CITATION: Ziefman Partners Inc., v. Aiello, 2022 ONSC 611
COURT FILE NO.: CV-15-11148-00CL
DATE: 20220127

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ZIEFMAN PARTNERS INC., INITS CAPACITY AS RECEIVER OF THE PROPERTY MUNICIPALLY KNOWN AS 40 PARK LANE CIRCLE	)	*Bobby Sachdeva* and *Stephanie De Caria*, for the Plaintiff
Plaintiff	)	
	)	*Brian Diamond* and *Patrick Bernard*, for the Defendant
– and –	)	
DAVID AIELLO	)	
Defendant	)	
	)	
	)	**HEARD:** January 25, 26, 27, 28, March 4, and June 3, 2021

CAVANAGH J.

REASONS FOR JUDGMENT

Introduction

[1] Zeifman Partners Inc. (the "Receiver") is the receiver of the property known municipally as 40 Park Lane Circle, Toronto, Ontario (the "Property"). The Property is a multi-million dollar residence of approximately 27,000 square feet in the Bridle Path area of Toronto.

[2] The Receiver entered into an agreement of purchase and sale with David Aiello for the sale of the Property on an "as-is where-is" basis (the "Agreement"). The sale did not close. The Receiver sold the Property to another buyer at a significantly lower price. The Receiver sues Mr. Aiello for damages for breach of the Agreement.

[3] Mr. Aiello contends that after the Agreement was made the Property became substantially damaged principally as a result of two incidents involving water damage to the Property leading, according to Mr. Aiello, to the growth of dangerous mould and other damage.

The Agreement provides that in the event of substantial damage to the property, Mr. Aiello has the option of terminating the Agreement and having all monies paid returned to him.

[4] Shortly before the scheduled closing date, Mr. Aiello asked the Receiver for an extension of the closing date to permit him to satisfy himself regarding the condition of the Property. When this request was made, Mr. Aiello was entitled, under the Agreement, to extend the closing date for one week upon payment of an additional $100,000 as a deposit. The Receiver refused the grant the requested extension without payment of the additional $100,000 deposit.

[5] Mr. Aiello defends the action on the basis that the Receiver breached the Agreement by failing to properly maintain the Property after the Agreement was made such that it became substantially damaged, including through the growth of mould, and that the failure to close was due to this breach of the Agreement by the Receiver. Mr. Aiello pleads that under the Agreement, he is entitled to treat the Agreement as terminated and receive the return of the deposits held by the Receiver.

[6] Mr. Aiello also pleads that the Receiver anticipatorily breached the Agreement, and thereby repudiated it, by communicating in writing through the Receiver's lawyers, before the closing date, that the Receiver will treat the Agreement as being in breach and the deposits forfeit as a result of Mr. Aiello's notification that he required, and was entitled to, an extension of the closing date. Mr. Aiello submits that by not extending the closing in the way (through payment of an additional deposit as permitted under the Agreement) and by not paying the purchase price on the closing date, he accepted the Receiver's repudiation of the Agreement, thereby bringing it to an end.

[7] Mr. Aiello also pleads that the Receiver, by insisting that any damage to the Property was insignificant and refusing to grant an extension of the closing date to allow the parties to properly assess the damage, anticipatorily breached the Agreement.

[8] Mr. Aiello pleads that after the closing date passed, he offered to reinstate the transaction and close the Agreement if the Receiver (i) provided an abatement of the purchase price in the amount of $500,000, or (ii) provided an undertaking to be responsible for any damage that occurred after the Agreement and prior to closing. Mr. Aiello submits that by failing to accept one of these options, the Receiver failed to mitigate damages.

[9] For the following reasons, I allow the Receiver's action and grant judgment in favour of the Receiver against Mr. Aiello.

Factual context

[10] Much of the factual context for this action is shown by the documentary evidence and is not contentious.

The Property

[11] The Property was formerly owned by an individual who became a bankrupt. The Receiver was appointed as receiver of the Property by Order dated April 18, 2013. At the time of

the bankruptcy and prior to the Receiver's appointment, the bankrupt had been in the course of renovating the Property.

[12] The extensive renovation undertaken by the bankrupt was designed to transform the house on the Property to be in the style of the Palace of Versailles. The house was large, ornate and grand with vast hallways and open spaces. The house itself was not entirely new. Portions of the old home going back 18 years were retained (such as the basement) and there were additions built as well as renovations.

[13] The bankrupt's renovations to the Property ceased approximately three years prior to the receivership. The Property was vacant prior to receivership. Some of the rooms were in a state of disrepair. Construction debris was sprawled across many rooms in the Property.

Agreement of Purchase and Sale

[14] The Receiver obtained court approval pursuant to an Order dated October 2, 2013 for a sale process involving an auction of the Property using Concierge Auctions LLC ("Concierge").

[15] Mr. and Mrs. Aiello were introduced to the Receiver by the real estate agent retained by the Receiver. They were very interested in the Property. The Receiver entered into an agreement of purchase and sale with Mr. Aiello for a purchase price of $12 million, outside of the auction process, subject to court approval. The Court denied the Receiver's request for approval of the sale, given that a Court approved sales process via auction was already in place.

[16] The Receiver conducted an auction in respect of the Property, using Concierge, in or around November 2013. Mr. Aiello's bid was the highest bid and it was accepted.

[17] By agreement of purchase and sale dated November 26, 2013, Mr. Aiello agreed to purchase the Property from the Receiver for a purchase price of $12,200,000. Mr. Aiello submitted $610,000 (5% of the purchase price) as an initial deposit to be held in trust pending completion or other termination of the Agreement and to be credited toward the purchase price on completion.

[18] The Agreement provided for a completion date or closing date on February 14, 2014. However, pursuant to the Agreement, the closing date could be extended by up to eight weeks provided Mr. Aiello paid an amount of $100,000 per week in certified funds to the Receiver's counsel.

[19] Mr. Aiello paid additional deposit funds in the amount of $700,000, increasing the amount of the deposit to $1,310,000 and the closing date was extended to April 4, 2014.

[20] The Agreement included the following provision:

> 11. INSURANCE: All buildings on the property and all other things being purchased shall be and remain until completion at the risk of Seller. Pending completion, Seller shall hold all insurance policies, if any, and the proceeds thereof in trust for the parties as their interests may appear and in the event of substantial damage,

> Buyer may either terminate this Agreement and have all monies paid returned without interest or deduction or else take the proceeds of any insurance and complete the purchase. No insurance shall be transferred on completion. If Seller is taking back a Charge/Mortgage, or Buyer is assuming a Charge/Mortgage, Buyer shall supply Seller with reasonable evidence of adequate insurance to protect Seller's or other mortgagee's interest on completion.

[21] Under the Agreement, Mr. Aiello acknowledged and agreed that the Property is being sold and is accepted by him "as-is, where-is", without any representation, warranty or covenant whatsoever by the Receiver or anyone acting on the Receiver's behalf. Mr. Aiello acknowledged and agreed in the Agreement that he inspected the Property, including all improvements thereon, prior to executing the Agreement and improvements thereon, and that he has relied solely upon his own inspections and investigations of the Property and improvements thereon and findings resulting therefrom and not upon any information, documentation, statement or opinion, written or oral, provided by the Receiver or any agent of the Receiver.

[22] The Agreement provides that the buildings on the Property shall remain at the risk of and for the benefit of the Receiver until completion and, should loss or damage occur, the Receiver may, at its option, terminate the Agreement and return the deposit to Mr. Aiello without interest or penalty.

[23] The Agreement provides that if the transaction is not completed as a result of default of Mr. Aiello, the deposit, together with interest thereon, shall be forfeited to the Receiver as liquidated damages and not as a penalty, and in addition the Receiver shall have all of its rights and remedies against Mr. Aiello under the Agreement, at law or in equity as a result of Mr. Aiello's default. If the transaction is not completed for any reason other than the default of Mr. Aiello, the deposit shall be returned to him forth with thereafter without deduction.

[24] The Agreement provides that unless expressly provided for elsewhere in the Agreement, Mr. Aiello is not, prior to completion of the Agreement, entitled to enter in, on, or upon the Property, for the purposes of inspection, or otherwise, without the express written consent of the Receiver, which consent may be arbitrarily withheld.

[25] The Agreement provides that notice may be given or received by the respective solicitors of the Receiver and Mr. Aiello in writing.

