

**CITATION:** Rutherford Road Holdings v. Ocean Sands Developments, 2024 ONSC 2964  
**COURT FILE NO.:** CV-22-00676341-0000  
**DATE:** 20241003

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
RUTHERFORD ROAD HOLDINGS ) *Jacqueline L. Cole*, Lawyer for the Plaintiff  
CORP. ) and Defendant by Counterclaim  
Plaintiff and Defendant by Counterclaim )  
)  
– and – )  
)  
)  
) *Chris Tonks*, Lawyer for the Defendants and  
OCEAN SANDS DEVELOPMENTS ) Plaintiffs by Counterclaim  
LIMITED and COLDWELL BANKER )  
REAL ESTATE MANAGEMENT )  
LEADERS )  
)  
Defendants and Plaintiffs by Counterclaim )  
)  
) **HEARD: MAY 21, 22 and 23, 2024**

2024 ONSC 2964 (CanLII)

**G. DOW, J.**

**REASONS FOR DECISION**

[1] The parties seek determination of a dispute arising from the plaintiff, Rutherford Road Holdings Corp.’ (“Rutherford Road”) purchasing Units 9, 10 and 11 from the defendant, Ocean Sands Developments Limited (“Ocean Sands”) at an industrial building located at 255B Rutherford Road South, Brampton which was being converted into a condominium.

[2] The issue to be determined is whether the defendant, Ocean Sands is entitled to payment of “Base Rent” for some portion or all of the period between July 1, 2017 to April 14, 2022.

[3] This matter proceeded as a summary trial. That is, the bulk of the evidence in chief was tendered by affidavit sworn by the owners of the corporate litigants. The plaintiff’s owner, Albertino Domingues, tendered affidavits sworn December 22, 2023, February 22, 2024 and March 28, 2024. The defendants’ owner, Ermidio Alves, tendered affidavits also sworn December

22, 2023, February 22, 2024 and March 28, 2024. The affidavit evidence of the plaintiff included a total of 49 exhibits and the affidavit evidence of the defendants included 64 exhibits. The material was in four volumes marked as Exhibits 1 to 4. During the trial, I made a ruling allowing the defendants tender as Exhibit 5 additional material setting out rental payments plus HST which included GST/HST Return Summaries from the Canada Revenue Agency.

## **Background**

[4] The building in question was purchased by the defendant, Ocean Sands in or about 2007. Mr. Domingues and Mr. Alves became acquainted when Mr. Domingues' son married Mr. Alves' stepdaughter in 2010. Mr. Domingues, age 70, (with a formal grade 4 education in Portugal), came to Canada about 55 years ago. He owns and operates a meat wholesale business which has included the purchase of multiple real estate properties. Mr. Alves, age 69, has been in the real estate business from 1977 including as a realtor, broker and property manager using corporate identities such as the co-defendant, Coldwell Banker Real Estate Management Leaders ("Coldwell Banker"). It appears both men had the corporations who are the main litigants created to facilitate this real estate investment.

[5] While I found neither person to be credible on any important part of their evidence, it is clear both have a sophisticated depth of experience and knowledge with regard to real estate investment, whether on their own, by example Mr. Alves' drafting of the Agreement of Purchase and Sale and Lease documents at the center of this litigation, or through their counsel, as will be seen on the part of Mr. Domingues.

[6] The industrial plaza owned by Ocean Sands at 255B Rutherford Road South, as of 2015, had nine units, 8 of which were rented to automobile repair related businesses. Mr. Domingues became interested in purchasing Unit 9 which Mr. Alves had already begun dividing into Units 9, 10 as well as Unit 11. Mr. Domingues wanted a place to store his hobby vehicles as well as a place to maintain or repair his wholesale meat delivery vehicles.

[7] Mr. Alves had also begun steps to convert the building into an industrial condominium corporation, with the units available for purchase by the existing tenants.

[8] The deal was negotiated and completed between Mr. Domingues and Mr. Alves on the part of the litigants which consisted of an Agreement of Purchase and Sale dated December 15, 2015 and a Lease of the same date to rent Units 9, 10 and 11 for one year, effective January 1, 2016.

