CITATION: *Markew et al. v. Tidol et al*., 2025 ONSC 6953
COURT FILE NO.: CV-21-00000496-0000
DATE: December 12, 2025

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SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
	)	
Andrew Markew and Richard Araujo (in Trust)	)	
	)	
	)	
	)	Kyle C. Armagon, counsel for the Plaintiffs
	)	
– and –	)	
	)	
	)	
Tidol Corporation and Masilamany Subramaniam	)	
	)	
	)	Arjun Norula, counsel for the Defendants
	)	
	)	

HEARD**:** July 17, 2025

RULING ON SUMMARY JUDGMENT MOTION

THE HONOURABLE JUSTICE SUNIL S. MATHAI

A. Introduction

[1] On December 1, 2020, the parties entered into an Agreement of Purchase and Sale ("APS"). In the APS, the plaintiffs, Andrew Markew and Richard Araujo, proposed to purchase the property at 762 McKay Road in Pickering, Ontario (the "Property") from the defendant, Tidol Corporation ("Tidol"). The parties agreed to a purchase price of $1,450,000.00 and a February 12, 2021 closing date.

[2] The defendants refused to close, claiming that the APS was invalid. Specifically, Tidol's principal, Masilamany Subramaniam, alleged that one of Mr. Araujo's signatures in the APS was not authentic.

[3] The plaintiffs commenced the within action for a breach of the APS. As a remedy, the plaintiffs seek specific performance requiring Tidol to transfer ownership of the Property. The plaintiffs commenced this summary judgment motion seeking the same relief. The defendants oppose the summary judgment motion but have not brought a "boomerang" motion seeking summary judgment dismissing the plaintiffs' action.

[4] For the reasons that follow, I grant the plaintiffs' motion for summary judgment. There is no genuine issue with respect to whether Tidol breached the APS. It did. Further, there is no genuine issue requiring a trial with respect to remedy. I grant the request for specific performance on the basis that the plaintiffs have established that there are no comparable alternatives to the Property that would satisfy the plaintiffs' business needs. In the circumstances, damages are an inadequate remedy.

B. Background Facts

[5] What follows is a summary of the relevant facts. These facts are not in dispute.

(i) The Plaintiffs' Search for a Property

[6] The plaintiff, Mr. Markew, is the owner of Whitby Shores Landscaping Ltd., a landscaping and construction business. The plaintiff, Mr. Araujo, is the owner of So-Pic Auto and Tire Ltd.

[7] The plaintiffs had a business plan. A central pillar of that plan was to operate their businesses on one property. In furtherance of this plan, the plaintiffs searched for an industrial property that: (a) was large enough to permit outside storage of large equipment; (b) was located within the Durham region; and (c) was zoned for outside storage and included provisions for a contractor's yard.

[8] The plaintiffs began their search for an ideal property in February 2019. In October 2019, the plaintiffs retained a realtor, Christopher Ennis, to assist with finding a suitable property in accordance with their specific requirements.

[9] On August 26, 2020, the plaintiffs identified the Property as meeting their needs. Mr. Ennis reached out to the listing agent, Chenth Sivalingam, to make inquiries about the Property. At that time, the Property was under contract. As a result, the plaintiffs did not make an offer on the Property.

(ii) The APS

[10] On November 24, 2020, the Property was re-listed. Mr. Ennis again made inquiries about the Property with Mr. Sivalingam. Mr. Sivalingam advised Mr. Ennis that he expected multiple offers on the property.

[11] On November 27, 2020, Mr. Ennis prepared an offer package that was sent to Mr. Sivalingam. The plaintiff offered to purchase the Property for $1,400,000.00. On November 30, 2020, Mr. Sivalingam sent a counteroffer for $1,450,000.00.

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[12] On December 1, 2020, the plaintiffs accepted the counteroffer and sent the fully executed APS to Mr. Sivalingam. Pursuant to the APS, the plaintiffs made a deposit of $50,000.00. The parties agreed to a February 12, 2021 closing date.

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(iii) The Waivers

[13] On December 28, 2020, the plaintiffs waived conditions related to municipal approvals for the plaintiffs' proposed use of the Property. On January 25, 2021, the plaintiffs waived a condition related to environmental and geotechnical tests on the Property. On the same date, the plaintiffs advised the defendants that they were prepared to proceed with the sale on February 12, 2021.

(iv) The Sale Does Not Close

[14] On January 5, 2021, Tidol's principal, Masilamany Subramaniam, emailed the plaintiffs. In that email, Mr. Subramaniam stated that there must be a "stay of process" because of ongoing court proceedings regarding the Property. Mr. Subramaniam also suggested that the pandemic created a "force majeure" situation, such that all further actions in closing the sale had to be suspended. The plaintiffs' solicitor rejected these reasons for "staying" the APS.

