CITATION: Ruzgar v. Real Estate Council of Ontario et al, 2025 ONSC 6793
COURT FILE NO.: CV-24-00728373-0000
DATE: 20251205

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ALI OSMAN RUZGAR Applicant	*J. L. Frustaglio,* for the Applicant
– and –	
REAL ESTATE COUNCIL OF ONTARIO a.k.a. RECO AND 2699064 ONTARIO INC. Respondents	*J. D. McConville*, for the Respondent, 2699064 Ontario Inc. *C. Breukelman,* for the Respondent, Real Estate Council of Ontario
	HEARD: November 12, 2025 at Toronto

E. IACOBUCCI, J.

REASONS FOR DECISION

INTRODUCTION

[1] This application concerns a real estate transaction for a property in Toronto that failed to close. In connection with the transaction, the Applicant/Buyer, Ali Osman Ruzgar (hereinafter the "Buyer"), paid a total deposit of $300,000, which had initially been held in trust by a real estate brokerage that acted in the deal, but is now held by the Real Estate Council of Ontario ("RECO"). The Buyer submits that the Respondent, 2699064 Ontario Inc. ("Seller"), breached the Agreement of Purchase and Sale ("APS") by failing to deliver the property with vacant possession, and therefore that the deposit should be returned to him. The Respondent Seller submits that the APS did not require vacant possession, that the Buyer breached the APS by failing to purchase the property despite the existence of one or more leases on the property, and that the deposit is owed to the Seller.

[2] While there are peripheral issues, this dispute boils down to a question of contractual interpretation: did the APS require the conveyance of the property with vacant possession, as the Buyer claims, or not, as the Seller claims?

[3] I find that the APS did not require the conveyance of the property with vacant possession, that the Buyer breached the APS, and that the deposit is to be paid out to the Seller.

[4] Before turning to the substance of my reasons, I note that RECO, while formally a Respondent in this matter, is involved in this dispute only as the trustee of the deposit. RECO has not made submissions in favour of either the Buyer or the Seller, and simply asks that this Court make an order instructing it to pay the deposit to one party or the other, or alternatively into Court. Because of my conclusion that the Buyer breached the APS and thus forfeited his deposit, I order RECO to pay the deposit to the Respondent Seller.

FACTS

[5] The dispute concerns a failed transaction to purchase a commercial property located on Lawrence Avenue East in Toronto.

[6] The Buyer and the Seller entered into an APS for the property that was agreed to by all parties on January 16, 2022. Pursuant to the APS, the Buyer agreed to pay $4,600,000 for the property, with a deposit of $300,000 to be delivered in two installments, one of $50,000 that was paid within two business days after the APS was executed, and another of $250,000 that was delivered on February 8, 2022. The second installment was required by the APS to be paid within two days of the Buyer's waiver of a due diligence condition in the APS. The due diligence provision allowed the Buyer wide discretion not to proceed with the transaction without forfeiting the deposit or other consequences. The Buyer waived the due diligence provision on February 11, 2022, after the payment of the $250,000 installment of the $300,000 deposit.

[7] The deposit was held in trust by the selling agent's brokerage, which also acted for the buyer in this transaction. The completion date for the transaction as set out in the APS was February 28, 2022.

[8] On February 15, 2022, after the due diligence condition had been waived, the Seller and Buyer entered into an amending agreement pursuant to which the Seller was permitted to enter into a lease agreement with Woburn Medical and Dental Centre Inc. that would survive the scheduled closing. It was a short-term, three-month lease that could be terminated by the lessor on one week's notice.

[9] On and before February 28, 2022, the scheduled date for closing, there was a flurry of correspondence between counsel for the Buyer and counsel for the Seller concerning, amongst other matters, the existence of other leases on the property. There were two. One was with a lawyer, Sheldon Sherman (the "Lawyer"). Another lease was with a pharmacy.

[10] Buyer's counsel on February 28 indicated an expectation of vacant possession, and sought confirmation that leases in connection with two Notices of Lease on title had expired. The Seller asked to extend the closing to March 1, 2022 in order for the Seller to have more time to obtain discharge statements from mortgagees on the property. The Buyer, through counsel, communicated a need for a discharge from title of Notices of Leases and an acknowledgement by tenants with respect to vacant possession.

[11] The Seller's counsel replied on February 28 that vacant possession would not be delivered.

[12] The disagreement whether vacant possession would be delivered and/or was required under the APS continued, with an extension to March 2 to resolve the vacant possession dispute. The transaction was not completed on March 2.

