COURT OF APPEAL FOR ONTARIO

CITATION: Ungar v. MOD Developments, 2024 ONCA 298
DATE: 20240422
DOCKET: COA-23-CV-0038

Harvison Young, Thorburn and Favreau JJ.A.

BETWEEN

Eva Ungar and Torandim Limited

Applicants (Respondents)

and

MOD Developments (Charles) Limited Partnership
by its General Partner MOD Development (Charles) Inc.

Respondent (Appellant)

AND BETWEEN

MOD Developments (Charles) Limited Partnership
by its General Partner MOD Development (Charles) Inc.

Applicant (Appellant)

and

Eva Ungar and Torandim Limited

Respondents (Respondents)

Michael Farace, for the appellant

Stephen Brunswick and Victoria Ostrovsky, for the respondents

Heard: September 20, 2023

2024 ONCA 298 (CanLII)

On appeal from the judgment of Justice Markus Koehnen of the Superior Court of Justice, dated December 1, 2022, with reasons reported at 2022 ONSC 6772.

Favreau J.A.:

2024 ONCA 298 (CanLII)

OVERVIEW

[1] The respondents on this appeal, Torandim Limited ("Torandim") and Eva Ungar, respectively owned two apartment buildings at 55 Charles Street east and 61-63 Charles Street east in Toronto. The building at 55 Charles Street east contained 76 rental units and the other building contained 24 rental units, for a total of 100 apartments.

[2] The appellant, MOD Developments (Charles) Limited Partnership ("MOD"), purchased the two buildings. Around December 18, 2017, the parties entered into two separate, but essentially identical, agreements of purchase and sale (together the "APSs").

[3] The appellant intended to redevelop the two buildings into a 52-storey building complex, to be comprised of 565 condominiums, 7 townhouses, 100 rental apartments, a commercial underground parking garage, and 5 storeys of commercial space.

[4] The APSs provided that the appellant would pay approximately $75 million to the respondents. In addition, once the condominium was registered, the appellant was to transfer the 100 rental apartments to the respondents, 76 to Torandim and 24 to Ms. Ungar. It was anticipated that, at that point, the

respondents would be responsible for renting out and populating the rental units. In doing so, the respondents were to give their former tenants a right of first refusal.

[5] At the time the parties entered into the APSs, they were aware that they would have to enter into a cost sharing agreement for the common areas of the development, however they did not address the specific terms of such an agreement. Instead, the APSs provided that the details of such a cost sharing agreement were to be at the appellant's discretion and the respondents were to act reasonably in executing such an agreement.

[6] After the parties executed the APSs, the appellant was required to enter into a development agreement with the City of Toronto (the "City"), referred to as a Section 111 Agreement.[1] The agreement between the appellant and the City, (the "Section 111 Agreement") included specifications related to the rental units that were inconsistent with the development as initially anticipated in the APSs. One of the requirements was that there be a common entrance for the condominiums and rental apartments, whereas the APSs anticipated that there would be separate entrances. The development agreement also required that the rental apartments be made available once the condominium units were 70% ready for occupancy,

[1] Chapter 667 of the City of Toronto Municipal Code passed pursuant to s. 111 of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, prohibits the demolition of a residential property without a permit. As part of the permitting process, developers are typically required to enter into what is referred to as "Section 111 Agreements" with the City.

2024 ONCA 298 (CanLII)

whereas the APSs anticipated that title to the rental apartments would be transferred at a later stage in the development.

[7] The parties were unable to agree on the financial consequences of the unanticipated requirements imposed by the City. The appellant took the position that the respondents should pay a larger proportion of the maintenance costs than would have been required under the original plan, and that it should be responsible for arranging occupancy of the rental units and collecting their rent until the rental units were transferred to the respondents. The respondents disagreed.

[8] The parties brought cross-applications to the Superior Court, seeking orders regarding their respective obligations arising from the requirements set out in the Section 111 Agreement.

