

- [4] I award LGG damages in the amount of \$62,400 USD pursuant to the Minimum Payments Clause.

The Issues

- [5] In arriving at this decision, I have considered the following issues:

Issue 1: Did TidySquares stop supplying inventory intentionally or did this result from something outside of TidySquares' control?

Issue 2: Did LGG waive its entitlement to payment pursuant to the Minimum Payments Clause?

Issue 3: What is the amount owed pursuant to the Minimum Payments Clause?

Issue 4: Is the Minimum Payments Clause an unenforceable penalty clause?

Discussion

- [6] Before addressing the issues, I will say a few things about this matter being brought by way of Application.
- [7] Rule 14.05 provides that a proceeding may be brought by Application where the determination of rights depends upon the interpretation of a contract, or in respect of any matter where it is unlikely that there will be any material facts in dispute. TidySquares never took the position an application was not proportionate or appropriate; given the amount in dispute, it was.
- [8] To the extent that there are facts in dispute or credibility issues, these issues are resolvable based on the affidavit evidence and the cross examinations on those affidavits, particularly the significant admissions made by TidySquares. As set out in *2516216 Ontario Ltd. o/a NUMBRS v. AbleDocs Inc*, 2023 ONSC 4713, at paras. 14-17, an order converting an application to an action is typically only made when there is conflicting evidence and complex and disputed questions of fact or credibility which require oral evidence, like the standard applied on a motion for summary judgment. The Court also noted that, as with a summary judgment motion, the Court may proceed on the basis that the parties have put their best foot forward.
- [9] This approach to hearing and determining applications is consistent with the Supreme Court's direction in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, that fairness and justice do not require painstaking procedure and viva voce evidence in all cases, even those where there is some conflict in the evidence. The paramount consideration is whether the process employed can achieve a fair and just outcome.

- [10] I am satisfied that the record before me has permitted me to find facts, make any necessary credibility findings and make necessary inferences to decide this matter; in all the circumstances, proceeding by way of application is a proportionate and fair process.

Issue 1: Did TidySquares stop supplying inventory intentionally or did this result from something outside TidySquares' control?

- [11] I conclude that TidySquares did stop supplying inventory intentionally and that this did not result from something outside TidySquares' control.

The Agreement

- [12] TidySquares sells custom closets directly to builders. Up until the end of 2020, TidySquares also had an e-commerce line which it sold through e-commerce platforms, particularly Wayfair.

- [13] On October 30, 2017, LGG entered into an agreement with TidySquares whereby LGG would market TidySquares' products on e-commerce platforms (the "Agreement").

- [14] Specifically, the Agreement required LGG to "develop and manage" TidySquares' relationships with the on-line retailers set out in Schedule "A" to the Agreement, including WayFair.com, Wayfair.ca, Overstock, Amazon.ca and Amazon.com.

Payment for Services

Commission

- [15] Pursuant to s. 1(b), TidySquares agreed to pay LGG commission on net payments (gross sales minus tax) received by TidySquares from all listed accounts in Schedule "A", which listed accounts could be adjusted over time. The commission percentage varied according to the volume of sales and annual growth. For example, if TidySquares' gross sales grew by \$100,000 each year, it would pay LGG 12 % of such sales in the first year ("Growth Commission"). In the following years, it would pay 6 % of such sales ("Maintenance Commission") and 12 % of any increased sales above \$100,000.

Minimum Payments Clause

- [16] Pursuant to s. 1(c), TidySquares agreed to pay the minimum amount of \$2,000 USD per month per on-line retail account if it intentionally failed to make sufficient inventory available to satisfy orders. Specifically:

In the event that an e-tailer or online marketplace has insufficient inventory as a direct result of the client's intentionally not shipping or making available for shipping sufficient inventory to fill orders, LGG reserves the right to charge a monthly the [sic] minimum of \$2,000 USD per month per account until the client can supply sufficient product to fill orders.

