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Buyer's Claim Denied for $57 Million in "Speculative" Profits on Aborted Deal

In a recent Ontario decision, the question for the court was whether a Europe-based, global real estate investor should be awarded $57 million in damages for the seller's breach of an agreement of purchase and sale, to cover the lost opportunity to "cash in" on the Toronto real estate boom.

In 2015, the buyer/investor agreed to purchase seven residential apartment buildings in Toronto, for $229 million in total.

After paying the first deposit, the buyer learned that certain mortgages still remained on title to some of the properties. The buyer asked the sellers to have them removed, and, expecting no difficulty, proceeded to advance the second deposit. As it turned out, the sellers either could not or would not remove the encumbrances from title and eventually conceded that the amounts payable totalled nearly $49 million. The sellers proposed various solutions, including one that would have the buyer assume the mortgages and take a price abatement. The buyer refused, and when the deal did not close, litigation ensued.

The court first concluded that the buyer had no obligation to accept the sellers' abatement offer or similar proposals. The buyer was ready, willing, and able to close as agreed, had tendered the balance of the purchase price on closing, and took all other needed steps. In contrast, the sellers did not do "all that they could" to make good on their promise to convey good title; they merely made some initial inquiries with the mortgagees.

The court noted the sellers' fundamental obligation under the agreement and under the law of conveyancing was to convey good title, clear of the mortgages, rather than an "encumbered title with a cash-back equivalent or some other compensatory measure no matter how reasonable." Having failed to convey clear title, the sellers were in breach and were liable for damages to the buyer.

The more complex issue was how to quantify the buyer's damages. The buyer calculated them at $57 million in lost profits, being the difference between the purchase price under the agreement, and the greatly-increased price at which the sellers sold to a new buyer more than two years later, during the Toronto real estate boom. The buyer complained that the sellers' breach had prevented it from realization these hefty gains.

The court rejected that argument and declined to award damages of this nature. It did accept that the properties were worth $225 million in January 2016 when the deal was slated to close. Under Canadian law, the properties' value on that date was the customary starting point for assessing damages, which involved looking at the difference between the contract price and the market price. There could be some flexibility to this approach, but it depended on what was fair on the facts of the case, including the nature of the properties.

Here, the buyer was not in the business of *flipping* apartment buildings; it was an income property investor with holdings worldwide. Although the buyer had wanted to invest specifically in the Toronto market, even without anticipating the boom, the court was shown no evidence to prove that it could not replicate the same kind of capital appreciation "by buying a building in Boston or Stockholm or Zurich". Indeed, the buyer had fulfilled its post-breach mitigation duty by actually investing in other properties elsewhere in the world.

Ultimately, the court ruled the buyer was not entitled to receive the $57 million in damages for speculative profit merely because the sellers later realized that same profit more than two years later. As the court put it, "[t]he damages must make up what the purchaser lost in value on the closing date, not what a property speculator standing in the purchaser's shoes would have lost." However, the buyer was entitled to nearly $776,000 for expenses reasonably incurred to pursue the aborted transaction, including legal and professional fees and conducting due diligence. See: *Akelius Canada Inc. v. 2436196 Ontario Inc.*, 2020 ONSC 6182.

Condo Buyers Fail in Bid to Certify Class Action Against Developer for Cancelled Project

A land developer had plans to develop a 10-storey residential condominium in Toronto. Between 2015 and 2016, it pre-sold 179 units to various purchasers under pre-construction agreements of purchase and sale. However, due to rising construction costs that ultimately rendered the project financially unviable, construction never actually commenced. Instead, the developer terminated all the agreements in 2017 and returned each of the buyers' deposits with interest, in accord with the agreement's termination provision. Importantly, the agreement also included an Exculpatory Clause, absolving the developer for liability for damages or costs arising from its decision to terminate.

A group of disappointed buyers decided to try to launch a class proceeding against the developer. While they did not contest the developer's right to terminate the deals, they claimed that as intended purchasers of condominium units in a dramatically-rising market, they each lost the opportunity to obtain a residential condominium at the bargained-for price. Essentially, they alleged breach of contract by the developer, for which they sought damages. They brought a motion to have their proceedings certified as a class action.

The developer succeeded in having these buyers' claims dismissed by the court.

