CITATION.: 2324780 Ontario Inc. v. Tobyn Park Homes Inc., 2025 ONSC 6256
COURT FILE NO.: CV-20-71932
DATE: 2025-11-14

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
2324780 ONTARIO INC. o/a Losani Homes	)	Ted Evangelidis and Monty Dhaliwal, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	Jordan Diacur, for the Defendant
TOBYN PARK HOMES INC.	)	
	)	
Defendant	)	
	)	
	)	
	)	**HEARD:** May 1, 2025

REASONS FOR DECISION

JUSTICE S. ANTONIANI

[1] These reasons follow a one-day trial. Only one witness was called on behalf of the Plaintiff. The defendant called no witnesses.

[2] The plaintiff, 2324780 Ontario Inc. ("Losani"), and the defendant, Tobyn Park Homes Inc., are in business as land developers and builders.

[3] The parties each own lands in Stoney Creek that are residential developments. The lands share adjoining roadways. In order to fully develop their respective lands, the City of Hamilton required the parties to perform construction and urbanization for nearby roadways. The parties entered into a Construction and Cost Sharing Agreement ("CSA"), which was intended to govern

cost sharing for the construction and urbanization of the roadways, and for storm and sanitary sewers, water works, and other infrastructure. Losani and Tobyn are the only parties to the CSA.

[4] Pursuant to the CSA, Losani was to be responsible for all of the design and construction of the roadways, and Tobyn agreed to share in the costs.

[5] The work has been completed. The parties disagree as to when Tobyn was required to make its contribution pursuant to the CSA. Under Tobyn's interpretation, payments have been made in full and it owes nothing further. Under Losani's calculations, the payments were all late, and there is interest of over $2 million owing.

This disagreement hinges on whether interim payments were required to be made as per article 2.02 of the CSA, as the construction engineer provided Progress Certificates, or whether Tobyn was entitled to wait until the City of Hamilton gave its formal approval and acceptance that the Works were completed, as per the terms of an External Works Agreement ("EWA") signed between the City and Losani. The EWA was annexed to the CSA.

Issue

[6] Was Tobyn required to make interim payments as the construction engineer provided Progress Certificates, or was it entitled to wait to make payment until after the City of Hamilton gave its formal approval and acceptance of the work done?

Decision

[7] Tobyn was required to make interim payments as the construction engineer provided Progress Certificates. Tobyn is responsible to pay Losani interest for the late payments.

Law- Contractual Interpretation

[8] The starting point for any court's interpretation of a contract is its language. In *Earthco Soil Mixtures v. Pine Valley Enterprises Inc.,* 2024 SCC 20, at para. 63, Martin J. relies on *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, [2014] 2 S.C.R. 633 and *Corner Brook (City)*

v. Bailey, 2021 SCC 29, [2021] 2 S.C.R. 540, to make the following comments regarding the modern principles of contractual interpretation:

> The actual words chosen are central to the analysis because this is how the parties chose to capture and convey their contractual objectives. To determine their true intent, decision-makers "must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (*Sattva*, at para. 47). While "[t]he facts surrounding the formation of a contract are relevant to its interpretation" (*Corner Brook*, at para. 19), they "must never be allowed to overwhelm the words of that agreement" or cause courts to create brand new agreements (para. 20; *Sattva*, at para. 57). [Additional citations omitted.]

[9] In *Sattva*, Rothstein J. explained the goal of examining the surrounding circumstances of the contract, at para. 57:

> The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement. [Citations omitted.]

[10] The surrounding circumstances may be used as an interpretive aid for determining the meaning of the written words chosen by the parties. (*Sattva, at para 60*) However, the interpretation of the contract must always be grounded in the text of the contract, and any surrounding circumstances considered should consist only of objective evidence of background facts which ought have been within the knowledge of both parties at the time of the signing of the contract (*Sattva*, paras 57, 58)

[11] In *Weyerhaeuser Company Limited v Ontario (A-G)*, Brown JA (for the majority) set out the following approach to contractual interpretation, taking into account developments made in and after *Sattva*:

> When interpreting a contract, an adjudicator should:

> i. determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they have intended what they have said;
>
> ii. read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, 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;
>
> iii. read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, include facts that were known or reasonably capable or being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and
>
> iv. read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.

