Date: 20201223
Docket: CI 19-01-24070
(Winnipeg Centre)
Indexed as: 6486976 Manitoba Ltd. v. 7344989 Manitoba Ltd.
Cited as: 2020 MBQB 192

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	**APPEARANCES:**
	)	
6486976 MANITOBA LTD.,	)	Stephan Thliveris
plaintiff,	)	for the plaintiff
- and -	)	
	)	Connor Williamson
7344989 MANITOBA LTD.,	)	for the defendant
defendant.	)	
	)	
	)	Judgment delivered:
	)	December 23, 2020

EDMOND J.

Introduction

[1] The defendant, 7344989 Manitoba Ltd. ("734"), seeks summary judgment dismissing the claim of 6486976 Manitoba Ltd. ("648") with costs. In October 2016, 6318984 Manitoba Ltd. ("631") as vendor and 648 as purchaser entered into an agreement for the purchase and sale real estate (the "Agreement"). The Agreement contemplated the construction and sale of 10 commercial units on the main floor of a

development project which is a 4-storey mixed use complex (the "Project") and includes 53 residential units located at 1730 Leila Avenue in Winnipeg, Manitoba.

[2] By assignment executed by 631 on December 31, 2016, 631 assigned all rights, interests and obligations in the Agreement to the defendant, 734.

[3] 734 submits the transaction contemplated by the Agreement was extended in accordance with the terms and conditions of the Agreement to close on September 30, 2019. The purchaser, 648 failed to tender the balance due on closing in accordance with the Agreement and that is fatal to the plaintiff's claim. Accordingly, 734 submits that there is no genuine issue requiring a trial and the court must dismiss 648's claim.

[4] The plaintiff submits that the "Closing Date" as defined in the Agreement was extended unilaterally by 734 during the course of construction of the units and there is no evidence that 648 agreed to the new possession date or closing date in writing as required pursuant to paragraph 35 of the Agreement. Further, the plaintiff submits that there are numerous deficiencies in the construction of the units such that the construction was completed in a manner that is contrary to the agreed specifications forming part of the Agreement. The plaintiff submits the deficiencies amount to a fundamental breach of the Agreement.

[5] 648 submits that the alleged breaches or defaults by 734 require the deposits made pursuant to the Agreement to be returned to 648 and the remaining claim for damages requires a trial.

[6] For the reasons that follow, I am satisfied that there is no genuine issue requiring a trial and a fair and just determination of this action can be made on the

basis of the evidence that has been filed. 648's failure to tender the balance due on closing, on or about September 30, 2019, or within a reasonable period of time thereafter, as contemplated pursuant to the Agreement is fatal to 648's claim. In accordance with the terms and conditions of the Agreement and in particular, paragraphs 1(a) and 26 of the Agreement, the deposit, as defined in the Agreement, is forfeited to 734.

Statement of Facts

[7] 734 is the owner of property commonly known as 1730 Leila Avenue, Winnipeg, Manitoba (the "Property"). On December 31, 2016, 631 assigned the Agreement to 734. The Project included construction of 10 commercial condominium units and 53 residential units within a 4-storey multi-use building.

[8] The purchase price set forth in the Agreement for the 10 commercial units is $2,845,500.00 plus GST if applicable, payable as follows:

A.	An initial deposit within 24 hours of acceptance of the Offer to Purchase	$50,000.00
B.	A second deposit at the commencement of construction on or before July 1st, 2017 said funds to be held in trust by the solicitors for the vendor	$376,825.00
C.	A further deposit by way of credit on closing to the Purchaser by the Vendor in exchange for the Discharge of Mortgage No. 4510297/1 currently registered against the property	$300,000.00
D.	The balance of the purchase price plus or minus adjustment to be paid to the Vendor's solicitor on or before Closing Date	$2,118,675.00
	TOTAL PURCHASE PRICE	**$2,845,500.00**

[9] The relevant terms and conditions of the Agreement include the following:

1. a) The deposit shall be paid to Re/Max Performance Realty pending completion or other termination of the agreement arising from the acceptance of this Offer. In the event the purchase is not completed by the Purchaser by reason of the nonfulfillment of the conditions as herein contained or by reason of the default of the Vendor, the deposit shall be returned to the Purchaser without deduction interest thereon (if any) [sic]. In the event that the purchase is not completed by reason of the default of the Purchaser, the deposit and interest (if any) shall be forfeited immediately to the Vendor and the Vendor may exercise whatever other remedies are available to the Vendor at law.

   b) The purchaser agrees to provide a postponement of Mortgage Number 4510297/1 in favor of the Vendor's new construction financing, to be arranged.

