CITATION: Goncalves v. 958041 Ontario Limited et al., 2025 ONSC 1813
COURT FILE NO.: CV-23-82806
DATE:20250324

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
FILIPE GONCALVES also known as PHILIP GONCALVES	)	Sara Mosadeq and Francesca Sgambelluri, for the Plaintiff/Responding Party
Plaintiff/Responding Party	)	
– and –	)	
958041 ONTARIO LIMITED and FIORE VACCA CONSULTING INC.	)	Adam Huff, for the Defendants/Moving Parties
Defendants/Moving Parties	)	
	)	**HEARD: March 6, 2025**

REASONS FOR JUDGMENT

JUSTICE L. SHEARD

Overview

[1] This litigation arises from an Agreement of Purchase and Sale dated February 28, 2023 (the "APS") between the plaintiff, Philip Goncalvès, buying in Trust for a Company to be Incorporated (the "Buyer"), and the defendant, 958041 Ontario Limited. In these reasons the defendants are referred to collectively as the "Seller".

[2] The sale did not close. The Seller asserts that the APS came to an end or expired when the Buyer failed to waive conditions (the "Buyer's Conditions") within the time prescribed in the APS.

[3] The Buyer asserts that the Seller waived reliance on the "Time is of the Essence Clause" in the APS and, as a result, at all times the APS remained valid, subsisting, and enforceable. The Buyer wishes to complete the purchase of the subject property located at 1100 South Service Road, Suite #116/216, Stoney Creek, Ontario (the "Property").

2025 ONSC 1813 (CanLII)

[4] There were two motions before the court:

i. The Buyer's motion for leave to register a certificate of pending litigation ("CPL") against the Property; and

ii. The Seller's motion for summary judgment ("SJM") dismissing the Buyer's claim.

[5] In addition, in response to the SJM, the Buyer seeks a "boomerang" order for specific performance of the APS.

[6] A finding in favour of the Seller would extinguish the need to hear the Buyer's motion for a CPL. For that reason, only the SJM proceeded and the Buyer's CPL motion was deferred to await the outcome of the SJM.

[7] At the outset of this hearing, the Seller confirmed that it would not sell the Property pending the outcome of this motion and/or, if the SJM were dismissed, until the Buyer's CPL motion was determined.

Issues to be decided

[8] There are two main issues to be decided on the Seller's motion:

Issue #1: *Is this an appropriate case for summary judgment?*

Issue #2: *Did the APS remain valid and enforceable and open for acceptance at all times?*

The Facts

[9] Based on the record before the court, the following are the facts and chronology of events:

Parties Enter into the APS

(1) The Property is a 7839 sq. ft. industrial unit designed to provide office and storage space for businesses.

(2) The Property had two (joint) tenants: Clearsolv Solvents Inc. ("Clearsolv") and Growhaus Supply Co Inc.

(3) On February 28, 2023, the Buyer presented the APS to the Seller. On March 1, 2023 the APS was signed by the Seller and the Buyer, at a purchase price of $1,835,000. The Seller also agreed to take back a first mortgage for 75% of the purchase price (the "VTB").

(4) The Buyer and the Seller communicated through their respective agents: Ted Peters ("Peters-B") for the Buyer and Drew Blair ("Blair-S") for the Seller.

2025 ONSC 1813 (CanLII)

(5) The APS required the Buyer to pay a deposit of $100,000 upon acceptance of the APS and a second payment of $100,000 upon the waiving of the Buyer's conditions (the "Buyer's Waiver").

Due Diligence Period

(6) Para. 7 of Schedule "A" to the APS contained the "Buyer's Conditions" clause. It provided that the APS was conditional for a period of 30 calendar days from the date of receipt of a status certificate (the "Due Diligence Period"). At the expiry of the Due Diligence Period ("DDate"), the Buyer was required to notify the Seller in writing that the conditions were waived or satisfied, failing which, the APS would automatically terminate and be of no force and effect and all deposit monies would be returned to the Buyer without deduction and with interest (the "Automatic Termination Clause").

(7) Para. 10 of the APS sets out the Seller's Representations and Warranties. Clause 10(b) reads: "That, the property has never been used for a landfill or waste disposal site, or for the storage of hazardous wastes or substances or of environmental contaminants" (the "Seller's Reps").

