

Seller ordered to obtain severance of residential properties to complete transaction

Litigation | Litigation & Dispute Resolution | Ontario Planning Act | Real Estate

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In a real estate transaction, the seller must be in a position to ensure that good title is conveyed to a buyer at closing. In the time leading up to the scheduled completion date, a buyer's lawyer will usually conduct a title search of the property being purchased to ensure that it has not merged with any adjoining properties under Ontario's *Planning Act*. Merger of titles may occur when the same owner acquires title to two or more adjacent properties, with the consequence that they cannot re-sell the merged properties separately without obtaining a severance from the municipality.

If such a title merger has occurred, then the buyer may be in a position to refuse to close and to obtain the return of any deposit paid. However, the Agreement of Purchase and Sale (APS) may also require the seller to take steps to ensure compliance with the *Planning Act* if the buyer wishes to complete the transaction.

Kanthian v. Hastings Local Housing Corporation, 2023 ONSC 657 (CanLII), involved the sale of two adjacent properties in Belleville, Ontario to the plaintiff by the Hastings Local Housing Corporation (HLHC).

In January 2001, as part of the transfer of housing responsibility from the provincial government to municipalities, HLHC became the owner of the two properties and used them for affordable housing for approximately 17 years before listing them for sale.

In 2017, the plaintiff buyer and HLHC entered into a separate APS for each of the two properties. The scheduled completion date was 28 April 2017.

On 13 April 2017, the plaintiff's real estate solicitor sent HLHC's real estate solicitor a requisition letter which noted that title to the two properties had merged with each other and with titles to abutting lands. The requisition letter included a request for, among other things, the completion of statements confirming compliance with the *Planning Act*.

Upon determining that HLHC would have to obtain severance of the properties in order to proceed with the sale, the plaintiff advised HLHC's lawyer that he expected HLHC to apply for severance and that he was prepared to postpone the closing date until 15 days after severance was obtained.

HLHC took no steps to apply for severance as it determined that doing so would have been too time-consuming and expensive without a guaranteed outcome.

Instead, HLHC's lawyer informed the buyer's lawyer that HLHC would be unable to satisfy the requisition by the scheduled closing date. HLHC took the position that the APS was therefore at an end and refunded the plaintiff's deposit.

In order to salvage the deals, the plaintiff offered to apply for and pay for the severance himself or, alternatively, to purchase the entire block of adjacent properties with a commitment to honour the existing rented tenancies. Neither offer was accepted. HLHC refused to extend the closing date and made no attempt to apply for severance.

The plaintiff sued HLHC and brought a motion for summary judgment. The plaintiff claimed that because the APS did not close, he was unable to close three other purchases in his own name and was forced to assign them to a third party.

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At issue on the motion were two clauses that are included in the standard Ontario Real Estate Association (OREA) form of APS, clause 10 (Title) and 15 (Planning Act).

Clause 10 requires a seller to convey title to a property to a buyer “good and free from all registered restrictions, charges, liens and encumbrances”. A buyer has a specified time to raise any valid objection to title in writing, and if the seller is unable or unwilling to remove, remedy or satisfy the objections then the APS shall be at an end.

Clause 15 requires compliance with the *Planning Act* subdivision control provisions and to obtain any necessary severances. Specifically, the seller is required to comply with the subdivision control provisions of the *Planning Act* and covenants to proceed diligently at their own expense to obtain any necessary consent by completion. Consent generally requires obtaining a severance pursuant to the *Planning Act*.

As noted by the motion judge, the words in clause 10 “which the Seller is unable or unwilling to remove” have been consistently interpreted to require sellers to exercise their rights reasonably and in good faith, not capriciously and arbitrarily: *Gracegreen Real Estate Development; Hurley v. Roy* (1921), 1921 CanLII 522 (ON CA). This generally means that a seller “cannot take advantage of his own default and use the clause to escape his obligation”: *Mason v. Freedman*, 1958 CanLII 7 (SCC), [1958] SCR 483.

Conversely, neither party provided the motion judge with any caselaw which had considered clause 15 in a residential real estate transaction. Accordingly, the motion judge referred to similarly worded clauses in cases involving commercial transactions in which a seller had been ordered to ensure that any subdivision approvals were obtained, including *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.*, 2003 CanLII 52131 (ON CA).

HLHC claimed that it was unaware that the titles in question had merged but the motion judge rejected this position. The lands in question were conveyed to HLHC by the province in 2001 as a block and HLHC was represented by a real estate agent when it listed the properties and by a real estate lawyer for the sale. If HLHC did not know about the merged title, then it ought to have known at the time that it entered into the APS with the plaintiff.

The motion judge therefore concluded that HLHC was required to apply for severance as a term of the APS and its failure to do so amounted to a breach of contract. In the motion judge’s view, the failure of HLHC to apply for a severance or extend the closing date to do so breached the duty of a seller under clause 10 of the APS to exercise their rights reasonably and in good faith rather than capriciously and arbitrarily. HLHC also breached the vendor’s covenant as set out in clause 15.

As for the remedy, the motion judge followed the Supreme Court of Canada’s decision involving commercial property in *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, 1978 CanLII 215 (SCC), and ordered compliance with terms of the APS by requiring HLHC to apply for a severance. The court declared the contract between the plaintiff and HLHC to be binding including the term set out in clause 15 and ordered HLHC to pursue a *bona fide* application for severance as required by clause 15 within 60 days. Whether the plaintiff will be able to pursue additional damages depending on the results of the severance remains to be seen.

The decision shows that a seller of residential properties should consider whether the property has merged before entering into a binding APS. In the case at hand, HLHC agreed to the terms of the APS which included its obligation to apply for severance and it ought to have known that there would be a cost and uncertain outcome of a severance application before the transaction could be completed. The motion judge noted that HLHC could have attempted to remove clause 15 from the APS but did not do so. As a result, HLHC was bound to carry through with its agreed-upon obligations to apply for a severance as its own expense. A PDF version is available to download [here](#).

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