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# Mortgage and Real Property Law Report

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## Can a Seller Decline a Full-Price Offer Without Paying Commission?

In *T. L. Willaert Realty Ltd. v. Fody* the seller wanted to sell his property and signed a standard listing agreement with a real estate agent. Under its terms, commission was payable on the receipt of a "valid offer to purchase", even if the agreement was not ultimately completed, provided the non-completion was "owing or attributable to the Seller's default or neglect."

The seller also signed a separate document titled "Vacant Land Data Input Form" (VLDIF) which, in a box titled "Realtor Remarks," included some additional minor conditions imposed by the seller, relating to the installation of a hydro box and septic system and requiring possession to take place within 15 days.

The agent presented the seller with several offers within the listing period, one of which was for the full cash asking price. After sending a copy of it to the seller's spouse and lawyer, the agent texted the seller to let him know.

A few minutes later the seller replied, asking for clarification on whether the offer was for the full asking price. By reply text, the agent confirmed that it was. At this point, however, the seller disappeared for the rest of the day and became unresponsive for the following three days. Subsequent efforts by the agent to get the seller to agree to meet were ignored; the agent texted the seller to remind him that under the terms of the listing agreement, commission was still payable in these circumstances. The seller responded to this by threatening the agent that he should "not continue to harass or threaten" him.

Ultimately, the seller did not accept the full price offer. The agent then sued successfully in Small Claims Court for almost $9,000 in commission plus costs; the seller appealed, claiming (among other things) that the full price offer was not presented within the listing period, and that it was nonetheless deficient because it failed to include all of the minor conditions set forth in the VLDIF dealing with the septic installation, hydro box and possession date.

The appeal court rejected all of these arguments. First, it found that the agent's efforts to present the offer to the seller were entirely reasonable. In fact, the court put it this way:

*…[i]t is difficult to appreciate any other way that [the agent] could have presented this offer.*

The steps taken by the agent included: 1) notifying the seller's spouse; 2) faxing a copy to the seller's lawyer; and 3) texting the seller several times. The agent also dropped off a copy of the offer to the seller's mailbox the same evening the offer was presented. The seller was unresponsive to all of these efforts. Moreover, he was impolite and disrespectful when the agent later tried to follow up.

As for the seller's claim that certain conditions had not been satisfied, the appeal court remarked that the seller had never previously indicated that they were important to him. Rather, he raised and objected to these purported issues only during the trial itself and only as an ostensible defence to the agent's valid commission claim. Furthermore, even if they had been an issue, the potential buyer had shown some flexibility on those items and was willing to resolve them.

Ultimately, the appeal court agreed with the Small Claims Court's finding that the seller was simply avoiding the deal and frustrating the agent for improper reasons – namely because he had changed his mind and decided not to sell until he could buy a farm. Indeed, he became inaccessible and nasty to the agent and had not acted in good faith.

The appeal court also pointed out that listing agreements are legal contracts and, as such, the general law of contract applies to them. Under the specific terms of this particular one, the seller could be held liable for commission even if the deal did not close through default or neglect of his own.

This was precisely the situation at hand: the full-price offer had been presented by the agent to the seller within the time specified in the listing agreement and the conditions in the VLDIF had been effectively satisfied as part of it. This triggered the seller's obligation to pay the commission as agreed; there was no requirement that the offer must be actually accepted. The terms of the agreement were clear and the seller had simply acted in bad faith. The seller's appeal of the Small Claims Court's earlier damages award to the agent was accordingly dismissed. See *T. L. Willaert Realty Ltd. v. Fody*, 2013 (ONSC).

## Can an Owner Build an Addition on a Right-of-Way?

The Ontario court decision in *Weidelich v. De Koning* provides important insight into the specific rights and obligations of private property owners whose land is subject to a right-of-way in favour of another.

The matter involved a dispute between the neighbours in a modern residential townhouse development. On one of the townhouse properties there existed a reserved right-of-way, confirmed by deed, which allowed the adjacent owners to access their garages located at the rear of their homes. However, the owners of that particular townhouse were building a large, three-story addition with balcony and patio. Although it was being built mainly on the unreserved part, a portion of the addition would obstruct part of the right-of-way on a permanent basis. The result was that for at least some of the adjacent landowners, it would be much more difficult – though not impossible – for them to drive their vehicles to their rear garages.

The neighbours sued the owners of the townhouse, claiming that the completed addition would create a "real and substantial interference" – or at least a theoretical one – with the rights that they all enjoyed by virtue of the right-of-way.

The court considered the scenario. Although there was some general law to suggest that *any* substantial and permanent structure over a right-of-way amounted to a "substantial interference", it was important to consider the specific facts. Here, it was noteworthy that the right-of-way had been created by an express grant which established its nature and extent. The wording of that grant made it clear that it was created for a limited purpose: to allow the adjacent owners to access their garages and the street with their vehicles. This

meant they were to be afforded only a "reasonable opportunity" to exercise those specific rights, and could complain only about those obstacles that factually and substantially impeded them. As the court put it:

*Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it.*

The court then considered the evidence, including diagrams and video evidence. Here, it was still possible for vehicles, including large delivery trucks, to travel along the remainder of the right-of-way that had not been blocked by the addition. As such, the court found that the addition did not violate the adjacent owners' property rights. See *Weidelich v. De Koning*, 2013 (ONSC).

