

CANADA / JUDGMENT

Epix Developments Ltd. v. Bonnis Development Union Street Limited Partnership

2025 BCSC 805

COURT

Supreme Court of British Columbia

DECIDED

29 April 2025

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2025 BCSC 805 Epix Developments Ltd. v. Bonnis Development Union Street Limited Partnership

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Epix Developments Ltd. v. Bonnis Development Union Street Limited Partnership,

2025 BCSC 805

Date: 20250429

Docket: S222032

Registry: Vancouver

Between:

Epix Developments Ltd. and Epix Main Street Limited Partnership

Plaintiffs / Defendants by way of Counterclaim

And:

Bonnis Development Union Street Limited Partnership

Defendant / Plaintiff by way of Counterclaim

Before: The Honourable Justice K. Wolfe

Reasons for Judgment

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Place and Dates of Trial:

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April 22-26, 2024,

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Place and Date of Judgment:

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April 29, 2025

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Introduction

[1] This action concerns a failed real estate transaction in which the plaintiffs, Epix Developments Ltd. and Epix Main Street Limited Partnership (together, "Epix") sought to purchase a development site from the defendant, Bonnis Development Union Street Limited Partnership ("Bonnis"). Each side blames the other for the transaction not completing; each claims the deposit and various damages. At the time of the parties' agreements, the site in question consisted of three adjacent lots located in Vancouver's Chinatown, at the intersection of Main and Union Streets - an area with significant history and development

potential. Bonnis subsequently sold the site to another purchaser for less than what Epix had agreed to pay. The present dispute boils down to who is entitled to what after the parties' deal failed.

- [2] Epix says Bonnis did not fulfill its contractual obligations to deliver the site on the terms set out in the parties' agreements. In particular, Epix contends Bonnis failed to make the requisite efforts both to enact the rezoning and to obtain a development permit (or "prior-to" letter) from the City of Vancouver (the "City") by the earliest possible date. It is common ground that completion of those two processes were necessary prerequisites to development at the site. Epix says Bonnis also breached its obligations to keep Epix informed and to seek, consider and incorporate its input, and breached the common law duty of good faith. As a result of Bonnis' continuing repudiation of the agreements, Epix says it was entitled to, and did, validly exercise its right to terminate the contract on December 30, 2022. Epix says the Court should order return of its \$1.1 million deposit plus interest, together with general damages for breach of contract and / or breach of the duty of good faith and honest performance.
- [3] Bonnis disputes it failed to fulfill its contractual obligations and says Epix was never ready, willing and able to complete the transaction as agreed. Among other things, Bonnis alleges in its counterclaim that Epix improperly filed and maintained a certificate of pending litigation on March 23, 2022 (the "CPL"). Epix then hindered Bonnis' ability to enact the rezoning by refusing to remove the CPL even temporarily in December 2022. Bonnis says Epix committed the torts of slander of title and abuse of process, including by failing to secure adequate financing to complete the deal before filing the CPL. Bonnis asserts that even if it did breach the agreements at some earlier point in time, by December 2022, Bonnis had cured any breaches. Accordingly, Bonnis says it was Epix who repudiated the contract, allowing Bonnis to terminate. Bonnis seeks an order for forfeiture of the deposit plus interest, as well as damages for slander of title and abuse of process, including operational costs and losses allegedly incurred to secure a subsequent purchaser.
- [4] As a result of trial management conference orders made before my involvement, the matter proceeded as a hybrid trial. Virtually all direct evidence was placed before the Court by way of six extensive volumes of more than 30 separate affidavits. Key affiants were then cross-examined before the Court. The parties also referred to a significant number of documents at trial, the majority of which are attached as exhibits to affidavits, rather than having been marked separately. It is obviously not possible to address in detail all of the written and oral evidence in this judgment, but I have considered all of it, as well as the parties' comprehensive written and oral submissions, in rendering my decision.
- [5] I made three substantive rulings during the course of the trial. First, I sustained Bonnis' hearsay objection to certain affidavit evidence from Epix relating to financing. Second, I dismissed Epix's challenge to certain expert evidence Bonnis tendered and ruled the report and voir dire evidence admissible at trial. Finally, I refused Bonnis' application, advanced at the start of closing submissions, to amend its counterclaim to plead general damages for

breach of the duty of good faith. To the extent required for these reasons, I address those rulings summarily below.

Issues

- [6] Through their respective pleadings (claim and counterclaim), the parties raised a multitude of issues and sub-issues, which were made more complex by each side approaching the litigation with a different focus. In my view, the overall issues for determination by the Court are best framed as follows:
1. What is the proper interpretation of the parties' contractual obligations?
 2. Did either side breach their specific obligations under the agreements or otherwise breach the duty of honest and good faith performance?
 3. Which side validly terminated the agreements?
 4. Did Epix's filing and maintenance of the CPL constitute slander of title or abuse of process?
 5. What are the appropriate remedies?
- [7] Each side suggests costs should be the subject of further submissions.

Background

- [8] To situate my analysis, it is helpful to provide a high-level overview of the parties, their relationship and the chronology of events underlying the transaction. As I address the facts that are key to each issue in more detail below, this section is intentionally summary in nature. To the extent the parties disagree about certain facts that require resolution for my decision, I either address that in this section or in my analysis below.

The parties and the property

- [9] There are two plaintiffs. Epix Developments Ltd. is a British Columbia company in the business of property development, which was founded in 2009. Epix Main Street Limited Partnership is a limited partnership which was registered in September 2021 so it could be assigned the contract for purchase of the development site at the heart of this dispute. Derek DiMartile is a founder and the President of Epix Developments Ltd. and was the main person involved in the transaction on behalf of Epix. Mr. DiMartile has been involved in various aspects of real estate and property development for over 20 years. For purposes of this transaction, Mr. DiMartile worked with a licensed realtor, Victor Jang.
- [10] The defendant, Bonnis, is a limited partnership registered in British Columbia. Bonnis Development Main Inc. ("Bonnis Inc.") is a British Columbia company and, at all relevant times, was the registered owner of the development site, holding the site as nominee agent and bare trustee for Bonnis. Two brothers, Kerry and Dino Bonnis, are the principals of Bonnis. Dino's son, Dimitri Bonnis, is a Vice-President of Bonnis. As the members of the

Bonnis family have the same last name, I will refer to them by their first names in this judgment, without meaning any disrespect. The Bonnis family and their companies have significant development experience in Vancouver. Bonnis was represented in this transaction by their licensed realtor, Adrian Gomes. Mr. Gomes is related to the Bonnis family through marriage.

- [11] Throughout the relevant time period, each side worked with various consultants and professionals, including environmental consultants, architects, solicitors and personnel at the City. The involvement of these people will be addressed below as required.
- [12] At the time the parties began discussing the possible purchase in May 2021, the development site owned by Bonnis consisted of three adjacent lots on the northeast corner of Main and Union Streets in Vancouver, with civic addresses of 728, 780 and 796 Main Street (collectively, the "Property"). One lot contained a two-storey commercial building built in 1910. A second lot contained a three-storey building built in 1899 and designated for single room occupancy, with 27 rented rooms. The Property is in the historic Chinatown area, close to the site for the new St. Paul's hospital. The Property backs onto an alley known as "Hogan's Alley" which is a site that holds Black cultural and historical significance in Vancouver. The Property was previously the site of two historical landmarks (the Brickhouse and the Jimi Hendrix Shrine), which had been included in Bonnis' development plans.
- [13] In 2017, Bonnis had unsuccessfully applied to the City to rezone the Property to "Comprehensive Development" district (CD-1) to permit mixed commercial and residential use. Bonnis revised and resubmitted its rezoning application in late 2019, with the intention of enabling development on the Property of an 11-storey, mixed-use building, with ground-floor commercial retail space, 19 social housing units and 75 market strata residential condominium units. Around November 2020, staff at the City recommended that Bonnis' rezoning application pass, subject to Bonnis satisfying certain conditions before the rezoning bylaw could be enacted. The specific conditions were set out as part of a rezoning referral report the City provided to Bonnis. Bonnis subsequently decided to sell the Property, rather than complete the redevelopment itself.

The agreements

- [14] Two related agreements define the rights and obligations of the parties for purposes of this litigation. While the parties disagree about the proper interpretation of their obligations under those agreements, the history of them is largely not in dispute.
- [15] Mr. DiMartile met Mr. Jang in 2019 while working to market a different development project Epix had built in Vancouver. Mr. DiMartile let Mr. Jang know he was welcome to forward other possible opportunities for Epix's consideration. Mr. Jang has known Mr. Gomes for more than 30 years through their work in the real estate industry; they are in contact several times a year. Mr. Jang asked Mr. Gomes about possible off-market development opportunities with Epix in mind. On May 15, 2021, Mr. Gomes sent Mr. Jang an email

providing information about a possible opportunity to purchase the Property for \$22 million. Mr. Jang forwarded the email to Mr. DiMartile on May 18, 2021. Mr. DiMartile was away on vacation, but since the Property was of interest to Epix, Mr. DiMartile reviewed the information and asked some further questions.

- [16] On May 23, 2021, Bonnis provided some additional information, including emails stating "zoning passed in March" and "anticipated [development permit] issuance by end of this year". Bonnis provided what it characterised as the "complete file" in electronic form in late June 2021, together with further emails suggesting zoning had "passed". Bonnis also advised Epix that Bonnis' architects expected to receive the development permit "prior-to" letter ("PT Letter") in September 2021. In general terms, a prior-to letter is a document by which the City provides a form of "approval in principle" for a development permit, as long as the additional conditions and items identified in the prior-to letter are satisfactorily addressed.
- [17] I find that based on the information Bonnis provided, Epix understood rezoning for the Property had already been enacted, and development work could begin after receipt of either the development permit or the PT Letter (assuming conditions in the latter could be addressed). This made the Property attractive to Epix and in early July 2021, Epix made an initial offer to purchase. Bonnis sent a counter-offer. On or about July 27, 2021, the parties entered into the first agreement, entitled "Offer for Purchase and Sale" (the "Purchase Agreement"). Again, when the Purchase Agreement was signed, Epix understood rezoning for the Property had already been enacted.
- [18] Among other things, the Purchase Agreement provides that:
- a) the purchase price for the Property is \$22 million (s. 1(f));
 - b) Epix will pay its solicitor an initial deposit of \$100,000 and an additional deposit of \$1 million (together, the "Deposit") (s. 1(g)); and
 - c) the completion date is the 30th day after the later of:
 - i. the date of satisfaction or waiver of the purchaser's conditions; and
 - ii. the date that is five business days following receipt of the PT Letter, as defined in Schedule D of the Purchase Agreement (s. 1(h)).
- [19] Section 2 of Schedule D defines the parties' rights and obligations in relation to the PT Letter. As that section was subsequently modified, for present purposes, it is sufficient to note the parties acknowledged and agreed Bonnis had applied to the City for a development permit in support of a development with specific characteristics (defined as the "DP Terms"). Under s. 2(b) of Schedule D to the Purchase Agreement, Bonnis was to have primary carriage of the development permit process and was required to use "commercially reasonable and diligent efforts" to obtain the development permit or at least the PT Letter (both to include the DP Terms) at the earliest possible date but prior to November 30, 2021 (referred to as the "Outside Date" in the Purchase Agreement). Bonnis was also required to keep Epix informed

"on a timely basis" of the "status and any material developments" in relation to the development permit process, and was required to seek, consider and, "wherever commercially reasonable and practical", incorporate Epix's input.

- [20] Section 2(c) of Schedule D to the Purchase Agreement set out the conditions under which the November 30, 2021 Outside Date could be extended by either side up until May 31, 2022, beyond which it could be further extended by mutual consent. The Purchase Agreement did not provide for termination or any other consequence in the event the Outside Date passed without satisfaction of the conditions precedent; it is simply silent. Sections 2(d) and (e) addressed Epix's options and remedies if the PT Letter did not sufficiently comply with the DP Terms.
- [21] Section 3 of the Purchase Agreement itself deals with the Deposit, including consequences if either party defaults on their obligations. In relevant part, it reads:
3. [] The Deposit will be credited to the Purchase Price and will be paid to the Vendor if the sale and purchase is completed in accordance with the terms hereof. The Deposit paid, together with all interest accrued thereon, will be forfeited to the Vendor if the Purchaser is in default of its obligation to complete the sale and purchase of the Property hereunder as liquidated damages (the parties hereby agreeing that such amount constitutes a genuine pre-estimate of damages) and as the Vendor's sole and exclusive remedy, or will be paid in full to the Purchaser, without prejudice to any other right or remedy of the Purchaser, in the event that the Purchaser elects to terminate this Offer to Purchase due to the Vendor being in default of its obligation to complete the sale and purchase of the Property hereunder.
- [22] Section 22 of the Purchase Agreement makes "time of the essence". Schedule A of the Purchase Agreement listed the "permitted encumbrances" for the Property. Of note, the list did not include the usual encumbrances that would have been necessary to allow for a subsequent enactment of rezoning, such as the various documents and agreements that the City requires be registered in first position on title.
- [23] The Purchase Agreement was subject to a number of conditions for Epix's benefit, including a 45-day period after receipt of all documentation from Bonnis in which Epix was to conduct its due diligence and remove the subjects. In the course of his review, Mr. DiMartile discovered that, contrary to Epix's belief to that point, the rezoning for the Property had not yet been enacted. Through Mr. Jang, Epix requested further information and clarification, and the parties engaged in further negotiations. The negotiations included in-person meetings on each of August 16, 2021 and September 16, 2021 to discuss Epix's questions about the Property, including about the rezoning. In this time period, among other matters, Epix also raised concerns about two specific rezoning-related issues that are discussed further below: an environmental soils condition requirement and a statutory right of way / setback requirement.

[24] While Dimitri's affidavit evidence contends Bonnis was clear about the status of the rezoning (i.e. that it had passed public hearing but not enactment), I am unable to accept that assertion. I find the documents and communications from that time (including the Purchase Agreement itself and emails from Kerry, Dimitri and Mr. Gomes) indicate Bonnis represented the rezoning as already being complete. In any event, following the further negotiations, on September 23, 2021, the parties entered into the second agreement, entitled "Subject Removal and Amending Agreement" (the "Amending Agreement"), which expressly made enactment of the rezoning a condition precedent to completion. It is significant, in my view, that the purchase price was not adjusted despite this change.

[25] In the Amending Agreement, Epix waived the conditions from the Purchase Agreement (recital B and s. 3). The Amending Agreement also modified the original completion date so that completion would not be triggered until after both the PT Letter had been received (the original condition) and rezoning for the Property had been enacted (the new condition). Section 1(h) of the Purchase Agreement was replaced with the following:

- (h) Completion Date: The 30th day after the later of: (a) the date of satisfaction or waiver of the Purchaser's Conditions (b) the date that is five (5) business days following the receipt of the "Prior To" Letter (defined in Schedule D) and (c) the date that is five (5) business days following the enactment of the Rezoning (as defined in Schedule D).

[Emphasis added.]