[9] The application judge agreed with the respondents, basing his decision on the wording of the APSs and the parties' reasonable expectations at the time they entered into those agreements. Specifically, he ordered that the respondents were only required to bear the cost of maintaining the amenities dedicated to the rental units and to contribute to the costs of the shared amenities "only to the extent of the cost that could fairly be attributed to that amenity as originally contemplated in the [APSs]". In addition, the application judge found that the appellant held the rental units in trust for the respondents. The respondents were thereby entitled to lease and populate the units and were to receive rental payments once the units

2024 ONCA 298 (CanLII)

were rented, even before title to the rental units was formally transferred to the respondents.

[10] The appellant puts forward two main arguments on appeal. First, it submits that the application judge erred in failing to require the respondents to pay a higher share of the common amenities, based on the revisions imposed by the Section 111 Agreement. Second, the appellant argues that the application judge erred in deciding that it holds the rental units in trust for the respondents, such that the respondents have control over leasing and populating the rental units and can receive rent payments before the legal transfer of the units.

[11] I see no error in the application judge's interpretation of the APS or his conclusions and would therefore dismiss the appeal.

[12] Below, I first address the cost sharing issue, and I then address the issue of responsibility for renting and populating the rental units and the right to collect rent. I refer to the relevant evidence and findings of the application judge as necessary in each section.

THE STANDARD OF REVIEW

[13] The issues on this appeal all turn on whether the application judge erred in his interpretation of the parties' rights and obligations under the APSs.

[14] Absent an extricable question of law or a standard form contract, contractual interpretation is a question of mixed fact and law subject to a deferential standard

2024 ONCA 298 (CanLII)

of review: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 52-53; *Intercap Equity Inc. v. Bellman*, 2022 ONCA 61, 160 O.R. (3d) 536, at para. 36.

[15] Extricable errors of law include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor": *Sattva*, at para. 53. However, the Supreme Court has explicitly cautioned that "the circumstances in which a question of law can be extricated from the interpretation process will be rare" because "the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific": in *Sattva*, at para. 55.

[16] Accordingly, in the absence of an identified error of law, the standard of review applicable in this case is the palpable and overriding error standard.

[17] As addressed below, I see no palpable and overriding errors in the application judge's interpretation of the APSs nor in his assessment of the factual matrix leading to his determinations.

ISSUE 1: ALLOCATION OF COSTS FOR THE COMMON AMENITIES

(1) Relevant factual background

[18] The APSs contemplated that the condominium portion of the development would be separate from the rental units, and that their respective common elements would also be separate. In addition, the APSs specified various aspects

2024 ONCA 298 (CanLII)

of the common areas for the rental units. These were to include an entrance to a vestibule area, with an intercom panel. The vestibule was to be large enough to provide “unimpeded access to the residential elevators while providing sufficient floor area to accommodate seating for six people” and “to accommodate the temporary placement of delivery packages and groceries while the intercom is being used”. The entrance to the rental units was also to provide access to two high-speed elevators.

2024 ONCA 298 (CanLII)

[19] The application judge found that this “clearly contemplated a small, modest entry and lobby, both with relatively little space”. In contrast, the condominium portion of the development was to have a “much more lavish entrance” that included a two-storey lobby and a concierge desk.

[20] At the time the parties entered into the APSs, they were aware that they may have to enter into a cost sharing agreement for certain aspects of the development, however they did not address the specific terms of such an agreement. Instead, the APSs provided that the details of such a cost sharing agreement were to be at the appellant’s discretion and that the respondents were to act reasonably in executing such an agreement. For example, the Torandim APS provided as follows:

> Shared Facilities/Reciprocal and Cost Sharing Agreement
>
> The [respondent] acknowledges and agrees that as at the date of this Agreement, the [appellant] has not

> finalized any architectural plans or sought any approvals from any Governmental Authority for the development and construction of the Apartment Units, Condominium and/or Development. However, it is likely that in order to deal with the normal operation, maintenance and repair of the Apartment Units and/or the Condominium and/or apartment units to be conveyed to the 61-63 Charles Property owner, pursuant to the 61-63 Charles APS, it may be necessary for the [respondent] to enter into or assume a shared facilities/reciprocal easement, operating and cost sharing agreement with the 61-63 Charles Property owner and/or the Condominium, for the use and cost sharing of those facilities and services which are either shared between the various owners including the Condominium or which are for the exclusive use and benefit of any one or more of the owners, but which form part of another owner's property. The details of which will be determined through the development approval process and by the [appellant] in its discretion. The [respondent] acknowledges and agrees that as part of the closing process related to the conveyance of the Apartment Units, it shall, acting reasonably, enter into and/or assume any such shared facilities/reciprocal easement, operating and cost sharing agreement and shall execute and deliver such other reasonable documents and agreements to give effect thereto. [Emphasis added.]

