

Agreements of Purchase and Sale and Leases: The Statute of Frauds and Part Performance

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There is an old saying that an oral agreement is not worth the paper it is written on. After all, doesn't the *Statute of Frauds RSO 1990, c s.19* (the "Statute") require that agreements in land, including leases and agreements of purchase and sale, have to be in writing. Recently, there have been important developments in the case law on leases and agreements of purchase and sale of real estate. Courts may increasingly find oral real estate agreements enforceable, due to the increased use of electronic communication and the Ontario Court of Appeal's recent approach to part performance in *Erie Sand and Gravel Ltd. v. Seres' Farms Ltd.*, 2009 ONCA 709. The following is a brief overview of a few developments in the law on leases and agreements of purchase and sale of real estate in Ontario.

The Statute of Frauds

The *Statute* provides that leases for more than three years or agreements of the purchase and sale of property must be made in writing, signed by both parties to it and lawfully authorized in writing. Section 4 of the *Statute* provides that no action can be brought where there is no written agreement or, in the alternative, "some memorandum or note thereof." A written contract would obviously meet the *Statute's* writing requirement. However, in instances where there is no written contract, there is no requirement that the memorandum or note has to be in a particular form.

Evidence of the agreement could be contained in correspondence, a receipt or even an internal company memorandum. The memorandum could have been made at any time, and does not need to be created contemporaneously with the formation of the agreement, as long as it existed before the action to enforce the contract.

Courts have found that written proof of an oral agreement can be in electronic form and even in an exchange of emails. They may find through an examination of email correspondence that an

agreement had been made between the parties and that such agreement complied with the *Statute's* writing requirement. In deciding whether a valid contract exists through correspondence, there must be clear indication within the correspondence that an offer was made and that the offer was accepted. Also the parties must have agreed upon the essential terms.

In order to sue upon a contract, only the person who is being sued is required to have signed the document whether a contract or written proof of an oral agreement. As long as the other requirements of the *Statute* are met, the courts have stated that "a plaintiff may sue upon a contract required to be in writing by the *Statute of Frauds* even though he has not signed it providing that the defendant has signed the memorandum or contract upon which he is sought to be charged."

Essential Terms of an Agreement

Essential terms must be present for the formation of a valid contract for the sale of land which would otherwise be void for uncertainty. In general, the four essential terms are: 1) the identity of the parties, clearly set out; 2) the property being dealt with, clearly set out; and 3) the price, or a formula to determine the value, must be established; 4) evident intent to convey, i.e. sell.

In the context of a lease, the requirements for a binding agreement are as follows: 1) the premises must be clearly defined and ascertainable; 2) the parties must be named and the names must be correct; 3) the rent of all types (i.e. basic and additional) is to be clearly set out; 3) the commencement and expiry dates of the term must be clearly set out and easily capable of being determined; and 5) all other material terms of the contract not incidental to the landlord and tenant relationship including any covenants, conditions, exceptions or reservations must be set forth.

It is important to note that courts have found that even if not all of the details of the lease have been set out, agreement on the fundamental terms of the lease contained in a written document may make it binding. Terms that parties considered fundamental to their particular agreement outside of those listed above can also be considered fundamental terms. Where the understanding of the parties is that their legal obligations will not arise until a formal contract has been executed, the execution of the completed formal agreement is essential to the formation of the contract itself. An agreement that does not comply with the *Statute* is not void, but rather unenforceable.

The Doctrine of Part Performance

The doctrine of part performance was developed to deal with cases where requiring strict compliance with the writing requirements of the *Statute* would be unjust. The doctrine of part performance provides that where one party to an oral agreement partially performs their undertaking, the oral agreement may be enforced to avoid injustice to the party conferring value. Part performance should only oust the application of the *Statute* where the acts are unequivocally referable in their own nature to dealing with the land.

The Supreme Court of Canada set out the requirements that must be satisfied before the doctrine of part performance applies as follows; 1) the performance must be unequivocally referable to the alleged contract. Payment of money is not sufficient to establish part performance; 2) the acts of performance must be acts of the plaintiff who acted to his detriment and which acts are known to the other party; 3) the contract must be one for which the law would grant specific performance if it had been properly evidenced in writing, i.e. it must have the essential terms discussed above; and 4) there must be clear and proper evidence of the existence of the contract.

Recent Changes

The Ontario Court of Appeal (the "ONCA") recently revised the law on part performance in *Erie Sand and Gravel Ltd. v. Seres' Farms Ltd.* In that decision, the court found that an offer signed only by the party making the offer, but not by the vendor, was binding on the vendor as all of the essential terms were established and the agreement was enforceable on the basis of part performance.

The decision is significant because real estate leases or agreements for purchase and sale, which do not satisfy the writing requirements of the *Statute of Frauds*, may be more likely to be enforced than they were in the past.

The ONCA found that payment of money could constitute a sufficient act of part performance, which is a deviation from the law as it existed before, and, secondly, the court also found that the acts of part performance needed to be referable to **a contract** and be consistent with the oral contract alleged, but not necessarily be unequivocally referable to the alleged contract. In other words, if the acts of part performance are on the balance of probabilities referable to a contract, then even though there could be other possible explanations as to why such acts of alleged part performance occurred, sufficient part performance could arise. Furthermore, the court widened the concept of the detriment that was necessary to be found to the party alleging the contract. Previous to *Erie*, an inability to acquire the property was not considered to be sufficient detriment. *Erie* appears to have changed that analysis and appears to recognize that an inability to acquire the property is sufficient detriment to the party alleging the contract. In *Erie*, the land in question was a gravel pit and the buyer was an operator of gravel pits who said they needed the land for the purposes of their business. As well, prior to *Erie*, the courts focused on the acts of the party claiming part performance. *Erie* suggests that courts should look more broadly at the actions of both parties to determine if there was part performance. With courts now looking to the actions of both parties, a binding lease or an agreement for purchase and sale may now be found to exist in situations where it had not previously.

So, basically, the possibility now exists that an exchange of e-mails followed by an allegation by a party that the essential terms of an agreement were set forth in the e-mails and together some act of part performance, which may simply constitute the payment of some money, could be the basis for an enforceable agreement for the acquisition of an interest in land. In other words, if you intend that such e-mail communications and letters to be non-binding and that any agreement only arise pursuant to an actual negotiated and executed agreement of purchase

and sale or offer to lease, then this had better be made explicit and, be aware that the acceptance of money following such an exchange of communications could result in a surprise allegation that the parties have made a binding deal.