COURT OF APPEAL FOR ONTARIO

CITATION: Tega Homes (Attika) Inc. v. Spencedale Properties Limited, 2023 ONCA 475
DATE: 20230707
DOCKET: C70284

Feldman, Lauwers and Roberts JJ.A.

BETWEEN

Tega Homes (Attika) Inc.

Plaintiff
(Respondent)

and

Spencedale Properties Limited and Markton Properties Limited

Defendants
(Appellants)

Thomas G. Conway and Kevin Caron, for the appellants

William C. McDowell, Aoife Quinn, and David Cutler, for the respondent

Heard: January 16, 2023

On appeal from the judgment of Regional Senior Justice Calum U.C. MacLeod of the Superior Court of Justice, dated January 5, 2022, with reasons reported at 2022 ONSC 75, and amended supplementary reasons dated March 28, 2022.

Roberts J.A.:

[1] This appeal concerns the assessment of damages in a failed commercial real estate transaction for the sale of properties that were approved for development as a multi-storey residential condominium. The appellants' liability for breach of contract was determined by way of a summary judgment motion and a trial of damages was ordered: *Tega Homes (Attika) Inc. v. Spencedale Properties*

Ltd., 2018 ONSC 6048. As a result, there was no dispute that the appellants breached the parties' agreement of purchase and sale when they refused to complete the sale of their properties to the respondent.

[2] The narrow issue for trial and on appeal is the quantification of the respondent's damages. The trial judge ordered that the appellants pay the respondent compensation representing the increase in the value of the properties between the date of the agreement and the date of the appellants' breach, and reimbursement of 90% of the respondent's expenses incurred in pursuing the redevelopment of that land. The appellants argue that the trial judge erred in his award of damages.

[3] These reasons explain why I would allow the appeal in part. The trial judge made no error in awarding both the increased value of the properties between the date of the parties' agreement and the date of the appellants' breach, as well as part of the respondent's wasted expenses incurred, to the knowledge of the appellants, in pursuing the redevelopment of the properties ("the development expenses"). However, the trial judge erred in awarding 90% of all the respondent's development expenses. Specifically, he erred by including some development expenses that had been previously released by the parties.

Background

[4] The appellants own two adjacent properties municipally known as 3 Hamilton Avenue and 233 Armstrong Street in the City of Ottawa. The appellants used the properties for commercial tenancies and a mini-storage business.

[5] On May 13, 2011, the parties entered into a joint venture agreement to develop the properties into a two-tower high rise residential condominium ("the JVA"). The JVA provided that the appellants would provide the properties and the respondent would fund the development expenses. Specifically, the respondent would be responsible for all of the up-front expenses of approval and development with no risk to the appellants if the respondent was unable to obtain approval within the defined timeframe under the JVA. There was no provision under the JVA for the respondent to recoup its investment in the project. The parties to the JVA would share the profits gleaned from the development. The termination clause in the JVA also provided that if the agreement terminated, the parties would release each other from all claims relating to the project.

[6] The joint venture never came to fruition and the JVA came to an end on April 30, 2013 in accordance with its terms because the respondent had not obtained the necessary governmental approvals in the timeline set out in the JVA. By the terms of the JVA, the parties released each other from all claims relating to the JVA. It was generally anticipated that a new JVA would be negotiated. Up to that point, the respondent had incurred about $722,904 in development expenses.

[7] The respondent continued to work on approvals and to develop a marketing plan. The parties continued to negotiate with a view to concluding a new agreement.

[8] However, the parties did not enter into a new joint venture agreement. Rather, on November 6, 2013, the parties entered into an agreement of purchase and sale with respect to the properties with no provision for a share of future profits and no share of risk if the project failed ("the 2013 APS"). The respondent agreed to purchase the properties for $7 million. Starting in November 2013, the respondent would pay rent to the appellants for a sales office. The 2013 APS constituted the entire agreement between the parties.

[9] The respondent was ultimately successful in 2014 in obtaining the approval for the rezoning of the lands to allow the project to proceed. The extended closing date was fixed for April 17, 2015. On the eve of closing, the appellants announced that they would not close the transaction, breaching the 2013 APS. The respondent had incurred $282,341.35 in development expenses after the 2013 APS was signed and prior to the date set for closing.

