COURT OF APPEAL FOR ONTARIO

CITATION: 660 Sunningdale GP Inc. v. First Source Mortgage Corporation, 2024 ONCA 252
DATE: 20240409
DOCKET: COA-23-CV-0497

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MacPherson, Miller and Paciocco JJ.A.

BETWEEN

660 Sunningdale GP Inc. and Michael C. Clawson a.k.a. Mike Clawson

Plaintiffs (Respondents)

and

First Source Mortgage Corporation and First Source Financial Management Inc.

Defendants (Appellants)

AND BETWEEN

First Source Mortgage Corporation and First Source Financial Management Inc.

Plaintiffs by Counterclaim (Appellants)

and

660 Sunningdale GP Inc., Michael C. Clawson a.k.a. Mike Clawson and Clawson 660 Sunningdale Inc.

Defendants by Counterclaim (Respondents)

David A. Taub and Samuel Mosonyi, for the appellants

Michael A. Polvere and Natalie Kuehn, for the respondents

Heard: January 22, 2024

On appeal from the order of Justice Pamela L. Hebner of the Superior Court of Justice, dated April 4, 2023, with reasons reported at 2023 ONSC 2129.

Paciocco J.A.:

OVERVIEW

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[1] The respondent, 660 Sunningdale GP Inc. (“660 Sunningdale”), a developer, agreed in a commitment letter (the “Loan Agreement”) to pay a “Lender Fee” to the appellant, First Source Mortgage Corporation, on behalf of its syndicate partner, First Source Financial Management Inc. (collectively, “First Source”), as part of the consideration for a multimillion-dollar loan. The loan amount would be the lesser of $15,500,000 or 62 percent of the value of a property 660 Sunningdale owned and was developing (the “Loan Amount”). The Lender Fee was deemed under the Loan Agreement to be earned upon the acceptance and execution of the commitment letter. The Loan Agreement provided that the Lender Fee was to be partially payable through a $100,000 payment made at the time the Loan Agreement was accepted and executed, with a remaining payment of $326,500 to follow.

[2] 660 Sunningdale paid the $100,000 upon executing the commitment letter but shortly after decided not to proceed with the loan, or to pay the balance of the Lender Fee. First Source registered a caution against the property, prompting 660 Sunningdale to issue a Notice of Action seeking a recission of the Loan Agreement and an Order discharging the registered caution. The parties subsequently agreed

to deposit the balance in trust and to commence litigation to resolve any payment obligations. First Source then countersued.

[3] The parties, including the respondent Michael C. Clawson, who guaranteed 660 Sunningdale's debt under the Loan Agreement, agreed to proceed by way of summary judgment. The motion judge held that First Source was entitled to keep the $100,000 that had been paid, but 660 Sunningdale was entitled to the release of the balance, plus interest, because: (1) the balance was payable under an unenforceable "penalty clause", and (2) relief against forfeiture should be granted for the balance pursuant to s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[4] The motion judge also appears to have concluded, possibly as an alternative basis for absolving 660 Sunningdale from having to pay the balance, that the balance of the Lender Fee was not earned because the loan had not been advanced.

[5] I would allow First Source's appeal. For the reasons that follow, the motion judge erred in finding the balance of the Lender Fee to be an unenforceable penalty clause. As I will explain, under the terms of the Loan Agreement, the balance of the Lender Fee was not a "stipulated remedy" for a breach of the contract. Rather, the balance was payable whether or not the contract was breached. In effect, the motion judge excused 660 Sunningdale from its obligations under a term of the

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Loan Agreement, using a body of law that governs the enforcement of penalties. But that body of law had no application.

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[6] The motion judge also erred in granting relief against forfeiture relating to the balance. Relief against forfeiture may be appropriate to relieve applicants of the consequences provided for in a contract as the result of their non-compliance with its terms. The balance of the Lender Fee was not payable as a result of non-compliance by 660 Sunningdale. As indicated, the balance was part of the Lender Fee, which was a sum payable as consideration under the loan contract in return for First Source obtaining the loan commitment, whether or not there was a breach of contract. The application of the doctrine of relief of forfeiture in the circumstances of this case is unsupported by authority, and wrong in principle. In my view, the relief the motion judge applied was only available under the independent doctrine of unconscionability, which did not apply in this case because 660 Sunningdale was not vulnerable as the result of unequal bargaining power.