[15] On February 2, 2021, Mr. Subramaniam advised the plaintiffs of two concerns that he had with the APS. First, Mr. Subramaniam questioned the authenticity of the plaintiffs' signatures in the APS. Second, Mr. Subramaniam alleged that the buyers had signed for the seller in the November 27, 2020 offer. Similar correspondence was sent on February 8, 9, 11, and 12, 2021.

[16] The transaction did not close on February 12, 2021. The defendants did not return the deposit.

C. Law and Analysis

(i) Governing Principles on a Motion for Summary Judgment

[17] Pursuant to r. 20.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence, or if the parties agree to have all or part of the claim determined by summary judgment and the court is satisfied that it is appropriate to grant it. Rules 20.04(2.1) and (2.2) provide the court with expanded fact-finding powers to make this determination.

[18] To be appropriate for summary judgment, the evidence before the court must be such that a judge is confident that she or he can fairly resolve the dispute (see *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 57).

[19] In determining whether a matter is appropriate for summary judgment, the court must first determine if there is a genuine issue requiring a trial based only on the evidence before it, without using the extended fact-finding powers in r. 20.04. There is no genuine issue requiring a trial if the

evidence allows the court to fairly and justly adjudicate the dispute through this proportionate procedure (see *Hryniak*, at para. 66).

[20] In assessing whether there is a genuine issue requiring a trial, the court may weigh evidence, evaluate the credibility of an affiant, and draw any reasonable inference from the evidence (see r. 20.04(2.1)).

[21] If there appears to be a genuine issue requiring a trial, the court must determine if the need for a trial can be avoided by using the powers in rr. 20.04(2.1) and (2.2). These powers may be used if it would not be against the interests of justice to do so (see *Hryniak*, at para. 66).

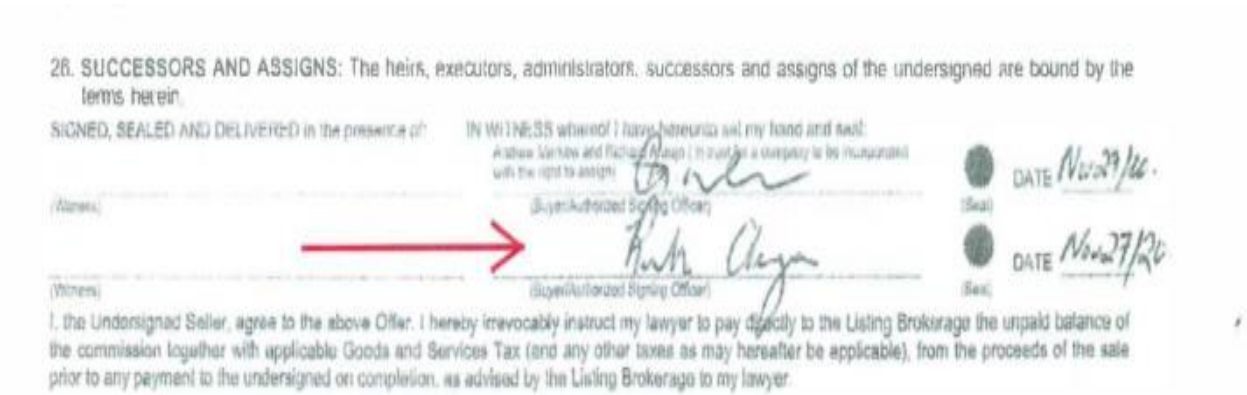
[22] The moving party bears the evidentiary burden of showing there is no genuine issue requiring a trial (see *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 11). On a summary judgment motion, the court is entitled to assume that the record contains all the evidence that the parties would present if the matter proceeded to trial and that each party has "put their best foot forward" with respect to the existence or nonexistence of material issues to be tried (see *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200, at paras. 26-27, aff'd 2014 ONCA 878; *Galal v. Hale*, 2018 ONSC 5502, at para. 14; *Georges v. Nahri*, 2016 ONSC 2294, at para. 19; *Afshari v. Privitera*, 2025 ONSC 5758, at para. 32).

(ii) Did the Defendants Breach the APS?

[23] Mr. Araujo's signature can be found in several locations in the initial offer package that Mr. Ennis sent to Mr. Sivalingam. The defendants allege that one of Mr. Araujo's November 27, 2020 signatures looks different from other signatures done on the same date and Mr. Araujo's signature on December 1, 2020. Specifically, the defendants allege that the offending signature is found in section 26 of the APS. The section 26 signature was executed on November 27, 2020 (i.e. the initial offer).

[24] The section 26 signature appears different from Mr. Araujo's signatures in other locations in the initial offer package. The section 26 signature also appears to be different from Mr. Araujo's signatures dated December 1, 2020 (i.e. when the plaintiffs accepted Tidol's counteroffer). For ease of reference, I reproduce the section 26 signature, which is alleged to be inauthentic, and some examples of the other signatures that the defendants take no issue with.

