

Sellers liable for deficiencies due to rectification of Agreement of Purchase and Sale (Melo v. Hiebert)

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26 January 2024

The legal doctrine of rectification is a remedy that may be available to correct errors in an agreement to give effect to the true intentions of the parties. The Ontario Superior Court of Justice decision in *Melo v. Hiebert*, 2024 ONSC 223 (CanLII), demonstrates the limited circumstances when the doctrine may be applied to an Agreement of Purchase and Sale in a real estate transaction.

The plaintiffs (the Melos), purchased a home in Aylmer, Ontario from the defendants (the Hieberts). The defendants had built the property intending to live in it themselves and had occupied it for several weeks before selling it to the Melos.

The initial purchase price of the property was to be \$520,000. When Mr. Melo went to tour the property, he informed Mr. Hiebert that he wished to have a shop built on the northwest corner of the property for him to work on restoring cars. As a result, the purchase price was increased to \$590,000 and, according to Mr. Melo, they agreed that the shop would be built, along with a laneway to the shop, and a retaining wall.

The Agreement of Purchase and Sale (“APS”) provided, in part, that: “Prior to close the Seller shall complete a 25 X 32’ (800 sq ft) Shed on the property in the North West corner of the lot” and “Gravel driveway installed to shed”. However, there was no mention of a retaining wall in the APS.

The Melos and the Hieberts were represented by the same real estate agent in the transaction who acted as an intermediary and prepared the APS.

After the transaction closed on 30 April 2019, the Melos moved into the property. At that point, the retaining wall had still not been built. Up to closing, Mr. Melo had regularly asked Mr. Hiebert when the wall would be built, without any real response.

The weekend after the Melos moved in, there was a significant rainfall, and they discovered that there was a large leak in the basement which allowed water to enter the home and damage the drywall and carpet. In addition, the property’s water supply system could not hold pressure or provide sufficient water and had to be re-installed. There were other deficiencies to the fireplace and washroom doors as well.

The Melos then discovered that the municipality had never completed the final inspection report on the newly-built home, and had not issued an occupancy permit until 22 May 2019, over three weeks after they had moved in.

The Melos sued the Hieberts claiming damages for the costs of building a retaining wall and deficiencies to the property.

In the trial [decision](#), the court first addressed whether the APS could be rectified to make the Hieberts liable for the costs of building a retaining wall.

In *2484234 Ontario Inc. v. Hanley Park Developments Inc.*, 2020 ONCA 273, the Ontario Court of Appeal affirmed that the doctrine of rectification was available to fix mistakes in an agreement where the mistake, whether mutual or unilateral, defeats what one or both of the parties were intending to achieve. Rectification cannot provide a remedy that goes into the realm of what one or both parties may have intended or was hoping to achieve, but was not made part of the “true”

agreement.”

Whether the doctrine of rectification applies turns on the assessment of six factors outlined by the Supreme Court of Canada in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, namely whether:

1. The parties had reached a prior agreement whose terms are definite and ascertainable;
2. The agreement was still effective when the instrument was executed;
3. The instrument fails to record accurately that prior agreement;
4. If rectified as proposed, the instrument would carry out the agreement;
5. The party resisting rectification knew or ought to have known about the mistake; and
6. Permitting that party to take advantage of the mistake would amount to “fraud or the equivalent of fraud”.

In applying this test, the trial judge decided that the parties had intended for their agreement to include a retaining wall. The purchase price had increased from \$520,000 to \$590,000 after Mr. Melo indicated he wanted to build the shop, yet the value of the shop and driveway without the retaining wall would be significantly less than \$70,000. Therefore, it was clear and ascertainable that the retaining wall would be included.

Additionally, the agreement to include a retaining wall had been in effect when the APS was signed, yet the APS failed to accurately record such an intention. Rectifying the agreement to require a retaining wall would allow the parties to carry out that intention. Thus, the first four requirements of the test had been satisfied.

The final two elements of the test apply only in cases of unilateral mistake. Here, the judge found that it was clear that Mr. Hiebert knew a retaining wall was required, but that he chose to ignore it. Mr. Melo had asked him about the retaining wall numerous times. Furthermore, Mr. Hiebert testified that he only agreed to build the shop if it was no larger than 25 by 32 feet because a shop this size would not require a minor variance from the municipality, which in turn would have required a retaining wall.

Finally, the trial judge considered whether permitting the Hieberts to take advantage of the mistake would amount to the equivalent of fraud, noting the evasive way in which Mr. Hiebert responded to questions in cross-examination regarding the retaining wall and the fact that he decided to wire the shop himself instead of hiring an electrician. These facts demonstrated knowledge of what the parties had agreed to (a retaining wall) and fraud-like attempts to avoid constructing that wall. The requirements for rectification were therefore met.

Ultimately, the court concluded that even if rectification was not available, the APS was ambiguous in the description of the “gravel driveway” and that it needed to be interpreted in a commercially reasonable manner. The only reasonable way to interpret the phrase “construction of a gravel driveway” is to interpret it as being a legal (i.e. conforming) driveway, which required a retaining wall. The Hieberts were therefore liable to pay \$38,081 for the costs of building the retaining wall.

The Hieberts were also found liable for \$19,665.11 for the costs of repairing the leak in the foundation and the resulting water damage found after the Melos had moved into the property. As the vendors of a newly-built home, the Hieberts were subject to a statutory warranty under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O 31 that “Every vendor of a new home warrants to the owner that there will be no water penetration through the basement or foundation of the home.” In the trial judge’s view, the damage caused because the basement had been improperly waterproofed was covered by the warranty and was therefore the responsibility of the Hieberts.

This case highlights the contractual issues at play in the real estate context and the importance of ensuring that an APS correctly reflects the intentions of both parties to the transaction. As a matter of equity, a party may not escape their agreed-upon obligations based only on a mistake in the drafting of the agreement. A PDF version is available for download [here](#).

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Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

Authors

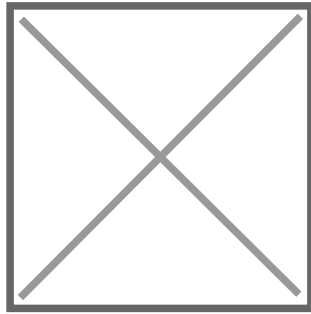


James R.G. Cook

Partner

416.865.6628

jcook@grllp.com



Christina Tassopoulos

Associate

416.865.3328

ctassopoulos@grllp.com