

KEEPING CURRENT

July 2, 2021

Environmental injunctions need not pass the flagrant breach threshold

By James R.G. Cook

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

James R.G. Cook
Partner
416.865.6628
jcook@grllp.com

Sales of new condominiums and townhouses may sometimes allow a buyer to move into a unit on an "interim occupancy date" which may be several months before the purchase is scheduled to be finally completed. In such cases, buyers may have to pay interest on the unpaid purchase price and other monthly expenses, but the entire purchase price is not due until the "unit transfer date." While the buyer may have possession they remain obligated to complete the purchase and may be liable for breach of contract if they fail to do so, entitling the seller to retain the deposit and sue for damages. Continuing to occupy a unit after the unit transfer date without completing the transaction may also give rise to a claim for trespass.

In *2100 Bridletowne Inc. v. Ding*, [2021 ONSC 2119 \(CanLII\)](#), a real estate agent with 10 years' experience bought a townhouse condominium under construction from the plaintiff, a developer. The agent's parents were added as buyers to the Agreement of Purchase and Sale (APS) before closing.

The "interim occupancy date" was scheduled for June 30, 2020, and the buyers took interim occupancy of the townhouse pursuant to an Occupancy Licence. During this time, the buyers allowed "affiliates" to stay in their unit as a "COVID hotel".

On July 13, 2020, the developer sent out an email to all buyers of townhouse units, including the defendants, that the closing and the unit transfer date would take place by October of 2020. The developer recommended that buyers contact their mortgage specialists to prepare for closing.

While the defendants claimed that they had not received the email of July 13, 2020 (even though it was sent to the agent's work email address), there was no dispute that on September 11, 2020, the developer notified the defendants and their real estate lawyer that the unit transfer date would take place on October 1, 2020.

On September 25, 2020, the buyers'

lawyer advised that the buyers were “overseas”, and that they were requesting an extension, without any further explanation. He repeated the request for an extension on September 30, 2020, citing the “physical impossibility of logistics for closing with such short notice”.

The seller’s lawyer responded on September 30, 2020, and advised that his client was prepared to grant an extension based on terms set out in an enclosed extension agreement. The agreement was not returned by the buyers.

After the transaction failed to close on October 1, 2020, the seller’s lawyer notified the buyers that they were in default of the APS but due to the unprecedented nature of the pandemic, the seller offered on a without prejudice, good faith basis, to continue to work with them to close the transaction.

The defendants did not take steps to complete the transaction. Rather, they simply moved into the townhouse on October 12, 2020, notwithstanding some complaints made by the agent about alleged deficiencies with the construction.

On October 23, 2020, the seller’s lawyer sent a further extension agreement and asked them to sign and return it by October 27, 2020. They did not do so. The defendants made no further inquiries about receiving an extension or closing the transaction until February 2021, after the seller had commenced legal proceedings against them.

On December 17, 2020, the seller served a notice of default on the defendants pursuant to the APS, requiring them to provide immediate vacant possession of the unit. The notice of default informed the defendants that they were trespassers, and that if they failed to provide

immediate vacant possession, the seller would commence court proceedings. The defendants refused to vacate the unit and litigation ensued.

In March 2021, the court heard a motion brought by the seller for a mandatory injunction requiring the defendants to vacate the townhouse. The seller was firstly required to establish that it had a “strong prima facie case” against the defendants: *R. v. Canadian Broadcasting Corp.*, [2018 SCC 5](#), [2018] 1 SCR 196, at para. 18.

Based on the buyers’ failure to complete the purchase or agree to the terms of an extension, the court had no difficulty finding that the seller had established a strong *prima facie* case. The buyers had also breached the terms of the APS by carrying out alterations to the unit before the final closing.

The seller was also required to establish that it would suffer irreparable harm if the injunction were not granted. The seller demonstrated that it was suffering irreparable harm to its business reputation as a result of the defendants’ trespass and the defendants’ conduct towards the seller’s staff.

Where a plaintiff complains of interference with property rights, injunctive relief has been strongly favoured by the Court of Appeal, especially in cases of direct infringement in the nature of trespass: *1465152 Ontario Limited v. Amexon Development Inc.*, [2015 ONCA 86](#), at para. 23.

The case at hand was clearly a case of trespass since the buyers had failed to close and had no right to continue to occupy the townhouse after their default under the APS and the termination of the interim occupancy licence. Awarding damages to the seller would not be a sufficient



remedy since the interference of the seller's property rights would continue.

In addition, the court found that the buyers had engaged in "horrible bullying and unbecoming behaviour" in a series of emails disparaging the seller and its employees. Damage to a business' reputation or goodwill can constitute irreparable harm meriting injunctive relief: *Sadlon Motors Incorporated v. General Motors of Canada Limited et al.*, [2011 ONSC 2628](#), at para. [85](#).

The motion judge found that the defendants' occupation of the townhouse was tied to their continued ability to harm the seller's reputation and to harass its staff. Their communications went beyond a genuine intention to address issues related to the transaction and represented attempts to intimidate and belittle the seller.

Finally, the seller established that the balance of convenience favoured granting the injunction since it would suffer greater harm than the buyers if possession were not returned to the seller. In this regard, the court noted that the defendants did not use the townhouse as their primary residence and that the agent's parents lived in another city.

As a result, the seller obtained an order requiring the buyers to vacate the townhouse and preventing their re-entry. The action for damages will continue. A motion for leave to appeal the decision was recently dismissed by the Divisional Court, with costs of \$15,000 payable to the seller pursuant to the Occupancy Licence, which provides that the buyers shall reimburse the seller "for all costs it may incur": [2021 ONSC 4552 \(CanLII\)](#).

The case demonstrates the issues that may arise when a buyer takes possession of a

property before the transaction is completed. The approach taken by the buyers in this case is difficult to understand. While they attempted to argue that the seller ought to have offered a further extension, there is generally no legal obligation for a seller to do so. Further, the seller *had* offered an extension and to work with the buyers. There was simply no question that the buyers were the defaulting party under the APS as they had advised prior to the closing date that they could not close, had sought an extension which was offered on terms and not accepted, and then took no steps to complete the transaction after the closing date. Instead, they embarked on an ill-advised email campaign and litigation strategy which appeared doomed to fail.

Contact us

If you have a litigation matter and are in need of legal advice, please contact [James Cook](#) at 416.865.6628, jcook@grllp.com.

(This newsletter is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP.)