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Scary Cases on Communication

Scary Communication Issues for the Real Estate Practitioner Ontario Bar Association's Institute

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Good Faith

Bhasin v. Hrynew[1]

Cromwell J. (McLachlin C.JC. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. Concurring):

> 73. …I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract…The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith…[2]

[1] 2014 SCC 71.

[2] *Ibid.*

Notice in Writing - Timing

Gaywood-Hall Developments Ltd. v. Wilkes et al.[3]

Background:

An offer to purchase was conditional on the purchaser being able to purchase adjoining acreage and to obtain municipal permission to subdivide before August 15, 1969. The purchaser had the right of waiver to be exercised on or before August 15, 1969. Time was stated to be of the essence.

The purchaser specifically instructed his solicitor to advise the vendor before August 15, 1969 that he was waiving the conditions. The solicitor neglected to comply with his client's explicit instructions, not notifying the solicitor for the vendor until August 18.

Decision:

The purchaser's action for specific performance was dismissed with cause.

> 21. It is elementary that, where a party to a contract wishes to benefit from a right of waiver of a condition in that contract and where he is contractually obliged to exercise that right within a limited time, he must communicate the waiver to the other party within that time.[4]

Notice – To Whom?

McKee v. Montemarano[5]

Background:

The Offer was conditional upon the buyer performing due diligence by a specified date. The offer provided that unless the buyer gave notice in writing, delivered to the seller, not later than 5:59 p.m. on the 1st of February, 2006, the offer would be null and void and the deposit returned to the buyer.

The waiver was left at the front door of the seller's residence sometime in the afternoon of February 1. No one delivered the waiver to the seller personally prior to February 1, 2006.

> 13. Mr. Montemarano, the buyer, admits that he made no effort whatsoever to deliver it to Mr. McKee, the seller, personally. He did not knock on the door. He did not telephone the McKee home prior to his arrival or on his arrival by cell phone, to ensure that Marvyn McKee was there to accept delivery…

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[3] 1872 CarswellOnt 326.

[4] *Ibid.*

[5] 2008 CarswellOnt 4285.

> 15. …He said he put it through the hole formed by the two front door latches. Whatever he did with it there and I do not accept that he used any particular care in leaving it, he made no effort to see that it got to Mr. McKee personally that day…[6]

Decision:

> 57. ...In this case, the provision in the due diligence clause itself providing for delivery of notice to the seller was not met…[7]

High Tower Homes Corp v. Stevens[8] was also a case where a condition for the purchaser's benefit provided for waiver "by notice in writing to the seller" within the time period stated in the agreement.

The purchaser's solicitor, however, gave notice to the vendor's solicitor, by fax, purporting to waive the conditions for the purchaser's benefit.

The Court of Appeal held that the contract was clear. Notice should have been delivered personally. The purchaser's action was dismissed.

Extension of Time

Background:

1375687 Ontario Ltd. v. Novatec Construction Ltd.[9]

The agreement of purchase and sale for an apartment building in St. Catharines provided that the purchaser's due diligence condition could be waived, but only until 4:00 p.m. on November 15, 1999. If the purchaser failed to waive the condition in writing by that time, the agreement would be null and void.

On Monday, November 15, 1999, the day the waiver had to be exercised, the two lawyers spoke at about 3:00 p.m. The solicitor for the purchaser asked the lawyer for the vendor for an extension of the conditional period for at least one day. The solicitor for the vendor responded to the solicitor for the purchaser that "I would speak to my client and get instructions but that I did not think it would be a problem".

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[6] *Ibid.*

[7] *Ibid.*

[8] 2014 ONCA 911.

[9] 199 CarswellOnt 4032.

Unfortunately the vendor did not agree to the extension and somewhere between 3:30 p.m. and 3:40 p.m. on November 15, the lawyer for the vendor told the lawyer for the purchaser that the vendor had not agreed to the extension.

After the lawyer for the purchaser contacted his client, the purchaser waived its condition. The lawyer for the vendor was told of the waiver somewhere between 4:02 p.m. and 4:10 p.m.

The issue was whether the vendor could rely on time is of the essence or whether the words used by the solicitor for the vendor raised a reasonable conclusion in the purchaser's lawyer's mind that an extension had been granted until the next day.

Decision:

21. The circumstances of this case point to the dangers of lawyers being less than clear in their communications. Lawyers should not say things to the effect of "it won't be a problem" unless they are able to act on their undertakings. Words like that create the impression that instructions are really in hand. They are tantamount to saying, "don't worry about it". This in turn sets up the reasonable expectation in the other side that it has more time to deal with the issues. This is so particularly where the lawyer are friends. If this was not to be the case, the solicitor for the vendor should have made that abundantly clear. The onus is on lawyers to make it clear they are not in a position to bind their client without clear instructions. It is not fair for a party to set up an atmosphere of reliance, only to withdraw from it at a time when the other party is not able to respond in time…The situation is particularly difficult when lawyers attempt to work in an atmosphere of trust and collegiality. A lawyer should be able to rely on what a fellow lawyer says.[10]

A Building Permit Requisition and Title Insurance

Background:

Thomas v. Carreno[11]

The purchaser bought a property for $1,510,000.00. The deposit was $100,000.00.

