



## Racing Against the Clock: Due Diligence Review in Real Estate Acquisitions

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In commercial real estate transactions, prospective purchasers will often set tight deadlines for the completion of their due diligence review and, to the extent necessary, then negotiate further extensions of the due diligence period with the would-be vendors. This strategy may enable transactions to take place on an accelerated timeline. However, as demonstrated by a Superior Court of Quebec decision dated April 30, 2021, there are potential pitfalls to pursuing such an approach where the vendor is unwilling to grant any extension of the due diligence period negotiated between the parties.

In *Gotham Devraker Developments Inc. v. Groupe Poulin et Frères Inc.* (“**Gotham**”), 2021 QCCS 1699, the Superior Court of Quebec held that in refusing to grant an extension of the due diligence period set forth in an Offer to Purchase in respect of industrial property, the would-be vendor had not acted in bad faith. Accordingly, the Court refused to grant an interlocutory injunction which would have extended said due diligence period and allowed the prospective purchaser to proceed with a geotechnical analysis of the property.

### Discussion of the **Gotham** decision Background

The *Gotham* decision concerned an Offer to Purchase in respect of industrial property (the “**Property**”) situated in the City of Longueuil, Quebec. The Offer to Purchase was entered into between Gotham Devraker Developments Inc. (the “**Purchaser**”), a real estate developer, and Groupe Poulin et Frères Inc. (the “**Vendor**”), the owner of the Property since 1982. Prior to 1982, the Property had been used as a municipal dumping ground for dry materials. During the discussions between the Purchaser and the

Vendor regarding the potential purchase and sale of the Property, the Purchaser was advised that the Property was likely contaminated and that a concrete slab covered the surface of the Property to seal off any contaminants present in the soil.

Due to the strong likelihood of the Property being contaminated, the Vendor insisted that the Offer to Purchase not include any representations or warranties with respect to environmental matters. Ultimately, the Offer to Purchase, prepared by the Purchaser, contemplated the acquisition of the Property on an “as is, where is” basis, at the Purchaser’s risk and peril, and included no legal warranty as to quality whatsoever.

The Offer to Purchase included a clause providing for a 30-day due diligence period (the “**Due Diligence Period**”) during which the Purchaser would, *inter alia*, inspect and examine the physical state of the Property and proceed with all necessary inquiries and inspections thereof. Upon the completion of the Due Diligence Period, if satisfied with its due diligence review, the Purchaser would issue to the Vendor a written notice to such effect, failing which the Purchaser would be deemed to have cancelled the Offer to Purchase. Last, the Offer to Purchase stipulated that all time delays set forth therein were compulsory.

During the Due Diligence Period, the Purchaser decided that it wanted to proceed with a geotechnical analysis of the Property to assess the volume of contaminated soil and the estimated decontamination cost. The Purchaser then sought an extension of the Due Diligence Period from the Vendor, so that the firm which the Purchaser had retained would benefit from additional time to complete such analysis. The Vendor refused to grant any such extension, relying upon the stipulated 30-day duration of the Due Diligence Period. Upon the expiry of the 30-day Due Diligence Period, in the absence of any written notice from the Purchaser, the Vendor took the position that the Offer to Purchase was void. The Purchaser applied to the Superior Court of Quebec for an interlocutory injunction requiring the extension of the Due Diligence Period so that it could proceed with a geotechnical analysis of the Property.

### Legal Issues

In considering whether to grant the injunction in favour of the Purchaser, the Court reviewed the criteria applicable to the granting of interlocutory injunctions which are well-established in Quebec jurisprudence, namely: (1) the existence of a serious question to debate or an apparent right based upon the nature of the order sought, (2) that the plaintiff (in this case the Purchaser) would suffer a serious prejudice or irreparable harm if the order was not granted and (3) that the balance of convenience favoured the plaintiff.

The Purchaser argued that the Vendor, in refusing to grant an extension of the Due Diligence Period and thereby preventing the Purchaser from conducting a geotechnical analysis of the Property, was acting in bad faith. The Court held that the Offer to Purchase provided for a right to conduct a geotechnical analysis of the Property during the Due Diligence Period and that the Vendor was within its rights to refuse an extension of the Due Diligence Period.

In other words, the Court concluded that the Purchaser should have proceeded with the geotechnical analysis of the Property during the 30-day Due Diligence Period, which time delay the Court noted that the Purchaser had imposed on the Vendor in preparing the Offer to Purchase. The Court found there would have been ample time to complete such geotechnical analysis within the Due Diligence Period had the Purchaser acted promptly. Further, the Court concluded that the Vendor had acted with complete transparency with respect to the environmental contamination of the Property and that there were no grounds for the allegations of bad faith.

Based upon the foregoing, the Court determined that there was no appearance of right justifying the interlocutory injunction sought by the Purchaser. Furthermore, the Court found that the Purchaser had failed to demonstrate that it would suffer irreparable harm if the order was not granted. Last, the Court ruled that the balance of convenience favoured the Vendor, given that the injunction would deprive it of the full exercise of its ownership rights.

## Conclusion

The *Gotham* decision represents an important lesson for prospective purchasers in commercial real estate transactions. Although commercial pressures to complete a transaction within an accelerated timeline frequently exist, a prospective purchaser should err on the side of caution to ensure that the Offer to Purchase provides for adequate time to complete the due diligence process. In our experience, the due diligence process on a complex commercial real estate transaction often takes longer than parties may initially anticipate and there may be unforeseen delays outside of the parties' control.

Ideally, prior to the commencement of the due diligence period, the Purchaser should (i) proactively select firms to conduct inspections and inquiries of the property in question, (ii) determine the mandates of those firms and (iii) ensure that those firms are afforded sufficient time to complete their activities within the due diligence period.

Once an Offer to Purchase has been negotiated and entered into, it should not be assumed that the vendor will necessarily consent to extensions of the agreed-upon due diligence period, particularly in a competitive real estate market. As *Gotham* demonstrates, if the vendor is unwilling to consent to an extension of the due diligence period beyond the time delay set forth in the Offer to Purchase, the purchaser may not have any further recourse.

The information and commentary set forth herein are for the general information of the reader and are not intended as legal advice or as an opinion to be relied upon in relation to any particular circumstances.

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If you have questions with respect to the subject matter hereof, please contact one of our specialized attorneys, who will be pleased to advise you.

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