

CANADA / JUDGMENT

Amiri v. One West Holdings Ltd.

2012 BCSC 236

COURT

Supreme Court of British Columbia

DECIDED

20 February 2012

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2012 BCSC 236 Amiri v. One West Holdings Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Amiri v. One West Holdings Ltd.,

2012 BCSC 236

Date: 20120220

Docket: S102586

Registry: Vancouver

Between:

Afrasiab Amiri

Plaintiff

And

One West Holdings Ltd.,

The Erickson Projects Limited Partnership

and The Erickson Projects Limited

Defendants

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment

Counsel for the Plaintiff:

J.P. Scouten

S.Y. Khan

Counsel for the Defendants:

L. Martz,

A. Cocks

Place and Date of Trial:

Vancouver, B.C.

October 11-14, 19 & 21, 2011

Place and Date of Judgment:

Vancouver, B.C.

February 20, 2012

I INTRODUCTION

- [1] This action arises as a result of an offer to purchase and agreement for sale ("the Contract") entered into between the plaintiff purchaser, Afrasiab Amiri, and the defendant, The Erickson Projects Limited Partnership ("the Vendor"). The Contract related to the purchase of proposed Unit #1702 in a residential high rise condominium complex known as "The Erickson". It was entered into on or about November 3, 2005.
- [2] The Contract did not proceed to completion. The plaintiff seeks an order of specific performance or, in the alternative, damages, including the return of his deposit totalling \$745,325 plus interest. The Vendor, by its counterclaim, seeks a declaration it is entitled to the deposit and interest accrued thereon.

II BACKGROUND/FINDINGS OF FACT

- [3] The facts giving rise to this action are, for the most part, not in dispute. An agreed statement of facts was entered as an exhibit at the trial. Upon a consideration of the evidence as a whole I make the following findings of fact:
- [4] The Vendor is the developer of The Erickson which is a 60 unit residential high-rise condominium complex located at 1560 Homer Mews on the north shore of False Creek in Vancouver (the "Development").
- [5] As of September 2005, the land on which the Vendor proposed to construct the Development consisted of an unsubdivided parcel of land, legally described as Lot 250, False Creek, Group 1, New Westminster District Plan LMP30177 (the "Parent Parcel"), which was then owned by Concord Pacific Group Inc. ("Concord Pacific").

- [6] On April 6, 2009, Concord Pacific (following its amalgamation with other corporations) changed its name to One West Holdings Ltd.
- [7] On or about September 25, 2005, the Vendor filed a Disclosure Statement with the Superintendent of Real Estate of British Columbia, pursuant to the Real Estate Development and Marketing Act, S.B.C. 2004 c. 41 [REDMA], in order to market units in the Development for sale to the public on a "pre-sale" basis.
- [8] On or about November 3, 2005, during the sales marketing campaign being conducted by the Vendor, the plaintiff entered into the Contract with the Vendor for the purchase of proposed Unit #1702 in the Development for a price of \$2,910,000.00.
- [9] The plaintiff, who is of Iranian origin, moved from Iran to Canada with his family in 2002. At the time he entered into the Contract, he and his family lived in a home located at 1409 Chartwell Drive in West Vancouver, which the plaintiff had purchased in December of 2003.
- [10] The plaintiff is a sophisticated individual in that he:
- holds a PhD in Industrial Management;
 - has for almost 20 years owned a company in Iran employing 260 people, the business of which includes construction and development, including apartment buildings;
 - is part owner of a private university in Iran which employs 100 permanent and about 90 part-time staff;
 - takes an active role in the management of his company and is responsible for evaluating the year-end reports, prepared as a result of his expertise; and
 - has bought real property in Iran and Dubai as well as several properties in the Vancouver area.
- [11] In the dealings and negotiations leading to the execution of the Contract, the plaintiff was represented by Iraj Hashemi ("Mr. Hashemi"), a real estate agent. Mr. Hashemi's business partner is a Mr. Dariush Tabei, another real estate agent, who also assisted in representing the plaintiff.
- [12] In addition to the plaintiff, Mr. Hashemi also represented various purchasers as their real estate agent in connection with the purchase of other units in the Development. Mr. Hashemi also had experience representing an estimated 40 purchasers in other developments marketed by affiliates of the Vendor. Mr. Hashemi reviewed the Contract with the plaintiff and was present with him when it was signed.
- [13] Schedule A to the Contract included the following terms with respect to the setting of the completion date for the plaintiff's purchase of Unit #1702:

2.0 COMPLETION OF PURCHASE AND SALE

2.1 Completion Date

The completion of the purchase and sale of the Strata Lot will take place on the date (the "Completion Date") to be specified by the Vendor which is not less than 10 business days after the day the Vendor or the Vendor's Solicitor notifies the Purchaser or the Purchaser's Solicitor (the "Completion Date Notice") that:

- (a) an Occupancy Permit (as defined in clause 2.3) has been or is expected to be issued prior to the Completion Date; and
- (b) the Strata Plan has been or is expected to be fully registered in the Land Title Office prior to the Completion Date.

...

Notwithstanding the foregoing, the Vendor may (in its sole and absolute discretion) extend any Completion Date by delivery of written notice to the Purchaser or the Purchaser's Solicitor without compensation to or consent from the Purchaser.

...

7.9 Notice

Any notice to be given to the Purchaser will be well and sufficiently given if sent by airmail, postage prepaid or delivered by hand or transmitted by telecopy or e-mail to the Purchaser's Solicitor at their office or to the Purchaser and will be deemed to have been received if delivered or transmitted, when delivered or transmitted and if mailed, on the third business day (exclusive of Saturdays, Sundays and statutory holidays) after such mailing. The address for the Purchaser will be as set out on the first page of this Agreement or such other address as the Purchaser notifies the Vendor in writing.

- [14] The Contract was in a standard form prepared by the Vendor. Its proposed terms, including the price, were not subject to negotiation. Prospective purchasers were essentially presented with a proposed agreement which they could either accept or not.
- [15] There were a number of other units for sale in similar developments which the plaintiff could have purchased in the latter part of 2005. He was particularly attracted to specific features of The Erickson, and notably Unit #1702, although other units were also available. That is why he entered into the Contract.
- [16] By a cheque dated November 3, 2005, the plaintiff paid \$291,000 to the Vendor's solicitors, McCarthy Tétrault, in trust, representing the initial deposit payment payable under the terms of the Contract.
- [17] On July 28, 2006, the Vendor filed an Amendment to Disclosure Statement with the Superintendent of Real Estate which, among other things, stated that the Vendor had arranged construction financing for the construction of the Development through HSBC Bank Canada (the "Construction Financing").

- [18] By cheques dated September 14 and October 17, 2006, the plaintiff paid \$100,000 and \$191,000, respectively, to the Vendor's solicitors, in trust, representing further deposit payments payable under the terms of the Contract.
- [19] On December 11, 2006, a mortgage was registered in the Land Title Office against the Parent Parcel in favour of HSBC Bank Canada under no. BA587429, representing part of the security provided by Concord Pacific in respect of the Construction Financing.
- [20] By a bank draft dated January 18, 2007, the plaintiff paid \$149,065 to the Vendor's solicitors, in trust, representing a further deposit payment payable under the terms of the Contract.
- [21] On January 25, 2007, the plaintiff and the Vendor entered into a Modification of Purchase Agreement, by which the parties agreed, among other things, that the purchase price for Unit #1702 would be increased to \$2,981,000, in view of modifications to the construction of the unit requested by the plaintiff.
- [22] By a cheque dated February 5, 2007, the plaintiff paid \$14,260 to the Vendor's solicitors, in trust, representing the further deposit payment under the terms of the Contract in respect of the agreed increased purchase price for Unit #1702, as well as an additional \$6,984 in respect of interest on a late payment of a deposit amount. The total deposit was, accordingly, \$745,325 which, pursuant to the Contract, represented 25% of the purchase price ("the Deposit").
- [23] On May 13, 2009, the Vendor filed an Amendment to Disclosure Statement with the Superintendent of Real Estate which, among other things, amended paragraph 5.1 of the original Disclosure Statement regarding the estimated dates for commencement and completion of construction of the Development.
- [24] On July 30, 2009, the plaintiff sold his family's home at 1409 Chartwell Drive in West Vancouver. On August 5, 2009, he purchased a condominium property at 1203 - 1205 West Hastings Street in downtown Vancouver where members of his family have since resided. The plaintiff did not advise the Vendor of these changes in his address.
- [25] As of the summer of 2009, the plaintiff had an existing banking relationship with the Canadian Imperial Bank of Commerce ("CIBC"), which had previously provided mortgage financing to him in connection with various earlier real estate transactions.
- [26] In August of 2009, the plaintiff contacted Maryam Rastegar ("Ms. Rastegar"), a Financial Advisor employed at the Park Royal South branch of CIBC with whom the plaintiff had previously dealt, to inquire about obtaining a first mortgage loan from CIBC to finance part of the purchase price for Unit #1702 once it was completed. No formal loan application was made at that time.
- [27] The plaintiff also had an existing business relationship with Bitra Basir ("Ms. Basir"), a mortgage broker, who had assisted him in seeking mortgage financing in connection with various real estate transactions in B.C. in the past.

