COURT OF APPEAL FOR ONTARIO

CITATION: Jones v. Quinn, 2024 ONCA 315
DATE: 20240429
DOCKET: COA-22-CV-0053

Miller, Paciocco and Coroza JJ.A.

BETWEEN

Linda Jones and Philip Jones

Applicants (Respondents)

and

Elwood Andrew Quinn* and The Bank of Nova Scotia

Respondents (Appellant*)

AND BETWEEN

Elwood Andrew Quinn

Applicant (Appellant)

and

Linda Frances Jones

Respondent (Respondent)

Erik Savas, for the appellant

Jason A. Schmidt, for the respondents

Heard: June 13, 2023

On appeal from the judgment of Justice Vanessa V. Christie of the Superior Court of Justice, dated July 28, 2022, with reasons reported at 2022 ONSC 4429 and 2022 ONSC 5287.

Coroza J.A.:

I. INTRODUCTION

[1] In 2017, the respondent Linda Jones ("Ms. Jones") transferred a 100-acre property that consists of farmland and residential land (the "Property") to the appellant Elwood Andrew Quinn ("Mr. Quinn"), as a temporary financing relief for her financial difficulties. This transfer was conducted pursuant to an agreement of private purchase and sale (the "APPS"). The APPS included a Buyback Provision ("BBP"), which provides that "[w]ithin eight years of the date of purchase, Linda Jones may purchase the property back from Elwood Quinn" for an amount based on the specified formula provided in the provision. The APPS does not expressly set out the precise mechanism to trigger the BBP. The APPS also provided that Ms. Jones "may live on the property, having full use of it, for a period of eight years" at a specified rent which was not due to be paid unless she exercised the BBP.

[2] Despite initial cooperation between the parties with regards to financing, maintaining, and improving the Property in 2017 and 2018, their relationship deteriorated amidst financial difficulties. In late 2019, the appellant appointed his son-in-law, Hugh Franklin ("Mr. Franklin"), as his agent and representative in dealing with the Property. This appointment marked a serious downturn in the parties' relationship. Before the end of the year, Mr. Franklin took multiple steps to

remove Ms. Jones and her son and co-respondent, Philip Jones (“Mr. Jones”), from the Property.

[3] Throughout 2020 and 2021, the respondents made attempts to initiate a buyback process. The application judge found that this process was thwarted by Mr. Franklin. On March 24, 2021, Ms. Jones delivered to Mr. Franklin an unconditional offer to purchase the Property for $384,000 in the form of an Agreement of Purchase (“APS”) dated March 23, 2021, with a proposed closing date of May 31, 2021. The offer was irrevocably open for acceptance until March 26, 2021. On March 26, Mr. Franklin acknowledged receipt, but did not sign the APS. Some correspondence was subsequently exchanged between the parties and the respondents’ real estate counsel, but the APS remained unsigned. Mr. Franklin did not advise that he had retained counsel to represent the appellant on the transaction until late on May 31. Ultimately, the transaction failed to close. On the same day, Mr. Franklin advised the respondents’ counsel that due to their failure to tender, the respondents had breached the BBP.

[4] Three applications were commenced by the parties in the court below and the respondents prevailed on all three.[1] The application judge found that the

[1] Court File Nos. CV-21-48, CV-21-68, and CV-21-86. Court File No. CV-21-48 was an application commenced on April 28, 2021 by the respondents to enforce the BBP. Court File No. CV-21-68 was an application commenced on June 1, 2021 by the appellant requesting recission of the BBP. Only these two applications are contested on appeal. The third and final application, Court File No. CV-21-86, was an application commenced on August 15, 2021 by the appellant regarding a purported commercial tenancy between the parties. This final application is not under appeal.

appellant breached the BBP of the APPS and, in the alternative, that the respondents established a constructive trust over the Property. The application judge ordered that the appellant permit Ms. Jones or an authorized third party to repurchase the Property in accordance with the BBP and that the parties take immediate steps to close the transaction.

[5] The appellant now seeks to overturn the application judge's orders. According to the appellant, the application judge erred in construing the BBP as "an agreement to agree" rather than "an option to purchase" the Property. This error led the application judge to incorrectly find the appellant, as opposed to the respondents, in breach. The respondents therefore were not entitled to the remedies they were granted. The appellant also challenges the application judge's order regarding the return of items and vehicles removed from the Property and seeks leave to appeal the application judge's costs award. The appellant also seeks leave to file fresh evidence.

[6] For the reasons that follow, I conclude that while the BBP is properly characterized as an option, the parties to the contract were required to perform their obligations in good faith. The application judge found that Mr. Franklin obstructed and frustrated the respondents' attempt to repurchase the Property. That finding is fully supported in the record. Therefore, I would dismiss the substantive appeal, save for quashing one aspect of the application judge's order concerning the return of non-specified "items" and clarifying another aspect of the

order regarding the return of “vehicles”. Finally, I would deny leave to appeal the costs award made against the appellant.

II. FACTS

[7] The application judge made detailed factual findings, spanning over 54 pages of published reasons. The appellant does not challenge any of these findings before this court. I do not purport to provide an in-depth review of the facts and will focus on the relevant findings that are dispositive to this appeal.

(1) The Genesis of the APPS

[8] Ms. Jones purchased the Property from her late father and has lived and operated an animal farm business there since 2004.

[9] In 2016, Ms. Jones’ business went through serious financial difficulties. The appellant, who had met Ms. Jones earlier in 2009, offered to assist her by providing financing in exchange for a mortgage against the Property.

[10] In February 2017, Ms. Jones and the appellant negotiated and signed a contract to transfer the Property from the former to the latter. This contract was the APPS. The transaction closed on May 1, 2017. The agreed purchase price was $300,000, which was less than the assessed market value of the Property at the time.

