

CITATION: *Basnandan v. Jones*, 2025 ONSC 3438
COURT FILE NO.: CV-24-95491
DATE: 2025/06/11

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Basil Basnandan

Applicant

– and –

Michael A Jones, Delphina Mervin Leblanc
and RE/MAX Hallmark Eyking Group
Realty

Respondents

HEARD: November 14, 2024 (By video
conference), with submissions
in writing thereafter

REASONS FOR DECISION

CORTHORN J.

Introduction

[1] This application arises from a failed real estate transaction in 2021. The applicant (“Basnandan”) and the individual respondents, Michael A. Jones and Delphina Mervin Leblanc (“the Purchasers”), entered into an Agreement of Purchase and Sale in July 2021 (“the Agreement”). The Agreement relates to a commercial property in Nepean, Ontario (“the Property”). The respondent, RE/MAX Hallmark Eyking Group Realty (“the Broker”) represented Basnandan; the Purchasers were represented by another broker.

[2] The terms of the Agreement required the purchasers to provide a deposit of \$200,000 (“the Deposit”). The Deposit was paid; the Deposit continues to be held in trust by the Broker. The original closing date for the transaction was in November 2021. On the day prior to the original closing date, the Purchasers requested an extension of the closing date to December 10, 2021. Basnandan agreed to the extension, on terms.

[3] On December 7, 2021, the Purchasers informed Basnandan that it was likely they would be unable to complete the transaction. Basnandan did not consent to a further extension of the closing date. December 10, 2021 passed without the Purchasers completing the transaction.

[4] Basnandan has not yet sold the Property. On this application, he seeks a declaration that the Purchasers are in breach of the Agreement and an order directing the Broker to release the Deposit to him.

[5] For the reasons that follow, the court makes the declaration requested and orders that the Broker release the Deposit to Basnandan.

The Issues

[6] Three issues are determined on this application:

1. Did the Purchasers' conduct amount to an anticipatory breach of the Agreement?
2. If the answer to Issue No. 1 is "yes", was Basnandan entitled to rely on the anticipatory breach and terminate the Agreement?
3. Is Basnandan entitled to the Deposit?

[7] Before I determine the substantive issues, I will first address a deficiency in the application record. That deficiency is the inclusion in the record of an affidavit for which (a) the affiant's signature is commissioned, and (b) none of the exhibits to the affidavit are commissioned.

The Deficiency in the Application Record

[8] On the return of the application in November 2024, the court ordered Basnandan to file written submissions addressing the fact that none of the exhibits to his affidavit are commissioned. Basnandan's affidavit is the only affidavit filed in support of the application.

[9] Within the timeframe specified, Basnandan filed a fully-commissioned version of his affidavit and written submissions. Basnandan seeks leave of the court, permitting him to file the fully-commissioned version of his affidavit.

[10] The requirement for an exhibit to be commissioned is found in r. 4.06(3) of the *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194. Pursuant to that subrule, "[a]n exhibit that is referred to in an affidavit shall be marked as such by the person taking the affidavit". The subrule thereafter stipulates how exhibits are to be handled, depending on whether the affiant refers to the exhibit as being attached to the affidavit (r. 4.06(3)(a)) or refers to the exhibit as produced and shown to them (r. 4.06(3)(b)).

[11] Basnandan's signature on the substantive portion of the original version of his affidavit was commissioned. I find that the failure of the individual who commissioned Basnandan's signature to commission the exhibits is an irregularity within the meaning of r. 2.01.

[12] Basnandan now seeks leave of the court to file an affidavit that (a) is identical in substance to his original affidavit; (b) includes the same exhibits as are attached to his original affidavit; and (c) is commissioned in its entirety (i.e., including the exhibits) by the same individual who commissioned the original affidavit.

[13] There is no prejudice to the respondents if Basnandan is granted leave to file the fully-commissioned version of his affidavit. None of the respondents delivered responding materials. The individual respondents chose not to deliver responding materials after being granted an adjournment of the application specifically for the purpose of allowing them to retain counsel and deliver responding materials: *Basnandan v. Jones*, (June 11, 2024), Ottawa, CV-24-95491 (ONSC). The respondents' respective decisions not to deliver responding materials did not turn on whether or not the exhibits to the original affidavit were commissioned.

[14] Permitting Basnandan to file a fully-commissioned version of his affidavit permits the court to determine the substantive issues. The leave requested in that regard is granted. A term to that effect is included in the order made at the conclusion of these reasons.

Issue No. 1 - Did the Purchasers' conduct amount to an anticipatory breach of the Agreement?

