

CITATION: Graf v. Periyathamby 2024 ONSC 1062
COURT FILE NO.: CV-16-4097-00SR
DATE: 2024/02/21

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Gary Graf and Valentina Bojic Graf)
)
Plaintiffs) Steven Gadbois for the Plaintiffs
- and -)
)
)
Easwara Periyathamby, Chitra)
Subramaniam, Via Realty Inc., and)
Mahesan Subramaniam)
Defendants) Syed Abid Hussain and Saba Viraney for the
) Defendants
)
)
)
) **HEARD:** April 24, 25, 26, 2023 and in
) writing

THE HONOURABLE JUSTICE I.R. SMITH

REASONS FOR JUDGMENT

1. Introduction

[1] The plaintiffs, Gary, and Valentina Graf are married. Ms. Graf works for the Region of Waterloo. Mr. Graf owned and operated a restaurant and hoped to purchase and run a second restaurant. To that end, he made enquiries about, and eventually agreed to purchase, a restaurant called Oscar's, situated in Kitchener. To fund that purchase, the plaintiffs listed for sale two

income properties which they owned, a duplex and a triplex, one in Waterloo¹ and one in Kitchener.² They entered into an agreement of purchase and sale (“APS”) with the defendant Easwara Periyathamby for the Waterloo property and with one Ramakrishnan Tharmalingam for the Kitchener property. The APS for the Waterloo property was later amended to substitute the defendant Chitra Subramaniam for Mr. Tharmalingam.

[2] On the agreed upon closing dates both purchasers said that they were not able to close the transactions. The plaintiffs then relisted the properties and they were successfully sold, the Kitchener property for more than the original APS price and the Waterloo property for less. With respect to the Waterloo property, the Grafts claim damages comprised of the difference between the originally agreed upon purchase price and the price at which the property was eventually sold plus lost transaction costs (legal fees, disbursements, and taxes), and that the deposit paid by Mr. Periyathamby should be forfeited and applied to those damages. With respect to the Kitchener property, they claim that the deposit paid be forfeited by Ms. Subramaniam.

[3] Default judgment was awarded against the defendant Via Realty Inc. on September 30, 2016, in the amount of the two deposits held by Via Realty on the two transactions. At present, by order of Justice Broad, dated March 14, 2018, both deposits are held by the Sheriff pending further order of the court.

[4] One Waran Nathans, whom the Grafts say they understood to be the owner of Oscar’s and a real estate agent, acted both for the Grafts and for Ms. Subramaniam and Mr. Periyathamby on the failed agreements to sell the two income properties. Mr. Nathans was the broker of record at Via Realty. He did not act on the later successful sales of the income properties.

[5] Because of the delays in the sale of the income properties, Mr. Graf’s agreement to purchase Oscar’s did not close.

[6] Importantly, the plaintiffs claim that it was not until after the two income properties were finally sold and they had commenced this action that they came to understand that Mr. Nathans

¹ 241 Mary Street, Waterloo, Ontario, to which I will refer as the “Waterloo property.”

² 105-107 Waterloo Street, Kitchener, Ontario, to which I will refer as the “Kitchener property.”

was not the owner of Oscar's, that Mr. Periyathamby and Ms. Subramaniam (and Mr. Tharmalingam) were connected to each other through the defendant Mahesan Subramaniam, that Chitra Subramaniam was the wife of Mahesan Subramaniam, that Mr. Subramaniam was the true owner of Oscar's, that Mr. Periyathamby and Ms. Subramaniam were trustees or mere representatives or nominees of Mr. Subramaniam on the failed purchases, and that Mr. Nathans and Mr. Subramaniam were in business together at Via Realty.³ Having come to know Mr. Subramaniam's role in this matter, the plaintiffs amended their statement of claim, added him as a defendant, and claim against him all the damages they have claimed from Mr. Periyathamby and Ms. Subramaniam.

[7] The plaintiffs claim would appear to be a straightforward matter of breaches of written contracts, but the defendants say that the written APS's were supplemented by a verbal agreement pursuant to which the plaintiffs and Mr. Subramaniam agreed that if, for any reason, the agreements to purchase the income properties failed, the plaintiffs would return the deposits paid by Mr. Periyathamby and Ms. Subramaniam, Mr. Subramaniam would return the deposit paid by Mr. Graf in connection with the agreement to purchase Oscar's, and the parties would exchange mutual releases on all three transactions. As it happened, the mortgage financing for one of the purchases of the two income properties was not approved. Both deals did not close. Accordingly, Mr. Subramaniam returned Mr. Graf's deposit on the purchase of Oscar's and was shocked to learn that the plaintiffs were refusing to return the deposits on the purchases of the income properties.

[8] On the basis of the alleged verbal agreement, as well as an alleged misrepresentation in the APS for the Kitchener property, the defendants say that the plaintiffs are entitled to nothing.

[9] For the following reasons, I find for the plaintiffs. The defendants launched a counterclaim but abandoned it at the outset of the trial. It is dismissed.

³ The evidence establishes that Mr. Nathans and Mr. Subramaniam are very close and that they were partners in, and the two directors of, the Via Realty business, where they were both real estate brokers. Mr. Nathans also employed Mr. Subramaniam at a related company called Via Financial, where Mr. Subramaniam acts as a mortgage broker. In addition, Mr. Nathans and Mr. Subramaniam together incorporated the numbered company which later owned Oscar's, but Mr. Nathans had left that business by the time of the events relevant to this trial.

2. The evidence

2.1 Introduction

[10] At trial, the evidence of the witnesses in-chief was received by affidavit followed by *viva voce* cross-examinations and re-examinations. I review here the chronology of events, highlighting some of the points of disagreement between the parties respecting the facts. I draw my conclusions on the facts in part 3 of these reasons.

2.2 Mr. Graf expresses interest in purchasing Oscar's

[11] As I have said, Mr. Graf operated a restaurant and hoped to purchase another. He and Ms. Graf were in the habit of having breakfast at Oscar's on weekends and had become friendly with a server there, one Frances Adsett. The plaintiffs say that Ms. Adsett told them on one of their weekend visits to Oscar's in May or June of 2014 that the restaurant was for sale. They expressed an interest in this information after which Mr. Nathans came to their table and introduced himself as the owner of Oscar's. They had a brief conversation then and a tour of the restaurant was arranged for Mr. Graf for a few days later. During that tour, Mr. Graf says he was very briefly introduced to Mr. Subramaniam, whom he understood to be Mr. Nathans' partner in Oscar's.

