

SUPREME COURT OF NOVA SCOTIA

Citation: *MacQuarrie v. Birch*, 2025 NSSC 36

Date: 20250211

Docket: HFX No. 510178

Registry: Halifax

Between:

Robert Dion MacQuarrie and Carla Ann MacQuarrie

Plaintiffs

v.

Aimee Leigh Birch and Thomas Henry Birch

Defendants

and

Emma Moore

Third Party

Judge: The Honourable Justice Ann E. Smith

Heard: June 17-18, 2024, in Halifax, Nova Scotia

**Additional Written
Submissions:** December 13, 2024

Counsel: Thomas (Tipper) McEwan, for the Plaintiffs
Allison Godwin, for the Defendants
Liza Myers, for the Third Party

By the Court:

Background

[1] This matter arises out of a failed residential real estate transaction.

[2] In March 2021, the plaintiffs, Dion and Carla MacQuarrie, purchased a property at 1448 West Porter's Lake Road, Porter's Lake, Nova Scotia (the "Property"). The MacQuarries already owned another property in Herring Cove, which was their primary residence. Although the MacQuarries initially planned to fix up the Property and make it their new home, they decided to list the Property for sale in late June 2021. They retained Natalie Shearer to act as their real estate agent and listed the Property for \$725,000. Offers were to be submitted by 6:00 pm on July 4, 2021, and left open until July 5 at 4:00 pm.

[3] In June 2021, the defendants, Aimee and Thomas Birch, were residing in Ontario and looking to purchase a property in Nova Scotia. They retained Liza Myers, the third party, to act as their real estate agent in Nova Scotia.

[4] On July 2, 2021, the Birches, through their agent, made a "bully offer" to purchase the Property for \$750,000. The MacQuarries accepted the offer, and the parties entered into an Agreement of Purchase and Sale ("APS") on July 2, 2021.

The APS

[5] Section 1.1 of the APS required the Birches to provide a deposit of \$15,000, to be held by Royal LePage in trust pending completion of the transaction.

[6] Section 8 of the APS set out the buyer's conditions:

This Agreement is subject to the Buyer, at the Buyer's expense, securing, conducting or reviewing the following on or before the 9th day of July, 2021:

Property Inspection(s)

Insurance

These conditions shall be deemed to be satisfactory to the Buyer unless the Seller or the Seller's agent is notified to the contrary, in writing, on or before the date outlined in clause 4.1. If notice to the contrary is received, either party shall be at liberty to terminate this Agreement and the deposit shall be returned to the Buyer.

[7] The APS also contained a "Water and Septic Schedule":

2.1 The Agreement is subject to the Buyer, at the Buyer's expense, to [sic] conduct tests and inspections of the well and septic systems, if applicable, to determine:

- a) the quality of the well water on the Property, including that it meets the recommended health standards of the Government of Nova Scotia for bacteria, minerals, and chemicals;
- b) the quantity of well water, including that it provides sufficient water for the needs of the Buyer; and
- c) the condition and function of the septic system.

The results shall be deemed satisfactory unless the Seller or the Seller's Agent is notified to the contrary, in writing, on or before the 9th day of July 2021. If notice to the contrary is received, either party shall be at liberty to terminate this Agreement and the deposit shall be returned to the Buyer.

[Underlining in original]

[8] Lastly, under the heading "Miscellaneous Provisions", the APS provided:

11.5 No amendment to the terms of this Agreement shall be effective unless it is in writing and signed by the parties.

Inspections

[9] Water samples were taken from the Property on Monday, July 5, 2021, and the results showed elevated levels of manganese.

[10] On July 6, 2021, Shorewater Septic Services performed a septic inspection at the Property. Real estate agent Emma Moore attended the inspection on the Birches' behalf. Ms. Moore testified that the inspector was unable to fit the camera through the pipe that leads from the septic tank to the septic field due to a crush in the pipe. The crushed section was approximately one foot inside the pipe. Ms. Moore testified that she witnessed the inspector try a smaller camera, but he was still unable to complete the inspection.

[11] Ms. Moore testified that she spoke with Mr. Birch during the inspection via FaceTime and alerted him to the crushed pipe. She then handed her phone to the inspector so that he could convey the pertinent information to Mr. Birch directly. The inspector indicated that he could not guarantee the condition of the septic field without a complete inspection. Ms. Moore and Mr. Birch testified that the inspector recommended that the Birches get the tank pumped, install effluent filter, discuss repair of the collapsed pipe with a licensed installer or qualified person, and rescope the system once the pipe was repaired.

[12] Mr. Birch testified that he was concerned about the inspection findings because the inability to inspect the entire septic field meant that he and his wife did not know whether there were any issues with it. He said that although the inspector reported that the water was running, the crush in the pipe made it impossible to see where the water was going.

Extension request

[13] On July 8, 2021, at 4:00 pm, the Birches set out to drive from Ontario to Halifax. They drove through the night and met Ms. Moore at the Property at around noon on Friday, July 9 (the conditions date).

[14] Emma Moore's evidence, which was generally consistent with the Birches' testimony, was that she obtained instructions from her clients on July 9, 2021, to request an extension of the conditions date to give them time to gather quotes for a water treatment system and for the repair of the crushed septic pipe. The Birches also wanted to ask a qualified person about what potential problems they might encounter once the septic pipe was repaired, and what those might cost.

[15] Ms. Moore said she discussed with the Birches that under clause 4 of the APS, any written notice of dissatisfaction would give the sellers the right to terminate. For this reason, she said, the standard practice at the time was for the buyers' agent to

have a phone call with the sellers' agent to gauge whether a request for an extension of the conditions would be entertained or would result in the sellers terminating the deal. Ms. Moore said the Birches instructed her to have the phone call with Ms. Shearer and that if the conversation went well, they would assess whether to draw up an amendment for a two-day extension.

[16] According to Ms. Moore, she spoke with Ms. Shearer on the phone and explained that she and the Birches had just left the house, that there were two issues arising out of the inspections that they felt needed addressing – the need for water treatment and the crushed septic pipe – and that they wanted more time to get quotes on the cost to address them. Ms. Moore said she asked Ms. Shearer to discuss the matter with her sellers and if they sounded amenable, Ms. Moore would put it in writing. She told Ms. Shearer that she did not want to put anything in writing yet because she didn't want the sellers to terminate pre-emptively.

