IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF BATHURST

Between:

VIVA HOLDINGS INC., MARC FRENETTE and THE MARC FRENETTE FAMILY TRUST

Applicants/Plaintiffs and Defendant

-and-

724003 N.B. Inc.

Respondent

(1st action BC-21-2022)

And between:

VIVA HOLDINGS INC., MARC FRENETTE and THE MARC FRENETTE FAMILY TRUST

Applicants/Plaintiffs

-and-

724003 N.B. Inc.

Respondent/Defendant

(2nd action BC-103-2022)

BEFORE:	The Honourable Mr. Justice J. A. Réginald Léger
AT:	Bathurst, New Brunswick
DATE OF HEARING:	December 21st, 2023
DATE OF DECISION:	April 18th, 2024
APPEARANCES:	Mario J. Lanteigne for the Applicants/Plaintiffs
	Edwin G. Ehrhardt, K.C., for the Respondent.

[1] The Plaintiffs are the former shareholders of Bathurst Fine Cars Ltd who owned and operated the Honda car dealership in Bathurst, N.B. Through a Share Purchase Agreement (SPA) executed on June 1st, 2021, the Plaintiffs sold their shares to the Defendant, a company owned by Groupe Olivier with a head office in the province of Quebec.

[2] Pursuant to the SPA, the purchaser paid the amount of 3,688,079$ on the closing date, which was on June 8th, 2021. An amount of 150,000$ was deducted from the purchase price and held in escrow by an escrow agent, in this case Bingham Law. A further sum of 750,000$ would be payable to the vendors by an issuance of seven hundred and fifty thousand preferred shares of the Purchaser which would be redeemable over 10 equal biannual installments of 75,000$ each, with a 3% semi-annual dividend payable on the preferred shares.

[3] The SPA provided for post closing adjustments to be prepared by the firm of Raymond Chabot Grant Thornton. The draft was to be delivered to the vendors as soon as practicable but not later than 60 days after the effective date which was specified in the SPA as May 1st, 2021.

[4] The parties waited for the appointed accountants to complete the Closing Financial Statements. The purchaser finally provided the vendors with the draft closing financial statement on December 13th, 2021. The draft statement showed that the new adjusted price favoured the Defendant purchaser by the significant amount of 866,253$. According to the SPA, the vendors had 60 days to contest the contents of the Closing Financial Statement provided to them.

[5] The matter quickly proceeded to litigation as on February 8, 2022, the Plaintiffs filed an action seeking an order directing that the amount held in escrow be transferred forthwith to the Plaintiffs and a declaration that the Defendant had waived any right to a post closing price adjustment as a result of a breach of the SPA by the Defendant.

[6] A second action was filed in June 2021 when the Defendant failed to make the second installment provided in the SPA. In the second action, the Plaintiffs allege breaches of the SPA and claim the balance owing under the SPA. The Defendant denies any breaches of the SPA and claims a right of set-off, being the difference in the purchase price and the adjusted purchase price.

[7] The Defendant further denies that the Plaintiffs are entitled to the amount held in escrow and a declaration that it has waived any right to any post closing adjustments to the purchase price. The defendant purchaser alleges that the Plaintiffs in the circumstances of this case have failed to meet their contractual obligations of honest performance under the SPA and have acted in bad faith.

[8] It should be noted that, pursuant to a Court Order issued on June 5th, 2023, both actions are to be tried and heard simultaneously with the evidence in one proceeding to be the evidence in the other proceeding.

[9] On September 22, 2023, the Plaintiffs filed the present motion for Summary Judgment seeking an order that the amount held in escrow be released to the Plaintiffs immediately, as well as a declaration from this Court that the Defendant has waived any right to post closing adjustments under the SPA. In support of their claim, they allege that the Defendant has breached the provisions of the SPA, notably clause 5.1.1.

[10] In regards to the second action, the Plaintiffs claim the full amount still owing under the SPA with interest, again alleging that the Defendant has breached the provisions of the SPA, more particularly sections 3.3.3 and 3.4.1 and 3.4.2.

[11] In both cases, the Defendant denies being in breach of the SPA and alleges that the Plaintiffs failed in their obligation to honestly perform their obligations under the agreement as well as acting in bad faith towards the Defendant. The Defendant purchaser also alleges that the Plaintiffs breached several terms of the agreement.

The Defendant takes the position that the motion should be dismissed as a genuine issue requiring a trial is clearly established by the evidentiary record before the court.

[12] For their part, the Plaintiffs take the opposite that there is no genuine issue requiring a trial and that summary judgement should be granted.

BACKGROUND

[13] As previously mentioned, the Plaintiffs, through Bathurst Fine Cars Inc., owned and operated the Honda dealership known as Bathurst Honda. When the vendors decided to sell their respective shares in Bathurst Fine Cars Inc. in October 2019, they mandated Templeton Marsh Ltd. to identify a purchaser of the Honda dealership in Bathurst. Gordon Cameron worked as the broker for the transaction with the company interested in purchasing all the outstanding share capital in Bathurst Fine Cars Inc.

[14] On December 24, 2020, a Letter of Intent (LOI) was entered into by the parties being: 1) Bathurst Fine Cars Inc., 2) Marc Frenette, 3) 5105465 NB Inc (should have been 510706 NB Inc.), 4) Viva Fun Realty Inc. as sellers and 1) Olivier Automotive Group Inc. and 2) Olivier Real Estate Inc. as purchasers. The LOI summarized in general terms the intent to purchase by Groupe Olivier the outstanding shares in Bathurst Fine Cars Inc. The terms of the letter were subject to an SPA signed by the parties, including the usual representations and warranties. The LOI provided that due diligence was to be to the complete satisfaction of the purchaser as to many aspects of the Company including its financial accounting. The purchaser had 60 days to complete its due diligence with a guaranteed full access to all necessary information from the vendors in order to effect complete due diligence.

