CITATION: Grandfield Homes (Kenton) LTD. v. Chen, 2023 ONSC 3058
COURT FILE NO.: CV-19-00617250-0000
DATE: 20230523

2023 ONSC 3058 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **GRANDFIELD HOMES (KENTON) LTD.**

Applicant

AND:

XIAO LU CHEN

Respondent

BEFORE: Koehnen J.

COUNSEL: *Michael Doyle, Sarah Jamshidimoghadam* for the Applicant

Spencer F. Toole for the Respondent

HEARD: May 9, 2023

ENDORSEMENT

[1] The applicant seeks a declaration that it is entitled to a deposit the respondent paid under a contract to purchase a new build home. In addition, the applicant asks that I direct the issue of damages beyond the deposit to the trial of an issue. The respondent contests both forms of relief.

[2] I grant judgment declaring that the applicant is entitled to the deposit the respondent paid but denying the applicant a trial on any further damages. On the facts of this case, the applicant should be limited to the return of its deposit.

The Facts

[3] The applicant, Grandfield Homes (Kenton) Ltd., describes itself as a developer and builder of luxury homes. It has been in operation since 2012 and, as of May 2019, had developed and built approximately 55 new homes.

[4] The Respondent, Xiao Lu Chen is a Toronto businessperson and the purchaser of a Grandfield home. She is 51 years of age.

[5] Pursuant to an agreement of purchase and sale dated May 5, 2017, the respondent purchased a home municipally known as 1 Daniel Cozens court in Toronto. The house was in a new build development in which the applicant was building several houses. The purchase price was $3,350,000 including HST. Ms. Chen paid several deposits for the house which came to a total of $502,500.

[6] Closing was scheduled for January 2, 2019. Ms. Chen first sought to extend the closing to January 14, 2019. She then asked for a second extension to February 20, 2019. Grandfield accommodated both requests. The day before the scheduled closing, Ms. Chen advised that she refused to close.

[7] Although Ms. Chen raised several grounds in her materials for refusing to close the purchase, by the time of the hearing they came down to two alleged misrepresentations. The first is that she says she was told that the house would be 4300 square feet when it was only 3000 square feet. The second is that the house would be finished to a high standard when it was not. Ms. Chen says she became aware of these short falls from the representations when she first visited the completed house in early February 2019.

[8] For the reasons set out below, I find that neither of these alleged representations gave Ms. Chen the right to abandon the agreement of purchase and sale.

Analysis

No Misrepresentations

[9] With respect to the square footage, Schedule B to the agreement contained an artistic depiction of the house. The following statement appears to the right of the depiction, in reproducing the statement I have tried to approximate the relative font sizes:

> 4255 sq ft
> Includes 1175 sq. ft.
> of finished Lower Level
> Elevation B
> Lot: 3 & 15

[10] Although the reference to the 1175 square foot finished lower level being included in the total size of the house is in smaller font than the total square footage, the font is nevertheless easily readable. In my view there is no misrepresentation in this statement.

[11] Moreover, as indicated in the statement quoted above, the home Ms. Chen wanted was only available on lots 3 and 15. Ms. Chen, however, wanted it to be build on lot 1. As a result, the agreement Ms. Chen signed has “Lot 3 & 15” crossed out and “Lot 1” written by hand

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beneath it. Ms. Chen initialled the changes. Her initials are within millimetres of the reference to the finished basement being included in the home's over all square footage.

[12] While Ms. Chen makes general allegations in her affidavit to the effect that she was assured verbally that the size of the home was 4255 square feet excluding the basement, she provides no particulars of those alleged misrepresentations. Any such representations would, in any event, not form part of the agreement because the agreement contains an entire agreement clause in two places. The first is on page 1 of the agreement which is also the signature page. Section 3 of that page provides:

> "… This Agreement shall not be amended except in writing. The Purchaser releases and absolves the Vendor of any obligation to perform or comply with any promises or representation as may have been made by any sales representative or in any sales brochure, unless same has been reduced to writing herein. It is agreed and understood that there is no oral or written representation, warranty, collateral term or condition affecting this Agreement or the Property, or for which the Vendor or the Owner (or any agent or sales representative) can be held responsible or liable in any way … other than as specifically set out in this Agreement in writing. …"

[13] Section 33 of the agreement provides:

> BINDING OFFER AND ENTIRE AGREEMENT
>
> 33. The parties re-affirm that this Agreement when accepted shall constitute a binding Purchase Agreement between the Purchaser and the Vendor. It is agreed and understood that there is no representation, warranty, collateral term or condition affecting this Agreement or the Property, or for which the Vendor (or any sales representative representing the Vendor) can be held responsible or liable in any way … or alleged against any sales representative representing the Vendor, other than as expressed herein in writing. … the Purchaser shall not make or pursue any claim or proceeding against the Vendor, nor hold the Vendor responsible or liable … for innocent misrepresentation, negligent misrepresentation or otherwise, in respect of, or arising from, any statement, representation, warranty, collateral term or condition alleged to have been made … save and except for those representations of the Vendor herein set forth in writing. The Purchaser further confirms that in entering into this Agreement, he has not relied on any representation, warranty, collateral agreement or condition affecting this Agreement or the Property, or supported thereby, other than those specifically set out in this Agreement or in any of

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> the schedules hereto, and specifically absolves the Vendor … of any obligation or liability to perform or comply with any promise or comply with any promise or representation that may have been made by any sales representative/agent or alleged against them, unless the same has been reduced to writing and is contained in this Agreement or in the schedules hereto.

[14] Entire agreement clauses are routinely enforced. In *Manorgate Estates Inc.*[1] Favreau J. (as she then was) summarized the law on the point as follows:

> As noted by this Court in *Chandler v. Hollett*, 2017 ONSC 2969 at paras. 55 and 60, the courts regularly give effect to these types of clauses:
>
> > "… Courts routinely give effect to entire agreement clauses, precisely to prevent this type of litigation, and to ensure the efficacy and efficiency of commercial arrangements. Here, the entire agreement clause applies to exclude the reliance on pre-contractual representations, since it is an express term of the contract that pre-contractual representations do not form part of the contract: *Gutierrez v. Tropic International Ltd.*, 2002 CanLII 45017 (ON CA), at paras. 24-25." …
>
> The Court of Appeal for Ontario in *Soboczynski v. Beauchamp*, 2015 ONCA 282, … at paras. 43 to 47, set out this principle as follows:
>
> > "An entire agreement clause is generally intended to lift and distill the parties' bargain from the muck of the negotiations. In limiting the expression of the parties' intentions to the written form, the clause attempts to provide certainty and clarity. …
>
> Justice P.M. Perell agrees. He says that "[t]he parol evidence rule then directs that the written contract may not be contradicted by evidence of the oral and written statements made by the parties

[1] *Manorgate Estates Inc. v. Kirkor Architects and Planners*, 2017 ONSC 7154 (CanLII) ("***Manorgate***"), ABOA, Tab 8, at paras. 37 *et seq*.

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> before the signing of the contract. The entire agreement clause is essentially a codification of the parol evidence rule".[2]

[15] Ms. Chen submits that it would be inequitable to enforce the clause against her because she spoke little English and because the person with whom she dealt at Grandfield told her that she did not need a lawyer, that the market was "hot," the lots may be sold if she did not act quickly, and that he was her friend. I do not accept that those are valid grounds for declining to apply the entire agreement clause in this case.

[16] Ms. Chen was a person of some sophistication. She had business experience in China and had purchased and sold real estate in Canada before the transaction at issue here. She knew that at least certain portions of the agreement could be negotiated and negotiated terms herself. She did not like the lot she was offered and had the lot changed. She did not like the lighting fixtures she was shown and negotiated for crystal lighting fixtures to be installed. Ms. Chen would appear to be sufficiently sophisticated to know that she could seek legal advice if she wanted to. Indeed, her allegation that the salesperson told her she did not need legal advice suggests that legal advice was an option. If Ms. Chen chose not to obtain legal advice, that was her decision. She cannot visit the consequences of that decision on Grandfield. Similarly, if Ms. Chen spoke little English, that would make it all the riskier to sign an agreement that she did not read or understand. There is no suggestion that Ms. Chen asked to take the agreement away to have it reviewed by a lawyer. It appears that Ms. Chen preferred the certainty of having the home over the possibility that she might lose the opportunity if she sought legal advice. I note as well that Ms. Chen did not take the agreement to a lawyer shortly after signing it. She only appears to have done so shortly before the closing.