[17] At 4:01 pm on Friday, July 9, 2021, Ms. Moore texted Ms. Shearer:

Any chance you heard back from your sellers?

[18] Ms. Shearer responded, in a series of text messages:

I did but they are a little perplexed . If what they need to do is too costly are they pulling? We lose a weekend of market if so.

So they are thinking. I have a list to call if it falls

Do you have a water test and septic report you can share ?

[19] Ms. Moore replied:

I'm trying to get the reports from them. I think they're sleeping after a long drive. They have no intention of pulling, it's just a budgeting thing.

[20] Ms. Moore obtained the water report from Aimee Birch, but the Birches had not yet received the septic inspection report.

[21] At 5:47 pm, the same day, July 9, 2021, Ms. Moore sent Ms. Shearer an email with the subject line "Extension":

Hi Natalie,

Here is the amendment proposing an extension to the buyer conditions until Tuesday. I know it's not ideal, but my clients would really appreciate a few more days to work on their budgeting for what needs to be done. They're incredibly earnest [*sic*] in their efforts. They just drove 18 hours straight last night to get here today and they're only staying for the weekend. This house is the only one that fits their needs, so it's not like they have other ones in their sights or anything. And I'm attaching the well report to further show how earnest [*sic*] they are. Just realized that Shore Water hasn't sent us the report yet, but I'm following up with them now. I was present as they scoped the crush on the pipe leading to the field, which prevented the camera from going any further.

I really hope we can work together to hold this deal together!

[22] Ms. Moore testified that she considered this email to be her clients' written notice of dissatisfaction. She attached an amendment to the APS, and a copy of the water testing report to the email. The amendment was signed by the Birches and proposed to amend the APS to provide that the "Buyer's conditions to be satisfied by July 13, 2021." The amendment indicated that it "shall be open for acceptance until 10:00 p.m. Atlantic Time, on the 9th day of July, 2021, after which time the Amendment shall be considered null and void, and the Agreement shall remain in full force and effect."

Sellers reject extension, propose counter-amendment

[23] Ms. Moore followed up with Ms. Shearer by text at 7:40 pm:

Did you get the extension email?

[24] Natalie Shearer replied:

Just saw it and forwarded it and sent a text. I'll call them if I don't hear back in an hour.

[25] Ms. Moore replied:

Ok thank you. Sorry I was on the road, I should've thought to text you earlier.

[26] Ms. Shearer answered:

All good :)

[27] Ms. Moore also texted the Birches at 7:40 pm:

I know you guys are exhausted, but try to stay awake or keep your volume on until I hear back about what the sellers decide to do with our extension

[28] Aimee Birch responded:

Will do!

[29] After hearing nothing more from Ms. Shearer, Ms. Moore texted her at 9:28 pm:

Any word from your clients yet?

[30] Ms. Shearer replied:

Hi Emma,

They aren't going to accept the amendment. The timeline just doesn't make sense for finding prices. They will drop \$3000 of the purchase price to pay for water treatment and firm up tomorrow morning. Otherwise they will go active again they decided. Sorry

[Emphasis added]

[31] Ms. Moore testified that she interpreted this text from Ms. Shearer to mean that the sellers had instructed her to tell Ms. Moore and her clients that they would not accept the amendment for an extension, but they were willing to prepare a counter-amendment for \$3,000 off the purchase price, and that the parties would “firm up” on Saturday morning (if the purchasers accepted the \$3,000 counter amendment). Otherwise, the sellers would terminate the deal and re-list the Property for sale.

[32] Ms. Moore replied, “Ok I’ll let you know ASAP”. At 9:31 pm, Ms. Moore texted the Birches with a copy of Ms. Shearer’s response to the amendment request, and added:

So unfortunately our options aren’t good. We either terminate, get your deposit back, and go back to looking. Or if you decide to go firm, and your sale ends up falling apart, you lose the deposit and risk legal ramifications if they end up not being able to get \$750k again (Which I think they’ll get at least that if they do go back on the market.)

[33] When Ms. Moore did not receive a response from the Birches, she texted Ms. Shearer:

Oh eff. I asked them to stay awake until I got back to them with an answer, but I can’t get ahold [sic] of them now. I’m afraid they may have passed out. Are you able to write up the counter amendment for us to reply to in the morning

[34] Ms. Shearer replied, “Yes no problem :)”. Ms. Moore said:

Thank you so much. I’m so sorry, I hoped to have this sorted tonight!

[35] Ms. Shearer responded:

It happens.

I'll [b]e home in 10min and will get it sent to my clients then to you

[36] At about 10:30 pm, Ms. Moore went to bed, believing that she and her clients had until the next morning to decide whether to accept the counter-amendment and firm up or reject it and terminate the APS. Ms. Moore testified on cross-examination that if she had received word from Ms. Shearer that the matter needed to be settled by midnight, she would have stayed awake and made every effort to get a hold of her clients. She said she would have gone to their hotel in Halifax. She did not do so because she believed the MacQuarries had instructed Ms. Shearer to prepare a counter-amendment open to the next morning.

[37] At 11:22 pm, Aimee Birch texted Ms. Moore:

Sorry we fell asleep I woke up to see this :(I don't think we are willing to throw 15k away :(and I don't know if they will expect the next offer from us :(frig

Ms. Shearer's communications with the MacQuarries

[38] At 10:13 pm, Ms. Shearer texted Dion MacQuarrie:

She can't reach them – thinks they are sleeping. I sent you the \$3000 amendment suggestion to sign and we will send to them [o]nce you sign. I put 11 am as time for acceptance.

[39] Dion MacQuarrie testified that after he read Ms. Shearer's text message, he spoke with her on the telephone. During that conversation, he told Ms. Shearer that he did not agree to extend the contract until the next morning. He said the APS had

to firm up at midnight that night. Ms. Shearer testified that she then tried to call Ms. Moore, but there was no answer. She could not recall whether she left a voicemail.

