

CANADA / JUDGMENT

1063418 B.C. Ltd. v. 1062111 B.C. Ltd.

2016 BCSC 741

COURT

Supreme Court of British Columbia

DECIDED

26 April 2016

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2016 BCSC 741 1063418 B.C. Ltd. v. 1062111 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1063418 B.C. Ltd. v. 1062111 B.C. Ltd.,

2016 BCSC 741

Date: 20160426

Docket: 177643

Registry: New Westminster

Between:

1063418 B.C. Ltd.

Plaintiff

And

1062111 B.C. Ltd., Raav Homes Ltd. and

Royal Trust Corporation of Canada

(Executor of the Will of Irene Alberta Bodner, Deceased)

Defendants

And

1063418 B.C. Ltd. and A&G Investment Inc.

Defendants by Counterclaim

Before: The Honourable Mr. Justice N. Brown

Reasons for Judgment

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W.D. Macleod

Place and Dates of Hearing:

Chilliwack, B.C.

April 5 - 6, 2016

Place and Date of Judgment:

New Westminster, B.C.

April 26, 2016

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Introduction

[1] The defendants in the action, 1062111 B.C. Ltd. ("111") and Raav Homes Ltd. ("Raav"), have applied to cancel a Certificate of Pending Litigation ("CPL") registered against two Surrey lots owned by an estate (the "Estate") for which Royal Trust Corporation of Canada ("Royal Trust") is the executor.

[2] The plaintiff, numbered company 1063418 ("418"), defendant by counterclaim, and respondent to the application, has filed a CPL against the two lots under s. 215 of the Land Title Act, R.S.B.C. 1996, c 250. GG Metro Developments Ltd. ("GG") is not named as a defendant in the originating action but as it is an affected party, being a subsequent assignee of the lots after 418, was served with the cancellation application and spoke to the matter. Royal Trust neither opposed nor supported the application. It extended the completion date for sale of the property however, to April 29, 2016, to give time for this application to be heard and for completion. The parties agreed Royal Trust does not have to file and serve a Response to Civil Claim in the proceedings.

[3] Given the need for a timely order, I advised the parties I would provide them with the Order I found fitting in the day following, with written reasons to follow. On April 8, 2016, I made the following Orders:

I order that the Certificate of Pending Litigation filed in the New Westminster Land Title Office by the plaintiff under registration number BB307708 registered against title for the properties located at:

6248 150th Street Surrey, B.C. - legally known as:

PID No. 002-135-221

Lot 1, Section 10 Township 2 New Westminster District Plant 66763

("Lot 1 Property")

and at:

6262 150th Street Surrey, B.C. - legally known as:

PID No. 002-135-302

Lot 2 Section 10 Township 2 New Westminster District Plan 66673

("Lot 2 Property")

be cancelled in whole, on both applicants providing the plaintiff or their counsel with a written undertaking to pay such damages as the court may order, if any. The applicants are not required to post security for their undertaking to pay damages.

The plaintiff shall not file further Certificates of Pending Litigation against either the Lot 1 Property or the Lot 2 Property.

Upon the filing of a certified copy of this Order in the New Westminster Land Title Office, the Registrar of Land Titles at the New Westminster Land Title Office shall cause the Certificate of Pending Litigation filed in the New Westminster Land Title Office by the Plaintiff under registration number BB307708 to be cancelled against title to the Lot 1 Property and the Lot 2 Property.

The applicants are entitled to costs of the application, in the cause.

- [4] The following are my reasons for the Order made on April 8, 2016. The hearing lasted one and one-half days.
- [5] The court has received several voluminous evidence and exhibit binders and excerpts from the examination for discovery hearing the parties conducted.
- [6] As this is an interlocutory application, the court's role is not to determine this application as if it were a summary trial. But because the plaintiff has filed its CPL based on its claim of an interest in land and claim for specific performance, the court has to engage in an assessment of the evidence so far necessary to enable determination of whether the plaintiff's claim has any merit or chance of success.

- [7] Given the interlocutory nature of the application, and to minimize prejudice to the parties, I will try to steer around making major findings of fact. On the other hand, considerable sums are at stake and the unsuccessful party will be majorly impacted by the court's order. Some critiques, findings, and inferences are necessary if the court is to come to a just determination of the merits of the plaintiff's claim. The depth of review that is appropriate naturally depends on the nature of the factual and legal issues and on what is at stake. If there is to be a trial, the judge would have the benefit of cross-examination on some matters, but the materials are comprehensive enough that the lack of cross-examination did not become a significant stumbling block to the determinations required here.

Summary of Facts

- [8] The plaintiff, 418 is a numbered company incorporated by Satish Kumar, a director of A&G Investment Inc. ("A&G"). The applicant 111 is a numbered company created by Ravinder Singh Basra on behalf of Raav, also a defendant and applicant. Both numbered companies were created to make a transfer of the draft assignment agreements that Raav and A&G had made. The assignments for the two lots, numbers 1 and 2, sought to assign Raav's interest under the purchase and sale agreement it had made with Royal Trust for the purchase of the two lots, owned by the Estate. That original purchase agreement came about as follows.
- [9] Raav became interested in purchasing Lots 1 and 2 for investment. The lots were residential properties. The residences were not valuable and would have to be torn down to permit development of the land.
- [10] On October 26, 2016, Raav and Royal Trust entered into two contracts, Royal Trust agreeing to sell Lot 1 for \$1,865,000 and Lot 2 for \$4,009,750, with completion dates of February 26, 2016. Each purchase was contingent on the sale of the other lot.
- [11] On October 29, 2015, Raav duly paid the Estate a deposit for Lot 1 of \$180,000; and for Lot 2, \$400,000.
- [12] Amarjit Singh Tut was a builder. He swore an affidavit on March 18, 2016, in which he gave his perspective on how the first purported assignments that are the centre of this case first came about. Mr. Tut was a close friend of a realtor, Mr. Raj Khela. Mr. Khela came to play a controversial role in the dealings between Raav and A&G; and later between their numbered assignees, 418 and 111. Mr. Tut was also acquainted with Harbinder Athwal, a director of Raav. Mr. Tut learned he might be interested in 'flipping their contract' with Royal Trust (as Mr. Tut put it). Mr. Tut deposed that he arranged a meeting with Mr. Khela and Mr. Athwal, which took place on an unspecified date.
- [13] It is not disputed that a meeting was arranged between Ravinder Basra (also a director or Raav), Mr. Tut, and Mr. Khela. It occurred on January 28, 2016. The applicants' position is that Mr. Khela represented 418 and A&G. 418's position is that Mr. Khela was working with Raav and 111. The only document independently verifying the nature Mr. Khela's business relationship with Raav or A&G is a fee agreement dated February 1, 2016, stating Mr. Khela

would be entitled to a brokerage fee of \$65,000 from the seller. Clause 6A of the document states:

A. the Brokerage and the REALTOR are not acting for either the Seller or the Buyer throughout the transaction and do not owe any agency duties to the Seller or the Buyer.

[14] Clause 6D of the document states:

D. nothing in this Agreement, including the obligation of the Seller to pay the remuneration set out in Clause 3, shall be construed as creating an agency relationship between the Brokerage for the REALTOR and the Seller or the Buyer.

