CITATION: 1000425140 ONTARIO INC. v. 1000176653 ONTARIO INC., 2023 ONSC 6688
COURT FILE NO.: CV-23-00701343-0000
DATE: 20231127

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
1000425140 ONTARIO INC. Plaintiff	John J. Adair and Ritika Rai, for the plaintiff
– and –	
1000176653 ONTARIO INC., 1223408 ONTARIO LIMITED, RAY GUPTA, SANDEEP GUPTA, and SUNRAY GROUP OF HOTELS INC. Defendants	Sumeet (Sonu) Dhanju-Dhillon and Kanwar Dhaliwal, for the defendants
	HEARD: October 12, 2023

ROBERT CENTA J.

[1] On May 10, 2023, Hailey Summers and her partner Shai Gilgeous-Alexander closed on the purchase of luxury home in Burlington, where they planned to start a family. Four days later, a stranger knocked on the door at the Burlington property. Ms. Summers answered the knock at the door and the stranger demanded to know the whereabouts of someone named Aiden Pleterski. Mr. Gilgeous-Alexander stated that he had no idea who Mr. Pleterski was, but he did not live there, and closed the door. According to Ms. Summers, the stranger seemed unsatisfied, returned to his car, but did not leave the Burlington property. Mr. Gilgeous-Alexander went out to the car and told the stranger to leave. The stranger finally drove off.

[2] Meanwhile, Ms. Summers searched the internet and quickly discovered that Mr. Pleterski, the self-described "Crypto King," had been sued for fraud and was involved in hotly

contested bankruptcy proceedings.[1] Unnerved, Ms. Summers called the police and reported the incident. When the police called her back, they told her that they had previously received reports of people trying to break into the Burlington property, but they could not tell her more than that. Ms. Summers continued to dig and learned through a contact in the private security business that Mr. Pleterski had defrauded some "very bad people" and that someone had threatened to burn down their new house. Whether or not these latter statements were true, Ms. Summers and Mr. Gilgeous-Alexander were sufficiently alarmed by this news that they moved out of their newly purchased dream house, never to return.

[3] As is now clear, the persons behind the vendor of the Burlington property knew all of this and much more when they listed it for sale. None of this information was disclosed when the Burlington property was marketed and sold.

[4] Ms. Summers and Mr. Gilgeous-Alexander purchased the Burlington property from an Ontario numbered company. The owner and sole director of that company is Ray Gupta. His son, Sandeep Gupta, was intimately involved in the events surrounding the house and had a curious and complex relationship with Mr. Pleterski.[2]

[5] In March 2021, Ray agreed to sell the Burlington property to Mr. Pleterski and entered into a rent-to-own agreement with him. That agreement did not close. By the time Ray re-sold the Burlington property to the plaintiff, the Guptas knew that Mr. Pleterski's investors had credibly accused him of defrauding them of over $25 million. The Guptas knew that the defrauded investors had learned that Mr. Pleterski used over $1 million of their stolen money for payments toward the purchase of the Burlington property. In June 2022, Sandeep was very concerned for Mr. Pleterski's safety. Sandeep knew that "randoms" were showing up at the Burlington property "every day." Sandeep was so worried that the defrauded investors would physically harm Mr. Pleterski that Sandeep moved him into another property owned by the Guptas where Mr. Pleterski could live rent-free.

[6] The Guptas knew that when they moved one of their employees, Ken Michaud, into the Burlington property to keep watch over it, he was getting "harassed" by people "coming up to the house ever single day" to the point where Mr. Michaud demanded that security be present. Mr. Michaud's wife simply refused to stay at the Burlington property. The Guptas knew that that the people harassing Mr. Michaud "would show up and think that [Mr. Pleterski] was there and that Mr. Michaud was lying to them."

[7] The Guptas also knew that Mr. Pleterski was kidnapped in December 2022 by people he had defrauded. The kidnappers demanded that Mr. Pleterski obtain $3 million in ransom funds. Mr. Pleterski called Sandeep multiple times over the several days he was held hostage, asking him for the money. When the kidnappers finally released Mr. Pleterski, with blackened eyes according to photos published in the media, he was dropped off in the immediate vicinity of Sandeep's home. Sandeep was extremely concerned by the

[1] See generally, *In the Matter of the Bankruptcy of Pleterski and AP Private Equity Ltd.*, 2023 ONSC 5546.
[2] Given their common surname, I will refer to each of Mr. Ray Gupta and Mr. Sandeep Gupta by his first name only. In doing so, I mean no disrespect to either gentleman.

kidnapping and stated "after the kidnapping, obviously [Mr. Pleterski] put myself in danger, my family in danger. I refused all communication with him."

[8] I find that Sandeep and Ray knew all of this when they listed the Burlington property for sale for over $8 million. The Guptas knew all of this when their real estate agent marketed the house as "private and secure."

[9] For the reasons that follow, I grant summary judgment in favour of the plaintiff against the company that sold the Burlington property. I find that the corporate owner of the Burlington property made a fraudulent misrepresentation to the plaintiff and failed to disclose a latent defect in the Burlington property.

[10] As a remedy for this fraudulent misrepresentation, I grant recission of the agreement of purchase and sale and equitable damages to put the plaintiff in the position it was in before it was induced to enter into this transaction.

Parties, key individuals, and litigation process

[11] The plaintiff, 1000425140 Ontario Inc., is a holding company incorporated on January 25, 2023. Its principal is Shai Gilgeous-Alexander, a well-known and successful Canadian-born professional athlete. Mr. Gilgeous-Alexander is in a romantic relationship with Hailey Summers.

[12] In 2022, the couple began looking for residential properties where they could live together and eventually start a family. They retained Jakub Jelen as their real estate agent to assist them with their search. In late February or early March 2023, Mr. Jelen told his clients that he had identified a property in Burlington that might meet their needs.

[13] That Burlington property was owned by the defendant Ray Gupta through the defendant 1000176653 Ontario Inc. ("653 Ontario"). Ray incorporated 653 Ontario on April 14, 2022, and was its sole officer and director. Ray had transferred the house to 653 Ontario from another one of his companies, the defendant 1223408 Ontario Limited ("408 Ontario"). Ray purchased all of the shares of 408 Ontario on August 23, 2019. The Burlington property was one of the assets of held by 408 Ontario at the time Ray purchased the company.

[14] The defendant Sandeep Gupta is Ray's son. The affidavit filed on behalf of the defendants does not explain Sandeep Gupta's role within the "family ventures." In an examination under oath conducted during Mr. Pleterski's bankruptcy, Sandeep stated that he was the Vice-President of the defendant Sunray Group of Hotels Inc. and, after September 2022, its President. As will be detailed below, Sandeep was heavily involved in the transactions surrounding the Burlington property.

[15] On March 27, 2023, Mr. Gilgeous-Alexander and Ray signed the agreement of purchase and sale on behalf of the plaintiff and 653 Ontario, respectively. The purchase price was $8.45 million. The closing date was set for May 17, 2023, although the transaction actually closed about a week earlier. Ms. Summers and Mr. Gilgeous-Alexander moved into the

property around May 14, 2023, and moved out of the property on May 22, 2023. They have never returned.

[16] On June 19, 2023, the plaintiff issued the statement of claim in this proceeding. The statement of claim sought a declaration that 653 Ontario had made a fraudulent misrepresentation that induced the plaintiff to sign the agreement of purchase and sale. The plaintiff sought recission of the agreement as a remedy for the fraudulent misrepresentation. The plaintiff claimed damages for conspiracy against all the other defendants and punitive damages from all the defendants.

[17] On July 7, 2023, the matter came before me in Civil Practice Court. The plaintiff sought an urgent date for a summary judgment hearing. The court found a mutually convenient date and the parties agreed on a timetable for the exchange of materials.

[18] The defendant served and filed a statement of defence on July 24, 2023. Thereafter, the parties exchanged materials for the summary judgment motion.

[19] At the hearing, the plaintiff asked for summary judgment on its claim and asked that I award recission either on the basis of fraudulent misrepresentation or the failure to disclose a latent defect. The defendants agreed that summary judgment was appropriate and asked that I dismiss the action with costs.

Principles of summary judgment

[20] Summary judgment is an important tool for enhancing access to justice where it provides a fair process that results in a just adjudication of disputes.[3] Used properly, it can achieve proportionate, timely, and cost-effective adjudication.

[21] The Court of Appeal for Ontario described the correct approach on a motion for summary judgment. I am to:

a. determine if there is a genuine issue requiring a trial based only on the evidence before me, without using the enhanced fact-finding powers under rule 20.04(2.1);

b. if there appears to be a genuine issue requiring a trial, determine if the need for a trial could be avoided by using the enhanced powers under

i. rule 20.04(2.1), which allow me to weigh evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence; and

ii. under rule 20.04(2.2), which allows me to order that oral evidence be presented by one or more parties.[4]

[3] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 4-7.
[4] *Royal Bank of Canada v. 1643937 Ontario Inc*., 2021 ONCA 98, 154 O.R. (3d) 561, at para. 24.

[22] The Supreme Court of Canada emphasized that I must focus on whether the evidence before me permits a fair and just adjudication of the dispute and cautioned that judges should not use the enhanced powers where their use would be against the interests of justice:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.[5] [emphasis in original]

[23] In this case, the parties agree that summary judgment is appropriate. While that agreement is not binding on me, it is a factor that I will consider in assessing whether or not there is a genuine issue requiring a trial.

No genuine issue requiring a trial based on the evidence filed on this motion

[24] On a motion for summary judgment, each party is required to put their best foot forward. They are not permitted to sit back and suggest that they would call additional evidence at trial.[6] The court proceeds on the basis that the parties have each advanced their best case and that the record contains all the evidence that would be led at trial.

[25] The plaintiff's record on this motion for summary judgment included two affidavits from Ms. Summers, an affidavit from its officer and director Mr. Gilgeous-Alexander (which adopted the contents of Ms. Summers' affidavit), and a law clerk's affidavit that attached a motion record in Mr. Pleterski's bankruptcy proceeding. That motion record contained the third report of the bankruptcy trustee, which incorporated a significant amount of evidence, including the transcript from an under-oath examination that Sandeep provided to the trustee in Mr. Pleterski's bankruptcy proceeding.