[11] The APPS contemplated that Ms. Jones would continue living in the Property and would be entitled to buy it back within eight years for an amount

specified by a formula. The “Rental Agreement” clause provided that “Linda Jones may live on the property, having full use of it, for a period of eight years at a rent of $500 per month for the entire 96-month period.” However, this rent was to be deferred and would only be payable to the appellant if she elected to exercise her right under the BBP. That provision stated:

> **Buyback Provision:** Within eight years of the date of purchase, Linda Jones may purchase the property back from Elwood Quinn for what he paid her for it ($300,000) plus a 5% ~~**compounded**~~ [delete compound replace with “annual”] interest on $300,000, plus the accumulated deferred rent of $500 per month. Linda may repurchase the property on her own or with or through a third party. Elwood Quinn agrees not to sell the property for an eight-year period following its purchase.… At the end of the eight years, any further rental agreement or repurchase shall be by mutual consent, on whatever terms may be mutually agreeable at that time. [Emphasis in original to denote handwritten portion].

(2) The Breakdown of the Relationship

[12] There was initially cooperation between the parties. For instance, to help the appellant get mortgage financing to buy the Property, Ms. Jones prepared a business plan for her existing business “Wholearth Farmstudio” located on the Property. Throughout 2017 and 2018, the appellant assisted and funded the Property maintenance and improvement.

[13] The parties’ relationship started to deteriorate in early 2019. Both parties began feeling that the other was not doing enough – Ms. Jones believed the appellant was not providing enough funds to maintain and improve the Property,

while the appellant believed Ms. Jones was demanding more than he was able to provide.

[14] Amidst rising tensions, Mr. Franklin, the appellant's son-in-law, came into the picture. In August 2019, the appellant appointed Mr. Franklin as his agent in dealing with the Property. He was later appointed as the appellant's power of attorney in dealing with the administration and disposition of the Property. Mr. Franklin pursued an aggressive approach to have Ms. Jones removed from the Property. Within months of his appointment, Mr. Franklin served Ms. Jones with numerous notices of termination, made multiple applications to the Landlord and Tenant Board seeking her eviction, sent her a cease-and-desist letter, initiated a Small Claims action against her, and attended the Property with and without notice to inspect the Property, conduct repairs, and encourage her to vacate.

(3) The Buyback Process

(a) The Respondents Initiated the Buyback Process

[15] In the summer of 2020, the respondents initiated the buyback process, which in turn set in motion a turbulent, year-long process culminating in the applications below. The application judge found that Mr. Franklin "made it extremely difficult, if not impossible" for the respondents to proceed. While I will not go into detail on this point, I note that during the period described below, the parties were also involved in extensive litigation relating to the tenancy and

exercise of the APPS before the Landlord and Tenant Board as well as the Cobourg Small Claims Court.

[16] In June 2020, Mr. Jones, Ms. Jones' son and co-respondent, phoned the appellant and expressed the respondents' intention to repurchase the Property. The appellant stated that he did not wish to talk to the appointed buyer but wanted the request in writing; the appellant then hung up.

[17] On June 28, 2020, Mr. Jones emailed the appellant seeking to activate the BBP in writing. No response was received from the appellant.

[18] On July 2, 2020, when a law clerk from the respondents' counsel's law office, Schmidt Law Legal Services, emailed the appellant to request his solicitor's name be included in a draft Agreement of Purchase and Sale, Mr. Franklin wrote to Mr. Jones introducing himself as the "duly authorised representative for Mr. Elwood Quinn in all matters relating to the [Property]" and stated that "any and all further communication with Mr. Quinn shall be considered harassment and will not be tolerated."

[19] Despite the respondents' counsel's inquiries, Mr. Franklin refused to retain counsel. This was made clear on July 6, 2020, when Mr. Franklin emailed Schmidt Law Legal Services to say that "Mr Quinn has no intention of retaining counsel." Again, on July 30, 2020, Mr. Franklin reiterated that the appellant was "not willing to incur the expense of counsel until necessary."

[20] It is clear there was much delay in the buyback process in the second half of 2020. Much correspondence ensued between Mr. Franklin and Mr. Schmidt's office. Mr. Franklin demanded signed confirmation from Ms. Jones that she was exercising her right to purchase the Property in accordance with the BBP in a particular form and style before he would consider it valid. This issue went back and forth for many weeks. Mr. Franklin also refused to confirm or deny the proposed purchase price and date (while cognizant that the closing amount was dependent on the closing date). On September 10, 2020, Mr. Schmidt floated a closing day of September 30, 2020. There was no affirmative answer from Mr. Franklin or the appellant. Rather, Mr. Franklin stated that his consent to a closing date was not required.

[21] The application judge noted that much of the tone and posture taken by Mr. Franklin during this period was "confrontational." This is illustrated in his August 7, 2020 email to Mr. Schmidt's office in which Mr. Franklin set out a long list of objections and directions to counsel.

[22] On September 29, 2020, Mr. Jones emailed Trish Mutch ("Ms. Mutch") at Mutch Property Group "looking for property advice and financing to buy back the family farm." Financing was not yet secured at this point.

[23] September 30, 2020, came and went. Meanwhile, the parties became embroiled in multiple proceedings relating to the appellant's attempt to evict Ms. Jones before the Landlord and Tenant Board.

[24] On December 1, 2020, the appellant issued a claim in the Small Claims Court seeking damages for an alleged breach of the APPS by Ms. Jones.

[25] On February 19, 2021, the respondents secured financing for their buyback. Ms. Mutch confirmed this in an email to Mr. Jones:

> I am confirming that you have been approved for a mortgage to purchase the property… in the amount of at a rate of 12% for $400,000 [*sic*] for one year with monthly payments of the interest only and a balloon payment at the end. There is also a 2% lender fee and a one year option to renew.