[26] To address Bonnis' new obligation to obtain the enactment of rezoning before completion, the Amending Agreement replaced section 2 of Schedule D to the Purchase Agreement in its entirety with the following (material additions noted with bold and underlining):

2. PRIOR-TO LETTER

- (a) The Vendor and the Purchaser acknowledge and agree that the Vendor has applied to the City of Vancouver for the enactment of a rezoning bylaw (the "Rezoning") to change the zoning of the Lands to CD-1 (Comprehensive Development) District and for a development permit for a proposed development of the Lands (the "Development Permit") which is anticipated to permit a development (the "Development") as follows:
- (i) an 11-storey building generally as shown in the drawings "Rezoning Resubmission (Response to U.D.P.) Jan 2nd, 2020";
- (ii) 6,099sf gross commercial space at grade, 4,955sf sellable;
- (iii) 14,982sf gross SRO space on floors 2 & 3 which will be donated to the City of Vancouver in lieu of a cash CAC payment; and
- (iv) 71,948sf gross market residential space on floors 4-11, 54,396sf sellable - 75 market residential condominium units; and

- (v) provisions by which the City approves any required tenant relocation plan (including costs associated therewith) in respect Building's tenants,
- (collectively, the "DP Terms")
- (b) The Vendor will make commercially reasonable and diligent efforts to obtain an enactment of the Rezoning and the Development Permit, intended to include the DP Terms, at the earliest possible date and in any event to obtain the Rezoning and receive from the City of Vancouver a development permit "prior-to" letter (i.e. a City of Vancouver letter stating that the Development Permit has been approved and may be issued upon the completion of the revisions and conditions noted within the "prior-to" permit issuance letter stating the same) which is intended to include the DP Terms (the "Prior-To-Letter") prior to December 31, 2021 (the "Outside Date").
- (c) The Vendor will have primary carriage of the Rezoning and the Development Permit process prior to the Completion Date but will keep the Purchaser informed on a timely basis as to the status and any material developments, and seek input from the Purchaser, in connection therewith, including with respect to any additional encumbrances (the "Additional Encumbrances") required by the City to be registered on title to the Lands in connection with the Rezoning, consider in good faith the Purchaser's reasonable comments and incorporate the Purchaser's reasonable comments wherever commercially reasonable and practical. The Purchaser will, and will cause the Purchaser's consultants to, respond promptly to requests from the Vendor for comment and input in connection with the Rezoning and the Development Permit process. For certainty, the parties acknowledge and agree that the Development Permit may not have been issued by the City prior to the Completion Date. On the Completion Date, the Vendor will transfer and assign to the Purchaser all applications, materials and other documentation respecting the Rezoning and the Development Permit together with all documents submitted to the City in draft form or otherwise respecting the fulfillment of the Prior-to-Letter.
- (d) If despite the commercially reasonable efforts of the Vendor to achieve the same, the Rezoning has not been enacted and the Prior-To-Letter is not issued before the Outside Date, but either of the Vendor or the Purchaser is of the opinion that there is a reasonable prospect that the Rezoning will be enacted and the Prior-To-Letter will be issued within a reasonable period of time, then that party may further extend the Outside Date on a month by month basis by giving written notice to the other party, except that the Outside Date may not be extended past May 31, 2022 without the prior written consent of the Purchaser and the Vendor.
- (e) In the event that the Prior-To-Letter issued by the City of Vancouver:
- (i) has parameters that are not at least equal to or within one percent (1%) in the aggregate of the DP Terms; or

(ii) does not approve a tenant relocation plan that is substantially similar to that proposed in the Development Permit application materials previously provided to the Purchaser; or

(iii) includes terms and/or conditions which, in the opinion of the Purchaser, acting reasonably, would materially affect:

(A) the design or functionality of the Development;

(B) the timeline for commencement and/or completion of the Development; or

(C) the cost of the Development,

then the Purchaser have [sic] the right, to be exercised by notice in writing to the Vendor within fifteen (15) days of the receipt of the Prior-To-Letter, to terminate this Offer to Purchase. In the event that the Purchaser exercises such right of termination, this Offer to Purchase will be null and void. In such event, the Purchaser's solicitors are hereby irrevocably directed by the Vendor and the Purchaser to forthwith repay any Deposit and accrued interest, in full, to the Purchaser and thereafter neither party will have any further obligations to the other hereunder, except for the obligation of the Purchaser to maintain the confidentiality of all disclosed documents and instruments delivered to it, to return all copies of such documents and instruments and to indemnify the Vendor as set out in Section 5 of this Offer to Purchase.

[clause (f) omitted in original Amending Agreement]

(g) In the event the sellable area of the Development included in the Prior-to-Letter is less than 59,351 square feet in total, the Purchase Price shall be reduced by \$370.68 per square foot.

(h) Notwithstanding the foregoing, at any time prior to the Outside Date, as may be extended, the Purchaser may waive the Vendor's obligation to make commercially reasonable and diligent efforts to obtain the Development Permit, and to obtain the Prior-to-Letter, by providing written notice of such waiver to the Vendor. If the Purchaser provides such waiver notice to the Vendor, then the Completion Date will be the date that is thirty (30) days following the delivery of the waiver notice to the Vendor.

[27] As the excerpt above makes clear, the Amending Agreement did not add consequences if the Outside Date (then set at December 31, 2021) were to pass without fulfillment of the conditions precedent. This is noteworthy because until December 27, 2022, Bonnis consistently took the position - both with Epix directly and in the subsequent litigation - that the parties' agreements ended on the expiry of the Outside Date. The parties did reconfirm that time was of the essence to the Purchase Agreement, as amended by the Amending Agreement (s. 5). On execution of the Amending Agreement, Epix paid the additional \$1 million portion of the Deposit into its solicitor's trust account.

[28] I will refer to the Purchase Agreement and the Amending Agreement collectively as the "Agreements", or the "contract".

Fall 2021 to February 2022: Work towards the PT Letter

- [29] As noted above, during the due diligence period, Epix raised concerns about the status of two rezoning-related requirements. The first was a requirement to obtain a form of approval from what was then the Ministry of Environment and Climate Change Strategy ("Ministry of Environment") in relation to possible soil contamination on the Property. In simple terms, given the historic uses of the Property, the Ministry of Environment required that a site investigation be undertaken to determine the status of possible contamination. The outcome of that investigation would dictate next steps, including whether further investigation or remedial work is required or if it would be sufficient to apply for a document (such as a release letter, or a formal letter of determination) confirming the presence or absence of contamination. Until these steps are completed, municipal permits (such as for rezoning and development) are suspended or "frozen".
- [30] The second requirement related to the need to ensure that the building footprint did not encroach on the City's statutory right of way, as measured from the back of the curb. The parties generally referred to this as the setback requirement. Given its experience on another development project, Epix was concerned that the architectural drawings and survey plan provided by Bonnis for development of the Property appeared to calculate the setback from the front of the curb, rather than the back of the curb. To meet the rezoning conditions, it would therefore be necessary to adjust the building design to accommodate this difference.
- [31] Epix attempted to raise these concerns before and during the parties' meeting on September 16, 2021. While Mr. DiMartile's impression was that Bonnis was dismissive of these concerns, the evidence at trial from Mr. DiMartile, Kerry and Dimitri is that, at the September 16, 2021 meeting, Bonnis provided assurances that it would have the rezoning enacted well before the ultimate Outside Date in May 2022; in fact, Bonnis expressed confidence that rezoning would be enacted by the end of 2021. Mr. Gomes' evidence mirrored this confidence as well.
- [32] Between October 2021 and February 2022, these two issues continued to be topics of discussion between the parties. Epix attempted repeatedly to engage with Bonnis on the setback requirement, including sending a detailed letter on October 19, 2021. Bonnis' position was that it would not take steps to amend the drawings until after the PT Letter had been received. This caused Epix concern because, in its view, there was a real risk of losing sellable square footage if the building had to be changed. Dimitri admitted on cross-examination and in discoveries that Bonnis recognized this as a risk, but it refused to acknowledge Epix's concerns directly and did not provide updates of any steps it was taking behind the scenes.
- [33] On the environmental side, Epix had engaged its own environmental consultant in August 2021 to complete a preliminary site investigation report. Bonnis did not engage an environmental consultant until late November 2021. Despite Epix having raised concerns,

Bonnis maintains that until it received a "critical" letter from the City on October 29, 2021, it did not appreciate that its applications were frozen and that it would require the assistance of an environmental consultant. Bonnis did not forward the City's letter to Epix or provide updates on its consultant's proposed strategy (which differed from what Epix believed to be required) until mid-December 2021.

- [34] In December 2021, Bonnis' solicitor sent a notice to extend the Outside Date to January 31, 2022, but it contained mistakes. When advised of those mistakes by Epix's solicitor, Bonnis' solicitor confirmed they would send a revised notice. In the interim, Epix's solicitor sent a notice to extend. Bonnis subsequently sent a revised notice to extend.
- [35] In January 2022, Epix's environmental consultant completed a stage 2 preliminary site investigation and Epix sought updates on the status of rezoning enactment efforts, as well as information required to arrange financing. Bonnis' environmental consultant followed up with the Ministry of Environment regarding the first stage of his strategy. On January 31, 2021, Bonnis sent a second notice to extend the Outside Date to February 28, 2022.
- [36] In February 2022, Epix continued to ask for updates directly and through its solicitor. Bonnis' said it did not have any updates to share on the PT Letter or the rezoning enactment, despite having received certain information from the City. On February 14, 2022, the City issued the PT Letter. One of the conditions noted the need to adjust the setback so that it would be measured from the back of the curb, as Epix had flagged in the fall of 2021. The parties' communications following its issuance confirmed both were aware that the environmental requirements had yet to be addressed. Epix raised a concern that Bonnis was not pursuing the correct form of approval and proposed Bonnis engage Epix's consultant to expedite the process. Despite concerns and further requests for updates, on February 27, 2022, Epix sent a third notice to extend the Outside Date to March 31, 2022.

March to November 2022: the start of litigation and subsequent events

- [37] Epix's attempts to obtain updates about the status of the work Bonnis was undertaking continued into March 2022, but with little substantive response.
- [38] On March 4, 2022, Bonnis advised it would not extend the Outside Date past May 31, 2022, stating it had worked hard and diligently to fulfill the conditions precedent, noting the issuance of the PT Letter and expressing confidence that there was no "real risk" that the building could not be built as planned, and suggesting the City was to blame for the delays in obtaining the rezoning enactment. The clear implication was that Bonnis believed Epix should close without the rezoning having been enacted. On cross-examination, Kerry admitted this was Bonnis' position in March 2022.

- [39] On March 8, 2022, Bonnis expressly asked Epix to advise if it would close by the Outside Date (implicitly, regardless of the status of rezoning), failing which, Bonnis would consider the contract to have ended. Epix responded that it was "ready, willing and able" to close on the parties' deal - in other words, with rezoning enacted. This exchange brought matters to a head between the parties, and litigation counsel became involved.
- [40] Despite the exchange of correspondence between litigation counsel, on March 21, 2022, Mr. DiMartile sent an email noting that the PT Letter required a response by September 15, 2022 and suggesting that, despite the current disagreements, there would be utility on both sides if the parties could "work together" to respond to the PT Letter and address the identified items. On March 22, 2022, Kerry responded by email stating that on a go-forward basis, all communications other than those required by the Agreements would be strictly through litigation counsel. Kerry stated Bonnis was "not open or otherwise amenable" to any changes, revisions, additions or alterations to the Agreements.
- [41] On March 23, 2022, Epix filed its notice of civil claim, alleging Bonnis breached the Agreements and seeking specific performance or in the alternative, damages. On the same day, Epix filed the CPL. On cross-examination, Mr. DiMartile admitted that on the date the CPL was filed, Epix could not have closed on the deal because it did not have the balance of the \$22 million purchase price on hand, nor sufficient subscriptions that it could call in on that date.
- [42] On the same date, Bonnis listed the Property for sale for \$23,888,000. On March 31, 2022, Bonnis' litigation counsel confirmed that Bonnis would not extend the Outside Date any further.
- [43] On April 29, 2022, Bonnis filed its original response to civil claim and its counterclaim. In its original response, Bonnis pleaded, among other things, that the Agreements were void for uncertainty and came to an end on March 31, 2022, or alternatively, that Bonnis had not breached the Agreements.
- [44] On May 6, 2022, Epix signed a commitment letter with Desjardins for financing for the Property.
- [45] The record indicates that from April 2022 to December 1, 2022, Bonnis did not provide Epix with any updates as to the status of the rezoning enactment and development permit process, despite a number of requests. As set out further below, the record reveals Bonnis was taking some steps during this period to move matters forward.

December 2022, January 2023 and subsequent events

- [46] While litigation-related correspondence continued between April and December 2022, it was not until December 1, 2022 that Bonnis "re-engaged" with Epix. I have set out the events of December 2022 in some detail in my analysis of Issue 3 below, so I will not duplicate those efforts here. In summary, in December 2022, Bonnis advised that it was close to securing the

rezoning enactment and requested that Epix lift the CPL, even temporarily, to allow the necessary documents to be registered in first position on title. In making that request, Bonnis did not proactively provide updates about what had been done in the intervening period, but did provide certain materials in response to direct requests from Epix. Mr. DiMartile's evidence was that there were competing demands on his time, including preparation for discoveries on December 15 and 16, 2022, that hindered his ability to review the materials that were eventually provided.

- [47] When Epix did not agree to lift the CPL by Bonnis' deadline, Bonnis sought short leave to bring an application to cancel the CPL. Short leave was denied. Bonnis made a further request for Epix to lift the CPL, and when Epix did not respond within two business days, Bonnis took the position that Epix was in breach and it was accepting Epix's repudiation. Epix refuted it was in breach. Two weeks later, on December 27, 2022, Bonnis reversed the position it had taken to that point, and asserted it was willing to accept that the Agreements were valid and enforceable, and purported to offer Epix "one final opportunity" to cure its alleged breach if it would lift the CPL by January 3, 2023.
- [48] On December 30, 2022, Epix sent an email alleging Bonnis had been and remained in continuous breach of its obligations, and purporting to terminate the Agreements. Epix advised it would discharge the CPL and pursue its claim for damages. Bonnis responded within hours, framing Epix's communication as an anticipatory repudiation. Bonnis purported to accept Epix's repudiation and terminate the Agreements.
- [49] On January 3, 2023, the next business day, Epix cancelled the CPL. On January 4, 2023, Bonnis filed the documents to be registered on title for rezoning the enactment; they were fully registered by January 16, 2023. On January 31, 2023, the City approved the enactment of rezoning.
- [50] In April 2023, Bonnis entered into an agreement with the Hogan's Alley Society for sale of the Property for \$21.75 million. Those parties subsequently agreed to reduce the purchase price to \$20 million, and the sale of the Property closed on November 6, 2023.

The parties' positions

- [51] While they will be addressed in more detail below in relation to the specific issues to be determined, at a high level, the positions advanced by Epix and Bonnis can be summarized as follows.