[10] On September 14, 2015, the parties entered into a further conditional agreement of purchase and sale ("the 2015 APS"), which was without prejudice to the respondent's claims arising from the appellants' breach of the 2013 APS. The 2015 APS lapsed after the respondent failed to obtain financing or waive the

financing condition, and the appellants refused to grant a further extension of the deadline to allow the respondent to obtain financing.

[11] The respondent brought a claim against the appellants for the losses it incurred from the appellants' breach of the 2013 APS. The appellants brought a counterclaim regarding money they alleged the respondent owed for interest on a loan and for unpaid rental costs. The respondent acknowledged that it owed some of the money the appellants sought in the counterclaim.

[12] The trial judge determined that the respondent was entitled to be put into the position it would have occupied had the transaction closed under the 2013 APS. The trial judge assessed damages as follows: $323,000, as the increase in the value of the land between the date of the agreement of purchase and sale and the date of the failed closing; and 90% of all the respondent's development expenses from 2010 to the date of the respondent's breach on April 16, 2015, in the amount of $1,103,191. Of that sum, $185,707.03 of the development expenses represented the total amount of unpaid invoices from service providers extending back to 2011 that the respondent undertook to pay. The judgment provided that the amount of those unpaid invoices constituted a first charge against any recovery by the respondent on the portion of the damages awarded for development expenses. With respect to the counterclaim, the trial judge ordered that the respondent owed the appellants the amount of $87,940 as damages under the

counterclaim. The trial judge also ordered pre-judgment interest in the amount of $89,775 and costs to the respondent in the amount of $70,000.

Issues

[13] The appellants submit that the trial judge made several reversible errors in his calculation of the respondent's damages, which I would summarize as follows:

i. He overcompensated the respondent by awarding damages to make the respondent "whole";

ii. He erred in awarding the respondent all of its development expenses incurred since 2010;

iii. He erred in his calculation of the respondent's development expenses.

[14] I shall consider each of these arguments in turn.

Analysis

(i) Did the trial judge overcompensate the respondent?

[15] The appellants do not challenge the award of the increase in land value of $323,000 to the date of breach that the trial judge granted to the respondent. However, they submit that the trial judge erred in also awarding to the respondent its development expenses as a category of damages. They argue that the trial judge erred in effectively awarding the respondent damages for loss of profit, as well as the development expenses incurred to generate those profits. They say the

trial judge erred in thus trying to make the respondent "whole", which resulted in overcompensating and putting the respondent into a better position than it would have occupied had the transaction closed.

[16] I do not accept these submissions.

[17] For the reasons expressed below, I agree that the trial judge erred in his determination of the amount of the damages awarded to the respondent. However, the trial judge made no error in awarding, as categories of damages, the increased value of the properties as at the date of the appellants' breach, as well as the respondent's wasted expenditures. The trial judge applied the correct contractual principles in his assessment of the respondent's damages. He recognized that the ordinary measure of damages for breach of contract in the context of a failed real estate transaction is to put the innocent party in the position it would have occupied had the contract been performed and to assess the damages as at the date of breach: *Akelius Canada Ltd. v. 2436196 Ontario Inc*., 2022 ONCA 259, 161 O.R. (3d) 469, at para. 22, leave to appeal denied, [2022] S.C.C.A. No. 183; *6472047 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.), at para. 41; *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401 (C.A.).

[18] Nor do I agree that the trial judge awarded the respondent "double-recovery" damages for loss of profit and the related expenses incurred to bring about those profits. The trial judge expressly rejected the respondent's claim for loss of profits from the failed project because the respondent was unable to prove that the project

would have been profitable. Instead, the trial judge accepted the respondent's alternative claim for the increase of the market value of the properties as at the date of breach, as well as its wasted development expenses related to the project.

