



# Real Estate News

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## *Only a Fundamental Breach Permits Repudiation*

In *Spirent v. Quake*, 2008 ONCA 92 (CanLII) the sublandlord (“SubLL”) agreed to lease the majority of a building under construction. The subtenant (“SubT”) and the SubLL agreed to sublet a portion of the building. Both leases were to start on June 1, 2001. Due to weather conditions and construction mistakes completion of the building was delayed. In April the SubLL advised the SubT that activity would be delayed until July 15, 2001 (45 days later than the agreed occupancy date). The SubT gave written notice that due to the anticipated failure of the SubLL to deliver the premises on June 1, 2001 and the failure to provide a final form sublease within the required time, it was not prepared to proceed with the sublease agreement. The SubLL accepted the repudiation and was able to sublet the space to a third party at a much-reduced rate. The SubLL sued the SubT for the difference between the amount it would have received under the sublease and what it was actually able to earn on the third party sublease. The trial judge concluded that the anticipated delay in occupancy was a fundamental breach by the SubLL and that the consequences of that breach were “material” to the SubT who was therefore entitled to treat the agreement as at an end.

The Court of Appeal pointed out that although the trial judge correctly stated that a fundamental breach is one that deprives the innocent party of substantially the whole benefit of the contract, the trial judge failed to measure the SubLL’s breach against that standard. The Court of Appeal has repeatedly stated that there are five factors that can be considered when determining when conduct has deprived the innocent party the whole benefit of the contract: “(1) the ratio of the party’s obligations not performed to that party’s obligations as a whole; (2) the seriousness of the breach to the innocent party; (3) the likelihood of repetition of such a breach; (4) the seriousness of the consequences of the breach; and (5) the relationship of the part of the obligation performed to the whole obligation”. The Court of Appeal also pointed out that an “anticipatory breach sufficient to justify the termination of a contract occurs when one party, whether by express language or conduct, repudiates the contract or evinces an intention not to be bound by the contract before performance is due...to assess whether the party in breach has evinced such an intention, the court is to ask whether a reasonable person would conclude that the breaching party intends to be bound by it...when determining whether the party in breach had repudiated or shown an intention not to be bound by the contract before performance is due, the court asks whether the

breach deprives the innocent party of substantially the whole benefit of the contract”.

The SubT argued that the anticipated delay was of fundamental importance because it would have been “out on the street” if it were not able to move into the new premises on June 1, 2001. But the Court of Appeal pointed out that the SubT’s existing landlord had been willing to provide it with a three-month extension albeit at a much higher rate. The SubT would have been entitled to look to the SubLL for the additional costs of maintaining its then existing lease. Moreover, the SubT did not apply for a building permit until March. The Court of Appeal thought that if the June 1, 2001 occupancy was of such importance, the SubT would have applied for its building permit well before then. In addition, the SubT was aware as early as November 2000 that the building might not be ready by June 1, 2001, but did not raise any protest until April 19, 2001. The trial judge had focused on the fourth factor – the seriousness of the breach to the innocent party – but the Court of Appeal did “not accept that the anticipated delay in occupancy had sufficiently serious consequences [to the SubT] that it would have deprived [the SubT] of substantially the whole benefit of the Agreement. This conclusion is reinforced by considering the first and fifth factors, that is, by considering the breach in the context of [the SubLL’s] overall obligation under the Agreement. [The SubLL’s] obligation under the Agreement was to provide [the SubT] with occupancy by June 1, 2001. [The SubT’s] occupancy was to last for three years. In the circumstances, a delay of occupancy of six weeks is not so significant that it amounts to deprivation of substantially the whole

Agreement.”

A reasonable person would conclude that the SubLL had not evinced an intention not to be bound by the Agreement. The Court of Appeal pointed out that the anticipated delay was not the result of the SubLL's action but rather of the weather and mistakes of third parties. The court also noted that in spring of 2001, in Ottawa, more rental space was available and rental rates had declined significantly. The SubLL had a financial incentive to keep the Agreement in place since the SubT's rents payable pursuant to the Agreement were considerably higher than the then market rates. The Court of Appeal held that the SubLL had continued to address the SubT's concerns and attempted to minimize anticipated delays.

The Court of Appeal agreed with the trial judge who found that the failure to provide the final form of the sub-lease was not a fundamental breach because all material provisions with respect to the agreement to lease were already contained in the offer to sub-lease and both parties had treated the offer as a binding agreement between them.

The Court of Appeal granted judgment in favour of the SubLL in the amount of \$1,096,793.87 being the difference in the rent that would have been collected over a period of three years from the SubT compared to the reduced rents paid by the third party SubT.

### **Builders Cannot Make Fundamental Changes**

In *Brooker v. Independence Way Inc.*, [2007] O.J. No. 4692 the buyers purchased a condominium unit to be constructed. A drawing was attached to the agreement that showed that the

furnace was to be located in a walk-in closet in the master bedroom. The seller's form of agreement contained an acknowledgment by the buyers that the location of the furnace would be determined by the architect and not as necessarily shown in the brochure, and went on to state that the buyers would be deemed to accept any such change. Without advising the buyers, the builder installed the furnace in the front hall closet. The buyers testified that “the front hall closet was rendered useless by the placement of the furnace in one half of the closet and by bringing forward the rear wall of the closet to within six inches of the closet doors”. The buyers refused to close and sued the builder for the return of their \$10,000 deposit. A deputy judge of the Small Claims Court found against the buyers and they appealed to the Superior Court of Justice. The Superior Court of Justice considered whether the change was a fundamental change as discussed in two Ontario Court of Appeal cases.

