Real Estate News

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Inducing Breach of Contract

In *Erie Sand and Gravel v. Seres' Farms and TRI-B,* 2008 CanLII 43583 (ON S.C.), Seres owned approximately fifty acres of land that contained about half of all known remaining aggregate in the County of Essex. Erie was in the sand and gravel business. TRI-B had a right of first refusal for the parcel Erie wanted to purchase. If Seres received an offer to purchase, TRI-B had five banking days to purchase the property by delivering a signed offer to purchase with the same deposit, terms and conditions.

Erie knew of the TRI-B's right of first refusal, and advised Seres that it would not submit a written offer until all terms had been verbally agreed upon. When agreement was reached, Erie submitted a signed offer to purchase incorporating the agreed terms together with the deposit for the entire agreed purchase price of $1,193,08.00 (a deliberate strategy by Erie to make it more difficult for TRI-B to match the offer). The offer was conditional upon TRI-B not matching the offer within five business days. Seres did not sign the offer to purchase but did deliver it to TRI-B immediately. TRI-B submitted its own offer to purchase on the same terms as the Erie offer except the deposit was only $25,000.00 and the closing date was delayed by a few weeks. Seres accepted TRI-B's offer. Erie started its action four days later. TRI-B agreed to pay Seres' legal fees, to file a defence on behalf of Seres and to share a common solicitor to defend Erie's claim for specific performance.

TRI-B argued that Seres and Erie had not reached an agreement, that they had done nothing more than to agree to agree. The Court disagreed, referring to *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.,* [1991] O.J. No. 495 (Ont. C.A.), wherein Robins J.A. stated:

> When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites of the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

TRI-B then argued that the verbal agreement was unenforceable because it contravened section 4 of the *Statutes of Frauds*, which provides that no action shall be brought to charge any person upon a contract for the sale of lands unless the agreement, or some memorandum or note thereof, is in writing and signed by the party to be charged. TRI-B pointed out that Seres had not signed the offer to purchase. The Court held that section 4 of the Act can be excluded by the doctrine of part performance provided that the performance unequivocally refers to and supports the existence of the agreement and is amenable to no other interpretation. The Court found that there were unequivocal acts of part performance: Erie had prepared and delivered its offer to purchase; the offer reflected the material terms, the parties, the property, and the price; Erie delivered a certified cheque for the full purchase price; Erie knew and expected that delivery of the agreement would trigger the TRI-B right of first refusal; Seres delivered the Erie offer to TRI-B; the TRI-B offer was a virtual mirror image of the Erie offer except for the amount of the deposit and the extended closing date. Accordingly, the Court held that the Erie offer was a valid and enforceable agreement. TRI-B did not match the Erie offer and by Seres accepting the TRI-B offer it had breached its agreement with Erie.

The Court found that Erie was entitled to specific performance because the property was unique to Erie who was dependant upon the supply of aggregate to continue its stone and gravel business, because aggregate is scarce in the County of Essex and 50% of the remaining aggregate is located on the property representing a five to ten-year supply of aggregate for Erie's needs.

After finding that Erie was entitled to specific performance, the Court considered Erie's claims for damages against TRI-B for inducing Seres' breach of contract with Erie, in the event that the Court's finding that Erie was entitled to specific performance should be overturned:

The four elements that Erie must prove to support its claim of inducing a breach of contract (also referred to as a tort of conspiracy) are:

a) a finding that the defendants agreed to act unlawfully;
b) their conduct was directed toward the plaintiff;
c) that the defendants should have known that their conduct was likely to injure the plaintiff; and
d) the finding that the plaintiff suffered damages.

The agreement to act unlawfully [Item a above] can be an agreement to interfere with the contractual rights of the plaintiff. The elements of the tort of inducing breach of contract or interfering with contractual relations are:

a) an enforceable contract;
b) defendant's knowledge of the plaintiff's contract;
c) an intentional act on the part of the defendant to cause a breach of that contract;
d) wrongful interference on the part of the defendant; and
e) resulting damage to one of the parties to the contract.

The Court held that the necessary elements of inducing a breach of contract against TRI-B had been established. TRI-B had a copy of the Erie offer. Seres advised him that the Erie offer was acceptable and that TRI-B would have to match it if it wanted the property. TRI-B was unable or unwilling to match the Erie offer. TRI-B had prepared its own offer and encouraged Seres to accept it and agreed to indemnify Seres and arranged to defend Erie's action against both Seres and TRI-B.

