COURT OF APPEAL FOR ONTARIO

CITATION: 1785192 Ontario Inc. v. Ontario H Limited Partnership, 2024 ONCA 775
DATE: 20241024
DOCKET: COA-24-CV-0331

Miller, Copeland and Dawe JJ.A.

BETWEEN

1785192 Ontario Inc. and 1043303 Ontario Ltd.

Applicants/Respondents
(Appellants/Respondents by way of cross-appeal)

and

Ontario H Limited Partnership

Respondent/Applicant
(Respondent/Appellant by way of cross-appeal)

Peter H. Griffin and Samantha Hale, for the appellants/respondents by way of cross-appeal

Aaron Kreaden, for the respondent/appellant by way of cross-appeal

Heard: September 19, 2024

On appeal from the judgment of Justice Jana Steele of the Superior Court of Justice, dated February 28, 2024, with reasons reported at 2023 ONSC 7105.

B.W. Miller J.A.:

[1] A pair of commercial leases contained options to purchase the underlying premises. The options provided that the purchase price was to be the midpoint of appraisals obtained by each party. The parties each obtained an appraisal. The two appraisals were widely apart – $11,746,000 and $31,200,000 – with a midpoint of $21,473,000. After a disagreement over the methodology used by each party's appraisal, the purchaser tendered $11,746,000, the value of its appraisal. It unilaterally reserved over $9,727,000 to be held in trust by its solicitor, representing the difference between its tender and the midpoint of the two appraisals. The vendor refused to close.

[2] The purchaser brought an application seeking specific performance of the contract, while the vendor brought an application for an order declaring the options null and void. The application judge found that the purchaser had made sufficient tender and consequently ordered specific performance.

[3] For the reasons set out below, I disagree, and would allow this appeal.

Background

[4] The appellant corporations ("the Landlord") own two commercial properties in Whitby, Ontario. The Landlord leases the properties to the respondent ("the Tenant"), which operates two car dealerships on them. The Tenant purchased the car dealerships from the Landlord in 2015 for approximately $30 million in an asset

purchase agreement. The Landlord had operated the two dealerships on the properties for the previous 18 years.

[5] Two leases were included in a schedule to the asset purchase agreement, which enabled the Tenant to continue operating the car dealerships on the properties. The leases were for a term of 5 years, with options to renew until 2035. The leases also provided an option for the Tenant to purchase the properties from the Landlord.

[6] The option to purchase clause contained in both leases included a mechanism for setting the price at which the Landlord would be required to sell the properties:

> [A] purchase price equal to the average of the appraised fair market value of the Leased Premises as determined by two appraisers, one chosen by the Landlord and one chosen by the Tenant.

[7] The Tenant failed to give timely notice of its intention to renew the leases, as required by the leases. When it later elected to do so, it was out of time and the Landlord refused to renew. For the Tenant to remain on the properties, its only remaining alternative was to exercise the options to purchase.

[8] In May 2020, the Tenant provided notice that it was exercising the options. Counsel for the Landlord acknowledged receipt of the notice and advised that the appraisals conducted must be based on the highest and best use of the properties.

[9] The Landlord obtained an appraisal of the properties from Colliers International Group Inc., valuing them at $31,200,000 collectively. The Tenant's appraisals, from Equitable Value Inc., valued the properties at $11,746,000, collectively. The midpoint of these two appraisals is $21,473,000.

[10] The parties disputed the validity of each other's appraisals. The Landlord initially took the position that the Tenant's appraisal was invalid and an attempt to game the pricing mechanism and obtain the property at an artificially low price. The Tenant similarly viewed the Landlord's appraisal as an attempt to artificially raise the price above the actual market value.

[11] The difference between the appraisals was caused predominantly by a difference in assumptions. The Landlord's appraisal was based on the assumption that the highest and best use of the properties would have the properties rezoned for the development of a residential condominium complex. The Tenant's appraisal was based on the assumption that the properties' highest and best use should reflect current zoning, and would involve one property being developed as a commercial property while the other remained an auto dealership.

