CITATION: 2832676 Ontario Inc. v. Treier, 2026 ONSC 1565
COURT FILE NO.: CV-21-00664937-0000
DATE: 20260318

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
2832676 Ontario Inc.	)	*William Alexander Chalmers*, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
Mary Treier	)	
Defendant	)	
	)	*John J. Adair, Cameron Rempel*, for the Defendant
	)	
	)	
	)	**HEARD:** April 7, 9-11, 22, and December 19, 2025

REASONS FOR JUDGEMENT

MERRITT J.

OVERVIEW

[1] This action involves a failed real estate transaction for the purchase of a parcel of vacant employment development land in the Ancaster Business Park at 635 Trinity Road South, Jerseyville, Ontario (the "Property"). Employment development property is property used for various businesses including manufacturing, warehousing, and offices.

[2] The Plaintiff 2832676 Ontario Inc. (the "Purchaser") agreed to buy the Property from the Defendant Mary Treier ("Mrs. Treier" or the "Vendor") in the Revised Agreement of Purchase and Sale dated March 9, 2021 (the "APS").

[3] The real estate transaction did not close on the date scheduled for closing because the lawyer for the purchaser sent the closing funds by a wire transfer that did not arrive until the day after the day set for closing.

[4] The Purchaser seeks specific performance.

[5] The Purchaser raises a number of arguments.

[6] The Purchaser says that it would be unfair or unjust to allow the Vendor to rely on the "time is of the essence" clause in the circumstances of this case because in the days leading up to the closing the Purchaser's lawyer told the Vendor's lawyer that he would be sending the funds by a direct deposit of a bank draft. The Vendor's lawyer did not object to this method of delivery until 2:37 p.m. on the day of closing. At that time, the Vendor's lawyer insisted on one of the methods set out in the APS. After some communications between them, the Purchaser's lawyer then began arranging the wire transfer and even though it was initiated on the day of closing, the wired funds did not arrive until the following day. The Purchaser says in these circumstances, the Vendor should not be allowed to rely on the "time is of the essence" clause and breached the APS by failing to close the transaction.

[7] In the alternative, the Purchaser says that the parties made an agreement that the Closing Funds would be provided by wire transfer initiated at 3:56 p.m. on the Closing Date (the "Closing Funds Agreement') in accordance with the APS. The purchaser says that by agreeing that the wire transfer would be initiated at this time, the vendor was implicitly agreeing that the funds would be received the following day because it was obvious that Closing Funds would not be received by the Vendor's lawyer by the Closing Time required under the APS if the wire transfer was commenced at that time. Therefore, it was an express or implied term of the Closing Funds Agreement that the transaction would close when the Closing Funds were received by the Vendor's lawyer. By failing to close the transaction, the Vendor breached the APS.

[8] In the further alternative, the Purchaser further submits that the Vendor negligently misrepresented that the Closing Funds had to be sent by a wire transfer and the Purchaser relied on this misrepresentation to its detriment.

[9] In the further alternative, the Purchaser submits that the Vendor should be estopped from relying on the strict provisions of the APS requiring the Closing Funds to be delivered by the 6:00 p.m. Closing Time on the Closing Date. The Purchaser relies on estoppel by representation, estoppel by convention, promissory estoppel and proprietary estoppel.

[10] In the further alternative, the Purchaser submits that the Vendor waived the requirement that the Closing Funds be delivered by 6:00 p.m. on June 16, 2021.

[11] In the further alternative, the Purchaser submits there was a common mistake or equitable mistake.

[12] In the further alternative the Purchaser says the Vendor breached her duty of good faith in the exercise of her contractual discretion not to extend the Closing Date.

[13] The Vendor does not dispute that she entered into the APS. She says the Purchaser was obligated to tender the Closing Funds by the Closing Time on the Closing Date. The Purchaser

attempted to tender the Closing Funds by way of a direct deposit of a bank draft which was not permitted under the APS. The Vendor did not agree to accept the direct deposit of the bank draft. The Vendor says that the Purchaser failed to deliver the Closing Funds by the Closing Date and this failure constituted a repudiation of the APS which the Vendor elected to accept and terminate the APS.

DECISION

[14] I am exercising my residual equitable jurisdiction to relieve against the breach of the "time is of the essence" clause because of the Vendor's unfair and unjust conduct. It was unfair for the Vendor to say nothing when the Purchaser's lawyer told the Vendor's lawyer before, and on the day the transaction was scheduled to close, that he would send the Closing Funds by a direct deposit of a bank draft and then, shortly before the Closing Time, refuse to accept the direct deposit of the bank draft.

[15] The Purchaser did not breach the APS. The Vendor did breach the APS by refusing to close the transaction once the wired Closing Funds arrived.

[16] I order specific performance of the Revised Agreement of Purchase and Sale dated March 9, 2021 requiring the Vendor to sell the Property to the Purchaser in accordance with that agreement.

THE EVIDENCE

[17] The parties submitted a joint exhibit book with an agreement regarding its use at trial.

[18] At the trial six witnesses gave evidence. The Purchaser called Bob Putman who is the principal of the Purchaser, Antonio Maddalena who was the Purchaser's lawyer for the real estate transaction, and an expert, Mark Conway. The Vendor called Tony Trier who is the Vendor's son, Tyler D'Angelo who was the Vendor's lawyer for the real estate transaction, and an expert, Michael Parsons.

[19] The parties consented to having the expert's reports marked as exhibits in lieu of examination in chief. Both experts were cross examined.

[20] On the third day of the trial the counsel for the Vendor advised the court that he had discussed Mr. Maddalena's evidence with Mr. D'Angelo in breach of the order excluding witnesses which I made at the outset of trial. Counsel advised that he told Mr. D'Angelo that Mr. Maddalena had given evidence that:

- It appeared to him that Mr. D'Angelo was not experienced.
- The two of them discussed the direct deposit in the days leading up to the closing.
- Mr. Maddalena found it odd that Mr. D'Angelo was copying Tony Treier on his emails.

- The email sent at 5:08 p.m. on June 16th, 2021 contains standard phraseology.

[21] Counsel for the Vendor acknowledged having breached the order excluding witnesses at the first opportunity to do so. I accept that the breach was inadvertent; counsel made a mistake. He apologized to the court.

[22] Counsel for the Purchaser accepted that the breach was a mistake and was inadvertent. The result was that Mr. D'Angelo had the benefit of knowing what Mr. Maddalena said in his evidence. Mr. Maddalena did not have the same benefit. Counsel for the Purchaser suggested the appropriate remedy would be that Mr. D'Angelo not be permitted to give evidence on matters discussed with him in breach of the order or alternatively, I could admit his evidence and consider the breach in assessing the weight of his evidence.

[23] At the time, both counsel agreed I should hear Mr. D'Angelo's evidence and defer my decision on the consequences of the breach, including the exclusion of any evidence, until the end of the trial.

