CITATION: *Tri-South Developments Inc. v. 583167 Ontario Inc.*, 2024 ONSC 3406
COURT FILE NO.: CV-21-00665510-0000
DATE: 20240724

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Tri-South Developments Inc.	)	*Mark Veneziano, Sean Lewis and Drew Black*, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
583167 Ontario Inc.	)	*Melvyn L Solmon and Nancy J. Tourgis*, for the Defendant
Defendant	)	
	)	
	)	
	)	HEARD: January 9-12 and March 27, 2024

REASONS FOR DECISION

CALLAGHAN J.

[1] The parties to this action entered into a Contribution Agreement (the "CA") to build a 41-storey condominium (the "Project"). The Defendant was to vend in a portion of a parcel of land. The Plaintiff was to develop the Project.

[2] In the end, the Project faltered over an agreed term that required the Plaintiff to obtain a severance of the parcel of land by a specified date. That date passed and the CA came to an end.

[3] The Plaintiff asserts that the Defendant knowingly misled the Plaintiff into believing that the severance date would not be relied upon and that the Project would continue. The Plaintiff relies on the contractual doctrine of "good faith and honest performance".

[4] It is argued that had the Defendant been forthright as to its intention to rely on the severance date as the basis for termination of the CA, the Plaintiff would have taken steps to avoid the termination of the CA. Indeed, the Plaintiff asserts that after the termination date passed, the Defendant continued to proceed with the Project, thereby waiving any right to rely on the severance provision to terminate the CA.

[5] The Defendant responds that it had no obligation to advise the Plaintiff of the Plaintiff's duties under the CA or the implications of the Plaintiff failing to meet its obligations. It denies it breached the duty of good faith and honest performance of the CA. Finally, it rejects that it waived the termination of the CA.

[6] I have concluded that the Defendant's conduct did not breach its duty of good faith and honest performance of the CA. I also conclude there was no waiver of termination of the CA. The reality is that the Plaintiff ignored the severance date from the outset. It failed to meet its obligation under the CA because it failed to take its duty to obtain the severance seriously. It assumed from the outset that the condition of severance, while contractual, was not to be taken seriously. On this point, it was mistaken.

[7] This was a bifurcated trial. As such, there is no assessment of what damages would have been had the Plaintiff succeeded on liability.

The Parties

The Plaintiff

[8] The Plaintiff, Tri-South Developments Inc ("Tri-South"), is a single-purpose real estate corporation. Its principals are John Mantia ("Mantia"), Sam Ferrari ("Ferrari"), and Saverio Caputo ("Caputo") (collectively the "Tri-South Principals").

[9] Mantia was responsible for all stages of the development of the Project, including obtaining all necessary approvals, instructing consultants, and getting the project to the stage where it was ready to build. Mantia had been a real estate agent for many years before his present role with Tri-South.

[10] Ferrari is a well-regarded builder. He was responsible for the construction of the proposed Project. He was well known to the Defendant.

[11] Caputo was a silent partner. He was not a central figure in this litigation.

The Defendant

[12] The Defendant, 583167 Ontario Inc. ("583 Ontario"), is the registered owner of the property municipally known as 4310 Sherwoodtowne Boulevard (the "Property").

[13] Greg Gilmour ("Gilmour") is the principal and directing mind of 583 Ontario. He is a real estate broker. He has been in the real estate business for 49 years.

The Project

[14] At 41 storeys and 330 units, the proposed condominium was the tallest building either party had built (the "Condominium"). The *pro-forma* budgets to complete the Project ranged from $150-250 million. This was the most costly project either party had undertaken.

[15] The Property is in a desirable part of the City of Mississauga (the "City"). At the west end of the Property, Gilmour had built a 6000sm 4 storey office building, which he largely used for his brokerage business (the "Office Building"). He employed some 500 real estate agents. A large portion of the Property abutting the Office Building was used for parking.

[16] For several years, Gilmour had contemplated developing the east portion of the Property. Long term, he envisioned a second phase to the development whereby he would redevelop the west portion of the Property where the Office Building stood.

[17] Gilmour had worked with Ferrari in the past and thought he was a good builder. It was proposed that Ferrari and Tri-South could undertake the development of the Project.

[18] The Project encompasses the eastern portion of the Property, which would become known as the "Schedule "B" Lands". Tri-South would design the Condominium, sever the land, and obtain the necessary approvals. The Schedule "B" Lands would then be sold by 583 Ontario to a newly formed limited partnership owned by the parties. 583 Ontario would keep the Office Building and the un-severed western portion of the Property, which was described as the "Phase 2 Lands". Tri-South would build the Condominium on the Schedule "B" Lands. Tri-South would keep 75% of the development profits, with 583 Ontario keeping 25%.

[19] The parties entered the CA on April 9, 2019. The CA contemplated that further agreements would be required before the project closed. These included a unanimous shareholder agreement, a construction management agreement, and a limited partnership agreement (collectively known as the "JV Documents"). The CA required that Tri-South would invest a minimum of $1 million as part of the "pre-development expenses". This included hiring an architect, a planner, and various other consultants needed to obtain City approvals. Tri-South hired Alan Tregebov ("Tregebov") as the architect and Jason Afonso ("Afonso") as the planner.

The Severance Condition

[20] The severance of the Property is at the center of this litigation. To accomplish the Project, the Schedule B Lands would have to be severed from the Phase 2 Lands. The severance line was delineated on a map attached as schedule 2 of the CA.

[21] The CA addresses the severance in several paragraphs. In the preamble, it states that Tri-South and 583 Ontario "agree to co-operate to make an application to sever" the existing lands into several parcels, leaving the Phase 2 Lands with 583 Ontario and developing the Schedule 2 Lands. In relation to co-operation, the CA also provided in paragraph 12 that Tri-South had the

right, either on its own account or on behalf of 523 Ontario, to take such action as needed to complete the severance.

[22] There were several conditions stipulated in the CA in favour of both Tri-South and 583 Ontario. Clause 7 listed conditions a) to g), which were described as the Purchaser's Conditions, the Purchaser being Tri-South. Condition 7(a) stated that Tri-South was to achieve severance of the Property by June 30, 2024 (the "Severance Condition").