[12] To provide the Tenant with reassurance of the *bona fides* of its appraisal, the Landlord had two further appraisals undertaken, one from Cushman & Wakefield ULC, which valued the properties at $27,480,000 and another from CBRE, which valued the properties at $24,500,000.

[13] The parties, which were represented throughout by counsel, engaged in a protracted course of bargaining. They considered arbitration and litigation. The Landlord refused to extend the closing date without a quantum of security that the Tenant was unwilling to provide. Each maintained that the transaction should close at the price of their respective appraisals and not the midpoint.

[14] On September 17, 2020, the Landlord circulated draft documents for closing requiring a purchase price of $21,473,000, but reserved the right to claim a full purchase price of $31,200,00 if the Tenant failed to close.

[15] The next day, the Tenant advised the Landlord that it was in breach of contract for failing to remove certain encumbrances from title.

[16] On the morning of the closing date, the Landlord again advised that it would accept a purchase price equal to the average of the two appraisals, being $21,473,000. The Tenant continued to dispute the validity of the Landlord's appraisal and did not agree.

[17] The Tenant purported to close by forwarding the requisite closing documents and wiring $11,746,000 to the Landlord's solicitor.

[18] The Landlord responded that the funds advanced were not compliant with the contract and demanded that the Tenant wire additional funds to make up the balance of $21,473,000.

[19] The Tenant took the position that it was ready, willing, and able to complete the transaction, but given the dispute over the purchase price, had wired an amount in excess of the funds in dispute to its solicitor, to be held in trust pending the outcome of future litigation or arbitration.

[20] The Landlord refused to convey title on this basis and returned the $11,746,000 to the Tenant's solicitor.

[21] The Landlord subsequently received an offer to purchase the property from a third party for $27,500,000.

The judgment below

[22] The Tenant brought an application seeking specific performance of the contract for $11,746,000, or in the alternative, $16,905,000, or in the further alternative, $18,123,000.

[23] The Landlord brought an application seeking a declaration that the Tenant failed to exercise the options in accordance with their terms and a declaration that the options are now null and void. It also sought an order removing from title the registrations of the options to purchase, and an order for vacant possession.

[24] A key issue for the application judge was whether both parties had obtained an appraisal that complied with the terms of the option. If so, then the purchase price was the midpoint between them, as the Landlord maintained. The Tenant's position was that the Landlord's appraisal was not a fair market appraisal as

required by the option, and as the Tenant was the only party to provide such an appraisal, the purchase price was the price provided by the Tenant's appraisal. The Tenant argued that the Landlord's appraisal was premised on improper assumptions about how the property could be developed if it was rezoned.

[25] The application judge, with the benefit of expert evidence, came to the following interpretation of the meaning of fair market value appraisal in the leases:

> Fair market value appraisals are governed by the Canadian Uniform Standards of Professional Appraisal Practice ("CUSPAP"), the official standards that govern the conduct of appraisals in Canada. CUSPAP defines a market value appraisal as "[t]he most probable price, as of a specified date, in cash or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, assuming that neither is under undue duress."

[26] The Tenant's expert disagreed with the assumptions used in the Landlord's evaluation, but agreed that it used a conception of fair market value consistent with CUSPAP. The Tenant's expert thought the Landlord's appraisal used "speculative assumptions" and a more likely development scenario would result in a fair market value of between $15,210,000 and $18,590,000.

[27] The Tenant's position was that regardless of whether the Landlord's appraisal conformed to the methodological requirements of CUSPAP, the Landlord's appraisal overvalued the property, was not within the range of

reasonable outcomes, and accordingly did not constitute an appraisal within the meaning of the option clause.

[28] Ultimately, the application judge concluded that "[t]he mechanism set out in the Leases takes into account that each party may seek an appraisal using reasonable assumptions that are most favourable to that party. That is what happened here." She concluded that both parties obtained a compliant appraisal, and the purchase price was therefore the midpoint between the two.

[29] On the question of whether the Tenant validly exercised the option, the application judge found that the Tenant validly gave notice, entitling it to purchase the properties for the amount set by the price mechanism. This was not disputed by the Landlord.