- [28] The plaintiff left Vancouver for Iran in the fall of 2009. He did so in order to take care of business interests which he had in that country. Prior to leaving Vancouver he spoke to Ms. Basir about arranging financing for his purchase of Unit #1702.
- [29] He also contemplated the possibility of the completion of Unit #1702 taking place in the winter of 2009, and his plan was to return to Vancouver at that time.
- [30] The plaintiff contacted Dr. Moen Vaziri ("Dr. Vaziri") and/or Mr. Hashemi in late November or early December 2009 to find out when the completion of his unit would be, but they had no news for him. Dr. Vaziri was a close friend of the plaintiff's. He had asked Dr. Vaziri to attend to matters in relation to Unit #1702 while he was absent from Vancouver.
- [31] On December 21, 2009, the Vendor sent a letter by mail to the address the plaintiff provided on the Contract (the "December 21, 2009 Update Letter"), being the 1409 Chartwell Drive, West Vancouver address. It included the following information:

3. Anticipated Closing Date

We anticipate that the Completion for the project will be in early 2010. We will notify you with this formal date in a letter that will arrive by courier. This letter will be delivered during regular business hours. If no one will be home at your residential address during these hours, please provide us with an alternative address or your work place on the Suite Inspection Registration Form.

- [32] The December 21, 2009 Update Letter enclosed, among other things, a document entitled "Suite Inspection Request Form". At the top of the form, immediately under Section I, "PURCHASER'S PARTICULARS", the following words appeared:

NOTE: YOUR COMPLETION LETTER WILL BE SENT BY COURIER

- [33] As of early January of 2010, Mr. Hashemi was aware, due to his involvement as agent for several buyers in the Development, that the project was nearing completion and those buyers, including the plaintiff, would shortly be required to complete the purchase of their units.
- [34] On January 15, 2010, Mr. Hashemi sent a completed Suite Inspection Request Form to the Vendor indicating, among other things, that he (Mr. Hashemi) had been appointed as the plaintiff's authorized agent to inspect Unit #1702 on behalf of the plaintiff once it was completed. The Suite Inspection Request Form had been completed as follows:
- in the section titled "PURCHASER'S PARTICULARS":
 - the plaintiff's name was written next to the space indicated for "Name";
 - "c/o I. Hashemi, 51 Lonsdale Ave., N. Van. B.C. V7M 2E5" was written next to the space indicated for "Mailing Address"; and

- the words "THE SAME AS ABOVE" were written next to the space indicated for "Courier Address", which is immediately below the space indicated for "Mailing Address" on which the 51 Lonsdale Ave. address had been written;
 - a signature consistent with the name of the plaintiff appeared next to the space indicated for "Purchaser's Signature"; and
 - the plaintiff's name was written next to the space indicated for "Purchaser's Name".
- [35] Section II of the Suite Inspection Request Form sought information with respect to who was appointed to carry out the inspection of the unit, and with respect to who was to assume possession.
- [36] The Erickson was completed on a timeline longer than anticipated at the outset of the project. The occupancy permit for Unit #1702 was issued on December 23, 2009, and the strata plan for The Erickson was deposited on January 22, 2010. This was slightly in excess of one year from the originally estimated construction completion date of December 2008. This timeline did not depart significantly from the changes to timelines experienced on projects built by the Vendor's affiliates (Concord Pacific). It had not been uncommon for buildings constructed by Concord Pacific to be completed in the range of one year later than anticipated at the outset. That is because the construction of a high rise building such as The Erickson is subject to many different factors which cannot be predicted before construction has begun.
- [37] In early to mid-January of 2010, Ms. Basir was asked by Mr. Hashemi to commence making loan applications on the plaintiff's behalf in order to secure mortgage financing for the purchase of Unit #1702 when the completion of the purchase of the unit was to occur. These steps included submitting applications to various institutional lenders, including North Shore Credit Union and Scotiabank, for first mortgage financing, and applications to various private lenders for additional second mortgage financing, should it be necessary.
- [38] The plaintiff did not specifically ask Ms. Basir or Mr. Hashemi to take steps to locate mortgage financing for him at this time. Rather Ms. Basir began to take those steps on her own initiative, at Mr. Hashemi's suggestion, believing based on her past dealings and relationship with the plaintiff that he would want her to do so.
- [39] On January 14, 2010, as a result of a request made to it by Ms. Basir, the Vendor sent an Appraisal Information Sheet and related documents to Ms. Basir describing the floor plan, features and amenities of Unit #1702.
- [40] On January 22, 2010, the Parent Parcel was subdivided by the registration of Strata Plan BCS3702 in the Vancouver/New Westminster Land Title Office. As a result of the subdivision, separate airspace parcels with separate legal descriptions were created for each of the residential units in the Development.

[41] Furthermore, the Vendor took specific steps to inform purchasers of the changes in the timeline for completion of The Erickson. These included delivery by the Vendor of the following documents:

- the Amendment to the Disclosure Statement Dated May 15, 2009, which updated the estimated date of completion of construction to January 2010;
- the December 21, 2009 Update Letter, which advised that the Vendor anticipated that completion of The Erickson was anticipated to be in "early 2010"; and
- a letter dated February 10, 2010, which was to the effect the Vendor anticipated that the completion date of Unit #1702 would be "mid-March, 2010". Although this letter was also sent to the Chartwell Drive address given by the plaintiff on the Contract rather than the address of Mr. Hashemi's office given on the Suite Inspection Request Form, it did nonetheless come to the plaintiff's attention via Dr. Vaziri in early March 2010.

[42] On February 24, 2010, Mr. Hashemi and Dr. Vaziri performed a walk-through of Unit #1702 with a representative of the Vendor. A Walk-Through Inspection Report noting various deficiencies was completed during or immediately after the walk-through which was signed by Mr. Hashemi and Dr. Vaziri. By this time, Mr. Hashemi had heard that the completion dates for units in the Development were likely to be set for mid-March, 2010. Mr. Hashemi advised Dr. Vaziri he should report this to the plaintiff.

[43] On February 25, 2010, Dr. Vaziri contacted Ms. Zahra Jenab ("Ms. Jenab"), a lawyer practising in West Vancouver who had previously acted for the plaintiff on various real estate transactions. Dr. Vaziri told Ms. Jenab about the plaintiff's pending purchase of Unit #1702.

[44] By a February 26, 2010 letter to the plaintiff, addressed to the attention of Mr. Hashemi at his place of business at 51 Lonsdale Avenue in North Vancouver (the "Completion Notice Letter"), and delivered to that address that day, the Vendor indicated it had, pursuant to s. 2.1 of the Contract, specified March 15, 2010, as the date for completion of the sale of Unit #1702 to the plaintiff.

[45] On March 1, 2010, Concord Pacific sent a copy of the Completion Notice Letter and a copy of the Contract to Ms. Jenab by fax. On the same date, Dimple Sukhrani (a real property paralegal employed by McCarthy Tétrault) sent Ms. Jenab the information package for the completion of the sale of Unit #1702.

[46] On March 1, 2010, Ms. Jenab received a phone call from Dr. Vaziri in which he requested that she seek an extension of the completion date on behalf of the plaintiff.

[47] The Contract provided that the completion date could not be set earlier than 10 business days from when written notice was delivered to the plaintiff.