[24] If a witness remains in court in breach of an order excluding witnesses the witness is not necessarily disqualified, although, in some circumstances, the evidence may be excluded. If the evidence is not excluded the weight, if any, to be given to the evidence is for the trial judge to decide: *R. v. Dobberthien*, [1975] 2 S.C.R. 560 at p. 572; *Davies v. The Corporation of the Municipality of Clarington*, 2016 ONSC 6636, at para. 26; *Rivait v. Monforton*, 2007 ONCA 829, at para. 6.

[25] I was not referred to any case where a witness' evidence was excluded because of the breach of an order excluding witnesses. Usually, the witness is cross examined on the tainted evidence and the extent and the effect of the taint are for the trier of fact to consider: *R v. Singh Nagra and Singh*, 2018 ONSC 5230, at para. 43.

[26] It would be a rare case where a witness would be found completely untrustworthy before they had given their evidence because of a breach of an order excluding witnesses: *Singh* at para. 42, citing *R v. Dikah* (1994), 18 O.R. (3d) 302 (Ont. C.A.), aff'd sub nom. *Naoufal v. R*, [1994] 3 S.C.R. 1020 (S.C.C.).

[27] I have decided to admit Mr. D'Angelo's evidence on the points discussed with him in breach of the order excluding witnesses for the reasons that follow.

[28] First, the only potentially contentious point was Mr. Maddalena's evidence that he and Mr. D'Angelo discussed the direct deposit of the bank draft in the days leading up to the closing. Any potential harm arising from the fact that Mr. D'Angelo was advised that Mr. Maddalena said this in his evidence at trial is minimal given that Mr. D'Angelo must have anticipated this would be Mr. Maddalena's evidence because Mr. Maddalena set this out in his email to Mr. D'Angelo at 6:12 p.m. on June 16, 2021.

[29] While there may be some lost theoretical advantage because counsel for the Purchaser was unable to use the element of surprise when confronting Mr. D'Angelo with Mr. Maddalena's evidence about them discussing the direct deposit, in the end, it was of no moment because Mr. D'Angelo did not deny that they had the discussion but simply said he did not remember the content of their discussion, and I accept Mr. Maddalena's evidence on this point as set out below.

[30] Second, as a lawyer, Mr. D'Angelo is an officer of the court and fully understands his obligations to the court regarding his testimony. Given that Mr. D'Angelo and Mr. Maddalena were testifying for opposing parties the likelihood of any harmonizing of evidence, or even unconscious influence, is small.

[31] While I do not minimize the importance of complying with court orders excluding witnesses, in the circumstances of this case the effect of the breach was minimal.

[32] After the evidence was completed, the parties requested time to obtain the trial transcripts and prepare written submissions. The Purchaser delivered its 420-page submissions on July 25, 2025. The Vendor delivered her 50 page submissions on August 20, 2025. The Purchaser delivered its reply submissions on September 4, 2025. The parties made final oral closing arguments on December 19, 2025.

THE ISSUES

[33] The principal issue in the case is whether the vendor was entitled to refuse to close because the funds were sent by wire transfer on the date of closing and did not arrive until the next day. There are six issues based on the arguments raised by the Purchaser as follows:

1) Should I exercise my equitable jurisdiction to relieve against the "time is of the essence" provision in the APS?

2) Did the parties enter into the alleged Closing Funds Agreement?

3) Did the Vendor negligently misrepresent that the Closing Funds needed to be sent by a wire?

4) Is the Vendor estopped from relying on the strict provisions of the APS?

5) Did the Vendor waive the requirement that the Closing Funds be delivered by 6:00 p.m. on June 16, 2021?

6) Was there a common mistake or equitable mistake?

7) Did the Vendor exercise good faith in the performance of the APS?

8) Is the Purchaser entitled to specific performance?

ANALYSIS

[34] The facts of this case are straightforward and, for the most part, undisputed.

[35] On March 9, 2021, the parties entered into an Agreement of Purchase and Sale (the "APS") whereby the Vendor Mrs. Treier agreed to sell and the Purchaser agreed to buy the Property.

[36] The closing date for the purchase and sale of the Property was June 16, 2021 (the "Completion Date or the "Closing Date") at 6:00 p.m. (the "Closing Time"). The purchase price was $9,054,375.

[37] The APS is a standard form Ontario Real Estate Association Agreement of Purchase and Sale - Commercial.

[38] Section 2 of the APS provides "COMPLETION DATE: This Agreement shall be completed by no later than 6:00 p.m. on the 16th day of June, 2021".

[39] Section 11 of the APS provides for the closing arrangements and includes the following provision:

> Unless otherwise agreed to by the lawyers, such exchange of Requisite Deliveries shall occur by the delivery of the Requisite Deliveries of each party to the office of the lawyer for the other party or such other location agreeable to both lawyers.

[40] Section 19 of the APS provides:

> TIME LIMITS: Time shall in all respects be of the essence hereof provided that the time for doing or completing of any matter provided for herein may be extended or abridged by an agreement in writing signed by Seller and Buyer or by their respective lawyers who may be specifically authorized in that regard.

[41] Section 21 of the APS provides:

> TENDER: Any tender of documents or money hereunder may be made upon Seller or Buyer or their respective lawyers on the day set for completion. Money shall be tendered with funds drawn on a lawyer's trust account in the form of a bank draft, certified cheque or wire transfer using the Large Value Transfer System.

[42] Section 26 of the APS contains an entire agreement clause which says:

> This Agreement including any Schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein.

[43] The first paragraph of Schedule A to the APS provides:

> The Buyer agrees to pay the balance of the purchase price, subject to adjustments, to the Seller on completion of this transaction, with funds drawn on a lawyer's trust account in the form of a bank draft, certified cheque or wire transfer using the Large Value Transfer System.

[44] There is no doubt that once he found out about the APS, Tony Treier wanted his mother out of the deal. In his view, it was an improvident bargain. He was not consulted about the sale and felt it was misguided and "a big mistake." He tried unsuccessfully to get out of the deal and he also tried unsuccessfully to extend the closing date. Even though he was unhappy with the deal, when his attempts to get out of the transaction failed, Tony Treier instructed the lawyer who was then acting for both his mother and the Purchaser, Mr. Maddalena, to proceed with the closing.

[45] Between February 2021 and early June 2021, Mr. Maddalena acted for both the Vendor and the Purchaser.

[46] On June 11, 2021, a new lawyer for the Vendor (Mr. D'Angelo) advised the lawyer for the Purchaser (Mr. Maddalena) that he had been retained to assist with the transaction and asked Mr. Maddalena to provide the closing documents.

[47] On June 12, 2021, the Purchaser's lawyer provided the closing documents to the Vendor's lawyer.

[48] On June 14 and 15, 2021, the Vendor's lawyer and the Purchaser's lawyer exchanged emails regarding the documents and information required to complete the transaction.

