FINANCIAL AND CONSUMER SERVICES tribunal DES SERVICES FINANCIERS ET DES SERVICES AUX CONSOMMATEURS

Citation: *Wahab Shobowale v. New Brunswick (Director of Consumer Affairs)* et al, 2021 NBFCST 8

PROVINCE OF NEW BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *REAL ESTATE AGENTS ACT,* S.N.B. 2011, c 215

Docket: CA-003-2020

BETWEEN:

Wahab Shobowale,

Appellant,

-and-

Director of Consumer Affairs, Robert Bernard, and Sarah Bradley

Respondents.

DECISION

PANEL:	Mélanie McGrath, Tribunal Chair Lucie LaBoissonnière, Tribunal Member J. Douglas Baker, Tribunal Member
DATE OF HEARING:	July 7, 2021
WRITTEN REASONS:	October 8, 2021
APPEARANCES :	Michel Boudreau, Financial and Consumer Services Commission Wahab Shobowale, per se Robert Bernard, per se Sarah Bradley, per se

I. DECISION

1. We dismiss Wahab Shobowale's appeal and affirm the Director of Consumer Affairs' decision of November 27, 2020. The deposit will be remitted to Robert Bradley and Sarah Bernard.

II. OVERVIEW

2. Wahab Shobowale and Titilayo Shobowale entered into an Agreement of Purchase and Sale [Agreement] for the purchase of Robert Bernard and Sarah Bradley's property located at 25 Glennorth Street in Fredericton, New Brunswick [the property]. Mr. Shobowale paid a deposit of $1,000 to be credited towards the purchase of the property. The Agreement was subject to conditions, including a financing condition. Mr. Shobowale secured financing for the purchase of the property, but this was subsequently withdrawn because Mr. Shobowale lost his employment due to lay-offs associated with the COVID-19 pandemic. Mr. Shobowale was unable to proceed with the purchase of the property and requested the return of his deposit. The sellers refused. The real estate agent submitted the dispute to the Director of Consumer Affairs, as required by section 22 of the *Real Estate Agents Act*, S.N.B. 2011, c 215 [*Real Estate Agents Act*]. After holding a hearing, the Director of Consumer Affairs concluded that the sellers were entitled to retain the deposit because all the conditions of the Agreement were met. Mr. Shobowale appeals the Director of Consumer Affairs' Decision to the Tribunal pursuant to subsection 22(5) of the *Real Estate Agents Act.*

3. This is an appeal *de novo.* Pursuant to subsection 22(4) of the *Real Estate Agents Act,* our role is to conduct a fresh analysis of the whole of the evidence in order to determine the rights of the parties in respect of the deposit and to direct the disposition of the deposit as between the parties.

4. The evidence on this appeal consists of the *Record of the Decision-making Process* prepared by the Director of Consumer Affairs and the oral testimony of Wahab Shobowale and Robert Bernard.

III. ISSUES

5. The issues raised on this appeal are the following:

   a) Does the Director of Consumer Affairs have standing in this appeal?

   b) Is Mr. Shobowale entitled to the return of his deposit?

IV. ANALYSIS

A. Does the Director of Consumer Affairs have standing in this appeal?

6. Mr. Shobowale contends that the Director of Consumer Affairs does not have standing in this appeal because she has no interest in this proceeding.

7. We find it is not necessary to decide this issue. It was rendered moot when the Director of Consumer Affairs terminated her participation in this appeal. On July 6, 2021, the Director of Consumer Affairs sent correspondence to the Registrar of the Tribunal advising that she was withdrawing her *Statement*

of Position. At the start of the hearing on July 7, 2021, the Director of Consumer Affairs confirmed on the record that she was withdrawing her *Statement of Position* and would not present any oral arguments or otherwise participate in the hearing.

B. Is Mr. Shobowale Entitled to the Return of his Deposit?

8. For the reasons set out below, we conclude that Mr. Shobowale is not entitled to the return of his deposit.

9. Mr. Shobowale advances two arguments in support of his position that he is entitled to the return of the deposit he paid towards the purchase of the property: (1) Verico AMC's withdrawal of financing on June 19, 2020 nullified its original approval of financing of June 4, 2020 *ab initio*; and (2) the Agreement became frustrated when Verico AMC withdrew its approval of financing on June 19, 2020.