[7] If the trial judge did find in the alternative that the balance of the lender fee was not earned because the loan had not been advanced, she erred in the construction of the Loan Agreement.

[8] I would therefore allow the appeal and order that the balance of the Lender Fee to be paid to First Source, and not to 660 Sunningdale.

THE MATERIAL FACTS

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A. THE RELEVANT TERMS OF THE LOAN AGREEMENT

[9] There are several terms of the Loan Agreement that set out 660 Sunningdale's obligation to pay the Lender Fee of 2.75 percent of the Loan Amount.

[10] Article 2.01 is the clause that specifically identifies the Lender Fee as part of the consideration owed to First Source in return for First Source obtaining the loan commitment. It provides, "[i]n consideration of First Source obtaining this Commitment, the Borrower hereby agrees to pay a fee … in the amount of 2.75% of the Loan Amount" (emphasis added). Article 2.01(b) also provides that "[t]he Lender Fee is deemed earned upon acceptance and execution of this Commitment."

[11] Given the multimillion-dollar Loan Amount, 2.75 percent is an appreciable sum, found by the motion judge to be $426,500. Article 2.01(b) recites that the "Borrower acknowledges that the Lender Fee is a reasonable estimate of the Lender's costs incurred in sourcing, investigating and underwriting and preparing the Loan."

[12] According to the terms of the Loan Agreement, $100,000 of the Lender Fee was to be paid upon acceptance of the commitment by the parties. The contractual terms that address the $100,000 payment include article 2.01(a), which provides

that $55,000 of that payment is designated as the “First Deposit” and the remaining $45,000 is identified as the “Initial Lender Fee”.

[13] As indicated, 660 Sunningdale paid the $100,000 upon executing the Loan Agreement.

[14] Article 2.01(a) goes on to provide that, “[t]he entire First Deposit and Initial Lender Fee shall be applied in satisfaction of the Lender Fee or all of the First Deposit and Initial Lender Fee shall be forfeited if the Mortgage Amount is not advanced by the Lender due to any cause whatsoever save and except default of the Lender.”

[15] Article 4.17, the “Cancellation” clause, addresses what is to happen to the deposit “[i]n the event the Loan is not advanced and the Commitment is terminated, through no fault of the Lender”. It specifies that “the Deposit shall not be refundable to the Borrower and may be retained by the Lender as liquidated damages”.

[16] As detailed below, the motion judge could not find on the evidence before her that the Lender was in default of the Loan Agreement.

[17] The Loan Agreement provides alternative methods for the payment of the balance of the Lender Fee, depending on the circumstances. Article 2.01 addresses what is to happen to the balance if a loan is advanced. It directs that “[t]he balance of the Lender Fee shall be payable from the closing proceeds on the closing date.”

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[18] Article 4.17 provides for an alternative mode of payment “[i]n the event the Loan is not advanced and the Commitment is terminated through no fault of the Lender.” In these events “the Borrower shall be responsible for and pay the deficiency between the Lender Fee and the Deposit forthwith on demand, unless if caused by the default of the Lender.”

[19] Article 2.01 provides security for the balance by providing First Source with “an interest in the Property for the Lender Fee” and specifying that if it is “not paid, and if litigation proceedings are commenced, the Lender shall be entitled to a Certificate of Pending Litigation against the Property.”

B. THE LITIGATION

[20] When 660 Sunningdale decided not to proceed with the loan, First Source filed a caution against the property, as well as registered a personal property security agreement (“PPSA”) on a parcel of land that was unrelated to the Loan Agreement. The wrongful PPSA registration was removed shortly after it was filed, after a call to First Source’s lawyer. The caution was lifted when the parties agreed that the $326,500 would be held in trust pending the outcome of their dispute.

