CITATION: *Coco Intl. Inc. et al. v. Green Infrastructure Partners Inc. et al.*, 2024 ONSC 1616
COURT FILE NO.: CV-23-00701401-00CL
DATE: 20240318

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:	)	
	)	
COCO INTERNATIONAL INC. et al.	)	*Nina Perfetto, David Levangie and Martine Garland,* for the Applicants
	)	
Applicants	)	
	)	
AND	)	
	)	
GREEN INFRASTRUCTURE PARTNERS INC. et al.	)	*James Bunting and Shimon Sherrington,* for the Respondents
	)	
Respondents	)	
	)	
	)	
	)	**HEARD:** October 12, 2023 and January 17, 2024
	)	

OSBORNE J.

REASONS FOR DECISION

[1] The Respondents bought a paving company from the Applicants for cash consideration. $80 million was set aside in an escrow account to fund an indemnity in favour of the purchaser from the vendor in respect of any undisclosed liabilities. As it turns out, there was an undisclosed liability in the form of a $213 million guarantee given prior to the sale by the paving company to a third party, unrelated to its core business.

[2] This Application comes about because the agreement for the sale of the paving company provided that 50% of the escrowed amount, or $40 million, was to be released by the escrow agent in one year if there was no notice of any indemnity claim.

[3] The Applicants take the position that there was no notice, or at least no technically sufficient notice, and they want the $40 million of escrowed funds released now. The Respondents take the position that sufficient notice was given, that the deadline by which notices were required was tolled by the parties, and that relief from forfeiture should apply in any event.

[4] For the reasons below, the Application is dismissed. The total of $80 million should remain in escrow.

The Application, the Parties, the Share Purchase Agreement and the Escrow Agreement

[5] The Applicants, Coco International Inc. and 1027458 Ontario Inc., (collectively, the "Vendors") seek an order directing the Respondent, Green Infrastructure Partners Inc. (the "Purchaser"), to execute a joint direction authorizing the Escrow Agent to release 50% of the Indemnity Escrow Amount totaling $40 million plus accumulated interest pursuant to either or both of the Share Purchase Agreement or the Escrow Agreement, and a declaration that the Purchaser failed to provide notice of an Indemnity Claim prior to April 28, 2023.

[6] The remaining Respondent, GFL Environmental Inc. ("GFL"), is the parent company of the Purchaser.

[7] On April 15, 2021, GFL and Coco Paving Inc. ("Coco Paving"), entered into a letter of intent providing for the purchase by GFL (or an affiliate) of Coco Paving and related entities. The letter of intent expressly stated that the purchase price assumed that the assets of the Purchased Entities would be "free of all debt, liens, encumbrances, mortgages, charges, capital leases, guarantees, profit participation claims, deferred compensation obligations and any other liabilities. [Emphasis added].

[8] As contemplated in the letter of intent, the Vendors, the Purchaser, GFL, Jenny Coco and Rock-Anthony Coco then entered into a share purchase agreement effective December 10, 2021 (the "Share Purchase Agreement" or the "SPA") pursuant to which the Vendors agreed to sell their shares in Coco Paving Inc., Coco Management Inc. and CII EDCO Corp. Inc. to the Purchaser.

[9] Cocoa Paving, Coco Management and EDCO are the parent companies of various other related entities of which they own all of the shares (collectively the "Purchased Entities").

[10] The SPA provided, in relevant part, that:

a. the Purchaser would deposit $80 million (the "Indemnity Escrow Amount") with TSX Trust Company as Escrow Agent at the time of closing;

b. any interest would be considered part of the Indemnity Escrow Amount and paid to the party entitled to receive the Indemnity Escrow Amount;

c. the Vendors indemnified the Purchaser and the Purchased Entities for any damages arising out of certain claims set out in the SPA at section 5.2(a) (the "Indemnity"), and the SPA provided that any such damages were to be satisfied first from the Indemnity Escrow Amount, and if that was depleted, the Vendors were obligated to pay the remainder;

d. GFL guaranteed the payment of any amounts owed by the Purchaser to the Vendors;

e. to engage the Indemnity, the Purchaser was required to provide written notice (the "Notice") to the Vendors (i.e., the Indemnifying Party) of any claim for indemnification (an "Indemnity Claim") within three business days of the Purchaser becoming aware of such an Indemnity Claim (s.5.4(a));

f. the written Notice of the Indemnity Claim must set out the facts constituting the basis for the Indemnity Claim and an amount are estimated amount of damages arising from the Indemnity Claim;

g. if the Indemnity Claim related to a claim or legal proceeding by a third party, a copy of that claim was to be attached to the written Notice;

h. **on the first anniversary of the Closing Date, the Purchaser and Vendors were to execute and deliver to the Escrow Agent a joint direction instructing the Escrow Agent to release 50% of the Indemnity Escrow Amount (or $40 million) plus accumulated interest, unless the Purchaser had delivered a written Notice of an Indemnity Claim to the Vendors and the Escrow Agent prior to the first anniversary of the Closing Date (s.5.5(e));** and

i. time was of the essence.

[Emphasis added].

[11] As part of the purchase and sale, the Vendors and the Purchaser also entered into an Escrow Agreement dated April 22, 2022 which was a companion agreement to the SPA and which provided, in relevant part, that:

a. the Purchaser <u>may</u> provide written Notice to the Escrow Agent of any Indemnity Claim and include details of the claim, a reasonable estimate of damages and all relevant and available supporting documentation no later than the Indemnity Claim Period Expiration Date (s.2.9(a));

b. upon receipt of a Notice of an Indemnity Claim, the Escrow Agent was required to set aside the value of the estimated damages from the Indemnity Escrow Amount;

c. following the first anniversary of the closing of the transaction, the Escrow Agent was to release 50% of the Indemnity Escrow Amount minus any Indemnity Claim delivered prior to the first anniversary, and following the second anniversary, was to release the remaining 50% minus any Indemnity Claim delivered prior to the second anniversary; and

d. time was of the essence.