Allegedly Inauthentic Signature (Red Arrow):



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Signature Dated November 27 and December 1 (Circled in Yellow):

OREA Ontario Real Estate Association

Form 801
for use in the Province of Ontario

Offer Summary Document
For use with Agreement of Purchase and Sale

For Brokerage submitting the offer on behalf of the Buyer:
When sent to the Listing Brokerage this form can be used as evidence that you have a written signed offer from a Buyer to the Seller.

REAL PROPERTY ADDRESS: 762 MCKAY ROAD PICKERING ONT (the "property")
(municipal address and/or legal description)

for an Agreement of Purchase and Sale dated: the 27TH day of NOVEMBER, 20 20 ("offer")

This offer was submitted by: **BROKERAGE:** ROYAL LEPAGE YOUR COMMUNITY REALTY BROKERAGE

SALES REPRESENTATIVE/BROKER: CHRISTOPHER ENNIS

I/We, Andrew Markew/ Richard Araujo (Name of Buyer(s)), have signed an offer for the property.

(Signature of Buyer) (Date) (Signature of Buyer) Nov 27/20 (Date)

This offer was submitted, E-Mail (by fax, by email or in person) to the Listing Brokerage at (a.m./p.m.) on the 27th day of November, 20 20

Irrevocable until (a.m./p.m.) on the 30th day of November, 20 20

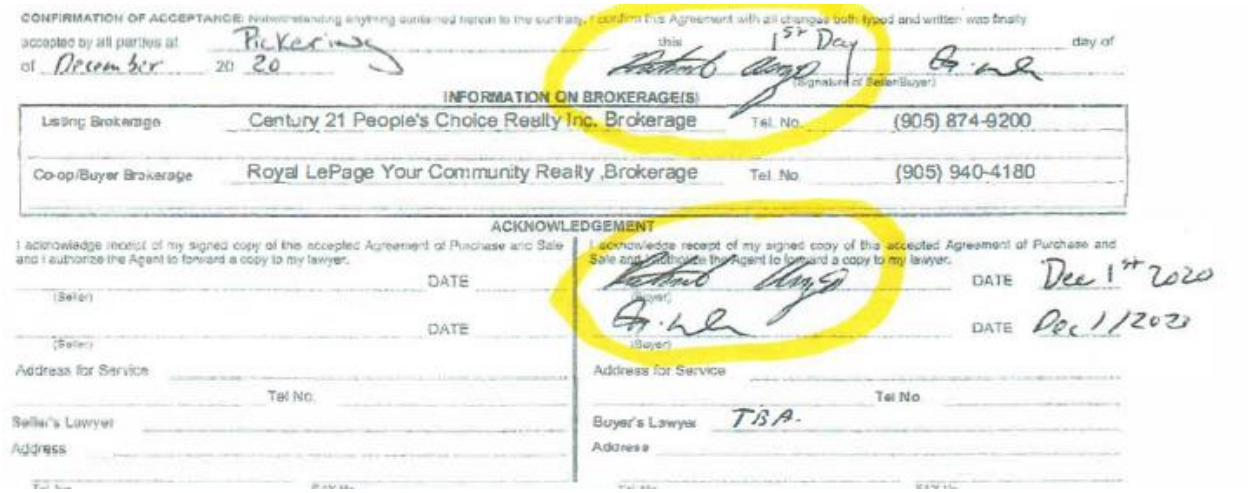
[For Buyer counter offer - complete the following]

I/We, Andrew Markew/ Richard Araujo (Name of Buyer(s)), have signed an offer for the property.

(Signature of Buyer) Nov 27 /2020 (Date) (Signature of Buyer) Nov 29/20 (Date)

An offer was submitted, (by fax, by email or in person) to the Listing Brokerage at (a.m./p.m.) on the day of

, 20 Irrevocable until (a.m./p.m.) on the day of , 20



CONFIRMATION OF ACCEPTANCE: Notwithstanding anything contained herein to the contrary, I confirm this Agreement with all changes both typed and written was finally accepted by all parties at Pickering this 1st Day of December 20 20

INFORMATION ON BROKERAGE(S)

Listing Brokerage	Century 21 People's Choice Realty Inc. Brokerage	Tel. No.	(905) 874-9200
Co-op/Buyer Brokerage	Royal LePage Your Community Realty ,Brokerage	Tel. No	(905) 940-4180

ACKNOWLEDGEMENT

I acknowledge receipt of my signed copy of the accepted Agreement of Purchase and Sale and I authorize the Agent to forward a copy to my lawyer.

(Seller) DATE

(Seller) DATE

Address for Service

Tel No.

Seller's Lawyer

Address

I acknowledge receipt of my signed copy of this accepted Agreement of Purchase and Sale and I authorize the Agent to forward a copy to my lawyer.

(Buyer) DATE Dec 1st 2020

(Buyer) DATE Dec 1/2020

Address for Service

Tel No

Buyer's Lawyer TBA.