Epix

- [52] Epix says, like the decision in *Sutter Hill Management Corporation v. Mpire Capital Corporation*, 2022 BCCA 13[1] [Sutter Hill BCCA], rev'ing 2020 BCSC 238 [Sutter Hill BCSC], this case turns on the interpretation of the Agreements and Bonnis' obligations to enact rezoning and obtain the PT Letter before completion would be triggered. Specifically, Epix says the Agreements compelled Bonnis to use "commercially reasonable and diligent efforts"

to obtain the PT Letter and enactment of rezoning "at the earliest possible date". Epix says this obligation required more than just commercially reasonable efforts, especially when coupled with Bonnis' additional obligation to inform and involve Epix in those processes in a meaningful way. Epix says the interpretation urged by Bonnis would deprive the specific contractual language chosen by the parties of its intended meaning. Based on its own interpretation, Epix says Bonnis failed to pursue the rezoning enactment "at the earliest possible date" and failed to inform and involve Epix as required, resulting in a continuing repudiation of the contract from March through December 2022. Epix says that as a result of this continuing repudiation, its decision to terminate the contract in December 2022 was valid.

[53] Epix says Bonnis improperly seeks to shift the Court's focus away from Bonnis' earlier actions to a narrative focused exclusively on December 2022, a timeframe in which Bonnis has attempted to "manufacture" a breach by Epix. Epix says the evidence (including contemporaneous documents) does not support Bonnis' shifting and inconsistent positions about the status of the Agreements. This is especially the case given Bonnis did not provide any indications between April and December 2022 that it intended to be bound by the Agreements, instead taking the position they were either void or had come to an end when the March 31, 2022 Outside Date was not extended. Epix maintains it went beyond its obligations in an attempt to facilitate completion of the deal.

[54] Epix seeks:

- a) return of its \$1.1 million Deposit, plus accrued interest;
- b) damages of \$190,572.68 for breach of contract and breach of the duty of good faith;
- c) dismissal of Bonnis' counterclaim; and
- d) pre- and post-judgment interest and costs.

Bonnis

[55] Bonnis denies that it repudiated the Agreements in March 2022, but says if it did, Epix had to make a choice: confirm the Agreements or accept the repudiation and terminate the contract. By filing the CPL and its claim for specific performance, Bonnis says Epix irrevocably chose to confirm the Agreements, which required both sides to perform their contractual obligations but which also had the effect of putting "time is of the essence" at large. Bonnis says Epix's decision to file and maintain the CPL was improper because Epix lacked adequate financing when the CPL was filed, meaning it was not ready, willing and able to complete the purchase. In any event, having chosen to affirm the Agreements, Epix was required to perform its obligations under them. As those obligations included not hindering Bonnis' ability to proceed with the enactment of rezoning, Bonnis says the events of December 2022 are determinative of both the claim and counterclaim.

- [56] Bonnis says between April and December, it continued to perform its contractual obligations by moving forward with rezoning. By December 2022, Bonnis says it was close to securing enactment of the rezoning, but due to Epix's CPL, Bonnis was unable to register the necessary charges first on title, as required by the City. Bonnis says Epix's refusal to withdraw the CPL, even temporarily, prevented Bonnis from completing the rezoning. But for Epix's refusal, Bonnis contends it was prepared to and would have completed the transaction on the agreed terms in January 2023. Bonnis says Epix's actions in not removing the CPL constituted a fundamental breach of the Agreements, which Bonnis says it accepted by letter dated December 13, 2022. Bonnis says it then chose to give Epix one more chance to complete in a letter dated December 27, 2022, but the December 30, 2022 response from Epix's counsel constituted an anticipatory breach. Bonnis says it accepted that breach on December 30, 2022, thereby terminating the Agreements, with the result that the Deposit forfeited to Bonnis.
- [57] Bonnis seeks judgment on its counterclaim and dismissal of Epix's claims. Bonnis says it is entitled to retain the \$1.1 million Deposit plus interest. In addition, Bonnis says it should be awarded damages for slander of title and/or abuse of process, in the amount of \$5,141,386.32 (if measured from the filing of the CPL to the date the Property was sold) or alternatively, \$3,578,593.37 (if measured from the termination of the Agreements). To the extent the Court grants any of the relief sought by Epix, Bonnis says it should be set off against what is owing to Bonnis. Bonnis also seeks costs.

Analysis

- [58] Before considering the specific issues set out above, it is helpful, in the context of this case, to first offer a few comments on credibility and reliability.

Credibility and reliability in contractual matters

- [59] Through the course of trial and in their closing submissions, each side contended that aspects of the other side's evidence were not credible or not reliable, or both.
- [60] The legal principles that govern credibility and reliability are not in dispute. In general terms, credibility "involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides": *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd*, [2012] S.C.C.A. No. 392. Reliability is a distinct but related concept. Rather than being concerned with the veracity or truthfulness of a witness, reliability is concerned with the accuracy of their testimony: *Ford v. Lin*, 2022 BCCA 179 at para. 104; *Equustek Solutions Inc. v. Jack*, 2020 BCSC 793 at para. 109.

- [61] In terms of how to assess credibility and reliability, this Court frequently cites the guidance in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.), and *Bradshaw* at paras. 185-187. In *Youyi Group Holdings (Canada) Ltd. v. Brentwood Laces Canada Ltd.*, 2019 BCSC 739 [Youyi Group Holdings], aff'd 2020 BCCA 130, leave to appeal to SCC ref'd [2020] S.C.C.A. No. 218, Justice Mayer (as he then was) offered the following helpful summary:
- [90] Evaluating the accuracy of a witness' evidence involves consideration of factors including the witness' ability and opportunity to observe events, the firmness of their memory, their objectivity, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his pre-trial evidence by the time of trial or their testimony at trial during direct and cross-examination, whether the witness' testimony seems implausible, and the demeanor of a witness generally.
- [91] An acceptable methodology for assessing credibility is to first consider the testimony of a witness on its own followed by an analysis of whether the witness' story is inherently believable in the context of the facts of the entire case. Then, the testimony should be evaluated based upon the consistency of the evidence with that of other witnesses and with documentary evidence, with testimony of non-party, disinterested witnesses being particularly instructive. At the end, the court should determine which version of events is the most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
- [Emphasis added.]
- [62] At para. 92 of *Youyi Group Holdings*, Mayer J. listed a number of additional factors that may also impact credibility, such as "when a witness' explanation defies business logic or common sense" or "when a witness is evasive, long-winded and argumentative in their responses to questions". I am mindful that credibility and reliability are not "all or nothing" propositions. Instead, it is open to the Court to accept all, part, or none of a witness' evidence, and to attach different weight to different parts of that evidence: *Radacina v. Aquino*, 2020 BCSC 1143 at para. 96, citing *R. v. R. (D.)*, [1996] 2 S.C.R. 291 at para. 93, 1996 CanLII 207.
- [63] As noted above, this matter proceeded by way of a hybrid trial, with the direct evidence of various critical witnesses being introduced almost entirely by affidavit. While viva voce witnesses were sometimes asked discrete "clarifying" questions before being cross-examined by the other side, the manner in which the trial proceeded limited my ability to assess if a witness' demeanour changed based on who was asking the questions.
- [64] In my view, and contrary to the position advanced by Bonnis, this is not a case that hinges on the overall credibility of one or more witnesses. There is contemporaneous documentation of most of the parties' interactions with each other and with third parties. Where there are "conflicts" with respect to those interactions, many appear more rooted in the parties' different understandings about what was communicated, than in true questions about who is being truthful or accurate in what they said. Specific to the context of a

contractual dispute, I find the comments of Justice Davies in *Wu v. Sun-Gifford*, 2001 BCSC 191, instructive:

- [28] In any commercial dispute which does not proceed to trial for many years after the events in issue, it is not surprising to find serious conflicts in the evidence as memories fade and positions harden. The result will often be the reconstruction of events to accord with the position advanced by the litigants. That is not to say that the litigants are intentionally dishonest when testifying. Although that may be true in some cases, more often witnesses who have a stake in the outcome of the litigation will have adopted as their evidence a version of events which has emerged and evolved over time through the litigation process and which favours their legal position.
- [29] In such circumstances the most reliable evidence as to what transpired will likely be found in contemporaneous documentation. In addition, the evidence of independent witnesses and the actions of all witnesses at the time events unfolded will more often reflect reality than a view of the past presented through reconstructive lenses. Further, the consistency or lack of consistency of the evidence of an interested witness with the contemporaneous documentation and with the evidence of independent witnesses will often be a valuable indicator of reliability.

[Emphasis added.]

- [65] Where the issues require me to assess credibility in respect of discrete events, I have applied the above guidance and principles to my analysis of the relevant evidence.

Issue 1: Interpretation of the Agreements

The applicable principles

- [66] The parties generally agree on the legal principles with respect to contractual interpretation, but not on how they apply in this case.
- [67] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [Sattva], the Supreme Court of Canada confirmed that contractual interpretation has evolved to require "a practical, common-sense approach" rather than one "dominated by technical rules of construction" (para. 47). Justice J. Hughes recently summarized the main principles underlying the practical approach in *Argo Mezzanine Financing No. 1 Ltd. v. Plaza 88 Developments Ltd.*, 2024 BCSC 1994:
- [36] The overriding goal of contractual interpretation is to determine the intent of the parties and the scope of their understanding at the time the contract was made. The central question is, what was the parties' mutual and objective intention as expressed by the words of the contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57 [Sattva]; *Resolute FP Canada Inc. v Ontario (Attorney General)*, 2019 SCC 60 at paras. 74-80 [Resolute], per Brown J. dissenting on other grounds.

- [37] The contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time the contract was formed: *Sattva* at para. 47. In this respect, contractual text derives its meaning, at least in part, from the context: *Resolute* at para. 77.
- [38] The surrounding circumstances will vary from case to case and "should consist only of the objective evidence of the background facts at the time of the execution of the contract", namely facts that were or reasonably ought to have been within the common knowledge of both parties at or before the date of contracting: *Sattva* at paras. 58, 60; *Wade v. Duck*, 2018 BCCA 176 at para. 26. However, as *Sattva* makes clear, the surrounding circumstances must not be allowed to overwhelm the words of the contract and cannot be used to deviate from the text such that the court effectively creates a new agreement: *Sattva* at para. 57.
- [39] Contractual interpretation also requires consideration of commercial reasonableness and efficacy. Commercial contracts are thus interpreted in accordance with sound commercial principles and good business sense: *Resolute* at para. 79. Ultimately, contractual interpretation involves the application of various interpretive tools, including the surrounding circumstances and the principle of commercial reasonableness--to properly understand the meaning of the words used by the parties to express their agreement: *Resolute* at para. 80.
- [Emphasis added.]
- [68] As the above summary makes clear, the meaning of the words used in a contract cannot be determined in a vacuum; rather, the interpretive exercise involves consideration of contextual factors such as the purpose of the agreement and the nature of the relationship created under it: *Sattva* at para. 48.
- [69] In *Sutter Hill BCCA*, the Court of Appeal found the trial judge erred in his interpretation of the specific contractual provisions at issue in that case, including by not giving effect to the totality of all of the words used by the parties to describe the contractual obligations. The Court's analysis suggests the following points may assist in guarding against such errors in future:
- a) consider the clause or clauses in question as a whole, in light of the surrounding circumstances, rather than approaching particular phrases or elements of phrases in a piecemeal fashion (*Sutter Hill BCCA* at para. 32);
 - b) rather than focusing on how similar words have been used in other situations, use the specific context to discern the intention of the parties in the particular situation at hand (*Sutter Hill BCCA* at para. 33); and

- c) ensure any interpretation takes into account all of the words used, in the context of the whole agreement and the surrounding circumstances, given that the objective is to determine the parties' intention, not merely the textual possibilities (Sutter Hill BCCA at paras. 34-35).

[70] While the Court of Appeal in Sutter Hill BCCA accepted that it can be helpful to consider how other cases have treated similar phrases, the Court cautioned that the focus must ultimately return to what the parties to that contract intended in the particular circumstances of the case at bar: Sutter Hill BCCA at para. 36.

[71] While Bonnis accepts Sattva as the governing authority for the main principles of contractual interpretation, it suggests Sutter Hill BCCA is factually distinguishable and therefore inapplicable.

Discussion

[72] Throughout the trial, the primary interpretive disputes between the parties related to two specific provisions in s. 2 of Schedule D of the Agreements, as they were modified by the Amending Agreement:

- a) Bonnis' obligation to use "commercially reasonable and diligent efforts" to obtain an enactment of the rezoning and the development permit, or at least the PT Letter (both to include the DP Terms), "at the earliest possible date" (s. 2(b) of Schedule D); and
- b) Bonnis' obligation to keep Epix "informed on a timely basis as to the status and any material developments" in the rezoning enactment and development permit process, and to "seek input, consider in good faith [Epix's] reasonable comments and incorporate [Epix's] reasonable comments wherever commercially reasonable and practical" in respect of those processes (s. 2(c) of Schedule D). For ease, I will refer to this obligation as the obligation to keep Epix "informed and involved".

[73] There is no dispute about the interpretation of the completion date. In practical terms, and as modified by the Amending Agreement, the completion date was 30 days plus five business days after the later of Bonnis receiving either the PT Letter or the enactment of rezoning. The express additions in the Amending Agreement make clear the parties' intended that completion would not be triggered until Bonnis had obtained both the PT Letter and the enactment of rezoning. There is no dispute the PT Letter was obtained on February 14, 2022, before the Outside Date. As a result, the outstanding event that would have triggered completion was the enactment of rezoning.

[74] There were additional minor skirmishes in respect of other provisions. For example, the parties made submissions on Epix's obligation (under s. 2(c) of Schedule D) to respond promptly, and cause its consultants to respond promptly, to requests from Bonnis for comment and input into the rezoning and development permit processes. The parties also addressed the further assurance clause (s. 8 of the Amending Agreement) that required each

side to, among other things, "do all acts and things" the other party may reasonably require "to carry out or better evidence or perfect the full intent and meaning" of the Agreements. However, as the parties largely focused their interpretation submissions on the above two provisions, I will do likewise.

