CITATION: McDonald v. Lowrie, 2025 ONSC 1397
COURT FILE NO.: CV-24-090
DATE: 2025/03/04

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
GRANT ALLEN MCDONALD Applicant	)	Sandra L. Dimeo, for the Applicant
– and –	)	
JANE LOWRIE, ANNE O'NEILL and SUSAN LOWRIE, in their capacity as the ESTATE TRUSTEES OF THE ESTATE OF JUNE LOWRIE Respondent	)	Richard B. Swan, Marshall Torgov, for the Respondent
	)	**HEARD:** January 13, 2025

TRANQUILLI J.

Overview

[1] A century home was destroyed by fire before its agreement of purchase and sale was scheduled to close. The applicant purchaser wanted to proceed with the sale, subject to the respondent vendor's guarantee of the minimum amount of insurance proceeds available to indemnify the loss. The agreement did not close as scheduled. The respondent claimed the applicant repudiated the agreement, thereby terminating the sale and forfeiting the deposit.

[2] The applicant seeks a declaration the respondent breached an agreement of purchase and sale and requests an order of specific performance requiring the sale to close. In the alternative, the applicant seeks relief from forfeiture and the return of his deposit.

[3] At issue is whether the applicant's requirement for a guaranteed amount of insurance proceeds was a repudiation of the agreement that allowed the respondent to terminate the agreement and retain the deposit.

[4] The applicant submits he fulfilled his obligations under the agreement. Subject only to reaching agreement on the terms of the assignment, he was ready, willing, and able to

close the sale. The applicant contends the respondent breached the agreement because of the untimely disclosure of the proposed assignment of insurance proceeds and an unreasonable refusal to accommodate a brief extension to allow the parties to reach agreement on the terms of the assignment. The respondent should not be able to rely on the time of the essence clause. The applicant submits the equities favour specific performance of the agreement as the property is unique, the applicant had otherwise fulfilled his obligations under the agreement, and damages would be an inadequate remedy. In the alternative, he submits these are circumstances where it would be unconscionable for the respondent to retain the deposit.

[5] The respondent submits the circumstances unquestionably demonstrate the applicant repudiated the agreement through the insistence of varying its terms to include the respondent's guarantee of the insurance monies payable for the loss. The respondent acted reasonably in agreeing to an extension of the closing date to allow for more particulars of the insurer's settlement position. However, the applicant was otherwise not entitled to require the respondent to guarantee the specific amount of insurance owing. The assignment proposed by the applicant did no more than reflect the applicant's obligations under the agreement and the respondent was not required to accept the applicant's terms for the assignment. The respondent was therefore entitled to treat the agreement as terminated and to retain the deposit. In any event, the respondent submits these facts do not favour specific performance of the agreement. The century home was destroyed and all that is at issue is a vacant property. Moreover, specific performance would have the effect of providing the applicant with a windfall where he was previously not motivated to close the sale. Finally, the applicant is not entitled to relief from forfeiture. This was a straightforward real estate transaction with no inequality of bargaining power. It is not unconscionable for the respondent to retain the deposit in accordance with the clear terms of the arms length agreement.

[6] These reasons shall explain why the court finds the application must fail. The weight of appellate authority leads to the conclusion that the applicant was not ready, willing, and able to close the sale in accordance with the agreed upon terms. The respondent was only required to give the applicant a reasonable amount of time to consider whether to elect to terminate the agreement or to take the insurance proceeds and close the sale. The respondent did so. The applicant's attempt to require the respondent to guarantee the minimum insurance funds payable amounted to a refusal to complete the agreement as written and entitled the respondent to accept the repudiation, terminate the agreement and retain the deposit. In any event, the court is not persuaded that the equities favour specific performance. Any uniqueness to the century home vanished with its destruction in the fire. The record is otherwise scant on evidence that demonstrates the property is otherwise objectively or subjectively unique or that damages would be an inadequate remedy. The agreement defined the consequences of a breach. The circumstances are not exceptional and do not justify relief from forfeiture of the deposit.

Background

[7] The application proceeded on a written record, with no cross-examinations on the affidavits. The parties agreed there are no material facts in dispute and that the court can make the necessary findings based upon the law of contract and governing authorities. While the parties invite the court to interpret certain of the facts in a different light, I agree there is no impediment to the court's ability to fairly and justly interpret the agreement on this record.

[8] The applicant entered into the agreement of purchase and sale on May 2, 2024 to buy the residential property at 144141 Hawkins Road, Tillsonburg, Ontario from the respondent estate for $775,000, including a deposit of $25,000. The property consisted of a rural century home on a mature two-acre lot. The deal was to close on August 12, 2025.

[9] The parties used the Ontario Real Estate Association's ("OREA") standard form agreement of purchase and sale. The standard form provisions included clauses addressing the entire agreement and that time shall be of the essence.