[Emphasis added].

[12] The SPA transaction closed on April 28, 2022 (the "Closing Date").

The CERIECO Guarantee

[13] Almost four years prior to entering into the SPA, on August 2017, Coco Paving had given a guarantee in favour of CERIECO Canada Corp. in the principal amount of $213 million (the "CERIECO Guarantee"). The CERIECO Guarantee was completely unrelated to the business of Coco Paving. CERIECO is a China-based lender that advanced funds to finance construction on a major condominium project known as "The One" located at 1 Bloor Street West, Toronto. Coco Paving had invested in that condominium project. The CERIECO Guarantee issued by Coco Paving guaranteed the indebtedness of that condominium project to CERIECO.

[14] The Vendors did not disclose the existence of the CERIECO Guarantee to the Purchaser prior to the execution of the SPA (or at any time thereafter including as part of the due diligence process). Their position at the time the SPA was executed on December 10, 2021 was, and apparently still is, that the CERIECO Guarantee had been released in accordance with an agreement they maintain that they entered into and which was signed by one of the directors of CERIECO, with the result that it was not a continuing liability of Coco Paving.

[15] Approximately eight weeks prior to closing of the SPA transaction the following year, the Purchaser learned from a third party of the existence of the CERIECO Guarantee and the fact of a dispute between Coco Paving and CERIECO. Not surprisingly, there was immediate and extensive correspondence between the Vendors and the Purchaser with respect to this issue.

[16] The Purchaser requested, and the Vendors provided, additional materials and particulars relating to the CERIECO Guarantee and the purported release of the CERIECO Guarantee. However, the Purchaser remained uncomfortable with the assurances that the CERIECO Guarantee had been released and requested further protection in respect of this potential liability.

The Letter Agreement and the CERIECO Proceeding

[17] This resulted in the Vendors, the Purchaser and GFL entering into a letter agreement dated April 1, 2022 (the "Letter Agreement") as a condition of closing to satisfy the concerns of the Purchaser. The Letter Agreement confirmed that the Indemnity provision in the SPA applied in the event that a claim was made relating to the CERIECO Guarantee.

[18] Less than a month after the Closing Date in respect of the SPA, on May 24, 2022, CERIECO commenced a claim in this Court (File No. CV-22-681586-CL) against Coco Paving and other parties in which it asserted, among other things, a claim under the CERIECO Guarantee (the "CERIECO Proceeding").

[19] The plaintiffs in the CERIECO Proceeding, which is still pending, seek to set aside the purported release and reinstate the CERIECO Guarantee, and claim from Coco Paving and the other defendants $200 million for breach of contract and $2 million in punitive damages.

[20] Approximately two weeks later, on June 6, 2022, and in accordance with the SPA, the Purchaser gave Notice to the Vendors (as well as Mr. and Ms. Coco) that it was making an Indemnity Claim under the SPA and the Letter Agreement. Also in accordance with the SPA, the Purchaser requested that the Vendors advise whether they would, as was their option, assume the carriage of the defence of the CERIECO Proceeding.

[21] Counsel for the Vendors then responded to the Notice almost immediately thereafter on June 16, 2022 and confirmed that CII intended to assume the defence of the CERIECO Proceeding on behalf of the Vendors.

The Tolling Agreement

[22] Given that the CERIECO Proceeding was then ongoing; the Vendors had taken over carriage of the defence; and the purported release of the CERIECO Guarantee was being challenged, a Tolling and Common Interest Agreement (the "Tolling Agreement") was entered into effective August 26, 2022 among the Vendors, the Purchaser, GFL, Jenny Coco and Rock-Anthony Coco (together with counsel).

[23] The Tolling Agreement included recitals which expressly formed part of the terms. Those recitals set out the context within which the Tolling Agreement was being entered into and referenced the following:

a. the indemnity provisions of the SPA;

b. the Letter Agreement and how the Indemnity obligations would apply in the event of a Guarantee claim;

c. the existence of the already pending CERIECO Proceeding;

d. the Notice that had been delivered on June 6, 2022 by the Purchaser to the Vendors in respect of the indemnification obligations arising out of the CERIECO Guarantee and the CERIECO Proceeding;

e. the position of [the Purchaser] that the Vendors and related parties may be required to indemnify them as a result of the CERIECO Guarantee; and

f. the fact that the [Purchaser] wished to continue to preserve its right to seek indemnification or other relief relating to any exposure arising from the CERIECO Proceeding or the facts pleaded therein (defined as the "Tolled Claims").

[24] The Tolling Agreement went on to provide, in relevant part, that:

a. **any limitation periods, deadlines or prescription periods applicable to any cause of action that [the Purchaser] may have for the purposes of any claim relating to the CERIECO Proceeding shall be suspended until either the Tolling Agreement expires or notice is given to terminate the agreement**; and

b. the Tolling Agreement did not affect, modify or supersede the SPA, the Letter Agreement or the various other agreements and other instruments contemplated thereby.

[Emphasis added].

[25] The first anniversary of the Closing Date was April 28, 2023. When counsel for the Vendors requested that the Purchaser execute the joint direction to the Escrow Agent referred to above to authorize the release of 50% of the Indemnity Escrow Amount (i.e., $40 million) plus interest, the Purchaser refused on the basis that it had given Notice of the Indemnity Claim relating to the CERIECO Guarantee and the CERIECO Proceeding referred to above.[1]

[26] This Application was then commenced.

The Positions of the Parties

[27] The Vendors take the position that the Notice was deficient because it was not delivered to the Escrow Agent prior to the first anniversary of the Closing Date in accordance with the SPA and the Escrow Agreement.

[28] In addition, the Vendors assert that the Notice, which they acknowledge was delivered to them prior to the first anniversary, was deficient in content in that it failed to provide an estimate of damages or sufficient facts detailing the basis of the CERIECO Proceedings, in further breach of the SPA and the Escrow Agreement.

