

# COURT OF APPEAL FOR ONTARIO

CITATION: Leeder Automotive Inc. v. Warwick, 2023 ONCA 726

DATE: 20231102

DOCKET: COA-22-CV-0239

Trotter, Sossin and Copeland JJ.A.

BETWEEN

Leeder Automotive Inc. and 2786818 Ontario Inc.

Applicants (Appellants)

and

Douglas Warwick

Respondent (Respondent)

Adam Goldenberg and Gregory Ringkamp, for the appellants

Hilary Book and William McLennan, for the respondent

Heard: May 11, 2023

On appeal from the order of Justice Susan Vella of the Superior Court of Justice, dated September 23, 2022 with reasons reported at 2022 ONSC 5438.

**Trotter J.A.:**

## **A. OVERVIEW**

[1] This appeal involves a share-purchase transaction gone wrong.

[2] The appellants, Leeder Automotive Inc. and 2786818 Ontario Inc. (collectively, “Leeder”) and the respondent, Mr. Warwick, entered into a share-purchase transaction pursuant to provisions of a unanimous shareholders’

agreement (“USA”). Mr. Warwick indicated his intention to sell his shares to Leeder. Leeder agreed to purchase his shares. However, the relationship between Mr. Warwick and Leeder’s CEO, John Leeder, broke down. Mr. Warwick ultimately refused to sell his shares.

[3] Leeder brought an application for an order forcing Mr. Warwick to complete the transaction. Mr. Warwick alleged that Leeder had failed to comply with the governing requirements of the USA and, by doing so, repudiated the share-purchase agreement. Leeder’s application was dismissed. The application judge held that, even though the share-purchase transaction did not constitute a contract separate from the USA, it was nonetheless repudiated by Leeder, and this repudiation was accepted by Mr. Warwick. Mr. Warwick remained a shareholder.

[4] Leeder’s appeal from that decision raises two related questions – was the share-purchase transaction a separate, standalone contract capable of being repudiated? If so, did Leeder repudiate that contract?

[5] As I will explain below, the application judge erred in holding that the share-purchase transaction did not constitute a standalone contract. In light of the terms of the USA in this case, it was a standalone agreement. It was capable of being repudiated. However, the application judge made no error in finding that it had been repudiated. Accordingly, I would dismiss the appeal.

## **B. BACKGROUND**

[6] Leeder Automotive Inc. (the “Corporation”) was incorporated in 2003 by Mr. John Leeder. Through his numbered company (2786818 Ontario Inc.), he has always been the majority shareholder of the Corporation. The Corporation owns two Volkswagen dealerships, one Acura dealership, and four commercial real estate properties in the Greater Toronto Area.

[7] On September 19, 2003, the Corporation and its shareholders entered into the USA. Mr. Warwick is one of several minority shareholders, holding 2,532 (amounting to 5.958%) of the Corporation’s shares.

[8] In 2017, Leeder received a settlement of approximately \$5,000,000 in relation to the Volkswagen TDI emissions scandal (“the TDI Settlement” or “the settlement”). Mr. Leeder received a bonus as a result of the settlement based on the profit made that year. The exclusion of the TDI Settlement from the financial statements and valuation reports became a contentious issue after Mr. Warwick gave notice of his intention to sell his shares.

**(1) The buy-sell mechanism and valuation provisions of the USA**

[9] Articles 8 (Rights of First Consideration) and 12 (Valuation) of the USA govern the sale of shares, subject to one limited exception (which does not arise in this case).<sup>1</sup> These Articles are reproduced in the Appendix to these reasons.

[10] Article 8 establishes a buy-sell mechanism that can be triggered by a shareholder who wishes to sell their shares. Before any shareholder solicits third party offers for its shares, they must offer their shares for sale internally (i.e., as a right of “first consideration”). That is, a shareholder must give written notice to the other shareholders, and to the Corporation, of their intention to sell. The Corporation is entitled to purchase the shares by providing written notice. If the Corporation does not provide written notice, the other shareholders are entitled to purchase the shares. If the other shareholders do not do so, the offeror of the shares is entitled to sell their shares to a third party.

[11] Once the buy-sell mechanism is triggered, Article 12 provides for the manner in which the valuation of the shares is to be determined. In summary, the Corporation’s auditors or accountants are to prepare financial statements using generally accepted accounting principles (“GAAP”), the Corporation’s real estate is to be appraised by an independent expert agreed upon by the shareholders, and

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<sup>1</sup> Under the USA, Article 8 does not apply where a minority shareholder receives “an unsolicited bona fide cash offer” from a third party. In this scenario, Article 9 (“Rights of Matching Bid”) applies.

the Corporation's goodwill is to be determined using the formula contained in Article 12.3. The fair market value of the shares is determined by adding up the value of the Corporation's assets, including its goodwill and the value of its real estate.