[12] At a meeting sometime after the tour, according to the plaintiffs, Mr. Nathans pushed them for an offer for Oscar's and they told him that they had two income properties which they would have to sell first in order to fund the purchase of Oscar's. At this point, Mr. Nathans told the plaintiffs that he was also a real estate agent and that he could list the properties for them. The plaintiffs provided Mr. Nathans with a credit report and with copies of the rental agreements for the then current tenants of the various units in the income properties. Mr. Nathans also attended the income properties to inspect them.

[13] Mr. Subramaniam, Mr. Nathans and Ms. Adsett all dispute this version of the genesis of the relevant events. Ms. Adsett deposed that she knew the Graf's as regular weekend customers of Oscar's but that she did not disclose to them in June of 2014 (or ever) that the restaurant was for

sale, information she said she did not know until late 2015. She said further in her affidavit that Mr. Subramaniam was the owner of Oscar's at that time and the "he was the only one who used to be present [*sic*] at Oscar's on a daily basis." Ms. Adsett was not cross-examined at trial. Mr. Nathans said that he was not at Oscar's on weekends.

[14] Mr. Subramaniam said that he was interested in selling Oscar's in 2014 and that he listed it for sale. That listing attracted no offers and by the time he was approached by Mr Graf the listing had lapsed. Mr. Subramaniam said that he understood that, after the lapse of the listing, a mutual acquaintance in the restaurant industry, one Phillip Nellis, had advised Mr. Graf that Oscar's was available. Then, at some point in mid-May 2014, Mr. Graf came to Oscar's and asked one of the staff if he could speak to the owner. Mr. Subramaniam says that Mr. Nathans was "never at Oscar's to meet customers" and that it was he, Mr. Subramaniam, who came out from the kitchen and sat with Mr. Graf at one of the tables.

[15] Mr. Subramaniam says that he confirmed for Mr. Graf that the restaurant was for sale in a meeting that lasted about 20 – 30 minutes. He said that he told Mr. Subramaniam that he would call "my realtor [Mr. Nathans] who had all the information about the restaurant" to arrange for a meeting between Mr. Graf and Mr. Nathans. A few days later Mr. Nathans, Mr. Subramaniam and Mr. Graf met at Oscar's. Mr. Graf was given a tour of the restaurant and he exchanged contact information with Mr. Nathans. A few days after that, Mr. Nathans told Mr. Subramaniam that the plaintiffs needed to sell two income properties to fund the purchase of Oscar's.

[16] Mr. Nathans corroborated the account of Mr. Subramaniam. He added that before leaving their meeting at Oscar's, Mr. Graf asked Mr. Nathans for a copy of Oscar's lease and financial information about the restaurant. Mr. Nathans said before the end of that month, May of 2014, he met with the plaintiffs at Mr. Graf's restaurant at which time he supplied financial information respecting the numbered company that owned Oscar's, which Mr. Graf had asked for. A few days after that, Mr. Graf asked for a further meeting at which he said he was interested in purchasing Oscar's but that he would have to sell two income properties first. Mr. Graf gave Mr. Nathans information about the two properties, and, with Mr. Graf, Mr. Nathans visited both.

[17] In cross-examination, Mr. Graf agreed that he heard from Mr. Nellis that Oscar's was for sale, but otherwise denied the version of these events provided by the defendants. He denied having met Mr. Subramaniam twice and repeated that he had been introduced to him only briefly during his tour of Oscar's, said that the first meeting at Oscar's was with Mr. Nathans, and that there was never a meeting where all three of them discussed the possible purchase of Oscar's. Similarly, Ms. Graf denied the defendants' evidence, maintained that she had never met Mr. Subramaniam, and rejected the suggestion that she had confused the two men.

2.3 The income properties are listed with Mr. Nathans

[18] As I have said, the plaintiffs say that Mr. Nathans told them that he was a real estate agent and that he could list the income properties for sale for them. They agreed to do so in June 2014 and listed the Waterloo property for \$479,900 and the Kitchener property for \$474,900. The listings made it clear that the two properties were not single-family residences. Neither property attracted any interest.

[19] Mr. Nathans said that he thought that the listing prices were high and that he told the plaintiffs as much. Mr. Graf insisted on these prices, however, because he was concerned about having enough money to purchase Oscar's. Mr. Graf denies that Mr. Nathans gave this advice and that it was Mr. Nathans who proposed the list prices. In any case, the properties remained on the market for almost three months during which time they attracted not a single offer. In early September 2014, Mr. Graf contacted Mr. Nathans and said that he thought that they should lower the list prices for the two properties. They scheduled a meeting for September 5, 2014, to discuss the issue.

2.4 Buyers for the income properties emerge

[20] Ms. Graf testified that she was working at her job for the Region of Waterloo on September 5, 2014, and that the meeting with Mr. Nathans that day was during her lunch hour, the only time at which she was able meet. She testified that the plaintiffs knew in advance that "something was coming from" Mr. Nathans.

[21] The plaintiffs say that at the meeting on September 5, 2014, Mr. Nathans presented amended listing agreements for both properties and offers to purchase both at the amended prices. Mr. Nathans was also acting for the prospective purchasers, Mr. Periyathamby and Mr. Tharmalingam. The offers were in the standard APS form of the Ontario Real Estate Association, had the same financing conditions (which had to be waived by September 12, 2014) and the same closing dates (October 15, 2014). Deposits of \$5,000 had been made in each case to Via Realty. The plaintiffs accepted the offers immediately (Ms. Graf described the offers as “wonderful”). Apparently unnoticed by the plaintiffs, both APS’s referred to the income properties as single-family residences, which they are not.

[22] At the same meeting, with the offers accepted, Mr. Nathans presented Mr. Graf with a draft offer to purchase Oscar’s from the numbered company which offer Mr. Graf signed. The offer included a financing condition (to be waived by October 6, 2014) and a closing date of October 31, 2014. Mr. Graf provided a cash deposit of \$5,000 to Mr. Nathans who then gave Mr. Graf a handwritten receipt dated September 5, 2014.

[23] All three APS’s contained standard entire agreement clauses.

[24] The plaintiffs say that they knew nothing about the identities of the two purchasers of their income properties and had no idea that they had any connection to Oscar’s. As far as they were concerned, the only connections between the three transactions were that they, the plaintiffs, needed to sell the income properties in order for Mr. Graf to be able to purchase Oscar’s and that Mr. Nathans was the agent for both sides on all three deals.