In *Danko v. 792207 Ontario Ltd.*, [2004] O.J. No.1542 (C.A.) the purchasers had contracted to receive a cathedral ceiling over the family room. “The Court held that there was evidence which subjectively and objectively supported a finding that the cathedral ceiling was a crucial feature of the home.” The Court of Appeal further held that a “provision allowing unilateral changes by the vendor was not unlimited and did not apply to fundamental changes”.

In *Kingsgate Homes v. Goliszek*, [2001] O.J. No. 1258 (C.A.) the purchasers contracted for a house with a detached garage at the side of the house instead of in front. The Court of Appeal agreed with the trial judge that the placement of the garage in front of the house was a material or

fundamental change entitling the buyers to refuse to close and to the return of their \$20,000 deposit.

In the *Brooker* case the Superior Court of Justice found on the basis of both subjective and objective evidence that the changed furnace location constituted a fundamental change. The Superior Court of Justice held that the deemed acknowledgement by the buyers “cannot be construed as unlimited and does not apply to fundamental changes”.

### **Editor's Comment:**

These decisions will make it difficult for lawyers to advise their new home buyer clients if a change is “fundamental” or not. Most new house contracts explicitly allow the builder to alter elevations, change materials, construct mirror images etc. If the buyers, objectively and subjectively, object to the change as being fundamentally different then what they contracted for, will a court enforce the builder's explicit terms in the contract? Would it matter, for example, if the builder had a legitimate reason for the change?

### **New Power of Attorney Rules**

In the last issue we speculated that the Ministry of Government and Consumer Services would make registration of powers of attorney mandatory. We also wondered if the Ministry would prescribe a law statement.

At the time of writing, the Ministry has just issued *Bulletin Number 2008-02* dealing with new registration requirements for transfers of title and new power of attorney requirements. It will now be necessary to scan in a copy of the power of

attorney. In addition the lawyer will have to make law statements which will require the lawyer to interview the attorney(s) to determine that the attorney(s) is the lawful party named in the power of attorney, that the attorney(s) is acting within the scope of the authority, that the attorney(s) believes that the power was lawfully given, and that the power has not been revoked. As part of the due diligence requirement of Rule 2.02(5) and case law, solicitors should obtain, and retain, photo identification from the attorney(s).

### ***When Must a Vendor Deliver Vacant Possession?***

Bob Arron answered this question in his February 9<sup>th</sup>, 2008, article in The Toronto Star.

Paragraph two of the *Standard Form Agreement of Purchase and Sale* published by the Ontario Real Estate Association provides that vacant possession is to be given “upon completion”, but when, precisely, is the purchaser entitled to vacant possession?

In *Cooper v. Mysak* (1986), 54 O.R. (2d) 346, the purchaser was looking for an opportunity to avoid his purchase if he could. The two lawyers met at the Registry Office at 3:30 p.m., on the day set for closing. But at that time, the vendor’s house was occupied by tenants who were in the

process of moving, but who did not, in fact, vacate the premises until 9:30 that evening. The purchaser could not provide vacant possession “upon completion”. The Ontario High Court held that it was only a breach of a fundamental term that entitles the innocent party to repudiate the contract. A delay of a few hours in providing vacant possession on the day set for completion is not a fundamental breach provided that possession is provided on the day set for closing.

The *Cooper* case was most recently considered by the Small Claims Court in *Foord v. Smith* (1993), 33 R.P.R. 279. Mr. Foord completed his purchase about 3:00 p.m., on the day of closing. His movers arrived at his new home about 6:00 p.m. Unfortunately, the Smiths were still in possession and refused to permit access for Mr. Foord’s movers. Finally, at about 9:00 p.m., the purchaser’s movers had to return to Toronto with the furniture still loaded on the truck. Mr. Foord sued the Smiths for the extra \$1,400.00 charged by the movers to make a second trip back to his new house. He also asked for \$400.00 in hotel expenses, since he could not occupy his new premises until the furniture was re-delivered by his movers.

In the *Foord* case the deputy judge held that the *Cooper* case does not stand for the proposition that vacant

possession can be delivered at any time up until midnight of the day of closing, as the vendors’ lawyers suggested. *Cooper* establishes that completion can occur after the Registry Office closes and that a small delay in providing vacant possession is not a fundamental breach entitling the purchaser to repudiate the contract. The general proposition is that vacant possession must be given to the purchaser upon completion, as specified in the contract. The Small Claims Court awarded judgment to Foord for his extra moving costs but awarded nothing else for his inconvenience or extra hotel costs.

Mr. Arron states that the *Foord* case “serves as a useful reminder that at the moment the sellers’ lawyer receives the purchase money and hands over the key, the sellers should be completely moved out of the house. If they aren’t out, and a purchaser’s movers are charging by the hour, the sellers are going to have to pick up the tab.” ■

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