DE FRANCESCA LAW

REAL ESTATE AND MORTGAGE REPORT

BI-MONTHLY NEWSLETTER EDITORIAL BOARD: PAUL DE FRANCESCA, AMANDA CARPENTER

Volume XVII Number 3 June 2022

Failure to Close a Sale: You can be on Hook for Lost Buyer Profits

In the case *The Rosseau Group Inc. v. 2528061 Ontario Inc.*, 2022 ONSC 486, the plaintiff bought from the defendant a piece of land in Caledon to develop into a green-themed residential development with nature trails. This land was unique by virtue of its heritage features being its wetland and valleys with a significant part of it being zoned for conservation uses. It was a highly valuable property once developed, with the court finding that profits from developing the land into residential homes totaling around 11.12 million dollars. With the finalized purchase price in the Agreement of Purchase and Sale ("APS") being only in the sum of 6.6 million dollars, it was a great deal for the plaintiff.

After the plaintiff paid the initial deposit of $50,000, the purchase price in the APS was reduced from 10.5 million dollars to 6.6 million dollars since the amount of developable acreage was reduced. In addition, the seller had discovered its existing mortgage to have a $200,000 prepayment penalty. To avoid having to pay this prepayment penalty, the defendant wanted the plaintiff to assume this mortgage on closing. In return for agreeing to assume the defendant's mortgage, the plaintiff successfully negotiated with the defendant for a removal of the second deposit of $400,000 from the APS that was due upon a waiver of all conditions. But, the deletion of the second deposit requirement, in fact, was not expressly deleted from the APS.

One of the issues revolves around whether the amended APS nullified the requirement to give the second deposit. The court restated the law on contractual interpretation.

> The proper approach to contract interpretation was summarized by the Supreme Court of Canada in *Sattva*, at paras. 47 and 57:
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> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time

> of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
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> No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
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> (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

Based on the evidence, upon the removal of this second deposit of $400,000 from the contract, the purchase price, initial deposit, assumed mortgage, and the vendor take back mortgage all added up to the amount the plaintiff was to pay on closing. Should the plaintiff have had to pay this additional $400,000 deposit, the numbers as agreed to in the APS did not add up, which helped lead the court to agree with the plaintiff that the second deposit was no longer due upon a waiver of all conditions.

After the plaintiff failed to pay the second $400,000 deposit, and of course after having received some higher offers for the property, the defendant declared the deal to be at an end, declaring the plaintiff to have repudiated the contract by reason of its non-payment. The seller returned the initial $50,000 deposit to the purchaser, thus leading the plaintiff to sue for damages. In the usual course of damages, should a defendant be found in breach of an APS, the buyer is awarded the difference between the purchase price as stated in the APS and the market value of the property on the scheduled closing date.

In this case, the court took a different route and awarded the plaintiff compensation based on lost profit, which in this case was an enormous amount of approximately 11.12 million dollars. Other considerations in support of damages being awarded to the purchaser were evidence of the plaintiff being ready, willing and able to close on the scheduled closing date and the plaintiff being unable to find a similar property to develop. Particularly in regards to its reasoning for awarding damages for lost profit instead of the usual damages, the court found the defendant knew of the plaintiffs intention to develop the property and as such the profit loss was in the contemplation of the defendant.

As such, you should think twice before a contract is ever broken or you could be on the hook for an enormous amount of damages. Damages can be significantly higher than you even contemplated especially when the sale agreement expressly sets out the intention of the buyer for purchasing the property.