[15] Based on Basnandan's uncontested evidence, I find that the events from the date on which the Agreement was entered into to the date of Basnandan's termination of the Agreement occurred as follows:

- July 21, 2021 - Basnandan and the Purchasers enter into the Agreement. The Purchasers make the first of two \$100,000 payments towards the Deposit required as a term of the Agreement.
- September 13, 2021 - The Purchasers make the second of two \$100,000 payments, completing payment of the Deposit.
- November 9, 2021 - The Purchasers fail to pay a further \$500,000 deposit required as a term of the Agreement.
- November 25, 2021 - The Purchasers request an extension from November 10, 2021, to December 10, 2021, of the closing date for the purchase of the Property. Basnandan accedes to that request and informs the Purchasers that he will not agree to any further extensions of the closing date.
- November 26, 2021 - The Purchasers accept the terms proposed by Basnandan for the extension of the closing date to December 10, 2021.

- December 7, 2021 - Three days prior to the extended closing date agreed upon, the Purchasers inform Basnandan they anticipate being unable to complete the purchase of the Property on that date. The reason given by the Purchasers is that the mortgage funds have not yet cleared FIN TRAC.
- December 8, 2021 - Basnandan reiterates to the Purchasers that he (a) will not grant a further extension of the closing date; (b) is treating the Purchasers' conduct as an anticipatory breach of the Agreement, and (c) intends to tender on December 10, 2021.
- December 10, 2021 - Basnandan informs the Purchasers that he (a) remains "ready and willing" to close the transaction; and (b) terminates the Agreement (because of the Purchaser's clearly stated intention not to close), without prejudice to his rights, as the vendor, pursuant to the Agreement.

[16] The December 7, 2021 communication from the Purchasers' lawyer, referred to above, was in the form of an email sent to Basnandan's lawyer. In that email, the Purchasers' lawyer says, "I am pretty sure this [transaction] will not close [on December 10, 2021] as I do not believe the mortgage funds have cleared FIN TRAC yet." There is an element of uncertainty in that statement.

[17] Any lack of certainty is removed by the first sentence of the response from Basnandan's lawyer. In a letter dated December 8, 2021, sent to the Purchasers' lawyer, Basnandan's lawyer says: "You have confirmed today that your client will not be able to close as scheduled on December 10, 2021 as [they] have not been able to secure financing."

[18] Based on the first line of the December 8, 2021 letter, I draw an inference and find that, on that date, the Purchasers informed Basnandan that they were unable to obtain the financing they required to complete the transaction.

[19] In *Rahbar v. Parvizi*, 2023 ONCA 522, 485 D.L.R. (4th) 239, at para. 29, Thorburn J.A. highlights that none of the parties to the appeal took issue with the application judge's finding that an anticipatory breach occurred by virtue of the communication of the fact the purchasers' financing had fallen through. In the matter before this court, by December 8, 2021, it was certain that the Purchasers' were unable to secure the financing they required to complete the transaction. An anticipatory breach of the Agreement occurred on or before that date.

[20] The question posed as Issue No. 1 is answered in the affirmative.

Issue No. 2 - If the answer to Issue No. 1 is “yes”, was Basnandan entitled to rely on the anticipatory breach and terminate the Agreement?

[21] Following the anticipatory breach of the Agreement, Basnandan had two options. He could choose either to affirm or disaffirm the Agreement: see *Rahbar*, at para. 30.

[22] Basnandan was entitled to terminate the Agreement; the contents of his lawyer’s December 8, 2021 letter make it clear that he did so. Issue No. 2 is also answered in the affirmative.

Issue No. 3 - Is Basnandan entitled to the Deposit?

[23] In both the notice of application and his affidavit, Basnandan addresses his request for the release to him of the Deposit. The Agreement is silent as to what happens to the Deposit in the event the Purchasers fail to complete the transaction.

a) The Law

[24] In *Benedetto v. 2453912 Ontario Inc.*, 2019 ONCA 149, 86 B.L.R. (5th), at para. 6, the Court of Appeal for Ontario explains that a purchaser’s deposit “stands as security for the purchaser’s performance of the contract”. If a purchaser is unable to complete the transaction, the deposit is forfeited unless the purchaser and vendor bargained to the contrary: *Benedetto*, at para. 5 (citations omitted).

[25] As explained in para. 6 of *Benedetto*, the prospect or fear of forfeiture “provides an incentive for the purchaser to complete the purchase.” Where a purchaser is unable to complete the transaction, the forfeiture of the deposit serves two purposes. First, the vendor is compensated for the opportunity lost because the property remained off the market. Second, the vendor is compensated for the loss of bargaining power with putative future purchasers because the vendor has revealed to the market a price at which they were willing to sell the property.

[26] Where the vendor establishes entitlement to the deposit, the onus shifts to the purchaser to seek and establish that they are entitled to the equitable remedy of relief from forfeiture. On the application before this court, the Purchasers did not file any responding materials and are therefore not seeking an order for relief from forfeiture. Regardless, I will review the law applicable to the remedy of relief from forfeiture in the context of a failed real estate transaction.

