

CANADA / JUDGMENT

Teralink Investment Group Inc. v. Park

2020 BCSC 471

COURT

Supreme Court of British Columbia

DECIDED

30 March 2020

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2020 BCSC 471 Teralink Investment Group Inc. v. Park

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Teralink Investment Group Inc. v. Park,

2020 BCSC 471

Date: 20200330

Docket: S201875

Registry: New Westminster

Between:

Teralink Investment Group Inc.

Plaintiff

And

Heung Sik Park, Hee Hyun Park, Sang Rok Park and So Hyun Park

Defendants

Corrected judgment: The front page of this judgment was
corrected on April 3, 2020

Before: The Honourable Madam Justice E. McDonald

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiff:

S.E. Streat

Counsel for Defendants:

J. Jung

Place and Date of Hearing:

New Westminster, B.C.

September 25, 2019

Place and Date of Judgment:

New Westminster, B.C.

March 30, 2020

Table of Contents

OVERVIEW... 3

The Application.. 3

ISSUES.. 5

The Law.. 5

Did the Defendants Comply with the Express Terms of the Agreement?. 6

Was Cooperation an Implied Term of the Agreement?. 9

Did the Defendants Breach Their Duty of Good Faith?. 13

CONCLUSION.. 17

OVERVIEW

- [1] The defendants owned a 7.123 acre farm located at 860 Dominion Avenue in Port Coquitlam that they wished to sell (the "Property"). On April 9, 2014, the defendants agreed to sell the Property to the plaintiff. The purchase was completed on June 11, 2014.
- [2] To facilitate the sale, the defendants agreed to finance part of the purchase price through a vendor take-back loan (the "VTB Loan"). The repayment of the VTB Loan was due on December 11, 2016. On June 9 and 10, 2014, the parties entered into a general security agreement ("GSA") and mortgage, respectively.
- [3] There is no dispute that the defendants knew that the plaintiff's plan involved subdividing the Property. However, there is a dispute as to how much the defendants knew about the subdivision plans and whether the defendants knew and agreed to cooperate with the plaintiff's actual plan to subdivide and sell off subdivided lots in order to pay off the VTB Loan.

- [4] On November 22, 2016, the plaintiff sought the defendants' approval of its subdivision application. The plaintiff submits that despite repeated requests, the defendants wrongfully refused to execute the subdivision application. As a result, the plaintiff had to seek bridge financing to pay off the VTB Loan. The plaintiff seeks damages in relation to the alleged breach of the agreement including the costs associated with the bridge financing.

The Application

- [5] The defendants apply pursuant to Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 for an order summarily dismissing the plaintiff's notice of civil claim (the "Claim"). The plaintiff opposes the application.
- [6] The Claim seeks damages in relation to the defendants' alleged failure to abide by an express or implied term in an agreement between the parties that required the defendants to cooperate with the plaintiff's plans to redevelop the Property.
- [7] The plaintiff alleges that it was an express or implied term of the GSA and mortgage between the parties that the defendants would, amongst other things, reasonably cooperate with the plaintiff's efforts to subdivide the Property and sell the subdivided lots, including executing the documents reasonably required. However, at the hearing, the plaintiff appeared to argue that the basis for its claim was an express or implied term in the purchase agreement rather than in the GSA and mortgage.
- [8] The plaintiff says that the defendants breached the agreement by unreasonably refusing to sign the documents necessary to subdivide the Property and sell the lots. As a result of the defendants' unreasonable refusal, the plaintiff alleges that it was unable to subdivide and sell the lots in time. Instead, the plaintiff alleges that it had to borrow funds to pay off the VTB Loan. The plaintiff claims that it suffered loss and damage as a result of the defendants' breach in the following amounts:
- a) \$56,400 lender's fee;
 - b) \$49,726.47 interest up to January 25, 2017;
 - c) \$1,243.87 in legal fees; and
 - d) \$600 discharge fee.
- [9] In the alternative, the Claim alleges the defendants made negligent or fraudulent misrepresentations to the plaintiff that they would reasonably cooperate with the plaintiff's efforts to subdivide the Property.

[10] However, the plaintiff did not advance the claim for fraudulent or negligent misrepresentation at the hearing. Rather, the plaintiff argued that implying the term requested by the plaintiff was required to give business efficacy to the agreement. The plaintiff further argued that without such an implied term, the plaintiff would not have entered into the agreement.