**(2) The buy-sell mechanism is invoked**

[12] On June 26, 2020, Mr. Warwick provided notice under Article 8.2 of the USA of his intention to sell all of his shares in the Corporation. Around the same time, four other minority shareholders also provided their notices. These other shareholders have completed their transactions.

[13] On the same day that Mr. Warwick gave notice, Mr. Leeder emailed the Corporation's accountants, BDO Canada ("BDO"), and instructed them to prepare a valuation "according to the [USA]". He attached Article 12 to his email.

[14] Mr. Leeder also asked the Corporation's longstanding property appraisers, Cushman & Wakefield, to appraise the value of its four commercial properties. Earlier, in March 2020, Leeder had asked Cushman & Wakefield to appraise its real estate holdings because some minority shareholders had indicated they may wish to sell their shares. On July 7, 2020, Cushman & Wakefield confirmed that its March 2020 appraisals remained current and accurate. The appraised value of the four properties was \$41,870,000.

[15] On July 16, 2020, Leeder delivered a notice to Mr. Warwick under Article 8.2 of the USA indicating its intention to purchase his shares. Having invoked the buy-sell mechanism, the requirements of Article 12 were triggered.

[16] On July 13, 2020, BDO sent a draft financial valuation report to Mr. Leeder. In the email to which the report was attached, BDO indicated that Article 12.1 required “GAAP financial statements, being a Review or Audit engagement.” However, BDO went on to state that the draft report was “not GAAP.”

[17] On July 28, 2020, Mr. Leeder sent the draft valuation report prepared by BDO to each of the selling shareholders, including Mr. Warwick. Omitted from the valuation was the TDI Settlement that the Corporation received in 2017. This was purportedly done to “normalize the net income” of the Corporation for that year. One of the other selling shareholders, Mr. Duncan Webb, raised concerns about the omission of the TDI Settlement, as well as the report’s compliance with the USA.

[18] On August 2, 2020, Mr. Leeder sent the selling shareholders the appraisal reports prepared by Cushman & Wakefield. Mr. Leeder’s email also responded to Mr. Webb’s concerns about the compliance of the BDO report, and indicated that the report had been prepared in accordance with the USA, with the exception of the deduction of the TDI Settlement.

[19] On August 4, 2020, in order to allay concerns regarding the deduction of the TDI settlement funds, in an email Mr. Leeder offered to add roughly one half of the settlement funds to the valuation. Mr. Leeder attached BDO's final valuation report. The report included a "Notice to Reader" explaining that BDO had not performed an independent audit, that the report was based on information provided by management, and that BDO expressed no assurance concerning the veracity of the statements in its report.

[20] On August 13, 2020, Mr. Warwick informed Mr. Leeder that he was declining the August 4, 2020 offer and would continue as a shareholder. An ensuing email exchange between Mr. Warwick and Mr. Leeder demonstrated that there had been a breakdown of their personal relationship.

[21] By the end of August 2020, all selling shareholders except Mr. Warwick had accepted the August 4, 2020 offer. On August 25, 2020, Mr. Leeder indicated that Mr. Warwick had been put on notice that he could not refuse to proceed with the share-purchase transaction. On August 31, 2020, Mr. Warwick proposed a new valuation for his shares, indicating that the prior valuation was not "in accordance with the Shareholders Agreement". Mr. Leeder did not accept this new valuation.

[22] On October 27, 2020, Mr. Leeder tendered the closing documents for the share-purchase transaction in accordance with the August 4 offer, but did not tender the closing funds. Mr. Warwick did not execute the documents.

### C. THE APPLICATION JUDGE'S REASONS

[23] Leeder brought an application seeking an order compelling Mr. Warwick to complete the transaction. Mr. Warwick's position was that, by failing to comply with the valuation process set out in Article 12, Leeder had repudiated the share-purchase transaction agreement.

[24] On the application, both sides agreed that Mr. Warwick's notice under Article 8.2 of the USA, coupled with the Corporation's response, constituted a standalone contract incorporating the terms of Article 12. The parties disputed whether Leeder had repudiated the agreement by its lack of compliance with Article 12.