- [75] I agree with Epix that the first provision at issue in this case is similar to the one at issue in Sutter Hill BCCA in that it obliges Bonnis to attempt to secure the enactment of rezoning and at least the PT Letter (not the development permit itself) from the City in order to trigger completion. As in Sutter Hill BCCA, while it was common ground that neither side could control the City's actions (and in fact, here, the Agreements expressly recognized that the development permit itself might not have been issued by the completion date), the critical question is what efforts the parties were each required to expend towards securing the City's approvals (Sutter Hill BCCA at para. 11). I reject Bonnis' position that because the vendor in Sutter Hill BCCA chose to accept the breach and terminate the agreement, that fact somehow makes the Court of Appeal's guidance regarding contractual interpretation of the first provision inapplicable to this case.
- [76] Before turning to my specific interpretative analysis, I find the following to be relevant "surrounding circumstances" based on the evidence adduced at trial:
- a) At the time the parties began negotiating, both parties understood that certain City approvals would be required before any development of the Property could take place.
 - b) The parties entered into a contract for purchase and sale, the commercial purpose of which was more than simply the purchase and sale of bare land. Rather, Epix bargained for the purchase of a development site with specific characteristics, namely, a site where rezoning had been enacted and a PT Letter (if not the development permit itself) had been issued, such that Epix would be in a position to move forward quickly with developing the Property based on the contractually-specified DP Terms. The purchase price which Bonnis requested, and Epix agreed to pay, for the Property reflected this added value. To the extent there was any initial confusion about the enactment of rezoning being a condition precedent, that was conclusively settled by the parties entering into the Amending Agreement.
 - c) After the Amending Agreement was signed, the parties understood that completion would not be triggered until Bonnis received both the PT Letter and the enactment of rezoning, although the Agreements anticipated completion might occur before the City issued the development permit itself. The Agreements obliged Bonnis to use "commercially reasonable and diligent efforts" to obtain the enactment of rezoning and the development permit "at the earliest possible date", but, as noted, provided that enactment of rezoning and issuance of the PT Letter could be sufficient.
 - d) Until completion, the Agreements provided that Bonnis had primary carriage of the rezoning enactment and development permit processes. Bonnis also continued to be responsible for the carrying costs for the Property.

- e) On its face, the contract was not one that allowed the parties to continue to function at arms' length or wholly independent from each other. Instead, the contractual relationship created by the Agreements contemplated a fairly high level of collaboration between the parties during the period before completion when Bonnis was to work towards satisfying the conditions precedent "at the earliest possible date". The Agreements anticipated open communications both ways: Bonnis was obliged to keep Epix informed (on a timely basis) and involved (through seeking and considering Epix's input); Epix was obliged to respond promptly to Bonnis' requests for comment and input. These obligations make sense in the context of Agreements under which Epix would ultimately acquire the Property and be obliged to develop it pursuant to parameters and constraints established through the rezoning enactment and development permit processes.
- f) Given their respective responsibilities and plans, it was important to both parties that the transaction close as soon as possible. Having previously initiated the rezoning and development permit processes for the Property, Bonnis was in the best position to estimate the timing for completion of those steps, and Epix relied on Bonnis' statements in this regard. At the time of the Purchase Agreement, Bonnis represented that the condition precedent of the PT Letter would be satisfied by the end of 2021. When the Amending Agreement was entered into, Bonnis represented it was confident the further condition precedent of the enactment of rezoning would also be satisfied by the end of 2021, but certainly well before the end of May 2022 ultimate date set out in the contract.
- [77] In light of the above "surrounding circumstances" that were known or ought reasonably to have been known to both parties when they entered into the Agreements (as opposed to what came to light afterwards), I turn now to how each of the disputed contractual provisions should be interpreted.

"Commercially reasonable and diligent efforts" to obtain approvals "at the earliest possible date"

- [78] The phrase "commercially reasonable efforts" is common contractual language and has been previously interpreted by the courts as "efforts that would appear to be reasonable from a commercial perspective", based on "sound judgment": Sutter Hill BCCA at para. 40. However, it is not a standard that lies "in the absolute discretion of the party with the obligation": Precursor Capital Corp. v. HydRx Farms Ltd., 2018 BCSC 1150 at para. 141. That party cannot deliberately prevent the occurrence of the condition or take advantage of its own wrongs or omissions: Precursor Capital Corp. at para. 141; Southcott Estates Inc. v. Toronto Catholic District School Board, 2012 SCC 51 [Southcott Estates Inc. SCC], aff'ing 2010 ONCA 310 at para. 13.
- [79] It is generally agreed that, on its own, the phrase "commercially reasonable efforts" is not the same as "best efforts", which is understood to require that "no stoned [be] left unturned": Sutter Hill BCCA at para. 40, citing Atmospheric Diving Systems Inc. v. International Hard Suits Inc. (1994), 89 B.C.L.R. (2d) 356 at para. 71, 13 B.L.R. (2d) 243. Accordingly, the real question in the case at bar is what, if anything, the inclusion of the language "diligent

efforts" and "at the earliest possible date" adds to Bonnis' obligations to fulfill the conditions precedent under the Agreements.

- [80] As was the case before the trial judge in Sutter Hill BCSC, the parties before me were unable to locate any other cases where the contract in question used the phrase "commercially reasonable and diligent efforts" to fulfill certain conditions "at the earliest possible date". Given the guidance in Sutter Hill BCCA, the lack of an analogous precedent is not problematic, as my focus in any event is determining the intention of these parties in the specific context of this case. I am also conscious that my analysis must reflect the totality of the words used, including the phrase "at the earliest date possible".
- [81] Epix says the parties' inclusion of the term "diligent efforts" reflects an intention to impose a standalone or additional obligation on Bonnis that required it to meet a higher standard than simply "commercially reasonable efforts". Citing dictionary definitions of "diligent", including one relied on by the Court in *James v. Black Press Group Ltd.*, 2012 BCSC 1969 at para. 40, Epix says Bonnis was also obliged to work towards the fulfillment of the conditions precedent in a "careful, attentive and conscientious" manner. Epix acknowledges the Agreements use the phrase "commercially reasonable" in other provisions without the additional qualifier of "diligent efforts". Epix says this supports its view that the Court must interpret the specific language of "diligent efforts" in s. 2(b) of Schedule D as reflecting the parties' deliberate intention to impose a greater obligation on Bonnis' than simply a requirement to use "commercially reasonable efforts."
- [82] Finally, Epix says the choice to require Bonnis to fulfill the conditions precedent "at the earliest possible date" should be interpreted as conveying the parties' intention that Bonnis was required to move the deal towards completion as early as possible. Recognizing that neither Bonnis nor Epix could control the City's actions, Epix says the question of whether Bonnis met the timing component of its obligations should be assessed objectively in light of the chronology of the evidence.
- [83] Bonnis says its obligation must be interpreted in light of the particular commercial context in which the Agreements were made and the parties' objectives in entering into the contract. This is because what is commercially reasonable in one context may not be commercially reasonable in another setting. Bonnis disputes that the term "diligent efforts" can be equated to "best efforts", arguing, among other things, that if the parties intended to make "best efforts" required, they would have said so expressly. Bonnis says the interpretation urged by Epix, under which both "diligent efforts" and "at the earliest possible date" are to be given meaning, fails to consider the surrounding circumstances and the other parts of the Agreements where that language is not used. Applying a proper approach to contractual interpretation, and reading the Agreements as a whole, Bonnis maintains the parties only intended to require "commercially reasonable efforts", such that the terms "diligent" and "at the earliest possible date" were not meant to add to or change that obligation.

- [84] In support of this position, Bonnis points to s. 2(d) of Schedule D, which allows either party to extend the Outside Date if, despite Bonnis' "commercially reasonable efforts", the rezoning had not yet been enacted or the PT Letter had not yet been issued. Bonnis says the choice to remove the language of "diligent efforts" and "at the earliest possible date" in this provision reflects an intention by the parties to clarify the efforts Bonnis was required to take. Bonnis also relies on the fact that the Agreements recognized the development permit might not be issued and the choice not to have the Agreements terminate if the conditions precedent were not fulfilled by the Outside Date. Further, Bonnis says the fact that s. 2(h) permitted Epix to unilaterally waive the conditions precedent distinguishes this contractual environment from the one at issue in Sutter Hill BCCA, where the condition precedent could not be unilaterally waived by either party.
- [85] Bonnis' position invites the same types of legal error that the Court of Appeal in Sutter Hill BCCA found the trial judge to have committed. In Sutter Hill BCCA, the Court held the trial judge erred by concluding that the use of the word "best" in the phrase "commercially reasonable best efforts" could be attributed to "over-drafting" and did not add anything (at paras. 34-35). Similarly, the Court found it was an error for the trial judge to have separated his analysis of the phrase "as soon as possible" from his consideration of the standard of "commercially reasonable best efforts" (at para. 33). The Court found the trial judge's approach failed to take into account "all of the words", offending the principle that words in a contractual provision should not be interpreted so as to render them "mere surplusage" or meaningless (at para. 34). The Court held the trial judge erred in principle by dividing up the clause that required interpretation and approaching it in piecemeal fashion, rather than addressing the words in their totality (at para. 32).
- [86] In light of the Court of Appeal's guidance, I am unable to agree that the parties' intention was simply to impose an obligation on Bonnis to use "commercially reasonable efforts" to obtain the enactment of rezoning and the development permit or PT Letter. The parties chose to include the words "diligent efforts" and "at the earliest possible date" in the specific clause that set the standard for not just the degree of effort required from Bonnis to fulfill the conditions precedent, but the speed at which those tasks should be pursued. The choice to include both terms must be given meaning; they cannot just be ignored or effectively deemed "surplus", as Bonnis urges.
- [87] However, I am also not satisfied that, in the circumstances of this case, it is appropriate to equate "diligent efforts" with "best efforts". While I acknowledge that Epix referred to at least two cases where the courts have used those terms interchangeably to describe the level of effort required, Epix admitted that in both cases, the standard of "best efforts" was implied into the contract, rather than being explicitly written down (see *CDM Construction Ltd. v. Ven-Star Development Ltd.*, [1998] B.C.J. No. 1099, 1998 CanLII 3869 (S.C.) and *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2009] O.J. No. 428, 2009 CanLII 3567 (S.C.J.), rev'd 2010 ONCA 310, aff'd 2012 SCC 51). In the case at bar, the parties used specific written language to establish the requisite standard. While it was open to them to use the

language of "best efforts", they did not do so.

- [88] I accept Epix's submission that the ordinary and grammatical meaning of the term "diligent" includes the notion of being careful, conscientious and attentive, as well as embodying a sense of persistence or steady effort. The language of "at the earliest possible date" similarly invokes the notion of aiming to complete as soon as possible, recognizing there could be external forces at work. This is consistent with the surrounding circumstances I have set out above: it was in both parties' interests to complete the deal quickly and what was bargained for was a site that was close to, if not fully, "development-ready". Both facts necessitated further work and collaboration by the parties to achieve, even if they did not have ultimate control over what the City would do and on what timelines.
- [89] As I result, I conclude that, in light of the specific language of s. 2(b), viewed in the context of the Agreements as a whole and the surrounding circumstances, the parties intended that Bonnis make careful, conscientious and persistent efforts to do what appeared reasonable from a commercial perspective in order to obtain the enactment of rezoning and the issuances of the development permit, or at least the PT Letter, at the earliest possible date. In my view, this standard does not require Bonnis to take steps that would be commercially unreasonable, based on their sound business judgment, but does oblige them to find ways to continue moving steadily forward.

Obligation to keep Epix informed and involved

- [90] On its face, s. 2(c) of Schedule D gives Bonnis "primary carriage" of the rezoning enactment and development permit process, but imposes conditions on Bonnis' exercise of those responsibilities. In particular, as I have framed it, Bonnis was obliged to keep Epix "informed and involved" in those processes. The contractual language sets out four distinct obligations in this regard:
- a) To keep Epix informed on a timely basis as to the status and material developments of the rezoning enactment and development permit processes;
 - b) To seek input from Epix in connection with those processes;
 - c) To consider "in good faith" Epix's reasonable comments; and
 - d) To incorporate Epix's reasonable comments wherever commercially reasonable and practical.
- [91] Epix says those contractual provisions must be interpreted as requiring ongoing and open collaboration between the parties. In other words, while Bonnis was understood to have primary carriage of the rezoning and development permit processes, it could not operate wholly independent of Epix. To be able to exercise its contractual rights to provide informed input for Bonnis' "good faith" consideration, Epix says it was critical that it be kept apprised, on a timely basis, of both the status of, and material developments in relation to, those two processes.

- [92] Epix says further that any interpretation of those four specific obligations must necessarily take into account that further down in that same clause (s. 2(c)), the parties anticipated that the development permit itself might not be issued prior to the completion date. In that event, the Agreements expressly contemplate that Epix would become responsible for obtaining the development permit itself. To facilitate that, Bonnis would provide Epix "all applications, materials and other documentation" respecting those processes and the fulfillment of the PT Letter.
- [93] Epix says in this particular contractual context and given that the overall objective of the Agreements was to transfer an effectively "development-ready" site, it makes commercial sense to interpret these contractual obligations as creating a meaningful role for Epix in the rezoning and development permit process before completion. Epix says the language chosen by the parties reflects the parties' intention that Epix would have input into the parameters that would govern its ultimate ownership of, and ability to develop, the Property.
- [94] In contrast, Bonnis urged an interpretation of these provisions that would significantly limit Epix's involvement, going so far in its submissions as to state that the Agreements gave Bonnis "exclusive control" of the rezoning and development permit processes. Bonnis contends that under the Agreements, Epix was "was not entitled to play a role" in those processes. As a result, Bonnis' obligation was limited to keeping Epix informed of "material developments" on a timely basis, and seeking and incorporating Epix's input where Bonnis (in its exclusive determination) deemed it commercially reasonable and practical to do so. Bonnis says it is inconsistent with the plain meaning of the term "material developments", as informed by the commercial context of the Agreements, to interpret these provisions as requiring Bonnis to copy Epix on all internal and external communications related to the processes or to inform Epix about each step along the way. In Bonnis' view, "material developments" are limited to "recent events in a series of related events" that are "important or significant".
- [95] I reject Bonnis' suggested interpretation. It misstates or ignores the actual contractual language used, and cannot be reconciled with the surrounding circumstances and the text of the Agreements as a whole. The Agreements do not give Bonnis "exclusive control" of the rezoning enactment and development permit processes. Instead, Bonnis was given primary carriage but, as noted, its responsibility was subject to the requirements to keep Epix informed and involved. Contrary to Bonnis' position, the plain language of the clause contemplates a role for Epix in those processes. The concept of "primary carriage" creates space for another party to play a secondary role.

- [96] I agree with Bonnis that the language chosen by the parties must be given meaning. However, throughout its submissions, Bonnis misstates that language. The obligation was not limited to keeping Epix informed of "material developments" alone. Rather, the language of s. 2(c) expressly required Bonnis to "keep [Epix] informed on a timely basis as to the status and any material developments" in relation to the rezoning enactment and the development permit processes. This is a broader obligation.
- [97] I accept that updating Epix on the status of, and material developments in relation to, the two processes did not require Epix to be copied on or provided with "every email communication" Bonnis was involved in. However, a proper interpretation of what Bonnis was required to share must be informed by its subsequent obligations to seek, consider and, where commercially reasonable and practical, incorporate Epix's reasonable input. The contractual obligation must be assessed in its totality. A party cannot provide informed and reasonable comments if it does not know a sufficient amount of the history and details that preceded the request for input.
- [98] In addition, the parties explicitly chose to include a requirement that Bonnis keep Epix informed "on a timely basis". This is consistent with the obligation, found further down in s. 2(c), for Epix to "respond promptly" to requests from Bonnis for "comment and input" in connection with the rezoning enactment and development permit processes. To be able to "respond promptly", Epix would need to be up to speed on the status of those processes and any material developments. The focus on timely communications by both parties is also consistent with Bonnis' obligation to obtain the rezoning enactment and at least the PT Letter "at the earliest possible date".
- [99] In light of the foregoing, I accept Epix's interpretation and conclude that Bonnis was obligated to maintain ongoing and open communications with Epix, so that Epix could play a meaningful role by providing reasonable and informed input into the rezoning enactment and development permit processes. This is not to say that Bonnis was obligated to accede to all of Epix's comments, but rather that Bonnis had to provide a realistic opportunity for Epix to be involved, since it was Epix that would ultimately be required to act on the outcome of those processes.
- [100] Having determined how the parties' contractual obligations should be interpreted, I turn now to the question of whether either side failed to meet those obligations, resulting in a fundamental breach or repudiation.