Inspections of the Property by Mr. Aiello before Agreement

[26] Prior to entering into the Agreement, Mr. Aiello obtained an inspection report from Jeff Clarke of Baker Street Home Inspection Services Inc. Mr. Clarke attended at the Property on October 23 and 24, 2014. Mr. Clarke's inspection report included the following statements:

a. In comparison to other homes of similar vintage in the vicinity, the functional condition of the building is average.

b. Major repairs were recommended to the roofing, exteriors, interiors, maintenance, structure, electrical, heat/cool and plumbing.

c. Determining the presence of mould fungi and other indoor air quality contaminants are specifically not included in Mr. Clarke's report. Mr. Clarke reported that he is unable to detect "existence of mold at interior space" and recommended further investigation.

d. Exclusions from Mr. Clarke's report included "mold and other indoor air quality contaminants".

e. Mr. Clarke recommended that Mr. Aiello request additional inspections to address special concerns and/or matters that Mr. Clarke cannot inspect. He should budget for an additional 20% of unforeseen deficiencies that will not be revealed by a visual inspection.

[27] Mr. Aiello understood from reading Mr. Clarke's report that the Property required at least $530,000 in additional work as a minimum budget and a further optional budget of $200,000 to complete the main floor show kitchen.

January 2014 incidents

[28] In January 2014, after the Agreement was made, there were two incidents which resulted in damage to the Property.

[29] On January 22, 2014, Mrs. Aiello attended the Property and observed that damage had occurred and that a noticeable portion of the ceiling had collapsed and flooding had occurred on the Property, particularly on the second floor above the garage and in the basement. She notified the Receiver's realtor who notified the Receiver.

[30] The Receiver contacted its property manager, AGC Inc., who inspected the Property. The leak was repaired on January 29, 2014 with the assistance of Dufferin Roofing, a professional roofer. ACG and Dufferin determined that the leak was caused by the uncoupling of a plumbing part designed to connect water flow to a drain that had become disconnected. The Receiver reported that there was damage to the drywall and part of the premises as well as to the flooring, a light fixture in the garage below, the office area and to drywall in the roof of the garage.

[31] On January 28, 2014, Mrs. Aiello attended at the Property and, while she was there, several pipes burst in the pool/spa area. Mrs. Aiello's evidence is that when the pipes burst, a massive gush of water ensued, which filled and burst light fixtures and ran down multiple sections of walls in various areas. The Receiver retained a contractor to repair this damage. The invoice for the leak repair work was sent on January 29, 2014.

[32] The Receiver retained a contractor to repair and paint the damaged dry wall in the second floor office above the garage (where the ceiling leak occurred) and the basement bathroom, room adjacent to the bathroom and poolroom bathroom (where the water pipe leak occurred). These repairs commenced on February 6, 2014 and the final invoice for the repairs was dated February 10, 2014.

Inspection by Jeff Clarke on January 31, 2014

[33] Upon learning of the damage caused by the two incidents, Mr. Aiello arranged for Mr. Clarke to inspect the Property on January 31, 2014. Mr. Clarke provided a report for Mr. Aiello dated January 31, 2014.

[34] In his report, Mr. Clarke confirmed that he performed an inspection at the Property that day for the purpose of reviewing the causes, damages and remediation in respect of the recent water damage. His report states that the roof, above the garage extension, leaked causing extensive water damage to the second floor finished space and the garage ceiling below. Mr. Clarke reported that, additionally, water pipes in the pool/spa area suffered freezing damage consequently causing leakage and water damage into the basement apartment below.

[35] Mr. Clarke made several recommendations for inspections and repairs including that the hardwood floor on the second floor office be replaced. Mr. Clarke recommended that a mould test be undertaken to determine if there is a present environmental risk to occupy the residence. He recommended that the roof be professionally inspected and evaluated to ensure that repairs were conducted in a good workmanlike manner and to ensure that there are no other vulnerabilities that could cause leakage.

[36] Mr. Clarke estimated that the cost for repair (including $32,000 to remove and replace the walnut veneer hardwood flooring) would be $55,878.50.

[37] The Receiver agreed to be responsible for the cost of replacing the walnut hardwood floor and to adjust the purchase price accordingly, as opposed to undertaking repairs prior to closing. The floor was not replaced by the Receiver before the Property was sold to another purchaser.

Mr. Aiello's request on February 7, 2014 to extend closing date

[38] On February 7, 2014, after the two incidents in January 2014, the lawyer for Mr. Aiello wrote to the lawyers for the Receiver and advised that there are number of issues which had arisen with respect to the Property. Mr. Aiello's lawyer advised that Mr. Aiello has reported extensive damage which has occurred since the date of execution of the Agreement and that the damages are listed in the report from Mr. Clarke dated January 31, 2014, which was enclosed.

[39] Mr. Aiello's lawyers advised that they required these damages to be rectified prior to closing and that Mr. Aiello cannot properly assess the damages to the roof and the extent of repair required. Mr. Aiello's lawyers requested a postponement of the closing date to April 15, 2014 without the requirement to pay any additional amounts as provided for in section 24 of the Agreement. Mr. Aiello's lawyer stated that once the ice has melted, they will be better able to assess the damages to the roof. Mr. Aiello's lawyers took the position that the damages occurred after the time of execution of the Agreement and were due to lack of maintenance of the Property during the interim period.

[40] The Receiver's lawyers responded by letter dated February 10, 2014. They advised that roofing repairs were completed on January 29, 2014 by Dufferin Roofing and the leak was identified as a coupling that came loose and was repaired. The letter states that drywall has been repaired, re-taped and painted and that the Receiver will investigate the flooring issue and if it

has been caused by water damage subsequent to execution of the Agreement, the Receiver will ensure repairs are made subsequent to closing. In the letter, the Receiver's lawyers state that they are advised that there is no evidence of any mould issues with reference to the Property and that an inspection was conducted that day by a qualified environmental engineer who confirmed this. The Receiver's lawyers stated that they would be pleased to permit Mr. Aiello to inspect the Property to confirm this information.

[41] The report provided to the Receiver by the environmental engineer who conducted the mould inspection was not enclosed with the February 10, 2014 letter.

[42] The Receiver's lawyers took the position that the matters identified in the letter from Mr. Aiello's lawyers "are extremely minor and of a monetary value that is insignificant in relation to the within transaction". The Receiver's lawyers advised that they expect Mr. Aiello to complete the transaction on February 14, 2014, in accordance with the Agreement, or avail himself of the extension provisions in the Agreement.

[43] By letter dated February 21, 2014, Mr. Aiello's lawyer wrote to the lawyers for the Receiver and forwarded $100,000 to extend the closing date for a further seven-day period in accordance with the Agreement. Mr. Aiello's lawyer advised that, notwithstanding this extension, "the issues that we mentioned before has to be resolved on or before closing".

Mr. Aiello's April 2014 request for extension of closing

[44] On April 2, 2004, the Receiver's lawyers wrote to Mr. Aiello's lawyer to respond to a verbal request made on behalf Mr. Aiello for a two week extension of the closing date. The Receiver's lawyers responded that they are instructed to advise that no extension will be granted and that the Receiver expects Mr. Aiello to honour his obligations as to closing pursuant to the Agreement. The closing was scheduled for April 4, 2014, and this date could be extended for one week under the Agreement if Mr. Aiello paid an additional deposit of $100,000.

[45] By letter sent on April 3, 2014 (incorrectly dated April 4, 2012), Mr. Aiello's lawyer wrote to the Receiver's lawyers stating that since the execution of the Agreement, the Property was not properly maintained and that there has been extensive damage to it. Mr. Aiello's lawyer described the damage as including water leakage, broken pipes, warped doors due to inappropriate heating, damage to flooring and drywall and possible mould damage as a result of frozen pipes. Mr. Aiello's lawyer suggested that a minimum four week extension should be granted in order for the parties to be able to properly assess and resolve the issues. Mr. Aiello's lawyer referred to the Receiver's position that the damages are insignificant and that an extension of the closing date would not be granted, and he suggested that the Receiver's position is in breach of the Agreement and is anticipatory. Mr. Aiello's lawyer confirmed his rights under the Agreement and expressed that Mr. Aiello requires the issues to be addressed forthwith and to his satisfaction prior to closing.

[46] The Receiver's lawyers responded to the letter from Mr. Aiello's lawyer by letter dated April 3, 2014. The letter reads:

> We have your letter of April 3, 2014. You indicate that, in light of the Receiver's position that it is not prepared to grant any further extensions beyond those

> permitted in the Agreement of Purchase and Sale, you will not be providing the further deposit of $100,000 for the last extension due Friday, April 4, 2014. As you know, Friday, April 4th, 2014 is otherwise the date for closing without any further extension. We confirm that you cannot and will not close.
>
> Accordingly we will treat the contract as being in breach, the deposits forfeit and action will be taken for the damages that may flow as a result of the breach.
>
> There is little point in debating the contents of your letter. They are wrong. The fact is your clients do not have the money to close nor will they by April 11, 2014 even if they were to extend the closing one more week pursuant to the Agreement of Purchase and Sale.