[26] At the time of this correspondence, Ms. Mutch "conservatively" valued the Property at $700,000.

(b) The First Agreement of Purchase and Sale

[27] On February 24, 2021, at 9:09 p.m., Morgan Payne of Schmidt Law Legal Services sent an email to Mr. Franklin containing an Agreement of Purchase and Sale dated February 23, 2021, signed by Mr. Jones only (the "first APS"). The purchase price noted was $384,000.00. The offer was irrevocable by the seller until 4:30 p.m. on February 26, 2021. The closing date proposed was May 31, 2021. The first APS was conditional upon Mr. Jones being able to arrange financing within five banking days after acceptance of the offer.

[28] On March 1, 2021, Mr. Franklin emailed, acknowledging receipt of the first APS. Rather than commenting on the substance of the first APS, he chastised counsel for their past correspondence in August 2020 and directed her to consult with Ms. Jones with regards to the Small Claims matter that Mr. Franklin initiated. Neither the appellant nor Mr. Franklin signed the first APS.

(c) The Second Agreement of Purchase and Sale

[29] On March 24, 2021, Ms. Jones delivered to Mr. Franklin an unconditional offer to purchase the Property for $384,000 in the form of an Agreement of Purchase and Sale (the “second APS”) dated March 23, 2021. The offer was irrevocably open for acceptance until 4:30 p.m. on March 26, 2021, and the proposed closing date was May 31, 2021.

[30] On March 26, 2021, Mr. Franklin wrote to the law clerk at Mr. Schmidt’s office acknowledging receipt of the second APS, but again did not sign it. Rather, he asked her to consult with Mr. Schmidt and advise if their firm was representing Ms. Jones in the Small Claims action.

[31] On April 28, 2021, the respondents issued a Notice of Application initiating an application at issue in this appeal seeking to compel the transfer of the Property back to Ms. Jones pursuant to the terms of the APPS (Court File No. CV-21-48).

[32] On May 26, 2021, Mr. Schmidt sent an email to Mr. Franklin once again asking if a lawyer had been retained. He further wrote:

> We note that we have not served Mr. Quinn personally in accordance with the Rules but that a lawyer can accept service on behalf of Mr. Quinn in lieu of personal service. Otherwise, we will take steps to serve Mr. Quinn personally in accordance with the Rules.

[33] On May 28, 2021, Mr. Franklin responded and stated in part as follows:

> 1. Although you have tacitly acknowledged in your last correspondence receipt of the *General Mandate for the administration of Property* dated May 4th, 2021, I have attached a notarized *Specific Power of Attorney* dated May 26th, 2021 which should make absolutely clear to you that I am for all intents and purposes Elwood Quinn as it concerns the disposition of his real property. I ask that you take particular note of paragraph 1.7 wherein I am authorized to effect the transfer or sale of any of his properties.
>
> 2. The terms of the buyback provision were agreed to in 2017: no warranties, no inspections, no title searches, as is where is, and clear method of calculation of the buyback price. It does not say that a new Agreement of Purchase and Sale (APS) is necessary.
>
> 3. I clearly set out my understanding of the buyback process in my letter to your subordinate Ms. Morgan Payne on August 7th, 2020 in reply to her threat to force the sale of the property. She chose not to reply. Twice.
>
> 4. Our correspondence of September 2020 clearly demonstrates that both yourself and your client understood how the purchase price would be calculated and that it would be due on the date she picked. On advisement of that date, Mr Quinn would prepare the necessary documentation to effect the transfer of the property. Despite having done the math and picked the date, she didn't go through with the purchase. Mr Quinn then instructed me to pursue his just relief through the courts and I did so in the Ontario Superior Court of Justice, Cobourg Small Claims Court file number SC-20-00000203- 0000. I clearly advised Ms. Payne of this on

> March 1st, 2021 following her production of an APS from Phillip Jones on February 24th, 2021.
>
> 5. In the APS dated March 23rd, 2021 your client has again fixed a date for the transfer of the property, performed the calculations necessary to determine the amount due, and then, rather than wait for reply, purports to have made a claim before the Ontario Superior Court of Justice on the basis of a presumptive breach by Mr Quinn.
>
> 6. Mr Quinn has not breached the terms of the buyback provision and per my authority under the *Specific Power of Attorney*, I will prepare and sign the *Transfer/Deed of Land* and undertake to provide all other documentation necessary to effect the transfer of the property on May 31st, 2021. **All that is needed to complete the transfer is for your clients to produce the necessary funds by 6:00 p.m. on Monday May 31st, 2021**.
>
> As Mr Quinn said on July 24th, 2019 "*Show me the money! Done like dinner*." [Emphasis in original.]

[34] Mr. Schmidt responded on the same day advising Mr. Franklin that he would require a lawyer to complete the transaction:

> You will require a lawyer in Ontario to effect the sale. Please advise who that is and our office will send the necessary documentation to complete this transaction. Money needs to be transferred between lawyers' trust accounts for the purchase of real estate in Ontario.

[35] Mr. Franklin wrote back stating:

> Although I have not renewed my OREA membership for a number of years, I still recall how to effect the sale of a property. Kindly advise when you are in funds and I will provide you with instructions.

(d) The Events on the Closing Date

[36] On the purported closing date of May 31, 2021, at 8:03 a.m. and 3:16 p.m., Mr. Franklin made two requests of both Mr. Schmidt and Ms. Jones to provide information necessary to complete the transfer, specifically the date of birth of Mr. Jones. Further, he asked that Mr. Schmidt advise when he was in funds so that their counsel could provide Mr. Schmidt with instructions. As of the time these emails were sent, the identity of the appellant's counsel was still unknown to the respondents and their counsel, despite Mr. Schmidt's earlier request for that information.

