CITATION: Sumarah v. International Property Group (Toronto) Limited, 2024 ONSC 334
COURT FILE NO.: CV-21-00654947-0000
DATE: 20240115

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
BRADLEY ARCHIBALD SUMARAH and ROBERT STEVEN ANDREW CLARKE Plaintiffs	*Andrew Finkelstein* and *Adam Zur* for the Plaintiffs
- and -	
INTERNATIONAL PROPERTY GROUP (TORONTO) LIMITED, IN TRUST FOR A CORPORATION TO BE INCORPORATED aka INTERNATIONAL PROPERTY GROUP (TORONTO) LTD. Defendants	*Timothy M. Duggan* for the Defendant **HEARD**: December 20, 2023

PERELL, J.

REASONS FOR DECISION

> "I know […] that there are many ways we prefer to look at things. But one must actually take facts as they are, must one not? And it does not seem to me that the facts bear the interpretation you put upon them.": Miss Jane Marple [Agatha Christie, *Murder at the Vicarage*, 1938]

A. Introduction

[1] In this abortive real estate transaction litigation, the Defendant International Property Group (Toronto) Ltd. moves to have the action, which was brought by the Plaintiffs, Bradley Archibald Sumarah and Robert Steven Andrew Clarke, and its own counterclaim dismissed. International Property submits that the action and the counterclaim settled when it purchased the subject property under a revised agreement of purchase and sale ("APS").

[2] Messrs. Sumarah and Clarke dispute that the action has settled. They say that the subsequent sale was in mitigation of the aborted first transaction and did not resolve the litigation.

[3] I disagree with Messrs. Sumarah and Clarke's legal interpretation of the facts. I agree with

International Property's interpretation, and I dismiss the action and the counterclaim without costs, and I grant the motion with costs fixed at $5,000, all inclusive.

B. Overview

[4] The parties agree about the normative contract law with respect to settlement agreements and agreements for the purchase and sale of land. However, there is a wide divergence about how to interpret the raw facts in light of the applicable law.

[5] The raw facts are that Messrs. Sumarah and Clarke agreed to sell 66 Amelia Street to International Property, whose principal is Mr. Cogan. The agreement did not close, and Messrs. Sumarah and Clarke sued International Property for breach of contract. International Property defended and counterclaimed.

[6] After the litigation started, the parties discussed a settlement involving a revised purchase agreement and releases. The parties negotiated a revised purchase agreement. Then, they negotiated a revised-revised purchase agreement. The third iteration of the sale closed. A year-and-a-half passed, and then Messrs. Sumarah and Clarke amended their Statement of Claim to assert that the revised-revised agreement was just in mitigation of their damages for breach of contract, and they claimed $150,000 in damages.

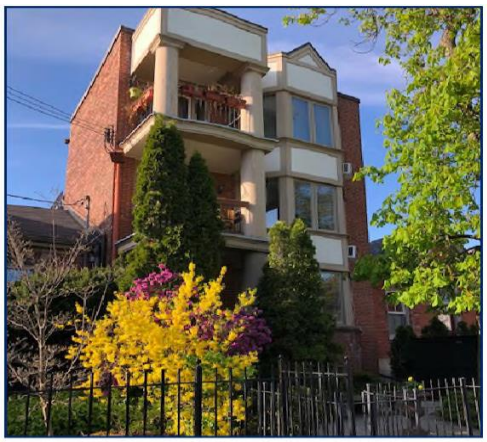
[7] Messrs. Sumarah and Clarke's interpretation of the raw facts is that International Property breached the first agreement and sale. They submit that in as much as releases were never agreed to and signed, the sale of the property pursuant to the revised-revised agreement did not settle the action or the counterclaim. They submit that the only consequence of the closing of the revised-revised agreement was that the vendors had mitigated damages suffered by International Property's breach of the original agreement of purchase and sale.

[8] International Property's interpretation of the raw facts is that the parties did settle the litigation. The settlement involved three essential terms: (a) the parties would complete a sale of the subject property; (b) the parties would exchange mutual releases; (c) the claim and the counterclaim would be dismissed without costs. International Property submits that the parties mutually performed the first essential term of their settlement agreement pursuant to the revised-revised agreement of purchase and sale. International Property submits that Messrs. Sumarah and Clarke then reneged on the settlement agreement by treating the completion of the sale as a mitigatory act rather than as a term of the settlement agreement and by refusing to exchange releases and to have the claim and the counterclaim dismissed without costs.

[9] I agree with International Property's interpretation of the raw facts.

[10] Accordingly, I dismiss the action and the counterclaim without costs, and I grant the motion with costs fixed at $5,000, all inclusive.

C. Facts



[11] Robert Steven Andrew Clarke, who is a non-practicing lawyer that works for a title insurance company and Bradley Archibald Sumarah were the owners of 66 Amelia Street, Toronto.

[12] The property is a four-unit residential rental property in the Cabbagetown area of Toronto. Adding a fifth laneway residential unit was permitted by the zoning for the property. Mr. Clarke lived in unit 1. Mr. Sumarah also had lived at the property.