[15] The nature of Mr. Khela's role is significant to the plaintiff's argument addressed later, that Mr. Khela could orally communicate the plaintiff's acceptance of the defendants' offer in what became the final version of the assignments agreement.

[16] On either January 31, 2016 or February 1, 2016, Mr. Khela emailed Mr. Basra the assignment agreements for the two lots, naming Raav as assignor and A&G as assignee.

[17] On February 1, 2016, Mr. Khela gave Raav A&G's draft of an agreement for an Assignment of Contract and Purchase of Sale of Lots 1 and 2, for consideration of \$725,000 and a deposit of \$400,000, payable on removal of the subject clause, the balance on completion of the contract of purchase of sale. Mr. Kumar signed the offer, but his signature was not witnessed. No date for acceptance or time for removal of the subject to financing clause after acceptance was stipulated. The subject clause stated it was for the buyer's sole benefit. I will refer to this first version of the Assignment of Contract and Purchase of Sale of Lots 1 and 2 as "Assignment #1".

[18] Raav made changes to the pending assignment agreement including: insertion of a deadline for acceptance of February 1, until 3:00 p.m., removal of a subject to financing clause by the assignee on or before February 1, a change from "buyer" to "assignee," and changing the obligation to pay the deposit to "within 24 hours of subject removal". Mr. Basra initialled the changes, except for the dates for acceptance of the counter offer. At para. 17 to 19, of an affidavit sworn by Mr. Kumar on March 18, 2016, Mr. Kumar confirmed his response to Mr. Raav's changes:

17. Later that day [February 16] or the next, Mr. Khela returned to me with the A&G Assignments as executed by Raav Homes.

18. They had filled in the date of the offer being Feb. 1, 2016, the time for acceptance being 3:00 p.m. on Feb. 1, 2016 and the date for subject removal being also Feb. 1, 2016. They had also inserted the assignment fee of \$575,250, allocated as between the two assignments, the timing for payment of this fee and the timing for reimbursement of the deposits paid by Raav under the original Contracts.

19. I told Mr. Khela that these terms were acceptable except for the deadline on the financing condition, that is, since I hadn't received formal approval from the bank I was not in a position to waive the condition on the same day. I told Mr. Khela that although the Bank had told me informally the loan was a "go", I wanted to have a formal approval before firming up the deal.
- [19] There is no dispute between the parties that A&G never endorsed the amendments for Assignment #1 or delivered them to Raav. The plaintiff granted that offer had effectively collapsed.
- [20] Mr. Kumar decided he wanted to incorporate a company that would become the assignee of the contract to purchase instead of A&G. On February 2, 2016, Mr. Khela accordingly asked Raav to enter into an assignment of the lots with a numbered company, 418, affiliated with A&G. Terms and conditions were to be the same as before, although as it was, Mr. Basra also wished to use a numbered company to complete the purchase in place of Raav and he was amenable to A&G also using a numbered company. Accordingly, for nominal consideration, Raav, as assignor, and 111, as assignee, entered into an assignment of Contract of Purchase and Sale for purchase of the two lots. At para. 29 of his first affidavit, Mr. Basra deposed that Mr. Khela advised him A&G would serve as guarantor for 418. The parties disagree over whether it was agreed A&G would guarantee 418's performance.
- [21] Mr. Khela told Mr. Basra he would simply white-out the names of the parties in the amended Assignment #1 from A&G to 418 and from Raav to 111 and did so.
- [22] Mr. Khela emailed Mr. Basra the same form of assignment agreements with the same handwriting, signatures, and initials as were on the previous version of Assignment #1. I will refer to this new version of the assignment as "Assignment #2". The names of both original parties were whited out and changed to the parties' numbered companies. Mr. Khela whited out part of the date for the subject removal that had been written in as February 1, 2016, leaving it to read as February 0, (i.e. no specific day of the month). The date for acceptance of the offer, however, still stood at February 1, 2016 at 3:00 p.m.
- [23] On February 3, 2016, Mr. Basra further amended Assignment #2 by changing the date of acceptance to February 4, 2016 at noon. He initialled the further amendments and emailed them to Mr. Khela. I will refer to this now amended assignment as "Assignments #3". It is not disputed 418 never endorsed Assignments #3 or delivered it to 111 or Raav, and that neither party endorsed acceptance of the assignments as representatives of 418 or 111.
- [24] At para. 36 of his affidavit, Mr. Basra explained how the acceptance date for Assignments #2 changed to February 4, 2016 at 12:00 p.m.
36. On February 3, 2016, Mr. Khela called me to request that the time for acceptance of Assignments #2 be changed to February 4, 2016 at 12:00 p.m. I agreed and advised I would make the amendment to the date and time of acceptance and would send the amended Assignments #2 to him for endorsement by 418.

- [25] Mr. Basra summarized the applicant's position regarding the plaintiff's performance of its obligations:
42. I called Mr. Khela on February 4, 2016 at 4:51 p.m. as I had received a missed call from him. I advised Mr. Khela that his client had failed to provide the endorsed Assignment #3 or the deposit prior to noon. He requested I now accept the deposit. I reminded him that I had told him his client had to provide the endorsed Assignments #3 and deposit by noon and there was no agreement between the parties.
43. 418, A&G and Mr. Khela never delivered or asked me or anyone on behalf of 111 or Raav to accept endorsed Assignments #3 or the deposit by 418 by 12:00 p.m. on February 4, 2016.
44. As 418 failed to deliver acceptance of Assignments #3 and the deposit to 111 prior to 12:00 p.m. on February 4, 2016, there was never an endorsed assignment agreement, or any agreement, between 111, as assignor, and 418, as assignee.
- [26] Mr. Basra testified on examination for discovery that he considered the offers were enforceable and capable of being accepted, and that when he was approached by another realtor about another potential assignee, GG Metro Developments Ltd., he told the realtor the contracts were tied up and he could not move forward with an offer from them. But as it turned out, the applicants say the plaintiff never did accept the offer and is in no position to enforce any assignment agreement.
- [27] After Mr. Khela asked Mr. Basra for additional changes to the second assignment, Mr. Basra changed the date for acceptance to read: "This offer, or counter-offer, will be open for acceptance until 12:00 o'clock p.m. on February 4, 2016". This was a critical change.
- [28] Mr. Kumar deposed that on February 3, 2016, at 3:57 p.m., Mr. Kumar forwarded Canadian Western Bank copies of the assignment with the revised February 4, noon, the time for acceptance. When asked at examination for discovery why he had left the matter so late, Mr. Kumar stated he was "really busy."
- [29] 111 states that, at all material times, it has maintained the position that for its offer to be accepted, it required 418 to deliver Assignments #3, the subject removal documents, and the deposit monies, by noon on February 4, 2016. On his examination for discovery, however, Mr. Kumar testified he thought that he had until day's end to complete.
- [30] It is not in dispute that the plaintiff never delivered its written acceptance to 111 by 12:00 p.m. noon on February 4, 2016. Mr. Kumar and Mr. Khela both deposed they arranged for Mr. Khela to meet at Kumar's home at 9:00 a.m. to endorse the revised Assignments #3. Mr. Kumar stated he initialed many boxes that Basra had initialed. For reasons discussed later in these reasons, the applicants doubt whether Mr. Kumar signed the amended assignment at 9:00 a.m. as he claims.