[37] At 4:19 p.m., Mr. Franklin wrote to Mr. Schmidt advising him that Mr. Quinn's counsel at Kelly Santini was standing by to accept the funds and effect the transfer.

[38] At 4:23 p.m., Mr. Schmidt asked for the name of the counsel.

[39] At 4:35 p.m., a clerk at Kelly Santini purported to email Mr. Schmidt with confirmation that Sasha Willms had been retained. However, the email confirmation addressed to Mr. Schmidt was sent to a wrong email address ending in ".ca" as opposed to ".com" used in previous correspondence.

[40] The closing did not take place.

[41] At 6:37 pm, Mr. Franklin emailed Mr. Schmidt to advise of the "formal acceptance of [Ms. Jones'] breach of the buyback provision … said breach having occurred at 6:00 p.m. this day."

[42] The application judge made a factual finding that the respondents had funding ready on May 31, 2021. On cross-examination, Ms. Mutch testified that she remained willing to provide a mortgage to re-purchase the Property on similar terms to those described in her confirmation email to Mr. Jones on February 19, 2021.

[43] In the subsequent period leading up to the hearing of the applications, the application judge found that Mr. Franklin took further steps to have the respondents removed from the Property by rendering their living conditions "unliveable".

(4) The Judgment Below

[44] The application judge granted the respondents' application and dismissed the appellant's applications.

[45] She held that the appellant, through his agent Mr. Franklin, breached the BBP under the APPS by refusing to cooperate and thwarting Ms. Jones' attempts to trigger the BBP to repurchase the Property. She found that Mr. Franklin was "often confrontational, argumentative, vague, and unresponsive, refusing to confirm a purchase price or closing date for the proposed transfer, and failing to engage in reasonable discussions for more than sixty days following the delivery of the APS to finalize the terms of the transaction to transfer the property." He "also refused to retain a lawyer" to complete the transaction despite repeated inquiries by the respondents' counsel.

[46] She further held that since the appellant did not accept the unconditional offer made to him, there was no agreement to sell the Property. Therefore, the respondents did not breach the APPS by failing to tender $384,000 on May 31, 2021.

[47] For completeness, the application judge went on to consider in the alternative whether to grant an equitable remedy and determined that Ms. Jones successfully established a constructive trust over the Property. The appellant was enriched by purchasing the Property below market value and retaining it despite the fact that the transfer was meant to be a temporary financing arrangement. Ms. Jones suffered corresponding deprivation by transferring the Property below market value and being thwarted in her buyback efforts. And there was no juristic reason for the enrichment as the BBP clearly put the obligation on the appellant to transfer the Property back at Ms. Jones' request, but instead Mr. Franklin continued to put roadblocks in Ms. Jones' path.

[48] The application judge ordered, *inter alia*, the following remedies:

1. That the parties immediately conclude the transfer on the terms equivalent to the second APS which was due and payable on May 31, 2021;
2. That a mandatory injunction require the appellant to allow Ms. Jones to repurchase the Property in accordance with the BBP;

3. “[T]hat any items that have been removed from the property, such as vehicles, must be returned to its rightful owner as soon as possible.”

[49] After receiving further submissions from the parties, the application judge granted the respondents costs in the amount of $50,000, all-inclusive.

III. ISSUES ON APPEAL

[50] The appellant raises six grounds of appeal. The first two grounds relate to the proper interpretation of the BBP. The second two grounds relate to the remedies granted due to the breach of the BBP. The final two grounds relate to the application judge’s order relating to items removed from the Property and her costs award.

[51] For clarity, I would characterize the issues on this appeal as follows:[2]

1. Is the appellant precluded from raising the option issue for the first time on appeal?
2. Did the application judge err in failing to interpret the BBP as an option?
3. If so, did the respondents breach the contract arising from their execution of the option?

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[2] The appellant also appeals the application judge’s decision to grant a constructive trust over the Property in favour of Ms. Jones. However, the application judge did not order a constructive trust in her judgment. Her reasons make clear that a constructive trust would have been an alternative remedy to the mandatory injunction. As appeals are taken against orders, not reasons, and I am satisfied the application judge did not err in granting a mandatory injunction for reasons independent of her constructive trust finding, it is not necessary to address this issue: see *Cirillo v. Ontario*, 2021 ONCA 353, 486 C.R.R. (2d) 25, at para. 73, leave to appeal refused, [2021] S.C.C.A. No. 296.

4. Did the application judge err in ordering the appellant to sell the Property to the respondents in accordance with the terms of the second APS, and in granting a mandatory injunction for the same?
5. Did the application judge err in granting unpleaded, excessively vague relief in the form of an order that "any items that have been removed from the property, such as vehicles" be returned to their "rightful owner"?
6. Did the application judge err by granting excessive costs?

[52] The appellant also seeks to introduce fresh evidence on appeal. On November 1, 2022, while this appeal was pending, the appellant transferred the Property to the respondents. The fresh evidence relates to the legal costs and expenses the appellant incurred for the transfer in the amount of $7,658.35, all-inclusive. The appellant only seeks to use the fresh evidence in case this court allows their appeal on the interpretation of the BBP. As I would ultimately dismiss this aspect of the appeal, I would decline to admit the fresh evidence.[3]

[3] At the opening of their oral submissions, counsel for the appellant also referred to the fresh evidence to notify the court of a possible conflict of interest by respondents' counsel. The basis for this supposed conflict is a certificate of pending litigation entered by respondents' counsel on the Property, which according to the appellant relates to the respondents' unpaid legal bills. Respondents' counsel responded that they did not consider this a conflict, but that at any rate their clients had waived any potential conflict. Assuming without deciding that a conflict existed, the panel was satisfied with the respondents' waiver, and proceeded to hear the appeal on the merits.