10. Robert Bernard and Sarah Bradley contend that all conditions under the Agreement were met such that the deposit is forfeited to them.

Effect of the Withdrawal of Financing

11. Mr. Shobowale contends that the Agreement is clear that if financing was not secured, he would be entitled to the return of his deposit in full. According to Mr. Shobowale, Verico AMC's initial approval of financing on June 4, 2020 was negated and cancelled by its subsequent notification of mortgage cancellation on June 19, 2020, due to Mr. Shobowale being laid off from his employment. Mr. Shobowale argues that Verico AMC's withdrawal of financing on June 19, 2020 should be treated as going back to nullify the approval of financing *ab initio.* He relies on the decisions of *Tang v Zhang*, 2013 BCCA 52 [*Tang v Zhang*] and *Snell v Brickles* (1914) 49 SCR 370 [*Snell v. Brickles*] in support of his argument that he is entitled to the return of the deposit as he did not intentionally default on the purchase of the property.

12. While we are sympathetic to Mr. Shobowale's situation, his position is not compatible with the Agreement nor the law.

13. We cannot accept Mr. Shobowale's interpretation of the decisions of *Tang v Zhang* and *Snell v Brickles*. In our view, they do not stand for the proposition that a buyer who unintentionally defaults on the completion of the purchase is entitled to the return of his or her deposit.

14. First, *Snell v Brickles* was overturned by the Privy Council in *Brickles v Snell*, [1916] 2 AC 599. That matter did not deal with the return of a deposit where the buyer defaults on the sale; it dealt with a request for specific performance of an Agreement of Purchase and Sale by a purchaser. In that matter, the purchaser's solicitor fell ill and was unable to convey the balance of the purchase monies on the closing date. The Privy Council found that the buyer was in default and was not entitled to specific performance.

15. In *Tang v Zhang*, the sellers entered into a standard form contract to sell a residential property for

$2,030,000. The buyer paid a deposit of $100,000 but failed to pay the balance of the purchase monies by the closing date. The sellers argued that the deposit was forfeited to them. A clause in the agreement stipulated:

> TIME: Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreement to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and, in such event, the amount paid by the Buyer will be absolutely forfeited to the Seller in accordance with the *Real Estate Services Act*, on account of damages, without prejudice to the Seller's other remedies.

16. Justice Newbury, writing for the British Columbia Court of Appeal, conducted an extensive review of the caselaw relating to the nature of deposits and stated the following:

> [30] In conclusion, I suggest that the following general principles may be stated with regard to deposits in the present context:
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> 1. On a general level, the question of whether a deposit or other payment made to a seller in advance of the completion of a purchase is forfeited to the seller upon the buyer's repudiation of the contract, is a matter of contractual intention;
>
> 2. Where the parties use the word 'deposit' to describe such a payment, that word should in the absence of a contrary provision be given its normal meaning in law;
>
> 3. A true deposit is an ancient invention of the law designed to motivate contracting parties to carry through with their bargains. Consistent with its purpose, a deposit is generally forfeited by a buyer who repudiates the contract, and is not dependant on proof of damages by the other party. If the contract is performed, the deposit is applied to the purchase price;
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> 4. The deposit constitutes an exception to the usual rule that a sum subject to forfeiture on the breach of a contract is an unlawful penalty unless it represents a genuine pre-estimate of damages. However, where the deposit is of such an amount that the seller's retention of it would be penal or unconscionable, the court may relieve against forfeiture, as codified by the *Law and Equity Act*;
>
> 5. A contractual term that a deposit will be forfeited 'on account of damages' on the buyer's failure to complete does not alter the nature of a deposit, but may be construed to mean that if damages are proven, the deposit will be applied against ('on account of') them. If no damages are shown, the deposit is nevertheless forfeitable, subject always to the expression of a contrary intention.

17. *Tang v Zhang* was recently followed by the New Brunswick Court of Queen's Bench in *Hasanova v*

Wulastook Industries, 2015 NBQB 233. In that matter, Mrs. Hasanova entered into an Agreement of Purchase and Sale with Wulastook Industries Limited for the purchase of a commercial property for $525,000. The Agreement provided that Mrs. Hasanova would pay a deposit of $100,000 at the time of the execution of the Agreement, with the balance of the purchase monies payable at the time of closing. She defaulted on her obligation to purchase the property and requested the return of her deposit. The defendant refused, declaring the deposit to be forfeited in full.

