

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF SECTION 60 OF THE TRUSTEE ACT, R.S.O. 1990, C. T.23,
AS AMENDED, AND RULE 10 OF THE ONTARIO RULES OF CIVIL
PROCEDURE, R.R.O 1990, REG. 194, AS AMENDED

AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF
ADELAIDE STREET LOFTS INC.

FACTUM OF ADELAIDE STREET LOFTS INC.
**(in response to the cross-motion of Lanterra Developments Limited, returnable
April 22, 2020)**

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FACTUM

PART I - OVERVIEW

1. In December 2019, stakeholders in the property located at 263 Adelaide Street West, Toronto concluded a challenging but value-maximizing settlement. The settlement included a sale of the property to Lanterra Developments Limited (“**Lanterra**”), with a scheduled closing date in May 2020. Adelaide Street Lofts Inc. (“**Adelaide**”) is a party to the settlement, and is the vendor in the sale of the property.

2. Adelaide wholly supports the motion to approve the settlement. The settlement is the best outcome that stakeholders can achieve, it was the result of a long and difficult negotiation supervised by this Court, and the settlement has been overwhelmingly approved by investors.

3. However, Lanterra now seeks a judicial decree to amend two contracts entered into as part of the settlement (the settlement agreement to which Adelaide is a party, and the agreement of purchase and sale in which Adelaide is the vendor), to extend the closing date to some ill-defined future date. Lanterra cites the COVID-19 situation, but provides only bald statements and no particulars as to why the amendments are sought.

4. The relief sought by Lanterra should be refused for two reasons:
 - (a) The Court does not have the jurisdiction to amend contracts, as Lanterra seeks.
 - (b) Even if the Court did have such jurisdiction, Lanterra has offered only bald statements and vague assertions, not clear and cogent evidence of the need for the amendments. Without such clear and cogent evidence, the Court should not intervene to vary the settlement negotiated by the parties and approved by investors.

PART II - THE FACTS

The request for amendments of contracts by judicial decree

5. Lanterra seeks amendment, by judicial decree, of two agreements dated December 20, 2019:
 - (a) minutes of settlement among a number of parties, including Adelaide (the “**Minutes of Settlement**”);
 - (b) an agreement of purchase and sale with respect to the property located at 263 Adelaide Street West, Toronto, in respect of which Adelaide is the vendor (the “**Agreement of Purchase and Sale**”).¹

¹ Notice of cross-motion of Lanterra, para. 1.

The sources of alleged jurisdiction relied upon

6. In support of the Court's jurisdiction to make such a judicial decree amending two contracts, Lanterra relies on:

(a) section 10 of the *Trustee Act*,² a provision that actually deals with the Court's power to grant vesting orders;

(b) section 96 of the *Courts of Justice Act*,³ a provision that actually deals with the fusion of law and equity and states that in the event of conflict the rules of equity prevail;

(c) section 97 of the *Courts of Justice Act*, a provision that actually deals with the Court's power to grant declarations;

(d) section 98 of the *Courts of Justice Act*, a provision that actually deals with relief against forfeiture;

(e) section 100 of the *Courts of Justice Act*, a provision that actually deals with the Court's power to grant vesting orders;

(f) a grab bag of procedural provisions of the *Rules of Civil Procedure* (Rules 1.04, 1.05, 2.01, 2.03, 3.02, 16, 37 and 38), none of which actually confer jurisdiction on the Court to amend contracts; and

² R.S.O. 1990, c. T.23.

³ R.S.O. 1990, c. C.43.

(g) the “inherent and equitable jurisdiction of his Honourable Court”, without any further explanation of how inherent jurisdiction or equity confers upon the Court the power to amend contracts.⁴

The evidentiary basis for the amendment request

7. The entire evidentiary basis for the extraordinary relief sought in the cross-motion is found in four short paragraphs of the affidavit of Lanterra’s Chief Operating Officer. These four paragraphs contain bald assertions that the agreed closing date is “no longer commercially feasible” in light of COVID-19 and that the current situation “prevents Lanterra from being able to close the Sale on the Closing Date”.⁵ While some general information is provided about the current state of Lanterra’s business, the statements in the affidavit (i) lack particularity about what efforts Lanterra has made to complete the transaction, including efforts to secure financing; (ii) lack particularity about why closing on the agreed date is allegedly “no longer commercially feasible”, aside from the general (and obvious) point that COVID-19 has caused commercial disruption; and (iii) are totally unsupported by any documentary evidence, such as correspondence from proposed lenders that they will not provide financing at the current time.

8. If closing truly were impossible, one would have expected much more detail, as well as supporting documentation. The inference that should be drawn from Lanterra’s reliance on vague generalities is that closing on the agreed closing date would be

⁴ Notice of cross-motion of Lanterra, paras. 17-20.

⁵ Affidavit of Christopher J. Wein, paras. 7 and 10.

inconvenient given the COVID-19 crisis, not that it would be *impossible*. An extension of the closing date is sought to convenience the purchaser, not to save the settlement.

PART III - ISSUES AND THE LAW

9. The cross-motion raises two issues:
- (a) Does the Court have jurisdiction to amend contracts at the behest of one of the contracting parties?
 - (b) If the Court does have such jurisdiction, should it be exercised in the absence of particulars as to why it is essential to invoke the jurisdiction in order to ensure performance of the contracts and preserve value for stakeholders?

The Court does not have jurisdiction to amend contracts at the behest of one of the contracting parties

10. None of the grounds relied upon by Lanterra supports the existence of the Court's jurisdiction to amend contracts in the circumstances of this case. That is because no such jurisdiction exists.