(8) On March 3, 2023, the Buyer received the status certificate, triggering the commencement of the Due Diligence Period. DDate was April 2, 2023.

(9) On March 6, 2023, the Buyer paid the first $100,000 deposit.

Buyer Inspects, Clearsolv containers observed

(10) On March 20, 2023, the Buyer inspected the Property. In that portion of the Property used by Clearsolv, the Buyer noticed containers with labels containing a "flame symbol" and an "exclamation mark symbol". The presence of these containers caused the Buyer to have concerns about lack of adequate fire, explosion, and environmental protection.

(11) The contents of the Clearsolv containers remains unknown.

First Amendment:

(12) On April 1, 2023, the parties signed the First Amendment to the APS. The First Amendment extended DDate to April 21, 2023, and added a new para. (d) to the Buyer's Condition Clause, making the APS conditional upon: "*The Buyer reviewing and approving any new leases and/or lease amendments between any of the current tenants and/or any new tenants*".

(13) Clearsolv removed its containers and ceased to occupy any space in the Property on or about the end of April 2023 or the first days of May 2023.

Second Amendment:

2025 ONSC 1813 (CanLII)

(14) On May 1, 2023, the parties signed the Second Amendment, which removed all previous conditions except the condition added in the First Amendment and included a new condition that Clearsolv vacate the space.

(15) The Second Amendment extended the DDate to May 5, 2023 and repeated the Automatic Termination Clause which stated that the Buyer's Waiver was required by DDate (now May 5, 2023), failing which, the Automatic Termination Clause would operate to terminate the APS, which would then be of no further force and effect.

Buyer's New Terms – Proposed Third Amendment

(16) On May 5, 2023, Peters-B emailed Blair-S advising that the Buyer was prepared to waive conditions and "firm up the deal", provided that environmental testing was conducted, at the Buyer's expense, and, "as a condition of closing", the Buyer was provided with "clean phase 1 and phase 2 ESA (if required) reports". Also, the parties would need to "kick out closing another 30 days (60 days total)". The email asserted that this new condition should be seen as a "reasonable ask, given the [Seller's] negligence and allowing hazardous product to be stored" in the Property.

(17) On May 6, 2023, Peters-B sent Blair-S a third amendment, signed by the Buyers. Its terms differed from those in the May 5, 2023 email in that it was now the Sellers who were to pay cost of any environmental testing and ESA reports, and the Sellers were also now required to cover the costs of any required remediation, and, finally, the closing date was extended to the date on which any remediation was completed (the "Proposed Third Amendment").

(18) Blair-S responded that he would communicate the Proposed Third Amendment to the Seller.

(19) On May 16, 2023, Peters-B emailed Blair-S confirming that the Buyer was ready, willing, and able to complete the purchase as per the Proposed Third Amendment. In this email, Peters-B alleged that the Seller was in breach of the Seller's Reps and required the Seller's position, in writing, by Friday [May 19, 2023].

(20) On May 17, 2023, Blair-S responded that the Seller was traveling in Europe and was reviewing the matter with his lawyer.

Seller Rejects Proposed Third Amendment and requests Buyer's Waiver

(21) On May 19, 2023, Blair-S sent an email to Peters-B which reads:

> Good morning Ted:
> I spoke to the Seller late yesterday afternoon, he has not changed his position. He will not agree to the amendment to the APS. The position is to waive your condition and close. If you have any questions, please contact me at your convenience.
> Sincerely, Drew

2025 ONSC 1813 (CanLII)

Buyer's Response: Seller must agree to new terms or face litigation

(22) On May 31, 2023, Peters-B responded to Blair-S's email stating:

> Hi Drew,
> Would the Seller be willing to change his position if the Buyer paid for the costs of the Phase 1 ESA?
> The Buyer is ready with their legal team and will have to move ahead on this is the Seller is not prepared to do this deal(sic).
> The Buyer is still completely motivated and trying to complete this deal"
> Thanks Drew,
> Ted

(23) Blair-S responded that day stating: "I will ask."

(24) The next communication between the parties was not until June 29, 2023, when Blair-S sent an email.

Seller sends Mutual Release and offers return of deposit

(25) On June 29, 2023, Blair-S emailed Peters-B enclosing a mutual release for the Buyer to sign.