[23] The June 30 date (the "Severance Date") was chosen by Tri-South. Why Tri-South chose that date is not clear. The CA provided that Tri-South could extend the Severance Date by 3 months or could waive all the conditions (i.e., all of 7(a) to 7(g)). Accordingly, Tri-South could perform its obligations in respect of the Severance Condition by obtaining a severance by the Severance Date, by extending the Severance Date by three months and obtaining severance then, or by waiving all of the Purchaser's Conditions. The right to extend the Severance Date was in Tri-South's "sole and uncontrolled discretion". If the Severance Date passed, without a waiver or extension, the CA "shall be at an end and this [CA] shall be null and void and the parties shall be relieved of any obligation or liability hereunder" or, as Mantia described it, if conditions in the CA were not met, "the Agreement would terminate by its terms".

[24] As it happened, the Severance Date came and went without a severance, an extension, or a waiver. The CA was at an end.

[25] Tri-South claims that it was misled by Gilmour to believe that the severance condition would not be relied upon by 583 Ontario. It asserts that Gilmour took no steps to correct this misapprehension. It is asserted that Gilmour did so because he wanted the CA to come to an end.

[26] For his part, by early 2020, Gilmour was frustrated with the Project. He felt he was not listened to by Tri-South and its consultants. He felt the design being advanced, specifically the driveway to the proposed Condominium, encroached on the Phase 2 Lands. The driveway design would undermine the parking for the Office Building and undervalue the development potential for Phase 2 Lands. Moreover, the Phase 2 Lands were not part of the bargain and were excluded from the CA.

[27] As a result, Gilmour called his lawyer in April 2020. The lawyer told him that the CA would terminate on June 30 if there was no severance, waiver, or extension. Gilmour remained silent on the issue of the Severance Condition. As he said, he was "counting down the days" until the CA was at an end. It is this conduct that is central to Tri-South's complaint that 583 Ontario breached its duty of "good faith and honest performance". Because good faith and honest performance is contextual and driven by the facts, a closer look at the Project's progression is required.

The Project Progression

[28] It is suggested by Tri-South that the parties were, in fact, in an agreement prior to the execution of the CA. I do not agree. The parties were in a due diligence stage prior to the CA.

[29] Discussions of a project began as early as 2016. It is not clear exactly when discussions became more serious, but the idea that Tri-South might develop the Property was in full swing very early in 2019. For example, Tri-South had *pro-forma* financial statements prepared in February 2019. Tri-South had consulted with, but had not formally retained, Tregebov. No other consultant was formally retained in this early phase.

[30] In my view, the work conducted prior to the execution of the CA was the type of work parties would do before committing the time and, in this case, a million dollars on the pre-development phase of the project.

[31] Moreover, the principals on both sides are sophisticated businesspeople who are immersed in the real estate world. Each agreed on cross-examination that they required written agreements when dealing with real estate. There was no such written agreement until the CA was signed in May 2019.

[32] There was no enforceable oral or written agreement prior to signing the CA.

[33] From the outset, the Project timeline saw the site plan being approved in 12-18 months. This was the advice of the planner, Afonso. The schedule produced by Afonso did not include a date for severance, even though the Severance Date was stipulated in the CA.

[34] This was because Afonso was unaware of the Severance Condition in the CA. Tri-South did not share either the CA or the need for a severance by June 30 (or 3 months later if an extension was required) with Afonso. It seems elementary that a developer would share the Severance Date with the planner whose responsibility it was to obtain the severance. There was no good explanation as to why the Severance Date was not shared by Mantia or Ferrari with Afonso. Tregebov was also central to the site plan work, and he too was not told that Tri-South had committed to the Severance Date.

[35] To be clear, Afonso was aware that the Project was to be on the Phase 2 Lands. He testified that in most projects, the site plan would be completed first, and any severance would follow once the site plan details were resolved. As he explained, the site plan process is complex and involves pre-approval meetings with the municipality, which may result in design changes that might not only affect the severance but also any easements that might cross the severance line.

[36] While I accept that testimony of Afonso, I also accept what was stated by the planner for the Defendant, Mr. Cieciura, about severances. He stated a severance is not dependent on the site plan. A severance may be applied for approval prior to the site plan being completed. There is some ability to return to the municipal authorities to vary a severance line due to a subsequent site plan revision. While the advice of Afonso to complete the severance after the site plan might be sound planning, it did not accord with the CA, of which he had no knowledge.

[37] As it happened, the CA had already expired once, because of contractual a conditions in the CA that were not met or waived within the timeframe contracted for in the CA. Notwithstanding the expiry of the CA, the parties continued to progress the Project.

[38] The first expiry happened on July 9, 2019. It was not until September 28, 2021, that the CA was revived and amended. This was done with the assistance of counsel for both parties. The Agreement Amending Contribution Agreement ("ACA") addressed several issues. Most importantly, it revived the CA. The ACA specifically provided that all terms and conditions of the CA were revived and reinstated "as they existed prior to the expiration of the [CA]". This included the Severance Condition in 7(a) of the CA.

[39] At that time, the parties and their lawyers expressly turned their minds to the conditions in the CA. The ACA expressly stated that Tri-South had satisfied and waived certain of its conditions in the CA. While the ACA went through several drafts, there was never a waiver of the Severance Condition. Clearly, at that time, Tri-South negotiated the waiver of some conditions but not the Severance Condition.

[40] There were two emails sent by Gilmour, both before and after the ACA was signed, enquiring generally about the conditions. Neither email specifically mentioned the Severance Condition. However, neither email was responded to by Tri-South. In their evidence, neither Mantia nor Ferrari recalled Gilmour asking about conditions. Gilmour clearly did. He simply got no response.

The Driveway

[41] Very early in the Project, Gilmour indicated that he did not want to be involved in the "day to day running of the project". However, with respect to the design, he definitely wanted to be involved. He is said to have advised Tri-South that, "no temple gets built without my approval."

[42] The proposed Condominium was designed by Tregebov. In the main, Gilmour was pleased with the design. The contentious issue would be the driveway and the entrance to the Condominium.

[43] The Condominium was to face Sherwoodtowne Blvd. Sherwoodtowne Blvd. was intended to be the main egress and ingress for the building. There were two proposed designs for the driveway.

[44] The first was the D-drive. The D-drive consisted of a semi-circle entrance, where the cars would enter and exit on to Sherwoodtowne Blvd. This would require the Condominium to be set back from the road and sidewalk. The D-drive would result in the pedestrian sidewalk being some distance from the front of the building. There would be a very, very small encroachment of less than one percent of the Phase 2 Lands for the D-drive to work.