18. After an extensive review of the caselaw, Morrison, J. stated that the decision of *Tang v Zhang* provided a comprehensive review of the law of deposits. He added:

> [4] A clause in an agreement of purchase and sale which provides for the payment of funds as a 'deposit' should be given its normal meaning in law unless a contrary intention is demonstrated. In such cases, the deposit money is considered 'earnest money' or a guarantee for the performance of the contract. In the event of the purchaser's non-performance of the contract the deposit is forfeited to the vendor regardless of whether the vendor has suffered any damages (see generally, Anger and Honsberger, *Law of Real Property*, (3d) Edition, Looseleaf (Toronto: Canada Law Book 2015) at para. 23:30.10(b)(i); *Tang v Zhang*, 2013 BCCA 52 at para. 30)

19. It is a well known of principle of contractual interpretation that the contract must be read as a whole, giving the words "their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract". [*Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 (CanLII) at para 47]

20. Turning to the within matter, clause 4 of the Agreement sets out the requirement to pay a deposit and that the deposit is credited towards the purchase price on completion:

> **4. DEPOSIT**
> (a) Deposit(s) will be payable to the Listing Agent, to be held in trust, pending completion or other termination of this Agreement. The deposit(s) shall be credited towards the purchase price on completion, and the Buyer shall pay the balance of the purchase price on closing or as otherwise stated in this Agreement.
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> (b) The Buyer submits with this offer 1000 (48 hours upon acceptance of offer) Dollars ($_____) ☐ CASH / ☒OTHER: e-transfer.
>
> (c) The Buyer agrees to increase deposit to $_____ (or ___%) of purchase price) ☐ CASH / ☒ CHEQUE / ☐OTHER: _____ on or before ___ day of _____, 20__ or within ___ days of receipt of waiver of clause #3.

21. In our view, the deposit contemplated by clause 4 is "earnest money" or a guarantee for the performance of the contract. Pursuant to clause 4, Mr. Shobowale paid a $1,000 pursuant to the Agreement.

22. Clause 4 is silent on what happens to the deposit in the event there is no completion of the sale.

23. As is customary in the real estate sector, the Agreement was subject to certain conditions relating to financing, an inspection, the residential property disclosure statement, and title. These conditions, if not completed by the specified deadlines, entitled Mr. Shobowale to walk away from the sale and to the return of this deposit, the Agreement becoming null and void.

24. The Agreement contained the following conditions:

> **5. FINANCING**
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> This Agreement is subject to the Buyer or the Buyer's agent delivering written poof of financing to the Seller or the Seller's Agent in the amount of approximately $_____ (or ___% of purchase price) on or before the 10th__ day of June, 2020, failing which this agreement becomes null and void. If Financing is subject to Sale of Buyer's Property, a final approval of financing will be provided to the Seller or Seller's Agent within ____ days of receipt of waiver of clause #3.
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> **6. INSPECTION**
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> The Buyer ☒ DOES or ☐ DOES NOT require an inspection of the Property. The Buyer is urged to carefully inspect the Property and may, if desired, have the Property inspected at the Buyer's expense. If the results of the inspection are not satisfactory to the Buyer, the Buyer may terminate this Agreement by delivering written notice to the Seller or the Seller's Agent by the 12th day of June, 2020 or within ___ days or receipt of waiver of clause #3, upon which this Agreement becomes null and void.
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> […]
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> **10. RESIDENTIAL PROPERTY DISCLOSURE STATEMENT**
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> The Seller ☐ WILL or ☐ WILL NOT provide a current Residential Property Disclosure Statement to the Buyer on or before the 3rd day of June, 2020. If the information contained in the Residential Property Disclosure Statement is not satisfactory to the Buyer, the Buyer may terminate the Agreement by delivering written notice to the Seller or Seller's Agent by the 5th day of June, 2020, upon which this Agreement becomes null and void.
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> […]
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> **16. TITLE SEARCH**
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> The Buyer may examine the title of the Property at the Buyer's expense and any valid objection to the title which the Buyer wishes to make shall be made in writing to the Seller on or before the day of closing. In the event a valid objection to title is made that the Seller is unable or unwilling to remove prior to the closing, and which the Buyer does not waive, this Agreement becomes null and void.