[17] With respect to the alleged shortcomings in the finishings of the house, Ms. Chen alleges that she was told the finishes and fixtures would be of "premium quality," the standard of finishes would be "higher" than they were, and that the finishes would be "luxe" but were, in Ms. Chen's view, of the "lowest quality."

[18] Ms. Chen provides no particulars about the level of finishes in the home. There are no photographs of the home. There is no comparison to other homes at a similar price point. There is not even a verbal description from Ms. Chen that sets out how the finishes fell short of her expectations beyond the bald allegation that they were of the "lowest quality" and that she expected them to be "higher". In those circumstances Ms. Chen has not made out any valid claim about the level of the finishes.

[19] Moreover, without any evidence about the actual level of finishes or the level of finishes one might reasonably expect in a house at this price point, any representations about the level of finishes would also be caught by the entire agreement clause.

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[2] *Manorgate, ibid* at paras. 38 and 41.

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[20] The general principles concerning the forfeiture of deposits in contracts for the sale of land was summarized by the British Columbia Court of Appeal as follows in *Tang v. Zhang:*[3]

> 1. On a general level, the question of whether a deposit or other payment made to a seller in advance of the completion of a purchase is forfeited to the seller upon the buyer's repudiation of the contract, is a matter of contractual intention;
>
> 2. Where the parties use the word "deposit" to describe such a payment, that word should in the absence of a contrary provision be given its normal meaning in law;
>
> 3. A true deposit is an ancient invention of the law designed to motivate contracting parties to carry through with their bargains. Consistent with its purpose, a deposit is generally forfeited by a buyer who repudiates the contract, and is not dependant on proof of damages by the other party. If the contract is performed, the deposit is applied to the purchase price;
>
> 4. The deposit constitutes an exception to the usual rule that a sum subject to forfeiture on the breach of a contract is an unlawful penalty unless it represents a genuine pre-estimate of damages. However, where the deposit is of such an amount that the seller's retention of it would be penal or unconscionable, the court may relieve against forfeiture, as codified by the *Law and Equity Act*;
>
> 5. A contractual term that a deposit will be forfeited "on account of damages" on the buyer's failure to complete does not alter the nature of a deposit but may be construed to mean that if damages are proven, the deposit will be applied against ("on account of") them. If no damages are shown, the deposit is nevertheless forfeitable, subject always to the expression of a contrary intention.

[21] With respect to the first principle set out in *Tang*, the contractual intention here is set out in s. 36 of the agreement of purchase and sale which provides, among other things, that upon the purchaser's default, the vendor:

> … may at the Vendor's option, unilaterally declare the Property Agreements to be terminated and of no force or effect, whereupon

[3] *Tang v. Zhang*, 2013 BCCA 52

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> all deposit monies thereto for paid, together with all monies paid for any extras or changes to the Property, may be retained by the Vendor as the Vendor's liquidated damages, and not as a penalty…

[22] With respect to the second principle from *Tang,* the parties have used the word "deposit" which should, absent a contrary provision be given its ordinary meaning. I was directed to no contrary provision in the agreement of purchase and sale.

[23] With respect to the fourth principle set out in *Tang*, the respondent relies on *World Land Ltd. v. Daon Development Corp*.,[4] where the Alberta Court of Queen's Bench granted a purchaser relief from forfeiture of a deposit which amounted to approximately 15% of the purchase price because the vendor retained the land and had suffered no loss. In that case however, the value of the land had increased almost four fold between the time of default and the time of trial.[5]

[24] It does not strike me that a 15% deposit on a purchase price of a new build home is unconscionable. I note that in *Grandfield Holmes (Kenton) Ltd. v. Li*[6] Pinto J. upheld the forfeiture of a 15% deposit of an affiliate of the applicant under a similar agreement.

Non Est Factum

[25] Ms. Chen relies in her factum on the doctrine of *non est factum* to avoid the agreement. Counsel agreed in oral submissions, however, that the complaints that trigger this defence are the square footage of the home and the level of finishes. For the reasons set out above, those complaints have not been made out. While the question is academic given that the factual complaints have not been made out, it strikes me that the real complaint is not *non est factum* but of breach of contract.

Defects in Applicant's Materials

[26] Ms. Chen also complains that the evidence of the plaintiffs should not be accepted because it is based on an affidavit from someone who had no involvement with the matters at issue, is based on hearsay about contentious points and that the plaintiff has not met the tests of reliability or necessity for the admission of hearsay evidence.