[45] A criticism of this design was that it would not allow for a "commercial friendly" development at street level. There would be no commercial outlets at street level accessible to

pedestrians. It was Tri-South and its consultants' understanding that the City wanted a commercial friendly street front.[1]

[46] To allow the Condominium to be accessible at street level, as opposed to recessed behind a D-drive, another option was needed. The proposed option was that the building's entrance would be re-oriented so it faced the Phase 2 Lands. The entrance would still be on Sherwoodtowne Blvd. However, the driveway would swing onto the Phase 2 Lands where there would be a courtyard that allowed the cars to enter and drop off passengers. This became known as the "Courtyard design".

[47] The problem with the Courtyard design was that it encroached significantly on to the Phase 2 Lands. This encroachment was said by Gilmour to be approximately 40% of Phase 2 Lands. It specifically encroached on the parking spaces used for the Office Building. Whatever the percent, Gilmour was not happy. The CA did not account for any encroachment on the Phase 2 Lands. Gilmour called it "stealing".

[48] Both designs were being considered in early November 2019 and were circulated to Gilmour. However, Tri-South and its consultants were of the view that the City would not approve a D-drive.

[49] The matter came to a head on November 22, 2019. Tri-South was to meet with the city in early December. They sent Gilmour a plan on November 18 that utilized the Courtyard design. Gilmour wrote back saying that there needs to be a meeting because Tregebov's design "keeps going back to taking the office parking lot". Gilmour wrote that he preferred when the buildings were separate, which was consistent with the D-drive.

[50] The principals met on November 22, along with Tregebov. At that meeting, Gilmour expressed that he did not agree with the Courtyard design and would only approve the D-drive. Neither Mantia nor Ferrari had much of a recollection of this meeting, which is frankly surprising given the importance of the design to the Project. Tregebov noted the meeting in his calendar, but he had no recollection as to the meeting.

[51] However, the fact that they met and discussed the driveway designs is supported by the subsequent communication. On November 25, 2019, Mantia writes the consultants that they are "altering entrance to a D Drive". Plans utilizing the D-drive were circulated on November 28,

[1] There was an objection at trial as to what the City wanted by way of design. The Tri-South witnesses say that in their meetings with the City, they were told that the City would not approve the D-drive design. The Defendant objected that this was hearsay as no one from the City testified. The evidence was admitted not for the truth of the contents (i.e., whether the City truly objected to the D-drive), but rather to explain why the Tri-South witnesses would later advance the Courtyard design, rather than the D-drive.

2024. Gilmour replied, “I like this.” These are the only plans which Gilmour ever expressly approved.

[52] I accept that Gilmour, at that November 22, 2019 meeting, advised Tri-South that he would not agree to the Courtyard design as it meant a significant encroachment on the Phase 2 Lands.

[53] The D-drive was submitted to the City in advance of a pre-application consultation on December 2, 2019. Tri-South and some of its consultants attended that meeting. At the end of the meeting, Tri -South and its consultants were of the very firm belief that the City would not approve the D-drive. No one reported to Gilmour about the results of the December 2, 20219 meeting.

[54] On December 4, 2019, a new design was sent to the City by the architects incorporating the Courtyard design.

[55] On December 23, 2019, Ferrari sent a note to Gilmour attaching the D-drive, saying “[t]his is the building layout the city will be good with based on our meeting with them.” Gilmour testified he did not look at the email until January 2020 when he returned from holiday. He says he was very upset to learn that Tri-South was once again using the Courtyard design. However, whenever it was in January 2020 that he looked at the new drawings, he never communicated his disagreement with Tri-South.

[56] In preparation for a meeting on February 25, 2020, with the City, a package of design material was sent to the City on February 4, 2020. The design package contained the Courtyard design.

[57] There was a subsequent email chain of February 11, 2020, in which the design package was sent again as an attachment. There was some confusion at trial as to whether the email Gilmour received had the attachment with the design. The confusion was due to the way productions were assembled. I accept that the email he received on February 11, 2020 did not include the design package.

[58] The February 2020 email was a long chain which, in part, set out who would attend the meeting with the City later that month. Gilmour’s reply to the February 11, 2020 email chain was “all Good”, which was suggested by Tri-South to be an admission that Gilmour was content with the D-drive. I accept that his response was related to being “all good” with those listed as attendees at the meeting with the City and not the design, which, as noted, was not attached to the February 11, 2020 email received by Gilmour.

[59] Gilmour was provided with an email from the City on April 22, 2020, which included comments on the Courtyard design. Again, he took no steps to advise Tri-South that he did not approve of the Courtyard design. When asked why he did not confront Tri-South, Gilmour took the view he had no obligation to do so.

[60] By April 22, Gilmour was unhappy with Tri-South, and he was unhappy with the Courtyard design. In cross-examination, he conceded that by April 22, 2020, he wanted the CA to end. Furthermore, he figured that the Severance Date would never be met, which would bring the CA to an end. As he candidly conceded in cross-examination: “Also, at this stage, by this time I am upset. I have called my lawyer. I asked him to confirm that the deal expires June 30th, and I am waiting for June 30th, hoping that they don't extend.”

[61] Meanwhile, Tri-South continued to proceed with the Courtyard proposal. The site plan application was approved for filing by the City on June 25, 2020.

[62] During this entire process, there were no discussions regarding severance, and I reject any evidence to the contrary. The closest were the two emails sent by Gilmour around the signing of the ACA about conditions, although there was no specific mention about severance in those emails. Those emails went unanswered. In the case of Gilmour, he said it was not his responsibility to tell Tri-South how to meet their obligations under the CA. His position can be encapsulated in his testimony where he said:

> Q. You did not say before June30, to anyone on behalf of the plaintiff, that if they did not obtain severance by June 30, 2020, you were terminating the agreement?
>
> A. It was not my responsibility to say anything like that. They drafted their agreement, and they had specific terms that they drafted, and they knew that they had to have the severance by June 30, 2020, or the deal expired and was at an end according to their contract. It was not my responsibility to tell them. John's responsibility was to look after the paperwork.
>
> Q. And so, you did not tell them that. Right?
>
> A. I did not tell them that.

[63] As late as June 25, 2020, with five days left until the Severance Date, Tri-South’s consultants were emailing Gilmour about next steps regarding the design. Gilmour remained silent.

> Q. Okay. You are remaining silent about them proceeding with the courtyard entrance design?
>
> A. As he did with when I asked about conditions.
>
> Q. You are remaining silent about them proceeding with the courtyard.
>
> entrance design?
>
> A. Just the same as John Mantia. So, yes.