The Force Majeure Clause

- [17] However, the Minimum Payments Clause did not apply if the failure to supply was outside TidySquares' control:

This penalty does not apply in the event that the shortage occurs as a direct result of something outside the clients control i.e third party errors, acts of god, etc.

Termination Clause

- [18] Pursuant to s. 3(c), TidySquares could terminate the Agreement after 360 days by giving three months' written notice. If TidySquares so terminated, it would have to pay ongoing commissions at the current rate for 12 months for all accounts generating more than \$60,000 USD per year, and then only the Maintenance Commission for such accounts for a further 12 months.

- [19] Thus, while TidySquares could terminate without cause, for its own pecuniary benefit or for any reason, there would be financial consequences for a period if it did so.

The Surrounding Circumstances¹

- [20] At the time of the Agreement, the surrounding circumstances of which the parties were aware or of which they were reasonably aware are as follows:

¹ In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 58-59, the Supreme Court directed that when interpreting contracts courts must take into account the surrounding circumstances which are known to the parties, or which reasonably ought to have been known at or before the time of contract formation.

- TidySquares did not manufacture its inventory. Instead, it created custom closet systems from parts manufactured by a third-party. TidySquares argues that it is a surrounding circumstance that the third-party manufacturer was Whip's, who had production facilities in Burlington, Ontario, for products shipped in Canada, and in Phoenix, Arizona, for products shipped in the United States. Although there is no specific evidence before me that LGG knew this at the time of the Agreement, the parties negotiated the Agreement over months, and thus Whip's being the manufacturer was either known, or something of which LGG ought reasonably to have been aware.
- Each of the On-Line Retailers had a different portal to log into, had to be maintained separately, and had their own pricing.
- To perform the Agreement, LGG would have to incur start-up costs that involved developing a pricing strategy, assembling a comprehensive profitability analysis on a per item basis, working on promotional strategy, holding meetings with On-Line Retailers, and evaluating TidySquares' online store presence.
- LGG would also incur ongoing work to maintain these portals, including regular monitoring and performance management to optimize TidySquares' search ranking on the various websites.
- Because the Agreement provided remuneration by way of commission on sales only, it did not specifically compensate LGG for maintenance work if no sales were made. I agree with LGG's submission that the purpose of the Minimum Payments Clause was to compensate LGG for ongoing maintenance work if sales could not be made because TidySquares intentionally failed to supply inventory to fill orders and this failure was not for reasons outside its control.

[21] I disagree with TidySquares' implicit argument that just because LGG likely knew the manufacturer at the time was Whip's, the only obligation on TidySquares to fulfill orders was from Whip's, its then manufacturer. The parties negotiated the Agreement over several months. If TidySquares had wanted to insert a term that specified the manufacturer was Whip's and that limited the terms of the Minimum Payment Clause with reference to Whip's manufacturing capabilities, it could have done so. Instead, there is no mention of Whip's at all in the Agreement.

[22] Reading the Agreement as a whole, in accordance with good business sense, it places an obligation on TidySquares to supply inventory to fill on-line orders. There is no explanation for the Minimum Payments Clause otherwise. The Agreement would make no commercial sense if LGG was required to perform work to maintain the On-Line Retailers and was compensated based on sales, and yet TidySquares had no obligation to supply inventory to fulfill orders.

- [23] Thus, if orders could not be fulfilled by whatever manufacturer TidySquares was using (which happened to be Whip's at the time), there is an implicit obligation on TidySquares to seek to obtain inventory from another manufacturer as part of its obligation to perform the Agreement.

Performance of the Agreement

- [24] There is no denial that from 2017 to 2020, LGG set up and maintained the portals for the On-Line Retailers. There is no claim in this proceeding that LGG failed to perform its contractual obligations or breached the Agreement.