[19] The trial judge's approach to the respondent's wasted development expenses was consistent with this court's guidance in *PreMD Inc. v. Ogilvy Renault LLP*, 2013 ONCA 412, 302 O.A.C. 139, at paras. 67-68, that a plaintiff may only recover those expenses that were truly wasted and that would not have been wasted regardless of the breach. If the expense would not have been recouped even if the contract had been performed, then the expense is not recoverable because it was not caused by the breach of contract.

[20] The trial judge was therefore obliged to consider, and did consider, whether the claimed development expenses could have been recouped from the increase in the market value of the properties and were therefore truly wasted expenditures. He found that it was highly probable that the respondent would have recouped its expenses had the transaction closed, not from the future profits of the project, but from the increased market value of the properties. The properties, at the date of trial, were worth more than $9 million. The trial judge's findings were open to him and are not challenged by the appellants on appeal.

[21] I do not find the appellants' rigid damages characterization as "expectation" or "reliance" damages to be helpful here. I agree with the trial judge's observation

that the respondent's damages are not properly assessed "by adopting arbitrary categories or airtight silos": at para. 59.

[22] Rather, the question to be asked, as the trial judge correctly did, is: having rejected the claim for future profits, what amount of damages will put the respondent in the position it would have occupied had the 2013 APS closed? The answer, as the trial judge also correctly stated, was to award the respondent the increased value of the properties as well as the respondent's wasted development expenses that the appellants knew the respondent had incurred after entering into the 2013 APS. He did not award the respondent damages for making a bad bargain nor did he make the appellants the insurer of the respondent's project. The award of damages did not place the respondent in a better position than if it had closed the transaction on April 17, 2015.

[23] If the 2013 APS had been performed, the respondent would have owned properties that had appreciated in value to the date of breach, as well as the benefit of the development expenses it had sunk into the project. Without performance, the respondent lost both the increase in value and its development expenses. The damages awarded at trial restored the respondent to the position it would have occupied had the 2013 APS closed, in which case the development expenses incurred by the respondent would not have been wasted. As the trial judge explained, at para. 72:

> Awarding the [respondent] the increase in value at the time of closing, but also providing for significant recovery of the funds it invested to pursue the project honours the principle of "efficient breach". The [appellants] still reap a benefit by retaining the land and its subsequent increase in value, but the plaintiff is fully compensated and put in the position it would or should have been had the transaction closed.

[24] I therefore see no reversible error in the trial judge's award of the properties' increased market value to the date of breach as well as the respondent's development expenses related to the 2013 APS as categories of damages.

(ii) Did the trial judge err in awarding the respondent's development expenses since 2010?

[25] The appellants maintain that if the respondent is entitled to reimbursement of any development expenses, that entitlement could only apply to those expenses reasonably incurred from the date of the 2013 APS and that the trial judge erred in awarding any development expenses incurred prior to the 2013 APS.

[26] The respondent argues that the trial judge made no error and that it was open to the trial judge to find that the parties clearly contemplated that if the 2013 APS were breached, the respondent would lose all of its development expenses.

[27] The trial judge determined that there were exceptional circumstances and that the respondent could recover any development expenses because they flowed from the 2011 JVA to the 2013 APS to the knowledge of the respondent.

[28] The difficulty with the trial judge's finding and the respondent's argument is that they ignore the separate existence and fundamentally different terms of the JVA and the 2013 APS. Respectfully, the trial judge erred in two material respects. First, he failed to explain what "exceptional circumstances" existed or the significance that "exceptional circumstances" played in the analysis he was required to undertake. Second, and more important, he failed to give effect to the distinction between the JVA and the 2013 APS in accordance with their distinct terms. The two agreements were completely different.

[29] Under the JVA, the respondent was required to incur development expenses as part of its contribution to the project; the parties would share in the losses and profits of the joint venture; and, notably, in the event that the JVA terminated, the parties released each other from all claims.

[30] The terms of the JVA did not roll over and become part of the 2013 APS. Rather, the 2013 APS was an entirely separate agreement. It was not a joint venture share purchase where the parties shared the losses and profits of the project; it was a simple real estate transaction. As the trial judge noted in his reasons, the marked change in the transaction angered the appellants' principal, Mr. Edwards, who believed a joint venture agreement was of greater value to him.