[13] It appears that the Lawyer's lease was the central sticking point for the Buyer. There were attempts to negotiate a deal with the Seller, Buyer and Lawyer that would satisfy all parties, including the Buyer.

[14] The Buyer sent a message to the Seller on March 22, 2022 with changes to a proposed agreement with the Lawyer, asking the Seller's counsel to advise immediately as the Buyer wanted to close by Friday, March 25, 2022. The Seller did not reach a deal with the Lawyer.

[15] On April 1, 2022, the Buyer delivered a proposed amendment to the APS, with a price adjustment from $4,600,000 to $4,500,000 and other conditions, including conditions relating to a deal with the Lawyer that would be acceptable to the Buyer. The Buyer proposed a closing date of April 8, 2022. The Seller did not accept.

[16] While the Seller attempted to reach the Buyer after April 1, it appears that the next communication between the parties was on or around April 21, 2022. On that day, the Seller's counsel sent a letter to the Buyer's counsel summarizing a telephone call in which the Buyer's counsel had advised that the Buyer would not close the transaction. The Seller communicated that it would assume that the Buyer was forfeiting his deposit given his inability to close. The Buyer's counsel replied that the Buyer was ready, willing and able to close the transaction, but the obstacle to closing was that the Seller could not provide vacant possession as required by the APS. The Buyer's counsel relayed to the Seller that the deal with the Lawyer was not acceptable to the Buyer's lender. The Buyer demanded the return of his deposit.

[17] The deposit remained with the brokerage, but given the passage of time, was later transferred to RECO, where it remains pending the outcome of this case.

ISSUES

[18] The following issues arise in this application:

I. Did the APS require vacant possession?
II. Was there a breach of the APS? and
III. If there was a breach, what is the remedy?

ISSUE I: Did the APS Require Vacant Possession?

Interpretive Principles

[19] The question of whether the conveyance of the property with vacant possession was required by the APS is one of contractual interpretation. A leading case from the Supreme Court of Canada on the proper approach to interpreting a contract is *Sattva Capital Corp. v. Creston Moly Corp.* [2014] 2 SCR 633. It stands for a number of propositions, some of which are as follows:

(a) "[T]he interpretation of contracts is a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine 'the intent of the parties and the scope of their understanding.'" (*Sattva*, para. 47)

(b) "A decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the contract." (*Sattva*, para. 47)

(c) "While surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement… The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract." (*Sattva*, para. 57)

(d) "The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract…While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement." (*Sattva*, para. 57)

(e) "The nature of the evidence that can be relied upon under the rubric of 'surrounding circumstances' will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract…, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the time of contracting." (*Sattva*, para. 58)

[20] Other useful observations about contractual interpretation are found in *Ventas, Inc. v Sunrise Senior Living Real Estate Investment Trust,* 2007 ONCA 205. Paragraph 24 of *Ventas* observes that a commercial contract is to be interpreted:

(a) "As a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;

(b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the 'cardinal presumption' that they have intended what they have said;

(c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; …and (to the extent there is any ambiguity in the contract),

(d) in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity." [References omitted.]

The Wording of the Contract

[21] In applying these principles in the present case to interpret the APS, it is appropriate to begin with a close examination of the words of the contract. The APS has three parts, two of which

are relevant to this dispute. One relevant part of the contract includes standard Ontario Real Estate Association ("OREA") terms in an APS for commercial transactions. Another relevant part of the APS is Schedule A. The third part, Schedule B, is not relevant to this dispute.

[22] The Buyer places significant weight on Section 2 of the OREA part of the contract (which I will refer to as "OREA s. 2"). It provides that, "Upon completion, vacant possession of the property shall be given to the Buyer unless otherwise provided for in this agreement."

[23] The Buyer submits that, given that nowhere else in the contract does it explicitly say that vacant possession is *not* required, the effect of the plain meaning of OREA s. 2 is that the Seller was contractually obliged to provide vacant possession.

[24] The Seller, however, identifies a number of other clauses in the contract that complicate the interpretive question.

[25] One feature of Schedule A which the Seller emphasizes concerns a provision that was crossed out, with the deletion initialed by both parties. The heading of Schedule A, Section 17.0 had read, "VACANT POSSESSION," while Section 17.1 had read, "Vacant Possession shall be provided by the SELLER(S) to the BUYER(S). This unqualified requirement of vacant possession was, to repeat, struck out of the contract and initialed by both parties.