Can an Administration Charge be a Criminal Rate of "Interest"?

Section 347 of the *Criminal Code* defines a criminal rate of interest as an interest charge having an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty percent of the credit advanced under an agreement or arrangement. Anyone who enters into an agreement to receive a criminal interest rate is guilty of an indictable offence and liable for imprisonment for a term not exceeding five years or guilty of an offence punishable on summary conviction and liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

In *Peter De Wolf v. Bell ExpressVu Inc.,* 2008 CanLII 46128 (ON S.C.) Mr. De Wolf subscribed to television services provided by Bell ExpressVu Inc. ("Bell"). On several occasions Mr. De Wolf had not paid his monthly account on time and Bell had charged him interest together with an administration fee which was currently twenty-five dollars, having been increased from nineteen dollars. Mr. De Wolf claimed that the administration fee was a criminal rate of interest. Bell argued that the one-time fee constituted liquidated damages based on studies undertaken by it to determine its collection cost, if a customer's account remained outstanding for sixty days or more.

The Court pointed out that an agreement to defer payment of an amount due under an agreement for goods or services constitutes an agreement to advance credit. Here, Bell allowed a subscriber to delay payment of the monthly charge. The Court continued, "In the case at bar, for the payment cycle, payment for the television services is due on day 25, interest is levied beginning on day 30, the administration fee is imposed on day 60, and the service is soft disconnected on day 75 if payment is not made. Until day 75, the customer has the benefit of Bell ExpressVu's uninterrupted service for which the customer has an outstanding indebtedness for which payment is overdue. Under this arrangement, it would appear to the customer that he or she can delay payment for the services he or she has received and will be receiving without losing the benefit of the contract for television services. The customer would believe that he or she is paying something more for the receipt of the goods or service. This appears to be advancing credit in return for paying the interest charge and the administration fee. This arrangement does not have the appearance of the enforcement of a breached contract."

Accordingly, the Court found that the administration fee was a criminal rate of interest and accepted Mr. De Wolf's actuary's opinion that the effective rate of interest charged by Bell ranged from two hundred percent to three hundred and forty-eight percent.

Is There a Duty of Good Faith to a Bidder Responding to a Tender Request?

In *Aloia Bros. Concrete Contractors Ltd. v. Regional Municipality of Peel,* 2008 CanLII 43580 (ON S.C.)*,* Aloia submitted a bid, on the Township's form of tender, to undertake a road stabilization project. The form of tendering included a "privilege clause" which permitted the Township to refuse to award the contract if the

required approvals were not obtained by a specified date. Aloia submitted the lowest bid but the Township evoked the privilege clause and cancelled the bidding process because the Niagara Escarpment Commission did not give its approval in time for the project to be completed within the time required in other approvals. Aloia sought damages alleging that the Township had not conducted the bidding process in good faith.

Citing *George Wimpey Canada Ltd. v. Hamilton-Wentworth (Regional Municipality),* [1997] O.J. No. 3644 the Court held that "the law implies an obligation on the owner of fairness in exercising its rights under the privilege clause. The reason is to ensure that everyone is bidding on the same basis with no hidden preferences. The language of the privilege clause is clear, but more explicit language is required to exclude the implied obligation of fairness and good faith". The Court of Appeal held (see [1999] O.J. No. 3273):

> There is a long line of authority for the proposition that the owner is obliged to treat all bidders fairly and in good faith and that the owner is in breach of contractual obligations under [the invitation to tender] Contract A where it awards the contract on the basis of considerations or criteria extraneous to those identified in the tender documents.

The Court found that the Township had acted in good faith. The tender documents were explicit that commencement of the work was conditional upon receipt of the specified approvals and permits, including the approval of the NEC. The privilege clause was also explicit and included the right to cancel the call for bids. At a site meeting prior to the submission of bids, the bidders were put on notice that permits and approvals had to be in place before work could commence. To the extent that those present at the site meetings were left with the impression that approvals would not prevent the construction from commencing, there was no intention on the part of the Township representatives to either withhold information or to mislead. The Township had a reasonable basis for believing that the NEC approval, already received but subject to an appeal, would either be withdrawn by the parties who had filed an objection or that NEC would make a ruling in sufficient time to allow construction to begin. In addition, the Township employees had met with the objectors to discuss their concerns and had, they believed, answered the concerns raised by the objectors about the impact of the proposed project.

