SUPREME COURT OF NOVA SCOTIA

Citation: *Hazouri v. Beacon Hill Development Ltd.*, 2021 NSSC 340

Date: 20211221
Docket: Hfx No. 508650
Registry: Halifax

Between:

Rita Hazouri

Applicant

v.

Beacon Hill Development Ltd.

Respondent

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	November 15, 2021, in Halifax, Nova Scotia
Counsel:	Laura Neilan, for the Applicant Matthew Gough, for the Respondent

By the Court:

[1] The Applicant, Rita Hazouri, seeks an order declaring that the Agreement of Purchase and Sale ("APS") signed between herself and the Respondent, Beacon Hill Development Limited dated March 11, 2020 is *void ab initio* or, alternatively, that it was breached by the Respondent, and she is therefore entitled to repudiate it as a consequence. She has referred, specifically, to s. 4 of the *Vendors and Purchasers Act*, R.S.N.S. 1989, c. 487, which says:

> A vendor or purchaser of any interest in land or his representative may, at any time and from time to time, apply in a summary way to a judge or local judge of the Trial Division of the Supreme Court in respect of any requisition or objection or any claim for compensation, or any other question arising out of or connected with the contract and the judge or local judge may make such order upon the application as appears just, and refer any question to a referee or other officer for inquiry and report.

Background

[2] Both Ms. Hazouri and the person with whom she dealt on behalf of the Respondent, Edgard Hoyeck, are first cousins. They are originally from Lebanon, the Applicant having moved to Canada in 1994, and having moved from Toronto to Halifax in 2005.

[3] On May 3, 2017, the Applicant purchased an undeveloped lot in East Chezzetcook bearing a property identification description (PID) number 40240665 (hereinafter referred to as "the property"). She did so in reliance upon the advice of her cousin, Mr. Hoyeck, and the plan was that he would build a house on the property, she would sell it, and reimburse him the cost of building the house, including materials. She intended it as a short-term investment.

[4] After she purchased the property, the cousins could not bring the plan to fruition. They could not agree on the collateral details with respect to erecting the house. Ms. Hazouri, who lives in a condo with her young son, therefore decided to sell the property and use the proceeds (in concert with those yielded by the sale of her condo) to purchase a house with a yard, primarily for the benefit of her son.

[5] She initially retained the services of local real estate agent, Jackie Chahine, and listed the property (on August 23, 2018) for $49,900.00. The initial listing expired on January 1, 2019, and the property was relisted again on December 3,

2019, for the same price. Although she came close on one or two occasions, the Applicant was unable to sell the property before entering into the APS with the Respondent.

[6] In early 2020, Mr. Hoyeck approached the Applicant and said he would purchase the property. He offered to meet her at Ms. Chahine's office and they did so on March 11, 2020. Mr. Hoyeck brought with him an Agreement already prepared, albeit one drawn up on a standard Nova Scotia Real Estate Commission Agreement of Purchase and Sale form. The form had a typographical error on it, and Mr. Hoyeck asked Ms. Chahine to retype a corrected document at her office. She did so, although she was not acting on behalf of either party in furtherance of this transaction. The APS was signed on that date.

[7] In the APS, the buyer was indicated to be the Respondent, "Beacon Hill Development Limited and or Assignee". The Applicant had previously understood she would be selling to Mr. Hoyeck personally. They had earlier agreed (verbally) that she would sell it to him for $40,000.00, which was below list price, because she considered him family. Her evidence on this point, which I accepted, was that she did not wish (at the time) to sell the property for that price to an unknown third-party.

[8] Mr. Hoyeck told her, on March 11, 2020, that the corporate Respondent was his company and that he "owned it". Afterward, she learned that his role was that of an agent facilitating the purchase on the Respondent's behalf. Much later (in August 2021) after Ms. Hazouri had retained counsel in relation to this matter, further ostensible clarification was provided by the Respondent as follows:

> August 17, 2021
>
> Pressé Mason
> 1254 Bedford Highway
> Bedford, Nova Scotia B4A 1C6
> Per: Laura H. Neilan
>
> Dear Ms. Neilan
>
> Re: Edgard Hoyeck - Beacon Hill Development Ltd. Signing Authority

> With respect to your request for confirmation that Mr. Edgard Hoyeck has signing authority to bind Beacon Hill Development Ltd., I confirm this to be true and that Mr. Hoyeck has permission and capacity to conduct business on behalf of, and bind, Beacon Hill Development Ltd.
>
> Yours truly,
>
> Joseph Msaddi
>
> Director & Secretary of
>
> Beacon Hill Development Ltd.

[9] To return to the APS itself, it called for a one dollar deposit, and specified a purchase price of $40,000.00. Moreover, in paragraph 2.1 we find:

> This agreement shall be completed on or before the 13th day of April 2020 (the closing date). Upon completion, vacant possession of the property shall be given to the buyer unless otherwise provided as follows:
>
> > Closing date may be amended to two weeks after subdivision approval is granted.