[26] The Buyer submits that s. 17, which clearly would have required vacant possession, was redundant given OREA s. 2. I do not accept the Buyer's submission. Section 2 provides for vacant possession *unless otherwise provided for in the agreement.* [My emphasis.] It is necessary, therefore, to consider the whole APS in deciding whether vacant possession was required by OREA s. 2. Section 17 would have created an unqualified, clear requirement of vacant possession. Section 2 requires further examination of the APS. An undeleted s. 17 would not have been redundant.

[27] The Seller, on the other hand, submits that the deletion of s. 17 was significant, especially given that the preamble to Schedule A provides that in the event of any conflict between Schedule A and the OREA part of the contract, Schedule A is to prevail. The Respondent submits that there is a conflict between the deleted requirement of vacant possession in s. 17 of Schedule A and OREA s. 2, and that Schedule A's implication of no vacant possession should prevail.

[28] I do not accept the Respondent's submission that the deletion of s. 17 indicates that there was no requirement of vacant possession. The deletion of s. 17 in Schedule A fails to dislodge OREA s. 2. That is, deleting s. 17's unqualified requirement of vacant possession does not logically imply that the opposite of s. 17 holds, namely, that vacant possession is *not* required. Section 2 continues to operate, and it provides for vacant possession unless otherwise provided in the agreement. The APS must be read as a whole to determine the vacant possession question.

[29] It is clear that answering the following question is critical to resolving the contractual interpretation question at the core of this dispute: is the qualified requirement of vacant possession in OREA s. 2 countermanded by provisions elsewhere in the agreement that contemplate something other than vacant possession?

[30] It is helpful to recall the observation in *Sattva* at para. 57 that "The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire

contract…" In addition, *Ventas* at para. 24 states that contracts ought to be interpreted, "As a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective; by determining the intention of the parties in accordance with the language they have used in the written document and based upon the 'cardinal presumption' that they have intended what they have said…; [and] in a fashion that accords with sound commercial principles and good business sense."

[31] The Buyer correctly points out that there is no (undeleted) provision other than OREA s. 2 in the APS that explicitly addresses vacant possession. But to reach a conclusion on vacant possession, it is necessary to read the text of the contract as a whole, giving meaning to each term, avoiding interpretations that would render one or more of its terms ineffective, and in a fashion that accords with good business sense.

[32] There are several terms in the APS that do not make sense if there were a requirement of vacant possession. Rather, there are terms that make sense only if there is no requirement of vacant possession. I will first outline the key provisions, and then discuss their significance.

[33] Schedule A, s. 6.1 sets out a number of items to be delivered to the buyer as long as they are in the Seller's control. Section 6.1(e) provides that the Seller must provide the Buyer with "copies of all subsisting offers to lease, agreements to lease, leases, subleases, renewals of leases, and other rights granted to possess or occupy space within the property now or hereafter."

[34] Schedule A, s. 14.1(b) requires the Seller to provide information concerning the property's "operation, leasing and maintenance," and s. 14.1(c) provides that the Seller represents and warrants that, "To the best of the SELLER(S) knowledge, there are no unregistered agreements in respect of the property, the buildings located on the Property or the lands which will bind the BUYER(S), the property, the building or the lands after the Completion Date, other than the Leases or the Contracts provided to the BUYER(S) prior to the Completion Date."

[35] Schedule A, s. 16.1(b) provides:

> 16.1 The SELLER(S) covenants and agrees with the BUYER(S) that the SELLER(S) will…:
>
> > b) following the Due Diligence Date, the SELLER(S) shall not enter into any amendments or other arrangements to modify or change the terms of the Leases, or accept any termination or surrender of any Lease, without the prior approval of the BUYER(S), and will not enter into any contracts, amendments to existing contracts or termination of any Contracts without the prior approval of the BUYER(S), such approval not to be unreasonably withheld. The BUYER(S) agrees to respond to any request within TWO (2) Business Days.

[36] These three provisions in Schedule A lead to the conclusion that the contract anticipated the existence of leases on the property, and that the leases could survive the completion date. That is, the clauses imply that the contract did not require vacant possession. To conclude that the

contract did require vacant possession would fail to give "meaning to all of its terms…" (*Ventas*, para. 24).

[37] Section 6.1 requires the Seller to provide the Buyer with the terms of all leases on the property. If there were a requirement of vacant possession, it is not obvious why information on the leases would be provided. If the property were to be conveyed vacant, why would the Buyer need to see the leases? Giving meaning to this requirement, that is, understanding the contract to mean what it says, s. 6.1 appears to contemplate something other than vacant possession.

[38] Moreover, s. 6.1 refers to leases and other rights to occupy space "now and hereafter." It is reasonable to conclude that "hereafter" implies that there might be leases that continue to operate after closing. That is, the Buyer has a contractual right to see the leases because they might survive closing, which implies that vacant possession is not required.

