The Deal That Didn't Tank: Walton v Warren

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On January 9, 2020, the BC Supreme Court released its decision in *Walton v Warren*.[1] *Walton* is about the survival of environmental obligations after the closing of a real estate transaction and emphasizes that the wording in contracts for purchases and sales is critical.

Facts

The Defendants sold a residential property in Victoria, British Columbia to the Plaintiffs. After being warned by their realtor that many older homes in Victoria have buried fuel oil tanks, the Plaintiffs included an oil tank addendum (the "Addendum") in the agreement of purchase and sale.[2] The Addendum required the Defendants to remove any underground storage tank located on the property and remediate the surrounding soil before closing.[3]

More than two and a half years after the transaction closed, the Plaintiffs found an underground fuel oil storage tank on the property. The Plaintiffs successfully sued the Defendants for the costs the Plaintiffs incurred to remove the tank and impacted soil.[4]

Judgment

The Judge focused her reasoning on the interpretation of the Addendum saying:

> In, my view, the wording of the Addendum is not ambiguous. It obliges the defendants to remove "any" oil tank on the Property and to remediate prior to the Completion Date. As an oil tank was discovered some years after the Completion Date, the defendants had not complied with the terms of the Addendum on the Completion Date. They were in breach of the Addendum.[5]

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1 *Walton v Warren*, 2020 BCSC 19 [*Walton*].
2 *Ibid* at para 6.
3 *Ibid* at paras 6, 61.
4 *Ibid* at para 1.
5 *Ibid* at para 61.

Focusing on the wording of the Addendum, the judge spent no time addressing the doctrine of merger, and little time on the survival clause.

Merger

Pursuant to the doctrine of merger, on completion of a contract for the sale of land, the conditions of the contract and the parties' rights under the contract often merge into the deed of conveyance.[6] If that is the case, after closing the parties can only look to the deed of conveyance for a remedy and can no longer rely on the conditions of the contract.[7]

Whether the doctrine of merger applies to specific conditions of a contract of purchase and sale depends on the intention of the parties.[8] Without an intention for merger, a condition can survive closing.[9]

Survival

In reference to the survival of the Addendum, the Judge said:

> There is no evidence in this case that the parties intended for the Addendum to expire and have no effect after the Completion Date. In fact, the Contract signed by the parties provides that its terms survive the Completion Date.[10]

The contract of purchase and sale signed by these parties included a "boilerplate" survival clause. The judge was satisfied that this survival clause evidenced the parties' intention for the terms and conditions of the Addendum to survive closing.

The survival clause is quoted below. It was not part of the Addendum, but is a section of the BC Real Estate Association's standard form Contract of Purchase and Sale.

> 18. REPRESENTATIONS AND WARRANTIES: There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale.[11]

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6 *Hashman v Anjulin Farms Ltd*, [1973] SCR 268 at para 23 [*Hashman*].
7 *Ibid* at para 24.
8 *Fraser-Reid et al v Droumtsekas et al*, [1980] 1 SCR 720 at para 30 [*Fraser-Reid*].
9 *Ibid* at 30, 34.
10 *Walton*, *supra* note 1 at para 72.
11 BC Real Estate Association, "Contract of Purchase and Sale" (February 2019), s 18.

Notwithstanding the Judge's discussion of the parties' intention, the Judge fails to reference the statement in the Addendum that "Seller shall remove the tank before the Completion Date." In fact, the Judge says:

> There is no language in the Addendum which could be interpreted as limiting the defendants' obligations only to those USTs that were discovered prior to the Completion Date or to those USTs of which they were aware.
>
> The Addendum does not include any conditional language. For example, it does not say that the defendants are to remove and remediate "any oil tank that is discovered prior to the Completion Date" or "any oil tank that they are aware of prior to the Completion Date."[12]

Case Comment

The Judge articulates the importance of the intention of the parties when construing a survival clause. However, she fails to comment on the apparent conflict between the obligation to remove the tank prior to closing and her finding that paying the cost of removal survived closing.

The survival of the Addendum was fundamental to the outcome, in our view. But the judge seems to treat survival as an aside rather than at the crux of the legal issue. Would the judge have found for the Plaintiffs without the survival clause? Is the public policy impetus for environmental remediation now sufficiently overwhelming to trump the doctrine of merger?

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[12] *Walton*, *supra* note 1at paras 62-63.