[25] The application judge reserved judgment. Following the hearing, different counsel for Leeder at the time wrote to the application judge to bring to her attention to the decision in *Blackmore Management Inc. v. Carmanah Management Corporation*, 2022 BCCA 117, 60 B.C.L.R. (6th) 213, in support of its position that there was a standalone agreement, but it had not been repudiated. The application judge allowed brief written submissions. Leeder's counsel submitted: "Leeder submits (as per *Blackmore*) that yes, the Notice to sell created a contract, and, it was not revocable" (emphasis added). Mr. Warwick also took the position that the share-purchase transaction created a separate contract, but maintained that it had been repudiated.

[26] The application judge relied on *Blackmore* to reject the submission that there was a separate agreement created by the buy-sell mechanism. As she said, at paras. 43-44 of her reasons:

I prefer the analysis of the British Columbia Court of Appeal in *Blackmore*. The Court rejected the characterization of the “shotgun offer” and compulsory “buy-sell provision” of the shareholders’ agreement in that case as a separate standalone contract. The court reasoned that “to invoke a shotgun clause is to rely on a term of an existing contract by which the parties have agreed to a compulsory buyout procedure” (at para. 31). The consequence of this characterization is that the Shareholders’ Agreement as a whole must be considered in examining the enforceability of the share purchase transaction.

This is the appropriate approach to the contractual analysis before me. I have reviewed all of the relevant provisions in the Shareholders’ Agreement beyond Article 8 and Article 12, such as Article 13. I am guided by the principles of contractual interpretation as set out by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47, and cited in *Blackmore*, at para. 32. I have interpreted the buy-sell and buy-sell implementation provisions within the context of the Shareholders’ Agreement as a whole, adopting a “practical, common-sense” approach to determining the objective intentions of Leeder and Mr. Warwick. [Emphasis added.]

[27] Nonetheless, the application judge concluded that this interpretation did not impact her repudiation analysis (at para. 45):

However, in light of my finding, below, that the buy-sell and buy-sell implementation provisions constitute a fundamental part of the Shareholders’ Agreement as a

whole, the outcome is the same whether the share purchase transaction is characterized as a standalone contract or, as I have found, the implementation of the applicable contractual provisions in the Shareholders' Agreement.

[28] The application judge then considered whether the actions of Leeder during the buy-sell implementation amounted to a fundamental breach of the agreement. She relied on the principles and factors identified in *Place Concorde East Limited Partnership v. Shelter Corporation of Canada* (2006), 270 D.L.R. (4th) 181 (Ont. C.A.), and *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, 88 O.R. (3d) 721, application for leave dismissed, [2008] S.C.C.A. No. 151.

[29] Mr. Warwick alleged breaches of the USA which, individually or in combination, amounted to repudiation: (1) the failure of Leeder to close the transaction within the stipulated time period; (2) Leeder's reliance on the Cushman & Wakefield valuation of its properties; and (3) Leeder's reliance on BDO's financial statements and valuation of the Corporation's goodwill.

[30] The application judge found that Leeder failed to close the transaction on time, but she did not consider this breach to be particularly serious, characterizing it as "more of a technical breach than a substantive one in the circumstances of this transaction": at para. 64. However, she found the other two breaches were serious, each amounting to repudiation.

[31] First, the application judge found that Leeder failed to comply with Article 12.2 in respect of the valuation of the Corporation's properties. This provision specifically requires Leeder and the shareholders to agree upon an "independent business valuator." As she said, at para. 72: "Mr. Warwick was not even consulted in the appointment of Cushman & Wakefield, contrary to the express terms of Article 12.2 which calls for a mutually agreeable appointment." Instead, Leeder unilaterally chose Cushman & Wakefield. The application judge also concluded that Cushman & Wakefield were not "independent", given their long-standing relationship with Leeder.

[32] Moreover, the appraisals were done in advance of the "Valuation Date", also specified in Article 12.2. The application judge considered these to be serious breaches because the real estate appraisals formed a significant component of the valuation of the shares. The application judge concluded, at paras. 76-77:

What appears to have happened here is that Leeder simply by-passed the strict requirements of Article 12.2 without any explanation.

In my view, this event of non-compliance is sufficient to deprive Mr. Warwick of substantially the deal he bargained for when he issued his Notice of Intent to Sell and Leeder accepted it pursuant to the buy-sell provisions of the Shareholders Agreement.

[33] Second, the application judge found that Leeder breached Articles 12.1 and 12.3 by relying on BDO's valuation report to determine its value, including the value of its goodwill. Article 12.1 of the USA provided that, in preparing the valuation of

the business, auditors or accountants “shall use generally accepted accounting principles applied on a basis consistent with those used in the preceding fiscal year.” The application judge found that the BDO report was not prepared in accordance with this standard. It was unaudited, prepared on a “Notice to Reader” basis, and did not apply GAAP, contrary to the express language in Article 12.1.