ISSUES

[11] This application raises the following issues:

- a) Did the defendants breach an express or implied term of the agreement with the plaintiff, or the duty of good faith?
- b) If the defendants did breach an express or implied term of the agreement, or the duty of good faith, are the defendants liable to the plaintiff for the damage or loss claimed?

The Law

[12] Neither party alleges that there is ambiguity in the words of the agreement at issue. Justice Smith in *Perrin v. Shortreed Joint Venture Ltd.*, 2009 BCCA 478 at para. 23, citing *Investor's Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 at 114 (H.L.), confirms that where ambiguity is a non-issue:

the intention of the parties is to be determined objectively by attributing a meaning to the words that would be conveyed to a 'reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'.

[13] In construing an agreement, the settled law establishes that:

- a) "the intention of the parties must be determined from the words of the contract read as a whole": *Perrin* at para. 24, citing *Aquadel Golf Course Limited v. Lindell*, 2009 BCCA 5;
- b) "the plain and ordinary meaning must be given to words in a contract unless to do so would result in absurdity": *Perrin* at para. 24 citing *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489 at para. 20;
- c) where the agreement involves a negotiated commercial document, the agreement "should be construed in accordance with sound commercial principles and good business sense. To the extent that it is possible to do so, it should be construed as a whole and effect should be given to all of its provisions. The provisions should read, not as standing alone, but in light of the agreement as a whole and the other provisions thereof": *Perrin*, para. 24 citing *Scanlon v. Castlepoint Development Corp.* (1992), 99 D.L.R. (4th) 153 at para. 179 (Ont. C.A.);
- d) while the "factual matrix of a contract" is material, caution is required to ensure that consideration of "context" does not exclude the plain and ordinary meaning of the words used in the contract: *Perrin* at para. 25; and

- e) "there is a presumption preventing adding unexpressed terms to a contract by necessary implication unless 'it goes without saying' or is necessary to give business efficacy to the contract. Any implied terms must also be capable of clear expression and must not contradict any express term of the contract": Perrin at para. 27.

[14] In considering the contract, I must ascribe the plain and ordinary meaning of the words in the relevant clause when it is read in light of the contract as a whole and the factual matrix in which the contract arose. I must not imply a term which would be unnecessary to give effect to the intention of the parties as expressed in their contract: Perrin at para. 6.

Did the Defendants Comply with the Express Terms of the Agreement?

[15] I must first determine whether there was an express term in the agreement between the parties that required the defendants to cooperate with the plaintiff's plans to redevelop the Property.

[16] On April 9, 2014, the defendants entered into a contract of purchase and sale with Mr. Wawryk, one of the principals of Teralink, in his personal capacity (the "Sale Contract"). Approximately one month later, Mr. Wawryk assigned the Sale Contract to the plaintiff. Clause 18 of the Sale Contract (the "Entire Agreement Clause") stated as follows:

18. REPRESENTATIONS AND WARRANTIES: There are no representations, warranties, guarantees, promise or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale.

[17] On June 9, 2014, the plaintiff's counsel wrote a letter to the defendants' counsel (the "Letter Agreement"), which stated as follows:

We confirm that your clients are aware of our clients' development plans for the property and that as part of same the following improvements will be carried out:

1. The house and all structures located on the Property will be demolished once the property is vacated by the Sellers;
2. Structural Fill to be placed on the Property as required by the City of Port Coquitlam;
3. A portion of the Property will be dedicated to the City of Port Coquitlam for roads and our clients will be building the roads as required by the City; and
4. As part of the development process, 13,000 square feet of the Property will need to be subdivided and transferred.

Please confirm by return your clients' consent to items 1 - 4 being done and that your clients will execute the requisite partial discharge of the Take-Back Mortgage with respect to items 3 and 4 when required.

[Emphasis added.]