[13] International Property is an Ontario corporation that is in the business of residential development. Alain Cogan is the President of International Property. He founded the company with John Arbour and Ralph Kemp.

[14] On **July 23, 2020**, International Property entered into a standard form agreement of purchase and sale to purchase 66 Amelia Street from Messrs. Clarke and Sumarah. The purchase price was $3,545,000. It was a cash transaction. The closing date was October 29, 2020, which was subsequently extended to November 12, 2020.

[15] On **November 9, 2020**, International Property's lender determined that the total rentable square footage of the property was approximately 3,621square feet, not 5,800 square feet as stated in the real estate listing for the property. The lender appraised the property as having a value of approximately $2.65 million and would only agree to advance funds on this appraised value.

[16] On **November 12, 2020**, the transaction did not close but the parties agreed to extend the closing to November 27, 2020 to provide International Property more time to obtain financing for the transaction.

[17] International Financing was unable to obtain financing, and on **November 27, 2020**, International Property refused to close the transaction.

[18] On **January 15, 2021**, Messrs. Sumarah and Clarke sued International Property for breach of contract. Their lawyers of record were Kestenberg Siegal Lipkus LLP.

[19] On **March 8, 2021**, International Property delivered its Statement of Defence and Counterclaim. In its counterclaim, it claimed return of its deposit and damages for alleged negligent misrepresentation relating to the square footage of the property. Its lawyers of record are Stevenson Whelton LLP.

[20] Messrs. Sumarah and Clarke delivered their Reply and Defence to Counterclaim on **March 23, 2021**.

[21] As described below, the litigation then paused for twenty-one months.

[22] On **April 19, 2021**, Mr. Clarke wrote to Mr. Kemp to ask to schedule a call to discuss the abortive sale. Mr. Kemp spoke to Mr. Clarke and told him to call Mr. Cogan. And, on **April 20, 2021**, there was a telephone meeting between Mr. Clarke and Mr. Cogan. Following the meeting, Mr. Clarke sent Mr. Cogan and Mr. Kemp the following email message confirming their conversation:

> Ralph and Alain, Pleasure speaking to you today. I spoke to Brad [Sumarah], and I confirm we're willing to entertain an offer with some element of a VTB. If your group is interested in the property please advise upon what terms, including: purchase price, deposit, whether you need a condition and how long you'd need to close, the VTB amount, and the terms and conditions contained therein. If we're in agreement in principle we can use the form of offer we used previously.

[23] On **April 20, 2021**, Mr. Cogan sent Mr. Clarke a reply by email: "Robert, give us a couple of days to reassess our numbers for the property."

[24] On **April 26, 2021**, Mr. Cogan and Mr. Clarke had a phone conversation. Mr. Cogan said that International Property would agree to settle the litigation by terms that (a) it would purchase 66 Amelia Street for $3.1 million paid pursuant to the deposit from the original agreement and a $200,000 vendor take-back mortgage, and (b) the claim and counterclaim would be dismissed on a without costs basis.

[25] On **April 27, 2021**, there was an exchange of email messages as set out below.

> **10:18 a.m.** [Mr. Cogan], Thanks for speaking with me yesterday. Unfortunately, your offer comes up significantly short on price. For what it is worth our counter is $3.4M and we'd be willing to take a VTB ranking behind your lender(s) in priority. I believe we are generally in agreement on all other terms and conditions. I will mention that since your last offer we have incurred significant legal, financing and loss-of-bargaining position costs and we will likely realize losses that are greater than the $300K deposit our broker and lawyer hold. Thanks for your consideration and efforts to try to make a deal happen. RC [Clarke]
>
> **12:45 p.m.** [Mr. Clarke], Thanks for this. I think both sides have incurred significant losses of various kinds on the previous go around, and neither party is very happy with the outcome of that deal; it is somewhat encouraging, however, that both sides are still open to making this work. In that spirit, we are willing to meet you in the middle at 3.25M.

[26] On **May 3, 2021**, Mr. Cogan sent Mr. Clarke an email message indicating that he thought the parties were nearing an agreement in principle but that the details had to be discussed before referring the matter to the lawyers.

[27] On **May 11, 2021**, Mr. Clarke sent Mr. Cogan the following email message:

> [Mr. Cogan], I trust this note finds you well. I thought I'd write to see if there is any news on your end. I understand that you're aligning your mortgage financing and equity partners and that takes some time. If you'd be able to let us know whether you've made any progress, when we might hear back from you and whether your group is still interested in pursuing a purchase/sale it would be greatly appreciated. Many thanks for your consideration…

[28] On **May 13, 2021**, Mr. Cogan sent Mr. Clarke an email message. Mr. Cogan said that International Property was waiting to hear back from its lenders. Mr. Clarke replied on **May 17, 2021** with the following email message:

> [Mr. Cogan] […] We feel we are being very flexible in trying to negotiate closing terms. We would suggest reminding your partners that: We've come down in purchase price by $150K; We're offering a $200K VTB; The property has appreciated by a minimum of 5% or $170K since last summer; We're willing to use your form of Offer to Purchase; We've refrained from any further litigation steps despite our counsel's advice to proceed with setting discovery and trial dates. I will also mention that there are other interested parties who are contacting us about the building since our listing expired in April. We showed parts of the building to a group on Friday. An offer from any such party would not attract brokerage fees (approx. $140K in savings for us) and we would still have our interest in the deposit and any damages above that amount. We have also spoken to a few brokers who are confident we would be able to sell the property in July when the listing overhold

> period expires and COVID conditions permit us to start showing the tenanted units again. I look forward to hearing from you at your earliest convenience and hope we can come to a mutually agreeable resolution.

