SRLaw
Schneider Ruggiero Spencer Milburn LLP

Mortgage and Real Property Law Report



A Legal Newsletter for the Mortgage and Real Estate Industries

Vol. 26, No. 3 • September 2020

Deficient Survey Did Not Go to the "Root of the Bargain"

In *Hannivan v. Wasi*, the agreement of purchase and sale on a $1.15 million residential property called for the buyer to submit a $50,000 deposit. It also stipulated that within two weeks, the sellers were to provide him with a survey of the property showing "the current location of all structures, buildings, fences, improvements, easements, rights-of-way, and encroachments affecting said property."

What the sellers provided instead, was a "bare bones" document purporting to be a survey. It was dated and signed by an Ontario Land Surveyor, but did not show the current location of the items listed in the agreement. It was handed to the buyer on the day the agreement was signed.

At no time prior to closing did the buyer submit requisitions. But on the day before closing, nearly five months after the agreement was executed, he complained for the first time that the sellers had failed to provide an adequate survey as required in the agreement's schedule. The buyer took the position that the agreement was accordingly void.

The sellers did not agree, and the transaction did not close. Concluding that the buyer was in breach, the sellers kept the $50,000 deposit, and re-listed the property. They sold it to another person for $234,000 less than the price the original buyer had agreed to pay, and sued him for the difference. In response, the buyer asked the court for a return of his deposit. The matter came before the court on a summary judgment motion.

The court ruled in the sellers' favour. In these circumstances – and even though the provided survey did not technically conform to the requirements in the schedule – the buyer was not entitled to repudiate the contract. In the court's words, a more detailed or original survey did not "go to the root of the bargain" between the parties.

In coming to this conclusion, the court relied on a similar recent decision in *Hatami v. 1237144 Ontario Inc.*, which was later affirmed by the Ontario Court of Appeal. There, the court noted that in certain circumstances a buyer may justly refuse to close where it is essential to the transaction that the seller provide an up-to-date survey and where the seller has failed to do so. But this is not necessarily the case where the seller has no unqualified obligation or commitment to provide such a survey for the property.

The court explained that in this instance, any shortcomings in the survey tendered by the sellers did not impact the "essence" of the transaction. The survey's deficiencies were unrelated to issues of financing, zoning, or any other requirement that might have affected the buyer's ability to close.

The court also noted that the buyer only complained about the alleged survey deficiencies on the day before the scheduled closing; this was in contrast to several months' worth of clear communication in which the buyer never indicated that he required a different survey.

The court ruled that this was a clear case for summary judgment in the sellers' favour, and awarded them the $234,000 difference in price obtained for the property. Conversely the buyer was not entitled to a return of the deposit. See: *Hannivan v. Wasi*, 2020 ONSC 1060.

Standard Utility Easements Unremoved: Buyers in Breach for Failure to Close

Can a buyer refuse to close because of unremoved standard utility easements? That was the issue in *Joo v. Tran*, where the sellers and buyers had struck an agreement for the $2.13 million sale of a residential property. A signed amendment to the agreement included a schedule containing a building location survey.

Prior to the last day for submitting requisitions, the buyers discovered four easements that had been registered on title in 2002, but which had been undisclosed by the sellers. These were standard utility easements in favour of the municipality, Bell Canada, a cable TV company, and a hydro company and were intended to accommodate water mains, storm sewers, and telecommunication facilities and services. They ran along the front of the property, with a smaller easement running along the back, and appeared to service the property as well as the adjacent lots. The easements' location did not impinge on the use of the backyard, nor allow for public entry onto the defined easement area.

Importantly, all four easements were well-illustrated on the parcel identification page, and were marked on a survey attached to the parties' agreement.

Prior to closing, the buyers nonetheless submitted a written requisition to have the easements removed, claiming they were an undisclosed material fact that – had they known in advance – would have precluded them from entering into the deal in the first place. They correctly pointed out that the easements took up 27 percent of the lot they had agreed to buy.

The sellers took the position that there was no valid objection to title, and refused to

take steps to remove the easements in accord with the buyers' requisition. The buyers subsequently refused to close.

The sellers re-listed the property soon after, and sold it for $1.7 million. They sued the buyers for the shortfall and brought a motion for summary judgment.

