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## **Chien v. Law Development Group (Thornhill) Ltd.**

Between

Ching-Lee Chien and Ching-Ting Chien, applicants, and  
Law Development Group (Thornhill) Limited, respondent

[1998] O.J. No. 3054

Court File No. 97-CV-130820

**Ontario Court of Justice (General Division)**

**Hoilett J.**

June 30, 1998.

(3 pp.)

*Sale of land — Remedies of purchaser — Rescission or annulment — Return of deposit or purchase price.*

Application by the purchasers for return of their deposit and rescission of an agreement of purchase and sale. The applicants purchased a commercial unit in a condominium development from the respondent builder. The applicants wanted to operate a fast food take-out facility in the unit. The agreement of purchase and sale described the unit as 445 square feet of commercial space, an unencumbered floor space and a wide corridor shared with a bank. The completed unit had a supporting pillar almost in the centre of the floor and only one side of plate glass. There was no common corridor with the bank. The applicants argued that these variations materially impeded the applicants' prospective use of the unit.

**HELD:** Application allowed. The unit as completed was materially different from the unit the applicants had bargained for, and the variations resulted in a material shortfall for the applicants. They were thus entitled to be relieved from their obligations under the contract and to a return of their deposit.

**Counsel:**

Kevin D. Sherkin, for the applicants.

Robert L. Love, for the respondent.

1 **HOILETT J.:**— A joint reading of the two facta filed sets out fairly comprehensively the factual context. The facts, however, are not in dispute and a brief rendition of those facts are sufficient for a disposition of this matter. The parties entered

into an agreement of purchase and sale wherein the applicants agreed to purchase unit D27 in "building D", forming schedule "C" at Tab C of this record. Sch. "C" outlines the unit as bargained for; 445 s.f. of commercial space with two sides of the unit framed by plate glass, an unencumbered floor space and a wide corridor in the east, shared with the Bank of Hongkong. The doors to D27 were to be located at the N/W corner of the unit.

2 Tab 4, being Ex "B" to the affidavit of Ching-Lee Chien herein reflect unit D27 as completed. The following are the departures from the unit as bargained for: (1) instead of 445 s.f. of open space, there is a supporting pillar located more or less in the centre of the floor; (2) instead of 2 plate glass sides as contemplated in Sch "C", supra, there is one side only of plate glass (being a plate glass sliding door); that which should have been the other plate glass wall instead forms a common wall with the bank to the east, eliminating the corridor that the applicant had anticipated sharing with the bank.

3 The purpose for which D27 was intended to be a fast food take-out facility and the applicant avers that the wide corridor with the easy access between the bank and D27 was an important consideration in the decision to purchase the unit; the anticipation being that for the luncheon crowd there was a natural and easy flow of traffic between the bank and D27. The building as completed completely eclipsed that prospect. Similarly, two sides of plate glass promised greatly enhanced visibility, a prospect that was also aborted.

4 I am of the opinion that this application is to be disposed of based on the principle stated by Moldaver J. (as he then was) in *Stefanovska et al. v. Kok* (1990), 12 R.P.R. (2d) 80, and adopted by Day J. in *Coppard Farm Estates Inc. v. Gupta* (1994), 42 R.P.R. (2d) 302; that principle being that when that which is delivered is materially different from that bargained for the diminished party is entitled to be relieved of the obligation. In the present case I am of the opinion that the cumulative effect of the "variations" resulted in a material shortfall to the applicant who, in the circumstances, is entitled to a return of its deposit together with interest and costs. The language of Clause 15 of the Agreement must be reasonably construed and may not be read to impair materially what was bargained for even if, as the respondent submits, the market value remained substantially the same, concerning which Mr. Warren Stewart's opinion is dubious at best.

HOILETT J.

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