Post-closing communications

[47] The closing date of April 4, 2012 passed without the transaction being completed. Soon after, Mrs. Aiello made inquiries about inspecting the Property. The Receiver did not permit an inspection after the closing date had passed.

[48] On April 9, 2014, Mr. Aiello's lawyer wrote to the Receiver's lawyer advising that "[u]pon closing we will require your client's written undertaking to repair or replace any items that were damaged subsequent to the execution of the agreement and prior to closing, or alternatively agree to a holdback of $500,000". Mr. Aiello's lawyer asked whether this is acceptable.

[49] The Receiver's lawyer responded by email on April 11, 2014 and advised that the transaction was at an end on April 3 and no undertaking will be given because there is no longer any contract. The Receiver's lawyer advised that if Mr. Aiello were able to demonstrate that he had sufficient financing to complete the transaction, this might encourage the Receiver to believe that Mr. Aiello could "close the terminated transaction and to mitigate the damages".

[50] Mr. Aiello's lawyer responded by email on April 11, 2014:

> You have not advised whether the Receiver would be prepared to provide the undertaking requested with respect to damages to the premises subsequent to execution of the agreement of purchase and sale or agree to an abatement for the purposes of closing as was discussed with you with the last day or so. Consequently, we have been unable to determine the appropriate amount to tender on closing. We are prepared to agree to have a Vendors and Purchasers Application to determine as the appropriate amount to tender and to do same expeditiously.
>
> In this regard, we have asked that our experts attend at the property in order to examine and determine the issue of damages. Your refusal to permit us to do so is most unreasonable.

Sale of the Property

[51] After April 4, 2014, the Receiver took steps in the receivership proceeding to obtain authorization to relist the Property for sale. The Property was listed for sale from July 31, 2014 to November 30, 2014, and no offers were received during this time period. The Receiver extended the listing period to February 1, 2015. No offers to purchase were received. The Receiver sought Court approval of a second auction agreement in order to sell the Property through auction. A second auction agreement with Concierge was approved by order dated February 3, 2015.

[52] On or about May 25, 2015, the Receiver received an offer to purchase the Property. The Receiver entered into an agreement of purchase and sale dated May 25, 2015 pursuant to which the purchaser agreed to purchase the Property for a purchase price of $9,500,000 subject to certain conditions, including Court approval. Pursuant to an Approval and Vesting Order dated July 6, 2015, as amended, the Purchase Agreement and the transaction contemplated therein were approved. Mr. Aiello did not oppose the sale. On August 14, 2015, the transaction was completed and the Receiver sold the Property to the purchaser for a purchase price of $9,500,000.

Mould inspections and remediation after April 4, 2014

[53] Allan Rutman is the partner at the Receiver with responsibility for the receivership. Mr. Rutman's evidence is that Mr. Aiello's allegations that there was a significant mould problem with the Property caused concerns that the Property would become more difficult to sell and may not achieve the highest possible sales price. As a result, the Receiver sought and obtained approval from the Court to (a) engage a mould expert to attend at the Property; and (b) complete all steps recommended by the mould expert, including the remediation plan.

[54] The Receiver obtained quotes from three mould remediation companies in respect of remediation work. The Receiver retained Grande Environmental Ltd. which attended the Property and delivered reports. Grange recommended remediation steps. The Receiver followed the recommendations and engaged Caliber Environmental Construction Service Inc. to perform remediation work. Caliber completed its remediation work on November 13, 2014. The Receiver engaged Moldtech to perform certain post-remediation cleanup work and assess the success of the mould remediation efforts.

[55] Mr. Rutman testified that the total cost of the mould remediation work was $26,781 inclusive of HST. Mr. Aiello's position is that the true cost of remediation of the mould was $39,394.06 which includes the charges from Martech ($4,612.66) and Grande ($8,000.40).

Analysis

[56] The following issues arise in this action:

a. Is Mr. Aiello entitled to treat the Agreement as terminated and to the return of deposits under paragraph 11 of the Agreement because the Property was substantially damaged after the Agreement was made?

b. Did the Receiver, through the April 3, 2014 letter from its lawyers sent prior to the closing date commit an anticipatory breach of the Agreement by which the Receiver repudiated the Agreement, which repudiation was accepted by Mr. Aiello?

c. Did the Receiver commit an anticipatory breach the Agreement and thereby repudiate it by insisting that any damage to the Property was insignificant and refusing to grant an extension of the closing date to allow the parties to properly assess the damage?

d. If Mr. Aiello is liable for breach of the Agreement, what is the measure of the Receiver's damages?

Issue #1 Is Mr. Aiello entitled to treat the Agreement as terminated and to the return of deposits under paragraph 11 of the Agreement because the Property was substantially damaged after the Agreement was made?

[57] Mr. Aiello pleads that at the date for closing, April 4, 2014, there was extensive damage to the Property that had occurred after the Agreement was made, including unaddressed mould problems, such that the Receiver was no longer in a position to convey substantially the same property as Mr. Aiello had contracted to purchase. Mr. Aiello relies on the provision in the Agreement that "in the event of substantial damage", he may terminate the Agreement and have all monies paid returned without interest or deduction.

[58] Mr. Aiello pleads that the failure of the transaction to close was due to default of the Receiver to deliver the Property without substantial damage and, therefore, Mr. Aiello is entitled to the return of his deposit and all partial payments made towards the purchase price under the Agreement.

[59] The Receiver submits that Mr. Aiello has failed to discharge his onus of proving that there was "substantial" damage to the Property subsequent to the Agreement. The Receiver submits that any damage to the Property was insignificant and of no consequence to Mr. Aiello's obligations to close under the Agreement.

[60] The Receiver also submits that there can be no breach of the Agreement which amounts to repudiation where the Receiver is in a position to convey substantially what Mr. Aiello contracted to purchase. The Receiver submits that on the scheduled closing date, April 4, 2014, the Receiver was in a position to convey substantially what Mr. Aiello had contracted to purchase, which was an incomplete Property with significant documented design flaws and other deficiencies that required numerous and substantial repairs and improvements, as well as completion of the project. The Receiver submits that, as such, Mr. Aiello is not entitled to treat the Agreement as having been repudiated.

[61] The Receiver also submits that even if there had been a breach of the Agreement that amounted to repudiation thereof, Mr. Aiello subsequently affirmed the Agreement and lost the right to accept a repudiation thereof.

[62] After the two incidents involving water damage, Mr. Clarke inspected the Property and he provided an estimate of the repair costs. The total estimated repair costs were $55,878.50 of which $32,000 was estimated for replacing the hardwood floor in the room above the garage. The Receiver agreed to accept this cost. The remaining estimated charges were for other repairs. The Receiver provided evidence that the water damage was repaired.

[63] Other than in respect of the issue of mould, the evidence does not support a finding that the repairs were not done properly or that any significant additional cost for other repairs would be needed to remediate any damage that occurred after the Agreement was made. Other than in respect of the mould issue, which I address below, I find that there was no substantial damage to the Property after the Agreement that would allow Mr. Aiello to treat the Agreement as terminated and have the deposits returned.

[64] I now turn to the issue involving mould.

[65] Mr. Aiello was informed by Mr. Clarke in his report provided before the Agreement that he was not conducting any inspection for mould. Mr. Clarke recommended that Mr. Aiello retain a third-party inspector with appropriate expertise to conduct a mould inspection at the Property. Mr. Aiello was not advised that there was any evidence that mould was present at the Property. He did not arrange for a mould inspection.

[66] In February 2014, after the two incidents in January, the Receiver retained Martech Group Inc. to measure and test for mould at the Property. Mr. Marwan Essa of Martech attended at the Property on February 10, 2014 and performed a visual inspection of services within the interior of the building on the Property. The purpose of the inspection was to inspect surfaces, where accessible, for visible signs of mould, water damage or any potential concerns that may lead to mould issues within the site, limited by the visual inspection. All three levels of the Property were inspected being the basement, main and second levels. Mr. Essa reported on February 10, 2014 that at the time of inspection, no visible mould was identified. He observed some water stains in the basement's electrical room but there was no evidence of mould and he regarded the stains as normal. Mr. Essa testified that it can take up to 5 months for mould to germinate and become visible.

[67] In the fall of 2014, the Receiver implemented an investigation and remediation program in accordance with orders of this Court. The Receiver engaged a mould expert, Bernardino Grande of Grande Environmental Projects Ltd. Mr. Grande was asked to inspect the Property, conduct intrusive testing and deliver a written report setting out his recommendations. Mr. Grande provided three reports, a Limited Mould Assessment dated September 29, 2014, a Supplemental Mould Assessment dated October 9, 2014 and a Mould Clearance Summary Report dated November 21, 2014.