[21] In the action that it commenced, 660 Sunningdale sought the return of the $100,000 it had paid upon the acceptance and execution of the commitment, and the return of the $326,500 balance of the Lender Fee held in trust. It argued that the commitment had been terminated through the fault of the lender because First

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Source had made unreasonable demands, thereby entitling 660 Sunningdale under the terms of the contract to the return of the $100,000 advance and relief from the balance of the Lender Fee.

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[22] In her summary judgment, the motion judge listed the demands and actions that 660 Sunningdale alleged had been made unreasonably by First Source:

1) Insisting on an out-of-date residual valuation method.
2) Insisting on a valuation method that would only be available after the closing date of April 12, 2021.
3) Insisting that one of the 660 Sunningdale's directors resign.
4) Insisting that Peter Griffis (an officer and director of 660 Sunningdale) sign as guarantor.
5) Rejecting the project costing projections.
6) Generally, not exercising the duty of good faith.

[23] The motion judge accepted evidence that these demands and actions had occurred but decided that she could not resolve on the evidence before her whether they were unreasonable. She said, "I am unable to determine whether the termination of the commitment letter was the fault of the lender."

[24] The motion judge then said that she was "able to conclude that the requirements complained of, and the PPSA registration, at the very least made the developer's life difficult… [c]ollectively… [causing] the developer to unilaterally terminate the commitment letter and look elsewhere for financing."

[25] Despite her inability to find that the termination of the commitment letter was First Source's fault, which would have permitted 660 Sunningdale to avoid the Lender Fee under the terms of the contract, the motion judge concluded that the balance of the Lender Fee is unenforceable as a penalty clause, and that relief from forfeiture should be granted under s. 98 of the *Courts of Justice Act*.

[26] She arrived at these conclusions on the premise that the Lender Fee is a "stipulated remedy clause", giving rise to the application of the law described by Sharpe J.A. in *Peachtree II Associates - Dallas L.P. v. 857486 Ontario Ltd.* (2005), 76 O.R. (3d) 362 (C.A.), leave to appeal refused, [2005] S.C.C.A. No. 420. According to this body of law, a stipulated remedies clause can be found to be: (1) an unenforceable penalty clause if it is "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach", or (2) a forfeiture, that is eligible for relief of forfeiture because it would be unconscionable for the party seeking the forfeiture to retain the right, property or money forfeited: *Peachtree*, at paras. 24-25, quoting from *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co. Ltd.*, [1915] A.C. 79 (H.L.), at p. 87.

[27] The motion judge concluded that the $100,000 "is a pre-estimate of damages" and not a penalty clause. She therefore held that First Source is entitled to retain this amount. But she found that the balance of the Lender Fee should be released to 660 Sunningdale because it is a penalty, constituting a sum that is

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"extravagant and unconscionable in amount in comparison with the maximum loss that could have been sustained by the party seeking to enforce the clause." She went on to decide that she should grant relief from forfeiture from the balance because "the demands and actions of the lender made it difficult for the developer to comply and lead the developer to look for financing elsewhere" making it "unconscionable to require the developer to pay the balance of the lender's fee."

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[28] The motion judge did not specify whether she considered relief against forfeiture as the mechanism she was using to prevent enforcement of the penalty clause or whether relief against forfeiture was an alternative basis for ordering return of the balance to 660 Sunningdale. Properly applied, the two mechanisms are alternative ways of responding to punitive stipulated remedies. I will presume for the purpose of these reasons that the motion judge employed them in the alternative.

[29] In the course of finding that the balance was an unenforceable penalty clause she said that "much of the work for which the lender fee was payable (namely underwriting, sourcing, and preparing the loan) was not done; and the balance of the lender fee was to be paid out of the loan advance, which never happened." Given the context in which she made these findings, the motion judge may have been doing no more than explaining her conclusion that payment of the balance would be extravagant and unconscionable, and therefore an unenforceable penalty. But it is also possible that she was of the view that the

Lender Fee was not earned and therefore not payable. This is particularly so given the reliance she placed on the decision in *Marshallzehr Group Inc. v. Ideal (BC) Developments Inc.*, 2021 ONCA 229, 155 O.R. (3d) 200, which turned on a finding that a lender fee was not payable because it was not earned. In the reasons that follow I will therefore proceed on the assumption that this could be an alternative basis for the motion judge's decision to grant summary judgment of the balance in 660 Sunningdale's favour.