[15] The record indicates that the purchaser requested an extension for due diligence purposes on at least three occasions. There is no evidence that the purchaser advised the vendors of any dissatisfaction with their cooperation regarding their exercise of due diligence. Marc Frenette who provided the affidavits in support of the motion for summary judgement stated that the vendors cooperated fully with the purchaser.

[16] The Letter of Intent also referred to how the purchase price would be paid according to the respective interest between Marc Frenette 510796 NB Inc and Viva Fun Realty Inc. The LOI also provided a formula by which the adjustment of the purchase price would be calculated.

[17] The Letter of Intent more specifically provides the following:

> The price offered will be established based on an estimate of the net book value of the shareholders' equity excluding the Interest-bearing debts, advances due or receivable from the shareholders or affiliated companies or related to the shareholder and other assets or liabilities not required for the operation of the Company. The price will be adjusted according to the closing net book value based on the financial statements as prepared by the accounting experts of the Company at the date of closing.
> The price offered is also established according to the minimal aggregate fair market value of the Buildings, validated by a recent and independent appraisal, to the Purchaser's satisfaction, of three million seven hundred thousand dollars ($3,700,000).
> Any variation, increase or decrease, to the "balance sheet net book value" of the Company against the above-mentioned sum, if needed, will be adjusted dollar for dollar, increase or decrease, as the case may be, at the closing of the transaction as mentioned in point 1 above.

[18] It should be noted that Covid restrictions imposed by public authorities were in force during the period for due diligence. The LOI provided for extensions at the sole discretion of the Purchaser. As mentioned, at least three extensions were granted to the purchaser.

[19] The initial date for closing of the transaction was on April 30th, 2021. The deal was finalized with the execution on June 1st, 2021, of the SPA. During the preceding months, there were many exchanges between counsel for both parties, as well as between Marc Frenette and Jacques Olivier of Groupe Olivier.

[20] According to the SPA, the purchase price was $4,438,079 with the terms of payment as outlined in section 3.3 of the SPA. The section reads as follows:

> 3.3.1 At the Closing Date, the Purchaser will pay a sum of THREE MILLION SIX HUNDRED EIGHTY-EIGHT THOUSAND SEVENTY-NINE DOLLARS ($3,688,079) by wire transfer to the trust account of BINGHAM LAW, which will make payments to the Vendors' creditors that have security interests in the Assets (excluding any floor plan security which will be paid directly by the Purchaser's financial institution to the Vendors' financial institution at the Closing Date), if any, and to the Vendors' broker, Templeton Marsh, and will remit to the Vendors' lawyers, in trust, on the Closing Date, the remaining amounts less the Escrow Amount in accordance with paragraph 3.3.2 below;
> 3.3.2 ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000) (the "Escrow Amount") shall be deducted from the Purchase Price and held by BINGHAM LAW (the "Escrow Agent") in escrow and released in favour of the Parties according to their joint written instructions to the Escrow Agent following approval of the Closing Financial Statements and the Closing Net Book Value calculation by the Parties in accordance with paragraph 5.1 of this Agreement; and
> 3.3.3 The balance, a sum of SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000), will be payable by an issuance of SEVEN HUNDRED FIFTY THOUSAND preferred shares of the Purchaser (the "Preferred shares") which will be redeemable in ten (10) equal biannual installments of SEVENTY-FIVE THOUSAND DOLLARS ($75,000) each. A semi-annual dividend of THREE percent (3%) per annum will be payable on those preferred shares. The planned biannual installments described in this paragraph 3.3.3 are hereinafter referred to as the "Scheduled Repurchase Payments").

[21] The SPA also provided for a purchase price adjustment as follows:

> 4.1 If the Closing Net Book value is greater than FOUR MILLION FOUR HUNDRED THIRTY-EIGHT THOUSAND SEVENTY-NINE DOLLARS ($4,438,079), the Purchase Price

> will then be increased by a sum equal to such difference, dollar for dollar. In contrast, if the Closing Net Book Value is lesser than FOUR MILLION FOUR HUNDRED THIRTY-EIGHT THOUSAND SEVENTY-NINE DOLLARS ($4,438,079), the Purchase Price will be reduced by a sum equal to such difference, dollar for dollar.

[22] The Closing Financial Statements are further discussed in section 5 of the SPA.

> 5.1.1 The Purchaser hereby appoints the firm Raymond Chabot Grant Thornton, Chartered Professional Accountants (the "Purchaser's CPA"), to prepare, at the expense of the Corporation, which expense shall be limited to $8,000.00 plus applicable taxes and must be provided for in the Closing Financial Statements, a balance sheet and review engagement of the Corporation, dated the Effective Date, together with a detailed statement reflecting the calculation of the Closing Net Book Value (the "Closing Financial Statements"). Drafts thereof must be delivered to the Vendors as soon as practicable, but not later than sixty (60) days after the Effective Date. The Closing Financial Statements must be prepared in accordance with Corporate Accounting Standards, applied consistently from fiscal year to fiscal year and be accompanied by a review engagement report. The Vendors must allow the Purchaser and its representatives to be present during the inventory count and other procedures performed in the preparation of the Closing Financial Statements. The Purchaser and the Purchaser's CPA must provide the Vendors and their representatives with copies of all worksheets, review engagement files and other documents created or used in connection with the preparation of the Closing Financial Statements.
>
> 5.1.3 The Vendors will be entitled, within sixty (60) days after receipt of the draft of the Closing Financial Statements, to contest the contents thereof by giving written notice to that effect to the Purchaser. Should the Vendors fail to provide such notice within said time limit, the draft Closing Financial Statements will be deemed to have been approved by the Vendors and such draft will be deemed to constitute the Closing Financial Statements for the purpose of calculating the Net Book Value Adjustment.

