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COURT OF APPEAL FOR ONTARIO

RE: **TERESA ROPPO and MICHAEL ROPPO (Applicants/ Respondents) – and – AVVRO DEVELOPMENTS INC. (Respondent/Appellant)**

BEFORE: **WEILER, GOUDGE AND SIMMONS JJ.A.**

COUNSEL: **J. David Sloan**
for the appellant

Jonathan Rosenstein
for the respondent

HEARD: **December 7, 2006**

On appeal from the judgment of Justice Edward P. Belobaba of the Superior Court of Justice dated March 7, 2006.

E N D O R S E M E N T

[1] Avvro Developments Inc. appeals the order declaring that an agreement of purchase and sale of land was valid and that the purchasers, the Roppos, were entitled to the remedy of specific performance and damages. The appellant raises five arguments on the appeal.

[2] First, it says that the application judge should have found that there was no completed agreement because the terms of the contract cannot be ascertained with certainty and the parties were not *ad idem*. In essence, the appellant argues that the court cannot be sure whether the terms of the agreement are found in the February 27, 2003 document, or in that document together with the March 5, 2003 memorandum.

[3] The application judge found that the February 27 document (the APS sent back by the respondents), which was accepted by a letter by the appellant, constitutes the agreement. The additional terms contained in the March 5 memorandum were not similarly accepted, so that while Mrs. Roppo may have thought it was included in the agreement, it was not. The finding that the terms of the agreement are set out in the February 27 document was available to the application judge on this record, and there is no basis to interfere with it. Those terms are clear and constitute the contract.

[4] Second, the appellant says that these terms are no more than a non-binding agreement to agree. We disagree. The essential terms of the land sale contract are all there. Any subsequent recording of these terms in a more formalized way does not negate their binding effect prior to that.

[5] Third, the appellant says that the contract is void because the November 30, 2003, closing date passed without the required planning approval. However, the application judge found as a fact that both sides proceeded on the basis that November 30 was simply a suggested closing date and that closing would take place after the requisite approvals had been obtained. They conducted themselves accordingly. This finding is unassailable and is a complete answer to this argument.

[6] Fourth, the appellant says that the respondents cannot establish the uniqueness of the property for which specific performance was ordered. Again, the findings of fact answer this assertion. This property was unique in being vacant, and in being one on which the respondents had the right to construct a new house, using the builder of their choice.

[7] Fifth, the appellant says that for the other two properties covered by the contract, damages should have been calculated as of the date of its breach by unlawful repudiation, rather than as at the date of judgment. It says that if this is so, the respondents also failed to mitigate following the breach.

[8] We disagree. Although a departure from the norm, it is open to the court to depart from the date of breach when fixing the date for calculation of damages, provided always that it is reasonable to do so. Here at the date of breach, planning approval had not yet been obtained. Part of the value contracted for was the enhancement in the value of the property up to the point of that approval, when closing would take place. Therefore, it is undoubtedly reasonable to compensate the respondents so as to include that portion of the enhancement from breach up to the date of judgment. This being so, no issue of mitigation prior to judgment need be considered. Moreover, the appellant led no evidence of the absence of reasonable mitigation efforts by the respondents.

[9] The appeal must therefore be dismissed.

[10] Costs to the respondents fixed at $14,000.00 inclusive of disbursements and G.S.T.

"Karen Weiler J.A."
"S.T. Goudge J.A."
"Janet Simmons J.A."