[31] In the document that Mr. Kumar holds out as the one he allegedly signed at 9:00 a.m. on February 4, he did not initial clause 4.2. It obliged the plaintiff assignee to pay a \$180,000 deposit, part of the assignment amount, "upon subject removal". But at clause 4.3, no date is entered for removal of the subject clause, appearing only as "February 0", to the extent it is legible.

[32] Mr. Kumar's examination for discovery testimony indicates a meeting between Mr. Khela and him that lasted perhaps five minutes, both he and Mr. Khela were in a hurry, Mr. Kumar testified, discussions taking place at the front door, no table sat at or written on, and taking one or two minutes to initial the agreement and give it to Mr. Khela, Q 865 - 866:

Q: And how long was this whole interaction of [Mr. Khela] in your house?

A: He didn't stay too long.

Q: How long?

A: Only might have been five minute. Then I told him, you know, I can meet you afternoon at the bank and give you all my cheque, the cheque afternoon.

[33] At Q 829, Mr. Kumar said the first time he saw that the acceptance date was noon on February 4, was the morning of February 3, 2016. At Q 827, he stated he presumed he had until the end of the day to remove the subject clause.

Q: Did you have any discussions [referring to previous day] with Mr. Khela about February 4 at noon or did you simply tell him the bank needs a few more days that you told him in early February?

A: No, I said that's no problem but the bank told me they will give the answer on February 4th and that's why, when I talked to Khela next day, I invite him to come to my home get the paper sign, paper initial -- initial all the document.

So that time I presuming, you know, I have the end of the day, February end of day to remove the subject.

[34] The parties agree the last communication the parties had before 12:00 p.m. occurred at 11:03 a.m., on February 4, 2016. Mr. Basra deposed he contacted Mr. Khela to ask if the plaintiff "would be accepting Assignments #3"; and that in response Mr. Khela had advised him, "his clients required a few more days". Mr. Basra further deposed, as I noted earlier, that he told Mr. Khela the plaintiff "must deliver the enclosed Assignments #3 and deposit by noon that day as there would be no agreement unless [the plaintiff] took these steps within [the] time". Mr. Basra states that he also told Mr. Khela he had other interested parties, which was the case.

[35] On the other hand, Mr. Khela deposed in his March 22, 2016 affidavit that Mr. Basra had asked "if the assignments had been accepted, or words to that effect". Mr. Khela deposed he told Mr. Basra that "the assignments had been signed that morning, that the financing

approval was expected that day and that Mr. Kumar was to call [him] when he had a bank draft for the deposit and the assignment fees payable and [he] would be meeting Mr. Kumar at the bank". (As we shall see, that meeting did not occur until 2:00 p.m. that day.) Mr. Khela then deposed that he asked Mr. Basra "whether [he] should send the accepted assignments to him at that time", and that Mr. Basra replied, 'Let me know when you have the draft and I will meet you' or words to that effect." Mr. Khela deposed that he agreed and they ended the call.

- [36] Mr. Khela's affidavit on this exchange exhibits noteworthy conspicuous discrepancies between paras. 36 and 62. As we have seen, at para. 36, he deposed that Mr. Basra told him to "let [him] know when he had the draft and [he] would meet [him]'or words to that effect" - which is not a direct answer and also happens to suggest Mr. Khela did not convey the impression he had the signed agreement in hand. In para. 62 of the same affidavit, Mr. Khela deposed, on the same point, that "I told him that I had the signed assignment agreements and that final financing approval was imminent, and asked whether he wanted me to provide him with the executed assignment agreement, to which he replied that I should do that once I have the cheque."
- [37] This would likely be closely cross-examined in conjunction with other incommensurate related aspects of Mr. Khela's and Mr. Kumar's evidence.
- [38] Mr. Kumar's affidavit is silent on this exchange between Mr. Basra and Mr. Khela. On his examination for discovery, he confirmed he understood the importance of including all relevant facts. He granted he was not present during any of the conversations that took place between Mr. Khela and Mr. Basra and had to rely on what Mr. Khela told him.
- [39] The applicants complained that the first time they were provided with copies of Assignments #3 with Mr. Kumar's signature or any subject removal document was during the document discovery process. They submit the court will need to skeptically regard 418's conduct surrounding the signatures.
- [40] Mr. Kumar deposed at para. 32 of his first affidavit that soon after 2:00 p.m., he met with Mr. Khela, who collected a bank draft for the deposit and had him sign a form for removal of the subject financing condition, which Mr. Khela also took with him. Attached to his affidavit at Exhibit "J" is a bank draft for \$830,000. Attached as Exhibit "K" to his affidavit is a copy of an undated Removal of "Subject to Clause". It is somewhat surprising how remiss the paperwork has been, considering the values involved.
- [41] At para. 34, Mr. Kumar deposed that he believed he had acted in good faith and taken all steps necessary to obtain the assignments of the contracts and be ready to complete the purchases of the property.

1 Plaintiff's February 4, 2016 dealings with the lending bank

- [42] The plaintiff exhibited a letter dated February 4, 2016, co-signed signed by Mr. C. Bhatti, Senior Manager, Commercial Banking for Canadian Western Bank and the Branch Manager. The confirmed the bank's offer of financing for \$6,632,000, consisting of \$2,762,000 borrower's equity and \$3,870,000 bank financing. The letter set out a number of loan conditions, including a requirement that the borrower maintain total cash equity of at least \$2,762,000 in the project at all times until full repayment of the loan. The letter also acknowledged the bank's receipt of a non-refundable commitment fee of \$10,000. The terms were confirmed by two signatures on behalf of the borrower, 418, and the signatures of three guarantors. Mr. Kumar did not mention in his affidavit the participation of Rajinder Nagra as one of the guarantors, the point being that the guarantors would have to be assembled and the bank's offer fully signed before Mr. Kumar could be sure he had the necessary financing.
- [43] Mr. Khela stated in his affidavit at para. 38 that he met Mr. Kumar at the bank at around 2:00 p.m. and that the bank draft was ready soon after his arrival. He further deposed at para. 39 that he then immediately tried to phone Mr. Basra "more than once to arrange to meet him and give him the bank draft and executed assignment agreements", his calls going unanswered.
- [44] From his failed attempts and the contents of text messages from Mr. Basra at 3:37 p.m. and 4:50 p.m., it was obvious the applicants considered the plaintiff in breach of the noon deadline for acceptance of the offer, payment of the deposit and removal of the subject clause. In his affidavit sworn on March, 21, 2016, Mr. Bhatti deposed at para.4 that he "work[ed] intensively on the application as [he] knew from speaking [to his colleague] and Mr. Kumar that the matter was very time-sensitive".
- [45] Mr. Bhatti confirmed that between January 28, 2015 and February 3, 2016, he met several times with Mr. Kumar and his business partner and had indicated he "did not foresee any problems with their loan application". On February 3, 2016, from Mr. Kumar he became aware the assignments now contained a February 4, 12:00 p.m. deadline for written acceptance of 111's offer. On "February 3, at 5:05 p.m. (Pacific) he finalized his recommendation to head office for approval of a loan.
- [46] At para. 12 of his affidavit, Mr. Bhatti deposed that before lunch on February 4, he had a discussion with Mr. Basra and recalled telling him that the loan had been recommended for approval, and that he would definitely have a formal response before the end of the day. He added, "I did not guarantee that head office would approve the loan as that is beyond my power, but I told him that all looked good. I told him that I would try to call him back before 2:00 [p.m.] with an update." At para. 13, Mr. Bhatti further confirmed he received formal written approval from Edmonton at 12:36 p.m. Pacific time. After that approval came, Mr. Kumar and his business partner, Mr. Nagra, attended the bank, "to open an account and sign documents and to receive a bank draft for \$830,000 for the amounts due to 1062111 BC Ltd. under the Assignment Agreements for the [two lots]".