Issue 2: Did either side fundamentally breach their contractual obligations or the duty of honest and good faith performance?

The applicable principles

- [101] As with the principles of contractual interpretation, the legal framework for repudiation of a contract, and what flows from it, are largely not in dispute.

- [102] A repudiation of a contract occurs "where a party demonstrates a clear and unequivocal intention not to be bound by the terms of the contract": *Sewell v. Abadian*, 2024 BCSC 1116 at para. 73. The requisite intention can be demonstrated by a refusal to perform or by a fundamental breach of a primary contractual obligation: *Sewell* at para. 73, citing *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 40, 1999 CanLII 664; *Kuo v. Kuo*, 2017 BCCA 245 at paras. 39-40. A breach can also be anticipatory, if one party "manifests, through words or conduct, an intention not to perform or not to be bound by provisions of the agreement that require performance in future": *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10 at para. 149, citation to text omitted.
- [103] Not every breach will constitute a repudiation; there must be a breach of a contractual condition or another sufficiently important term that amounts to a substantial failure of performance: *Potter* at paras. 144-145. Put another way, a breach is repudiatory if it deprives the innocent party of substantially the whole benefit of the contract: *Marcotte v. Marcotte*, 2018 BCCA 362 at para. 44 citing *Kuo* at para. 39. Whether there has been a repudiation of a contract is to be determined objectively: *Guarantee Co. of North America* at para. 40.
- [104] Where one party repudiates a contract, the innocent party has two options: accept the repudiation (terminating the contract) and pursue remedies for the breach, or affirm the contract, which remains alive in all respects for both parties: *Dosanjh v. Liang*, 2015 BCCA 18 at paras. 33-34. In other words, termination does not automatically follow repudiation. To terminate the contract, the innocent party must either communicate its acceptance of the repudiation to the repudiating party, or provide notice of termination, within a reasonable time: *Kaur v. Bajwa*, 2020 BCCA 310 at paras. 26, 28-29; *Conwest Contracting Ltd. v. Crown and Mountain Creations Ltd.*, 2021 BCSC 2116 at para. 209. When faced with a repudiation, the opposing party is entitled to a reasonable period of time in which to decide whether to affirm the contract or accept a repudiation; this can include time to assess the circumstances, consider the options and explore possibilities to resolve the situation: *Dosanjh* at paras. 23, 36-37.
- [105] Where a repudiation is clearly accepted, the contract is terminated and both parties are released from their obligations. However, if the innocent party does not clearly and unequivocally accept the repudiation or instead elects to affirm the contract, the contract continues and the parties remain bound by their contractual obligations: *Kaur* at paras. 30-31.
- [106] While the innocent party's "election" in response to a repudiation is generally said to be "irrevocable", where there is a continuing repudiation, the innocent party remains entitled to accept that continuing repudiation, even if the innocent party has previously affirmed the contract: *Dosanjh* at paras. 41-43; see also *601 Main Partnership v. Centura Building Systems (2013) Ltd.*, 2024 BCCA 76 at paras. 56, 63. A continuing repudiation will be established where it is "clear beyond question" that there is a continued or repeated refusal

to perform the contract. Such a refusal may take different forms, including silence in response to a request to perform: *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp - Canada*, 2007 BCCA 88 at para. 109, cited in *Dosanjh* at para. 43.

[107] The parties also agree on the principles governing the common law duty of honest and good faith performance in contractual matters.

[108] In *Bhasin v. Hrynew*, 2014 SCC 71, the Supreme Court of Canada confirmed that every contract includes a common law obligation to act "honestly and reasonably and not capriciously or arbitrarily" in relation to the obligations and duties arising under the contract (at para. 63; see also paras. 33, 74). Among other things, the duty means that parties "must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract": *Bhasin* at para. 73. In the subsequent decision in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 [Callow], the Court clarified that the requirement of honest performance goes further than "prohibiting outright lies" and can include "half-truths, omissions, and even silence, depending on the circumstances" (at paras. 90-91). The determination of whether a party has been "knowingly misled" is fact-specific: *Callow* at para. 91.

[109] The Supreme Court of Canada has been clear that the common law obligation "does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract": *Bhasin* at para. 73. Rather, a contracting party must have "appropriate regard" to the legitimate interests of the other contracting party, and must "not seek to undermine those interests in bad faith": *Bhasin* at para. 65. The "good faith" analysis is context-specific; it will likely have "different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange": *Bhasin* at para. 69, citation to text omitted.

The parties' positions

[110] Epix says Bonnis breached the Agreements in three distinct and fundamental ways, resulting in repudiation.

[111] First, Epix says Bonnis failed to use commercially reasonable and diligent efforts to obtain the enactment of rezoning (and the development permit) at the earliest possible date. In summary form, Epix points to the chronology of events, and says Bonnis failed to:

- a) take adequate and timely steps to determine and act on the requirements for enactment of rezoning and issuance of the development permit or PT Letter, including with respect to the necessary environmental work (and despite Epix's continued efforts to draw the environmental requirements to Bonnis' attention);
- b) exercise diligence by providing its environmental consultants and architects with the Agreements or advising them of the agreed timelines; and

- c) ignored repeated requests to explore and address, or instruct its architects to address, the setback requirement, including through revisions to the architectural drawings.
- [112] Second, Epix alleges Bonnis failed to keep it informed and involved in the rezoning enactment and development permit processes, contrary to its contractual obligation to do so. In particular, Epix says Bonnis failed to engage with Epix on the setback requirement, despite Epix repeatedly raising the issue and Bonnis recognizing a real risk that the issue could result in a loss of sellable square footage in the development. Bonnis also made changes to the architectural drawings for the development without informing Epix or seeking its input. Further, Epix says Bonnis failed to keep it informed on a timely basis of the work it was doing to address the environmental requirements and in fact, failed to disclose what Bonnis discovered about the environmental requirements. In addition, Epix says Bonnis ceased virtually all communications about the rezoning enactment and development permit processes after the litigation was commenced and up until Bonnis requested on December 1, 2022 that Epix lift its CPL to allow registration of the rezoning documents on title. By that point, Epix asserts decisions had been made and steps taken without its input.
- [113] Third, Epix says Bonnis breached its common law duty of good faith and honest performance, including by: refusing to extend the Outside Date beyond March 31, 2022 (despite the conditions precedent not having been satisfied); failing to disclose the true status of the rezoning and development permit process (despite Epix's requests) when Bonnis knew in February and March 2022 that the transaction could not be closed by March 31, 2022; and keeping Epix in the dark between April and December 2022 and then abruptly changing its position in an attempt to "manufacture" a breach by Epix.
- [114] Epix says that while many of these breaches had occurred by mid-March 2022, Bonnis' conduct between April and end of December 2022, including its silence in response to requests for performance of the contract, constituted a continuing repudiation, thereby entitling Epix to terminate the Agreements.
- [115] Bonnis disputes that it breached the Agreements as alleged or at all before December 2022, but says that even if it is assumed Bonnis was in breach at some point before December 2022, Epix affirmed the Agreements, which allowed Bonnis to cure any breaches. Bonnis contends that as of December 30, 2022, there were no extant or continuing breaches that could have entitled Epix to terminate the Agreements. Instead, Bonnis says it is Epix that repudiated the Agreements in two ways: first, by refusing to lift the CPL (thereby impeding Bonnis' ability to satisfy the condition precedent to enact rezoning); and second, because its email of December 30, 2022 advised that Epix would not complete the contract, constituting an anticipatory breach.
- [116] By way of preliminary arguments, Bonnis says that Epix bears the burden to prove both what the obligation to use "commercially reasonable and diligent efforts" required in these circumstances and also how Bonnis' conduct fell short. Relying on the decision in HSBC

Bank Canada v. Kupritz, 2011 BCSC 788, Bonnis contends Epix could only meet its burden by adducing expert evidence, including of the "industry standard" for commercially reasonable efforts in relation to environmental regulatory processes. Bonnis says Epix's failure to do so is fatal. Further, Bonnis says the obligation to keep Epix informed and involved was not a "sufficiently important term", as that phrase is used in Potter, to form the basis of a repudiatory breach.

- [117] In any event, Bonnis says it met what it characterizes as the applicable standard of "commercially reasonable efforts" to obtain the rezoning enactment and development permit (or at least PT Letter). Bonnis notes the PT Letter was obtained before the Outside Date (suggesting its obligations in that regard had largely been fulfilled) and it took adequate steps to deal with the architectural drawings after the PT Letter had been issued. With respect to rezoning, Bonnis asserts it engaged consultants to assist with the environmental requirements and pivoted as it learned of new obligations and as a result of Epix's alleged "interference". Bonnis argues it cannot be considered to have breached the standard when, at Epix's request, it switched to working with Epix's environmental consultant. Bonnis says the delay in obtaining the environmental regulatory approvals lies at the feet of the provincial government regulators, and cannot be attributed to it.
- [118] Lastly, in reliance on its narrow view that Epix was not entitled to play a role in the rezoning enactment and development permit processes, Bonnis contends it met its obligations to keep Epix informed of material developments on a timely basis, and appropriately sought and incorporated Epix's input. In this regard, Bonnis maintains that it was only required to inform Epix of "material developments", arguing that many of Epix's complaints concern matters that were not material developments.
- [119] Finally, Bonnis argues Epix breached its duty of honest and good faith performance by improperly filing and maintaining the CPL, which interfered with Bonnis' ability to secure the enactment of rezoning. Epix disputes that it repudiated the Agreements or breached its duty of honest and good faith performance.

Discussion

- [120] I will first deal briefly with the question of whether, to establish a breach, Epix was required to adduce expert evidence of the contractual standards Bonnis had to meet. While I appreciate the language of HSBC Bank Canada suggests expert evidence is generally required in order to establish "the industry standard against which the debtor's allegation of substandard conduct can be measured" (at para. 36), I am not satisfied that proposition applies to the instant case for two reasons.
- [121] First, as Epix pointed out, both HSBC Bank Canada and the decision in *Canadian Western Bank v. Quigley*, 2019 BCSC 1020 [Quigley] (on which Bonnis also relies), are decisions made pursuant to the particular legislative regime of the Personal Property Security Act, R.S.B.C. 1996, c. 359. Section 68(2) of that highly technical statute imposes an express legislative

obligation for parties to security agreements to exercise or discharge all their "rights, duties or obligations" arising under a security agreement, that act or other applicable law "in good faith and in a commercially reasonable manner". The decisions referred to in Quigley are likewise cases decided in the context of security agreements. Further, the passages relied on by Bonnis are primarily cited by subsequent courts dealing with the test for the defence of "improvident realization" and the burden of proof in that context, which is not at issue here.

- [122] Second, there are other decisions, including those in Sutter Hill BCSC and Sutter Hill BCCA, where there was no suggestion that expert evidence was required in order for the innocent party to establish a breach of the contractual standard of effort. Instead, in those cases, the Courts conducted their assessment of whether the standard had been met based on the evidence of the chronology of events. In Sewell, Justice Elwood held that expert evidence of the "industry standard" amongst licensed realtors was neither necessary nor helpful when interpreting a contract of purchase and sale between two unlicensed parties. The Court concluded that the question of whether the buyer was entitled to terminate the contract and demand return of the deposit was "primarily a question of ordinary contractual interpretation" (at paras. 58-59), based on the facts at hand. In the context of this case, and particularly given where my analysis below has landed, I do not consider it necessary to have expert evidence of the standards Bonnis was obliged to meet.
- [123] The parties spent considerable time during the trial and in their closing oral and written submissions debating the question of whether Bonnis breached its obligation to use "commercially reasonable and diligent efforts" to obtain the rezoning enactment and at least the PT Letter "at the earliest possible date". Counsel canvassed the parties' communications regarding the environmental requirements and the setback requirement in significant detail.
- [124] The parties adduced competing expert reports addressing the steps taken by Bonnis' initial environmental consultant to first seek an amendment to the site disclosure statement for the Property, without simultaneously pursuing one of the Ministry of Environment instruments that was required before the rezoning application could proceed. There are disputes about which instrument was actually required, what the applicable environmental and municipal legislation dictates and whether the timeframes within which particular steps were taken were reasonable. In relation to the setback requirement, there are disputes about whether the architects ought to have begun their work to revise the architectural drawings before the issuance of the PT Letter and about what instructions and information they were given by Bonnis and when. There are disputes about whether Bonnis continued to be under a timeliness obligation because of the express requirement to obtain rezoning "at the earliest possible date" when the filing of Epix's claim put "time is of the essence" at large.

- [125] In my view, there is a simpler and more direct answer to the question of whether Bonnis breached its obligations under the Agreements. That answer lies in consideration of Bonnis' second contractual obligation to keep Epix "informed and involved" in the rezoning enactment and development permit processes, to which I now turn.
- [126] I reject Bonnis' position that the obligation to keep Epix informed and involved was not a sufficiently important term of the Agreements to ground a repudiatory breach. That assertion is not borne out by the wording of the Agreements themselves or by the evidence adduced at trial about the purpose of that obligation in the context of the Agreements as a whole.
- [127] In the original Purchase Agreement, Bonnis' obligation to keep Epix informed and involved was contained in the same paragraph as Bonnis' obligation to use "commercially reasonable and diligent efforts" to obtain (at that time) the PT Letter. The language of the two obligations makes clear that they are directly linked - one describes what must be obtained before completion and the other describes the process to be followed in pursuing that requirement. Under the Amending Agreement, the two obligations were separated into different subparagraphs (ss. 2(b) and (c)), but their necessary connection remains apparent.
- [128] Further, as previously noted, at the end of the day, what Epix bargained to acquire under the Agreements was essentially a "development-ready" site, the parameters for which would largely be dictated through the rezoning enactment and development permit processes to be undertaken before completion. It makes neither commercial nor logical sense to suggest that the obligation to inform and involve Epix in those processes was not sufficiently important to the Agreements, when it was Epix that would ultimately be bound by the outcome of those processes. Throughout his evidence at trial, and through the contemporaneous documents, Mr. DiMartile consistently emphasized the importance of the process to Epix; the language and structure of the Agreements support that it was an important element. I therefore find that obligation to be a sufficiently important term that it can ground a repudiatory breach.
- [129] In my view, the real issue is whether there was an initial breach of that obligation by March 2022 that then continued through December 2022. For the reasons that follow, I find there was.
- [130] To begin, while the obligation to keep Epix informed and involved related to both the rezoning enactment and the development permit processes, it is common ground that the PT Letter was issued February 14, 2022, before the Outside Date expired on March 31, 2022. As a result, to the extent Epix raised concerns about Bonnis' failures in relation to the PT Letter itself, they are no longer relevant to the analysis. However, there were elements relating to the broader development permit process, such as the setback requirement, that were raised before the PT Letter was issued and that persisted beyond it being obtained. They remain relevant, as I agree the Agreements obliged Bonnis' to continue to work towards obtaining the development permit itself up until completion. In my view, it follows

that Bonnis remained obligated to keep Epix informed and involved of steps it was taking in relation to the development permit, including any response to the PT Letter and any revisions to the architectural drawings to address the setback requirement.

