CITATION: Reddy v. 1945086 Ontario Inc., 2019 ONSC 2554
COURT FILE NO.: CV-18-604320-CL
DATE: 20190429

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

BETWEEN:	)	
	)	
Jay Reddy, Jacob Jaramillo, Carla Gravina, Ina Cici, Cecilia Yung, Santino Paglia, Guiseppe Panza, Mark Cruden and the Applicants Listed in Schedule A to This Notice of Application	)	Theodore Charney, Remissa Hirji and John DeVellis for the Applicants
Applicants	)	
– and –	)	
1945086 Ontario Inc., 1945087 Ontario Inc., 1834371 Ontario Inc., and Liberty Development Corporation	)	Monique Jilesen and Derek Knoke for 1945086 Ontario Inc. and 1945087 Ontario Inc.
Defendants		Micheal Simaan for Liberty Development Corporation
	)	
	)	
	)	**HEARD:** April 23, 2019

PENNY J.

Overview and Background

[1] This is an application for a determination of contractual rights. The determination of these rights depends on the interpretation of an early termination

provision in a pre-construction agreement of purchase and sale for condominium units in a project known as Cosmos Towers.

[2] There are 605 applicants in this proceeding who, in 2016, entered into standard form contracts with the vendors, 1945086 Ontario Inc. and 1945087 Ontario Inc. (Vendors), to purchase 454 condominium units in Cosmos Towers.

[3] By regulation, these contracts are required to incorporate the provisions of the Tarion Addendum to Agreement of Purchase and Sale. The Addendum permits certain "types" of early termination conditions but "only in the limited way" described in the Addendum (para 6(a)). The Addendum goes on to provide that any "other condition" included in the purchase agreement for the benefit of the vendor not expressly permitted is "deemed null and void and is not enforceable" by the vendor (para 6(b)).

[4] One "type" of permitted early termination condition is "receipt by the vendor of confirmation that financing for the project on terms satisfactory to the vendor has been arranged by a specified date"[1] (Schedule A para 1(b)(ii)). Each condition must be set out separately, be reasonably specific as to the type of approval which is needed for the transaction and identify the approving authority (Schedule A para 3).

[5] Under the Addendum a vendor must agree to "take all commercially reasonable steps within its power to satisfy" the early termination conditions (para 6(f)).

[6] The Addendum is a standard form agreement and provides a space for each early termination condition to be described. Each space also contains language which contemplates early termination conditions which involve third-party approvals from an "Approving Authority"[2]. The parties are told to add additional pages as an appendix if there are additional early termination conditions.

[7] In this case, the parties added an appendix entitled Early Termination Conditions. Under Condition #2, the agreement provides as follows:

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[1] The addendum also deems a default date where no "specified date" is provided. The date for the exercise of this early termination condition in not in issue in this proceeding.

[2] Approving Authority is effectively defined to mean governmental and statutory regulatory bodies.

> Description of the Early Termination Condition: The Purchase Agreement is conditional upon receipt by the Vendor of confirmation that the financing for the project on terms satisfactory to the Vendor has been arranged.
>
> The Approving Authority (as that term is defined in Schedule A) is: n/a, the determination of the Vendor in its sole, absolute and unfettered discretion.

[8] In 2018, two years after entering into the purchase agreements, the applicants were notified by written correspondence that the Vendors were exercising their rights under Early Termination Condition Number #2 to cancel the project on the basis that, despite having taken all commercially reasonable steps, financing satisfactory to the Vendors could not be arranged.

[9] Important context for the framing of the contract interpretation dispute in this application is that the reasonableness and good faith of the Vendors' termination of the agreements on the basis that satisfactory financing could not, despite having taken all commercially reasonable steps, be arranged, is not in question.

[10] The deposits of all of the purchasers were fully refunded.

The Issue

[11] The issue for determination is whether Early Termination Condition #2 is null and void in its entirety, such that the Vendors were left with no contractual "financing out" option as a basis to terminate the agreements.