[29] On **May 20, 2021**, Mr. Cogan sent an email message to Mr. Clarke asking to meet "to finalize our agreement, discuss timing, and move forward."

[30] On **May 26, 2021**, Mr. Cogan and Mr. Clarke met and on **May 28, 2021**, Mr. Clarke sent the following email message to Mr. Cogan:

> [Mr. Cogan], Further to our discussion, we had the opportunity to speak to our litigation counsel about reviving the agreement of purchase and sale and completing a sale of the property to your group. Based on these discussions we require the following to be a part of any transaction we enter into: a full and final release of any allegations the buyer has pleaded in its defense and counterclaim; - a purchase price: $3.4M- we'll offer a VTB of $200K for 1 year at 7% (if buyer needs it) – […] - Purchaser to have a three business day conditional period for its counsel to review APS. - Buyer will compensate the Vendors for the Buyer's agents' share of the commission, i.e., 2% of the transaction. For greater clarity, vendors will pay no more than $71,000 plus taxes in brokerage fees and any overage shall be buyer's responsibility and shall be subject to adjustment and negotiations between buyer and its agent. - Buyer to assume existing leases for units 2-4. Robert to lease unit 1 for $3,200 a month on a month-to-month basis terminable by either party on 60 days notice. Please advise if your group is agreeable to these terms and we will have our counsel prepare a draft form of amending agreement to revive the old agreement of purchase and sale for your review. RC [Clarke]

[31] On **June 2, 2021**, there was the following exchange of emails between Mr. Cogan and Mr. Clarke:

> **11:04 a.m.** Robert [Clarke], We have been negotiating this agreement for several weeks and came to an accord on May 26th on the outstanding items. The purpose of the email below was to write out the agreement we had come to; however, the items outlined in your email below are not the agreement we came to. The agreement we came to: - a purchase price: $3.4M, - a full and final release of the claim and counterclaim, - a VTB of $200K for 1 year at 7%, - a 6 week closing date with another possible extension of up to 6 weeks (but we will close as soon as the funds are available), - the release of $100K to the sellers if closing extension is needed past the 6 weeks, - Purchaser to have a three business day conditional period for its counsel to review APS. We are willing to move forward on the agreement you and I came to. Sincerely, Alain [Cogan]
>
> **12:07 p.m.** Alain [Cogan], Any discussions we had were always explicitly subject to each of our litigation counsel's review and advice. Brad and I discussed reviving the deal with Marc Kestenberg on Friday who had input on the transaction, including for example, the release, which neither you or I contemplated or considered, but which you now seem to be in agreement with below. I would assume buyer wants a similar release as well on closing which illustrates the importance of having counsel review, which again, was what we agreed upon. Your request for an extension of 6 weeks suggests to us that you don't expect to be in a position to close the transaction in mid July and we're unwilling to wait around to see if you ultimately arrive such a position, failing which we would need to then proceed with litigating for the remaining $200K deposit and then re-list the property in July. We'll only revive the agreement if you are certain you will close in mid-July (or such date as you may reasonably require). If you were certain you were able to close in mid-July or such other reasonable date as you may require, then you shouldn't have any issues releasing $100K to us at time of waiver, nor signing the direction releasing the remainder of the deposit on closing. Simply put we don't think you have all of your equity partners committed to this transaction and we're unwilling to wait all summer to see if they change their minds. We require a confirmation that you are agreeable to our conditions by 5:00pm on Thursday June 3rd, failing which we will instruct Marc Kestenberg to proceed with next litigation steps. Robert [Clarke]

> **1:37 p.m.** Robert [Clarke], We're willing to accept the release as you state it, and take on a 10-week closing. We will not accept to compensate for any realty fees nor will we accept any lease for the basement unit: these are non-negotiable. Sincerely, Alain [Cogan]
>
> **4:02 p.m.** Alain [Cogan], we're fine with the 10-week closing provided the deposit funds are treated as set out […]. Please confirm. We are also fine with providing vacant possession of unit 2 - this is not an issue.