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[5] *Hryniak*, at para. 66.
[6] *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326, 162 O.R. (3d), at para. 4; *Ntakos Estate v. Ntakos*, 2022 ONCA 301, 75 E.T.R. (4th) 167, at para. 38; *Salvatore v. Tommasini*, 2021 ONCA 691, at para. 17; *Miaskowski (Litigation guardian of) v. Persaud*, 2015 ONSC 1654, 51 R.P.R. (5th) 234, at para. 62, rev'd on other grounds, 2015 ONCA 758, 342 O.A.C. 167.

[26] The defendants raised no issue about the admissibility of the transcript for the truth of its contents and relied on some of that evidence in their own factum. Counsel advised that Sandeep was not examined under oath pursuant to rule 39.03 because the parties agreed on the admissibility of Sandeep's transcript.

[27] In addition, the plaintiff examined its real estate agent, Jakub Jelen, under oath pursuant to rule 39.03.[7]

[28] The defendants cross-examined Ms. Summers and Mr. Jelen, but did not cross-examine Mr. Gilgeous-Alexander.

[29] The defendants relied on a single affidavit from Kenneth Gibson, the President of the Sunray Group of Hotels.[8] Although this is a motion for summary judgment,

a. Ray did not file an affidavit, despite being a personal defendant and the principal of 653 Ontario and 408 Ontario;

b. Sandeep did not file an affidavit, despite being a personal defendant with material first-hand knowledge about the matters in dispute;

c. the seller's real estate agent, Carlos Clavero, did not file an affidavit, despite being the person who marketed the Burlington property and the person who allegedly made the crucial representations to Mr. Jelen that lie at the heart of the case; and

d. no officer or director of any of the corporate defendants filed an affidavit.

[30] The defendants offered no explanation for choosing not to file these affidavits. Each of Ray, Sandeep, and Mr. Clavero had critical first-hand information on contested matters at the heart of this proceeding.

[31] I will consider Mr. Gibson's affidavit in more detail as I address the specific issues to be determined. At this stage, I wish to point out at a high level some of the weaknesses in Mr. Gibson's affidavit. Like many affidavits filed with the court, Mr. Gibson's affidavit contains legal argument, his opinion, rhetoric, and unfounded speculation. Such content is not uncommon, but it is always unhelpful and undermines the credibility of an affiant. If those were the only flaws in Mr. Gibson's evidence, I would simply ignore those paragraphs and move on to consider the balance of his affidavit. However, there are much more serious problems with the affidavit, including the following:

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[7] Rule 39.03, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[8] Unfortunately, Mr. Gibson had a serious health issue that prevented him from being cross-examined on his affidavit. The plaintiff did not want to adjourn the hearing and agreed to proceed with the motion for summary judgment without cross-examining Mr. Gibson.

a. Mr. Gibson provides the hearsay evidence of the seller's real estate agent, Mr. Clavero. The defendants knew that these facts were contested, but did not provide the first-hand evidence of Mr. Clavero, who would have personal knowledge of them. In my view, the hearsay evidence from Mr. Clavero is not admissible and, in any event, I would give it very little weight.[9]

b. Mr. Gibson provides hearsay evidence from an unnamed employee of Sunray. This information might have been provided to Mr. Gibson from Mr. Michaud, but Mr. Gibson does not name the source of this hearsay evidence on a contentious point. In my view, the evidence is not admissible because the source of the information is not named. Moreover, the evidence is hearsay, is not admissible, and I give it no weight.[10]

c. Mr. Gibson provides hearsay evidence from Ray and Sandeep on critical and contested facts. Some of this hearsay evidence is contradicted by the evidence Sandeep gave under oath during Mr. Pleterski's bankruptcy proceeding. As I will explain, the hearsay evidence from Ray and Sandeep is inadmissible and I give it no weight. Ray and Sandeep ought to have provided affidavits so that they could be cross-examined.[11]

[32] The defendants were required to put their best foot forward on this motion for summary judgment. Instead, they tendered virtually no first-hand evidence. Tactical decisions like this have consequences. In this case, among other results, it allows me to conclude based on the record before me that there is no genuine issue requiring a trial on the issues of fraudulent misrepresentation and the existence of a latent defect at the Burlington property.

[33] I can fairly determine the motion on the record before me without resort to the enhanced powers under rules 20.04(2.1) or (2.2). The dispute between the parties does not require me to weigh the evidence, evaluate the credibility of the deponents, or draw inferences from the evidence.

The limits on the doctrine of "buyer beware"

[34] The parties agree on the state of the law of Ontario but not its application to the facts of this case.

[35] There is no implied warranty of fitness for human habitation upon the purchase of a house already completed at the time of sale.[12] The law is clear that a buyer who does not protect herself through contract or inspection is without a remedy, absent fraud.[13] The purchaser

[9] Rule 20.02(1).
[10] Rules 39.01(4) and 20.02(1).
[11] Rule 20.02(1).
[12] *Dennis v. Gray*, 2011 ONSC 1567, 105 O.R. (3d) 546, at para. 11.
[13] *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720, at p. 720.

must generally seek protection either by express warranty or by independent examination of the premises.[14] This legal doctrine is known as "buyer beware" or "*caveat emptor*." In 1979, the Court of Appeal for Ontario adopted this description of the law:

> Absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it, whether it be dilapidated, bug-infested or otherwise uninhabitable or deficient in amenities, unless he protects himself by contract terms.[15]

[36] The parties agree that there are exceptions to the general doctrine of buyer beware, two of which are relevant in this case: fraudulent misrepresentation and latent defect.

Fraudulent misrepresentation

[37] The plaintiff submits that it was induced to sign the agreement of purchase and sale through 653 Ontario's fraudulent misrepresentation. The elements of fraudulent misrepresentation are that:

a. the defendant made a false representation of fact;

b. the defendant knew the statement was false or was reckless as to its truth;

c. the defendant made the representation with the intention that it would be acted upon by the plaintiff;

d. the plaintiff relied upon the statement; and

e. the plaintiff suffered damages as a result.[16]

Did 653 Ontario make a false representation of fact?

[38] The plaintiff claims that 653 Ontario made two representations of fact that were false. I will first determine what representations of fact were made by 653 Ontario. I will then consider whether or not those representations were false.

First representation: the Burlington property was private and secure

[39] The plaintiff submits that 653 Ontario falsely represented that the Burlington property was private and secure.

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[14] *Carleton Condominium Corporation No. 32 v. Camdev Corporation* (1999), 124 O.A.C. 352 (C.A.), at para. 4.
[15] *McGrath v. MacLean et al.* (1979), 22 OR. (2d) 784 (C.A.), at p. 791, quoting then Prof. Bora Laskin in "Defects of Title and Quality: Caveat Emptor and the Vendor's Duty of Disclosure" (1960), Law Society of Upper Canada, Special Lectures, p.389 at pp.403-4.
[16] *Mariani v. Lemstra* (2004), 246 D.L.R. (4th) 489 (Ont. C.A.), at para. 12; leave to appeal refused, [2004] S.C.C.A. No. 355; *Chaba v. Khan*, 2020 ONCA 643, at para. 15, leave to appeal refused 2021 CanLII 24825.

[40] First, the plaintiff points to listing agreement that describes the property as private. This representation is not controversial. The first words of the listing agreement describe the house as a "Private Waterfront Estate Property." I am satisfied 653 Ontario represented as a fact that the Burlington property was private.

[41] Second, the plaintiff submits that 653 Ontario marketed the property through its real estate agent as "private and secure." In their factum and in oral argument, the defendants disputed that 653 Ontario made that representation.

[42] The plaintiff's best evidence on this point comes from the examination under oath of its real estate agent, Mr. Jelen. All of the communications between the parties were between the two agents: Mr. Jelen and Mr. Clavero. So, any representation by 653 Ontario must have come from its agent, Mr. Clavero, to Mr. Jelen.

[43] Mr. Jelen testified that Ms. Summers and Mr. Gilgeous-Alexander told him that privacy and security were "quite important" to them when purchasing their home. I accept that Mr. Jelen would have had these concerns in the front of his mind when he discussed potential properties with vendors.

[44] During his examination by counsel for the plaintiff, Mr. Jelen agreed that the 653 Ontario's real estate agent marketed the property as being private and secure:

> Q. In terms of your interactions with the listing agents and the materials that you read and the discussions that you had, is it accurate to say that the home was being marketed as being private and secure, among other features?
>
> A. Yes. Comparable to other houses that we looked at and we tried to make an offer previously, I would say yes.

[45] Counsel for the defendants did not challenge Mr. Jelen's evidence during cross-examination. Indeed, counsel did not ask Mr. Jelen any questions about his evidence that the 653 Ontario's real estate agent marketed the property as being private and secure.

[46] As indicated, the defendants did not file any direct evidence from Mr. Clavero about the representations he made (or did not make) about the property. They made this choice despite knowing that the plaintiff pleaded in three separate paragraphs of the statement of claim that the defendants "marketed the [Burlington property] by representing that it was private, secure, and secluded." This allegation also appeared in several places in the plaintiff's notice of motion for summary judgment. Mr. Gibson's affidavit, which

contained a significant amount of hearsay evidence from Mr. Clavero, did not directly address whether or not Mr. Clavero marketed the property as private and secure.[17]

[47] The question of whether or not 653 Ontario marketed the property as private and secure was front and centre in the plaintiff's claim. The plaintiff's real estate agent agreed under oath that the property was marketed as private and secure. The defendants neither cross-examined Mr. Jelen on this point nor called any admissible contradictory evidence.

[48] I am satisfied that 653 Ontario, through its agent Mr. Clavero, represented as a fact that the Burlington property was private and secure.

Second representation: 653 Ontario failed to disclose the safety risk at the Burlington property

[49] The plaintiff submits that 653 Ontario made a false representation by omitting to disclose the safety risk that existed at the Burlington property, which left the plaintiff and its principal with the false impression that there was no reason to doubt that it would be safe to live there.

[50] The parties agree that 653 Ontario did not say there was a safety risk at the Burlington property. This omission is only legally significant if there was, in fact, a safety issue at the Burlington property. In my view, this second representation is essentially just a repetition of the first representation. In any event, I will consider that issue below.

Did 653 Ontario know the statements were false or were they reckless about their truth?

[51] The plaintiff claims that 653 Ontario made the following two statements knowing them to be false or being reckless as to their truth:

a. the Burlington property was private and secure;

b. the omission to disclose the safety risk that existed at the property, which left Mr. Gilgeous-Alexander and Ms. Summers with the false impression that there was no reason to doubt that it would be safe to live there.

