

Court of Appeal affirms that entire agreement clause is not bullet-proof

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Drafting clear, concise and bullet-proof provisions in a contract is an art. It takes time and a complete understanding of a client's agreement with another party, including whether any pre-contractual representations have been made to induce the other party to enter into the agreement. Although an entire agreement clause is meant to protect a client against a claim for misrepresentations that are not expressly set out in a contract, if not drafted well enough a pre-contractual representation can result in exposing a client to significant liability.

In *Spot Coffee Park Place Inc. v. Concord Adex Investments Ltd.*, 2023 ONCA 15, an entire agreement clause failed to protect a commercial landlord from liability for a pre-contractual representation made to a "high-end" European coffee shop tenant. The liability was over \$1 million.

The parties had met in 2010 to discuss renting a unit in a mixed-use condominium. At a presentation meeting, representatives of the coffee shop were shown floor plans of an underground parking lot that serviced the retail portion of the condominium complex. A representative of the landlord took the coffee shop representatives on a tour of the parking lot and represented that there would plenty of parking spaces available for retail customers to the shop and that the customers would have unimpeded access to their retail unit. The representations caused the coffee shop to enter into a lease at the complex.

The Offer to Lease contained an entire agreement clause, which stated as follows:

This Offer to Lease contains all of the terms and conditions of the agreement between the parties relating to the lease of the Premises and supersedes all previous agreements or representations of any kind, written or verbal. There are no covenants, representations, agreements, warranties or conditions in any way relating to the subject matter of this Offer to Lease, expressed or implied, collateral or otherwise, except as expressly set out herein.

Subsequently, the parties entered into a formal Lease that also contained an entire agreement clause. This clause stated as follows:

This Lease contains all of the terms and conditions of the agreement between the parties relating to the matters herein provided and supersedes all previous agreements or representations of any kind, written or verbal, made by anyone in reference thereto, with the exception of any written and excluded offer to lease or agreement to lease ("Offer to Lease") which may exist between the parties and pursuant to which this Lease has been entered into. There are no covenants, representations, agreements, warranties or conditions in any way relating to the subject matter of this Agreement expressed or implied, collateral or otherwise, except as expressly set out herein or in the Offer to Lease, if any. In any event of any inconsistency or contradiction between the provisions of any Offer to Lease and the terms and conditions of this Lease, this Lease shall prevail.

There shall be no amendment thereto unless in writing and signed by the party to be bound.

After opening, the coffee shop encountered customer parking problems. Customers did not have easy access to the underground parking lot that serviced their retail unit or unimpeded elevator access to the retail lobby in order to access the retail spaces. The coffee shop suffered losses and ultimately abandoned their rented unit because of the parking issues.

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A trial judge found that the landlord had owed a duty of care to the tenant and had made misrepresentations to the tenant about convenient access to free customer retail parking and that customers would be able to access the coffee shop via an elevator from the underground parking lot. Despite the entire agreement clause, the trial judge held that the tenant's claim was not precluded because the clause was limited to representations "relating to the *subject matter of this Agreement*" (Emphasis added). Issues related to the underground parking lot were not included in either the Offer to Lease or the Lease.

The only parking issues addressed in the agreements related to unreserved parking spots that were exclusively allocated to the coffee shop for their employees. Those spaces were in an area that was separate from the customer spaces. In addition, the coffee shop was required to pay for those spots.

The landlord contended that the trial judge had failed to interpret the Lease as a whole and relied on two provisions in the agreement which it contended addressed the issue of customer parking. One of the clauses had not been relied upon at trial by the landlord.

The tenant argued that a deferential standard of review applied to the trial judge's decision because at issue was the interpretation of a commercial contract that was made between two sophisticated parties. In general, as determined by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, contractual interpretation involves issues of mixed fact and law. The Supreme Court of Canada in *Corner Brook (City) v. Bailey*, 2021 SCC 29 affirmed that this attracts a deferential standard of review.

The Court of Appeal rejected the landlord's arguments that the two clauses it raised on appeal made the underground parking lot a subject matter of the agreement. The appellate court noted that the trial judge had specifically considered the entire agreement clause and found, among other things, that the landlord's representative testified that the Lease only dealt with parking that was granted in exchange for rental fees.

As well, the Court of Appeal stated that even if relevant, it defied common sense for the landlord to have, on appeal, relied upon a clause that was not brought to the attention of the trial judge to contend that customer parking had formed a subject matter of the Lease.

In the result, the Court of Appeal dismissed the landlord's appeal because customer parking was not a "subject matter" of the Lease.

This case serves as a reminder that an entire agreement clause may not preclude a claim against all pre-contractual representations and that all provisions in a contract must be carefully considered and reviewed before a contract is executed. Before finalizing a contract, a client should be questioned as to whether they have made any pre-contractual representations or whether they have been induced to enter into the agreement as a result of any pre-contractual representations. As well, this case affirms that a deferential standard of review will be applied in most cases involving the interpretation of a contract. A PDF version is available to download [here](#).

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