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ISSUES

[30] First Source identifies two general grounds of appeal.

[31] In the first ground of appeal, First Source argues that the motion judge erred in awarding summary judgment to 660 Sunningdale of the balance, plus interest, to be paid from the funds held in trust. It advances several arguments in support of this general ground of appeal. I will address only the arguments made by First Source that I would accept, since they are enough to sustain this ground of appeal.

[32] In the second ground of appeal, First Source argues that the motion judge also erred in failing to dismiss damages claims made by 660 Sunningdale that were put before the motion judge but not established. As indicated, I would not accept this ground of appeal.

GROUND OF APPEAL 1 - THE MOTION JUDGE ERRED IN GRANTING SUMMARY JUDGMENT TO 660 SUNNINGDALE OF THE BALANCE OF THE LENDER FEE

(1) The Motion Judge Erred in Applying the Law of Unenforceable Penalty Clauses

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[33] I agree with First Source that the motion judge erred in applying the law relating to unenforceable penalty clauses. As Sharpe J.A. explained in *Peachtree*, at para. 24, “both [the common law unenforceability of extravagant penalty clauses and the equitable relief against unconscionable forfeiture clauses] have the effect of relieving the breaching party of the penal consequences of stipulated remedy clauses” (emphasis added).

[34] By the terms of the Loan Agreement, the Lender Fee is not payable as a stipulated remedy for a breach of the contract, but rather as consideration for First Source obtaining the loan commitment. As Article 2.01 states, “[i]n consideration of First Source obtaining this Commitment, the Borrower hereby agrees to pay a fee”, identified as the Lender Fee. By its terms, the Lender Fee is payable as consideration whether or not the contract is ultimately breached by 660 Sunningdale. Put otherwise, the obligation to pay the Lender Fee does not arise because of conduct by 660 Sunningdale, as a remedy for that conduct. The Lender

Fee provision is therefore not a stipulated remedy clause and, in my view, cannot be an unenforceable penalty clause.

[35] The accepted definition of a "penalty" reinforces this point. "A penalty is the payment of a stipulated sum on breach of the contract, irrespective of the damage sustained": *Canadian General Electric Co. v. Canadian Rubber Co.* (1915), 52 S.C.R. 349, at p. 351; see also *Peachtree*, at para. 31. By its very nature, a penalty clause purports to preordain the payment required if a breach occurs. Unless a term of a contract stipulates a purported remedy for a breach, it cannot be a penalty clause. As Sharpe J.A. said in *Peachtree*, at para. 22, the "essence" of a penalty clause "is a payment of money stipulated as in terrorem of the offending party": citing *Dunlop Pneumatic*, at pp. 86-87. Put otherwise, a penalty clause says, "if you breach the contract, look at the penalty you will have to pay." That is not what the Lender Fee provisions say.

[36] It is settled that it is an error to apply the law relating to penalty clauses to funds that are payable under a contract, in the absence of a breach: *Polaroid Canada Inc. v. Continent-Wide Enterprises Limited* (2000), 7 B.L.R. (3d) 37 (Ont. C.A.). In *Polaroid*, the appellant tried to avoid its contractual agreement to pay an elevated export price by arguing that the provision requiring payment of that fee was an unenforceable penalty clause. This court held that the relevant provision of that contract could not be a penalty clause because it was not an

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obligation to pay damages by reason of the breach of the agreement: *Polaroid*, at para. 9.