[68] Mr. Grande concluded that no obvious visible mould was observed in the roof above the garage where water had entered from the roof leak. Intrusive tests were done in this area. Visible mould was identified on a wood support in the attic. The basement closet in the staff quarters area was confirmed to contain mould including on the surface of drywall behind the baseboard. Potential visible mould was also identified in a basement storage room where exercise equipment was being stored. Mr. Grande also found mould in the basement laundry room and the basement

east cold storage room. Mr. Grande did not find evidence of mould in the area in or around the second floor where there had been a leak from the roof area or in the pool shower area where a pipe had burst.

[69] Mr. Grande wrote that regardless of mould type, it is unacceptable to have mould growth within occupied spaces and that mould growth is not acceptable from a building performance point of view. In accordance with the recommendations made by Mr. Grande, the Receiver carried out remediation work at a cost of $26,781 Mr. Grande confirmed at the conclusion of the work that the remediation had been successful and that the mould had been removed. As I have noted, Mr. Aiello position is that the true cost of mould remediation was $39,394.06. I accept Mr. Aiello's position in this respect.

[70] Mr. Aiello tendered expert evidence from Frank Haverkate who confirmed the existence of mould in the building on the Property. Mr. Haverkate did not identify the source of the mould or if it pre-dated the Agreement.

[71] Mr. Aiello provided evidence that three of their children suffer from serious chronic illnesses and that he and his wife were concerned about the presence of mould at the property and its associated health risks. Mr. Aiello's evidence is that he and his wife decided it was necessary to assess the extent of the water damage inside the walls and the potential for mould damage. Mrs. Aiello arranged a meeting with Mr. Clarke on or about April 7, 2014 for him to inspect the Property and provide an analysis of damage caused since his inspections on October 23 and 24, 2013. However, the Receiver refused access to the property to Mr. Clarke on this occasion.

[72] Mr. Aiello relies on the evidence of Mr. Essa that he observed no mould at the Property during his inspections on February 10, 2014 whereas mould was discovered in August 2014 when Mr. Grande undertook investigations. Aldo Garibaldi, the principal of AGC Incorporated, the project manager for the Property, testified that he conducted a detailed visual inspection of the Property after the water damage incidents and he did not see evidence of mould. Mr. Aiello relies on the evidence given by the Receiver's mould experts to prove that mould was not visible and present in November 2013 but it was present in the fall of 2014 when Mr. Grande conducted his inspections. The areas where mould was found were not the areas of water infiltration from the two incidents in January 2014.

[73] The evidence with respect to the presence of mould on the Property does not allow me to reach a firm conclusion as to whether mould developed on the Property after the Agreement was made or, if so, whether it was caused by the water incidents. Mr. Aiello is not required to prove this fact on a basis that is free from doubt. He is required to prove that it is more likely than not that mould developed on the Property after the Agreement was made. There is no evidence that mould was present at the Property when the Agreement was made, or that mould was present in February 2014 when the Property was inspected for mould. Mould was found in August 2014. I am satisfied that Mr. Aiello has proven on a balance of probabilities that mould developed on the Property after the Agreement was made, and after the January 2014 water damage incidents, and before the April 4, 2014 closing date.

[74] The next question is whether the presence of mould on the Property on April 4, 2014, in the circumstances, qualifies as "substantial damage" within the meaning of that term in the Agreement, such that Mr. Aiello was entitled to treat the Agreement as terminated and receive back his deposits.

[75] Mr. Aiello submits that the mould damage to the Property was substantial in April 2014 because he was left in a position where he was uncertain as to the extent of the water damage and when it would be safe for him and his family to occupy the Property. Mr. Aiello submits that, although the Receiver's position is that the cost to remediate the mould on the Property was small in relation to the value of the Property, the focus of the analysis should be on the fact that Mr. Aiello expressed concern about mould, he was told that there was no mould on the Property, and then he was denied access to the Property to conduct a fulsome inspection because Mr. Rutman claimed that such an inspection was not directly related to securing financing.

[76] Mr. Aiello submits that the cost of remediation does not determine whether or not damage is substantial, and there was no way of knowing at the closing date how expensive any repairs would be if mould was found on the Property. Mr. Aiello submits that before the closing date, the Property was substantially different than when the Agreement was made because it had a new, uninvestigated risk of mould, and no one could have known whether the Receiver was in a position to convey substantially what had been contracted for until a proper mould inspection was complete.

[77] In support of these submissions, Mr. Aiello cites *Pordell v. Crowther et al.*, 2020 ONSC 1635. In *Pordell*, a purchase agreement for the sale of a house had a provision that in the event of "substantial damage", the purchaser had an option to terminate the agreement. A fire occurred between the time of the agreement and the closing date. The purchaser was aware of the fire and made requests to inspect the damage before it was repaired, but that did not happen. The purchaser saw the house after repairs were completed and received limited documents from the vendor about the repairs shortly before closing. The purchaser did not complete the sale and asked for return of the deposit. The purchaser sued for return of the deposit and the vendor counterclaimed for damages for breach of the purchase agreement.

[78] The trial judge referred to the provision in the agreement with respect to "substantial damage" and held, at para. 67, that where damage has occurred, the purchaser must be given a meaningful opportunity to inspect the property and determine the extent of the damage. The trial judge held that the purchaser had not been given an opportunity to inspect the property and determine whether there was substantial damage. As a result, the purchaser was denied his right to decide whether to terminate the agreement or take a reduction in price reflecting the cost of repairs.

[79] The vendor in *Pordell* argued that the damage was not substantial because the cost of repairs was insignificant compared to the purchase price. The trial judge did not accept this submission and held, at para. 74, that the phrase "substantial damage" not restricted to a definition based solely on the cost to repair, and the quality, character and consequences of the damage must also be considered. There was expert evidence given by experts for the purchaser and the vendor about whether the damage from the fire was substantial. The experts disagreed.

The trial judge did not accept the evidence given by vendor's expert that the house had sustained no substantial damage based on the material he reviewed.

[80] The trial judge found that the fire caused considerable damage that could not be repaired in a day or two, and the extent of the damage could only be speculated by the experts after the fact based on limited information, although with more information than was provided to the purchaser. The trial judge, at para. 76, found that the damage was substantial and, given that the vendor failed to provide the purchaser with an opportunity to inspect the damage and exercise his rights under the purchase agreement, the vendor breached the agreement.

[81] I agree with the trial judge in *Pordell* that the phrase "substantial damage" in the Agreement is not restricted to whether the cost of repairing damage to the Property is significant in relation to the purchase price. The quality, character and consequences of the damage must also be considered. Although the cost of remediation of the Property to address mould issues identified by Grande, $39,394.06, was minor in relation to the purchase price, the circumstances between late January 2014 and the closing date of April 4, 2014 must be examined to determine whether the mould issues amount to substantial damage that gave Mr. Aiello the right to treat the Agreement as terminated and recover his deposits.

[82] Mr. Aiello places particular reliance on his assertion that the Receiver refused to allow him to investigate whether there was mould on the Property from water damage from the two January incidents. Mr. Aiello submits that the Receiver's position, based on Mr. Rutman's evidence, that Mr. Aiello did not re-attend with an inspector between January 2014 (when the two incidents involving water damage occurred) and April 3, 2014 is intentionally misleading. Mr. Aiello submits that Mr. Rutman's evidence at trial was that he would only permit inspections for the purpose of securing financing, and Mr. Aiello was forbidden from other inspections and, particularly, inspections of the damage to the Property. Mr. Aiello submits that there was no reason for him to ask to conduct an inspection of mould damage when he knew his request would be refused.

[83] Mr. Rutman was cross-examined extensively and at length concerning whether he allowed Mr. and Mrs. Aiello to inspect the property, and whether he imposed restrictions on their ability to inspect for damage to the Property, including mould damage, resulting from the two incidents.

[84] Mr. Rutman was asked about his working relationship with Mr. and Mrs. Aiello from October 2013 through the end of 2013. He testified that believed he had a good working relationship with them, at least to the end of March 2014. He testified that he has no recollection of conflicts with them other than in relation to replacement of the floor on the second floor office above the garage. It was put to him that he unreasonably imposed restrictions on Mrs. Aiello with respect to attending to inspect the Property. Mr. Rutman responded that he was entitled to approve who would be on the property and the Receiver had discretion with respect to inspections of the Property.

[85] Mr. Rutman testified that an inspection for the purpose of financing would not be a problem. Mr. Rutman testified that Mrs. Aiello did not ask to bring people to the Property until the end of March and into April, after the closing date had passed. It was put to Mr. Rutman that

he would not let Mrs. Aiello bring an inspector to satisfy herself that there was no damage at the Property and Mr. Rutman responded, “at the time, no”.

[86] Mr. Rutman was directed to his email to the real estate agent on January 27, 2014 asking to be informed every time Mrs. Aiello asks to go to the premises and he responded that this was appropriate, and he cooperated with her requests. After giving this answer, Mr. Rutman confirmed that there was no request by Mr. Aiello or Mrs. Aiello to bring an inspector to assess the damage to the Property from the January incidents until late March or early April 2014 and that an inspection took place on April 1.