[49] On June 15, 2021, the Vendor's lawyer, the Purchaser's lawyer and the Vendor met at the Purchaser's lawyer's office to sign documents for the transaction.

[50] On the June 16, 2021 Closing Date, the Purchaser's lawyer and the Vendor lawyer exchanged email messages as follows:

1) At 8:45 a.m., the Purchaser's lawyer provided the Vendor's lawyer with a package of closing documents and stated that the Vendor's lawyer would receive evidence of their **bank draft and deposit**[1] once completed (emphasis added).

[1] I understood Mr. Maddalena's evidence to mean that rather than physically delivering a bank draft of the Closing Funds to Mr. D'Angleo's office as required by the APS, he proposed to obtain a bank draft and attend at a bank closer to his own office and instruct the bank to deposit the bank draft directly into Mr. D'Angelo's law firm trust account. In these reasons, I refer to this procedure as a direct deposit of a bank draft.

2) At 9:54 a.m., the Vendor's lawyer confirmed that a Survivorship Application - Land had been submitted for registration on title to the Property.

3) At 2:12 p.m., the Vendor's lawyer asked for an update on the closing funds.

4) At 2:13 p.m., the Purchaser's lawyer said:

> The lender's lawyer just received funds and are in the works of getting funds to us. We have told them not to send by wire as wires are taking quite a while so they will direct deposit. Hopefully within the next hour or so we should be starting the closing process.

5) At 2:37 p.m., the Vendor's lawyer said: "Our bank does not accept direct deposits. It will have to be a wire to our account."

6) At 2:43 p.m., the Purchaser's lawyer said:

> That is surprising to me as we direct deposit to TD law firm accounts all the time. My fear is that we do not even have funds yet in our trust account and then to initiate the wire process, we may not get the funds into your account by end of day. When we initial the request, our bank manager has to call to verify, especially with such a large amount and then it gets sent to the "wire department" to process.

7) At 3:17 p.m., the Vendor lawyer said:

> Hi all, I've spoken with our accounting department. We cannot accept direct deposit due to the risk of it being recalled. The purchase agreement also does not permit direct deposit (see section 21, and first paragraph of Schedule A). At this stage it will need to be a wire.

8) At 3:56 p.m., the Purchaser's lawyer said: "We are initiating the wire transfer and will advise further shortly."

9) At 4:05 p.m., the Purchaser's lawyer said: "Please note that the funds have been wired. See attached. Please advise once you have received same and released."

10) At 4:44 p.m., the Purchaser's lawyer enquired further: "Any word on the funds?"

11) At 4:45 p.m., the Vendor's lawyer responded: "Nothing yet"

12) At 5:08 p.m., the Purchaser's lawyer said:

> As the funds have not yet been received and are travelling through "cyberspace", and as the registration system has now shut down for the day, can you please confirm that your client is agreeable to extending the closing of this transaction to tomorrow, with all to remain the same, time to still be of the essence and that all deliveries by all parties are to be held in escrow pending the closing.

13) At 5:47 p.m., the Purchaser's lawyer stated: "I called and left you a couple of messages and am wondering what the status is. Can you please let me know."

14) At 5:59 p.m., the Vendor's lawyer said:

> Hi Tony – as you know, closing was to occur by 6:00 p.m. today, June 16. We have not yet received closing funds. As such, please find attached our tender letter. At this time our client has not agreed to extend until tomorrow. I will advise once the funds land. As of 10 minutes ago they had not yet landed. I confirm that the funds will be dealt with in accordance with the LSO's multi-party DRA.

15) At 6:12 p.m. the Purchaser's lawyer said:

> Hello Tyler
>
> As you know, we have delivered our closing documents and were discussing depositing funds to your trust account over the last couple of days, until you advised at 2:38 p.m. today that you would not accept a direct deposit. I then asked you to reconsider and you confirmed at 3:55 p.m. that your firm would not.
>
> We wired the funds at approximately 3:57 p.m. but expressed our concern that it would not land in your trust account in time. If we were informed earlier, we would have sent a driver to deliver the certified funds, but that was not possible given the time that you confirmed that a direct deposit would not be accepted.
>
> Accordingly, we have done all we can to accommodate and the funds were sent to you. Unfortunately, we are not in control of the banking systems' electronic money transfer.
>
> Our client is willing and able to complete the transaction, but due to the limitations on delivery of our funds, the money is in transit to you and should have landed in your account by now or will soon.
>
> Our client is reserving its rights under the Agreement, and will pursue its remedies in the circumstances.

> Please confirm when the funds arrive and same are to be held in escrow.
>
> Thank you.

[51] The closing funds arrived in the Vendor lawyer's trust account at 1:51 p.m. on June 17.

[52] The Vendor's lawyer said in his emails of 2:37 p.m. on June 16th that his bank does not accept direct deposits. His statement in his email of 3:17 p.m. on June 16th regarding information from his accounting department is hearsay. The agreement between the parties concerning the use of the Joint Exhibit Book says that the documents are "subject to the usual rules with respect to admissibility and hearsay regarding the content of the document".

[53] The Vendor's lawyer testified that a direct deposit does not represent certified funds and can be recalled. He said that a direct deposit could be done with a personal cheque with insufficient funds in the account upon which it is drawn. However, in this case the Purchaser was proposing a direct deposit of a bank draft, not a direct deposit of a personal cheque.

[54] The Purchaser's lawyer testified that, in his experience, the TD Bank does accept direct deposits and it is his understanding that direct deposits cannot be recalled. I infer that in giving this evidence he was talking about the procedure that he was proposing; a direct deposit of a bank draft.

[55] There was no evidence regarding direct deposits of bank drafts, and whether or not they can be recalled, from the accounting department of the Vendor's lawyer's law firm or from TD Bank.

Issue 1: Time is of the Essence

[56] A "time is of the essence" clause generally means that any time limit in the agreement is essential and a breach of a time limit will permit the innocent party to terminate the contract: *3 Gill Homes Inc. v. 5009796 Ontario Inc. (Kassar Homes)*, 2024 ONCA 6, 491 D.L.R. (4th) 499, at para. 24.

[57] A vendor is not obligated to offer an extension to close a real estate transaction: *2100 Bridletowne Inc. v. Ding*, 2021 ONSC 2119, at para. 66. It is generally not bad faith simply to insist on strict performance of an agreement of purchase and sale including a "time is of the essence" provision: *Rahbar et al. v. Parvizi et al.*, 2022 ONSC 2136, at paras. 40-42. However, this is not always the case, as the court retains equitable jurisdiction to relieve against such a clause in certain circumstances: *Salama Enterprises (1988) Inc. v. Grewal* (1992), 66 B.C.L.R. (2d) 39 (B.C.C.A.) at p. 5, leave to appeal refused, [1992] S.C.C.A. No. 243, citing *Landbank Minerals Ltd. v. Mesgeo Enterprises Ltd.* (1981) 21 R.P.R. 220 (Alta. Q.B.), at p. 14..