[23] These sections of the SPA are critical to the issues raised in this motion, as it is this very section that the Plaintiffs rely on to ground their request for summary

judgement. They argue that the Defendant breached section 5.1.1 by not respecting the temporal requirement of sixty (60) days specified in section 5.1.1.

[24] It should also be noted that section 11.1 provides that time limits contained in the agreement are to be strictly applied.

[25] The evidentiary record reveals that as per the SPA, the Defendant had the responsibility to produce the Closing Financial Statements. The draft statement was only delivered on December 13, 2021, some five and a half months beyond the 60-day period mentioned in the SPA.

[26] The Closing Financial Statements of December 13, 2021, established the adjusted purchase price at $3,571,826 as opposed to the estimated purchase price in the SPA of $4,438,079, a difference of $866,253. The newly calculated amount of the purchase price was sent to Marc Frenette by email which email also requested his comments as provided for in the SPA. The Vendors had 60 days to contest the draft Closing Statements. Mr. Frenette responded by having his counsel send a letter to the purchaser on February 7, 2022, advising them that they were in breach of section 5.1.1 of the SPA and that he wanted the amount held in escrow to be transferred immediately.

[27] The evidence shows that on December 13, 2021, Counsel for Marc Frenette requested by letter that the first installment of $75,000 be remitted immediately, adding that the payment was due on December 1st, 2021. The Purchaser did make the first installment as required by the SPA.

[28] In response to the letter on behalf of the vendors, the Purchaser's solicitor Richard D'Amour sent an email to counsel for the vendors advising that the balance owing would not be paid to Viva Holding as requested but rather any amount still owing should be applied to compensate for the amounts due as a result of the adjusted sale price which had been delivered to Marc Frenette a few days earlier. Mr. D'Amour

in this email reminded counsel for the Vendors that they had 60 days to respond to the draft version of the adjusted purchase price for the shares.

[29] As stated earlier, the Vendors response came on February 7th, 2022, when counsel for the vendors advised the Purchaser's counsel by letter of their position. I reproduce portion of the letter which explains clearly the Vendors' position in this litigation.

> This letter shall serve to notify 724003 NB Inc (the "Purchaser") of the Vendors contestation of the drafts of the Closing Financial Statement delivered by email to the Vendors on December 13, 2021. The Vendors contestation results also from the Purchaser's breach of section 5.1.1 of the SPA.
>
> The SPA contemplates a post-Closing price adjustment and sets forth a temporal adjustment process for calculating and paying any adjustment out of the escrowed funds under sections 4 and 5 and which escrowed funds are to be distributed in accordance with section 3.3.2.
>
> Pursuant to section 5.1.1 of the SPA, the Purchaser has the mandatory and unconditional obligation to deliver drafts of the Closing Financial Statements "(…) not later than sixty (60) days after the Effective Date". This constitutes a rigid and strict temporal requirement to ensure, *inter alia*, that the parties to the SPA would be aware of their respective financial positions under the SPA shortly after closing.
>
> The SPA defines the "Effective Date" as being May 1st, 2021 at 00:01 A.M.
>
> The Purchaser delivered the drafts of the Closing Financial Statements by email to the Vendors on December 13, 2021, more than seven (7) months after the Effective Date.
>
> In the alternative, even if June 1st, 2021 was determined to be the Effective Date, the drafts of the Closing Financial Statements would still have been delivered more than six (6) months after the Effective Date.
>
> The Vendors hereby notify the Purchaser that it has failed to deliver the drafts of the Closing Financial Statements in accordance with the strict temporal adjustment process outlined in the SPA at section 5.1.1. which is sixty days (60) days from the Effective Date.
>
> Consequently, the temporal adjustment process outlined in section 5 of the SPA has been frustrated and the Vendors are now entitled to the Escrow Amount.

> The Vendors therefore ask that the Purchaser provides Bingham Law (the "Escrow Agent") with a joint written instructions to immediately release the Escrow Amount (150,000.00$) to the Vendors and that is also provides the Vendors with a written confirmation that is has waited its right to any negative post-Closing price adjustment set forth in the SPA and that as a result of this the final purchase price adjustment amount is ZERO DOLLARS (0$).

[30] The first action was filed on February 9, 2022, alleging a breach of section 5.1.1 of the SPA. When the Purchaser failed to remit the second installment on June 8, 2022, the Vendors filed the second action again alleging a breach of the SPA, more specifically sections 5.1.1 and 3.3.2. They allege that the Purchaser failed to make the payments as contemplated by the SPA.

[31] In both actions the Purchaser filed Statements of Defense and counterclaims. The Defendant Purchaser basically denies any breach of the SPA and claims a set-off of the outstanding amounts owed under clause 3.3.3 against the difference in the purchase price as established by the adjusted purchase price delivered December 13, 2021. In its Statement of Defense, the Defendant states that the Vendors failed to meet their obligations of honest performance under the SPA and failed in their duty to act in good faith in regards to certain aspects of the transaction.

[32] Richard Martineau provided an affidavit on behalf of the Defendant in opposition to the motion for Summary judgement. Mr. Martineau is the Chief Financial Officer of Groupe Olivier Automobile. In his affidavit, Mr. Martineau, explains the reasons behind the delay for the appointed accountants to complete the draft adjusted purchase price. Basically, Mr. Martineau blames the vendors for the Purchaser's inability to prepare the draft adjusted statements.

[33] Mr. Martineau, in his affidavit, also provides important information which serves to explain the significant difference between the adjusted price and the estimated price at the time of closing. The principal reason advanced by the Purchaser for the

difference is that the vendors stopped paying its suppliers at the end of April 2021, the month preceding the closing of the transaction.