[40] Ms. Shearer was asked on cross-examination whether she told Ms. Moore that she and her clients would have until the next morning to decide whether to accept the counter-amendment or terminate. She responded that she “might have”, but that she “would have to say that.” Ms. Shearer added, however, that Ms. Moore “did not have the amendment yet so the contract was done at midnight, without a signed amendment.”

The next morning

[41] Ms. Moore testified that she had no missed calls or voicemails when she woke up on the morning of Saturday, July 10, 2021. At 7:09 am, she replied:

I figured :(I asked the other agent to write up the counter amendment when I didn't hear from you guys, just to buy us until this morning. Once I get that back, I'll write up the termination.

[42] Ms. Moore heard from Ms. Shearer by email at 8:56 am:

Hi Emma,

My clients have instructed me to put the house active again if your clients aren't firming up. They easily googled estimates for both water filtration and septic pipe replacement so they don't see why an extension is needed on your buyer's behalf. Please let me know asap if they are purchasing the home or if I should send a termination.

[43] Ms. Moore replied at 9:03 am:

Hi Natalie,

I guess send the termination. My buyers seem to be having some personal issues, and I think termination is sadly the best option. I'll save you the step and I'll write up the termination.

I'm so sorry we couldn't get this to work.

[44] Ms. Moore proceeded to prepare and email Ms. Shearer a document with the file name "440 – Termination of Agreement of Purchase and Sale Release of Deposit.pdf".

[45] At 12:46 pm, Ms. Shearer replied and advised Ms. Moore that her clients were not willing to release the deposit:

Hi Emma,

I'm sorry but my clients aren't going to sign the release of deposit. They are happy to continue the deal but if not they are feeling they have lost opportunities to sell and therefore would not be willing to release the deposit.

I know this puts you in an awkward situation but I have to follow their instructions.

Please discuss with them – I will wait to hear from you either way by 6:00 once you let them know they may forfeit their deposit by not continuing

[46] Ms. Moore replied at 1:06 pm:

Hi Natalie,

I understand how your clients feel, but because we gave written notice of dissatisfaction yesterday, your clients do not have a right to the deposit. ...

[47] Ms. Shearer and her clients took the position that none of Ms. Moore's communications with Ms. Shearer amounted to a notice of dissatisfaction and that they were therefore entitled to retain the deposit. The deposit has never been returned and remains in trust with Royal LePage.

[48] On August 7, 2021, the MacQuarries entered into an agreement of purchase and sale with a third party and sold the Property for \$685,000. The sale closed on September 8, 2021.

Positions of the Parties in Brief

[49] The Birches say they provided the MacQuarries with written notice of dissatisfaction and were therefore entitled to the return of their deposit upon termination of the APS and are not liable for the difference between their offer of \$750,000 and the \$685,000 offer the MacQuarries accepted one month later.

[50] In the alternative, the Birches argue that they were entitled to rely, and did rely, on the representations made by Ms. Shearer that her clients were preparing a counter-amendment that would be left open to the next morning. The Birches say they relied on Ms. Shearer's representations to their detriment, and that the MacQuarries "are liable for any reliance by the Birches on those representations. Although the Birches do not use the word "estoppel" in their submissions, their argument is effectively that the MacQuarries are estopped from relying on the strict terms of the APS, including the condition date of July 9, 2021.

[51] Ms. Moore makes a similar argument on her own behalf. She submits that the MacQuarries, through their agent, represented to her and her clients that the

MacQuarries would sign a counter-amendment and “firm up in the morning.” Put differently, Ms. Moore submits that Ms. Shearer represented that the MacQuarries would not enforce their strict contractual right to treat the APS as firm at 12:00 am on July 10, 2021. Ms. Moore says she relied on Ms. Shearer’s representations in instructing her clients, and that if she had known that the MacQuarries intended to rely on the strict terms of the APS, she would have done whatever was necessary to contact her clients, including going to their hotel in Halifax.

[52] The MacQuarries argue that they never told Ms. Shearer that they were willing to extend the APS until the morning of July 10, 2021. They say they were willing to drop \$3,000 from the purchase price, but that the deal still had to go firm at midnight. The MacQuarries say any reliance by Ms. Moore and her clients on Ms. Shearer’s representations was not reasonable, for two reasons: (1) real estate agents cannot bind their clients without a power of attorney, and (2) the APS provided that an amendment was effective only if it was in writing and signed by the parties.

Issues:

[53] The Court identifies the following main issues for determination:

Issue 1: Are the MacQuarries estopped from relying on clause 4.1 of the APS to argue that the APS was firm as of midnight on July 10, 2021?

Issue 2: Did Ms. Shearer make representations that altered the parties' obligations under the APS?

Issue 3: Did the Birches have "clean hands", i.e., did they act honestly and in good faith throughout the transaction so as to be entitled to the protection of equity?

The Law

Issues 1 and 2: Reliance and Promissory Estoppel

[54] Before considering the law of promissory estoppel, the Court notes that if the Birches did provide a valid notice of satisfaction, (Ms. Moore's July 9, 2021 email to Ms. Shearer) there is not need to consider that issue, and the Birches are entitled to the return of their deposit. The Court is not satisfied on the evidence before it, that this case really turns on the issue of the validity of the supposed notice of dissatisfaction, but rather on what transpires between the parties and Ms. Moore which follows.

[55] If I am wrong about that, I would find that the July 9, 2021 email sufficiently constitutes a notice of dissatisfaction in the circumstances. If it does not, then the Court goes on to determine the issues of reliance and promissory estoppel.

[56] The law of promissory estoppel was succinctly reviewed by the Ontario Court of Appeal in *Grasshopper Solar Corporation v. Independent Electricity System Operator*, 2020 ONCA 499, leave to appeal denied, [2020] S.C.C.A. No. 361:

[67] Promissory estoppel typically involves a promise by one party not to rely on its strict contractual rights. Where such a promise has been made with an intention that the other party will rely on it, and that party relies on the promise to his or her detriment, the party who made the promise is estopped from acting inconsistently with it. ... [A]lthough the promise does not vary the terms of the contract, the party who made the promise may be precluded from resiling from it to the extent necessary to protect the position of the party who has relied on the promise to his or her detriment.