Address

[25] In cross-examination, both Mr. Markew and Mr. Araujo testified that they executed the initial offer on November 27, 2020, and in the presence of Mr. Araujo's father. In cross-examination, Mr. Araujo acknowledged that the section 26 signature looks different from his signature in other locations. Mr. Araujo testified that his signature may have looked different because, "[he] could have signed that sitting on the side of a sign out front of [his] building."

[26] Mr. Subramaniam decided not to close because the plaintiffs never adequately explained why Mr. Araujo's section 26 signature looked different. While not explicitly stated this way, Mr. Subramaniam's evidence is that he did not want to be a party to a fraud.

[27] There is no genuine issue requiring a trial with respect to whether the defendants breached the APS. I reject Mr. Mr. Subramaniam's excuse for refusing to close. I find that Mr. Subramaniam was not genuinely concerned that the plaintiffs were engaging in some type of fraud. Additionally, the alleged fraudulent signature was contained in the initial offer, which was rejected by Mr. Subramaniam. As a result, the initial offer was null and void. The plaintiffs accepted the defendants' counteroffer on December 1, 2020, and there is no allegation that the December 1, 2020 signature are inauthentic.

[28] I start by evaluating Mr. Subramaniam's reasons for not closing. A review of the record demonstrates that Mr. Subramaniam was attempting to derail the sale and was looking for an excuse to do so.

[29] On December 28, 2020, the plaintiffs sent Mr. Sivalingam the first waiver. On the same day, Mr. Sivalingam forwarded the waiver to Mr. Subramaniam. On December 30, 2020, Mr. Subramaniam emailed Mr. Ennis, Mr. Sivalingam, and the plaintiffs the following cryptic message:

> To who [sic] it may concern,
>
> Please read The Agreement of Purchase and Sales [sic] on OREA form 500 fully.

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[30] Mr. Ennis made attempts to clarify what, if any, concerns Mr. Subramaniam had with the APS. On December 31, 2020, Mr. Ennis spoke to Mr. Sivalingam about Mr. Subramaniam's concerns. On the record before me, it is not clear what was discussed.

[31] On January 5, 2020, Mr. Subramaniam emailed the plaintiffs and advised that he had decided to "suspend all further actions" on the sale of the Property. Mr. Subramaniam's email did not reference the signature issue. In his email, Mr. Subramaniam offered the following reasons for suspending the sale:

> 1. STAY OF PROCESS: The on-going court proceeding between the previous buyer of the same property and the seller due to the change of Limitation period from 2 years to 5 years. Plaintiff, the buyer, is not setting a trial date. You may contact Superior Court of Justice, Hamilton, Ontario before you proceed any further with this agreement. Plaintiff Mocon Group Inc vs Defendant Tidol Corporation. This action has to be disposed of before any agreement can be consummated. The present buyers may have to wait till 2nd January 2023, when the 5-year period will expire.
>
> 2. FORCE MAJEURE. The current Covid-19 situation has made the "Normal Functioning" of the institutions and Individuals impossible. A "force majeure" is a contract provision that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible. Buyer is advised to wait until the situation returns to "Normal" and the Emergency Regulations repealed.

[32] There are two aspects of the January 5, 2020 email that cause me to doubt Mr. Subramaniam's evidence that he failed to close because he was concerned about the validity of Mr. Araujo's signature.

[33] First, Mr. Subramaniam did not raise the signature issue in the January 5th email. This omission is significant. Mr. Subramaniam's evidence is that his concerns with Mr. Araujo's signature began on December 5, 2020. If Mr. Subramaniam genuinely believed that there was a concern with the validity of the APS, then why not raise the issue in the January 5th email? Mr. Subramaniam's affidavit does not offer any explanation for this omission. When cross-examined on this issue, Mr. Subramaniam gave the following evidence:

> Q. Okay. So, your letter didn't reference anything -- problems with the signatures, correct?
>
> A. I do.

[34] It appears that Mr. Subramaniam believed that the January 5th email raised the signature issue. If that is what Mr. Subramaniam meant, then his answer is incorrect. If that is not what he meant, then Mr. Subramaniam has offered no explanation for why his January 5th email did not raise the signature issue. Either way, the January 5th email and Mr. Subramaniam's evidence on the email leads me to have significant concerns with respect to the sincerity of Mr. Subramaniam's assertion that he failed to close because of the signature issue.

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[35] Second, the purported excuses for "suspending" the sale does not withstand even the slightest of scrutiny. With respect to the ongoing litigation, I note that the defendants listed the Property in November 2020 when the litigation was ongoing.[1] At the time of listing the Property, the defendants were not concerned that the ongoing litigation would impact a future sale. In cross-examination, Mr. Subramaniam admitted that the litigation related to the return of a deposit. As a result, the Property was not encumbered such that the plaintiffs' purchase would have to wait until January 2023.