2.5 A verbal agreement?

[25] Mr. Subramaniam and Mr. Nathans, however, tell a different story. Mr. Nathans testified that there was a meeting on the morning of September 5, 2014, at which the plaintiffs agreed to reduce the Waterloo property to a list price of \$424,900 and the Kitchener property to \$449,900. On his way home from this meeting, according to Mr. Nathans, he called Mr. Subramaniam to tell him of the reductions.

[26] Mr. Subramaniam said that a few days after Mr. Graf's tour of Oscar's, Mr. Nathans told him that the plaintiffs had decided to list with Mr. Nathans and Via Realty. Over the next few months, he would ask Mr. Nathans for progress reports on the sale of the properties but that Mr. Nathans would tell him there was no interest in them. On September 5, 2014, Mr. Nathans told him that he was to meet with the plaintiffs that morning to discuss reducing the asking prices of the two properties. That same day, at around noon, Mr. Nathans called to tell him that he had met with the plaintiffs and that they had agreed to reduce the Waterloo property to a list price of \$424,900 and the Kitchener property to \$449,900.

[27] Mr. Subramaniam said that at the time he heard from Mr. Nathans that the plaintiffs were willing to lower the listing prices for their income properties, he was anxious to sell Oscar's. He did not want to purchase any residential properties, but he wanted to sell the restaurant. He decided to call on friends to help. He put it as follows in his affidavit:

I thought about the reduced prices. I called two friends who knew I wanted to sell the Oscars. I asked my friends, [Mr. Tharmalingam] and [Mr. Periyathamby] for their help. I requested them to act as buyers to purchase the two properties owned by Gary and Valentina so that Gary and Valentina could get the required equity to purchase the Oscars.

Both of my friends agreed to help. I told them that if they suffered any losses, I would be responsible. As they had been my friends for a long time, they trusted me, and I trusted them. They agreed to act as buyers.

[28] Mr. Periyathamby confirmed that on September 5, 2014, he agreed "to act as a buyer for one of the properties" and that Mr. Subramaniam committed to "be responsible for any losses related to the purchasing of the residential property." In cross-examination, Mr. Subramaniam agreed with the suggestion that Mr. Periyathamby was doing him "a kindness" by buying the property.

[29] Thereafter, Mr. Subramaniam says that he called Mr. Nathans at about 2:00 p.m. on September 5, 2014 and told him to convey an offer to the plaintiffs whereby (1) he would arrange for buyers for their income properties (at prices of \$415,000 for the Waterloo property and \$440,000 for the Kitchener property) if Mr. Graf would agree to purchase Oscar's (for \$375,000) and (2) if the agreements to purchase the income properties do not close for any reason the parties

will exchange mutual releases and return the deposits without any deductions on all three properties. Mr. Subramaniam says that Mr. Nathans told him he would contact the plaintiffs and call him back. About an hour later, Mr. Nathans called back and said that the plaintiffs had accepted all components of this verbal offer. Mr. Nathans asked Mr. Subramaniam for the names of the purchasers of the income properties, which Mr. Subramaniam provided, and Mr. Nathans then prepared standard form APS's for each of the three transactions.

[30] That same day, according to Mr. Subramaniam, Mr. Tharmalingam signed the APS for the Kitchener property in Mr. Nathans' office and Mr. Subramaniam took the draft APS for the Waterloo property to the home of Mr. Periyathamby for his signature. Mr. Subramaniam was advised by Mr. Nathans that on the following day, September 6, 2014, the plaintiffs both signed the APS's for the income properties and that Mr. Graf signed the APS for Oscar's, all based on the verbal agreement as described in the previous paragraph. No lawyers were involved at this stage. Mr. Subramaniam said that he fully intended that all three transactions would close but that all parties "knew full well" that if either of the income property deals did not close, Mr. Graf would not have enough money to purchase Oscar's. Mr. Nathans' version of these events conforms with that of Mr. Subramaniam.

[31] The plaintiffs deny that there was any agreement between the parties except as captured in the three written APS's. They say that there was only one meeting on September 5, 2014, and no meeting at all on September 6, 2014.

2.6 The parties engage solicitors and work towards closing

[32] The plaintiffs hired Paul Settimi to act as their solicitor on all three transactions and he opened three separate files. He said that the purchasers for the two income properties both retained Shalini Sathya to act as their solicitor. He did not find this unusual because they had a common real estate agent, Mr. Nathans, and that it is common for real estate agents to refer their clients to lawyers with whom they have a relationship. Mr. Settimi noted that a different lawyer, Gary Anandasangaree, had been retained to act for the numbered company which was the seller of Oscar's.

[33] On September 10, 2014, the plaintiffs agreed to an amendment to the APS for the Kitchener property by which it was agreed that the purchaser would assume the then current tenants of that property. Mr. Graf continued to evaluate Oscar's and hired an accountant to help him review Oscar's financial records, which had been provided by Mr. Nathans.

[34] On September 12, 2014, both purchasers of the income properties waived their financing conditions. Mr. Graf never waived the financing condition in his favour on the Oscar's APS, which condition expired on October 6, 2014.

[35] On October 6, 2014, Mr. Nathans asked the plaintiffs to agree to amend the APS for the Kitchener property by replacing Mr. Tharmalingam with Ms. Subramaniam, and to amend the APS for the Waterloo property by changing the closing date to October 30, 2014. The plaintiffs agreed, signed the amended documents, copies of which they forwarded to Mr. Settimi. The plaintiffs say that they had no knowledge of any connections between Ms. Subramaniam, Mr. Periyathamby, Mr. Tharmalingam and Oscar's. Mr. Settimi said that it was unusual that these amendments (including the September 10, 2014, amendment respecting the tenants at the Kitchener property) were presented and agreed to without the involvement of the solicitors on either side. Ms. Sathya said that she did not even become aware of the September 10 amendment until after the Kitchener transaction failed to close.

[36] On the date set for the closing of the Kitchener property, October 15, 2014, through her solicitor, Ms. Sathya, Ms. Subramaniam requested that the closing date be changed to October 20, 2014. Mr. Nathans had advised the plaintiffs that the purchaser was having difficulty securing insurance for the property, and they agreed to the request through Mr. Settimi. The plaintiffs say that at this time Mr. Nathans pressured Mr. Graf to sign a document saying that the Kitchener property was a single-family residential unit. He refused. Mr. Nathans denied that he made this request.