[39] Consideration of s. 14.1 strengthens the case for concluding that there is no requirement of vacant possession. Section 14.1 refers to disclosure of leasing information, and includes a representation and warranty that there are no unregistered agreements that will bind the buyer, the building or the property after the completion date, *other than the leases provided to the Buyer.* [My emphasis.]

[40] It is difficult to accept that vacant possession is a requirement if the contract called for the delivery of leases that might bind the property and/or building post-closing. If vacant possession were a requirement, there would be no possibility of leases of this description to deliver and this term would be without effect. Given that *Ventas* requires an interpretation that gives effect to a contract's terms, it is appropriate to interpret the contract as not requiring vacant possession.

[41] Finally, Schedule "A", s. 16.1(b) commits the Seller not to amend, cancel, enter into, etc. any lease relating to the property without permission from the buyer after the due diligence waiver date. By implication, the Seller is permitted to amend a lease without permission before the due diligence waiver date.

[42] A requirement of vacant possession does not sit well with s. 16.1(b). If there were a requirement of vacant possession, the Seller would be in breach if it attempted to convey the property encumbered by leases. It is therefore unclear why there would be a contractual requirement to obtain permission from the Buyer, pre- or post-waiver of due diligence conditions, to enter into, amend etc. any lease on the property. The leases cannot exist on closing if there were a vacant possession requirement; a contractual requirement of permission from the Buyer to amend leases is commercially inexplicable in the presence of a vacant possession requirement.

[43] On the other hand, if there were no requirement of vacant possession, the requirement of permission to amend leases not before, but after, the waiver of the due diligence conditions has meaning, and makes commercial sense. It is helpful to set out what the due diligence clause provides in more detail. Section 11.1 of Schedule A reads in part:

> 11.1 This Agreement is conditional until the "**BUYER(S) DUE DILIGENCE PERIOD"** for a period of FIFTEEN (15) days, upon the BUYER(S) being satisfied in the sole and absolute unfettered discretion with the results of any general reporting, inspection, investigation and due diligence that may be conducted by the

> BUYER(S) relating to the property and this Agreement, including but not limited to, rezoning for the BUYER(S) redevelopment objective,… and the BUYER(S) review of the disclosure documents… Unless the BUYER(S) give notice in writing delivered to the SELLER(S)… not later than the time period indicated in this paragraph, that the preceding condition has been fulfilled, this offer shall become null and void and the deposit shall be automatically and immediately returned to the BUYER(S) in full without deduction forthwith. This condition is included for the benefit of the BUYER(S) and may be waived at the BUYER(S) sole option by notice in writing to the SELLER(S) as aforesaid within the time period stated herein.

[44] The due diligence requirement essentially provides the Buyer with a time-limited option to walk away from the deal without penalty for any reason. Prior to the waiver of due diligence conditions, the Seller is free to enter into, amend, etc. leases on the property without obtaining the Buyer's permission. The due diligence provision provides the Buyer with strong protection from leases to which he objects that are entered into, amended, etc. during the pre-waiver period: if the Seller encumbers the property with an unwanted lease post-closing but pre-waiver, the Buyer has an option to walk away from the deal with a return of his deposit. (Recall that the Seller has an obligation to deliver all leasing information to the Buyer such that the decision to waive would be informed.) This makes commercial sense.

[45] The Buyer's option not to purchase the property without cost expires with the waiver of a due diligence condition. It therefore makes commercial sense that, once the Buyer waives the due diligence condition, any change to any lease that would encumber the property post-closing would require the Buyer's approval.

[46] If vacant possession were required, permission from the Buyer to enter into or amend a lease would be irrelevant at all times since no lease could exist at the date of closing. If the requirement in s. 16.1 of obtaining permission to change any lease post-waiver is to have practical significance and make commercial sense, it is because there is a possibility that a lease may survive closing, which in turn implies that there is no requirement of vacant possession.

[47] I note that the possibility of amending a lease after the waiver of due diligence but before closing came to pass in the present case. The Seller and Buyer agreed after waiver of due diligence to amend the APS to allow a lease with Woburn Medical and Dental Centre Inc. for a three-month period, with a one-week notice period for vacating the lease.

[48] In summary, the wording of the contract indicates that the APS does not require vacant possession.

Surrounding Circumstances

[49] *Sattva* allows consideration of surrounding circumstances known to the parties at or before the time of contracting. The surrounding circumstances cannot overwhelm the wording of the contract, but may inform interpretation of the contract. I have concluded that the wording of the contract indicates that the APS does not require vacant possession. The Buyer submits that surrounding circumstances known to the parties are consistent with a contract that requires vacant

possession. I am unpersuaded that the surrounding circumstances suggest that the contract required vacant possession.