- [47] On February 12, 2016, the plaintiff's solicitor, Mr. J.A. Jaffer, wrote Royal Trust demanding that it complete the sale of the two properties to his client.
- [48] Mr. Jaffer filed two caveats: the first, on February 5, 2016; the second, on February 9, 2016, both were rejected by the Land Title Office for fundamental deficiencies.
- [49] As of February 4, 2016, the plaintiff's only financial commitment was the bank's committal fee of \$10,000. The draft for the deposit was never cashed.

2 GG Metro Developments Ltd.

- [50] Turning briefly to GG's involvement. A real estate representative for GG had been in regular contact with Mr. Basra because GG was interested in the lots. Mr. Basra told the realtor an assignment had been offered to a third party, open for acceptance until noon on February 4, 2016. GG was interested in making an offer if that did not go through. After the realtor contacted Mr. Basra and asked him if the assignment had been accepted, Mr. Basra told him it had not gone through. In the afternoon of February 4, 2016, GG and 111 made an agreement for the assignment of the purchase contracts for lots 1 and 2.
- [51] The terms of the professionally drafted GG assignment are clear. There is no contention that GG was other than a bona fide arms-length purchaser.
- [52] As the \$900,000 advanced has not been held in trust, GG stands to lose \$900,000 if the CPL is not cancelled and the amount not recoverable from the assignor.
- [53] There is no contention that GG was other than ready, willing, and able to complete the transaction on April 29, 2016, the new completion date on the original contract of purchase and sale between Royal Trust, Raav and 111.
- [54] There is no dispute between the applicants or GG, apart from 418's CPL and claim that it is entitled to specific performance of its alleged assignment.

Timeline Table

- [55] Just for quick reference, the following aide-mémoire table gives a skeletal timeline of the succession of assignment agreements, explained more below. The critical documents are Assignments #3, particularly the second of the two assignments numbered 3 that way:

TIMELINE OF ASSIGNMENTS

Date

Contracts

Vendor/

Assignor

Purchaser/

Assignee

Stated

Acceptance/

Completion Date

26-Oct-2015

Original purchase/

Royal Trust

Royal Trust

Raav Homes Ltd.

26-Feb-2016

1-Feb-2016

Assign #1, lots 1 & 2

Raav Homes Ltd.

A&G Investment Inc.

None

1-Feb-2016

Assign #1, lots 1 & 2

Raav Homes Ltd.

A&G Investment Inc.

1-Feb-2016,

3 P.M.

2-Feb-2016

Assign #1, lots 1 & 2

Raav Homes Ltd.

111 B.C. Ltd.

Not applicable

2-Feb-2016

Assign #2, for lots 1 & 2

111 B.C. Ltd.

418 B.C. Ltd.

1-Feb-2016,

3 P.M.

3-Feb-2016

Assign #2, for Lots 1 & 2

111 B.C. Ltd.

418 B.C. Ltd.

3-Feb-2016,

3 P.M.

3-Feb-2016

Assign #3, for Lots 1 & 2

111 B.C. Ltd.

418 B.C. Ltd.

4-Feb-2016,

12 P.M.

4-Feb-2016

Assign #3, for Lots 1 & 2

111 B.C. Ltd.

418 B.C. Ltd.

4-Feb-2016,

12 P.M.

4-Feb-2016

Assign, for Lots 1 & 2

111 B.C. Ltd.

GG Metro Dev. Ltd.

4-Feb-2016,

N/A

[56] The issues addressed on the application are:

1. Have the applicants shown they are likely to experience "hardship and inconvenience" as a result of the registration of the CPL?
2. Should the CPL be discharged because the plaintiff's claim for specific performance has no merit?
3. Are damages an adequate remedy?
4. Is the assignment void for uncertainty of essential terms such as the date for removal of the subject clause?
5. Should the applicants be required to post security; and if so, in what form and amount?

[57] In addition, the plaintiff raised a standing issue:

6. Do the applicants have standing to apply for cancellation of a CPL?

Sections 256 and 257 of THE LAND title act

[58] The relevant sections of Section 256 and 257 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA] provide:

256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit

- (a) particulars of the registration of the certificate of pending litigation,
- (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
- (c) the grounds for those statements,

apply for an order that the registration of the certificate be cancelled.

257 (1) On the hearing of the application referred to in section 256 (1), the court

- (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
 - (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and
 - (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or
- (b) may refuse to order the cancellation of the registration, and in that case may order the party

- (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and
 - (ii) to give security in an amount satisfactory to the court and conditioned on the fulfilment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.
- (2) The form of the undertaking must be settled by the registrar of the court.
 - (3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.

Discussion of issues

1 Have the applicants shown they are likely to experience "hardship and inconvenience" as a result of the registration of the lien?

.1 Applicable principles

- [59] As a preliminary matter, the applicants must show they are experiencing or likely to experience "hardship and inconvenience" as a result of the filing of the CPL: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388, at para. 28 [Youyi]. The court need not be exacting in its analysis of hardship and inconvenience, but it should be significant and hard to bear: para. 28.
- [60] Unless the CPL is removed, the applicants cannot complete their purchase agreement with Royal Trust and in turn perform their assignment obligations to GG. They could lose their large deposit paid to Royal Trust. They have indemnified Royal Trust for financial losses they have incurred because of the failed completion.
- [61] The applicants have and will continue to suffer significant financial hardship and inconvenience if the CPL is not discharged. I find the applicants have crossed the necessary threshold for bringing an application.
- [62] A cancellation of the CPL does not automatically flow from a finding of hardship and inconvenience; it remains a matter of discretion: *Youyi* at paras. 28-29.
- [63] Although an application under s. 256-7 is interlocutory, if specific performance is sought in the underlying litigation, the cancellation of the CPL deprives the plaintiff of the remedy it seeks and leaves the owner free to sell the property free of any proprietary claim: *Youyi* at para. 30.
- [64] It is for the applicant to satisfy the court that it is clear and obvious the plaintiff cannot succeed on the claim for specific performance at trial: *Youyi* at para. 34.

2 Should the CPL be discharged because the plaintiff's claim for specific performance has no merit?

[65] The applicants submit the CPL should be discharged because the plaintiff cannot show they had a binding and enforceable agreement with 111, and there is consequently no merit to the plaintiff's claim they have any claim to or interest in the lots.