[29] The Purchaser takes the position that regardless of whether or not there was a requirement to provide the Notice to the Escrow Agent before the First Anniversary of the Closing Date, the Tolling Agreement suspended any such obligation in any event.

[30] In addition, the Purchaser submits that the Notice was made, as required to the Vendors, and the whole purpose of the Indemnity and the escrow structure was to set aside the funds until any Indemnity Claim was determined or resolved.

[31] Finally, the Purchaser submits that even if the interpretation urged by the Vendors is accepted, this Court should exercise its equitable discretion to grant relief from forfeiture in respect of the alleged failure to notify the Escrow Agent.

Analysis

[32] I will address these issues in order.

When Was the Notice Required to be Given?

What did the SPA and the Escrow Agreement Require?

[33] The SPA set out in s.5.4 the Claims Procedure that applied whenever an Indemnity Claim was made. The structure of the claims procedure applied to claims for indemnification going either way (i.e., claims by the Vendors to the Purchaser and vice versa).

[34] Pursuant to s.5.4(a), Notice of any Indemnity Claim was to be given by the Indemnified Party to the Indemnifying Party, and, when known, the facts constituting the basis for such claim

[1] There was also a second issue in respect of which notice had been given arising out of an inquiry by a government agency into alleged actions of Coco Paving prior to closing although I need not address that further for the disposition of this Application.

and an amount or estimated amount of Damages arising out of any such Indemnity Claim were to be provided. As noted above, if any such Indemnity Claim resulted from or was in connection with a claim or legal proceedings by a third party, the Notice was to be accompanied by a copy of such Third Party Claim.

[35] In this case, obviously, the Indemnifying Parties are the Vendors and the Indemnified Party is the Purchaser.

[36] Pursuant to s.5.4(b), the Indemnifying Party had the right to participate in the investigation and defence of such Third Party Claim and the right also, upon providing written notice to the Indemnified Party, to assume the defence of such Third Party Claim.

[37] All of this occurred in this case, and all of the above provisions were engaged.

[38] The Escrow Release Procedures were set out in the SPA at s.5.5. They provided for the staged release of the Indemnity Escrow Amount over three years following the Closing Date if there were Indemnified Claims. If there were Indemnified Claims, the amount otherwise available for release was reduced by the amount of the Indemnity Claim.

[39] In particular, s. 5.5(e) of the SPA provided that if Purchaser notified the Vendors and the Escrow Agent prior to the first anniversary of the Closing Date that all or a portion of the Indemnity Escrow Amount then held by the Escrow Agent was subject to a claim for indemnification that have not been finally determined, the amount delivered to the Vendors shall be equal to 50% of the remaining balance of the Indemnity Escrow amount, less the sum of any amount subject to the [Indemnity Claim].

[40] The companion Escrow Agreement provided in s. 2.9(a) that the Purchaser "may" provide the Escrow Agent with Notice of an Indemnity Claim, and that if such a Notice is delivered prior to the first anniversary of the Closing Date, the estimated damages of the Indemnity Claim "shall" be held back from any payment to be made (i.e., funds released from escrow) on the first anniversary of the Closing. [Emphasis added].

[41] This Application arises as a result of the fact that while the Purchasers delivered the Notice promptly to the Vendors in accordance with s.5.4, the Notice was not delivered to the Escrow Agent until after the first anniversary of the Closing Date as contemplated in s.5.5 of the SPA. As highlighted above, the provision relating to notice to the Escrow Agent in the Escrow Agreement was not mandatory (it used the permissive word "may").

[42] The Letter Agreement had been entered into specifically to address the possibility of the CERIECO Proceeding, which subsequently came to pass.

[43] When that occurred, the Purchaser (through counsel) provided formal Notice to the Vendors on June 6, 2022 given the CERIECO Proceeding, it was asserting an Indemnity Claim pursuant to s.5.4(a) of the SPA.

[44] I pause to observe that this Notice was therefore clearly delivered prior to the first anniversary of the Closing Date (April 22, 2023).

[45] That Notice from the Purchaser specifically requested, also in accordance with s.5.4(a), that the Vendors confirm whether they would assume carriage of the defence of the CERIECO Proceeding.

[46] The Applicants place great weight on the fact that the Notice makes no reference to s.5.5 of the SPA or to s.2.9 of the Escrow Agreement. In my view this is not relevant; there was no requirement that it do so.

[47] As noted above, upon receiving the Notice, the Vendors (also through counsel) confirmed as contemplated in the SPA upon receipt of such a Notice, that they would be assuming carriage of the defence of the CERIECO Proceeding.

[48] Notice to the Escrow Agent is contemplated in s.5.5(e) of the SPA and s.2.9(b) of the Escrow Agreement. I agree with the submission of the Respondents that those provisions relate to the mechanics and procedure for the release of the Indemnity Escrow Amount and are for the benefit of and to protect the Escrow Agent to ensure that funds are not inappropriately or inadvertently distributed while an Indemnity Claim is outstanding.

[49] This is clear from a plain reading of s.5.5(e) of the SPA (on which the Applicants place great reliance) itself. It does not in fact require the Purchaser to provide the Notice to the Escrow Agent by a certain date or at all. What it does provide is that if Notice is provided, the mandatory duty of the Escrow Agent is to withhold the appropriate amount (i.e., the Escrow Agent shall reduce the amount distributed). The structure of this clause is consistent with the position of the Respondents with what in my view was the clearly expressed intention of the parties: if the Escrow Agent was on Notice of an Indemnity Claim before it released the funds, it had the duty to hold them back.

[50] In my view, those provisions are not and were not intended by the parties to compel the release of an Indemnity Escrow Amount in circumstances where, as here:

a. there is in fact an outstanding Indemnity Claim and the Vendors did in fact receive Notice of such Indemnity Claim formally and in accordance with the SPA; and

b. the Escrow Agent did in fact receive formal Notice from the Purchaser and, while that Notice was delivered after the first anniversary of the Closing Date, it was delivered before the Escrow Agent released any funds from escrow.