IV. LAW AND ANALYSIS

(1) Issue One: The Appellant is not Raising the Option Issue for the First Time on Appeal

[53] Appellants are typically not permitted to raise legal issues for the first time on appeal: *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 22. The respondents argue that the appellant should be precluded from raising the issue of options at all, since he did not argue that the BBP was an option before the application judge.

[54] I do not accept the respondents' submission. In my view, the appellant raised the issue of option contracts before the application judge and is not raising the issue for the first time on appeal.

[55] The respondents argue that while the appellant referred to the BBP as an "option" in his factum below, he used the word "option" in a colloquial, as opposed to legal sense. The appellant disagrees with this characterization.

[56] I agree with the respondents that the appellant did not expressly set out the law of options before the application judge in his factum or oral submissions. Nor did the appellant explicitly make submissions on why the BBP qualified as an option. However, the appellant did bring to the application judge's attention cases that engaged deeply with the law of options, such as *364021 Alberta Ltd. v. 361738 Alberta Ltd.* (1990), 115 A.R. 333 (Q.B.), aff'd 1994 ABCA 89, 149 A.R. 219. These

cases were no use to the application judge except to summarize the law of options. The application judge exhaustively canvassed all the cases that were placed before her in her comprehensive reasons. In my view, the appellant made the law of options a live issue before the application judge, albeit in a less developed way than before this court. I am satisfied that the appellant is not raising the issue for the first time on appeal. In any event, the respondents have shown no prejudice in this court entertaining argument on this issue. Indeed, both parties in their factums and submissions have made arguments on the point.

(2) Issue Two: The BBP is an Option

[57] I begin with the standard of review. The Supreme Court of Canada has outlined the standard of review for the interpretation of negotiated contracts in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 42-55. Courts of appeal should generally review the interpretation of a contract on a deferential standard of palpable and overriding error, absent an extricable error of law, which must be analyzed on a correctness standard.

[58] The appellant submits that the BBP is properly interpreted as an option in favour of Ms. Jones, granting her the right (but not the obligation) to buy back the Property from Mr. Quinn within eight years, for a price prescribed by the BBP and only known when Ms. Jones notifies Mr. Quinn of the date she requires the Property back. For ease of reference, I reproduce the BBP again:

> **Buyback Provision:** Within eight years of the date of purchase, Linda Jones may purchase the property back from Elwood Quinn for what he paid her for it ($300,000) plus a 5% ~~**compounded**~~ [delete compound replace with "annual"] interest on $300,000, plus the accumulated deferred rent of $500 per month. Linda may repurchase the property on her own or with or through a third party. Elwood Quinn agrees not to sell the property for an eight-year period following its purchase.… At the end of the eight years, any further rental agreement or repurchase shall be by mutual consent, on whatever terms may be mutually agreeable at that time. [Emphasis in original to denote handwritten portion].

[59] The application judge found that this clause was "drafted in a simple and straightforward manner so as to permit an efficient and simplified process." She found that the clause granted Ms. Jones an unlimited number of chances to attempt to buy back the Property over the eight-year period. Ms. Jones made such an attempt, but the appellant breached the clause by obstructing the buyback process.

[60] The appellant argues that the BBP is a unilateral option and that once the respondents invoked the clause, they were required to strictly comply with its terms, or else lose their one and only chance to complete the buyback. Since the respondents did not tender on time, the application judge should have found that they were in breach. Instead, the appellant argues, the application judge erroneously read the APPS as requiring the parties to cooperate and enter into a separate agreement that fixed the purchase price and date for the Property's

transfer. In sum, the appellant argues that the application judge interpreted the BBP as an unenforceable "agreement to agree," which the parties did not intend.

[61] The respondents argue that the BBP does not constitute an option because it contains no specification as to how a contract of sale may be created, nor does it lay out any obligations for the parties to enter a subsequent contract of sale upon the exercise of the buyback provision.

[62] Clearly, the proper interpretation of the BBP is of central importance to this appeal. It was also of central importance in the argument before the application judge although, as noted above, the appellant did not explicitly argue the BBP was an option. While I have found that the appellant is not precluded from raising this argument on appeal, in fairness to the application judge, the issue of whether this provision was an option was not directly pursued before her. Nevertheless, it was an extricable error of law for her to not consider whether the BBP was an option. As I will explain, with the benefit of the parties' submissions on this issue, I conclude that the BBP, properly interpreted, is an option.

[63] An option is generally understood in Canadian contract law to be an irrevocable offer, backed by consideration: *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187, at para. 27. The party making the offer is the optionor. The person obtaining the offer is the optionee or option holder. The optionee can invoke the option, according to its specifications, at which point a

new contract forms between the parties. The rights and obligations of the parties to this new, bilateral contract are determined by the terms of the option: *Mitsui*, at para. 28, citing *Sudbrook Trading Estate Ltd. v. Eggleton*, [1983] 1 A.C. 444 (H.L), at pp. 476-77, *per* Lord Diplock.

[64] In *Mitsui*, at para. 26, the Supreme Court noted that there are three "principal features" of an option:

1. Exclusivity and irrevocability of the offer to sell within the time period specified in the option;
2. Specification of how the contract of sale may be created by the option holder; and
3. Obligation of the parties to enter into a contract of sale if the option is exercised.

[65] I conclude that the BBP meets the three principal features from *Mitsui*, and so it is an option.

[66] The respondents do not contest that the BBP meets the first *Mitsui* feature. The provision clearly provides Ms. Jones an offer to purchase the specified Property for a specified price over a specified time period. The third feature is, in my view, also clearly met. The provision leaves the appellant with no discretion. If Ms. Jones invokes the provision, then under its terms the appellant must sell the

Property, or else he is in breach. This is how the application judge interpreted the provision.

[67] The respondents contest the second *Mitsui* feature. They argue that the BBP does not specifically lay out how the option holder, Ms. Jones, can create the contract of sale.