[12] The applicants argue that the "sole, absolute and unfettered discretion" proviso (the Proviso) in the satisfactory financing condition is inextricably part of Condition #2. They further argue that the Proviso is not permitted under the terms of the Addendum, rendering Condition #2 null and void in its entirety. In the absence of Condition #2, the Vendors had no right to effect early termination on the basis that satisfactory financing could not been arranged. Without any right to cancel the project in the absence of satisfactory financing, the purported early termination was a breach of contract, giving rise to a claim for damages for loss of bargain.

[13] The applicants rely on the principle that where statutory regulations dictate requirements for what must be in documents, those regulations must be construed strictly. Where there are two possible interpretations of circumstances under which a protection is to be extended, the one more favourable to the consumer should

govern, *Opoku v. Pal* [1999] OJ No 2692 (CA) at para 38. By analogy, therefore, they argue that in deciding whether a vendor has complied with the early termination conditions authorized by the Addendum, the vendor's compliance must be interpreted strictly in a manner that protects the purchasers. Vendors are only permitted to terminate the agreement in accordance with the precise conditions permitted by the Addendum. The court should therefore apply the Addendum strictly in determining whether early termination Condition #2 was authorized.

[14] The permitted condition, satisfactory financing, is subject to a good faith and reasonableness standard, both by the specific provisions of the Addendum itself (in para 6(f) quoted above) and at common law, *Griffin v. Martens*, [1988] BCJ No 828 (BCCA) at para 13; *Marshall v. Bernard Place Corp.*, [2000] OJ No 3321 (Ont SCJ) at 21.

[15] The applicants interpret the Vendors' early termination condition, leaving out what their counsel refers to as "the superfluous references to the approving authority," to read as follows:

> The Purchase Agreement is conditional upon receipt by the Vendor of confirmation that financing for the project on terms satisfactory to the Vendor has been arranged, the determination of the Vendor in its sole absolute and unfettered discretion.

[16] Thus, the applicants read the Proviso as being attached to or an integral part of the financing condition. They argue that the inclusion of the Proviso in Condition #2 was an attempt by the Vendors to enhance their ability to terminate the agreement beyond that permitted in the Addendum. In other words, the applicants argue that the Proviso was intended to expand the Vendors' ability to terminate beyond the obligation to take all "commercially reasonable steps within its power" to satisfy the financing condition and turn it into a purported ability to terminate under the financing condition in the Vendors' "sole, absolute and unfettered discretion." The expanded language of Condition #2 which the Vendors imported into the otherwise permitted "satisfactory financing" condition of Schedule A para 1(b)(ii) thus derogates from, or conflicts or is inconsistent with the Addendum. The Proviso turned Condition #2 into a "type" of condition not expressly permitted under the Addendum and, therefore, a condition that is deemed null and void and not enforceable by the Vendors (para 6(b)).

[17] The applicants also rely on principles of general contract interpretation in the commercial context which, they concede, apply to consumer contracts. In particular,

the applicants rely on the principle that the words in a contract must be interpreted in the context of the contract as a whole and that, to the extent possible, meaning must be given to all the words of the contract. The court should strive to give meaning to the contract and reject an interpretation that would render one of its terms ineffective, Hall, *Canadian Contractual Interpretation Law*, 3rd ed (Toronto, LexisNexis Canada, 2016 at p 16.

[18] It is presumed that words in a contract have meaning. The Proviso, therefore, must be presumed to have meaning. The fact that the Vendors added the Proviso to Condition #2, the applicants argue, "can only be interpreted to mean that the Vendors intended something else by [Condition #2] beyond the ordinary course of being able to ascertain whether financing was satisfactory."