[30] On the ultimate question of whether the Tenant tendered to close the transaction, the application judge accepted the Tenant's submission that, given there was a dispute about the purchase price, the Tenant was justified in tendering the undisputed amount while placing the disputed balance with a "reputable stakeholder", in this case the Tenant's solicitor.

[31] The application judge ordered specific performance, directing the Landlord to convey the properties in exchange for $21,472,000, which the application judge stated as the midpoint of the two appraisals.

Issues on appeal and cross-appeal

[32] The Landlord appealed on the basis that the application judge erred in:

1. Finding that the Landlord refused to close the sale;
2. Failing to find that the Tenant was in breach of the contract;
3. Failing to find the option null and void;
4. Awarding specific performance; and
5. Finding that the Tenant made a valid tender.

[33] The Tenant cross-appealed on the basis that the application judge erred in finding that the Landlord had obtained a valid appraisal.

Analysis

[34] As explained below, I agree with the Landlord that the application judge made a reversible error in concluding that the Tenant made a valid tender. The purchase price was fixed by the mechanism set out in the option clause. The Landlord was not required to accept any less than that amount, and the Tenant was in breach of contract when it purported to tender part in cash and part by way of funds unilaterally and non-irrevocably forwarded to the Tenant's solicitor in trust. Having exercised the option to purchase without completing the sale transaction, the option is now spent, and the Landlord is entitled to the relief it seeks.

The option contract

[35] The Supreme Court explained the nature of options in *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187, at para. 27:

> An option contract is an antecedent contract because it precedes the contract of purchase and sale that will result if the opportunity provided by the option is "seized upon" or exercised. Once an option is exercised, the parties discharge their obligations under the option contract by entering the contract of purchase and sale. The exercise of an option is the election to buy property on the terms specified in the option agreement, and is the equivalent of accepting the irrevocable offer made in the option. One cannot exercise the same option twice. The exercise of the option must mean the acceptance of the offer. The acceptance must be unconditional, must only be made once, and must be made in accordance with the terms of the option.

[36] There is no dispute that the Tenant gave valid notice that it was exercising the options.

[37] The option clauses constituted an irrevocable offer to the Tenant to purchase the properties "for a purchase price equal to the average of the appraised fair market value of the Leased Premises as determined by two appraisers, one chosen by the Landlord and one chosen by the Tenant… If the Option is exercised in the manner herein provided, the Landlord and Tenant shall have, and be deemed to have, entered into a binding contract for the sale and purchase of the Leased Premises, which will be completed upon the terms herein contained on the date set out by the Tenant in the written notice of exercise of the Option, provided

that such date can be no earlier than 120 days following the date such notice is delivered to the Landlord…".

[38] The application judge found that the Tenant exercised the option, which thereby created an obligation on the Landlord to sell the properties, and the Tenant to purchase them, at the price set using the valuation process stipulated in the option clauses. The application judge made no error in so finding.

[39] The issue for the appeal is not whether the option was exercised – it was – but whether the application judge erred in not finding that the Tenant breached the contract of purchase and sale that resulted from the exercise of the option.

The cross-appeal: the validity of the Landlord's appraisal

[40] The parties were obligated to obtain fair market appraisals of the properties. The application judge found that both parties fulfilled this contractual obligation.

[41] The Landlord – reluctantly, late in the day, but nevertheless on time – accepted that the Tenant's appraisal constituted a valid appraisal, and that the purchase price was therefore the midpoint between the two valuations. The Tenant, however, never accepted the validity of the Landlord's appraisal and maintains in its cross-appeal that the application judge erred in accepting its validity.

[42] What constitutes a valid appraisal is a question of fact. Absent some palpable and overriding error, the application judge's finding in this regard is

entitled to deference and there is no basis on which this court would be entitled to set it aside: *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235. No such error has been identified by the Tenant.

[43] The Tenant, in its cross-appeal, argues that there was no evidentiary foundation for the application judge's finding. The argument is – essentially – that although the Landlord's expert stated that both valuations were proper appraisals, the expert later conceded on cross-examination that where there is such a dramatic difference in appraisals, "someone has probably deviated from what is the appropriate methodology."

