Protect Your Rights: Purchasers Warned to be Cautious Regarding a Vendor Reserving Rights on a Sale

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The Ontario Superior Court's recent decision in *2284064 Ontario Inc. v. Shunock* 2017 ONSC 7146 provides a firm reminder to purchasers that when a vendor wishes to reserve rights on a transfer of a real property interest, the parties to the transaction must ensure that there is a sufficient understanding as to what those rights are.

Background

Michael Shunock ("Shunock") owned and occupied a two-storey building located at 820 Mount Pleasant Road in Toronto (the "Subject Property"). In 2011, Steven Leyzac (the "Applicant") approached Shunock about purchasing the Subject Property as part of a land assembly that was anticipated to include four properties: (1) the Subject Property, (2) 808 Mount Pleasant Road (the "808 Property"), (3) 247 Roehampton Avenue (the "247 Property"), and (4) 249 Roehampton Avenue (the "249 Property", and together with the 247 Property, collectively, the "Roehampton Properties"). Leyzac had already negotiated agreements of purchase and sale for the Roehampton Properties.

Shunock was initially unwilling to sell the Subject Property as it was useful to him both personally and professionally. If he was to sell, he wanted the opportunity to purchase commercial space in the proposed development. In 2011, by agreement of purchase and sale (the "Agreement"), Shunock agreed to sell the Subject Property. The Agreement contained the following provision:

The Seller shall retain a first right of refusal to purchase commercial/professional space in the development project on an exclusive basis for a dental/orthodontic/hygiene office. Said space shall be considered as prime commercial space located on the main floor with frontage on Mount Pleasant Road up to 3500 square feet but not less than 3000 square feet at a sale price of $375 per square foot plus applicable taxes.

Shunock later registered the "first right of refusal to purchase" on title to the Property (the "Disputed Right").

The 808 Property was the last of the four properties needed for the proposed land assembly. The Applicant entered into a memorandum of intent (the "MOU") with

Norsham Inc. ("Norsham"), the owner of the 808 Property, with the intent of entering into a partnership for the joint development of a residential, retail and commercial complex. However, one year later, Norsham terminated the MOU on the basis that the parties had not settled the terms of the partnership agreement within the time period specified.

Given that the 808 Property was now unavailable for the proposed development, Leyzac was unable to proceed with a development project of the size and scale that he anticipated at the time of contracting to purchase the Subject Property. On July 4, 2016, Leyzac received an offer to purchase the Subject Property and the Roehampton Properties from All-Borough Millenium Inc. The offer to purchase was conditional on a release of Shunock's Disputed Right.

The Applicant sought a declaration that the Disputed Right was void, invalid and no longer of any force and effect. Given that the 808 Property was unavailable as a part of the project, the Applicant submitted that the Disputed Right was void on the basis of frustration.

The Decision

The Court noted that the drafting of the Disputed Right merged and conflated a right of first refusal with a right to purchase. After outlining the differences between a right of first refusal and a right to purchase, as well as looking at the intent of the parties in the drafting of the Agreement, the Court concluded that the Disputed Right was not a right of first refusal, but was instead an immediate right in favour of Shunock to purchase a specific part of the proposed development once completed. Additionally, the Court determined that the scope of the Disputed Right was such that even without the 808 Property, the right to purchase still existed so long as the floor space specified by the Disputed Right was constructed.

The Court also found that the Applicant failed to establish the elements of the doctrine of frustration. The evidence showed that the possibility that the 808 Property would be unavailable was foreseen by the Applicant in the MOU and that specific provisions were drafted accounting for this possibility. Additionally, the Court noted that there was insufficient evidence to establish the impossibility of advancing a development project on the land assembly consisting of the Subject Property and the Roehampton Properties to produce commercial space of the size required to activate the Disputed Right.

Comment

An important takeaway stems from this decision: when a vendor wishes to reserve rights on a transfer of a real property interest, the parties to the transaction must draft such rights in a manner that is sufficiently clear in specifying what those rights are and what limitations, if any, are attached to those rights. For instance, if the rights are intended to apply in the event that a specified development project is constructed and completed, that must be explicitly set out and the specified development must be appropriately defined.

In this case, it was unclear what rights were reserved to Shunock by the Disputed Right. Additionally, it was uncertain if the Disputed Right applied to a development project that

did not include the 808 Property. As a result, the purchaser has been left in a position where he is forced to honour the vendor's right to purchase a specified floor space, even though one of the significant properties in the proposed development project is not available.

Purchasers must be cautious when permitting vendors to reserve rights on a transfer and must always ensure that if rights are reserved by the vendor, that those rights are understood by the parties to the agreement.

By

Andrew Guerrisi, Anthony Deluca

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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