[58] In *3 Gill Homes Inc.* the Court of Appeal considered the consequences of closing funds being delivered 35 minutes late in a real estate transaction. The Court of Appeal upheld the

decision of the application judge who relied on the cases supporting a rigid use of the timelines in a contract if there is a "time is of the essence" clause, particularly where the parties are sophisticated and in the business of real estate: at para 11.

[59] At para. 24 the Court of Appeal said:

> As this court stated in *Di Millo v. 2099232 Ontario Inc.*, 2018 ONCA 1051, 430 D.L.R. (4th) 296, at para. 31: "A 'time is of the essence' clause is engaged where a time limit is stipulated in a contract. The phrase 'time is of the essence' means that a time limit in an agreement is essential such that breach of the time limit will permit the innocent party to terminate the contract."

[60] The court has equitable jurisdiction to relieve against a "time is of the essence" clause where there are circumstances which make it unjust or inequitable for a party to rely on it: *Salama,* at p. 5, citing *Landbank Minerals Ltd.,* at p. 14.

[61] The Court of Appeal in *3 Gill Homes Inc.* said, at para. 14, that the application judge below, Grace J., referenced the court's residual equitable jurisdiction to relieve against the breach of a "time is of the essence" clause where there is a basis to do so and cited *Bowlen v. Digger Excavating (1983) Ltd.*, 2001 ABCA 214, 97 Alta. L.R. (3d) 4, at para. 24.

[62] Paragraph 24 of *Bowlen* reads as follows:

> Assuming, without deciding, that the Court has equitable jurisdiction to relieve against a breach of a time clause, beyond the waiver issue, we are of the view that the court should only exercise such discretionary jurisdiction where the evidence establishes that the other parties had conducted themselves in an unfair and unjust manner… at the least the party seeking relief must be in a position to show that the conduct of the other party misled him or caused him to act in a manner which resulted in an inability to perform the obligations that he would otherwise have been in a position to perform…

[63] In *3 Gill Homes Inc*., at para. 31 the Court of Appeal said:

> Finally, while not specifically raised by the appellant as a separate ground of appeal, we note that the application judge acknowledged the possibility of a residual equitable jurisdiction of the court to relieve against the breach of a time provision but found the "necessary evidentiary foundation" to warrant the exercise of this discretion lacking. While the application judge did not elaborate on what such an evidentiary foundation would need to show, it is implied from the earlier reference to *Bowler* that some unfair or unjust action on the part of the respondent would have to be apparent on the record. In this case, the correspondence between the parties revealed clear and repeated reminders about the closing date and time, which were acknowledged by the appellant. It is also noteworthy that the respondent is not

> seeking to keep the appellant's deposit and has returned the funds to the appellant's counsel.

[64] In *3 Gill Homes Inc.*, even though the result was harsh, it was not unconscionable or unfair because the clear wording of the contract, and the vendor's several clear warnings that the purchase price had to be paid on the closing date by 3:00 p.m., as set out in the contract or the deal would be terminated, reflected the parties' shared understanding that the closing date and time was to be enforced: at para. 26.

[65] In *Bowlen*, at paras. 18-19, the court said that "the rule that the equitable jurisdiction of the court is not triggered where time is of the essence is not absolute" and the party seeking to rely on a time is of the essence clause must be acting in good faith, citing Perell and Engell, *Remedies and the Sale of Land* (2nd ed.) (Toronto: Butterworths, 1998), at p. 46.

[66] In this case, the Purchaser was financing the purchase and the closing funds had to travel from the lender to the Purchaser's lawyer to the Vendor's lawyer.

[67] The Vendor says that the principal of the Purchaser, Mr. Putman, decided to take a risk by specifically arranging for the closing funds to arrive at his lawyer's office at 3:40 p.m. on the Closing Date. I do not agree. Mr Putman agreed that he arranged for the funds to be delivered on the Closing Date but he did not unequivocally agree that he arranged for the funds to arrive at 3:40 p.m.

[68] In cross-examination, Mr. Putman agreed that in his answers to his undertakings he said that he made decisions "so that the funds would be advanced and available to Antonio Maddalena on the date and at the time that they were made available" and that he gave instructions "that the arrangements were to be made to have the closing funds available to Antonio Maddalena on the date and at the time they were made available". However, he also said that he said he tried to have the funds delivered to his lawyer earlier in the day. He said he called his lender at 10:00 a.m. but never discussed the specific time for delivery of the funds with the lender. He did not agree that he could have made arrangements to have the funds delivered to his lawyer earlier in the day. He also said it would be difficult to tell the bank what to do. I find that the evidence falls short of establishing that Mr. Putman made a conscious decision to have the funds arrive at his lawyer's office at 3:40 p.m. on the Closing Date.

[69] Mr. Putnam said that in his experience, it had never been an option for the bank to advance funds to a lawyer prior to the day of closing because the bank would not have security for the money, and that if the bank did, they would charge interest. He also said that if he knew he could have obtained the funds the day before, the additional interest would not have been an impediment.

[70] It would not make sense that there would be any advantage, from the perspective of accruing interest, to having the funds arrive later in the day as opposed to first thing in the morning, and there was no evidence in this regard.

[71] I do not find that the closing funds were sent later in the day as a result of a choice Mr. Putman made for his own financial reasons.

[72] The evidence was that both the Purchaser's lawyer and the Vendor's lawyer hoped that the wire initiated at 3:56 p.m. would arrive before 6:00 p.m. Indeed, the Purchaser's lawyer's office followed up at 4:44 p.m. regarding receipt of the wire.

[73] In this case, I am exercising my residual equitable jurisdiction to relieve against the breach of the "time is of the essence" clause because of the Vendor's unfair and unjust conduct.

[74] As set out above, s. 11 of the APS provides that the lawyers may make a different agreement than what is set out in the APS with respect to the exchange of closing documents and funds. The parties agree that the lawyers can just agree to make such a change and there is no requirement that it needs to be in writing.

[75] The Purchaser's lawyer testified that in the days leading up to the Closing Date he had discussions with the Vendor's lawyer about providing the closing funds by way of direct deposit. The Purchaser's lawyer said that he told the Vendor lawyer that the funds would be provided by direct deposit and that while the Vendor's Lawyer did not expressly agree, he did not say that a direct deposit was not acceptable. The Purchaser's lawyer said that he assumed the direct deposit would be acceptable based on his prior experience in providing closing funds to TD Bank by direct deposit.

[76] The Vendor's lawyer did not say these conversations did not occur. Rather he testified that he did not recall the discussions and did not keep any notes.

[77] I accept the Purchaser's lawyer's evidence regarding the conversations in the days leading up to the closing where he told the Vendor's lawyer that he would provide the closing funds by direct deposit. There is no evidence to the contrary. The Purchaser's lawyer referred to those conversations in his email of 6:12 p.m. on June 16th, 2021:

> As you know, we have delivered our closing documents and were discussing depositing funds to your trust account over the last couple of days, until you advised at 2:38 p.m. today that you would not accept a direct deposit.