[44] The Tenant urged the application judge to conclude from this statement that the difference in valuations were not within the realm of reasonable disagreement, but that at least one was necessarily a product of methodological error. On the Tenant's view, one or the other of the valuations had to be erroneous, and the one option that was not available to the application judge on the evidence was to find that both were valid. The Tenant's expert testified that the Landlord's appraisal used a CUSPAP compliant definition of market value, but incorporated speculative assumptions and was therefore not valid. The Tenant's position was that the Tenant's appraisal was therefore the only valid evaluation. (The Tenant's theory is complicated somewhat by the fact that the Tenant's expert also rejected the quantum of the Tenant's appraisal and offered in its place a valuation range of $15,210,000 to $18,590,000.)

[45] I do not agree that the application judge made a reviewable error. She was entitled to accept all, some, or none of the evidence before her. She was entitled to reject the answer of the Landlord's expert on cross-examination that a difference in valuation of the magnitude was probably the result of methodological error in one of the appraisals. That answer, moreover, was far from a conclusive statement that there was a methodological error, or that if there was a methodological error, that it was on the part of the Landlord's appraisal.

[46] There is no palpable error here. To conclude that the application judge erred in finding that both appraisals were valid would require a deep examination of the record and, at a minimum, a determination of whether the term "fair market evaluation" as used in the option contract either excluded the highest and best use assumption in general or the specific type of development particularized in the Landlord's appraisal. The Tenant has not placed this court in the position to undertake that sort of analysis, which in any event would be the antithesis of palpable error and accordingly outside the scope of appellate review.

Was there a breach of contract?

[47] Having determined that the option was validly exercised and the application judge made no reviewable error in determining that both parties satisfied their obligations to obtain fair market appraisals, did either party thereafter breach the contract?

[48] Although the Landlord disputes the point on appeal, a necessary implication of the application judge's holding is that she found the Landlord to have breached the contract of purchase and sale by refusing to convey title to the Tenant. She explicitly found that the Tenant's partial tender was adequate and not a breach of its obligation to tender the midpoint of the two valuations.

[49] In my view, both of these conclusions by the application judge are in error.

[50] Having exercised the option, the Tenant was obligated to purchase – and the Landlord was obligated to sell – at the purchase price established using the methodology specified in the option. The parties were obligated to take all necessary steps to effect the purchase and sale on those terms.

[51] The application judge accepted the Tenant's argument that partial tender was acceptable, relying on *Kingsberg Developments Ltd. v. K Mart Canada Ltd.,* (1983), 40 O.R. (2d) 348 (H.C.), *Self Unit Acquisitions Inc. v. Cherokee-Oakville Property G.P. Inc.*, 2007 CarswellOnt 5115 (S.C.), and *Vulcan Packaging Inc. v. Capital Ventures Group Inc.* (1990), 71 O.R. (2d) 554 (C.A.).

[52] Each of these cases arose from a similar factual situation: a purchaser was in some way dissatisfied with the quality of the property to be purchased and sought an order for specific performance but at a reduced purchase price. The purchaser registered a certificate of pending litigation on title to prevent the vendor from dealing with the property before the dispute could be resolved at trial. The

vendor then brought an application to have the certificate discharged from title. The discharge of the certificate was a matter of judicial discretion, to be informed by several factors. One of those factors was whether the purchaser who was resisting the application for discharge was willing to post security. In an ordinary case, the amount posted would be equivalent to the purchase price. But in an abatement case, the question was whether the amount to have been posted should be reduced to take into account the alleged deficiency in the property. The issue in *Vulcan* was stated as follows:

> The only issue in this appeal is whether a purchaser of land who properly claims specific performance of an agreement for sale with an abatement is obliged as a matter of law to quantify the amount of the abatement claimed and pay it into court or in escrow in order to resist a vendor's application to obtain an order expunging the agreement from the registry.

[53] The Tenant, in the present appeal, argues that the abatement cases support the proposition that partial tender, reduced by the amount of the purchase price that is disputed, is sufficient tender, provided some form of security is provided for the remainder.

