

COURT OF APPEAL FOR ONTARIO

CITATION: Drag v. Mehta, 2024 ONCA 334

DATE: 20240502

DOCKET: COA-22-CV-0110

Zarnett, Coroza and Favreau JJ.A.

BETWEEN

Bernard Drag

Plaintiff/Defendant to Counterclaim  
(Appellant)

and

Rohit Mehta

Defendant/Plaintiff by Counterclaim  
(Respondent)

Marek Z. Tufman, for the appellant

Gary M. Caplan and Aram Simovonian, for the respondent

Heard: April 23, 2024

On appeal from the judgment of Justice Thomas A. Bielby of the Superior Court of Justice, dated August 5, 2022, with reasons at 2022 ONSC 4574.

REASONS FOR DECISION

**INTRODUCTION**

[1] The appellant, Bernard Drag (“Drag”), was ordered to specifically perform an Agreement of Purchase and Sale dated December 2, 2020 (the “APS”). Under the APS, Drag agreed to sell a residential property at 1 Flaherty Lane, Caledon,

Ontario, to the respondent, Rohit Mehta (“Mehta”), at a price of \$2,470,000, with a closing date of April 28, 2021. There is no dispute that Drag refused to close on the contractual closing date.

[2] Drag agreed at trial that specific performance was the appropriate remedy if the APS continued in force after December 9, 2020. He argues that the trial judge erred in failing to find that the APS came to an end on December 9, by virtue of the provisions of its home inspection condition. He submits that the result should have been a dismissal of Mehta’s claim.

[3] We disagree, and therefore dismiss the appeal.

## **BACKGROUND AND THE DECISION BELOW**

### **(1) Factual Context and the Trial Judge’s Findings**

[4] The APS was conditional on Mehta being satisfied with the result of a home inspection by a qualified home inspector. The APS was to be “null and void” unless Mehta gave notice in writing to Drag that the condition was either (i) fulfilled or (ii) waived. Any such notice had to be delivered within five banking days of the acceptance of the APS.

[5] The APS also contained provisions about giving notice to Drag. It appointed the listing broker as Drag’s agent for receiving notice. It provided that any notice had to be received personally or be hand delivered to an address for service provided in the APS (which was 1 Flaherty Lane, the property to be sold under the

APS). Alternatively, if a facsimile number or email address was provided in the APS, then notice could be delivered by fax transmission or email to that number or address, respectively.

[6] There was neither a facsimile number nor an email address listed for Drag and his listing agent, Tav Schembri (“Schembri”). Nevertheless, Schembri regularly communicated with Drag’s agent, Shan Ghuman (“Ghuman”), by email, and the parties do not dispute that it would have been permissible to give notice to Drag by email to Schembri at his regular email address.

[7] The trial judge found that the acceptance date of the APS was December 2, 2020 (rejecting Mehta’s contention that acceptance occurred on December 3); 5 banking days from the acceptance date would expire at 11:59 p.m. on December 9, 2020.

[8] After Mehta received a home inspection report on December 8, 2020, he initially chose to seek an abatement of the purchase price on the basis of which he would agree to delete the home inspection condition and render the APS firm. Ghuman and Schembri dialogued about this on December 8 and 9, discussing various proposals, which ultimately came down to a suggested abatement of \$40,000.

[9] At 6:59 p.m. on December 9, Ghuman emailed Schembri attaching an amending agreement signed by Mehta, which provided that the purchase price

was reduced by \$40,000, the home inspection condition was deleted and the APS was firm and binding. The amending agreement was irrevocable until December 10 at 12:30 p.m. The covering email from Ghuman to Schembri stated: “I got it signed as per your commitment.... The deal is firm now & send me the signed copy tomorrow”.

[10] The trial judge made findings that:

- This email was the result of an earlier telephone conversation between Ghuman and Schembri;
- The proposed amending agreement was made irrevocable until December 10 because Schembri had represented that Drag was out of town on December 9;
- Schembri did not respond by denying any agreement or commitment; and
- Following the email Schembri had expressed annoyance when requested to confirm the contents of Ghuman’s email in writing, telling him (and Mehta who was listening to the call) that they could rely on Schembri’s word.

[11] Based on what he found was said and not said, the trial judge found “that Schembri on behalf of Drag made misrepresentations to make Ghuman (and Mehta) believe there was an agreement as set out in the [attachment to the email] that would be executed the next morning”. He further found that “as a result of such misrepresentations, it would be reasonable to conclude and rely thereon, that the

11:59 p.m. expiry of the time period to waive the home inspection condition was either deleted (retroactively) and/or would not be relied upon or enforced by Schembri and Drag”.

[12] The trial judge also found that during the evening of December 9, Ghuman and Mehta became concerned about whether they could rely on what Schembri had said or whether a waiver of the home inspection condition should be delivered before 11:59 p.m. (which would make the APS firm, but without any abatement). They received some advice from other real estate brokers and a lawyer at about 10:30 p.m., after which they made efforts to deliver notice of a waiver of the condition.

[13] The trial judge found that the efforts at personal delivery before 11:59 p.m. on December 9 did not occur as Mehta and his witnesses contended at trial: “[T]here are significant credibility issues with respect Mehta’s witnesses and their evidence of delivering the waiver to Schembri’s office and the property.” The other effort taken that evening, fax delivery, was legally ineffective. The trial judge thus concluded that notice of waiver was not given on December 9, 2020 in a manner that accorded with the requirements for notice in the APS.