[10] The agreement also included an "insurance clause" that provided the terms on which the property would remain at the respondent's risk until closing. In the event of substantial damage, the purchaser would have the option to elect either to terminate the agreement with a refund of the deposit or to take the proceeds of any insurance and complete the sale:

> 14. INSURANCE: All buildings on the property and all other things being purchased shall be and remain until completion at the risk of Seller. Pending completion, Seller shall hold all insurance policies, if any, and the proceeds thereof in trust for the parties as their interests may appear and in the event of substantial damage, Buyer may either terminate this Agreement and have all monies paid returned without interest or deduction or else take the proceeds of any insurance and complete the purchase. No insurance shall be transferred on completion. If Seller is taking back a Charge/Mortgage, or Buyer is assuming a Charge/Mortgage, Buyer shall supply Seller with reasonable evidence of adequate insurance to protect Seller's or other mortgagee's interest on completion.

[11] A fire destroyed the home on May 22, 2024. There is no dispute that this event engaged the insurance clause.

[12] On July 19, 2024, the applicant's lawyer notified the respondent's lawyer that the insurance clause was invoked and requested details of the insurance available to respond to the loss. On August 2, 2024, respondent counsel provided a copy of the insurance policy. The respondent confirmed the policy was valid and that the insurer was in the process of obtaining quotes in respect of the loss, which might not be available until after the scheduled closing date of August 12, 2024. On August 12, 2024, the respondent provided the closing documents; however, the parties also formally agreed to extend the closing date to August 28, 2024, to allow for receipt of more information about the available insurance.

[13] On August 26, 2024, the respondent received and forwarded the insurer's offer to settle the insurance claim. The contractor's rebuild quote totalled $973,813.94. The insurer proposed the respondent could either hire a contractor to rebuild the house or take a cash settlement of $749,375.37, being the rebuild quote less overhead, profit and taxes.

[14] On August 27, 2024, the applicant requested a one-month extension in order to consider the insurer's proposal. The respondent would only agree to a brief extension of a couple more days. On August 28, 2024, the parties agreed to extend the closing date to August 30, 2024, at 5:00 pm.

[15] On August 29, 2024, applicant counsel raised concern about the sufficiency of the insurer's settlement offer and repeated his request for a one-month extension of the closing date. That same day, respondent counsel advised that the insurer had already given a definite commitment of the amount payable under the policy and that the respondent would not agree to any further extensions of the closing date. The respondent also advised the estate would execute an assignment of the insurance proceeds to the applicant.

[16] Closing day arrived on August 30, 2024. The respondent tendered the closing documents and included an assignment of insurance proceeds by the estate to the purchaser. The applicant forwarded the balance of the funds due on closing and a direction authorizing the estate to transfer the property to the applicant. However, the applicant did not register the transfer. Respondent counsel made several inquiries throughout the day as to the status of the registration.

[17] Shortly before the 5:00 pm closing deadline, the applicant provided a revised assignment to the respondent and advised the purchaser would close the sale subject to the respondent's guarantee of the minimum insurance proceeds payable for the loss. The closing deadline of 5:00 pm passed without the registration of the transfer. By follow up communication later that evening, applicant counsel proposed that the estate trustees execute the revised assignment with an extension of the closing date to September 3, 2024, with adjustments to remain as at the closing date of August 30, 2024, and with time to remain of the essence.

[18] By responding letter of September 3, 2024, respondent counsel advised that the applicant had repudiated and terminated the agreement through its insistence on the guarantee of the insurance proceeds. The respondent returned the sale proceeds less the $25,000 deposit, taking the position the applicant had forfeited the deposit through breach of the agreement.

[19] The applicant commenced this application within a few weeks of the failed closing and brought a motion for a certificate of pending litigation. The parties resolved the motion on the respondent's undertaking the estate would not assign, sell, or encumber the property pending final disposition of this matter.

Analysis

[20] The reasons of the Supreme Court of Canada in *Wile v. Cook*, [1986] 2 S.C.R. 137 are dispositive of this matter. *Wile* concerned an insurance clause in an agreement of purchase and sale similar to, although not the same as, the OREA insurance clause in issue. Nevertheless, the Court of Appeal has accepted that this clause is substantially similar to the OREA insurance clause, such that *Wile* applies in this context: *Bilotta v. Booth*, 2020 ONCA 522 at paras. 17-18.

[21] The insurance clause alleviates the harshness of the common law which would otherwise require a purchaser to go through with a purchase when the property is damaged and pay the full purchase price. The provision requires the property to remain at the risk of the vendor until closing. In the event of damage to the premises, the purchaser may either take the insurance proceeds and complete the purchase or cancel the agreement and have the deposit returned. However, the clause does not set forth a specific amount of insurance. The clause only provides for the purchaser to be entitled to receive whatever insurance proceeds may be owing, but "*does not give the purchaser any guarantee that the insurance money is necessarily collectible*": *Wile*, at 143. While the purchaser is entitled to be granted time to obtain the details of insurance coverage from the vendor and to consider his election, the clause does not accord the purchaser the right to wait and see if the insurer will pay. The purchaser has the option to cancel the agreement if he is concerned about the insurance: *Wile*, at 143.