[17] The closest Mr. Gibson's evidence gets to this point is saying that "Mr. Clavero has advised me that none of the alleged statements that are attributed to him in Mr. Adair's letter [of June 6, 2023] were made by him." It appears to me that this is addressing an allegation in Mr. Adair's letter that Mr. Clavero stated that "the vendor was a European couple who used the Lakeshore property as a vacation home," not the issue of whether Mr. Clavero marketed the property as "private and secure." I also note that Mr. Jelen subsequently testified under oath that Mr. Clavero stated that the owners "don't spend a lot of time there anymore, and it's their vacation home." That statement about it being a vacation home itself appears to be misleading given the history of the Burlington property. Counsel for the defendants did not cross-examine on this evidence. In any event, if Mr. Clavero's oblique denial was intended to address the key representation in this case, it is still hearsay in Mr. Gibson's affidavit and I give it no weight.

[52] In my view, whether or not these statements were false turns primarily on whether or not there was a safety risk at the property at the time 653 Ontario marketed and sold the Burlington property to the plaintiff.

Was there a safety risk at the Burlington property? Did the defendants know about it?

[53] To provide the context necessary to determine whether or not there was a safety risk and, if so, whether the defendants knew about the risk, it will be necessary to consider the how the defendants came to know Mr. Pleterski.

[54] As noted above, Ray acquired the Burlington property in 2019 and renovated it between 2019 and 2021. According to Mr. Gibson's affidavit, in October 2020, Ray retained Mr. Clavero to assist with the sale of the Burlington property. In March 2021, Mr. Clavero introduced Ray, Sandeep, and Mr. Gibson to Mr. Pleterski. They met with Mr. Pleterski at their office, where he provided copies of his bank statements and credit reports.

[55] On March 4, 2021, Mr. Pleterski and 408 Ontario, which owned the Burlington property at that time, signed an agreement of purchase and sale for the property. The purchase price was set at $8.49 million, and the transaction was to close two years later, on March 10, 2023. Mr. Pleterski agreed to pay a non-refundable deposit of $500,000 in two instalments due in March 2021.

[56] The agreement of purchase and sale contained a lease-to-own agreement at Schedule C. The lease had a term of two years, commencing on March 12, 2021, with monthly rent of $42,174.16, plus an amount for property taxes. The lease payments were to be credited toward the purchase price on closing. When shown the signature on the agreement of purchase and sale during his examination, Sandeep confirmed that he signed the documents on behalf of 408 Ontario, although there was some doubt regarding whether or not he was shown the final version of the agreements.

[57] Mr. Pleterski moved into the Burlington property in March 2021. According to Mr. Gibson's affidavit, Sandeep took the lead in handling the tenancy arrangements with Mr. Pleterski. Sandeep stated in his examination in the bankruptcy proceeding that he would speak with Mr. Pleterski a "couple of times a month" from a "mentor perspective" and that he was "a shoulder [for Mr. Pleterski] to lean on." Sandeep stated that he would provide coaching to assist Mr. Pleterski when he started to get into a "little bit of financial trouble." Sandeep stated that Ray did not have a relationship with Mr. Pleterski.

[58] Sandeep testified that Mr. Pleterski made most of the monthly rent payments to him personally, despite the fact that the lease agreement was with 408 Ontario. When asked if Sandeep would then move the money over to 408 Ontario, he answered "Overall. Not every month, but we did, yes."

[59] Sandeep testified that in the latter part of 2021, the rent payments from Mr. Pleterski started to be a little delayed. He thought that Mr. Pleterski made his final lease payment in May 2022, for the month of April.

[60] On April 21, 2022, Sacha Amar Dario Singh and 9319697 Canada Ltd. commenced an action against Mr. Pleterski and his company alleging breach of contract, fraudulent misrepresentation, civil fraud, misappropriation of funds, conversion, and unjust enrichment. The claim alleged that Mr. Singh and his company were induced into making substantial investments with Mr. Pleterski between April 2021 and January 2022 and that the inducement was based on fraudulent misrepresentations.

[61] On June 27, 2022, Mr. Pleterski transferred a McLaren Senna (a type of car) to the Sunray Group of Hotels Inc. as security for his obligations under the lease agreement. Sandeep confirmed that the car provided security worth $900,000 and that there was no written document governing the grant of security, rather it was "verbal." He explained that it was transferred to the Sunray Group of Hotels Inc., even though it "has nothing to do with the home, technically, it was just for insurance purposes because we have fleet insurance for the company."

[62] Sandeep testified that he had the goal of coaching Mr. Pleterski into better investments because Sandeep wanted Mr. Pleterski to close on the sale transaction for the Burlington property and that his interest was to "protect our home":

> Obviously our interest was to protect our home. It's not something that we wanted to take back. We wanted him to close on it. So if we could help advise him or try to coach him into better investments so it could grow back, then that's what our goal was. Because he was of the opinion strongly that he could earn back his money that he's lost.

[63] According to Mr. Gibson's affidavit, in the weeks leading up to July 7, 2022, Mr. Pleterski "advised Sandeep that threats were being made against him and unwanted visitors were coming to the Property."

[64] On July 7, 2022, Sutherland J. issued a *Mareva* order against Mr. Pleterski.

[65] Mr. Pleterski moved out of the Burlington property in late June or July 2022. Sandeep indicated that Mr. Pleterski was allowed to stay at another one of their properties rent free. Sandeep testified that he was very concerned about Mr. Pleterski's safety while he was living at the Burlington property. He testified that he "literally thought [Mr. Pleterski] was going to be harmed" by the "randoms showing up at the house every day." Sandeep wanted to get Mr. Pleterski out of the house to protect Mr. Pleterski and the "very valuable" Burlington property. Sandeep put it this way:

> Q. So is that sort of relationship why Mr. Pleterski's been living at [the second] property since June of 2022?
>
> A. Yes and no. He was living in the home located in [Burlington] and, you know, there was a matter of safety. There was a lot of concern for his safety. We obviously had -- when he stopped paying for his rent payments, we had to -- I had to look at something

> to protect our company and protect our investment. We were having randoms showing up at the house every day, so from a vandalism perspective, from a -- also, I literally thought that he was going to be harmed, and speaking to him during that time, suicidal. So we thought that we benefitted from getting him out of the -- out of the [Burlington property] that we needed to, which was very valuable. And so by taking him out of there and putting him into one of our other properties, it was something that was no skin off our back. It didn't cost us anything, and it was helpful for us to get him out of [the Burlington property].

[66] This brings us to the first meaningful factual dispute between the parties related to the safety issues at the Burlington property.

[67] After Mr. Pleterski moved out, Sandeep arranged for Ken Michaud, a staff member of one of Ray's companies to stay at the Burlington property. Sandeep's testimony about the conditions faced by Mr. Michaud is extremely significant. He explained that "we were getting harassed" by people coming up to the house every single day looking for Mr. Pleterski and that these harassers did not believe Mr. Michaud when he said that Mr. Pleterski did not live there. It was "a very bad situation," so bad that Mr. Michaud's wife refused to stay at the property and even Mr. Michaud wanted security present on site:

> Q. Thank you. Let's talk about some of Mr. Pleterski's property. We examined him, and during that examination, he confirmed that when he became bankrupt, you were holding a few of his cars, right?
>
> A. We were holding it -- a bit of background on that: We were holding it because when he moved out of the home and Mr. Michaud moved in, we were getting harassed -- people were coming up to the house every single day, looking for Aiden, to the point where Mr. Michaud wanted to have security himself there. His wife refused to stay there. It was a -- it was a very bad situation. [Inaudible]. And so all of his cars were on the Burlington property at that time, his exotic cars. So we had to move them because when the cars were there, everybody would show up and think Aiden was there and that Mr. Michaud was lying to them. So we moved them to our other property, whether it was a hotel. The really expensive ones we would put where we had some shelter for protection, but, yeah, we moved them from the property.

[68] Sandeep explained that he took possession and moved all of these cars without any written agreement with Mr. Pleterski and admitted that "we didn't give him much of a choice."

[69] The defendants now characterize Mr. Michaud's experience at the Burlington property quite differently. Mr. Gibson's affidavit states as follows:

> 23. Aiden had caused damage to the Property that needed repair. In order to facilitate the renovations, it was decided that a staff member would temporarily reside at the Property. The staff member stayed at the Property from July, 2022 until October 15, 2022.
>
> 24. I am advised by the staff member that during his temporary occupancy there were four (4) instances of visitors attending at the Property and inquiring about Aiden. The details surrounding each instance are as follows:
>
> > (a) On or about the third week of July 2022, an individual knocked on the front door of the Property and requested to speak to Aiden. After being advised that Aiden was no longer residing at this address, the visitor left without issue;
> >
> > (b) On or about July, 2022, an individual knocked on the door and identified himself as a Bailiff looking for certain automobiles belonging to Aiden. The Bailiff was advised that the automobiles had been removed. The Bailiff left without issue;
> >
> > (c) On or about August, 2022, an individual knocked on the front door of the Property and requested to speak to Aiden. She identified herself as a friend of the family. After being advised that Aiden was no longer residing at this address, the visitor left without issue; and
> >
> > (d) On or about the last week of August, an individual knocked on the front door of the Property and requested to speak to Aiden. After being advised that Aiden was no longer residing at this address, the visitor left without issue.
>
> 25. All four (4) instances involved a separate visitor attending at the Property. In addition to there not being any repeat visitors, in each instance the visitor promptly vacated the premises upon being informed that Aiden did not reside there. I am advised that the visitors did not ask questions, argue, incite violence, or damage the Property. None of the visits were perceived to be dangerous or threatening by the staff member.
>
> 26. After reading Ms. Summers' Affidavit, I reached out to the staff member to inquire if he had received a threat that someone would burn down the Property and he has advised me, and I do verily believe that no such threat was ever made to him.

[70] I do not give any weight to Mr. Gibson's evidence, which is entirely unsatisfactory on a motion for summary judgment.

[71] First, Mr. Gibson does not identify the person who provided this information to him. Rule 4.06(2) restricts the contents of an affidavit to be used in a proceeding to "the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court." Rule 39.01(4), however, creates an exception to the general prohibition on hearsay established in rule 4.06(2) and permits an affidavit on a motion to contain statements of the deponent's information and belief if the source of that information is specified in the affidavit.[18] In this case, however, Mr. Gibson chose not to identify the source of his information.