[34] The application judge also found that Leeder had instructed BDO to remove the TDI Settlement from the calculation of net annual income. The TDI Settlement had been included as income in the Corporation’s 2017 financial statements, which were also prepared by BDO, and approved by the Corporation’s directors and shareholders. Indeed, Mr. Leeder’s 2017 bonus had been calculated by including the TDI Settlement.

[35] The application judge reviewed the conflicting evidence concerning why BDO removed the settlement amount. She concluded, at para. 85: “It is reasonable to draw an adverse inference that Leeder instructed BDO to remove the TDI Settlement revenue from its draft valuation report, and BDO complied”. The application judge made the following findings, at para. 89:

Again, applying the five factors from *Place Concorde*, and for the reasons above stated, I find that the financial statements prepared by BDO and relied upon as the basis for the valuation of Leeder’s book value [are] non-compliant with Article 12.1. It flows that therefore the value of the goodwill, reflected in BDO’s financial statements, similarly is not compliant with Article 12.3. This noncompliance is a fundamental breach of the buy-

sell implementation provisions of the Shareholders' Agreement and substantially deprived Mr. Warwick of the bargain he had in the Shareholders' Agreement under the five-part test set out in *Place Concorde* for the same reasons as provided in my analysis of the real estate property valuation. [Emphasis added.]

[36] The application judge concluded that the two serious issues of non-compliance discussed above were each sufficient on their own to justify the exceptional remedy of repudiation, “but there is no doubt when taken together they reach the threshold. The basis by which Leeder agreed to have Mr. Warwick’s shares valued was totally undermined by its conduct and essentially deprived Mr. Warwick of the very thing bargained for under the Shareholders’ Agreement”: at para. 93. The application judge treated the share-purchase transaction as being at an end, with the result that Mr. Warwick continued to hold his shares in the Corporation.

#### **D. THE POSITIONS OF THE PARTIES**

[37] Contrary to the position taken (by other counsel) before the application judge, the appellants submit that the application judge was correct to find that the buy-sell mechanism did not create a standalone contract. However, they contend that she erred, as a matter of law, in concluding that there could be partial repudiation of a contract, in this case the USA. The appellants also challenge the application judge’s conclusions that there were any breaches of the USA, let alone breaches amounting to repudiation.

[38] The respondent submits that the trial judge erred in her reliance on *Blackmore* and in her subsequent finding that the buy-sell mechanism did not give rise to a standalone agreement, capable of being repudiated. However, the respondent submits that the application judge's findings that Articles 8 and 12 of the USA were breached are untouchable, firmly grounded in the record.

## **E. ANALYSIS**

### **(1) Introduction**

[39] Contractual interpretation is a question of mixed fact and law, generally subject to review only where there has been a palpable and overriding error. However, where the judge has made an extricable error of law, the standard of review is correctness: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 51-54; and *Flintoff v. Crown William Mining Corporation*, 2016 ONCA 86, at para. 6.

[40] In my respectful view, the application judge made a palpable and overriding error in concluding that the buy-sell mechanism did not give rise to a standalone agreement. However, I see no error in the application judge's findings that the agreement was breached in a number of respects; individually and in combination, they amounted to repudiation of the standalone agreement.

**(2) The share-purchase transaction was a standalone contract capable of being repudiated**

[41] Leeder submits that this ground of appeal involves a matter of contractual interpretation and gives rise to a question of mixed fact and law that is entitled to deference on appeal. It relies on *Flintoff*, in which Pardu J.A. said the following about the standard of review, at para. 7:

Determining whether an option contained within a contract amounts to a separate unilateral agreement is an exercise driven by the context and the contractual language. In *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265, at para. 41, Bastarache J. stated that:

Whether a contract which contains an option clause establishes a single, bilateral contract or two separate contracts, one bilateral and the other unilateral, is a matter of construction. Courts must examine the text of the contract and the context surrounding it in order to determine the intention of the parties, keeping in mind that this Court has previously approved of the tendency by courts to treat offers as calling for bilateral rather than unilateral performance whenever a contract can fairly be so construed. [Citations omitted.]

[42] In my respectful view, the application judge erred in her conclusion that the buy-sell agreement did not form a separate contract. As laid out in *Flintoff*, this is a matter of contractual interpretation, something that would ordinarily attract deference on appeal. However, the application judge's ultimate conclusion in this case – that the agreement had been repudiated – appears to rest on the assumption that it did not matter whether there was a standalone contract or not (see para. 27, above).

