CITATION: Ruparell v. J.H. Cochrane Investments Inc. et al., 2020 ONSC 7466
COURT FILE NO.: CV-20-00641529-0000
DATE: 20201207

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
DEEPAK RUPARELL Plaintiff	*P. Fruitman and V. Calina*, for the Plaintiff
– and –	
J.H. COCHRANE INVESTMENTS INC., 2117105 ONTARIO INC., 2122192 ONTARIO INC., D/B/A TOWN + COUNTRY VOLKSWAGEN, and 1788289 ONTARIO INC. Defendants	*J. Doris and A. Vaidyanathan*, for the Defendants
	HEARD: November 23-26, 2020

REASONS FOR JUDGMENT

LEIPER J.

Overview

[1] This case concerns the failed purchase of shares in a Volkswagen auto dealership and its land. The central issue is whether the defendants breached their agreement.

[2] The Plaintiff, Deepak Ruparell, is a business owner of hotels and auto dealerships across Canada and the United States. The Defendants (collectively, "Town and Country") are the corporate owners of Town and Country Volkswagen, its land, and assets.[1] Its current Dealer-

[1] The defendant 1788289 Ontario Inc. owns the land. The defendant 2122192 Ontario Inc. owns the dealership. The defendant 2117105 Ontario Inc. owns the shares of the landholding company. The defendant J.H. Cochrane Investments Inc. owns the shares in the dealership holding company. All the defendants are controlled by Cynthia Cochrane-Little and her father, Jim Cochrane. Cynthia Cochrane-Little was the dealership's principal during the relevant times.

Principal is Cynthia Cochrane-Little, who succeeded her father, James Cochrane in that role. James Cochrane is the President of Town and Country Volkswagen.

[3] In 2019, Mr. Ruparell learned that Town and Country would be interested in negotiating a sale of the dealership business and the land associated with the business.

[4] In January of 2020, Town and Country retained accounting firm KPMG for advice during the negotiations with Mr. Ruparell.

[5] In February 2020, Jim Cochrane as President of the landholding company, 1788289 Ontario Inc. and on behalf of Town and Country Volkswagen, and Mr. Ruparell signed a non-binding Letter of Intent ("LOI") which described terms of engagement for a due diligence and financial information review, expectations on closing, purchase price, and a deposit of $1 million. The LOI had an exclusivity clause preventing Town and Country from negotiating with other parties until April 15, 2020. By the terms of the LOI, the parties agreed to negotiate in good faith and use "reasonable commercial" efforts to close the transaction by April 15, 2020. The LOI required "definitive, written and executed" Share Purchase Agreements ("SPAs").

[6] Counsel to the parties began to draft the SPAs that would complete the expected transaction. They exchanged several versions in March and early April.

[7] On April 16 2020, Mr. Ruparell told KPMG he had concerns about the effect of the global pandemic on the hotel and automotive businesses. He proposed to withdraw his offer. KPMG encouraged him to make a new offer. Mr. Ruparell made a new offer (the "April Offer") for the share purchase with a lower price and financing with a vendor take-back ("VTB") mortgage.

[8] On April 24, 2020, the parties exchanged terms under the April Offer in a series of texts, telephone conversations and in an informal Term Sheet.

[9] Between April 26-28, 2020, counsel for the parties revised the SPAs in accordance with the April Offer conversations and the Term Sheet. On April 28, before the final SPAs could be signed, Town and Country received a better offer from the AWIN Group, another Volkswagen Dealer.

[10] On May 5, 2020, KPMG told Mr. Ruparell that another offer had been received by Town and Country. KPMG invited him to improve the April Offer. Mr. Ruparell was upset by this news. He accused Town and Country of reneging on its agreement with him. He did not increase his price.

[11] Mr. Ruparell insisted that Town and Country close the transaction. He left his deposit in place and brought this action for specific performance.

[12] Town and Country agreed to sell to the AWIN Group. That transaction did not close, because Mr. Ruparell placed a certificate of pending litigation on the title to the land. The AWIN Group transaction has been held in abeyance until the outcome of this action.

The Positions of the Parties

The Plaintiff Claims Breach of Contract

[13] Mr. Ruparell's position is that the LOI — which required written, definitive, and executed agreements for the transaction to be binding —applied to his first all-cash offer to purchase the land and dealership for approximately $31.3 million. Mr. Ruparell asserts that when the parties reopened price negotiations on April 16, the LOI no longer applied. The new offer was on substantially different terms: it was approximately $24.1 million, with $9.5 million to be financed by a VTB mortgage and not in cash. The exclusivity period had passed, and the parties had not closed on April 15, 2020 as anticipated in the LOI.