[32] On **June 3, 2021**, there was the following exchange of email messages between Messrs. Cogan and Clarke:

> **9:30 a.m.** Robert [Clarke], 1. We agree to have the deposit funds treated as you describe in your May 28th email. 2. Please clarify what you mean by "unit 2" below: does that mean that 2 units will be vacant on possession, the basement unit and unit 2? Please explain. 3. Please confirm re. realty fees: we will not be providing any compensation for realty fees (as stated below, this is non-negotiable) Best, Alain [Cogan]
>
> **10:16 a.m.** Alain [Cogan], Apologies - 'unit 2' was a typo. On closing, unit 1 - the unit I occupy - will be vacant. The remainder of the units will be tenanted. We have reached out to our broker SVN to see if the brokers will accept a total of 2% in commission. We are still not in agreement as to who will pay for any amounts above 2% (if any) however we want to quantify this amount. We would encourage you to consider reaching out to your broker to impress upon him (i) how close we are to having a deal, (ii) how the commission issue is the only outstanding issue preventing a deal from happening, (iii) how much money both parties have spent on legal fees and other consequential damages; (iv) how messy and time consuming litigation can be; (v) how tenuous his claim to any part of the commission is, particularly if we can't get a deal done and this goes to litigation – i.e.: 1% is better than absolutely nothing. I will be back to you when I hear from our broker, who hopefully will consult with your broker and agree to the terms we've proposed. Robert [Clarke]

[33] As appears in his email message to Mr. Clarke, Mr. Cogan suggested that Mr. Clarke speak to his real estate agent about reducing his commission and point out that the commission was the only outstanding issue preventing a deal from happening. Between **June 3, 2021** and **June 14, 2021**, the parties discussed with their respective real estate agents whether the agents would agree to reduce their commissions in order to facilitate the completion of an agreement between the parties.

[34] On **June 14, 2021**, Mr. Clarke sent the following email message to Mr. Cogan: "Alain [Cogan], Do we have a deal or no? We need an answer as soon as possible."

[35] On **June 15, 2021**, Mr. Clarke sent Mr. Cogan an email message setting out the terms upon which he and Mr. Sumarah would agree to revive the agreement to sell 66 Amelia.

[36] Mr. Clarke's email message was followed by an exchange of emails on **June 18, 2021**. The exchange began with Mr. Cogan's email message making changes to Mr. Clarke's email message of June 15, 2021. This email was followed by two more email messages.

[37] Mr. Cogan's email message – which includes – Mr. Clarke's email of the 15th stated:

> **June 18, 2021**, **9:16 a.m.** Robert [Clarke], Please see below in **RED** and crossed out. Best Alain [Cogan]
>
> > Alain [Cogan], I write to summarize the terms and conditions on which we've agreed to revive our old APS as amended. They are as follows: - a full and final release of any allegations the buyer has pleaded in its defense and counterclaim and any issues relating to the purchase and sale of the building; - a purchase price of $3.4M - Closing date of ~~August 27th~~ **12 weeks from signing the updated APS**. Buyer shall have the right to bring forth

> the closing date to an earlier date upon 2 weeks written notice. Buyer shall not be allowed to extend the closing date ~~beyond August 27th~~. - Upon waiver of all conditions buyer shall authorize the release of $100K of the Deposit held by David Goldstein to vendor. At same time, buyer shall sign an irrevocable direction authorizing the release of the remainder of the deposit ($200K) on the closing date to the vendor. - Buyer to have a three business day conditional period for its counsel to review APS. - Vendor will pay 1% commission to buyer's broker on closing. Buyer will indemnify vendor for any amounts claimed by buyer's broker above 1% **from vendor**. Vendor will pay vendor broker commission to vendor's broker directly on closing. - Buyer to assume existing leases for units 2-4. Vendor shall deliver vacant possession to unit ~~2~~ **1** on closing. **Confirmation that existing leases are month to month - and that there are no new leases**. - Buyer shall have access to the property 2 more times prior to closing date. ~~-~~ **a VTB of $200K**. Please confirm you are in agreement with the above as soon as possible and we will have our counsel start drafting the amending agreement for your signature and so that your counsel can review during your 3 day conditional period. RC [Clarke]

[38] As noted above, Mr. Cogan's email message of June 18, 2021, which incorporated Mr. Clarke's email of the 15th was followed by two more email messages later in the day as follows:

> **June 18, 2021, 11:33 a.m.** Alain [Cogan], We are fine with all your changes, subject to the following: We want to confirm that the VTB will be for a term of 1 year at 7% interest. Please confirm. I also need some certainty of when I need to move out of unit 1. If you guys end up advancing the closing date, would it be acceptable to allow me to stay in the unit until August 31st? Robert [Clarke]
>
> **June 18, 2021, 3:35 p.m.** Robert [Clarke], Yes to the VTB details and Yes to you staying in the unit until August 31st. Alain [Cogan]

[39] On **June 22, 2021** and **June24, 2021**, Mr. Clarke and Mr. Cogan exchanged emails as follows:

> [Mr. Cogan], Our lawyer David Goldstein is on holidays now so we're having another lawyer draft the amending agreement as set out below. I'm hopeful we'll have a draft to you tomorrow or Thursday. Apologies for the delay. [Mr. Clarke]
>
> [Mr. Clarke], Please also include in the APS that: you would grant permission for us to review files on the property from the city before closing. Thanks, [Mr. Cogan]
>
> [Mr. Cogan], Are you asking that we sign a consent allowing city of Toronto government entities to release information about the property? [Mr. Clarke]
>
> [Mr. Clarke], Yes, so we see architectural plans and building permits in the City files. Best, [Mr. Cogan]

[40] On **July 7, 2021**, Mr. Clarke sent Mr. Cogan an email advising that his lawyer was working on the draft and he hoped to have the draft for Mr. Cogan's review by the end of the week.