[78] The Vendor's lawyer did not send any correspondence disputing the discussions over the previous couple of days regarding delivery of the closing funds by direct deposit.

[79] I accept that the Purchaser's lawyer raised the issue of a direct deposit in the couple of days prior to the Closing Date. The Vendor's lawyer did not tell the Purchaser's lawyer that a direct deposit was unacceptable at that time.

[80] On the June 16, 2021 Closing Date at 8:45 a.m., the Purchaser's lawyer again told the Vendor's Lawyer that the closing funds would be provided by way of direct deposit and specifically referenced the bank draft. He said that the Vendor's lawyer would receive evidence of

the bank draft and deposit once completed. Again the Vendor's lawyer did not tell the Purchaser's lawyer that a direct deposit of a bank draft was unacceptable.

[81] I note that the Purchaser's lawyer did not mention providing the closing funds by direct deposit again in his 2:13 p.m. email to the Vendor's lawyer presumably because that email is about the Purchaser's lawyer getting the closing funds from the lender.

[82] The Vendor's lawyer first advised the Purchaser's lawyer at 2:37 p.m. on the Closing Date that a direct deposit was not acceptable because their bank did not accept direct deposit. This email proves that the Vendor's lawyer knew before that time that the Purchaser's Lawyer was proposing a direct deposit.

[83] Even if I did not accept the Purchaser's lawyer's evidence that he told the Vendor's lawyer in the days prior to closing that he would be providing the closing funds by direct deposit, which I do find, I would still find that the Vendor's lawyer knew of that intention as of 8:45 am. on the Closing Date and said nothing about a direct deposit being unacceptable until almost six hours later at 2:37 p.m.

[84] At 2:43 p.m. the Purchaser's lawyer pushed back saying that his firm did direct deposits to TD law firm accounts all the time. The Purchaser's lawyer also expressed concern about the time it would take for a wire transfer to arrive in the Vendor's lawyer's account.

[85] After receiving the Purchaser's lawyer's email of 2:43 p.m. the Vendor's lawyer continued to explore the possibility of accepting a direct deposit and finally confirmed at 3:17 p.m. that they could not accept a direct deposit due to the possibility of it being recalled. It was in the 3:17 p.m. email that the Vendor's lawyer raised for the first time that the purchase agreement does not permit direct deposit and repeated: "At this stage it will need to be a wire."

[86] Had the Vendor told the Purchaser that a direct deposit was unacceptable before the Closing Date, or, at the very least immediately after the 8:45 a.m. email on the Closing Date, the Purchaser may well have been able to make other arrangements to have closing funds delivered before the Closing Time. He was lulled into a sense of security by the Vendor's silence on the issue of direct deposit.

[87] Before the Closing Date, there were no discussions regarding strict reliance on the Closing Time and Closing Date. The Vendor never warned the Purchaser that the closing funds had to be received in the Vendor Lawyer's trust account by the Closing Time on the Closing Date. This is unlike the situation in *3 Gill Homes*, where the vendor's reminders that the purchase price had to be paid on the closing date by 3:00 p.m., as set out in the contract, reflected the parties' shared understanding that the closing date and time was to be strictly enforced.

[88] The Vendor submits that the Purchaser should have known that the Vendor would require strict compliance with the APS because the Purchaser itself would not agree to amend the APS when the Vendor made requests to modify the APS, including asking the Purchaser not to go

through with the transaction. I do not find that, as a result of these denied requests, there was a shared understanding that the Closing Date and time was to be strictly enforced.

[89] It was unfair and unjust for the Vendor to say nothing when the Purchaser's lawyer raised the issue of direct deposit in the days prior to, and again early in the morning of the Closing Date, then advise the Purchaser's lawyer just a few hours before the Closing Time that a direct deposit was not acceptable, and, then, knowing that the Purchaser's Lawyer had initiated the wire before the Closing Time and it was on its way, refuse to agree to close the transaction when the wired funds arrived.

[90] In the circumstances of this case, the Vendor's refusal to accept the confirmation that the funds had been sent by wire as sufficient, was unfair and reflects a lack of good faith. The land was vacant and the Vendor did not have another transaction depending on the funds from this sale. The Vendor wanted out of the transaction because her son Tony Treier, who was instructing her lawyer, did not like or want the transaction. He believed it was not a good deal and the real estate agent(s) had taken advantage of his mother, so he seized the opportunity presented by the late arrival of the wire.

[91] I find that the Purchaser did not breach the APS and that the Vendor did breach the APS by refusing to close the transaction once the wired closing funds arrived.

Issue 2: The Alleged Closing Funds Agreement

[92] Given that I am exercising my residual equitable jurisdiction to relieve against the breach of the "time is of the essence" clause because of the Vendor's unfair and unjust conduct, I do not need to address the Purchaser's alternative arguments; however, in the event that I am wrong, I will consider the other issues raised by the Purchaser.

[93] A contract consists of an offer, an acceptance, and consideration.

[94] Whether a contract is formed is determined objectively: *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29, 41 B.C.L.R. (6th) 1, at paras. 29, 33, citing *Smith v. Hughes* (1871), L.R. 6 Q.B. 597, at p. 607. For a contract to exist, the parties must be *ad idem* – there must be a meeting of the minds. The test of whether the parties are *ad idem* is also objective: "would an objective, reasonable bystander conclude that, in all the circumstances, the parties intended to contract?": *UBS Securities Canada, Inc. v. Sands Brothers Canada Ltd.*, 2009 ONCA 328, 95 O.R. (3d) 93, at para. 47.

[95] A contract is only created where the parties "have formed a mutual intention to enter into a bargain with each other and further, are in agreement as to the terms of that bargain": *Xynos v. Xynos*, 2023 ONSC 830, at para. 92, citing John McCamus, *The Law of Contracts* (3d ed., 2020), p. 31.

[96] The Purchaser says that when the Vendor said Closing Funds would have to be sent by wire at 2:37 p.m. and 3:17 p.m. on June 16, the Vendor was proposing a wire transfer of a bank

draft, which is a different delivery method under the APS and thus there was an implied term that the Closing Time would be extended.

[97] I do not find that the parties made an agreement to extend the time for closing, regardless of the delivery method for the closing funds. Section 19 of the APS expressly stipulates that any extension of time must be "an agreement in writing signed by Seller and Buyer or by their respective lawyers who may be specifically authorized in that regard."

[98] Neither the Purchaser's lawyer nor the Vendor's lawyer had instructions to agree to an extension. The Purchaser's lawyer did not speak to his client at all before the Closing Time (6:00 p.m.). The Vendor's lawyer did not speak to the Purchaser's son Tony Treier (from whom he was taking instructions) until sometime after 5:00 p.m. on the Closing Date and during that call, Tony Treier refused to extend closing. There was no agreement to extend the Closing Time.