TidySquares Stops Fulfilling Orders

- [25] It is undisputed that from November 2020 through to June 24, 2021, TidySquares stopped filling online orders and/or stopped maintaining any inventory on various On-line Retailers' websites, thereby preventing orders from being submitted or fulfilled.
- [26] It is also undisputed that TidySquares gave notice on March 22, 2021, terminating the Agreement effective June 24, 2021.

Supply Issues

- [27] TidySquares' affiants, Ron Binder (President) and Gav Givon (Vice-President) gave evidence that beginning in or around the fall of 2020, TidySquares was unable to produce any inventory because of the "manufacturing capacity" of its third-party manufacturer Whip's. They said orders to Whip's were not filled on time or at all. TidySquares thus argues that Whip's failure to fill orders was outside of its control, triggers the Force Majeure clause, and nullifies the Minimum Payments Clause.
- [28] In support of these contentions, there are copies of email communications between TidySquares and Whip's between August 27, 2020 and September 4, 2020. These communications did show that there were some issues at Whip's during this period. There was one piece of equipment at Whip's that was not operational during this period which

created a backlog of approximately 20 orders. Whip's also advised that staff illnesses due to COVID caused delays. However, on August 28, 2020, Whip's advised that the one broken machine was running again and that they would start working on the backlog. While there were concerns about delays, the communications show that Whip's was working with TidySquares to address this backlog. As of September 3, 2020, Whip's advised that it had put the first batch of orders on shipment.

- [29] There are also some limited emails between Whip's and TidySquares at a later time, between November 24, 2020, and November 30, 2020, regarding production delays. On November 30, 2020, Whip's did advise that there had been absenteeism due to illness and they would provide updates as they became available. Whip's also confirmed that there were 11 orders on the floor that were ready to go out.
- [30] What is important about the emails attached to both Mr. Binder's and Mr. Givon's affidavits is that Whip's always responded and continued to maintain that they were working on the orders. This is contrary to both Mr. Givon's and Mr. Binder's evidence, as well as TidySquares' ongoing representations to LGG, that Whip's was not responding to their emails and could not manufacture product. Neither Mr. Givon nor Mr. Binder produced any examples of any of their emails that had not been responded to.
- [31] The email correspondence between Whip's and TidySquares, from only August 2020 to September 4, 2020, and then between November 24 and November 30, 2020, does not support TidySquares' otherwise bald allegations that Whip's had been unable to produce inventory beginning in the fall of 2020 up until June 2021. It was TidySquares' obligation to put its best foot forward. Bald allegations together with these limited emails does not satisfy this obligation and does not show that Whip's was unable to supply inventory.
- [32] Further, TidySquares examined Mr. Mike Lycklama, Whip's President, as a witness. He testified that Whip's stopped receiving orders from TidySquares from its Burlington facility in September of 2020 and was never told why. TidySquares' own answers to undertakings confirm that its last order to Whip's in Canada was September 24, 2020.
- [33] Failing to make any orders to Whip's Canadian facility to fill orders were intentional.
- [34] With respect to its factory in Arizona, Mr. Lycklama confirmed that there were issues with one machine that led to a delay in manufacturing certain orders for a three-week period in or around August 2020 only. Mr. Lycklama confirmed that afterwards it began production again and received some orders from TidySquares, which it began filling in September 2020.

