CITATION: SARAI et al. v. SINGH et al 2023 ONSC 2102
COURT FILE NO.: CV-21-4554
DATE: 20230403

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
HARNEK SINGH SARAI, VIVEK SHARMA and KARAMJIT SARAI	)	Bhupinder Nagra, for the applicants
Applicants	)	
– and –	)	Prabjot Singh Badesha, for the respondent Kulwant Singh
KULWANT SINGH, KULWINDERPAL KAUR BRAR and HARJIT SINGH AUJLA	)	
Respondents	)	
	)	**HEARD:** November 30, 2022

REASONS FOR JUDGMENT

RAHMAN, J.

1. Introduction

[1] The applicants wanted to buy a large property that could accommodate their growing trucking business. In May 2021, they were put in touch with the respondent, Harjit Aujla, through a mutual friend. They learned that Mr. Aujla and his business partners had a property that the applicants considered ideal for the purposes. It was a 14-acre property located on Airport Road, Caledon. More importantly, the property had a residential building on it that could be used as a large office and workshop. On May 24, 2021, the applicants entered into an agreement of purchase and sale (APS) with the respondents to buy the property for $3 million. The closing date for the sale was November 30, 2021. But the deal did not close.

[2] One of the respondents, Kulwant Singh, did not want to complete the deal. He claimed the applicants had delivered their deposit too late. The APS required the applicants to deliver the $100,000 deposit payable to the respondents' lawyer in trust within 48 hours of the respondents' acceptance of the agreement. But the respondents did not tell the applicants who their lawyer was until May 28, 2021. Within 24 hours of learning the lawyer's identity, the applicants provided a bank draft to satisfy the deposit. The respondents' solicitor accepted the deposit. It was not until weeks before the closing date that the applicants learned indirectly that Mr. Singh may not be interested in closing. And it was not until the day before the closing date that the Mr. Singh notified the applicants in writing that he was not prepared to close the transaction. Mr. Singh considered the applicants' delivery of the deposit untimely because it did not happen within 48 hours of the agreement's acceptance. He claims to have considered the APS to have been at end. He just did not bother to inform the applicants in writing that he was not planning to close their $3 million real estate transaction.

[3] The applicants apply to have the court declare that the APS is binding on the respondents and to enforce specific performance of it. The applicants argue that they had a binding contract with the respondents. They argue that, viewed objectively, Mr. Singh's conduct suggested that there was a fully binding agreement. The fact that Mr. Singh accepted the deposit through the respondents' lawyer made clear that the respondents were waiving strict compliance with the 48-hour deadline. Further, the applicants argue that they are entitled to specific performance because the property is unique, and because damages would be an inadequate remedy. They also say that the equities favour specific performance since the respondent acted in bad faith and the other two respondents were prepared to complete the transaction.

[4] Mr. Singh maintains that he was entitled to treat the APS as being at an end. He claims the applicants breached a fundamental term of the APS by not delivering the deposit on time. He points to the fact that the APS made clear that time was of the essence for doing anything required by it. Mr. Singh says that there is no written agreement providing for an extension of the deadline to provide the deposit. Mr. Singh argues that the applicants could have delivered the deposit directly to the respondents within 48 hours. He also claims that he told the applicants

orally that he was backing out of the deal, though he acknowledges that he did not inform them in writing through his lawyer until November 29.

[5] For the reasons that follow, the application is granted. Mr. Singh was obligated to perform the APS. It was valid and binding. The applicants did not commit a fundamental breach that entitled Mr. Singh to treat the contract as if it was at an end. The APS required the applicants to deliver a deposit payable to a lawyer whose name they had not been given within the 48-hour deposit deadline window. The respondents made strict performance of the condition impossible. And they waived strict compliance with the deadline when they accepted the deposit. Mr. Singh's failure to notify the applicants in writing about his position until November 29 was completely unreasonable. Mr. Singh did not act in good faith in his dealings with the applicants. The applicants are entitled to specific performance of the contract given the uniqueness of the property, the inadequacy of damages, and Mr. Singh's unreasonable behaviour. Mr. Singh's co-respondents were not opposed to completing the deal and have not opposed this application. Specific performance is appropriate.

2. Facts

[6] The essential facts are not in dispute.