[72] The defendants explained that "it is Mr. Gibson's practice not to mention company employees in documents to be filed with the Court." The *Rules of Civil Procedure* offer no support for his practice. In my view, it is inappropriate to advise simply that the source of the information is a "staff member." Mr. Gibson leaves it to the court to infer that the employee in question is Mr. Michaud, but neither the opposing party nor the court should be put in that unacceptable situation. The requirement to identify the source of the hearsay information requires, at a minimum, the name of the person providing that information.

[73] Second, this is not an ordinary motion, this is a motion for summary judgment. While an affidavit on a motion for summary judgment may be made on information and belief (subject to the requirements of rule 39.01(4) discussed above), on the hearing of the motion the court may draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts. This rule "effectively preclude[s] affidavits on information in belief in respect to contested facts" on motions for summary judgment.[19]

[74] In the statement of claim, the plaintiff clearly raised Mr. Michaud's perception of his own as a relevant issue:

> 17. Sandeep Gupta then moved Mr. Pleterski out of the Property in June or July of 2022. To ensure that it was clear that Mr. Pleterski no longer lived at the Property, Sandeep Gupta moved a new tenant in, a Mr. Ken Michaud. Mr. Michaud worked for Sunray Group, and moved into the Property with his wife in or about August 2022.
>
> 18. However, the threatening visits continued every single day even after Sandeep had installed Mr. Michaud and his wife as the new tenants.

[18] Rule 39.01(4).
[19] *Armstrong v. McCall* (2006), 213 O.A.C. 229 (C.A.), at para. 33.

> 19. Mr. Michaud and his wife were so concerned for their safety that they decided to vacate the Property.

[75] The plaintiff also filed an affidavit containing the transcript of Sandeep's evidence in the bankruptcy proceeding that provided a very different version of events (see paragraph [67], above). The plaintiff not only pleaded the issue related to Mr. Michaud's safety, but it also provided evidence out of the mouth of one of the defendants that, absent contradiction, would allow the plaintiff to demonstrate that there was no genuine issue requiring a trial on this point.

[76] The defendants knew that issues related to the safety of the Burlington property after Mr. Pleterski moved out, Mr. Michaud's perception of his safety, and the defendants' knowledge about those issues were contentious issues on a motion for summary judgment. If the defendants wished to show that there was a genuine issue requiring a trial, they needed to put their best foot forward. They did not do so. Instead, they relied an affidavit from Mr. Gibson that contained only the hearsay evidence of an unnamed staff person.

[77] In my view, assuming for the moment that Mr. Gibson was referring to Mr. Michaud, the defendants should have tendered an affidavit from Mr. Michaud to provide admissible evidence. This would have permitted the plaintiff to test Mr. Michaud's memory through cross-examination. The plaintiff could have asked Mr. Michaud to produce, for example, any contemporaneous emails or text messages that he may have sent about his experiences at the Burlington property. I do not accept the defendants' submission that the onus was on the plaintiff to summons Mr. Michaud to give evidence under rule 39.03. If the defendants wished to have evidence from Mr. Michaud before the court to counter Sandeep's evidence, it was incumbent on them to provide such evidence in an admissible form.

[78] The safety of the Burlington property after Mr. Pleterski moved out, and what the defendants knew about that danger, were significant issues on this motion for summary judgment. I am sceptical of the value of Mr. Gibson's evidence on this point.[20] It provides a very sanitized version of events that stands in stark contrast to Sandeep's evidence to the bankruptcy trustee. In these circumstances, I do not admit Mr. Gibson's hearsay evidence from the unnamed staff member. If it were admissible, I would give it no weight. I accept the evidence of Sandeep on this point.

[79] The defendants also point to evidence that they believed the property was so safe after Mr. Pleterski moved out, that they used it as a vacation property. Mr. Gibson's affidavit stated as follows:

> 28. During that time, no unintended visitor attended at the Property. The Property was and is equipped with security cameras and any visit would have triggered the security system and alerted the Guptas about any visitors. I am advised by Sandeep that the only

[20] *Armstrong*, at para. 33.

> instance of the security system being triggered was in November 2022 due to a powerful storm in the area which rattled the windows with a force strong enough to trigger a sensor.
>
> 29. Further, during the 7-month period following the staff member's departure from the Property [in October 2022], the Guptas' family and friends, including Sandeep and his family, vacationed at the Property. No one encountered any additional visitors or felt any threat or danger associated with their stay at the Property. I myself visited the Property.

[80] First, Mr. Gibson's evidence about his own observations is quite limited and generally devoid of detail. His direct evidence states only that "I myself visited the Property." Mr. Gibson provides no details that allow me to assess the circumstances or purpose of his visits, how often or when he visited, how long he stayed at the Burlington property, or who else was at the Burlington property when he visited. The lack of detail regarding Mr. Gibson's own experience reduces its utility significantly.[21]

[81] Second, the balance of Mr. Gibson's evidence on this point is hearsay evidence. Mr. Gibson recounts what Sandeep told him about the security system. That is classic hearsay evidence that is not admissible on a motion for summary judgment. That evidence should have come directly from Sandeep. I do not admit that evidence and, if I did, I would give it no weight.

[82] Similarly, Mr. Gibson does not state that he vacationed with the Guptas' family and friends. There is no basis in the evidence to conclude that he directly observed or participated in such vacations. There are no details that permit me to assess his conclusory statement. Instead, it appears to me that this is, at best, a form of disguised hearsay.[22] Unless he was a member of the vacation party, somebody must have told Mr. Gibson that Sandeep and other members of the Gupta family vacationed at the property.[23] Mr. Gibson, however, does not state the source of his information and belief. For the reasons set out above, this is not permissible. This evidence should have been in affidavits from Ray and Sandeep so that they could be cross-examined on it. In the circumstances, I give little weight to Mr. Gibson's evidence on this point.

[83] Moreover, it is difficult to reconcile Mr. Gibson's evidence with that given by Sandeep on the examination by the bankruptcy trustee. I find that, in February 2023, Sandeep knew that even after Mr. Pleterski moved out of the property,

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[21] *Konstan v. Berkovits*, 2023 ONSC 497, paras. 8 to 12, and *Prodigy Graphics Group Inc. v. Fitz-Andrews*, 2000 CarswellOnt 1178 (Ont. S.C.), at para. 46.
[22] *Konstan*, at paras. 8 to 12, and *Prodigy Graphics*, at para. 46.
[23] *Prodigy Graphics Group Inc. v. Fitz-Andrews*, 2000 CarswellOnt 1178, at para. 46; *Novak v. St. Demetrius (Ukrainian Catholic) Development Corporation*, 2017 ONSC 3503, at para. 31; *Konstan v. Berkovits*, 2023 ONSC 497, at para. 8.

a. the Guptas were being harassed by people coming up to the house every single day looking for Mr. Pleterski;

b. the people looking for Mr. Pleterski thought he was there (because his cars were there) and that Mr. Michaud was lying to them when he said that Mr. Pleterski did not live there; and

c. the threats posed by the people looking for Mr. Pleterski were serious enough that Mr. Michaud wanted security to be present if he was going to stay at the house and Mr. Michaud's wife refused to stay there at all.

[84] There is no indication in Sandeep's examination that Sandeep and his family used the Burlington property as a vacation property after Sandeep moved Mr. Pleterski to another one of the family's properties. I do not accept Mr. Gibson's evidence and find that Ray and Sandeep continued to believe that there was an ongoing threat to the safety and security of the Burlington property and its occupants. If necessary, I would draw an adverse inference against the defendants on this point for failing to provide the direct evidence of Ray or Sandeep.

[85] Returning to the chronology, on August 9, 2022, Mr. Pleterski and his company AP Private Equity Limited were adjudged bankrupt. The bankruptcy trustee has asserted an interest in the Burlington property.

[86] In December 2022, Mr. Pleterski was kidnapped, held for several days, and roughed-up by people demanding a ransom. The defendants accept that one of Mr. Pleterski's kidnappers was an inspector in the bankruptcy proceeding and that the kidnappers had a great deal of information about Mr. Pleterski and the bankruptcy.

[87] Sandeep testified that Mr. Pleterski called him for help several times while kidnapped. Mr. Pleterski told him that he had been kidnapped by some "bad people" who wanted $3 million. He described the conversation in early December 2022, as follows:

> A. So that day, I received multiple calls from Aiden, but it was late at night; I have a young child, so I didn't answer. There was no reason to, and he never called me late. But it was constant calling. And then at around 1:30 a.m., I finally had enough, and I picked up the call. And I asked him right away if everything was okay. And, you know, he's very monotone when he speaks. And from there, it was just basically everything that -- you know, I'm kidnapped. I'm with some bad people right now. They need $3 million. I have nobody else to call. My parents don't have that type of money, and you're the only person who can help me, type of thing, in a frantic -- in a frantic way, of course.

[88] Sandeep testified that he was worried about Mr. Pleterski's safety "because they're saying they're there to harm him; they kidnapped him" but "obviously…I'm not paying out any

money, but I was trying to…help him so that he doesn't get harmed." Sandeep contacted the police, who were able to listen in on some of the calls from Mr. Pleterski.

[89] A few days later, the kidnappers released Mr. Pleterski. For reasons unknown, they abandoned Mr. Pleterski at the location where Sandeep lived.

[90] Sandeep testified that the last time he spoke to Mr. Pleterski was in December 2022, after he was released by the kidnappers and before he was apprehended by the police. During that conversation, Sandeep was providing some advice and trying to help Mr. Pleterski "so that he wouldn't be harmed or killed." Sandeep testified that, after the kidnapping, he stopped communicating with Mr. Pleterski because he had put Sandeep and his family in danger:

> A. Correct. That's something that -- after the kidnapping, obviously he put myself in danger, my family in danger. I refused all communication with him. And so on the residence at [redacted] we have another associate within our company who has been dealing with that.

[91] The defendants submit that they did not believe there was any connection between the abduction of Mr. Pleterski and a danger at the Burlington property. Mr. Gibson's affidavit states as follows:

> 30. Six (6) months after Aiden had vacated the Property, Aiden was allegedly abducted and held for ransom. I am advised by Sandeep that Aiden telephoned him in the middle of the night to demand a payment of $3 million in exchange for his release. Sandeep refused to provide any ransom monies and Aiden was subsequently released.
>
> 31. Understandably, Sandeep was disturbed by this ordeal, but we never understood there to be any connection between the abduction and any perceived threat or danger to the Property.