[19] The Vendors, in response, argue that the financing condition is a permitted "type" of condition under the terms of the Addendum and that, on a proper interpretation of the agreement as a whole, the Proviso either does not form part of Early Termination Condition #2 at all or could not, in any event, be relied upon by the Vendors as derogating in any way from their obligation to take all commercially reasonable steps within their power to arrange satisfactory financing. As the good faith and reasonableness of the Vendor's efforts to obtain financing is not being challenged, their cancellation of the project on the basis that Early Termination Condition #2 had not been satisfied was an entirely valid exercise of a right the Vendors had under the agreement. Thus, the Vendors argue, there was no breach of contract and, as a result, no basis for any claim in damages for loss of bargain.

Analysis

[20] It is well-established that the *Ontario New Home Warranties Plan Act*, and its regulations, constitute consumer protection and remedial legislation. As such, a broad and liberal interpretation of its provisions in light of their object and purpose is appropriate, *Ontario New Home Warranty Program v. Lukenda*, [1991] OJ No 320 (CA) at para 7.

[21] I agree with the applicants that that where, as here, statutory regulations dictate requirements for what must be in documents, those regulations must be construed strictly and that, where there are two possible interpretations of circumstances under which a protection is to be extended, the one more favourable to the consumer should govern.

[22] Contracting out of the protections provided by the Addendum is also explicitly prohibited. Under para 13 of the Addendum, the parties agreed not to include any provision in the purchase agreement that "derogates from, conflicts with or is inconsistent with" the provisions of the Addendum, except where the Addendum "expressly permits the parties to agree or consent to an alternative arrangement." The provisions of the Addendum prevail over any offending provision.

[23] The reforms which brought about O. Reg. 165/08 were the result of an independent review conducted by a special committee headed by The Honourable J. Douglas Cunningham. The Special Committee released its final report with recommendations in December 2016. The Committee recommended adjustments to the structural framework of relationships between new home developers/vendors and purchasers to better meet the objectives of the ONHWPA and regulations. I agree with the applicants' submission that a purpose of the Addendum was to better clarify and prescribe the conditions under which agreements of purchase and sale could be terminated.

[24] It is important to remember, however, that the Committee acknowledged that the imposition of regulatory warranties should not unduly favour purchasers in a manner that is onerous for builders or that fails to recognize the inevitability of certain delays in new home construction, Special Committee Report, p. 19.

[25] The Committee recognized that a builder of a condominium must be permitted to set *tentative* occupancy dates in order to recognize longer lead times for condominium projects "and threshold commercial financing requirements that must be met before construction begins," Special Committee Report, p. 11.

[26] The recommendations of the Committee therefore included permitting provision for early termination on the basis of conditions precedent which have not been satisfied. The types of permitted conditions ultimately included an early termination condition in relation to satisfactory financing being arranged.

[27] I agree with the respondent Vendors that the inclusion in the Addendum of a permitted satisfactory financing condition was intended to achieve a balance between the rights of both builders and purchasers. It protects vendors from having to undertake projects, or be responsible for damages, in circumstances where satisfactory financing is not secured. It similarly protects purchasers from being involved with projects which are insufficiently financed and at risk of failure. It also reduces the risk that Tarion has to act as a backstop for projects or builders facing financial challenges.

[28] While it is true that words in a contract are presumed to have meaning, this principle of contract interpretation is one of many, and must be placed in proper context. One of the well-accepted, more comprehensive formulations of contract interpretation is that a contract is to be interpreted:

(a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;

(b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the cardinal presumption that they have intended what they said;

(c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and, to the extent there is any ambiguity in the contract,

(d) in a fashion that accords with sound commercial principles and good business sense and that avoids a commercial absurdity.

Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust, [2007] O.J. No. 1083 (C.A.) at para. 24.

[29] The Supreme Court of Canada considered the principles of contract interpretation in *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53. The overriding concern is to determine the intent of the parties. To do so the court must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own. No contract is made in a vacuum. Subjective evidence of intention, however, is not admissible in the guise of "surrounding circumstance."

[30] Applying these principles to the issue and the circumstances in this case, I come to the following conclusions.