[37] On October 20, 2014, a further extension of the closing date (to October 29) was requested and again the plaintiffs agreed. Ms. Subramaniam requested and was provided access to inspect the Kitchener property on October 22, 2014.

[38] On October 21, 2014, Mr. Settimi received a letter from a solicitor named Rishi Vaid, who advised that he would be acting for Mr. Periyathamby on the purchase of the Waterloo property. Ms. Sathya testified that she did not know why Mr. Periyathamby changed lawyers, but the change post-dated her discussion with Mr. Periyathamby about the fact that the property was not a single-family residence as reflected in the APS. Mr. Periyathamby said that he never spoke to Ms. Sathya or to Mr. Vaid, and that the lawyers were arranged for him by Mr. Subramaniam. He said that he never provided any instructions to either lawyer. He gave no evidence about why his solicitor changed from Ms. Sathya to Mr. Vaid.

[39] Thereafter, in the days leading to the closing dates, Mr. Settimi heard nothing from either Ms. Sathya or Mr. Vaid. Accordingly, on October 27, 2014, he wrote to Mr. Vaid but received no response. On that same day, he came to understand that the purchaser of the Kitchener property was having difficulty with financing.

[40] Mr. Settimi said that at no time did anyone, including both his clients and the solicitors involved on the transactions, ever advise him that there was any connection between agreements to purchase the Kitchener property, the Waterloo property, and Oscar's.

[41] Mr. Subramaniam said that he instructed Mr. Nathans to waive the financing conditions on the purchase of the income properties because he knew that his verbal agreement with the plaintiffs meant that if either deal failed to close the parties would execute mutual releases and deposits would be returned. For the same reason, he was comfortable substituting his wife, Ms. Subramaniam, for Mr. Tharmalingam when Mr. Tharmalingam asked that his name be removed as the buyer of the Kitchener property.⁴ Mr. Nathans provided similar evidence. He added that Mr. Settimi was not involved in the amendments to the APS's because the "parties had a verbal agreement for the three properties, and they cooperated with each other."

2.7 The deals fail

⁴ There was no evidence about why Mr. Tharmalingam no longer wanted to act as a buyer for Mr. Subramaniam.

[42] On October 28, 2014, Ms. Sathya wrote to Mr. Settimi to advise that her client, Ms. Subramaniam (the intended purchaser of the Kitchener Property), would be unable to close on the purchase of the Kitchener property. Ms. Sathya wrote as follows:

Our client has advised that their mortgage provider has deemed the above noted property a rooming house and has declined funding. It is our understanding that an appraiser from the bank attended at the property to complete final inspections and was not satisfied with the use of the property. The Vendor failed to disclose these facts to our client. Given the circumstances, our client is not willing to complete closing and has requested for [sic] a return of their deposit.

[43] Mr. Settimi responded the same day, pointing out that the relevant documents, signed by Ms. Sathya's client, made it plain that the property was a "multi-use residential rental property." Therefore, he wrote, Ms. Subramaniam's failure to secure financing "has nothing to do with our clients and is not sufficient for cancelling this transaction." Mr. Settimi further wrote that the plaintiffs were ready, willing and able to close, and that they would pursue a claim should they suffer any damages due to Ms. Subramaniam's failure to close. Ms. Sathya did not respond to this letter.

[44] Also on October 28, 2014, Mr. Vaid wrote to Mr. Settimi respecting the Waterloo property, advising simply, and without explanation, as follows: "Please be advised that the above-noted transaction is cancelled." As he did with Mr. Sathya, Mr. Settimi wrote to Mr. Vaid (solicitor for Mr. Periyathamby), and advised that his clients were ready, willing and able to close and that the plaintiffs would pursue a claim for damages. Mr. Vaid did not respond.

[45] On October 29, 2014, Mr. Nathans contacted the plaintiffs and advised that neither of the purchasers would be able to close on the agreements to purchase the income properties. That same day, by email, he sent mutual releases signed by Ms. Subramaniam and Mr. Periyathamby on October 28, 2014. The plaintiffs refused to sign the releases and forwarded them to Mr. Settimi.

[46] On October 31, 2014, Mr. Nathans wrote to Mr. Settimi and asked that mutual releases be signed on all three transactions. Mr. Settimi declined and, in the email exchange which followed, Mr. Nathans wrote as follows: "... you will hear from [Mr. Subramaniam's] lawyer regards all properties, and all 3 deals are interlinked, sellers and buyers are well aware about it." Mr. Settimi

said that this was the first time anyone had suggested to him that the three transactions were connected. None of the three lawyers he was dealing with had said anything about such a connection. Neither did his clients or Mr. Nathans. The only connection he was aware of was that Mr. Nathans was the agent on all three deals. Nothing in any of the documents suggested such a connection. No-one told him that Mr. Tharmalingam, Ms. Subramaniam and Mr. Periyathamby were trustees for Mr. Subramaniam, or otherwise not the true buyers of the income properties.

[47] Mr. Settimi closed the email exchange of October 31 by writing to Mr. Nathans and demanding that Via Realty not release the deposits on the real estate transactions, advising again that the plaintiffs would be commencing an action in connection with the failure of the purchasers of their income properties to close, and demanding the return of the deposit paid on Mr. Graf's failed attempt to purchase Oscar's.

[48] Ms. Sathya testified that there was nothing in her file respecting any trust agreements on either of the income property transactions, nothing indicating anything about any verbal agreement respecting the transactions, nothing linking the two income property transactions such that if one did not close, they both would not close, nor anything linking either transaction to an agreement to purchase a restaurant.

[49] At trial, Mr. Subramaniam said that he had hired a mortgage broker to secure financing for the purchases of the plaintiffs' income properties. The broker told him that the lender had asked for an inspection by an appraiser of the Kitchener property. That inspection was arranged through Mr. Nathans and Mr. Graf. After the inspection (which was on October 22, 2014), the appraiser told the mortgage broker, who told Mr. Subramaniam, that the property was not a single-family residence, as reflected on the APS. It was also reported that the appraiser had been unable to visit all the units in the property. This resulted in "challenges in the final approval/release of the financing" for the Kitchener property. Although Mr. Subramaniam continued to work with the broker to resolve the problem, the lender decided not to fund the purchase because the property was a "multi-residential/rooming house."

