LAWSON LUNDELL LLP
www.lawsonlundell.com

February 2013

Whoa! developers: Court may no longer be the answer

Michael Morgan

A recent Supreme Court of Canada decision addressed a number of thorny issues relevant to commercial real estate disputes including whether a Plaintiff must mitigate its damages where it has made a claim for specific performance of a real estate contract. The decision has wide-ranging implications for commercial real estate developers.

The case involved Southcott Estates, a single purpose corporation, which is a part of the Ballantry Group, a developer that acquires and develops land in the Greater Toronto Area. The Defendant, the Toronto Catholic School Board (TCSB), was in the process of selling property to Southcott Estates when the deal began to go south. After entering into the contract, TCSB subsequently failed to satisfy a condition in the contract and refused to extend the closing date. In turn, Southcott Estates sought specific performance of the contract.

The Supreme Court was asked to consider three issues:

- Whether a single purpose company should mitigate its losses;
- To what extent must a Plaintiff mitigate where the Plaintiff has made a claim for specific performance; and
- Did the trial judge err in concluding there was no evidence of comparable properties available for mitigation?

In a 6 to 1 decision, the Supreme Court of Canada dismissed the appeal. The Court considered the nature of single-purpose corporations created within a larger group of companies which is a common practice with commercial real estate developers. The Court commented that these single-purpose corporations cannot avoid mitigating their damages simply because they have no assets as that would be an unfair advantage over those conducting businesses without the use of single-purpose corporations. Further, Southcott Estates could not claim damages as a result of the failed contract as they didn't take reasonable efforts to find a substitute property, which could have reduced the damages alleged to have been incurred.

Michael Morgan
604.631.9227
mmorgan@lawsonlundell.com

This decision is significant in that, among other things, many commercial real estate developers utilize single-purpose corporations for various legitimate reasons while developing properties. However, the use of these single-purpose corporations may have an impact upon a claim for specific performance and/or damages and a duty to mitigate should the transaction fail to complete due to a breach by a Vendor.

Given the number of collapsing real estate transactions over the last several years, commercial real estate developers will need to carefully consider the impact of this decision including steps they ought to take in response to a real estate deal that does not close.

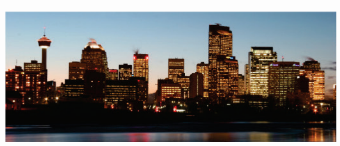
For example, developers ought to assess:

- Whether there is a fair, real and substantial justification for claiming specific performance;
- If not, what steps ought to be taken to find a suitable alternative development site; and
- Whether a court action against a defaulting vendor ought to be pursued if damages are the only realistic remedy available.

Accordingly, as a result of this decision, developers may no longer simply seek to enforce the contract against a defaulting vendor as a matter of course but rather further analysis must be undertaken. That analysis will include the state of the market at the time of breach and the likelihood of a court forcing a sale of the property in the circumstances faced by the innocent developer.

For more information please contact Michael Morgan at mmorgan@lawsonlundell.com or 604.631.9227.

Article reprinted with permission. Originally published in Canadian Real Estate Magazine on January 14, 2013.



Vancouver
Suite 1600, Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
(T) 604.685.3456
(F) 604.669.1620

Calgary
Suite 3700, 205-5th Avenue S.W.
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
(T) 403.269.6900
(F) 403.269.9494

Yellowknife
P.O. Box 818
Sute 200, 4915 – 48 Street
Yellowknife, Northwest Territories
Canada X1A 2N6
(T) 867.669.5500 Toll Free: 888.465.7608
(F) 867.920.2206