[50] I begin by observing that the surrounding circumstances analysis relates to the factual matrix known to the parties at or before the time of contracting. At para. 47 in *Sattva*, Rothstein J. states that, "A decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the contract." *Sattva* also says at para. 57, "The nature of the evidence that can be relied upon under the rubric of 'surrounding circumstances' will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract…, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the time of contracting."

[51] Both parties in this matter refer to facts that arose after the execution of the contract to bolster their interpretations of the APS. Such facts may be relevant to the disposition of this dispute – for example, they are clearly relevant to the determination whether there was a breach of the APS – but they are not to be relied upon to interpret the contract under *Sattva*. Contractual interpretation requires an understanding of the objective intentions of the parties at the time of contracting, and it follows that the surrounding circumstances analysis focuses on facts known at or before the time of contracting.

[52] In the Buyer's submission, the critical fact in the surrounding circumstances is that the parties knew that the property was being purchased for redevelopment. I accept that this was known to the parties before and at the time of contracting. The real estate agent, who acted for both sides, approached the Buyer proposing a purchase and redevelopment of the property. In addition, the APS itself, in the due diligence condition set out above, makes reference to the Buyer's due diligence in respect of rezoning and the Buyer's redevelopment objective. It is, I conclude, uncontroversial that the parties knew the Buyer's redevelopment goals.

[53] The Buyer submits that it would be commercially unreasonable for the APS not to have a vacant possession requirement given the known objective of redevelopment. I am not persuaded for the following reasons.

[54] It cannot be that the existence of any lease on the property would necessarily present an objectionably high barrier to redevelopment. Leases might have a short expiry date that would not interfere with groundbreaking on the property. Moreover, they might have short notice-of-termination periods. And the obvious upside of leases while they operate is that they provide the building owner with revenue.

[55] Of course, some leases may have a long duration, may not have straightforward or timely rights to terminate, and may provide comparatively little revenue in relation to the gains from redevelopment. I make no claims about the predictable net advantage or disadvantage of leases to a buyer of a property subject to redevelopment. I simply observe that there are possible advantages of leases such that a redevelopment objective is not in itself enough to conclude that taking a property without vacant possession is commercially irrational. Indeed, after waiving the due diligence condition, the Buyer in the present case agreed to take on a lease that would survive

closing because, he submitted, the lease had a short duration, and a one-week notice period for termination. This was not a commercially irrational decision.

[56] Moreover, there is a critical aspect of the contract that has a clear, commercially sensible explanation even in circumstances where the Buyer intends to develop the property: the due diligence condition. As reviewed above, there was an obligation on the Seller to provide to the Buyer information on leases two days after the APS was executed. The APS then provided the Seller with the "unfettered discretion" to walk away from the contract without penalty for fifteen days. It clearly would not be irrational for a Buyer who had a redevelopment objective to decide for itself whether to pursue the transaction after reviewing the leases. The contract provided the Buyer with that opportunity. In addition, after the waiver of the due diligence period, the APS provides that the Seller requires the Buyer's permission to enter into or change any lease on the property, which also protects the Buyer from unwanted leases for any reason, including his redevelopment objective.

[57] I conclude that the surrounding circumstances at or before the time of contracting, and the development objective in particular, are not in tension with the text of the contract, which does not require vacant possession.

Post-Contracting Facts

[58] At the hearing, and in the record, there was some controversy over some facts that arose post-contracting. The Seller provided in the record a copy of an e-mail from the Buyer's agent, Mr. Di Vita (who was also the Seller's agent), requesting information on the leases on the property on behalf of the Buyer, as well as copies of e-mails in response attaching the leases and a letter from the Lawyer renewing his lease on the property until 2025. Di Vita in cross-examination at one point acknowledged sending the request and receiving a reply, as well as delivering the leases to the Buyer, but later in the examination expressed doubt that he had received any e-mails from the Seller or its advisors during the relevant period. Di Vita gave an undertaking to clarify whether he concluded that the copies of the e-mails sent to him were fraudulent, but Seller's counsel in the hearing reported that Di Vita did not follow-up.