## Could a Lease-Back Agreement Legitimately Derail a Sale of Development Lands?

In a recent Saskatchewan Court of Appeal decision, the court considered whether the pre-closing failure to finalize certain details on a lease-back arrangement was significant enough to scuttle a $3 million deal involving farm property that was ripe for development and whether specific performance was the appropriate remedy.

The dispute arose in connection with an agreement to sell, then lease-back, a 1600-acre farm near Regina. The owners were the Harles, and they were interested in selling only if they received an exceptionally favourable offer. They hired a real estate agent to solicit offers.

The agent put them on to a newly-created company that he also acted for, named 101090442 Saskatchewan Ltd. (the "Company"). The Company had been incorporated specifically to buy lands for future sale or development on behalf of a parent corporation which developed residential neighbourhoods.

The Company offered to buy the Harles' farm land for just over $3 million, which was acknowledged as being twice the farm land's market value. The offer was on a standard form but was amended to include various conditions as to possession date and certain rights of first refusal.

Because the Harles had wanted to continue to farm the land pending its eventual development, the agent confirmed with the Company that it would be content to hold the land for long-term development potential, but give the Harles a long-term lease-back in the meantime. The Harles accordingly submitted a counter-offer which specifically included a condition that "a farmland lease agreement be in place prior to closing date." Specific terms of the proposed lease-back were also set out.

The Company accepted the counter-offer, and the Harles' lawyer wrote to emphasize that the lease-back agreement needed to be in place prior to the August 2007 closing date. The Company did not reply, however, even after the lawyer's further follow-up.

Meanwhile, land prices around Regina started to rise. Two weeks before closing, the Company did provide a 13-page draft lease to the Harles, but it did not conform to the various terms they had proposed, added new obligations and in the Harles' view, changed the deal entirely.

Still, the Company forwarded the full amount of the purchase price the day before closing and both the closing date and the possession date passed without any communication from the Harles whatsoever. The deal did not close.

A week after that, the Harles indicated that they considered the agreement to be at an end because the required lease was not in place prior to closing as had been agreed. The Company, in contrast, claimed that there was a valid and enforceable agreement and that it had the right to sue, which – after some additional but unsuccessful negotiations with the Harles – it did. At trial, the Company succeeded in obtaining an order for specific performance.

The Harles appealed. They claimed that the agreement to sell was too uncertain and that the pre-condition as to executing a lease-back of the land was not satisfied. They also claimed that awarding the Company damages would have been adequate as a remedy, since the property was not truly "unique" under the law relating to specific performance.

The Appeal Court disagreed in part: it found that the trial judge was correct in finding that there was no contractual uncertainty and that the exchange of documents was a valid contract for both the sale and lease-back of land. However, it disagreed that an order for specific performance was appropriate here.

First, the Appeal Court agreed that the contract consisted of the offer, the counter-offer, and two amending documents and that when read together, they contained all the essential terms of the lease-back (including the parties names, the rental rate and term and how the lease could be brought to an end). A separate formal lease was unnecessary, even if certain terms might have to be imputed later, in order to address future issues.

Next, the Court pointed out that the parties clearly intended to be bound by their overall agreement even before the formal lease was signed. There was no true condition precedent in the traditional sense; rather the lease was part of a larger transaction. There was no uncertainty and the contract was valid and enforceable.

With that said, the Appeal Court also concluded that the trial judge erred in forcing the agreement to go through by ordering specific performance.

In particular, it took issue with the trial judge's approach to assessing the facts. It was true that the land was a 1600-acre, single-ownership property located close to Regina and that replacement land was likely unavailable. However, the judge should have started the examination with whether damages were an adequate remedy; once that assessment was done, the judge could then turn to considering whether the property was "unique". The overriding legal test is whether justice calls for a specific performance order because damages would be inadequate.

Here, the Company did not have a specific plan for the land; rather it was content to wait-and-see on the best course in the future (*i.e.* development or re-sale). This meant it was incapable of establishing the necessary evidence that money was not an adequate remedy, or that damages were too speculative or uncertain and that an order for specific performance was necessary. The Court also pointed out that since the Company was buying with a view to future profits, an order for specific performance would give it a risk-free period of speculation between the date of the breach and the date of the trial – all at the Harles' expense.

Accordingly, the specific performance order was set aside, and – notwithstanding the Company's vague plans for the land – damages could still be assessed and the matter was remitted back to the trial judge to do so. See *Harle v. 101090442 Saskatchewan Ltd*, 2014 (SKCA).

## LEGAL ALERTS

### Ministry of Finance

On January 23, 2014, the Ontario Ministry of Finance released a report titled "Strengthening Ontario's Mortgage Industry: Five-year Review Recommends New Measures to Protect Consumers". Among the initiatives addressed by the report was the review of the *Mortgage Brokerages, Lenders and Administrators Act*, and the resulting recommendations designed to enhance consumer faith in both the standards of practice that govern mortgage brokerages and in the ongoing initiatives designed to prevent fraud. A full copy of the report is found on the Ontario Ministry of Finance website at www.fin.gov.on.ca.