[9] The Agreement of Purchase and Sale for Units 9, 10 and 11 was for \$1.5 million with an initial deposit of \$9,000 plus \$291,000 described in Clause 1(d) of the Agreement of Purchase and Sale as "monies advanced to the Vendor by the Purchase from separate/independent real estate transaction"(sic). The other noteworthy term was contained in Clause 2 that sets out the units were being purchased "As Is" and that the plaintiff "currently occupies such a Unit as a tenant and pays monthly rent to the Vendor as a landlord pursuant to a lease" (Exhibit "1", Case Lines page F86). The Lease document contained the plaintiff's agreement to rent the three units for a one year term

commencing on January 1, 2016 or earlier as may be agreed upon (Section 2.02) with zero “Base Rent” plus “Additional Rent” which was understood to be “Taxes Maintenance and Insurance” – (TMI) which was estimated at \$5.75 per square foot (Section 2.03). The word “Term” was included in the definitions (Section 1.01(xvii)). Overholding, or occupation of the premises after expiry of the lease was also considered at Section 11.11 with the tenancy becoming monthly “at a monthly rental and term **to be negotiated**” (bold in original).

[10] There was both oral and written evidence that before the Agreement of Purchase and Sale and Lease were entered into, the cost of completion of the work required to have Units 9 and 10 become separate units would be approximately \$125,000. This was the basis for zero Base Rent (see paragraph 25 of the affidavit of Ermidio Alves sworn December 22, 2023). Albertino Domingues alleged he spent more than \$365,040.41 (see paragraph 11 of the affidavit of Albertino Domingues sworn on February 22, 2024) to complete separation of the units. There was evidence that amount included upgrades from the basic work required to establish separate units.

[11] The Lease had five schedules attached, the fifth being “Schedule “E” – Credits for the Benefit of the Tenant/Purchaser” which provided for the plaintiff, as the tenant, to terminate the purchase of the units if the registration did not occur within six months. It described the sum of \$241,000 as “Prepaid Rent” and a “Security Deposit” of \$50,000 which would be returned.

[12] The conversion of 255B Rutherford Road South to a condominium building took much longer than the four to six months discussed. That is, the process was not completed, and the Agreement of Purchase and Sale did not close, until April 14, 2022.

[13] In February, 2017, Ermidio Alves asked Albertino Domingues to lend him \$400,000 with monthly interest paid at 8 percent per year. This occurred and became subject to a signed Promissory Note. The funds were to be repaid June 13, 2017. That did not occur. The Promissory Note was extended to September 13, 2017 which was confirmed in writing by a letter dated June 8, 2017 from Rutherford Road’s legal counsel, Murray Lipton (Exhibit “1”, Case Lines page F222). This letter does confirm Murray Lipton acting as “counsel for Rutherford Road Holdings Corp.”.

[14] The next key document is a letter dated June 13, 2017 (Exhibit “1”, Case Lines pages F224-226) apparently mailed and also sent by email from Ermidio Alves, as President of Coldwell Banker to Murray Lipton. It confirmed extension of the \$400,000 Promissory Note to September, 13, 2017 and ongoing interest payments. This communication then goes on to set out that, with the delay in registration of the industrial building as a condominium, what should be done with the \$300,000 of various funds provided by the plaintiff to the defendant at the outset. This has been previously described as a \$9,000 deposit towards the Agreement of Purchase and Sale, a \$50,000 security deposit with regard to the lease and the remaining \$241,000 referred to as “prepaid rent”. The letter dated June 13, 2017 sets out Ocean Sand’s intention to start paying interest on the \$291,000 at 8 percent per year starting July 1, 2017. It also proposes to begin charging Base Rent of \$8,000 per month (plus HST) or \$8.70 per square foot. This Base Rent was to be deducted from

the \$291,000 being held by Ocean Sands. Ermidio Alves admitted in cross-examination that no response was ever received by him to this letter.

[15] The letter purported to enclose the first three monthly cheques for interest on the declining balance of \$291,000. The evidence at trial was not in dispute that these cheques were never cashed or have since been located. The controlling mind of the plaintiff, being Albertino Domingues, denies being notified of this letter until late in 2021 when it was retrieved from Murray Lipton's file as part of this action. No communication confirming receipt of this letter was tendered in evidence.

[16] Albertino Domingues was adamant in his evidence that Murray Lipton had no authority to negotiate on his or the plaintiff's behalf. His authority was only to document what he himself had agreed upon with others directly.

[17] The letter of June 25, 2017 was followed by an email from Ermidio Alves dated August 1, 2017 to Murray Lipton, and copied to Ermidio Alves' lawyer (Heather Picken), an accounting person, (Bonnie Hatcher) and Albertino Domingues' son, Michael Domingues (who worked in the Domingues family business) updating the efforts and problems with getting municipal approvals to complete the conversion of the industrial building to a condominium. The email sets out a timeline for up to eight additional months given the ongoing difficulties with the proposal, described Albertino Domingues' apparent displeasure with the situation, and possibly terminating the deal.