[21] The APSs also provided that changes may be necessary to the design of the common areas to accommodate regulatory requirements and that:

> Subject to the prior written consent of the [respondent], not to be unreasonably withheld or delayed, and for which consent the [respondent] is invariably entitled to consultation with the party, authority or agency seeking, ruling or recommending or advising that certain amendment(s) and/or changes be made, the [appellant] may, from time to time and within the spirit and intent of the Agreement, change, vary or modify the plans and specifications pertaining to Apartment Units and shared

2024 ONCA 298 (CanLII)

> common element areas, including those set out above, provided that any changes or substitutions made are reasonably comparable to or better than the specifications set out above, as determined by the [appellant's] architect and the [respondent] acting reasonably. [Emphasis added.]

[22] Despite the parties' agreement that the rental units were to have a separate entrance and lobby, through the Section 111 Agreement, the City required a common entrance for the condominiums and the rental units, and that three elevators, rather than two, provide access to the rental units. In addition, the Section 111 Agreement expressly limited both the initial rent and rent increases the respondents could charge returning and new tenants.

[23] The respondents were not parties to the Section 111 Agreement nor were they involved in its negotiation. However, the application judge found that "even if the [respondents] were not consulted at every single step, they had a meaningful opportunity to put their position to the City" as the Section 111 Agreement negotiations progressed. The City rejected the positions the respondents put forward.

[24] In accordance with the APSs, the Section 111 Agreement was registered on title on October 2, 2019.

[25] After the formation of the Section 111 Agreement, the appellant presented the respondents with a draft cost sharing agreement, which included a requirement that the respondents pay 15% of the expenses of all the common amenities in the

2024 ONCA 298 (CanLII)

condominium building, including the cost of maintaining the lobby, the concierge, the management fees and the reserve required by the condominium. The respondents agreed that they should pay a portion of the costs of some of the common amenities. However, they took the position that they should not pay for the costs of the shared amenities that were not contemplated by the APSs, such as the larger lobby and the concierge. The application judge noted that some of these costs would be significant; for example, the concierge alone could cost up to $560,000 per year.

2024 ONCA 298 (CanLII)

(2) The application judge's decision on cost sharing

[26] The application judge noted that the matters in dispute between the parties were not specifically addressed or contemplated in the APSs. To determine what was in the "reasonable expectation" of the parties, he considered the wording of the APSs and the context in which they were made.

[27] The application judge held that the wording of the APSs and the circumstances in which they were made did not support the appellant's position that the respondents should be required to contribute 15% of the costs. He gave several reasons for this conclusion.

[28] The application judge observed that the plans originally contemplated that the rental units would have a smaller separate lobby. He noted that the appellant would be in a better position to bear the economic consequences of the large,

shared lobby because the respondents were limited in their ability to recoup extra expenses from the renters given the limits on available rent increases. In contrast, the appellant could fund the maintenance costs through the fees charged to condominium purchasers, which it was already anticipated would increase at a rate of 7.5% per year. He described this as a matter of "commercial efficacy":

> The issue of commercial efficacy is particularly relevant here. The budget statement that [the appellant] proposes to provide to Condominium purchasers foresees its maintenance charges increasing by 7.5% annually after December 31, 2023. [The appellant] has therefore sought and obtained contractual protection for those increases. As noted earlier, rental increases are subject to limits of 2% in Ontario. It is therefore impossible for the [respondents] to protect themselves against any increased costs beyond a 2% rent increase.