[10] Para. 7 of the APS stated:

> Buyer, at the expense of the buyer, to prepare a tentative subdivision approval plan and submitted [sic] by the owner to HRM (all costs associated will be paid for by the buyer).

[11] Although she did sign the APS, Ms. Hazouri did not check any of the boxes in section 14 to specifically indicate that she had accepted Mr. Hoyeck's offer to purchase the property.

[12] That is not all that she was asked to sign on March 11, 2020. Mr. Hoyeck also prepared a handwritten "Confidentiality Agreement" of the same date. This is what it said:

> This agreement drawn on 11th day of March 2020 with respect to lot X East Chezzetcook of Nova Scotia PID 40240665, in the presence of Jackie Chahine (witness) and Rita Hazouri owner of said land, Edgard Hoyeck, (purchaser).
>
> Any information related to lot X, discussed from March 11 onward, to remain strictly confidential and no discussion with other parties will be permitted.

[13] The Applicant said, in her affidavit (para.16), that she was advised by Mr. Hoyeck that the Confidentiality Agreement required that she not discuss the APS with anyone, not even a lawyer, otherwise she could be sued. Ms. Chahine's affidavit evidence (para. 9) was to the same effect. Mr. Hoyeck did not contradict this in his affidavit of October 26, 2021, nor were these allegations challenged by the Respondent on cross-examination. I accept the evidence of Ms. Hazouri and Ms. Chahine that this is what was said to the Applicant by Mr. Hoyeck, the Respondent's agent.

[14] Very proximate to the execution of the APS was the imposition of Provincial restrictions due to the global COVID-19 pandemic. The Applicant, therefore, felt that it would be reasonable to expect that it might take a little longer than usual to obtain subdivision approval than otherwise.

[15] Although prepared for the possibility of some delay, the Applicant began to be concerned after several months had passed and she was not made aware of any steps having been taken to secure the necessary subdivision approval. As the property owner, she was provided with letters from Halifax Regional Municipality dated April 22, 2020 and July 8, 2020. There had been some (minimal) delay in her receipt of these letters, because they were initially sent to the address with which Halifax Regional Municipality had been provided for her, which was that of her parents.

[16] The July 8, 2020 letter from Halifax Regional Municipality concluded with the following paragraphs:

> It appears, from this review, that the proposed subdivision meets the requirements of the applicable land use bylaw and the Regional Subdivision Bylaw. If you choose to proceed to the final subdivision application stages outlined under sections 105 through 121 ... Please ensure that you provide a copy of this letter and the accompanying correspondence to your survey or and/or engineering design consultant to assist them in the preparation of your final subdivision application submission.
>
> Notwithstanding the recommendations contained in this letter, the requirements are future subdivision approval may change depending on the regulations in effect when an application is submitted. To determine the current requirements for approval, please contact this office prior preparing and submitting an application for subdivision approval.

[17] Prompted by this correspondence, on July 27, 2020, the Applicant contacted Halifax Regional Municipality and it was confirmed that, although preapproval had

been granted, no application for final approval had been made. Very little happened to change that picture for over a year. That said, the ensuing year was not uneventful.

[18] For example, in April 2021, the Applicant contacted Halifax Regional Municipality once again and learned that there still had been no activity on the file in furtherance of final subdivision approval since her previous inquiry. In approximately May 2021, the Applicant was approached by a third-party who inquired about the property and was willing to purchase it for $70,000.00. She asked him to give her a month to get back to him, and spoke to Mr. Hoyeck, told him about the offer, showed him the contact information for the person who had inquired, emphasized that this transaction had already taken too long, and that if he was going to purchase the property, they needed to close the transaction quickly, since she was missing out on this and other opportunities. Mr. Hoyeck received this information, and responded shortly thereafter with words to the effect that he had contacted the prospective purchaser and told him that the property was his (Mr. Hoyeck's), that he was going to purchase it, and to "stay away".

[19] The Applicant expressed her frustration to Mr. Hoyeck. She was concerned that he was taking too long, and she was not only missing opportunities to sell her land, but also on opportunities to purchase a house, since she could not do so without the proceeds of sale of the property. Moreover, she felt that the cost of purchasing a home was skyrocketing during the COVID-19 pandemic.

[20] Other prospective purchasers had contacted Ms. Chahine (she estimated about four or five in total after March 2020). She too spoke with Mr. Hoyeck, in June 2021, to inquire about the delay. Her evidence was that the latter advised her that he would not "let Ms. Hazouri out of the Agreement of Purchase and Sale, and if she (Ms. Hazouri) tried to sell the land he would put a lien on her condo". He went on to add, during the conversation, that by not closing the transaction he was actually doing her a favour, because she would "spend the proceeds of the sale recklessly". Again, Mr. Hoyeck did not deny, in his affidavit, that he said this, nor did the Respondent’s counsel pursue the topic in cross-examination.