[87] Mr. Rutman was cross-examined about emails concerning the January 31, 2014 inspection in which the real estate agent expressed concerns about the presence of “trades”. Mr. Rutman responded that when this inspection took place, he did not know that an inspector would be present, and he felt that he was entitled to know who would be on the Property. Mr. Rutman testified that he had no problem with Mr. and Mrs. Aiello knowing what work was being done to make repairs to the Property and satisfying themselves that the work was done to a proper standard.

[88] Mr. Rutman was asked whether he objected to Mrs. Aiello inspecting the Property with an inspector to assess the state of repairs to the Property and inspecting damage to the Property, and he responded that, to the contrary, he encouraged this. He pointed to the February 10, 2014 letter from the Receiver’s lawyers and testified that he never stopped Mr. or Mrs. Aiello from coming to the Property. Mr. Rutman testified that after the February 10, 2014 letter, Mr. or Mrs. Aiello were on the Property on an ongoing basis and they had a full opportunity to inspect the damage to the Property from the two incidents in January 2014. It was put to Mr. Rutman that the Receiver refused to allow inspections of the damage or that he put time limits on inspections and he responded that, to his knowledge, there were no refusals or time limits. Mr. Rutman testified that Mrs. Aiello did not express concerns that the repairs had not been done properly.

[89] Mr. Rutman was asked about an email he received from Barry Cohen, the real estate agent representing the Receiver, on March 6, 2014 concerning a forthcoming visit to the Property by Mrs. Aiello and her “mortgagee and contractor” in which the agent wrote that he would have one of his team attend “and coach them on no inspections”. Mr. Rutman responded that under the Agreement, the Receiver had discretion to refuse inspections and that he required notification that an inspection would be taking place. The Receiver would then determine whether to allow the inspection to take place. He stated that if he concluded that the purpose of the inspection was to object to the repairs for the purpose of developing a strategy to delay closing, or to reduce the purchase price on closing, he would regard that to be conduct that was not in good faith and the Receiver would be entitled to refuse the inspection. Mr. Rutman confirmed that Mr. and Mrs. Aiello were given opportunities to inspect the repairs and that Mrs. Aiello did not express dissatisfaction with the repairs that were done. Mr. Rutman testified that he had no issue with allowing inspections to determine the existence of mould on the Property, but there were no indications that Mr. or Mrs. Aiello wished to have such inspections until early April 2014, just before the scheduled closing date.

[90] Mr. Rutman was asked about an exchange of emails on March 13, 2014 in which the real estate agent confirmed that Mrs. Aiello had requested a visit to the Property. Mr. Rutman

approved the visit, but added in his email to the agent, when it was proposed that the real estate agent for Mr. Aiello would be present, that he would be more comfortable with "someone from our side" being present at the visit. Mr. Rutman testified that he wanted a representative of the seller there.

[91] Mr. Rutman was questioned about an email exchange on March 27-28, 2014 with the real estate agent representing the Receiver, in which Mr. Rutman was asked to approve an inspection by Mrs. Aiello's contractor on April 1, 2014. Mr. Rutman's email to Mr. Cohen states that he will not approve, and he wants confirmation first of the closing date. Mr. Rutman acknowledged that he communicated this position to Mr. Cohen and he agreed that he wanted Mr. Aiello to confirm the closing date (then scheduled for April 4, 2014, subject to one further extension) because he was concerned that the transaction would not close. It was put to Mr. Rutman that he refused access to the Property. Mr. Rutman responded that the Receiver allowed the inspection on April 1, 2014 to take place and it did take place.

[92] Mr. Rutman testified that the Receiver did not object to any requests by Mr. Aiello or Mrs. Aiello to inspect the Property prior to April 7, 2014.

[93] On her cross-examination, Mrs. Aiello agreed that she was not denied entry to the Property until her request to attend on April 7, 2014, after the transaction failed to close on April 4, 2014. Mrs. Aiello agreed that she was never denied entry to the Property by the Receiver as long as she asked in advance.

[94] I accept Mr. Rutman's evidence with respect to his dealings with Mr. Aiello and Mrs. Aiello about inspections of the Property after the January 2014 incidents. His evidence withstood cross-examination. Although Mr. Rutman conceded that he was concerned about whether the transaction would close, and he insisted that he be given advance notice of any inspection and that someone would accompany Mr. Aiello or Mrs. Aiello on inspections, he was firm that Mr. Aiello and Mrs. Aiello were given full access to the Property to inspect it to determine whether the repairs to the water damage from the two incidents had been done properly or whether there was mould present.

[95] There is no evidence that at any time before the April 4, 2014 closing date either Mr. Aiello or Mrs. Aiello was denied access to the Property to conduct an inspection, with or without an inspector accompanying them. The written record is clear that in the February 10, 2014 letter from its lawyers, the Receiver invited Mr. Aiello to inspect the Property to assess the repairs that were done. After this date, Mrs. Aiello attended at the property, sometimes with contractors, on several occasions. If Mr. Aiello was concerned that there might be mould on the Property, notwithstanding the Receiver's statement to the contrary, it was open to him at any time before closing to inspect the Property to satisfy himself about the absence of mould.

[96] Mr. Aiello had been advised by Mr. Clarke to inspect the Property for mould before entering into the Agreement, and he decided not to do so. As a result, before entering into the Agreement, Mr. Aiello took the risk that there might be mould on the Property. In the same way, Mr. Aiello did not inspect the Property for mould after the two water damage incidents in January 2014. Although the Receiver had advised that its inspector had confirmed that there was no mould, Mr. Aiello, through his lawyer, did not accept this as determinative, and they reserved

their rights to require further remediation if required. Nevertheless, Mr. Aiello did not ask to inspect the Property for mould or other unrepaired damage until just before the closing date, and he requested an extension of the closing date for this purpose.

[97] I do not accept that the evidence shows that Mr. Aiello was forbidden from further inspections of the damage to the Property after the two January 2014 incidents involving water damage, or that unreasonable restrictions were imposed. The Receiver gave Mr. Aiello a long period of time after the repairs were done at the end of January 2014 and before closing to inspect the Property and assess the quality of the repairs. The evidence is unlike the evidence in *Pordell* where the trial judge found that the vendor had failed to provide the purchaser with an opportunity to inspect the damage. If Mr. Aiello had decided by early April 2014 that he wished to conduct a mould inspection, he had the right to extend the closing date for another week under the Agreement (by paying an additional $100,000 deposit), but he chose not to avail himself of this right.

[98] I conclude that the presence of mould at the Property on April 4, 2014 was damage that was minor and could be readily remediated at a very modest cost in relation to the purchase price of the Property. This is shown by Mr. Grande's evidence. Mr. Aiello could have confirmed this fact had he taken advantage of the opportunities to inspect the Property for mould prior to the closing date. He chose not to do so.

[99] I conclude that Mr. Aiello has failed to prove that the Property was substantially damaged after the Agreement was made and before the April 4, 2014 closing date, such that he was entitled to treat the Agreement as terminated and have all monies paid for deposits returned without interest or deduction.

Issue #2 Was Mr. Aiello entitled to refuse to close the Agreement on April 4, 2014 because the Receiver repudiated the Agreement through the April 3, 2014 letter from its lawyers?

[100] In his closing submissions following the completion of evidence, Mr. Aiello's counsel argued that the Receiver repudiated the Agreement through the April 3, 2014 letter from its lawyers and that the Agreement was terminated by the Receiver before the April 4, 2014 closing date. The Receiver objected to these submissions because Mr. Aiello had not pleaded the April 3, 2014 letter or its legal effect.

[101] Mr. Aiello requested an adjournment to allow him to seek leave to amend his statement of defence. The closing submissions were adjourned and Mr. Aiello brought a motion for leave to amend his statement of defence. I granted leave to Mr. Aiello to amend his statement of defence. The Receiver delivered a reply pleading. Counsel made additional submissions to address the pleading amendments.

[102] In his Amended Statement of Defence, Mr. Aiello specifically pleads the April 3, 2014 letter from the Receiver's lawyers which I have quoted in my summary of the evidence above. The letter states, in part:

> Accordingly, we will treat the contract as being in breach, the deposits forfeit and action will be taken for the damages that may flow as a result of the breach

[103] Mr. Aiello pleads that the Receiver, through its words in this letter and its actions following the letter, unilaterally repudiated the Agreement at a time when the Agreement remained alive, and that the repudiation amounted to an anticipatory breach of the Agreement.