[68] I agree that the words of the BBP, read literally in isolation, do not explain with any precision the process by which Ms. Jones can exercise her right to repurchase the Property from the appellant. However, the context of the agreement allows for inferences to be drawn about what the parties intended. It was clearly intended to provide a right to repurchase, which necessitates some means of exercising the right.

[69] Given the nature of real estate transactions, which forms part of the surrounding circumstances against which the clause must be interpreted, the option to repurchase must have been exercisable through the provision of notice to that effect. Notice allows for the parties to work out the many necessary procedural formalities, such as the requirement that all parties be represented by counsel, and that the transactions be put in writing to comply with the *Statute of Frauds*, R.S.O. 1990, c. S.19.

[70] The correct interpretation of the BBP thus provides Ms. Jones with the right to trigger the process of the repurchase of the Property via notice. This is how the application judge interpreted the provision. The second *Mitsui* feature is met.

[71] I therefore conclude that the BBP reflects the three principal features of options from *Mitsui*. In conclusion, the provision is an option.

[72] In their submission before this court, the parties appeared to assume that all options are unilateral contracts and that strict compliance with the BBP's terms was therefore necessary for its valid exercise. However, in *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265, the Supreme Court held that an option can be either a unilateral contract or an indivisible element of a bilateral contract. This distinction is often important because while the execution of a unilateral option generally requires strict compliance with its terms, if the option is closely linked with another contract between the parties, then it should be characterized as a bilateral contract which requires only substantial performance: *Sail Labrador Ltd.*, at para. 37; *Jesan Real Estate Ltd. v. Doyle*, 2020 ONCA 714, 26 R.P.R. (6th) 233, at para. 27; and *Gatoto v. 5GC Inc.*, 2024 ONCA 210, at paras. 9-10.

[73] However, since the parties did not address this issue and since nothing ultimately turns on it, I would decline to determine whether the BBP is unilateral or bilateral. Whether the option requires strict or substantial performance of its terms, the application judge's finding that the appellant's repeated efforts to thwart

Ms. Jones' from exercising the option breached the contract and were the cause of any alleged failure by Ms. Jones to satisfy her obligations is sufficient to dispose of the appeal. That is the issue I will turn to next.

(3) Issue Three: The Appellant Frustrated the Respondents' Exercise of the Option

[74] In *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, the Supreme Court acknowledged that "good faith contractual performance is a general organizing principle of the common law of contract" and "manifests itself in various more specific doctrines governing contractual performance:" at paras. 33, 63. The list of doctrines is not closed, but includes: "1) the duty of cooperation between the parties to achieve the objects of the contract; 2) the duty to exercise contractual discretion in good faith; 3) the duty not to evade contractual obligations in bad faith; and 4) the duty of honest performance:" *2161907 Alberta Ltd. v. 11180673 Canada Inc.*, 2021 ONCA 590, 462 D.L.R. (4th) 291, at para. 44.

[75] As I read the application judge's reasons, she was undoubtedly concerned with the appellant's failure to cooperate by taking reasonable steps to facilitate the sale of the Property to Ms. Jones.

[76] The application judge found that Mr. Franklin, as the appellant's representative, frustrated Ms. Jones' attempt to repurchase the Property. For example, she wrote, at para. 215:

> It is this court's view that the stated intentions of Linda Jones and Philip Jones to trigger the buyback provision has been met with criticisms and demands which have left more questions than answers. A careful review of the correspondence certainly leaves the impression that Mr. Franklin, as Mr. Quinn's representative, was attempting to delay and frustrate the repurchase of the property. The nature and tone of the communication from Mr. Franklin made it impossible to come to terms on the transfer. For example, Hugh Franklin mentions an APS in his September 11, 2020 correspondence, suggesting that he agreed that an APS was required or at least reasonable in order to close this transaction, however, later took the position that an APS was not required, and seemingly refused to sign. [Emphasis added.]

[77] She further found that, at para. 224, that Mr. Franklin had put and continued to put "roadblocks" to Ms. Jones buying back the Property.

[78] The parties to an option contract are subject to the same good faith obligations as the parties to other contracts. For example, in *Lafarge Canada Inc v. Bilozir*, 2018 ABCA 416, the court upheld a chambers judge's decision finding that an optionor had not acted in good faith when he refused to answer the door and take delivery of the optionee's notice. The court wrote, at para. 5:

> The Supreme Court of Canada has confirmed that parties to contracts must perform their obligations in good faith: *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 SCR 494. A contracting party can act in its own best interests, but it must not seek to undermine the legitimate interests of the other party in bad faith: *Bhasin* at para. 65. In this context, a party who is being given notice of exercise of an option cannot actively obstruct service of that notice. By refusing to answer the door and take the letter, the appellant was wilfully blind to the respondent's legitimate efforts to exercise the option. The chambers judge committed no

> reviewable error in finding that the appellant's refusal to answer the door amounted to a failure to discharge his obligations under the contract in good faith.

[79] Here, even if the appellant were correct in his assertion that the BBP did not require the parties to enter into a formal agreement of purchase and sale confirming the purchase price and closing date, his failure to respond to the second APS by refusing to sign the agreement and provide the name of the lawyer representing him before the scheduled closing belies any argument that he was proceeding in good faith. Despite having previously stated (in September 2020) that an APS was required or at least reasonable in order to close the transaction, Mr. Franklin did not sign the APS that was sent to him on March 24, 2021 and changed positions just days before the scheduled closing to assert that an APS was unnecessary. When asked that same day to provide the name of his lawyer to effect the sale, Mr. Franklin did not respond. Indeed, despite knowing a lawyer was required to close the transaction for at least several months, he waited until the day of closing to indicate that he had retained counsel. He then advised Ms. Jones' lawyer, at 4:19 p.m. on the day of closing, that unnamed "counsel" at Kelly Santini LLP was ready to accept the funds. Ms. Jones' lawyer immediately responded at 4:23 p.m. to ask for the name of the lawyer. A law clerk from Kelly Santini then purported to email Ms. Jones' lawyer with the name of the lawyer representing Mr. Franklin at 4:35 p.m., but the email was sent to the incorrect address. Mr. Franklin then emailed Ms. Jones' lawyer at 6:37 p.m., after the

scheduled closing deadline of 6:00 p.m., to accept Ms. Jones' purported breach of the BBP.