[21] At one point, Ms. Hazouri offered to pay Mr. Hoyeck $11,000.00 (which he had earlier advised her he had sunk into the property in furtherance of the subdivision approval process) to release her from the APS. Her evidence was that he was not prepared to accept this either, because he wanted yet more money: he told her that he wanted to be compensated also for the time he spent preparing for subdivision

approval. When later asked by counsel for the Applicant to provide receipts or other proof that he had actually incurred this (or any) expense, nothing was forthcoming.

[22] That said, Mr. Hoyeck did, on June 22, 2021, send an email to Blair MacKinnon, the Applicant's (then) legal counsel, in which he claimed to have been talking to the septic engineers two days previous. He also said that the paperwork (for the subdivision approval) was on the senior engineer's desk, waiting for his review. He went on to say that what he actually had spent on the property was $14,000.00:

> I never wanted anything to do with Rita nor her lot. She tried selling it for three years with no success. She literally begged me to buy it for a long time and I agreed on the conditions listed in the agreement. Once we signed the agreement plans were drafted, surveyors did the subdivision plans, applications were put through to the Miss Pali [sic] as well as province and engineers were hired to do work. Over $14,000 were spent with Rita's consent yet she is trying to sell the lot from under me.

[23] As the Applicant states in her affidavit of October 18, 2021 (para. 27):

> Until June 2021, I did not seek legal advice because I was afraid Mr. Hoyeck will sue me, due to the Confidentiality Agreement I had signed. I also do not want to put a lien on my house.

[24] In late July 2021, the Applicant retained her current counsel, who promptly wrote to Mr. Hoyeck in an effort to break the impasse. She also requested particulars of the $14,000.00 allegedly spent by him to obtain subdivision approval thus far.

[25] The Respondent retained counsel, who then advised of the Respondent's current position, which is that they are willing to close the deal once the building permit (as opposed to the contractually stipulated subdivision approval) had been obtained from Halifax Regional Municipality. In fact, application for the building permit had only been made by Mr. Hoyeck (on the Respondent's behalf) on August 5, 2021. In Court, the Respondent, through Mr. Hoyeck, insisted on its rights under the contract, and although the subdivision approval process is still not complete, claimed that the Respondent was willing to (now) consummate the deal when the building permit was obtained, because that (they claimed) would be faster.

[26] The Applicant, given that the present market for the property will enable her (she feels) to sell the Property for a higher price, and given the earlier opportunities that she has lost to sell it, as well as the fact that she will likely now have to pay

more to purchase a home, no longer wishes to sell to either Mr. Hoyeck or Beacon Hill Development Limited. As she states in her affidavit (para. 38):

> I deeply regret the situation and the fact that I had to take court action against my cousin. Mr. Hoyeck has been a source of support for me since moving to Halifax and I did want him to have priority purchasing the property from me. I feel that I have no choice but to bring this court application so that I can finally sell the property on which I never intended to live, so that I can buy a house to live in with my young son.

Issues

[27] The issues resolve themselves into the following:

A. *Credibility*

B. *Was a valid and enforceable Agreement of Purchase and Sale entered into between the parties with respect to the property, or is the contract void ab initio?*

C. *If there was a valid contract, has it been breached, and is the Applicant entitled to treat her obligations pursuant to it as an end, as a consequence?*

Analysis

A. *Credibility*

[28] To a greater or lesser degree, credibility is often an issue with which a trier of fact must contend. Rarely, however, will that task be more easily resolved than in this case.

[29] Ms. Hazouri presented as an eminently credible witness. Given the constraints under which she felt that she was operating due to the Confidentiality Agreement prepared by Mr. Hoyeck, the steps that she took to attempt to resolve this matter, whether by contacting Halifax Regional Municipality, or her cousin himself, and ultimately counsel, were logical and well explained by her. Her object was, at all times, to sell a property (which she had only purchased, in any event, after being encouraged by Mr. Hoyeck to do so) so that she would have enough funds (in addition to those obtained from the sale of her condominium) to buy a house with a backyard in which her son could play.

[30] Mr. Hoyeck testified that he knew at all times that the Applicant was interested in selling the property as soon as possible when she signed the APS on March 11, 2020. Through him, the Respondent is deemed to know it too.

[31] On cross-examination, Mr. Hoyek was questioned as to the steps that he took between June 2020 (by which date we know that the preliminary subdivision approval had been obtained) and August 2021, by which time the Respondent, through its counsel, was offering to close when the building permit was issued (instead, of the actual subdivision approval which was the condition precedent noted in the APS). He explained the delay by vaguely referring to the vicissitudes of COVID-19, and other obstacles imposed by one or two engineers who each (he claimed) had resigned several months after being retained.