[34] Marc Frenette, in response to Mr. Martineau's affidavit, acknowledges that he didn't pay the suppliers as mentioned by Mr. Martineau. Given its importance, I can do no better than reproduce parts of Mr. Martineau's affidavit on the issue:

> 37) The main discrepancy from the estimated Net Book Value in the SPA and the Final Closing Accounts is Accounts Payable and Accrued Expenses. As noted in Exhibit S, Marc Frenette was heavily involved with the operations of the Target Company up until closing. Accordingly, Marc Frenette knew, or ought to have known, the impact that his management decisions by delaying payment to suppliers were having on the Net Book Value and how large of a discrepancy he was creating between the expected Closing Accounts and the Final Accounts prepared by RCGT.
>
> 39) All discussions with regard to estimated net Book Value for closing purposes were done based on the March figures. Levesque first sent us the March pro forma figures established at the $1,600,000 Net Book Value on May 6th of 2021.
>
> 40) We agreed on the estimated Net Book Value of $1,600,000, and we were comfortable with a usual withholding amount of the Escrow agreement. The usual Escrow amount is 10% of the transaction. We usually work with 10% of the internal pro forma figures because it is usual to get adjustments at closing.
>
> 41) We had asked for a 10% withholding from the very beginning and Marc Frenette tried to limit the exposure of the adjustment because he knew that the Estimated Net Book Value was overestimated. While we were discussing the estimated Net Book Value, Marc Frenette was reviewing and working on the January 31st, 2021, year end financials with Grant Thornton. Marc Frenette was aware of the journal entries that would be necessary for the Year End financials and such Year End entries would have a negative impact on the estimated Pro Forma Net Book Value used to estimate the purchase price.
>
> 42) Before the official closing, we had received the April 2021 internal financial statements. We had asked multiple times to get a revised Estimated Pro Forma Net Book Value based on the April 2021 figures and the proposed reorganization from Grant Thornton. No one gave us the revised figures and Levesque finally said in an email on May 20th, 2021, that he was not instructed by Marc Frenette to perform a revised Estimate Net Book Value.

> 43) Marc Frenette was managing the company and he voluntarily stopped paying suppliers in late April. Marc Frenette knew, or ought to have known, exactly that the Net Book Value at closing would be much lower than the original estimated amount of $1,600,000.

[35] In his supplementary affidavit, Mr. Frenette explained as follows the stoppage in payment of the suppliers:

> 14. In response to paragraphs 37 and 43 in the affidavit of Michel Martineau, because the Purchaser was keeping May 2021 profits, the Vendors ceased paying Bathurst Fine Cars Inc. suppliers at the end of April 2021 so that the payables for April 2021 and May 2021 would be clearly separate for the accountants in order to avoid overlap.
> i. Attached and marked as Exhibit "D" is a true copy of emails dated May 27 and May 28 between Marc Frenette and Jacques Olivier Jr.
> 15. The Applicants/Plaintiffs repeat that they have acted in good faith and have honestly performed their duties and obligations under the SPA throughout the commercial transaction and collaborated well and beyond what was required of them.

[36] The Defendant states that the vendors, by their conduct, are in breach of the Representations and Warranties sections of the SPA, more specifically sections 6.1.22, 6.1.24, 6.1.26 and 6.1.27. These sections read as follows:

> 6.1.22 Financial Statements. The Financial Statements fairly present, in all material respects, the Assets, liabilities, shareholders' equity, revenues and expenses and financial position of the Corporation, including, without limitation, any liabilities for income taxes and other taxes owing or overdue. The Financial Statements are true and accurate and have been prepared in accordance with Corporate Accounting Standards and applied consistently over the past fiscal years.
>
> 6.1.24 Recording of operations. All purchases, sales and generally all material transactions of the Corporation have been duly recorded in accordance with Corporate Accounting Standards and consistently applied by the Corporation in previous fiscal years.
>
> 6.1.26 Debts. All of the Corporation's Debts have been provided for and are reflected in the Financial Statements or set out in Schedule

> 6.1.26. There exists no Debt for which the Corporation is or may become liable upon completion of the transactions contemplated herein, other than those referred to in the Financial Statements and Schedule 6.1.26, including accrued vacation time of the Corporation's employees as of the Closing Date and the Corporation's Workplace Health, Safety and Compensation Commission premiums for the period through the Closing Date.
>
> 6.1.27 Conduct of business. Since its incorporation, the Business has been conducted in the ordinary course of business and in compliance with Applicable Laws, and the Corporation has not received any notice that the Business or any of the Assets are not in compliance with Applicable Laws. In addition, the Corporation has not conducted any other operation since the date of its incorporation, except for those operations related to the business as described herein.

[37] It should also be mentioned that there is disagreement between the parties as to the circumstances which led to the draft adjusted price calculated by Alexandre Joly of Raymond Chabot Grant Thornton ultimately delivered on December 13, 2021.

[38] Marc Frenette asserts that at all times the Plaintiffs acted in good faith and honestly performed their duties and obligations under the SPA throughout the transaction. He adds that the Vendors went well beyond what was required of them. Mr. Frenette explained that any issues regarding the delays in producing the Financial Statements were not due to the Vendors but should be borne entirely by the Purchaser. He specified that Grant Thornton provided services as accountants for Bathurst Fine Cars until June 8, 2021, and from then on Patrick Levesque of Grant Thornton became the Purchaser's accountant.

[39] Mr. Martineau, on behalf of the Purchaser, explains why the transaction was delayed and why the closing only took place on June 8, 2021. Mr. Martineau asserts that from April 20th, 2021 onward, any delays were caused by Marc Frenette. According to Mr. Martineau, the Purchaser was prepared for a closing on May 1st, 2021.

[40] The evidence on the motion shows that the Purchaser provided the initial draft of the SPA on April 9th, 2021. Comments on the draft SPA were only received from the Vendors on April 26, 2021. The comments come the day after counsel for the Purchaser had requested comments on the SPA. According to the Purchaser, it seems that the delay for comments by the Vendors was longer than normal.