- [35] TidySquares' answers to undertakings show that a total of 63 orders were filled by Whip's after September 8, 2020. This significantly undermines TidySquares' position that problems at Whip's prevented inventory from being manufactured and filled.
- [36] Then, in or around October 2020, Whip's learned that TidySquares had been purchased by one of Whip's competitors, Cutler Group Inc. ("Cutler"), who had its own business selling products to builders. Whip's also learned that TidySquares had begun approaching Whip's dealers to make direct sales to them of building supplies.
- [37] Mr. Lycklama telephoned Mr. Binder from October 2020 to November 2020 to discuss his concerns about TidySquares competing with Whip's. He left multiple messages to discuss this but Mr. Binder did not return his calls until October 30, 2020, when Mr. Binder emailed saying that he was busy and would call back. Mr. Lycklama followed up on November 17, 2020, but TidySquares never responded. These emails are in the record.
- [38] As a result, Whip's ultimately decided to stop producing inventory for TidySquares in Arizona. This is why there were ultimately orders that Whip's did not fill, not its manufacturing capability.
- [39] TidySquares could have obtained whatever evidence it wished from Whip's but asked only a total of 10 questions. I was not referred to any evidence that would have contradicted Mr. Lycklama's testimony.
- [40] As part of TidySquares' obligation to perform the Agreement in good faith, it was obliged to at least make some effort to hear Whip's concerns about it competing with Whip's by selling to Whip's dealers. TidySquares' failure to at least respond to inquiries from Whip's at all about these concerns was intentional and resulted in Whip's deciding to terminate the supply agreement. TidySquares knew or ought to have known that its failure to communicate with Whip's about this would cause this outcome. In other words, it was not open to TidySquares to begin competing with Whip's, ignore communications from Whip's, and then claim that Whip's subsequent failure to fill orders was "outside its control". I add that there is not even any evidence that TidySquares followed up with Whip's about the orders.
- [41] Further, even if TidySquares had been able to prove that Whip's could no longer provide inventory, or that it was justified in moving away from Whip's because of backlogs or delays, both Mr. Binder and Mr. Givon admitted that there were other facilities that could have manufactured their product, and that they never made any effort to find another manufacturer. This was also intentional.

- [42] While TidySquares argued that it would take time for it to find and establish a relationship with another manufacturer, there is no independent evidence in this regard, only bald self-serving assertions from Mr. Binder and Mr. Givon. The fact that TidySquares failed to even try is telling and does not satisfy its obligation of good faith performance or of putting its best foot forward.
- [43] I also reject TidySquares’ argument that there was a burden on LGG to provide evidence that there were other manufacturers who could have stepped in, particularly since TidySquares did not even try to find one. In any event, as set out in *Morris et al v. Cam-Nest Developments Ltd.* (1988), 63 O.R. (2d) 475 (High Ct.), at para. 43, while the burden is always on the plaintiff or applicant, where the subject matter of the allegation is particularly within the knowledge of one of the parties, that party must prove it.
- [44] The work LGG did pursuant to the Agreement was all in respect of On-Line Retailers. It had no responsibility for manufacturing, and there is no evidence that it had any information on manufacturing specifications, TidySquares’ product costing or other issues particular to TidySquares’ manufacturing needs. These are things that would need to be known to locate other suitable manufacturers. I infer that LGG did not have this information. If TidySquares wanted to prove that it would have taken too long to find another manufacturer, it should have provided some evidence, apart from bald self-serving allegations, as part of its obligation to put its best foot forward.
- [45] Furthermore, TidySquares’ own evidence, as set out in Mr. Binder’s affidavit, shows that the real reason TidySquares stopped supplying inventory is that its new owner, Cutler, “elected to pursue a new business model for TidySquares by moving away from the ecommerce approach” and that “TidySquares was precluded from offering its products for sale on online platforms serviced by LGG.” Mr. Binder confirmed when cross examined that this decision was made “with TidySquares’ authority.”
- [46] In terms of when this decision was made, cross examination of Mr. Givon showed that this was in or around August 2020, immediately after Cutler acquired TidySquares:

Still in 2020, it was very soon after I think we signed the contract, that they made a decision, as majority owners, they were like, ‘You guys are just not going to do the e-commerce...’

[...]

Of course I wouldn’t remember a date. But it was pretty much right when we signed the contract with them.

[...]

So, let's say in August 2020, they made the decision that they don't want us to focus on e-commerce specifically, from their manufacturing facility.