[41] On **July 9, 2021**, Mr. Clarke sent a draft agreement of purchase and sale to Mr. Cogan covered by the following email message:

> [Mr. Cogan], Please find attached the Agreement of Purchase and Sale and Page 2 to Schedule A. Please confirm your satisfaction with same and that you and your group are prepared to execute. As mentioned in Schedule "A" [Mr. Sumarah] and I need to sign a new Listing Agreement with our broker reflecting the revised brokerage fees payable to both brokers. Our broker is in the process of preparing a revised form of listing agreement. We're hopeful the brokers remain committed to closing this deal and accepting the amounts agreed upon. We also in the process of preparing the release relating to the litigation which we will forward as well to you. One small drafting point: we

> ran out of space typing in the Purchaser's name in the field. If we're in agreement on the form and content we can handwrite in the rest of the purchaser's name and 'to be incorporated wording." [Mr. Clarke]

[42] The draft agreement stipulated a $3.4 million purchase price. The closing date was to be September 10, 2021. The draft included International Property the option of a $200,000 one-year term vendor take-back mortgage with interest at the rate of 7% per annum.

[43] As events developed the release relating to the litigation referred to in Mr. Clarke's email message was never drafted and never forwarded to Mr. Cogan for review.

[44] On **July 15, 2021**, Timothy Duggan, International Property's conveyancing lawyer sent an email to David Goldstein, Messrs. Sumarah's and Clarke's conveyancing lawyer, attaching a revised draft Agreement of Purchase and Sale. The email message stated:

> [Mr. Goldstein] I hope that all is well. As you are likely aware our respective clients have been working to revive this deal, and your clients have sent my clients their proposed form of APS for the revived deal. Attached is the APS (together with additional Schedule "A" page) with our changes. The amendments from your clients form of document are as follows: The closing date has been changed to October 7 2021. I have inserted my email address for notices to the buyer. The paragraph in Schedule "A" dealing with commissions has been amended to specify that the buyer is only responsible to indemnify the seller for amounts claimed by the buyer's agent from the seller above the Cooperating Commission. The paragraph in Schedule A dealing with the VTB has been amended to delete the loan-to-value cap, as my client will be obtaining construction financing in connection with its redevelopment of the property. The paragraph in Schedule "A" dealing with title searching (which has been moved to page 2 in order to fit) has been amended to provide that the buyer may file applications etc. in the seller's name in connection with the redevelopment of the property prior to closing. The paragraph in Schedule "A" dealing with visits prior to closing has been amended to provide for four visits with a maximum duration of two hours each. The paragraph in Schedule "A" requiring the buyer to pay the seller's interim financing costs as agreed in the extensions of the first APS has been amended to set out the amount set out in the last statement of adjustments provided by your office prior to the termination of the first APS. Let me know if you have any questions. Regards, Tim Duggan

[45] On **July 21, 2021**, by email message, Mr. Goldstein sent Mr. Duggan a further revised draft Agreement of Purchase and Sale reverting the completion date to September 10, 2021, among other changes. The email message stated:

> Hi Timothy, as discussed, I have attached the revised Agreement of Purchase and Sale together with Schedule A. Please note that my clients would like the agreement finalized and signed by 5pm on Friday as they need finality while the real estate market remains strong in case they are in a position that they otherwise have to re-list the property in order to mitigate any further damages. PLEASE ALSO SEE MY COMMENTS IN CAPS BELOW

[46] On **July 22, 2021**, there was an exchange of emails between Mr. Duggan and Mr. Goldstein as set out below.

> **11:52 a.m.** Hi Tim, my client is firm on the Sept 10 closing date and it is a deal breaker for them. If your client does not agree to this date by 5pm today, my client will re-list in order to mitigate any further damages. Please advise with thanks. Regards, David J Goldstein.
>
> **5:00 p.m.** Hi David. In light of your clients' refusal to abide by their previous agreement that the closing date would be 12 weeks from the signing of the APS, I confirm this deal will not be proceeding. Thanks for your efforts. Regards, Tim Duggan

[47] Notwithstanding the exchange of correspondence between the lawyers, during the rest of

July and **August 2021**, Mr. Clarke and Mr. Cogan continued to discuss closing a purchase and sale of 66 Amelia Street. On **July 26, 2021**, Mr. Duggan sent the following email message to Mr. Goldstein:

> Hi David, Further to my last, I understand that Mr. Clarke has expressed to [Mr. Cogan] that your clients do not believe that my client will have the funds to close, and that your clients' insistence on the September closing date is so that they can have the property available for the fall market if the revived deal does not close. Putting aside the fact that this property would not likely be subject to the same market cycle considerations as a regular single-family residential property, it is my understanding that our client is in a position to provide your client with written confirmation that the deal will be funded for an October closing. I note this would likely provide your clients with the best opportunity to mitigate any loses that they may claim to have incurred as a result of the prior deal not closing. To this end, if your clients have any interest in obtaining this written confirmation for the purpose of revisiting their prior position regarding the closing date, let me know.