[27] It is not necessary to address these points because I have in no way relied on the affidavits submitted by the applicant other than for the agreement of purchase and sale which is attached to the affidavit and which is not in issue. I base my decision on the agreed evidence that the respondent refused to close the transaction, the contents of the agreement of purchase and sale, and the evidence of Ms. Chen to justify her refusal to close.

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[4] *World Land Ltd. v. Daon Development Corp.,* 1981 CanLII 1140 (Alta. Q.B.), para. 73
[5] *World Land Ltd. v. Daon Development Corp.,* 1981 CanLII 1140 at para. 76.
[6] *Grandfield Homes (Kenton) Ltd. v. Li,* 2021 ONSC 2670

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[28] As a result of my finding about Ms. Chen's absence of grounds for terminating the agreement, Grandfield is entitled to retain her deposit of $502,500.

Trial of an Issue on Damages

[29] In addition to a declaration that it is entitled to the deposit, Grandfield asks that I direct the question of further damages to the trial of an issue. I decline to do so.

[30] The notice of application does not seek the trial of an issue on damages. Although a claim for damages was raised in correspondence that preceded the notice of application, that claim did not find its way into the notice of application itself. The applicant says this is because the closing date was February 20, 2019 and the notice of application was issued on April 1, 2019. By that time the house had not yet been re-sold.

[31] Grandfield also relies on an earlier endorsement of Kimmel J. dated September 1, 2020 in which she notes that Grandfield also claims additional damages beyond the forfeited deposit. In my view that does not assist Grandfield. If in fact Grandfield had wanted to advance its claim for damages, the time to have done so would have been in this application. It did not do so.

[32] In my view it would not be appropriate to grant partial relief, essentially on liability, and then allow Grandfield to proceed to a trial of an issue on damages. That relief was not set out in its Notice of Application. The Notice of Application was never amended. The respondent did not become aware that the applicant was seeking this relief until she received the applicant's factum. Had the respondent known that the applicant was seeking a trial of an issue on damages, she may well have objected to having the matter proceed as an application on the liability issue. The court would likely have had some reluctance to schedule the liability issue as an application and then schedule a separate trial on damages beyond the deposit. To bifurcate the proceeding in that way would result in an inefficient use of judicial resources and would create potential unfairness to the respondent. If for example, the evidence showed that the house was re-sold at a price substantially lower than the price Ms. Chen agreed to pay, that might suggest that the level of finishes in the house was in fact less than one might expect in a house of that price. That inquiry would not, however, be open to the trial judge if liability had already been determined.

[33] Finally, a trial of an issue on damages is a form of relief like any other. To warrant relief, an applicant must demonstrate its entitlement to relief with evidence. The applicant did not take me to any evidence in the record to show damages in excess of the deposit. Similarly, the applicant did it take me to any evidence to demonstrate why it was necessary to bifurcate the deposit and damages issue as opposed to addressing them both in either this application or in an action that would culminate in a trial. The only evidence approaching this that I could find in the applicant's supporting affidavit is at statement to

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the effect that "Grandfield has taken steps to mitigate its losses by remarketing the Home."[7] That is not sufficient evidence to warrant the bifurcated proceeding Grandfield seeks.

[34] In those circumstances, it strikes me that a further trial on damages would be contrary to the direction in s. 138 of the *Courts of Justice Act* that "as far as possible, multiplicity of legal proceedings shall be avoided."[8] I would therefore dismiss the applicant's request for the trial of an issue on damages.

Conclusion and Costs

[35] For the reasons set out above, I grant a declaration that the respondent has breached the agreement of purchase and sale by refusing to close, as a result of which Grandfield is entitled to the deposits of $502,500 that the respondent paid. I dismiss Grandfield's claim for a trial of an issue on any damages in excess of the deposit.

[36] Any party seeking costs as a result of these reasons may make written submissions on costs within 15 days of the release of these reasons. The responding party shall have a further 10 days to deliver its submissions, with a further five days for reply.

Date: May 23, 2023

Koehnen J.

[7] Affidavit of Barry Zhuang, sworn May 31, 2019.
[8] *Courts of Justice Act, R.S.O.* 1990, c. C.43, s. 138; see also *Mundell v. 796586 Ontario Ltd.,* 1996 CarswellOnt 2620 (Gen. Div.), para. 6.

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