- [131] Bonnis was also obligated to keep Epix informed and involved in relation to the rezoning enactment. I accept that the majority of the work in this regard related to the environmental requirements and attempts to obtain an instrument from the Ministry of Environment that would allow the rezoning application to proceed for approval by the City.
- [132] Epix points to numerous communications disclosed during the course of the litigation which demonstrate that Bonnis was engaging with various consultants and third parties regarding issues such as the setback and the environmental requirements, both before the claim was filed in March 2022 and afterwards, without any engagement with Epix.
- [133] For one example, Epix notes that despite having raised concerns in an October 19, 2021 letter about the setback requirement, and despite multiple follow-ups, Bonnis did not engage directly with Epix on those issues. While Bonnis maintains it was not required to respond to Epix's letter (on the basis it was not a "material development"), the evidence at trial was that after receipt of Epix's letter, Bonnis forwarded that letter to its architects asking that they review because of the potential implications for the sellable square footage. The next day, the City raised the same issue, and Bonnis forwarded the City's communication to its architects noting it was the same issue raised by Epix and stating a need to "address now/move square footages around" to avoid losing sellable square footage. Bonnis did not inform Epix of any of these communications or what steps it was taking to address the issue. In June 2022, Bonnis' architects were working on revising the architectural drawings in response to the PT Letter and to address the setback requirement. Epix was not informed of that work or asked for input into the architectural drawings before they were completed and submitted to the City.
- [134] Bonnis says those concerns are irrelevant and cannot constitute a breach of the Agreements. Bonnis says the issues were ultimately addressed after the issuance of the PT Letter without losing any sellable square footage. In any event, in February 2022, Epix reviewed the necessary agreement with the City and a sketch plan showing how the footprint would be modified. Bonnis says Epix did not ask to see the drawings for the rest of the building until early December 2022 (at which point Bonnis took the position Epix's request to review the documents was irrelevant).
- [135] As a second example, Epix says Bonnis failed to inform it of an email Bonnis received from the City on October 29, 2021 which Bonnis recognizes was a "critical" communication because it "alerted them to the need to retain an environmental expert" to address the environmental requirements. Epix says Bonnis failed to keep Epix informed in a timely manner of the steps it subsequently took to engage its initial environmental consultant, of the strategy he was pursuing to address the issues, or of his communications with third parties. While Epix admits it was copied on the preliminary and final letters of

determination when the Ministry of Environment issued them on July 14, 2022 and October 5, 2022 respectively, it maintains that was because of the CPL, not any effort by Bonnis. Further, Epix says Bonnis did not otherwise keep it informed as to the status of the progress toward fulfilling the environmental requirements.

- [136] Bonnis denies that its engagement of its environmental consultation was a "material development" and says, in any event, Epix was "made aware" of his engagement within about a month. Further, as Epix reached out directly through its own environmental consultant, Bonnis had "every reason" to believe Epix was aware of what was happening. With respect to the email from the City in October 2021 and subsequent communications, including through summer and fall 2022, Bonnis says it was not obligated to provide Epix with every email it was involved in and it is "unclear" how specifically providing the City's email of October 2021 would have "changed anything". Given the other communications that were exchanged, and contact between Epix's and Bonnis' respective solicitors, Bonnis contends Epix was aware of all "material developments" in relation to the environmental requirements at all relevant times.
- [137] Finally, Epix says Bonnis failed to communicate at all with respect to the rezoning enactment and development permit processes between April and December 1, 2022. Epix notes Bonnis' solicitor confirmed she did not communicate with Epix's solicitor during this timeframe, despite the fact that her office was in communication with the City about rezoning and Bonnis' response to the PT Letter. Epix says further Bonnis did not engage Epix in relation to any work it was doing to respond to the PT Letter, despite Epix's invitation that the parties "work together" on responding. Epix was never provided with a copy of the responses submitted.
- [138] On December 1, 2022, after essentially months of silence, Epix says Bonnis reappeared, announced it was close to securing the enactment of rezoning (without proactively providing details of the intervening work) and simply requested that Epix lift the CPL. Epix says Bonnis did not provide copies of the documents Bonnis wanted to register on title and other relevant information until Epix requested them. Bonnis then provided materials in a somewhat piecemeal fashion, demanding review and responses on an expedited timeframe under threat of court applications, during a period when Epix was already fully occupied with another project and preparations for upcoming discoveries.
- [139] Bonnis does not expressly deny that there was little to no communication with Epix between April and early December 2022. Instead, Bonnis seeks to minimize the work it was undertaking during that timeframe, arguing there were no real material developments. In relation to the PT Letter responses, Bonnis contends Epix had the PT Letter since February 14, 2022 and had "every opportunity" to provide input after that time. Bonnis says it cannot be held in breach for failing to consider input that Epix did not provide. In respect of December 2022, Bonnis says it provided the information Epix requested in a timely fashion, but Epix did not fulfill its contractual obligation to respond promptly and did not ultimately provide any input in December. Further, Bonnis says Epix exaggerates the volume of truly

"new" material that it had to review in December.

- [140] Considering the evidentiary record as a whole, I find Bonnis' positions do not withstand scrutiny. Throughout its submissions, Bonnis attempted to limit its consultation obligations to "material developments". As noted above, its obligations were broader than that. Bonnis was required to inform Epix on a timely basis as to the status of the rezoning enactment and development permit processes, as well as material developments. Bonnis had a positive obligation to provide Epix with information, and seek Epix's input, in relation to those processes. The Agreements did not create a relationship between the parties that allowed Bonnis to work on the rezoning enactment and development permit processes "behind closed doors" and then present Epix with a *fait accompli*, as it effectively did in December 2022. On the contrary, the Agreements expressly obligated Bonnis to collaborate with Epix throughout the two identified processes and up to the point of completion. I find Bonnis failed to do so.
- [141] Both before the litigation was commenced and afterwards, Bonnis failed to keep Epix apprised of the status of various elements of the rezoning enactment and development permit processes. The failure to engage on the setback requirement and the failure to involve Bonnis in the revisions to the architectural drawings are not minor failures in the context of the development project that Epix was to become responsible for under the Agreements. While I accept that Bonnis was not required to provide Epix every email communication it sent or received, Bonnis failed to forward or provide updates about communications (such as the October 2021 email from the City) that Bonnis itself characterized as "critical". In addition, it was not until October 30, 2023 that Epix learned, through the filing of an affidavit in the litigation, that Bonnis' architects submitted the revised drawings to the City on August 26, 2022 as part of the response to the PT Letter. The same affidavit revealed that on October 4, 2022, the City confirmed that it had received Bonnis' response to the PT Letter. Epix was not informed of or involved in any of those steps.
- [142] Further, Bonnis cannot rely on the fact that Epix eventually became aware of certain events or developments, including as a result of interactions with other sources. In many cases, the record demonstrates that it was Epix who followed up or made repeated requests for information. This is not consistent with Bonnis' positive obligations under the Agreements.
- [143] The failures noted are not isolated incidents. I find that with the exception of the preliminary and final letters of determination (which Bonnis did not provide directly), Bonnis completely failed to keep Epix informed and involved in relation to the rezoning enactment and development permit processes between April and early December 2022. I agree with Epix that this period of virtual silence constitutes a continuing breach of Bonnis' obligations. Nor am I satisfied that Epix can be faulted for not having provided input towards the PT Letter responses. In response to Mr. DiMartile's invitation of March 21, 2022 for the parties to "work together" on responding, the next day, Kerry sent an email through Mr. Gomes explicitly stating that, other than as "contractually obligated" under the

Agreements, "any and all correspondence" would be "strictly" through litigation counsel. He confirmed that Bonnis was "not open" to changing, revising, adding or otherwise altering the Agreements. I find this response clearly indicated Bonnis was not open to the kind of collaboration and communication that Bonnis now asserts Epix should have initiated.

[144] As a result, I find that by March 2022, Bonnis was in breach of its obligation to keep Epix informed and involved, and that breach continued up to December 2022. I will deal with the events of December 2022, including Bonnis' position that Epix was the one in breach, in the section below that addresses termination of the Agreements.

[145] In light of this conclusion, I do not consider it necessary to address whether Bonnis was also in breach of its obligations to use "commercially reasonable and diligent efforts" to obtain the enactment of rezoning and the development permit "at the earliest possible date". It is sufficient that Epix has established one fundamental breach. In the same vein, and given the overlap between Epix's arguments about the breach of the consultation obligations and the breach of the duty of good faith and honest performance, I also decline to address the latter issue.

Issue 3: Who terminated the Agreements in December 2022?

[146] The legal principles applicable to termination of a contract following a repudiatory breach are largely set out in the preceding section. I will not repeat them here. However, it bears mention that the right to terminate a contract in response to a repudiation does not need to be set out in the contract itself; it exists at common law: *Conwest Contracting Ltd.* at paras. 196-197, citing *Guarantee Co. of North America* at para. 40 and *Kuo* at paras. 39-40. There is a dispute between the parties about whether a party accepting a repudiation and terminating a contract is required to provide the specific reason for doing so. I will address that below.

[147] Both parties purported to terminate the Agreements in December 2022. I have concluded that by early December 2022, Bonnis' failure to keep Epix informed and involved constituted a continuing repudiation of the Agreements. The focus then turns to both parties' conduct in December 2022. While I do not accept Bonnis' contention that December 2022 is the only timeframe that matters, I agree it is a significant period for the question of termination.

The parties' positions

[148] Bonnis contends it had cured any existing breach by early December 2022, or at least before December 30, 2022, including by providing requested information. Bonnis refutes Epix's contention that Epix was provided "hundreds" of pages of agreements to review, stating instead that only one agreement had been revised from its previously approved form, and the changes to it were immaterial. Further, Bonnis says it provided the architectural drawings "within days" of Epix's request, but Mr. DiMartile admitted he did not get around to reviewing them until mid-December, more than two weeks later. As a result, Bonnis says

that before Epix purported to terminate the Agreements on December 30, 2022, Epix itself committed a breach by refusing to lift the CPL to allow registration of the rezoning documents on title and by not promptly reviewing the documents Bonnis provided. Bonnis says it accepted Epix's breach of the Agreements and of the duty of good faith performance by letter dated December 13, 2022.

- [149] Despite that, on December 27, 2022, and while expressly maintaining it had accepted Epix's repudiation of the Agreements, Bonnis nevertheless offered to give Epix one more chance to complete. Bonnis proposed that it would treat the Agreements as valid and enforceable, and would complete on the express terms of the Agreements, on condition that Epix voluntarily agree to cancel the CPL by 4:00 p.m. on January 3, 2023. Epix responded at 11:01 a.m. on December 30, 2022, taking the position that Bonnis was in continuing breach of its obligations and purporting to terminate the Agreements, without providing a specific reason why. Bonnis says Epix's response of December 30, 2022 was an anticipatory breach, evidencing a clear intention by Epix not to perform the contract. Bonnis contends that since it was not in continuing fundamental breach at that point, there were no grounds on which Epix could terminate. In addition, Epix had not yet provided any input on the documents and drawings, despite its representation on December 5, 2022 that it was prepared to review at least the drawings "in short order". As a result, Bonnis says it accepted Epix's anticipatory breach and terminated the Agreements through its letter sent at 2:11 p.m. on December 30, 2022.
- [150] Epix says Bonnis did not cure the continuing breach in December 2022; in fact, instead of curing the breach, Epix says Bonnis' breach continued in a manner that deprived Epix of substantially the whole benefit of the Agreements. Although Bonnis provided some information in December 2022 in response to requests from Epix's counsel, Epix says, by that point, given its contractual right to have been involved and provide input along the way, it was, in my words, "too little, too late." The exchange of materials in December 2022 concretely demonstrated that Bonnis had taken steps in the rezoning enactment and the development permit process without informing or involving Epix. In Epix's view, this evinces a continuing breach of the express terms of the Agreements (and the duty of honest and good faith performance).
- [151] Epix says further that when confronted with this new information after months of silence, it was reasonable for Epix to take some time to consider the new information as well as its options. Given the context, and the evidence about the other demands on Epix's time at the same period (including closing another project and preparing for discoveries in this claim), Epix denies that it failed to respond promptly, and in any event, denies that Bonnis' requests were "requests for comment and input in connection with" the rezoning enactment and development permit processes, as contemplated in s. 2(c) of Schedule D. Epix says, in the circumstances, it was unreasonable for Bonnis to ask Epix to lift the CPL on the timelines Bonnis demanded. As a result, Epix says it was not in breach of the Agreements when Bonnis purported to accept Epix's alleged repudiation on December 13, 2022.

[152] With respect to Bonnis' letter of December 27, 2022, Epix says it was an about-face. Until that point, Bonnis had maintained the Agreements came to an end with the expiry of the Outside Date. It was also the first time since the litigation was commenced that Bonnis indicated it would perform on the Agreements. Rather than being a clear confirmation that Bonnis would honour the Agreements, the statements were instead couched as an alternative to Bonnis' primary position that Bonnis had accepted Epix's alleged repudiation and terminated the Agreements as of December 13, 2022. In the face of this continuing uncertainty, and given the continuing breach of the obligation to keep Epix informed and involved, Epix says it was entitled to and did terminate the Agreements on December 30, 2022. Epix contends it was not required to provide a specific reason for doing so as long as reasons existed at the time. As Epix's email was sent first in time on December 30, 2022, Epix says Bonnis' subsequent attempt to terminate the Agreements on that day could not have been, and was not, effective.

Discussion

[153] For the reasons that follow, I find Bonnis did not cure the continuing breach of the Agreements before December 30, 2022, and Epix did not breach the Agreements in that timeframe.

[154] To begin, I accept that Bonnis provided certain information in December 2022, albeit only in response to Epix's direct requests. However, in my view, the provision of information was incomplete and, in any event, insufficient to cure the breach. As I concluded above, the contractual obligation was to keep Epix informed and involved in the rezoning enactment and development permit processes so that Epix could provide input into those processes. The obligation was not simply to inform Epix after the fact of the steps Bonnis concluded unilaterally in the interim.

[155] I reject Bonnis' attempts to minimize the work undertaken between April and December 2022 that would have required Epix's input. The record before me demonstrates otherwise, including that there were revisions of the architectural drawings, revisions to and work on at least two agreements (rather than one), and communications with the City regarding the response to the PT Letter. The evidence also establishes that by early October 2022, the City considered Bonnis to have responded to the PT Letter. In addition, a lot of this work did not come to light in December 2022; instead, Epix did not become aware of it until October 2023 through the litigation process. As of the date of trial, Bonnis still had not provided Epix with copies of the responses to the PT Letter, despite that being part of the "development permit process" Epix was entitled to be involved in.