[29] The application judge also found that the discretion given to the appellant in the APSs to develop cost-sharing agreements was not unfettered. In making this finding, he relied on the relevant wording in the agreements and on the admission by the appellant's deponent on cross-examination that the discretion did not give the appellant "free rein and that such discretion had to be exercised reasonably".

[30] The application judge rejected the appellant's argument that the respondents could use part of the $75 million they received as payment for the properties to fund any additional maintenance costs. He noted that the $75 million payment was meant to be consideration for the sale of the properties, and that there was "no expectation that the proceeds of sale would be used to fund the

2024 ONCA 298 (CanLII)

expenses associated with more luxurious amenities that would be imposed on the [respondents] against their will".

[31] The application judge rejected the appellant's position that the respondents should pay 15% of the management and maintenance costs. He stated that the rental apartments would require their own manager and maintenance, and that the respondents could pay for those costs as originally contemplated. In addition, he held that the respondents should not be required to contribute 15% to the condominium's reserve fund but accepted the respondents' proposal that they maintain a 4% reserve fund that could be subject to audit by the appellant.

[32] The application judge nevertheless found that it would be reasonable for the respondents to bear the additional cost of the third elevator for the rental apartments. He explained that while a third elevator was not contemplated when the parties entered into the APSs, it would only benefit the rental apartments.

[33] Ultimately, the application judge made the following order in relation to the respondents' obligations to pay for the maintenance and other costs:

> The [respondents] are required to bear the cost of maintaining amenities in the Development only insofar as those amenities are dedicated uniquely to the Rental Units. In the case of shared amenities such as the lobby, the [respondents] are required to contribute to the cost of maintaining those amenities only to the extent of the cost that could fairly be attributed to that amenity as originally contemplated in the Agreements of Purchase and Sale. Thus, for example, the [respondents] should be required to contribute to the Condominium an amount equal to

2024 ONCA 298 (CanLII)

> what the [respondents] would have had to spend to clean and maintain the small vestibule and lobby contemplated by the Agreement of Purchase and Sale but no more than that. In the case of the third elevator, the [respondents] will bear the cost of maintaining it because it is an amenity devoted exclusively to the use of the Rental Units.

(3) Analysis

[34] The appellant argues that the application judge erred in finding that the respondents should not be required to pay for their proportionate share of the common amenities. The appellant submits that this is contrary to the wording of the APSs which contemplate that the parties will have to enter into cost sharing agreements, that there may be necessary changes to the design of the building complex imposed by the City and that the appellant had discretion to impose the necessary cost sharing.

[35] I would reject these arguments. The application judge made no palpable and overriding errors in his analysis of the APSs, viewed in the context of the relevant factual matrix.

[36] In his decision, the application judge had proper regard to the wording of the APSs and the factual matrix in concluding that the respondents should not be required to pay for anything more than the common expenses they would have paid under the original plan.

2024 ONCA 298 (CanLII)

[37] As the application judge found, the APSs did not give unfettered discretion to the appellant to impose a cost sharing agreement on the respondents. While the appellant has the discretion to determine the terms of a cost sharing agreement, the respondents are only required to act “reasonably” in entering such an agreement. Similarly, the APSs explicitly described the common areas that were to be built for the rental apartments. These were to be separate from the common amenities for the condominiums. Again, the appellant was given discretion to make necessary changes to comply with the requirements of government authorities. However, as noted in the APSs, these changes were to be made with the respondents’ written consent, “not to be unreasonably withheld” and were also to be “within the spirit and intent” of the agreements.

[38] Given the language in the APSs, it was appropriate for the application judge to consider and decide whether it is reasonable for the respondents to be required to assume 15% of the cost of all shared amenities. The APSs did not give the appellant the unilateral ability to impose changes to the rental units and associated costs on the respondents. In the circumstances, it was appropriate for the application judge to consider what was in the reasonable commercial contemplation of the parties at the time they entered into the agreements.

[39] The appellant argues that the application judge overstepped his role in considering matters such as the respondents’ ability to increase rents and recoup the proposed shared costs. In this respect, the appellant argues that the

2024 ONCA 298 (CanLII)

application judge improperly relied on parol evidence. I do not agree that the application judge made any such error.