[31] I am unable to agree with the applicants that the Addendum mandates specific language to be used in the early termination conditions. This can be seen from the fact that the prescribed form of the Addendum leaves blanks for the description of the conditions, to be drafted and filled in by the parties. The parties are instructed, for example, to be "*reasonably* specific" when describing certain aspects of each

condition. Rather than prescribing specific words, the Addendum limits early terminations to certain "types" of conditions. There is no "prescribed form" of language. It is common ground that arranging satisfactory financing is a "type" of permitted early termination condition.

[32] Further, the very principles of interpretation, both statutory and contractual, relied on by the applicants convince me that the Proviso cannot and should not be interpreted so as to confer on the Vendors the "sole, absolute and unfettered discretion" to terminate the agreement. The applicants are, in fact, contrary to the interpretive principles they espouse, arguing for the *most adverse* possible interpretation of the agreement for the purchasers. They are doing so in order to argue that Condition #2 with the Proviso as an integral part, is null and void *in its entirety* and thus not available to the Vendors as a basis to terminate at all. I am unable to agree with the applicants for a number reasons.

[33] The Proviso appears in the agreement in a section beginning "The Approving Authority (as that term is defined in Schedule A) is:". In spite of their reliance on the "all words must have meaning" principle, the applicants read these words out of the agreement altogether and argue that the Proviso is just a continuation of the prior entry. It is the prior entry which actually provides the required description of the early termination provision. This prior entry reads, "Description of the Early Termination Condition: The Purchase Agreement is conditional upon receipt by the Vendor of confirmation that the financing for the project on terms satisfactory to the Vendor has been arranged."

[34] The applicants' interpretation, that the Proviso is just a continuation of the sentence describing the satisfactory financing condition, is not sustainable because:

(a) the sentence which does explicitly contain the description of the condition ends in a period;

(b) the Proviso appears in a new paragraph following the words "The Approving Authority (as that term is defined in Schedule A) is…";

(c) the Vendors are not an Authorizing Authority and have no authorizing capacity as that term is used in the Addendum; and

(d) if the Proviso is added to the description of the condition (even ignoring, for the sake of argument, the period), the description of the

condition is not a proper, grammatical sentence and literally makes no sense.

[35] It appears to me that the Vendors incorrectly interpreted the "Authorizing Authority" sentence of the standard language in the Addendum as somehow applying to themselves (perhaps because, under the satisfactory financing condition, it is the *Vendors* who have the exclusive ability to rely on that condition) and then sought to explain the scope of their authority, in that capacity, to act on the condition. To the extent this represents an attempt to confer on themselves some kind of unlimited discretion over something, it was in respect of a capacity the Vendors simply did not have. Reading the words of the agreement, as I must, in a way that prefers the interpretation which is more favourable to the purchaser, the Vendors are not an Authorizing Authority and the attempt, if that is what it was, to confer on themselves an unlimited discretion, in that or any other capacity, must fail. The sentence regarding the Authorizing Authority adds nothing and is effectively meaningless in the context. What the Vendors may subjectively have intended forms, of course, no part on the analysis.

[36] My second reason for rejecting the interpretation urged by the applicants is that, even if Condition #2 were to be read as including within it a sole, absolute and unfettered discretion to terminate, the Addendum itself:

(a) requires the Vendors to "take all commercially reasonable steps within [their] power to satisfy" the early termination conditions (para 6(f))[3]; and

(b) prohibits contracting out of the protections (including the protection of para 6(f)) afforded in the Addendum (para 13).

[37] The obligation to take all commercially reasonable steps within one's power to satisfy an early termination condition simply cannot be read harmoniously, and is in direct and unavoidable conflict, with a right to rely on a sole, absolute and unfettered discretion in respect of that same condition – the two cannot exist together; both cannot be the case.

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[3] This is also, as noted above, generally the manner in which such discretion is interpreted at common law, see also *Greenberg v. Meffert*, 1985 CarswellOnt 272 (CA) at para 18.