[14] Mr. Ruparell characterizes the April Offer and the agreement of April 24 as a "new deal" reached after verbal discussions, a voicemail message left by the Town and Country's representative at KPMG and a summary Term Sheet delivered by email from KPMG.

The Defence Responds There was No Agreement and No Breach

[15] Town and Country submits that there was no enforceable agreement reached by the parties on April 24. The Plaintiff revised his offering price and sought a VTB mortgage. The agreement by Town and Country to these terms did not represent a full agreement on all the essential elements, of the share purchase. The rules of engagement found in the LOI continued, including the requirement of definitive, written agreements.

[16] Town and Country submits that the SPAs, as complex commercial documents, were intended to be the final agreements. In their submission, a complex transaction of this nature is not completed by way of telephone calls and a brief memo. The final agreements were never complete, certain, finalized, or executed. Thus, there was no agreement between the parties and no breach of the agreement when Town and Country entertained the new offer from Mr. Ruparell.

Issues at Trial

[17] The primary issue at trial is whether there was an enforceable agreement between the parties. If there was an enforceable agreement, then the second issue is what is the appropriate relief for a breach of the agreement.

[18] The enforceability of the agreement depends on a thorough review of how the parties negotiated and communicated with each other. Most of the communications are documented: there are few findings of credibility or reliability. As discussed below, the test is an objective one.

Issue 1: Was there an enforceable agreement?

The Legal Principles

[19] "Every case turns on its facts, and an analysis of the parties' intentions." *Atria Networks LP v. Abovenet Communications Inc.* 2007 CarswellOnt 5147; 159 A.C.W.S. (3d) 670 (SCJ) at para. 55.

[20] The law recognizes that formal business agreements are often preceded by an agreement on the essential provisions to be included in the final agreement. It may take the form of an oral agreement, a memorandum, email, or other informal writings: *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, 1991 CanLII 2734 (ON CA) at p. 12; *Betser-Zilevitch v. Nexen Inc.*, 2019 FCA 230 (CanLII), para 4; *Home Oil Co. v. Page Petroleum Ltd.*, 1976 CarswellAlta 101;1976 CarswellAlta 101, [1976] 4 W.W.R. 598, [1976] A.J. No. 592 at para. 12; *Calvan Consolidated Oil and Gas Company Limited v Manning*, [1959] S.C.R. 253 at 260-261; *Klemke Mining Corp. v. Shell Canada Ltd.*, 2008 ABCA 257 at paras. 24 and 27.

[21] When parties agree on the essential provisions to be incorporated in a formal document with the intention that their agreement is binding, they will have fulfilled all the requisites for a contract. The fact that a formal written document will be prepared and signed later does not alter the binding nature of the original contract: *Canadian Northern Shield v. 2421593 Canadian Inc.* 2018 ONSC 3627 (CanLII): *Bawitko* at p. 12; *UBS Securities Canada, Inc. v. Sands Brothers Canada, Ltd.*, 2009 ONCA 328 (CanLII) at para. 47.

[22] An agreement is not final or binding if it is merely an agreement to agree on the essential terms in the future. If what has been agreed to is sufficiently uncertain, or where the parties intend that there is no binding agreement until a subsequent formal contract is executed, there is no enforceable agreement: *Alkin Corporation v. 3D Imaging Partners Inc.*, 2020 ONCA 441.*Northern Shield v. 2421593 Canadian Inc.* 2018 ONSC 3627 (CanLII); *Von Hatzfeld Wildenburg v. Alexander*, [1912] 1 Ch. 284; *Canada Square Corp. Ltd. et al. v. Versafood Services Ltd. et al.* (1980), 1979 CanLII 2042 (ON SC), 25 O.R. (2d) 591 (H.Ct.), aff'd., (1981), 1981 CanLII 1893 (ON CA), 34 O.R. (2d) 250 (C.A.); *Bahamaconsult Ltd. v. Kellogg Salad Canada Ltd.* (1976), 1975 CanLII 379 (ON SC), 9 O.R. (2d) 630 (H.Ct.), rev'd, (1977), 1976 CanLII 554 (ON CA), 15 O.R. (2d) 276 (C.A.); Chitty on Contracts, 26th ed. (1990), at pp. 79-91; Corbin on Contracts, (1963), Vol. 1, s. 29-30; and Treitel, *Law of Contract*, 7th ed. (1987), at pp. 42-47; *Headway Property Investments 78-1 Inc. v. Edgecombe Properties Ltd*, 1995 CarswellOnt 2481 1995 CarswellOnt 2481, [1995] O.J. No. 79, 52 A.C.W.S. (3d) 1356; 9. *Hunter's Square Development Inc. v. 351658 Ontario Ltd*. [2002] O.J. No. 2800 at para. 27.

