



Merger Articles

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Abstract

Prior to your purchase closing, it is imperative that any repair that you want the seller to complete prior to closing be completed. If a matter cannot be completed, you must decide if you are entitled to terminate the transaction based on the circumstances or if an undertaking by the seller and a holdback will be sufficient. In the absence of any action on your part prior to closing, you will jeopardize your legal right to have the repairs completed or any claim against the vendor for damages.

Full Article

Rosenhek v. Breda is an Ontario Superior Court of Justice decision whereby the purchaser of a residential property made a claim for damages in respect of an alleged breach of contract arising out of a residential purchase.

The parties entered into an agreement of purchase and sale that contained a clause providing that it was conditional on the purchaser obtaining at his expense, within three business days, an inspection of the property by a qualified home inspector. An inspection revealed a series of minor matters to be repaired.

The purchaser signed a typed waiver waiving the inspection condition in the purchase agreement. Underneath the typed portion of the waiver, the following was written in by hand: "This waiver is being provided on the understanding that the following items will be repaired/carried out as per attached list on or before closing of this transaction." Both the seller and purchaser initialed the handwritten clause (the "Repair Agreement").

Subsequent to the Repair Agreement and prior to the closing of the transaction, the seller arranged for work to be done on the items identified in the Repair Agreement.

The transaction closed on September 14, 2004. There was no evidence of any correspondence between solicitors or any issues raised on closing with respect to the repair items listed in the Repair Agreement. At the time of the closing the purchaser said that he thought that all the repairs had been done as the seller had promised.

In the spring of 2007, the purchaser's had a leak in their family room ceiling beneath the lower flat roof. The purchaser repaired the roof.



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The claim against the seller is for breach of the purchase agreement and the Repair Agreement. In particular, the purchaser submits that the seller breached the Repair Agreement by failing to eliminate the standing water on the flat roof and around the sky light on or before closing.

Nothing was done to eliminate the standing water from the lower flat roof or around the skylight. Justice Pattillo indicated that it was incumbent on the seller to find out what, if anything, was done or required to be done to the flat roofs to eliminate standing water on the lower flat roof and around the skylight on the upper flat roof. Since the seller did not do this, the seller was in breach of the Repair Agreement by not taking the necessary steps to eliminate the standing water on the flat roof and around the skylight on or before closing.

The seller submitted that even if it was in breach of the Repair Agreement, the purchaser's claim is not actionable having regard to the doctrine of merger.

The doctrine of merger provides that the acceptance of a deed in the sale of land is prima facie full execution of the agreement to convey the land and any preliminary understandings or agreements relating thereto become merged in the conveyance. There is no presumption in favour of merger. Its application depends on the common intention of the parties express or implied.

In the view of Justice Pattillo the Repair Agreement was a collateral contract between the purchaser and seller. It was entered into subsequent to the Agreement and in respect of the waiver of the inspection condition. It is an agreement or undertaking independent of the purchase agreement itself but related to the sale of the property.

As noted, the doctrine of merger is not applicable if it was the intention of both parties that the Repair Agreement survives the closing. That intention must be discerned from the wording of the Repair Agreement itself and the surrounding circumstances. The plain wording of the Repair Agreement suggests that it was not intended to survive the closing. It provides that the listed items will be repaired/carried out on or before closing of the transaction. As such, the court indicated that the obligations in the Repair Agreement were specific and meant to be completed on or before closing.

Given the genesis of the Repair Agreement, the court stated that it did not consider an interpretation that the parties intended the Repair Agreement to merge on closing to be either illogical or render the Repair Agreement meaningless. The Repair Agreement was the basis of the purchaser's waiver of the inspection condition. That condition permitted him to terminate the purchase agreement. He was entitled to require confirmation from the seller prior to or upon closing that the repairs had been completed. In the absence of the repairs having been completed, the seller would have been entitled to either refuse to close and terminate the purchase agreement or close with a further agreement extending any remaining repair obligation beyond closing.

In addition, the court held that the conduct of the parties after the closing supported the conclusion that the parties intended that the Repair Agreement would merge on closing.

Accordingly, the court held that the parties did not intend the Repair Agreement to survive the closing and therefore the doctrine of merger applies to the purchaser's claim for breach of the Repair Agreement with the result that it is not actionable.