LAW360™ Canada

Law360 Canada | 111 Gordon Baker Road, Suite 900 | Toronto, ON, M2H 3R1 Canada | www.law360.ca
Phone: (800) 668-6481 | customerservice@lexisnexis.ca

Courts won’t rewrite your business contract

By **Marco Falco**

Marco Falco

Law360 Canada (March 8, 2024, 9:25 AM EST) -- The words of a commercial agreement matter.

In 2014, the Supreme Court of Canada, in its leading decision *Sattva v. Creston Moly Corp.*, 2014 SCC 53, established that the starting point for any court’s interpretation of a contract is its language.

While the factual matrix at the time of the contract’s execution may shed light on the parties’ intentions, the court was clear that evidence of the agreement’s surrounding circumstances must “never be allowed to overwhelm the words.” That is, the courts will not use the parties’ conduct to re-draft the contract.

Nearly a decade later, a recent decision of the Ontario Court of Appeal, *3 Gill Homes Inc. v. 5009796 Ontario Inc. (c.o.b. Kassar Homes)*, 2024 ONCA 6, affirms that even where the strict enforcement of a business agreement’s language may seem harsh, Canadian courts will not recreate the parties’ bargain.

Minutes too late

The case of *3 Gill Homes* involved a commercial real estate transaction in which the purchaser investor missed the deadline to pay monies to close the transaction by 35 minutes. The purchaser and vendor entered into a number of agreements of purchase and sale for newly-built residential properties that the purchaser intended to rent out.

The agreement of purchase and sale at issue (the APS) included a typical “time is of the essence” clause, stipulating that the deadlines under the APS were to be strictly enforced absent a written agreement between the parties:

> 17.04 Time shall be of the essence of this Agreement in all respects, and any waiver, extension, abridgement or other modification of any time provisions shall not be effective unless made in writing …
>
> The APS also included a provision requiring that the purchaser pay the funds on the closing date by 3:00 p.m. or the deal would end:
>
> 14.02(c) If the Purchaser’s lawyer is unwilling or unable to complete this transaction via TERS [“Teraview Electronic Registration System”] … then said lawyer … shall be obliged to personally attend at the office of the Vendor’s Solicitor … by no later than 3:00 P.M. (London, Ontario time) on the scheduled Closing Date …
>
> 14.02(d) The Purchaser expressly acknowledges and agrees that the Vendor shall not be requested nor required to release the transfer / deed to the Property … unless and until the balance of all funds due on Closing … are remitted … and correspondingly received by the Vendor’s Solicitor by no later than 3:00 P.M. on the Scheduled Closing Date.

A number of delays plagued the transaction.

Pikovit44: ISTOCKPHOTO.COM

Specifically, the initial closing date of Aug. 31, 2021, was missed. As the Court of Appeal ultimately found, the “conduct of the parties treated deadlines as flexible” and the vendor had missed a number of deadlines under the APS that did not result in the contract’s termination. Ultimately, however, the parties modified the original APS on Nov. 15, 2021, to postpone the closing date and time to 3:00 p.m. on Jan. 28, 2022.

In the weeks leading up to the ultimate closing date, the vendor’s principal reminded the purchaser that the closing funds had to be paid by 3:00 p.m. or the transaction would terminate.

A few days before the closing date, the lawyer for the vendor wrote to the lawyer for the purchaser advising that closing funds were due at 3:00 p.m. on Jan. 28, 2022. The purchaser requested a further extension of the closing date to Jan. 31, 2022, which the vendor denied. On the day before closing, the vendor again reminded the purchaser that if the closing funds were not received by 3:00 p.m. the next day, the APS would be at an end.

At 2:47 p.m. on the closing date, the lawyer for the purchaser wrote to the vendor’s lawyer advising that the funds were ready and banking issues were being addressed.

3:00 p.m. passed.

At 3:10 p.m., the vendor’s lawyer wrote to the purchaser’s lawyer advising that the transaction was at an end as the 3:00 p.m. deadline had been missed and funds were not received by that time. The funds were ultimately delivered and received by the vendor’s lawyer 35 minutes late. The vendor returned the funds to the purchaser and declared the APS at an end.

The application judge rejected the purchaser’s submission that the vendor had breached the APS, that the contract was unconscionable, and that the purchaser had suffered damages. The court held that the vendor was allowed to terminate the APS due to the purchaser’s late payment. While the result appeared harsh, “it was not unfair for the [vendor] to enforce the payment deadline in light of the ‘time is of the essence’ clause.”

On appeal, the Court of Appeal affirmed.

Strict language of contracts will be enforced

The Court of Appeal leaned on the principle of freedom of contract in reaching its conclusion. Where sophisticated commercial parties enter into an agreement, the parties’ bargain is to be respected. Here, the language of the APS made it clear that receipt of the closing funds was to occur by 3:00 p.m. To hold otherwise would engage the court in the exercise of rewriting the words of the contract:

> … the wording of article 14.02(d) of the APS was clear and meant that where, as here, electronic registration was mandatory, the funds due on closing had to be received by 3:00 p.m. on the closing date. It would be an unwarranted intervention into the freedom of contract for a court to alter the APS and its closing time.

Parties' conduct cannot overwhelm contract's words

Presumably adopting the well-known principles in *Sattva, supra*, the court further held that the fact that the parties had, in the past, ignored previous deadlines in no way detracted from the enforcement of the "time is of the essence" clause:

> The appellant submits that the 'time is of the essence' clause was not strictly enforced in a series of transactions between the parties, including with respect to the prior missed deadlines under the APS … While the prior conduct of the parties treated deadlines as flexible … it was open to the application judge to treat the amendment as a starting point from which the closing deadline of 3:00 p.m. on January 28, 2022, was to be treated as firm …

By its very nature, the "time is of the essence" clause expressly provided that the parties did not waive the contractual deadlines. The parties' behaviour subsequent to entering into that clause could not be used to alter its plain and ordinary meaning.

Equity will not undue contractual language

The Court of Appeal further rejected the purchaser's argument that equitable considerations could be used either to deem the contract as a whole unconscionable or to relieve against the harsh effect of the APS' language. The parties were sophisticated real estate investors. In no way could the transaction or APS be characterized as "unconscionable." The parties had closed two previous transactions and had a history of dealings.

As for whether the court could exercise its equitable discretion to relieve against the harshness of the effect of missing the 3:00 p.m. deadline by 35 minutes, there was no "evidentiary foundation" to do so. Rather, the parties' emails exchanged before closing clearly revealed that the vendor had always maintained a strict enforcement of the closing deadline. Further, the vendor returned the funds to the purchaser, so no inequity had been visited upon the purchaser.

Words of a contract are paramount

All things equal, *3 Gill Homes Inc.* illustrates a simple principle: a contract's words, as chosen by commercial parties of equal bargaining strength, are of the utmost importance. A court's exercise in interpreting any agreement must begin with the words of the contract itself and the courts will enforce that bargain as expressed in language. Only where the parties' intentions cannot be glossed from a plain and ordinary reading of the agreement's language will a court proceed to consider evidence of the factual matrix surrounding the contract's execution, or resort, if necessary, to equity.

Otherwise, the words will govern.

Marco P. Falco is a partner in the Litigation & Dispute Resolution Group at Torkin Manes LLP. For more information regarding the interpretation of your business contract, you may contact Marco at mfalco@torkin.com. Please note that a conflict search will have to be conducted before your matter is discussed.