- [156] I similarly reject Bonnis' assertion that by December 13, 2022, Epix was in breach for failing to lift the CPL and failing to respond promptly. Under s. 2(c) of Schedule D, Epix's contractual obligation to respond promptly was specific to requests for "comment and input" in connection with the rezoning enactment and development permit processes. The context and timing of events is key.
- [157] On Thursday, December 1, 2022, at 4:00 p.m., Bonnis contacted Epix to request that Epix lift the CPL to permit registration of the rezoning documents on title, setting a deadline of Monday, December 5, 2022 for response. The next day, Epix requested copies of the documents to be registered and by the end of that day, Bonnis had provided the documents to be registered and confirmed that Epix could share them with its surveyor. The same day, Epix requested black-lined versions of the agreements as well as the most recent architectural, structural and geotechnical drawings. It was not until almost 7:00 p.m. on Monday, December 5, 2022 that Bonnis provided the black-lined version of the one agreement and offered to extend the deadline for response to noon the next day. Epix followed up again that evening to ask if the drawings would be provided the next day. When Bonnis' counsel questioned the relevance of the drawings, Epix's counsel provided the rationale in an email sent just prior to 10:00 p.m.
- [158] On the morning of December 6, 2022, Bonnis provided Epix with a link to copies of the architectural drawings as revised and submitted to the City by its architects on August 26, 2022. As noted, communications only subsequently disclosed through the litigation process confirm that, as of early October 2022, the City had circulated the drawings among staff for their review as part of Bonnis' overall response to the PT Letter, in preparation for obtaining the development permit itself. This was obviously months before the drawings were provided to Epix. In the circumstances, I do not accept that when Bonnis provided the drawings to Epix in December 2022, Bonnis was doing so to request Epix's "comment and input" within the meaning of the Agreements. This is particularly so given Epix had to ask for the drawings repeatedly, and Bonnis' counsel maintained the position that the drawings were "irrelevant".
- [159] Further, while Bonnis said at the time that there was only one agreement that had been modified from the previous versions reviewed by Epix's solicitor, as noted, through document disclosure in the litigation, it was revealed that there was actually a second agreement Epix had not previously seen. In any event, after months of silence and after finding out that other steps had been concluded without Epix's input, it is understandable that Epix would wish to remind itself of the agreements and documents to be registered on title, and satisfy itself that no other changes had been made. In my view, it was not reasonable for Bonnis to maintain its noon deadline for Epix's response when it only provided the last of the materials Epix had requested that day.

- [160] As Epix did not agree to lift the CPL by early afternoon on December 6, 2022, on December 7, 2022, Bonnis applied for short leave to allow it to bring an application on December 14, 2022 to lift the CPL. Epix opposed the application, including on the basis that at least one full day would be required for the hearing of the application on its merits. Associate Judge Bilawich dismissed the application for short leave.
- [161] Counsel then corresponded about availability for the hearing of Bonnis' application. On December 9, 2022, Bonnis wrote twice in relation to these matters. In its first communication, Bonnis proposed that the application to lift the CPL be heard in early January 2023, presumably to preserve the possibility of the rezoning enactment being addressed by City council in later January. Epix's counsel advised they were not available until February 2023. In its second communication, Bonnis again proposed that Epix consent to temporarily lift the CPL to allow the rezoning documents to be registered without the need for a court application. This was on a Friday, three days after Epix received the last of the materials it had requested, and four business days before the parties were scheduled to attend discoveries on December 15 and 16, 2022. Within two business days of sending those communications, Bonnis wrote again on December 13, 2022 and took the position that Epix was in breach because it had not yet responded to Bonnis' request and the CPL was preventing Bonnis from registering the necessary rezoning documents on title. Epix briefly disputed Bonnis' interpretation in a letter dated December 15, 2022.
- [162] I am unable to find that on December 13, 2022, Epix was in breach in the manner suggested by Bonnis or at all. As detailed above, the chronology of events does not support Bonnis' position. Given that Bonnis did not meet its obligation to keep Epix informed and involved between April and December 2022, it is not reasonable to expect that Epix could review the materials, consider its options and respond by December 13, 2022. This is not a matter of Epix adopting a "wait-and-see" approach. The timeframes Bonnis sought to unilaterally impose were unrealistic after such a prolonged period of silence; Bonnis was essentially asking Epix to get caught up on the last eight months in a period of seven days, and then decide what to do. The timelines were even more problematic in light of the discoveries the parties had previously scheduled and Bonnis' additional decision to bring a short leave application. Further, Mr. DiMartile's unchallenged evidence was that at the exact same time, Epix was working to address time-sensitive matters on another Epix project that had to be dealt with before the holiday season.
- [163] My conclusion that Epix was not in breach as of December 13, 2022 means there was no repudiation for Bonnis to accept as of that date. This conclusion in turn affects how Bonnis' letter of December 27, 2022 must be viewed. While Bonnis characterizes that letter as an "unequivocal" statement that it would perform the Agreements on their terms, in my view, the letter is anything but.
- [164] In its December 27, 2022 letter, Bonnis completely reversed the position it had been taking for months in the litigation and baldly asserted that the parties were now "ad idem" that the Agreements were valid and enforceable (rather than having ended on one of the earlier

Outside Dates, as Bonnis had maintained up to that point). Bonnis then effectively attempted to benefit from two inconsistent positions at the same time. Bonnis stated that its' position remained that the Agreements had been terminated on December 13, 2022 because Bonnis had accepted Epix's repudiation. However, Bonnis then purported to offer Epix "one final opportunity" to cure the breach and complete the deal. Bonnis cannot have it both ways.

[165] If Bonnis had terminated the Agreements on December 13, 2022, as repeatedly alleged, there would be nothing left for Epix to cure and complete. Its proposal would not make any sense. Instead, I have found Bonnis was not entitled to terminate the Agreements on December 13, 2022 because Epix was not in breach. That means, in the context of the still existing Agreements, the December 27, 2022 letter was Bonnis' first indication since the litigation commenced that Bonnis would honour the Agreements. However, it is far from an unequivocal statement that Bonnis would close on the deal. Bonnis only proposed to honour the Agreements if Epix cancelled the CPL by 4:00 p.m. on January 3, 2023. Bonnis further indicated it would treat any refusal to lift the CPL by that deadline as a repudiation of the Agreements. The clear implication of Bonnis' contingent position is that if Epix did not agree to lift the CPL by the January 3, 2023 deadline, Bonnis did not intend to be bound by the Agreements.

[166] I agree with Epix that the present case bears some similarities to the situation in *Amacon Alaska Development Partnership v. ARC Digital Canada Corp.*, 2023 BCCA 34. In that case, the landlord engaged in conduct designed to force the tenant into a "breach", with the intention of relying on the tenant's breach to withhold a second payment to which the parties had ostensibly agreed. Although *Amacon* was decided on the basis of a breach of the duty of good faith and honest performance, the landlord in *Amacon* engaged in conduct similar to what Epix complains of here. In *Amacon*, the parties negotiated a lease modification agreement under which the tenant was to vacate earlier than its original lease end date, in exchange for two compensation payments. However, after being sent the executed agreement by the tenant, the landlord reversed position and refused to sign. As the tenant was relying on the compensation payments to facilitate its move to new premises, the tenant did not vacate, and instead filed a claim seeking specific performance. After months of silence about its intentions under the agreement, and the passage of a certain contractually-significant date, the landlord suddenly executed the agreement, paid the initial amount and then immediately took the position that the tenant was in breach because it had not vacated. The Court of Appeal found a continuing repudiation and a breach of the duty of good faith and honest performance.

[167] In the present case, Bonnis took the position in the litigation that the Agreements were void and unenforceable, and remained silent for months about what, if any, steps it was taking towards completion, in breach of its contractual obligation to keep Epix informed and involved. Then without warning, on December 1, 2022, Bonnis suddenly re-engaged by announcing it was close to securing the rezoning enactment and requesting that Epix lift

the CPL. Through December 2022, Bonnis suggested (indirectly at first, and then explicitly on December 27, 2022) that the Agreements were valid and enforceable and demanded Epix take steps on expedited timeframes. When Epix did not take those steps, Bonnis asserted a repudiatory breach.

- [168] I find that because Bonnis' breach continued into December 2022, on receipt of Bonnis' letter of December 27, 2022, Epix was entitled to a reasonable period of time to consider the new information (in the form of Bonnis' reversal of position and qualified proposal for completion) and assess its options, before deciding on next steps. Bonnis contends it only asked Epix to lift the CPL within a week, and to allow completion to occur 30 days after the fifth business day after rezoning was enacted. This ignores the fact that, at that point, Epix did not know what Bonnis had submitted in response to the PT Letter, was not certain what had been agreed to, and had not had a realistic opportunity to provide input into the development for which it would become responsible. In essence, Bonnis was asking Epix to "trust it" when nothing in the last eight months would reasonably lead Epix to do so.
- [169] Faced with that option, on December 30, 2022, Epix chose not to accept Bonnis' most recent proposal, and instead provided notice through counsel that it was terminating the Agreements on the basis of Bonnis' continuing breaches. Bonnis says this was not a valid acceptance of repudiation that can support termination as, even if Bonnis was in breach, Epix failed to provide an express reason for its purported acceptance. Bonnis says, among other things, Epix's purported acceptance deprived Bonnis of any ability to evaluate and potentially cure the breach. Bonnis says Potter confirms, at para. 176, that if the ground advanced at trial is one that could have been corrected, it cannot be a valid acceptance of repudiation.
- [170] Relying on the decision in *Carr v. Fama Holdings Ltd.*, 40 B.C.L.R. (2d) 125 at 131, 1989 CanLII 240 (C.A.) (in turn, citing *Universal Cargo Carriers Corporation v. Citati*, [1957] 2 Q.B. 401 at 443), [1957] 2 W.L.R. 713, Epix says an innocent party is not required to specify the reason for accepting a repudiation as long as "there are at the time facts in existence which would have provided a good reason." The same principle was endorsed in *Potter* (at paras. 172-178, citing both the same and additional authorities). Epix says that its failure to state a particular reason for accepting Bonnis' breach on December 30, 2022 is not fatal, as it has demonstrated through trial the existence of those reasons - namely, the continuing breach of the obligation to keep Epix informed and involved.
- [171] I conclude that on December 30, 2020, Bonnis' continued breach of its obligations to keep Epix informed and involved was a fact in existence that Epix could have relied on to accept the repudiation. Bonnis' letter of December 27, 2022 may itself also have constituted an anticipatory breach, given the clear implication that Bonnis did not intend to be bound by the Agreements if Epix did not lift the CPL by the deadline requested. However, I need not reach a conclusion on that point.

- [172] Further, I am not satisfied that Bonnis could have "cured" the continuing breach, as I have found it to exist, even if Epix had provided that reason at the time. Bonnis contends it could have "easily cured" any alleged failure to inform Epix of "material developments" had Epix informed Bonnis of the "information it required". This position again demonstrates Bonnis' fundamental misapprehension about the scope of its contractual obligations. Bonnis' obligation was not limited just to "material developments" or to the obligation to "inform" Epix. Rather, the obligation was to inform Epix of the status and material developments so that it could be involved in a meaningful way in the rezoning enactment and development permit processes. Providing Epix with information after the fact, in circumstances when materials have already been finalized and communications exchanged without any input from Epix, could not serve to "cure" that breach.
- [173] As Bonnis did not cure the continuing breach of its contractual obligations in December 2022, Epix was entitled to accept Bonnis' repudiation and terminate the Agreements as it did on December 30, 2022. For the reasons expressed above, it is not fatal that Epix did not provide a specific reason for accepting the repudiation in its December 30, 2022 email. Epix has established through trial that reasons existed at that date that can support its acceptance of Bonnis' repudiation. Accordingly, I find Epix validly terminated the Agreements as of December 30, 2022. It follows that the aspects of Bonnis' counterclaim which are based on Epix's alleged repudiatory breach fail and are therefore dismissed.
- [174] I have not separately addressed Bonnis' claim that Epix was in breach of its duty of good faith and honest performance because of its filing and maintenance of the CPL outside the period of December 2022. There is considerable overlap between that claim and Bonnis' claims for slander of title and abuse of process, which is the subject of the next section. As I did not permit Bonnis to amend its counterclaim to include a claim for damages arising from the breach of the duty of good faith and honest performance, in my view, there would be no utility in deciding that claim. Even if successful, it could not result in a remedy.

Issue 4: Did the filing and maintenance of the CPL by Epix constitute slander of title or abuse of process?

The applicable principles

- [175] There is no dispute about the legal principles that govern Bonnis' tort claims against Epix for slander of title and abuse of process arising from filing and maintaining the CPL.
- [176] To establish a claim for slander of title, a defendant must prove the plaintiff published words in disparagement of their property, the words were false, the words were published with malice (in that the plaintiff knew or was reckless about whether they were false), and the defendant suffered special damages as a result: *Western Surety Co. v. Hancon Holdings Ltd.*, 2007 BCSC 180 [Western Surety] at paras. 49-51. A certificate of pending litigation can constitute the requisite published words in a claim for slander of title, as it operates as a "cloud" on title to the property: *International Sausage House Ltd. v. Hammer Estate*, 2015

BCSC 1155 at para. 206. Slander of title will not be made out if there is a lack of evidence establishing bad faith on the part of the filing party: *Nouhi v. Pourtaghi*, 2022 BCSC 807 at para. 379, citing *Midland Resources Holdings Ltd. v. Bokserman*, 2021 ONSC 3077 at para. 51.

- [177] A claim for abuse of process will be made out where the claiming party can prove: a) a collateral or improper purpose; b) an overt act in furtherance of the collateral or improper purpose; and c) a resulting loss: *Oei v. Hui*, 2020 BCCA 214 at paras. 5-6. A collateral or improper purpose is one that is "outside the normal incidents of litigation" or for a purpose "not reasonably related to the subject matter of the litigation": *Oei* at para. 9; *Nouhi* at para. 382. In order to establish abuse of process in relation to the filing of a certificate of pending litigation, the claiming party must establish malice, in the sense that the filing party knew and intended that the filing was inappropriate. The requisite malice cannot be established solely on the basis that the filing party was ultimately proven wrong in registering the certificate of pending litigation: *Western Surety* at para. 52; *Taylor v. Banicevic*, 2017 BCSC 1538 at paras. 245-248.