- [18] The defendants executed the Letter Agreement and prefaced their signatures with the following statement: "For sufficient consideration the receipt of which is acknowledged, the Sellers hereby confirm their consent to the items 1 - 4 set out above."
- [19] On June 9, 2014, the parties also executed a mortgage to secure the VTB Loan. The VTB Loan was due and payable on December 11, 2016. The mortgage included the Prescribed Standard Mortgage Terms as set out in Schedule B of the Land Title (Transfer Forms) Regulation, B.C. Reg. 53/90.
- [20] The defendants specifically rely on Clause 7(1)(f) of the Prescribed Standard Mortgage Terms, which states as follows:
- 7.(1) A default occurs under this mortgage if
- (f) the borrower sells or agrees to sell all or any part of the land or if the borrower leases it or any part of it without the prior written consent of the lender,
- ...
- (2) If a default occurs under this mortgage, it will have the same effect as though a default had occurred under any other mortgage or agreement between the borrower and the lender.
- [21] The consequences of a default and the enforcement steps available to the lender are set out in Clause 8 of the Prescribed Standard Mortgage Terms:
- 8(1) If a default occurs, all the mortgage money then owing to the lender will, if the lender chooses, at once become due and payable.
- [22] The Property purchase completed on June 11, 2014. The defendants submit that the closing involved a "standard set of closing documents typical of a residential real estate transaction" except for the additional Letter Agreement.
- [23] It is the terms of the Letter Agreement that are relevant to determining the present application. The Letter Agreement is a separate agreement of the parties. The defendants confirmed as much when they signed the Letter Agreement and stated that it was based on receipt of sufficient consideration. I note that neither party suggests that the Letter Agreement is not binding on the parties.
- [24] The Letter Agreement, which I note was drafted by counsel for the plaintiff, says in paragraph 4 that, "As part of the development process, 13,000 square feet of the Property will need to be subdivided and transferred". The Letter Agreement expressly seeks the defendants' consent to the items in paragraphs 1 to 4 being done and that the defendants confirm their consent to "execute the requisite partial discharge of the Take-Back Mortgage with respect to items 3 [the road dedication] and 4 when required."

- [25] Based on a reading of the plain meaning of the words of the Letter Agreement read as a whole, it is clear that the plaintiff planned to develop the Property and to facilitate its plan, it sought the defendants' consent to dedicate a portion of the Property to roads and to subdivide and transfer 13,000 square feet out of the 7.123 acres. These are the relevant express terms of the Letter Agreement.
- [26] The Letter Agreement contained express terms that obligated the defendants to execute the requisite partial discharge of the VTB Loan in regards to the 13,000 square foot portion of the Property. However, there were no express terms requiring the defendants to cooperate with any actions beyond those stated in the Letter Agreement. I note that 13,000 square feet is a very small portion of the overall Property.
- [27] The parties agree that approximately six months after the sale of the Property, the defendants complied with the express terms of the Letter Agreement. They signed the documents required by items 3 and 4 of the Letter Agreement. Therefore, the defendants had complied with their express obligations under the Letter Agreement by no later than January of 2015.

Was Cooperation an Implied Term of the Agreement?

- [28] As explained above, I have concluded that the defendants complied with the express terms of the Letter Agreement. However, I must also address whether there was an implied contractual term that required the defendants to provide further cooperation and assistance to the plaintiff after the initial road dedication described in item 3, and the small subdivision referred to in item 4 of the Letter Agreement.
- [29] This leads me to ask what exactly is the implied term that is being alleged here. Counsel for the plaintiff describes the implied term as follows: "It was an implied term of the Contract that the Defendants would cooperate with the Plaintiff's subdivision of the Property."
- [30] In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Limited*, [1999] 1 S.C.R. 619 at para. 27, Justice Iacobucci, citing *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 at 775, confirmed the three circumstances in which terms may be implied in a contract:
- (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed"
- [31] Justice Iacobucci at para. 29 of *M.J.B.* goes on to discuss the presumed intention of the parties and he states as follows:

What is important is a focus on the intentions the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intention of reasonable parties. That is why the implication of the term must have a certain degree of obviousness to it, and why, if there is a evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G.H.L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994) at p. 476:

In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

[Emphasis in original.]

[32] The plaintiff says that finding such an implied term is necessary to give "business efficacy" to the contract. Mr. Wawryk says that had he known the defendants would not cooperate with the subdivision to the extent he wanted, he and the plaintiff would not have agreed to purchase the Property in the first place.

[33] In his affidavit sworn August 15, 2019, Mr. Wawryk states that in purchasing the Property, "The defendants were aware, and I discussed with the Defendants, that in order to develop the Property, Teralink intended to subdivide the Property into different lots, and to sell the lots to others. In order to subdivide the Property into different lots for development and/or sale, there needed to be roads created to access each of the newly created lots."