[40] In *Sattva*, at paras. 59-61, the Supreme Court explained the distinction between inadmissible parol evidence and admissible evidence regarding the circumstances surrounding the formation of a contract. Inadmissible parol evidence is evidence that "would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing": *Sattva*, at para. 59. In other words, it is evidence of the parties' subjective intentions and interpretations that risks displacing or overwhelming the clear language of the written contract. By contrast, evidence of the surrounding circumstances consists of objective evidence of the background facts at the time the contract was executed that was known or that reasonably ought to have been known by the parties at the time they entered the contract: *Sattva*, at paras. 58. This includes anything that affects the way the contractual language would have been understood by a reasonable person. The parol evidence rule therefore does not preclude courts from considering the surrounding circumstances under which a contract was made: *Sattva*, at para. 60.

[41] In my view, the evidence considered by the application judge falls into the category of surrounding circumstances and is therefore not excluded based on the parol evidence rule. In deciding whether it was reasonable to require the respondents to share in the costs of the condominium lobby, including the

2024 ONCA 298 (CanLII)

concierge service, the application judge had regard to the circumstances and intent of the parties at the time the agreements were made. These circumstances included the parties' objectively clear intention that the rental apartments and condominiums would operate separately and have separate entrances. In this context, it was also known to all parties that the respondents had limited means of recouping any expenses from the tenants. This is not extrinsic parol evidence, but rather formed part of the surrounding circumstances and was relevant to determining what shared costs it was reasonable for the respondents to bear.

[42] Similarly, it was not an error for the application judge to interpret the APSs, taking commercial reasonableness and efficacy into consideration. The parties' differing commercial positions, including their respective abilities to recoup expenses from renters as compared to condominium buyers, was known to all parties at the time they entered into the APSs. Commercial realities can be relevant to the interpretation of a contract: *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, [2019] 4 S.C.R. 394, at para. 79.

[43] Notably, the interpretation exercise in this case required consideration of the surrounding circumstances and the parties' objective intentions because the APSs did not directly address how costs were to be shared. The APSs gave the appellant the discretion to develop cost sharing agreements and required that the respondents act reasonably in executing such agreements. In the face of the significant changes imposed by the City in the Section 111 Agreement, it was

2024 ONCA 298 (CanLII)

necessary for the application judge to determine whether the cost sharing agreement proposed by the appellant was reasonable. This necessarily required consideration of the circumstances under which the APSs were formed and the parties' expectations at that time. I see no error in the application judge's reliance on the surrounding circumstances or in the conclusions he reached regarding how costs should be allocated. Accordingly, I see no palpable and overriding error in the application judge's decision regarding the portion of the shared expenses the respondents should be required to pay.

2024 ONCA 298 (CanLII)

ISSUE 2: RESPONSIBILITY FOR RENTAL UNITS PRIOR TO TRANSFER

(1) Relevant factual background

[44] The APSs do not explicitly state who will be responsible for leasing out the rental units.

[45] The APSs also do not specify the date by which title to the rental units will be transferred to the respondents. However, as found by the application judge, title to the rental units must be transferred at least 90 days after the condominium is registered given the terms of a collateral mortgage held by the respondents:

> The [APSs] do not provide a specific date by which [the appellant] will transfer title to the Rental Units to the [respondents]. Instead, the [respondents] have a collateral mortgage against the project to secure the transfer of title in the rental apartments to them. That collateral mortgage matures 90 days after the registration of the Condominium. In effect, [the appellant] must transfer title in the Rental Units to the [respondents] no

> later than 90 days after the registration of the Condominium.

[46] Despite the parties' agreement on the timing of the transfer, the Section 111 Agreement requires that the rental units be available for occupancy by the time 70% of the condominium units in the complex are "occupant ready". As found by the application judge, it is likely that the appellant would obtain occupancy permits for 70% of the condominium units well before the condominium is registered. Therefore, the appellant will be the legal title holder to the rental units when the City requires that they be made available for rental.