[32] He produced not one scintilla of evidence documenting these alleged efforts to obtain subdivision approval, either on his part or by the Respondent. At one point he purported to consult his cell phone (while testifying) and claimed that he could "show" some documentary evidence to counsel for the Applicant, while in the middle of his cross-examination. At another point, when asked why neither he or the Respondent had produced this documentation in response to letters the Applicant's counsel had sent to the Respondent's counsel, he looked at the Beacon Hill's counsel, and said words to the effect of "isn't that what I sent to you yesterday?". On another occasion he purported to "remind" counsel for the Applicant that he himself was not the Respondent, Beacon Hill Development Limited, and she should direct her questions about disclosure to that entity. This despite the fact that counsel for Beacon Hill Development Limited had been the recipient of the Applicant's prior inquiries, that their counsel was present with him in Court, and that he himself had been put forward as the only witness on behalf of the corporate Respondent.

[33] Mr. Hoyeck was argumentative and evasive. Even simple questions rarely elicited anything less than a soliloquy which, despite the length of what he said, and despite being asked by the Court several times to answer the questions that were being put to him, often did not address the proper topic.

[34] By way of another example, in his affidavit of October 26, 2021. Mr. Hoyek states (at paras.10 - 11):

> 10. During this period [the months following the execution of the Agreement of Purchase and Sale] I contacted the Municipality to acquire the status of the subdivision approval and was informed, do verily believe, the Municipality had forwarded correspondence to the Applicant related to the subdivision application

> months prior back, as outlined above, it is my belief in understanding the applicant misplaced or lost those documents as they had not been provided to me.
>
> 11. Despite the delays caused by the applicant in the initial subdivision application process, preapproval for the subdivision was granted in or about July 2020.
>
> [Emphasis added]

[35] The only correspondence which the evidence established had been actually sent by Halifax Regional Municipality to the Applicant in relation to the subdivision approval process consisted of letters dated April 22, 2020, and July 8, 2020 . The former was attached as Exhibit “A” to Ms. Hazouri's amended rebuttal affidavit dated November 8, 2021. Also attached was a copy of her email to Mr. Hoyeck dated May 6, 2020, with which she sent the April 22, 2020 letter to him. Also attached was Mr. Hoyeck's response to that letter:

> That's fine, it won't change anything. Now that we have DOT's approval HRM should have no issues approving the subdivision. I left a call to Ruth [person at HRM] yesterday and waiting on a call back from her to see what she wants us to do next.

[36] As for the July 8, 2020 correspondence from Halifax Regional Municipality, Mr. Hoyeck was shown the Applicant's email to him of July 20, 2020:

> Hi cousin
>
> Hope you are well.
>
> I got this mail from the city.

[37] Upon being shown these emails, Mr. Hoyeck (only then) acknowledged that he actually did receive both of the letters from the Applicant, and moreover that he was unaware whether there were any others that had ever been sent to the Applicant by Halifax Regional Municipality. He was then pressed on what he meant, then, by his indication in para. 10 of his affidavit, where he said "...it is my belief and understanding the applicant misplaced or lost those documents as they had not been provided to me." He responded with words to the effect of "how do I know there weren't others that she did lose or misplace?"

[38] The above examples are not intended to be nearly exhaustive. It will be sufficient to say at this juncture that whenever Mr. Hoyeck's evidence differed from that of Ms. Hazouri or that of Ms. Chahine, I much preferred the evidence of the two latter witnesses.

B. Was a valid and enforceable Agreement of Purchase and Sale entered into between the parties with respect to the property, or is the contract void ab initio?

(i) The closing date

[39] The Applicant's first argument relates to the document itself. Clause 2.1 contemplates a closing date of April 13, 2020, and adds that "closing date may be amended to 2 weeks after subdivision approval is granted".

[40] Paragraph 7 provides that:

> Buyer, at the expense of the buyer, to prepare a tentative subdivision plan and submitted [sic] by the owner to HRM (all costs associated will be paid for by the buyer).

[41] The APS went on to provide for review by the lawyers for the respective parties and would be deemed acceptable to the parties unless either party was notified before March 30, 2021. However, the collateral "Confidentiality Agreement" was explained by Mr. Hoyeck to mean that the Applicant could not discuss the APS with anyone, not even a lawyer, so she did not obtain any legal advice at the time.

[42] The document also contains the standard Nova Scotia Real Estate Association clause 11.5:

> No amendment to the terms of this Agreement shall be ineffective unless it is in writing and signed by the parties.

[43] Counsel for Ms. Hazouri points out that clause 2.1 provides that the closing date may be "amended" to two weeks after the grant of subdivision approval, that clause 11.5 says that any amendment must be in writing, and that April 13, 2020 came and went without any such written amendment to extend the closing date. Because of that, in part, we are left with a contract that does not specify a closing date. She argues that this renders the APS void for uncertainty.