[48] The Contract was explicit, however, that once the completion date had been set, the Vendor had the sole and absolute discretion with respect to any extensions to extend the Completion Date to a later date. The third paragraph of s. 2.1 provides:

Notwithstanding the foregoing, the Vendor may (in its sole and absolute discretion) extend any Completion Date by delivery of written notice to the Purchaser or the Purchaser's Solicitor without compensation to or consent from the Purchaser.

[49] The provisions of the Contract which governed the Vendor's rights at this juncture were as follows:

1.2 Payment of the Deposit by the Vendor's Solicitor

In respect of the Deposit, the Vendor's Solicitor is authorized:

(b) unless precluded by Court order, to pay the Deposit:

(iv) to the Vendor if the Purchaser is in breach of any covenant or obligation hereunder. If the Purchaser is in breach of any of the covenants or obligations hereunder, the Vendor may, at its election, retain the Deposit and accrued interest thereon as liquidated damages. The parties hereby agree that such amount constitutes a genuine pre-estimate of the minimum damages suffered by the Vendor.

7.7 Time

Time will be of the essence and unless all payments on account of the Purchase Price, together with adjustments thereto as provided herein and all other amounts payable hereunder are paid when due, the Vendor may at its option:

(a) cancel the Agreement by written notice to the Purchaser or the Purchaser's Solicitor and in such event the amount theretofore paid by the Purchaser any interest accrued thereon will be absolutely forfeited to the Vendor in accordance with clause 1.2 without prejudice to its other remedies and which amount the Vendor will be entitled to be paid upon written demand therefor by the Vendor; or

(b) elect not to cancel the Agreement, in which event the Purchaser will pay to the Vendor:

(ii) in the event of a late payment of the Closing Funds, in addition to the Closing Funds, a late closing fee in an amount set by the Vendor in its sole and absolute discretion.

The Vendor may so cancel the Agreement at any time during the continuance of the default by the Purchaser, even if the Vendor had previously elected not to cancel the Agreement. If the Purchaser's default continues beyond the extended date for completion established pursuant to clause 7.7(b), the Vendor may thereafter elect to cancel the Agreement or permit a further extension pursuant to clause 7.7(a) or 7.7(b), as applicable.

...

7.21 Waiver

No failure to exercise or delay on the part of the Vendor in exercising any right under this Agreement will operate as a waiver thereof, nor will any single or partial exercise of any right by the Vendor preclude any other or further exercise thereof or the exercise of any other right by the Vendor.

(emphasis added).

- [50] On March 3, 2010, Ms. Jenab sought a one month extension of the completion date via an e-mail sent to the Vendor's solicitors.
- [51] This request was declined, but the Vendor was ultimately prepared to extend the completion date to March 29, 2010.
- [52] From January through to the end of March 2010, the plaintiff was in Iran. Prior to March 5, 2010, he was staying at an agricultural property owned by him located in a remote location in northern Iran. He was attending to business there. At this location there is no cellular phone coverage or internet connection. This made the plaintiff effectively unreachable by anyone trying to contact him. In order to receive communications, he would have to travel six hours on remote mountainous roads to a larger town in northern Iran where a private university, owned by him, is located. It was his normal practice to travel from the agricultural property to the larger town roughly every four days. In 2010 he remained somewhat longer than usual at his agricultural property to deal with business there.
- [53] The plaintiff first learned of the March 15, 2010 completion date in early March 2010 (March 4 or 5), when Dr. Vaziri was able to reach him via telephone on an occasion when the plaintiff had gone into town. Dr. Vaziri had left several urgent messages for him. The plaintiff told Dr. Vaziri that he required a one-month extension in order to complete his purchase because of his commitments in Iran related to the upcoming Iranian New Year. Dr. Vaziri advised him such a request had already been made.
- [54] On March 3, 2010, Mr. Hashemi exchanged e-mail messages with S. H. Soon, Administrative Assistant, Customer Relations at Concord Pacific, regarding a possible extension to the completion date.
- [55] On March 3 and 4, 2010, Ms. Jenab exchanged e-mail messages with Dimple Sukhrani and Jacqueline Leung ("Ms. Leung" - another real property paralegal employed by McCarthy Tétrault) regarding an extension to the completion date.
- [56] On March 5, 2010, Mr. Hashemi, or a member of the staff of his office, sent a copy of the Completion Notice Letter to Ms. Jenab by fax.

- [57] It was around this time that yet another misfortune befell the plaintiff which further delayed him from coming to Canada. While in the northern part of Iran he was involved in a motor vehicle accident. This activated a pre-existing lower back problem he had and caused him extreme pain. After visiting the local hospital, he returned to Tehran and, on March 9, 2010, checked into Kasra Hospital where he was hospitalized overnight.
- [58] On March 10, 2010, while at Kasra Hospital, the plaintiff was seen by Dr. Seyed Ebrahim Ketabshi, a neurological surgeon, who advised him to "take a complete bed rest of three weeks."
- [59] After being discharged from Kasra Hospital, the plaintiff went to his home in Tehran where he remained in bed, completely immobile, for several days. After this period he remained in bed but, over the course of the next several days, was able to see employees who came to his home to deal with business matters, which were then coming to a head with the approach of the Iranian New Year.
- [60] The Iranian New Year in 2010 fell on March 20. In the Iranian culture festivities connected to the New Year extend over a two-week period. Businesses close for much of that time period and there is a very heavy volume of air travel in and out of the country.
- [61] For a businessman with management responsibilities in a large company such as the plaintiff's, Iranian New Year carries with it unique and additional burdens. The days leading up to and immediately following the New Year is the time when employees provide annual reports to their superiors and budgets and plans are made for the coming year. It is a time of year when the plaintiff's presence in Iran was very much needed.
- [62] While the plaintiff was struggling with these problems in Iran, loan commitments from the various lenders to which Ms. Basir had applied for mortgage financing for the plaintiff started to arrive.
- [63] On March 8, 2010, Ms. Jenab and Ms. Leung exchanged further e-mail messages regarding the request made by Ms. Jenab for an extension to the completion date.
- [64] On March 8, 2010, Ms. Jenab received a phone call from Ms. Basir in which Ms. Basir advised that she was seeking to arrange a first mortgage loan from Scotiabank and an additional loan for \$800,000 from a private lender on behalf of the plaintiff to finance part of the purchase price for Unit #1702.
- [65] By a commitment letter dated March 11, 2010, Secure Mortgage, a private lender, agreed to provide a second mortgage loan of \$875,000 to the plaintiff to be used to finance the completion of the purchase of Unit #1702.
- [66] On or about March 11, 2010, Ms. Basir informed Ms. Jenab over the telephone that loan financing for the plaintiff's purchase of Unit #1702 could be obtained within two weeks if the Vendor would agree to extend the date for completion.

- [67] On March 12, 2010, following an inspection of Unit #1702 done on March 10, 2010, Kirk Appraisals Ltd. provided an appraisal report to Ms. Basir in connection with the plaintiff's application made to Scotiabank for mortgage financing.
- [68] On March 12, 2010, the Vendor listed Unit #801 in the Development for sale through its real estate agent, Prompton Real Estate Services Inc., for a price of \$3,699,000.00.
- [69] On March 15, 2010, Ms. Leung sent an e-mail message to Ms. Jenab advising that the Vendor would agree to extend the date for completion to March 29, 2010, and attaching a written Extension and Amending Agreement (the "Extension Agreement") to Ms. Jenab for execution and return.
- [70] On March 15, 2010, Ms. Jenab signed the Extension Agreement on behalf of the plaintiff and returned it to McCarthy Tétrault by fax that afternoon. The document entitled "Legal Information Form" which had been faxed to the Vendor on January 15, 2010, together with the Suite Inspection Request Form, identified Ms. Jenab as the plaintiff's legal representative for the completion of his purchase of Unit #1702. The Extension Agreement provided that the terms of the Contract not expressly modified by it were ratified and confirmed.
- [71] Prior to signing the Extension Agreement, Ms. Jenab had not spoken with the plaintiff regarding the pending purchase of Unit #1702, and did not have his express authorization to sign the document on his behalf. She did so believing it was in the plaintiff's interests. Ms. Jenab did not advise the Vendor's representatives of this.
- [72] Although Ms. Jenab did not have the plaintiff's specific authorization to execute the Extension Agreement on his behalf, he accepted during his evidence she did have authority to do so.
- [73] After leaving Canada in the fall of 2009, the plaintiff did not make arrangements, tentative or otherwise, to pursue the option of wiring funds to Canada for the closing in the event it occurred when it would be inconvenient for him to travel from Iran to Vancouver.
- [74] The plaintiff had made his other purchases in Vancouver with mortgage financing. Insofar as transferring or wiring money from Iran to Canada was concerned, he stated the Iranian government imposed restrictions on wiring large sums of money. This entailed an explanation being provided regarding the purpose for the funds. It was a lengthy process. Mr. Grant Murray who gave evidence on behalf of the Vendor stated he was aware of funds having been wired from Iran for other purchases in which the Vendor had been involved. On a consideration of all of the evidence on this point I find the plaintiff could have made arrangements to have funds transferred from Iran to Canada had he pursued that option in a timely way.
- [75] On March 18, 2010, the owner of Unit #1701 in the Development (who had completed the purchase of that property from the Vendor on March 15, 2010) listed Unit #1701 for sale for a price of \$3,998,000.00.