[34] Mr. Wawryk agrees that in or around January of 2015, the defendants cooperated with the plaintiff's request to "execute documents related to the partial subdivision of the Property to allow for roads to be constructed" as per the Letter Agreement. Mr. Wawryk says that if the defendants had not intended to "cooperate with the entire subdivision aspect of the development" to achieve optimum marketability, he would have expected them to refuse to cooperate from the outset.

[35] Mr. Wawryk describes the intention of the parties as follows:

It was the intention of both of the parties that the Property would be developed, including but not limited to the demolishing of the home on the property, the placing of structural fill, the partial subdivision to the City to allow for the building of roads to access the subdivision lots, the building of roads, and the ultimate subdivision of new lots, and development and/or sale of the Property to new uses.

[36] Ms. So Hyun Park, one of the original owners of the Property, explained her role in her affidavit #1 sworn July 18, 2019, as follows:

Of the four members of the family, I was the person who communicated with the plaintiff in all matters of substance pertaining to the sale of our family's property in June of 2014, the two ancillary matters after the sale in 2014 involving the subdivisions of a small piece of land and for the roads pursuant to those items agreed to in a letter agreement dated June 9, 2014, and all matters pertaining to the payout of the vendor take back loan ("VTB Loan") in November and December of 2016.

[37] In her affidavit #2, Ms. Park denies that Mr. Wawryk ever specifically explained how the plaintiff intended to subdivide and develop the Property. She also denies that Mr. Wawryk ever advised her that the plaintiff would rely on the sale of the subdivided lots to repay the VTB Loan. After the sale of the Property closed, the defendants cooperated with the plaintiff regarding the subdivision referred to in the Letter Agreement as Ms. Park describes in her affidavit #2:

Any discussions involving the subdivision of the subject property was only with respect to that small triangular shaped piece of land, as well as dedicating a portion of the property to the City of Port Coquitlam for roads both of which were followed up by putting them into the letter agreement of June 9, 2014.

[38] Ms. Park says that following their cooperation to subdivide a small portion of the land and dedicate the roads, the defendants heard nothing further from the plaintiff regarding further subdivision of the Property or proposed lot sales until November 15, 2016, shortly before repayment of the VTB Loan was due.

[39] The defendants rely on the Entire Agreement Clause and clause 7(1)(f) of the Prescribed Standard Mortgage Terms. Clauses 7(1)(f) and 8 of the Prescribed Standard Mortgage Terms provided that the plaintiff could cause default under the mortgage by selling or agreeing to sell all or any part of the land without the prior written consent of the lender. There is no dispute that the plaintiff failed to obtain the necessary consent of the defendants to the sales of the proposed subdivided lots.

[40] The defendants submitted that:

since the parties had agreed to certain additional terms as set out in the June 9 Agreement, it is clear expression of the parties that they were agreeable to additional terms but that any such additional terms would have to be clearly set out in written agreement and signed by the parties. Based on this, it would be reasonable to infer that there were no other terms agreed by the parties, either express or implied, other than the written documents expressly signed by the parties.

[41] The Letter Agreement sets out four specific actions that the plaintiff expressly sought to have the defendants consent to. It is not clear, based on the express words in the agreement and the evidence before me, how the parties' agreement would be deprived of its business efficacy absent the implied term sought by the defendants. While I agree with the plaintiff that the Letter Agreement refers to "development plans" and "part of the development

process", the words used also plainly and unambiguously lists four specific "...improvements [that] will be carried out ". It is with respect to these four specific improvements that the plaintiff sought the defendants' consent. Nothing in the Letter Agreement leads me to conclude that the business efficacy of the deal relied on some implied term that the defendant consent to the development process ultimately undertaken by the plaintiff.

- [42] Additionally, the implied term alleged by the plaintiff does not have the requisite degree of obviousness to it. When the plaintiff expressly asked the defendants to confirm their consent to sign documents necessary to dedicate roads and subdivide a small portion of the overall Property, it was not a necessary implication that the defendants also agreed to "cooperate with the Plaintiff's subdivision of the Property". The implied term alleged by the plaintiff is too broad and imprecise because it is not clear exactly what would be included in the development process or what "cooperation" would entail. It is also unclear how long that cooperation would be required. In my view, the implied term runs afoul of Professor Fridman's instruction quoted in M.J.B. above because of the difficulty of ascertaining the precise nature of what, if anything, should be implied.