[31] The parties had contracted under the JVA to release all claims on the termination of the JVA. As a result, any claim for any development expenses incurred was therefore released before the parties entered into the 2013 APS.

Consequently, unless the parties agreed that the development expenses already incurred would continue as part of the 2013 APS, the respondent's development expenses incurred under the JVA, before the 2013 APS, could not be claimed in relation to the breach of the 2013 APS. There was no agreement that any development expenses incurred prior to the 2013 APS could be claimed. To the contrary, as pleaded by the appellants in their statement of defence and counterclaim, the "entire agreement" clause of the 2013 APS was clear that there were no prior representations and warranties. Accordingly, the respondent had no entitlement to claim any development expenses incurred prior to the 2013 APS.

[32] The amount of damages properly awarded to the respondent for its wasted development expenses should be $254,107.22, namely, 90% of the amount of $282,341.35 that was incurred after the 2013 APS was entered into up to the date of the appellants' breach. The trial judge overcompensated the respondent in respect of the released expenditures by $849,083.78. This amount, as the trial judge ordered, is subject to the respondent's undertaking to pay the outstanding service providers the amount of $185,707.03, which remains a first charge on the amount awarded for development expenses.

(iii) Did the trial judge err in his calculation of the respondent's development expenses?

[33] The appellants argue that the development expenses should be reduced further for three reasons: a) the award includes the rental amounts paid by the

respondent to the appellants for office space used for an unrelated project, which were not development expenses; b) the award provides the respondent with a reimbursement for amounts that it did not even pay; and c) the development expenses should be discounted by more than 10%. I turn to consider each of these arguments.

(a) Did the trial judge err in including unrelated rental amounts in the respondent's development expenses?

[34] The appellants submit that the trial judge erred in holding that the rental costs associated with a sales office in the amount of $226,642.50 that it paid to the appellants for a unit in the properties were part of the respondent's recoverable development expenses. This amount was stipulated in Exhibit D, part of the respondent's chart of expenses.

[35] The appellants argue that the trial judge misapprehended the parties' agreement about the respondent's chart of expenses and that there was no evidence supporting his conclusion that the claimed rental costs were recoverable development expenses. According to the appellants, the rental office in issue was not used in relation to the 2013 APS but only for unrelated storage and as a sales office for the respondent's unconnected Rhombus project.

[36] The respondent submits that the space was used for a project sales office for the development project related to the 2013 APS and that the appellants'

breach created wasted expenses properly claimed as wasted development expenses.

[37] I start with the standard of review. The trial judge's assessment of the respondent's development expenses is a fact-driven issue that, absent palpable and overriding error, attracts appellate deference. However, if the trial judge materially misapprehended the parties' agreement concerning the respondent's chart of expenses or the evidence in relation to the claimed rental costs, appellate intervention would be justified. Other than a necessary adjustment to limit the quantum of rental costs to those incurred under the 2013 APS, I see no reversible error that warrants appellate intervention.

[38] The parties agree that the rental space in question for this ground of appeal is Unit 233B[1]. This is the rental space for the development project referenced in the JVA[2]. The 2013 APS refers to a "sales office" and the rent cheques produced at trial with respect to Unit 233B reference "233B" or reference "rent for sales office". In Exhibit D, part of the respondent's chart of expenses, $226,642.50 is claimed for rental costs incurred for Unit 233B from 2011 to the date of breach.

[1] There were three units referenced in these proceedings: Units 233A, B and C. The rental costs for Unit 233A were for the space under a separate lease - the Suzy Q Donuts lease - that the respondent assumed and were awarded under the appellants' counterclaim to the date of breach; the rental costs for that unit are not in issue under this ground of appeal. The respondent leased Unit 233C as a proposed model suite for the unrelated Rhombus project.

[2] In s. 2.6 of the JVA, the rental office is referenced as "233A"; however, both parties conceded at trial that this was an error and that the correct reference should have been to "233B".

[39] What then did the trial judge decide? In supplementary reasons dated March 4, 2022, the trial judge initially concluded that he would not include the rental of Unit 233B in the damages for the development expenses because it was acknowledged that the rent for the sales office was owing to the appellants up to the date of closing and was an admitted debt under the counterclaim; it would not be reasonable to permit the respondent to resile from the set off amount by claiming it back in damages.