[51] The interpretation of the relevant agreements, their business purpose and surrounding context are entirely consistent with the position of the Respondents.

[52] The law is clear that the interpretation of written contractual provisions must be grounded in the text and read in light of the entire contract. The contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 ("*Sattva*") at para. 47; and *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para. 106.

[53] I pause again to observe that in the particular circumstances of this case, the whole underlying notion of the Vendors becoming aware of the CERIECO Proceeding through the Notice delivered by the Purchaser is somewhat artificial at its core. The Cocos, as principals of the Purchased Entities and Vendors, were already well aware of the CERIECO Proceeding, having received a copy of the statement of claim directly since they were named as individual defendants.

[54] In fact, the June 6, 2022 Notice from the Purchasers enclosed, together with a copy of the statement of claim in the CERIECO Proceeding, a copy of correspondence dated June 2, 2022 from counsel to CERIECO directly to counsel for Coco Paving (who is also counsel to the Applicants in this proceeding), expressly providing them directly with a copy of the statement of claim and asking if they would accept service. Accordingly, when the Applicants received the Notice contemplated under the SPA four days later from the Purchaser, they were already fully aware of the CERIECO Proceeding.

[55] In any event, the Vendors acknowledged receipt of the Notice. The correspondence from their counsel dated June 16, 2022, by which they advised that the Vendors would assume carriage of the defence of the CERIECO Proceeding, expressly states that: "Coco International Inc. acknowledges receipt of the Notice of the Third Party Claim pursuant to section 5.4(a) of the Share Purchase Agreement together with the Statement of Claim. In accordance with section 5.4(b) of the Share Purchase Agreement, CII hereby provides written notice that CII intends to assume the defence of such Third Party Claim."

[56] I find that receipt of the Notice was acknowledged and accepted. Further, it was acted upon since the option of the Vendors to assume carriage of the defence of the Indemnified Claim is only triggered, as they expressly acknowledged themselves in the above correspondence, upon receipt of the Notice. There is no reference to any deficiency in the Notice or to the fact that it had not, at that time, been provided to the Escrow Agent.

[57] In any event, there is no issue between the parties that Notice has now been provided to the Escrow Agent, the Escrow Agent has not requested any further information in respect of the Notice or challenged its validity, and no funds have been released.

[58] Section 2.9 of the Escrow Agreement provides as noted above that the Indemnified Party "may" provide notice of an Indemnified Claim to the Escrow Agent. There is no question that the June 6, 2022 Notice was not provided to the Escrow Agent at the same time that it was delivered to the Vendors.

[59] However, and as discussed below in these reasons in the section related to relief from forfeiture, the Applicants never raised any concern or allegation of deficiency, as to delivery to the Escrow Agent or as to content, at the time they received the Notice and relied upon it to exercise their option to assume carriage of the defence of the CERIECO Proceeding, nor at any time for almost a year until after the first anniversary of the Closing Date.

[60] The Applicants waited until the first anniversary of the Closing Date had passed, and then wrote to the Escrow Agent on May 9, 2023, without copying the Purchaser, to inquire whether the Escrow Agent had received any Notice. When the Escrow Agent replied to the effect that it had not, counsel for the Applicants then wrote to counsel for the Purchaser on May 12, 2023, taking

the position that because the Purchaser had not provided Notice to the Escrow Agent, the Vendors were entitled to require the Purchaser to execute the joint direction authorizing the release of 50% of the Indemnity Escrow Amount.

[61] Immediately thereafter, on May 15, 2023, counsel for the Purchaser replied to confirm that the Purchaser would not execute the joint direction because Notice of an Indemnified Claim had been given to the Vendors, but further that to the extent the Notice had not been provided previously to the Escrow Agent, the Escrow Agent was copied on that correspondence, which itself was well within the Indemnity Claim Period Expiration Date as defined in the Escrow Agreement.

[62] There is no dispute on this Application that, as contemplated in the SPA, the damages claimed in the CERIECO Proceeding materially exceed the Indemnity Escrow Amount, nor is it disputed that the CERIECO Proceeding remains unresolved.

[63] Accordingly, I find that Notice was given to the Vendors prior to the first anniversary of the Closing Date in accordance with the terms of the SPA.

What is the Effect of the Tolling Agreement?

[64] Further, and in any event of all of the above, I find that the Tolling Agreement suspended all contractual periods in respect of the CERIECO Proceeding and any other relief relating to exposure arising from that Indemnified Claim in any event.

[65] The Tolling Agreement is described above. It was entered into by the parties in the wake of the CERIECO Proceeding having been commenced and Notice that the Purchaser was asserting an Indemnity Claim having been delivered by the Purchaser and having been received, acknowledged and acted upon by the Vendors.

[66] I am satisfied that the intent of the parties in entering into the Tolling Agreement, and indeed the whole point of the Tolling Agreement, was to toll and suspend all contractual periods which specifically included the CERIECO Proceeding and the corresponding Indemnity Claim made.

[67] In my view, a reading of the Tolling Agreement as a whole, consistent with the surrounding circumstances (many of the most relevant of which are reflected in the recitals) does not allow for any other interpretation: see *Sattva*.

[68] As summarized above, the recitals to the Tolling Agreement expressly and repeatedly refer to the very events giving rise to this Application:

a. the CERIECO Proceeding having been commenced;

b. the June 6, 2022 Notice having been given by the Purchaser to the Vendors expressly pursuant to s.5.4(a) of the SPA and section 1 of the Letter Agreement;

c. the fact that it is the position of the Purchaser that the Vendors may be required to indemnify them for any damages suffered as a result of CERIECO Proceeding; and

> d. the fact that the Purchaser "wishes to continue to preserve their right and seek indemnification or any other relief relating to exposure arising from the CERIECO Proceeding or the facts pleaded therein, which are expressly defined as the "Tolled Claims", and suspend any applicable statutory, common law, contractual, equitable or other periods in respect of the Tolled Claims." [Emphasis added].