> Q. I am going to ask it one more time. You are remaining silent about them proceeding with the courtyard entrance design?
>
> A. With five days left in their condition. Yes

[64] In the case of Mantia and Ferrari, they took no steps to prepare for the severance. They said that they were going to wait until after the site plan to address the severance. However, doing so did not accord with the CA. Moreover, it was Tri-South who chose the June 30, 2020 date. They knew almost from the outset they would not meet the Severance Date. Inexplicably, they took no steps to have the Severance Condition addressed in the ACA. Rather than address it at that time, they stayed silent. They never spoke to Gilmour about the severance issue. Gilmour never told them he was not relying upon the Severance Condition. Both Mantia and Ferrari testified that Gilmour did nothing to prevent Tri-South from meeting the Severance Date.

[65] When pressed on cross-examination, Ferrari explained that he made a conscious decision, after speaking with Mantia, not to raise the Severance Date with Gilmour.

> Q. And you didn't speak to Mr. Gilmour and say, we don't want to bother you with this detail. We, I'll know that we're not going to meet June 30th, so we're just not going to do anything?
>
> A. I never had that discussion with Mr. Gilmour.
>
> Q. So, you and Mr. Mantia just determined on your own to ignore, basically, the June 30th, 2020 date?
>
> A. No. I made the decision. I made the decision to ignore it. We worked with Mr. Gilmour for about a year without any written agreement. And the relationship I had with Mr. Gilmour was not one that if this wasn't met that this would be a dead deal. Never was indicated or we would have dealt with it.
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> Q. So, you alone made a decision to.
>
> A. No. Mr., Mr. Mantia asked me the question, and I said to him, I don't think we need to do it. I don't want to offend Greg. Those were my exact words with Mr. Mantia at that time, and we never talked about it again.
>
> Q. So, you knew when you did that, you were taking a risk. However, that, you had a written legal document that said you were required to do something by June 30th?
>
> A. Perhaps we had a written legal document, but I did not think it was risk at all.

[66] Given the size of the Project and the consequence of missing the conditions, the explanation that Tri-South did not want to "offend" Gilmour is hard to comprehend.

[67] There was no communication between the parties on June 30, 2020 regarding the severance or the fact that the CA had just terminated.

Post-June 30

[68] On July 3, 2020, there were a series of three emails from Gilmour from 10:45-11:55 a.m. The first dealt with accommodating Tri-South's experts who were still preparing reports. The second was Gilmour giving input on the design of the condo units: "I personally think a split 2 bedroom will be our big seller". In the last email, Gilmour wrote: "I think it is time we looked at our deal and the big picture. I'm thinking if we are moving towards a 2nd building we better plan how to move some of my tenants. Also, I think we need to plan our sales center."

[69] Gilmour states that this email reflected that the CA was at an end and that the parties needed to look at the big picture, which may include restructuring the deal to add the Phase 2 Lands.

[70] Tri-South saw these emails as a continuation of the CA and Gilmour wanting to consider what to do with the second phase. As Ferrari wrote: "Wow, he blows like the wind". In the meantime, the consultants, Afonso and Tregebov, continued to "refine the site plan".

[71] Limited communication continued after July 3, 2020. On July 27, 2020, Gilmour sent an email to his neighbour, Mr. Beamish. Beamish owns land abutting the eastern border of the Schedule 2 Lands. Gilmour had proposed to Beamish that his lands could be incorporated into a development of 583 Ontario's property, but Beamish never accepted that invitation. Gilmour testified that he was referring to what he hoped would be a new, bigger project.

[72] Matters came to a head on August 17, 2020. Gilmour met Ferrari and told him the deal was at an end. Ferrari was devastated. He told Gilmour he could not face his partners with the news, saying "John and Sav are going to kill me." He implored Gilmour to tell the others.

[73] There were a series of text messages that were introduced between Ferrari and Gilmour. They were undated. In one text, Gilmour clearly states that the land was to be severed in June 2020 and no conditions were removed. In its statement of claim, the Plaintiff pled that this constituted notice of termination but that it was not sent until May 2021, almost a year after termination. In its pleading, this was a key fact in support of its waiver plea. This timing is wrong. The text message was sent some time between July-September 2020, although the exact date was not established. In my view, the text was sent soon after August 17, 2020, when Gilmour told Ferrari the CA was over. If it were earlier, I am satisfied that Ferrari would have been concerned enough about the text to reach out to Gilmour, which did not happen. In any event, it was weeks, not months, from the termination and was consistent with the August 17 message.

[74] A meeting was held September 2, 2020, between the parties. At that meeting, Gilmour confirmed to the others the CA was dead. Gilmour was prepared to enter negotiations about a new agreement relating to both the Schedule B Lands and the Phase 2 Lands.

[75] However, Gilmour was not prepared to build one building that would encroach on the Phase 2 Lands to the extent of the Courtyard design. He was prepared to consider a new deal where the entire site would be developed.

[76] Negotiations took place regarding a possible new agreement. New plans were developed by Tregobov, new *pro-formas* were prepared, and discussions continued. However, no new contract was reached. After many months of negotiations, they parted ways, and this lawsuit ensued.

[77] Along the way, after June 30, 2020, there were discussions that 583 Ontario might consider paying for the costs of the consultants' work on the Project, if 583 Ontario could have access to that work for any future development. Tri-South first insisted that they spent $800,000 in pre-development expenses. In fact, it spent closer to $400,000. There was never a deal. 583 Ontario never received the reports or plans prepared by Tri-South or its consultants.

[78] Gilmour moved on. He partnered with Plazacorp to develop the lands. The agreement with Plazacorp was said to be coming to an end soon after this trial finished. Gilmour said that agreement would not be renewed.

Issues:

[79] The Plaintiff raises the following issues:

1. Did the Defendant breach its duties of good faith and honest performance?

2. Did the Defendant waive performance of the Severance Condition or is it otherwise estopped from relying on the Severance Condition or termination?

3. Has the Defendant been unjustly enriched?

[80] The Defendant responds, in part, by saying Tri-South was the one that breached its duty of good faith. This is not a claim in this proceeding but is rather raised by the Defendant as part of its defence. Both parties assert that the other's principal(s) are neither credible nor reliable witnesses. I will start with this assertion.

Credibility/Reliability

[81] Credibility is a distinct concept from reliability. As explained in *R. v. H.C.*, 2009 ONCA 56, 244 O.A.C. 288, at para. 41,

> [41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
>
> i. observe;
>
> ii. recall; and
>
> iii. recount
>
> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at 526 (C.A.).