- [47] He further testified that this was at least, in part, because their margins were low on e-commerce.
- [48] I am satisfied that TidySquares intentionally stopped providing inventory to fill on-line orders such that the Minimum Payments Clause was triggered, and that this failure was not the result of something outside of TidySquares' control.
- [49] Rather, the failure to provide inventory was the direct result of a decision made by its new owner, Cutler, that it would move away from on-line sales. TidySquares intentionally failed to make orders from Whip's Canadian facility after September 2020, intentionally failed to respond to Whip's inquiries regarding TidySquares' alleged sales to Whip's dealers from October 2020 to November 2020, resulting in Whip's termination of its supply from the Arizona facility, and intentionally failed to at least try to find another manufacturer.

Issue 2: Did LGG Waive its entitlement to make a claim pursuant to the Minimum Payments Clause?

- [50] I reject the argument that LGG waived its entitlement to make a claim pursuant to the Minimum Payments Clause.
- [51] Mr. Binder of TidySquares gave evidence that Mr. Gordon assured him that they would not apply the \$2,000 USD penalty "because it was clear that the inventory problems were outside TidySquares' control."
- [52] The Agreement specifically provides that waivers must be in writing and signed by LGG:

10. Strict Performance of Covenants

The failure of any party to pursue any remedy resulting from a breach by any party shall not be construed as a waiver of that breach by that party or as a waiver of any subsequent or other breach unless such a waiver is in writing and signed by the relevant party.

[53] There is no evidence of any signed.

[54] At most, there is an email from Mr. Gordon on or about March 19, 2021, where TidySquares does say that LGG had “been patiently in pursuit of an updated mutual agreement for an extended period of time and have waived our penalties in order to build a good faith relationship.” This email does not satisfy the contractual requirement for a waiver in accordance with the Agreement. Further, read in context, in all the circumstances, although the word “waiver” is used, the email shows that LGG had not charged the monthly minimum because it continued to believe that supply issues were outside TidySquares’ control, taking at face value TidySquares’ various assertions.

[55] Further, at no time until it filed its responding materials in this proceeding did TidySquares advise LGG that Cutler had already made the decision in August 2020 that TidySquares would no longer be in the e-commerce business. Indeed, throughout the fall of 2020 and early 2021, TidySquares represented to LGG that it would be able to obtain inventory from its new owner, Cutler, imminently for the e-commerce business:

- On November 16, 2020, TidySquares wrote to LGG advising that it would be able to ship products from Cutler, in December of 2020.
- On November 26, 2020, TidySquares wrote that Whip’s experienced COVID outbreaks at its factories in Burlington and Phoenix, but that it was hoped that shipping from Cutler would begin, as they had told LGG earlier.
- On November 30, 2020, TidySquares wrote that Whip’s seemed unable to manufacture orders, but that it was hoped that product would be shipped out of Cutler’s locations in the next couple of weeks.
- On December 17, 2020, TidySquares advised that it had worked out an arrangement to manufacture its inventory through Cutler for both Canadian and U.S. orders. Even though there is no evidence of any further communications with Whip’s after November 2020, TidySquares continued to maintain that Whip’s had continued COVID issues in addition to issues in their manufacturing and even said that Whip’s had not been returning their emails or calls for weeks, of which there is no supportive evidence. It represented that Cutler would be taking the reins by the end of January which would make things run more smoothly. As set out above, the email correspondence between Whip’s and TidySquares does not support this; nor does the evidence from the President of Whip’s, Mr. Lycklama.
- On January 19, 2021, TidySquares again emailed explaining efforts it was making to get manufacturing going. It set out photographs of what were presumably boxes of inventory and advised that a new system was expected to be in place by March 2021.