After entering into the agreement of purchase and sale, the purchaser discovered the existence of an open building permit in relation to some construction on the property which had taken place about four years earlier. After receiving a requisition relating to the open building permit and after the purchaser refused to extend the closing date, the lawyer for the vendor obtained a commitment from the title insurance company that the open building permit requisition could be satisfied by the

[10] *Ibid.*

[11] 2013 ONCA 556, 2013 CarswellOnt 12821.

title insurer's commitment to provide title insurance as contemplated by the agreement of purchase and sale.

The vendor's solicitor emailed the purchaser's solicitor at 3:55 p.m. taking the position title insurance was available to satisfy the requisition.

The purchaser's lawyer did not monitor her fax machine after 4:00 p.m. and did not see the vendor's lawyer's fax until after 6:00 p.m. She did not believe that the requisition had been satisfactorily answered and therefore refused to close.

Decision:

The purchaser was not entitled to terminate the agreement once the vendors obtained a title insurance commitment and offered to provide that commitment to the purchaser's lawyer.

> 40. Until 6:00 p.m., the Agreement was in full force and effect, and the parties had a duty to act in good faith and were required to do what was necessary to fulfill their obligations under it. Once the vendors obtained a commitment for title insurance and offered to provide title insurance with reference to paragraph 10 of the Agreement, there was an obligation on the Applicant to follow that up and order insurance. By prematurely ignoring the matter after 4:01 p.m. there was a failure to comply with the duty to continue to carry out the terms of the Agreement and to take necessary steps to act in good faith to close the transaction.[12]
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> 41. Both lawyers, being busy with other transactions that were closing, appear to have left this matter to the last minute; however, there was an obligation on both sides to act in good faith and do what was necessary within the time frame set out by the Agreement of Purchase and Sale.[13]

Building Permit

Background:

1473587 Ontario Inc. v. Jackson[14]

The vendor entered into an agreement to sell about 12 acres of land to Loblaws for $1,800,000.00. Although the deposit of $75,000.00 was to be paid by Loblaws within five days of the execution of

[12] *Ibid.*

[13] *Ibid.*

[14] (2005), 29 R.P.R. (4d) 9.

the agreement, the deposit, through Loblaws' inadvertence was not paid until seven days later than stipulated in the agreement.

The vendor refused to close. The issue was whether the vendor was entitled to treat the agreement at an end because of the late payment of the deposit cheque.

Decision:

The Court referred to the decision of Union Eagle v. Golden Achievement,[15] which dealt with the purchase of a $4,200,000.00 flat which was to close before 5:00 p.m. on September 30, 1991. The purchaser's lawyer arrived at 5:10 p.m. The vendor rescinded at 5:11 p.m.

Lord Hoffman concluded as follows:

> 20. …The fact is that the purchaser was late. Any suggestion that relief can be obtained on the ground that he was only slightly late is bound to lead to arguments over how late is too late, which can be resolved only by litigation. For five years the vendor has not known whether he is entitled to resell the flat or not. It has been sterilised by a caution pending a final decision in this case. In his dissenting judgment, Godfrey J.A. said that the case "cries out for the intervention of equity". Their Lordships think that, on the contrary, it shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, equity will not intervene.

The Court therefore held that Loblaws, although it failed to pay the deposit cheque within the time specified through inadvertence, breached a term of the agreement which the Court held was a fundamental breach entitling the vendors to treat the contract as discharged.

Stevens v. Stevens[16]

Background:

This case dealt with whether a marriage contract should be set aside because of a fundamental mistake.

It was clear from correspondence that the wife intended to give her husband one-half of the value of the matrimonial home. The marriage contract mistakenly stated that the wife would give him the full value of the matrimonial home.

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[15] 2005 CarswellOnt 712.

[16] 2013 ONCA 267.

Decision:

70. Accordingly, equitable relieve may be granted where one party, knowing of the other's mistake as to the terms of an offer, remains silent and concludes a contract on the mistaken terms. The party seeking equitable relief need not necessarily prove actual knowledge on the part of the party seeking to uphold the contract if the circumstances are such that the mistake would have been obvious to a reasonable person in that party's situation.[17]

71. Equitable relief may also be granted if the unmistaken party ought to have known of the other party's mistake.[18]

The Court concluded that there was no enforceable agreement.

[17] *Ibid.*

[18] *Ibid.*