[80] It was open to the application judge to find that Mr. Franklin, as the appellant's representative, put up roadblocks to Ms. Jones' legitimate efforts to exercise her right to repurchase the Property and, in doing so he failed to discharge his obligations to act in good faith.

[81] In sum, the application judge found that the respondents did everything that could have been expected of them in the circumstances and that Mr. Franklin acted in a highly obstructionist manner. He failed to cooperate with the respondents to achieve the objects of the contract and sought to evade his contractual duties. Given his actions, it was not reasonable to expect the respondents to make tender at 6:00 p.m. on May 31, 2021 and I agree with the application judge's conclusion that the appellant was not entitled to rescind the contract on that basis. The appellant was in breach because he failed to discharge his obligations under the contract in good faith.

(4) Issue Four: The Application Judge was Entitled to Order the Appellant to Sell the Property to the Respondents

[82] In the alternative, and assuming that he was in breach of the BBP, the appellant argues that the application judge erred in ordering as a remedy that the

parties conclude a sale of the Property in accordance with the terms of the second APS as soon as possible.

[83] The appellant characterizes the application judge's order as impermissibly fashioning an agreement for the parties. But that is not how I read her order. I understand the order as requiring the specific performance of a contract arising out of the exercise of the option, which the parties freely entered into. The parties agreed to a contract to sell a property, via the execution of an option. The appellant breached, and the application judge ordered them to follow through with their commitment and complete the conveyance of the Property.

[84] I acknowledge that the application judge did not conduct a formal specific performance analysis in her reasons. However, I have no hesitation in concluding that specific performance was an available remedy in this case, given that the Property was of unique significance to Ms. Jones: see generally *Erie Sand and Gravel Limited v. Tri-B Acres Inc*, 2009 ONCA 709, 97 O.R. (3d) 241, at para. 117.

[85] I would not give effect to this argument.

(5) Issue Five: The Application Judge was Entitled to Order that the Appellant Return "Vehicles," but not Unspecified "Items", to their "Rightful Owner"

[86] The application judge ordered "that any items that have been removed from the property, such as vehicles, must be returned to its rightful owner as soon as possible." The appellant attacks this order on three fronts.

[87] First, the appellant submits that the application judge erred in making an order that the respondents did not ask for. He points out that the respondents did not request this relief in their application, and never argued the point before the application judge.

[88] I am not persuaded by this submission.

[89] The appellant's argument is in effect a claim for a breach of procedural fairness: *Voreon Inc. v. Matas Management Services Inc.*, 2023 ONCA 745, at para. 29. Viewing this matter in its entire procedural history, I find that no unfairness has been visited upon the appellant.

[90] As referenced previously, the parties engaged in extensive litigation leading up to the applications under appeal. In addition to litigation surrounding the exercise of the BBP, the parties also engaged in significant landlord-tenant litigation. This litigation revolved in large part around whether Ms. Jones was

impermissibly using the Property as if she held a commercial, as opposed to residential, tenancy.

[91] As one front in this protracted litigation, on June 29, 2021, the appellant sought and obtained an interim injunction from Lavine J. of the Superior Court of Justice for the respondents to "cease and desist any and all commercial activities on those portions of the property … not designated as residential." Mr. Franklin served Ms. Jones with this order. On July 4, 2021, Mr. Franklin attended the Property with police and had a green flatbed truck and an Airstream trailer removed from it. On July 16, 2021, Lavine J. ordered that the appellant "maintain possession of, and preserve [the two vehicles] at his expense, for thirty days or further order of the court".

[92] This injunction and its procedural history were put before the application judge and formed a significant part of her factual narrative. The application judge was thus aware that the appellant had possession of two vehicles taken from the Property, well after the court order authorizing that possession had expired. In such a circumstance, there was no substantial unfairness in the application judge recognizing that Lavine J.'s order authorizing possession of the vehicles had expired and that the vehicles should be returned.

[93] In any event, the appropriate remedy for a denial of procedural fairness in a first instance proceeding can be an opportunity to attack the substantive

correctness of the impugned order on appeal, rather than to quash or remand the order: *R. v. Nahanee*, 2022 SCC 37, 474 D.L.R. (4th) 34, at para. 57. The appellant has been given the opportunity to make substantive submissions challenging the correctness of the order to return vehicles and items to their rightful owner before this court; indeed, he has done so. There is thus no basis to interfere with the order for lack of procedural fairness.

[94] Second, the appellant contends that the respondents had asked for this relief in a separate motion at the Superior Court earlier in the proceedings, but that request for relief was dismissed as abandoned. To receive the same relief after the request was already dismissed as abandoned is thus an improper collateral attack.

[95] I do not agree.

[96] The rule against collateral attacks applies to insulate court orders that dispose of a request for relief on a substantive basis. The rule is generally invoked when a party attempts to circumvent the effect of an order rendered against it by challenging its validity in the wrong forum: see generally *Yan v. Hutchison*, 2023 ONCA 97, at para. 16, leave to appeal refused, [2023] S.C.C.A. No. 203; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at paras. 71-72; *R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 23. The discretionary rule is intended to promote the orderly administration of justice and is a particular application of the

broader abuse of process doctrine: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 22; *Amtim Capital Inc. v. Appliance Recycling Centers of America*, 2014 ONCA 62, 118 O.R. (3d) 617, at paras. 15-16; and *R. v. Irwin*, 2020 ONCA 776, 398 C.C.C. (3d) 304, at paras. 28-29.