[99] I do not find that the Vendor made an offer when the Vendor's Lawyer said it will have to be a wire. That statement was not an offer to change the method of Requisite Deliveries under section 11 or how funds were to be paid under section 21 and Schedule A; rather, it was simply a statement that the Vendor was relying on the terms of the APS and that a wire was the only realistic way of delivering the funds by the Closing Time in a manner permitted by the APS.

[100] If the Vendor was making an offer to enter into a new agreement, one would expect that offer to include other standard phraseology that real estate lawyers use to request an extension of closing such as "all to remain the same, time to still be of the essence and that all deliveries by all parties are to be held in escrow pending the closing". The emails from the Vendor at 2:37 p.m. and 3:17 p.m. on the Closing Date do not contain any such terms.

[101] Also, if, as the Purchaser submits, the parties had already entered into another contract, there would be no reason for the Purchaser to send a further email at 5:08 p.m. on the Closing Date asking the Vendor to confirm the extension of the Closing Time. This email also does contain the standard phraseology "all to remain the same, time to still be of the essence and that all deliveries by all parties are to be held in escrow pending the closing."

[102] Finally, if the parties had entered into another contract one would expect the Purchaser to have referred to this agreement when sending the email at 6:12 on June 16, 2021. The June 16 email which the Purchaser Lawyer agreed was a "positioning" email does not refer to any such agreement.

[103] The parties did not enter into the alleged Closing Funds Agreement.

[104] The Defendant states that much of the relief claimed by the Plaintiff depends on the Closing Funds Agreement with the exception of the negligent misrepresentation and estoppel/waiver claims. I agree and therefore I will address only these three issues below.

Issue 3: Negligent Misrepresentation

[105] The Purchaser says that the Vendor's Lawyer made negligent misrepresentations to the Purchaser's Lawyer when he said at 2:37 p.m. "It will have to be a wire to our account" and again at 3:17 p.m., "At this stage it will need to be a wire".

[106] For the reasons that follow I find that the Vendor Lawyer did not owe a duty of care to the Purchaser's Lawyer.

[107] The vendor in the sale of property does not owe a duty of care in tort to the purchaser of the property to protect the purchaser's economic interests. The duties owed by each party are contained in the contract. Therefore the lawyers acting for a vendor, who have no reason to believe that the purchaser is relying on them, generally do not owe a duty to the purchaser: *Kamahap Enterprises Ltd. v. Chu's Central Market Ltd.* (1989), 40 B.C.L.R. (2d) 288 (B.C.C.A.), at p. 13-14.

[108] A lawyer has a duty to protect his or her own client's interests in transactions. A lawyer generally does not owe a duty of care to other parties in the same transaction. Divided loyalty in such circumstances would potentially create a conflict of interest: *Pichelli v. Kagalj*, 2019 ONSC 168, at para. 87.

[109] A lawyer could owe a duty of care to the opposite party in exceptional circumstances. "Reliance on advice or opinion provided by a lawyer representing the other side in a commercial transaction would be, absent special circumstances, unreasonable. But reliance on a fact conveyed by that same lawyer arguably might not be": *Ramsarran et al. v. Assaly Asset Management Corp. et al.*, 2017 ONSC 7191, at paras. 20, 22-24.

[110] I do not find that the Vendor's lawyer owed the Purchaser a duty of care in this case. The alleged negligent misrepresentation is not a statement of fact. It is a statement of the Vendor's lawyer's belief or opinion that, practically speaking, the wire was the only way to get the funds to him on time.

[111] This is not a case like *347671 B.C. Ltd. et al. v. Heenan Blaikie* where one party was not represented by counsel: 2000 BCSC 1714, 83 B.C.L.R. (3d) 120, aff'd 2002 BCCA 126, 98 B.C.L.R. (3d) 205. In the present case, the Purchaser was represented by the Purchaser's lawyer. Both lawyers were equally capable of determining their respective client's obligations under the APS.

[112] At trial, the Purchaser's lawyer agreed that the Vendor's lawyer did not owe a duty to the Purchaser, and only owed a duty to the Vendor. While this admission is not binding because it is an informal admission rather than formal admission, it is evidence I can consider: *Rosenberg et al v. Securtek Monitoring Solutions Inc*, 2021 MBCA 100, 465 D.L.R. (4th) 201, at para. 53.

[113] I have not been referred to any cases where a court has found that a lawyer owes a duty of care to the lawyer on the opposite side of a transaction, and, in the absence of such authority, I decline to find such a duty of care in this case.

Issue 4: Estoppel

[114] Estoppel is closely related to waiver. It is an equitable doctrine that prevents a party from retracting a statement upon which another party has relied: *Yeung v. Chan*, 2017 ONSC 3138, at para. 39, citing *Spencer Bower on the Law Relating to Estoppel by Representation*, 3rd ed. by Tuner (London, Butterworths, 1977) p.

[115] There are six types of estoppel: estoppel by representation of fact, proprietary estoppel, promissory estoppel and estoppel by convention, estoppel by deed and estoppel by negligence: *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 52, citing G. S. Bower, *The Law Relating to Estoppel by Representation* (4th ed. 2004)

[116] The Purchaser relies on estoppel by representation of fact, proprietary estoppel, promissory estoppel and estoppel by convention.

[117] For each type of estoppel relied upon by the Purchaser there is a requirement of reliance.

[118] In *Grasshopper Solar Corporation v. Independent Electricity System Operator*, 2020 ONCA 499, 8 B.L.R. (6th) 169, at para. 55, the court set out the test for estoppel by convention:

> Estoppel by convention is a relatively rare form of estoppel that may arise when both parties to a contract act based on a shared assumption concerning circumstances relevant to their contract. If it would be unfair to allow a party to resile from the assumption, the doctrine operates to provide a remedy for detrimental reliance on the assumption by the other party.

[119] The shared assumption may arise from conduct or silence but must be clear and shared. The doctrine exists to protect reasonable reliance: see *Grasshopper* at para. 56.

[120] The Purchaser says that both parties proceeded on the same underlying assumption that the Closing Funds would arrive by wire before the Closing Time on the Closing Date. I do not agree. In his email of 2:43 p.m. on the Closing Date, the Purchaser's lawyer clearly expressed his concerns that the Closing Funds would not arrive if they were sent by wire.

[121] Promissory estoppel applies when one party makes a promise by words or conduct which is intended to affect the legal relationship and be acted on or relied on by the other party: see *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47, [2021] 3 S.C.R. 490, at para. 15, quoting Sopinka J. in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, at p. 57.

[122] Proprietary estoppel arises when: (i) an owner of land induces, encourages or allows an individual to believe that they have or will enjoy a right or benefit over the owner's property; (ii) in reliance on the belief, the individual acts to their detriment, to the knowledge of the owner; and (iii) the owner then seeks to take unconscionable advantage of the individual by denying the benefit: *Schwark v. Cutting*, 2010 ONCA 61, at para. 34, citing *Eberts v. Carleton Condominium No. 396 et al.* (2000), 36 R.P.R. (3d) 104 (Ont. C.A.), at para. 23.