[92] I will not repeat the analysis above, but Mr. Gibson's evidence suffers from the same failings as the other excerpts set out above. Mr. Gibson provides a bare conclusion without explanation. It appears to me that his understanding of the views of Sandeep and others is a form of disguised hearsay. I do not give his conclusion any weight.

[93] Moreover, in my view, Mr. Gibson's evidence fails to address why Sandeep cut off communication with Mr. Pleterski. Sandeep stated that "after the kidnapping, obviously he put myself in danger, my family in danger." The kidnappers, happily, did not seek to kidnap Sandeep, yet he perceived himself and his family to be in danger. I find that Sandeep's perception of danger derived from his connection to Mr. Pleterski through the Burlington property, the debts Mr. Pleterski owed to the creditors, and the fact that Mr. Pleterski was dropped off by the kidnappers where Sandeep lived. I have no doubt that Sandeep would be very alarmed by knowing that the kidnappers knew where he lived. That fear is

reasonable. As I explain below, I find that Mr. Gilgeous-Alexander and Ms. Summers would have a similar and equally reasonable fear about the Burlington property.

[94] During his examination on February 9, 2023, Sandeep advised that in November or December 2022, "we just listed" listed the property for sale for $9.75 million using the same real estate agent who did the original listing. I infer that Sandeep was referring compendiously to Ray, 653 Ontario, and himself.

[95] On March 14, 2023, the trustee in bankruptcy released its third report. The report was filed with the court and made available to Mr. Pleterski's creditors. As noted above, the third report contained the transcript of Sandeep's examination as an appendix to the report. I am not relying on the report for the truth of its contents, only for the fact that the following information was made public. This is information to which Mr. Pleterski's creditors had easy access. The trustee notes that Mr. Pleterski has not accounted for all of his assets and the third report contained the following statements:

a. "Since its appointment, the Trustee has expended considerable effort attempting to trace and recover property of [Mr. Pleterski and his company] that had been transferred to other persons or not otherwise delivered up to the Trustee."

b. "Additionally, Pleterski paid $1.1 million in rent and a deposit on the Burlington Property, bringing the total lifestyle expenses funded by the Bankrupts' investors to $15.9 million during the Review Period – in other words, Pleterski spent approximately 38% of the money he raised from investors on his own lifestyle expenses."

c. "Beginning at the First Meeting of Creditors and continuing throughout these proceedings, investors have questioned Pleterski's relationship with the Gupta family and interest in the property known municipally as 5126 Lakeshore Road, Burlington, ON (the "Burlington Property"). The Trustee, at the request of the estate inspectors, has investigated this asset and Pleterski's relationship thereto."

d. "Bank statements of Pleterski reflect that, except for the first month's rent, which was paid to the Registered Owner's real estate lawyer, in trust, the rent for the Burlington Property was paid directly to Ray Gupta's son, Sandeep Gupta, rather than the Registered Owner. The Registered Owner (by virtue of the Burlington Deposit (as defined below) and payments to Sandeep Gupta) has received $1,095,764 of investor funds in respect of the Burlington Property. Sandeep Gupta appears to have been the main contact between Pleterski and the Registered Owner based on a review of Pleterski's cellphone."

e. "The Burlington Property was recently listed for sale for $8,999,000. The Trustee reserves its rights and remedies in respect of the $1,095,764 of investor funds paid to Sandeep Gupta in respect of the Burlington Property, including the $500,000 Burlington Deposit. Similar to the Westney Deposit, this $500,000 appears to have been paid for using investor money without their consent."

f. "In this Third Report, the Trustee has presented the findings of the Banking Analysis which evidences that less than 1.6% of the funds collected from investors in Pleterski's chequing account were actually invested by the Bankrupts…. Lastly, the Banking Analysis also outlines the extravagant lifestyle that Pleterski lived which was funded by his investors and ultimately led to his bankruptcy. The total amount spent by Pleterski on lifestyle expenses, such as his Lamborghinis, McLarens, flights on private jets, etc. is approximately $15.9 million or 38% of the total disbursements paid by Pleterski over a period of approximately 2.5 years."

[96] Less than two weeks after the trustee released its third report, Mr. Gilgeous-Alexander and Ray Gupta signed the agreement of purchase and sale on behalf of the plaintiff and 653 Ontario, respectively. The purchase price was $8.45 million.

[97] Ms. Summers and Mr. Gilgeous-Alexander moved into the property on May 10, 2023. Less than a week later, the stranger looking for Mr. Pleterski arrived at the Burlington property.

[98] Against this backdrop of facts, I find that Sandeep knew that the Burlington property was neither private nor secure. It was not secure or safe in the weeks leading up to July 7, 2022, when Mr. Pleterski "advised Sandeep that threats were being made against him and unwanted visitors were coming to the Property."

[99] Sandeep knew the Burlington property was not secure or safe a few weeks later when he "literally thought [Mr. Pleterski] was going to be harmed" by the "randoms showing up at the house every day."

[100] Sandeep knew the Burlington property was not secure or safe after Mr. Pleterski moved out and while Mr. Michaud lived there from July until October 2022. The Guptas were being harassed by people coming up to the house every single day looking for Mr. Pleterski. The people looking for Mr. Pleterski thought he was there (because his cars were there) and that Mr. Michaud was lying to them when he said that Mr. Pleterski did not live there. The threats posed by the people looking for Mr. Pleterski were serious enough that Mr. Michaud wanted security to be present if he was going to stay at the house and Mr. Michaud's wife refused to stay there at all.

[101] Sandeep knew that it was dangerous for him and his family to be connected to Mr. Pleterski when he was kidnapped in December 2021, particularly because the kidnappers seemingly knew where he lived. Nothing about the kidnapping incident could have convinced Sandeep that the Burlington property, with its obvious connection to Mr. Pleterski, was any safer than before.

[102] The situation grew more dangerous again on March 13, 2023, when the trustee released its third report. Among other things, the trustee's report advised that the Burlington property was up for sale, and that Mr. Pleterski had diverted $1,095,764 of investor funds into the Burlington Property. Given the prior visits to the property and the report of the trustee, I do not accept that it was accurate to describe the property as private or secure. In my view, the Burlington property was not safe and secure at any time from June 2022 to June 2023.

The misrepresentation was material and the plaintiff's concern was objectively reasonable

[103] In their factum, the defendants submit that they had no obligation to disclose their personal reasons for selling the Burlington property "where such reasons have no bearing on the objective value or usefulness of the property." The defendants submit that any safety issue was not objectively material and did not need to be disclosed. Relying on a decision of the B.C. Court of Appeal, the defendants submit that *caveat emptor* "recognizes that if buyers were required to disclose every possible feature relating not only to the physical and extrinsic qualities of their properties but also to all possible sensitivities and superstitions buyers might have, there would be no end to the resulting litigation."[24]

[104] I do not accept that the safety concerns of Ms. Summers and Mr. Gilgeous-Alexander about the Burlington property are fairly described as "sensitivities or superstitions." A 'superstition' is believing that a commercial building is unfit for use because it is haunted.[25] A superstition is believing that a house is uninhabitable because a prior occupant died by suicide on the premises.[26] In neither situation is there a rational or real ongoing threat to a subsequent inhabitant. A 'sensitivity' is finding out that there is a nude beach near your property.[27] An idiosyncratic preference of this sort will not require disclosure.

[105] In my view, there is a significant difference between the examples of sensitivities and superstitions described above and the objectively reasonable danger generated by the repeated and ongoing visits to the property by angry creditors who were enraged that Mr. Pleterski defrauded them and misappropriated over a million dollars of their money to invest in the Burlington property. Mr. Michaud, his wife, Ms. Summers and Mr. Gilgeous-Alexander all reasonably feared for their safety in light of all the events described above. Their concerns cannot fairly be described as sensitivities or superstitions. I find that any reasonable person would fear for their safety at the Burlington property. The fact that someone showed up looking for Mr. Pleterski within a week of Ms. Summers and Mr. Gilgeous-Alexander moving in to the property demonstrates the on-going threat.[28] The misrepresentations were objectively material.

Conclusion

[106] For all of the reasons set out above, I am satisfied that there was a significant safety risk at the Burlington property at the time 653 Ontario marketed and sold the Burlington property to the plaintiff. I am also satisfied that Sandeep knew that there was a significant safety risk at the Burlington property at that time.

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[24] *Wang v. Shao*, 2019 BCCA 130, 21 B.C.L.R. 225, at para. 45.
[25] *1784773 Ontario Inc. v. K-W Labour Association Inc*., 2013 ONSC 5401 aff'd 2014 ONCA 288.
[26] *Knight v. Dionne*, 2006 QCCQ 1260. [2006] R.D.I. 398.
[27] *Summach v. Allen*, 2002 BCSC 119, aff'd 2003 BCCA 176.
[28] At times, the defendants appeared to cast doubt on whether or not a stranger actually showed up at the Burlington property after Ms. Summers and Mr. Gilgeous-Alexander moved in. For clarity, I accept Ms. Summers' description of that episode without reservation.

[107] I am also find that Ray knew from Sandeep that there was a safety risk at the Burlington property at the time it was marketed and sold to the plaintiff. Although Ray owned the Burlington property through 653 Ontario, he delegated many of the tasks associated with the house to Sandeep. It was Sandeep who "took the lead in handling the tenancy arrangements with [Mr. Pleterski]." In his examination with the trustee, Sandeep referred to the fact that "we just listed [the Burlington property]" among many other times he used "we" to describe his role in handling issues related to the Burlington property.

[108] Indeed, it was Sandeep who signed the agreement of purchase and sale and agreement to lease with Mr. Pleterski. The evidence does not make clear the source of Sandeep's legal authority to sign the contract for 408 Ontario. In my view, nothing turns on that. The fact that Sandeep signed any version of the contract on behalf of 408 Ontario is clear and convincing evidence of his deep involvement in the sales of the Burlington property. This level of involvement justifies my inference that Sandeep told Ray everything he knew about Mr. Pleterski and dangerousness of the property, particularly when neither Ray nor Sandeep provided an affidavit on this motion. I do not accept that Sandeep would have kept those facts from his father, who owned the company that owned the Burlington property. I find that Ray knew that there was a safety risk at the Burlington property at the time that property was marketed and sold to the plaintiff.