[82] In considering credibility and reliability, the court may believe, all, none, or some witness' evidence: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 65. Accordingly, in assessing a witness' evidence, it is not all or nothing. The court can accept or reject parts of a witness' testimony or can accord little or no weight to evidence the court has accepted: *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (Ont. C.A.), at para. 44.

[83] The parties accept that the factors for determining credibility are set out in Centa J.'s decision of *2730453 Ont. Inc. v. 2380673 Ont. Inc.*, 2022 ONSC 6660, 165 O.R. (3d) 124, at para. 50. I will not repeat the factors here but am conscious of them as I consider the credibility and reliability of the witnesses. However, assessing credibility is not a science.

[84] To be clear, none of the three principals, Mantia, Ferrari, or Gilmour, were entirely reliable narrators. Repeatedly, through skillful cross-examinations, counsel was able to have each witness resile from statements made either in their affidavits or earlier testimony. In some instances, the witness fought the suggestion until confronted with documents or other facts and, at other times, the witness simply agreed with counsel's suggestion. Each side also departed from their pleadings at least once in the proceeding.

[85] Given the amounts in issue, each of these witnesses have a motive to both fabricate and exaggerate. There were issues that caused me to pause in respect of each witness when considering their evidence.

[86] For example, Mantia seemed not to have a memory of many things that one would expect a person to remember who was managing a development as large as this. Ferrari had the same issue, although to a much lesser degree. On the other side, Gilmour was combative and unnecessarily argumentative. For a period in his cross-examination, Gilmour quite literally turned his back on counsel for Tri-South.

[87] As mentioned, for the most part, when confronted by counsel with other facts that were at odds with their narrative, each of the three corrected or modified their position. In my view, in this case, there is no issue of veracity, but the case abounds with issues of reliability.

[88] I found the remaining witnesses to be largely reliable. Even then, there were times where prodding cross-examination corrected prior testimony. However, none had a motive to fabricate, and I found them all credible.

[89] Throughout this decision I am alive to the varying factors presented by each side to challenge the reliability of the other's witnesses. While it is not possible to highlight each complaint by each party of each witness, I have arrived at my decision having regard to those submissions.

Good Faith Performance

[90] The duty of good faith performance of a contract has taken a much bigger role in contract law in the last decade. In *Bhasin v Hrynew,* 2014 SCC 71, [2014] 3 S.C.R. 494, the Supreme Court recognized a "general organizing principle" of good faith. It described four recognized situations where the principle of good faith applies: (1) a duty of cooperation between the parties to achieve the objects of the contract (at para. 49); (2) a duty to exercise contractual discretion in good faith (at para. 50); (3) a duty not to evade contractual obligations in bad faith (at para. 51); and (4) a duty of honest performance (at para. 73).

[91] The Plaintiff asserts that the Defendant knowingly misled the Plaintiff to believe that the Defendant would not rely on the Severance Condition to terminate the CA. In this regard, the Plaintiff asserts that the Plaintiff breached the "standalone duty of honesty in contractual performance". Had the Plaintiff been aware that the Defendant would rely on the Severance Condition to bring the CA to an end, the Plaintiff asserts it would have taken steps to protect itself, presumably by extending the deadline or waiving all the conditions.

[92] While the Plaintiff speaks of a standalone duty of good faith, whether a party's performance is in good faith must be considered in the context of the rights and obligations of their contractual bargain. As the Supreme Court has said, good faith "may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties": *Bhasin*, at para. 69. As such, the conduct of the Defendant must be assessed in the context of rights and obligations bargained for by the parties and not isolated from them.

[93] Tri-South undertook to obtain the severance. While the CA provided that 583 Ontario and Tri-South "agree to cooperate to make an application to sever the Existing Lands", the CA provided that Tri-South had the right on behalf of 523 Ontario to take such action as needed to complete the severance. Tri-South had complete control of seeking and obtaining a severance. 583 Ontario neither denied its co-operation nor frustrated Tri-South in obtaining the severance.

[94] Tri-South was aware of its contractual rights to extend the Severance Date or waive the conditions. It acknowledges that it studiously avoided addressing the topic with Gilmour "out of respect", which, frankly, makes little sense in a deal of this magnitude. Both Mantia and Ferrari were experienced real estate people and understood the need to document agreements and changes to agreements in writing. They had highly experienced real estate development lawyers work on doing just that.

[95] They insisted on the ACA in writing and used lawyers for that purpose. The Severance Condition was affirmed in the ACA, along with all the remaining conditions that were not already waived in the ACA.

[96] As it related to severance, the performance options rested with Tri-South. The CA provided Tri-South had three options, it could complete the severance by June 30, 2020; at its sole discretion, it could extend the deadline to complete the severance by three months; or it could waive all the conditions.

[97] When nothing was done and the Severance Date passed, the CA terminated. Termination was not triggered by any action or election on the part of 583 Ontario.

[98] As it relates to the CA, the parties' bargain left control of the Severance Condition in the hands of Tri-South. This is not a case where 583 Ontario had any election to make and did so in bad faith. Rather, the focus of Tri-South's argument was on the conduct of Gilmour and what was described as dishonest conduct.

[99] Tri-South argues that Gilmour had made up his mind by April 22, 2020, that he no longer wanted to be part of the Project. This is true. He no longer trusted Tri-South because he thought Tri-South was stealing his land. He wanted out.

[100] As such, Tri-South's argument proceeds from the vantage point that Gilmour wanted out of the CA. However, it is important to distinguish the motive of a party from the actual contractual performance of a party. The focus is to be on the latter, not the former. Often, one party to a contract is entitled to rely on the other party's failure of performance to bring a contract to an end, particularly where the contract specifies that result. Gilmour's motive in wanting out of the CA is not the focus of this lawsuit, rather it is 583 Ontario's performance of its obligations under the CA, including good faith.

[101] This is confirmed in *Bhasin*. There the court held that a good faith analysis is not to be a "pretext for scrutinizing the motives of the contracting parties": at para. 70. In *C. M. Callow Inc. v. Zollinger*, 2020 SCC 45, [2020] 3 SCR 908, a case addressing honest performance of a contracting party, the Court said the motive of the defendant was "of no moment" to the analysis: at para. 85. In avoiding the scrutiny of motive, the court is avoiding "palm tree" justice, whereby the motives are judged rather than the contractual performance.

