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Out of Context, Out of Luck

In *Coco Intl Inc v Green Infrastructure Partners Inc*, the Ontario Superior Court addressed an application ordering the release of $40 million of escrow funds.

Background: An Agreement Between Giants

The Applicants, Jenny Coco and Rock-Anthony Coco, the sibling duo who ran Coco Paving, one of Canada's largest paving businesses (the "Coco's"), sued Green Infrastructure Partners, and its parent company, GFL Environmental Inc. ("GFL"), a Canadian waste management giant headquartered in Toronto, for $40 million following GFL's acquisition of Coco Paving.

Two months after entering into the Share Purchase Agreement (SPA), the Coco's informed GFL of a $213 million guarantee given by Coco Paving four years earlier to CERIECO, a Chinese state-owned lender, involving the development of a major condominium project at 1 Bloor Street West, "The One." As a result, the Coco's and GFL entered into subsequent agreements, one of which suspended notice periods under the SPA. According to the Coco's the CERIECO guarantee was released on agreement between the parties.

According to the SPA, $80 million was set aside in an escrow account to fund any undisclosed legal liabilities, 50% of which ($40 million) would be released back to the Coco's after 1 year, following the closing date in the event of no indemnity claims.

As it turns out, the CERIECO guarantee was not released. Less than a month after closing, CERIECO commenced a claim against the Coco's and others, asserting, among other things, damages arising out of the $213 million guarantee. Two weeks later, the Coco's advised GFL of the claim and GFL assumed the defence of the proceeding.

One year after the closing date, the Coco's requested the release of 50% ($40 million) of the escrow funds. GFL refused on the basis that notice of an indemnity was given to the Coco's within one year of the closing date, as required by the SPA. The Coco's responded with a $40 million lawsuit against GFL, arguing that GFL's notice was deficient because it was not delivered to the escrow agent prior to the one-year anniversary of the closing date and because the notice did not provide an estimate of damages.

Findings: Trying to Pull a Fast One? Try Again

Justice Osborne was unimpressed with the Coco's attempt to "pull a fast one." He rejected the Coco's narrow interpretation of the SPA and noted artificiality of the entire interpretive exercise proposed by the Applicants as they were already made aware of the proceedings involving the guarantee as they were each named as individual defendants in that proceeding days prior to receiving notice from the purchasers.

Justice Osborne was led by the Supreme Court of Canada's doctrine on contractual interpretation that:

> [52] The law is clear that the interpretation of written contractual provisions must be grounded in the text and read in light of the entire contract. The contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract […]

In dismissing Coco's argument, Justice Osborne first looked to the ordinary and grammatical meaning of the words contained in the relevant provisions of the SPA, finding that while notice to the Coco's was to be provided within one year, based on the SPA's use of "must," notice to the escrow agent was not mandatory, based on the SPA's use of "may," and that the SPA did not require the Coco's to be provided with an estimate of damages. Justice Osborne then turned to the other agreements relating to the indemnity, finding that any timelines under the SPA relating to the indemnity were suspended by subsequent agreements.

Justice Osborne was also asked to consider whether relief from forfeiture was available in this case and held that while it was available, it was not necessary to be decided on the basis of the contractual agreements in place, and based on Coco's opportunistic behaviour in the lawsuit. He was also asked to consider whether the decision in of the Court of Appeal in *3 Gill Homes Inc v 5009796 Ontario Inc. (Kassar Homes)* fundamentally changed the legal approach to "time is of the essence" clauses in the agreements between the parties. In finding that Gill Homes did not change the legal approach to such clauses, Justice Osborne held that the cases were distinguished on their facts and in equity: there was no dispute about the timeline in Gill, and that the "laying in the weeds" strategy deployed by the vendors was distinguishable from the conduct of an innocent party.

Key Takeaways: Precedent Still Stands

Justice Osborne's analysis provides a helpful reminder to practitioners and businesses that the wording and interplay within and between contractual agreements will guide the analysis in a contracts dispute. Furthermore, his decision

suggests that courts will not tolerate the dubious conduct of parties when commencing proceedings.