(26) The Buyer did not respond.

(27) On July 18, 2023, Blair-S again emailed Peters-B, asking what the Buyer was doing with the mutual release sent on June 29, 2023.

(28) The Buyer did not respond.

(29) On August 7, 2023, Blair-S emailed Peters-B a third time. This email is reproduced below:

> Hi Ted:
> The Seller of the unit has requested I email you again regarding the Mutual Release. The deal expired and the Seller would like to clean this up and return the deposit. If your client still would like to purchase the unit then a new deal will have to be submit as I stated previously the original deal had expired.
> The Seller is not will to do a VTB as in previous deal and price need to be discussed.
> Please speak to your client and get an answer, so both parties can move on.
> Sincerely, Drew

(30) The Buyer did not respond.

2025 ONSC 1813 (CanLII)

Letter from Buyer's Lawyers on August 14, 2023

(31) On August 14, 2023, the Buyer's litigation lawyers delivered a letter to the Seller (the "August 14 Letter"), which the Buyer put into evidence on this motion.

(32) The August 14 Letter threatened litigation if the Seller continued to assert that the APS had been terminated. It alleged that the Seller's (alleged) termination of Clearsolv's lease was an acknowledgment (by the Seller) that hazardous waste was being stored on the Property; evidence that the Seller was in breach of the Seller's Reps. The August 14 Letter asserted that these events justified the Buyer's request for clean ESA reports.

(33) The concluding paragraphs of the August 14 Letter are reproduced below:

> Frankly, the Vendor, while being in breach of the APS, neither had the right nor authority to demand that the Purchaser waive the due diligence condition and complete the APS. The Purchaser's proposal to obtain clean ESA reports was commercially reasonable in the circumstances. Moreover, the Vendor was not permitted to refuse to rectify its breach under the APS and insist on closing.
>
> **With the foregoing in mind, the Purchaser will accept the Premises in its as-is condition and will attend to the remediation of the hazardous waste/materials at it's own cost.** We trust that you appreciate that the very presence of hazardous waste/materials on the Premises has significantly devalued the Premises. **However, the Purchaser remains agreeable to closing on the terms of the APS.**
>
> We ask that you immediately and by no later than August 17, 2023, confirm that the Vendor will complete the APS, failing which the Purchaser will immediately issue litigation proceedings, seeking specific performance of the APS and any damages that the Purchaser has incurred in connection with this matter, plus interest and legal fees.
>
> We trust that same will not be necessary and that the parties will work amicably to complete the APS in short order. We look forward to your response forthwith. [Emphasis added]

(34) The Seller did not respond to the August 14 Letter.

(35) On September 14, 2023, the Buyer issued this claim.

2025 ONSC 1813 (CanLII)

The APS

[10] The following clauses in the APS are of particular relevance on this motion:

(i) **Clause 23, Time Limits**

Time shall in all respects be of the essence hereof provided that the time for doing or completing of any matter provided for herein **may be extended or abridged by an agreement in writing signed by Seller or Buyer or by their respective solicitors who are hereby expressly appointed in this regard** [Emphasis added];

(ii) **Clause 7, Buyer's Conditions**

The Buyer's Conditions and the DDate in the APS were changed by the First Amendment and Second Amendment. In each, the Buyer's Conditions clause concludes with a paragraph containing this sentence:

> The Buyer must notify the Seller in writing that the conditions are waived or satisfied with the time period specified above failing which the Agreement shall automatically terminate and be of no further force and effect and all deposit monies shall be returned to the Buyer without deduction and with interest; and

(iii) **Clause 15, Schedule "A": Completion Date:**

Clause 15 reads: This Agreement shall be completed no later than 6:00 P.M. on the 30th day after the waiver of the Buyer's Conditions in full.

[11] It is undisputed that the Buyer never notified the Seller in writing that the conditions were waived or satisfied.

Issue #1: Is this an appropriate case for summary judgment?

[12] The evidence on this motion is almost exclusively documentary and principally consists of:

a) the APS, as amended in writing by the First Amendment and the Second Amendment;

b) emails exchanged between Peters-B and Blair-S; and

c) the August 14 Letter.