[59] There was also some dispute whether the Buyer had been misled into believing that the leases had expired. In an exchange on February 28, the Buyer's counsel refers to a February 9 email from the Seller's counsel indicating that the Lawyer's lease had expired. Seller's counsel replied that he should have been clearer, but the earlier email referred to the expiry of a different, registered lease, that the Buyer knew about the Lawyer's lease not expiring, and that he had explained this in a telephone conversation after the February 9 email. Moreover, the Seller's counsel sent the Buyer's agent a letter from the Lawyer that indicated the renewal of the Lawyer's lease until 2025.

[60] There is no dispute that prior to closing all were aware that the Lawyer's lease had not expired – this is the reason the Buyer gave for not closing.

[61] I make two observations about the disputed facts. First, they arose after the time of contracting and therefore do not form part of the surrounding circumstances that inform interpretation of the contract.

[62] Second, not only do they not help resolve the question of whether there was a contractual requirement of vacant possession, they also do not shed light on whether there was breach of that requirement given the nature of the breach found in the submissions of the parties.

[63] The Seller submits that the Buyer refused to close when required to do so, and that this was in breach of the APS.

[64] The Buyer claims that the Seller's failure to provide vacant possession was the relevant breach of the APS.

[65] If there were a requirement of vacant possession, then there is a strong case for concluding that the Buyer's decision not to close was justifiable under the APS, and the deposit ought to be returned to him. If there were no such requirement, then conveying the property without vacant possession was consistent with the APS, and there is a strong case for concluding that the Buyer was in breach and the deposit should be paid out to the Seller.

[66] Learning late, but prior to closing, that the Lawyer's lease would survive closing, if that is indeed what occurred, would not ultimately have prejudiced the Buyer; indeed, the Buyer refused to close precisely because of this lease. And if there were a claim that the Seller failed to deliver leases to Di Vita, which Di Vita seemed at one point to deny, and at another to imply, the Buyer could have invoked his rights during the due diligence period to walk away from the contract. These skirmishes are beside the central question in this case: does the APS contract require vacant possession? My answer is that it does not.

[67] Other post-contracting facts appear to be less controversial. The Seller attempted to negotiate with the Lawyer to end his lease early. The back and forth about this possibility continued until April 21, 2022, with the Buyer informing the Seller that he would not proceed with the transaction because of the failure to provide vacant possession, and the Seller replying that the Buyer was in breach of the APS and therefore forfeited the deposit.

[68] The Buyer submits that these attempts by the Seller to negotiate with the Lawyer for early termination of the lease support the conclusion that the APS required vacant possession. There are two problems with this submission.

[69] First, as the Seller submits, the Seller may have preferred to close the deal even if it required negotiating with the Lawyer over his lease, rather than pursuing an action for breach of contract. Even if the APS did not require vacant possession, it was within the Seller's rights, and not obviously commercially irrational, to prefer to try to smooth the way for a deal by negotiating with the Lawyer. This says nothing meaningful about the Seller's views of the APS.

[70] Second, as discussed, as set out in *Sattva*, the conduct of the Seller post-contracting does not form part of the surrounding circumstances that potentially help interpret the contract. Facts that arise after contracting are not able to inform the objective intentions of the parties at the time of contracting.

Were the parties* ad idem*?

[71] The Buyer submits that if I find that the contract does not require vacant possession, I should conclude that the parties were not *ad idem*, the contract has no force, and the deposit should be returned to the Buyer.

[72] I do not accept that the parties were not *ad idem*. Disputes over contractual interpretation are commonplace. It cannot be that every time a party to a dispute over interpretation does not have its preferred interpretation accepted that there is a finding that the parties are not *ad idem.*

[73] Contractual interpretation turns on, amongst other things, an objective understanding of the intentions of the parties at the time of contracting. To repeat what was set out above, *Sattva* at para. 57 holds that "While surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement… The goal of examining such evidence is to deepen a decision-maker's understanding of the *mutual and objective intentions* of the parties as expressed in the words of the contract." [My emphasis.] Even if the Buyer did subjectively believe that vacant possession was a requirement, the objective evidence was that vacant possession was not a requirement.

ISSUE II: Was there a breach of the APS?

[74] The Buyer did not close the transaction to purchase the property on the basis that vacant possession was a requirement of the APS, and the Seller was not going to provide vacant possession as indicated by a communication from counsel on February 28, 2022, the date of closing specified in the APS. I find that the contract did not require vacant possession, and therefore the failure to close the transaction by the Buyer because vacant possession was not forthcoming was a breach of the contract.

[75] The only question regarding breach concerns its timing. As I will explain, I find that the Buyer repudiated the contract when he communicated that he would not accept the property without vacant possession. The repudiation was not accepted by the Seller, however, until April 21, 2022.