[69] In the body of the Tolling Agreement, the operative provisions do precisely what was contemplated and described in the recitals as the intent of the parties.

[70] Section 2 provides that: "the Parties agree that the running of time and any limitation periods, deadlines or prescription periods applicable to any cause of action or claim that [the Purchaser] may have for the purposes of the Tolled Claims shall be suspended …"

[71] In my view, and considered in light of the definition of Tolled Claims in the recital summarized above, that agreement to suspend any deadline inescapably includes the deadline by which the Purchaser was required (to the extent there was any such requirement in the first place) to give notice to the Escrow Agent earlier than it did.

[72] The position of the Vendors that the Tolling Agreement does not assist the Purchaser rests almost entirely on s. 27 of the Tolling Agreement which provides that:

> This Agreement constitutes the entire agreement between, by and among the Parties respecting the subject matter of this Agreement, and supersedes any and all previous agreements, communications, representations or understanding, whether oral or written. This agreement does not affect, modify or supersede the SPA, the Letter Agreement or the various other agreements and other instruments contemplated thereby.

[73] In reliance on this provision, the Vendors argue on this Application that the Tolling Agreement could not have the effect of suspending the deadline for the delivery of Notice of and Indemnity Claim to the Escrow Agent as provided for in the prior agreement.

[74] I cannot accept the submission. First, s. 27 itself is clear that the Tolling Agreement constitutes the entire agreement between the Parties respecting the subject matter. The Tolling Agreement is clear and unambiguous that the subject matter is this very Indemnity Claim in respect of the CERIECO Proceeding. Section 27 goes on to provide that the Tolling Agreement supersedes any and all previous agreements. This would clearly include the SPA, the Letter Agreement and the Escrow Agreement.

[75] In my view, the last sentence of s. 27 is perhaps not as clearly articulated as it could have been in relation to the immediately preceding sentence referred to above. However, in my view, the clear meaning of that last sentence, which provides that the Tolling Agreement does not affect, modify or supersede the SPA or the Letter Agreement, is that the rights of the parties, including the right of the Purchaser to be indemnified and the right of the Vendors to elect to assume carriage of the defence of an Indemnified Claim if it is a Third Party Claim, continue. Nothing in the Tolling Agreement, (including for greater certainty if the Tolling Agreement is interpreted as I have

concluded it should be), supersedes the SPA or the Letter Agreement. The Tolling Agreement is, on the contrary, completely consistent with those earlier agreements.

[76] Moreover, the interpretation of the Tolling Agreement urged by the Respondents in this Application; namely that the Tolling Agreement may have tolled other deadlines, but did not toll the deadline by which Notice of an Indemnity Claim was to be given to the Escrow Agent, is completely inconsistent with every one of the earlier agreements entered into by the parties: the SPA, the Letter Agreement and the Escrow Agreement. It is also inconsistent with the terms of the Tolling Agreement itself, as informed by the recitals in that very agreement which described in detail the context and factual matrix within which that Tolling Agreement was entered into.

[77] I find that the intent of the parties, as reflected in the clear and unambiguous language of all of their agreements, was to provide for the purchase and sale of the Purchased Entities, to provide for an indemnity in favour of the Purchaser in the event of a Third Party Claim such as the CERIECO Proceeding, and when that occurred as it did here, to toll and suspend all deadlines and periods between and among the parties to the Tolling Agreement to give the Vendors the clear and unfettered ability to defend the CERIECO Proceeding, as they had elected to assume.

[78] Among other things, the penultimate recital in the Tolling Agreement which expressly states that [the Purchaser] wishes to continue to preserve [its] right to seek indemnification relating to exposure arising from the CERIECO Proceeding and suspend any contractual period in respect of that CERIECO Proceeding, allows for no other interpretation.

[79] Finally, in this regard, and as further discussed in the section of these reasons below addressing relief from forfeiture, the evidence of the Vendors on this Application was that they had formed the view that the Notice was deficient (in large part because it had not been delivered to the Escrow Agent) at the time they entered into the Tolling Agreement (but did not express this view to the Purchaser).

[80] If their position were accepted now, it would require me to interpret the Tolling Agreement to conclude that it had the effect of suspending and tolling all contractual deadlines in all of the relevant agreements relating to the CERIECO Proceeding, except however for s.5.5(e) of the SPA and the timing of notice to the Escrow Agent. No reasonable interpretation of the Tolling Agreement allows for this result.

[81] Accordingly, the Notice was delivered in time and even if it was not, that timeline was expressly suspended by the Tolling Agreement.

Was the Content of the Notice Deficient?

[82] The Vendors assert in this Application that the content of the Notice in that: “while it included a copy of the claim, it cited the incorrect provision of the SPA and failed to include an estimated amount of the damages arising from the claim.”

[83] There is no merit to this submission.

[84] The June 6, 2022 Notice is discussed above. It included a copy of the June 2, 2022 letter from counsel to the plaintiffs in the CERIECO Proceeding directly to counsel for the Vendors, and

a copy of the statement of claim itself. It specifically referred to the SPA, the Letter Agreement and the covenant to indemnify the Purchaser in respect of such a Third Party Claim. It requested that the Vendors accept the notice in accordance with s. 5.4(a) of the SPA and s. 1 of the Letter Agreement. In my view, the fact that it did not also expressly reference s.5.5 of the SPA or s.2.9 of the Escrow Agreement is of no moment. The Notice was clear and sufficient.

[85] The submission that it did not adequately set out an estimate of damages is also without merit. It included a copy of the statement of claim which in turn included the prayer for relief setting out the quantum of damages sought by the plaintiff in the CERIECO Proceeding.