[13] There is no disagreement that:

i. all relevant documents have been produced and are included in the record before the court;

ii. the parties executed the APS, the First Amendment, and the Second Amendment; and

2025 ONSC 1813 (CanLII)

iii. except for the August 14 Letter, the parties always communicated through their respective agents, whose emails are in the record before the court.

[14] The Buyer's identify one factual dispute: Whether Blair-S telephoned Peters-B on May 5 or 6, 2023 and, in that telephone call, advised Peters-B that the APS was terminated as of May 5, 2023, by reason of the expiry of the "due diligence condition".

[15] Blair-S was examined as a non-party witness and stated that he "believed" he communicated with Peters-B on May 5, 2023, "likely by phone", that the APS was at an end.

[16] Following Blair-S's examination, the Seller permitted the Buyer to deliver an affidavit sworn by Peters-B in which he denied that Blair-S had advised him on May 5 that the APS was terminated.

[17] In support of his submissions that a SJM is not appropriate, the Buyer asserts that resolving the conflict between the evidence of Blair-S and Peters-B is critical to resolving the main dispute in this action namely, whether the APS remained valid and enforceable after May 5, 2023.

[18] On this motion, the Seller acknowledged that while Blair-S's email to Peters-B of May 19, 2023 *could* be seen as extending the May 5, 2023 DDate, that email made clear the Seller's position: the Buyer was to waive the Buyer's condition and close.

[19] The Buyer could not identify any other alleged inconsistency or credibility dispute, aside from this one alleged conflict in the evidence.

The Law on Summary Judgment

[20] Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.

[21] As set out in *Hryniak v. Mauldin*, 2014 SCC 7, at para. 49, there will be no genuine issue requiring a trial:

> "…when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result."

[22] To be appropriate, summary judgment must provide a "fair and just adjudication" that allows the judge to "find the necessary facts and resolve the dispute. [T]he standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute." *Hryniak*, at para 50.

2025 ONSC 1813 (CanLII)

[23] Rule 20.04(2.1) of the *Rules of Civil Procedure* sets out the powers of the court on a motion for summary judgment:

> (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> (1) Weighing the evidence.
>
> (2) Evaluating the credibility of a deponent.
>
> (3) Drawing any reasonable inference from the evidence.

[24] *Hyrniak* offers a "roadmap" for a summary judgment motion, at para. 66:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interests of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[25] The jurisprudence has established the following principles that govern motions for summary judgment:

(1) Parties are expected to put their best foot forward and the court will assume that all necessary evidence has been tendered;

(2) A motion judge is entitled to presume that the evidentiary record is complete and there will be nothing further if the issue were to go to trial; and

(3) A motion judge is not required to resort to the summary judgment enhanced powers to remedy a party's evidentiary shortcomings.

2025 ONSC 1813 (CanLII)

Disposition of Issue #1

[26] As set out above, apart from the alleged disagreement about one telephone call, the facts in this case are not in dispute and all the relevant documents are before the court.

[27] In my view, a determination of whether or not a telephone conversation took place on May 5 or 6, 2023 and/or if Blair-S told Peters-B that the APS was at an end, would not resolve the main issue (whether the APS was at all times open for acceptance), and does not give rise to a genuine issue requiring trial.

[28] The Buyer has not identified any clause in the APS that obligates the Seller to remind the Buyer about the Automatic Termination Clause, which speaks for itself.

[29] For these reasons, I do not accept the Buyer's submission that the validity of the APS on and after May 5, 2023, and the entitlement of the Buyer to enforce the APS (as it purported to do on August 14, 2023), requires a determination of the apparent contradiction between the evidence of the parties' agents concerning a telephone call.

[30] I conclude that a determination of the issues in this case are ideally suited for a SJM.

Issue #2: Did the APS remain valid and enforceable at all times or did it terminate on its terms?

Positions of the parties

(i) The Buyer's Position

[31] The Buyer submits that, by its conduct, the Seller waived its right to rely on Clause 23, Time Limits, and that the APS remained open for acceptance at all times. On this basis, the Buyer submits that when it notified the Seller in the August 14 Letter that the Buyer was ready to purchase the Property on an "as-is" basis and to complete the transaction with the APS, the Seller was obliged to proceed to complete the sale.

