



The Perils of Drafting an Ambiguous Escape Clause

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Abstract

Escape clauses in purchase agreements must be drafted clearly in order to convey the intention of the parties, otherwise there is a danger that the courts will interpret the clause least favourable to the author of the document.

Full Article

It is very important when drafting agreements of purchase and sale to ensure that an escape clause is drafted clearly in order to convey the intention of the parties. Where there is ambiguity in a contract, the courts will examine the intention of the parties reflected in the language of the contract. In cases of ambiguity, courts will apply the rule of *contra proferentem*, which means that any ambiguity should be interpreted in the fashion least favourable to the author of the document (*Manulife Bank of Canada v. Conlin*). As such, if the purchaser insists that a provision be inserted into a purchase agreement, the language of the provision should provide courts with a clear picture as to the exact intention of the party insisting on the clause.

A recent Ontario Superior Court of Justice decision highlights the importance of drafting unambiguous provisions reflecting the clear intent of the party in order to avoid the application of the rule of *contra proferentem*.

In *Shoker v. Orchard Garden Markets Ltd.*, [2007] O.J. No. 3482, Ont. S.C.J, the vendor was approached by the real estate agent acting for the purchaser who wished to purchase the property for commercial purposes. The agent obtained from the vendor a list of permitted uses and prepared an offer on a pre-printed form for a purchase price of \$2,240,000 million and a deposit of \$50,000. The conditions in favour of the purchaser were as follows: (1) the purchaser to ascertain that the property was zoned for the permitted uses listed by the vendor and (2) that the Purchaser exercise his due diligence in that the property be suitable for his use". The offer was accepted by both parties and the deposit was delivered to the vendor.

During the due diligence period, the purchaser's realtor advised the vendor that the purchaser intended to terminate the transaction because the property could not be used as a trucking terminal. The purchaser, however, did not include any provision in the agreement that he intended to use the property in such a manner. The vendor



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refused to return the deposit and the purchaser brought an application for the return of the deposit claiming the second condition to be a stand alone clause allowing him to terminate the contract should the property not be compatible with his intended use, whether specified in the contract or not.

The court, in dismissing the purchaser's application, applied the rule of contra proferentem and did not accept the purchaser's argument that the second condition was a stand alone clause. Instead, while emphasizing that the conditions were included for the benefit of the purchaser by the purchaser's realtor, the court concluded that it was the intention of the parties to specify the contemplated uses of the property in the first condition, while the second condition was ancillary and imposed due diligence requirements on the purchaser in reliance of the first condition. As such, the purchaser forfeited its deposit simply because he did not specify his intended use of the property in the purchase agreement.

In conclusion, it is extremely important that your lawyer closely review purchase agreements to ensure that the escape clauses contained therein are drafted clearly in case the agreement must be terminated by the purchaser. If clauses are not drafted clearly with the necessary language, a court will likely interpret the contract in a manner least favourable to the person who drafted the agreement and who is insisting on a particular interpretation of the subject clause.

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