[23] The intention of the parties at the time of the agreement, must be determined by examining the words, the nature of the purported agreement, and the course of conduct of the parties. It is an objective test, as seen through the eyes of a "hypothetical onlooker" rather than based on the subjective impressions of the parties after the fact: *Cook v. Joyce*, 2017 ONCA 49 at para. 65 ; *Andrews v. Lundrigan*, 2009 ONCA 160; *Bawitko;* Case name 2005 CanLII 36270 (ON SC*)* G.H.L. Fridman, The Law of Contract in Canada, 5th ed. (Toronto: Thomson Carswell, 2006), at p. 6. *Betser-Zilevitch v. Nexen Inc*., 2019 FCA 230 (CanLII), at para. 4.

[24] Whether terms will be considered essential will vary with the nature of the transaction and the context in which the agreement is made: *United Gulf Developments Ltd. v. Iskandar*, 2008 NSCA 71, [2008] N.S.J. No. 317, at para. 14.

[25] Essential terms are also considered relative to the nature of the transaction, the context in which the agreement is made and by the parties' interests: *Cdn. Northern Shield v. 2421593 Canadian Inc.*, 2018 ONSC 3627, at para. 88.

Applying the Principles to this Transaction: Was There an Enforceable Agreement on April 24, 2020?

[26] This question requires a thorough understanding of the history of the parties' negotiations.

[27] The negotiation of this transaction had two distinct phases, bisected by the global pandemic.

January-April 2020: Phase One

[28] The first phase began in early 2020: Mr. Ruparell delivered an unsolicited offer on January 10, 2020 in the form of a first draft LOI, which was requested by Tom Jakobek, who acted as a liaison for a time between these parties.

[29] Town and Country retained a team of corporate finance representatives at KPMG representatives, Jay Tailor, Michael Carolan and Peter Hatges. The senior member of the team, Peter Hatges, is the Managing Director of KPMG Corporate Finance Inc., and National Sector Lead, Automotive, for KPMG in Canada.

[30] KPMG assigned the junior member of the team, Mr. Tailor, to the due diligence communications and liaison between the vendors and purchaser. A data room was set up for providing access to information.

[31] The parties agreed to terms of engagement by signing the LOI of February 25, 2020. It set out the details of an all cash transaction, for $5 million for the goodwill in the dealership company plus the method to determine the dealerships net asset value and $21.33 million for the shares in the real property company. The LOI was non-binding. It was intended to provide time for Mr. Ruparell to conduct due diligence and review financial information. The parties agreed to use "reasonable commercial efforts" to execute the SPAs by April 15, 2020. Both sides would bear their own costs of these activities. Mr. Ruparell agreed to pay a deposit of $1 million.

[32] One of the key provisions in the LOI was an exclusivity clause which prevented Town and Country from negotiating, soliciting, or engaging with other potential purchasers until April 15, 2020. Town and Country relies on this for its acceptance of the AWIN Group offer that took place in late April.

[33] Up until April 15, 2020, the LOI protected Mr. Ruparell from the vendors entertaining other offers while he spent time and money on due diligence before firming up the offer. It also provided Town and Country with a defined time limit for their agreement to observe exclusivity: that way Town and Country would not be tied up indefinitely while Mr. Ruparell did due diligence for the transaction.

[34] The LOI required the parties to use "commercially reasonable" best efforts to close by April 15, 2020. This might well have happened but for the intervening event of the global pandemic in March of 2020.

[35] The evidence establishes that the parties kept to their agreements under the LOI. Mr. Ruparell conducted his due diligence. Town and Country provided access to their financial records

and other materials relevant to their business via KPMG. KPMG provided an Excel workbook showing how the Net Asset Value ("NAV") would be calculated at closing. There was a preliminary meeting between the principals which reportedly went well. Each side took commercially reasonable steps consistent with closing by April 15: they retained corporate transaction counsel and began the process of drafting SPAs to complete the transaction described in the LOI.