[123] In this case the evidence does not establish that the Purchaser's lawyer relied on the Vendor's Lawyer's statement that the Closing Funds would have to be sent by wire because it was the APS itself that specified that the fund had to be sent by wire. A wire was one of the permitted payment methods under the APS. The Purchaser's Lawyer said that he believed that, of the permitted payment methods, the wire was likely to be the most effective given the time of day, geographical distance between his office and the Vendor Lawyer's office and the likely traffic conditions. There is no evidence that the Purchaser committed an act or omission resulting from the statement that it would have to be a wire such as to cause him detriment.

Issue 5: Waiver

[124] The Supreme Court of Canada described waiver as occurring where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: see *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*., [1994] 2 S.C.R. 490, at para. 499, citing *Mitchell & Jewell Ltd. v. Canadian Pacific Express Co*., [1974] 3 W.W.R. 259 (Alta. C.A.); *Marchischuk v. Dominion Industrial Supplies*, [1991] 2 S.C.R. 61, [1991] 4 W.W.R. 673 (dealing with waiver of a limitation period).

[125] The doctrine of waiver was explained by Major J. at pp. 499-501:

> Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party [citations omitted]. The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp*. (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):
>
> The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

[126] Waiver will be found where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of a stringent test is justified because there is no consideration flowing from the party in whose favour the waiver operates: see *Saskatchewan River Bungalows*, at p. 500.

[127] "The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party": *Saskatchewan River Bungalows,* at p. 501.

[128] There was no evidence that the Vendor intended to waive its rights under the APS. The Vendor did not communicate a clear intention to waive its rights under the APS to the Purchaser.

Issue 6: Specific Performance

[129] Damages are the usual contractual remedy and are intended to provide the innocent party with what the contract should have provided, meaning the financial equivalent of performance: *Lucas v. 1858793 Ontario Inc. (Howard Park)* 2021 ONCA 52, at para. 68, citing Angela Swan, Jakub Adamski & Annie Na, *Canadian Contract Law*, 4th ed. (Toronto: LexisNexis Canada, 2018), at §6.14 and John D. McCamus, The *Law of Contract*s, 3rd ed. (Toronto: Irwin Law, 2020), at p. 971.

[130] However, it is inaccurate to describe the remedy of specific performance as an "extraordinary remedy": *2730453 Ont. Inc. v. 2380673 Ont. Inc.*, 2022 ONSC 6660, 165 O.R. (3d) 124, at para. 127, citing *Dhatt v. Beer*,2021 ONCA 137, 68 C.P.C. (8th) 128, at para. 42.

[131] The basic rationale for ordering specific performances is that damages may not afford a complete remedy: *Lucas*, at para 69, citing *Adderley v. Dixon* (1824), 57 E.R. 239 (Ch.), at p. 240; *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.), at para. 21; *Matthew Brady Self Storage Corp. v. In Storage Limited Partnership*, 2014 ONCA 858, 125 O.R. (3d) 121, at para. 29.

[132] The test for specific performance is whether a plaintiff has "shown that the land rather than its monetary equivalent better serves justice between the parties" and this depends on whether money is an adequate substitute which in turn depends on whether the property is generic or unique: *Lucas,* at para. 70, citing *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001), 56 O.R. (3d) 341 (Ont. S.C.), at para. 55, aff'd (2003) 63 O.R. (3d) 304 (Ont. C.A.), leave to appeal refused, [2003] S.C.C.A. No. 145.

[133] The court will typically consider (i) the nature of the property; (ii) the related question of the inadequacy of damages as a remedy; and (iii) the behavior of the parties, having regard to the equitable nature of the remedy: *Lucas,* at para. 71, citing *Landmark of Thornhill Ltd. v. Jacobson* (1995), 25 O.R. (3d) 628 (Ont. C.A.), at p. 636.

[134] Uniqueness is only one of several factors the court considers: *Lucas,* at paras. 71 and 77.

[135] "In assessing whether a property is unique, courts may have regard to: (a) a property's physical attributes; (b) the purchaser's subjective interests, or (c) the circumstances of the underlying transaction": *Lucas*, at para. 73.

[136] "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" *Lucas*, at para. 74 citing, *John E. Dodge Holdings Ltd.*, at para. 60.

[137] It is more difficult for a plaintiff to establish that a commercial or investment property is unique (versus residential property), and more difficult to show that damages are not an adequate remedy for its loss: *Lucas*, at para. 78, *Gao v. Park*, 2021 ONSC 4560, at para. 65(5); *Khanna v. Holzel et al.*, 2025 ONSC 3786, at paras. 40–41.

[138] "In the context of a commercial property, in order to establish that a property is unique, the person seeking specific performance must show the property has a quality that cannot be readily duplicated elsewhere; this quality should relate to the proposed use of the property and be a quality that makes it "particularly suitable" for the purpose for which it was intended": *Bell v. Bisaillon*, 2025 ONSC 3965, at para. 38, citing *John E. Dodge Holdings Ltd.*, at paras. 38-39.

[139] The subjective uniqueness of a property to a plaintiff is assessed at the date of contracting because that is when the purchase decision was made: *Lucas*, at para. 75.

[140] The availability of replacement properties is assessed at the date of the breach because that is when a plaintiff has to make a choice about its available remedies, raising the question of whether a replacement is available: *Lucas*, at para. 74; *Gao*, at para. 64.

[141] Both experts provided evidence of commercial property transactions in the City of Hamilton. The Purchaser's expert Mr. Conway examined market activity between June 2020 and March 2024. The Vendor's expert Mr. Parsons examined market activity between June 2017 and March 2024. Their reports identify a number of similar properties that were transacted after mid-June 2021.

[142] In this case, one of the main focuses of the parties submissions on the appropriateness of specific performance was Mr. Putman's (through a company he controls) purchase of a property at 1550 Cormorant Road which closed on January 7, 2022, approximately seven months after the failed closing of the sale of the Property.

[143] The Cormorant Road property is very close in size to the Property in issue here. The Cormorant Road property is 6.3 hectares or 15.5 acres and the Property is 5.9 hectares or 14.5 acres. The properties are approximately 1 kilometer apart, and both are within the Ancaster Business Park.

[144] The Purchaser's expert, Mark Conway, confirmed that the Cormorant Road property met all of the criteria for employment development land that the Putman family companies relied on

to select the Property and that his opinion is that the Cormorant Road property and the Property are substitutes.

[145] The Vendor submits that Mr. Putman has already purchased a replacement property (Cormorant Rd) that both parties' experts agree is a comparable substitute. The Vendor submits that this is a basis to decline to award specific performance because the purchase of the Cormorant Road property shows that a comparable substitute was available at the relevant time and the Purchaser bought it and the Property was not unique for the Purchaser's purposes.