(2) The application judge's decision on the issue of responsibility for renting the apartment before legal transfer

[47] At the hearing below, the appellant took the position that, given that it was to be the legal title holder to the rental units at the time the City requires the units be made available for rent, the appellant should be responsible for renting the units and collecting rent from the renters.

[48] The application judge rejected this position. In doing so, he found that it was more consistent with the intent of the parties for the respondents to take responsibility for leasing and populating the rental units because the respondents already had a relationship with the original tenants and because they will continue to have a relationship with the tenants going forward:

2024 ONCA 298 (CanLII)

The period of time between the occupancy of the Rental Units and the registration of the Condominium will be relatively short. Probably a question of several months to a year. The [respondents] will own the Rental Units in perpetuity. Given that time difference, there is no doubt in my mind that the [respondents] have a greater commercial interest in controlling the repopulation process than does [the appellant]. In addition, the [respondents] have an existing relationship with former tenants. To the extent that new tenants occupy the premises, the [respondents] as landlords have a legitimate commercial interest in establishing the relationship directly and in the vetting the tenants who will live in the building.

Moreover, the [respondents] have extensive experience in leasing apartments. [The appellant's] deponent on cross-examination admitted that [the appellant] has no experience in relocating tenants and admitted that it would make more sense for the [respondents] to be involved in repopulating the Rental Units than for [the appellant].

In my view it would be more consistent with principles of contractual interpretation for the [respondents] to control the repopulation process. The Rental Units are being constructed for the benefit of the [respondents]. Delivery of the Rental Units constitutes part of the purchase price for the two buildings the respondents sold to [the appellant]. The [respondents] will be titleholders to those Rental Units in perpetuity, unless of course they transfer the interest to another party. That gives the [respondents] an objective, reasonable expectation to control the rental process. If they do not control that process, they are not getting the benefit of full title to the Rental Units at a critical time, namely tenant selection and relationship building. It is, in my view more consistent with the objective expectations of the parties to have the long-term owner of the Rental Units repopulate them.

2024 ONCA 298 (CanLII)

[49] In concluding that the respondents should have the responsibility for populating the rental units, the application judge rejected the appellant's reliance on the obligation imposed on the appellant to repopulate the rental units in the Section 111 Agreement. He noted that the respondents were not a party to that agreement, and it was therefore not binding on them. He also accepted the respondents' invitation to make it a term of his order that the respondents would be responsible for indemnifying the appellant for any breach of the Section 111 Agreement related to the repopulation of the rental units.

[50] The application judge further rejected the appellant's position that, regardless of whether the respondents are permitted to repopulate the rental units, the appellant should be entitled to collect the rents on the units until they are legally transferred to the respondents. The application judge did not agree with the appellant that s. 4(f) of the *Vendors and Purchasers Act*, R.S.O. 1990. c. V.2, entitles the applicant to collect rent on the rental units until they are transferred to the respondents. The application judge further held that, until the rental units are transferred, the appellant holds the rental units in trust for the respondents, who are the beneficial owners of the units:

> As noted earlier, the Rental Units were part of the consideration that [the appellant] paid to the [respondents] for the transfer of their two buildings. The Rental Units were always to be constructed for the benefit of the [respondents]. Given that the Rental Units were part of the consideration, it is in my view more consistent with the reasonable expectations of the parties

2024 ONCA 298 (CanLII)

> that the benefit of those Rental Units would accrue to the [respondents] as soon as the units began earning rent. That interpretation gives the [respondents] the full benefit of the consideration they agreed to for the sale of the properties. If [the appellant] wanted to depart from that fundamental concept, it should have made that exception to the underlying purpose of the transaction clear in the Agreements of Purchase and Sale.

(3) Analysis

[51] The appellant argues that the application judge erred in finding that the respondents are entitled to populate the rental units and collect rent before the rental units are legally transferred. I disagree.

[52] Again, this was an issue that is not explicitly addressed in the APSs. It was appropriate for the application judge to seek to discern the parties' intentions based on the surrounding circumstances. It is evident that, at the time the parties entered into the APSs, they anticipated that the respondents would be fully in control of repopulating the rental units and collecting rents. I agree with the application judge's reasoning and conclusion that the Section 111 Agreement, which only has the effect of changing the timing of the repopulation, should not affect the clear intention of the parties.

