

Legal update

What to believe? Contradictory provisions in a deed of sale

October 2016

Real estate

In the *Les Habitations Gilles Stébinne Inc. v 9166-9929 Québec inc.* decision rendered this past summer, the Superior Court of Quebec was faced with a situation we see all too often in real estate transactions concerning contradictory wording. And this situation all too often leads to litigation.

Background

In the deed of sale that was registered on title to give effect to the transaction, a section provided that (our translation), “The purchaser declares that it has completed tests regarding the quality of the ground and the underground and it releases the vendors from all responsibility and waives its right to make any claim, action or proceeding against the vendors with respect to the condition of the ground or the underground of the property and that the purchaser is satisfied therewith.” (The Environmental Provision)

Despite the clarity of such section in regard to environmental matters, the deed of sale also had a representation and warranty of the vendors to the effect that the property complies with all environmental laws and regulations and the sale was made with legal warranty. Moreover, a provision of the offer to purchase (which preceded the deed of sale) included a vendors’ representation that the property was not subject to any contamination issues.

It is surprising how often we see this kind of contradictory wording within a deed of sale or the discrepancies between the offer to purchase that precedes the deed of sale and the deed of sale itself. A thorough review of the deed of sale in this case should have normally resulted in specific references to the Environmental Provision to prevent the type of issues that were raised in this case.

Parties’ intent to exclude environmental liability

In this case, despite the fact the property in question did not comply with environmental laws, the judge thankfully gave precedence to the Environmental Provision and concluded that the specificity of the Environmental Provision made it abundantly clear that the parties’ intent was to exclude the vendors’ environmental liability despite the other contradictory provisions found within the deed of sale.

There were other important factors that led the judge to come to this conclusion, including the fact the purchaser was an experienced real estate businessperson and it was the purchaser’s notary who drafted the deed of sale.

It should also be noted the purchaser did not conduct any independent environmental assessment of the property and relied on prior reports given to it by the vendors. The judge therefore found it difficult to hold the vendors responsible when the purchaser, in an effort to reduce costs, was not willing to conduct a proper due diligence despite acknowledging doing so in the deed of sale.

Another interesting aspect of this case is that the plaintiff took the unusual step of taking action against the vendors' shareholders despite the fact they did not guarantee the vendors' obligations. The plaintiff claimed the shareholders acted in a fraudulent manner and that the corporate veil could be lifted to engage the personal responsibility of the shareholders. The individuals who were sued were successful in their counterclaim against the plaintiff for instituting abusive proceedings against them since there was no reasonable basis to institute such claim. The corporate vendors were unsuccessful, however, in their counterclaim against the plaintiff for abusive proceedings as the judge felt there was enough of a legal basis to make a claim against them.

It goes without saying that while some provisions are standard in a deed of sale, when there is a special indemnity or an exoneration of responsibility for certain aspects of the transaction, an effort should be made to ensure that the proper qualifications are added to the deed to avoid contradictory provisions that will inevitably lead to litigation.

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