[36] With respect to the pandemic, there is no reason why COVID-19 would impact the sale of the Property. There is no suggestion that it impacted the defendants' attempt to sell the Property in October 2020. In cross-examination, Mr. Subramaniam testified that Tidol's employees were working from home, and it would not have been possible for Tidol to complete the sale of the Property. This excuse is simply not believable. In a world where real estate transactions are completed electronically, it is not possible that the sale could not be completed on February 12, 2021 because Tidol's employees were working from home.

[37] For the above reasons, I find that Mr. Subramaniam's January 5th email was an attempt to get out from under the APS. When the plaintiffs' solicitor rejected the excuses, Mr. Subramaniam moved on to another tactic.

[38] On February 2, 2021, Mr. Subramaniam sent a letter to the plaintiffs requesting a copy of the executed APS because: (1) the plaintiffs appeared to have signed on a signature line reserved for the seller;[2] and (2) some of the signatures appeared inconsistent. The last two paragraphs of this letter read as follows:

> What I need is a legally enforceable Purchase and Sale Agreement in case of default.
>
> There is reason because in our previous failed agreement the buyer forged his signature. This led to the Real Estate Agents found [sic] negligent by the Real Estate Council of Ontario and the license of the buyer's lawyer cancelled.

[39] On February 8, 2021, Mr. Subramaniam followed up with a letter wherein he made the same allegations. In that letter, Mr. Subramaniam states, "We are not delaying the closing; your clients are not explaining these serious violations…..There [sic] are serious criminal violations and if they don't come up with credible explanations, they are Indictable offences under the criminal code for personation, fraud and forgery. I may also report this matter to the Real Estate Council of Ontario and the Law Society of Ontario."

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[1] On January 7, 2021, Mr. Sivalingam sent an email to Mr. Ennis stating that he was never advised about the "situation" for the Property and that Mr. Sivalingam had been, "honestly and sincerely work[ing] to get [his] client [the] best deal." I have not relied upon this email in finding that Mr. Subramaniam's concern about ongoing litigation to be disingenuous.

[2] In both oral and written submissions, the defendants' only relied upon the inconsistent signatures as the basis for believe that the plaintiffs were engaging in a fraud.

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[40] Despite claiming that the defendants were not "delaying the closing", the defendants did not have counsel retained to conduct the closing that was scheduled to occur four days later.

[41] On February 9, 2021, Mr. Subramaniam sent correspondence to the plaintiffs, Mr. Ennis, the plaintiffs' solicitor, and Mr. Sivalingam. In that letter, Mr. Subramaniam confirmed that the sale would close on February 12, 2021. Again, Mr. Subramaniam requested a copy of the executed APS and advised that the sale would not close unless he received an executed APS that corrected the deficiencies. Mr. Subramaniam still did not have counsel for the closing.

[42] After receiving this correspondence, the plaintiffs' real estate agent had a telephone conversation with Mr. Sivalingam. Mr. Subramaniam's agent confirmed that a hard copy of the executed APS was hand delivered to Mr. Subramaniam on December 3, 2020, and that the document was also electronically sent to Mr. Subramaniam on February 3, 2021. On February 9, 2020, Mr. Ennis sent an email to Mr. Subramaniam and Mr. Sivalingam confirming the contents of this discussion.

[43] On February 12, 2021, Mr. Subramaniam sent an email to Mr. Ennis, the plaintiffs, and Mr. Sivalingam again questioning the validity and placement of the plaintiffs' signatures.

[44] I find that the "concerns" expressed in Mr. Subramaniam's February 2021 correspondence were not genuine. I arrive at this conclusion for two reasons.

[45] First, Mr. Subramaniam's allegation is implausible. Mr. Araujo affixed his signature to the following four documents that were sent with the initial offer package on November 27, 2020:

(1) One signature in s. 26 of the APS;

(2) Two signatures in the Offer Summary Document (OREA Form 801);

(3) Two signatures in the Buyer Representation Agreement (OREA Form 300); and

(4) One signature in the Confirmation of Co-operation and Representation form (OREA Form 320).

Mr. Subramaniam does not take issue with five of Mr. Araujo's signatures in the initial offer package. On Mr. Subramaniam's theory, on November 27, 2020, Mr. Araujo signed in five places, but someone else may have signed Mr. Araujo's name in section 26. This theory makes no sense and undermines the credibility of Mr. Subramaniam's assertion that his concerns were genuine.

[46] Second, given my concerns with the January 5th email and the implausibility of Mr. Subramaniam's position, I find that Mr. Subramaniam's February 2nd, 8th, and 9th emails were further attempts to scuttle the sale. Despite his assertions to the contrary, Mr. Subramaniam had no intention of closing the sale on February 12, 2021. He did not even have a lawyer retained for the sale. I find that in sending the February emails, Mr. Subramaniam was hoping that the plaintiffs would withdraw from the sale.

[47] On the record before me, I am unable to make a finding on the defendants' motive for wanting to scuttle the sale. This does not matter. The defendants' motive is not relevant to whether

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the defendants breached the APS. Having found that Mr. Subramaniam did not have a valid reason for failing to close, it does not matter why he decided to derail the closing.