[40] Due to what looked like a misunderstanding between counsel and their request to make further submissions on various issues, the trial judge withdrew the March 4 supplementary reasons and replaced them with his March 28, 2022 amended supplementary reasons.

[41] In his March 28, 2022 amended supplementary reasons, the trial judge came to a different conclusion with respect to the respondent's claimed rental costs for the sales office. He indicated that he was satisfied that the rent paid by the respondent for a sales office was a recoverable development cost contained in the chart of expenses incurred by the respondent and should form part of the judgment.

[42] I am not persuaded by the appellants' submission that the trial judge misapprehended the parties' agreement with respect to the respondent's chart of expenses. When read as a whole, the trial judge's reasons demonstrate that he correctly understood that the parties' agreement was only that the amounts were

accurately stated in the chart of expenses and that they were incurred by the respondent so that there was no need to prove individual invoices. As the trial judge stated in his March 28, 2022 reasons, at para. 4, "[a]s a matter of trial efficiency, I was advised that counsel had agreed on charts of expenses which the defendants were satisfied the plaintiff had incurred". His reasons show that he appreciated that while the amount of the expenses claimed was not in issue, the question of whether "the rent for the sales office paid by the [respondent] to the date of intended closing was part of the development expenses to be recovered under the judgment" was a live issue that had to be determined: at para. 13.

[43] While the trial judge's reasons on this issue do not repeat the parties' submissions, he did not ignore them. His reasons indicate that he was alert to this issue. Moreover, the record provides support for his conclusion. According to the evidence given by the respondent's principal, Mr. Dimitrakopoulos, prior to 2013, the respondent had renovated Unit 233B for the purpose of using it as a sales office for the development project of the properties and that rent was paid until the breach of the 2013 APS.

[44] The appellants point to Mr. Dimitrakapoulos' evidence during his cross-examination that Unit 233B was never occupied by the respondent as a sales office for the project under the 2013 APS and that from 2013 onwards, Unit 233B was used as an office space for the unrelated Rhombus project and for storage.

[45] In my view, the evidence that the respondent may have used Unit 233B for other purposes until it could be used as a sales office for the development project under the 2013 APS does not detract from the evidence that it was an actual expense that the respondent incurred and was required to pay under the 2013 APS. There is no dispute that Unit 233B was the space that was refurbished and referenced for use as a sales office first under the JVA and then under the 2013 APS. Regardless of the use to which the respondent chose to put the space, as reflected by the terms of the 2013 APS and the rent cheques produced at trial, the respondent was required to pay and did pay rent for Unit 233B under the 2013 APS. There is no evidence that the respondent assigned those rental costs to the Rhombus project.

[46] As such, the rental costs for Unit 233B were clearly wasted expenses that were incurred under the 2013 APS and could be awarded as part of the respondent's development expenses. As the trial judge concluded in his March 28, 2022 reasons, at para. 15: "Accordingly, the rent paid by [the respondent] for the sales office does form part of the development expenses which [the respondent] would have charged against the project had it proceeded." This conclusion was open to the trial judge. I see no basis to interfere with it.

[47] As indicated above, the award of $226,642.50 in relation to the rental costs must be reduced in light of my determination that the trial judge erred in awarding development expenses from 2010 onwards. Accordingly, the respondent is entitled

to recover as part of its wasted development expenses only the rental costs it incurred for Unit 233B during the 2013 APS.

[48] However, the amount of the rental costs that was incurred in relation to Unit 233B, between the date the 2013 APS was entered into on November 6, 2013 and the breach of the 2013 APS on April 16, 2015, is not clear from the record. Accordingly, I would invite the parties to agree on this amount, failing which they could include as part of the written submissions regarding pre-judgment interest and costs, as indicated below, a calculation referenced to the existing record, within seven days of the release of these reasons.

(b) Did the trial judge err in awarding damages for unpaid service provider invoices?

[49] The appellants submit that the trial judge erred in including unpaid service provider invoice amounts that had been incurred more than two years before trial as part of the development expenses awarded to the respondent.