[7] The applicants entered into the APS with the respondents for the property at 15245 Airport Road in Caledon on May 24, 2021. Because May 24 was a holiday (Victoria Day), the applicants did not deliver the deposit that day. The APS specified that the applicants were to deliver the $100,000 deposit payable to the respondents' lawyer in trust within 48 hours of the respondents' acceptance of the agreement. It seems that all parties understood that the respondents would advise the applicants of their lawyer's name the next day. I set out the deposit clause below exactly as it appears in the agreement (all emphasis, and non-standard grammar, in the original):

> **DEPOSIT**: Buyer submits in Forty-Eight (48) hours, on acceptance, **ONE HUNDRED THOUSAND** Dollars (CDN$). $100,000 by negotiable cheque payable to **Seller's lawyer in Trust** "Deposit Holder" to be held in trust pending completion of or termination of this Agreement and to be credited toward the Purchase Price on completion. For the purposes of this Agreement, "Upon Acceptance" shall mean that the Buyers are required to deliver the deposit to the Deposit Holder/Seller within 48

> hours of the acceptance of the agreement. The parties to this Agreement hereby acknowledge that, the Deposit Holder shall deposit in trust the Deposit Holder's non-interest-bearing trust account and no interest shall be earned, received or paid on the deposit. If for any reason the transaction is not completed by the buyers on the date of completion, all deposits given under this Agreement of Purchase and Sale will be returned to the Buyers without any deduction.

[8] In the normal course, the 48-hour deadline would have required the applicants to deliver the deposit by May 26, 2021. As it happened, the respondents did not advise the applicants who their lawyer was until May 28, 2021. The applicants either dropped off a bank draft for the deposit amount at the respondents' lawyer's office the next day or made the cheque available for the respondents to pick up the next day. According to the respondent Mr. Aujla, any delay respecting the deposit was the respondents' fault because they did not provide the name of their lawyer, Maninder Mann, until May 28. Mr. Aujla said that none of the respondents took issue with the late delivery of the deposit. He also said that the applicants had followed up after entering into the APS and were asking for the name of their lawyer "every day." When cross-examined on his affidavit about the deposit, Mr. Singh said he had little to no knowledge about the payment of the deposit. Mr. Singh said that he knew the applicants had provided a deposit, but he did not know where the deposit went. He also said that he asked Mr. Aujla about the deposit at some point more than 48 hours after the agreement was signed, but that Mr. Aujla did not tell him anything. Mr. Singh also claimed that he did not know when his business partners told the applicants the identity of their lawyer, to whom the deposit cheque was to be made out. There is nothing in the record that suggests he did anything, himself, to ensure that the applicants were informed of the identity of the respondents' lawyer.

[9] The APS stated that the within 15 days of the agreement the applicants had to fulfill or waive certain conditions. On June 10, 2021, the applicants executed a waiver stating that the conditions had been waived or fulfilled.

[10] On June 17, 2021, a firm called Sahara Lawyers PC sent a letter to Mr. Mann telling him that he did not represent Mr. Singh for the sale. The letter appears to have been in response to a letter that Mr. Mann had delivered to Mr. Singh explaining that Mr. Mann was terminating their solicitor-client relationship. The letter said that Mr. Singh had never retained Mr. Mann. The letter said nothing about Mr. Singh considering the APS to be null and void because the deposit

had not been delivered on time. The letter also did not say that Mr. Mann had no authority to accept the deposit. When cross-examined on his affidavit, Mr. Singh could not explain why he did not have Sahara Lawyers tell either Mr. Mann or the applicants that he considered the agreement to be at an end.

[11] The Applicants say that they heard in September 2021 that Mr. Singh did not want to go through with the deal.

[12] On September 14, 2021, the applicants' lawyer, Ms Nagra, wrote to Mr. Singh directly. She informed him that the other respondents had agreed to move the closing date earlier, to November 15. Ms Nagra's letter explained that her clients were agreeable to moving the date and that they would draft the required amendment to the APS. She asked Mr. Singh to confirm whether he would also agree to move the date, since all sellers were required to confirm the amendment. Mr. Singh did not respond. However, shortly after Ms Nagra sent this letter, the applicant Mr. Sarai heard that Mr. Singh was looking to back out of the deal. Mr. Sarai asked Ms Nagra to write to Mr. Singh.

[13] On September 20, 2021, Ms Nagra wrote to Mr. Singh directly, saying that the applicants had learned Mr. Singh may not want to close the transaction. Ms Nagra's hand-delivered letter asked Mr. Singh to confirm by September 24, 2021 whether he intended to close the transaction. Ms Nagra's letter also said that if she did not hear back from Mr. Singh by September 24, the applicants would proceed on the basis that he had no issue with the closing. Mr. Singh did not respond to the letter. When cross-examined on this point, he said that he did not respond to the letter because he had no reason to respond to it. His rationale was that "the deal is done after 48 hours."

