

Developer can't charge buyer for adjustments not included in Agreement of Purchase and Sale (Bellisario v. 2200 Bromsgrove Development Inc.)

Agreement of Purchase and Sale | Buyer | Development | Litigation | Litigation & Dispute Resolution

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Over the past few years, there have been several media reports of developers in Ontario attempting to levy charges against buyers for various matters that were not included in the original purchase price. Such issues may arise during the process of construction or at the time of closing, and buyers may be left feeling that they have no choice but to agree to the charges or lose their deposit. Whether a seller is legally entitled to demand additional payments from a buyer generally comes down to the wording of the Agreement of Purchase and Sale (APS).

In *Bellisario v. 2200 Bromsgrove Development Inc.*, 2025 ONSC 2546, several buyers of units in a townhouse complex commenced an application for a declaration that the developer was not entitled to charge them certain adjustment amounts on closing. The buyers entered into their respective APSs for amounts varying from \$400,000 to \$700,000 before the units were constructed.

In the APSs, there were provisions for adjustments to the purchase price related to matters including utilities which were to be calculated and paid as of the closing date. A few days before the scheduled closing dates, the developer delivered final Statements of Adjustment that contained adjustments reflecting alleged "Utility Meter Installation Charges" for electrical, gas, water/sanitary and permits/fees. The utility charges also included amounts paid by the developer to various contractors and trades for work done on the various utilities as well as construction management and landscaping. In some cases, the additional charges were as high as \$86,000.

In response to one of the buyer's requests for evidence to substantiate these adjustments, the developer provided a "Certificate" that outlined in greater detail the costs reflected in the Statement of Adjustments. The Certificate set out only total amounts paid under various subheadings related to the entire project, which amounts were then divided among the buyers based on their proportionate share.

The buyers closed as scheduled but commenced the application to challenge the developer's position.

The term at issue in the APS provided that the developer was entitled to a reimbursement of:

- A. the cost of any water and water check/sub meter costs, installation and connection charges and hydro and gas/BTU check/sub meter costs, installation and connection charges; and
- B. a proportionate share of all electricity, gas, water, sanitary, drain and sewer infrastructure, installation, connection and energization costs (or security relating thereto) paid by the Vendor to or deposited by the Vendor with the Municipality or utility service provider which shall be calculated by multiplying

said charges by the Percentage Contribution to Common Expenses or equally to each dwelling (in the Vendor's sole discretion) and by charging the Purchaser in the statement of adjustments with that portion of such charges.

The developer argued that the above term permitted it to charge the buyers for all costs associated with the engineering, installation, and connection of the necessary utility services irrespective of who such amounts were paid to. Such costs were unknown at the time that the parties entered into the APSs. While the term expressly referenced the developer's ability to pass along amounts paid to a "Municipality or a utility service provider", the developer argued that the term "utility service providers" was not defined and therefore included third-party contractors and trades.

The buyers' position was that the developer was attempting to recoup costs that it should have borne as part of the overall infrastructure development costs and that these costs could not be passed on to individual buyers at the time of closing. The buyers argued that there was no basis to interpret "utility service provider" to include trades and others paid by the developer in respect of the utility infrastructure costs.

The application judge applied the general principles applicable to contractual interpretation, including that (a) courts should not interpret a contract in a way that would lead to an absurd, unjust, or commercially unreasonable result; and (b) in the case of ambiguity in the contract, the rule of *contra preferentum* can be applied to give effect to an ambiguous clause by preferring the reasonable interpretation that favours the party that did not have control over its drafting: *2249778 Ontario Inc. v. Smith (Fratburger)*, 2014 ONCA 788, at paragraphs 19, 22.

In the application judge's view, the plain and ordinary meaning of the words in the APS term at issue supported the buyers' position. The APS provided that the developer was permitted to charge buyers for the cost of installing meters for the services in their respective units, but this did not include infrastructure and energization costs. The APS did not provide the developer with the right to charge for matters that related to the utility infrastructure if these amounts were not paid to the municipality or to utility service providers. There was no ambiguity in that regard, but even if there was, it ought to be resolved in the buyers' favour.

The developer argued that the buyers had agreed to amounts in the Certificate and that the APSs provided that the Certificate shall "constitute sufficient evidence" for the purpose of calculating the adjustments. However, the application judge noted that "evidence" can always be challenged or rebutted with other evidence and this did not mean that the Certificate was conclusively binding.

Further, the application judge was satisfied that the Statement of Adjustments and Certificates provided by the developer were misleading and amounted to bad faith, such that it would be inequitable to permit the developer to rely upon a Certificate that included charges that it was not entitled to pass on to the buyers. Other cases have held that the submission of false and exaggerated invoices was sufficient to disentitle reliance on a certificate: *Lawhill Limited v. Ontario (Realty Corporation)*, 2007 CanLII 53241 (ON SC), at paragraphs 622-631 & 639.

Lastly, the developer attempted to rely on a limitation of liability clause in the APS which purported to limit a buyer's remedies to return of the deposit. The application judge found the limitation clause to be inapplicable for several reasons, including an overriding public policy interest in preventing developers from escaping liability "where they secretly and not transparently charge for amounts to which they are not entitled".

The application judge therefore concluded that the developer could only charge by way of adjustment for installation of meters as well as infrastructure costs that it paid to the Municipality or to utility service providers. As the purchase transactions for the units had been completed, the dispute was directed to a future reference hearing to determine what amounts were actually permitted to be charged to the buyers and for an accounting for any reimbursements to made to the buyers.

The decision illustrates that buyers may have recourse to challenge amounts that they believe have been charged by a developer or seller which are not permitted under the APS. The specific wording of the APS should be carefully reviewed in such cases to assess the parties' positions. A PDF version is available for download [here](#).

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