[50] In his supplementary reasons dated March 4, 2022, the trial judge stated that the respondent was to provide proof of payment of the outstanding professional fees within 60 days and that "[i]f any amount shown as owing…is not paid within that time then 90% of the amount shown as owing will be a credit to the [appellants] and shall be paid to the [appellants] or deducted from any outstanding judgment amount".

[51] In his March 28, 2022 reasons, the trial judge noted that some of the professional invoices for legal and consulting fees were partially paid and that the respondent indicated that the invoices would be paid when and if judgment was recovered and that the service providers were not pursuing the matter until then. The trial judge did not set a time for payment of professional fees as he had suggested in his March 4 reasons. He accepted the respondent's submission that it would not be reasonable to order the respondent to do so in advance of recovering any funds under the judgment.

[52] I see no error in the trial judge's treatment of this issue. This is not a case where the respondent was claiming damages for services that were not rendered. Moreover, as noted by the trial judge, the parties had agreed on the quantum under the invoices for which the respondent was potentially liable to the unpaid service providers. Further, I do not accept the appellants' submission that the passing of the applicable limitation period necessarily means those debts are no longer payable. The passing of any limitation period does not extinguish those debts but may affect the service providers' ability to enforce them if they have not been acknowledged by the respondent. Here, by its undertaking to pay the unpaid invoices from the judgment, the respondent is acknowledging its indebtedness to the unpaid service providers. I also agree with the respondent's submission that there can be no concern about a windfall to the respondent because the award is

subject to the respondent's undertaking to pay and is subject to a first charge in favour of the service providers.

[53] My determination that the respondent's entitlement to development expenses runs from the 2013 APS and not from 2011 may also affect the amount of the respondent's undertaking to pay its service providers and the first charge against the damages awarded for its development expenses. The parties did not make submissions on this issue. If they cannot agree, I would allow them to make written submissions on this issue together with the other written submissions as directed below.

[54] To ensure no further dispute about the service provider invoices, I would add to the judgment a provision that the respondent is required to provide to the appellants, within 30 days following the appellants' payment to the respondent of the judgment, proof of the respondent's payment to the service providers of their outstanding invoices and acknowledgement of such payment by the service providers. If the respondent fails to comply with this provision, the appellants are entitled to the return of any surplus monies paid under this portion of the judgment that have not been paid to or acknowledged by the respondent's service providers.

(c) Did the trial judge err in discounting the respondent's development expenses by only 10%?

[55] The appellants submit that a discount of 15% rather than 10% should have been applied to the claimed development expenses.

[56] In his initial reasons, the trial judge awarded damages and assessed a 10% deduction to recognize that while it was “highly probable” that the respondent would have recovered its development expenses, “the recovery would have been deferred and the [respondent] would have had to carry the property until it could be sold at a profit or would have had to expend further funds to pursue the condominium project”: at para. 71.

[57] The trial judge chose 10% in the exercise of his discretion. There is no set amount that the trial judge had to apply in reducing the development expenses to take into account the various contingencies that he properly considered.

[58] I see no error in the trial judge’s approach to this issue.

Disposition

[59] Accordingly, I would allow the appeal in part. I would set aside paragraph 1 b. of the judgment dated January 5, 2022 to be replaced with a revised paragraph to be completed once the calculations of the deduction for the Unit 233B rental costs and the amount of the respondent’s undertaking and first charge against the damages recovered for development expenses are finalized.

[60] Given the significant reduction in the respondent’s award of damages, I would also set aside paragraphs 2 and 4 of the judgment regarding the quantum of pre-judgment interest and costs owing from the appellants to the respondent.

[61] If the parties cannot agree on an amended calculation of damages for the recovered development expenses, pre-judgment interest, or the disposition of costs on appeal and at trial, I would invite the parties to make brief written submissions of no more than ten pages, plus a costs outline, within seven days of the release of these reasons.

Released: July 7, 2023 “K.F.”

“L.B. Roberts J.A.”
“I agree. K. Feldman J.A.”
“I agree. P. Lauwers J.A.”