[48] On **September 2, 2021**, the parties signed another standard form agreement of purchase and sale. The purchase price was $3.45 million.

[49] On **September 14, 2021**, Mr. Duggan sent the following email message to Mr. Goldstein:

> Hi David, I hope all is well. I understand that our respective clients have (again) revived this deal. The closing date is stipulated in the APS as being six weeks after the date of the APS, but there seems to be some uncertainty as to whether this would take us to October 13 or October 14. Can you please confirm your clients' understanding of the closing date for this transaction? Regards, Tim Duggan.

[50] On **October 13, 2021**, the purchase and sale of 66 Amelia Street closed.

[51] For the next thirteen months, there is no activity of note. The litigation was dormant. Neither party asked for a release. Neither party moved to have the claim or the counterclaim dismissed.

[52] On **November 15, 2022**, International Property listed 66 Amelia Street for sale for $5.5 million.

[53] Messrs. Sumarah and Clarke changed their lawyer of record to Chernos Flaherty Svonkin LLP, and on **January 11, 2023**, Messrs. Sumarah and Clarke delivered an Amended Statement of Claim seeking $95,000 in damages, being the difference in the purchase prices in the September 2021 Agreement of Purchase and Sale and the July 23, 2020 agreement plus additional carrying costs and other relief including interest and costs.

[54] On **February 1, 2023**, International Property delivered an amended Statement of Defence and Counterclaim.

[55] On **May 9, 2023**, International Property brought a motion to have the action and counterclaim dismissed. The motion was supported by the affidavit dated May 8, 2023 of Mr. Cogan. The motion was opposed by the affidavits of Mr. Clarke dated July 12, 2023 and November 30, 2023.

[56] There were no cross-examinations, and the motion was argued on December 20, 2023. I reserved judgment.

D. Discussion and Analysis

[57] Contractual interpretation is an exercise in which the principles of contractual

interpretation are applied to the words of the written contract, considered in light of the factual matrix.[1] The goal of contractual interpretation is to determine the intent of the parties and the scope of their understanding giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.[2] The court should interpret the contract fairly and broadly without being too astute in finding defects and rather to give effect to the intention of the parties by looking at substance and not form.[3]

[58] A settlement agreement is subject to the ordinary rules of contract.[4] For there to be a binding settlement agreement, there must be a mutual intention to create a legally binding agreement and the essential terms of the agreement must have been agreed upon.[5] The conduct of the parties, including the language they used, is viewed objectively in order to determine whether a contract has been made.[6] However, it is not necessary to have reached agreement on incidental matters, such as the method of payment or the exchange of releases.[7] An enforceable settlement agreement may be made orally, in writing, by correspondence, or by an exchange of emails.[8]

[59] The policy of the court is to encourage settlements and in matters of interpretation, courts are not inclined to find that the settlement agreement does not have the requisite certainty in its essential terms.[9] If the settlement agreement is silent, there is an implied term that the parties will execute a release consistent with the terms of the settlement.[10]

[60] In the immediate case, the analysis may begin with the normative contract law that the innocent party to a breach of contract is expected to take reasonable steps to mitigate his or her damages consequent on the breach of the contract. The innocent party to a breach of contract may not recover for losses that it could have avoided by taking reasonable steps to avoid loss.[11] This is the principle of mitigation, and in assessing the innocent party's efforts at mitigation, the courts