Did the Defendants Breach Their Duty of Good Faith?

- [43] The plaintiff submits that the defendants breached their implied duty of good faith in contractual performance, described by Justice Cromwell in *Bhasin v. Hrynew*, 2014 SCC 71, by failing to promptly and reasonably cooperate with the plaintiff after November 16, 2016 as it sought to subdivide and sell subdivided lots.
- [44] In *Bhasin*, Justice Cromwell points out the organizing principle that the parties to a contract "generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily": para. 63. In my view and for the reasons that will follow, I have concluded that the defendants' actions cannot be said to amount to be arbitrary or capricious or result in a breach of the implied duty of good faith.
- [45] At this point, it is helpful to set out the events of November and December 2016, when Mr. Wawryk requested the defendants sign the subdivision documents.
- [46] According to Ms. Park, in early November of 2016, she contacted Mr. Wawryk to ask him whether the plaintiff anticipated any problems paying out the VTB Loan on time. Mr. Wawryk assured her there was no problem.
- [47] On November 15, 2016, Mr. Wawryk sent a text message to Ms. Park stating that he needed to have her and her family available " this week to sign some documents". Ms. Park replied that she needed to review the documents first and Mr. Wawryk agreed.
- [48] On November 16, 2016, Mr. Wawryk sent Ms. Park a text message asking her if she and her family were available at 3:00 p.m. on November 17, 2016 to sign the subdivision documents that he had forwarded to her. The text messages passing between Ms. Park and Mr. Wawryk indicated that he wanted the documents signed within a few days.

[49] The messages make it clear that Ms. Park was trying to understand the documents, locate her family members and explain the documents to her parents, all within the short deadline set by Mr. Wawryk. She also specifically asked Mr. Wawryk for information regarding the triangular portion of the Property that the plaintiff had already subdivided, with the defendants' consent. In other words, she was alive to the fact that the defendants had certain limited obligations to cooperate and she was attempting to determine whether those obligations had been met.

[50] On November 16, 2016, Ms. Park told Mr. Wawryk that she had spoken with her parents and she reported to him that: "From what I get they prefer you wait until we are out of title so we don't have to be more legally involved. In short tomorrow [to sign the document] most likely won't work."

[51] On November 16, 2016, Mr. Wawryk began to take the position that the defendants would be breaching the terms of the agreement if they did not sign the documents he had provided. He sent a text message to Ms. Park with the following message:

Better call me. With out this signed the subdivision does not occur. Sales do not occur and you are breach of contract with the terms of the mortgage. Give me a call to discuss what the concern is please. Thx.

[Emphasis added.]

[52] By November 18, 2016, Mr. Wawryk appeared to be trying to give the defendants more time. He texted Ms. Park and said the documents he previously sent to her did not need to be signed. However, he said:

Two, no need to sign the documents I sent. However I do have a subdivision application I need signed by next Wednesday. Three, anticipated closing date that works for your family for document signatures. I propose between the 13th and the 15th of December. Call to discuss. Thank you.

[53] On November 18, 2016, Ms. Park advised Mr. Wawryk that Ms. Park's family members would be travelling for medical reasons on December 12. Mr. Wawryk then advised Ms. Park that he wished to pay out the mortgage earlier than the due date of December 11, 2016.

[54] In text messages exchanged between the parties between November 18 and November 29, 2016, the parties discussed arranging for a notary or legal counsel to handle the mortgage payout. In exchange for immediate signing of the subdivision application, Mr. Wawryk offered to pay the defendants an additional \$4,000 to cover their legal fees. If the VTB Loan could not be repaid within 10 days of December 11, 2016, he also offered to pay a "penalty" of \$15,000 in addition to the interest adjustment.