.1 Principles

[66] Section 59(3) of the Law and Equity Act, R.S.B.C. 1996, c. 253 provides:

- (3) A contract respecting land or a disposition of land is not enforceable unless
 - (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
 - (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
 - (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

[67] It is trite contract law that the formation of a contract requires an offer, an acceptance and communication of an acceptance. If a manner of communication of acceptance is not mandatory, then another means of communication will form the contract provided that the acceptance is actually received by the offeror within the prescribed times: *Premium Properties Ltd. v. Subway Franchise Restaurants of Canada Ltd.*, 2014 ONSC 3150 at para. 17.

[68] Assignments #3 stipulated acceptance of the offer occurred "upon acceptance of the offer, or counter-offer, by accepting in writing and notifying the other party of such acceptance."

[69] In *Cheema v. Chan*, 2004 BCSC 1342, Burnyeat J. decided a case very similar case to this. Three properties were listed for sale in October 2003. In February 2004, the purchaser delivered three offers to the agent that required acceptance by 10:00 .a.m. The vendor denied they were accepted by 10:00 a.m. The wording on what was required for acceptance was identical to terms in this case.

[70] The agent in the *Cheema* case represented the defendant vendor. Burnyeat J. found that although the real estate agent was in a position to receive the acceptance in writing on behalf of the vendor, the terms for acceptance required the vendor be notified of the acceptance before the deadline for acceptance. Burnyeat J. further found, as set out at paras. 37 to 39 of *Cheema*, i.e. that the notification of acceptance had to be in writing, delivered before the deadline, and that the agent's notification did not suffice for notification of the plaintiff. In this case, there is no evidence of any agency agreement, which strengthens the applicants' position on notification.

.2 Failure to sign and deliver

- [71] Mr. Khela was not a dual agent. The parties individually deny he was their representative. There is no evidence to show the Assignments #3 contemplated anything other than written acceptance and direct notification to the other party of such acceptance before the deadline for acceptance.
- [72] The differences between the parties regarding what Mr. Basra and Mr. Khela did or did not discuss at 11:03 a.m., one hour before the deadline for acceptance, do not vary the terms for acceptance in the contract. None of the plaintiff's evidence shows how Mr. Khela was in any way deterred from or encouraged to delay delivery of Mr. Kumar's alleged acceptance to Mr. Basra, if it was by then in hand, by email, text, fax (as he had done on other occasions), or in person.
- [73] None of 418's evidence explains what happened to Assignments #3. Mr. Kumar said he signed around 9:00 a.m., but did not explain why they were not delivered, emailed or faxed to the applicants, as Mr. Khela had done before, if Mr. Khela indeed had an executed Assignments #3 in hand. The bank had not been provided with a signed assignment at that point and the deposit cheque was not emailed to Mr. Basra until 5:43 p.m. Mr. Kumar and Mr. Khela knew 111 and Raav were anxious about delivery of their money and the 11:03 a.m. conversation occurred two hours after Mr. Kumar said he signed the documents.
- [74] The applicants also submit the plaintiff has failed to show, apart from Mr. Kumar's bare assertion that 418 was ready, willing, and able to complete, that it was able to meet the various conditions Mr. Bhatti itemized in Canadian Western Bank's commitment letter, most notably, the requirement that 418 provide 40% of the financing required, i.e. \$2,762,000.

3 Plaintiff's response

- [75] The plaintiff submits there is no reason to believe that Mr. Khela, an experienced realtor, would not have Mr. Kumar endorse the assignment agreements at 9:00 a.m., three hours before the deadline for acceptance, it being negligent in the extreme for him, 418 submitted, for him not to have done so. However, considering Mr. Khela would have been paid \$65,000 if the assignments were executed and delivered to Mr. Basra, it makes it that much more peculiar why Mr. Khela did not submit them to Mr. Basra forthwith, if Mr. Khela did indeed have the executed assignments in hand.
- [76] The plaintiff further submits the language in clause 4.21 of the assignments - "by accepting in writing and notifying the other party of such acceptance, there will be a binding Assignment Agreement on the terms and conditions set forth"-- does not expressly require communication of acceptance in writing; and that accordingly oral communication of the written acceptance was sufficient. Even were that so, the plaintiff has to confront the question of Mr. Khela's capacity to communicate acceptance to the applicants.

- [77] Assuming the 11:00 a.m. conversation did not amount to sufficient notification, however, the plaintiff submits Mr. Kumar's having handed to Mr. Khela the written assignments at 9:00 a.m. was notification to 111 sufficient to fulfil the delivery component of acceptance. The plaintiff proposed that Mr. Khela's agency extended to "all of the things that would normally be in the course of the agent's business" "restricted to the range of his employment and to the acts and representations which a prudent and ordinarily sagacious and experienced person might expect him to do or to be authorized to make in respect of the particular business entrusted to him" citing *Manufacturers Accident Insurance Co. v. Pudsey*, (1897) 27 S.C.R. 374 at paras. 23-26. The plaintiff pointed out that the court also confirmed the sufficiency of communication of an acceptance if it is made and communicated through the same agent who presented the offer.
- [78] The argument Mr. Khela was authorized to accept and offer on their behalf does not much assist the plaintiff. Mr. Khela's \$65,000 fee agreement, mentioned earlier in these reasons, specifically denied agency obligations toward either party. The parties individually denied he was their agent. Mr. Kumar was specific about it. Mr. Khela having conveyed drafts of assignments back forth, making a few authorized changes in the draft did not make him an agent for the purposes of confirming acceptance in this case.
- [79] *Carmichael v. Bank of Montreal*, [1972] 3 W.W.R. 175 (Man. Q.B.) does not assist in this case either. Mr. Kumar practised law in India and was an experienced developer. Mr. Khela was experienced in real estate matters. They knew they faced a noon deadline. They had a reasonable time, from 9:00 a.m. to 12:00 noon, three hours, to communicate written acceptance to Mr. Basra. The applicants had agreed to this deadline at the plaintiff's request. Given the immediate means of communication right at hand and the awareness of the applicant's anxiety about completing and its receipt of the monies due, the plaintiff had every reason to give unmistakable notification of 418's written acceptance.
- [80] Regarding Mr. Bhatti's discussion with Mr. Basra, it can be reduced to the narrow point that "everything looked good and that he would have a formal response before the end of the day." Mr. Bhatti's communication was not a notification by the plaintiff of a written acceptance before 12:00 p.m.
- [81] Waiver of the financing condition before noon is a secondary matter, as there is no evidence of written acceptance of the offer by 12:00 p.m. If a time for fulfillment is not stipulated a party can waive a condition within a reasonable time: *Gulston v. Aldred*, 2011 BCCA 147 [Gulston] at paras. 39-40. That principle does not assist the plaintiff here, where the court has not been shown evidence of any written acceptance and notification by the plaintiff before 12:00 noon. Further, the parties in *Gulston* were represented by a realtor who had been granted limited dual agency by the parties, which is not the case here.
- [82] I will not comment on the other ably argued but somewhat remote cases the plaintiff relied on for its submissions. I found no merit in the plaintiff's agency submissions.