[32] The Buyer lists conduct by which, the Buyer asserts, the Seller informally communicated its "clear intention to waive strict reliance on the deadlines in the APS and Amendments". The Buyer offers the following as examples of such conduct:

(i) the DDate was extended to May 5, 2023, despite that the Seller did not sign back the First Amendment, signed by the Buyer, until April 28, 2023, seven days after the expiry of the DDate in the APS, and the Seller did not inform the Buyer that the APS had terminated in the interim;

(ii) the Seller failed to notify the Buyer on May 5, 2023 (DDate) that the APS would come to an end if the Proposed Third Amendment was not executed by May 5, 2023;

2025 ONSC 1813 (CanLII)

(iii) Blair-S's email of May 19, 2023 shows that the Seller was treating the APS as valid and binding despite the expiration of the DDate and that Peters-B's email of May 31, 2023 demonstrates that the parties were continuing to negotiate;

(iv) the first time the Seller indicated that the APS was at an end was in Blair-S's email of June 29, 2023, enclosing a mutual release; and

(v) on August 7, 2023, when Blair-S again emailed a mutual release to be signed he also confirmed that the Seller would be willing to sell the Property, albeit on new terms including a new price and without a VTB.

[33] On this motion, the Buyer acknowledges that he has never provided the Buyer's Waiver, and asserts that the August 14 Letter ought to be enough to entitle the Buyer to enforce the APS.

[34] The Buyer also submits that *if* the APS had terminated on May 5, 2023, it was revived by the conduct of the parties. In support of this argument, the Buyer relies on *Rabinowitz v. 2528061 Ontario Inc*., 2024 ONSC 2357.

[35] In *Rabinowitz*, the court found that, as neither party was able to close the transaction, neither could rely on the "time is of the essence clause". He found also that after the closing date had passed, the vendor and buyer continued to engage in negotiations, conduct which, the judge found, operated to revive the contract. On that basis, the buyer was entitled to exercise his option under the contract to extend the closing date by 60 days.

[36] I find the facts here to be distinguishable from those in *Rabinowitz*. In this case, the evidence does not support a finding that the parties continued to negotiate after the DDate. In my view, the Seller's email of May 19, 2023, and the Buyer's email of May 31, 2023, do not amount to the parties engaging in negotiations: the May 19, 2023 email makes it clear that the Seller's position is firm and unchanged, and the May 31, 2023 email, softening the terms of the Proposed Third Amendment, went unanswered.

[37] On the basis that the APS was "revived"– implicitly by Blair-S's email of May 19, 2023 – the Buyer asks the court to find that the APS was open for acceptance as late as August 14, 2023. In essence, the Buyer submits that the Time Limits clause was unenforceable (by virtue of the May 19, 2023 email), yet the other terms contained in the APS could be enforced.

[38] The Buyer's position is that, on or after August 14, 2023, he could demand the Seller to complete the sale. That position implies that the Buyer was entitled to rely on certain terms of the APS, such as the purchase price and VTB, and free to ignore other terms, such as the Due Diligence Period, delivery of the Buyer's Waiver, and that the closing date was to take place 30 days after the DDate. The Buyer appears to suggest that these latter terms could be ignored, or changed (unilaterally), by the Buyer, without the Seller's consent, written or otherwise.

[39] The Buyer also advances an argument that the Seller acted in bad faith by:

2025 ONSC 1813 (CanLII)

(i) insisting on compliance with the "Time is of the Essence Clause" despite that the First Amendment and the Second Amendments were both necessitated in order to deal with issues with the tenant [Clearsolv];

(ii) signing the Second Amendment on April 28, seven days after the April 21, 2023 DDate;

(iii) refusing to amend the APS to provide environmental testing, the need for which arose from the alleged breach of the Seller's Reps, and even after the Buyer agreed (on May 31, 2023) to pay for the testing;

(iv) refusing to complete the APS after the Buyer agreed [in the August 14 Letter] to accept the Property in its "as-is" condition;

(v) asserting that the APS was invalid from the outset because Fiore Vacca is not a "seller" under the APS [the Seller is not pursuing this defence];

(vi) not taking all reasonable steps to verify the accuracy of the Seller's Reps; and

(vii) refusing to take all reasonable steps to complete the APS.