[86] There were no further or better particulars as to an estimate of damages (or indeed as to the details of the claim at all) that the Purchaser could have provided. The basis for the allegations in the CERIECO Proceeding are set out, to the extent that they were known to either the Purchaser or the Vendors, in the statement of claim itself which was attached in full to the Notice.

[87] Moreover, if any party knew more about an accurate estimate of exposure in the CERIECO Proceeding, it was the Vendors. Ms. Coco is named as a personal defendant in the CERIECO Proceeding. She was directly involved in the execution of the CERIECO Guarantee on which that claim is based and the circumstances of the alleged subsequent release of that CERIECO Guarantee. I reject the notion that she, in her personal capacity or perhaps more relevantly as a principal of the Applicants, somehow lacked sufficient notice of the claim. There is simply nothing that the Respondents knew that the Applicants did not.

[88] Finally, the Applicants expressly acknowledged that the Notice had been delivered in the Tolling Agreement as well as in correspondence from their counsel dated June 16, 2022 referred to above, in which, in express reliance on the Notice having been delivered and received, the Applicants exercised their right to assume carriage of the defence of the CERIECO Proceeding. They clearly had all sufficient information they required in order to make a decision as to whether to assume carriage of the defence.

[89] In light of this, in addition to all of the above, I find that the content of the Notice was sufficient.

Is Relief from Forfeiture Necessary and Should it be Granted?

[90] The Respondents submit that even if there was a deficiency in the timing or content of the Notice (or both), the circumstances warrant the exercise of equitable jurisdiction to grant relief from forfeiture.

[91] Given my findings above, such equitable relief is not necessary. However, if I am in error in respect of my findings above, I would grant relief from forfeiture in the circumstances of this case.

[92] Jurisdiction to grant such relief is found in s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, which gives this Court the discretion to grant relief "against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just."

[93] The power to relieve from forfeiture is based in equity. As expressed by the Court of Appeal for Ontario in *Ontario (Attorney General) v. 8477 Darlington Crescent*, 2011 ONCA 363:

> [87] The power to relieve from forfeiture is discretionary and fact-specific: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 S.C.R. 490 at p. 504. The power is predicated on the existence of circumstances in which enforcing a contractual right of forfeiture, although consistent with the terms of the contract, visits an inequitable consequence on the party that breached the contract. Relief from forfeiture is particularly appropriate where the interests of the party seeking enforcement by forfeiture can be fully vindicated without resort to forfeiture. Relief from forfeiture is granted sparingly and the party seeking that relief bears the onus of making the case for it: *1497777 Ontario Inc. v. Leon's Furniture Ltd.* (2003), 2003 CanLII 50106 (ON CA), 67 O.R. (3d) 206 at paras. 67-69, 92 (C.A.).
>
> [88] In *Saskatchewan River Bungalows*, at p. 504, Major J. identified the factors relevant to the exercise of the power to grant relief against forfeiture:
>
> > ... The factors to be considered by the court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach.

[94] The Applicants submit that, separate entirely from their submission that equity does not support the exercise of discretion to assist the Purchaser here, relief from forfeiture is not available to the Purchaser because the escrowed funds are a form of security rather than a penalty or a forfeiture and therefore s. 98 does not apply at all.

[95] They submit that the Purchaser is entitled to the portion of the Indemnity Escrow Amount (i.e., the $40 million the Applicants want released now) only if the CERIECO Proceeding is successful as against Coco Paving (or there is a settlement) such that the indemnification obligation is triggered. In the absence of any evidence that the Indemnifying Parties would be unable to pay any judgment, the Purchaser could still sue the Indemnifying Parties if they failed to make payment, all with the result that no right has been forfeited and there is therefore no basis for relief from any forfeiture.

[96] Finally, the Vendors submit that this is not a case where the failure to give Notice resulted in the Purchaser having to pay funds it would not otherwise have been required to pay, and since the Purchaser maintains all of its rights to assert and enforce whatever claims it may have, there has been no penalty or forfeiture.

[97] I cannot accept the submissions. Relief from forfeiture is available broadly and "simply refers to the power of a court to protect a person against the loss of an interest or right because of

the failure to perform a covenant or condition in an agreement or contract": *Kozel v. The Personal Insurance Company,* 2014 ONCA 130 ("*Kozel*") at para. 28.

[98] Such an alleged failure is the very basis upon which the Vendors bring this Application: their overarching position, as confirmed in their factum, is that "this application relates to the failure of the Respondents to provide notice". The courts have previously granted relief from forfeiture in respect of the late delivery of a notice required in a contract to prevent the release of funds held in escrow: *Voortman v. SPCVC Investments Inc*., 2018 ONSC 3602 at paras. 20 – 22, relying on the decisions of the Court of Appeal for Ontario in *Kozel* and *PDM Entertainment Inc. v. Three Pines Creations Inc.*, 2015 ONCA 488 at paras. 61 – 62.

[99] In my view, relief from forfeiture can apply to the circumstances of this case. The issue is whether the equities are such that this discretionary relief should be granted.

[100] It is to be remembered that the first possible release of any portion of the Indemnity Escrow Amount could not occur until months after all of the events described above and which give rise to this Application occurred in any event: on the first anniversary of the Closing Date in April, 2023.

[101] To state the obvious, this is not a case where the Escrow Agent, in ignorance of the existence of an Indemnity Claim, mistakenly (or at least to the detriment of the Indemnified Party) released funds in escrow. That did not occur here, the Indemnity Escrow Amount remains in escrow with the Escrow Agent, and as noted above the Escrow Agent now clearly has Notice and there is no allegation of any deficiency in any Notice.

[102] Nor is there any dispute that the CERIECO Proceeding remains unresolved and the exposure on that claim materially exceeds both the portion of the Indemnity Escrow Amount that the Applicants want released now ($40 million) and also the entire Indemnity Escrow Amount ($80 million). The principal amount of the CERIECO Guarantee is $213 million and the plaintiffs in the CERIECO Proceeding claim damages of $200 million plus punitive damages of $20 million.