[104] Mr. Aiello submits that the Receiver could not close the Agreement on April 4, 2014 because the Receiver had already terminated it on April 3, 2014 and the Receiver acted in accordance with that termination thereafter. Mr. Aiello submits that the subsequent actions of the Receiver rendered the option to expressly disaffirm the Agreement unavailable and impractical.

[105] In addition to the April 3, 2014 letter, Mr. Aiello relies on a letter sent on April 11, 2014 from the Receiver's lawyers to Mr. Aiello's lawyer stating that "the transaction was at an end on April 3", and "there is no longer any contract". Mr. Aiello also relies upon the Fourth Report of the Receiver which states "[t]he Receiver's counsel advised that the Purchaser was in breach of the Agreement of Purchase and Sale, that the transaction was terminated and that the deposits were forfeited".

[106] Mr. Aiello relies on this evidence to show that the Receiver made the decision to terminate the Agreement as expressed in the April 3, 2014 letter.

[107] Mr. Aiello disputes the Receiver's assertion that he did not affirm the repudiation by clearly and unequivocally communicating his intention to do so. Mr. Aiello submits that his acceptance of the Receiver's repudiation was abundantly clear.

[108] In support of this submission, Mr. Aiello relies upon a decision of the Court of Appeal for Ontario in *Brown v. Belleville (City)*, 2013 ONCA 148. In *Brown*, the Court of Appeal set out, at paras. 42-48, the governing principles regarding the consequences of a repudiatory or anticipatory repudiation of contract. I quote the following passages from these paragraphs:

> A repudiatory breach or an anticipatory repudiation of contract does not, in itself, terminate or discharge contract. In [page 571] *Guarantee Co. of North America* v. *Gordon Capital Corp*., [1999] 3 S.C.R. 423, [1999] S.C.J. No. 60, at para. 40, the Supreme Court explained:
>
> > Contrary to rescission, which allows the rescinding party to treat the contract as if it were *void ab initio*, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each (party) has a right to sue for damages for past or future breaches" (emphasis in original): *Cheshire, Fifoot & Furmston's Law of Contract*, (12th ed. 1991), by M.P. Furmston at p. 541. If, however, the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from further obligations. Rights and obligations that have already matured or not extinguished. Furmston, *supra*, at pp. 543-44.
>
> ...

> In his leading textbook, *The Law of Contracts* (Toronto: Irwin Law, 2005), John D. McCamus refers to the election right of the innocent party on repudiation as an option to disaffirm or affirm the contract. Disaffirmation of the contract, in this sense, constitutes an election to terminate the contract in the face of the non-innocent party's repudiation of the contract. In the applicable authorities, it is frequently said that an election to disaffirm the contract is an "acceptance" or "adoption" of the repudiation. On this view, an election to affirm the repudiated contract constitutes rejection or denial of the repudiation and a decision to treat the contract as subsisting and ongoing.
>
> ...
>
> It appears to be settled law in Canada that where the innocent party to a repudiatory breach or an anticipatory repudiation wishes to be discharged from the contract, the election to disaffirm the contract must be clearly and unequivocally communicated to the repudiating party within a reasonable time. Communication of the election to disaffirm or terminate the contract may be accomplished directly, by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case: McCamus., at pp.659-61.
>
> ...
>
> More recently, in *White v. E.B.F. Manufacturing Ltd*., [2005] N.S.J. No. 518, 2005 NSCA 167, 239 N.S.R. (2d) 270, at para. 91, Saunders J.A. of the Nova Scotia Court of Appeal accepted the following description of what constitutes "acceptance" of repudiation, as set out in *Chitty on Contracts*, 28th ed. Vol. 1 (London: Sweet & Maxwell, 1999), at p. 25-012:
>
> > Where there is an anticipatory breach, or the breach of an executory contract, and the innocent party wishes to treat himself as discharged, he must "accept the repudiation." It is usually done by communicating the decision to terminate [to] the party in default although it may be sufficient to lead evidence of an "unequivocal overt act which is inconsistent with the subsistence of the contract ... without any concurrent manifestation of intent directed to the other party" ... Acceptance of a repudiation must be clear and unequivocal and mere inactivity or acquiescence will generally not be [page 573] regarded as acceptance for this purpose. But there may be circumstances in which a continuing failure to perform will be sufficiently unequivocal to constitute acceptance of a repudiation. It all depends on "the particular contractual relationship and the particular circumstances of the case."

[109] Mr. Aiello submits that when he failed on April 4, 2014 to either (i) pay a further $100,000 deposit to extend the closing date for the Agreement by a further week, or (ii) pay the

purchase price, he clearly and unequivocally accepted the Receiver's repudiation of the Agreement.

[110] Mr. Aiello submits that the evidence is clear that he still wanted to purchase the Property and, for this reason, through his lawyer, he continued to try to work with the Receiver to reach some sort of agreement to revive the sale. Mr. Aiello submits that his conduct cannot fairly be taken to mean that he did not accept the Receiver's repudiation.

[111] The Receiver's primary position, as pleaded in its reply, is that the April 3, 2014 letter from Mr. Aiello's lawyer amounted to an anticipatory breach of the Agreement by Mr. Aiello. The Receiver points to the language used by its lawyers in their April 3, 2014 letter in response confirming that Mr. Aiello "cannot and will not close" and stating "[a]ccordingly, we *will* treat the contract as being in breach, the deposits forfeit and action will be taken for the damages that may flow as a result of the breach." (emphasis added). The Receiver submits that the letter from the Receiver's lawyers on April 3, 2014 left it open to Mr. Aiello to close the Agreement on April 4, 2014, however, he failed to do so.

[112] The Receiver pleads, in the alternative, that if the April 3, 2014 letter from its lawyers amounted to an anticipatory breach or a repudiation of the Agreement, Mr. Aiello did not accept the repudiation.

[113] The April 3, 2012 letter from the Receiver's lawyer must be read and understood in context. This letter followed a letter from the Receiver's lawyer, just one day before, on April 2, 2014, refusing to agree to a two-week extension of the date of closing of the Agreement, as had been requested. In response, Mr. Aiello's lawyer wrote on April 3, 2012 and took the position that the Receiver's refusal to agree to an extension of the closing date was "inappropriate" and he requested a "minimum four week extension" of the closing date.

[114] Mr. Aiello's lawyer included the following paragraphs in his letter:

> In our letter dated February 7, 2014, we requested an extension in order to be able to properly determine the extent of the damages to the Property, which we asserted could not be adequately addressed until the snow had melted. We continue to re-assert our client's rights under the APS and specifically noted that our client agreed to take the property "as is" as of the date of signing. We maintain that the damages occurred after such date. The APS clearly requires that all buildings on the property and all things being purchased shall remain at the risk and for the benefit of the seller until completion. Given the fact that you have taken the position that the damages are insignificant and that you will not grant an extension to deal with the extent of the damages, we suggest that your position is in breach of the APS and is anticipatory. Under these circumstances, it is inappropriate for us to provide you with a further deposit.

> Accordingly, we affirm our rights under the APS and require the above-mentioned issues to be addressed forthwith and to our satisfaction prior to closing.

[115] This letter from Mr. Aiello's lawyer is clear that Mr. Aiello will not complete the transaction on the scheduled closing date on the basis that he is not required to do so. It was open to the Receiver to treat this notification as a repudiation of the Agreement. The response from the Receiver's lawyer is clear, however, that the Receiver did not accept the repudiation as bringing the Agreement to an end. The Receiver left it open to Mr. Aiello to close.

[116] The April 3, 2014 letter from the Receiver's lawyers in response confirms the April 4, 2014 closing date (without any further extensions) and confirms the Receiver's understanding that Mr. Aiello will not close. The letter does not state that the Agreement "is" or "is hereby" terminated. The letter states that the Receiver "will treat" the Agreement as being in breach and the deposits forfeit. Through this language, the Receiver's lawyers were clear that the Receiver will treat Mr. Aiello's failure to close as a breach of the Agreement. This is exactly the position the Receiver has taken.

[117] I conclude that the Receiver did not repudiate or anticipatorily breach the Agreement through the April 3, 2014 letter from its lawyers.

[118] If I am in error, and if the letter should be read as a statement on behalf of the Receiver that the Agreement "is hereby" terminated, a repudiation of the Agreement by the Receiver, the next question would be whether the Receiver's repudiation was accepted by Mr. Aiello.

[119] In Mr. Aiello's affidavit tendered as his evidence in chief, he states that he was always willing and able to close the sale of the Property "[s]ave and except for the damage caused to the Property by the Receiver's neglect [of] its duty to maintain the Property". Mr. Aiello's evidence is that the Receiver repudiated the Agreement by, amongst other things, (a) the Receiver's refusal to rectify the damage it had caused, (b) the Receiver's failure to undertake to repair the damage that occurred to the Property while it was at the Receiver's risk; (c) the Receiver's refusal to allow inspections of the Property to properly assess the extent of the damages; and (d) the Receiver's failure to provide adequate information to his lenders regarding the necessary repairs. Mr. Aiello does not raise the April 3, 2014 letter from the Receiver's lawyer as an act of repudiation.