[36] However, all did not end uneventfully. On or around April 13, Mr. Ruparell, through KPMG, let Town and Country know he was considering withdrawing from completing the transaction because of the economic impacts of the pandemic on his business interests.

[37] On the evening of April 13, 2020, Ms. Cochrane-Little spoke to KPMG team members Mr. Tailor and Mr. Carolan. They confirmed that Mr. Ruparell had told them that he wanted to revise his price. Mr. Ruparell testified that he spoke to Mr. Tailor over the April 13-14 period and mentioned wanting to revise his price and seek a VTB. Mr. Tailor testified that he advised Mr. Ruparell to deal with the Director, Peter Hatges who had the authority to discuss a new offer with Mr. Ruparell.

[38] The global pandemic was also affecting Town and Country's business: Ms. Cochrane-Little testified about this in the context of seeking a short closing period, "I mean, we're talking hundred thousand-dollar losses every month because of COVID."

[39] Neither party had obligations to continue at this point. The LOI could have been amended in writing: it was not. The exclusivity period ended. The parties ceased work on the SPAs. There was no deal as contemplated by LOI. This led to the second phase of the negotiations.

April 16-May 5, 2020: Phase Two

[40] The second phase began on April 16, 2020. Mr. Ruparell was willing to make a second offer. Town and Country were willing to consider a revised offer. Town and Country authorized the National Sector Lead, Automotive, for KPMG in Canada and senior member of the team, Peter Hatges, to negotiate on its behalf. Mr. Hatges gave the file his personal attention from the time of his first contact with Mr. Ruparell on April 16, until the agreement of April 24. His communications with Mr. Ruparell are key communications that preceded the disputed agreement of April 24.

[41] On April 16, Mr. Ruparell and Mr. Hatges spoke by telephone for the first time. Mr. Ruparell made the April Offer. A set of negotiations ensued, with Mr. Hatges representing Town and Country.

[42] The texts between Mr. Ruparell and Mr. Hatges between April 16-24 record these key communications. The parties made decisions in a matter of days during this period, without excessive delays. Mr. Hatges communicated about when his clients would be considering the April Offer. After a two-day gap in time, he assured Mr. Ruparell that he had not forgotten about him.

[43] The Town and Country made a counteroffer on April 22 seeking an increase to the April Offer. Mr. Ruparell declined to increase his price. On April 23, Mr. Hatges told Mr. Ruparell that he was pushing his clients to decide before the weekend.

[44] Ms. Cochrane-Little testified about her initial concern about a VTB mortgage commitment. This was much different from the offer in the LOI, which was an all-cash offer. In cross-examination, she confirmed that she authorized KPMG to put forward the Town and Country counteroffer of April 22, which also provided for a VTB mortgage, after the KPMG team told her that she could expect "airtight" VTB documents.

[45] On April 24, Mr. Hatges left a voice mail for Mr. Ruparell that Town and Country had accepted his terms using the words, "we have a deal." That voice mail, played several times during the trial, was placed from a noisy auto garage where Mr. Hatges was having his car's tires changed.

[46] The context for the "deal" was as follows: both sides were experiencing financial pressure. The exclusivity period and target closing date under the LOI had passed. The deal was at a vulnerable state. Mr. Ruparell had signalled that he might walk away. Both sides had spent time, money, and energy to arrive at this stage of the negotiations set in an uncertain economic context because of the global pandemic.

[47] The Term Sheet of April 24 settled the price for the land holding company and the dealership holding company. It provided the terms for the VTB mortgage, including amount, interest rate, principal payments on anniversary, details of the security for the mortgage and term. In cross-examination, Mr. Hatges acknowledged in his trial evidence that Mr. Ruparell's proposal was a "fundamental change" to the transaction that had been contemplated in the LOI. He agreed it "created a very different situation [from the original offer]." Mr. Hatges also agreed that the "highlights" of the deal as recorded in the Term Sheet were the "essential terms."

[48] Mr. Hatges extracted one additional concession from Mr. Ruparell on April 24 on a matter of importance to Town and Country. Mr. Ruparell agreed to protect the general manager's job. The importance of this additional concession to Town and Country is suggested by the way that Mr. Hatges communicated about this to his team: "he caved." The Term Sheet did not include this concession. I find it was an additional part of the agreement made on April 24 between the parties.