[103] In my view there is nothing about the conduct of the Purchaser, as the party seeking relief from forfeiture, that would disentitle it to such equitable relief being granted in its favour. In fact, the opposite is true here.

[104] The Purchaser bought a paving business. It had no knowledge of the CERIECO Guarantee, which was unrelated to the core business of the entities it purchased. The Applicants, as Vendors, naturally knew about the CERIECO Guarantee but did not disclose to the Purchaser, either when the SPA was signed or any time thereafter during the due diligence period. The Purchaser learned of its existence just prior to the Closing Date of the SPA from a third party.

[105] As soon as the Purchaser learned of the CERIECO Guarantee, it raised the issue of this very significant exposure with the Vendors as a result of which the parties entered into the Letter Agreement as a condition of closing required by the Purchaser. The very objective of that Letter Agreement was to record the agreement of the parties that the Indemnity provisions of the SPA would apply to this very risk: a claim made against the Purchased Entities based on the CERIECO Guarantee. That is exactly what the CERIECO Proceeding is.

[106] Moreover, the chronology of events in the period of time between the date on which the parties to this Application received notice of the CERIECO Proceeding and the date on which funds could be released from escrow on the first anniversary of the Closing Date is also relevant to an analysis of the equities to be considered in the context of relief from forfeiture.

[107] In inquiring about the particulars of the CERIECO Guarantee as soon as they learned about it, then seeking to protect themselves through both the Indemnity provisions of the SPA and the Letter Agreement to ensure that those provisions applied to the CERIECO Proceeding, and then promptly giving Notice of the Indemnified Claim when the CERIECO Proceeding was commenced, the Purchaser acted reasonably and prudently.

[108] As against this, what did the Applicants do? They confirmed and accepted the Notice, and relied on the Notice to exercise their triggered right to assume carriage of the defence of the claim. Then they did nothing. In particular, they raised no objection, nor did they assert any deficiency with the Notice as to timing of delivery to the Escrow Agent or content.

[109] On the contrary, they waited until after the first anniversary of the Closing Date had passed, and then wrote to the Escrow Agent without copying the Purchaser, to inquire as to whether the Escrow Agent had received any Notice of an Indemnified Claim. When the Escrow Agent confirmed it did not have a record of any such Notice, the Vendors formally requested that the Purchaser sign the joint direction authorizing the release of the funds, knowing full well that the CERIECO Proceeding was pending and that the Purchaser had delivered to it [the Vendors] Notice of the Indemnified Claim under the SPA almost a year earlier.

[110] In addition, on cross-examination on her affidavit in this Application, Ms. Coco candidly admitted that the Vendors had formed the view, at the time they signed the Tolling Agreement, that the Notice that had previously been provided on June 6, 2022 was deficient, yet acknowledged that the Vendors did not at any time prior to the expiry of the first anniversary date advise the Purchaser that the Vendors considered the Notice to be deficient, stating that: “it’s not for me to correct his deficiencies in this letter, it’s for him and his legal counsel”. (Q. 144, 155 – 158).

[111] If there were a requirement for the Purchasers to have notified the Escrow Agent, they did so within days of being advised that the Vendors took the position that there was such a requirement, and before any Indemnity Escrow Amount funds were released in any event. The gravity of the breach, if it exists, is relatively minor.

[112] On the other hand, the proportionality analysis contemplated by the third factor described by the Court of Appeal above, clearly favours relief from forfeiture here. The loss of the ability to look to $40 million of escrowed funds is wholly disproportionate to the minor breach of the obligation to notify the Escrow Agent.

[113] Finally, I agree with the Respondents that it is significant, at least with respect to this issue, that the Applicants did not include the Tolling Agreement in the Application Record or make any reference to it whatsoever in their materials. In my view, the Tolling Agreement is clearly relevant to the issues on this Application, whether or not the Applicants were of the view that it did not have the effect of tolling the particular deadline by which the Notice ought to have been delivered to the Escrow Agent.

[114] In all the circumstances, and had it been necessary, I would find that the Respondents are entitled to relief from forfeiture in this case.

Supplementary Submissions made while Decision under Reserve

[115] Following conclusion of the hearing of this Application and while the matter was under reserve, counsel for the Applicants contacted the court and requested the opportunity to make supplementary submissions as a result of a decision just released by the Court of Appeal for Ontario which, the Applicants submit, changes the law and has a direct bearing on the disposition of this Application.

[116] I agreed to hear the parties with respect to this issue.

[117] On January 3, 2024, the Court of Appeal for Ontario released its decision in *3 Gill Homes Inc. v. 5009796 Ontario Inc. (Kassar Homes)*, 2024 ONCA 6 ("*Gill*").

[118] In *Gill*, the Court of Appeal addressed the effect of a "time is of the essence" clause in a real estate agreement of purchase and sale. The purchasing party missed the time stipulated for paying the funds to close the transaction by 35 minutes. On the basis of that breach, the vendor treated the contract as terminated. The application judge found in favour of the respondent vendor. On appeal by the purchaser, the Court of Appeal concluded that there was no error, and dismissed the appeal.

[119] The Applicants here submit that in *Gill*, the Court of Appeal provided guidance on three points relevant to this Application:

a. the impact of a "time is of the essence" clause;

b. the circumstances in which a court can exercise its equitable jurisdiction to relieve a party from non-compliance where there is a "time is of the essence" clause in an agreement; and

c. the rigidity of timelines, having regard to the sophistication of the parties, where an agreement contains such a clause.

[120] There is no question that each of the SPA and the Escrow Agreement contains a relatively typical "time is of the essence" clause. The Applicants submit that the decision in *Gill* is conclusive that any breach of such a time limit will permit the innocent party to terminate the contract, with the result that 50% of the Indemnity Escrow Amount should be released. It follows, they submit, that the failure to deliver the Notice to the Escrow Agent at the same time it was delivered to the Vendors is fatal to the position of the Respondents on this Application.