[14] As the closing date approached, the respondents Aujla and Brar informed the applicants that Mr. Singh had retained his own lawyer to handle the transaction's closing. On October 1, 2021, the applicants' real estate solicitor, Mr. Verma, sent a letter to Mr. Mann seeking clarification on who was representing the sellers. On October 7, 2021, Mr. Mann wrote to the applicants' solicitor explaining that he was only acting for the respondents Aujla and Brar. He

explained that he did not act for Mr. Singh. Mr. Mann explained that he understood Supriya Joshi to be representing Mr. Singh. Mr. Mann copied Ms Joshi with his response.

[15] Mr. Verma sent a number of letters to Mr. Mann and Ms Joshi in preparation for the closing. It does not appear that Ms Joshi responded to any of the following correspondence:

- On October 19, 2021, Mr. Verma wrote to Mr. Mann and Ms Joshi with a list of requisitions.
- On November 4, 2021, Mr. Verma wrote to both lawyers again asking for a statement of adjustments to be sent to him as soon as possible.
- On November 22, 2021, Mr. Verma wrote to Mr. Mann and Ms Joshi asking how they wished to receive funds. Mr. Verma said in the letter that he had still not received confirmation that Ms Joshi was representing Mr. Singh. He underscored that the closing date was imminent, and that he required a timely answer.
- On November 25, Mr. Verma wrote to both counsel again asking for them to provide copies of voided trust account cheques.
- On November 29, Mr. Verma sent an urgent letter to both counsel saying that he had received closing documents from the respondents Aujla and Brar, but not from Mr. Singh. He asked for the documents to be sent to him given that the deal was to close the next day.

[16] On November 29, 2021, Mr. Singh finally responded to the applicants in writing. At 3:40 pm that day, Mr. Singh's new lawyer, Jaskaran Sandhu, emailed the applicants' litigation counsel explaining Mr. Singh's position that the APS was void because the applicants' deposit was not delivered on time. There is no dispute that this was the first time Mr. Singh had communicated in writing that he did not intend to close. The material paragraph from the email is set out below:

> Our client is not agreeable to this purchase and sale and did not provide instructions that would suggest otherwise. The APS was voided due to the failure to provide the deposit on time. The APS, dated May 23, 2021, clearly states that the "Buyers are

> required to deliver the deposit to the Deposit Holder/Seller within 48 hours of the acceptance of this agreement." However, the deposit was not provided within the required 48 hours and as a result, the APS is deemed to be void and there is no longer a valid contract. Please forward all communications with respect to this matter to our firm directly.

[17] On November 30, 2021, Ms Nagra wrote back to Mr. Singh's new lawyer and explained why the deposit had not been paid within 48 hours. She also explained that she had received no response to her earlier letter of September 20, 2021. Ms Nagra explained that her clients would hold Mr. Singh to the deal, and that she would obtain a certificate of pending litigation for the property. By this time, the respondents Aujla and Brar had both signed the closing documents and were ready to close the transaction. The respondent Aujla testified that when he learned that Mr. Singh did not want to close, he and the respondent Brar's husband went to Mr. Singh's home to find out why he had not signed the closing documents. Mr. Singh told them that prices had increased so he would not sell at the agreed upon price.

[18] The applicants' real estate solicitor emailed Mr. Mann and Ms Joshi on November 30, 2021, explaining that the applicants were ready to close and providing a copy of the certified cheque for the balance of the monies owed under the agreement. Because Mr. Singh refused to close, the sale did not take place.

3. Analysis

3.1. The contract is binding

[19] The respondents, including Mr. Singh, were bound by the agreement. The fact that the deposit was delivered outside of the 48-hour period set out in the agreement is of no moment. The respondents waived strict compliance with that deadline when they took more than 48 hours to provide their lawyer's name to the applicants. More importantly, they all waived compliance with that deadline when they accepted the applicants' deposit. Despite Mr. Singh's claim that he had never retained Mr. Mann, he was aware that the applicants did deliver a deposit. Yet he took no steps to notify the applicants that he considered the deposit to be untimely.