Discussion

- [178] Bonnis says that in the context of this case, Epix's decision to file and maintain the CPL amounts to slander of title and abuse of process. In brief, Bonnis says that the only claim to an interest in the Property that could have entitled Epix to file the CPL was Epix's claim for specific performance. However, Bonnis says that claim was based on two allegations Epix knew were false.
- [179] First, Bonnis says Epix lacked sufficient funds or financing to close the deal, both when it filed the CPL on March 23, 2022, and in December 2022 when it refused to lift or cancel the CPL. As a result, Bonnis contends it was false for Epix to represent that it was "ready, willing and able" to close on the deal at all material times. Bonnis points to Mr. DiMartile's admission on cross-examination that Epix was not "ready, willing and able to close" when the CPL was filed (however, I note that Mr. DiMartile maintained March 23, 2022 was not the relevant date on which Epix needed to close). Bonnis says further the documentary evidence confirms Epix did not sign a financing commitment letter until May 6, 2022, the terms of which provided for a maximum amount of \$14.3 million and required that the first advance be made within six months of Desjardins' approval (i.e. by November 2022).
- [180] I also sustained Bonnis' objections to certain passages in Mr. DiMartile's affidavit evidence regarding his conversations with Desjardins on the basis they were inadmissible hearsay. However, I allowed the paragraphs to remain for the non-hearsay purpose that a conversation took place. Given earlier trial management conference orders restricting the presentation of evidence, I also invited Epix to apply for leave to call a witness from Desjardins if Epix elected. Bonnis asks the Court to draw an adverse inference to the effect that Epix did not, in fact, ever have the funds to close, because Epix failed to either produce documentary evidence of adequate funds (particularly subscription agreements that would

have supplemented the Desjardins financing), or call a witness that could substantiate Mr. DiMartile's assertions.

- [181] In terms of the second false allegation, Bonnis says Epix failed to provide evidence that the Property was something more than a uniquely good investment to Epix, which is insufficient to support a claim for specific performance.
- [182] Bonnis says Epix's true motivation in filing the CPL was to give it an element of control over the rezoning enactment and development permit processes that the Agreements did not grant it. Since it characterizes Epix as not using the CPL to ensure the Agreements were performed on their terms, but rather to assert rights of review that Epix did not have, Bonnis maintains the filing and maintenance of the CPL constitutes an overt act collateral to the litigation. Bonnis claims it has suffered special damages as a result, in the form of a lower sale price for the Property than Epix had agreed to pay, and carrying costs of approximately \$1.56 million from the period of March 23, 2022 to December 31, 2022, and of \$1.58 million from January 1, 2023 to the end of October 2023.
- [183] Epix disputes that its decision to file the CPL was for any purpose other than its legitimate claim for specific performance of the Agreements. It maintained that claim from March 23 to December 30, 2022, when Epix advised it was terminating the contract and would instead pursue its alternative claim for damages. At that point, Epix discharged the CPL on the next possible business day (January 3, 2023). Epix says it had a reasonable claim to an interest in the Property during the timeframe the CPL was registered on title because it sought to preserve the Property in the event Epix obtained the remedy of specific performance. Further, Epix says there is ample evidence before the Court of the Property's unique characteristics and the attraction of this particular development project, given its location, its historical significance and the fact that the development plan was directly tied to that history.
- [184] Epix contends Bonnis' focus on whether Epix had the financial means to close when the CPL was filed, or even in December 2022, is misguided. Epix says the party who filed the CPL only needs to demonstrate they are "ready, willing and able" to close on the completion date: see the discussion in *Toor v. Dhillon*, 2020 BCCA 137 at paras. 69-81. Here, the completion date under the Agreements was contingent on the rezoning being enacted. As that event did not occur before the Agreements were terminated, the completion date - and therefore Epix's obligation to close - was never triggered. Further, as Epix abandoned its claim for specific performance almost a month before rezoning was enacted, and well before trial, there was no requirement for Epix to prove it could close on either the agreed closing date or some earlier date. Epix accepts that if it had maintained its claim for specific performance through trial, its financial means would be relevant, but says those are not the present facts.

- [185] Finally, Epix says Bonnis' belief that Epix filed the CPL to improperly expand its control over the rezoning enactment and development permit process is again a reflection of Bonnis misapprehending Epix's contractual rights to be informed and involved. Rather than using the CPL to leverage an improper expansion of its role before and during December 2022, Epix says its requests to review were consistent with exercising its contractual rights under s. 2(c) of Schedule D to be informed of and to provide input on the two identified processes.
- [186] On the evidence before me, I am not satisfied Bonnis has met its burden to prove the element of malice necessary to establish either slander of title or abuse of process arising from Epix's filing of the CPL. Rather than being filed for an improper or inappropriate purpose not reasonably related to the subject matter of the litigation, I find Epix filed the CPL to preserve its claim for specific performance of the Agreements. The parties both provided evidence regarding the unique location, features and history of the Property. When coupled with development plans that would incorporate and highlight those historical characteristics, I am satisfied for present purposes that the Property had a quality that made it appropriate for the planned development purpose, such that damages may not have been an appropriate remedy if Epix had not pivoted away from seeking performance.
- [187] I am further not persuaded, in the context of these particular Agreements, that Epix was under an obligation to demonstrate the financial means to close the deal on a date earlier than the completion date agreed to by the parties. There is nothing in the Agreements that required Epix to disclose its financial situation in advance of completion. Since the completion date was tied to the enactment of rezoning and was not triggered before the Agreements were terminated, I agree with Epix that its obligation to demonstrate, with concrete proof of financial means, that it was "ready, willing and able" to close the deal did not ultimately arise. Epix also abandoned its claim for specific performance before rezoning was enacted. It would not be appropriate to hold Epix to an evidentiary burden, or to draw an adverse inference, on the basis of alleged failures related to a claim Epix had confirmed it would not pursue.
- [188] Lastly, I agree that Bonnis' theory about Epix's true motivation in filing the CPL is rooted in Bonnis' continuing view that Epix was not contractually entitled to play any real role in the rezoning enactment and development permit processes. For the same reasons set out above, which I will not repeat, that interpretation is in error. It is not supported by either the words of the Agreements or the surrounding circumstances. Epix already had rights to be informed and involved; the filing of the CPL was neither necessary for, nor connected to, the exercise of those rights.
- [189] I therefore dismiss Bonnis' claims for slander of title and abuse of process arising from the filing and maintenance of the CPL.

Issue 5: What are the appropriate remedies?

[190] Each side seeks the Deposit and any accrued interest, as well as damages. I will deal with the question of the Deposit first.

Who is entitled to the Deposit?

[191] As noted above, the Agreements specifically address what is to happen with the Deposit in the event the transaction does not complete as the parties originally anticipated. For ease, I repeat the relevant portions of s. 3 of the Purchase Agreement:

The Deposit paid, together with all interest accrued thereon, will be forfeited to the Vendor if the Purchaser is in default of its obligation to complete the sale and purchase of the Property hereunder as liquidated damages (the parties hereby agreeing that such amount constitutes a genuine pre-estimate of damages) and as the Vendor's sole and exclusive remedy, or will be paid in full to the Purchaser, without prejudice to any other right or remedy of the Purchaser, in the event that the Purchaser elects to terminate this Offer to Purchase due to the Vendor being in default of its obligation to complete the sale and purchase of the Property hereunder.

[Emphasis added.]

[192] The plain meaning of this contractual provision is that, in the event one party defaults on its obligation to complete the transaction pursuant to the terms of the Agreements, the non-defaulting party is entitled to the Deposit, together with all interest it has accrued. On its face, s. 3 also operates to limit Bonnis' remedies under the Agreements solely to the forfeiture of the Deposit (plus interest). If entitled to the return of the Deposit, Bonnis cannot seek other damages under the contract. In contrast, in the event Epix is found to be the innocent party, the return of the Deposit is expressly stated to be without prejudice to Epix's right to additional remedies.

[193] Given my conclusions above that Bonnis breached its contractual obligations, thereby entitling Epix to terminate the Agreements, I find that Epix is contractually entitled to the return of the Deposit, together with all accrued interest.

What damages, if any, are owed?

[194] Where the Court finds a breach of contract, the innocent party may be entitled to recover damages from the other party. It is common ground that damages for breach of contract are most often awarded as "expectation damages", which focus on putting the innocent party in the position it would have been in if the contract had been performed: 1155204 B.C. Ltd. v. NV Highway Properties Ltd., 2024 BCSC 248 at para. 139, rev'd on other grounds 2025 BCCA 8. Such damages are presumed to be assessed as of the date of the breach: Dosanjh at paras. 53, 55. Damages for breach of the common law duties of good faith and honest performance are awarded on the same principles: Callow at paras. 106-107, 109.

[195] In assessing the measure of damages that would put the innocent party in the appropriate position, the Court can award costs incurred by the innocent party in preparing to acquire and develop a property, as well as reasonably foreseeable consequential losses, such as

legal costs thrown away: *Bajwa v. Habib*, 2018 BCSC 1822 at paras. 120-129, aff'd 2020 BCCA 230, leave to appeal to SCC ref'd, *Shahid Habib, et al. v. Navdave Preet Singh Bajwa, et al.*, [2020] S.C.C.A. No. 438. A party claiming damages for a breach has a duty to mitigate their loss, although the burden to prove a failure to mitigate and that mitigation was possible rests with the opposing party: *Southcott Estates Inc.* SCC at paras. 23-25.

[196] Where a party has sought specific performance of a contract, but ultimately abandons that claim in favour of seeking damages, the original claim for specific performance may inform what constitutes reasonable mitigation. For example, where there is a substantial justification for the claim, or a legitimate interest in specific performance, that party's choice to incur certain costs may be justified, rather than amounting to a failure to mitigate: *Southcott Estates Inc.* SCC at paras. 36-37.

[197] Epix seeks general damages for breach of contract and breach of the common law duty of good faith and honest performance. I have found a breach of contract, but have declined to decide the alleged breach of the duty of good faith and honest performance by Bonnis. However, Epix did not seek separate or additional damages as a result of the latter form of breach.

[198] Epix claims damages of \$190,572.86 for professional fees incurred in preparing to acquire the Property, including fees from surveyors, its environmental consultant and fees to maintain Epix Main Street Limited Partnership. Epix also secured financing to complete the purchase. The breakdown of damages claimed by Epix is as follows:

Invoices

Nature of Expense

Amount

Active Earth invoices

Environmental consultant fees (Sept 30/21 to Mar 14/22)

\$52,947.53

Terra Law invoices

Legal fees for acquisition of the Property (July 31/21 to Apr 30/22)

\$58,701.05

Altus Group invoices

Fees to estimate current market value of property as of Sept 1/21 (Sept 23/21)

\$9,240.00

Watson & Bernard Land Surveying

Land surveyors fees (Feb 28/22 to Sept 30/22)

\$5,863.28

McCarthy Tetrault invoices

Legal fees to arrange financing (for the period ending Dec 8/22)

\$20,000.00

Desjardins Fees

Fee for financing

\$37,500.00

Areti CPA Inc.

Accountants fees to maintain Epix Main Street Limited Partnership for 2021 and 2022 fiscal years

\$6,321.00

Total

\$190,572.86

[199] With the exception of the fee for financing paid to Desjardins, Epix provided documentary evidence supporting each of the above amounts. Mr. DiMartile provided affidavit evidence respecting the financing fee; it was not challenged.

[200] Epix says, in light of its real, substantial and legitimate claim for specific performance, which it maintained up until December 30, 2022, it was reasonable for it to incur the above costs in preparation for acquiring and developing the Property. Epix contends Bonnis has not proven a failure to mitigate and, in any event, it has fulfilled its duty to mitigate.

[201] Bonnis says the damages alleged by Epix are costs they incurred to complete the transaction and do not flow logically from the breaches Epix asserts. In particular, in light of my focus above, Bonnis says Epix did not suffer any specific consequences leading to a compensable loss as a result of Bonnis' alleged failure to keep Epix informed and involved. Further, Bonnis asserts Epix could have fully mitigated these costs simply by completing the transaction. As a result, Bonnis says Epix has failed in its duty to mitigate.

[202] In light of the applicable principles, I am satisfied the damages claimed by Epix were costs and losses that are reasonably foreseeable consequences of a breach of contract that led to the termination of the Agreements. In reviewing the specific damages claimed, I note that the majority of them are for costs incurred before the breakdown of the parties' relationship in late March 2022, and that were necessary for Epix as it was preparing to acquire and develop the Property. The factual background of this matter demonstrates that costs such as legal fees for acquisition and financing, environmental consultant fees, property appraisals and land survey costs were all incurred with the knowledge of Bonnis

or can reasonably be supposed to have been in the contemplation of both parties when the Agreements were made. Bonnis was also aware that Epix Developments Ltd. intended to assign the contract to Epix Main Street Limited Partnership. There is no suggestion this was something Bonnis opposed. Accordingly, the costs to maintain the limited partnership were also reasonably foreseeable.

- [203] Given my findings of breach above, I reject Bonnis' contention that Epix ought to have mitigated these costs by completing the transaction. In addition, to the extent any of the claimed damages post-date March 2022, Bonnis' failure to keep Epix informed and involved between April and early December 2022, and its failure to indicate if it would honour the Agreements, limited Epix's ability to make informed choices about whether to continue incurring these costs.
- [204] Accordingly, I order Bonnis to pay Epix general damages of \$190,572.86 for breach of contract.
- [205] In its counterclaim, although Bonnis pleaded breach of the duty of good faith and honest performance, Bonnis only sought damages for alleged slander of title and abuse of process arising from the CPL. As noted above, at the start of closing submissions, Bonnis applied to amend its counterclaim to also plead damages for breach of the duty of good faith and honest performance. Epix opposed the amendment. I denied Bonnis' application primarily on the basis that I was satisfied Epix would be prejudiced by permitting the requested amendment after the close of evidence, given the broader characterization of the breach Bonnis wished to advance.
- [206] Given that ruling, and my conclusion that Epix did not breach the contract in a manner that would result in forfeiture of the Deposit to Bonnis, the only remaining basis on which Bonnis' could seek damages was its claims for tortious use of the CPL. As I have rejected Bonnis' claims for slander of title and abuse of process, I find Bonnis is not entitled to any damages.

Conclusion and summary of orders

- [207] Based on my reasoning above, I declare that Bonnis defaulted on its contractual obligations to keep Epix informed on a timely basis as to the status of and material developments in connection with the rezoning enactment and development permit processes and to seek Epix's input, consider in good faith Epix's reasonable comments and incorporate those comments wherever commercially reasonable and practical.
- [208] In addition, I make the following orders:
- a) Epix's claim is allowed on the basis of the breach declared above;
 - b) The Deposit of \$1.1 million, together with all accrued interest, is to be paid to Epix Developments Ltd.;

- c) Bonnis is to pay Epix Developments Ltd. general damages for breach of contract in the amount of \$190,572.86; and
- d) Bonnis' counterclaim is dismissed in its entirety.

[209] As Epix has been substantially successful, Epix is presumptively entitled to pre-judgment interest and costs of the action. In their written and oral submissions, both parties indicated a desire to speak to costs at a later date, presumably once the outcome of the action had been determined. To the extent either party still wishes to make further submissions on costs, they may do so in writing. The parties' submissions should not exceed five pages in length and should be exchanged according to a schedule to be agreed between counsel, with the first submission to be filed with the Supreme Court Registry within 30 days of the release of these reasons.

"K. Wolfe J."

[1] Leave to appeal to SCC ref'd [2022] S.C.C.A. No. 90.

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