[120] Mr. Aiello also swore an affidavit in these proceedings on May 29, 2014. In this affidavit, Mr. Aiello gave evidence that the sale did not close because the Receiver failed to maintain the Property in a reasonable and prudent fashion such that the Property suffered significant damages that the Receiver was unwilling to repair before closing or allow Mr. Aiello to fully assess. Mr. Aiello states in this affidavit that "[t]his forced me to terminate the agreement due to the Receiver's anticipatory breach".

[121] Mr. Aiello did not give evidence that he did not close the purchase of the Property because of the April 3, 2014 letter from the Receiver's lawyers.

[122] It is clear to me that Mr. Aiello did not treat the April 3, 2014 letter from the Receiver's lawyers as a repudiatory breach of the Agreement. Mr. Aiello had already taken the position that

the Receiver's refusal to extend the date for closing was an anticipatory breach of the Agreement because Mr. Aiello was entitled to more time to investigate the damage to the Property and determine the extent of this damage. Mr. Aiello had already communicated, before his lawyer received the April 3, 2014 letter from the Receiver's lawyer, that he was entitled to an extension of the closing date and he did not intend to close the Agreement on April 4, 2014. Mr. Aiello never communicated to the Receiver, expressly or by conduct, that he treated the Receiver's lawyers' April 3, 2014 letter as repudiation of the Agreement which he accepted as bringing the Agreement to an end.

[123] In the circumstances, with the closing scheduled for April 4, 2014, the time for Mr. Aiello to make an election to accept the letter as a repudiatory breach was before the closing date passed. But Mr. Aiello did not take the position that the Agreement was terminated by his acceptance of the Receiver's repudiatory breach. He took the position that he was not required to close on April 4, 2014, and that the Agreement was continuing in full force and effect. Even if the letter from the Receiver's lawyers was a repudiation of the Agreement, Mr. Aiello, by taking the position that he had a right to an extension of the closing date, elected to affirm the Agreement.

Issue #3 Did the Receiver commit an anticipatory breach the Agreement and thereby repudiate it by insisting that any damage to the Property was insignificant and refusing to grant an extension of the closing date to allow the parties to properly assess the damage?

[124] Mr. Aiello also pleads that by refusing to extend the date for closing to allow the parties to determine the extent of the damage to the Property, the Receiver repudiated the Agreement and anticipatorily breached the Agreement. Mr. Aiello submits that the actions of the Receiver are completely at odds with a duty of good faith and a willingness to take reasonable steps to complete the sale. He submits that the actions of the Receiver support a finding that the Receiver repudiated the Agreement.

[125] In support of this submission, Mr. Aiello relies on *Buckwheat Enterprises inc. v. Shiu*, [2001] B.C.J. No. 2807. In *Buckwheat*, there was an interim agreement for the purchase of a property and the property was damaged by fire before closing. The purchaser wished to close and asked for a price abatement and an extension of the closing date to allow for further negotiations. The presiding judge, at para. 9, cited the following legal principles with respect to the obligations of the parties where damage to property occurs before closing:

> The purchaser has a right to the conveyance of the property with a reasonable abatement of the price. The vendor has a right to an extension of the time for closing so as to permit negotiations to proceed. These mutual obligations impose a duty of reasonableness on both parties. Each must be reasonable as to price. Each must enter into the negotiations in good faith. Each must be reasonable as to time, so as to permit the negotiations to come to fruition. A failure by either party to live up to these newly imposed, implicit obligations caused by the change in circumstances may contribute to a finding that there has been a repudiation.

[126] I have reviewed the evidence on this issue extensively in my analysis of the first issue. Mr. Aiello's request for an extension of the closing date was not for the purpose of allowing the

parties time to negotiate a price adjustment to reflect the cost of remediation of known mould on the Property. At the time of closing, the Receiver understood that there was no mould on the Property and, as I have found, Mr. Aiello took no steps to, himself, verify this information, until just before the closing date. These facts differ materially from those in *Buckwheat*.

[127] Although the Agreement includes the usual "time is of the essence" provision, it was open to Mr. Aiello to extend the closing date for an additional week by paying an additional deposit. In the circumstances, the Receiver did not act unreasonably by refusing to extend the date for closing. The Receiver did not act in a way that would amount to a breach the duty to act in good faith.

[128] I conclude that the Receiver did not repudiate the Agreement by refusing to extend the time for closing.

Issue #4 If Mr. Aiello is liable for breach of the Agreement, what is the measure of the Receiver's damages?

[129] The Receiver seeks damages under the follow heads:

a. $2,663,162.18 representing the deficiency in the purchase price between the Agreement and the price under the second transaction, after allowing for a price adjustment of $36,837.82 for the replacement cost of flooring to which Mr. Aiello was entitled.

b. $1,220,000 in the Receiver's capacity as assignee of Concierge's contractual claim against Mr. Aiello for the Buyer's Premium, pursuant to Minutes of Settlement between the Receiver and Concierge.

c. $561,400 representing original auction fees that were paid by the Receiver and not recovered.

d. $132,000 representing an engagement fee and $429,400 representing the real estate broker's commission.

e. $979,039.40 representing additional costs incurred by the Receiver during the holding period comprised of Receiver's fees and disbursements in the amount of $436,098, legal fees and disbursements in the amount of $236,248.34, and Property holding and maintenance costs in the amount of $534,285.02.

[130] Mr. Aiello objects to the Receiver's claim for damages on several grounds. I address his objections below in relation to each head.

<u>Price deficiency</u>

[131] Mr. Aiello submits that the Receiver's claim under this heading is excessive.

[132] First, Mr. Aiello submits that the amount claimed fails to account for unrepaired damage to the Property from the January 2014 incidents which would affect the appeal of the Property and, therefore, the purchase price obtained.

[133] The Receiver agreed to allow $36,837.82 (an average of three quotes obtained by Mr. Aiello) for replacement of the floor in the room above the garage. There was no evidence of the cost of other damage from the two incidents that was not properly repaired by the Receiver. I do not accept that the damages should be reduced because the appeal of the Property may have been affected by unrepaired damage. The house was incomplete and would need extensive work to become complete. No evidence was tendered of the effect of any unrepaired damage on the market value of the Property.

[134] Second, Mr. Aiello submits that the Receiver failed to mitigate its damages by refusing to hold good faith negotiations with Mr. Aiello in April 2014 when he offered to accept a $500,000 price abatement or close with the Receiver's undertaking to fully remediate any damage that occurred at the Property between the execution of the Agreement and closing.

[135] The Receiver's lawyers responded to the proposal made by Mr. Aiello's lawyer by an email on April 11, 2014. They responded that no undertaking would be given because the Agreement was at an end. They addressed the possibility of resurrecting the Agreement and advised:

> There has been no indication, confirmation, evidence or anything else that would provide the Receiver with any comfort or certainty that your clients have the funds necessary to close the transaction. Your correspondence is really therefore quite academic and there is little point in debating it further.
>
> There is a beautiful expression it fits the current situation; "show me the money" with the appropriate linguistic accent. If your clients were in fact able to do that, it might go some distance to encouraging the receiver to believe in your clients' ability now to close the terminated transaction and to mitigate the damages.

[136] Mr. Aiello did not respond to this email with evidence demonstrating his financial capability of completing the purchase of the Property.

[137] I am satisfied that the Receiver did not fail to mitigate its damages by failing to accept a $500,000 price abatement.

[138] With respect to Mr. Aiello's request to reinstate the Agreement based on the Receiver's undertaking to fully remediate any damage that occurred at the Property between the execution of the Agreement and closing, the Receiver submits that it was appropriate for it to seek confirmation and evidence of Mr. Aiello's ability to close a reinstated transaction for the purchase of the Property.

[139] The Receiver submits that the evidence shows that Mr. Aiello was not in a financial position to close the transaction at any time between February 14, 2014 and April 4, 2014. In support of this submission, the Receiver relies on the lack of evidence that Mr. Aiello had confirmed mortgage financing in place that was sufficient to fund completion of the sale. The

Receiver relies on the statement in Mr. Aiello's affidavit that he received a commitment dated May 28, 2014 confirming financing of $2,000,000 by way of a second mortgage. The Receiver relies on the evidence that, although Mr. Aiello planned on financing the balance of the purchase price through personal assets and the sale of his home in Thornhill (which sold for $4,200,000), the Aiellos' home in Thornhill did not sell until June 9, 2014. Mr. Aiello testified that, in fact, the proceeds from the sale of the Thornhill house were not needed.

