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## UNEXECUTED AGREEMENTS:

# Binding or Not?

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### Abstract

*The Ontario Court of Appeal has clarified that otherwise unenforceable verbal contracts for the purchase and sale of land will be upheld because the terms of the otherwise unenforceable contract were partly performed, notwithstanding a statutory requirement that such deals must be reduced to writing and signed in order to be enforceable. As such, it is very important for buyers and sellers to obtain real estate legal advice when negotiating agreements of purchase and sale.*

### Full Article

Erie Sand and Gravel Limited ("Erie") bought land from Seres' Farms Limited ("Seres") in the County of Essex (the "north side land"). It wanted to buy other land that Seres owned on the south side of that previously purchased land (the "south side land"). Erie wanted the south side land because it contained aggregate and Erie's business depended on having an adequate supply of aggregate. Seres told Erie that it was willing to sell the south side land to it on the same terms as it had sold the north side land.

Erie knew that the south side land was subject to a right of first refusal in favour of Tri-B Acres Inc. ("Tri"). It had a copy of the right of first refusal and recognized that giving Seres an offer for the south side land could trigger its operation.

Erie and Seres met to discuss the purchase and sale of the south side land. Erie told Seres that because of the right of first refusal, it wanted to have all the terms agreed to before it gave Seres a written offer. The parties agreed that Erie would buy the south side land and agreed to the essential terms. Seres asked Erie to give it a written offer that reflected their agreement and said that Erie would get the south side land unless Tri matched its offer.

Erie prepared an offer in accordance with the agreed upon terms and delivered it to Seres. Seres took the offer to Tri and Tri made an offer for the property that did not match the Erie offer. Despite Seres promise to Erie, it accepted the Tri offer.

Erie immediately brought an action for specific performance of the agreement it had with Seres. The trial judge held, among other things, that Tri was ordered to transfer the south side land to Erie. The Ontario Court of Appeal, on appeal, held that the trial judge did not err in finding that the parties had reached an oral agreement for the purchase and sale of the lands.



# Unexecuted Agreements

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The Court of Appeal reasoned as follows. To protect against fraud, section 4 of the Ontario *Statute of Frauds* stipulates that in order to be enforceable, an agreement for the sale of land must be (1) in writing and (2) signed by the “party to be charged”. An exception to this requirement is the doctrine of part performance, which applies because the risk of fraud in such circumstances is minimal. As such, the court may enforce an agreement that is unsigned or unwritten, if there has been partial performance of the otherwise unenforceable agreement.

The agreement between Erie and Seres was more than an agreement to agree. The fact that a formal written document was to be prepared and signed did not alter the binding validity of the original contract. There were sufficient acts of part performance to take the agreement outside the *Statute of Frauds*. As Erie had performed its obligations under the agreement to its detriment while Seres stood by, equity would not permit Seres to rely on the *Statute of Frauds* to excuse it from performing its obligations under the agreement. Erie could not stand in a better position than Seres. It was quite clear that the property was unique to Erie justifying a finding of specific performance of the contract resulting in the property to be transferred to Erie.