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[37] 660 Sunningdale argued before us that the motion judge did not err because she interpreted the Lender Fee as a stipulated remedy, and this court should defer to her interpretation. In support of this argument, it emphasizes two provisions of the Loan Agreement, Article 2.01(b) which recites that "[t]he Borrower acknowledges that the Lender Fee is a reasonable estimate of the Lender's costs incurred in sourcing, investigating and underwriting and preparing the Loan", and Article 4.17, which describes the "deposit" as "liquidated damages". It argues based primarily on these clauses that the motion judge was entitled to conclude that since loan funds had not been advanced, the amount estimated for the Lender Fee was not incurred leaving the stipulated payment as extravagant and unconscionable.

[38] I disagree. First, the construction that 660 Sunningdale advanced before us is not reflected in the motion judge's decision. She did not address whether the Lender Fee was payable as a remedy for a breach, which is a necessary condition to it being characterized as a stipulated remedies clause. She focused only on whether the amount provided in the Lender Fee was extravagant and unconscionable in comparison to the amount First Source actually expended. As I will explain below, by looking only at whether the amount of the balance of the Lender Fee was extravagant and unconscionable without first determining that the

Lender Fee is a stipulated remedy clause, the motion judge effectively applied the independent doctrine of unconscionability rather than the doctrine of unenforceable penalty clauses.

[39] Moreover, even if the motion judge's decision could be read as 660 Sunningdale suggests it should be, there is no reasonable basis for that interpretation, given that the Loan Agreement provides no possible support for a finding that the Lender Fee is payable to remedy a breach. The recital in Article 2.01(b) does no more than describe how the Lender Fee in the contract was quantified. It is Article 2.01 that specifies the basis for its payment and, as I have emphasized, it says that the Lender Fee is payable as consideration for obtaining the loan commitment, earned upon the acceptance and execution of the commitment.

[40] Similarly, the description of the deposit as "liquidated damages" in Article 4.17 cannot support a reasonable finding, in the context of the Loan Agreement as a whole, that the Lender Fee is payable in order to remedy a breach of the Loan Agreement. I appreciate that Article 4.17 invokes the term "damages" which is a concept premised on a breach, but the deposit designated under the Loan Agreement consists of only $55,000 of the $100,000 advance. Even a finding that the deposit is payable pursuant to a stipulated remedy clause tells us nothing about the balance of the Lender Fee, which is the sum in issue. If anything, the singular identification of the deposit as damages suggests that the balance of the Lender

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Fee is not a damages provision or stipulated remedy clause. Moreover, by the clear terms of the Loan Agreement First Source's entitlement to the deposit does not arise if there is a breach of the Loan Agreement by 660 Sunningdale. Instead, that entitlement arises either if the loan is advanced, or if it is not advanced "through no fault of the Lender".

[41] I therefore do not accept 660 Sunningdale's submission that the motion judge interpreted the Lender Fee as a remedy for a breach, and I am persuaded that had she done so, it would have been an unreasonable construction of the loan contract, amounting to a palpable and overriding error.

[42] I am therefore satisfied that the motion judge committed a legal error in using the law of unenforceable penalty clauses to relieve 660 Sunningdale from its agreement to pay the balance of the Lender Fee as consideration for the Loan Agreement.

(2) The Motion Judge Erred in Applying the Law of Relief of Forfeiture

[43] I am also persuaded that the motion judge erred in excusing 660 Sunningdale from paying the balance of the Lender Fee based on the law of relief against forfeiture. Relief against forfeiture may be available to relieve a party of the consequences of its non-observance or breach of the terms of a contract or covenant. The balance of the Lender Fee was payable under the terms of the Loan Agreement regardless of any breach or non-observance of its terms. By granting

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relief against forfeiture to 660 Sunningdale from a contractual payment obligation that did not arise from any non-observance of the Loan Agreement on its part, the motion judge, in effect, applied the independent doctrine of unconscionability incorrectly in circumstances where there was no finding of inequality of bargaining power.