- [56] It is also telling that TidySquares terminated the Agreement on March 22, 2021, shortly after LGG finally indicated that it would start claiming the monthly minimum pursuant to the Minimum Payments Clause by email on March 19, 2021.
- [57] Because of TidySquares' misrepresentations which resulted in LGG not applying the Monthly Minimum, and this delay in termination, TidySquares eliminated the payment that would have been required pursuant to s. 3(c) of the Agreement upon a without cause termination, because the amount payable pursuant to this clause had a threshold of sales that had to be reached and was based upon the previous year's commissions, which had already been artificially reduced by TidySquares' conduct. Mr. Binder's affidavit confirms its position that no compensation would be paid under s. 3(c) because as at that time, "TidySquares had no online marketplace accounts generating more than \$60,000 USD per year...when the Contract terminated."
- [58] TidySquares cannot lawfully string LGG along, misrepresent the facts concerning Whip's manufacturing capabilities, misrepresent Cutler's supposed ability to start manufacturing product when Cutler had already decided to discontinue the e-commerce business in August 2020, and then rely on LGG's alleged indulgences with respect to the Minimum Payments Clause, which indulgences were procured by TidySquares' own misrepresentations.
- [59] To hold that LGG waived its rights in these circumstances would be inconsistent with the principle that waiver can only occur where one party to a contract takes steps that amount to "foregoing reliance on some known right or defect in the performance of the other party" in circumstances where the party had "full knowledge of rights" and made an "unequivocal and conscious intention to abandon them": *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, at paras. 19 and 20 [Emphasis added].

Issue 3: What is the amount payable pursuant to the Minimum Payments Clause?

- [60] There were five On-Line Retailers whose websites TidySquares maintained: Overstock.ca, Overstock.com, Amazon.ca, Amazon.com and Wayfair.
- [61] I reject TidySquares' evidence set out in Mr. Binder's affidavit that no minimum payment is due in respect of Amazon.com on the basis that TidySquares has not had an active seller account on Amazon.com since at least 2018. Mr. Gordon provided an excel spreadsheet which showed that TidySquares received and cancelled orders on Amazon.com as late as April 2021. This has not been contradicted with any other documentary evidence, or even a further reply affidavit from TidySquares.
- [62] With respect to Amazon.ca, I accept Mr. Binder's evidence that Amazon.ca was cancelled in or around 2018. Although there is a conflict in the evidence on this point, there is no similar evidence of orders made on Amazon.ca throughout this period. The burden is on

LGG to demonstrate the amount due pursuant to the Minimum Payments Clause. Since the evidence on Amazon.ca conflicts, I cannot resolve it and therefore LGG has not met its burden with respect to Amazon.ca.

[63] Although there was no formal amendment to Schedule “A” of the Agreement, that set out the list of on-line retailers, it would be an unreasonable interpretation of the Agreement to find that the Minimum Payments Clause applied to Amazon.ca in these circumstances.

[64] The uncontested evidence is that TidySquares stopped filling orders in November 2020.

[65] Therefore, the total payment owed by TidySquares for the 7 months from November 1, 2020, to June 1, 2021, pursuant to the Minimum Monthly Payment clause is $\$2,000 \times 4 \times 7 = \$56,000$ USD. LGG says the Agreement was terminated effective June 24, 2021. This is a partial month with 30 days. The pro rata amount payable for the month of June is \$6,400 USD such that the total payment required is \$62,400.

[66] Here I point out that the Minimum Payment would still be due during the three-month termination period; during this period, the parties would still have to perform their obligations which included TidySquares supplying inventory to fill orders, which it did not do.

Issue 4: Is the Minimum Payments Clause an unenforceable penalty clause?

[67] I also reject the argument that the Minimum Payments Clause is an unenforceable penalty clause.

[68] TidySquares focuses on the fact that the total payments made to LGG for the years 2019, 2020 and 2021, were only \$50,863, and that the payment pursuant to the Minimum Payments Clause is unreasonable because it is far in excess of this, on a pro rata basis. I note that the chart submitted is incomplete because TidySquares stopped supplying inventory in or around the fall of 2020 so there could be no sales afterwards, and also because TidySquares failed to provide include amounts sold in 2018.