[121] The Applicants also submit that in *Gill*, the Court of Appeal considered the circumstances in which the court's residual equitable jurisdiction should be exercised to provide relief to a party that has failed to comply with a "time is of the essence" clause, and that no such circumstances exist here.

[122] The Applicants emphasize the observation of the Court of Appeal in *Gill* that while the outcome of that case "was indeed harsh, it was not unconscionable or unfair", and submit that the outcome they seek in the present case is "not nearly as harsh, and certainly not unconscionable or unfair. At its highest,… the Respondents lose a portion of their security in the event that the release of guarantee is set aside but maintain their ability to assert a claim over the balance of the escrow funds and pursue the Applicants if required".

[123] I am not persuaded that the Court of Appeal fundamentally changed the law relating to "time is of the essence" clauses in contracts in *Gill*, but rather, applied the well-established legal principles to the particular facts of that case. The Court of Appeal stated at para. 24:

> 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 were a time limit is stipulated in the 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."

[124] Beginning at the next paragraph, para. 25, the Court of Appeal proceeded to apply the law to the particular facts in *Gill* and considered the series of transactions between the parties, their prior conduct and indeed the entire record in that case.

[125] At the conclusion of its reasons, the court noted that the application judge had 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 in that case.

[126] The Court of Appeal observed that some unfair or unjust action on the part of the respondent would have to be apparent on the record, and then considered the equities applicable to the facts there, including the fact that the correspondence between the parties revealed clear and repeated reminders about the closing date and time, which were acknowledged by the appellant, and the fact that the respondent was not seeking to keep the appellant's deposit and had returned the funds to the appellant's counsel. In short, the court concluded that a balancing of the equities in that case did not justify the exercise of equitable jurisdiction to relieve against the breach.

[127] In my view, the facts of the present case are distinguishable from those in *Gill*. In fact, the only material similarity is the existence of a "time is of the essence" clause in the relevant agreements.

[128] First, and fundamentally, there was no issue in *Gill* that the contractual deadline in the agreement of purchase and sale was missed. The appellant purchaser there had been repeatedly reminded of the deadline by the respondent vendor and simply missed it.

[129] That is not so here. As I have found for the reasons expressed above, the Tolling Agreement suspended the applicable contractual periods, and in particular the contractual period in respect of "the right to seek indemnification or any other relief relating to exposure from the [CERIECO Proceeding]". As I have found, that included the suspension of the deadline to provide Notice to the Escrow Agent.

[130] Second, the conduct of the parties in the present case is distinguishable. Contrary to the situation in *Gill* where the correspondence between the parties revealed clear and repeated reminders about the closing date and time, which were acknowledged by the appellant there, the conduct of the Applicants here was to the opposite effect, as set out above. Rather than giving the Respondent "clear and repeated reminders" about the deadline, let alone obtaining acknowledgements from the Respondent about the deadline, the Applicants:

a. accepted and acknowledged receipt of the Notice;

b. relied on the Notice to exercise their option to assume carriage of the defence of the CERIECO Proceeding;

c. raised no issue with the lack of Notice to the Escrow Agent at that time;

d. waited almost one year until after the first anniversary of the Closing Date had passed, and then inquired of the Escrow Agent without notice to the Respondents, whether the Escrow Agent had received the Notice;

e. when the Escrow Agent replied in the negative, they demanded execution of the direction to release funds; and

f. as acknowledged by Ms. Coco on her cross-examination, the Applicants did the above intentionally, since it was "not their job" to remind the Respondents of the deadline.

[131] In my view, this "laying in the weeds" approach is completely distinguishable from the conduct of the innocent party considered by the Court of Appeal in *Gill*.

[132] Third, and even more fundamentally, the equities more generally here are also entirely distinguishable, again for the reasons set out above.

[133] The Applicants failed to disclose the CERIECO Guarantee to the Respondents at any time. They could have done so, together with disclosure of whatever other facts they felt were relevant to and supportive of their own position that the CERIECO Guarantee had in fact been released, in order that the Respondents could evaluate the exposure and risk as against the representations made in the SPA. That was the whole point of the representations and the due diligence process that followed execution and preceded closing.

[134] When the CERIECO Guarantee was discovered by the Respondents, they insisted on the Letter Agreement as a condition of closing in order to ensure that the parties were in agreement that the Indemnity Escrow Amount would answer a claim on the CERIECO Guarantee if such a claim were advanced, and that is exactly what subsequently occurred.

[135] In my view, the just and equitable result on this Application is that the entire Indemnity Escrow Amount should remain available to respond to the exposure in the CERIECO Proceeding. That entire amount is itself less than half of the exposure on the CERIECO Guarantee as claimed.

[136] It is also important to remember the obvious point that I am making no final determination on this Application about the ultimate entitlement to the Indemnity Escrow Amount, inclusive of the accrued interest. If the Vendors, who have assumed carriage of the defence of that CERIECO Proceeding, are successful on the merits or even if they are unsuccessful in the CERIECO Proceeding but successful as against the Respondents here on the Indemnity Claim in respect of which Notice was given, they would presumably be entitled to the return of the entire Indemnity Escrow Amount. Obviously, if the Respondents are successful in their position, they would presumably be entitled to the same funds. All of that is for another day.

Result and Disposition¶

[137] For all of the above reasons, the Application is dismissed.

[138] If the parties are unable to agree on costs, the Respondents may file through my judicial assistant Mary Sibenik at mary.sibenik@ontario.ca brief submissions as to costs not exceeding three pages in length, to support their bill of costs already uploaded to CaseLines, within 10 business days of the date of these reasons. The Applicants may file brief submissions also not exceeding three pages in length within 10 days thereafter.

Osborne J.