[12] Tobyn cites the decision in *Fuller v Aphria Inc.,* 2020 ONCA 403 at paras. 64-65 as support for its position:

> An interpretive approach that views the terms of a "host" contract as a better reflection of the specific parties' intent than an apparently inconsistent term incorporated by reference, may be appropriate in cases where the incorporation by reference is effected by language that does not give the incorporated terms priority. However, I do not agree that the approach would necessarily apply if the incorporation by reference is effected by language that indicates the incorporated provisions have priority over, or at least are not all automatically subordinate to, those originally expressed. There can be good reasons why parties might choose to incorporate terms and specify that they wish those incorporated terms to govern in the event of a conflict with the host contract's provisions.

[13] In the preceding paragraph, the court in Fuller cited *Spina v. Shoppers Drug Mart Inc.*, 2012 ONSC 5563, at paras. 141 to 142:

> Where contracting parties expressly incorporate terms into a contract, the court must make two interrelated interpretative decisions. First, because the incorporated language will be read into the contract, the court must determine the extent of the incorporation by reference. Second, the court must eliminate wording that is inconsistent or insensible with the pre-existing language of the contract." See: K. Lewiston, The Interpretation of Contracts, (5th ed) (London: Sweet & Maxwell, 2011), pp. 105, 505-506; H.G. Beale, Chitty on Contracts (30th ed.) (London: Sweet & Maxwell, 2008), para. 12-079; Tradigrain S.A. v. King Diamond Shipping SA, [2000] 2 Lloyd's Rep. 319. When terms would be incorporated by reference into a contract, the terms of the host contract prevail over any inconsistent terms incorporated by reference: Sabah Flour and Feed Mills Sdn Bhd v. Comfez, [1988] 2 Lloyd's Rep. 18 (C.A.); Modern Building Wales Ltd. v. Limmer and Trinidad Co. Ltd., [1975] 1 W.L.R. 1281 (C.A.); Lac La Ronge Indian Band v. Dallas Contracting Ltd., 2001 SKQB 135at para. 83; Pass Creek Enterprises Ltd. v. Kootenay Custom Log Sort Ltd. 2003 BCCA 580at paras 15-17."

Discussion

[14] There is factually little in dispute, as evidenced by a detailed agreed statement of facts relied upon at trial. The only issue between the parties is the question of when Tobyn was required to make payments for its share of the work under the CSA.

[15] The Plaintiff called one witness, William Liske. As of the trial date, Mr. Liske had been the VP of land development, and general counsel to Losani for about 13.5 years. He negotiated the agreement with counsel for the Defendant, Mark Giavedoni, another senior lawyer with significant experience in real estate development. The evidence of Mr. Liske was useful in setting the background facts into context. Most of those facts were already before the court as part of the agreed statement of facts. Mr Liske confirmed that the CSA was negotiated between two

sophisticated parties, each represented by senior counsel who understood land development. I accept Mr. Liske's evidence, though it was primarily helpful to situate the parties and the project. As will be seen, the terms of the CSA are clear, and need little extraneous support for their interpretation.

[16] The purpose of the CSA was to share the cost of certain "Works", defined in the EWA to include construction and urbanization of roadways, storm and sanitary sewers, water works, and other infrastructure that were mutually needed by the parties in order to develop their adjacent subdivisions in Hamilton.

[17] Tobyn argues that it does not owe Losani any interest because the triggering event for its making payment was formal approval and acceptance of the Works by the City as complete. This did not occur until 2023, almost a year after the last of 5 Progress Certificates were issued. Tobyn relies on the fact that the parties annexed to their CSA, the agreement between Losani and the City of Hamilton, the External Works Agreement ("EWA"). Tobyn was not a party to the EWA.