[27] First, the equitable remedy of relief from forfeiture is addressed in s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Pursuant to that section, the “court may grant relief against penalties and forfeiture, on such terms as to compensation or otherwise are considered just.”

[28] A two-part test is applied: *Stockloser v. Johnson*, [1954] 1 All. E.R. 630. First, the court considers whether the amount of the deposit to otherwise be forfeited is out of proportion to the damages suffered. Second, the court considers whether it would be unconscionable for the vendor to retain the deposit.

[29] Last, a proceeding related to the release of a deposit towards the purchase of real property is an action for the recovery of “land” within the meaning of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15. The applicable limitation period is therefore ten years; the application now before the court was commenced within the limitation period.

b) Analysis

[30] The Agreement is silent as to what is to happen to the Deposit in the event the Purchasers fail to complete the purchase of the Property. The parties to the Agreement did not bargain to the contrary of forfeiture; Basnandan is entitled to the Deposit.

[31] If the Purchasers were requesting an order for relief from forfeiture, which they are not, the court would consider the amount of the Deposit in proportion to the agreed-upon purchase price. The Deposit represents slightly less than ten percent of the purchase price. With the Purchasers having failed to pay the additional \$500,000 towards the deposit required pursuant to the Agreement, the court considers only the Deposit (i.e., not the total amount of the deposit agreed upon (\$700,000) in comparison to the purchase price (\$2,250,000).

[32] Applying the first part of the two-part test described in the preceding section of these reasons, the Deposit is not out of proportion to the loss of the sale of the Property in December 2021.

[33] The second part of the two-part test requires the court to consider whether it would be unconscionable for Basnandan to retain the Deposit. In that regard, I note the following points:

- There is no evidence to support a finding that the Purchasers were unsophisticated or that there was an inequality, between them and Basnandan, in bargaining power.
- Basnandan and the Purchasers each had their own real estate broker when negotiating the terms of the Agreement.
- The Agreement does not include a financing condition. It would be reasonable to infer from the fact that the Purchasers were represented by a broker that they were aware of the absence of a financing condition.
- Basnandan acted reasonably throughout the fall of 2021, including that he agreed to an extension of the deadline for the payment of the \$500,000 instalment towards the overall deposit and ultimately to proceed to the closing date without the payment of that portion of the deposit. He also acted reasonably by extending the closing date.

[34] On consideration of the second part of the two-part test, there would be nothing unconscionable in permitting Basnandan to retain the Deposit.

[35] The fact that Basnandan had not sold the Property as of May 2024, when he swore his affidavit, would not preclude him from retaining the Deposit. It would not matter that there is no evidence from Basnandan as to one or more of the following points: (a) his efforts to sell the Property since December 2021; (b) income derived from the Property since December 2021; and (c) expenses incurred as a result of his continued ownership of the Property.

[36] The fact that the court is not in a position to calculate the damages suffered by Basnandan as a result of the Purchasers' failure to complete the transaction would not, on its own, justify granting relief from forfeiture. For example, in *Rahbar*, at para. 59, Thorburn J.A. concludes that the fact that the subject property later sold at a higher price than was agreed upon for the failed transaction did not justify granting relief from forfeiture.

[37] To permit the Purchasers to retain the Deposit, in the post-closing-date circumstances before this court, would be to water down the purpose a deposit is intended to serve. The order made at the conclusion of these reasons provides for the release of the Deposit to Basnandan.

[38] Before concluding these reasons, I will consider the fact that Basnandan does not seek the release of interest that may have accrued on the Deposit since the summer of 2021.

c) *Accrued Interest*

[39] From the terms of the Agreement, it is unclear whether the Deposit, held in trust by the Broker, is accruing interest:

- On p. 1 of the Agreement, the parties to the Agreement “acknowledge that, unless otherwise provided for in this Agreement...no interest shall be earned, received or paid on the deposit.”
- Schedule ‘B’ to the Agreement is titled “Trust Deposit Interest Agreement and Direction”. That schedule refers to a variable interest rate of 1.95 to 3.45 percent per year; the “amount of interest calculated”; administrative fees; and waiver of such fees where the “calculated interest” exceeds \$50.
- Schedule ‘B’ to the Agreement includes the following term: “The parties to this Agreement of Purchase and Sale hereby acknowledge and agree that the Brokerage shall be entitled to retain any interest earned or received on the deposit if the conditions precedent to payment of interest have not been satisfied.”
- Numbered paragraph 26 of the Agreement appears to provide that in the event of a conflict or discrepancy between the standard terms of the Agreement and the contents of a schedule, the latter prevails.