[48] Mr. Subramaniam takes the position that he was not required to complete the sale because the plaintiffs did not adequately assuage his concerns with respect to Mr. Araujo's section 26 signature. In support of this argument, Mr. Subramaniam argues that he was not provided with an executed APS that corrected the signature issue and the plaintiffs never explained the discrepancy in signatures. I reject this argument for two interrelated reasons.

[49] First, Mr. Subramaniam already had a copy of the executed APS. Mr. Subramaniam's December 5, 2020 email and his February 2nd, 8th, and 9th, 2021 correspondence confirm that he had the executed APS. Without having a copy of the executed APS, Mr. Subramaniam would not have been able to observe the purported discrepancies.[3] It appears that Mr. Subramaniam wanted the plaintiffs to execute a new agreement of purchase and sale. Given that I do not believe that Mr. Subramaniam was really concerned about the signature issue, I find his request for a newly executed agreement of purchase and sale to be disingenuous. Mr. Subramaniam already had the APS, and it was executed. A request for the newly executed agreement of purchase of sale was a further attempt to get out from under the APS.

[50] Second, and more importantly, if Mr. Subramaniam was really concerned about the potential of a forged signature, then he would have taken the plaintiffs up on their offer to provide him with a statutory declaration signed by the person who observed the plaintiffs' signature. The plaintiffs' counsel made this offer in correspondence to Mr. Subramaniam dated February 8, 2020. Mr. Subramaniam never sought the statutory declaration. Instead, Mr. Subramaniam decided not to close.

[51] In arguing that summary judgment is inappropriate, the defendants rely heavily on Wendy Carlson's expert report. Ms. Carlson is a forensic document examiner and handwriting expert. The plaintiffs do not challenge Ms. Carlson's qualifications and do not challenge the admissibility of the expert report despite some irregularities in the way the expert report was originally filed.[4] The plaintiffs choose not to cross-examine Ms. Carlson.

[52] In her report, Ms. Carlson states that the defendants asked her to examine and compare the signature at section 26 with Mr. Araujo's "multiple purported known" signatures in the APS. Ultimately, Ms. Carlson's report concludes that the person who signed section 26 of the APS is not the same person who signed Mr. Araujo's multiple known signatures for Mr. Araujo.

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[3] In making this finding, I have not relied upon Mr. Ennis's February 9, 2020 email, which includes hearsay information on a contentious point.

[4] Ms. Carlson's report, which was sworn by a notary in Texas, was originally attached as an Exhibit to Mr. Subramaniam's affidavit (see s. 45(1) of the *Evidence Act*, R.S.O. 1990, c. E.23). It did not include an acknowledgment of expert's duty. The plaintiffs objected to the admissibility of the report in this fashion (see *Wang v. Rezapoor*, 2021 ONSC 1466, at para. 20). To addresses the plaintiffs' concerns, Ms. Carlson reproduced her report in their Supplementary Motion Record and included an acknowledgement of expert's duty signed by Ms. Carlson on February 28, 2025.

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[53] There is a clear conflict between Ms. Carlson's evidence and the plaintiffs' evidence. I cannot resolve this conflict on the record before me; however, I still find that there is no genuine issue requiring a trial with respect to this issue. I arrive at this conclusion for two reasons.

[54] First, as noted above, I find that Mr. Subramaniam was not really concerned with the discrepancy between the signatures and was simply attempting to avoid having to close the transaction. As such, the discrepancy between the section 26 signature and the other signatures is not relevant to the issue of whether the defendants breached the APS.

[55] Second, and more importantly, the plaintiffs' initial offer was made null and void after the defendants made a counteroffer. A counteroffer constitutes non-acceptance of a previous offer, and the previous offer is only valid if it was revived (see *Tang v. Rong*, 2021 ONSC 8058, at para. 45). In this case, the only alleged inauthentic signature was in the initial offer. When Tidol made a counteroffer, the initial offer was rendered null and void. Ultimately, the counteroffer was accepted on December 1, 2020, and there is no allegation that Mr. Araujo's December 1, 2020 signatures were inauthentic or forged. As a result, there was a binding agreement made on December 1, 2020 that operated independently of the initial offer that contained the impugned signature.

[56] Finally, the defendants argue that summary judgment is not appropriate because there is important evidence that has not been presented to the Court. Specifically, the defendants point to the evidence of Mr. Sivalingam and Mr. Araujo's father.[5] In making this argument, the defendants misunderstand the test for summary judgment. The defendants are required to lead "trump" or risk losing and I am permitted to assume that the record before me is the record that would be led at trial. The defendants were entitled to obtain the evidence of both witnesses, and they made a tactical decision, like the plaintiffs did, not to lead the evidence of these two witnesses. As such, the defendants cannot rely on the absence of this evidence in support of their position that there is a genuine issue requiring a trial. Put simply, I do not require the evidence of Mr. Sivalingam and Mr. Araujo's father to decide whether the defendants breached the APS.