[18] Losani argues that Tobyn was required to make payments on an ongoing basis as required by the CSA. All the payments were late, and interest is owing.

The Text of the CSA

[19] The Cost Sharing Agreement incorporated some of the terms of the City's External Works Agreement.

[20] Article 2.01(a) of the CSA adopts the EWA's definition of the scope of the "Works":

> 2.01(a): Works **shall include all obligations** of the owner [Losani] as listed in the City's standard External Works Agreement, annexed hereto as Schedule C…"

[21] Articles 2.02(a) and 2.02(b) of the CSA refer to the parties' payment obligations:

> 2.02(a): Upon completion of any portion of the Works by Losani for **which interim or final payment is required to be made**, the Consulting Engineers shall provide **to**

> **each of Losani and Tobyn, a Progress Certificate** certifying and specifying the nature of the works completed, the costs of the same and proportionate liability of each of the Parties **for that portion of the works**.
>
> 2.02(b): **Payment shall be made** by each Party to the contractor by **no later than twenty (20) days after delivery** by the Consulting Engineers **of each Progress Certificate**…. [Emphasis added.]

The External Works Agreement

[22] The CSA states that Tobyn authorizes Losani to complete all of the Works in accordance with the "terms of the agreement and the requirements of the City of Hamilton." Tobyn argues the following articles of the EWA override its obligations under Article 2 of the CSA to make payment 20 days after each Progress Certificate:

> 6. a) The Owner [Losani] shall proceed diligently with construction and installation of all storm and sanitary drainage, watermain and road Works to the satisfaction of the City and in accordance with the approved construction drawings and specifications, Engineering Guidelines, relevant policies and by-laws, good engineering practices and all other relevant provisions of this Agreement and in accordance with the Ministry of the Environment's approval.
>
> …
>
> 17. c) The City agrees **that acceptance of the Works as complete and commencement of the maintenance periods** described in this Agreement shall take place upon the fulfillment of the following conditions by the Owner:
>
> > i) the Works, which the Owner is required to construct pursuant to this Agreement, are substantially complete, in the reasonable opinion of the Senior Director of Growth Management; and,

> ii) the Works, which the Owner is required to construct pursuant to this Agreement, have been inspected to the reasonable satisfaction of the Senior Director of Growth Management; and,
>
> iii) the City has not identified any major deficiencies in the Works constructed pursuant to this Agreement. [Emphasis added.]

[23] On March 29, 2023, the City confirmed that the Works were completed to its satisfaction, and the maintenance period began. Tobyn states that it was not required to pay its portion of the cost until that date.

[24] Tobyn argues that formal approval and acceptance by the City was an obligation that Losani had to satisfy before the engineer could validly issue any Progress Certificates. The evidence of Mr. Liske, which I accept, is that there is no legislation which governs the issuance of progress certificates. It is a matter of the contracting party trusting the engineer to indicate when portions of the work are completed.

[25] According to Tobyn, the condition precedent – that is, the requirement that the City accept the Works as complete prior to the issuance of any progress certificate - was created when the parties agreed to annex the EWA to the CSA. Tobyn argues that the impact of annexing the EWA to the CSA meant that the terms of the EWA also became terms of the CSA, and that the terms of the EWA are overriding, where the two agreements differ.

[26] Tobyn also relies on Article 2.01(a) of the CSA which states that "Losani agrees to proceed in an expeditious manner to complete the Works as set out in Schedule "B" annexed hereto in the city of Hamilton which Works shall include all obligations of the Owner (Losani) as listed in the City's standard External Works agreement annexed hereto as Schedule "C" as that Agreement pertains to the Works".

[27] Tobyn points out that the term "shall include" in Article 2.01(a) of the CSA is "mandatory language, and a marker of the intended priority of the terms of the EWA to be incorporated by reference over those of the "host" contract, the CSA.