[43] The parties agree that the law does not recognize the concept of partial repudiation of a contract. Repudiation occurs when the entire foundation of a contract has been undermined; where the very thing bargained for has not been provided. It allows the non-repudiating party to elect to treat the contract as at an end, and relieves the parties from further performance of the contract: see *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576, 389 D.L.R. (4th) 671; *Spirent*, at para. 35; *Place Concorde* at para. 51; *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 1 All E.R. 474 (C.A.), at 485; and Angela Swan, Jakub Adamski & Annie Na, *Canadian Contract Law*, 4th ed. (Toronto: LexisNexis Canada, 2018), at §7.89.

[44] Partial repudiation of a contract would be antithetical to a finding that the entire foundation of a contract has been undermined. Accordingly, the application judge could not have found, on the one hand, that the share-purchase transaction was merely an implementation of the USA, but on the other hand, that the transaction agreement alone had been repudiated. Thus, in the circumstances of this case, the application judge's analysis on this issue is not entitled to deference; it is predicated on an incorrect legal assumption.

[45] Returning to the question of whether there was in fact a standalone agreement, both parties urged her to make that finding. It would appear that Leeder's counsel provided *Blackmore* to the application judge in order to draw an analogy between the treatment of the shotgun provision in that case, and the buy-

sell mechanism in this case. However, *Blackmore* does not assist with the interpretive issue in this case.

[46] In *Blackmore*, the shareholder agreement entitled “each shareholder to force a share sale at a price and on the terms stipulated in [the shareholder’s] offer”, at which point “the recipient of the offer decides whether to buy or sell”: at para. 34. The agreement identified the shareholder who triggered the shotgun provision as the “Instigator”, and the target as the “Recipient”. As MacKenzie J.A. wrote, at para. 36: “The ordinary meaning of these provisions is that once the clause is invoked, the process cannot be stopped – the shareholder relationship will be severed” (emphasis added). The court found that, based on the agreement as whole, once the process was triggered, it was irrevocable during the relevant notice period. The offering parties were not permitted to back out even if market conditions changed during that period.

[47] Whether the shotgun provisions gave rise to a standalone agreement would appear to have played a minor role in the *Blackmore* decision. MacKenzie J.A. characterized the invocation of the shotgun provision as the exercise of a contractual term rather than as an offer to form a new contract. This characterization influenced her analytical approach to the central question of revocability. As MacKenzie J.A. said, at para. 31:

I am not persuaded that the invocation of a shotgun clause is either an exercise of a contractual option or an

offer to form a new contract. Rather, to invoke a shotgun clause is to rely on a term of an existing contract by which the parties have agreed to a compulsory buyout procedure. As a result, whether the respondents were entitled to revoke the shotgun offer depends on the proper interpretation of the shareholders' agreement as a whole. [Emphasis added.]

[48] Interestingly, although the application judge in this case relied on *Blackmore* to find the buy-sell mechanism did not create a standalone contract, she declined to characterize the mechanism as a shotgun provision. Relying on the discussion of shotgun provisions in *Western Larch Limited v. Di Poce Management Limited*, 2013 ONCA 722, 117 O.R. (3d) 561, leave to appeal dismissed, [2014] S.C.C.A. No. 32, at paras. 41 and 42, the application judge said, at para. 54:

In my view, Article 12 is not a true shotgun buy-out provision because it cannot be used to initiate a sale of shares against an unwilling vendor. However, once the offer is accepted, this provision does operate in a similar manner insofar as the offeror vendor cannot withdraw from the transaction unilaterally.

[49] As outlined above, Article 8.2 requires that, before a shareholder enters into any discussions with a third party about the purchase and sale of any shares, it must provide notice to all other shareholders of its intention to sell. There is no corresponding obligation on the Corporation to buy those shares. The Corporation may choose not to buy those shares, and the shares may be sold to other shareholders, who may also decline the offer. In this eventuality, the shareholder may sell the shares to a third party: Articles 8.2-8.4.

[50] As can be seen, there is little that is compulsory about this procedure, not at least until the Corporation or other shareholders elect to purchase the offered shares. Built into the buy-sell mechanism are a number of exit ramps, including where the Corporation declines to purchase the shares, and where other shareholders do the same. At this juncture, the offering shareholder may decide to sell to a third party, or they may have a change of heart and retain their shares.

[51] In my view, Article 8.2 creates a mechanism akin to a right of first refusal, giving rise to a new contractual arrangement built on an offer to sell (by Mr. Warwick) and the acceptance of that offer (by the Corporation or other shareholders). The application judge said that Leeder “effectively had a right of first refusal under Article 8.2 of the Shareholders’ Agreement”: para. 46. Indeed, Article 8 is entitled “Rights of First Consideration”, a relevant factor in the interpretation of these contractual provisions.