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[1] *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53.
[2] *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4; *Skye Properties Ltd. v. Wu*, 2010 ONCA 499; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21.
[3] *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A.); *Hillas & Co. Ltd. v. Arcos* (1932), 147 L.T. 503 (H.L).
[4] *Knight v. Chappel*, 2022 ONSC 7175; *Dodla v. Dodla*, 2022 ONSC 5648; *Hodaie v. RBC Dominion Securities et al*.,2011 ONSC 6881, aff'd 2012 ONCA 796; *Donaghy v. Scotia Capital Inc./Scotia Capitaux Inc*., 2009 ONCA 40, leave to appeal dismissed, [2009] S.C.C.A. No. 92.
[5] *Knight v. Chappel*, 2022 ONSC 7175; *Dodla v. Dodla*, 2022 ONSC 5648; *Wilson v. BKK Enterprises Inc.*, 2015 ONSC 4394; *Hodaie v. RBC Dominion Securities*, 2011 ONSC 6881, aff'd [2012] O.J. No. 5428 (C.A.); *Ferron v. Avotus Corp*., [2005] O.J. No. 3511 (S.C.J.); *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 721 (Gen. Div.), aff'd [1995] O.J. No. 3773 (C.A.).
[6] *Huma v. Mississauga Hospital*, 2020 ONCA 644; *Olivieri v. Sherman*, 2007 ONCA 491.
[7] *H. (J.) v. Smith*, [2007] O.J. No. 269 (S.C.J.); *Perri v. Concordian Chesterfield Co.*, [2003] O.J. No. 5852 (S.C.J.).
[8] *Huma v. Mississauga Hospital*, 2020 ONCA 644; *Beck v. Chmara*, 2014 ONSC 4874; *Hodaie v. RBC Dominion Securities*, 2011 ONSC 6881 at para. 17, aff'd [2012] O.J. No. 5428 (C.A.).
[9] *Lumsden v. The Toronto Police Services Board et al*., 2019 ONSC 5052; *Oliviervi v. Sherman* (2007), 86 O.R. (3d) 778 at para. 50 (C.A.), citing *Canada Square Corp. v. Versafood Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A.).
[10] *Agg v. Watson*, 2021 ONSC 3068; *Huma v. Mississauga Hospital*, 2020 ONCA 644; *Hodaie v. RBC Dominion Securities*, 2011 ONSC 6881, aff'd 2021 ONCA 796; *Pukec v. Durham Regional Police Service*, [2001] O.J. No. 1587 (S.C.J.); *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 721 (Gen. Div.), aff'd [1995] O.J. No. 3773 (C.A.).
[11] *Asamera Oil Corp Ltd. v. Sea Oil & General Corp.*, [1979] S.C.R. 633; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Br. Westinghouse Electric & Mfg. Co. Ltd. v. Underground Electric R. Co. of London, Ltd*., [1912] A.C. 673 (H.L.).

are tolerant, and the innocent party need only be reasonable, not perfect in its efforts to mitigate.[12] The onus of proving that the innocent party failed to mitigate rests upon the guilty party.[13]

[61] Case law establishes that it is a reasonable act of mitigation for an innocent vendor to sell the property to the guilty purchaser, and then the vendor may claim the deficiency between the original contract price and the resale to the purchaser as the measure of the vendors' damages for the loss of the benefit of the bargain.[14]

[62] In the immediate case, Messrs. Sumarah and Clarke rely on this law, which they then apply to their interpretation of the raw facts. As noted in the Overview above, I, however, do not agree with their interpretation of the raw facts.

[63] As I interpret the legal significance of the facts, the original agreement of purchase and sale of 66 Amelia Street did not close as scheduled for the end of November 2020. For present purposes, it is not necessary to decide whether or not International Property had grounds to rescind the transaction and have its deposits returned. For present purposes, what is pertinent is that in January 2021, Messrs. Sumarah and Clarke sued International Property for damages, and it counterclaimed for a return of its deposit.

[64] After the close of pleadings, in April 2021, Mr. Clarke reached out to Mr. Cogan. Mr. Clarke told Mr. Cogan that he and Mr. Sumarah were willing to entertain a revised offer for 66 Amelia Street. International Property was interested in reviving the transaction and during May, the parties negotiated largely focusing on the purchase price.

[65] During the negotiations in April and May, Mr. Cogan mentioned that International Property would agree to settle the litigation based on a revived transaction. In the email message dated May 26, 2021, Mr. Clarke said that he and Mr. Sumarah required a release from International Properties of its counterclaim as part of a revived transaction.

[66] Mr. Cogan, confirmed in his email message of June 2, 2021 that he understood that there was an agreement between the parties. Mr. Clarke did not disagree, but he said that any agreement was understood to be conditional on litigation counsel's review and input. In this regard, it was Mr. Clarke who pointed out that International Property would wish to receive a release in exchange for the release of the counterclaim that it had agreed to extend to Messrs. Sumarah and Clarke.

[67] The discussions between Mr. Clarke and Mr. Cogan culminated in the exchange of emails of June 18, 2021, the text of which is set out in full above. In my opinion, this exchange of emails constitutes a Settlement Agreement (Minutes of Settlement of the litigation).

[68] This Settlement Agreement was drafted by the parties without the assistance of their litigation lawyers. The fundamental terms of the Minutes of Settlement were threefold: (a) the parties would revise the agreement of purchase and sale of 66 Amelia Drive with a purchase price of $3.4 million and close the transaction; (b) the parties would exchange mutual releases; and (c) the litigation would be dismissed or discontinued without costs.

[69] Given the factual nexus that the animating purpose of the negotiations was to settle the litigation by reviving the transaction and given that Mr. Clarke had indicated that the vendors

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12 *Banco de Portugal v. Waterlow & Sons Ltd.,* [1932] A.C. 452 (H.L.).
13 *100 Main Street Ltd. v. W.B. Sullivan* (1978), 20 O.R. (2d) 401 (C.A.), leave to appeal to the S.C.C. refused O.R. *loc cit; Dobson v. Winton & Robbins Ltd.,* [1959] S.C.R. 755.
[14] *Azzarello v. Shawqi*, 2019 ONCA 820.

required a release and that he anticipated that the purchaser would also require a release, in my opinion, this is how an objective person would interpret the language used by the parties in their Settlement Agreement.