4 Summary of merits assessment on acceptance issue

- [83] From the voluminous affidavits, documents, examination for discovery excerpts, and agreed facts, some incontrovertible facts emerge that are not going to mutate between now and trial. Written acceptance by 12:00 noon was required, or there would be no agreement. Mr. Khela knew this. A signed acceptance could have been emailed, faxed, or texted, as Mr. Khela had done on previous occasions. Mr. Basra happened to call at 11:00 a.m., one hour before the deadline, but Mr. Khela did not call, email or text Mr. Basra before then, or before noon.

5 Credibility issues

- [84] Credibility issues are best addressed at trial, but the applicants drew out a number of conspicuous internal inconsistencies and improbabilities in the plaintiff's evidence that will not change between now and trial, and can be considered at the interlocutory state. I have done so, but given this is an interlocutory matter, I will not comment much on them, noting only a couple of solid evidentiary matters not likely to change character between now and trial.
- [85] On examination for discovery, Mr. Kumar testified he was not aware of 111's position it had never received Assignments #3 endorsed by 418 and that he had never asked Mr. Khela if he had delivered the assignments to 111. I also note Mr. Kumar's testimony at examination for discovery - questions 803 to 827 inclusive - particularly between questions 814 through to 820 - on the subject of why it took the plaintiff five and one-half hours to forward Assignments #3 to the bank, and even then endorsed only by 111.

6 GG's litigation position

- [86] GG distilled its position on the acceptance issue with the following points: Mr. Kumar and Mr. Khela are sophisticated business people. Mr. Kumar formerly practiced law. They have been represented by skilled counsel. This issue has been front and centre in this litigation, yet to date, neither have made any attempt to explain the absence of notification, which GG submitted cried out for an explanation.
- [87] GG submitted the only explanation that consists reasonably with Mr. Kumar's testimony that he had signed Assignments # 3 is that he did not want to be committed until financing was approved, [Q 563-564]. GG pointed out final approval for financing was not sent to the bank's head office until late on February 3; that Mr. Kumar could not know if financing had indeed been approved at 9:00 a.m. when he purportedly signed the final document.
- [88] I will not comment on counsel's logical circumstantial-evidence submission, except to note that it addresses the plaintiff's position that Mr. Basra's evidence that Mr. Khela told him "his clients needed a few more days" was "implausible to the point of being preposterous" - when it is taken into consideration that the bank had not yet given its approval at 11:03 a.m. when Mr. Khela spoke with Mr. Basra.

7 Legal principles and application

- [89] If a plaintiff with a CPL is advancing a claim to an interest in land and fails to raise a triable issue, or if the claim has no merit or no chance of success, the CPL will be cancelled, *De Cotiis v. De Cotiis*, 2004 BCSC 1658 at paras. 35-36; *0861695 B.C. Ltd. v. Meola*, 2013 BCSC 121 at para. 8 [Meola]; *Aviawest Resorts Inc. v. Memory Lane Developments Inc.*, 2004 BCSC 999 [Aviawest] at para. 8.
- [90] The court does not determine the application as if it were a summary trial, but must engage in an assessment so far as is necessary to enable the court to determine if the plaintiff has any chance of success on its claim: *Aviawest* at para. 8.
- [91] Considering all the evidence, especially facts not in controversy and submissions of counsel, I find the plaintiff has little chance of success on its claim for specific performance, or alternatively damages. Inconsistencies and implausibilities in the affidavits presented by the plaintiff and in examination for discovery testimony given by Mr. Kumar further weaken its position.

Are damages an adequate REMEDY?

- [92] The applicants submit the investment properties in this case are not unique, an award of damages is capable of adequately compensating the plaintiff's loss and that an accurate assessment of damages would be possible.

1 Legal principles

- [93] *Newbury J.A.* pointed out in *Youyi*, at para. 49, that the grant of the remedy of specific performance "has much to be said for it, at least in the context of contracts for the sale and purchase of land. ... [I]t is likely to be less expensive and time-consuming than the assessment of damages, which requires the parties to marshal expert evidence concerning the value of the land as at a particular date (which may be in issue) in what may be an unstable market".
- [94] *Newbury J.A.* further stated at para. 56:
- [56] [T]he determination of whether damages will provide an adequate or appropriate remedy is largely fact-dependent and should not be determined by the application of a "presumption or replaceability" of the property in question.
- [95] When the parties are at the trial stage, the onus is on the plaintiff to show that damages would provide an adequate or appropriate remedy. At the interlocutory stage, however, the onus is on the applicant to show that "it [is] plain and obvious the person seeking specific performance would not succeed on that claim at trial" (*Youji*, para. 39), [emphasis in original]; and "damages would provide an adequate (or appropriate) remedy" (*Youyi*, para. 57). The chambers judge's focus is not only on whether damages will be adequate, but "whether specific performance can be eliminated as having no reasonable chance of success" (*Youyi*, para. 39).

[96] "Uniqueness [of a property] is a matter of proof and the onus lies on the party seeking the remedy" (Youyi, para. 45), [cited authorities omitted.] While it is "important to identify the factors that make a property unique to a particular plaintiff [t]he more fundamental question is whether the plaintiff has shown that the land rather than its monetary equivalent better serves justice between the parties" (Youyi, para. 45), [authorities omitted; underline emphasis removed.]

[97] In *Earthworks 2000 Design Group Inc. v. Spectacular Investments (Canada) Inc.*, 2005 BCSC 22 [Earthworks], a summary judgment case, Slade J. helpfully distilled the leading case on the uniqueness of property. *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 [Semelhago], and other decisions are noted in his reasons.

[98] Slade J. states at para. 22:

[22] Semelhago, and other decisions mentioned above, reveal that an assessment of uniqueness must take account not only of the attributes of the property, but also the attraction or value of those attributes to the particular purchaser. A property which is generally considered desirable due to locational or other market factors will not necessarily be considered sufficiently unique to satisfy the test for specific performance. Similarly, a property which has an intrinsic value to a particular purchaser, if readily substituted by another available property, will not be sufficiently unique to establish a basis for specific performance. Further, assuming that some aspect of uniqueness can be made out, it remains for the purchaser seeking specific performance to establish further justification for specific performance. This may take the form of proof that damages are not adequate compensation.

[Emphasis in original.]

[99] It was held in *1174538 Ontario Ltd. v. Barzel Windson (1984) Inc.*, [1999] O.J. No. 5091 (Ont. S.C.J.) that a property with special investment attributes purchased as an investment and for profit was not unique so as to justify an order of specific performance. See also in this vein: *Earthworks*, para. 42; *Trinden Enterprises Ltd. v. Ramsay*, 2004 BCSC 226, para. 49.

[100] The court in *Youyi*, stated at para. 35, citing *United Gulf Developments Ltd. v. Iskandar*, 2004 NSCA 35:

[U]niqueness is only part of the equation. The essential question is whether damages are capable of compensating the loss and whether accurate assessment of damages will be possible, or whether the exercise will be chiefly speculative or conjectural. [Authorities cited omitted, emphasis in original.]