[44] In a helpful article, Eric Andrews commented that "[t]he penalty doctrine and relief against forfeiture are limited to a relatively narrow set of circumstances" while the distinct and independent unconscionability doctrine has a wider ambit: Eric Andrews, "The Penalty Doctrine, Relief against Forfeiture, and Unconscionability in Anglo-Canadian Law", (2023) 86 Sask. L. Rev. 197, at p. 200. This proposition is supported by expositions of the law provided in *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118, where Abella J. and Rowe J. explained for the majority that although "other doctrines can provide relief from specific types of oppressive contractual terms, unconscionability allows courts to fill in gaps between the existing 'islands of intervention' so that the 'clause that is not quite a penalty clause or not quite an exemption clause or just outside the provisions of a statutory power to relieve will fall under the general power, and anomalous distinctions… will disappear": at para. 60, citing S.M. Waddams, *The Law of Contracts*, 7th ed. (Toronto: Thomson Reuters, 2017), at p. 378. In his concurring judgment Brown J., at paras. 150-52, helpfully added that although there are doctrines that address conduct that can be described as unconscionable, no doubt

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including the doctrines invalidating penalty clauses or permitting relief against forfeiture, their policy rationales differ from the "independent doctrine" of unconscionability that "has developed a special meaning in relation to inequality of bargaining power", and which alone should be referred to by the term "unconscionability".

[45] As I will explain, even though it is wider in ambit, the independent doctrine of unconscionability is limited to unfair agreements that have resulted from inequality of bargaining power, a circumstance that has no application in the instant case. In my view, the motion judge employed the law of relief against forfeiture in circumstances that are not supported by precedent and that are contrary to principle, effectively misapplying the unconscionability doctrine without finding the requisite inequality of bargaining power.

[46] I do not purport in the following comments to exhaustively define the set of circumstances in which relief against forfeiture is available, but it is helpful to canvass its better-known applications to demonstrate that the application of relief against forfeiture in this case does not appear to be supported by precedent.

[47] Perhaps the paradigm circumstance in which relief against forfeiture is available is where the enforcement of a clause inserted to secure some aspect of the bargain would result in overcompensation for a breach of contract by the party seeking relief. Indeed, although Canadian authority may be more generous than

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English law, the application of relief against forfeiture that I have just outlined has been described in England as one of only two situations where courts my relieve against breaches of covenants and conditions, the other involving relief where there has been "fraud, accident, mistake or surprise": *Shiloh Spinners Ltd. v. Harding*, [1973] AC 691, at pp. 722-724.

[48] In Canada, the application of the law of relief against forfeiture arising from breaches of contractual clauses inserted to secure performance can be observed, for example, in cases recognizing that relief against forfeiture can be granted to prevent the forfeiture of non-refundable deposits (see *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, 137 O.R. (3d) 374, at paras. 18-20; *Rahbar v. Parvizi*, 2023 ONCA 522, at paras. 49-51); the forfeiture of insurance coverage for imperfect compliance with policy terms (*Kozel v. The Personal Insurance Compa*ny, 2014 ONCA 130, 119 O.R. (3d) 55, at para. 40); the forfeiture upon repudiation by the purchaser of installments or part or full payment of purchase monies that have been advanced (*216927 Alberta Ltd. v. Fox Creek (Town)*, 1990 ABCA 29, 104 A.R. 321, at paras. 23-27; *Conner v. Bulla*, 2010 BCCA 457, 297 B.C.A.C. 20, at para. 12); and forfeitures provided for in stipulated remedy clauses (*Peachtree*). This line of authority does not avail 660 Sunningdale relating to the balance of the Lender Fee. As I have explained, the balance of the Lender Fee was not paid or payable, in form or in substance, as a deposit, or a

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part payment or installment, and it is not a stipulated remedy clause, precisely because it was not agreed to in order to secure performance of the bargain.

[49] Nor does this case involve any suggestion of "fraud, accident, mistake or surprise" so it cannot shelter under the alternative situation derived from English authority.