(iii) Is Specific Performance Appropriate?

[57] The typical remedy for a breach of contract is damages. The exceptional equitable remedy of specific performance is available as a potential remedy where damages may not serve as an adequate remedy on the facts of the case (see *Erie Sand & Gravel Limited v. Tri-B Acres Inc*., 2009 ONCA 709, 97 O.R. (3d) 241, at para. 110; *9725440 Canada Inc. v. Vijayakumar*, 2023 ONCA 466, at para. 23). The party seeking the remedy has the onus of demonstrating entitlement to specific performance (see *Lucas v. 1858793 Ontario Inc. (Howard Park)*, 2021 ONCA 52, at paras. 70 and 75; *Vijayakumar*, at para. 30). Specifically, the party seeking specific performance must establish that the property itself and not the monetary equivalent better serves justice between the parties (see *Lucas*, at paras. 70-71; *Vijayakumar*, at para. 24).

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[5] Mr. Sivalingam made a complaint about Mr. Ennis to the Real Estate Council of Ontario. In support of Mr. Ennis, Mr. Araujo's father signed a witness statement indicating that he observed the plaintiffs execute the initial offer and accept the counteroffer. The plaintiffs produced the statement pursuant to an undertaking given under cross-examination. I have not considered that statement for the truth of its contents because it is hearsay.

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[58] Specific performance should not be granted absent evidence that, "the property is unique to the extent that its substitute would not be readily available'" (*Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, at para. 22). In cases involving land, damages may be inadequate where the subject property is subjectively and objectively unique having regard to the purchaser's intended use for the property and the property's particular characteristics. There is no presumption that all real estate is unique (see *Semelhago*, at paras. 20-21; *Vijayakumar*, at para. 24).

[59] The "uniqueness" of the subject property is considered at the time of contracting and requires the court to consider the purchaser's subjective interests or intentions in purchasing the property, the property's physical attributes, and the circumstances of the underlying transaction. As the Ontario Court of Appeal explained in *Lucas*, at paras. 74-75:

> Uniqueness does not mean singularity or incomparability. Instead, it means that the property has a quality (or qualities) making it especially suitable for the proposed use that cannot be readily duplicated elsewhere…. The court should examine the subjective uniqueness of the property from the point of view of the plaintiff at the time of contracting. The court must also determine objectively whether the plaintiff has demonstrated that the property or the transaction has characteristics that make an award of damages inadequate for that particular plaintiff. [Citations omitted.]

[60] The objective and subjective uniqueness of the property informs the question of whether damages are an adequate remedy. Courts should be, "reluctant to award specific performance of contracts for property purchased solely as an investment, since money damages are well-suited to satisfy purely financial interests" (*Lucas*, at para. 78). The analysis of a property's objective and subjective uniqueness was further explained by Lax J. in *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341 (Ont. S.C.), at para. 59, aff'd (2003), 63 O.R. (3d) 304 (C.A.), leave to appeal refused, [2003] S.C.C.A. No. 145:

> There is both a subjective and objective aspect to uniqueness. While it is difficult to be precise about this, it strikes me that normally, the subjective aspect will be less significant in commercial transactions and more significant in residential purchases, unless the motivation in the latter case is principally to earn profit. In terms of the subjective aspect, the court should examine this from the point of view of the plaintiff at the time of contracting…The court will determine objectively whether the plaintiff has demonstrated that the property has characteristics that make an award of damages inadequate for that particular plaintiff. Obviously, investment properties are candidates for damages and not specific performance. [Notes omitted.] [Emphasis added.]

[61] In determining whether specific performance ought to be granted, courts will also consider the behaviour of the parties (see *Lucas*, at para. 71). A seller's bad faith attempt to terminate a valid agreement of purchase and sale may support an order of specific performance against that party (see *Lucas*, at para. 81).

[62] In applying these factors, I find that there are no genuine issues requiring a trial with respect to whether specific performance is an appropriate remedy. It is. The Property's physical attributes make it objectively unique and the plaintiffs' reasons for attempting to purchase the Property make it subjectively unique.

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[63] I start by looking at the subjective aspect of uniqueness.

[64] The location of the Property was integral to the plaintiffs' business plan. The Property was close to Brock Road and the 401 interchange. The Property's location made it readily accessible to the plaintiffs, their employees, and their existing customers. Significantly, the Property was zoned M2S Industrial, which allows a wide range of commercial and industrial uses, including automotive repair and large equipment storage. Given the plaintiffs' businesses, this zoning was imperative.

[65] Further, the plaintiffs intended to use some of the land on the Property as separate storage facilities that would generate rental income. In this way, the large size of the Property was also important to the plaintiffs' business plan. While the Property was intended to generate rental income for the plaintiffs, it was not an "investment property." The plaintiffs intended to use the land for the expansion of their business and not as a passive investment. The plaintiffs' evidence on the uniqueness of the Property was not challenged in cross-examination. As such, I find that the Property was subjectively unique to the plaintiffs.