[40] As noted, should the court dismiss the SJM and find that the Seller breached the APS, the Buyer seeks a "boomerang" order granting it specific performance of the APS.

Specific Performance Request

[41] The Buyer submits that the court should exercise its discretion to order specific performance in this case given the nature of the Property, the alleged inadequacy of damages as a remedy, and the behaviour of the parties, having regard to the equitable nature of the remedy.

[42] Based on the record before me, even if I were to rule in favour of the Buyer on this motion, I would not grant specific performance of the APS.

[43] I find that the Buyer's evidence fell short of establishing that this commercial building was unique in any way or was treated as such by the Buyer. I find also that the Buyer failed to lead any or evidence to establish that damages would be an inadequate remedy.

[44] Finally, I consider the parties' behaviour, one of three relevant factors to be considered, having regard to the equitable nature of the remedy. I find that the facts favour the Seller. The Buyer refused to accept the APS as drafted and, without providing any proof that hazardous materials were stored on the Property, set out a list of demands that had to be met by the Seller, before the Buyer would waive conditions and close.

[45] It is undisputed that the Buyer has no proof that the containers contained hazardous wastes or substances or environmental contaminants and cannot establish that the Seller was in breach of the Seller's Reps. I find, therefore, that the Buyer's demands to amend the APS

2025 ONSC 1813 (CanLII)

to include conditions related to environmental testing, were without a factual foundation and sought to impose unknown and potentially significant costs consequences upon the Seller.

[46] Also, when the Buyer's demands to amend the APS were not accepted by the Seller, the Buyer failed to waive the conditions and close and refused to sign a mutual release and walk away from the deal.

(ii) The Seller's Position

[47] The Seller submits that at no time did the Buyer waive the Buyer's Conditions, and that, as a result, the Automatic Termination Clause operated to terminate the APS on May 6, 2023.

[48] In the alternative, the Seller submits that even if the APS "was still alive after May 5, 2023" time remained of the essence and any extension of time required a written and signed agreement.

[49] The Seller submits that after the expiry of the DDate, the Buyer sought to impose new contractual terms, upon threat of litigation. The new terms were rejected by the Seller, no new amendment was signed, and after May 5, 2023, the parties were never *ad idem.*[1]

[50] The Seller submits that – to be effective – any waiver of the Time Limits Clause or the DDate had to be "express"[2] and that the Buyer must demonstrate that the Seller had an "unequivocal and conscious intention to abandon" its "right to insist on strict compliance"[3].

[51] The Seller says that it clearly communicated that it did **not** accept the Buyer's proposed amendments or conditions and that the Seller's position that the APS was terminated was clearly communicated in Blair-S's emails to Peters-B on June 23, July 18, and August 7, 2023.

[52] The Seller's alternative submission is that even if the APS was still "alive" as of May 19, 2023, the Buyer had repudiated the APS by pursuing the inclusion of new conditions on May 31, 2023, and, thereafter, by failing to communicate with the Seller between May 31, 2023 and August 14, 2023[4].

[53] The Seller submits that it had accepted the Buyer's repudiation, which was communicated to the Buyer in the emails sent by Blair-S to Peters-B in the summer of 2023.

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[1] *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, 1991 CanLII 2734 (ON CA), at p. 18.
[2] *Firoozi v 809963 Ontario Ltd*., [2005] O. J. No. 6233, at para. 90.
[3] *High Tower Homes Corporation v Stevens*, 2014 ONCA 911 (CanLII), at para. 47; *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597 (CanLII), at para. 63.
[4] *Roalno Inc. v. Schaefer*, 2024 ONCA 262 (CanLII), at para 45.

2025 ONSC 1813 (CanLII)

[54] In its factum and in oral argument, the Seller denied the Buyer's allegation that the Seller breached the Seller's Reps. The Buyer's admission that it has no proof of that breach defeats that allegation.

[55] The Seller also submits that the Buyer's allegation that the Seller had breached the Seller's Reps is a "red herring": the Buyer had no right to impose the Proposed Third Amendment or, indeed, any new terms, upon the Seller. The Seller submits that the options available to the Buyer were to terminate the APS without penalty or complete the purchase and sue for damages.

[56] Finally, the Seller denies that it had an obligation to notify the Buyer that the APS was at an end by virtue of the Automatic Termination Clause; the APS imposed no such obligation.