[54] The Landlord argued below (and before this court) that the tender was not adequate because options must be exercised strictly, and that the obligation under the option was to tender at the midpoint of the two valuations. The Tenant did not do that, and therefore it did not validly exercise the option.

[55] The application judge rejected the Landlord's characterization of the obligation to tender as falling within the option rather than the ensuing bilateral contract. She noted that the Landlord provided no argument to assist the court in determining whether tender was sufficient, and concluded summarily "I am satisfied that the steps taken by the Tenant on closing were sufficient."

[56] In my view, although the Tenant's obligation to tender was generated by the Tenant's exercise of the option, the application judge made no error in finding that the act of tender was not a matter of exercising the option, but of taking the steps required to affect the purchase under the ensuing bilateral contract of purchase and sale. Accordingly, the Landlord's argument from the strict obligation to comply with option was misguided and left the application judge without adequate assistance to assess the Tenant's argument that its tender was sufficient. As a result, the application judge's analysis of whether the Tenant complied with its obligation to tender was underdeveloped and, in my view, erroneous.

[57] The Tenant did not provide any authority that unambiguously held that a purchaser can unilaterally withhold a portion of the purchase price where there is a dispute about what the purchase price is. The abatement cases where a vendor seeks to discharge a certificate of pending litigation do not address this point and are not authority for the proposition advanced.

[58] Were this court to accede to the proposition advanced by the Tenant, it would mean that vendors would be required to convey property in any circumstance where, as here, the purchaser disputes the purchase price, potentially resulting in a substantial part of the proceeds of sale being held up indefinitely, pending years of litigation. In the present case, the Landlord did not agree to the funds being held in trust, and the funds were not even placed in trust irrevocably, but were later returned to the Tenant, which used them to purchase other car dealerships.

[59] Accordingly, I would find that the Tenant materially breached the contract of purchase and sale by only tendering roughly half of the full purchase price. It follows from this that the Landlord was not in breach by refusing to convey title.

[60] With respect to the Tenant's argument that the Landlord was not in a position to convey title because it had not cleared encumbrances as requisitioned, I do not accept that the objection was made in good faith. The removal of the encumbrances – including rights of way in favour of utility providers – would result in the properties losing access to electricity, water, and sewer connections. The Tenant clearly did not genuinely want this, and tellingly did not seek this relief on this appeal.

Relief from forfeiture

[61] The only remaining issue – one not reached by the application judge – is whether the Tenant should be relieved from the forfeiture of its right to purchase the property following its invalid tender.

[62] The Landlord argues that it should not, on the basis that options are to be construed strictly, and that strict conformity with the terms of the option includes strict conformity with the terms of the resulting sales contract. It provides no authority for this latter proposition, which seems doubtful.

[63] Regardless, the Tenant has not mounted an adequate argument as to why it should be granted relief from forfeiture. Its argument, essentially, is that it was taken by surprise when the Landlord refused to close, and expected that the title would be conveyed and the parties would subsequently litigate how much more – if any – the Tenant would be required to pay.

[64] The obligation is on the Tenant to establish that relief from forfeiture is available on failure to tender the full purchase price, and that it ought to be ordered in the circumstances of the case. It has done neither.

[65] At the end of the day, two commercially sophisticated parties, represented by counsel, engaged in elaborate, protracted, and hardnosed negotiation. The Tenant, if it wanted to protect its position, could have tendered the purchase price and litigated afterwards. It engaged in a strategy to enable it to acquire the

properties at substantially below fair market value. The strategy failed. There is no reason that it should be relieved of the consequences.

Disposition

[66] I would allow the appeal and dismiss the cross-appeal. I would make a declaration that the options are null and void, order that the registration of the options in the land registry be removed, and order that the Landlord be granted vacant possession of the lands 12 months from the date of these reasons.

[67] I would order that the Landlord is entitled to costs of the appeal in the amount of $60,000 all inclusive, as agreed between the parties, and costs of the application below in the amount of $183,000, all inclusive.

Released: October 24, 2024 “B.W.M”

“B.W. Miller J.A.”
“I agree. J. Copeland J.A.”
“I agree. J. Dawe J.A.”