

CITATION: Canadian Tire Corporation Limited v. Concord Adex Investments
Limited, 2011 ONCA 354
DATE: 20110509
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COURT OF APPEAL FOR ONTARIO

Rosenberg, Simmons and Blair JJ.A.

BETWEEN

Canadian Tire Corporation Limited

Applicant/Appellant

and

Concord Adex Investments Limited, Concord Discovery
Limited Partnership, Concord North York Limited Partnership,
Concord North York Limited, The Crestmark Developments
Limited Partnership and The Crestmark Developments Limited

Respondents/Respondents

Michael R. Kestenberg, for the appellant

Michael T. Tamblyn and Anthony Scane, for the respondents

Heard: May 2, 2011

On appeal from the judgment of Justice John R. R. Jennings of the Superior Court of
Justice dated December 21, 2010.

ENDORSEMENT

[1] The appellant appeals from a judgment dismissing its request for rectification –
based on mutual mistake – of a definition contained in an Agreement of Purchase and
Sale under which the appellant was the vendor and the respondents were purchasers.

[2] Under the terms of the Agreement of Purchase and Sale, in the event the Gross Floor Area (“GFA”) of the purchased lands was subsequently increased by by-law beyond the “GFA” of the purchased lands as of the execution date of the Agreement of Purchase and Sale, the respondent agreed to pay the appellant additional consideration for the purchase of the lands.¹

[3] “GFA” is defined in the Agreement of Purchase and Sale as having the meaning “ascribed to the terms ‘residential gross floor area’ and ‘non-residential gross floor area’ as applicable in [City of Toronto] By-law No. 438/86, as amended to the date of this Agreement.”

[4] Despite this definition of GFA, it is undisputed that the numeric references in the Agreement of Purchase and Sale to the GFA as of its date of execution were the same as the numeric references to the maximum GFA in a site specific by-law pertaining to the lands – and that those numbers were calculated using the definition of “Floor Area, Gross” in a predecessor North York By-law.

[5] The application judge dismissed the appellant’s request to rectify the definition of GFA as set out in the Agreement of Purchase and Sale to correspond with the definition in the site specific By-law because he found that “although agreeing on the base square footage that was said to be calculated under the site specific By-law, [the parties] intended to provide for variation under the definition in the By-law contained in the contract.”

¹ This agreement was carried forward into the terms of a free-standing agreement signed on the date of closing.

[6] The appellant contends that the trial judge erred in this finding and asks that we grant its application for rectification.

[7] In our view, this is not a case for rectification. Even if the trial judge erred in finding that it was the *appellant's* intention that GFA be defined by reference to City of Toronto By-law 438/86, there was compelling evidence to support his finding that it was the *respondent's* intention that the City of Toronto By-law definition be used to determine whether there was an increase in GFA beyond the specified GFA as of the date of execution of the agreement of purchase and sale. Counsel for the respondent made the respondent's intention clear in a meeting at which the definition of GFA was discussed. Rectification based on mutual mistake is not available in these circumstances.

[8] The fact that the respondents may have mistakenly believed that the GFA specified as of the date of execution of the agreement of purchase and sale was calculated using the City of Toronto By-law does not alter this result. They agreed to a price adjustment premised on using the City of Toronto By-law definition of gross floor area.

[9] The appeal is therefore dismissed with costs fixed in the amount of \$31,000 inclusive of all applicable taxes, as agreed by the parties.

“M. Rosenberg J.A.”
“Janet Simmons J.A.”
“R.A. Blair J.A.”