[102] As stated in *Callow*, the duty of honest performance "does not require parties to act angelically by subordinating their own interest to that of their counterparty": at para. 86. Rather,

contracting parties "must refrain from lying or knowingly misleading their counterparty": at para. 86. A party may mislead either by words, silence, or action: at para. 89. In this respect, the dishonest performance requires some subjective intent: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, [2021] 1 SCR 32, at paras. 55-56.

[103] In *Callow*, the plaintiff had a snow removal contract that was to be renewed. The defendant actively misled the plaintiff to believe it would be renewed when the defendant had, in fact, resolved to terminate the contract. The defendant was aware that the plaintiff was under that misapprehension but did nothing to correct that misapprehension. On the strength of that belief, the plaintiff did additional work for free. The plaintiff's contract was not renewed.

[104] In *Callow*, the defendant had a discretion to extend the contract. The Court was clear that the breach of good faith performance related to the nature of the misrepresentation and not the failure of the defendant to advise Callow that it would not renew the contract. The Supreme Court agreed with the Court of Appeal that it goes too far to impose a duty on a contracting party to require prompt notice of termination where termination is contemplated. Rather, the Court focused on the false representations. As stated by Kassirer J., at para. 104:

> I would note, however, that I do agree in part with the Court of Appeal's observation that the trial judge went too far in concluding that "[t]he minimum standard of honesty would have been to address the alleged performance issues, to provide prompt notice, or to refrain from any representations in anticipation of the notice period" (trial reasons, at para. 67). In my respectful view, to impute these first two requirements would amount to altering the bargain struck between the parties substantively, a conclusion not sought by Callow before this Court.

[105] Similarly, the Ontario Court of Appeal held that a party is not acting in bad faith by "pouncing" on an opportunity to end an agreement. In *2161907 Alberta Ltd. v. 11180673 Canada Inc*., 2021 ONCA 590, at para. 57 stated as follows:

> [57] …. A party is not prevented from exercising a right of termination simply because it wishes to bring its relationship with the other party to an end. Nor should a party be prevented from ending a relationship because it will deprive the defaulting party of a payment that it would have received had the relationship continued. Where a party is anxious to end a relationship, and a valid reason to do so presents itself, that party is not, in the absence of some other relevant fact, prevented from "pouncing" on it.

[106] In this case, 583 Ontario was not exercising a contractual discretion as to whether the severance date was met or whether the CA terminated. The onus was on Tri-South to obtain the severance, and it had all the contractual power it needed to do so. It chose not to do so from the outset. There was no co-operation withheld by 583 Ontario that prevented Tri-South from obtaining severance. In my view, 583 Ontario did not have an obligation to advise Tri-South that it would or would not accept the termination once it occurred. There was nothing 583 Ontario did,

did not do, said, or did not say that was in bad faith (or not in good faith) that prevented Tri-South from obtaining the severance.

[107] The Tri-South argument is, in some respects, more subtle. It states that Gilmour formulated a plan, deliberately remained silent, and waited for June 30, 2020, with the hope that Tri-South would not waive, sever, or extend the severance condition. Tri-South alleges that he did so with the intent to end the deal.

[108] I accept that Gilmour had decided to lay low and wait until June 30, 2020 passed. He wanted out of the deal. In effect, he "pounced" on the failure of Tri-South to meet the condition in the CA. He was entitled to do so. Gilmour had no obligation to tell Tri-South what was obvious from the CA that it terminated on June 30, 2020, absent a severance or extension.

[109] It is further argued by Tri-South that by not objecting to the Courtyard design, Gilmour misled Tri-South to believe matters were on course and that the CA would not terminate. In my view, the driveway design dispute was a red herring. This action is not about the failure to approve a design for the driveway.

[110] Whether it was a Courtyard or D-drive, there was still a requirement for severance. The failure to respond to the design of the driveway cannot be equated with a waiver by 583 Ontario of Tri-South's Severance Condition or waiver of termination. Had this action been about the driveway design, there may have been a different outcome. However, the claim is about the impact of the Severance Condition and termination, not the driveway design. Even if the driveway design is relevant, I do not accept that it is reasonable to equate the satisfaction of the driveway design as a waiver of the Severance Condition.

[111] The reality is that Tri-South paid little heed to the Severance Condition from the outset. It never advised its consultants about the Severance Condition, or the timing required for severance under the CA. It reaffirmed the severance condition in the ACA when it knew the completion date was in doubt. It took no steps to complete the severance. The failure to do so rests with Tri-South.

[112] While Gilmour may have been opportunistic, I do not believe his actions or representations misled Tri-South regarding compliance with the severance condition, which Gilmour never agreed to waive.

[113] For the reasons stated, I do not find that 583 Ontario breached its obligation of good faith and honest performance in its dealings as it relates to the Severance Condition. That claim is dismissed.

Waiver

[114] Tri-South further argues that 583 Ontario waived reliance on the severance condition and affirmed the contract by its conduct after June 30, 2020.

[115] Tri-South states that after June 30, 2020, it was "business as usual". It asserts that Gilmour did not assert reliance on the termination of the CA until August 17, 2020. Tri-South asserts that the passage of those six or seven weeks constitutes sufficient waiver or estoppel such that 583 Ontario ought not to be able to rely on the alleged termination due to Tri-South's failure to obtain the severance.

[116] In response, 583 Ontario says it did not waive the condition or termination. In any event, it asserts that the severance condition was a true condition and that it cannot be waived. In this regard, 583 Ontario points to the *Planning Act*, R.S.O. 1990, c. P.13, s. 50(3), which requires there to be a severance in circumstances where a portion of a property is to be sold. It asserts that only the City can grant a severance and therefore there can be no waiver. 583 Ontario also refers to the contractual provision in the CA that stipulates that the parties will comply with the *Planning Act*.

Is this a True Condition?

[117] A true condition relates to a future, uncertain event, entirely dependent on the will of a third party. Where performance is dependent, not on the parties, but a third person, the condition cannot be waived: *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.*, 2009 ONCA 328, 95 O.R. (3d) 93, at para. 90.

[118] Whether a condition is a true condition is a matter of contractual interpretation. The Alberta Court of Appeal, in *Kempling v. Hearthstone Manor Corp.* (1996), 184 A.R. 321, at para. 32, described it this way:

> It is the intention of the parties that ultimately determines their duties under a contract containing a conditional clause. While it is true that the registration of a condominium plan depends on the will of a third party and that such is a feature of a true condition precedent, that, by itself, is not determinative.