- [76] On March 19, 2010, the owner of Unit #1802 in the Development (who had completed the purchase of that property from the Vendor on March 15, 2010) listed Unit #1802 for sale for a price of \$4,980,000.00.
- [77] On March 22, 2010, the owner of Unit #1801 in the Development (who had completed the purchase of that property from the Vendor on March 15, 2010) listed Unit #1801 for sale for a price of \$4,100,000.00.
- [78] On March 25, 2010, Ms. Jenab sent a letter to McCarthy Tétrault enclosing documents for execution by the Vendor in connection with the pending purchase and sale of Unit #1702.
- [79] On March 25, 2010, the North Shore Credit Union issued a commitment letter confirming its agreement to provide a first mortgage loan of \$1,695,175.50 to the plaintiff and Zohreh Sehati, the plaintiff's wife ("Ms. Sehati"). The North Shore Credit Union's agreement to provide this loan was conditional on Ms. Sehati being a co-borrower together with the plaintiff.
- [80] On March 26, 2010, the owner of Unit #1803 in the Development (who had completed the purchase of that property that day), listed Unit #1803 for sale for a price of \$4,980,000.00.
- [81] On March 26, 2010, McCarthy Tétrault returned to Ms. Jenab, duly executed, the Vendor documents that Ms. Jenab had sent to them on March 25, 2010.
- [82] On March 29, 2010, Ms. Jenab faxed a letter to McCarthy Tétrault dated March 25, 2010, requesting that the completion date be extended from March 24, 2010, to March 31, 2010. Ms. Jenab was not asked or instructed by the plaintiff to request this extension. Rather, she made the request believing, based on information received previously from Ms. Basir, that loan financing needed for the plaintiff to complete the purchase would be available by March 31, 2010. Ms. Jenab did not provide this information to the Vendor's representatives.
- [83] Late in the day on March 29, 2010, the plaintiff arrived in Canada after traveling from Iran.
- [84] The sale of Unit #1702 to the plaintiff did not complete on March 29, 2010.
- [85] By a letter dated March 29, 2010, sent by fax at 5:11 p.m. that day to Ms. Jenab, the Vendor's solicitors confirmed the Vendor's position that the plaintiff was in default of his obligations under the Contract.
- [86] Ms. Jenab met with the plaintiff on March 30, 2010. She informed the Vendor's solicitors by e-mail that day he had just arrived, and expressed hope that the plaintiff would be able to complete that week. In her reply e-mail sent that afternoon, Ms. Leung confirmed the Vendor's position the plaintiff was in default and that the Vendor would not allow any extension.
- [87] On March 31, 2010, Scotiabank issued a commitment letter confirming its agreement to provide a first mortgage loan of \$1,565,182 to the plaintiff in connection with his proposed purchase of Unit #1702.

- [88] Soon after arriving in Canada and seeing that mortgage financing was still not in place, the plaintiff decided to take steps of his own to secure the mortgage financing he needed to complete the purchase of Unit #1702. The North Shore Credit Union commitment Ms. Basir had obtained was of no use to him, as his wife was in Iran and unavailable to sign the necessary documents, and he attempted to secure mortgage financing as soon as possible
- [89] The plaintiff contacted the Bank of Montreal, which had provided financing for the purchase of his Chartwell Drive property, and applied for a mortgage loan, but was told that the Vendor would not allow an appraisal to be done, so the application could not proceed.
- [90] On or about April 1, 2010, the plaintiff contacted Ms. Rastegar of CIBC to request financing for the purchase of Unit #1702.
- [91] Ms. Jenab had pre-arranged plans that required her to be away from Vancouver during the week of April 6, 2010. On or about March 31, 2010, she contacted Ali Sodagar ("Mr. Sodagar"), a lawyer practising in downtown Vancouver, to ask that he assume conduct of the plaintiff's file in her absence.
- [92] On April 6, 2011, Anita Wong, a conveyancer employed by Mr. Sodagar, sent an e-mail message to Ms. Leung advising that Mr. Sodagar's office had been retained by the plaintiff and requesting that the completion date be extended to April 16, 2011.
- [93] Later in the day on April 6, 2010, Conrad Rego ("Mr. Rego"), a lawyer at McCarthy Tétrault, sent a reply e-mail message to Anita Wong, attaching a letter to Mr. Sodagar. It stated that the Vendor was resetting the completion date under the Contract for Thursday, April 8, 2010. The covering e-mail was to the effect the Vendor was not prepared to accept the proposed completion date of April 16, 2010.
- [94] The April 6, 2010 letter provided:
- "We confirm once again that the Purchaser is in default of his obligations under the Purchase Agreement by failing to complete the purchase of the Strata Lot on the extended completion date of March 29, 2010, agreed to by the parties pursuant to the Extension and Amending Agreement.
- The Vendor is hereby resetting the completion date under the Purchase Agreement for Thursday, April 8, 2010. Time is of the essence. The Purchase Agreement, as amended hereby, remains in full force and effect, and all terms and conditions in the Purchase Agreement remain the same, except to the extent expressly amended hereby.
- If the Purchaser does not complete the purchase of the Strata Lot on Thursday, April 8, 2010 and provide all amounts owing under the Purchase Agreement, the Vendor reserves the right to terminate the Purchase Agreement and retain the deposit paid by the Purchaser thereunder, and all interest earned thereon, without prejudice to any other remedies of the Vendor.
- [95] On April 7, 2010, Mr. Sodagar sent a letter to McCarthy Tétrault enclosing documents for execution by the Vendor in connection with the pending purchase and sale.

- [96] Later in the day on April 7, 2010, McCarthy Tétrault returned to Mr. Sodagar, duly executed, the Vendor documents that Mr. Sodagar had sent to them.
- [97] On April 8, 2010, Mr. Sodagar sent a letter to Mr. Rego requesting a further extension of the completion date to April 16, 2010.
- [98] Later in the day on April 8, 2010, Mr. Rego sent an e-mail message to Mr. Sodagar stating that the Vendor would not agree to the plaintiff's extension request, and attaching a letter from Mr. Rego to Mr. Sodagar confirming the Vendor's position.
- [99] The sale of Unit #1702 to the plaintiff did not complete on April 8, 2010.
- [100] After 5:00 p.m. on April 8, 2010, Mr. Rego sent a letter to Mr. Sodagar confirming the Vendor's position that the plaintiff was in default of his obligations under the Contract, and notifying the plaintiff that, pursuant to section 7.7, the Vendor had elected to terminate the Contract.
- [101] On April 9, 2010, the plaintiff completed and signed a CIBC Personal Borrowing Application in respect of his application to CIBC for mortgage loan financing.
- [102] On April 9, 2010, Ms. Rastegar of CIBC sent a letter to Mr. Sodagar stating that CIBC had approved mortgage financing to the plaintiff in the amount of \$1,938,780 in respect of the plaintiff's proposed purchase of Unit #1702.
- [103] On April 9, 2010, Scotiabank sent written instructions to Mr. Sodagar in respect of the mortgage loan that it proposed to make to the plaintiff.
- [104] On April 9, 2010, FNF Canada Company, a company engaged by CIBC to manage credit facilities provided by it, also sent written Directions to Solicitor to Mr. Sodagar in respect of the mortgage loan that CIBC had agreed to make to the plaintiff.
- [105] On April 13, 2010, Jeff Scouten ("Mr. Scouten") of Henshall Scouten, a litigation lawyer acting on behalf of the plaintiff, sent a letter to Mr. Rego requesting the Vendor's agreement to extend the completion date.
- [106] Later in the day on April 13, 2010, Lisa Martz, a partner at McCarthy Tétrault, sent a letter to Mr. Scouten confirming the plaintiff's position that the Contract had been terminated by reason of the plaintiff's failure to complete on April 8, 2010.
- [107] On April 16, 2010, CIBC advanced mortgage loan proceeds in the amount of \$1,938,780 to Henshall Scouten, in trust, by way of a bank draft for that amount, in connection with the proposed CIBC mortgage loan financing.
- [108] On April 16, 2010, the plaintiff paid the sum of \$537,613.92 to Henshall Scouten, in trust, by way of a bank draft for that amount.