The Cost Sharing Agreement and the External Works Agreement, read together

[28] Losani argues that there is no conflict between the agreements because Tobyn conflates (a) the triggering event for its payment obligation for the Works under the CSA with (b) the standard to which the Works must be completed in order to obtain final approval from the City.

[29] I agree with Losani's position and find Tobyn's reliance on article 17(c) of the EWA to be misdirected.

[30] Article 17(c) of the EWA defines when the Works will be considered to be ***substantially complete*** by the City, an issue which is entirely separate and distinct from when the parties would be responsible to make their respective interim payments. Article 17(c) governs when the entire works will be considered complete, thereby moving the project into a subsequent maintenance period.

[31] The EWA does not address what occurs on completion of any portion of the Works. It only addresses completion of them. The EWA does not address payment in any way.

[32] Losani further argues that the EWA was annexed to the agreement for reference but that there was never any intention to have the terms of the EWA supersede the terms of the CSA. They argue that Tobyn's position is contractually unfounded, untenable and that it renders the role of the consulting engineer in the CSA moot and unnecessary and article 2.02 meaningless.

[33] There is nothing in the wording of the provisions of the two agreements that signals an intention to have the incorporated EWA govern overall, and certainly not on the issue of when payments were due from Tobyn. I find that the EWA did not, either expressly or implicitly, overwrite the agreement between the immediate parties, and that, in any event, the EWA was not inconsistent on the issue of when Tobyn was required to make payments.

[34] I find that the specific rights and responsibilities of Losani and Tobyn for payment of the Works are found entirely within the CSA, and that agreement must be interpreted according to the plain and ordinary meaning of the terms therein. Article 2.02 is clear and unambiguous, and I find that it is not in conflict with the EWA. As stated, the CSA makes no reference to City approval in any of the payment provisions, and the EWA makes no reference to payments.

[35] Tobyn's interpretation is inconsistent with multiple provisions of the CSA, and would render numerous specific negotiated terms of the CSA moot. The CSA clearly contemplates multiple Progress Certificates as portions of work are complete. Pursuant to article 2.02(a) of the CSA, Tobyn's obligation to pay arises "upon completion **of any portion** of the Works by Losani for which interim or final payment is required to be made." This clearly references completion of portions of the Works. The phrase "for which interim or final payment is required to be made" clearly refers to the obligation to pay the engineers.

[36] By contrast, the EWA does not address any obligations prior to "…acceptance of the Works as complete and commencement of the maintenance periods…". This clearly contemplates a completion of the entire Works project. Mr. Liske's evidence is that the city would likely only be expected to inspect and accept the Works as completed upon conclusion of the entire project. I do not find that the documents are in conflict with one another when read in context.

[37] Article 2.02(b) of the CSA further states:

> … In the event that Losani has paid the contractor prior to delivery of the Progress Certificates to each of the parties, then Tobyn shall make the requisite payment to Losani **immediately** upon Losani providing proof of payment to the contractor. … [Emphasis added.]

[38] Article 2.02(b) specifies that any such payment is at "Losani's risk that the payment made is compliant with the Progress Certificate as issued and no interest will be payable by the other parties where Losani has paid the contractor before the progress certificate has been delivered."

[39] These articles clearly contemplate interim payments, and even the possibility that payment may be made *prior* to the receipt of Progress Certificates –terms which are wholly inconsistent with an interpretation that the Works required final approval from the City before any payment was due from Tobyn. Where payment was made prior to delivery of a progress certificate, upon proof of payment, Tobyn was required to pay *immediately*.

[40] Further, article 2.03 of the CSA indicates that "Once payment has been received from each of the Parties for the Shared works, Losani shall notify the city of Hamilton in writing that such payment has been made, provide the City with Proof of payment and request a reduction in all securities posted with the City." Under article 5.01 of the CSA, the parties each agreed to post irrevocable letters of credit in the amount of their estimated proportionate share of the Works as set out in the agreement plus an additional ten percent. Article 5.02(a) of the CSA provides that if payment is not made when due pursuant to the Progress Certificates issued by the consulting engineer, S. Llewellyn & Associates Limited ("SLA"), then either "Losani or [the City] are irrevocably authorized to draw upon the Letter of Credit Security in order to pay for" the defaulting party's proportionate share of completed works.[emphasis added]

[41] There would be no need for a "reduction" of the securities posted, if all of the payment was due at one time, when the entirety of the Works was completed.