The Law and Analysis

[57] Based on the facts as I have found them, the central issue now to be decided is whether the APS was still valid and open for acceptance as of August 14, 2023.

Principles of Interpretation of Commercial Contracts

[58] As per the terms of the para. 7 of the APS, the completion of the purchase was to take place 30 days after the Buyer's Waiver which, under the Second Amendment, was May 5, 2023. In fact, the Buyer did not provide the Buyer's Waiver on that date (or at all all) and, instead, sought to renegotiate and amend the terms of APS.

[59] The Seller did not agree to the Buyer's proposed new terms and on May 19, 2023, told the Buyer to provide the Buyer's Waiver and close.

[60] In my view, the May 19, 2023 email can and ought to be viewed as a new proposal made by the Seller to amend the APS by extending the DDate to May 19, 2023.

[61] Commercial contracts must be construed "in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective...The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity": *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 ("*Salah*"), adopted in *Ariston Realty Corp. v. Elcarim Inc.*, 2014 ONCA 737 (CanLII) ("*Ariston*").

[62] The Buyer did not agree to the new terms proposed by the Seller in the May 19, 2023 email, and appears to take the position that the email should be viewed as the Seller's waiver of Clause 23, the "Time is of the Essence" clause, with the result that there was no longer a DDate nor any deadline by which to provide the Buyer's Waiver. That interpretation of the contract between the parties would leave the Seller in the impossible position of being bound to sell the Property at the negotiated price and terms, including a VTB, but with no ability to enforce a closing date. Such an outcome conflicts with the principles set out in *Salah* and in *Ariston*.

2025 ONSC 1813 (CanLII)

Did the Seller waive compliance with the "Time is of the Essence" clause in the APS?

[63] In *High Tower Homes v. Stevens*, 2014 ONCA 911 (CanLII), the court stated, at para 43:

> [43] In *Technicore Underground Inc. v. Toronto (City)*, [2012] O.J. No. 4235, 2012 ONCA 597, 354 D.L.R. (4th) 516, at para. 63, Gillese J.A., writing for the court, summarized the essentials of waiver as set out by the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, [1994] S.C.J. No. 59:
>
> Waiver occurs when one party to a contract (or proceeding) takes steps that amount to foregoing reliance on some known right or defect in the performance of the other party. It will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated. Communication can be formal or informal and it may be inferred from conduct. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

[64] Applying these principles to the facts here, I cannot conclude that the May 19, 2023 email demonstrates the Seller's "unequivocal and conscious intention to abandon the right to rely on" either the Time is of the Essence clause or the Buyer's Conditions Clause.

[65] Firstly, the May 19, 2023 email makes reference to the Buyer's obligation to waive conditions which, in my view, clearly demonstrates the Seller's intention to rely on and enforce the APS and, in particular, the requirement for the Buyer's Waiver. The Buyer's Waiver is significant as it triggers the commencement of the 30-day period leading to the closing date.

[66] Secondly, while the May 19, 2023 email may be seen as the Seller offering to *extend* the DDate from May 5, 2023 to May 19, 2023, it cannot be seen as demonstrating the Seller's "unequivocal and conscious intention to abandon" its right to rely on any timelines in the APS. That conclusion is reinforced by the Seller's emails sent in June, July and August 2023, in which it expresses its reliance on the timelines in the APS and the operation of the Automatic Termination Clause.

[67] In my view, the May 19, 2023 email was simply the Seller proposing its own amendment to extend the DDate to May 19, 2023. As this proposed amendment was not accepted by the Buyer nor embodied in a signed, written agreement, the Seller's proposed amendment could not and did not operate to amend the APS.

2025 ONSC 1813 (CanLII)

[68] Just as the Buyer could not require the Seller to agree to the Proposed Third Amendment, or any variation of it, the Seller could not require the Buyer to accept its proposed change to a term of the APS, including a change in the DDate. As per its terms, any amendment to the APS required an agreement in writing, signed by the parties, just as the parties had done with the First Amendment and Second Amendment. On this basis, I conclude that the new terms proposed by the Seller in the May 19, 2023 email were not effective to amend the APS.

[69] I find that, except as amended in writing, the terms of the APS remained unchanged, valid and enforceable, including the Automatic Termination Clause.