[44] With respect, this argument overlooks the fact that, although, the word "amend" is used in 2.1, the APS does not require a further written amendment to make its intent clear. On its face, the APS contemplates the existence of subdivision approval prior to the closing. With April 30, 2020 having passed, the closing date

would revert to the alternative, which is to say, within two weeks of subdivision approval having been granted.

[45] As Cromwell, J.A. (as he then was) pointed out in *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd.*, (2000) NSCA 95:

> … To paraphrase Lord Wright, an agreement is unenforceable because of uncertainty only in those infrequent cases in which the words used by the parties, considered broadly and untechnically and with due regard to all the just implications, do not evince any definite meaning on which the court can safely act: see *G. Scammell and Nephew, Ltd. v. Ouston (H.C. and J.G.)*, [1941] A.C. 251 (H. L.(E.)) at 268. It is important not to equate difficulties of interpretation with uncertainty in law.

[46] In this case, the interpretation is more pedestrian. The closing date may be easily ascertained by reference to an anticipated event (subdivision approval). The Applicant herself acknowledges that she expected some delay due to the Covid-19 lockdown that occurred shortly after the APS was signed. This argument is without merit.

(ii) The Statute of Frauds

[47] This statute has for centuries occupied a prominent place in British land conveyancing lore. It has equivalents in most Commonwealth countries.

[48] In Nova Scotia, its present incarnation, the *Statute of Frauds*, R.S.N.S. 1989, c. 442 is largely unchanged (in its essential aspects) from its hoary British ancestor. Section 4 says:

> No interest in land shall be assigned, granted or surrendered except by deed or note in writing signed by the party assigning, granting or surrendering the same, or by his agent thereunto authorized by writing, or by act and operation of law.

[49] The Applicant's argument, in sum, is that the box in the APS signifying that Ms. Hazouri was accepting the Respondent's offer was not checked off by her, even though she signed the APS. She argues that without the a check mark in the box indicating the acceptance of the offer, there is no agreement <u>in writing</u> to consummate the deal.

[50] The Applicant nonetheless acknowledges the significant body of case law which deals with the equitable doctrine of part performance. For example, in *MacLellan v. Morash*, 2006 NSSC 101, it was noted:

39. Counsel here have recognized that the Court has the right to avoid that necessity if the defendant can show part performance of an oral agreement.

40. Counsel for the plaintiffs suggests that the leading case on proprietary estoppel is from the *House of Lords in Crabb v. Arun District Council* [1976] 1 Ch. 179 (C.A.) where Lord Denning said: [pages 187- 188]

> The basis of this proprietary estoppel – as indeed of promissory estoppel -- is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as "estoppel." They spoke of it as "raising an equity". If I may expand what Lord Cairns L.C. said in *Hughes v. Metropolitan Railway Co.* (1877) 2 App. Cas. 448: "it is the first principle upon which all courts of equity proceed," that it will prevent a person from insisting on his strict legal rights – whether arising under a contract, or on his title deeds, or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties.
>
> When then are the dealings which will preclude him from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist upon his strict legal rights – then, even though that promise may be unenforceable in point of law for want of consideration or want of writing – then, if he makes the promise knowing or intending that the other will act upon it, and he does act upon it, then again a court of equity will now allow him to go back on that promise: see *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] K.B. 130 and *Charles Richards Ltd. v. Oppenhaim* [1950] 1 K.B. 616, 623. Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights – knowing or intending that the other will act on that belief – and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied...

[51] While conceding that we are clearly dealing with "part performance" as noted above, Applicant's counsel argues that equity will only assist someone with "clean hands", and that those of Mr. Hoyeck (and, through him, the Respondent) are not "clean", in the circumstances of this case.

[52] Without commenting on this latter aspect of the argument (for the moment), I have concluded that this point is also without merit. Merely because the boilerplate

Nova Scotia Real Estate Commission Agreement of Purchase and Sale which Mr. Hoyeck used when he wrote up the initial version of the APS, and when the corrected and signed version was retyped by Ms. Chahine, was set up in a certain way with a final box to check (explicitly signifying that the signor was accepting the Respondent's offer) in no way derogates from the fact that she signed the offer with the clear intent to accept it. The *Statute of Frauds* has no application to this case.

(iii) The identity of the purchaser

[53] It is clear that the Applicant, at the time she entered into the APS, thought she was either dealing with her cousin, Mr. Hoyeck, or a company that was "owned" by him. For that reason she was willing to give him a break at the time and sell it for less than the price at which it had been formerly listed.

[54] That said, it is clear from the evidence presented by the Applicant that she eventually did find out that Mr. Hoyeck did not "own" the company. Exactly when she learned this is far less clear. She says in para. 13 of her affidavit:

> Mr. Hoyeck wished to purchase the Property on behalf of a company called Beacon Hill Developments Limited. He said he owned the company and the company was under his name. I do not know if he actually owns that company but I believe it is owned by a friend of his who lives in the United States. I did not know this at the time, and I believed Mr. Hoyeck when he told me that he owned the company. My intention was to sell it to him because he is family. I did not wish to sell the Property for that price to an outside third party company.