[57] The Supreme Court of Canada summarized the equitable defence as follows in *Engineered Homes Ltd. v. Juniper Lands Ltd. (Trustee of)*, [1983] S.C.J. No. 42 (S.C.C.):

7 In this Court the appellant argued that the Court of Appeal was in error in finding that an estoppel could be raised on the evidence at trial, arguing that it failed to meet the evidentiary requirements for proof of estoppel. The requirements of a successful defence based on promissory estoppel are conveniently set out in Halsbury's Laws of England (4th ed.), vol. 16, para. 1514, in these words:

1514. Promissory estoppel. When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced. This doctrine, which is derived from a principle of equity enunciated in 1877, has been the subject of considerable recent development and is still expanding. It differs from estoppel in pais in that the representation relied upon need not be one of present fact.

Cases dealing with the question in this Court include *Conwest Exploration Company Limited v. Letain*, [1964] S.C.R. 20, and *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, in which Ritchie J., at p. 615, speaking for the Court, cited the judgment of Lord Denning in *Combe v. Combe*, [1951] 1 All E.R. 767:

In the case of *Combe v. Combe*, Lord Denning recognized the fact that some people had treated his decision in the *High Trees* case as having extended the principle stated by Lord Cairns and he was careful to restate the matter in the following terms:

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

[58] At all relevant times, Ms. Shearer was the MacQuarries' agent in the transaction with the Birches. Purchasers are entitled to rely on representations made by a vendor's real estate agent. In *Lambert v. Gillis*, 1993 CarswellNS 90 (S.C.(T.D.)), Goodfellow J. stated:

11 The duty of a vendor's agent to a prospective purchaser is one of honesty and integrity as a professional and not a duty arising from contract.

12 A prospective purchaser is entitled to rely upon representations made by the vendor's agent, who must maintain a level of professionalism that does not countenance the misleading of a prospective purchaser by misrepresentation or omission on matters that are material to the entry by the prospective purchaser into the agreement of purchase and sale and acquisition of the property.

[Emphasis added]

[59] A vendor, as principal, will also be liable for a fraudulent or negligent misrepresentation made by the vendor's agent to a third party. In G.H.L. Fridman,

Canadian Agency Law, 3d ed. (Toronto: LexisNexis Canada Inc., 2017), the author writes:

8.10 If an agent, acting within the scope of the agent's authority, and with the intent to deceive, commits the tort of deceit, by making a false statement of fact, on which the third party relies to his or her detriment, the principal will be vicariously liable even though the principal did not know that the agent was making such a statement, and never instructed the agent to do so. ...

...

8.13 A non-fraudulent, but negligently made misrepresentation of fact by an agent will render the principal vicariously liable, as long as it was made in the performance of the authority conferred on the agent and entailed the breach of a duty of care owed by the principal or the agent to the person to whom it was made, and by whom it was relied upon.

[Emphasis added]

[60] In *Sproule v. Nichols*, 2024 NSSC 26, the purchasers sued the vendors upon discovering water damage to the home, which had not been disclosed to them before the purchase. In 2018, the defendants – Shawna and Brian Nichols – noticed a water spot on their bedroom ceiling. They retained a roofing company, who nailed flashing around the chimney and told them the problem was solved. When the defendants listed their property for sale in late 2019, they reported the 2018 leak and repair in the property disclosure statement (“PDS”), but they did not read the portion of the PDS requiring it to be updated if any conditions changed prior to closing.

[61] When the water spot returned before the property was sold, they discovered a new or ongoing leak and replaced wet insulation and drywall themselves before retaining a roofing company who believed the problem was solved by adding

caulking around the fascia. The defendants reported the issue to their realtor, Maita Lavoie, but she did not update the PDS. When viewings resumed, Ms. Nichols asked Ms. Lavoie whether the prospective purchasers knew about the ceiling, and Ms. Lavoie replied, “Yes I just noted it in my confirmation so they both do – unless they don’t read the notes :)” (para. 35).

[62] The court rejected the real estate agent’s claim that she had notified the purchasers’ agent, noting that her reply reflected the agent’s “lack of concern as to whether potential buyers had notice of the leak” (para. 35). In finding the vendors liable for their agent’s negligent misrepresentation, the court stated:

[56] The issue of the agency relationship between a real estate agent and the agent’s principal is relevant to this case. In *R. v. Levy Brothers Co.*, [1961] S.C.R. 189, in giving the Court’s judgment Ritchie J., stated at para. 4:

... The law governing these circumstances has been stated in *Story on Agency*, 7th ed., para. 452, in terms which have been approved in this Court on more than one occasion. It is there said:

...he (the principal) is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them.

This language was adopted as applicable to the relationship between master and servant by Lord Macnaghten in *Lloyd v. Grace, Smith & Company*, and by this Court in *Lockhart v. Canadian Pacific Railway Company*, per Duff C.J., *W.W. Sales Limited v. City of Edmonton*, and *The Queen v. Spence*. See also *Percy v. Corporation of the City of Glasgow*, and *United Africa Company Limited v. Saka Owoade*.

See also *Canadian Agency Law* (3rd ed.) by G.H.L. Fridman at section 8.2.

[57] In *Trequinna v. Gauld*, (Ont. S.C.) No 99-GD-47369, the agency relationship between a real estate agent and his or her principal is described at para. 5:

The principal is liable for the negligent or fraudulent misstatements of the principal's agent, made to a purchaser of a house by way of inducement to buy, where the agent's scope of authority is general – to sell the house.

...

[64] As principals, Mr. and Ms. Nichols are liable for the actions of Ms. Lavoie acting within the scope of her authority, as here when dealing with the PDS.

[63] In *Drag v. Mehta*, 2022 ONSC 4574, aff'd 2024 ONCA 334,¹ Rohit Mehta, the defendant and plaintiff by counterclaim, sought an order for specific performance alleging a breach of an agreement of purchase and sale. The plaintiff and defendant by counterclaim, Bernard Drag, took the position that the APS was null and void as of 11:59 pm, December 9, 2020, and denied the claim.