[50] Mr. Subramaniam says that he told Mr. Nathans on October 28, 2014, that the purchase of the Kitchener property could not close. All parties understood that Mr. Graf would have

insufficient funds to purchase Oscar's, and that, pursuant to their verbal agreement, mutual releases for all three transactions would be exchanged and deposits returned. He acknowledged that the transaction for the Waterloo property could have closed (as did the proposed purchaser of that property, Mr. Periyathamby⁵), but said that he asked Mr. Nathans to send mutual releases for both transactions, signed by his wife and by Mr. Periyathamby, to the plaintiffs. Shortly thereafter, a mutual release and Mr. Graf's deposit for the Oscar's transaction were delivered to the plaintiffs' solicitor.

[51] Mr. Subramaniam says that he was "shocked" when the plaintiff's refused to sign the releases and return the deposits on the income property transactions "in breach of the Verbal Agreement." Mr. Nathans claimed to be "shocked" when he received Mr. Settini's letter of October 31, 2014, given its "utter disregard of the Verbal Agreement."

[52] The plaintiffs say that it is true that Mr. Graf would not have had enough money to purchase Oscar's if either of both of the income property transactions did not close, but that there was never any agreement that if one of the three deals failed that all three deals would necessarily fail. He intended to purchase a restaurant and, whether or not that restaurant was Oscar's, he needed to sell the income properties to achieve that goal. I note that Mr. Graf did later purchase a different restaurant, after the income properties were sold to other purchasers.

2.8 The aftermath

[53] Upon the collapse of the deals to sell the two income properties, the plaintiffs listed them for sale again. The Kitchener property sold for \$10,000 more than the price to which the plaintiffs and Ms. Subramaniam had agreed, which was the price at which it was re-listed with a new real estate agent. The Waterloo property sold for \$73,500 less than the price to which the plaintiffs and Mr. Periyathamby had agreed (\$415,000). It was initially re-listed at \$410,000 but attracted no

⁵ I note that during his discovery Mr. Periyathamby said that the transaction did not close only because "plaintiff Graf precluded the agreement on October 29th." At trial, he said that he did not remember using these words at the discovery.

buyer for over 4 months, at which point the listing price was reduced to \$341,500, which is the price at which it sold over a month after the reduction.

[54] The plaintiffs then commenced this action by way of a statement of claim that did not name Mr. Subramaniam. He was added as a party later, after discoveries when they learned of his connection to Mr. Nathans, Ms. Subramaniam, Mr. Peryiathamby and Mr. Tharmalingam, and his previously hidden role in the failed purchases of the income properties.

3. Findings of fact

3.1 Introduction

[55] As I have said, I find for the plaintiffs in this matter. They have offered a coherent and straightforward account of the relevant events that is supported by the documentary record. This was a case of three legally unconnected transactions documented in three separate APs which do not refer to each other. There was no additional verbal agreement. Two of the transactions failed because the purchasers were unable or chose not to close. The plaintiffs are entitled to damages incurred as a result.

[56] By contrast, the defendants offer a strained version of events that is incredible and is not supported by the documentary record.

[57] I come to these conclusions based on the following analysis of the evidence, and my discussion of the application of the facts to the relevant law at part 4 of these reasons.

3.2 Did the plaintiffs deal with Mr. Subramaniam?

[58] While the competing versions of the genesis of the relevant events are not very different, and while both accounts suffer from the passage of nearly a decade since the relevant events, some of the differences are important. The plaintiffs say that they never discussed the sale of Oscar's with Mr. Subramaniam, its owner, and that they understood Mr. Nathans to be an owner of Oscar's.

The defendants say that the plaintiffs' evidence that they learned from Ms. Adsett that the restaurant was for sale, when in fact Mr. Graf learned that fact from Mr. Nellis, and the evidence that Mr. Nathans did not attend Oscar's on weekends, establishes that the plaintiffs have no credibility. In their written submissions, the defendants argue that these inaccuracies suggest that the plaintiffs' evidence cannot be believed on any point.

[59] In my view, the discrepancies in the evidence about how the plaintiffs learned that Oscar's was for sale is of little significance and is most likely attributable to the passage of time and the frailties of human memory. I certainly do not draw the conclusion that the plaintiffs were being dishonest about this point. In any case, the more important point is whether the plaintiffs met and had any substantive discussions with Mr. Subramaniam in this period. Both plaintiffs were adamant that they had not. Both understood that Mr. Nathans was an owner of Oscar's. Even Mr. Subramaniam's wife thought that Mr. Nathans was an owner of Oscar's. Moreover, even on Mr. Subramaniam's evidence, immediately after being approached by Mr. Graf, he effectively immediately turned the matter of the negotiation of the sale of Oscar's over to Mr. Nathans and it was from Mr. Nathans that Mr. Graf sought and received financial information about Oscar's.

[60] In other words, it was reasonable for the plaintiffs to believe that they were dealing with an owner of Oscar's. I believe the plaintiffs when they say that they did not have any substantive discussion at any time with Mr. Subramaniam, and that all such discussions were with Mr. Nathans. This conclusion is supported by the fact that when this action commenced, the plaintiffs did not name Mr. Subramaniam as a defendant. He was not added as a defendant until after the plaintiffs' discoveries of Ms. Subramaniam and Mr. Periyathamby during which they learned of Mr. Subramaniam's role in this matter.

[61] It follows that I do not accept the defendants' submission that this body of evidence demonstrates the plaintiffs' incredibility and/or unreliability. On the contrary, as will become clear, I accept that the plaintiff's testified truthfully before me. It is the defendants whose evidence lacks credibility.

3.3 Did the plaintiffs meet with Mr. Nathans on both September 5 and 6, 2014?

[62] The plaintiffs say that there was one meeting with Mr. Nathans on September 5, 2014, at which he presented three separate APS's which they signed at that meeting.

[63] The defendants say that Mr. Nathans met with the plaintiffs in the morning of September 5 to discuss new listing prices for the two income properties, that Mr. Nathans then spoke with Mr. Subramaniam by telephone twice, that Mr. Nathans then spoke again with Mr. Graf to convey Mr. Subramaniam's proposed verbal agreement, which Mr. Graf accepted, that the APS's were then prepared and signed by the proposed purchasers (Mr. Tharmagalingam and Mr. Periyathamby) late in the day, and that the APS's were then presented to the plaintiffs on September 6, 2014 at another in person meeting.

[64] Again, I am satisfied that it is the plaintiffs' version of events which should be accepted. There was a single meeting with Mr. Nathans on September 5, 2014, at which he presented APS's already signed by the proposed purchasers of the income properties and by Mr. Subramaniam on behalf of the numbered company that was selling Oscar's. The meeting happened on Ms. Graf's lunch hour as she described. As a full-time employee, she could not meet at any other time that day, or at least not at the time described by Mr. Nathans.