[49] The content and tone of the communications suggest that both parties were anxious to come to terms on the essential elements of this transaction. There was an air of urgency in the April negotiations, with Mr. Hatges at one point noting he was "pushing" his clients to decide. There was one offer on the table. The economic context had already introduced an intimation of doubt into whether there would be a deal.

[50] As Mr. Ruparell testified:

> …when a guy who is an experienced person like KPMG, after going back and forth for eight days, with his client and comes back to me, because he is going back and forth on the numbers says that "we have a deal", I take that as we have a deal.

[51] This was how Mr. Ruparell saw it. More importantly, it is how an objective observer, viewing the history, the nature of the parties and reviewing the communications between them would also see it.

[52] Moreover, in the immediate aftermath of these negotiations, the parties behaved as if they had reached an agreement. Mr. Ruparell brought in his brothers to assist with details on the final

SPAs, as was his practice with other transactions. He sought a meeting with Town and Country's general manager to discuss transition. Mr. Ruparell's corporate counsel started work without delay, sending an email out on the weekend after the April 24 agreement and circulation of the Term Sheet.

[53] Mr. Hatges stepped back from sending multiple texts to Mr. Ruparell as he had done between April 16-24. Mr. Tailor stepped back in to manage the details and flow of funds communications. All appeared to be moving toward a closing as soon as possible to give effect to the April 24 terms. The event that put a stop to this forward momentum was not a drafting dispute between the parties: it was the unsolicited offer of April 28 from the AWIN Group.

[54] Through the lens of an objective observer, the parties made an agreement on the essential terms of the new transaction. I find that for this transaction, the essential terms were price, share sale, financing, security, timing of payment, asset valuation and post closing adjustment and retaining the general manager to work for the new company.

[55] Town and Country argues that the LOI applied to the negotiations of the April offer, including its provisions that parties would not be able to sue for specific performance, that it could negotiate and make agreements with other parties after April 15 and that only formal SPAs could bind an agreement with Mr. Ruparell. I disagree. The Term Sheet did not refer to the LOI. There was no reference in the texts sent, the voicemails or the conversations related by the witnesses to the LOI. The Term Sheet did not provide that the parties agreed they would not be bound until the final terms of the contracts or SPAs were finalized and signed. What is more, the commercial purposes for the LOI were spent. The exclusivity period had expired. The parties had not closed on April 15, 2020 as contemplated. The LOI had described an all cash transaction at a different price than the price agreed to on April 24. It provided for all employees of the dealership to be kept on. The LOI was silent as to its application after the key date of April 15, 2020. The parties' April negotiations re-opened fundamental questions of price, financing, and job security for the general manager.

[56] Town and Country also argues that the definition of the LOI, which described the "transaction" is further evidence that the parties intended to be bound by the terms of the LOI throughout their dealings with one another. This definition was in the draft SPAs that were prepared in anticipation of the first all cash offer. It stayed in the later versions that were not completed, for the April offer. Its provisions and agreements for that period would be required to protect the parties for their actions during the February 25-April 15, 2020 time period. The parties had agreed to several protections for each other. Its inclusion in the SPAs was logical for those purposes. This does not mean that it governed the negotiations and agreement pertinent to the April Offer. The transaction contemplated as of April 24 was simply not the same transaction described in the LOI. The parties' conduct, the context, the communications, and the words of the LOI all consistently support a finding that parties did not treat the LOI as governing their negotiations and this aligns with the terms of the LOI itself. It is the commercially sensible way to read this document. Otherwise, there would have been no need to negotiate for example, the retention of the general manager. Town and Country could have relied on that part of the LOI.

[57] The use of Term Sheets also suggests that the parties were no longer dealing with the first offer, as described in the LOI. They could have amended the LOI with the new transaction in place.

They did not. Instead, they left the LOI behind, conducted fresh negotiations and made an agreement marked with some sense of urgency in agreeing to terms, consistent with the loss of the protections within the LOI.

[58] However, the LOI is not irrelevant to understanding the transaction. It was a valuable stepping-stone in the negotiations. The parties used it to govern their early interactions, and to demonstrate to one another their willingness to be bound by written agreements. They abided by its terms. But it no longer to the second phase of negotiations for a new price and financing. The exclusivity clause not longer bound Town and Country.