[38] The Addendum itself provides that the parties agree not to include any provision in the purchase agreement that "derogates from, conflicts with or is inconsistent with" the provisions of the Addendum, except where the Addendum "expressly permits the parties to agree or consent to an alternative arrangement." Of equal importance in this context is that para 13 of the Addendum also requires the provisions of the Addendum to prevail over any inconsistent provision inserted into the agreement.

[39] These provisions and the other interpretive principles advanced by the applicants (with which, in principle, I agree and which I accept) require that the interpretation more favourable to the purchasers, and the one which is consistent with the Addendum, be adopted. Obviously, the more favourable interpretation to the purchasers is one which requires the Vendors to take all commercially reasonable steps within their power to satisfy the financing condition, not the interpretation which leaves that choice to the exercise of the Vendors' sole, absolute and unfettered discretion.

[40] My third reason for rejecting the applicants' interpretation arises from the interpretive doctrine of *contra proferentem*. The applicants rely on this principle as reflecting a policy goal, consistent with the ONHWPA, of "protecting consumers from deceptive or abusive commercial practices, and of giving consumers the benefit of any doubt." However, the applicants appear to apply this interpretive doctrine as a rule of substantive law to bring about a particular result; that is, the applicants urge me not to adopt the interpretation of the words in question most favourable to the consumer but the opposite, to adopt the interpretation most unfavourable to the consumer, so as to then be able to turn around and declare Condition #2 in its entirety, not just the Proviso, null and void in accordance with para 6(b) of the Addendum.

[41] This is not a proper application of the *contra proferentem* doctrine. The *contra proferentem* doctrine requires the court to find an *interpretation* of the language used that is favourable to the consumer, not to mandate an outcome in favour of the consumer independent of the terms of the agreement. Instead of asking the court to adopt an available interpretation that upholds the agreement, while still providing the purchasers and the Vendors every protection the Addendum was intended to provide, the applicants are asking the court to adopt an interpretation of the agreement that is not only adverse to the purchasers but which is actually legally unavailable because it is inconsistent with established common law jurisprudence

concerning the exercise of contractual discretion and the express provisions of para 6(f) of the Addendum itself.

[42] Even if, therefore, the Proviso is not interpreted to be effectively meaningless and even if it is not in direct conflict with the common law and the language of the Addendum, it, at the very least, raises an ambiguity about the Vendors' obligation to take all commercially reasonable steps within their power to satisfy the financing condition as opposed to having an unfettered discretion to do so. Applied properly, the doctrine of *contra proferentem* requires that, in the face of an ambiguity, I adopt the interpretation of Condition #2 that is more favourable to the consumer. That interpretation is to limit the effect of the Proviso and interpret the agreement, as it says in para 6(f) and 13, to require the Vendors to comply with their obligation to arrange satisfactory financing by taking all commercially reasonable steps within their power, and not merely in their sole, absolute and unfettered discretion, to do so.

[43] The fourth reason for rejecting the applicants' argument is based on the principle that, in interpreting a contract, the court will prefer to give the provisions of the contract a meaning that will make them lawful, rather than unlawful, *Ventas*, *supra*, at para 14. This argument is based on essentially the same logic as the prior three arguments. Faced with two possible contructions, one which renders the agreement legal and in conformity with O. Reg. 165/08 and the common law of the exercise of contractual discretion, and another which makes the agreement illegal and in conflict with the statutory regime and the common law, I am to prefer the interpretation that renders the agreement lawful. That is, as above, also the interpretation which favours the purchasers.

[44] My fifth and final reason for rejecting the applicants' interpretation arises from the requirement to interpret a contract in a fashion that accords with sound commercial principles and good business sense and that avoids a commercial absurdity. I say this because the applicants' interpretation of Condition #2: i) results in a commercial absurdity, ii) places the Vendors under obligations which are, quite possibly, impossible of performance, and iii) could result, contrary to the entire purpose of the ONHWPA, O. Reg. 165/08 and the Addendum, in placing the purchasers in an even worse position than they were as a result of the termination of the project.

