Building Relationships

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BARRISTERS & SOLICITORS

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CLOSING DELAY (2)

Builders usually draft their own one-sided agreements. Does it help them? Often. However, sometimes an angry purchaser makes a point. One such point was made in Logger v. Bear Inc. [2007] O.J. 2007 (S.C.J.).

Tomorrow

A purchaser entered into an agreement with a builder for the purchase of a new unit in a condominium. The scheduled closing date was May 1, 2003, but the agreement had a clause that allowed the builder to postpone closing for up to 18 months. Two postponements later, the extended closing date was to be August 1, 2003. On June 7, 2003, the purchaser chose and paid for her upgrades. The unit was not ready on August 1, 2003. The builder extended the closing date four more times to a proposed date of October 31, 2004, one day before the 18-month deadline.

On October 31, 2004, the purchaser showed up with a loaded moving truck, but the builder told her that the unit was not ready. The builder and the purchaser agreed that the purchaser could store some chattels in the unit and that the builder would pay for the purchaser to live in a hotel. The new closing date was agreed to be January 24, 2005.

On January 24, 2005, the unit was still not ready for occupancy and the purchaser finally had had enough. She wanted her money back: $8,000 for the deposit and $7,300 for the upgrades. The builder was willing to comply. However, it wanted to set off the hotel charges it had paid against her deposit and was unwilling to refund the upgrade charges. The builder relied on a clause in the agreement that prevented the purchaser from recovering her upgrade costs if the agreement was not completed.

Gotcha

The judge noted that the 18-month extension period was long gone, but that the purchaser and the builder had agreed to the new January 24, 2005 closing date, with time still of the essence. The judge held that there was no agreement by which the purchaser gave *"an infinitum gratuity to the vendor to complete its project and provide consideration under the Agreement."* The judge therefore held that there was no reason why the builder should have a right of setoff for its own default.

The judge also refused to allow the builder to rely on its confiscation clause for upgrade costs. He applied both tests in Hunter Engineering v. Syncrude Canada [1989] 1 S.C.R. 426 dealing with exculpatory clauses (the majority had set out two differing, but similar, tests). He first held that there was a complete failure of consideration. If that was not sufficient, he held that the builder's use of the clause was unconscionable.

He stated, *"I find it would be unconscionable in the circumstances of this case for the defendant to retain Unit 307 with cabinets and appliances paid for by the plaintiff with the Unit never occupied by her. It would be unfair to the extreme. ... The defendant was in effect, holding the plaintiff hostage in that she had given up her lease of her prior home, was in very temporary and unsatisfactory accommodations provided to her by the defendant. There was a situation of decidedly weak bargaining position of the plaintiff vis à vis the defendant, the latter having full knowledge of the futility or wishfulness of its proposed successive closing dates and accordingly having awareness of its risk of default. The plaintiff's trust in the defendant was abused."*

In the result, the judge ordered the builder to return to the purchaser all monies that she had paid to the builder. He also ordered the builder to pay $9,013.37 in costs; it seems that the purchaser beat her offer to settle.

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LIMITATIONS

Because cases dealing with the effect of the new Limitations Act, 2002 are just percolating through the system, we expect that we will be reporting on a few of them over the next year or two. The latest case, York Condominium Corporation No. 283 v. Jay-M Holdings Inc. [2007] O.J. No. 240, deals with the 15-year ultimate limitation period.

Allegations

In June 2005, a condo sued its developer regarding fire-related construction deficiencies that were discovered in May 2004. The condo joined the City, alleging that it negligently exercised its building inspection duties in 1978. The City brought a motion to strike the statement of claim; it argued that, under the Act, there was a 15-year absolute limitation period and that, accordingly, the condo's cause of action died in 1993.

Section 15(1) of the Act states that a cause of action expires after 15 years, regardless of the discoverability principle. Section 24(5) of the Act, a transition provision, states that if a claim is not discovered by January 1, 2004, then, for purposes of the 15-year rule, the Act applies as if the claim was discovered on January 1, 2004.

The motions judge felt that section 24(5) was ambiguous, would lead to absurd results if applied as the condo claimed it should be, and contradicted section 15(1). Accordingly, he allowed the City's motion and struck the condo's claim.

When we read the decision of the motions judge, we admit to being perplexed. We felt that the interpretation that the judge used was forced and that his "absurdity" example was wrong. It seems that the condo was also perplexed because it appealed the decision to the Ontario Court of Appeal.

Redemption

We will spare you the detailed statutory analysis. In essence, the Court held that:

1. The provisions of the Act should be interpreted liberally in favour of the individual whose right to sue for compensation is in question.

2. Simply because counsel for the City put forward two conflicting interpretations of section 24(5) did not mean that the section was ambiguous.

3. Although section 15 (1) modified the common law discoverability rule, section 24 (5) operated to mitigate the effect of the new legislation on pre-existing, but undiscovered, causes of action.

4. Section 24(5) and section 15(1) were not disharmonious; the latter was the general provision and the former applied only to the transition period.

5. The example that the motions judge used to demonstrate the validity of his interpretation was flawed.

6. The condo's claim was not discovered until 2004. Accordingly, it was deemed to have been discovered for purposes of the 15-year rule, on January 1, 2004. Therefore, the condo commenced its action within the regular two-year limitation period and the cause of action did not expire under the 15-year limitation period.

The Court allowed the appeal and allowed the action to continue.

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MOST PAPER

The disappointed client in Liorti v. Menzies (see our newsletters of February 2007 and April 2007) moved for leave to appeal the Court of Appeal's decision. The Supreme Court of Canada denied leave in May 2007.

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