[59] Town and Country submitted that even if the LOI no longer applied, and the parties made an oral contract with certain provisions, it was not enforceable if the parties intended to defer their legal obligations until they completed a formal written agreement: *Bawitko* at para. 21.

[60] I find that *Bawitko* can be distinguished from the facts here. The question of an agreement depends on the individual facts of each case. In *Bawitko* the parties were negotiating a franchise agreement. There were different "essential" terms in that agreement, which was for a franchise. Additionally, in *Bawitko*, the oral agreement involved an oral amendment to the standard form franchise agreement, which was never put in writing, nor had it been read by the plaintiff. The plaintiff in *Bawitko* attempted to have the agreement apply to two locations, when only one location had been discussed during the conversation that ostensibly created a binding agreement between the parties.

[61] The Court of Appeal in *Bawitko* found on these facts, "The agreement reached on April 18 did not encompass essential aspects of the intended formal agreement." This is the key factual difference. Mr. Ruparell and Town and Country, through the experienced representation of their agent, Peter Hatges, reached an agreement on the "essential aspects of the intended formal agreement."

[62] The same holds true for Town and Country's submission that the decision in *Alkin* is dispositive in its favour. In *Alkin*, the plaintiff sought to rely on a share purchase agreement that required formal documentation. The plaintiff's express position in *Alkin* was that the share purchase agreement "fully and accurately outlined the terms upon which the appellant's shares were to be purchased." This admission was fatal to the plaintiff's claim because the share purchase agreement required formalizing of the agreements.

[63] In its final submissions, Town and Country pointed to facts which are more consistent with the parties' intention to defer their legal obligations until signing the SPAs. These include:

1. The LOI expressly provided that the parties would defer their binding obligations;

2. The LOI was a defined term in the draft SPAs which described it as the letter of intent "entered into in respect of the transactions contemplated herein";

3. The complex, multi-page SPAs with schedules containing representations, warranties and covenants were never completed in this transaction;

4. The parties exchanged multiple drafts of the SPAs both before April 24 and after April 24;

5. The parties' conduct following the April 24 voicemail to immediately reengage the corporate lawyers to revise the draft SPAs;

6. The draft SPAs include "entire agreement "and "no amendment except in writing clauses";

7. During the exchange of the draft SPAs, counsel reserved their clients' rights to make further changes upon their client's further review;

8. The requirement of a written agreement to gain the consent of Volkswagen Canada;

9. The VTB mortgage meant there would be an ongoing business relationship as debtor-creditor between Mr. Ruparell's purchasing company and Town and Country;

10. The April 27 request by Mr. Ruparell to allocate an additional $1 million from the land deal to the dealership price and to remove the pre-payment penalty from the mortgage terms;

11. The email from Mr. Ruparell to Tom Jakobek on April 27 suggesting if things did not work out, he would walk away.

[64] Points 1 and 2 above, deal with the application of the LOI. Given my findings that the LOI was effectively "spent" by the time of the April 24 agreement I would not apply the deferral clause in the LOI to the words of the agreement. Its significance as a document which governed the parties' relations with one another for a time is consistent with its reference in the final SPAs.

[65] Points 3 through 7 refer to the documentation expected by the parties to give effect to their April 24 Term Sheet and agreement on Mr. Ruparell retaining the general manager. Although never signed, the SPAs were contemplated as being necessary to close the transaction. "The incorporation of the essential terms of an agreement into a more detailed and formal agreement at a later time is a common feature of commercial life": *Home Oil Co. v. Page Petroleum Ltd.,* 1976 CarswellAlta 101, [1976] 4 W.W.R. 598, [1976] A.J. No. 592 at para. 12; *Bester Zilevitch* at para. 3; *Mitsui & Co.* at paras. 46, 67 and 68.

[66] Point 8 is the Volkswagen Canada consent. Written SPAs were required to obtain consent from Volkswagen Canada, but this step does not prevent the parties from making a binding contract with one another prior to seeking such consent.

[67] Point 9 submits that the VTB mortgage and concomitant three-year creditor-debtor relationship favours a finding that a final agreement could not be reached until the closing documents were executed. There was evidence that Town and Country was nervous about accepting a VTB mortgage to finance the deal. There were discussions with KPMG about wanting "iron-clad" security. This was addressed in the April negotiations: significantly, the mortgage security terms found in the April 24 Term Sheet are precise.