   In addition, the Purchaser will provide a discharge of the said mortgage to be held in Trust by the Vendor's solicitor to be registered in the Winnipeg Land Titles Office upon the Vendor's solicitor providing the Purchaser's solicitor with the latter of the following dates, a copy of an unconditional letter of commitment concerning the construction financing upon commencement of construction. Provided however, that should be the Vendor's construction financing require that the discharge to be registered before advancing funds then the Vendor shall be at liberty to so register the discharge of Mortgage.
2. a) The transactions contemplated by this Offer shall be completed no later than 5:00 p.m. on the 30th day of June, 2018 or earlier by mutual written consent (the "Closing Date");

   b) Construction shall commence on or before July 1, 2017 and be completed on or before June 30, 2018;

   c) It is understood and agreed that the Vendor does not guarantee completion of the units or possession being available to the Purchaser on the date of possession. Such date may be extended by reasons of delay beyond the control of the Vendor and without limiting the generality of the foregoing by labour disputes, strikes, lockouts, fire, unusual delay by common carriers, unavoidable casualties, acts of God, weather conditions, inability of obtaining materials or tradespersons, usual construction delays and any act or omission of the Purchaser.

. . . .

4. (a) The said 10 commercial condominium units shall be constructed in more or less the configuration as shown on a schedule attached hereto and marked as Schedule "A". Attached hereto and marked as Schedule "B" are specifications with respect to the construction of the said 10 commercial condominium units.

   (b) Schedule "A" is a preliminary drawing and contemplates 10 condominium units totaling a square footage of 13,550 square feet. The Purchase Price shall be based upon the actual square footage constructed at a rate of $210.00 per square foot and the Purchase Price set forth on page 1 hereof shall be adjusted according to final measurements made upon construction of the main floor of the project. The area shall be certified

by a Manitoba Land surveyor as selected by the vendor and based upon the following criteria:

(a) Exterior face of finish for all exterior walls;
(b) Exterior face of glass for all full height glazing;
(c) Centre line of all shared walls (such as stair wells, utility rooms not included in the sale and other spaces dedicated to the building at large);

. . . . .

7. On the date of possession or the provision of the Transfer of Land to convey Title to the units purchased to the Purchaser, whatever is the later (the "Closing Date") all amounts shall be payable to the Vendor. Any amount due and owing to the Vendor that is not paid on the Closing Date shall bear interest payable to the Vendor at the rate equal to the greater of (i) 5% per annum or (ii) the same rate as the new Mortgage from the Date of Possession until paid in full. It is understood that the Possession Date may be delayed for reasons beyond the control of the Vendor for a period of up to a maximum of three months.

8. On or before the possession date, the Vendor or its representative and the Purchaser shall inspect the said units and complete and sign a written list of all unfinished items with respect to each of the units. The parties shall be bound thereby as to the completion of such unfinished work, notwithstanding such deficiency list. The Purchaser shall pay all amounts hereunder as and when due without deduction to the Vendor's solicitor and the Vendor's solicitor shall hold back an amount of stipulated in the said list of unfinished items, pending a completion of those items. As each item is completed, the corresponding amount shall be released to the Vendor. The Vendor's solicitor will accept a trust condition with respect to statutory holdback pursuant to *The Builder's Lien Act* for a period of 40 days from the earlier of each advance or substantial completion of the unit but the Vendor's solicitor must receive all of the advance. Interest shall accrue to the Vendor on all amounts held in trust.

9. All adjustments of taxes, proportional allotment of local improvement or growth levies, reserve funds amount as set forth herein, interest assessments prepaid or owing for common expenses and other matters requiring adjustments shall be made as of the Date of Possession.

. . . . .