[42] The annexation of the EWA is not effected by language that indicates the incorporated provisions have priority over the CSA in the event of conflict. In any event, I have found no conflict. Indeed, as discussed, an interpretation that the host contract is subordinate would render significant carefully negotiated details to be meaningless. I find that the host contract prevails.

[43] Further, to "read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed" cannot result in a conclusion that Losani, a separate business entirely from Tobyn, would take on the entire cost and risk of performance of the Works until the obligations were deemed entirely completed by the City. The parties are not related. There is no suggestion that Tobyn otherwise paid a fee to Losani

to take on the Works. The arrangement was obviously convenient and financially viable due to the parties' shared requirement to improve the roads as a condition of their respective developments.

Tobyn's part performance and communications

[44] Although it is unnecessary to consider anything further to resolve the single issue between these parties, I note that the parties' course of communications and part performance also supports Losani's interpretation. Courts may look to the parties' course of conduct in performing the contract to determine what the parties meant: *SS&C Technologies Canada Corp. v. The Bank of New York Mellon Corporation*, 2024 ONCA 675. Many communications between the parties which are included in the record corroborate Losani's position that payments from Tobyn were due on an intermittent basis. In October and December 2018, there were emails from Losani's engineer to Tobyn, requesting payment "to avoid further interest charges". I note that the response from Tobyn begins with "I am working on arranging the payments for the work done". It does not include any complaint about the interim invoice, or any comment on the interest charges accruing.

[45] In another communication Tobyn wrote "we are working on releasing money for [H]ighland [R]oad, and asking for an invoice addressed to Tobyn Park."

[46] In response to an email dated February 25, 2019, asking "are the funds being released this week?" Tobyn wrote "our account manager acknowledges that payment to Losani is top priority and they are doing their best to get the funds released."

[47] In March 2019, further communications from Tobyn indicated that its lender would be releasing funds, but that the lender was waiting on a report from Tobyn's cost consultant. Also from Tobyn in Maarch, 2019: "Our Lender is aware that Losani's payment is priority".

[48] Each of these communications were clearly made in contemplation and promise of Tobyn's performance – of making interim payments, after having received Progress Certificates from the engineers, and before the City gave its final approval.

[49] Further, the first payment made by Tobyn was in the sum of $1,899,985.00 on October 17, 2019. This payment, for almost 2/3 of the total amount owing by Tobyn, was made about 3.5 years ***before*** City of Hamilton approval, which was given on March 29, 2023. The payment was made through counsel, in the months following the various communications that Tobyn was awaiting a release of funds. I reject Tobyn's position that this payment of approximately 2/3 of their entire share of the cost was simply a good faith payment, made years before they believed payment to have been due.

Breach of Contract

[50] Tobyn further argues that it was not required to make interim payments because Losani was in breach of the CSA. It argues that the Works were not completed on anything close to the expected schedule. Pursuant to the CSA, Losani was supposed to commence the Works in November, 2017 and "proceed expeditiously with commencement of the Works based on an anticipated construction schedule beginning in November 2017 and ending in the Spring of 2018". The Works were not in fact completed until five years later, in 2023. Tobyn argues that Losani bears responsibility for a 5 year delay. It argues that Losani's breach prevented it from demanding performance from Tobyn.

[51] Although this argument was made, it was not supported by any evidence as to what the delays were, or the cause of them, or that any delays were of concern to anyone when they occurred. Tobyn called no witnesses at trial and submitted no evidence to suggest it ever objected to the timing of the construction. Tobyn made clear in its submissions that it does not claim damages resulting from any delay. It only relies on delay to argue that Losani is not entitled to demand performance.