[140] I do not need to decide whether, in fact, Mr. Aiello had financing in place to complete the Agreement in April 2004. I am satisfied that after the Agreement failed to close, it was reasonable for the Receiver to require evidence that Mr. Aiello had financing in place before it reinstated the Agreement on the basis proposed by Mr. Aiello, with an undertaking to be given by the Receiver to fully remediate any damage that occurred at the Property between the execution of the Agreement and closing.

[141] The Receiver did not fail to mitigate its damages.

[142] The damages under this head are $2,663,162.18.

Buyer's Premium

[143] Mr. Aiello entered into an agreement dated November 25, 2013 with Concierge entitled Bidder Registration Auction Terms and Conditions in respect of the auction that was conducted in November 2013 (the "ATC Agreement"). Under the ATC Agreement, Mr. Aiello agreed to pay a premium as a fee of 10% of the highest bid to Concierge for bringing the Property to auction (the "Buyer's Premium"). The Buyer's Premium amounted to $1,220,000. Mr. Aiello was required to pay the Buyer's Premium on the closing date unless the transaction failed to close due to a default by the Receiver.

[144] Pursuant to Minutes of Settlement between the Receiver and Concierge dated August 14, 2015, Concierge agree to assign, transfer and convey to the Receiver all of its right, title and interest in and to the Buyer's premium. The Receiver paid $320,000 to acquire the debt.

[145] The Receiver claims $1,220,000, as assignee from Concierge, in this action.

[146] Mr. Aiello submits that the Receiver should not be able to recover this amount because to allow it to do so would allow the Receiver to profit from its own repudiation of the Agreement and its subsequent conduct.

[147] Mr. Aiello relies on background facts which led the Receiver to acquire Concierge's claim to the Buyer's Premium. The settlement between the Receiver and Concierge came about after Concierge claimed an entitlement to a 10% buyer's premium for the second auction because the Receiver sold the Property to someone who, reportedly, was present at the second auction. Mr. Aiello submits that the settlement between the Receiver and Concierge had nothing to do with his conduct and resulted from potential wrongdoing by the Receiver. On this basis, Mr. Aiello submits that the Receiver should not be able to recover any amount for the buyer's premium.

[148] In the alternative, Mr. Aiello submits that, based on the $9,500,000 sale price on the second sale, the Buyer's Premium should be calculated to be $950,000.

[149] In the further alternative, Mr. Aiello requests that the recoverable damages for the buyer's premium be limited to the amount paid by the Receiver to acquire Concierge's claim, that is, $320,000.

[150] I do not agree that the circumstances surrounding the Minutes of Settlement justify refusing to give effect to the Receiver's claim as assignee. The Receiver acquired Concierge's claim against Mr. Aiello under the ATC Agreement for good consideration. As assignee, the Receiver is entitled to claim the Buyer's Premium from Mr. Aiello.

[151] I allow the Receiver claim under this head in the amount of $1,220,000.

Original Auction Fees

[152] The Auction Services Agreement between the Receiver and Concierge provides that in the event the successful bidder at the auction is not HSBC:

a. the Concierge Engagement Fee (in the amount of $132,000) paid by the Receiver to Concierge will be refunded to the Receiver; and

b. Concierge will pay the real estate broker's commission related to the sale of the Property (not to exceed 5% of the sale price, not including the Buyer's Premium).

[153] Mr. Aiello was the successful bidder at the auction with the result that the provision in the Addendum to the Auction Services Agreement was triggered (because the successful bid was not from HSBC).

[154] Because Mr. Aiello did not close the transaction, Concierge did not refund the Receiver the amount of $132,000 paid by it on account of the Concierge's Engagement Fee, and Concierge did not pay the real estate broker's commission (which it would have done if Mr. Aiello had closed the transaction under the Agreement). As a result, the Receiver paid the real estate broker's commission in the amount of $429,400.

[155] Concierge did not charge an engagement fee for the second auction.

[156] Mr. Aiello submits that the Receiver's claim for damages under this heading should be denied because it failed to plead the material facts upon which it relies in its Amended Statement of Claim.

[157] Paragraph 32 of the Amended Statement of Claim states:

> The Plaintiff has sustained the following losses as a result of Aiello's failure to close the transaction contained in the Aiello Agreement:

(a) The amount of $2,700,000 in respect of the amount by which the sale price and the proposed transaction with Aiello exceeded the proceeds of the sale to Ping; and

(b) The amount of $2,147,360 in respect of additional costs incurred by the Plaintiff in administering the estate during the period between the Closing Date and August 14, 2015 (being the date of the sale to Ping).

[158] The amount claimed under this heading for the original auction fee and the charge for real estate commission are included in the claim for $2,147,360. Supporting documents were produced and this claim was a subject of the examination for discovery of the Receiver's representative.

[159] The amount of the claim and a general description of the nature of the claim were pleaded and the claim was the subject of discovery. There is no evidentiary basis for me to find that Mr. Aiello was taken by surprise by this claim at trial. This claim was adequately pleaded.

[160] Mr. Aiello also submits that the Original Auction Fees are not recoverable because they would constitute a double recovery by the Receiver in light of the claim for the Buyer's Premium. Mr. Aiello submits that the reason that the Receiver would not have been required to pay the engagement fee or the Real Estate Commission had the first sale to Mr. Aiello closed was because these costs would have been assumed by Concierge, as auctioneer, because these amounts would have been covered by the $1,220,000 Buyer's Premium to be paid by Mr. Aiello.

[161] The obligation of Mr. Aiello to pay the Buyer's Premium arises under the ATC. The obligation of Concierge to refund the engagement fee and to pay the real estate commissions on the first auction arises under the Auction Services Agreement, a separate contract. There is no evidence that the Buyer's Premium was intended to cover the cost of the fees under the Auction Services Agreement. There is no evidence to support Mr. Aiello's submission that to allow the Receiver to recover damages under this head would amount to double recovery.

[162] Mr. Aiello submits, with respect to the claim for real estate commission, that the Receiver failed to mitigate its loss by selling the Property outside of the second auction process because, had the Property been sold pursuant to the second Auction Marketing Agreement, the real estate commission would have been paid by Concierge, the auctioneer.

[163] There is no evidence to support a finding that the Receiver acted unreasonably by selling the Property outside of the second auction as it did. In the absence of such evidence, I do not accept that the damages claimed under this head should be denied because the Receiver failed to reasonably mitigate its damages by selling at the auction.

[164] Damages under this head are allowed in the amount of $561,400.

Additional Costs of the Receiver

[165] The Receiver claims damages based on additional costs incurred to hold the Property until the replacement sale. This amount excludes:

a. Claims related to mould remediation in the amount of $29,696.40 comprised of (i) $3,164 charged by Grande to assess mould; (ii) $5,650 charged by Moldtech to assess mould; (iii) $12,882 charged by Caliber Environmental Construction Services Inc. to remediate mould; and (iv) $8,000.40 charged by Grande to assess mould and inspect remediation of mould.

b. Costs related to legal issues in the receivership proceeding and the closing of the replacement sale in the amount of $39,672.17.

[166] Mr. Aiello submits that the amount claimed should be reduced by a total of $63,366.42 which he submits are expenses dealing with the investigation and/or remediation of mould at the Property.

[167] The Receiver disagrees that charges by the Receiver, its lawyers, and its property manager with respect to mould investigation and remediation should not be disallowed because these expenses would not have been incurred of Mr. Aiello had completed the transaction. I accept the Receiver's position. These expenses are not disallowed.

[168] In addition to the expenses that the Receiver accepts are not recoverable, the following expenses related to mould remediation are disallowed: (i) $2,480.35 charged by Martech Group to assess mould; (ii) $2,132.31 charged by Martech Group to assess mould; and (iii) $5,085 charged by Grande to assess mould. These amounts total $9,697.66.

[169] I allow damages under this head in the amount of $899,973.17.

Disposition

[170] For these reasons, the Receiver's action for damages is allowed. Mr. Aiello is liable to the Receiver. I award damages to the Receiver in the amount of $5,344,535.35 together with applicable pre-judgment and post-judgment interest.

[171] If the parties are unable to resolve costs, I ask them to agree on a timetable for written submissions to be provided to me for approval.

Digitally signed by Mr. Justice Peter Cavanagh

Cavanagh J.

Released: January 27, 2022

CITATION: Ziefman Partners Inc., v. Aiello, 2022 ONSC 611
COURT FILE NO.: CV-15-11148-00CL
DATE: 20220127

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ZIEFMAN PARTNERS INC., INITS CAPACITY AS RECEIVER OF THE PROPERTY MUNICIPALLY KNOWN AS 40 PARK LANE CIRCLE

Plaintiff

– and –

DAVID AIELLO

Defendant

REASONS FOR JUDGMENT

Cavanagh J.

Released: January 27, 2022