[146] The Cormorant Road property was not a comparable substitute at the relevant time because Mr. Putman testified that he purchased the Cormorant Road property before he purchased the Property, although the closing date was after. This evidence was uncontroverted.

[147] In his initial report the Purchaser's expert Mr. Conway stated that the Cormorant Road property was the only available substitute for the Property.

[148] The Vendor's expert identified the Cormorant Road property and two additional properties not in the Ancaster Business Park as comparable substitutes. These two other substitute properties are located at 28 Glover Road in the Stoney Creek Business Park (sold in January 2023), and a farmland property at Rhymal Road East (sold in October 2023).

[149] Mr. Conway agreed in cross-examination that these two other properties are comparable aside from the fact that they are not in the Ancaster Business Park.

[150] The Vendor submits that Mr. Putman did not say that a desirable property for the businesses could only be within the Ancaster Business Park. He did not say the Property itself was essential to him or the businesses, or that other properties with similar characteristics could not serve a similar function. Both parties' experts opined that other available properties could serve a similar function. However, the Property has unique physical attributes that made it particularly attractive to Mr. Putman and suitable for his proposed use as an investment property.

[151] Mr. Putman wanted to purchase the Property for his family businesses which are located in the Ancaster Business Park.

[152] Mr. Putman testified that his family businesses bought their first property in the Ancaster Business Park in 1988. They eventually bought 10 or 11 buildings and two pieces of land in the Ancaster Business Park.

[153] I accept Mr. Putman's evidence that being in the Ancaster Business Park was very important to him. His evidence was that they wanted the Property for the following reasons:

- It is close to the Putman family's homes.
- It is close to their head office in the Ancaster Business Park.

- It is zoned in a desirable fashion.
- It has services such as hydro close by.
- It is ideal for building a warehouse with offices.
- It is accessible because it is near to the highway 403, only an hour and a half from Fort Erie, close to Brantford and accessible by public bus transportation. The proximity to Brantford and public transportation make it easy to hire people from Brantford.
- They could build upon it because it is within the urban boundary. Their plan was to build as high as they could and put offices in the building.
- The environmental and geotechnical assessments were good.

According to Mr. Putman "the big thing" was that it was close to all of their businesses.

[154] Mr. Putman's evidence regarding the importance of the Property being in the Ancaster Business Park and its other desirable attributes was not challenged in his cross-examination and not addressed by the Vendor's expert.

[155] Mr. Putman said that other than the Cormorant Road Property, the Property was the only other 14-acre or larger parcel of land available in or near the Ancaster Business Park. This evidence was consistent with the evidence of both experts.

[156] Mr. Putman listed the Cormorant Road property for sale to try to raise capital for his son's business. The Vendor submits that listing the Cormorant Road property for sale indicates that Mr. Putman viewed it as a business asset that could be sold to generate capital as needed. The Vendor further submits that this evidence suggests that I can infer that generally, the purchase of property in the Ancaster Business Park was for commercial or investment purposes, damages would be an adequate remedy and strongly militates against specific performance. I do not agree. Mr. Putman did not say he was purchasing the Property for investment purposes. He said that he intended to build on it and use it as a warehouse for products for the businesses in other properties he owns.

[157] I find that the Property has qualities that make it especially suitable for the proposed use that cannot be readily duplicated elsewhere primarily because it is located in the Ancaster Business park and also for all the reasons listed in paragraph 155 above.

[158] I accept Mr. Putman's evidence that he purchased the Cormorant Road property before the sale of the Property fell through. Therefore the Cormorant Road property was not a substitute for the Property, and the two other properties which the Vendor's expert identified as comparable are not in fact comparable because they are not located in the Ancaster Business Park.

[159] The Property rather than its monetary equivalent better serves justice between the parties. Damages are not an adequate substitute. The uncontroverted evidence is that, aside from the

Cormorant Road property, the Property in issue was the only comparable property in the Ancaster Business Park.

[160] It is appropriate to consider the behaviour of the parties when determining whether or not to award specific performance: *Lucas v. 1858793 Ontario Inc. (Howard Park)*, 2021 ONCA 52, at para. 71. Typical factors in this analysis include delay, prejudice, unconscionability, and unfairness: 94827 Newfoundland and *Labrador Ltd. v. MLP Holdings Inc*., 2026 NLSC 14, at para. 34.

[161] In *Omoruyi v. Tavernese*, when balancing the equities, the court considered that there was no record of prejudice suffered by the sellers except for a bald statement that they could be caused "considerable inconvenience and anguish": 2022 ONSC 3051, at para. 20.

[162] In *Sarai et al. v. Singh et al,* the court found that the behaviour of the seller (failing to communicate with the purchaser or clarify who his lawyer was) indicated bad faith and was unreasonable, tipping the equities in the seller's favour: 2023 ONSC 2102, at para. 32.

[163] It is "inappropriate to reward a party who violates a valid APS because they feel they would be in a more advantageous financial position by doing so": *More v. 1362279 Ontario Ltd.*, 2022 ONSC 1363, at para. 31, citing *Davis v. Khouri,* 2021 ONSC 4095, at para. 75.

[164] In this case, the Vendor seized the opportunity to get out of the deal in circumstances where one would expect a party acting in good faith and intending to honour the agreement and close the transaction to promptly advise the Purchaser of the acceptable delivery methods, and, upon not doing so, either agree to accept the direct deposit of the bank draft or close the deal in escrow pending receipt of the wired Closing Funds. While Tony Trier said he was concerned about "additional risks" to his mother, he did not identify any such risks.

[165] In this case the Vendor behaved unreasonably while the Purchaser behaved reasonably by providing chances to find a reasonable solution: *Bellwoods Brewery Inc. v 1896841 Ontario Limited*, 2023 ONSC 2845, at para. 91.

[166] The equities favour the Plaintiff. Specific performance is the appropriate remedy in this case.

[167] If the parties cannot agree on a new closing date, submissions can be made in writing in accordance with the schedule for costs submissions below.

COSTS

[168] I encourage the parties to agree on costs. If they cannot agree, I will consider brief written submissions. These costs submissions shall not exceed five pages in length, (not including any bill of costs or offers to settle). The Plaintiff shall deliver their written submissions within ten days of the date of these reasons. The Defendant's responding submissions shall be delivered within five days of receipt of the Plaintiff's costs submissions. Any reply submissions shall be delivered within

three days of receipt of responding submissions and shall be no more than three pages long. Costs submissions shall be served, filed with the court and delivered to me by way of email to my Judicial Assistant.

Merritt J.

Released: March 18, 2026

CITATION: 2832676 Ontario Inc. v. Treier, 2026 ONSC 1565
COURT FILE NO.: CV-21-00664937-0000
DATE: 20260318

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2832676 Ontario Inc.

Plaintiff

– and –

Mary Treier

Defendant

REASONS FOR JUDGMENT

Merritt J.

Released: March 18, 2026