The court granted the sellers' motion. This was a standard-form agreement of purchase and sale, stating that title to the property would be "good and free from all registered restrictions and encumbrances" except for "minor easements … for domestic utilities, telephone services, drainage and sewers, utility lines, telephone lines, and cable lines". In other words, the agreement expressly carved out a clear exclusion for certain standard municipal and utility easements.

In the court's view, the four contentious easements fell squarely within the wording of that exclusion clause. The agreement also included a clearly-marked survey as an attachment – which the parties had initialed – showing the easements' locations. The court added that while the agreement was signed in May 2017, the buyers did not raise the easements issue until several months later, in August of 2017.

As for the buyers' complaint over the easements' relative size, the court said:

> *Although these easements take up a significant percentage of the lot, I am satisfied that this has to be reviewed in context and in view of the actual location of the dwelling, the location of the easements, and the stated purpose of these easements. … these are the types of utility easements that any purchaser might expect in a residential subdivision.*

Since the standard utility easements fell within the clearly-worded exclusion, the buyers had not raised valid unanswered requisitions to title which gave them the right to terminate the transaction. They were in breach for failing to close.

On the issue of damages, the court found no evidence to show that the sellers had acted imprudently in ultimately re-selling the property for $1.7 million on the open market. They were accordingly entitled to damages in the amount of $430,000, being the difference between the price obtained and the price originally agreed-to by the buyers. See: *Joo v. Tran*, 2020 ONSC 806.

Was Owner-Built Pool and Deck on Town's Easement Prohibited?

In this case, the owners' residential property was located in the Town of Oakville, and was subject to a 10-foot wide easement that had been registered in 1972. It accommodated an underground hydro wire that provided electricity to a nearby property.

Under the wording of the registered easement, the owners granted the Town the right to construct, operate, maintain, replace, and repair underground sewers, drains, pipes and related services. Conversely the easement stated that the owners reserved their own right to "use the surface of the said land for any purpose" provided it did not "conflict with" the rights afforded to the Town. It specifically excluded "the planting of any tree and the erection of any building or structure."

The owners were aware of the easement when they bought the property in 2012, but thought it had been abandoned or had never been used. In 2014, they installed a pool and surrounding pool deck on the land that was the subject of the 10-foot easement. They did so without obtaining the necessary building permit.

Having later learned of the existence of the owners' completed pool and deck structure, the Town applied for a court declaration that its easement rights over their property had been encroached-upon. The Town also applied for an injunction, and for a mandatory order requiring the owners to remove the pool and amenities.

The Town was successful in obtaining the orders sought. Perhaps ironically, this was despite the owners having persuaded the court that the pool and deck did *not* substantially interfere with the Town's easement rights. As the court observed, the owners had "won that battle", but the Town effectively "won the war".

The owners' failed argument relied on the thinly-minced interpretation of the easement's wording: That as long as they did not *interfere with* the Town's rights, they could still plant a tree or erect a building or structure on the easement area. In their view, the threshold was whether the Town was impacted – if not, then on their reading of the easement description they were entitled to build on the strip.

The court rejected this interpretation as being devoid of "common sense". To accept it would mean that the easement description's reference to trees, buildings and structures was wholly superfluous; otherwise the wording could have ended simply with "which does not conflict with the Town's rights".

Instead, the plain wording conveyed a basic two-part message: (1) The owners were prohibited outright, and under any circumstances, from using the surface of the easement strip for any purpose that conflicted with the Town's rights; and (2) to avoid confusion, this meant they were prohibited under any circumstances from constructing any building or structure, or planting any tree, on the easement strip.

The court summed it up plainly: "In other words, the planting of a tree or the erection of a building or structure on the Easement land is not permitted, period."

With that conclusion in mind, it was immaterial that at the time the owners added their pool and amenities, there were already existing and pre-approved structures on the easement area (namely a shed and carport) as well as two large trees. There was also nothing to stop the Town from insisting on its easement rights after-the-fact, since there was no evidence the owners had – to the Town's knowledge – acted to their detriment.

The owners had contravened the express terms of the easement description by installing the pool and deck. They were ordered to remove the encroaching structures at their own expense, and to remediate any damage to the easement area itself. See: *Town of Oakville v. Sullivan*, 2020 ONSC 1419.