[20] I cannot agree with Mr. Singh's submission that because there was no agreement to extend the deposit deadline, and because the contract said time was of the essence, he was entitled to treat the contract as having been null and void. The uncontradicted evidence is that the

respondents were late giving their lawyer's name to the applicants. Indeed, there is evidence that it was the applicants who were asking for the lawyer's name so that the cheque's payee would be correct. Mr. Singh, himself, did nothing to ensure any lawyer's name was provided to the applicants, and he claimed his co-respondents kept him in the dark about the deposit. Finally, when the respondents' lawyer, Mr. Mann, accepted the deposit, the respondents, including Mr. Singh, waived strict compliance with the deposit deadline.[1] The failure to deliver the deposit within 48 hours of the agreement in these circumstances did not constitute a fundamental breach.

[21] Moreover, Mr. Singh's contention during his cross-examination that he told the applicants orally, at some unspecified times, that he considered the deal to be dead strains credulity for a number of reasons. First, he made no mention of telling anyone, orally or in writing, in his responding affidavit. This fact only came out when he was cross-examined on his affidavit. Second, he did not specify in his affidavit when it is that he determined that the agreement was at an end. He first claimed in his cross-examination that he was told nothing about the deposit. He later claimed that he learned about the timing of the deposit through Mr. Mann about a week after the agreement was signed. But he did not make clear when he came to the conclusion that the contract was null and void. Third, and most significantly, Mr. Singh had Sahara Lawyers write to Mr. Mann to tell them that Mr. Mann did not act for him on the sale. However, that letter does not mention Mr. Singh's position about the agreement no longer being in force. And Mr. Singh did not bother to instruct his lawyer to write to the applicants' lawyer to notify them of his position. These circumstances all lend credence to Mr. Aujla and Mr. Brar's evidence that Mr. Singh did not want to sell because he no longer liked the price. It is also curious why Mr. Singh would have a lawyer write to Mr. Mann to simply say that Mr. Singh did not consider Mr. Mann to be his lawyer. The implication is that a sale was still supposed to happen, and Mr. Singh did not want Mr. Mann to represent him for that transaction.

[22] I should add that, even if I were to accept Mr. Singh's evidence that he mentioned his position orally to the applicants, it would not change my conclusion. This was a $3 million real estate transaction for a large piece of land. Mr. Singh is not unsophisticated. It was not his first

[1] See *Ahmad v. Ashask*, 2022 ONSC 1348, at para. 120.

real estate transaction. He has his own business. He was also capable of retaining a lawyer to write to Mr. Mann to tell Mr. Mann that he was not his lawyer. It is difficult to understand why he did not see the need to communicate his position about the agreement of purchase and sale being null and void. A party to a contract of this nature who alleges that the contract is unenforceable because of a fundamental breach must communicate that position in writing. That is especially so because he received Ms Nagra's September 20 letter asking him for a response. Mr. Singh's behaviour here, even on his own evidence, was unreasonable. There are sound policy reasons why it should not be rewarded.

[23] I will next explain why I find that specific performance is appropriate in this case.

3.2. Specific performance is appropriate

[24] Specific performance is an equitable remedy. It does not follow automatically where a court finds that one party has improperly refused to live up to its end of a contract. A court that is asked to grant specific performance will consider the following factors to determine whether specific performance should be ordered:[2]

- The nature of the property involved,
- The inadequacy of damages as a remedy, and
- The behaviour of the parties having regard to the equitable nature of the remedy.

[25] As I will explain, in this case, all the foregoing factors favour granting specific performance. I should note that the Mr. Singh's main opposition to this application was about whether the contract was binding. Mr. Badesha made no submissions, orally or in writing, about the appropriateness of specific performance as a remedy. At the end of his oral submissions, he said that his client did not contest the remedy if the court finds the APS to be binding.

[2] *Lucas v. 1858793 Ontario Inc. (Howard Park)*, 2021 ONCA 52, at para 71.

3.2.1. Nature of the property

[26] The more unique a property is, the more appropriate it will be to order specific performance. Uniqueness in this context "means that the property has a quality (or qualities) making it especially suitable for the proposed use that cannot be readily duplicated elsewhere."[3] A court should assess uniqueness from the perspective of the plaintiff at the time the contract was signed. A court "must also determine objectively whether the plaintiff has demonstrated that the property or the transaction has characteristics that make an award of damages inadequate for that particular plaintiff."[4] Moreover, "uniqueness does not mean singularity or incomparability [rather] it means that the property has a quality (or qualities) making it especially suitable for the proposed use."[5]

[27] The applicants have demonstrated that the property is quite unique. In support of their position, the applicants have provided an affidavit from Tony Sharma, a real estate broker. Mr. Sharma deposed that the property is unique because of the following characteristics:

(a) Rural land of 13.85 acres with a residential property;

(b) Finished basement in the residential property with a side entrance;

(c) Easy highway access;

(d) Truck parking allowed;

(e) Gravel yard;

(f) Truck repair shop with storage on site;

(g) Walking distance to schools and plazas;

(h) Subject to commercial zoning in near future; and

(i) Municipal water and not septic.