[101] At trial, "the plaintiff is not required to prove a negative and demonstrate the complete absence of comparable properties", *Youyi*, para. 45, citing *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.* (2001) 56 O.R. (3d) 341 (S.C.), *aff'd* (2003) 63 O.R. (3d) 304 (C.A.), (*lve.to* app. *dism'd*, [2003] S.C.C.A. No. 145) [Dodge]. In *Dodge*, the court explained at para. 60:

- [60] [U]niqueness does not mean singularity. It means that the property has a quality (or qualities) that make it especially suitable for the proposed use that cannot be reasonably duplicated elsewhere. To put this another way, the plaintiff must show that the property has distinctive features that make an award of damages inadequate. The plaintiff need not show that the property is incomparable.
- [102] I note in passing that where the cases I have mentioned refer to the burden of proof being on the plaintiff to prove the uniqueness of the property at trial, I am mindful it may be the burden of proof at trial that is being addressed, which is not the same on an interlocutory application, where the applicant must satisfy the judge it is plain and obvious that the person seeking specific performance will not succeed on that claim at trial, and damages will provide an adequate or appropriate remedy. Accordingly, I have considered the plaintiff's trial burden only as part of my determination as to whether the applicants have shown it is plain and obvious that the plaintiff will not succeed on its claim for special damages and that damages will provide an adequate or appropriate remedy.
- [103] The applicants maintain the lands in question are investment lands that are subdividable and can be developed for profit. At paras. 5-7, of his affidavit, Mr. Kumar stated his interest in the property:
5. My interest in the Property was for both personal and business reasons. On the personal side, the Property is situated close to newer shopping districts in Surrey which my family enjoys going to, and in walking distance from shops and services that we attend.
 6. The Property is also ideally situated only about 10 blocks from where my daughter and her two children live. My wife and I have been planning to build a new home in this area of Surrey, and building a new home on one of the subdivision lots in the Property will give us the opportunity to be much closer to our children for our retirement years.
 7. On the business side, I felt that the Property would offer excellent redevelopment potential. [He then set out expected profits.]
- [104] On the commercial side of his interest in the property, Mr. Kumar testified on examination for discovery he had not decided on the number of lots he would subdivide, whether he would sell the lots bare or build homes, and whether to involve other investors (Q 272-288 and Q 150-152).
- [105] Mr. Kumar's current home of 25 years is located in the vicinity of the subject lands. Mr. Kumar is interested in its nearby amenities. Mr. Kumar agreed on examination for discovery that other bare lots or teardowns are available in the same area, albeit at what would be a higher price than a lot he could subdivide in the development. Exhibit "A" attached to Mr. Basra's second affidavit appears to confirm this. If that is the case, the court could award the difference in damages.

- [106] No application for subdivision of the properties has been made. Mr. Kumar had not made any inquiries with the City. He did not know how many homes were already located on the properties, etc. He had never personally viewed the subject lands (Q 252, examination for discovery).
- [107] The applicant has shown "that it is plain and obvious that damages [would] provide an adequate remedy", considering the property and the purchaser: Youyi, para. 57. The property was clearly an investment property. It is noteworthy that 418, not Mr. Kumar, is the plaintiff. As for Mr. Kumar's personal interests, other residential lots are available that would adequately address Mr. Kumar's personal interests in the subject properties. Mr. Kumar never looked at the subject lands to confirm whatever special characteristics they had and whether they would meet his objectives.
- [108] The plaintiff's evidence makes it abundantly clear that its real interest was in making a profit from the development of the property.
- [109] An implicit representation of the plaintiff's underlying purpose for filing the CPL can be found in paras. 4-5 of the Part 5 of the plaintiff's application response: being left without an effective remedy because "1062111 has no assets" and to address that concern, to obtain an order requiring 111 to post security of \$3,100,000 for the plaintiff's anticipated profit.
- [110] Accordingly, the applicants have discharged their burden on this issue. Damages would provide an adequate remedy and I would cancel the CPL on this ground.

Is the assignment void for uncertainty of essential terms such as the date for removal of the subject clause?

- [111] Given the dispositive findings reached so far, this issue is moot and I will address it only briefly. The applicants submit the date for removal of the subject clause is a material term as that is the date on which Assignments #3 would become binding on the parties. The evidence is clear that this was a very important term for both parties. Mr. Kumar acknowledged its importance to him several times. 111 was anxious to complete and receive the deposit. Having no stipulated date for removal of the subject clause would leave 111 in the predicament of having to complete, but without a binding contract until the subject clause was removed.
- [112] An effective agreement requires a meeting of the minds of the parties. An enforceable contract requires a consensus between the parties on all of the essential terms of their contract: *Litt v. Gill*, 2015 BCSC 491 [Litt], paras. 16-17, citing *Frolick v. Frolick*, 2007 BCSC 84, para. 30:
- [30] It is the responsibility of the parties, not the court, to clearly express those essential terms so "that their meaning can be determined with a reasonable degree of certainty": *Scammell and Nephew Ltd. v. Outston*, [1941] A.C. 251.

[113] In *Litt, Fenlon J.* as she then was, refused to infer terms where the construction contract was silent on when construction would commence and complete and due dates for interim payments. At para. 37 she explained:

[37] As Professor Fridman notes in *The Law of Contract in Canada*, 5th ed (Scarborough: Thomson Carswell, 2006) at 21-22:

For the most part, where terms are missing or have not been finalized, or there is some ambiguity about the precise meaning of what the parties appear to have agreed to, the general tenor of the decisions is against any possibility of completing the parties' work for them and creating a valid contract out of the vague contractual intent that may be evidenced by their language or conduct.

[114] The plaintiff pointed out Mr. Basra noticed the subject removal date on the revised version of Assignments #3 had been left blank before he gave it back to Mr. Khela. Mr. Kumar deposed he did not notice the omission and just initialed the boxes Mr. Basra had initiated and operated on the understanding he had until the end of the day to waive the subjects and provide the deposit.

[115] Mr. Kumar's understanding, regarding the payment of the deposit, does not consist with Mr. Khela's testimony.

[116] The plaintiff relied on *Gulston*, at para. 39, which cited 54(c) of the Law and Equity Act, for the point that if time for fulfillment of a condition precedent is not stipulated, a party can waive a condition precedent within a reasonable time. *Gulston* involved a condition precedent that obligated the seller to provide a certificate of remediation of soil contaminated by a residential oil tank. The soil was in fact remediated in time, but the certificate testifying to that fact was not issued until five days later, and late. The matter was disposed of, ultimately, on the basis that the breach was not tantamount to the frustration of the contract, not through application of the Law and Equity Act.

[117] Given neither Mr. Basra nor Mr. Kumar stipulated a date for removal of the subject clause, but had clearly different expectations as to when that occurred, there was no consensus. The question of whether s. 54 would assist the plaintiff is arguable, but in this case, the contract was not capable of being performed without removal of the subject clause and that requirement of the Act would not be satisfied.

[118] Whether the failure to stipulate a time for removal of the subject clause rendered the contract void for uncertainty is at best arguable, but given the other conclusions I have reached, a determination either way would not alter the result.

Should security be ordered?