[97] In some circumstances, it might constitute an abuse of process for a party to obtain relief that they had requested and then abandoned at an earlier stage of the proceeding. For example, it would be an abuse of process for a party, inferring from a judge's comments that their motion will fail, to abandon the motion, and then try to seek the same relief before a new judge. However, that is clearly not what happened in this case, and the appellant fairly makes no claim of an abuse of process.

[98] Finally, the appellant argues that the order is impermissibly vague, since it does not define "items", "vehicles", or "rightful owner": see *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79.

[99] I agree with the appellant that courts have a duty to ensure that their orders "state clearly and unequivocally what should and should not be done": *Prescott-Russell Services for Children and Adults v. N.G.* (2006), 82 O.R. (3d) 686 (C.A.), at para. 27. To be enforceable, a court order must include all essential details as to the who, what, and when of its application, and must avoid overly broad language: *Carey*, at para. 33.

[100] In the abstract, an order to return “vehicles” to their “rightful owner” could be considered too vague to meet the *Carey* standard. However, in the context of this case, and in particular in light of the lengthy factual narrative in the application judge’s reasons, it is clear what is required of the appellant.

[101] As noted above, the application judge’s factual narrative includes a discussion of certain prior court orders emerging from Property-related litigation between the parties. These include the orders of Lavine J., which have long since expired, but which originally authorized the appellant to remove a green flatbed truck and an Airstream trailer from the Property. Since the expiry of Lavine J.’s order, the appellant has no obvious lawful basis to continue possessing these vehicles. He did not point to any such basis in the court below, nor has he done so on appeal. It is therefore sufficiently clear that these are the “vehicles” referred to in the application judge’s judgment.

[102] As to the “rightful owner” of these vehicles, the respondents argue that this simply means the vehicles must be returned to the Property, where whoever their rightful owner is can find them again. I do not agree with this interpretation, as it is not realistic. I do not believe that the application judge would have expected the rightful owner of the vehicles to return to the Property in search of the vehicles, more than a year after they were taken. Instead, I believe that the application judge’s judgment was for the appellant to take all reasonable steps to identify the rightful owner of the vehicles. My view is fortified by the absence of a direction in

the application judge's judgment requiring the appellant to return the vehicles to the Property.

[103] While an order for the appellant to take all reasonable steps to identify the rightful owner of the vehicles may be onerous, a court order is not impermissibly vague simply for being onerous. Mr. Franklin chose to remove the vehicles from the Property of his own free choice. He was not required to do so. And so he now must bear the consequences of his actions.

[104] I come to a different conclusion with regards to the order to return "items". The word "items" is exceedingly broad. And unlike with vehicles, a careful review of the application judge's reasons does not aid in narrowing down exactly what is being asked of the appellant. There is simply no guidance for the appellant to follow to determine what "items" he has control over and is expected to return. Nor is it clear how the appellant is to determine the "rightful owner" of these "items." I note that the respondents did not defend this aspect of the application judge's order before this court.

[105] Accordingly, I would quash the application judge's order that the appellant return "items" to their "rightful owner". I would further clarify that the remaining order with regard to "vehicles" relates to the green flatbed truck and Airstream trailer discussed in the application judge's reasons, over which the appellant must take all reasonable steps to ascertain their rightful owner.

(6) Issue Six: Leave to Appeal the Costs Award is Denied

[106] Lastly, the appellant seeks leave to appeal the application judge's costs award. He argues that the award of $50,000 was tainted by two errors.

[107] First, the appellant argues that the respondents' bill of costs was insufficiently detailed and did not include dockets.

[108] Second, the appellant claims that while the application judge rejected a claim for substantial indemnity costs, the quantum of the partial indemnity costs issued was "virtually the same" as a substantial indemnity award would have been.

[109] This court only grants leave to appeal a costs award in cases where it is obvious that there are strong grounds to believe that the judge erred in exercising their discretion: *Brad-Jay Investments Limited v. Village Developments Limited* (2006), 218 O.A.C. 315 (C.A.), at para. 21. It is not obvious to me that there are strong grounds in this case.

[110] The application judge's reasons track the correct and relevant principles of costs awards. The respondents' bill of costs below could have been more detailed, but $50,000 is not an unreasonable sum for a proceeding of this complexity. And while the application judge did affirmatively reject substantial indemnity in favour of partial indemnity costs, it is not a clear error for a judge to award partial indemnity costs that are similar in quantum to what a substantial indemnity award would have been. As this court has noted, partial indemnity fees are not defined in terms of an

exact percentage of full indemnity fees under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194: see generally *Wasserman, Arsenault Ltd. v. Sone* (2002), 164 O.A.C. 195 (C.A.), at para. 5; *Bondy-Rafael v. Potrebic*, 2019 ONCA 1026, 441 D.L.R. (4th) 658, at para. 57.

[111] Given the numerous factors that the court must consider in the exercise of its discretion in fixing costs, a highly deferential approach is required. I decline to grant leave to appeal the costs award.

V. CONCLUSION

[112] For all these reasons, I would dismiss the appeal, except for quashing the order below that the appellant return "items" removed from the Property to their "rightful owner" and clarifying that the remaining order with regard to "vehicles" relates to the green flatbed truck and Airstream trailer, over which the appellant must take all reasonable steps to ascertain their rightful owner.

[113] The respondents are entitled to the costs of this appeal in the agreed upon amount of $20,000, all-inclusive.

Released: April 29, 2024 "B.W.M."

"S. Coroza J.A."
"I agree. B.W. Miller J.A."
"I agree. David M. Paciocco J.A."