[41] The defendant Purchaser points to the fact that when the comments by the Vendors' lawyer finally came, they included several significant changes to the original draft including an escrow amount of $150,000 compared to the usual 10%, and that the Closing Financial Statements would be prepared by the Purchaser's CPA.

[42] In his affidavit, Mr. Martineau goes on to describe the various difficulties in obtaining crucial information from the Vendors including setting a closing date. As late as May 27th, 2021, counsel for the Vendors advised the Purchaser that Marc Frenette had not yet confirmed if June 1st 2021 was an acceptable date for closing. On May 28, 2021, Mr. Frenette emailed Mr. Olivier saying that the Vendors were ready to close as of May 21st, 2021, but that the date had been pushed to the end of May.

[43] In his email of May 28, 2021, Mr. Frenette seeks compensation for his work during the month of May as well as other expenses. The relevant portions of the email read as follows:

> - We were ready to close on 21 May 2021, but this date has been pushed to the end of May
> - I continued to work full-time at Bathurst Honda for the entire month of May 2021 and will be compensated with:
> My salary of $3039.61 bi-weekly for the entire month of May 21
> My expenses for the month of $1107.86
> - Olivier Group will receive the sales profit for the month of May 202 (sic)
> - Olivier Group will be responsible for Roy Nat interest charges of $260.15 per day from 2 May 2021 until closing date

> - Olivier Group will be responsible for the Roy Nat interest charges of $152.36 per day from 21 May 2021 until closing date
> - Olivier Group will be responsible for BDC interest charges of $231.35 per day from 21 of May 2021 until closing date.
> - Olivier Group will be responsible for BDC interest charges of 78.91 per day for 21 of May 2021 until closing date.
> Or other option we did not talk about last evening, since I work the whole month of May 2021/ I just keep the net Profit for the full month.

[44] In his affidavit, Mr. Martineau further explained the difficulties the Purchaser had prior to and after the closing of the transaction.

> 33) Marc Frenette and his advisors did not collaborate on this transaction and did not act in good faith for the Closing account mandate of RCGT. From January 31st, 2021, we were waiting for financials and journal entries that were not sent until June 25, 2021. Accordingly, RCGT could not have performed their mandate in a timely manner. Attached hereto as Exhibit "T" is a true copy of an email from Arseneau to Long dated June 25, 2021.
> 34) Later, on July 15, 2021, Levesque sent revised journal entries to Long, more than 75 days after the "Effective date" and more than 15 days after the 60-day period. A true copy of this email is attached hereto as Exhibit "U".
> 35) I am informed by RCGT, and do verily believe, that the documentation referred to in the preceding two paragraphs was required to perform their mandate and therefore the Plaintiffs' failure to produce this information delayed our ability to perform our contractual obligations.
> 38) I am informed by Joly and do verily believe that:
> c) RCGT started its review engagement work on July 13th. It did not get the information file from the auditor until September 12, 2021 (journal entries, scoresheet, copy of January 31, 2021 financial statements signed by seller). It did not have all the information it needed from the seller auditor until November 1, 2021.
> d) RCGT was unable to perform its mandate prior to December 2021 due to not being provided the required information until November 2021.

[45] The conflicting accounts as to who should bear responsibility of any alleged breaches of the SPA directly impact the issue of bad faith and the alleged breach of the duty of honest performance raised by the Defendant Purchaser in this motion.

[46] As can be seen, the Defendant takes issue with the Vendors' assertion that they collaborated completely and acted in good faith throughout the transaction. As support for their position, the Defendant points to the uncontested fact that the vendors failed to pay the suppliers, a decision made by Marc Frenette, which they argue he knew or ought to have known impacted the final closing price.

[47] For their part, the Vendors have clearly taken the view that the Purchaser has breached sections of the SPA for no valid reason, and as such they are entitled to the relief sought on the motion. Conversely, the Defendant Purchaser argues that the evidentiary record reveals a genuine issue requiring a trial and as such the motion should be dismissed.

ISSUES

Should the Court grant summary judgement in favor of the Plaintiffs or is there a genuine issue requiring a trial?

Summary Judgment:

[48] The cultural shift since our new rule on Summary Judgement (January 1st, 2017) and the decision of the Supreme Court of Canada in *Hryniak c. Mauldin*, 2014 SCC 7 (CanLII) is now well entrenched in New Brunswick. The courts are regularly asked to deal with motions for summary judgement. The rule provides for a broader evidentiary regime with the power, if appropriate to do so, to 1) weigh evidence, 2) evaluate credibility, 3) draw reasonable inferences from the evidence.

[49] Our Court of Appeal on several occasions has discussed the test set out under Rule 22. In *O'Toole v. Peterson*, 2018 NBCA 8, Chief Justice Drapeau, as he then was, wrote:

> The "no merit" test is nowhere to be found in our new Rule 22. The test for summary judgment is simply whether there is a genuine issue requiring a trial: Rule 22.04(1)(a) and *22 King Street Inc. et al.*

> *v. The Bank of Nova Scotia*, 2018 NBCA 16, at para. 15. As is well known, adjudication in civil litigation involves the application of the balance-of-probabilities standard. Since the moving party is the one making the allegation that there is no genuine issue requiring a trial, he or she bears the burden of persuading the court it has been established on a balance of probabilities. That is the extent of the moving party's evidential and persuasive burden. Both sides must "put their best foot forward" (*Cannon v. Lange*, at para. 23), the responding party having to "lead trump or risk losing": *1061590 Ontario Ltd. v. Ontario Jockey Club*, 1995 CanLII 1686 (ON CA), [1995] O.J. No. 132 (C.A.) (QL), at para. 35. As Justice Clendening astutely noted in *Gillis v. Law Society of New Brunswick et al.*, 2017 NBQB 212, [2017] N.B.J. No. 283 (QL), the process-liberalizing instructions provided by *Cannon v. Lange* "retain all of their relevance notwithstanding the legislative and jurisprudential changes" (para. 26).