[50] Relief against forfeiture is also available to prevent the loss of proprietary or possessory rights. In *Shiloh Spinners Ltd.*, at p. 722, for example, the court identified mortgages giving rise to equity of redemption and re-entry clauses under leases as the "commonest instances" of relief against forfeiture of property: see also *Liscumb v. Provenzano et al.* (1985), 51 O.R. (2d) 129, at p. 137 (Ont. H.C.), aff'd (1986) 55 O.R. (2d) 404 (C.A.), as well as Andrews, "The Penalty Doctrine, Relief against Forfeiture, and Unconscionability in Anglo-Canadian Law", at p. 216. This case, of course, does not involve the forfeiture of proprietary or possessory rights.

[51] Narrow jurisdiction to grant relief against forfeiture has also been recognized by authorities of this court where a party faces the loss of an option to renew a lease or extend a contractual right: *Ross v. T. Eaton Co.* (1992), 11 O.R. (3d) 115, at pp. 124-25 (C.A.). See also *120 Adelaide Leaseholds Inc. v. Oxford Properties Canada Ltd.*, [1993] O.J. No. 2801 (C.A.); *1383421 Ontario Inc. v. Ole Miss Place Inc.* (2003), 67 O.R. (3d) 161 (C.A.), at para. 80; *PDM Entertainment Inc. v. Three*

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Pines Creations Inc., 2015 ONCA 488, 388 D.L.R. (4th) 478, at para. 63.[1] Where a lease is involved, this line of authority is arguably no more than an application of the relief against forfeiture of property, since leases carry both contractual and property law characteristics: *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, [1971] S.C.R. 562. In any event, this line of authority does not avail 660 Sunningdale, as this case does not involve either property rights or a failed attempt to exercise an option to renew.

[52] The application of this body of law in the circumstances of this case is also contrary to principle. I say this for two reasons.

[53] First, in *Peachtree*, at para. 22, Sharpe J.A. defined forfeiture as "the loss, by reason of some specified conduct, of a right, property, or money, often held as security or part payment of the obligation being enforced under the threat of forfeiture" (emphasis added). All of the examples I have identified bear out that, accordingly, the doctrine of relief against forfeiture applies to relieve a party from the loss of a right, or property or money as the result of conduct on their part consisting of the non-observance of, or non-compliance with, the contract or

[1] As this court recognized in *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc. (Mr. Sub)*, 2016 ONCA 93, 393 D.L.R. (4th) 690, at para. 53, there are decisions to the contrary, including in our court, holding that relief against forfeiture is not available to relieve against the performance of a condition precedent: see *Re Pacella et al. and Giuliana et al.* (1977), 16 O.R. (2d) 6 (C.A.), at p. 8, citing *Sparkhall v. Watson*, [1954] 2 D.L.R. 22 (Ont. H.C.), at pp. 25-26, and see *Clark Auto Body Ltd. v. Integra Custom Collision Ltd.*, 2007 BCCA 24, 277 D.L.R. (4th) 201, at para. 30. I need not attempt to resolve this conflict.

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covenant. In this case, the motion judge did not relieve 660 Sunningdale from any specified conduct that it engaged in that triggered its obligation to pay the balance of the Lender Fee. She, in effect, purported to relieve 660 Sunningdale not from the consequences of its conduct relating to the contract but rather from a contractual term that she found to be excessive and unconscionable in amount. It is not the role of relief against forfeiture to relieve parties from terms of a contract they agreed to, on the grounds of the improvidence of that term. That is the function of the independent doctrine of unconscionability.

[54] This brings me to the second, related error in principle that the motion judge made in using the doctrine of relief against forfeiture to effectively address the unconscionability of contractual terms. The independent doctrine of unconscionability is meant to strike the proper balance between fairness and commercial certainty by protecting only "those who are vulnerable *in the contracting process* from loss or improvidence to that party in the bargain that was made" (emphasis in original): *Uber Technologies*, at paras. 60, 86. A two-part test is employed. To relieve a party from the contract they have agreed to there must be "(1) proof of inequality in the positions of the parties, and (2) proof of an improvident bargain": *Uber Technologies*, at paras. 64-65, citing *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at p. 256. There was no suggestion in the motion judge's decision that she considered whether there was an inequality of bargaining power between the parties to the Loan Agreement. Moreover, it bears

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notice that 660 Sunningdale appears to be a commercial developer capable of handling a largescale development, not a disadvantaged consumer. I am satisfied that the motion judge invalidated the terms of the contract relating to the balance of the Lender Fee, without complying with the limits of the doctrine of unconscionability that she was effectively applying.