[55] Although she was deterred from obtaining legal advice for a long time by what Mr. Hoyeck said the Confidentiality Agreement meant, even if Ms. Hazouri thought she was dealing with a company controlled or owned by her cousin, the APS clearly said "Beacon Hill Development Ltd. or assignee". On its face, it admitted the possibility that the benefit of the contract could be assigned to a third party.

[56] I have not been persuaded that the contract was void *ad initio* for this particular reason, either. Further, although it could be argued that the APS might have been voidable at her instance when the Applicant discovered that she was not really selling to her cousin, her subsequent willingness to conclude the APS after this discovery also precludes her from relying now upon that fact.

C. If there was a valid contract, has it been breached, and is the Applicant entitled to treat her obligations pursuant to it at an end, as a consequence?

(i) What was the Respondent required to do?

[57] Obviously, the condition precedent to a determination of whether there has been a breach is to first ascertain what the APS actually requires the parties to do. To the extent that this involves contractual interpretation, the modern approach to such an exercise is set forth in *Sattva Capital Corp v. Creston Moly Corp*., 2014 SCC 53, where Justice Rothstein explained:

...

> 47. … the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)
>
> 48. The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also *Hall*, at p. 22; and *McCamus*, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of

> the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]
>
> ...
>
> 50. … I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.
>
> [Emphasis added]

[58] He later expands on these concepts:

> 57. While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and *Hall*, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (*Hall*, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).
>
> 58. The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [Emphasis added]

[59] As noted earlier, the date for completion of the contract is readily ascertainable with respect to an objectively discernible event, which is to say, the

issuance of subdivision approval by the Halifax Regional Municipality. However, there is no date stipulated by which this must happen.

[60] With that having been said, I consider several factors, including the fact that:

(i) The APS, at para. 7, says: "Buyer, at the expense of the buyer, to prepare a tentative subdivision approval plan and submitted [sic] by the owner to HRM (all costs associated will be paid for by the buyer)". I consider this is to be interpreted such that it shall be the responsibility of the Purchaser to obtain the subdivision approval and bear all costs associated with it. The parties, in their dealings, certainly treated it as though it was the Respondent's responsibility to do what was necessary to get the subdivision approval and bear the cost. At no time did the Respondent's only witness (Mr. Hoyeck) contest that this was what had been intended, or deny that this was the Respondent's obligation. His efforts at the hearing seemed more focussed upon attempting to explain why the Respondent had not yet completed the subdivision approval process with Halifax Regional Municipality.

(ii) Ms. Hazouri realized that things might take somewhat longer to obtain subdivision approval than normal due to the fact that Provincial Covid-19 measures were implemented almost contemporaneously with the execution of the APS;

(iii) Mr. Hoyeck knew (and through him, so did the Respondent) that the Applicant was anxious to close the deal as quickly as possible;

(iv) No evidence (whether from Halifax Regional Municipality, or anyone else) was called as to what constitutes a normal timeline within to expect the subdivision approval process to occur, and /or the extent (if any) to which this timeline was impacted due to the implementation of the Provincial Covid-19 protocols.

[61] There is nothing in the APS which says that Mr. Hoyeck and/or the Respondent will take all reasonable steps required to facilitate the acquisition of the necessary subdivision approval as soon as is reasonably possible in the circumstances. Ought the Court to imply such a term?

D. Implied term?

[62] The test for finding an implied term in a contract was explained in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd*, [1999] SCJ No. 17, where Iacobucci, J. stated:

> 27. ... The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p. 775). See also *Wallace v. United Grain Growers Ltd*., 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, at para. 137, per McLachlin J., and *Machtinger v. HOJ Industries Ltd*., 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at p. 1008, per McLachlin J.
>
> …
>
> 29. As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd.*, supra, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:
>
> > In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.
>
> [Emphasis added]

[63] Clearly, Ms. Hazouri carries the onus of establishing the existence of an implied term on the basis noted above. Although she has not explicitly argued that the Court ought to find such a term, she has argued that the Respondent breached the APS by virtue of the fact that it has been in existence since March 11, 2020, and yet the subdivision approval contemplated as a condition precedent to closing has still not yet been obtained.

[64] In substance, what she has argued is that Mr. Hoyeck and/or the Respondent have not done the things required of them to facilitate the approval process within a reasonable period of time. Twenty months have elapsed, and it is still not yet obtained, nor does the Respondent (even now) suggest that subdivision approval is on the horizon, and Beacon Hill has not produced any credible evidence as to any efforts expended to bring it about.