[109] Ray is the sole officer and director of 653 Ontario. He alone had the authority to cause 653 Ontario to market and sell the Burlington property. A corporation is generally imputed to have the knowledge of its directing minds.[29] For the purposes of this action, it is appropriate to attribute his knowledge to 653 Ontario and conclude that it knew what Ray knew.

[110] I find, therefore, at the time 653 Ontario marketed and sold the property to the plaintiff, Sandeep, Ray, and 653 Ontario each knew that the Burlington property was not safe. I also find that 653 Ontario made a knowingly false statement when it represented that the property was private and secure; and

[111] Silence can amount a fraudulent misrepresentation where, as here, the circumstances establish that the dishonest conduct of 653 Ontario intended to deceive the plaintiff by its failure to disclose the relevant information and intended to commit this fraudulent act through non-disclosure of the relevant information.[30] 653 Ontario suppressed the truth about the Burlington property, which in this case amounted to a fraudulent misrepresentation.[31] However, it also went further and made positive representations that the property was private and secure. Those representations were knowingly false.

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[29] *R. v. Canadian Dredge & Dock Co*., [1985] 1 S.C.R. 662, at p. 704; *Standard Investment Ltd. v. Canadian Imperial Bank of Commerce* (1985), 52 O.R. (2d) 473 (C.A.); *Livent Inc. (Special Receiver and Manager of) v. Deloitte & Touche* (2016), 128 O.R. (3d) 225, at paras. 103, 114 (C.A.).
[30] *Perdue v. Myers*, 2005 CanLII 30860, at para. 31.
[31] *Rowley v. Isley*, [1951] 3 D.L.R. 766, at p. 767.

The representations were made with the intention they would be acted upon

[112] 653 Ontario made the false representations as part of their marketing of the Burlington property. The defendants filed no first-hand evidence from Ray or 653 Ontario's real estate agent to deny the obvious inference that the representations were made with the intention that they be acted upon by the plaintiff.

[113] In these circumstances, I find that 653 Ontario made the representations with the intention that they would be acted upon by the plaintiff.

The plaintiff relied on the statements

[114] I am satisfied the plaintiff, and its principal Mr. Gilgeous-Alexander, relied on the false statements described above. Ms. Summers stated in her affidavit, which was adopted by Mr. Gilgeous-Alexander in his affidavit, that they were looking for a "luxury property in proximity to our families that was private, safe, and secure." She stated that Mr. Jelen had found a home, the Burlington property, that had these features. In her affidavit, she stated that she and Mr. Gilgeous-Alexander relied on the false representations:

> 17. None of the history of the Property was disclosed to Shai or me when we were looking at the Property, or at any time before [the plaintiff] agreed to purchase the Property. If it had been disclosed, we would not have decided to cause [the plaintiff] to purchase the Property. The privacy, safety, and security of the Property were important to us (as I believe they would be to anyone spending that much money on a luxury home).
>
> 18. The vendors misrepresented the nature of the Property to us. It was marketed as being private and secure, and it is neither. The misrepresentations as to privacy and security, and the failure to disclose the history and ongoing risk of threats to the Property and occupants, caused us to decide to purchase the Property. If we had simply been told the truth, we never would have done so.

[115] Counsel for the defendants did not cross-examine Ms. Summers on her evidence that the plaintiff relied on the false statements. In addition, the defendants made no submissions as to whether or not the plaintiff relied on the representations.

[116] I find that the plaintiff relied on 653 Ontario's false representations.

The plaintiff suffered damages as a result of its reliance on the false statements

[117] I find that the plaintiff has suffered damages as result of its reliance on 653 Ontario's knowingly false statements.

[118] As set out in paragraph [114], the uncontradicted evidence of Mr. Gilgeous-Alexander and Ms. Summers is that they would not have caused the plaintiff to purchase the Burlington property absent their reliance on 653 Ontario's false representations.

[119] The plaintiff now owns a property in which its principal does not want to live. The plaintiff has incurred mortgage payments of well over $75,000 and climbing maintenance and repair expenses, insurance costs, property taxes, and utility bills all in respect of property where its principal will not live. These are all damages resulting from the plaintiff's reliance on 653 Ontario's false statements.

[120] The defendants submit that the plaintiff's damages were not caused by any misrepresentations made by the defendants. They rely on two items: the failure of the plaintiff to fix the main gate before moving into the Burlington property and the uncertainty about whether the security cameras were working.

[121] Mr. Gibson's affidavit states that Mr. Gilgeous-Alexander and Ms. Summers did not fix the front gate of house prior to moving into the Burlington property. Mr. Gibson states that he fails "to understand why such a high net-worth individual, who is rightly concerned about his privacy, would move in to the [Burlington property] without first repairing the front gate which he agreed to do as part of the APS."

[122] Ms. Summers' affidavit explains that during the negotiations over the purchase of the Burlington property, she and Mr. Gilgeous-Alexander agreed to repair a deficiency in the gate (among other repairs) in exchange for a $50,000 reduction in the purchase price. She stated that they planned to do the repairs shortly after moving into the Burlington property. On cross-examination, she stated that there were many tradespeople and service staff at the house when they first took possession and they thought they could "get away with it for about a week" until the gate was repaired.

[123] Mr. Gibson goes on to say that if the front gate had been repaired, the "alleged visitation would have been entirely avoided." I accept that having the gate repaired would make the property more safe and secure. Ms. Summers properly conceded this point on cross-examination. I do not accept, however, Mr. Gibson's opinion that the visitation would have been entirely avoided. His opinion goes well beyond a permissible compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly.[32] Witnesses are entitled to provide lay opinions on matters such as the identity of persons or places, the identification of handwriting, mental capacity, and state of mind.[33] His opinion that the visitation would have been entirely avoided goes well beyond permissible lay opinion. Moreover, his affidavit does not contain any facts that would allow me to assess his opinion on whether or not the gate, if repaired, would have repelled a determined visitor. Finally, his affidavit does not explain whether the front gate was also broken when unwelcome visitors were attending the Burlington property on a daily basis when Mr.

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[32] *R. v. Graat*, [1982] 2 S.C.R. 819, at p. 835.
[33] John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis, 2022), at paras. 12.17 to 12.38.

Pleterski and Mr. Michaud lived there or, if fixing the gate would have completely solved that problem, why the Guptas did not fix the gate at that time.

[124] In my view, the failure to complete the repairs to the gate before moving into the Burlington property does not mean that the plaintiff's damages were not caused by the false representations. Indeed, the plaintiff made the decision regarding when to repair the gate misinformed by 653 Ontario's false statements. If 653 Ontario had not made these misrepresentations, the plaintiff would have decided how to proceed based on correct information.

[125] Second, the defendants submit that the security cameras were not working. I accept the defendants' submission, as did Ms. Summers on her cross-examination, that having operating security cameras would make the property more secure.

[126] Ms. Summers' evidence on cross-examination, however, was that she never received the passwords for the security cameras for the Burlington property. The defendants filed no first-hand evidence to contradict Ms. Summers. Instead, they filed a hearsay statement from their real estate agent, Mr. Clavero, to Mr. Gibson stating that he did provide the passwords to the plaintiff's real estate agent. On his rule 39.03 examination, Mr. Jelen acknowledged that he received some passwords but was uncertain whether or not he received the passwords for the security cameras or if he received other passwords for the Burlington property.

[127] For the reasons set out above, I give little weight to Mr. Gibson's hearsay evidence on this contested point. The defendants have not proven that they provided the password for the security camera to the plaintiff or its real estate agent. Moreover, even if the defendants had provided the password, that would not break the chain of causation.

[128] Security cameras can be a useful forensic tool. After the fact, they may provide evidence of the identity of the person who approached the Burlington property. There is no evidence before me to suggest that security cameras serve a prophylactic purpose to deter people from approaching the Burlington property to look for Mr. Pleterski. Indeed, the evidence suggests that the cameras that were present while Mr. Pleterski and Mr. Michaud lived at the Burlington property had little to no deterrent effect whatsoever. Even if the plaintiff had the password for the cameras, that would not affect my conclusions regarding damages and causation.

[129] For the reasons set out above, I find that there are no genuine issues requiring a trial and grant summary judgment in favour of the plaintiff on its claim against 653 Ontario for fraudulent misrepresentation.

Liability of Ray Gupta, Sandeep Gupta and Sunray

[130] In its factum, the plaintiff submits that each of Ray, Sandeep, and Sunray Hotels are liable to the plaintiff for the fraudulent misrepresentation. The plaintiff submits that, as the sole shareholder and director of 653 Ontario, Ray must have authorized the misrepresentations

and is personally liable for them. The plaintiff submits that Sandeep and Sunray also participated in the misrepresentations.

[131] I am not prepared to find Ray Gupta, Sandeep Gupta, or Sunray Hotels liable for the misrepresentations.

[132] First, the plaintiff did not make claims against Ray, Sandeep or Sunray Hotels for fraudulent misrepresentation in the statement of claim. The prayer for relief stated:

> 1. The Plaintiff claims against the defendant 1000176653 Ontario Inc. for:
>
> > (a) a Declaration that the defendant 653 Co. made a fraudulent misrepresentation that induced the plaintiff to enter into an agreement of purchase and sale ("APS") dated March 26, 2023 for the [Burlington property];
> >
> > (b) rescission of the APS as a remedy for the fraudulent misrepresentation;
>
> 2. The Plaintiff claims against the defendants 1223408 Ontario Limited, Ray Gupta, Sandeep Gupta, and Sunray Group of Hotels Inc.:
>
> > (a) damages for conspiracy in a sum to be particularized;[34]
>
> 3. The plaintiff claims as against all defendants: (a) an award of punitive damages in the sum of $50,000.

[133] Second, in its notice of motion for summary judgment, the plaintiff requested summary judgment in the form of an order:

> (a) declaring that the defendant 1000176653 Ontario Inc. ("653 Co.") made fraudulent misrepresentations that induced the plaintiff 1000425140 Ontario Inc. ("140 Co.") to enter into an agreement of purchase and sale ("APS") in respect of the property municipally known as 5126 Lakeshore Road;
>
> (b) granting the plaintiff's claim for rescission and directing the parties to rescind the APS transaction and restore one another to the position they were in prior to the transaction taking place;

[34] The plaintiff's factum on the motion for summary judgment did not seek summary judgment on its claim in conspiracy. I do not grant summary judgment on that claim.