[109] On April 16, 2010, Mr. Scouten sent a letter to Ms. Martz stating the plaintiff's position that the Vendor's termination of the Contract was invalid, and stipulating Tuesday, April 20, 2010, as the new date for completion of the Contract.

[110] On April 20, 2010, Jason Ellis, a lawyer with Henshall Scouten, attended at the Vancouver Land Title Office for the purpose of formally tendering the payment of the purchase price and other documents which the plaintiff was required to provide upon completion of the Contract.

[111] The sale of Unit #1702 to the plaintiff did not complete on April 20, 2010.

[112] On May 4, 2010, Mr. Scouten returned to CIBC the \$1,938,780 sum that CIBC had advanced to Henshall Scouten on April 16, 2010.

III THE ISSUES

[113] The issues raised by this case may be summarized as follows:

- (a) Did the plaintiff breach the Contract by failing to complete the purchase of Unit #1702 on April 8, 2010, the completion date stipulated by the Vendor's solicitor in his letter dated April 6, 2010?
- (b) Did the Vendor breach the Contract by failing to complete the sale of Unit #1702 on April 20, 2010, the completion date stipulated by the plaintiff's counsel in his letter dated April 16, 2010?
- (c) If the Vendor breached the Contract, is the plaintiff entitled to an order for specific performance?
- (d) If the plaintiff breached the Contract, is he entitled to relief from forfeiture of the Deposit totaling \$745,325 paid by the plaintiff under the Contract and of the interest accrued on those funds?

IV THE PLAINTIFF'S POSITION

[114] The plaintiff says he always wanted to complete the transaction. He acknowledges he did not have his affairs in order such that the transaction could complete within the timeframe stipulated by the Vendor in its counsel's letter of April 6, 2010, being April 8, 2010.

[115] During closing argument the plaintiff conceded:

- the March 29, 2010 completion date was validly fixed by virtue of the Extension Agreement, signed by Ms. Jenab on behalf of the plaintiff and Grant Murray on behalf of the Vendor;
- there was "no dispute" the plaintiff breached the terms of the Contract by failing to complete on March 29, 2010. The Vendor, having previously delivered a Form A transfer in registrable form was ready willing and able to complete that day. The plaintiff was not;

· as of the close of business on March 29, 2010, the plaintiff was in breach of his obligations under the Contract and the Vendor had the right by virtue of s. 7.7 to cancel or terminate the Contract should it choose to do so.

[116] The plaintiff's written submission stated:

Following the Plaintiff's default on March 29, 2010, the Vendor did not cancel the Contract, nor did it exercise its right under paragraph 7.7(b)(ii) to require the Plaintiff to complete at a later specified date together with a late closing fee, while preserving its right as provided for in the clause to cancel the Contract by reason of the default that occurred on March 29th and which continued after that date. Rather, on April 6, 2010, the Vendor adopted the superficially similar but legally very different course of waiving its right to cancel based on the default that occurred on March 29, affirming that the Contract was still in force and remained binding (on both parties) and re-setting April 8, 2010 as the new date for completion under the Contract.

[117] The plaintiff's position is that any new completion date set by the Vendor on April 6, 2010, had to be reasonable under the circumstances. In the plaintiff's submission, April 8, 2010, was not reasonable.

[118] Furthermore, the plaintiff submits he was entitled to set a new completion date. He did so on April 16, 2010, specifying a new completion date of April 20, 2010.

[119] The plaintiff conceded that if the Vendor did have the right to terminate the Contract when the plaintiff failed to complete the sale on April 8, 2010, then the only remaining issue relates to whether the Deposit was a genuine pre-estimate of damages or a penalty. If the latter then he was entitled to relief from forfeiture.

V THE VENDOR'S POSITION

[120] The Vendor's position can be summarized as follows:

- the March 15, 2010 completion date was set in accordance with the Contract and was therefore valid and enforceable;
- the parties' agreement to extend the completion date to March 29, 2010, the validity of which was conceded by the plaintiff, replaced the March 15, 2010 completion date;
- the Vendor had the "sole and absolute discretion" to reset the completion date to April 8, 2010;
- the Final Notice sent April 6, 2010 was an exercise of the Vendor's rights under section 7.7(b) of the Contract. The Vendor elected not to cancel the agreement in light of the plaintiff's failure to close on March 29, 2010. Rather it was prepared to extend the completion date pursuant to its rights under s. 2.1;

- the plaintiff's and the Vendor's rights and obligations were governed by the Contract. There was no legal requirement that the Vendor provide reasonable notice to the plaintiff before exercising its right to cancel the Contract. The Vendor had the unilateral right to reset the completion date for April 8, 2010, pursuant to ss. 2.1 and 7.7 of the Contract;
- although there was no requirement that reasonable notice be given, the April 8, 2010 completion date was, in the circumstances, reasonable;
- the plaintiff had put himself in an unfortunate position but it was not the Vendor's responsibility to continue helping him to get out of it. The plaintiff could have had funding in place by April 8, 2010, had he acted with greater diligence. The Vendor had no obligation to allow any further extension of the completion date after April 8, 2010, to allow the plaintiff to make up for his omissions;
- the plaintiff was not ready, willing and able to close the transaction until well after the April 8, 2010 completion date;
- the plaintiff did not have the right to re-set the closing date under common law principles or the terms of the Contract. It was simply not open to him to substitute his own completion date and his own completion process for those provided for under the express terms of the Contract;
- if the plaintiff did breach the Contract, the deposit was not a penalty and he was not entitled to relief from forfeiture;

VI DISCUSSION

Who as between the plaintiff and the Vendor was in breach of Contract?

[121] Section 7.7 of the Contract provides:

7.7 Time

Time will be of the essence and unless all payments on account of the Purchase Price, together with adjustments thereto as provided herein and all other amounts payable hereunder are paid when due, the Vendor may at its option:

- (a) cancel the Agreement by written notice to the Purchaser or the Purchaser's Solicitor and in such event the amount theretofore paid by the Purchaser and any interest accrued thereon will be absolutely forfeited to the Vendor in accordance with clause 1.2 without prejudice to its other remedies and which amount the Vendor will be entitled to be paid upon written demand therefor by the Vendor; or
- (b) elect not to cancel the Agreement, in which event the Purchaser will pay to the Vendor:
 - (i) in the event of a late payment of a portion of the Deposit, in addition to the Deposit, interest on the unpaid portion of the Deposit payable hereunder at the rate of 2% per month (24% per annum) calculated daily from the date upon which such portion was due to the date upon which such portion is paid; and

(ii) in the event of a late payment of the Closing Funds, in addition to the Closing Funds, a late closing fee in an amount set by the Vendor in its sole and absolute discretion.

The Vendor may so cancel the Agreement at any time during the continuance of the default by the Purchaser, even if the Vendor has previously elected not to cancel the Agreement. If the Purchaser's default continues beyond the extended date for completion established pursuant to 7.7(b), the Vendor may thereafter elect to cancel the Agreement or permit a further extension pursuant to clause 7.7(a) or 7.7(b), as applicable.