[65] The Applicant purchased the property on May 3, 2017. The encouragement of her cousin Mr. Hoyeck was instrumental in her decision to do so. He was going to build a house on it, but that did not happen. In February 2019, he attempted to have Ms. Hazouri confer an option upon his company, EPH Total Construction Inc., to purchase it for $45,000.00 prior to March 1, 2020. She did not sign it (*Applicant, amended rebuttal affidavit November 8, 2021, para. 16 and Exhibit "E"*).

[66] Ms. Hazouri, with the assistance of Ms. Chahine, attempted to sell the property. Mr. Hoyeck came forward with another APS that he or the Respondent had drawn up, on March 11, 2020, and the parties signed it that day. He knew that he (and through him, the Respondent) was getting a break on the price. He initially misrepresented his relationship to the corporate Respondent to persuade her to sell for that price, albeit she was still prepared to sell later when she found out that the relationship was different to what she had been told. He prepared a Confidentiality Agreement and had her sign that, telling her that among other things, it prevented her from even discussing the APS with a lawyer.

[67] He knew she was very anxious to close the deal as soon as possible. While she expected that the Covid protocols might cause some delay, it will soon be two years since the APS was signed, with no end in sight.

[68] The only way to bring business efficacy to the parties' dealings is to imply a term whereby the Respondent was to undertake the steps required of it to facilitate the acquisition of the necessary subdivision approval as soon as was reasonably possible in the circumstances.

[69] Such a term is clearly fundamental to the APS. Otherwise, the effect of the parties' dealings would be to confer upon Mr. Hoyeck's principal, the Respondent, an open-ended option to complete the APS whenever it felt like it, by taking as long as it wanted to conclude the subdivision approval process. Meanwhile, the money that Ms. Hazouri had invested to acquire the property (with Mr. Hoyeck's encouragement) would be tied up indefinitely, because Mr. Hoyeck had told her that

he and/or the corporate Respondent would "sue her and put a lien on her condominium" if she tried to liquidate it or sell to anybody else.

[70] While there was no evidence presented as to the length of time that a “normal” subdivision approval process would be expected to take, there is no credible evidence that either Mr. Hoyeck or the Respondent actually did a single thing after June/July 2020 in furtherance of the necessary approval from the Municipality. It appears from his affidavit that he was more concerned with obtaining a building permit than in discharging his obligations under the APS.

[71] Indeed, the only actions ascribed to either Mr. Hoyeck or the Respondent (post July 2020) relate to the attempted acquisition of the building permit. Even most of those efforts only appear to have taken place in August 2021, after the Applicant had retained counsel (*affidavit, Edgard Hoyeck, October 26, 2021 paras. 12 – 26*).

[72] Interestingly, and as a side note, one of those "things" the corporate Respondent actually did do, was to sign a Construction Agreement (on December 6, 2020) with EPH Total Construction Inc. (a company of which Mr. Hoyeck is a Director) to construct up to two four-unit buildings on the property. (*Affidavit of Edgard Hoyeck, para. 12*). It appears that he wanted to make sure that he could get the building permit in furtherance of these designs, before he or the Respondent invested any money in a surveyor, or incurred any other expense to move the subdivision approval process along.

[73] It is often unnecessary to get into issues of whether a particular breach is one of warranty (which, historically, did not bring the contract to an end, but could result in a damage award to the aggrieved party) or condition (which could, in some circumstances, relieve the party yet to perform her obligations pursuant to the Agreement from performing them).

[74] Indeed, in *Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265, at para. 31, the Court accepted the rationale of the well known pronouncement by Lord Diplock in *Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26, at p. 66, where it was noted:

> The test whether an event has this effect [discharged the party who has yet to perform from performance of his undertakings] or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed

> in the contract that he should obtain as the consideration for performing those undertakings?

[75] This requires Court to ask itself "whether, given the party's reasonable expectations from the terms of the contract, it has been substantially deprived of what it was to get from the contract" (per Angela Swan, *Canadian Contract Law*, 3rd ed (Markham, Ont: LexisNexis, 2012, at para. 7.66). Alternatively, "was the commercial purpose of the contract destroyed?" (*Majdpour v. M & B Acquisition Corp.*, 2001 CanLII 28457, para. 6).

[76] When the Respondent indicated, through its counsel (in late August 2021) that it had still not yet obtained subdivision approval, and gave no indication when that process would be complete, it had become clear it had breached its implied and yet fundamental obligation to do what was required of it to bring about the subdivision approval process (and close the purchase of the property) as soon as was reasonably possible. Because the Respondent has not shown that it did a single thing after July 2020 to advance the subdivision approval process the Applicant has been substantially deprived of what she had reasonably expected to obtain from the APS.

[77] Indeed, the Respondent's new "offer" (in response to this Application) to change the terms of the contract and close when the building permit was obtained, does not alter that fact. Even on the date that this Application was heard, the building permit had still not been obtained yet, either.