[18] The credibility of the defendants and Ermidio Alves is further undermined by this party's bookkeeping records. This includes confirmation no rent invoice was sent to the plaintiff until October, 2021 (Exhibit "1", Case Lines page F233) by which time Ocean Sands had completely retired the \$291,000 (by July 1, 2020) and calculated a balance owing of \$141,421.14. In addition, a schedule of rental income for all the units at 255B Rutherford Road South (see Exhibit "EEE" to the affidavit of Ermidio Alves sworn December 22, 2023, Case Lines pages F865-872) has Units 9 to 11 paying \$8,000 per month from **July, 2016**. As Ermidio Alves repeated more than once in his cross-examination evidence that he and his accounting employees had "dropped the ball".

[19] The evidence of Ermidio Alves of \$8,000 per month (or \$8.70 per square foot) as the Base Rent amount being less than market prices was neither substantiated or challenged. There is evidence that the plaintiff was able to sublease Units 9, 10 and 11 from time to time at rents ranging between \$12.20 to \$20.34 per square foot for Base Rent (see Ermidio Alves' affidavit sworn December 22, 2023 at paragraphs 47 to 51). Further, the base rent for other units for 255B Rutherford Road South were paying in the range of \$8.12 to \$13 per square foot for Base Rent during the relevant time period (see affidavit of Ermidio Alves sworn December 22, 2023 at paragraph 134).

## **Analysis**

[20] It is clear there are documents or contracts negotiated between the parties (being Agreement of Purchase and Sale and the Lease) in which each side contemplated and committed to an agreement. The issue is whether the parties provided for what occurred, which was a much delayed completion the conversion of 255B Rutherford Road South as an industrial building into an 11 unit condominium with Rutherford Road's desire to purchase Units 9, 10 and 11. Further, what rent should be paid for occupancy while the process of converting the property was completed.

[21] The Lease clearly set out a contemplated rent of the three units for a one year term commencing January 1, 2016. A reduced rent was negotiated to offset the transfer from Ocean Sands to Rutherford Road of the cost of converting Units 9 and 10 into separate units.

[22] I find the possibility of the Lease needing to be extended was contemplated. The clause at Section 11.11-Overholding was not the usual commercial lease term of payment "at a monthly rental equal to 150 percent of the monthly installments of Basic Rent" (and as contained in other leases tendered at this trial, for example, Exhibit 1, tab 15, page 22, Case Lines page F194 and Exhibit 2, tab L, page 29, Case Lines page F624).

[23] Further, had that clause been part of the lease in question, the result would remain payment of zero Basic Rent ( $\$0 \times 150 \text{ percent} = \$0$ ).

[24] The leads to the determination of the issue whether any legal effect or consequences can be found from the June 13, 2017 letter proposing commencement of the Basic Rent at \$8,000 per month. I reject that submission for two reasons.

[25] The first reason is that while Murray Lipton had stated in the June 8, 2017 letter that he was acting as counsel for Rutherford Road Holdings Corp. he did not make it clear that he had the corporation's authority to negotiate (or in this situation apparently ignore) the proposal contained in the June 13, 2017 letter.

[26] The second reason is that the statements claiming the commencement of rent at \$8,000 per month conflicts with the term of the lease that overholding, which I find occurred here, was to be negotiated. The letter also fails to state a fixed term for the payment of rent at this rate. The letter fails to state or confirm some other discussion with or agreement by a representative of Rutherford Road (such as Albertino Domingues) to this significant change in the rent to be charged. The letter even fails to purport the amount is agreed upon in the absence of any response.

[27] I am reinforced in this conclusion by the three cheques identified as enclosed which the parties agree were never cashed and remain missing.

[28] Were this the end of the analysis, the claim for more or Basic Rent after July 1, 2017 would fail. However, I rely on the comments in the decision *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326 (at paragraphs 15-16) where the governing principles of contractual interpretation are reviewed subsequent to *Sattva Capital Corp. v. Crescent Moly Corp.*, 2014 SCC

53 that this Court’s mandate (as summarized in *Weyerhauser Co. v. Ontario (Attorney General)*, 2017 ONCA 1007 (at paragraph 65) is to:

- “ i) determine the intention of the parties in accordance with the language they have used in the written document, based upon the “cardinal presumption” that they have intended what they have said;
- ii) read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
- iii) read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and
- iv) read the text in a fashion that accords with the sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.”

[29] However, the second issue which emerges from the factual matrix is the unfairness which would result if Rutherford Road not required to begin paying some Basic Rent after the period of time contemplated by the parties to convert 255B Rutherford Road South into a condominium had passed. This leads to the area of the law known as occupation rent.