[64] In December 2020, Mr. Drag was the registered owner of the property at 1 Flaherty Lane in Caledon, Ontario. On December 2, 2020, the parties executed the APS by which Mr. Drag agreed to sell the property to Mr. Mehta for \$2,470,000. The deal was to close April 28, 2021. The APS included a condition, for the sole benefit of Mr. Mehta, allowing for a home inspection by a qualified home inspector. The condition had to be waived within five business days from the date of execution, otherwise the APS was null and void. This meant that the condition had to be waived by 11:59 pm on December 9, 2020.

[65] The home inspection report, released on December 8, 2020, identified a number of deficiencies. As a result, Mr. Mehta sought an abatement of the purchase

price and negotiations ensued between Mr. Mehta's agent, Shan Ghuman, and Mr. Drag's agent, Tav Schembri. The negotiations continued into the evening of December 9. The parties, through their agents, agreed to an abatement of \$40,000. Mr. Ghuman prepared an amending agreement reducing the purchase price and deleting the home inspection condition and rendering the APS firm. The amending agreement was irrevocable until December 10 at 12:30 pm. Mr. Ghuman emailed the agreement, signed by Mr. Mehta, to Mr. Schembri, who advised that Mr. Drag was away for the evening and would not be available to sign the amending agreement until the next morning.

[66] At the time, both parties believed the home inspection condition had to be waived by 11:59 pm on December 9. Otherwise, if the amending agreement was not signed and the condition not waived, the APS would be null and void. Accordingly, after emailing the signed agreement, Mr. Ghuman sought written confirmation from Mr. Schembri that the parties had agreed on an abatement amount and the deletion of the home inspection condition, and that Mr. Drag would execute the document the next day. Mr. Schembri refused, telling Mr. Ghuman something to the effect of, "You have my word." Mr. Ghuman and Mr. Mehta became concerned that Mr. Drag would not agree to the amendment, making it impossible to effect the waiver of the condition. As a result, they attempted, unsuccessfully, to deliver the waiver, which

would have made the APS firm without any abatement. On the morning of December 10, 2020, Mr. Drag did not sign the amending agreement and took the position that the APS was void.

In granting judgment for specific performance, the trial judge held:

[166] On these facts I conclude that Schembri and Drag, did not act in good faith and breached their duty of acting of good faith and made misrepresentations, as to an accepted amending agreement and Drag's unavailability to execute it until the next morning. These misrepresentations were made by Schembri, on behalf of Drag and were intended to be relied upon by Mehta and Ghuman. They were, in fact, relied upon by Mehta and Ghuman. They were made in an effort to have the APS declared null and void. *Mehta's reliance on the misrepresentations, delayed and compromised delivery of the waiver of the home inspection condition, to his detriment.*

...

[167] The misrepresentation that Drag was out of town on the evening of December 9, 2020 and was not available to execute the amending agreement until the next day, infers that the time period for the waiving the home inspection condition would, at least, be deferred an additional day. Drag on that basis alone should not be able to declare the APS null and void. The waiver, without a doubt, was delivered the next day by email to Schembri.

[Emphasis added]

[67] On appeal, Mr. Drag argued that the trial judge erred in finding that Mr. Schembri's statements on December 9, 2020, had the effect of preventing the APS from becoming null and void at 11:59 p.m. on December 9 in accordance with its own terms. Mr. Drag did not challenge the trial judge's finding that Mr. Schembri's statements on his behalf constituted a breach of Mr. Drag's duty of honest performance but argued that what Mr. Schembri said on December 9 had no consequence, because Mr. Mehta was aware of the need to waive the condition by

11:59 pm on that date, as illustrated by his purported efforts to do so after he became suspicious that Mr. Drag would not agree to the amendment. In other words, Mr. Drag argued that Mr. Mehta did not rely on any misrepresentations to his detriment. The Court of Appeal disagreed:

[21] Mehta's pleading was that he did rely on the representations of Schembri, later became suspicious, and took certain steps toward waiver as a precaution. The trial judge was not obliged to approach the matter on the basis that Mehta could succeed only if he was so completely fooled for the entirety of December 9 that he did or attempted nothing toward waiver. The trial judge was entitled to find the requisite degree of reliance on, and detriment arising from, Schembri's misrepresentations in the fact that they "delayed and compromised delivery of the waiver of the home inspection condition".

[22] On the trial judge's findings, Mehta did rely on the assurances that Schembri provided to Ghuman. Mehta became suspicious well into the evening of December 9, given that Schembri did not give a written confirmation (while saying his word could be relied on). The obtaining of advice as to how to deliver the waiver and the actual efforts to do so were compressed into the last 90 minutes of December 9. As the trial judge found, "the ability to properly deliver a waiver was compromised and rushed." Had the misrepresentations not been made, Mehta and his advisors would have had a longer time to focus on how to deliver the waiver. It was open to the trial judge to find that Mehta suffered a detriment.

[68] The Court of Appeal went on to find at para. 23:

We see no error in the trial judge's holding that, in light of the misrepresentations by Schembri, Drag was not entitled to insist on the strict timing in the APS to declare the APS became null and void at 11:59 p.m. on December 9. There is abundant authority for the proposition that a party may not rely on strict timing where they have indicated, by words or conduct, that they will not do so and the other party has relied on that representation to their detriment: see e.g., *Owen Sound Public Library Board v. Mial Developments Ltd.* (1979), 26 O.R. (2d) 459, at para. 16 (C.A.); *Petridis v. Shabinsky* (1982), 35 O.R. (2d) 215, at paras. 20-22 (H.C.); *Charles Rickards Ltd. v. Oppenheim*, [1950] 1 K.B. 616, at 623 (Eng. & Wales C.A.). The trial judge found that was exactly what Schembri's misrepresentations meant in so far as the timing for delivery of a waiver was concerned, and he found that Mehta relied on them to his detriment.

[Emphasis added]

[69] The MacQuarrie's say, in supplemental trial submissions, that the evidence before this Court distinguishes that of *Drag* for five reasons:

Reason One

[70] First, the MacQuarries say *Drag* involved a representation by the seller's agent that the seller was out of town and unable to sign the amending agreement before the deadline. They submit that the representation that the seller was out of town and unable to sign the amendment until the next day was the basis for the trial judge's decision that the condition date was extended. They cite the following paragraphs from the *Drag* trial decision:

[154] I also find that the third amending agreement, was made irrevocable until December 10th at 12:30 because of Schembri's representation to Ghuman that Drag was out of town on the evening of December 9th, a fact denied by Drag. Schembri in his testimony agreed that he may have made said Drag was out of town and I accept that he did. No other reasonable inference was suggested as a reason for the terms of the agreement to be irrevocable until the next day.

