from one person to a second, who then uses it to buy real estate or other property.

In such money-transfer scenarios there is usually one of two outcomes: 1) the money is an outright gift from one person to the other; or 2) the person giving the money intends to take title to the property and essentially invest in it. But for "grey area" situations involving unrelated individuals (*i.e.* not family members), if the money is neither clearly a gift nor clearly an investment then the purchase money resulting trust concept steps in to make a presumption that the person

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advancing the money intended to take title and therefore a "beneficial interest", unless the evidence shows otherwise. In those cases a legal trust is imposed on the money, with the person who received it being deemed to hold it on behalf of the person who transferred it. The Supreme Court described the concept this way:

*A purchase money resulting trust arises when a person advances funds to contribute to the purchase price of property, but does not take legal title to that property. Where the person advancing the funds is unrelated to the person taking title, the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person's contribution. This is called the presumption of resulting trust.*

In *Nishi*, the particular money transfer under contention fell into that "grey area": at the time it was made, the parties' respective intentions and expectations were not clear. The court was therefore asked to consider whether a purchase money resulting trust arose.

The background facts were a little complex: Rascal Trucking Ltd. ("Rascal") leased a two-acre property from the eventual seller, and used the land to operate a topsoil-processing facility. After the noise and dust sparked complaints from neighbours, the City declared the facility a nuisance and removed the topsoil. It then added the $110,679.74 in clean-up costs to the seller's property's tax bill, which was already in arrears. Rascal never reimbursed the seller directly for the topsoil removal costs.

The seller, meanwhile, ran into financial difficulties. In light of its existing mortgage obligations and the newly-increased tax arrears amount, it decided that there was no equity left in the property. It stopped making mortgage payments, which in turn triggered foreclosure proceedings. The mortgagee ended up having to pay the tax arrears.

Rascal's principal then made several unsuccessful overtures to buy the property himself. Eventually, a third party named Nishi bought it for about $240,000, but Rascal contributed $110,679.74 toward the purchase price – which was the exact amount, to the penny, of increase in the tax arrears imposed by the City for cleanup. Rascal sent various proposals to Nishi, detailing the precise legal effect and intent behind this financial contribution, but the parties did not really come to terms. In the end, Nishi took sole title to the property notwithstanding Rascal's financial outlay.

Not surprisingly, a dispute arose as to the true nature of Rascal's contribution to the purchase price. Rascal claimed a 50 percent undivided interest; the trial judge dismissed that claim but it was overturned on later appeal.

The Supreme Court of Canada agreed with the trial judge, and held that Rascal had no legally-established interest in the property; Nishi remained the sole title-holder.

In this scenario the law presumed that Rascal, as a party unrelated to Nishi, had contributed the funds with the intention of obtaining a beneficial interest in the property, in proportion to the monetary contribution made. That legal presumption could be rebutted by Nishi; normally that was accomplished by proving on the balance of probabilities that at the time of the funds transfer, Rascal intended the money to be a gift to Nishi.

That was not exactly the case here, though. While it could not be said that Rascal intended to forgo any beneficial interest, it was also true that the transfer of the $110,679.74 was motivated by Rascal's desire to make good on its original obligation to the seller for the clean-up costs on the tax bill. Correspondence between the parties showed that the transfer was made without conditions. Overall, Rascal's advance of funds was *not inconsistent* with a legal gift, which was enough to rebut the presumption of purchase money resulting trust, leaving Rascal without a claim to a legal beneficial interest in the land. *Nishi v. Rascal Trucking Ltd.*, 2013 (SCC).

## Is an Open Building Permit a Title Defect?

In *1854822 Ontario Inc. v. Martins Estate*, the interesting issue was whether an open building permit – relating to work that had never actually been done – was a defect in title which could form the legal basis for the buyer's valid title objection.

The buyer and seller executed an agreement of purchase and sale with a May 2013 closing date. The buyer later learned from the City that there was an active building permit relating to certain work proposed for the dilapidated garage that was located on the property. The seller tried unsuccessfully to have the permit cleared prior to closing. The buyer and seller then disagreed on whether this was a valid requisition; this in turn gave rise to a legal dispute before the court.

Specifically, the buyer claimed that the open building permit was a cloud on title amounting to a valid objection on title,which exposed him to a risk of litigation. The seller, on the other hand, claimed it made no difference, since no actual work was ever undertaken on the garage. He pointed out that the permit merely allowed a new owner to do work; it did not oblige him or her to. Furthermore, the buyer had been aware of the dilapidated state of the garage when he bought the property, so according to the seller, there had been "no surprise".

The court agreed with the buyer. Even knowing as he had about the garage's dilapidated state prior to signing, the buyer was put at risk by the open permit because it allowed the City to inspect the premises at any time and to issue a work order with which the buyer would be legally required to comply. This in turn gave rise to the risk of litigation. And while the *Building Code Act* did provide for a permit-closing procedure, it was not an automatic process, since the City retained some discretion. There was also no evidence provided to show the type of work that would satisfy the City, nor what the cost of that work might be.

In short, the existence of the open permit gave rise to risk, which in turn affected the buyer's right to the use and enjoyment of the property. As such, the court found it formed a valid objection to title in this case. *1854822 Ontario Inc. v. Martins Estate*, 2013 (ONSC).