[69] In any event, TidySquares’ argument misunderstands the legal test which applies to clauses like the Minimum Payments Clause.

[70] Pursuant to *Peachtree II Associates—Dalas L.P. v. 857486 Ontario Ltd.* (2005), 76 O.R. (3d) 362, at para. 24, the test is whether the Minimum Payments Clause was a genuine attempt to estimate the damages LGG would suffer in the event of the breach at the time of the contract, not what LGG was earning shortly before the Minimum Payments Clause was

triggered. Further, given the test, the fact that the word “penalty” is used in the Minimum Payments Clause is not determinative.

[71] As also set out in *Peachtree*, at para. 34, there is a policy of upholding freedom of contract, particularly where parties have turned their mind to the damages that would be incurred by the innocent party in the event of a breach. Provisions like these make it easier and cheaper for parties to address a breach when it occurs, particularly in a case like this, where it would be difficult to calculate damages given that TidySquares had never had anyone doing this work, and the parties hoped and expected that sales would increase continually. Thus, expert evidence would likely be required in the event of a breach.

[72] Section 1(b) shows that the parties contemplated that there could be significant sales and earnings by LGG:

Client shall pay LGG a commission per the table below of Client’s net payments received (less Sales Tax if any) from all accounts listed in appendix A on an annual basis commencing upon the date of execution of this agreement. The currency of the payment shall be the same as that which is received/transacted in.

	From 0 an \$2MM USD [Annual Per Account]	From \$2MM - \$4MM USD [Annual Per Account]	Above \$5MM [Annual Per Account]
Growth	12% of Gross Sales	10% of Gross Sales	8% of Gross Sales
Maintenance	6% of Gross Sales	5% of Gross Sales	4% of Gross Sales

[73] Thus, the parties contemplated that sales could be as high as \$5,000,000 per year per account or \$25,000,000 per year for all five On-Line Retailers. If these were growth sales, the parties contemplated that LGG could earn as much as \$2,000,000 annually.

[74] Considering what the parties expressly contemplated at the time of the Agreement, the Minimum Payments Clause is not extravagant or unconscionable in comparison to the greatest loss that could conceivably be proved.

- [75] Further, although evidence of pre-contractual negotiations should not be admitted to interpret an agreement², evidence of these negotiations is relevant to the inquiry of whether the Minimum Payments Clause was a genuine attempt to estimate the damages.
- [76] This Minimum Payments Clause was not boiler plate; the parties had significant negotiations about it which lasted months. The initial draft proposed by LGG referenced a minimum monthly fee of \$4,000 USD per month per account until TidySquares could supply sufficient product. This version did not contain any force majeure language.
- [77] TidySquares initially sought to strike out the provision altogether but then sent a revised draft that lowered the minimum monthly fee from USD\$4,000 to USD\$2,000 and added the force majeure language.
- [78] LGG accepted the reduced amount because of its belief in the significant potential to grow TidySquares' online sales, which potential was reflected in clause 1(b) as set out above.
- [79] Mr. Binder agreed that both parties came to an agreement they could live with.

Conclusion

- [80] Judgement to go awarding LGG contract damages in the amount of \$62,400 USD payable within 30 days.
- [81] I strongly encourage the parties to settle costs so that they do not expend more money on this matter through the preparation of costs submissions. If they cannot, they may make submissions as follows: LGG within 7 days and TidySquares within 7 days thereafter, each to be no longer than 4 pages.

Papageorgiou J.

² See *Goodlife Fitness Centres Inc. v. Rock Developments Inc.*, 2019 ONCA 58, at para. 15.

Released: February 12, 2024

CITATION: Looking Glass Group v. Tidysquares Limited, 2024 ONSC 920

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

LOOKING GLASS GROUP LTD.

Applicant

– and –

TIDYSQUARES LIMITED

Respondent

REASONS FOR JUDGMENT

Papageorgiou J.

Released: February 12, 2024