[68] Point 10 refers to Mr. Ruparell's request, which was not accepted by Town and Country, to revise the allocation of the purchase price as between the land and the dealership. This does not undermine the agreement made on April 24: *Bester Zilevitch* at para. 4. *Soleil Hospitality Inc. v. Louie*, 2006 BCSC 1920 at para 26, aff'd 2008 BCCA 206. *Vancouver Canucks Limited Partnership v. Canon Canada Inc.*, 2015 BCCA 144 at para. 79.

[69] Point 11 involves an email from Mr. Ruparell to Mr. Jakobek which was ambiguous. Mr. Jakobek had been associated with the real estate agents who informed Mr. Ruparell about this potential sale. He communicated from time to time with Mr. Ruparell, Ms. Cochrane-Little during the negotiations. Later, it seems he represented the AWIN Group. He did not testify at the trial. His role and interests in the Ruparell-Town and Country transaction were unclear.

[70] The email relied on by Town and Country could have referred to another transaction which Mr. Ruparell was considering at this time, also with Mr. Jakobek's assistance. By the time of this email, Mr. Jakobek was not playing a key role in the Town and Country negotiations. A single line in an email from Mr. Ruparell which he testified was an attempt to "brush off" Mr. Jakobek does not undo the course of conduct of the parties described above which was consistent with a final agreement.

[71] For all these reasons, I find that Mr. Ruparell has established on a balance of probabilities that he and Town and Country formed a binding agreement on April 24, 2020. When Town and Country received a superior offer, they sought to improve the price agreed to by Mr. Ruparell and when he declined, Town and Country broke the agreement by agreeing to sell to the AWIN Group. Having made these findings, I consider the remedy that is appropriate in this case.

Issue 2: What is the appropriate remedy?

[72] I turn next to the question of remedy for Town and Country's breach of the contract it made with Mr. Ruparell.

[73] Mr. Ruparell seeks specific performance. He testified at trial that the lands and the Town and Country dealership are located on a large piece of land in a particularly desirable location in Markham, Ontario, with high visibility. He had plans to develop the land further and perhaps build a hotel on the property. His evidence was that there were no comparable properties for sale in this area and thus, it is a unique property.

[74] Mr. Ruparell submits that a remedy of specific performance would put him in the very position he was in by virtue of his agreement with Town and Country—ready to close on the terms and for the amounts agreed upon on April 24, 2020.

[75] Town and Country submits there are several reasons why an award of specific performance is not appropriate if a binding agreement is found by the court. The first reason is that the agreement was and is subject to third party consent from Volkswagen Canada. The consent of a third party may be impossible for a defendant to procure, thus having been decreed to carry out the contract, it would require the defendant to perform an impossibility. Accordingly, specific performance will be refused when the performance of the contract depends on the consent or action of a third party: *Metropolitan Trust Co. of Canada et al. v. Pressure Concrete Services Ltd. et al.*,

[1973] 3 O.R. 629 at pp. 26, 27, aff'd *Metropolitan Trust Co. of Canada et al. v. Pressure Concrete Services Ltd. et al.*, (1976), 9 O.R. (2d) 375 at p. 3.

[76] Mr. Ruparell would distinguish the *Metropolitan Trust* on the facts: in that case it was known that the third party would refuse to consent. That was the case in that set of facts, however the principle was not limited to proof that there would not be consent. The uncertainty and potential for a "no third-party consent" leads to the same problematic outcome.

[77] Town and Country submits that the second impediment to ordering specific performance is the nature of the agreement in this case which includes completing the SPAs, their accompanying schedules, and the terms of the VTB mortgage. This aspect would require ongoing supervision. Town and Country relies on the decision of Smith, J. in *Thunder Bay (City) v. CN Rail*, 2017 ONSC 3560 at paras. 154-156; Robert J. Sharpe, *Injunctions and Specific Performance*, (2017) (Toronto: Thomson Reuters, 2016) ch. 7 at 2. In *Thunder Bay*, the issue concerned the maintenance and safety of a train bridge. Justice Smith found there were insufficient specifics proposed for maintenance and repair. This presented the risk of an order being ill-defined and difficult to enforce.

[78] Mr. Ruparell would have the court apply any necessary supervision to an order of specific performance. He submits this is not unusual and is done so routinely in the case of receivership orders. He submits that a mortgage with defined security is capable of being the subject of an order for specific performance.

[79] I find that there are several factors which undermine a remedy for specific performance and favour an award of damages. These include the requirement for third party consent from Volkswagen Canada and court supervision of the SPA finalization, which include a moderate degree of complexity, and the availability and adequacy of damages.