[76] Repudiation of a contract was discussed in the recent case of *Taheripouresfahani v. Dormer Bond Inc.*, 2025 ONSC 5833:

> [62] The law relating to anticipatory breach of contract was summarized by the Ontario Court of Appeal in *Spirent Communications of Ottawa Limited v. Quake Technologies (Canada) Inc.,* 2008 ONCA 92, at para. 37:
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> > An anticipatory breach sufficient to justify the termination of a contract occurs when one party, whether by express language or conduct, repudiates the contract or evinces an intention not to be bound by the contract before performance is due. See *Pompeani v. Bonik Inc.* (1997), 1997 CanLII 3653 (ON CA), 35 O.R. (3d) 417, [1997] O.J. No. 4174 (C.A.). To assess whether the party in breach has evinced such an intention, the court is to ask whether a reasonable person would conclude that the breaching party no

> longer intends to be bound by it. See *McCallum v. Zivojinovic* (1977), 1977 CanLII 1151 (ON CA), 16 O.R. (2d) 721, [1977] O.J. No. 2341 (C.A.). …[I]n determining whether the party in breach had repudiated or shown an intention not to be bound by the contract before performance is due, the court asks whether the breach deprives the innocent party of substantially the whole benefit of the contract.

[63] In addition, the Ontario Court of Appeal held in *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576, at para. 47, that the test for anticipatory breach is an objective one based on a consideration of the surrounding circumstances: "a party can repudiate a contract without subjectively intending to do so." The Court (at para. 48) adopted this summary from Angela Swan, *Canadian Contract Law*, 3d ed. (Markham: LexisNexis Canada, 2012), at p. 618:

> The person (or his or her solicitor) may believe when the statement is made that he or she has an excuse for non-performance and that it is the other party who is in breach of the contract. The characterization of the statement as an "anticipatory breach" [or "repudiation"] will then be made when the dispute goes to trial.

[64] Similarly, the Ontario Court of Appeal in *Pompeani* adopts the following statement from Waddams, *The Law of Contracts*, 3rd ed., paras. 613-614:

> Repudiation can be by words or conduct evincing an intention not to be bound by the contract. It was held by the Privy Council in *Clausen v. Canada Timber & Lands, Ltd*. that such an intention may be evinced by a refusal to perform, <u>even though the party refusing mistakenly thinks that he is exercising a contractual right</u>. [Emphasis added in *Taheripouresfahani*.]

[65] When confronted by an anticipatory repudiation or breach, the innocent party has a right to elect to terminate the agreement or accept the repudiation as discharging the agreement. The effect of exercising the right to terminate the agreement relieves the party of any further obligation to perform its obligations under the contract and allows it to pursue damages for the breach of contract without the need to tender: *Pompeani; Bethco Ltd. v. Clareco Canada Ltd.* (1985), 1985 CanLII 2252 (ON CA), 52 O.R. (2d) 609, John D. McCamus, "*The Law of Contracts* 2nd Ed." Irwin Law, 2012, at 686.

[77] In the present case, on February 28, the Buyer, through counsel, communicated that vacant possession was expected, and the transaction failed to close that day and thereafter even as negotiations continued. Given my finding that the APS did not require vacant possession, the Buyer's communications on February 28 and into March that he would not close without vacant possession evinced an intention not to be bound by the contract and amounted to a repudiation of the contract. This conclusion does not depend on whether there was subjectively a genuine but mistaken belief about the contract's requirements.

[78] Repudiation was not accepted by the Seller on February 28 or in early March. Rather, there was a longer period in which both parties discussed conditions, especially amending the Lawyer's lease, that would result in the transaction closing. There continued to be communications between the parties after February 28, through March, and into April that largely focused on negotiating with the Lawyer to end his lease early.

[79] These negotiations were ultimately unsuccessful, as reviewed above. On April 21, 2022, the Seller's counsel sent a letter to the Buyer's counsel summarizing a telephone call in which the Buyer's counsel advised that the Buyer would not close the transaction. The Seller communicated that it would assume that the Buyer was forfeiting his deposit. The Buyer's lawyer replied that the Buyer was ready, willing and able to close the transaction, but the Seller could not provide vacant possession as required by the APS. The Buyer demanded a return of the deposit.

[80] The Seller's counsel submitted in the hearing that the Seller accepted the repudiation of the contract by the Buyer on April 21, 2022. I agree. The communications and ongoing negotiations between the parties leading up to April 21 imply that both parties were operating under the assumption that the transaction might yet be salvaged. On April 21, in contrast, the discussion came to an end, and each party demanded payment of the deposit by the other. The date that the Seller accepted the repudiation, and thus the date of breach, was April 21, 2022.