[52] There was no evidence called, expert or otherwise, on the issue of the "*anticipated* construction schedule", and how it was determined, and what occurred that caused the construction to deviate from it, and whether Losani failed to "proceed expeditiously". As noted, there were numerous communications between the parties included in the record. There is nothing which

demonstrates that any party was concerned that any delays were problematic, or that they constitute a breach of the agreement.

[53] I note that Tobyn sent its fully executed CSA to Losani on September 19, 2018. The executed agreement included "the final Schedule E dated July 23, 2018". I heard no evidence as to why, although the agreement included the above noted timelines of November 2017 – Spring 2018, it appears that the parties may have delayed in all things, including final details and execution of the CSA.

[54] During examination, the representative for Tobyn indicated the reason payments were withheld was because he wanted to ensure that there would be nothing left outstanding to be remedied for the City give its final approvals. He admitted that nobody from Tobyn addressed delay with anyone from Losani at any time. The CSA does not address what would occur in the event of delay.

[55] I am unable to find that there is any evidence to support the argument that delays in the construction put Losani in breach of the contract which in turn entitled Tobyn to refuse payment until the Works were entirely completed.

Conclusion

[56] The CSA required payment be made within 20 days of receipt of a progress certificate by the engineers, or earlier, as per the terms of article 2.02.

Calculation of Sums Owed

[57] According to the agreed statement of facts, the total sum payable by Tobyn for its share of the total pre interest cost of the Works was $2,894,554.18. The parties agree that the CSA calls for interest at 15% per annum on late payments, compounded monthly until payment is made. I have found all of the payments were late.

[58] The parties agree that there were 5 Progress Certificates, and I find that interest began to accrue as follows:

- PC1: delivered October 15, 2018, due: November 4, 2018
- PC2: delivered January 10, 2019, due: January 30, 2019
- PC3: delivered October 31, 2019, due: November 20, 2019
- PC4: delivered November 24, 2020, due: December 14, 2020
- PC5: delivered April 7, 2022, due: April 27, 2022

[59] The parties further agree that Tobyn made the following payments: $1,899,985.00 paid on October 17, 2019; $886,100.32 paid on May 26, 2023; and $108,453.86 paid on November 18, 2023, for a total of $2,894,554.18.

[60] I have found that Tobyn was required to pay Losani by the 20th day following the delivery of each Progress Certificate by the consulting engineer. Because it failed to do so, interest has accrued on the payments due at 15% per annum, compounded monthly. The parties agree that, if the interest is payable, the total owed and by Tobyn as of the date of this trial is $2,001,760.70.

Order

Tobyn shall pay Losani the sum of $2,001,760.70 plus 15% interest, which additional interest began to accrue after the date of the trial, which was heard on May 1, 2025.

Costs

[61] I would urge the parties to agree on costs. If the parties are unable to come to an agreement, then costs submissions may be made as follows:

a. Within 15 calendar days of the distribution of these reasons to counsel, the plaintiff shall serve and file her bill of costs, along with any written costs submissions, not exceeding three pages, double-spaced;

b. Within 25 calendar days of the distribution of these reasons, the defendant shall serve and file any responding costs submissions of no more than three pages, double-spaced, together with a draft bill of costs;

c. The plaintiff's reply submissions, if any, are to be served and filed within 30 calendar days of the distribution of these reasons, and are not to exceed two pages;

d. If no submissions are received from either party within the timeline allocated, that party shall be deemed to have no submissions; and

e. If no submissions are received from either party, the parties will be deemed to have resolved the issue of the costs, and costs will not be determined by me.

Justice S. Antoniani

Released: November 14, 2025

CITATION.: 2324780 Ontario Inc. v. Tobyn Park Homes Inc., 2025 ONSC 6256
COURT FILE NO.: CV-20-71932
DATE: 2025-11-14

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2324780 ONTARIO INC.

Plaintiff

– and –

TOBYN PARK HOMES INC.

Defendant

REASONS FOR DECISION

S. Antoniani, J.

Released: November 14, 2025