- [55] After the exchange of text messages, the parties' lawyers began communicating on behalf of their clients. On November 29, 2016, litigation counsel for the plaintiff sent a letter to defendants' counsel. The plaintiff's counsel took the position that the defendants were breaching the contract by refusing to sign the subdivision application. However, he repeated the offer made by Mr. Wawryk to pay the defendants additional funds if they signed the subdivision documents.
- [56] The defendants' counsel responded and indicated that he would have his clients' answer by December 5, 2016. The defendants' counsel also requested information regarding the sales of the proposed subdivided lots. However, on December 3, 2016, counsel for the plaintiff advised that while the plaintiff was willing to consider a reasonable proposal, the plaintiff had proceeded to make other arrangements for paying out the VTB Loan.
- [57] Mr. Wawryk explained that due to the lack of explanation for the defendants' non-cooperation and the tight timelines, he felt he had no assurance or confidence that the defendants would cooperate. As a result, the plaintiff made alternate arrangements for bridge financing to pay out the VTB loan and incurred various costs.
- [58] Mr. Wawryk also states that the subdivision process was delayed as a result of the defendants' refusal to cooperate.
- [59] Mr. Wawryk states in his affidavit that prior to his counsel receiving the December 5, 2016 letter from the defendants, "the Defendants had not requested any information from the Plaintiff in respect of the action being requested by them." However, in the text messages it is clear that Ms. Park had requested information about the subdivision documents from Mr. Wawryk and that she was uncertain about the plaintiff's requests.
- [60] I find that Ms. Park responded to Mr. Wawryk's unexpected and rushed request to sign documents by making legitimate and timely requests for information, including to receive a copy of the documents. Ms. Park kept Mr. Wawryk informed of the efforts she was making and the challenges she faced dealing with his request to have the documents executed. She was honest and forthright about why the defendants were reluctant to sign the documents. She was also legitimately concerned to hear, since Mr. Wawryk had already confirmed that the VTB Loan would be paid out without issue, that repayment of the VTB Loan hinged upon the defendants signing the subdivision documents and the proposed sales of the subdivided lots.
- [61] Once the defendants had the opportunity to consult with their counsel, the defendants reasonably signalled their willingness to cooperate with the plaintiff. While the plaintiff did not think, wrongly in my view, that it had to supply information about the proposed sales to the defendants, and while the plaintiff was dissatisfied with the lack of precision in the defendants' offer to cooperate, the fact remains that the defendants did confirm their willingness to work with the plaintiff regarding the subdivision. The time pressure faced by the plaintiff to subdivide and sell the lots cannot be laid at the feet of the defendants. The plaintiff could have approached the defendants earlier, but it did not and there was no

adequate explanation offered by the plaintiff for the lateness of its request.

- [62] The text messages show that Mr. Wawryk contacted Ms. Park to arrange to have a document signed within a matter of days. This was done without even sending her the document first. At this point Ms. Park had no idea that a subdivision was necessary and that sales of the subdivided lots were pending. Ms. Park's advice to Mr. Wawryk that the defendants would prefer to end their involvement with the further subdivision and sales of the Property was not an unreasonable position to take. The defendants sold the Property and agreed to finance part of the purchase price. They entered into the Letter Agreement, but they did not enter into a joint venture or partnership with the plaintiff to develop the Property.
- [63] The defendants also submit that the plaintiff breached clause 7(1)(f) of the Prescribed Standard Mortgage Terms applicable to the mortgage. The defendants submit that clause 7(1)(f) required the plaintiff to seek and obtain the prior written consent of the defendants to the sale of the subdivided lots prior to the plaintiff entering into contracts of purchase of sale. Mr. Wawryk stated that he was unaware of this requirement.
- [64] I find that the plaintiff's alleged breach of clause 7(1)(f) is not particularly relevant to determining this application except to the extent that I have mentioned it above. That breach entitled the defendants to certain remedies but in any event, the VTB Loan was paid out in full as agreed.
- [65] However, I accept Ms. Park's evidence that prior to receiving Mr. Wawryk's text messages starting on November 16, 2016, she was unaware of both the proposed subdivisions and the sales. It was perfectly reasonable, especially in light of the clause 7(1)(f) of the mortgage, for the defendants to have asked the plaintiff for more information regarding the proposed sales. In sum, the defendants' actions were not arbitrary or capricious, and did not result in a breach of the implied duty of good faith.

CONCLUSION

[66] For the reasons explained above, I have concluded that:

- a) the defendants complied with the express terms of the Letter Agreement;
- b) there was no implied contractual term as alleged by the plaintiff; and
- c) the defendants did not breach the duty of good faith in contractual performance.

The application for an order dismissing the plaintiff's claim is granted. The defendants shall have their costs.

"E. McDonald J."

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