One of the key issues was whether the Exculpatory Clause was enforceable in the circumstances, even though it was part of an agreement that the developer had breached in a fundamental way. The court ruled that the Exculpatory Clause was enforceable; looking at the Clause in the overall context, and using the modern approach to interpreting its wording, it was unambiguous, and was intended to apply to precisely this kind of scenario involving a valid termination. Plus, it would not be against public policy to enforce it, nor would it be unconscionable or unfair to do so.

Legally, the Exculpatory Clause was a complete defence, in that it protected the developer from all claims by the buyers for their damages and costs. In the end, the court granted the developer's summary judgment motion, and declared the request for class action certification to be moot. See *Ritchie v. Castlepoint Greybrook Sterling Inc.*, 2020 ONSC 3840.

Must a Seller Act in Good Faith to Disclose Pre-Closing Property Damage?

In *Bilotta v. Booth*, the Ontario Court of Appeal considered the scope of a seller's obligation to act in good faith in connection with its pre-closing disclosure to buyers that there had been some unexpected damage to the property.

The buyers had signed an agreement of purchase and sale to buy the seller's house for $750,000. About two weeks before the scheduled July 7, 2017 closing, the sellers' basement was flooded. A contractor performed emergency repairs, and soon after that the sellers received almost $15,000 from their insurer toward the cost of a more permanent fix.

The sellers waited until the day before closing, July 6, 2017, to advise the buyers of the flood and insurance funds. This prompted the buyers to ask for at least a one-week closing date extension, as they wanted to have a qualified home inspector assess the damage. During negotiations through their respective lawyers, the sellers provided an adjuster's report, took the position that there was no substantial damage and indicated their intention to close on July 7th as planned.

When that day came, the buyers complained again about the last-minute notice and again asked for time to do an inspection. The buyers offered to either: (1) extend the closing and renegotiate the price after inspection; or (2) close the deal as scheduled, but reduce the price by $50,000. The sellers agreed only to extend the closing somewhat, but did not agree to either proposals for a price reduction. The seller did however offer to pay the storage costs for the buyers' belongings.

Despite the sellers' expressed readiness to complete the transaction on the new date, the deal still did not close. The sellers re-listed the house, and were only able to sell it about a year later for $100,000 less than the buyers had originally agreed to pay.

The buyers and sellers each blamed the other for the aborted sale and went to court for a resolution. The sellers sought $128,500 in damages, reflecting $28,500 in expenses plus the $100,000 for the shortfall in the sale price. The buyers asked for the return of their $30,000 deposit and some additional damages.

The lower court judge sided for the buyers, ruling that the sellers had breached the agreement with their late-breaking revelation of the flood damage a mere day before closing. This timing did not give the buyers a meaningful opportunity to consider whether to potentially exercise their contract termination rights. The judge ordered the sellers to return the $30,000 deposit.

On later appeal, the Court of Appeal overturned that earlier ruling, finding that it was actually the *buyers* who were in breach, because they had no right to terminate the deal. The insurance clause in the standard form agreement of purchase and sale was the key to the appeal outcome; it stated that in the event of "***substantial damage***", the buyers may either: (1) terminate the agreement and have their deposit returned; or (2) take the proceeds of any insurance and complete the purchase. Typically, in scenarios involving more *major* unexpected pre-closing damage to properties, buyers would be entitled to a reasonable amount of time to sort out what to do and to obtain details of the insurance coverage from the seller. They could then make an informed election on whether to terminate or go forward with the purchase.

But in this case, the flood damage was only *minor*, so the buyers were not entitled to added time. On the eve of closing, they knew the insurer had issued a $15,000 cheque to cover the repairs and were also given the adjuster's report. They knew or ought to have known the damage was not "substantial", which term was the trigger for their right to elect to either terminate or accept the insurance proceeds and still close. There was no such election to be made in this case, so the buyers were not entitled to reasonable extra time to assess their position. Their refusal to close on the newly-extended date was a repudiation of the contract. In contrast, the sellers had acted reasonably throughout, by making reasonable offers to extend.

In light of the buyers' breach, the sellers then had two choices: (1) either accept the buyers' repudiation and terminate the contract; or (2) reject it and keep the contract alive. They decided to do the former. They terminated the contract, which allowed them to sue for damages from the buyers. The Appeal Court allowed the appeal and awarded the sellers damages representing the difference between the contract price and the amount they realized on resale of the house, *i.e.* $100,000, with the buyers' $30,000 deposit to be credited against that amount. See *Bilotta v. Booth*, 2020 ONCA 522.