[122] The same section 7.7 of the Contract was the subject of consideration by the British Columbia Court of Appeal in *Hinkson Holdings Ltd. v. Silver Sea Developments Limited Partnership*, 2007 BCCA 408. Hinkson was a case involving an affiliate of the Vendor in relation to another Concord Pacific project named "Silver Sea".

[123] In Hinkson, the purchaser had failed to make deposit payments required under the agreement. While in default, he made a partial payment towards the deposits then owing which the vendor accepted. The purchaser then argued that, by accepting this partial payment, the vendor should be treated as having waived its right to cancel the agreement by virtue of the common law principles of waiver. The Court of Appeal found that the parties had, by the express terms of the agreement, "contracted out of the application of the common law principle of waiver" (para. 19). Accordingly, the vendor was entitled under the terms of s. 7.7 to cancel the contract "anytime during the continuance of the default" by the purchaser.

[124] In Hinkson, Lowry J.A. stated:

[24] At least in the absence of the vendor extending the time for payment of that instalment, I am unable to see any basis upon which it can be said the vendor's right to cancel the agreement during the continuance of the default, even though the vendor may have previously elected to complete the transaction, could not be exercised on August 30 without the vendor giving the notice for which the purchaser contends. Further, I see no support in the concluding sentence of the clause for an interpretation that would require such notice to be given.

[25] In effect, the notice the purchaser says must be given is, as recognized by the judge, the kind of reasonable notice the common law requires be given before a right to cancel can be regained by a vendor who has failed to exercise, and so waived, the right to cancel. But here, the vendor's right to cancel was not waived; it was preserved under clauses 7.21 and 7.7. The notice was not required.

[125] The plaintiff submits the Vendor in this case did precisely what the Vendor in Hinkson had not done: it expressly waived its rights to cancel the Contract on the basis of the default which had occurred on March 29, 2010. The wording in the Final Notice sent April 6, 2010, which stated the purchase agreement as amended "remains in full force and effect" and reset a new completion date of April 8, 2010, amounted to an express waiver of the Vendor's rights to cancel based on the March 29, 2010 default.

[126] Accordingly, on the plaintiff's submission, the Vendor could not benefit from the "no waiver" clause in the Contract, having waived its Contractual rights. In resetting a completion date, it could not do so unilaterally for April 8, 2010. While it was open to the Vendor to reset a new completion date after waiving its right to cancel based on the plaintiff's failure to complete on March 29, 2010, on the plaintiff's submission, the new deadline specified by it for completion had to have been reasonable in order to be effective.

[127] In support of this submission, the plaintiff relies on a series of cases including *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, where, at paragraph 90, it was stated:

[90] Once a deadline for closing has been extended by the conduct of the parties even in the presence of a "time is of the essence" clause, the deadline must be reset with reasonable notice of the new deadline before a party can rely upon the failure to close by that date as a ground for treating the contract as being at an end or for permitting an action for specific performance. For time to be of the essence again, the person wanting a new date must specify a reasonable new completion date in such a manner that the other person would realize that he or she is now bound by the new date: *Ambassador Industries v. Kastens*, [2001] B.C.J. No. 825 (B.C.S.C.) (Q.L.); *Norfolk v. Aikens* (1989), 41 B.C.L.R. (2d) 145 (B.C.C.A.); and *Abramowich v. Azima Developments Ltd.* (1993), 86 B.C.L.R. (2d) 129 (B.C.C.A.).

See also: *Woels and Woels v. Mashinter*, [1976] 5 W.W.R. 79 (Alta S.C.) paras. 24 to 31; *Stickney v. Keeble*, [1915] A.C. 386 (H.L.); *Schackleton v. Hayes*, [1954] 4 D.L.R. 81 (S.C.C.); *Beks v. Share*, [1994] B.C.J. No. 83 (S.C.).

[128] I am unable to accept this submission. As the Court of Appeal found in *Hinkson*, the express terms of the Contract set out the Vendor's rights. The Contract, in my view, left no room for the imposition of common law requirements of a reasonable time for completion.

[129] It should also be noted that the April 8, 2010 date was not an arbitrary one selected by the Vendor. The evidence on this point was to the effect that, as Thursday April 1, 2010, was the last business day before the Easter long weekend, Mr. Hashemi indicated to the Vendor's representatives that the plaintiff would be in a position to complete the transaction on Monday April 5, 2010. The Vendor's representative advised Mr. Hashemi he was uncertain as to whether the land title office was in fact open on Easter Monday. Accordingly, the Vendor fixed the new closing date for Thursday, April 8, 2010. In other words, the final closing date was three days later than what the plaintiff's representative had conveyed to the Vendor the previous week would be required for the transaction to complete.

- [130] The authorities referred to by the plaintiff and which relate to the circumstances under which a reasonable time frame to complete will govern the relationship between the parties do not, in my view, apply in this case. They govern situations where the completion date has passed without a provision in the Contract outlining what will then occur. The Contract in this case was clear in its terms and governed the relationship between the plaintiff and the Vendor. It provided an express framework for the Vendor's rights.
- [131] Pursuant to the Contract, an election under clause 7.7(b) to continue the agreement did not amount to the Vendor foregoing its rights under s 7.7(a) to cancel the Contract without providing the plaintiff a reasonable time to cure his default.
- [132] The Final Notice was clear and unambiguous. The Vendor was resetting the completion date to Thursday April 8, 2010. Time was of the essence and the Vendor stipulated that the purchase agreement remained in full force and effect. The plaintiff was specifically put on notice that if he did not complete the purchase on the completion date,
- the Vendor reserves the right to terminate the Purchase Agreement and retain the deposit paid by the Purchaser thereunder, and all interest earned thereon, without prejudice to any other remedies of the Vendor. In such event, the deposit and all interest earned thereon will be released and paid to the Vendor as agreed to by the Purchaser pursuant to paragraph 3 of the Extension and Amending Agreement.
- [133] The plaintiff is not assisted by the fact the covering e-mail from the Vendor's solicitor under which the Final Notice was sent advised he would not be subject to an extension fee. The Vendor could have charged 24% interest per annum on the outstanding amount when the completion date was extended but chose not to do so as an accommodation to the plaintiff. This action could not and did not, in my view, alter the legal effect of the Final Notice.
- [134] I conclude the Final Notice was a legitimate exercise of the Vendor's rights pursuant to s. 7.7 (b) of the Contract. The Vendor did not waive its rights. It reset the completion date. It chose not to enforce its rights under s. 7.7 (b)(ii) to require the plaintiff to pay a late closing fee. In this regard it had the "sole and absolute discretion".
- [135] The statement in the Final Notice that the Contract remained in "full force and effect" did no more than convey to the plaintiff the fact the Vendor had not yet exercised its rights to terminate the Contract as a result of the plaintiff's failure to complete on March 29, 2010. The Final Notice was an expression by the Vendor, conveying to the plaintiff the latter's default and expressly stating the Vendor "reserves all of its rights and remedies in respect of the purchaser's default."
- [136] The Final Notice also stated that time was of the essence and the Vendor reserved the right to terminate the Contract and retain the Deposit. The Vendor was entitled to do so pursuant to the express terms of the Contract.

- [137] The plaintiff also took issue with what it considered to be the Vendor's unilateral resetting of the completion date for April 8, 2010. In my view, sections 2.1 and 7.7 of the Contract entitled the Vendor to do just that. The express terms of the Contract were clear, and do not permit the imposition of common law requirements that reasonable notice be given to the purchaser prior to the Vendor exercising its right to cancel it.
- [138] The plaintiff was clearly in an unfortunate position as of April 8, 2010. He was not "ready willing and able" to close the transaction until well after that date. He did not have the necessary funds "in hand": *Norfolk v. Aikens* (1989), 64 D.L.R. (4th) 1 (B.C.C.A.) at para. 13.
- [139] While the plaintiff's motor vehicle accident and the circumstances surrounding the Iranian New Year serve to place what occurred in context, they do not amount to a legal justification for his failure to complete. In any event, it was not just the events of the spring of 2010 which were responsible for the plaintiff's predicament. That is because:
- he knew as of the fall of 2009 he would need to be making arrangements to have his financing in place;
 - although he contacted Dr. Vaziri and/or Mr. Hashemi in the latter part of 2009 to find out when the completion of his unit would be, they had no news for him. He did not, however, follow up with them in early 2010 because he did not find it necessary to do so;
 - he continued in his usual activities, including travelling to areas where it was either difficult or impossible to be reached by telephone, cellular or otherwise. When Dr. Vaziri tried to reach the plaintiff to advise him of the March 15, 2010 completion date, some time passed before he was able to do so;
 - In any event, by early March 2010, the plaintiff knew the date for completion was approaching. He still did not put himself in a position to close. He did not personally involve himself in the pursuit of appropriate financing until his return to Vancouver on March 29, 2010. He left it to others to do so;
 - he did not, in my view, provide a satisfactory explanation for not making arrangements to transfer or wire funds from Iran in a timely way. While it was his right to complete the transaction on the basis of mortgage financing, it was not the Vendor's responsibility to accommodate him in that regard.
- [140] On a consideration of the evidence as a whole I conclude the plaintiff's failure to become more directly involved in his financing arrangements such that the transaction could complete when the time stipulated to do so by the Vendor was communicated to him, was largely due to his own failure to have adequate arrangements in place.
- [141] The plaintiff also alleges the Vendor breached the Contract by failing to allow him to complete the transaction on April 20, 2010.