11. The proposition that the Court has the general power to amend contracts is outlandish, indeed alarming. Parties make contracts; courts enforce the parties' agreement. Courts do not make contracts for parties.⁶

⁶ "It should be elementary that courts do not make contracts for parties.": *Moojelsky v. Rexnord Canada*, 1989 CanLII 3402 (AB QB) at para. 45.

12. In some circumstances, the Court's inherent and equitable jurisdiction is broad. But there is no authority for the proposition that such jurisdiction extends so far as to give the Court the general power to amend contracts. That power is held by the parties themselves, and by the parties alone.

13. Some insolvency law statutes provide the Court with the power, in certain circumstances, to stay enforcement of contracts or to authorize parties to contracts to disclaim them. But none of those statutes are applicable in this case. And even if applicable, none of them give the Court broad and general power to *amend* contracts.

14. The Court quite simply does not have jurisdiction to grant the cross-motion. The cross-motion should be dismissed on that ground alone.

Even if jurisdiction existed, it should not be exercised on the basis of the bald assertions relied upon by Lanterra

15. Even if the jurisdiction to amend contracts existed, the bald assertions in Lanterra's evidence would not provide any basis for invoking it. At the very least, one would expect clear and detailed evidence of Lanterra's efforts to perform its contractual obligations, clear and detailed evidence of the impossibility of performance, and a clear justification of the particular amendments sought.

16. None of that is present in this case. Lanterra simply points to COVID-19 and says that it wants more time. We all understand that COVID-19 is disruptive, but it cannot serve as a magic incantation justifying the postponement of contractual obligations without more.

PART IV - RELIEF REQUESTED

17. The cross-motion should be dismissed.⁷

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of April, 2020.



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⁷ While Adelaide wholly opposes the cross-motion on the basis that the Court has no jurisdiction to grant it and should not grant it based on the thin evidence provided, if the cross-motion is granted it should be for a limited and well defined period of time, not for something as vague and potentially lengthy as eight weeks following the lifting of the declaration of emergency by the Province of Ontario. In addition, whatever happens in respect of the cross-motion, the Court should grant an order approving the settlement.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Moojelsky v. Rexnord Canada*, 1989 CanLII 3402 (AB QB)

**SCHEDULE “B”
RELEVANT STATUTES**

Trustee Act, R.S.O. 1990, c. T.23, s. 10

Vesting orders

10 (1) In any of the following cases,

(a) where the Superior Court of Justice appoints or has appointed a new trustee; or

(b) where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person is a minor, or is out of Ontario, or cannot be found; or

(c) where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; or

(d) where it is uncertain whether the last trustee known to have been entitled to or possessed of any land is living or dead; or

(e) where there is no heir or personal representative of a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; or

(f) where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for fourteen days after the date of the requirement,

the Superior Court of Justice may make an order, vesting the land in any such person in any such manner, and for any such estate, as the court may direct, or releasing, or disposing of the contingent right to such person as the court may direct. R.S.O. 1990, c. T.23, s. 10 (1); 2000, c. 26, Sched. A, s. 15 (2).

Vesting of estate

(2) Where the order is consequential on the appointment of a new trustee, the land shall be vested for such estate as the court may direct in the persons who, on the appointment, are the trustees. R.S.O. 1990, c. T.23, s. 10 (2).

Where trustee out of Ontario

(3) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of Ontario or cannot be found, the land or right shall be vested in such other person, either alone or with some other person. R.S.O. 1990, c. T.23, s. 10 (3).

Courts of Justice Act, R.S.O. 1990, c. C.43

Rules of law and equity

96 (1) Courts shall administer concurrently all rules of equity and the common law. R.S.O. 1990, c. C.43, s. 96 (1); 1993, c. 27, Sched.

Rules of equity to prevail

(2) Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails. R.S.O. 1990, c. C.43, s. 96 (2); 1993, c. 27, Sched.

Jurisdiction for equitable relief

(3) Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided. 1994, c. 12, s. 38; 1996, c. 25, s. 9 (17).

Declaratory orders

97 The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed. 1994, c. 12, s. 39; 1996, c. 25, s. 9 (17).

Relief against penalties

98 A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just. R.S.O. 1990, c. C.43, s. 98; 1993, c. 27, Sched.

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. R.S.O. 1990, c. C.43, s. 100.

Rules of Civil Procedure, Rules 1.04, 1.05, 2.01, 2.03, 3.02, 16, 37 and 38

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

Matters Not Provided For

(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them. R.R.O. 1990, Reg. 194, r. 1.04 (2).

(3) Revoked: O. Reg. 231/13, s. 2.

“Party and Party” Costs

(4) If a statute, regulation or other document refers to party and party costs, these rules apply as if the reference were to partial indemnity costs. O. Reg. 284/01, s. 3.

“Solicitor and Client” Costs

(5) If a statute, regulation or other document refers to solicitor and client costs, these rules apply as if the reference were to substantial indemnity costs. O. Reg. 284/01, s. 3.

ORDERS ON TERMS

1.05 When making an order under these rules the court may impose such terms and give such directions as are just. R.R.O. 1990, Reg. 194, r. 1.05.

EFFECT OF NON-COMPLIANCE

2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part. R.R.O. 1990, Reg. 194, r. 2.01 (1).

(2) The court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed. R.R.O. 1990, Reg. 194, r. 2.01 (2).

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time. R.R.O. 1990, Reg. 194, r. 2.03.

[Rule 16 addresses service of documents]

[Rule 37 addresses the procedure for motions]

[Rule 38 addresses the procedure for applications]

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Proceeding commenced at Toronto

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