[30] Occupation rent is grounded in unjust enrichment, that is, the financial benefit Rutherford Road received after July, 2016 by occupying the premises paying only TMI Rent. This deprived Ocean Sands of possessing the property and collecting additional revenue. I accept the submission of Ocean Sands that this equitable remedy is available at law. This principle was explained in *Calmusky v. Calmusky* 2020, ONSC 1506 (at paragraphs 70 to 74). While more commonly applied in family law, I accept it was originally developed in the commercial context (*Korsch v. Hildebrandt et al.*, 2023 ONSC 2513 (at paragraph 22).

## **Conclusion**

[31] However, while I accept Ocean Sands’ entitlement to some occupation rent, there is also merit to the submissions of Rutherford Road that the award of the full 57.5 months between July 1, 2017 until the Agreement of Purchase and Sale closed April 12, 2022 would not properly take into account Ocean Sands various failures in notifying Rutherford Road of its intentions to advance its claim for basic rent. These failures (as detailed in paragraph 89 of Rutherford Road’s Closing Argument) are highlighted by the failure to issue invoices or rent due notices and particularly not confirming when it believed the loan it had obtained from Rutherford Road was fully repaid.

[32] As a result, I would reduce Ocean Sands entitlement to occupational rent to the value of 35 months at \$8,000 per month or \$280,000 plus HST of \$36,400 for a total of \$316,400.

[33] This also avoids the application of Section 1 of the *Statute of Frauds*, R.S.O. 1990, c. S.19 raised by Rutherford Road in which it acknowledged Section 3 of that statute provides a narrow exception for instances “not exceeding the term of three years”.

[34] Regarding the rate of \$8.70 per square foot or \$8,000 per month plus HST, the absence of expert evidence which established it as the fair market value for base rent is offset by the absence of any evidence challenging this rate as sought by Ocean Sands. I find it to be an appropriate rate. In this regard, I am also mindful of Rutherford Road having acknowledged collecting \$347,569.51 (inclusive of HST) in rent paid by sub-tenants between January 1, 2016 until April 14, 2022 (as noted in its written Closing Argument at paragraph 30).

[35] Further, any costs Rutherford incurred in separating the Units was the consideration for paying zero base rent between January 1, 2016 until July 1, 2017.

[36] This separates repayment of the Promissory Note of \$400,000 which appears to have been extended beyond September 13, 2017 and is included in paragraph 1(l) of the prayer for relief in the Statement of Claim of Rutherford Road. Ocean Sands has confirmed its willingness to continue payment of same at 8% per year subject to alternative terms as agreed upon between the parties. The parties are entitled to set-off amounts owed to each other. This would include the hold-back of \$291,000 which occurred on the closing of the Agreement of Purchase and Sale and held in trust by counsel for Rutherford Road.

[37] As a result, Ocean Sands is entitled to payment of occupation rent from July 1, 2017 until the Agreement of Purchase and Sale closed April 14, 2022 in the amount of \$316,400 inclusive of HST.

### Costs

[38] Rutherford Road submitted a Costs Outline for this matter claiming fees at partial indemnity rates of \$81,776.10 plus HST of \$10,630.89 and disbursements of \$3,550.96 for a total of \$95,957.95. This rises to \$122,644.15 if fees are at a substantial indemnity rate for a total of \$142,161.45 (inclusive of HST and disbursements).

[39] This compares to Ocean Sands’ draft Bill of Costs seeking (by my calculations) \$66,573.75 for fees at partial indemnity rates plus HST of \$8,654.59 and disbursements of \$2,565.77 for a total of \$77,794.11. This rises to \$99,860.62 at substantial indemnity rates plus HST of \$12,981.88 and the disbursements of \$2,565.77 for a total of \$115,408.27

[40] I urge the parties to agree on costs. In my view, there has been divided success. If they cannot, each party shall forward its written submissions to me, not to exceed five double spaced pages compliant with Rule 4.01 plus any required supporting documents (such as an Offer to Settle) being relied on. Such submissions are due on or before **November 1, 2024**. Each party

shall party shall have until **November 21, 2024** to submit responding submissions, if any, identically limited.

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Mr. Justice G. Dow

**Released: October 3, 2024**



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**BETWEEN:**

RUTHERFORD ROAD HOLDINGS CORP.  
Plaintiff

– and –

OCEAN SANDS DEVELOPMENTS LIMITED and  
COLDWELL BANKER REAL ESTATE  
MANAGEMENT LEADERS  
Defendants

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**REASONS FOR DECISION**

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**Mr. Justice G. Dow**

**Released: October 3, 2024**