

# THE GR COURT DOCKET

August 4, 2017

## Provisions of whole contract make seller responsible for severance costs

By Stephen Thiele

When interpreting a contract, it is important to remember the fundamental rule that the whole agreement must be considered, not just a few isolated words or one isolated provision.

In the recent case of *Union Building Corp. of Canada v. Markham Woodmills Development Inc.*, the application of this fundamental rule of contractual interpretation resulted in the seller of undeveloped land being required to pay 100% of the costs of entering into a local Cost Sharing Agreement (the “CSA”). Under a specific provision of the agreement of purchase and sale (the “APS”) between the buyer and the seller, the seller had contended that those costs were “onerous or unreasonable” and should be the responsibility of the buyer.

### Facts and Argument

On July 23, 2015, the buyer agreed to purchase part of a larger piece of land for approximately \$4 million. The land had to be severed from the larger piece and thus the APS required the seller to apply to the local Committee of Adjustment

for the severance and to satisfy any conditions that might be imposed.

At the time the APS was entered into the land was zoned as “Agricultural”. Yet the buyer was going to construct a commercial building on the land so rezoning was required as well.

While the local Committee of Adjustment approved the severance of the larger piece of land, it imposed a condition that the seller enter into a Cost Sharing Agreement with the surrounding land owners for the costs of infrastructure. Under the CSA the share of costs attributable to the severed property was \$407,582.

The seller did not want to pay this cost and sought to have the buyer agree that the buyer pay this cost. According to the seller this was the intention of the APS anyway since the buyer would be the one developing the property.

The buyer took the position that the APS provided otherwise.

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 two of Canada’s largest banks, several medium to large-sized municipalities, agencies, boards and commissions and other government entities, high tech and software companies, real estate developers, lenders and investors.

A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

**Gavin Tighe**  
Partner  
416.865.6664  
gjtighe@grllp.com

**Stephen Thiele**  
Partner  
416.865.6651  
sthiele@grllp.com

**Brady Jones**  
Associate  
416.865.6614  
bjones@grllp.com

**Bill Michelson**  
Associate  
416.865.6649  
bmichelson@grllp.com

In order, to close the transaction the buyer agreed to pay the cost for entering into the CSA subject to retaining the right to seek repayment by way of court resolution. Meanwhile, the seller acknowledged that it would not rely on any understanding that the conditions contained in the APS had merged on closing.

On the hearing of the buyer's court application, the seller contended that the buyer was required to pay the costs because under the APS if the conditions imposed on the severance were "onerous or unreasonable" such that the seller was not prepared to satisfy them, it could offer to the buyer the opportunity to satisfy the conditions or, in the alternative, terminate the agreement. The seller submitted that the costs to enter into the CSA were 10% of the purchase price and that this was obviously "onerous or unreasonable".

The buyer disagreed, submitting that the seller was required to pay the costs of the severance "at its sole expense" because they did not come as a surprise to the seller. Also other provisions in the APS showed that the CSA was to be signed, and that the condition of entering into that agreement on the granting of the severance could be imposed in order to complete the sale.

### **Decision of the Court**

The Court explained that the interpretation of a contract was a search for the intention of the parties at the time the agreement was made and that in interpreting an agreement of purchase and sale the law instructs a court to consider the agreement as a whole.

Accordingly, the Honourable Justice Lederer considered the competing arguments and the

various provisions of the APS, including the clause which dealt with zoning. This provision provided, in part, that the rezoning which was required to permit the buyer to build a commercial building was to be undertaken at the sole cost and responsibility of the seller.

His Honour explained that this provision made it plain that the parties had specifically included an intention in the APS for the seller to be responsible to pay the costs associated with rezoning. This provision drove the buyer's understanding that the cost of severing the property was subsumed in the purchase price, and thus the exception contained in the APS for conditions that were "onerous or unreasonable" did not apply.

While Justice Lederer accepted that the seller was surprised that it was required to enter into the CSA, he found that this surprise did not render the condition "onerous or unreasonable" in any event.

Accordingly, the Court granted the buyer's application for the reimbursement of \$407,582, which it had paid to cover the costs of the seller being required to enter into the CSA.

### **Representation of the Buyer**

The buyer was represented by Gavin Tighe, partner and certified specialist in civil litigation, Gardiner Roberts LLP. He was assisted throughout the application by litigation associate Bill Michelson and in the preparation of the legal argument made before the Court by the firm's

Director of Legal Research and partner, Stephen Thiele.



The buyer's real estate lawyer was senior associate, Brady Jones, also of Gardiner Roberts LLP.

## About the Author

**Stephen Thiele** is a partner and the Director of Legal Research at Gardiner Roberts LLP. He can be contacted at **416.865.6651** or **sthiele@grllp.com**.

*(This newsletter is provided for educational purposes only. It is not intended to be relied upon for any legal advice and any views expressed herein are not those of Gardiner Roberts LLP.)*