[40] I make no finding as to whether interest has accrued on the Deposit. Nor do I make any finding as to whether Basnandan is entitled to the interest, or any portion of it (i.e., assuming interest has accrued on the Deposit). In the event Basnandan and the Broker are unable to agree upon the amount of the funds to be released to Basnandan, he may bring the matter before me. I remain seized of the matter for that purpose.

Summary

[41] In summary, the court grants the following declaratory and other relief:

1. The Purchasers are in breach of the Agreement.
2. The Broker shall release the Deposit to Basnandan.
3. Basnandan is granted leave to file a fully-commissioned version of his May 2024 affidavit.

[42] With none of the respondents having delivered responding materials, it is not necessary for Basnandan to obtain from them approval as to the form and content of the draft order prior to submitting it to the court for signature. There remains the issue of Basnandan's costs of the application.

Costs

[43] For the purpose of the November 2024 hearing of the application, Basnandan filed a costs outline. He seeks his costs of the application, on the substantial indemnity scale, in the amount of \$15,072.34. Although he does not request costs on the partial indemnity scale, in his costs outline, Basnandan identifies costs on that scale in the amount of \$10,048.22.

[44] I decline to award costs on the substantial indemnity scale and, instead, award costs on the partial indemnity scale. The respondent, Michael Jones, appeared twice before this court. He did so in June 2024, with counsel, and was successful in obtaining an adjournment of the hearing of the application. At the time, Jones intended to retain counsel to represent him in the matter; Jones ultimately did not do so.

[45] Jones attended on the return of the application in November 2024. He requested and was denied an adjournment: *Basnandan v. Jones*, (November 18, 2024), Ottawa, CV-24-95491 (ONSC). In support of the request for an adjournment, Jones testified as to his intentions when he entered into the Agreement, his historical relationship with Basnandan, and the significance to him of the loss of \$200,000.

[46] In the circumstances, I am unable to conclude that Jones intentionally delayed the hearing of the application for any purpose other than to do what he could to protect himself in what are, for him, dire financial circumstances. His conduct during the proceeding does not rise to the level of entitling Basnandan to costs on the substantial indemnity scale.

[47] Basnandan’s costs, on the partial indemnity scale, of \$10,048.22 are broken down as follows:

Fees	\$	8,191.50
Counsel fee (for hearing)	\$	1,140.00
Disbursements (inclusive of HST)	\$	716.72

[48] It is unclear on the face of the costs outline whether the fees and counsel fee are inclusive of HST. I treat the amounts requested for fees and a counsel fee as inclusive of HST. It is not incumbent on the court to scrutinize a party’s arithmetic in an effort to ascertain whether the figures presented are inclusive or exclusive of HST.

[49] The fees claimed include approximately \$1,675 for work done by a “Paralegal Candidate”. That individual’s qualifications are not explained in the costs outline. Absent information to assist the court in understanding the nature of that individual’s expertise, I exclude the fees for that work: see *Vriend v. Vriend and PGT*, 2024 ONSC 4015, at paras. 49-61 regarding work done by non-lawyer employees.

[50] I am otherwise satisfied that the hourly rates charged by the senior and associate counsel and the amount of work docketed by those individuals are reasonable. I therefore fix the fees and counsel fee, inclusive of HST, in the amount of \$7,700.

[51] The actual disbursements incurred are \$1,194.53. I am not familiar with case law pursuant to which disbursements incurred are reduced from their full amount because costs are awarded on the partial indemnity scale. Basnandan is entitled to the full amount of disbursements the court finds to be reasonably incurred.

[52] The only disbursement that I find to have been unreasonably incurred is related to service of what are described as an “amended” notice of application and an application record including the “amended” version of the notice of application. Basnandan did not seek an order of the court granting him leave to amend the notice of application. It was improper for him to refer to an “amended” notice of application.

[53] The purported amendments to the notice of application relate to the June 2024 appearance at which Jones' request for an adjournment was granted. There was no need to address that appearance in the notice of application. That appearance could have been addressed by reference to the endorsement from that appearance; that endorsement forms part of the record before the court.

[54] It appears that the purpose of attempting to amend the notice of application was to bring to the court's attention the order made by Justice Somji pursuant to which Basnandan is entitled to costs of \$2,500 thrown away for the June 2024 appearance. That costs award is independent of the costs awarded in these reasons.

[55] I reduce the disbursements awarded from the full amount incurred, of \$1,194.53 including HST, by \$410 (for service of the amended notice of application etc.), to \$780.

[56] In summary, the Purchasers shall pay to Basnandan his costs of this application, on the partial indemnity scale, in the total amount of \$8,550 (\$7,700 + \$780). There are no costs awarded against the Broker.

Madam Justice Sylvia Corthorn

Released: June 11, 2025

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