Misappropriated Funds Invested in Matrimonial Home

This is a sad case. Paul Penna died in 1986 leaving an estate worth $24 million. Barry Landen was appointed as one of his executors. Landen described his relationship with the deceased as follows: "over the years, my relationship with Paul developed into more than that of an employer/employee, became closer to a father/son relationship. Paul and I were close and trusted friends". Landen then proceeded to divert $2,668,486.00 from his "friend's" estate and several million additional dollars were also missing and unaccounted for.

Part of the diverted funds were used by Landen to purchase a luxury residence costing $1,185,000.00 which he further upgraded at a cost of $942,054.00. Title was taken in Mrs. Landen's name and the home was occupied by both as their matrimonial home. At the trial, the new estate trustees and several beneficiaries obtained a declaration that the matrimonial home was held by the wife on a constructive trust for the estate and the Court made a vesting order in favour of the estate. The wife appealed.

The wife argued that the Court's declaration that she held in trust for the estate would be a proper remedy against her husband but not against her. The Court of Appeal found that the wife never had a beneficial ownership in the home because neither she nor her husband paid anything towards the purchase or renovations totalling more than $2 million. All the money had been misappropriated by her husband from the estate.

Mrs. Landen argued that she had contributed over $8,100.00 per month to pay for the mortgage, maintenance and utilities which, she said, should be deducted from any future sale of the home and paid to her. The Court disagreed. It turned out that she had made the mortgage payments for only four months. "Moreover, [the wife] and the Landen family had lived rent-free for a decade in a luxury Forest Hill home... Finally, there is a personal debt of the [wife] and her husband of approximately $1 million secured against the home which the estate will have to pay off on closing of the sale of the property. In these circumstances, any notational entitlement the [wife] might have to reimbursement for personal money directed toward the Forest Hill home is rendered nugatory by the financial benefits which she has enjoyed during a decade of living in the home". The case is *Langston v. Landen (*2008), 90 O.R. (3d) 673.

Right to Partition - the Hardship Test

Sections 3 and 4 of the *Partition Act* provide that joint tenants and tenants in common may be compelled to suffer partition of a property or a sale thereof under the direction of the Court.

In *Bailey v. Rhoden,* 2008 CanLII 42427 (ON S.C.) on complicated facts, three young adult siblings inherited a house which had been occupied by them and their uncle with whom they had lived following their mother's death when they were very young. The relationship had deteriorated to the point that the parties could no longer live together. The uncle had acted as if he were the owner of the home and had, on occasion, expelled one or more of the siblings and had required that they pay rent to him. The siblings were not aware, until they were young adults, that they owned the home. One of the three children conveyed her one-third share to her uncle. The other two siblings brought an application under the *Partition Act* to sell the home and the uncle objected.

At one time it was thought that the Court had no discretion in such applications and was compelled to grant partition if requested by one joint-tenant. In 1950, the Court of Appeal determined that, although a joint tenant has a *prima facie* right to partition, the Court does have a discretion to refuse partition or sale if it can be established that the applicant was behaving maliciously, oppressively, or with a vexatious intent toward the non-applicant co-owner. The Court held that "oppression could include 'hardship' and … a judge could refuse partition and sale if hardship to the co-tenant resisting the application is of such a nature as to amount to oppression:"

> The evidence does not establish that the parties in this case *ever* really operated as joint tenants… The respondents were not even aware of their rights until 2000 at the earliest. Until that date, Donald [the uncle] appears to have conducted himself as if he was the owner of the property and there is substantial evidence that he continued to do so after that time. While the applicants lived in the house from time to time, their evidence suggests that they did so on Donald's terms. If their evidence is accepted, [the uncle's] conduct excluded them from their own home. I am satisfied that the conduct of the applicants is motivated simply by a desire to realize their interests in the property and is not brought for malicious, vexatious or oppressive reasons.

Accordingly, the Court ordered that the home be sold, that the uncle was to grant access to the premises, that the sale was to be completed before a stated date and that the uncle was to deliver-up vacant possession on or before that date. A further reference was ordered to determine all other issues relating to the conduct of the sale and the taking of accounts to take into account the fact that the uncle alone had paid for the mortgage, the taxes and the maintenance of the property and the applicants' claim for occupation rent. ■

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