[65] Several factors lead to these conclusions, which I catalogue as follows:

- a. The plaintiff's version of events is straightforward and sensible. They had discussed reducing the list prices of the two income properties a few days before September 5, understood that Mr. Nathans would be able to produce buyers at lower prices and they met for the purpose of receiving those offers, which they accepted.
- b. It is clear that the APS's for the income properties were prepared prior to September 5, 2014, not on that date as Mr. Nathans and Mr. Subramaniam testified. Both documents are originally dated September 2, 2015, and reflect an offer open until September 3, 2014. The documents were then amended by hand to reflect offers dated September 5, 2014, open until September 6, 2014. This is consistent with Ms. Graf's evidence that they knew in advance that offers were to be presented to them when they met with Mr. Nathans on September 5

- c. The offers and the signatures of the purchasers are dated, in their own handwriting, September 5, 2014.
- d. The plaintiff's signatures on the APS's for the income properties are dated September 5, 2014, not September 6. Again, the date is inserted in their own handwriting.
- e. The signatures of the purchasers finally accepting the transactions are dated September 6, 2014, in their own handwriting.
- f. Mr. Graf's signature on the Oscar's APS is dated September 5, 2014, in his own handwriting.
- g. Mr. Nathans' handwritten receipt for the deposit paid by Mr. Graf is dated September 5, 2014.

[66] Mr. Nathans was effectively cross-examined on all this evidence which demonstrates that he had purchasers for the income properties in hand before September 5, that he prepared the APS's for the income properties on September 2 (not Sept. 5), that he met with the plaintiffs on September 5 for the purpose of getting them to sign amended listing agreements, to accept offers for the income properties, and to make an offer on Oscar's, and that the deals were all finally accepted by the nominee purchasers and by Mr. Subramaniam on the Oscar's transaction on September 6. There was no meeting with the plaintiffs on September 6.

[67] Mr. Nathans' evidence that the dates on the documents were accidents or mistakes is not credible. He said that he made mistakes using the online form such that the dates of September 2 and 3 appeared instead of September 5 and 6, and that that those mistakes repeated themselves in subsequent documents. I do not accept that evidence especially given that it is contradicted by all of the handwritten dates on the documents, all of which conform with the version of events provided by the plaintiffs. I do not believe that all who signed the documents uniformly and

repeatedly wrote the wrong date when they executed those documents. It is much more likely that they uniformly and repeatedly recorded the correct date, and I so find.

[68] I am also of the view that Mr. Subramaniam's evidence respecting September 5 is also incredible. I do not accept that in the space of a few hours he learned of the reduced prices for the income properties, decided that he wanted to buy them, devised his alleged verbal agreement connecting all three transactions, described that proposed deal to Mr. Nathans (who in turn got Mr. Graf to agree to it), and then convinced two friends to "act as buyers" of the two properties in some ill-defined capacity. Again, it is much more likely that the friends, Mr. Tharmalingam and Mr. Periyathamby, were engaged by Mr. Subramaniam to act on or before September 2, when their names were applied to the APS's by Mr. Nathans for the income properties, and I so find.

[69] I am also of the view that there were no discussions of a verbal agreement connecting the three transactions, or of Mr. Subramaniam's involvement in the income property transactions, but I will return to those topics below.

3.4 Did the plaintiffs make a fraudulent or negligent misrepresentation?

[70] The APS's for the two income properties both referred to the properties as being in use as single family residences. This was not correct. The defendants say that the plaintiffs misrepresented the nature of the properties to the purchasers. It is further argued that the transaction for the Kitchener property failed because the lender refused to fund the purchase when it discovered that the property was not a single-family residence as reflected in the APS.

[71] The facts do not support the defendants' position. The APS for the Kitchener property was, as I have said, prepared by Mr. Nathans before September 5, 2014. He was acting for both buyer and seller on that transaction and he had complete knowledge of the nature of the property. He had personally inspected it. Moreover, Mr. Nathans had been provided with copies of the rental agreements for the property which show that the property was a triplex and was being used by more than one family. The MLS Data Information Form, which Mr. Nathans prepared with the plaintiffs, referred to the property as "Residential – Duplex," and noted that the house had three kitchens, a separate basement entrance, and was an "investor's dream property" that came equipped with three refrigerators and three stoves. These points are all repeated in the listing,

which Mr. Nathans created. Moreover, the APS allowed for the purchaser to inspect the property, which would make clear that it was not a single-family residence. In any case, on September 10, 2014, the parties to the transaction agreed to an amendment of the APS whereby the purchaser agreed to assume the tenants then living at the property upon closing.

[72] In addition, Mr. Nathans testified that Mr. Subramaniam, who was the actual purchaser of the property, although he was using his friend Mr. Tharmalingam and then his wife as nominal purchasers, was aware that the Kitchener property was not a single-family residence. In this respect it bears repeating that Mr. Nathans and Mr. Subramaniam are very close business associates.

[73] There was no misrepresentation by the plaintiffs. The purchaser was at all times aware that the Kitchener property was not a single-family residence. The plaintiff's signed the APS prepared by Mr. Nathans on September 5 and did not notice the erroneous reference to the contrary. This was a mistake, an oversight, and, in any case, given that the defendants were well-aware of the nature of the Kitchener property, the responsibility to describe the property properly to prospective lenders lay with them. As Mr. Settimi put it in his October 28 email to Ms. Sathya, "this has nothing to do with our clients."

3.5 Was there a verbal agreement?

[74] Mr. Subramaniam testified that there was a verbal agreement, nowhere reduced to writing, that had two components. The first component was that Mr. Subramaniam would arrange for two buyers for the plaintiffs' two income properties at the reduced prices set on September 5 if Mr. Graf agreed to purchase Oscar's. The second component was that if either of the income property deals did not close for any reason, all parties would sign mutual releases and return the deposits made without deduction of any kind.

[75] The plaintiffs deny that there was any such arrangement. They never spoke to Mr. Subramaniam and deny that Mr. Nathans ever put such a proposal to them for their consideration and agreement. They had no idea that the purchasers of their income properties (Mr. Periyathamby and Mr. Tharmalingam) were in any way connected to the transaction for Oscar's, or to Mr.

Subramanian (whose role they did not fully understand), and they never agreed that if one of the income property transactions failed, they would both fail.