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(3) The Balance of the Lender Fee was Not Contingent on the Loan Being Advanced

[55] I have explained in reviewing the motion judge's decision that there are indications that she may have found, in the alternative, that 660 Sunningdale should receive the return of the balance of the Lender Fee because it was not earned, as the loan was not advanced. Those indications include the focus that she gave to a term of the Loan Agreement providing that the Lender Fee was payable out of the first advance, as well as her conclusion that *Marshallzehr Group Inc.* supported her decision. *Marshallzehr Group Inc*. turned on a finding that the lender fee in that case was not payable unless the loan was advanced. It did not address either penalty clauses or relief against forfeiture. Therefore, the motion judge's reliance on this decision strongly suggests that she concluded that the Lender Fee in this case was similarly unearned, and not payable because the loan had not been advanced. If the motion judge did indeed arrive at this conclusion, she made a palpable and overriding error by arriving at an unreasonable

interpretation of the contract and/or she made an extricable legal error by failing to consider the whole of the Loan Agreement.

[56] The decision in *Marshallzehr Group Inc*. to deny Marshallzehr its lender fee turned on the particular terms of the commitment letter in that case. That contract provided that the lender fee “shall be deducted from the Initial Advance”. Since the commitment letter did “not contain any other language of entitlement to the lender fee”, as a matter of construction, the lender fee was not earned until the Initial Advance was paid. It was therefore found not to be payable.

[57] The Loan Agreement before the motion judge was materially different than the loan agreement at issue in *Marshallzehr Group Inc*. Not only does Article 2.01 of this Loan Agreement deem the Lender Fee to be earned at the time of the acceptance and execution of the commitment letter, but Article 4.17, the “Cancellation” clause, provides an alternative mode of payment if the loan is not advanced through no fault of the Lender. By its terms, in these circumstances, the balance is to be payable on demand, an obligation secured by a contractual declaration of interest in the land. Quite simply, in the face of these provisions the motion judge could not have arrived at a conclusion that the balance of the Lender Fee would not be due without an advance unless she failed to consider the entire Loan Agreement. In any event, such an interpretation would have been unreasonable and therefore a palpable and overriding error.

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(4) Overall Conclusion on Ground of Appeal 1

[58] For the foregoing reasons, Ground of Appeal 1 must be allowed. The motion judge erred in granting summary judgment to 660 Sunningdale of the balance of the Lender Fee.

GROUND OF APPEAL 2 - THE MOTION JUDGE DID NOT ERR BY NOT DISMISSING 660 SUNNINGDALE'S DAMAGE CLAIMS

[59] In its statement of claim, 660 Sunningdale sought $1 million in punitive damages and $50 million in damages against First Source for disrupting its business by causing 660 Sunningdale to terminate its loan commitment as a result of First Source's unreasonable behaviour. First Source joined issue with that claim, denying that it committed any breaches of the Loan Agreement.

[60] As described, the motion judge decided that 660 Sunningdale had not established the breach, but she did not dismiss or address its damage claim. She did not have to do so. 660 Sunningdale abandoned its damages claim in its summary judgment motion factum, stating that it was "foregoing any other damages and is simply requesting a release of the funds". The damages claim therefore ended with its abandonment without the need for a ruling.

[61] I would dismiss this ground of appeal.

CONCLUSION

[62] I would allow the appeal. The balance of the Lender Fee is to be paid to First Source, not 660 Sunningdale.

[63] The costs award below is reversed, with costs payable to First Source on the summary judgment motion in the amount of $50,000 inclusive of disbursements and applicable taxes. Costs on the appeal are payable to First Source in the amount of $20,000.

Released: April 9, 2024 “J.C.M.”

“David M. Paciocco J.A.”
“I agree. J.C. MacPherson J.A.”
“I agree. B.W. Miller J.A.”

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