[52] The essential aspect of a right of first refusal is “a commitment by the grantor to give the grantee the first chance to purchase should the grantor decide to sell. This commitment may be structured in a variety of ways”: Paul M. Perell, “Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land” (1991) 70 Can. Bar Rev. 1, at p. 8 (emphasis added); *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187 at p. 200.

[53] The authors of *Canadian Contract Law* identify a right of first refusal as a type of option contract. They state, at §4.120:

An option contract is a contract like any other. The typical arrangement is that the optionor, *i.e.*, the person giving the option, agrees with the optionee, *i.e.*, the person who may want to exercise that option, to sell property, often real property or shares, to the optionee in return for a payment by the optionee. Options may take other forms; a right of first refusal, for example, is an option to buy property at the price and on the conditions fixed by the offer the optionor has received from a third party. [Footnotes omitted.]

[54] In this case, the triggering of the buy-sell mechanism by the selling shareholders did not force a sale, as the shotgun clause did in *Blackmore*. Instead, the buy-sell mechanism required an acceptance of the seller's offer by the Corporation (or by other shareholders), and in this way the mechanism differed fundamentally from the shotgun clause in *Blackmore*. It was the fact that the buy-sell mechanism required both offer and acceptance that caused it to give rise to a standalone contract. In my respectful view, it was therefore an error to characterize the buy-sell mechanism in this case by relying on the analysis of the shotgun clause in *Blackmore*.

[55] That the buy-sell mechanism must give rise to a standalone contract is also illustrated by the scenario involving a potential sale to a third party. By definition, a third party purchaser is not a party to the USA. Any such sale would undoubtedly involve a separate contract. In oral argument, the appellants submit that this

situation is just “different” and inconsequential. They relied on *Sail Labrador* to illustrate the following distinction. On the one hand, a third party sale would require an offer and an acceptance, thus giving rise to a contract. By contrast, a sale from one shareholder to another would simply follow the process laid out within the existing USA. I would not accept this submission.

[56] The process in the USA required shareholders wishing to sell their shares to make an offer that the Corporation could accept or reject, and subsequently, another shareholder could either accept or reject. The offer, if accepted, created an agreement that the transaction would be completed through compliance with Article 12. The presence of the opportunity for the Corporation or another shareholder to accept - or reject - the offer, and, subsequent to rejection by both, for the offeror to retain their shares, meant that the buy-sell mechanism would give rise to a contract in the same way that sale to a third party would inevitably require the creation of a contract.

[57] In this case, reading the relevant provisions in the context of the USA as a whole, there is no basis on which to characterize a sale between shareholders and a sale between a shareholder and a third party in such fundamentally different ways. This approach would mean that some share-purchases (i.e., to the Corporation or other shareholders) *would not* constitute standalone transactions, and *would not* be capable of repudiation, whereas others (to third parties) *would*. I would reject this interpretation.

[58] In conclusion, the agreement to sell Mr. Warwick's shares was a standalone agreement that arose from and incorporated terms of the USA – specifically, those laying out the valuation procedure under Article 12. As a standalone agreement, it was capable of being repudiated.

**(3) Leeder repudiated the agreement**

[59] As noted above, the application judge found that Leeder had repudiated the share-purchase transaction by failing to comply with various aspects of the valuation process under Article 12 of the USA. The appellant does not claim that the application judge misstated the test for repudiation. Leeder challenges the application judge's findings that two of the three breaches she identified amounted to repudiatory breaches. These factual findings were made after a careful review of the evidence. They were responsive to the submissions of counsel. They are entitled to deference on appeal: *Barresi v. Jones Lang Lasalle Real Estate Services Inc.*, 2019 ONCA 884, 58 C.P.C. (8th) 318, at para. 8. In my view, the application judge made no palpable and overriding error.

[60] Leeder submits that the application judge erred by finding that Leeder had repudiated the contract because Leeder's breaches were "purely procedural defects" and did not deprive Mr. Warwick of the "very thing" for which he bargained. I would reject this submission. The obligations that the application judge found Leeder had disregarded were designed to generate a fair price for the sale of the

shares, which was at the heart of the share-purchase agreement. It is difficult to think of anything more important than the price at which the shares will be purchased. The provisions that were designed to yield fair market value had been disregarded. They were not merely procedural; they were essential, something that the shareholders had agreed upon back in 2003.