[50] In *Russell et al. v. Northumberland Co-Operative Limited*, 2019 NBC 70, at paragraphs 21-23 Justice LeBlond wrote:

> 21. The Rule therefore provides a two-step process with specific reference to the central question: is there a genuine issue requiring a trial?
>
> 22. In step one, the judge must determine if the evidence put before him reveals a genuine issue requiring a trial. At this point, there is no need to resort to the fact-finding powers contained in Rules 22.04(2) and (3). Adjudication under step one may include cross-examination on any affidavit (Rule 39.03). Any such cross-examination does not trigger the mini trial prescribed by Rule 22.04(3). If, on the filed evidence alone, the judge can fairly and justly adjudicate the dispute, there will be no genuine issue requiring a trial and the judge **must** grant summary judgment. There is no discretion under the Rule to refuse to do so (see *22 King Street Inc. et al. v. The Bank of Nova Scotia*, 2018 NBCA 16, [2018] N.B.J. No. 42 (QL)). The motion judge in this case granted summary judgment on that basis and therefore did not need to proceed to step two.
>
> 23. A judge only proceeds to step two if the assessment of the filed evidence leads to the conclusion that there **may** be a genuine issue requiring a trial. In that case, the judge then needs to determine if that trial can be avoided by resorting to the fact-finding powers of Rules 22.04(2) and (3). The guiding principle is that it will always be in the interest of justice for the judge to make use of these fact-finding powers if, applying the principles of timeliness, affordability and proportionality, the judge believes a trial can be

> avoided and a fair and just result can be obtained. The discretion vested in the judge under this second step will provide the flexibility required to fashion the appropriate course to follow.

[51] It is clear from the jurisprudence in our province that to be successful, the moving party on a motion for summary judgement bears the onus of demonstrating to the motion's judge that there is no genuine issue requiring a trial. Also of critical importance is that each party must put their "best foot forward or risk losing". The motion's judge is entitled to assume that each party has in fact put their best foot forward. Finally, I reproduce the words of Karakatsanis J. at para. 49 in *Hryniak*:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

POSITION OF THE PARTIES

[52] The Plaintiffs in this case take the position that this matter can be determined by way of summary judgement. They argue that for the most part, the evidence is documentary in nature and the material facts required to determine the issues between the parties are not in dispute.

[53] They further contend that the evidence clearly establishes that the Defendant is in breach of the SPA and that summary judgement should be granted.

[54] The Defendant on the other hand takes the position that the evidentiary record reveals a genuine issue requiring a trial, and as such, the motion should be dismissed. The Defendant more specifically asserts that the issues regarding credibility, honest performance and bad faith constitute genuine issues requiring a trial.

ANALYSIS AND DECISION

FIRST ACTION BC-21-2022

[55] The first action filed in February 2022 is mainly focused with a claim for the amount held in escrow and a declaration that the Purchaser has breached its obligations under the SPA, more specifically sections 5.1.1 and 11.1. As a consequence of the breach, the Plaintiffs seek a declaration that the Purchaser has waived any right to any post-closing adjustment.

[56] The evidentiary record establishes that the Purchaser failed to deliver the draft adjusted purchase price within the 60-day timeframe provided for in section 5.1.1 of the SPA. The Vendors take the position that because the Purchaser has failed to comply with a significant term of the SPA, they are entitled to the amount held in escrow ($150,000) and that the only proper remedy that follows such a breach is that the Purchaser be deemed to have waived its right to any post closing adjustments. The Vendors emphasize that the SPA provides that timelines are to be strictly applied.

[57] In the present case, the post-closing adjusted amount is significant. The amount, as calculated by Raymond Chabot Grant Thornton, is $866,253.00. In support of their position, counsel for the Vendors refers this court to the case of *Think Research Corporation v. N & M Medical Enterprises*, 2023 ONSC 6910. In *Think Research*, the purchaser acquired a business where the SPA provided for purchase price post-closing adjustments. As in the present case, the SPA called for the purchaser to provide the post-closing adjustments within a 60-day period. The closing occurred on January 29, 2021, with the working capital calculation provided in October 2021, well beyond the 60-day period mentioned in the share purchase agreement. The court found that the Vendor had implicitly agreed in writing to accept the closing statements outside of the 60-day time period.

[58] Counsel for the Vendors rightfully points out that in the instant case, there is no evidence of an agreement in writing by the Vendors that the 60-day timeframe was waived. Rather, the evidence shows that the vendors were totally silent on the issue for several months. It should be noted that the issue of strict adherence to the 60-day period mentioned in section 5.1.1 was only first brought to the attention of the Purchaser a little less than two months after they were provided with the adjusted closing price which clearly showed a significant adjustment in favour of the Purchaser. Whether or not the conduct of the Vendors amounts to an implied waiver remains to be determined.

[59] Clearly the issue of waiver is important given the relief sought by the Vendors on the motion. The Defendant submits that the Vendors should not be allowed to rely on a strict interpretation of the contract when the Vendors themselves failed in the performance of their contractual duties. In my view, the unexplained silence for the rather long period awaiting the draft adjusted purchase price is an issue that requires clarification. In my view, it is quite appropriate to question whether the conduct of the Vendors during the period awaiting the production of the draft post closing adjusted price amounted to an implicit waiver of the 60-day timeframe provided in the SPA. I find this issue by itself is a genuine issue requiring a trial in the context of this litigation and motion before the Court.