[53] I also agree with the application judge's conclusion that the respondents are entitled to receipt of the rental units from the time they are rented out, even before title is legally transferred to the respondents.

2024 ONCA 298 (CanLII)

[54] On appeal, the appellant renews its reliance on s. 4(f) of the *Vendors and Purchasers Act*, which provides that:

> 4. Every contract for the sale and purchase of land shall, unless otherwise stipulated, be deemed to provide that,
>
> …
>
> (f) the purchaser is entitled to possession or the receipt of rents and profits upon the closing of the transaction.

[55] I agree with the application judge that the appellant's reliance on this provision does not take into account the overall context of the transaction between the parties. Section 4(f) of the *Vendors and Purchasers Act* is not absolute. It is necessarily subject to the agreement reached between the parties.

[56] In rejecting the appellant's position that it is entitled to collect rents from the rental units until title is transferred, the application judge found that the appellant held the rental units in trust for the respondents, and that the respondents are the beneficial owners of the units. While the application judge did not fully analyze the basis on which the appellant holds the units in trust for the respondents, I nevertheless agree with his conclusion on this issue. The doctrines of unjust enrichment and constructive trust assist in addressing this issue.

[57] Courts may recognize a constructive trust to avert unjust enrichment: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at paras. 20 and 36. Unjust enrichment arises where (1) one party is enriched, (2) another party experiences a corresponding deprivation, and (3) no juristic reason justifies the deprivation: *Soulos*, at para. 20.

2024 ONCA 298 (CanLII)

The deprivation need not be limited to a direct loss. Rather, it can include a benefit that was never in the respondents' possession but that would have accrued for their benefit had it not been received by the appellant: *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, at para. 44. Where unjust enrichment is established, a constructive trust may be recognized when monetary damages cannot address a deprivation that is linked to property: *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660, at para. 149, citing *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 988.

[58] Based on the factual findings made by the application judge, it is evident that the appellant would be unjustly enriched if it were permitted to collect rent on the rental units for its own benefit before the units are transferred to the respondents. The APSs contemplate the rental units are to be transferred to the respondents as consideration for the overall transaction. This necessarily includes an expectation that the respondents, and not the appellant, would benefit from the rents to be collected from rental units as part of that consideration. The APSs never contemplated that the appellant would be entitled to receive any rent from the rental units.

[59] The APSs require the appellant to transfer the rental units to the respondents no later than 90 days after the registration of the condominium, after which it was expected that the respondents would start populating the rental units and collecting rents. This conflicts with the appellant's separate Section 111

2024 ONCA 298 (CanLII)

Agreement with the City of Toronto, which requires it to make the rental units available for prospective tenants once 70% of the condominium units are ready for occupancy. Because the occupancy threshold is likely to be reached well before the deadline for the transfer of the rental units, the appellant would remain the legal owner of the rental units pre-transfer. Absent beneficial ownership, the rental income on the rental units in that period would accrue to the appellant's benefit, not to the respondents. The appellant's enrichment and the respondents' corresponding deprivation lacks a juristic basis, as it is the outcome of the terms of the Section 111 Agreement, which the appellant entered into independent of the respondents. It also conflicts with the parties' expectations at the time they entered into the APSs.

[60] Clearly, the appellant's enrichment and the respondents' corresponding deprivation have a proprietary link. Further, awarding monetary damages at this stage is inadequate, as the loss has not yet occurred.

[61] In my view, while the application judge did not engage in a fulsome analysis of the issue, he was correct to recognize the respondents as beneficial owners of the rental units, as doing so averts unjust enrichment by the appellant.

DISPOSITION

[62] For these reasons, I would dismiss the appeal.

2024 ONCA 298 (CanLII)

[63] I would also award costs in the amount sought by the respondents of $38,000.00 inclusive of disbursements and HST.

Released: April 22, 2024 “A.H.Y.”

“L. Favreau J.A.”
“I agree. Harvison Young J.A.”
“I agree. Thorburn J.A.”

2024 ONCA 298 (CanLII)