[61] Leeder further submits that the application judge erred in finding a fundamental breach in the absence of any evidence of loss sustained by Mr. Warwick. They rely on Mr. Warwick's counteroffer towards the end of the process (see para. 21, above) as an indication that, if there was any breach, it fell far short of being fundamental. The application judge found that Mr. Warwick did not bargain for a specific amount, but rather she found that the "whole bargain" was that he would receive fair market value "in accordance with the formula and process set out by Article 12": at para. 47. These were factual issues for the application judge to determine. I see no error in her assessment of this breach. I also note that this finding is fully consistent with the analysis above: the content of the standalone agreement was that the share-purchase transaction would be completed through compliance with the valuation process in Article 12. Fundamental breach of this article, then, undermined the standalone agreement as a whole.

[62] In terms of the valuation of the Corporation's real estate holdings by Cushman & Wakefield, Leeder contends that there was no breach because

Article 12.2 required the shareholders to collectively choose a valuator. In essence, it asserts that Mr. Warwick was at least partially responsible for allowing the valuation to be performed by Cushman & Wakefield, because he failed to oppose this decision after it was made. I disagree.

[63] As the application judge found, Mr. Leeder as President, and on his own initiative, engaged Cushman & Wakefield on this issue. The previous valuation, from March 2020, was performed to assist Mr. Leeder in buying out his shareholders. There were legitimate concerns about the firm's independence from Leeder. Mr. Leeder did not consult any of the shareholders on this issue. Mr. Warwick was not advised that this valuation process was ongoing until it was presented as a *fait accompli*.

[64] It was open to the application judge to find that the failure to obtain an independent appraisal of the Corporation's real estate holdings was a repudiatory breach of the share-purchase agreement. Afterall, Leeder's real estate holdings were an essential component of the Corporation's value, and the value of its shares. The point of Article 12 was to generate the fair market value of the company based in part on a fair value for these holdings. Bypassing the requirements put in place to generate a fair value would therefore undermine the purpose of this article altogether.

[65] A similar analysis applies to Leeder's attempts to undo the application judge's findings in relation to the BDO valuation. As noted above, Article 12.1 requires that the accountants or auditors "shall use generally accepted accounting principles applied on a basis consistent with those used in the preceding fiscal year". As noted above, when draft financial statements were sent to Mr. Leeder, BDO wrote: "Paragraph 12.1 requires GAAP financial statements, being a Review of Audit Engagement. The draft financials are a Notice to Reader engagement only and are not GAAP" (emphasis added). This draft included the TDI Settlement. Subsequent statements excluded the TDI Settlement. The application judge concluded that this exclusion must have been on the basis of Mr. Leeder's instructions. This conclusion was reasonable.

[66] On appeal, Leeder submits that Article 12.1 did not require formal compliance with GAAP. Something short of GAAP was permitted, based on the language "applied on a basis consistent with those used in the preceding fiscal year". This amounts to the proposition that, in 2003, the shareholders intended that, down the road, the exchange of potentially millions of dollars' worth of shares would proceed on a 'GAAP-lite' basis: without properly audited statements that were instead based on the advice of management. This is an untenable interpretation of Article 12. The provision could not be any clearer. This is undoubtedly why BDO was cautious to alert readers of the statements that they were not prepared according to GAAP. This was a sufficient basis for the

application judge to find that Article 12.1 had been infringed. There is no basis to set aside this finding.

## **F. CONCLUSION**

[67] As I have explained, the share-purchase agreement was a separate contract, which Leeder repudiated by failing to comply with the valuation provisions of the USA. Mr. Warwick accepted the repudiation. Consequently, there is no basis to force Mr. Warwick to sell his shares. I would dismiss the appeal.

[68] At the conclusion of the hearing, the parties requested the opportunity to make submissions as to costs following the decision of this court. I would allow the parties to each make submissions no longer than three pages in length. No reply submissions will be entertained. I would leave it to the parties to make arrangements for the orderly exchange and filing of these materials within 14 days of the release of this decision.

Released: November 2, 2023 “G.T.T.”

“Gary Trotter J.A.”  
“I agree. Sossin J.A.”  
“I agree. J. Copeland J.A.”

## APPENDIX

### ARTICLE 8 – RIGHTS OF FIRST CONSIDERATION

8.1 In the event that any Supporting Shareholder(s) wish to sell some (subject to Section 8.5) or all of the outstanding shares of the Corporation which such Shareholder(s) owns, and he, she or it have not received an unsolicited bona fide cash offer from a person acting at arm's length to each of the Shareholders and the Principals (a "Third Party") for such shares, then the following provisions shall apply.