[142] Once again, the relationship between the plaintiff and the Vendor is governed by the Contract itself. It provided no legal basis for the plaintiff to substitute his own completion date once the April 8, 2010 date had come and gone. The terms of the Contract are clear. It was only the Vendor who had the ability to extend the completion date.

[143] Accordingly, I conclude it was the plaintiff alone who breached the Contract by failing to complete the transaction on April 8, 2010. That being the case, a consideration as to whether he is entitled to a decree of specific performance is not required.

Specific Performance

[144] If I am wrong and it is determined the Vendor did in fact waive its rights under the Contract, either to unilaterally re-set the completion date (and that April 8, 2010 was unreasonable), or to cancel the Contract at any time after the plaintiff's default, such that the Vendor in fact breached the agreement, I would have granted an order of specific performance to the plaintiff.

[145] A recent decision of the Court of Appeal, *Lalani v. Wenn Estate*, 2011 BCCA 499, reaffirms the Supreme Court of Canada's view that specific performance should only be granted in contracts dealing with real property where "the property is unique to the extent that its substitute would not be readily available" (*Lalani*, para. 18, citing from *Semelhago v. Paramadevon*, [1996] 2 S.C.R 415 at para. 22). Furthermore, the potential availability of other similar properties to Unit #1702 in the area of The Erickson is not to be given undue weight. In establishing uniqueness of property, the plaintiff's "subjective desires may be properly considered" (*Lalani*, para. 20).

[146] In this case, the property itself is unique in its design and was considered by the plaintiff to be a masterpiece of architectural design by Vancouver's most prominent architect of international fame, the late Arthur Erickson. The Erickson was specifically conceived to appeal to a unique set of tastes among wealthy, high-end purchasers and, as can only be found in certain developments, had elevator access directly to the unit.

[147] Unit #1702 was also customized to the plaintiff's particular tastes by the installation of limestone flooring. It was also intended to be the plaintiff's home - a consideration of importance in the Court of Appeal's decision in *Ali v. 656527 B.C. Ltd.*, 2004 BCCA 350 at para. 29.

[148] If specific performance cannot be achieved as a result of the impact on third parties' rights or some other equitable consideration, damages in lieu should be assessed as of the time of trial: *Lalani*, paras. 22-24, and *Semelhago*, paras. 14-15.

Relief Against Forfeiture

[149] Section 24 of the Law and Equity Act, R.S.B.C. 1996 c. 253 provides:

Relief Against the Penalties and Forfeitures

24. The court may relieve against all penalties and forfeitures and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

[150] The threshold issue is whether the deposit in question constitutes a penalty as opposed to being a genuine pre-estimate of liquidated damages.

[151] In Hinkson, the court cited with approval *Liu v. Coal Harbour Properties Partnership*, 2006 BCCA 385 ("Liu (C.A.)"), stating at para. 33:

As most recently discussed by this Court in *Liu v. Coal Harbour Properties Partnership*, 2006 BCCA 385, 56 B.C.L.R. (4th) 230, where the forfeiture of a deposit in a real estate transaction constitutes a penalty as opposed to a genuine pre-estimate of liquidated damages, the court may grant relief if it would be unconscionable not to do so. See in particular paragraph 24.

[152] Para. 24 of the court's decision in *Liu (C.A.)* cites the decision of Gow J. in *Lee v. Skalbana* (1987), 47 R.P.R. 162 (B.C.S.C.), aff'd (1989), 4 R.P.R. (2d) xxxiii (B.C.C.A.):

...where the issue is whether a contractual clause is for liquidated damages, or is a penalty:

1. The question "penalty" or "liquidated damages" is to be answered as at the date of the making of the agreement;
2. If the answer is "liquidated damages", that is the end of the matter, but, if the answer is "penalty"; then,
3. There arises the next question should relief be granted against the penalty?
4. The answer to that question depends upon whether to enforce the penalty would be unconscionable, and that unconscionability has to be determined at the date of the invocation of the clause.
5. Sec. 21 of The Law and Equity Act only applies if and when stage 3 has been reached.

[153] The trial judgment in *Liu* (2005 BCSC 873 - "*Liu (S.C.)*") also provides a useful summary where, at para. 41, Wilson J. states:

The leading decision on this issue is that of Lord Dunedin of the House of Lords in *Dunlop Pneumatic Tyre Company, Limited v. New Garage and Motor Company, Limited*, [1915] A.C. 79. After a review of the case law, he set out a number of propositions, the relevant portions of which are as follows:

1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.

2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda [1905] A.C. 6.
3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (Public Works Commissioner v. Hills [1906] A.C. 368 and Webster v. Bosanquet [1912] A.C. 394.
4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
 - (a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in Clydebank case).
 - ...
 - (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties (Clydebank Case, Lord Halsbury; Webster v. Bosanquet, Lord Mersey).

[154] In Liu (C.A.), Hall, J.A. referred to Workers Trust & Merchant Bank Ltd. v. Dojab Investments Ltd., [1993] A.C. 573 (P.C.). There, Lord Browne-Wilkinson discussed the exceptional status of deposits in land contracts, stating at 373-74 (cited from Liu (C.A.) at para. 16):

One exception to this general rule is the provision for the payment of a deposit by the purchaser on a contract for the sale of land. Ancient law has established that the forfeiture of such a deposit (customarily 10% of the contract price) does not fall within the general rule and can be validly forfeited even though the amount of the deposit bears no reference to the anticipated loss to the vendor flowing from the breach of contract.

(emphasis added in Liu)

[155] Reduced to their essentials, the various legal principles set out in the legal authorities amount to the following:

- the law has long encouraged parties to provide for a pre-estimate of a sum as the amount to be paid as liquidated damages if the contract goes off by default of a party;

· even though the parties may so stipulate, the court is entitled to disagree with the characterization of the payment if the estimate termed "damages" is really a penalty in disguise (Liu (C.A.) at para. 10).

[156] Finally, in Liu (C.A.), Hall, J.A. noted that where a deposit amount is "much in excess of 20% of the purchase price of a property would invite particular scrutiny by a court" (para. 14). The amount of the Deposit in this case was 25% of the purchase price.

[157] The issue then becomes whether what is stated by the parties in the Contract to be a deposit is "out of all proportion" to the estimated damages and is effectively a "penalty in disguise"?

The Provisions of the Contract

[158] Following the discussion relating to Liu (S.C.), noted above, the court in Hinkson referred to Hughes v. Lukuvka (1970), 14 D.L.R. (3d) 110 (B.C.C.A.). It noted at para. 36 that "the agreement of liquidated damages itself affords evidence of a genuine pre-estimate of damages."

[159] The relevant provision of the Contract, s.1.2(b)(iv), is to the following effect:

If the Purchaser is in breach of any of the covenants or obligations hereunder, the vendor may, at its election, retain the Deposit and accrued interest thereon as liquidated damages. The parties hereby agree that such amount constitutes a genuine pre-estimate of the minimum damages suffered by the vendor. (emphasis added)

[160] Thus, there is a prima facie indication, based on the terms of the Contract, that the plaintiff and Vendor both viewed the deposit as a genuine pre-estimate of liquidated damages.

