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Real Estate

City of Orillia claims double victory in Ontario Court of Appeal decisions

By **Jeff Buckstein**

(May 17, 2021, 8:39 AM EDT) -- The City of Orillia emerged victorious recently on both ends of an appeal and a cross-appeal heard simultaneously by the Court of Appeal for Ontario.

Orillia (City) v. Metro Ontario Real Estate Limited 2021 ONCA 291 involved a commercial lease in a shopping centre with the City as landlord and Metro as tenant. The City appealed a 2019 judgment from the Superior Court of Justice, *City of Orillia v. Metro Ontario Real Estate Ltd*. 2019 ONSC 7467 in favour of Metro.

Metro, in turn, cross-appealed another part of that same decision in favour of the City.

Metro originally signed a 25-year lease on March 1, 1979, to expire Feb. 28, 2004, with a right to five successive renewal periods of five years each that could extend for a maximum lease period of 50 years until February 2029.

In 1999, the lease was extended until Feb. 28, 2014. The City contended that two of the five renewal periods had been exercised, with three remaining until the maximum lease term expired in 2029. Metro argued it still had five renewal options that could extend its lease until 2039.

The application judge ruled in favour of Metro, stating that the lease was ambiguous because there were two reasonable interpretations of its term clauses.

In appealing to the higher court, the City argued that the application judge had committed an extricable error of law in finding an ambiguity with respect to the length of the lease and failed to interpret the contract as a whole. Metro contended this was a question of mixed fact and law and that the standard of review was one of palpable and overriding error, and that no such error was made by the application judge.

The May 6 unanimous Court of Appeal decision, written by Justice Alison Harvison Young, and supported by Justices Kathryn Feldman and Janet Simmons, allowed the City's appeal and agreed the maximum expiry date for the lease remained 2029 and not 2039.

"The application judge fell into error in failing to consider the actual wording within the context of the lease as a whole, which led him to find that the provision was ambiguous. This was an extricable legal error," Justice Harvison Young wrote.

The second case involved Metro's cross-appeal with respect to which party was responsible for roof replacement. After Metro's roof began to leak in 2016, it brought an application requesting an order for the City to do so. The City counterargued that the roof, whether it required repair or replacement, was Metro's responsibility.

The application judge ruled in favour of the City, noting that Metro had an obligation under a clause of its lease with the City to maintain and repair its premises, and there was no legitimate basis to distinguish that clause because it said "repair" and not "replace."

Justice Harvison Young stated the application judge did not err in concluding that the City did not have any duty to replace the roof, and dismissed the cross-appeal.

"The starting point for the determination of the parties' rights and obligations under a commercial

lease must be the lease itself, read as a whole. The covenant to repair as set out in s. 14(1) imposes a general obligation upon the tenant," noted the decision, which also held that the maximum lease length of 50 years was longer than the typical service life of 20-25 years for built-up roofs.

Stephanie Fleming, Municipal Law Chambers

Stephanie Fleming, an associate with Municipal Law Chambers in Oakville, Ont., said she agreed with both decisions by the Court of Appeal, taking into account an interpretation of the original and amended lease agreements, the facts of the matter and how they apply.

The Court of Appeal provided necessary clarity to the lease term in the appeal by examining the original and amended agreements in their entirety. On that basis it determined, without ambiguity, that the lease only ran for 50 years, rather than relying on a piecemeal interpretation, where one new provision on the amended lease might have been viewed as letting it run for 60 years, she explained.

"Sometimes looking at an agreement as a whole is difficult because contracts can be hundreds and hundreds of pages, and when you look at certain parts, you think 'this cancels out an earlier part.' But when you look at it as a whole it gets clearer," said Fleming.

"I absolutely agree with both decisions," said Robert Wood, a partner with Borden Ladner Gervais LLP in Toronto, who was counsel for the City of Orillia. "The City is very pleased, and we were pleased as counsel."

"The issue of the maximum lease term was a very significant issue for the City in light of their plans to redevelop the downtown area. We wanted certainty for the lease term, and for the purposes of redevelopment flexibility," Wood explained.

Robert Wood, Borden Ladner Gervais LLP

The major issue with respect to the appeal was a question of contractual interpretation for what the City contended was an extricable error of law on the part of the Superior Court of Justice decision, which called for a standard of correctness, said Wood.

It is rare to get a finding of an extricable error of law, as determined in the Court of Appeal ruling. This decision therefore confirmed that the obligations of a judge when reviewing two agreements such as this is that both need to be reviewed carefully together in order to arrive at a harmonious interpretation, he elaborated.

"It was on that basis that the Court of Appeal agreed with the City's original position, which was that there is no ambiguity here if you properly consider both agreements together," said Wood.

Legal experts believe there are several lessons for lawyers emanating from these Court of Appeal rulings.

With respect to the appeal case, real estate lawyers in particular "might want to look over their contracts just to make sure things are unambiguous, that their repair and replace clauses are clear, and obviously that the terms of the leases are very clear as well," said Fleming.

Wood said these decisions by the Court of Appeal for Ontario are instructive for solicitors or lawyers who negotiate contracts.

He cited the following, as written by Justice Harvison Young in her decision: "The application judge's view that the basket clause in s. 6 of the amending agreement applies does not survive scrutiny. Section 6 provided that the original lease would be amended where necessary to give effect to the amendments. But the parties did not amend the 50-year limit provision, despite the fact that it was in the same section of the original lease addressing the initial term and renewal options."

That part of the decision is a salutary finding for counsel everywhere to take care. If the parties to an amending agreement believe that an amendment to the underlying agreement is significant it should be expressly covered in the amending agreement, Wood said.

It is very common in real estate and commercial transactions to have amending agreements or schedules added to agreements, particularly in lengthy contracts that extend over decades. This case reiterates that "an amendment to an agreement is a part and parcel of the agreement, and therefore you have to read them holistically," said Darryl Singer, head of commercial and civil litigation with Diamond & Diamond Lawyers LLP in Toronto.

"It's an interesting first principles case that I would use as instructive to young lawyers. We have a large real estate practice in my firm, and they often seek advice from me on drafting. I would be saying to them with this case 'you need to be abundantly clear in how you draft things. You can't leave any room for ambiguity or doubt,' " he added.

Lawyers sometimes have a tendency to think the longer the contract is, the better. But it is not about how long the contract is — the important lesson is to be specific in drafting, said Singer. "If you make it precise, you're safe," he stressed.

Singer recommended that when negotiating a commercial lease for a business involving an older building where there is a possibility that something is going to need extensive replacement, lawyers might want to consider inserting a clause in the contract that defines replacement differently than repair.

The Lawyer's Daily also reached out to the counsel for Metro, but did not get a response.