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"We Have a Deal": How Words and Actions Can Seal Your Fate in Commercial Transactions

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The enforceability of commercial contracts does not exclusively depend on what has been reduced to a formal written document. In the recent decision of *Ruparell v. J.H. Cochrane Investments Inc.*, 2021 ONCA 880 ("***Ruparell***"), the Ontario Court of Appeal confirmed that contracts can be formed where there is an agreement on essential terms and where such terms are *later* incorporated into a formal written document.

Ruparell concerns the failed purchase of a Volkswagen dealership and the land it was situated on. The Defendants, (collectively, "**Volkswagen**") were negotiating the sale with the Plaintiff, Ruparell, over the course of several months in 2020 and an agreement was reached on a number of terms. Shortly thereafter, Volkswagen received a higher offer from a third party, which they accepted. Ruparell sued for breach of contract and sought specific performance.

Facts

Between January to April 2020, Ruparell and Volkswagen entered into negotiations regarding the sale of the car dealership and land in Markham, Ontario. In February 2020, the parties signed a non-binding Letter of Intent ("**LOI**") which described the terms of engagement regarding due diligence, review of financial information, expectations on closing, purchase price, a $1 million deposit and required written and executed Share Purchase Agreements ("**SPAs**"). The LOI also had an exclusivity clause which prevented Volkswagen from negotiating with other parties until April 15, 2020.

In April of 2020, Ruparell made an offer for the share purchase, which was lower than a previous offer made due to concerns about the effect of the global pandemic ("**April Offer**"). The April Offer contemplated financing with a vendor take-back mortgage. On April 24, 2020, after some back-and-forth negotiations between the parties, a representative for Volkswagen left a message for Ruparell which stated that the parties had a deal. On the same day, the parties exchanged terms under the April Offer in a series of text messages, telephone conversations and in an informal Term Sheet. The Term Sheet settled the purchase price and it provided the terms for the vendor take-back mortgage, which included amount, interest rate, principal payment, and details of the security for the mortgage term.

SPAs were revised in accordance with conversations on the April Offer and Term Sheet. On April 28, 2020 – *before* the final SPAs were signed – Volkswagen received a better offer from a third party. On May 5, 2020, Ruparell was advised that Volkswagen had accepted the third party offer. Ruparell was invited to improve the April Offer. Ruparell did not increase the purchase price and instead insisted that Volkswagen close the transaction. Subsequently, Ruparell initiated an action for specific performance.

Trial Court Decision

At trial, Volkswagen argued that the SPAs were intended to be the final agreements given the complex nature of the transaction.

Volkswagen further submitted that such a complex transaction could not be completed by way of telephone calls and brief memos. As such, given that the SPAs were never complete, finalized or executed, there was no agreement between the parties and therefore, no breach of contract. Volkswagen also attempted to rely on the LOI to argue that Ruparell could not sue for specific performance and in any event, the exclusivity period had passed.

The trial judge disagreed.

In finding that the agreement between the parties was enforceable, the trial judge reiterated some of the essential principles regarding the formation of commercial contracts:

- formal business agreements are often preceded by an agreement on the essential provisions to be included in the final agreement (oral agreements, memorandums, emails, etc.);
- the fact that a formal written document will be prepared and signed later does not alter the binding nature of the original contract where the parties have agreed on the essential provisions;
- an agreement is not final or binding where it is merely an agreement to agree on the essential terms in the near future;
- the intention of the parties at the time of the making of the agreement is to be determined objectively, by an examination of the words, the nature of the purported agreement, and the course of conduct of the parties; and
- the nature of the transaction and the context in which the agreement is made will impact whether the terms are considered essential.

The trial judge determined that the content and tone of the communications between the parties suggested that both parties were anxious to agree on essential terms of the transaction and that the parties behaved as if they had reached an agreement. Importantly, the trial judge noted that an objective observer, viewing the history and communications between the parties, would have also seen it this way. Additionally, the trial judge found that the commercial purpose of the LOI was spent after the April Offer was made.

Through the lens of an objective observer, the trial court found that the parties had made an agreement on the essential terms of the transaction. Such terms included: price, share sale, financing, security, timing of payment, asset valuation and post closing adjustment, and retaining the existing general manager.

The trial court awarded $5 million in damages in lieu of specific performance and $1 million for the return of the deposit, plus pre and post judgment interest.

Volkswagen appealed.

The Court of Appeal Decision

On Appeal, Volkswagen argued that the trial judge erred in finding that the parties had reached an agreement and erred in the calculation of damages.

The Court of Appeal dismissed Volkswagen's appeal and found that commercial contracts can be formed by agreement on essential terms before such terms are incorporated into a formal written document. In so finding, the Court reiterated one of the fundamental principles of contract formation: whether a binding contract has been reached depends on the circumstances of the case and the intention of the parties.

The Court of Appeal agreed with the trial judge's determination that the parties had agreed on the essential terms of the transaction and that the parties had acted as though they had a deal. The Court of Appeal noted that the trial judge found that the parties agreed

to these terms on April 24, 2020, when an adviser engaged by Volkswagen told Ruparell in a voicemail message: “we have a deal”.

Takeaways

The written and verbal words and actions of parties to commercial transactions can be determinative as to whether the parties have reached a binding agreement, even where no formal written document exists. Where the parties continue to negotiate and agree on essential terms, a court will be hard-pressed to find that a binding agreement has not been reached, even where it has yet to be formalized.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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