[60] The Purchaser submits that the Vendors are in breach of their duty of honest performance by reacting as they did following the receipt of the draft Closing Financial Statements. The respondent on the motion takes the view that the Vendors failed to meet their obligation of honest performance by not using the prescribed resolution process in the SPA. The Purchaser also expressed concerns as to the Vendors' silence during the period of time required to produce the Closing Financial Statements. The Purchaser relies on material facts as support for its position that the Vendors are in breach of their duty of honest performance. As will be further discussed, the Defendant also relies on several portions of the evidentiary

record to support its position that the motion should be dismissed as the evidentiary record discloses genuine issues requiring a trial.

[61] The Defendant Purchaser takes the position that there is genuine issue requiring a trial in regards to whether or not the Vendors are in breach of their duty of honest performance or acted in bad faith in the performance of the contract. In *Bhasin v. Hrynew*, 2014 SCC 71, the Supreme Court discussed the duty of honest performance on the part of parties to an agreement. There is a general duty of honesty in contractual performance by the parties of a contract. This means that the parties must not lie or otherwise mislead each other about matters directly linked to the performance of the contract: see paragraph 73. Cromwell J. writing for the court, wrote at paragraph 80:

> Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. The duty is also clear and easy to apply. Moreover, one commentator points out that given the uncertainty that has prevailed in this area, cautious solicitors have long advised clients to take account of the requirements of good faith: W. Grover, "A Solicitor Looks at Good Faith in Commercial Transactions", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (1985), 93, at pp. 106-7. A rule of honest performance in my view will promote, not detract from, certainty in commercial dealings.

[62] Counsel for the Defendant contends that the evidentiary record supports their view that the Vendors have breached their duty of honest performance. The primary feature of the evidence relied upon by the Purchaser is the fact that the Vendors stopped paying the suppliers at the end of April 2021. This material fact is not in dispute. In fact, Marc Frenette explained in his supplementary affidavit that the Vendors stopped paying its suppliers at the end of April so that the payables would be clearly separate for the accountants in order to avoid overlap since the Purchaser was to keep the May 2021 profits. In the view of the Purchaser, this conduct constitutes a major variance and a material change from the normal course of

business. According to the Defendant, the Vendors' conduct is in breach of the Representations and Warranty sections contained in the SPA.

[63] The Defendant argues that the Vendors' conduct throughout the contract amounts to a breach of the Vendors' duty of honest performance as discussed in *Bhasin*. Mr. Martineau in his affidavit clearly states that Mr. Frenette did not act in good faith or honestly perform their contractual obligations under the SPA, and further failed to meet their obligations under clauses 6.1.22, 1.24, 6.1.26 and 6.1.27 of the SPA.

[64] For their part, the Vendors stated clearly that they honestly performed all of their obligations under the SPA and that there is no evidentiary basis for the Defendant's position. Counsel for the Vendors submits that there is no evidence of bad faith as defined in Bhasin, that is to say no evidence that the Vendors lied or otherwise knowingly misled the Purchaser about any matter related to the performance of the contract.

[65] In support of their position, the Vendors pointed to the fact that the Purchaser had full access to every necessary information through the process of due diligence. Counsel also noted that the record does not reveal any issues in relation to the due diligence process. The Vendors further argue that the Purchaser was aware that the suppliers were not being paid in the month prior to closing as they already had their own controller in place.

[66] Finally, the Vendors submit that there was never any obligation on their part to do anything during the period pending the production of the draft post-closing statement.

[67] From my assessment of the evidentiary record, I find that there is a genuine issue requiring a trial. More specifically, I find that there are genuine issues as to honest performances of the contract as well as bad faith. Whether or not the conduct of Marc Frenette on behalf of the Vendors amounted to a breach of the duty of honest

performance or bad faith is, in my view, a genuine issue requiring a trial. Both Mr. Frenette and Mr. Martineau make contradictory assertions as to honest performance of the contract. Mr. Frenette asserts that he honestly performed his obligations and acted in good faith throughout the contract, whereas Mr. Martineau maintains the opposite, that is that Mr. Frenette breached his duty of honest performance and acted in bad faith.

[68] The decision of Mr. Frenette to stop paying the suppliers clearly had a significant impact on the post-closing adjusted purchase price. The Vendors' explanation as to why he stopped paying the suppliers raises several questions. Furthermore, Mr. Frenette did not explain if he knew that the decision he took in regards to suppliers would have the significant impact that it did on the purchase price adjustment. Under the circumstances, it is also reasonable to query whether the decision by Mr. Frenette to stop paying the suppliers at a critical time was consistent with his representations in the SPA to the effect that the Vendors had operated the company in the normal course of business. This material fact is important as the Vendors clearly represented to the Purchaser in the SPA that the business had been conducted in the ordinary course of business. The Purchaser argues that the decision to stop paying the suppliers is clearly not in the ordinary course of business.

[69] In regards to the term "Ordinary course of business", the decision of *Fairstone Financial Holdings Inc. v. Duo Bank of Canada*, 2020 ONSC 7397 CanLII offers an interesting discussion of any interpretation of the ordinary course of business obligation in the context of a share purchase agreement. At paragraphs 182-184, the Court writes:

> [182] I glean the following principles from the foregoing summary of the case law. There is no single definition of an ordinary course obligation even in the context of a share purchase agreement like the one at hand here. The specific interpretation of an ordinary course obligation will depend on the circumstances of the case at hand. A proper analysis takes into account and balances all of the relevant circumstances some of which may include the following:
>
> 1. Does the conduct render the nature of the business different at closing than it was at the time of signing?