8.2 Prior to entering into any discussions with any Third Party concerning the purchase and sale of any shares, the Shareholder(s) seeking to sell certain of his, her or its shares of the Corporation shall provide written notice to each of the other Shareholders and to Leeder of his, her or its intentions. Within twenty (20) days following receipt of such notice, LeederCo (or Leeder, at their option) shall be entitled by written notice (for purposes of this section, the "Notice") to the Shareholder(s) who wishes to sell his, her or its shares (collectively, "the Vendor") and to the other Shareholders to purchase such issued and outstanding shares of the Corporation owned by the Vendor. If LeederCo (or Leeder) does not deliver a Notice within such twenty (20) day period it shall be deemed to irrevocably indicate that it does not wish to purchase such shares of the Corporation owned by the Vendor. If LeederCo (or Leeder) delivers a Notice, then it shall be required to purchase all of the shares of the Corporation offered for sale by the Vendor (the "Purchased Shares"), and the transaction of purchase and sale in question shall take place at the Place of Closing and at the Time of Closing on the date which is twenty (20) days following receipt by the Vendor of the Notice.

8.3 If LeederCo (or Leeder) does not deliver the Notice referred to in Subsection 8.2 above, the Shareholders (including LeederCo) shall have a further fifteen (15) day period during which they shall each be entitled by notice (for the purposes of this section, the "Notice") to the Vendor

to purchase all of the issued and outstanding shares of the Corporation offered for sale by the Vendor[.] [...]

8.4 If the Shareholders did not collectively deliver the Notices ... the Vendor may solicit the sale of the Purchased Shares to a Third Party. [...]

## ARTICLE 12 – VALUATION

12.1 Upon the provisions of ARTICLE 7 or ARTICLE 8, as the case may be, becoming applicable, the Corporation shall cause its auditors or accountants, as the case may be, to prepare financial statements for the Corporation as at and for the fiscal period ending on the Valuation Date. In preparing such statements, the auditors or accountants, as the case may be, shall use generally accepted accounting principles applied on a basis consistent with those used in the preceding fiscal year as if the statement date was the fiscal year end of the Corporation, with the exception that only the Book Value of the assets (other than the Lands, the value of which will be determined by a valuator in accordance with Section 12.2 and which will be excluded from such statements, and other than the goodwill of the Corporation, the value of which shall be determined in accordance with Section 12.3 and will be included in such statements) after deducting accumulated depreciation to the date of such statements as well as any other reserves established in accordance with generally accepted accounting principles, consistently applied, shall be reflected.

12.2 Within twenty (20) days following the occurrence of the event giving rise to the transaction of purchase and sale in question pursuant to ARTICLE 7 or ARTICLE 8, as the case need be, an independent business valuator, expertised in the appraisal and valuation of commercial real estate in the GTA, to be agreed upon by the shareholders, shall determine the Fair Market Value of the Lands owned by the Corporation as at the last day of the month preceding that in which the applicable event occurs (the “Valuation Date”). If the Shareholders fail to choose an independent business valuator within twenty (20) days

following the said event, then such independent business valuator shall be chosen by a judge, having appropriate jurisdiction, sitting in the City of Toronto upon the application of any of the Shareholders. In valuing the Lands, the valuator shall take into account and apply generally accepted accounting and valuation principles. However, if the event in question is the death or disability of Leeder, the valuator shall not have regard to the occurrence of his disability or death or imminent possibility therefore. Further, the valuator shall not apply any minority discount with respect to the value of any Shareholder's shares of the Corporation and shall not take into account any proceeds of insurance which may be received by the Corporation pursuant to ARTICLE 11. The valuation arrived at by the valuator, made as an expert and not as umpire or arbitrator, shall, in the absence of fraud, be final and binding, clerical errors accepted, and no appeal shall lie there from.

12.3 The goodwill of the Corporation shall have a Fair Market Value of two and a half (2.5) times the average annual net income of the Corporation and its Subsidiaries, determined on a consolidated basis over the course of the last three (3) completed fiscal years of operation of the Business. If the Corporation and its Subsidiaries have been operating the Business for less than three (3) fiscal years prior to the Valuation Date (or any such fiscal years reflect less than 365 days of operation), a similar average calculation shall be made based on the lesser number of actual completed fiscal years (of at least 365 days in length) of operation. If the Corporation and its Subsidiaries have operated the Business for less than one (1) fiscal year (of at least 365 days in length) prior to the Valuation Date, the Fair Market Value of the goodwill of the Corporation shall be determined by an independent business valuator, to be agreed upon by the Shareholders, on similar terms and conditions, *mutatis mutandis*, as set out above in Section 12.1 in connection with the valuation of the Lands, provided that such independent business valuator shall have expertise in relation to the valuation of goodwill and intangibles, rather than commercial real estate.