...

CONCLUSION

[167] The misrepresentation that Drag was out of town on the evening of December 9, 2020 and was not available to execute the amending agreement until the next day, infers that the time period for the waiving the home inspection condition would, at least, be deferred an additional day. Drag on that basis alone should not be able to declare the APS null and void. The waiver, without a doubt, was delivered the next day by email to Schembri.

[71] The MacQuarries state that no such representation was made in the present case – they were in town on the night of July 9, 2021, and available to sign the counter-amendment. They write at para. 43:

There was no reason to support that the MacQuarries were unavailable to sign the counter amendment (that Ms. Moore requested) before the condition date expired at midnight. That is the basis on which *Drag* was decided. *Drag* has no application to this case.

[72] Respectfully, this argument misses the mark. In *Drag*, the vendor's agent falsely represented to the purchaser's agent that the parties had reached an agreement to amend the APS and that the vendor, who was out of town, would execute the amending agreement the following morning when he returned. The court was satisfied that it was implicit in the agent's misrepresentation that the vendor would not enforce the time period for waiving the home inspection condition, which expired at midnight.

[73] In the present case, it is irrelevant that the MacQuarries were not out of town and could have signed the counter-amendment before the condition date expired at midnight. Ms. Shearer represented to Ms. Moore, at approximately 9:30 pm on July 9, 2021, that her clients would prepare a counter-amendment for \$3000 off the purchase price and that the parties would "firm up" on Saturday morning. On the basis of this representation, Ms. Moore and the Birches understood that the vendors either recognized that the email sent earlier that evening was a proper notice of dissatisfaction, or that they would not enforce the condition requiring notice of dissatisfaction by midnight that night.

[74] Whether the MacQuarries were in town and could signed the counter-amendment before midnight is immaterial. Ms. Shearer told Ms. Moore, at 9:30 pm, that her clients had proposed a counter-amendment that would drop \$3000 from the purchase price and the parties would firm up the next morning. She did not tell Ms. Moore that she would prepare and have her clients sign the counter-amendment immediately and that if the Birches did not execute it before midnight, her clients would treat the APS as firm. It was entirely reasonable, based on this representation, for Ms. Moore and the Birches to believe that the MacQuarries were content to finalize matters the next morning.

[75] The issue in this case, as in *Drag*, is not whether the vendors were in town or out of town on the night the contractual condition was set to expire. It is whether the vendors' agent made a representation that reasonably led the purchaser's agent to believe that the vendors would not seek to rely on their strict contractual rights. In *Drag*, the representation that gave rise to this reasonable belief was that the vendor was out of town but would execute the amending agreement the next morning. In the present case, the representation was that the vendors had proposed a counter-amendment and the parties would firm up in the morning.

Reason Two

[76] The MacQuarries say *Drag* doesn't apply because Ms. Shearer called Ms. Moore after speaking with her clients again and learning that they still intended to treat the deal as going firm at midnight. They say Emma Moore went to sleep and did not check her phone until the following day, and that Ms. Shearer's attempt to contact Ms. Moore distinguishes the case from *Drag*.

[77] There are two problems here. First, the Court is not satisfied that Ms. Shearer made that call. In her email to Ms. Moore early the next morning, she does not mention having tried to reach Ms. Moore after their text exchange. Ms. Moore denied having any missed calls or voicemails. There are no phone records in evidence which would have conclusively resolved the matter. The MacQuarries and Ms. Shearer are the ones who asserted that the call was made, and it was their assertion to prove.

[78] Second, even if Ms. Shearer had spoken to her clients after she texted Mr. MacQuarrie at 10:13 pm that night and was told that they still intended to treat the deal as firm at midnight on July 10, 2021, it would not necessarily follow that Ms. Moore acted unreasonably in relying on Ms. Shearer's earlier representation and going to bed. There is no reason why Ms. Moore ought to have anticipated that Ms. Shearer misunderstood her own clients' instructions and would call her later that night to clarify.

[79] In the view of this Court, Ms. Shearer's assertion that she called Ms. Moore at some point after their text messages changes nothing.

Reason Three

[80] The MacQuarries argue that *Drag* does not apply because the APS in this case does not give the agent the authority to revise the agreement and dictates that any amendments must be in writing and signed by the parties. The MacQuarries surmise that the situation may be different in Ontario. They write at paras. 48-51 of their supplemental submissions:

The fundamental nature of the law of agency is that the agent has the ability to effect another party's legal relationships.

The Ontario Court of Appeal did not include any provisions from the Agreement of Purchase and Sale before the Court which would inform the analysis of the agent's authority to make representations on behalf of the client.

The trial decision quotes a portion of the agreement in this case:

[22] On page 2 of the agreement, paragraph 3, of the APS, entitled "Notices" read as follows:

"NOTICES: The Seller hereby appoints the listing Brokerage as agent for the Seller for the purposes of giving and receiving notices pursuant to this Agreement. Where a Brokerage (Buyer's Brokerage) has entered into a representation agreement with the Buyer, the Buyer hereby appoints the Buyer's Brokerage as agent for the purposes of giving and receiving notices pursuant to this Agreement.

...

The trial judge also noted that there was no dispute about the seller's agent's ability to speak on behalf of the seller. The trial decision did not quote any other passage from the agreement that gave that agent that authority.