The Circumstances of the Contract

[161] In addition to the terms of the Contract itself, Wilson J. in Liu (S.C.) referred to certain legal authorities, which were to the effect that the circumstances under which a contract is entered are material to the determination as to whether a deposit is a penalty or a genuine pre-estimate of liquidated damages (para. 41).

[162] While the plaintiff in this case points to the fact that the Contract was put forth on a "take it or leave it" basis, there is nothing inherently unfair about a party being unwilling to compromise on its terms. Furthermore, the plaintiff was represented by Mr. Hashemi in the dealings leading up to the execution of the Contract and he was present with the plaintiff when it was signed. There is no allegation or indication of any unfairness regarding the parties' entry into the Contract.

[163] The plaintiff also submitted as part of the circumstances surrounding the making of the Contract that there was a "generally-held sense of optimism within the real estate development industry" in Vancouver, due largely to the upcoming Olympic Winter Games. Accordingly the market was likely to be favourable to sellers. On the other hand, it was possible the market could have declined between the time when the Contract was signed and the date set for completion. As Wilson J. stated in Liu (S.C.):

Lord Dunedin...[made] the point that it is no obstacle to the sum stipulated being a genuine pre-estimate of damages that the consequences of breach are such to make precise calculation almost an impossibility...that is just the situation when it is probable that pre-estimated damages was a true bargain.

(para. 45).

[164] Furthermore, as was the case in Liu, the fact that the construction of the Development was not to be completed for a number of years supports a finding that the Deposit was intended as "earnest money paid as a deposit to ensure that the land sale transaction is adhered to by the purchaser" (Liu (C.A.), para. 8).

[165] In Maguire v. Revelstoke Mountain Resort Ltd. Partnership, 2010 BCSC 1618, Fitzpatrick J. held that a deposit of 10% of the purchase price paid pursuant to a similar provision as in this case in a contract for the purchase and sale of a pre-sale condominium was valid and enforceable.

Similar to the findings of the court in Liu and Hinkson Holdings, I am unable to find any factor that would convince me that the plaintiffs should not be held to their bargain in forfeiting the deposits as a genuine pre-estimate of damages. I conclude that the clause does not represent a penalty.

(para. 113).

[166] This conclusion was reached notwithstanding the fact that the development was not proceeded with and the developer had instructed its agent to return the deposit to non-defaulting pre-sale purchasers.

[167] Blackcomb Skiing Enterprises Limited Partnership v. Schneider, 2000 BCSC 720, and Liu (S.C.) also stand as authority for the proposition that a liquidated damages clause, agreed to by the parties as reflecting a genuine pre-estimate of damages, entitles the Vendor to keep the deposit even if the property sells for substantially more than the sum the purchaser had contracted to pay. The fact the Vendor may have suffered no actual damages or made a profit is not relevant to the issue of whether the payment is a deposit or a penalty.

The Function of the Deposit

[168] I wish to comment on the plaintiff's submission that the deposits in relation to the Development allegedly served a different and more extensive function than a "simple" deposit where the funds are paid and held as "earnest money" to secure the buyer's obligation to complete.

[169] The submission was that the deposits obtained from the plaintiff and other purchasers formed part of the foundation upon which the Vendor was able to secure construction financing and ultimately be able to complete and earn a profit on the Development.

[170] This does not assist the plaintiff in attempting to characterize the deposit paid by him as a penalty as opposed to a contractually agreed upon genuine pre-estimate of damages. While it is true the Vendor in this case did avail itself of the option to access deposits paid by purchasers for the construction of The Erickson, it did so pursuant to a process specifically provided for under the REDMA. In any event, Mr. Murray testified that the Vendor did not avail itself of this option in respect of the plaintiff's Deposit.

Conclusion as to the Nature of the Deposit

[171] I have concluded the Deposit was a genuine pre-estimate of liquidated damages and not a penalty. I do so for the following reasons:

- the Contract itself provides some evidence that the parties themselves agreed the deposit amount was a genuine pre-estimate of damages;
- the plaintiff was a sophisticated businessman;
- he had access to professional advice including that of a real estate agent who was knowledgeable of similar transactions several of which involved the Vendor or its affiliates;
- the Contract was entered into with the plaintiff knowing full well the terms and conditions stipulated by the Vendor were non-negotiable;
- there was the uncontradicted evidence of Mr. Murray that the 25% Deposit reflected standard practice of not only Concord Pacific but other vendors in the pre-sale condominium market in Vancouver;
- although there was a general sense of optimism about the re-sale value of high-end condominiums, it was also Mr. Murray's uncontradicted evidence that there had been three major downturns in the real estate market including condominiums which he had experienced during his 30 year career. Concord Pacific did not know when the contract was entered into in 2005 what the market would be in December 2008, that being the originally contemplated construction completion date;
- while Hall J.A. stated in *Liu (C.A.)* that he would have considered the question of penalty also as the time set for performance based on equitable principles (at paras. 23 - 28), this does not, in my view, assist the plaintiff. That is because on March 15, 2010 his legal representative signed The

Extension Agreement. Paragraph 3 provided that should the purchaser fail to complete on the scheduled completion date with the Vendor then terminating the purchase agreement, the parties agreed the purchaser would release and pay the Deposit and all interest accrued thereon to the Vendor. Accordingly, as of March 15, 2010, the plaintiff was agreeing to forfeit the Deposit if the transaction did not complete due to his default on the new completion date, being March 29, 2010.

- [172] When the terms of the Contract and the circumstances surrounding its making are examined, it cannot be said that the 25% deposit constituted a penalty as opposed to a genuine pre-estimate of liquidated damages. If a 25% deposit is "much in excess of 20% of the purchase price", which may not necessarily be the case, in my view, then it deserves greater scrutiny. In any event, the Deposit in this case does not, in my view, stand out as being "out of all proportion" to the potential damages suffered by the Vendor on the plaintiff's breach. Nor is it inconsistent with other real estate transactions of this kind (Hinkson at para. 36).
- [173] In light of my conclusion on the issue of penalty it is unnecessary for me to decide whether it would be unconscionable for the Court to enforce the Contract. If required, I would have concluded the forfeiture was not unconscionable in these circumstances. In addition to the factors set out above, I would add the following. Although the plaintiff's conduct in this case was less egregious than that of the purchaser in Hinkson, he was, for the reasons already outlined, effectively the author of his own misfortune.
- [174] In addition, as noted above, the parties expressly agreed in the Extension Agreement that if the plaintiff failed to complete on the extended completion date of March 29, 2010, and the Vendor terminated the Contract as a result, the Deposit was to be released to the Vendor. As in Liu, the plaintiff was given several opportunities to meet its obligations as the Vendor sought to accommodate him.
- [175] While it now appears the plaintiff would have been able to complete the transaction had the Vendor agreed to one more extension, his submission on this point seeks to take advantage of the acuity of hindsight. The plaintiff had failed to meet the original completion date of March 15, 2010. He had also failed to meet the agreed upon extended completion date of March 29, 2010, and then failed to meet the final extension of April 8, 2010, a date which was three days later than he had indicated was required. At this point, given the actions of the plaintiff and the circumstances surrounding the purchase of Unit #1702 at the time, it was not unreasonable for the Vendor to exercise its contractual rights and terminate the Contract.

- [176] The plaintiff says the Vendor had given lengthier extensions in the past when units were thought to be worth less than the contract price at the time of default. Furthermore, when it sought to terminate the plaintiff's contract it did so while operating under the belief Unit #1702 could very likely be resold for a much higher price. But that was also the state of affairs when the Vendor provided prior accommodations to the plaintiff. In my view, the Vendor's conduct was not "sharp" or "oppressive" (Liu (C.A.) at para. 28)
- [177] In Liu (S.C.), the forfeiture of the deposit to the Vendor occurred despite there being a "windfall in excess of \$1,000,000" (para. 47) as a result of the failure of the purchasers to complete. In this case it is approximately \$750,000, excluding the increase in the value of Unit #1702.

VII CONCLUSIONS

- [178] The plaintiff's action is dismissed. It follows the Vendor should obtain the relief it seeks in its counterclaim, namely a declaration it is entitled to the Deposit, the interest accrued thereon and costs.

"Abrioux J."

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