[76] I accept the evidence of the plaintiffs and find against the defendants on these points, for several reasons, summarized as follows:

- a. I accept the plaintiffs' evidence that they did not deal with or understand the true role of Mr. Subramanian. While it is true that Mr. Subramanian signed the APS on behalf of the numbered company which was selling Oscar's, there is no evidence that that signature was drawn to their attention, or that they otherwise adverted to it, or that it would have been significant to them when they received that APS. As I have already found, they understood that Mr. Nathans was at least an owner of Oscar's and dealt with him accordingly. The plaintiffs did not know enough about Mr. Subramanian to add him to their statement of claim when they launched this action.
- b. I accept that the plaintiffs knew of no connection between the proposed purchasers of their income properties and either Mr. Subramanian or Oscar's.
- c. The plaintiffs never advised their lawyer, Mr. Settimi, of the alleged verbal agreement, and never sought his advice on such an agreement. There was no reason for them to fail to disclose such an agreement to their own solicitor.
- d. Mr. Settimi was not advised by anyone, including Ms. Sathya and Mr. Vaid, of any connection between the transactions.
- e. No one advised either Mr. Sathya or Mr. Vaid of the alleged verbal agreement or of any connection between the transactions or the purchasers.
- f. Nothing until Mr. Nathans' email of October 31, 2014, suggests any legal linkage between the three transactions, and even that email simply alleges that the deals are "interlinked" but does nothing to explain that linkage or its significance. Dealing

with this fact in his affidavit, Mr. Nathans claimed that, as a non-lawyer, he “could not fully articulate the Verbal Agreement.” I reject that explanation as incredible especially given that Mr. Nathans is said to have been the person who described the verbal agreement to the Mr. Graf and given that it is straightforwardly described in his own affidavit, upon which he was cross-examined before me, during which cross-examination it became clear that Mr. Nathans is not unsophisticated. I conclude that it is much more likely that he could not describe the verbal agreement to Mr. Settimi because it did not exist.

- g. As I have already found, the defendants’ description of the events of September 5 and 6, 2014, when the alleged verbal agreement is said to have crystallized, does not align with the documentary record, as I have found above. It is not credible.
- h. After the verbal agreement was allegedly accepted by Mr. Graf, Mr. Nathans and Mr. Subramaniam – both experienced real estate brokers – caused the parties to sign three APS’s each of which contained an entire agreement clause which, on its face, had the effect of nullifying any previous verbal agreement.⁶ If there had been such an agreement, they should have, and would have, struck out these provisions. I accept that the fact that a verbal agreement is nowhere put into writing is not a bar to finding that there was a verbal agreement (see *Mountain v. Mountain Estate*, 2012 ONCA 806, at para. 66), but the documents in this case are positively inconsistent with the existence of such a verbal agreement.
- i. Mr. Subramaniam’s evidence that he did not put the verbal agreement into writing because he thought that its existence would hamper the ability of the purchasers to

⁶ In the APS’s for the income properties, the relevant portion of the paragraph bearing the heading “AGREEMENT IN WRITING” reads as follows: “There is no representation, warranty, collateral agreement or condition affecting this Agreement other than as expressed herein.” In the Oscar’s APS, the relevant portion of the paragraph bearing the heading “AGREEMENT IN WRITING” reads as follows: “This Agreement, including any Schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein.”

get financing for the transactions, does not inspire confidence. It suggests that he was willing to attempt to mislead the lenders about the nature of the transactions in order to secure mortgages and tells against his credibility.

- j. Similarly, Mr. Subramaniam's decision to use nominee purchasers for the two income properties, is also suspect. It is likely that he did so because his own precarious financial situation (he made a consumer proposal in bankruptcy shortly after these events in 2016), meant it was unlikely he could successfully apply for financing in his own name. I note that the nominee purchasers who testified before me were not able to explain their role on these transactions coherently. Some of the evidence suggests that they were to be the actual purchasers and that Mr. Subramaniam was simply promising to indemnify them against any loss, or that they were to be trustees of some kind, but I am satisfied that Mr. Subramaniam was to be the actual purchaser and they were lending their names to the transactions and applications for mortgage financing.

- k. I agree with the suggestion of the plaintiffs that it is likely that the applications for financing made by the purchasers intentionally and falsely referred to the properties as single family residences and indicated that the purchasers were going to be occupying the properties personally, in an effort to increase the chances of financing being granted. I accept that it is more than likely that Mr. Nathans purposely referred to the properties as single family residences on the APS's for the same reason. In this respect, it is noteworthy that Mr. Nathans did not involve Mr. Sathya in the amendment of the APS for the Kitchener property in which the purchaser agreed to assume the then tenants of the property. Indeed, Ms. Sathya was unaware of the amendment until after the deal had failed because, as she testified, no one ever sent her a copy of it. I pause to note here that I reject Mr. Nathans' evidence that he did send the amendment to Ms. Sathya. By contrast, the plaintiffs promptly provided a copy of the amendment to Mr. Settini. In light of this evidence, I accept Mr. Graf's

evidence that Mr. Nathans attempted to get Mr. Graf to sign a document confirming (falsely) that the Kitchener property was a single-family residence.

- l. As evidence of the alleged verbal agreement, the defendants point to discussions that the Mr. Graf and Mr. Nathans had respecting how the purchase of Oscar's would be financed given that the plaintiffs expected that the sales of the income properties would not generate enough capital to purchase Oscar's outright. Mr. Graf agreed in his evidence that there were discussions about making monthly payments to the seller of Oscar's as a means of completing the transaction. However, I accept Mr. Graf's evidence that these discussions were uncertain and that no agreement was ever achieved on these points.

- m. Last, as I have already found, the defendants and Mr. Nathans suffer from a serious credibility deficit. Very little of their evidence is corroborated by the documentary records (and/or is positively contradicted by that record) and much of it (as I have explained here and under the previous headings in these reasons) makes little sense to me.

[77] The only facet of the evidence before me which has given me any pause is the decision of the purchasers of the income properties to waive the financing conditions in their favour on September 12, 2014. This, on its face, seems to have been an unwise decision that is difficult to explain, but Mr. Subramaniam testified that he was comfortable doing so because he knew that the plaintiffs had verbally agreed to provide mutual releases if either deal failed.