[14] On the morning of December 10, 2020, Drag did not sign the amendment providing for an abatement of the purchase price and a deletion of the home

inspection condition. Shortly after 1 p.m. on December 10, Ghuman emailed a waiver of the home inspection condition signed by Mehta to Schembri.

## **(2) The Trial Judge's Conclusions**

[15] As reviewed above, the trial judge rejected Mehta's arguments about the acceptance date and that he served the notice of waiver by 11:59 p.m. on December 9th. However, the trial judge held that Drag's contractual duty of good faith was breached by Schembri's misrepresentations as to "an accepted amending agreement and Drag's unavailability to execute it until the next morning". He found that the misrepresentations were intended to be, and were, relied on by Mehta and Ghuman to their detriment, as they "delayed and compromised delivery of the waiver of the home inspection condition". The misrepresentations implied "that the time period for the waiving the home inspection condition would, at least, be deferred an additional day." The trial judge concluded that "Drag on that basis alone should not be able to declare the APS null and void" as at 11:59 p.m. on December 9, and he held that "[t]he waiver, without a doubt, was delivered the next day [December 10] by email".

[16] The trial judge therefore granted specific performance of the APS, without any abatement.

## ANALYSIS

[17] Drag submits that Schembri's statements on December 9, 2020 could not have the effect that the trial judge gave to them: preventing the APS from becoming null and void at 11:59 p.m. on December 9 in accordance with its own terms, and permitting the notice of waiver of the home inspection condition to be validly given on December 10, 2020. Drag notes that Mehta did not contend, nor did the trial judge find, that whatever was said or sent by Schembri on December 9 resulted in a concluded amending agreement that reduced the purchase price and deleted the home inspection condition (the APS was ordered to be specifically performed without any abatement).

[18] Drag does not challenge the trial judge's finding that Schembri's statements (on behalf of Drag) constituted a breach of Drag's duty of honest performance – that parties “must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract”: *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 73. But he says that what Schembri said on December 9 had no consequence, because Mehta was aware of the need to waive the condition by 11:59 p.m. on that date, as illustrated by his purported efforts to do so on December 9 and his own pleading that described him as having become suspicious that Drag would not agree to the amendment and would make it impossible to effect the waiver of the condition.

[19] In other words, Drag submits that Mehta did not rely on any misrepresentations to his detriment. The fact that Mehta's efforts at waiver on December 9 were legally ineffective (or in some respects not even credibly described by Mehta and his witnesses) does not change the basic point that Mehta, on December 9, was not misled and knew that valid delivery of a waiver was required by the end of that day.

[20] We do not accept this argument.

[21] Mehta's pleading was that he did rely on the representations of Schembri, later became suspicious, and took certain steps toward waiver as a precaution. The trial judge was not obliged to approach the matter on the basis that Mehta could succeed only if he was so completely fooled for the entirety of December 9 that he did or attempted nothing toward waiver. The trial judge was entitled to find the requisite degree of reliance on, and detriment arising from, Schembri's misrepresentations in the fact that they "delayed and compromised delivery of the waiver of the home inspection condition".

[22] On the trial judge's findings, Mehta did rely on the assurances that Schembri provided to Ghuman. Mehta became suspicious well into the evening of December 9, given that Schembri did not give a written confirmation (while saying his word could be relied on). The obtaining of advice as to how to deliver the waiver and the actual efforts to do so were compressed into the last 90 minutes of



December 9. As the trial judge found, “the ability to properly deliver a waiver was compromised and rushed.” Had the misrepresentations not been made, Mehta and his advisors would have had a longer time to focus on how to deliver the waiver. It was open to the trial judge to find that Mehta suffered a detriment.

[23] The normal remedy for breach of the duty of honest performance is damages: *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, [2020] 3 S.C.R. 908, at paras. 106-9. But this was not a damages case, as the parties had agreed that if the APS did not become null and void on December 9, specific performance was appropriate. We see no error in the trial judge’s holding that, in light of the misrepresentations by Schembri, Drag was not entitled to insist on the strict timing in the APS to declare the APS became null and void at 11:59 p.m. on December 9. There is abundant authority for the proposition that a party may not rely on strict timing where they have indicated, by words or conduct, that they will not do so and the other party has relied on that representation to their detriment: see e.g., *Owen Sound Public Library Board v. Mial Developments Ltd.* (1979), 26 O.R. (2d) 459, at para. 16 (C.A.); *Petridis v. Shabinsky* (1982), 35 O.R. (2d) 215, at paras. 20-22 (H.C.); *Charles Rickards Ltd. v. Oppenheim*, [1950] 1 K.B. 616, at 623 (Eng. & Wales C.A.). The trial judge found that was exactly what Schembri’s misrepresentations meant in so far as the timing for delivery of a waiver was concerned, and he found that Mehta relied on them to his detriment.

**DISPOSITION**

[24] For these reasons the appeal is dismissed.

[25] Mehta is entitled to costs of the appeal in the agreed upon amount of \$15,000, inclusive of disbursements and applicable taxes.

“B. Zarnett J.A.”  
“S. Coroza J.A.”  
“L. Favreau J.A.”