[66] Many of the same factors make the Property objectively unique. The plaintiffs retained Mr. Ennis to locate an industrial land within the Durham Region that satisfied their business operations. The uncontested evidence is that the inventory of land zoned for the outdoor storage of raw materials and finished goods is limited within the Durham Region and there were *no other* properties that met the plaintiffs' business needs from February 2019 to November 2020. This evidence supports a finding that the Property is objectively unique.

[67] After the failed sale, the plaintiffs instructed Mr. Ennis to continue searching for a property with similar characteristics as the Property. From the fall of 2021 to the summer of 2022, Mr. Ennis identified over ten properties that sold in the area, none of which met the plaintiffs' business needs. Mr. Ennis' affidavit states that since the failed sale, he has not come across any land parcels available for purchase in the marketplace that satisfy the features and zoning requirements in respect of the plaintiffs' business needs. His affidavit also explains why two properties that were sold subsequent to the failed transaction did not meet the plaintiffs' business needs. This evidence was not challenged in cross-examination nor was it challenged with contrary evidence. As a result, I find that Mr. Ennis' evidence further supports the objective uniqueness of the Property.

[68] The plaintiffs have established that damages are an inadequate remedy. If there were alternative properties that met the plaintiffs' business needs, then damages would have been an adequate remedy. In that situation, the plaintiffs could be made whole if they received damages for: (a) any out-of-pocket expenses caused by the failed sale; (b) the return of the deposit; and (c) the difference between the purchase price of the Property and the purchase price of an alternative property (to the extent that the latter was higher). That is not the situation before this Court. Mr. Ennis' evidence demonstrates that the Property is unique. Properties with similar characteristics were scarce in 2020 and continued to be scarce until the time the motion materials were prepared. It is the uniqueness of the Property that makes damages an inadequate remedy.

[69] I also find that the equities favour granting the relief sought. While I am unable to ascertain the motive for terminating the deal, I have no difficulty finding that the defendants did not

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genuinely believe that the plaintiffs were perpetrating a fraud. The defendants wanted out of the sale and concocted an excuse not to close. This is bad faith.

[70] At paragraph 13 of its factum, the defendants argue:

> The Plaintiffs assert that the Property is unique based on its location, size and zoning. However, these features upon closer scrutiny do not meet the standard of uniqueness
>
> a) **Location**: the property is situated in Pickering, Ontario south of Highway 401 adjacent to a nuclear power generation facility, within an established industrial zone. These are common features in numerous industrial properties across the region.
>
> b) **Size**: The Plaintiffs required approximately 25,000 square feet of space; the subject property is 58,000 square feet. This is more than double the Plaintiffs' requirement.
>
> c) **Zoning**: The Property is zoned for heavy industrial use. Again, this is a zoning classification shared by numerous parcels within the industrial areas of the Greater Toronto Area and cannot be said to be singular or irreplaceable.

[71] I reject this argument for two reasons.

[72] First, and most importantly, the defendants have not filed any evidence in support of their assertion that the Property is not "unique." While the plaintiffs have the burden of establishing that specific performance is the appropriate remedy, the defendants have an evidentiary burden that they have not met. The defendants have not filed any evidence to support an assertion that similar properties that meet the plaintiffs' business needs were or are available. As a result, the plaintiffs' evidence on the Property's "uniqueness" is not challenged with any contrary evidence.

[73] Second, the defendants appear to base their argument on the assertion that properties with similar attributes are currently available. This is not the relevant time period for determining the subjective uniqueness of the Property. Rather, the relevant period is at the time of contracting. The defendants have not led any evidence to demonstrate the Property was not unique at the time of the APS nor have they challenged the plaintiffs' reasons for wanting to purchase the Property. Had the defendants led evidence of comparable properties being available after the failed sale, then it certainly would have been relevant to the issue of whether damages was an adequate remedy. They have not led such evidence.

D. Conclusion

[74] The defendants breached the terms of the APS. In the circumstances of this case, damages are an inadequate remedy. I therefore order specific performance of the APS. The terms and conditions of the APS will apply, subject to the following:

> 1. The closing date must be scheduled within 120 days from the date of this judgment. The closing should occur on the earliest available date to the parties acting reasonably, after the plaintiffs notify the defendants that they have the funds necessary to close the transaction; and

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2. Normal adjustments for a real estate transaction, subject to the provisions of the APS, but as of the new closing date, apply. The adjustment will account for the deposit still held by Century 21.

[75] This Court will remain seized of the matter for the purposes of any orders or directions that may be required in connection with the transaction.

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D. Costs

The parties have agreed that the successful party should receive costs in the amount of $10,000 inclusive of H.S.T. and disbursements. As such, I order the defendants to pay the plaintiffs $10,000 in costs within 30 days.

The Honourable Justice Sunil S. Mathai

Released: December 12, 2025

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