25. Clause 19(i) of the Agreement stipulates that if the Agreement becomes null and void, the buyer is entitled to the return of its deposit:

> **19. GENERAL**
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> […]
>
> (i) If this Agreement becomes null and void under the terms of this Agreement, all deposits paid shall be returned to the Buyer in full. By signing this Agreement, the Buyer and Seller consent and irrevocably instruct the Seller's Agent to release all deposits to the Buyer without interest or penalty.

26. The Agreement also contained a clause stipulating that time shall be of the essence:

> **19. GENERAL**
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> […]
>
> (d) In all aspects of this Agreement, time shall be of the essence. In the event of a written agreement of extension, time shall continue to be of the essence. This Agreement shall be to the benefit or and binding upon the parties, their respective heirs, executors, administrators, successors and assigns.

27. Dates in an Agreement of Purchase and Sale are important. They are typically associated with conditions so that sellers may know when the transaction is firm, allowing then to proceed with their moving arrangements. That is why conditions, such as the financing clause and the inspection clause, have completion dates.

28. On June 3, 2020, Mr. Shobowale was provided with the Disclosure Statement for the Property. He acknowledged receiving a copy the same day. There is no evidence in the *Record,* and he did not testify that the Property Disclosure Statement was not satisfactory to him; he did not deliver written notice by the 5th day of June 2020 that the property disclosure statement was not satisfactory. We conclude that this condition was met.

29. On June 4, 2020, Verico AMC provided a Letter of approval indicating that Wahab and Titilayo Shobowale had been approved for mortgage financing for the property. This letter constitutes written proof of financing, before June 10, 2020, as required by clause 5 of the Agreement. We find that the financing condition was satisfied.

30. Mr. Shobowale obtained a home inspection by Pillar to Post, at a cost of $600. On June 10, 2020, Mr. Shobowale signed the Exit Inspection Amendment/Fulfillment Form indicating that the results of the inspection of the property were fully satisfactory. We find that the inspection condition was satisfied on June 10, 2020, before the June 12, 2020 deadline.

31. There is no evidence with respect to the title. There is no evidence in the *Record* indicating that Mr. Shobowale had a valid objection to the title, nor did he make allegations in this regard in his evidence. For the purposes of this appeal, this is a non-issue.

32. We find that the financing, inspection, and residential property disclosure statement conditions under the Agreement were met by June 10, 2020. At this point, the Agreement became firm and Mr. Shobowale could no longer walk away from the purchase without defaulting on the completion of the purchase: *Sharifara v. Akhabari,* 2007 CanLII 9616 (ON SCDC).

33. In the within matter, Mr. Bernard testified that when the conditions were met, he travelled to Prince Edward Island and entered into an agreement to purchase a house.

34. Unfortunately, Mr. Showobale was laid off from his employment due to the economic downturn caused by the COVID-19 pandemic. On June 19, 2020, Verico AMC sent Mr. Shobowale a Letter of decline withdrawing its approval of financing for the purchase of the property.

35. In his June 26, 2020 correspondence to Re/Max East Coast Elite Realty, Mr. Shobowale requested the refund of his deposit. He explained that due to the withdrawal of financing, the purchase/sale of the property could no longer proceed. We accept that Mr. Shobowale did not have any intention of avoiding the completion of the transaction. He acted honestly and in good faith. However, by indicating that he could no longer proceed with the purchase of the property and requesting the return of his deposit, Mr. Shobowale defaulted on the completion of the purchase.

36. Because all the conditions were met before Verico AMC withdrew its financing, the Agreement could no longer become null and void. Consequently, the deposit cannot be returned under clause 19(i) of the Agreement.

37. Clause 19(h) of the Agreement explicitly states that if the buyer defaults on the completion of the sale, he forfeits any money paid under the Agreement to the Seller:

> **19. GENERAL**
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> […]
>
> (h) If the Buyer defaults in the completion of the sale under the terms of this Agreement, any money paid hereunder shall be forfeited to the Seller without interest or penalty by way of liquidated damages, or the Seller may, at the Seller's option, compel the Buyer to complete the sale.

38. We find that the term "any money paid hereunder" includes the deposit and the deposit is forfeited to Robert Bernard and Sarah Bradley.