> 2. Does the conduct give rise to moral hazard concerns?
> 3. Was the conduct arm's length in nature?
> 4. Is the conduct part of the usual, habitual flow of the business or was it unusual?
> 5. If the conduct was unusual, was it ordinary in light of the circumstances the business was facing?
> 6. Were those circumstances systemic or specific to the company?
> 7. How does the conduct compare to standards in the industry?
> 8. What was the intent behind or reason for the conduct?
> 9. Was the conduct pursued in good faith for the purpose of continuing the business?
> 10. Does the conduct defeat the legitimate interests of a creditor or other interested party?
> 11. Would the conduct surprise a reasonable businessperson?
> 12. What was the magnitude and duration of the conduct? Does it have a long-term impact?
> 13. Are there equities that should weigh in favour of the purchaser?
>
> [183] Not all of these factors will be relevant in any particular case. In some cases certain factors will assume greater importance than in others.
>
> [184] In considering these factors courts should be mindful of an ever present underlying tension. On the one hand, courts must guard vigilantly against moral hazard and opportunistic behaviour by sellers. At the same time, they must be mindful of similar opportunism on the part of purchasers. Ordinary course covenants are generally not intended to protect purchasers against the risk of market timing unless they contain specific language to that effect.

[70] As discussed in *Fairstone*, any interpretation of the ordinary course of business representation in any SPA depends on many circumstances. In light of the particular circumstances of this case, the interpretation to be given to the ordinary course of business representations made by the Vendors in the SPA, in my view, requires a trial.

[71] Furthermore, the issues of honest performance and bad faith in this case are of utmost importance, as the caselaw provides that the party relying on a strict time of the essence clause cannot do so if determined to have acted in bad faith. See *Deangelis v. Weldan Properties Inc.*, 2017 ONSC 4155.

[72] I wish to add that insisting on strict compliance of a term in an agreement such as the 60-day clause does not by itself amount to bad faith. See *Deangelis v. Weldan Properties Inc.*at paragraphs 41 and 42.

> [41] It would be tempting to let principles of fairness and equity direct a finding that a three day delay in the closing in the four year history of the Agreement, is a minor breach resulting in a financial windfall to the builder and, therefore, the Agreement should be upheld.
> [42] However, in my view, it would be wrong in law to find that insisting on compliance with a term of the agreement, agreed to by both parties with the assistance of counsel, amounts to bad faith depriving a party of the ability to strictly enforce an agreement where time is of the essence. Such a determination would mean that no party could insist on strict compliance of the term of an agreement because to do so would or might amount to bad faith. This would throw the law of contract into chaos by creating uncertainty in the enforcement of contracts.

[73] It should also be noted that the Defendant purchaser does not restrict its position on the sole issue of the Vendors' decision to stop paying the suppliers from late April onward. Amongst others, the Defendant has concerns about Marc Frenette's response when asked about any material changes since the March 31st, 2021, Financial Statements. Clearly the parties assert different views as to their conduct during the course of the transaction. The defendant also submits that there are serious credibility issues requiring a trial. I reproduce a portion of their brief:

> The Plaintiffs present a narrative that they have performed their contractual duties in good faith and are simply seeking to enforce their contractual rights. The Defendant, asserts that there has not always been strict compliance with the SPA on either side, that they were unable to begin work on Closing Financial Statements until they had everything they needed from the Plaintiffs, and that through a series of modifications to the SPA and decisions made by Frenette both the financial reality of the Target Company was obscured and the escrow amounts were reduced – limiting the Defendant's ability to adjust post-closing. The Defendant also says that Frenette through his deliberate actions, in particular, not paying supplies in the usual course, not only breached the agreement, but knowingly increased

> the value of the Target Company, and is now seeking to benefit from his "dishonest" performance.

[74] In summary, I am not able to confidently make a determination on the alleged breaches as framed by both parties in this case. The answer to the issues raised by the evidentiary record can better and more justly be answered by a trial. Stated otherwise, the evidentiary record, together with the applicable legal principles, do not justify the relief sought by the moving party on the motion. Finally, I am not convinced that the issues raised by the Defendant in this motion is a sham.

[75] I am also not convinced that resorting to the fact-finding powers under Rule 22.04(2) and (3) would be beneficial in avoiding a trial of the issues. It is important to bear in mind that the goal must always be to obtain a fair and just result.

[76] I conclude that there are genuine issues requiring a trial as to the first action and consequently the motion for summary judgement as it relates to action BC-21-2022 is dismissed.

SECOND ACTION BC-103-2022

[77] As previously mentioned, there is a second action filed by the Plaintiffs in this matter. On the second action filed in June 2022, the Plaintiffs allege a breach of the SPA, more specifically sections 3.3.3 and 3.4.1.

[78] Recall that under the SPA the Purchaser was to make a second payment of $75,000 plus 3% interest on June 8, 2022. When the Purchaser failed to make the required payment under the SPA, an action was filed. The Vendors argue that they have honestly performed all their contractual duties under the SPA and acted in good faith throughout the commercial transaction. The Purchaser takes the view that the defence of set-off is available in the circumstances that have already been discussed in detail in these reasons. Counsel for the Plaintiffs submits that in the absence of a final post-closing purchase price adjustment, no sum has been determined payable

under the SPA, and consequently there is no set-off defence possible. Clearly the issue relating to the waiver of the adjusted purchase price is very much in issue in the second action as well.

[79] The SPA provided for the Vendors to respond to the draft closing financial statements within 60-days.

[80] The Vendors responded with a letter and the first action in February 2022. The Vendors chose to respond in a manner different than the one provided in section 5.1. 3 of the SPA.

[81] The issue of bad faith and breach of the duty of honest performance is still very much relevant in the second action. In my view, the findings made in the first action are applicable to the second action. In other words, I am satisfied that there is a genuine issue requiring a trial. Clearly the findings on the issues that require a trial in the first action will have a definite impact on the issues raised in the second trial in regards to the amount still owing by the Purchaser under the SPA.

[82] For those reasons, the motion for summary judgement is also dismissed in the second action. As in the first action, the fact-finding powers would not be helpful in avoiding a trial.

[83] The Respondents on the motion are entitled to cost which I fix at $4,000.^{00}$ payable forthwith.

Dated at Bathurst, New Brunswick, this 18th day of April 2024.

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J. A. Réginald Léger

Judge, Court of King's Bench of New Brunswick