1 Principles

- [119] In *Braich v. Mission Development Corporation*, 2008 BCSC 1698, a foreclosure case, L. Smith J. stated at para. 68, "It is appropriate for the court to take into account the probability of the plaintiff succeeding in the action in determining the amount of security, if any, to be posted: s. 257(3) of the Land Title Act." [Emphasis in original.]
- [120] In *Meola*, Smith J. thought the plaintiff's case was weak, and stated the following at paras. 14 and 15:
- [14] I conclude that, if the plaintiff succeeds at trial, damages will be an adequate remedy and that, given my assessment of the plaintiff's likelihood of success on its claim to an interest in property, an undertaking similar to the one required in *De Cotiis*, will be sufficient security.
- [15] I therefore order that the CPL be cancelled upon the defendants providing an undertaking to pay damages that are proven and ordered to be paid as result of the cancellation.
- [121] See also *A&G Investment Inc. v. 0915630 B.C. Ltd.*, 2013 BCSC 1184, at para. 25, where the court found the plaintiff's claim sufficiently weak to order the CPL removal on an undertaking to pay damages.
- [122] My assessment in this case is also that the plaintiff's case has little chance of success and, at best, was weak. As set out at the start of these reasons, I accordingly ordered that the applicants provide only an undertaking to pay such damages as may be ordered by the court at the trial of this matter. The plaintiff had expressed concern about 111's ability to pay an award of damages. To the extent that concern has merit, it is addressed by the fact that both applicants will provide the undertaking.

Do the applicants have standing?

- [123] The plaintiff submits the applicants do not have standing because neither are "a person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered". The plaintiff argued any interest in the lots that the applicants had they divested and assigned to GG, alternatively, to 418.
- [124] 418 argued it is a requirement that before a person may apply for an order that the registration of a Certificate of Pending Litigation be cancelled under s. 256 of the LTA. The plaintiff must have an interest in land or a claim to an interest in land. What the plaintiff actually stated in its Application Response at para. 3 under Part 5 is that "the applicants do not have any right to apply under s. 256." This interpretation of the opening words to s. 256 is incorrect.
- [125] I find the applicants not only have standing to bring the s. 256 application as they do "claim to be entitled to an interest in land", but also because they do have a claim to an interest in the subject lots.

[126] There is no dispute that Raav as the original purchaser of Lots 1 and Lot 2 from the Estate had an equitable interest, a purchaser's lien, in the subject lots. Raav's deposits totalled \$180,000, and \$400,000 for lot 1 and lot 2 respectively. Where a purchaser has paid partial consideration, by, for example, deposits, they receive an equivalent equitable interest in that land at the time the purchaser provides the deposit or funds to the vendor in part payment of the purchase price. In *Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd.*, 2014 BCCA 113, Newbury J.A. explained how a purchaser's lien is thus security for monies paid under a binding contract at para. 32:

[32] As I will explain below, this reasoning overlooks the essential nature of a purchaser's lien as security for monies paid under a binding contract of purchase and sale that gives rise in Equity to "equitable title to the land to the extent of [the purchaser's] payments." See *Capital Plaza* at para. 9; see also *London & South Western Ry. v. Gomm* (1882) 20 Ch.D. 562 at 580-1.) Lord Westbury observed in *Rose v. Watson*:

When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase-money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate. [Emphasis in original.]

[127] In order to have standing to file a CPL, one must simply claim to have "an interest in land" under s. 215 of the LTA; and, likewise, in order to apply to remove a CPL, one must "claim to be entitled to an estate or interest in land". Nothing in the language of the LTA requires the applicant to in fact actually have a valid claim before they even bring the application, only that they claim to be so entitled. Then on the application being submitted, it may become quite to the Registrar of Land Titles, or in due course, to the court, whether or not they have no credible interest or claim to an interest.

[128] Routinely, purchasers with a purchaser's lien (thus claiming "an interest in land") apply to file CPLs on the subject land as against vendors. A purchaser's lien as explained above acts as a kind of secured interest that attaches to the land at the time of payment. It qualifies as a "charge" or "encumbrance". Under the LTA, a "charge", which includes an "encumbrance" is defined as:

"charge" means an estate or interest in land less than the fee simple and includes

- (a) an estate or interest registered as a charge under section 179, and
- (b) an encumbrance;

"encumbrance" includes

- (a) a judgment, mortgage, lien, Crown debt or other claim to or on land created or given for any purpose, whether by the act of the parties or any Act or law, and whether voluntary or involuntary
- [129] So as matters stand Raav had a purchaser's lien, which it assigned to 111. They are both listed as the assignors under the Assignment of Purchase Agreement with GG. This agreement has been duly executed and notice has been provided to the vendor, Royal Trust, informing them of the new assignee.
- [130] The question remains whether 111 wholly transferred its equitable interest in the lots to GG when it executed the Assignment of Purchase Agreement (dated February 4, 2016), so as to leave 111 completely bereft of any interest in the lots, so as to preventing them from successfully applying for removal of the CPL under s. 256 of the LTA; or, can it be said that 111 still retains some of portion of its purchaser's lien? This requires an examination of the consideration that is to pass between 111 and Raav as assignors and GG as assignee under their assignment agreement which is much like an original contract for purchase and sale of land.
- [131] In passing, I note the peculiarity in the plaintiff arguing that by virtue of their (failed) assignment agreement with 111, they have an equitable interest in the lots, while in their opposition to the cancellation application, they argue that the equitable interest to purchase the lands have already passed to GG by virtue of the Assignment of Purchase Agreement between 111 and GG.
- [132] It is apparent from reading the Assignment of Purchase Agreement between 111 and GG that an immediate assignment and vesting of all of 111's interests in the lots to GG did not occur when the parties completed their enforceable February 4, 2016 agreement.
- [133] The express wording of the contract operates on the assumption that 111 retains interest in the subject lands because clause 3(b) requires GG to pay the balance (still outstanding) of the Assignment Fee (\$255,250.00) on the April 29, 2016 completion date for the purchase of the lots. In other words, 111 has only received partial consideration for the assignment of its purchaser's lien to GG. As with a contract of purchase and sale, where partial consideration has been made by the purchaser, giving rise to a proportionate equitable purchaser's lien, both 111 and GG currently hold purchaser's liens in proportion to the consideration that has passed between them. It may be said that they both currently have an "interest in land".
- [134] Furthermore, the express provision of the contract in clause 3(b) confronts any claim that 111 has wholly transferred and vested its interest in the lots to GG. How could 111, as the assignor, complete "the purchase of the First Property and Second Property pursuant to the First Contract and the Second Contract" with the Estate as required by the contract (when according to the plaintiff) 111 has already completely divested itself of all interest in the subject lands by completing the Assignment of Purchase Agreement with GG?

- [135] If 111 had no interest to convey, GG's deposits would have secured nothing. 111 has to retain an equitable interest in the lots to have an interest to convey to GG upon its completion of the purchase and sale agreement with the Estate.
- [136] The Assignment of Purchase Agreement did not leave 111 wholly bereft of any claim to an interest in the subject lands.
- [137] At clause 6(a) of the Assignment Agreement, the Assignor (111 and Raav) represented that the Assignor "is the legal and beneficial owner of all rights as purchaser under the First contract and the Second Contract and has a full right to assign the First Contract and the Second Contract to the Assignee." Of course, they must retain that beneficial interest in order to complete the purchase with the Estate on April 29, 2016.
- [138] In summary, 111's equitable interest in the subject lands was not fully divested when the assignors and GG made their assignment agreement on February 4, 2016. The assignee, GG, has an outstanding pecuniary obligation or burden as stated above under clause 3(b).

"N. Brown J."

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