[81] The trial judge in *Drag* did not cite the above paragraph of the APS as giving the real estate agent the authority to bind his client. This is apparent when paragraph 22 of the decision is read in context:

[21] Attached to the offer was Schedule A, in which was included a home inspection condition of sale that read as follows (para. 5),

“This Offer is conditional upon the inspection of the subject property by a qualified home inspector at the Buyer’s own expense and the obtaining of a report satisfactory to the Buyer in the Buyer’s sole and absolute discretion. Unless the Buyer gives **notice in writing** delivered to the Seller within 5 banking days (excluding Saturday, Sunday & Bank holidays) following the date of acceptance of this offer that this condition is fulfilled this Offer shall be null and void and the deposit shall be returned to the Buyer in full without deduction. The Seller agrees to co-operate in providing access to the property for the purpose of this inspection. This condition is included for the benefit of the Buyer and may be waived at the Buyer’s sole option by notice in writing to the Seller within the time period stated herein.”

[22] On page 2 of the agreement, paragraph 3, of the APS, entitled “Notices” read as follows:

“NOTICES: The Seller hereby appoints the listing Brokerage as agent for the Seller for the purposes of giving and receiving notices pursuant to this Agreement. Where a Brokerage (Buyer’s Brokerage) has entered into a representation agreement with the Buyer, the Buyer hereby appoints the Buyer’s Brokerage as agent for the purposes of giving and receiving notices pursuant to this Agreement. Where a Brokerage represents both the Seller and the Buyer (multiple representations), the Brokerage shall not be appointed or authorized to be agent for either the Buyer or the Seller for the purposes of giving and receiving notices. Any notice relating hereto or provided for herein shall be in writing. In addition to any provisions contained herein and in any Schedule hereto, this offer, any counter-offer, notice of acceptance thereof or any notice to be given or received pursuant to this Agreement or any Schedule hereto [any of them, “Document” shall be given or received personally or hand delivered to the Address for Service provided for the Acknowledgement below, or where a facsimile number or email address is provided herein, when transmitted electronically to that facsimile number or email address, respectively, in which case, the signature of the party (parties) shall be deemed to be original.”

[23] As per the “Notice” paragraph, the waiver could be given and received personally or hand delivered to the Address for Service provided for in the

Acknowledgement paragraph, or where a facsimile number or email address is provided “herein”, transmitted electronically.

[Emphasis added]

[82] The trial judge relied on the “Notice” paragraph to determine how notice of waiver could be effected.

[83] There is no indication in the *Drag* trial decision that the trial judge relied on any unique provision in the APS to conclude that “there was no dispute as to [the agent’s] ability to speak and act on behalf of *Drag*” (para. 147).

[84] Assuming the MacQuarries’ position is correct, and a purchaser may not rely on a representation by a vendor’s real estate agent unless the purchaser can point to a contractual provision giving the agent the authority to bind a vendor to the agent’s statements, how would they explain cases like *Sproule v. Nichols*, 2024 NSSC 26, and many others, where vendors have been found liable in tort for negligent misrepresentations made by their real estate agents? The reasonableness of the purchaser’s reliance in these cases is not determined by the existence or non-existence of a contractual provision specifically authorizing the agent to make representations that bind the vendor.

Reason Four

[85] The MacQuarries’ fourth reason does not appear to rely on the *Drag* decision. The MacQuarries argue that Ms. Moore and the Birches are asking the court to apply

two different legal standards to statements by agents. On the one hand, the Birches and Ms. Moore submit that Ms. Shearer's statement regarding the counter-amendment affected the legal relations between the parties. On the other hand, they say the statement by Ms. Moore about the reason for termination ("personal issues") did not. The MacQuarries continue at paras. 66-68 of their post-trial submissions:

In cross examination by Ms. Godwin, Ms. Moore acknowledged that the Birches did not tell her to terminate because of personal issues. She claimed that the statement was just "a professional courtesy."

The MacQuarries submit that Ms. Shearer's willingness to write up a counter amendment at Ms. Moore's request was similarly just a professional courtesy. Clearly, according to the wording of the Agreement, this was not an amendment. Ms. Moore knew that it was up to the [MacQuarries] to sign it. She did not wait to see if they did – though had she stayed up like she told the Birches, then she would have answered Ms. Shearer's phone call and been able to act on Ms. Birch's text instructions to terminate the deal before the condition date expired at midnight.

Ms. Moore should not be permitted on the one hand to say that the statements made by Ms. Shearer are binding, but that hers are not.

[86] In response to this argument, the Court notes that Ms. Shearer told Ms. Moore that her clients were willing to drop \$3000 from the purchase price and that the parties could firm up in the morning. There is no expert evidence or any case law before the Court establishing that it was negligent or unreasonable for Ms. Moore to rely on Ms. Shearer's representation as to her clients' instructions to her rather than staying awake to make sure that the MacQuarries signed the counter-amendment before midnight.

Reason Five

[87] Finally, the MacQuarries argue that *Drag* does not apply because the Birches did not rely on Ms. Shearer's representation that Ms. Shearer would write up a counter-amendment to their detriment. They say the Birches "did not rely on Ms. Shearer's representation. They did not know about it."

[88] It is true that the Birches did not receive a copy of the text message Ms. Moore sent to Ms. Shearer after Ms. Moore did not hear back from the Birches, which said:

Oh eff. I asked them to stay awake until I got back to them with an answer, but I can't get ahold [sic] of them now. I'm afraid they may have passed out. Are you able to write up the counter amendment for us to reply to in the morning

[89] Nor did they see Ms. Shearer's reply:

Yes no problem :)

[90] However, the MacQuarries acknowledge that Ms. Birch woke up at some point on the evening of July 9, 2021, and texted Ms. Moore at 11:22 pm:

Sorry we fell asleep I woke up to see this, :(I don't think we are willing to throw 15k away :(and I don't know if they will expect the next offer from us :(frig

[91] It was not until the following morning at 7:09 am that Ms. Moore replied:

I figured :(I asked the other agent to write up the counter amendment when I didn't hear from you guys, just to buy us until this morning. Once I get that back, I'll write up the termination.

[92] However, by 11:22 pm on July 9, 2021, Ms. Birch had seen Ms. Moore's text messages sent at 9:31 pm:

Hi you guys, this is the response to our amendment:

Hi Emma,

They aren't going to accept the amendment . The timeline just doesn't make sense for finding prices . They will drop \$3000 of the purchase price to pay for water treatment and firm up tomorrow morning. Otherwise they will go active again they decided . Sorry

So unfortunately our options aren't good. We either terminate, get your deposit back, and go back to looking. Or if you decide to go firm, and your sale ends up falling apart, you lose the deposit and risk legal ramifications if they end up not being able to get \$750k again (Which I think they'll get at least that if they do go back on the market.)