[119] Like any contractual interpretation, the object of the exercise is to determine the intention of the parties. The intention of the parties is ascertained by examining the contract as a whole, giving the words their ordinary and grammatical meaning, and having regard to the factual matrix known to the parties at the time of the formation of the contract, and in a fashion that corresponds with sound commercial principles and good business sense: *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, [2019] 4 S.C.R. 394; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47; *Horn Ventures International Inc. v. Xylem Canada LP*, 2022 ONSC 4158, at paras. 77-78, aff'd 2023 ONCA 408.

[120] Failure to sever before closing would be fatal to a conveyance of only part of the lands while the remainder was still owned by 583 Ontario: *Morgan Trust Company v. Falloncrest Financial Corp.* (2006), 218 O.A.C. 71 (C.A.), at para. 15. I accept that compliance with the *Planning Act* is a true condition: *Goetz et al v. Whitehall Development Corp. Ltd.* (1978), 19 O.R. (2d) 33 (C.A.).

[121] In my view, the *Planning Act* requirements are not an issue in respect of the Severance Condition. While s. 50(3) of the *Planning Act* eventually would have to be complied with before the closing of the Project. The CA did not anticipate closing to happen for a year or more past the Severance Date. Severance could have been completed much later in the development process, and still comply with s 50(3) of the *Planning Act*.

[122] The Severance Condition was temporal. It was not intended to mimic the *Planning Act*. Indeed, it would be superfluous if it did. If severance was not obtained by the Severance Date, it merely put Tri-South to its election to extend or waive or to let the condition lapse bringing the CA to an end. Indeed, Tri-South could perform the contract as it relates to the Severance Condition by waiver, without ever obtaining severance.

[123] Whatever Tri-South elected to do, the parties were still obligated to comply with the *Planning Act*, but that could be complied with long after June 30, 2020.

[124] In my view, the severance condition was not a true condition.

[125] The CA specifically provides, in paragraph 6, that the parties expressly agreed that the conditions have been inserted in the agreement for the "sole benefit of Tri-South and may be unilaterally waived by Tri-South". This language supports my interpretation of the Severance Condition being a standard condition and not a true condition: *Coghlan v. Unique Real Estate Holdings Inc.*, 2016 ONSC 6420, 82 R.P.R. (5th) 153, at para. 39.

Did 583 Ontario Waive?

[126] Tri-South states that 583 Ontario waived reliance on termination by its conduct after June 30. The test for waiver was set out In *Technicore Underground Inc. v. Toronto (City*), 2012 ONCA 597, 296 O.A.C. 218, where Gillese J. stated, at para. 63:

> Waiver occurs when one party to a contract (or proceeding) takes steps that amount to foregoing reliance on some known right or defect in the performance of the other party. It will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated. Communication can be formal or informal and it may be inferred from conduct. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

[127] In this case, there is no doubt that by August 17, 2020, Gilmour made it crystal clear to Ferrari and Mantia that the CA was at an end. The issue is what occurred between June 30,

2020, and August 17, 2020. Tri-South points to the July 3, 2020, emails and the continued discussion by Gilmour with the neighbor Beamish in August 2020 as a course of conduct inconsistent with termination of the CA. In my view, the conduct of Gilmour did not demonstrate an unequivocal intention to abandon his reliance on the termination of the CA.

[128] I do not view the July 3 or Beamish emails as demonstrating an unequivocal and conscious intention by Gilmour to reject termination. The CA terminated by its terms. There was nothing for 583 Ontario to do to affect termination. The last email in the July 3 chain clearly envisions that the deal will morph into a second building on Phase 2 Lands. In my view, this is equally consistent with the CA being terminated and a new negotiation being undertaken, which, in fact, happened after August 17, 2020. Indeed, Tri-South's comment that Gilmour "blew like the wind" clearly indicated that the landscape had changed. Consistent with its past approach, Tri-South did not take the time to clarify why the wind changed, even though the Severance Date had passed. Similarly, the communication with Beamish is equally consistent with a new development.

[129] In my view, none of the communications or conduct by 583 Ontario demonstrated an unequivocal waiver of the Severance Condition. When seen in context, Gilmour did not "communicate a clear intention to waive" the Severance Condition or the termination that followed: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490.

[130] The CA terminated automatically on June 30 due to the breach of the Severance Condition. This was apparent to both parties. By July 3, 2020, Tri-South was aware that Gilmour was speaking of a very different project; he was now speaking of building on the Phase 2 Lands. Tri-South knew that any such project would require a new agreement. Given that this was a contract involving land, the parties also understood any agreement had to be in writing. They both had sophisticated counsel on call who could have easily papered that transaction had that been the desire.

[131] In the context of this case, I do not accept that there was any waiver by 583 Ontario. I would further add that if waiver did occur, it was capable of being retracted: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 SCR 490. There is no doubt by August 17 that 583 Ontario made it clear that the CA was at an end. This would amount to a retraction of any waiver. There was no significant reliance in those 5-6 weeks which would prevent retraction. Accordingly, if waiver occurred (which it did not) than I find it was retracted on August 17.

Estoppel

[132] Tri-South also relies on the doctrine of estoppel. Tri-South asserts Gilmour's conduct prior to the Severance Date, in not advising that 583 Ontario would rely on termination due to a breach of the Severance Condition, amounts to a clear (and intentional) representation to Tri-South, which was intended to be relied upon by Tri-South, that 583 Ontario did not intend to rely on the Severance Condition. It is further asserted that Tri-South relied upon that representation such that it did not waive the Severance Condition prior to the Severance Date.

[133] The test for estoppel is set out in *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance of Canada*, 2021 SCC 47, 163 O.R. (3d) 398, at paras. 15-16, and requires:

> (a) an existing legal relationship;
>
> (b) one of the parties, by their words or conduct, to make to the other a clear and unambiguous promise or assurance;
>
> (c) such promise or assurance was made with the intention of affecting the legal relationship between the parties and this promise or assurance was acted upon; and,
>
> (d) the other party acted on the promise or assurance, or in some way changed his or her position, to his or her detriment.

[134] Tri-South and 583 Ontario were clearly in a legal relationship.

