Publisher's Note

2018 — Release 3

Previous release was 2018-2

From Your Library:

☐ _____

☐ _____

☐ _____

☐ _____

☐

McDermott

Canadian Commercial Real Estate Manual

The *Canadian Commercial Real Estate Manual* addresses the unique requirements of the commercial real estate industry. It covers the critical stages of development from acquisition through property management. The primary tabs are: Financing, Taxation and Investment Analysis, Development and Conveyancing, Agreements, Precedents and Checklists.

This release features updates to the case law and commentary in Chapters 6 (The Law of Mortgages), 8 (Remedies), 36 (Construction and Development), 38 (Acquisitions and Dispositions), and 40 (Special Agreements).

Highlights

Construction and Development — Development Cost Sharing Agreements — Whether "Onerous or Unreasonable" — Whether at Purchaser's Cost — Where the agreement of purchase and sale required the vendor to have the zoning for a development in place on closing, and to make the necessary payments to accomplish that end, the provision in the agreement that if the conditions were "onerous or unreasonable", the purchaser would have the opportunity to satisfy same at its own expense

THOMSON REUTERS CANADA

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
Fax 1-416-298-5082 (Toronto)
Fax 1-877-750-9041 (Toll Free Canada Only)
Email CustomerSupport.LegalTaxCanada@TR.com

was not applicable in this case as the cost sharing agreement with the municipality was not unreasonable. In this case, the vendor entered into an agreement with a purchaser for the sale of the subject property that was part of a larger parcel. The sale price was $3.96 million. The vendor was responsible for applying for the severance required to complete the sale, and for satisfying any conditions at its sole expense. If the conditions were "onerous or unreasonable", the vendor could terminate the agreement or offer the purchaser the opportunity to satisfy the conditions at the purchaser's cost. The vendor was granted the severance on certain conditions, including that it sign a cost sharing agreement, and make a payment of $407,582 for the costs of providing services and infrastructure for the development of the property. The purchaser signed the agreement, and paid the cost sharing obligation. The purchaser the applied for repayment of the sum of $407,582. The purchaser's application was granted.

If the condition obliging the "owner" of the land to make the payment was onerous or unreasonable, then the vendor had the right to refuse to satisfy the condition, and give the purchaser the choice of satisfying it or withdrawing from the agreement. This clause of the agreement made clear that the parties intended the property to be rezoned to account for the purchaser's intended development with the vendor bearing responsibility to pay for the costs associated with the rezoning. The purchaser's entry into the cost sharing agreement, and the payment of the accompanying obligation was the condition to be satisfied for the zoning, and the agreement was clear that it was the vendor's responsibility to have such zoning in place by closing, and to make the necessary payments to accomplish that. The value of the property being sold would go up in accordance with the costs of the approvals obtained, and the purchaser at least accounted for such costs in considering the purchase price. The surprise of those acting for the vendor upon finding it had to make the cost sharing payment did not render the condition "onerous or unreasonable". Whatever those words stood for, they did not encompass the failure to understand the obligations of a freely entered into contract so as to allow the vendor to transfer the obligation it was required to fulfill to the purchaser because it did not take the obligation into account in setting the sale price. There was no evidence to suggest that the cost of $407,582 represented an unreasonable cost for the share of the services to be provided under the cost sharing agreement attributed to the parcel of land that was the subject of the sale: *Union Building Corp. of Canada v. Markham Woodmills Development Inc.* (2017), 89 R.P.R. (5th) 190, 2017 ONSC 4514, 2017 CarswellOnt 12490, [2017] O.J. No. 4208 (S.C.J.).

Acquisitions and Dispositions — Vendor Having Equity Agreement with Province — Right of First Refusal Not Registered as Caveat — Purchaser Refusing to Close — Where the vendor entered into an offer

to sell its property without disclosing that it had equity agreement with the province that contained a right of first refusal in the province's favour, the purchaser's action for the return of its deposit and damages was dismissed as the province had not registered a caveat, and its interest would be extinguished because the purchaser would have had indefeasible title if it proceeded to take title. In this case, the vendor entered into an offer to sell its property without disclosing to the purchaser that it had an equity agreement with the province that contained a right of first refusal (ROFR) in favour of the province. The province had a ROFR if the hospital land was being used for hospital purposes. The vendor ceased operating the property as a hospital but did not provide notice to the province of its intention to sell the property. The ROFR was not registered against title. In anticipation of closing, the purchaser took several steps to facilitate the redevelopment of the property. When the purchaser learned of the ROFR, it refused to close without first addressing the issue. The vendor refused to grant an extension, and the purchaser refused to close the sale transaction in July 1999. In August 1999, the province indicated it was forgoing its ROFR. The vendor sold the property to a third party. The purchaser commenced an action seeking the return of its deposit of $250,000, and damages. The vendor brought an application for summary dismissal of the action. The vendor's application was dismissed. The Master found there was a triable issue whether a cloud on title justified the purchaser's failure to complete the purchase, and whether the vendor breached a duty of good faith by failing to disclose the province's ROFR. The vendor appealed, and its appeal was dismissed.