[70] Mr. Clarke's email message was embedded in the June 18, 2021 emails between the parties. An objective observer would understand that Mr. Clarke's language (with my emphasis added) that says that the term and conditions of their settlement included: "to revive the old APS **as amended**" means that the parties would agree to revise the agreement of purchase and sale and then close the transaction. I appreciate that there were details yet to be settled with respect to drafting the revised agreement of purchase and sale, but the fundamental terms were agreed to. Although it took a revised agreement and then a revised-revised agreement, the parties did sign and they did mutually perform their obligations to complete the agreement of purchase and sale for 66 Amelia Street.

[71] The parties thus mutually performed the predominant term of an agreement intended by both parties from the outset of the negotiations as a means to resolve, *i.e*., end the litigation which it is to be recalled that Messrs. Sumarah and Clarke had put on pause precisely so that they could revive the transaction and avoid litigation.

[72] An objective observer would understand that Mr. Clarke's language embedded in the email of June 18, 2021 that says that the term and conditions of their settlement included: "a full and final release of any allegations the buyer has pleaded in its defense and counterclaim and any issues relating to the purchase and sale of the building" meant a mutual release.

[73] Giving these words, which refer to "any issues relating to the purchase and sale of the building" a reciprocal meaning infuses the interpretation with good faith. Mr. Clarke had already acted honourably by pointing out that International Property would want a reciprocal release. The factual nexus is that Mr. Clarke was bargaining in good faith and not setting up a trap to achieve an abandonment of the counterclaim while preserving the main claim. This would make Mr. Clarke out as a trickster.

[74] I appreciate that the email of June 18, 2021 did not expressly specify that the litigation, both claim and counterclaim, would be dismissed or discontinued without costs. However, that outcome follows logically or is an implied term of the Settlement Agreement. The dismissal or discontinuance without costs follows from the factual circumstance that the driving purpose of reviving the agreement of purchase and sale was to resolve the litigation. Settlement implies a promise to furnish a release unless there is a contractual agreement to the contrary.[15]

[75] Messrs. Sumarah and Clarke argue that the agreement of purchase and sale contains a release about title matters but says nothing about mutual releases or anything about the dismissal of the claim and counterclaim. They point out that the agreement of purchase and sale includes the standard form express agreement provision that: "there is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein."

[76] The flaw in this argument for Messrs. Sumarah and Clarke is that the Settlement Agreement never envisioned that the releases and the termination of the litigation would be part of the

[15] *Huma v. Mississauga Hospital*, 2020 ONCA 644; *Hodaie v. RBC Dominion Securities*, 2011 ONSC 6881, aff'd 2012 ONCA 796 (C.A.); *Ferron v. Avotus Corp*., [2005] O.J. No. 3511 (S.C.J.), aff'd 2007 ONCA 73; *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.,* [1995] O.J. No. 721 (Gen. Div.), aff'd [1995] O.J. No. 3773 (C.A.); *Fieguth v. Acklands Ltd.,* [1989] B.C.J. No. 857 (C.A.).

agreement of purchase and sale. Closing the agreement of purchase and sale and the exchange of releases (with the attendant termination of the litigation) were terms of the Settlement Agreement. In other words, the exchange of releases was not a condition or term of the agreement of purchase and sale that could affect the agreement or purchase and sale, which was an independent promise.

[77] Both parties performed the promise to complete a sale of 66 Amelia Street. Both parties were lackadaisical in not concurrently exchanging releases and wrapping up the litigation. It appears that it was only after some decision regret and second thoughts, (probably prompted a year later by International Property putting 66 Amelia Street back on the market) that Mr. Sumarah and Mr. Clarke changed counsel and pleaded that the resale of the property was not intended to end the litigation.

[78] It is demonstrably clear from the exchange of email and the conduct of the parties that the purpose of reselling the property was to end the litigation that had been paused by Messrs. Clarke and Sumarah. It is to be recalled that Mr. Clarke was the one who initiated the negotiations and that it was Mr. Clarke who asked for a release and who anticipated that International Property would ask for a release in return.

[79] As noted above, the policy of the court is to encourage settlements and in matters of interpretation, courts are not inclined to find that the settlement agreement does not have the requisite certainty in its essential terms. In the immediate case, the parties intended to resolve the litigation as part of their bargain. The court should hold them to their bargain.

E. Conclusion

[80] For the above reasons, I dismiss the action and the counterclaim without costs and I grant the motion with costs fixed at $5,000, all inclusive.

Perell, J.

Released: January 15, 2024

CITATION: Sumarah v. International Property Group (Toronto) Limited, 2024 ONSC 334
COURT FILE NO.: CV-21-00654947-0000
DATE: 20240115

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

BRADLEY ARCHIBALD SUMARAH
and ROBERT STEVEN ANDREW CLARKE

Plaintiffs

- and -

INTERNATIONAL PROPERTY GROUP (TORONTO) LIMITED, IN TRUST FOR A CORPORATION TO BE INCORPORATED aka INTERNATIONAL PROPERTY GROUP (TORONTO) LTD.

Defendants

REASONS FOR DECISION

PERELL J.

Released: January 15, 2024