[70] I conclude that the Automatic Termination Clause operated to terminate the APS on May 6, 2023, the DDate set by the Second Amendment, when the Buyer failed by that date, to provide the Buyer's Waiver.

2025 ONSC 1813 (CanLII)

Did the Buyer repudiate the APS?

[71] The Seller raises the alternate or additional argument that the Buyer repudiated the APS.

[72] While my determination above is sufficient to find in favour of the Seller, I will address the alternate argument advanced by the Seller.

[73] *Roalno Inc. v Schaefer*, 2024 ONCA 262 sets out how a court should determine if a party has repudiated a contract. The court states at para. 45:

> The question of whether a party's words or actions demonstrate an intention not to be bound by a contract must be determined objectively. As Gillese J.A. noted in *Spirent Communications*, at para. 37, "the court is to ask whether a reasonable person would conclude that the breaching party no longer intends to be bound by [the contract]".

[74] The applicable facts in this case include that:

(a) the Buyer failed to provide the Buyer's Waiver by May 5, 2023 or at all;

(b) the Buyer sought amendments to the APS, to which the Seller did not agree;

(c) the Seller made its position clear in the email of May 19, 2023 that it would not agree to the Buyer's proposed amendments, and made its own proposed amendment to allow the Buyer to provide the Buyer's Waiver on May 19, 2023;

(d) the Buyer did not accept the Seller's proposal of May 19, 2023, and made a further proposal in his email of May 31, 2023, which was not accepted by the Seller; and

(e) the Buyer did not respond to the Seller's emails of June, July and August 2023, until the August 14 Letter, remaining silent from May 31, 2023 to August 14, 2023.

[75] Given the facts set out above, the nature of the transaction and the timelines agreed to in the APS, as amended, I am of the view that a reasonable person would conclude that the Buyer no longer intended to be bound by the APS and had repudiated the APS.

Conclusion

[76] For the reasons set out, I conclude that:

(i) the APS became null and void by its terms on May 6, 2023;

(ii) the May 19, 2023 email did not operate to extinguish or preclude the Seller from relying upon or enforcing: a) Clause 23, Time Limits; b) the Buyer's obligations under the Buyer's Conditions Clause; c) the Completion Date clause; or d) any other term of the APS;

2025 ONSC 1813 (CanLII)

(iii) as the Buyer did not provide the Buyer's Waiver by the DDate, or at any time thereafter, the Automatic Termination Clause operated to terminate the APS and to render the APS of no force and effect as of May 6, 2023; and

(iv) the Buyer also repudiated the APS and the Seller accepted the repudiation.

Disposition

[77] The Seller's SJM is granted.

[78] The Buyer's request for specific performance is dismissed.

[79] Given the outcome of this motion, the Buyer's motion for a CPL would be unsuccessful and there is no need for a hearing.

Costs

[80] The Seller has been successful and is presumptively entitled to its costs.

[81] The parties are urged to agree on costs. If they are unable to do so, written costs submissions may be made as follows:

1. Written costs submissions are not to exceed three pages, double-spaced, together with draft bills of costs, evidence of docketed time, and copies of any relevant offers to settle.

2. Within 21 days of the date of the release of this decision, the Seller shall deliver its written costs submissions,

3. Within 14 days of service of the Seller's costs submissions, the Buyer is to deliver his responding submissions,

4. Within 7 days of service of the Buyer's responding submissions, the Seller may deliver its reply submissions, it any, not exceeding one page in length.

5. If no submissions are received within 35 days of the date of the release of these reasons, the parties shall be deemed to have resolved the issue of the costs and no costs decision shall be made by this court.

Justice L. Sheard

Released: March 24, 2025

2025 ONSC 1813 (CanLII)

CITATION: Goncalves v. 958041 Ontario Limited et al., 2025 ONSC 1813
COURT FILE NO: CV-23-82806
DATE: 20250324

2025 ONSC 1813 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

FILIPE GONCALVES also known as PHILIP GONCALVES

Plaintiff/Responding Party

– and –

958041 ONTARIO LIMITED and FIORE VACCA CONSULTING INC.

Defendants/Moving Parties

REASONS FOR JUDGMENT

Justice L. Sheard

Released: March 24, 2025