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Value of property a key to proving breach of contract

By **James R.G. Cook**

Law360 Canada (August 6, 2024, 2:41 PM EDT) -- In cases where sellers have failed to complete a binding agreement for the sale of property, the buyers may understandably assume that they have a valid claim for breach of contract. Buyers should nevertheless carefully assess the prospect and evidentiary burden of proving that damages resulted from the breach. A key factor in such an assessment should be the value of the property as of the date of the breach of contract, as demonstrated by the trial decision in *2511899 Ontario Inc. v. 2221465 Ontario Inc.*, 2024 ONSC 4159.

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The transaction at issue in the case involved the aborted sale of a gas station property near Brampton, Ont., for $3.5 million in 2016. The Agreement of Purchase of Sale (APS) between the parties required payment of $700,000 on closing. The parties disputed how the remaining $2.8 million was to be paid.

Viacheslav Besputin: ISTOCKPHOTO.COM

A term in the APS stated that the "seller will arrange the remaining as first mortgage on third-party mortgage conditions and as VTB combine totalling $2,800,000." The buyer's position was that the seller was required to provide a vendor take-back mortgage (VTB) and/or to arrange for a mortgage with another lender for the $2.8 million. The seller's position was that its only obligation was to arrange a first mortgage, and that "arranging" included making introductions to lenders, including the existing holder of a $1 million mortgage on the property.

The parties also disagreed over whether the buyer was required to pay an additional $100,000 deposit, which was either not accepted or not received by the seller.

Due to their ongoing dispute, neither party was ready to close on the scheduled completion date. Discussions to complete the transaction were ongoing when the seller agreed to sell the gas station to another party a few months later in 2017 for the same purchase price of $3.5 million. In 2018, the gas station was sold again for $7.1 million.

Litigation ensued between the original buyer and seller over the aborted transaction and eventually

went to trial in 2024.

The trial judge determined that the wording of the disputed term in the APS term meant that it was the responsibility of the seller to provide financing through third-party mortgages and/or a VTB to ensure that the buyer had the financing necessary to complete the transaction.

In addition, the trial judge found that the seller was not in a position to provide clear title on the scheduled completion date since a mortgage remained on title and there was no evidence that any preparations had been made or that the seller was ready to have that mortgage discharged from title on closing.

The APS contained a standard "time is of the essence" term, which required both parties to meet the stated deadlines in the APS for completion of the transaction. However, since neither side was in a position to close on the scheduled completion date, the APS remained binding and either party had the right to restore, time is of the essence and set a new closing date on reasonable notice to the other.

The trial judge referred to the Court of Appeal for Ontario decision in *Domicile Developments Inc. v. MacTavish*, [1999] O.J. No. 1998, at paragraph 12, which held that a party who is not ready to close on the agreed date and who subsequently terminates the transaction without having set a new closing date and without having reinstated time of the essence will itself breach or repudiate the agreement.

Since the APS had not been validly terminated by either party, the seller was in breach when it sold the gas station to another buyer. The remaining issue was whether the buyer suffered any damages as a result.

The buyer argued that it ought to be entitled to the difference between the value of the property at the date of purchase and its post-construction value. The party that bought the gas station was able to renovate and sell it in 2018 for $7.1 million. The buyer argued that based on the construction costs of the renovated property, its "lost opportunity" damages were $2.3 million.

In response, the seller argued that the date for assessment of damages was not the subsequent sale of the gas station but the date of the breach of the APS, namely the scheduled completion date.

The trial judge referred to *Rosseau Group Inc v. 2528061 Ontario Inc.*, 2023 ONCA 814, at paragraph 62, in which the Court of Appeal affirmed that the normal measure of damages for a failed real estate purchase is the difference between the contract price and the market value of the land on the "assessment date," which is usually the date on which the purchase was scheduled to close. The presumption is that damages are to be assessed as of the date of the breach, although a court may set a later date if the party seeking damages satisfies certain criteria.

Based on the evidence, the trial judge found that the buyer did not establish that a later date should be used for the valuation of the gas station and that the proper measure of damages was, therefore, the value of the gas station at the date of the breach.

The evidence was that the buyer intended to keep the gas station on a long-term basis and that it was a long-term investor rather than a speculator. The buyer did not tender evidence of the costs that it would have incurred to rebuild the gas station, including the cost of borrowing, but relied on hearsay evidence from the subsequent owner regarding the construction financing obtained as the amount that it would have cost to rebuild the station.

The trial judge commented that the buyer could have called an expert witness to testify on the value of the lost opportunity and/or expert opinion evidence on the value of the land, either on the date of the breach of the APS or some other appropriate date, but did not do so.

While an innocent buyer may be compensated for the loss of the market value of the purchase price of the property, which takes into account the fact that the land can be developed, the circumstances did not establish the lost opportunity damages claimed, and the trial judge agreed with the seller that damages must be calculated based on the market value of the gas station at the date of the breach of the APS.

The result of this choice of date was that the buyer failed to prove that it suffered any damages since the subsequent sale price of the property realized by the seller was $3.5 million, the same price that it had agreed to pay. The buyer, therefore, did not meet its burden of proving it suffered damages as a result of the seller's breach of the APS and the claim was dismissed.

The trial judge concluded that each party should bear its own costs of the litigation since the seller had been found to have breached the APS even if there were no damages. This result, after many years of litigation, may not provide any consolation to the plaintiff buyer.

James R.G. Cook is a partner at Gardiner Roberts LLP and has been with the firm since he articled there in 2002. As a litigator in the firm's dispute resolution group, he has experience in a broad range of commercial, real estate and professional liability litigation.

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