[Emphasis added]

[93] In the view of this Court, the issue of reliance is not determined by whether the Birches knew that Ms. Shearer said she would draft the counter-amendment. The Birches knew by 11:22 pm on July 9, 2021, that Ms. Shearer had told Ms. Moore that the MacQuarries would not sign the Birches' proposed amendment but would drop \$3000 off the purchase price to pay for water treatment and "firm up tomorrow morning." In other words, the Birches were aware of Ms. Shearer's representation that her clients were willing to firm up the next morning. The fact that they did not know which agent would be writing up the counter-amendment does not mean they did not rely on Ms. Shearer's representation to their detriment.

[94] The MacQuarries' post-trial submissions do not change the view of the Court on whether the Birches and Ms. Moore were entitled to rely on Ms. Shearer's representation that her clients were proposing a counter-amendment that would drop \$3000 off the purchase price and that the parties could firm up in the morning.

[95] The Court notes that if Ms. Moore did provide a valid notice of dissatisfaction, there is no need to consider the defence of estoppel. However, if the Birches did not have clean hands, they are not entitled to equity's protection.

Analysis and Findings

[96] During the text conversation with Emma Malone on the evening of July 9, 2021, Natalie Shearer was acting within the scope of her authority as agent for the MacQuarries in relation to the sale of the Property. In her text message sent at 9:28 pm, Ms. Shearer said:

They aren't going to accept the amendment. The timeline just doesn't make sense for finding prices . They will drop \$3000 of the purchase price to pay for water treatment and firm up tomorrow morning. Otherwise they will go active again they decided . Sorry.

[Emphasis added]

[97] When Ms. Moore was unable to reach her clients, she asked Ms. Shearer, "Are you able to write up the counter amendment for us to reply to in the morning". Ms. Shearer responded, "Yes no problem :)".

[98] Any reasonable person reading these text messages would conclude that the MacQuarries had agreed to draft a counter-amendment reducing the purchase price by \$3,000, and that the Birches would have until the next morning to decide whether to accept or terminate. In other words, any reasonable person would conclude that the MacQuarries, through their agent, were representing that they would not rely on their

strict contractual right to treat the APS as having firmed up at midnight. This interpretation is supported by Ms. Shearer's text message to Dion MacQuarrie 10:13 pm:

She can't reach them – thinks they are sleeping. I sent you the \$3000 amendment suggestion to sign and we will send to them [o]nce you sign. I put 11 am as time for acceptance.

[Emphasis added]

[99] According to Mr. MacQuarrie, he never instructed Ms. Shearer to tell the Birches that the parties could firm up the next morning, and he told her as much by phone after he received and reviewed her text message. Although Ms. Shearer testified that she tried to reach Ms. Moore after speaking with Mr. MacQuarrie, Ms. Moore testified that she had no missed calls or voicemails on her phone when she woke up on the morning of December 10. Nor did Ms. Shearer allude to having attempted to reach Ms. Moore the night before in her email to her at 8:56 am on December 10. In my view, Ms. Shearer did not attempt to contact Ms. Moore again after their text message conversation until the morning of December 10.

[100] As vendors, the MacQuarries, and their agent, owed potential purchasers a duty of care not to make negligent misstatements. The Birches and Ms. Moore were entitled to rely on Ms. Shearer's representations on behalf of her clients and they did rely on them, to their detriment.

[101] The MacQuarries argue that reliance was unreasonable because amendments to the APS were not effective unless they were in writing and signed by the parties. This view is misguided. Ms. Shearer did not represent that the APS had been amended, or even that her clients promised to amend it. Rather, she represented that her clients promised not to enforce their strict contractual right to treat the APS as firm at midnight unless they received written notice of dissatisfaction before that time. Instead, her clients would give the Birches until some time the next morning to respond to the proposed counter-amendment. Reliance by the Birches and Ms. Moore on Ms. Shearer's representations was not incompatible with the APS provision dealing with amendments.

[102] The MacQuarries' argument that reliance was unreasonable because real estate agents cannot bind their clients without a power of attorney must also fail. Regardless of a real estate agent's capacity to enter into or amend contracts on behalf of clients without a power of attorney, the law is clear that where an agent acting within the scope of her authority fraudulently or negligently misrepresents that her clients will not enforce their strict contractual rights, and the party to whom the representation is made relies on the misrepresentation to their detriment, equity precludes the clients from enforcing those rights.

Issue 3: Did the Birches have “clean hands”, i.e., did they act honestly and in good faith throughout the transaction so as to be entitled to the protection of equity?

[103] At paragraph 15(c) of the MacQuarries’ statement of claim, they state that the Birches’ desire to terminate the APS was caused by issues unrelated to the condition of the well or septic system. They maintained this position at trial.

[104] In particular, the MacQuarries argue that the Birches were trying to get out of the transaction as a result of the sale of their home in Ontario. They point to an email message Mr. Birch sent to Ms. Moore shortly after receiving her email on the morning of July 10, 2021 advising that the MacQuarries were not making a counter-offer with a change in the price where he stated that “the only thing that didn’t work out [was] our house not firming up!”.

[105] However, the Birches testified and demonstrated to the satisfaction of this Court, considering the totality of the evidence before it, that the sale of their home in Ontario was not the reason the Birches terminated. The Court notes that financing was not a condition in the APS. The Court finds that the Birches have “clean hands”.

Conclusions

[106] The MacQuarries are estopped from relying on clause 4.1 of the APS to argue that the APS was firm as of midnight on July 10, 2021.

[107] The Birches did not breach the terms of the APS.

[108] Ms. Moore was not negligent in her dealings with the Birches.

[109] As a result, the Birches are entitled to the return of their deposit (\$15,000 plus interest) and are not liable for the difference between their offer of \$750,000 and the \$685,000 offer the MacQuarries accepted one month later.

[110] The MacQuarries' claim is dismissed, with costs.

[111] If the parties are unable to agree on costs, the Court will receive written submissions within thirty (30) calendar days.

Smith, J.