[78] The Respondent has essentially done nothing at all to faciliate the necessary subdivision approval, since July 2020. It has effectively repudiated the contract.

[79] In *White v. EBF Manufacturing Ltd.*, 2005 NSCA 167, Saunders, JA provided a useful review of some of the important concepts to bear in mind within this context:

> 88. Repudiation occurs where a party intimates by words or conduct that he does not intend to honour his obligations when they fall due. Repudiation can be either explicit or implicit. It is implicit "where the reasonable inference from the defendant's conduct is that he no longer intends to perform his side of the contract." *Furmston*, supra, at p. 522.

[80] Earlier, he had noted:

> 74. Repudiation has two parts: an unambiguous demonstration by one party that it intends to default, and a clearly communicated acceptance of that default by the innocent party. If either element is missing, repudiation has not been made out. It is a well recognized principle that if a repudiation has occurred, the non-defaulting

> party must indicate acceptance of that repudiation in order to treat the contract as at an end. Thus, if there had been a repudiation of the agreement by EBF, White was required to indicate his acceptance of that repudiation in order to treat their contract as terminated. *Canada Egg Products Ltd. v. Canadian Doughnut Co.*, 1955 CanLII 90 (SCC), [1955] S.C.R. 398.

[81] Saunders, JA elaborated further:

> 90. In order for repudiation to be established there must be acceptance. As Fridman points out in *The Law of Contract in Canada*, supra, at pp. 647-648:
>
> > "An unaccepted repudiation" said Asquit L.J. in one English case, "is a thing writ in water and of no value to anybody; it confers no legal rights of any sort or kind." Although this graphic expression has said to be limited by the facts of the case in which it occurred, the phrase does have some merit, and does put succinctly an important aspect of the law relating to discharge by repudiation or anticipatory breach. Such repudiation will not effectively terminate the contract unless the innocent party does accept the repudiation, and is prepared to treat the contract as ended. The innocent party, in effect, has an election whether or not to treat the contract as continuing or as ended, once the party has committed an act which, in accordance with what has been said above, can be regarded as repudiating the contract.

[82] I find it to be unquestionably the case that the Applicant would have acted sooner to retain counsel had she not been deterred from doing so by the effect of the collateral Confidentiality Agreement which meant (as was "explained" to her by Mr. Hoyeck), that she could not even discuss the Agreement with a lawyer. She was also deterred by his threats to sue her and place a "lien" on her condo.

[83] Indeed, within mere days of her decision to nonetheless consult with her current counsel (late July 2021), her counsel reached out to the Respondent to attempt to resolve the outstanding issues. She discovered that the Respondent was still unable to say, even then (or now, for that matter), when the work necessary to obtain subdivision approval would be completed. This Application was thereupon brought by the Applicant in pursuit of the relief sought. The Notice of Application in Chambers was dated August 30, 2021, and it was filed on September 1, 2021.

[84] By September 1, 2021, at the very latest, the Respondent had notice that the position which the Applicant was taking was that, if the APS was not void *ab initio*, then she was nonetheless entitled to treat her obligations pursuant to it as an end (*Notice, para. 9*) because "... the Respondent has engaged in unreasonable delay in obtaining [the subdivision] approval." (*Notice, para. 7*) In effect, this is a clear an

unambiguous communication of the Applicant's position that she viewed her obligations pursuant to the APS as having ended.

[85] I find that she was entitled to take that position. The APS, or contract between the parties, is at an end. As the owner of the property, the Applicant is entitled to deal with it in any lawful manner, including selling it to a third party purchaser, if she wishes.

Costs

[86] The Applicant has been completely successful. She is entitled to her costs. Tariff C(4) of *Civil Procedure Rule* 77.18 says:

> (4) When an order following an application in Chambers is determinative of the entire matter
>
> at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts
>
> in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:
>
> (a) the complexity of the matter,
>
> (b) the importance of the matter to the parties,
>
> (c) the amount of effort involved in preparing for and conducting the application.
>
> (such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

Length of Hearing of Application	**Range of Costs**
Less than 1 hour	$250 - $500
More than 1 hour but less than ½ day	$750 - $1,000
More than ½ day but less than 1 day	$1000-$2000
1 day or more	$2000 per full day

[87] Tariff C prescribes a range of $750 - $1,000 where the proceeding (as in this case) consumes more than one hour but less than half a day. I also observe that this Application is determinative of the entire matter between the parties. I consider

factors noted under Tariff C(4), and, in particular the importance of the issues at stake for Ms. Hazouri.

[88] Moreover, given that costs are always in the discretion of the Court, I am not precluded from considering (in addition) the conduct of the Respondent's representative, Edgard Hoyeck, in prolonging this matter, and, at times, being less than candid in his dealings with the Applicant.

[89] Under the circumstances, the Applicant's costs are quantified in the amount of $2,000.00, payable by the Respondent forthwith.

Gabriel J.