[45] The applicants' interpretation results in a commercial absurdity because it would commit the Vendors to a project for which they would not have commercially viable financing. The report of the Special Committee recognized the necessity of

condominium projects being appropriately financed and specifically recommended that vendors retain the ability to terminate purchase contracts on the basis that satisfactory financing could not be arranged. That is what the government enacted and that is exactly what the Vendors have done in this case. The applicants do not challenge the bona fides or reasonableness of that decision. The applicants' interpretation of Condition #2 stands the balance which the Legislature adopted between the rights of the purchasers and the rights of developers in this regard, on its head.

[46] The applicants' interpretation, by eliminating the satisfactory financing condition altogether, also creates a significant risk that the Vendors could not possibly perform their obligations under the agreement. This would arise, for example, if the Vendors were not able to obtain financing at all. They would then be faced with the impossible choice of either proceeding with a project that would likely bankrupt them or have to pay out substantial damages for breach of contract (which could also bankrupt them).

[47] Finally, putting the Vendors in a position where they would be obliged proceed with a potentially uneconomic project and risk bankruptcy would bring about one of the very situations the government, in permitting the satisfactory financing condition, was trying to avoid. Becoming mired in a condominium project in bankruptcy or under receivership, or otherwise in financial difficulty, is certainly not in the Vendors' or in Tarion's interest and could not possibly be in purchasers' interest, as it would put them in a far worse situation than they ended up in as a result of early termination.

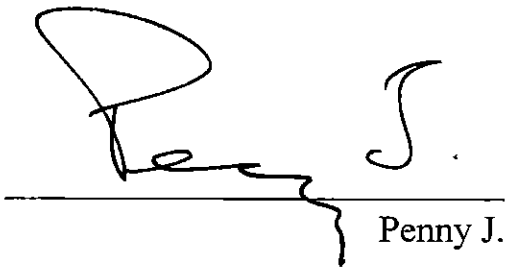
[48] It is for these reasons that I find, interpreted properly, Condition #2 of the Addendum to the purchase agreement did not confer on the Vendors any "sole, absolute and unfettered discretion" to terminate. The Vendors' early termination condition allowed them to terminate if, having taken all commercially reasonable steps within their power to do so, they were unable to arrange satisfactory financing. Condition #2, so interpreted, is consistent with the requirements of O. Reg. 165/08 and the Addendum. Condition #2 is, therefore, not null and void.

[49] Given my conclusion that the Proviso, properly interpreted in the context of the agreement as a whole, did not form part of Condition #2 and that, as a result, Condition #2 is consistent with the requirements of the Addendum and is not null and void in its entirety, it is not necessary to consider the alternative argument, raised by the Vendors, that the court should exercise its "blue pencil" authority to sever the Proviso from the contract. I would say briefly that, had it been necessary to do so, I

would have found that this was an appropriate jurisdiction to exercise in the circumstances.

Costs

[50] This case raised an apparently novel point in the context of a matter of public interest potentially affecting many people, not only those before the court. In this context, I am inclined to make no order as to costs. If, however, any party is not satisfied with this disposition they may make submissions to the contrary in a brief written submission not to exceed two typed, double-spaced pages, accompanied by a bill of costs, to be delivered within five days. Any party wishing to respond may do so by filing a responding submission, subject to the same page limit, also accompanied by the bill of costs they would have submitted had they been seeking costs, within a further five days.



Penny J.

Released: April 29, 2019

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COURT FILE NO.: CV-18-604320-CL

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

BETWEEN:

Jay Reddy, Jacob Jaramillo, Carla Gravina, Ina Cici, Cecilia Yung, Santino Paglia, Guiseppe Panza, Mark Cruden and the Applicants Listed in Schedule A to This Notice of Application

Applicants

– and –

1945086 Ontario Inc., 1945087 Ontario Inc., 1834371 Ontario Inc., and Liberty Development Corporation

Defendants

REASONS FOR JUDGMENT

Penny J.

Released: April 29, 2019