[28] Mr. Sharma said that he conducted a search for similar properties. He did find three properties, but he opined that they "fell far short of what the subject property had to offer." Mr.

[3] *Lucas*, at para. 74.
[4] *Lucas*, at para. 75.
[5] *Lucas*, at para. 74.

Sharma explained that the other properties were not as big; all were residential and none allowed for trucks to be parked on them.

[29] Mr. Sharma's description of the property supports the applicants' contention that the property is unique. I also accept that the aspects of the property that Mr. Sharma has listed make it a unique one for the applicants. The applicants selected this property because of its size, because it had a residence on it that could be used as an office, and because its zoning would permit them to run their business there. These qualities made it especially suitable for the applicants' intended use. The uncontradicted evidence on this application is that the property is one that is unique.

3.2.2. The inadequacy of damages

[30] This factor is related to the property's uniqueness. While uniqueness focuses on the "subject and objective qualities of the property itself," this second line of inquiry focuses on "whether damages would be an adequate remedy for the plaintiffs in light of their propose[d] use."[6] When considering this factor, a court must keep in mind the "very real element of risk that the translation into money terms of the effect of the breach on the plaintiff may be inaccurate."[7]

[31] I agree with the applicants that damages are an inadequate remedy here. This is a case where any attempt to calculate damages would risk not properly translating the effect of the breach into monetary terms. Moreover, estimating damages would be a time-consuming and expensive exercise. This is not a case where the applicants bought the property for investment or income purposes where it would be relatively easy to quantify the money that they lost. Quantifying damages here would prove to be especially difficult given the lack of comparable properties.

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[6] *Gillespie v. 1766998 Ontario Inc.*, 2014 ONSC 6952, at para 28.
[7] *Lucas*, at para. 68, citing The Honourable Robert J. Sharpe in *Injunctions and Specific Performance*, loose-leaf (2020-Rel. 29), 4th ed. (Toronto: Thomson Reuters, 2012), at §7.50.

3.2.3. The behaviour of the parties

[32] Mr. Singh's behaviour here strongly tips the equities in the applicants' favour. There is a great deal of evidence that Mr. Singh acted in bad faith. I say that because there is evidence that his purported reason for not closing the transaction was manufactured after the fact to get out of a sale he no longer believed was a good deal. However, even if I did not accept that Mr. Singh acted in bad faith, even on his own version of events he purposely acted in a way that was unreasonable. He could have notified the applicants of his position earlier. He did not even bother responding to the letter Ms Nagra sent him specifically asking for his position. This was not reasonable behaviour by someone who had entered into a $3 million real estate transaction, and who knew that the applicants had paid a $100,000 deposit.

[33] I also note that Mr. Singh's co-respondents do not oppose this application and were ready and willing to close the sale. They were taken by surprise when they learned Mr. Singh had not signed the closing documents. This factor favours this court's award of the equitable remedy of specific performance.

3.3. Weighing the three factors

[34] All of the foregoing factors favour granting specific performance in this case. There is no real need to balance the factors, or consider whether one should receive more weight. Specific performance is the most appropriate remedy for Mr. Singh's breach of the agreement.

4. Conclusion and order

[35] The application is granted. An order will issue declaring that the agreement of purchase and sale dated May 24, 2021 between the applicants and the respondents is valid and binding. An order will also issue requiring the respondents to perform the agreement and transfer the property municipally known as 15245 Airport Road, Caledon, Ontario (legally described as PT 1, PL 43R36124 S/T RIGHT AS IN AL20351, TOWN OF CALEDON, Ontario) to the applicants in accordance with the agreement.

[36] If the parties cannot agree on costs, the applicants may file their costs submissions (two pages, double-spaced, one-inch margins), costs outline, and any offers to settle on or before April

13, 2023. The respondents may respond on or before April 24, 2023 (two pages, double-spaced, one-inch margins), costs outline, and any offers to settle. If I have received no submissions within these time limits, I will assume that the parties have resolved the issue and make no costs order.

Rahman J.

Released: April 3, 2023

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