Frustration of Contract

39. Mr. Shobowale contends that the withdrawal of financing by Verico AMC on June 19, 2020 frustrated the whole contract in law as he was no longer able to fulfill the financing clause.

40. Under subsection 2(1) of the *Frustrated Contracts Act,* R.S.N.B. 2011, c 164, "frustration" occurs where a "contract […] has become impossible of performance or been otherwise frustrated". The *Act* does not provide guidance on determining when a contract has become impossible of performance or been frustrated.

41. The leading caselaw on the doctrine of frustration of contract is *Naylor Group Inc. v Ellis-Don Construction Ltd.,* 2001 SCC 58, in which Binnie J., writing for the Supreme Court of Canada, held:

> [89] The basic tenets of the doctrine of frustration are explained in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943:
>
> > Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract": *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, 1960 CanLII 37 (SCC), [1960] S.C.R. 361, *per* Judson J., at p. 368, quoting *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (H.L.), at p. 729.
> >
> > Earlier cases of "frustration" proceeded on an "implied term" theory. The court was to ask itself a hypothetical question: if the contracting parties, as reasonable people, had contemplated the supervening event at the time of contracting, would they have agreed that it would put the contract to an end? The implied term theory is now largely rejected because of its reliance on fiction and imputation.
> >
> > More recent case law, including *Peter Kiewit*, adopts a more candid approach. The court is asked to intervene, not to enforce some fictional intention imputed to the parties, but to relieve the parties of their bargain because a supervening event (the OLRB decision) has occurred without the fault of either party. For instance, in the present case, the supervening event would have had to alter the nature of the appellant's obligation to contract with the respondent to such an extent that to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agreed to under the tendering contract: *Hydro-Québec v. Churchill Falls (Labrador) Corp.*, 1988 CanLII 37 (SCC), [1988] 1 S.C.R. 1087; *McDermid v. Food-Vale Stores (1972) Ltd.* (1980), 1980 CanLII 1076 (AB QB), 14 Alta. L.R. (2d) 300 (Q.B.); *O'Connell v. Harkema Express Lines Ltd.* (1982), 1982 CanLII 3198 (ON SC), 141 D.L.R. (3d) 291 (Ont. Co. Ct.), at p. 304; *Petrogas Processing Ltd. v. Westcoast Transmission Co.* (1988), 1988 CanLII 3462 (AB QB), 59 Alta. L.R. (2d) 118 (Q.B.); *Victoria*

> *Wood Development Corp. v. Ondrey* (1978), 1978 CanLII 1447 (ON CA), 92 D.L.R. (3d) 229 (Ont. C.A.), at p. 242; and G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at pp. 677-78. [paras. 53-55] [Our emphasis]

See, as well, *McLean v. City of Miramichi*, 2011 NBCA 80, 380 N.B.R. (2d) 398, Robertson J.A., writing for the Court, at paras. 23-24.

42. The Supreme Court of Canada decision was recently followed by the New Brunswick Court of Appeal in *McLean v City of Miramichi*, 2011 NBCA 80 and *Dugas v Gaudet et al*., 2016 NBCA 19.

43. We would add to this that the party claiming that a contract has been frustrated bears the onus of proving the constituent elements necessary to establish frustration.

44. In our view, the doctrine of frustration of contract is not applicable to the within matter. We find that the denial of financing by Verico AMC on June 19, 2020 due to Mr. Shobowale's loss of employment was not a supervening event; it was not a situation for which the parties made no provision in the contract. Rather, clause 19(h) of the Agreement contemplates precisely the type of situation where the buyer defaults on the completion of the sale due to lack of financing as occurred here. The Agreement contemplated the purchase of the property at 25 Glennorth Street for a purchase price of $328,000. The same was true after the withdrawal of financing. We therefore conclude that the withdrawal of financing by Verico AMC did not made the performance of the contract "a thing radically different from that which was undertaken by the contract".

V. CONCLUSION AND ORDER

45. We dismiss Wahab Shobowale's appeal and affirm the decision of the Director of Consumer Affairs dated November 27, 2020. If not already done, the deposit shall be remitted to Robert Bernard and Sarah Bradley.

DATED this 8th day of October 2021.

Mélanie McGrath

Mélanie McGrath, Tribunal Chair

Lucie LaBoissonnière

Lucie LaBoissonnière, Tribunal Member

J. Douglas Baker

J. Douglas Baker, Tribunal Member