[81] As a final observation on breach, the Seller submitted during oral argument that even if the contract required vacant possession, the conduct of the Buyer was such that I should order the deposit payable to the Seller. Counsel in the hearing identified the case of *2054476 Ontario Inc. v. 514052 Ontario Limited*, 2009 CanLII 2037 (ON SC) as indicating that: once the initial date of closing has passed with neither party able to close, time is no longer of the essence; there is an obligation on both parties thereafter not to terminate the contract without reinstating time is of the essence by setting a new date for closing and giving reasonable notice; and a failure to reinstate time is of the essence could itself be construed as a breach or repudiation.

[82] I do not consider this argument for the following reasons. First, I find that the Buyer breached the APS and it is therefore unnecessary to consider this alternative argument. Second, while the Seller raises the more general doctrine of good faith in its factum, it does not in its factum cite the very specific approach to the implications of the question of whether time is of the essence found in *2054476 Ontario Inc. v. 514052 Ontario Limited*, nor did it elaborate on the application of this case to the facts in its factum. In my view, it was too late to identify this case and the argument about time being of the essence for the first time in oral argument, and it would be unfair to the Buyer to consider it.

[83] I also do not accept the Seller's submission that the Buyer acted in bad faith. The evidence on this motion establishes that the Buyer breached the contract, not that he acted in bad faith.

ISSUE III: What is the Remedy for Breach?

[84] I find that the Buyer breached the APS on April 21, 2022. The general rule is that a buyer that breaches, forfeits its deposit without a corresponding requirement of proven damage to the seller. *Azzarello v. Shawqi*, 2019 ONCA 820 (CanLII) observes at para. 45 that,

> It is well-established by case law that when a purchaser repudiates the agreement and fails to close the transaction, the deposit is forfeited, without proof of any damage suffered by the vendor: see *Tang v. Zhang,* 2013 BCCA 52, 359 D.L.R. (4th) 104, at para. 30, approved by this court in *Redstone Enterprises Ltd., v. Simple Technology Inc.,* 2017 ONCA 282, 137 O.R. (3d) 374. Where the vendor suffers no loss, the vendor may nevertheless retain the deposit, subject to relief from forfeiture.

It therefore presumptively follows that the Buyer has forfeited the $300,000 deposit presently held in trust by the Respondent RECO.

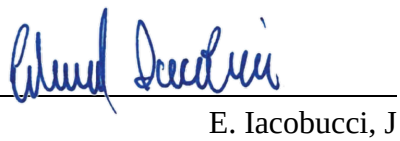
[85] I say "presumptively" because the Buyer raised the possibility of relief from forfeiture for the first time in reply in the oral hearing. The Buyer did not identify relief from forfeiture in his factum. Moreover, the Seller did not address relief from forfeiture in its submissions at the hearing, which in turn, indicates that raising the matter in reply was not an appropriate use of the opportunity to reply. In addition, I note that the Seller explicitly observes at para. 48 of his factum that the Buyer had not raised relief from forfeiture as a possibility, and in the hearing the Respondent Seller's counsel objected to the matter being raised only on reply in the oral hearing.

[86] I find that it would be improper and unfair to the Seller to consider relief from forfeiture. Relief from forfeiture is an equitable remedy that turns on a set of considerations that are distinct from a breach of contract claim. It would be inappropriate to consider relief from forfeiture when the matter was first raised in a reply in the oral hearing.

Conclusion

[87] The Seller requests that the $300,000 deposit presently held on trust by RECO be released to the Seller together with any interest accrued thereon. Given that the Buyer breached the APS, he forfeited his deposit. I order the Respondent RECO to release the deposit together with any interest accrued thereon to the Respondent Seller.

[88] The Seller requests his costs of this proceeding. If the parties are not able to resolve costs of this application, the Seller may email its costs submission of no more than three double-spaced pages to my judicial assistant at annamaria.tiberio@ontario.ca on or before December 11, 2025. The Buyer may deliver his responding submission of no more than three double-spaced pages on or before December 18, 2025.



E. Iacobucci, J

Released: December 5, 2025

CITATION: Ruzgar v. Real Estate Council of Ontario et al, 2025 ONSC 6793
COURT FILE NO.: CV-24-00728373-0000
DATE: 20251205

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ALI OSMAN RUZGAR

Applicant

– and –

REAL ESTATE COUNCIL OF ONTARIO a.k.a. RECO AND 2699064 ONTARIO INC.

Respondents

REASONS FOR JUDGMENT

E. Iacobucci J.

Released: December 5, 2025