[80] The availability and adequacy of damages relative to specific performance is an important factor to consider: Sharpe, *Injunctions and Specific Performance*. Specific performance is a discretionary remedy. At the heart of such a decision is the question of whether specific performance or damages would better serve justice between the parties: *UBS Securities Canada, Inc. v. Sands Brothers Canada, Ltd.*, 2009 ONCA 323 at para. 100; *Raymond v. Raymond*, 2011 SKCA 58 at para. 9.

[81] The third-party sale to AWIN Group is scheduled to take place by the end of this year. The terms of that sale were agreed to within days of the agreement on terms for the Ruparell sale. Such circumstances can provide a proxy value for the right amount of damages: *Rand v. MacDonald*, 1995 CarswellOnt 208 (Ont. Ct. (Gen. Div.)) at para. 53.

[82] An award of damages at the value of the third-party sale, less the offering price by a plaintiff, is justified under the principle of lost opportunity. The purchaser having been wrongly deprived of the opportunity to resell the property at the higher price may recover that value as damages: *Suburban Activity Centre v. 304629 Alberta Ltd*., 2011 ABQB 419 at paras. 117-121.

[83] Specific performance is a matter of discretion for a trial judge. Damages tend to be the preferred remedy in cases of commercial contracts to purchase land, although specific performance may be granted in circumstances of uniqueness and where damages are not an appropriate remedy.

Here, the issues with third party consent, the need to complete the SPAs, which although not impossible, present a complicating factor, and the ready availability of another offer which assists with quantifying the opportunity cost to Mr. Ruparell, persuades me that the preferred remedy is an amount of damages equal to the difference between the price agreed to by Mr. Ruparell and the price accepted from the AWIN Group.

[84] I conclude that an award of damages would do justice between these parties. The subsequent sale provides a ready method to assess damages as a function of the cost of a lost opportunity. Specific performance is problematic due to the requirement of third-party consent.

Conclusion

[85] The amount of damages may be calculated as lost opportunity cost. Mr. Ruparell and AWIN Group contracted for share sales, with the NAV of the assets to be finalized at closing using the methodology developed during the Ruparell transaction. Damages may be fixed as the difference in the amounts offered for the land and the good will of Town and Country in the two transactions.

[86] Mr. Ruparell offered $19 million for the shares of both companies. The AWIN Group offered $24 million. The difference is $5 million, and this amount represents a quantifiable amount for the cost of the lost opportunity.

[87] Mr. Ruparell is also entitled to the return of his deposit of $1 million which was retained by Town and Country after Mr. Ruparell refused its return.

[88] Mr. Ruparell has also asked for the costs of his due diligence conducted under the LOI during the first phase of the negotiations. I would not order these costs, given that at the time and in relation to those costs, the parties agreed that they would bear their own costs and no legal recourse could be had to recovery of those costs under the LOI. Those costs were part of what I have described as phase one of the negotiations. This provision was not the subject of a different agreement when the parties came to terms on April 24, 2020.

[89] The certificate of pending litigation will be lifted to permit the AWIN Group transaction with Town and Country to proceed.

[90] I order the following:

1. The Defendants are jointly and severally ordered to pay the Plaintiff, Deepak Ruparell:

    a. $5,000,000 in damages;

    b. $1,000,000 for the return of the deposit;

    c. Prejudgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

    d. Post judgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

2. Pursuant to s. 103(6) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 the Certificate of Pending Litigation registered on title in this matter will be removed.

Costs

[91] If the parties are unable to agree as to costs, they may provide brief written submissions (maximum 5 pages) by way of email to my judicial assistant on or before December 18, 2020, with the timing for a reasonable exchange of these submissions as arranged by counsel.

Leiper J.

Released: December 7, 2020

CITATION: Ruparell v. J.H. Cochrane Investments Inc. et al., 2020 ONSC 7466
COURT FILE NO.: CV-20-00641529-0000
DATE: 20201207

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DEEPAK RUPARELL

Plaintiff

– and –

J.H. COCHRANE INVESTMENTS INC., 2117105 ONTARIO INC., 2122192 ONTARIO INC., D/B/A TOWN + COUNTRY VOLKSWAGEN, and 1788289 ONTARIO INC.

Defendants

REASONS FOR JUDGMENT

Leiper J.

Released: December 7, 2020