The chambers judge found there was evidence that could be adduced at trial as to whether there was a cloud on the title. There was a viable argument that there was a reasonable threat of litigation by the province right up to the potential closing of the sale. It was not clear the principle of indefeasibility would have been applicable. Any issue as to whether the ROFR was valid and enforceable depended on an interpretation of the documentation involving the equity agreement. A trial was also needed to determine whether a basic duty of honesty required the vendor to disclose to the purchaser its contractual relationship with the province. The vendor further appealed to the Court of Appeal, and its appeal was allowed. There was no evidence to support the allegation of fraud. The province had not registered the caveat, and its interest would be extinguished. If the purchaser had taken title it would have had an indefeasible title, and a defence to any claim by the province. Given there was no evidence of any misrepresentations by the vendor, and the conclusion that the purchaser's interests were not affected by the relationship between the vendor and the province, there could be no concerns whether the vendor was undermining the purchaser's legitimate contractual interests in bad faith by failing to disclose or by failing to postpone the closing. There was no basis for the

chambers judge to conclude that further evidence was required to determine the claims based on a lack of honesty and good faith. The undisputed facts were sufficient to conclude that the purchaser's action could not succeed: *Angus Partnership Inc v. Salvation Army (Governing Council)* (2018), 90 R.P.R. (5th) 175, 2018 CarswellAlta 1049, 2018 ABCA 206, [2018] 8 W.W.R. 440, 422 D.L.R. (4th) 721, 70 Alta. L.R. (6th) 79, reversing *Salvation Army v. Angus Partnership Inc.* 2017 ABQB 568, 2017 CarswellAlta 1725.

Special Agreements — An Analysis of Ground Lease Provisions — Lease Agreement — Renewal by Tenant — Landlord Waiving Strict Compliance With Renewal Provision — Whether Revocation of Waiver — When the landlord waived strict compliance with the renewal provision under the lease, the landlord's subsequent revocation of that waiver was not effective where it did not provide reasonable notice to the tenant as it did not clearly indicate that the landlord would be insisting upon strict enforcement of its legal rights or provide the tenant with a reasonable period to cure the breach of the lease. In this case, in March 1997, the parties entered into a 21-year ground lease in respect of the premises. The tenant operated a restaurant on the premises and had built and renovated the restaurant, investing significant funds. The parties agreed the original term of the lease would end on March 10, 2017. The lease included an option to renew for two consecutive additional 10-year terms. The tenant gave proper notice of its intention to renew the lease for an additional 10-year term prior to the end of the original term, but the parties could not agree on the rent nine months prior to expiration of original term as required. The landlord applied for a declaration that the lease would terminate in May 2017; and the tenant applied for a declaration that the lease had been renewed to 2027, and for an order that parties proceed to arbitration to establish the fair market rental rate. The landlord's application was granted; the tenant's application was dismissed.

The application judge held that the renewal provision required the tenant to do more than provide notice of its intention to renew. She further found that because the parties could not agree on the rent at least nine months prior to the end of the original term, the tenant was required to refer the issue to arbitration or revoke its intention to renew. As the tenant had done neither, the application judge found that the lease came to an end on March 10, 2017, because the tenant failed to comply with the renewal provision. She went on to find that the landlord waived its right to insist on strict compliance with the terms of the renewal because the parties were engaged in negotiations, but that it later revoked the waiver. She also found that relief from forfeiture was not available. The tenant appealed, and its appeal was allowed. The application judge made a palpable and overriding error of mixed fact and law in her finding that the landlord properly revoked its waiver. The landlord waived strict compliance with the renewal provision

under the lease. The revocation of the waiver was not effective as it did not provide reasonable notice to the tenant. The email which the application judge took as revocation of the waiver did not clearly indicate that the landlord would be insisting upon the strict enforcement of its legal rights. The email also did not provide the tenant with a reasonable period to cure the breach of the lease. Because the waiver had not been revoked, the lease was declared to have been renewed for the renewal term, and the issue of fair market rent was referred to arbitration: *North Elgin Centre Inc. v. McDonald's Restaurants of Canada Ltd.* (2018), 87 R.P.R. (5th) 315, 2018 CarswellOnt 937, 2018 ONCA 71, [2018] O.J. No. 449, reversing 2017 CarswellOnt 9354, 2017 ONSC 3306, [2017] O.J. No. 3121 (S.C.J.).