[78] Having considered the matter carefully, however, I do not accept this explanation. Even if there were a verbal agreement, on the evidence before me it made little sense for the purchasers to waive the condition before they had secured financing. There is no evidence that they or Mr. Subramaniam secured any benefit from waiving the condition, nor that the plaintiffs sought such a waiver. I note that Mr. Graf did not waive the financing condition in his favour on the Oscar's transaction even though, had there been a verbal agreement as described, he should have been as comfortable doing so as Mr. Subramaniam says he was. In any case, as I have already laid out

above, the overwhelming weight of the evidence is that there was no verbal agreement, and I find that there was no such verbal agreement. I conclude that the decision of the purchasers of the income properties to waive the financing conditions is explained by facts or reasoning not in evidence before me.

[79] The defendants also point to the delivery of mutual releases immediately upon the failure of the transactions, to Mr. Nathans' email of October 31, 2014, and to the failure of the plaintiffs to respond to that email, as evidence of the existence of the verbal agreement. I do not agree that this evidence establishes the existence of the alleged agreement. In my view, the attempt to secure mutual releases said to be referable to an alleged verbal agreement was a desperate and fictitious after the fact creation intended to avoid liability for the failed transactions – which liability lay entirely at the feet of the defendants. The failure to respond to Mr. Nathans' email signifies nothing. The plaintiffs' solicitor had already made it plain that his clients intended to sue, and this is what they did. This action constitutes a clear denial of what was alleged in the October 31 email.

4. Conclusions

[80] Given that I have found that there was no verbal agreement as alleged by the defendants, nor any misrepresentation on the part of the plaintiffs, the contracts in the form of the APS's on the two income property transactions must be given their effect. The defendants were in breach of both contracts by failing to close the deals as they had agreed to do.

[81] Further, while it is strictly speaking not necessary to make this point given the findings I have made, even if there were some verbal agreement which preceded the signing of the APS's, the effect of the entire agreement clauses is that such an agreement cannot be given any effect or be enforced. It is superseded by the written contracts.

[82] In *Soboczynski v. Beauchamp*, 2015 ONCA 282, the court held as follows (at paras. 41 and 43; emphasis in the original):

... The entire agreement clause in the APS operates retrospectively, not prospectively. In other words, the application of the clause is restricted to limit representations, warranties, collateral agreements and conditions made *prior to or during* the negotiations leading up to the signing of the APS. ...

An entire agreement clause is generally intended to lift and distill the parties' bargain from the muck of the negotiations. In limiting the expression of the parties' intentions to the written form, the clause attempts to provide certainty and clarity.

See also *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at para. 50; *Fung v. Decca Homes Limited, et al.*, 2019 ONCA 848, at para. 5.

[83] In this case, the defendants allege that the verbal agreement preceded the written agreements including their entire agreement clauses. Therefore, in the absence of misrepresentation by the plaintiffs, the written contracts govern.

[84] I turn then to the orders to be made.

[85] With respect to the Waterloo property, the defendants Chitra and Mahesan Subramaniam will forfeit to the plaintiffs the deposit of \$5,000 paid on that transaction and which is now held by the Sheriff. The deposit is not disproportionate and ordering forfeiture is not unconscionable even in the absence of damages on this transaction (see *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, at paras. 15 – 30).

[86] With respect to the Kitchener property, damages *were* incurred. As noted earlier in these reasons, the Kitchener property sold for \$73,500 less than the purchase price agreed to by the defendants. The plaintiffs moved promptly to mitigate their damages by re-listing the property and, after waiting several months for an offer, accepting the first offer which was made.

[87] The defendants argue that the price at which the plaintiffs agreed to sell the Kitchener property to Mr. Periyathamby was artificially high and did not properly reflect the market value of the property. Therefore, in the absence of expert evidence of the market value of the property, the plaintiffs have not shown that they have suffered any actual damages.

[88] I do not accept this argument. Mr. Periyathamby and the actual buyer, Mr. Subramaniam, were aware that the property had been on the market and had not sold at its original list price. They offered to purchase the Kitchener property at a lowered price. There is no evidence that that price was unfair at that time or that the offer was not voluntarily made. Having rejected the existence of the alleged verbal agreement, I also reject the suggestion that a higher and artificial

price for the Kitchener property was agreed to as part of that verbal agreement. I find that the price agreed upon was the price that the parties' believed reflected the market at that time.

[89] Having freely entered into the contract, and having failed to honour it, the defendants Mr. Periyathamby and Mr. Subramaniam are liable for damages flowing from that failure and assumed the risk that the market would fall between the date of the breach and the date that plaintiffs were able to sell the property to a new buyer. That is what happened in this case. The damages are calculated as the difference between the APS price for the Kitchener property and the price at which it ultimately sold to a new buyer plus any lost transaction costs (*Azzarello v. Shawqi*, 2019 ONCA 820, at para. 21). The difference in prices in this case is \$73,500. The plaintiffs' lost transaction costs are the amount they paid to Mr. Settimi for legal fees, disbursements and taxes on the failed Waterloo transaction, or \$2,784.60.

[90] In total then, the damages on the Waterloo transaction are \$76,284.60. The \$5,000 deposit held in connection with the Waterloo property will be forfeited to the plaintiffs and applied against these damages.

5. Disposition and Costs

[91] It is ordered that the \$5,000 deposit made in connection with the Kitchener property is forfeited to the plaintiffs by the defendants Chitra and Mahesan Subramaniam.

[92] Mr. Subramaniam and Mr. Periyathamby are ordered to pay to the plaintiffs damages in the amount of \$76,284.60, plus pre-judgment interest from October 14, 2014, at the rate of 1.3%, payable forthwith.

[93] It is ordered that the \$5,000 deposit made in connection with the Waterloo property is forfeited to the plaintiffs by Mr. Subramaniam and Mr. Periyathamby and is to be applied to the damages I have ordered them to pay.

[94] The counterclaim is dismissed.

[95] If the parties are unable to agree on costs, the plaintiffs may serve and file brief written submissions respecting costs within 10 days of the release of this judgment. The defendants may serve and file brief responding submissions within 7 days of the service of the plaintiffs' submissions. The plaintiffs may serve and file reply submissions, if any, within 4 days of the service of the defendants' submissions.

I.R. Smith J.

Released: February 21, 2024

CITATION: Graf v. Periyathamby 2024 ONSC 1062
COURT FILE NO.: CV-16-4097-00SR
DATE: 2024/02/20

2024 ONSC 1062 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Gary Graf and Valentina Bojic Graf

Plaintiffs

– and –

Easwara Periyathamby, Chitra
Subramaniam, Via Realty Inc., and Mahesan
Subramaniam

Defendants

REASONS FOR JUDGMENT

I.R. Smith J.

Released: February 21, 2024