(c) awarding 140 Co. damages for conspiracy in an amount equal to $42,000 multiplied by the number of months between May 17, 2023 and the date of judgment, plus the land transfer tax for which 140 Co. was responsible;

(d) awarding 140 Co. punitive damages in the sum of $50,000;

[134] Third, Ray and Sandeep chose to rely on Mr. Gibson's affidavit and not to file affidavits in their own name in the context of the plaintiff's statement of claim and notice of motion. Because the plaintiff did not plead that Ray Gupta, Sandeep Gupta, and the Sun Ray Group of Hotels Inc. should be found personally liable for fraudulent misrepresentation, they could not be expected to know that they should be prepared to meet that allegation.[35] Had they known that they were required to meet that allegation, they might well have filed affidavits or conducted their defences differently.[36] In my view, it would be unfair to make such a finding that was not anchored in the pleadings or evidence of the parties.[37]

Latent defects

[135] The second relevant exemption to the principle of buyer beware is for hidden defects, which are sometimes called latent defects. In Ontario, a vendor may be liable to the purchaser of a property that is not new if the vendor knows of a latent defect which renders the premises unfit for habitation or dangerous in itself and does not disclose it to the purchaser.[38]

[136] In the sections above dealing with fraudulent misrepresentation, I have made several findings of fact that apply to the latent defect analysis:

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[35] *Garfin v. Mirkopoulos*, 2009 ONCA 421, 250 O.A.C. 168, at para. 19; *Grass (Litigation Guardian of) v. Women's College Hospital* (2005), 75 O.R. (3d) 85, at para. 53 (C.A.), leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 310.

[36] *A-C-H International Inc. v. Royal Bank of Canada*, (2005), 254 D.L.R. (4th) 327 (Ont. C.A.), at paras. 15 to 18; *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), at paras. 61 to 63.

[37] *Labatt Brewing Company Limited v. NHL Enterprises Canada L.P.*, 2011 ONCA 511, 106 O.R. (3d) 677, at para. 5.

[38] *Barbieri v. Mastronardi*, 2014 ONCA 416, at para. 17; *Dennis v. Gray*, 2011 ONSC 1567, 105 O.R. (3d) 546; *McGrath; Empire Communities Ltd. et al. v. H.M.Q. et al*., 2015 ONSC 4355, 57 R.P.R. (5th) 78, at para. 37. Some more recent articulations of the test for latent defect have broadened the test slightly. In *Swayze*, LaForme J. (as he then was) stated that test is whether a latent defect has caused a "loss of use, occupation and enjoyment of any meaningful or material portion of the premises or residence that results in the loss in the loss of enjoyment of the premises or residence as a whole." *Swayze v. Robertson* (2001), 39 R.P.R. (3d) 114 (Ont. S.C.) at para. 32, aff'd [2002] O.J. 785 (Div. Ct.), without agreeing or disagreeing with this part of the reasons; *Ashrafi v. Carraro*, 2019 ONSC 6326, at para. 48 (Div. Ct.); *Harkes v. 1084089 Ontario Ltd*., 2018 CarswellOnt 2191, at para. 16; *Vieira v. Dawson*, 2018 ONSC 413, at paras. 25 and 29.

a. the ongoing safety risk at the Burlington property was a defect;[39]

b. the defendants knew about this defect; and

c. this defect was not disclosed to the plaintiff.

[137] That leaves two additional questions to be considered: was the defect a latent defect? If so, did the latent defect render the Burlington property unfit for habitation or dangerous in itself?

Was the defect latent?

[138] In its factum, the plaintiff submits that a defect is latent if it would not be discovered by conducting a reasonable inspection and making reasonable inquiries about the property.[40] I note that there is some divergence in the case law on this point. Some cases follow the approach in *Swayze v. Robertson* and describe a latent defect as "some fault in the structure that is not readily apparent to an ordinary purchaser during a routine inspection." Other cases say that a defect is not classified as latent simply because it is not visible and that the purchase is also bound to make appropriate inquiries.[41]

[139] In this case, I find that the danger posed by Mr. Pleterski's prior occupation and dealing with the property would not have been discovered by conducting a reasonable inspection of the property. No routine inspection of the Burlington property would have revealed this issue.

[140] Similarly, there is no evidence to suggest that 653 Ontario would have provided the information about Mr. Pleterski if the plaintiff had asked. Indeed, as noted above, 653 Ontario took active steps to conceal the history of the property by describing it as "private and secure" when it was neither of those things.

[141] Also, I see no evidence that that the plaintiff could have discovered the dangerousness of the Burlington property if its agent or its principals had canvassed the neighbours for information. On cross-examination, Ms. Summers acknowledged that, sometime after the sale closed, her father was dog-sitting at the Burlington property. A neighbour told him that "a scammer lived here." The discovery of that fact would not have been determinative. The mere fact that a former resident was a "scammer," would not be a latent defect. It is the constellation of other facts known to Sandeep and Ray that provide the context for that

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[39] In some cases, the intended use of the property must be considered in determining whether the alleged defect is in fact a defect: *Tony's Broadloom & Flooring Covering Ltd. v. NCM Canada Inc*. (1996), 141 D.L.R. (4th) 394 (Ont. C.A.). Here, the uncontradicted evidence of Ms. Summers is that she and Mr. Gilgeous-Alexander bought the Burlington property through the plaintiff for the purpose of living there personally and starting a family. The ongoing safety risk is undoubtedly a defect given that purpose.

[40] *Vieira v. Dawson*, 2018 ONSC 413 at para. 13.

[41] *Moore v. Page*, [2002] O.J. No. 2256 at para. 34.

single fact. I do not think that the reasonable inquiries expected of a purchaser would have revealed the full extent of the situation.

[142] The burden is on the plaintiff to prove that the defect would not have been discovered by reasonable inquiries. I note, however, that the defendants have not filed any evidence to demonstrate that this information could have been discovered by a potential purchaser of reasonable diligence.

[143] I find that the defect was a latent defect.

Is the fact that the risk was extrinsic to the Burlington property fatal to it being a latent defect?

[144] The defendants submit that whatever danger the connection of the Burlington property to Mr. Pleterski posed, that risk cannot be a latent defect in the Burlington property because it was extrinsic to the structure and its lands. I do not accept this submission, which is contrary to the weight of the case law.

[145] In *Dennis v. Gray*, the plaintiffs, a couple with young children, purchased a house and subsequently sued the defendant sellers for failing to disclose the fact that a person convicted under the child pornography provisions of the *Criminal Code* lived across the street.[42] The defendant seller moved under rule 21.01(1)(b) to dismiss the purchaser's action on the basis that it was plain and obvious that such a fact does not, in law, amount to a latent defect of such a nature that is must be disclosed to a purchaser. Justice Hoy (as she then was) dismissed the motion and held it was not plain and obvious that the claim must fail, even though the danger at issue in that case did not originate from within the structure or property purchased by the plaintiffs.

[146] In *Sevidal v. Chopra*, the plaintiffs agreed to purchase a house from the defendants.[43] At the time the parties signed the agreement of purchase and sale, the defendants knew but did not disclose that radioactive material had been discovered in the yards and houses in the neighbourhood. Justice Oyen had no trouble concluding that the presence of radioactive material in the surrounding neighbourhood was a latent defect:

> To return to the case before me, and dealing first with the issue of whether the Chopras should have disclosed the existence of radioactive material in the area prior to entering into the agreement of purchase and sale, I find, based on the principles enunciated in the cases to which I have referred, that they should have. They knew about the potentially dangerous latent defect prior to the signing of the agreement. The fact that at the time the agreement was signed the latent defect was only known to be on property in the immediate

[42] R.S.C. 1985, c. C-46.
[43] (1987), 64 O.R. (2d) 169 (H.C.J.).

> area and not on the property itself, provides no excuse for non-disclosure. The Chopras were guilty of concealment of facts so detrimental to the Sevidals that it amounted to a fraud upon them, and, therefore, the Chopras are liable in deceit.[44]

[147] Although Oyen J. ultimately based his finding in deceit, the fact that the radioactivity was only known to be in the neighbourhood, and not on the property, at the time the agreement of purchase and sale was signed, was no impediment to finding it to be a latent defect.

[148] In *Godin v. Jenovac*, the defendant sellers failed to disclose the existence of a nearby landfill site, which had been used as a garbage dump.[45] The former garbage dump was at least two or three blocks away from the property at issue. Justice McCombs held that the presence of the garbage dump was a latent defect that the sellers would have had to disclose if it posed a health hazard. As there was no evidence that the proximity of the garbage dump posed a health hazard or other danger, McCombs J. held that the sellers were under no general duty to disclose the proximity of the landfill site.

[149] Based on these authorities, in my view, the law does not require that the source of the latent defect be located within the structure or property at issue. As long as the fact known by the seller (nearby radioactive waste, a convicted child pornographer across the street, a garbage dump that poses a health risk) affects the subject property, that is sufficient.

[150] In my view, the ongoing safety risk at the Burlington property was a latent defect. Not only did 653 Ontario not disclose the latent defect, it concealed the latent defect by representing that the house was private and secure.

Did the latent defect render the premises unfit for habitation or dangerous in itself?

[151] The final question is whether or not the latent defect rendered the premises unfit for habitation or dangerous in itself.[46]

[152] The defendants minimize the danger posed by the defect. They put it this way:

> 29. The fact is that [Mr. Gilgeous-Alexander], as one of the NBA's premier superstars, likely encounters a higher degree of risk to his safety on a daily basis than he does from the fact that [Mr. Pleterski] was an earlier tenant of the Property.

[153] This submission is not grounded in the record. There is no evidence in the record regarding the risk level Mr. Gilgeous-Alexander faces in his professional life or what measures are available to mitigate such risks. The defendants' submission is entirely speculative.

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[44] *Sevidal*, at para. 89.
[45] (1993), 35 R.P.R. (2d) 288 (Ont.C.J. (Gen. Div.)).
[46] *McGrath*.

[154] In my view, the ongoing safety risk rendered the Burlington property dangerous and unfit for habitation. This is not a situation where the defect affected only a small part of the house or marginally reduced how much the owners would enjoy a particular room. This is not a case where only the value of the Burlington property would be affected (although it may have lost value as well). In this case, Ms. Summers and Mr. Gilgeous-Alexander perceived, correctly in my view, that their safety was imperiled by living at the Burlington property. Their decision not to live at the Burlington property was as understandable as the Sevidals not wanting to live near radioactive material.

[155] In conclusion, I find that the ongoing safety risk at the Burlington property was a latent defect that rendered the Burlington property unfit for habitation.

