THE GR COURT DOCKET

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UNPERMITTED REMOVAL OF SUPPORT WALLS COVERED BY TITLE INSURANCE POLICY: TITLE INSURER OBLIGATED TO PAY FUTURE REPAIR COSTS TO REMEDY DANGEROUS CONDITION

By Stephen Thiele

On December 3, 2015, lawyers for Gardiner Roberts secured another in a long list of significant favourable awards against a title insurer.

In *MacDonald v. Chicago Title Insurance Co. of Canada*[1], we successfully argued that unpermitted work on a residential home undiscovered by the homebuyers prior to their purchase of it was a title defect covered under the title insurance policy they bought from Chicago Title at the time of closing.

The Ontario Court of Appeal wholly reversed the decision of a motions judge who had determined that Chicago Title's insurance policy was not required to respond to the homebuyers' claim for coverage because the policy only applied to things that were registered on title and the home was not unmarketable.

In rendering its decision, the Court of Appeal also made a number of other important pronouncements that generally impact Ontario law.

More specifically, along with establishing the scope of coverage of the Chicago Title insurance policy, which will be discussed in further detail below, the Court of Appeal held that the standard of appellate court review to be applied to standard form contracts or contracts of adhesion was correctness and that answers provided by a corporate employee cross- examined under Ontario civil procedure rule 39.02 bind the corporation. By accepting a "correctness" standard of review, the Ontario Court of Appeal distinguished a recent case from the Supreme Court of Canada which had pronounced that the standard of appellate court review for the interpretation of a contract was, absent extricable error of law, palpable and overriding error.[2] The palpable and overriding standard of review is generally more difficult to meet than the correctness standard.

RELEVANT BACKGROUND

In this case, the homebuyers had bought a multi-storey family home in 2006. As part of the purchase, the homebuyers obtained a Chicago Title title insurance policy.

Seven years later, the homebuyers learned during an upper-level bathroom renovation that load-bearing walls on the main floor of their home had been removed during prior renovation work undertaken by a previous owner without a building permit. This unpermitted work, to the complete unawareness of the homebuyers when they purchased home, rendered the home unsafe and immediately uninhabitable unless temporary work was done to support the upper-level floor.

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.

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While the City of Toronto issued an Order to Remedy an Unsafe Building, the homebuyers installed the necessary temporary shoring to prevent the upper-level from caving in and made a claim under the title insurance policy for the costs of the temporary repairs and the permanent repairs that would be needed to make their home structurally sound.

But Chicago Title denied the claim, citing a lack of coverage under its policy. This response forced the homebuyers to sue.

MOTIONS JUDGE DENIES COVERAGE

On a motion for summary judgment, the motions judge agreed with Chicago Title. The judge ruled that the insurance policy was unambiguous and none of the 23 Covered Title Risks contained in the policy applied to the circumstances of the case.

The motions judge concluded, among other things, that the homebuyers' title was unaffected by the unpermitted work because the title remained marketable, even though it was marketable for an amount less than what the homebuyers had paid for the home, that in order for coverage to apply, any demand or work order by a municipal authority to rectify a structural problem had to be registered on title and that the homebuyers suffered no loss.

COURT OF APPEAL FINDS COVERAGE

With respect to the finding that in order for coverage to apply, any demand or work order by a municipal authority to rectify a structural problem had to be registered on title, the Court of Appeal held that such a conclusion had been reached by the motions judge without any supporting evidence and was simply incorrect.[3]

As a matter of real estate law, municipal work orders were not registered in either the Registry or Land Titles systems in Ontario and were a defect that could only be discovered by "off-title searches".

This error on the part of the motions judge was found to permeate his entire analysis of the title insurance policy and ultimately resulted in the motions judge misinterpreting clause 11 of the policy, which provided coverage in circumstances where "Your Title is unmarketable, which allows another person to refuse to perform a contract to purchase, to lease, or to make a mortgage loan."

In interpreting this clause, the motions judge ruled that notwithstanding the significant structural defect created by the unpermitted work, the homebuyers' home was "marketable" in the sense that it could still be sold for an amount that was less than what they had paid for it. The Court of Appeal found that this analysis was entirely irrelevant and speculative to postulate under the language of clause 11.

Rather the correct approach to the interpretation of clause 11 was to first determine whether the defect in issue had rendered the home unmarketable as that term was defined (i.e. can a potential purchaser refuse to close an agreement and sale on learning of the defect).

While the evidence on the motion showed that Chicago Title had agreed that the dangerous condition to the home caused by the unpermitted work would permit a potential purchaser to refuse to close a purchase transaction, Chicago Title persisted in arguing at the hearing of the appeal that clause 11 could not provide coverage to the homebuyers because the unpermitted work created a latent defect that simply was not subject to coverage.

The Court of Appeal rejected this contention on the basis that this argument entirely ignored the actual cause of the homebuyers' problem: the fact that the previous owner had failed to obtain the necessary permit from the City of Toronto prior to renovating the home.

In the eyes of the Court of Appeal, it was clear

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that had the necessary approval from the dangerous construction been originally sought from the City, it would never have been granted. Accordingly, the dangerous condition flowed directly from the failure of the previous owner to attempt to obtain the necessary municipal approval. It was that failure which made the homebuyers title unmarketable within the policy of title insurance. Indeed, the homebuyers' had essentially acquired a home with an unmarketable title, even though they were unaware of that fact.

Lastly, the Court of Appeal agreed with our argument that even though permanent repairs

had not yet been made to the home, the homebuyers suffered an actual loss.

As a matter of public policy, the appellate court stated that requiring the homebuyers to only be entitled to compensation after they had paid for repairs themselves, as suggested in the reasons of the motions judge, was a "remarkable interpretation" that would only entitle insureds who had the financial resources to cover their loss to receive compensation.[4]

The Plaintiffs were represented by Gardiner Roberts LLP Partner Gavin Tighe, a certified specialist in civil litigation, and his associate, Alexander Melfi.

Mr. Tighe and Mr. Melfi were assisted in the preparation of their written argument by Stephen Thiele.

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1. 2015 ONCA 842
2. *Sattva Capital Corp. v. Cresten Moly Corp.*, 2014 SCC 53
3. Ibid., paras. 56 and 58
4. Ibid, para. 83