[22] The applicant purchaser had the same option in these circumstances. Consistent with the court's advice in *Wile*, the respondent recognized that sufficient details of the insurance proceeds would not be available in advance of the original closing date and agreed to a two-week extension, in which time the insurer's settlement offer materialized. In my view, the respondent was not required to do anything further. If the applicant was concerned that the insurance payout was insufficient or uncertain, then his option was to cancel the agreement and have the deposit returned.

[23] I do not accept the applicant's contention that the respondent "sprung" the terms of the assignment on the applicant and that the respondent is therefore disentitled from relying on the time of the essence in the agreement. The applicant was aware of the extent of the destruction, the existence of the insurance policy, and the insurer's offer. The closing date was extended to permit the applicant an opportunity to receive and consider the insurer's settlement position. The assignment presented by the respondent did no more than give effect to the OREA insurance clause, which obliged the respondent to hold "any" proceeds of insurance in trust for the applicant. The omission of the specified amount of insurance proceeds to be paid is entirely consistent with the insurance clause and the holding in *Wile*.

[24] However, the applicant's requirement that the respondent execute an assignment that guaranteed a minimum of insurance monies to be recovered went beyond the agreement and amounted to a variation of its terms which the respondent was not obliged to accept.

[25] While the applicant may have intended to close the sale, he was not "ready, willing and able" to close the agreement on its original terms. He may have tendered the balance of the purchase funds and a direction authorizing the transfer of the property, but he did not register the transfer. This was deliberate and significant, as the applicant intended that the amount of insurance monies to be paid was to be confirmed as a condition of closing the sale. This is evident from the applicant's communications to the respondent on the closing date: "…*we are prepared to close this transaction subject to execution of the Assignment of Insurance Proceeds document*."

[26] The applicant may have misconstrued in good faith his contractual right to know the specific amount of insurance to be paid as a condition of closing and he may nevertheless have intended to close the sale. However, this honest error does not mean that the applicant did not repudiate the agreement through his insistence on the respondent's guarantee of the insurance proceeds. The Court of Appeal has previously recognized that *Wile* is the governing authority rather than those cases which hold that an honest but mistaken view of one's contractual rights may not constitute repudiation: *Weenies Inc. v. 364558 Ontario Ltd*, [1988] O.J. No. 1805 (C.A.).

[27] I have considered the principles relevant to considering whether specific performance is an appropriate remedy: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415; *Paterson Veterinary Professional Corporation v. Stilton Corp. Ltd.*, 2019 ONCA 746; *Lucas v. 1858793 Ontario Inc. (Howard Park)*, 2021 ONCA 52. I am not persuaded that the equities favour specific performance as a remedy in these circumstances. I will accept that the property had both objectively and subjectively unique qualities given that the residence was a century home on mature rural acreage and that the applicant is a contractor who specializes in century home restoration. However, those unique qualities were removed by the fire loss. Specific performance would merely achieve transfer of the vacant property with the proceeds of insurance, which was the original bargain. There is no explanation as to how damages are insufficient in that context. Further, for the reasons just explained, the applicant was not ready, willing, and able to close the sale. While he urges that he had substantially completed all that was required to close the sale, it remains the fact that he did not as he sought the guaranteed insurance recovery as a condition of the closing.

[28] In the alternative, the applicant submits that forfeiture of the $25,000 deposit is disproportionate and unconscionable because the applicant tendered the balance of the funds on closing such that the respondent had not suffered any damages. I find that this is not one of those exceptional circumstances where it would be unconscionable to enforce the forfeiture clause: *Redstone Enterprises Ltd. v. Simple Technologies Inc.*, 2017 ONCA 282. This was a straightforward and arms-length real estate transaction with no inequality of bargaining power. As I have found the applicant repudiated the agreement, the terms provide that the applicant forfeits the deposit.

[29] The application is therefore dismissed for the foregoing reasons.

[30] The parties filed bills of costs but required an opportunity to make submissions. For example, the applicant raised that costs of the motion for the certificate of pending litigation should not be included in the respondent's bill of costs.

[31] If the parties are unable to resolve costs, the respondent shall file its written submissions by March 14, 2025, and the applicant his written submissions by March 21, 2025. Written submissions are limited to two pages excluding the bills of costs already filed. There will be no reply without leave.

Justice K. Tranquilli

Released: March 4, 2025

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

GRANT ALLEN MCDONALD

Applicant

– and –

JANE LOWRIE, ANNE O'NEILL and SUSAN LOWRIE, in their capacity as the ESTATE TRUSTEES OF THE ESTATE OF JUNE LOWRIE

Respondent

REASONS FOR JUDGMENT

Justice K. Tranquilli

Released: March 4, 2025