Recission is the appropriate remedy

[156] The plaintiff requests that I order recission of the agreement of purchase and sale for the Burlington property.

[157] Recission is an equitable remedy that is meant to put the contracting parties back in the positions they were in before entering into the contract (*restitutio in integrum*).[47] Recission has both legal and equitable elements.[48] Perfect restoration is not required, but the parties should be substantially returned to their pre-contractual state.[49] Even where the parties cannot be restored precisely to the state they were in before the contract was signed, courts may still grant and tailor the recission remedy because it is an equitable remedy focussed on practical justice, not rigid technicalities.[50] This is particularly true in cases of fraud, where the court is more willing to exercise its discretionary power to grant recission.[51]

[158] I find that it is appropriate to rescind the agreement of purchase and sale and to order 653 Ontario to restore the plaintiff to the position it was in prior to the transaction taking place. 653 Ontario's misconduct substantially deprived the plaintiff of what was bargained for and is sufficiently serious to permit the plaintiff to rescind the agreement.[52] As set out above, I have found that 653 Ontario's misrepresentation was material in the sense that a reasonable person would consider it to be relevant to the decision to purchase the

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[47] *Urban Mechanical Contracting Ltd. v. Zurich Insurance Company Ltd.*, 2022 ONCA 589, 163 O.R. (3d) 652, at para. 35; *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423, at para. 39; *Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd*., (2006), 270 D.L.R. (4th) 181 (Ont. C.A.).
[48] Harry D. Anger and John D. Honsberger, *Law of Real Property*, 3rd ed., (Toronto: Thomson Reuters, 2015) §23:39.
[49] *Lowe and Lowe v. Suburban Developers (Sault Ste. Marie) Ltd*. (1962), 35 D.L.R. (2d) 178 (Ont. C.A.); *Friesen v. Berta* (1979), 100 D.L.R. (3d) 91 (B.C.S.C.); *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 (C.A.); *Baranick v. Counsel Trust Co.* (1994), 12 B.L.R. (2d) 39 (Ont. C.J. (Gen. Div.)), affd 17 B.L.R. (2d) 140 (C.A.).
[50] *Urban Mechanical*, at para. 61.
[51] *Urban Mechanical*, at para. 63; *Spence v. Crawford*, [1939] 3 All E.R. 271 at p. 288;
[52] S*ail Labrador Ltd. v. "Challenge One" (The)*, [1999] 1 S.C.R. 265, at pp.281-282.

Burlington property.[53] I have also found that the plaintiff relied on 653 Ontario's misrepresentation.[54]

[159] The plaintiff did not delay in electing to rescind the contract. The stranger arrived at the Burlington property around May 14, 2023. Counsel for the plaintiff wrote to demand recission of the contract by June 6, 2023. The plaintiff did not sleep on this issue.

[160] Some courts have held that the fact that the contract has been executed or performed is a relevant but not a decisive factor to be considered when deciding whether or not award recission as a remedy.[55] In any event, a finding of fraud in the context of a real estate transaction induced by misrepresentations is sufficient reason not to allow execution of the contract to constitute a barrier to recission.[56]

[161] The defendants submit that recission is not appropriate in the circumstances of this case. They submit that certain externalities could not be dealt with appropriately:

> 74. In the present case, that test for rescission is not met. It is impractical and in fact not feasible to expect that 653 Co. can obtain the same financing it had in place pre-contract, that the payment of land transfer taxes could be undone, that the real-estate agents' commissions would be returned, and bank fees would be repaid, if rescission of the Agreement of Purchase and Sale were granted. In fact, none of these non-contractual entities have been made parties to this action such that an order would be binding upon them.

[162] It is important to note that prejudice to the rights of third parties may be, but is not always, a bar to recission.[57] The defendants cited no authority for the proposition that any of the issues they raise are a meaningful impediment to awarding recission as a remedy. I would not give effect to the defendants' submissions.

[163] First, the defendants have placed no evidence before me to suggest that they could not finance this Burlington property internally or that they would not be able to obtain the same or comparable financing. This argument is entirely hypothetical. Moreover, if the reason that the defendants could not obtain similar financing is that the bank would view the Burlington property as a riskier investment in light of Mr. Pleterski's connection to it, that

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[53] *Wang v. Feng*, 2023 ONSC 2315, at para. 130
[54]*Barclays Bank v. Metcalfe & Mansfield*, 2011 ONSC 5008, 82 C.B.R. (5th) 159, at paras. 156-59, aff'd 2013 ONCA 494, 365 D.L.R. (4th) 15, leave to appeal refused, [2013] S.C.C.A. No. 374.
[55] *S-244 Holdings Ltd. v. Seymour Building Systems Ltd*. (1994), 41 B.C.A.C. 272, at para. 22.
[56] *Singh v. Trump*, 2016 ONCA 747, 408 D.L.R. (4th) 235, at para. 157; *Redican v. Nesbitt*, [1924] S.C.R. 135; *Shortt v. MacLennan*, [1959] S.C.R. 3; *Kingu v. Walmar Ventures Ltd*. (1986), 10 B.C.L.R. (2d) 15 (C.A.).
[57] *Urban Mechanical*, at para. 5.

is no reason to leave that burden on the plaintiff's shoulders. The court should not award recission if it unjustifiably makes the defendant worse off, but that is not this case.[58]

[164] Second, land transfer taxes are paid on the closing of every residential real estate transaction in the province of Ontario. The defendants provided no authority for the proposition that recission is unavailable in Ontario, even in the case of a fraudulent misrepresentation or failure to disclose a latent defect rendering the property uninhabitable, merely because the defrauded buyer has paid the land transfer tax. It seems counter-intuitive that a fraudster will avoid recission because the defrauded party paid tax on the transaction. Moreover, the defendants' submissions do not address the possibility of applying for a refund or rebate of land transfer tax in a situation like this, where the transfer will be set aside, *ab initio*.

[165] Third, I accept that if an interest in the property has been acquired by a *bona fide* purchaser for value, recission may be denied.[59] For example, when a third party without notice has subsequently purchased and been conveyed the property at issue, recission will not be available because the pre-existing equitable interests of the defrauded party ware extinguished.[60] I do not think that the fees paid to the real estate agents amount to an interest in the property or pose a barrier to recission. Recission unwinds the contractual relationship between the contracting parties, here, the plaintiff and 653 Ontario. It does not unwind the contractual relationship with third parties.[61] It remains possible to put the plaintiff and defendant substantially in the same position as they were before the contract.

[166] In addition to awarding recission of the contract, the plaintiff should be put in the position it was in prior to entering into the contract. The plaintiff's principal has not been able to occupy the house. It has, nevertheless, been required to make mortgage payments and insurance payments on the house. In my view, 653 Ontario should make the plaintiff whole for all such payments after the plaintiff first sought recission on June 6, 2023.

In the alternative, the plaintiff is entitled to equitable damages

[167] In the event that recission is not appropriate in the circumstances of this case, I would, in the alternative, award the plaintiff damages as equitable compensation and aimed at restoring its pre-contractual position.[62] In the circumstances of this case, it would be entirely inequitable for 653 Ontario to retain the benefits of a bargain induced by a fraudulent misrepresentation of this kind.[63]

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[58] *Urban Mechanical*, at para. 63.
[59] *Foy v. Royal Bank* (1995), 37 C.P.C. (3d) 262, (O.C.J. (Gen. Div. Commercial List)), at paras. 10 to 12.
[60] *i Trade Finance v. Bank of Montreal*, 2011 SCC 26, [2011] 2 S.C.R. 360, at para 60.
[61] *Urban Mechanical*, at para. 78.
[62] *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at para. 66.
[63] *Urban Mechanical*, at paras. 58 to 72; *Dusik v. Newton* (1985), 62 B.C.L.R. 1, at p. 47; *Rick*, at para. 66; *Kupchak v. Dayson Holdings Ltd.* (1965), 53 D.L.R. (2d) 482 at pp.485-486 (B.C.C.A); *McCarthy v. Kenny*, [1939] 3 D.L.R. 556 at 563 (Ont. S.C.); *Trans-Canada Trading Co v. M. Loeb Ltd.*, [1947] 2 D.L.R. 556 (Ont. H.C.J.); *Stewart v. Complex 329 Ltd.*, (1990) 109 N.B.R. (2d) 115, (Q.B.) at p. 20.

[168] In my view this would be best achieved in the following way:

a. The plaintiff would sell the property on the open market, to an arm's length purchaser for the highest market price available for a cash-only purchase and would discharge any mortgages or other indebtedness of the Burlington property.

b. The defendant would pay damages to the plaintiff equal to the sum of the following amounts:

i. the difference between the purchase price paid by the plaintiff to purchase the Burlington property from 653 Ontario Inc., less the price obtained by the plaintiff on the sale of the Burlington property; plus

ii. the amount of Land Transfer Tax paid by the plaintiff when it purchased the Burlington property; plus

iii. the amount of all mortgage payments, insurance payments, and property taxes paid by the plaintiff from the date it purchased the Burlington property to the date of its sale.

[169] If it were to be necessary to do so, I would direct a reference of the issue of the calculation and assessment of the equitable damages referred to me, including any additional amounts required to do justice among the parties, pursuant to rules 54.02(b) and 54.03.

Punitive damages

[170] The plaintiff also seeks an award of punitive damages.

[171] In my view, this is not a case for punitive damages. The combination of recission and equitable damages is sufficient to remedy the wrong done to the plaintiff. An award of punitive damages is unnecessary in the circumstances of this case.

Costs

[172] If the parties are not able to resolve costs of this action, the plaintiff may email its costs submission of no more than three double-spaced pages to my judicial assistant on or before December 4, 2023. The defendants may deliver their responding submission of no more than three double-spaced pages on or before December 11, 2023. No reply submissions are to be delivered without leave.

Robert Centa J.

Released: November 27, 2023

CITATION: 1000425140 ONTARIO INC. v. 1000176653 ONTARIO INC., 2023 ONSC 6688
COURT FILE NO.: CV-23-00701343-0000
DATE: 20231127

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

1000425140 ONTARIO INC.

Plaintiff

– and –

1000176653 ONTARIO INC., 1223408 ONTARIO LIMITED, RAY GUPTA, SANDEEP GUPTA, and SUNRAY GROUP OF HOTELS INC.

Defendants

REASONS FOR JUDGMENT

Robert Centa J.