[135] In respect of the second requirement, Tri-South states that the conduct of Gilmour, particularly in not advising that 583 Ontario intended to rely on the Severance Condition, was such a promise or representation. As I have already found, 583 Ontario was not required to advise Tri-South of its intentions to rely on Severance Condition. As discussed above, Gilmour's conduct did not amount to a promise or representation that 583 Ontario would not rely on the Severance Condition. I do not accept that 583 Ontario by its word or conduct made any such promise to Tri-South as alleged.

[136] In terms of the third and fourth requirements, nothing Gilmour, said or did, prevented Tri-South from seeking the severance, waiving the conditions, or requesting the extension. Tri-South did not act in reliance upon 583 Ontario. As already stated, Tri-South ignored the Severance Condition from the outset.

Unjust Enrichment

[137] Tri-South asserts that 583 Ontario has been unjustly enriched by all the efforts of Tri-South in developing the Project to date.

[138] The test for unjust enrichment was set out by the Supreme Court of Canada in *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, at para. 37. The test has three parts:

> (a) the defendant has been enriched;
>
> (b) the plaintiff has been correspondingly deprived; and,
>
> (c) there is no juristic reason for the enrichment.

[139] The requirements of a) and b) go hand in hand. The defendant must have benefited at the detriment of the plaintiff. In *Tega Homes (Attika) Inc. v. Spencedale Properties Limited*, 2018 ONSC 6048, Gomery J. addressed the first part as follows:

> [43] On the first leg of the test requiring evidence that the defendant has been enriched, the court must conclude that "a tangible benefit…has been conferred on the defendant". Sparing the defendant an expense constitutes a benefit where (a) the services were performed at the request of the defendant, or (b) the defendant has been "incontrovertibly benefited."
>
> [44] In *Peel*, the Court held that a benefit is not incontrovertible if the plaintiffs cannot show that the defendants gained a "demonstrable financial benefit' or was saved an "inevitable expense". McLachlin J. wrote that an "uncontrovertible benefit" is:
>
> > an unquestionable benefit, a benefit which is demonstrably apparent and not subject to debate and conjecture. Where the benefit is not clear and manifest, it would be wrong to make the defendant pay, since he or she might will have preferred to decline the benefit if given the choice.

[140] It is not easy to define the alleged "benefit" and "detriment" in a case such as this. In this case, the work done by Tri-South was done in furtherance of its contractual obligations, not at the request of 583 Ontario. The CA set out the responsibilities of each side. Risks were allocated and tasks assigned. This was a negotiated bargain where the parties, using counsel, set the terms. To my mind, where there is a contract, negotiated by sophisticated parties, the concept of unjust enrichment is an uneasy fit as the parties have affixed inherent values to their tasks. The contract as bargained for reflects a balancing of detriments and benefits, rather than a detriment to one side.

[141] On the issue of the inconvertible benefit, the evidence was insufficient to establish there was any value to 583 Ontario from the work or reports undertaken by Tri-South, once the CA was terminated. For example, as part of the planning process, Tri-South was to and did commission various reports and studies on such things as noise, traffic, soil, etc. The reports were in draft. There was insufficient evidence as to the value, if any, of these draft reports associated with the Project, which was no longer proceeding.

[142] Nonetheless, Gilmour offered to pay for the reports if they were of any value to any larger project. Gilmour testified he was unimpressed with much of what he saw from the draft reports. Whether that characterization is fair is not particularly germane. What is germane is that the parties never came to an agreement on 583 Ontario using any of the work. The reports were never provided to 583 Ontario for its use. As such, in my view, 583 Ontario did not receive the benefit of any of the work done by Tri-South. I do not see any retained benefit inuring to 583 Ontario from Tri-South's work or reports. The claim for unjust enrichment fails for that reason alone.

[143] If there was such a benefit (and I conclude there was not), the next phase of the test would be to consider if there was a juridical reason for the benefit. As stated, a contract generally constitutes a juridical reason for a benefit: *Pacific National Investments v. Victoria*, 2004 SCC 75, [2004] 3 S.C.R. 575, at para. 28; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; and *Microcell Communications Inc. v. Frey*, 2011 SKCA 136, 377 Sask.R. 156, at para. 26. However, the contract must reflect that the parties addressed the alleged benefit in a way that allows the court to determine that the economic risk was allocated in some fashion and such that equity ought not to intervene.

[144] As Justice Binnie stated in *Pacific National*, at para. 31:

> The general rule, of course, is that it is not the function of the court to rewrite a contract for the parties. Nor is it their role to relieve one of the parties against the consequences of an improvident contract.

[145] In this case, the CA provided that where Tri-South failed to meet a condition, including the Severance Condition, the CA "shall be null and void and the parties hereto shall be relieved of any obligation or liability hereunder". Under the CA, Tri-South was to spend one million dollars in "pre-development expenses". The $400,000 spent by Tri-South were pre-development expenses. There was no provision that 583 Ontario would compensate Tri-South for any expenses it incurred, including on termination. In contrast, elsewhere in the CA, it did refer to the repayment by Tri-South of certain monies upon termination (see paragraph 13 of the CA re: "Closing Contribution"). The parties made no provision for the repayment of pre-development expenses if the CA terminated for the failure of Tri-South to meet the Severance Condition. In my view, the bargain between the parties did not provide for payment of the pre-development expenses upon termination. To award Tri-South compensation through the doctrine of unjust enrichment would be to rewrite the CA, which this Court cannot do.

[146] The claim for unjust enrichment is dismissed.

Disposition

[147] The action is dismissed.

Costs

[148] I encourage the parties to agree on costs. If they cannot, I will receive costs submissions as follows:

> a. Any party claiming costs shall file written submissions of no more than eight pages, plus a bill of costs and any offers to settle, within twenty days of the release of these reasons.

b. Any responding submissions shall be limited to eight pages, plus a bill of costs and any written offers to settle, and shall be delivered within ten days of receipt of the other party's costs submissions.

c. Any reply to submissions shall be delivered within four business days of receipt of responding submissions and shall be no more than three pages in length.

d. All submissions shall be uploaded to CaseLines and delivered to me by way of email to my assistant, from whom you received this decision.

[149] Finally, I would like to thank both sets of counsel for their thorough preparation and excellent presentation of this case.

Callaghan J.

Released: July 24, 2024

CITATION: Tri-South Developments Inc. v. 583167 Ontario Inc., 2024 ONSC 3406
COURT FILE NO.: CV-21-00665510-0000
DATE: 20240724

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Tri-South Developments Inc.

Plaintiff

– and –

583167 Ontario Inc.

Defendant

REASONS FOR DECISION

Callaghan J.

Released: July 24, 2024