13. It is understood and agreed that if amendments to the Declaration, and Plan sufficient to create an individual title to the Unit has not been registered prior to the Date of Possession, then, in that event, the Purchaser shall take occupancy [o]f the Unit on the Date of Possession and shall pay to the Vendor the cash balance of the Purchase Price payable on the Date of Possession and the Purchaser's contribution to the reserve fund in accordance with paragraph 1 [sic] hereof. The occupation of the Units by the Purchaser shall not in any way be construed as creating the relationship

of landlord and tenant between the Purchaser and the Vendor. The Purchaser shall pay a monthly common expense, and in the event that the Purchaser has paid cash to mortgage, further agrees to pay the Mortgage Proceeds with interest at 5% per annum, in a lump sum upon registration of the Condominium Plan. For purposes of clarity, if any amount remains outstanding after the Closing Date it shall accrue interest and be payable to the Vendor in accordance with paragraph 1 [sic].

. . . . .

19. The Vendor shall provide the Purchaser with a Transfer of Land which, when registered by the Purchaser, at the Purchaser's own expense shall cause title to the Units to issue in the name of the Purchaser, free and clear of registered encumbrances, except for:

(a) any Caveat protecting a right-of-way for services to which the Project is connected, including, without limiting the generality of the foregoing, hydro, telephone, water, gas and cablevision;
(b) any restrictions, conditions or covenants that run with the land;
(c) any easement or notice created by or pursuant to *The Condominium Act* of Manitoba;
(d) the terms of the registered Declaration, Plan and By-Law of the Project and any amendments thereto;
(e) a party wall declaration filed or to be filed by the Vendor with respect to the common wall(s) to be constructed on the Units;
(f) any Caveats filed by the City of Winnipeg, including those with respect to any Development Agreement;
(g) such other encumbrances as are placed by or on behalf of the Purchaser;
(h) any encumbrance which the Vendor agrees to discharge when title issues in the name of the Purchaser.

The Purchaser acknowledges that the Closing Date shall be the later to occur of:

(a) the Date of Possession; or,
(b) on or before Thirty (30) days after the completion of the registration of the amendments of the Declaration and Plan creating the individual title to the Units.

. . . . .

26. Should the Purchase fail to comply with the terms and conditions of this Offer to Purchase, the Vendor may, at its option, cancel this Offer to Purchase and take or retain the Deposits paid to that time (including any portion of the Deposits bonded by the Purchase under the terms of this Agreement) and/or take whatever remedies it, the Vendor, may have at law.

. . . . .

> 35. Time shall in all respects be of the essence provided that the time for doing or completing any matter provided for herein may be extended or abridged by an agreement in writing signed by the Vendor and Purchaser or by their respective lawyers who may be specifically authorized in that behalf.

[10] Schedule "B" attached to the Agreement are the specifications respecting the construction of the 10 commercial condominium units. Schedule "B" includes the following relevant specifications:

> - Ceiling unfinished at 10 feet clear in height, constructed with a 1.5 hour fire resistance rate
> - Individual furnace and air conditioning unit in each of the 10 units, supplied and installed without any distribution systems
> - A 60 gallon hot water tank in each of the 10 units supplied and installed
>
> . . . . .
>
> Current OTP terms include the provision of 10 feet clear from top of slab to underside of structure. Dropped ceilings and ductwork installed by the Purchaser or future tenants would, as a result, be below this height. If the Purchaser wishes to have higher ceilings constructed, they can be provided at a cost of $5/sq.ft. of floor area for each additional 1 foot of clear height, must be requested in increments of 1 foot (to a maximum of 13 feet of overall height), must be requested for the entire main floor, and must be requested in writing no later than 30 days from the signing of the OTP.

[11] On or about February 14, 2017, an amendment to the Agreement was entered into by the parties changing the ceiling height in the commercial units from 10 feet to 11 feet. 648 agreed to pay additional consideration for this change.

[12] The cash deposits referred to in the Agreement were tendered by 648 and held in trust at 734's lawyer's office. McRoberts Law Office LLP, the lawyers for 734, continue to hold the sum of $426,825.00 plus accrued interest in a trust account. The

third deposit was a credit of $300,000 provided by way of a discharge of mortgage in the sum of $300,000 which was held by another corporation controlled by 648.

[13] The construction was not completed by the defined Closing Date of June 30, 2018 and occupancy could not be provided to 648 as per paragraph 2(a) of the Agreement on that date. In accordance with paragraph 2(c) of the Agreement, 734 submits that it extended the possession date in order to complete construction and to provide 648 with occupancy to the units. There were a number of reasons for the delay in completion of the construction which are detailed in the affidavits filed in these proceedings. The parties dispute whether some of the delays were caused as a result of changes to the construction requested by the plaintiff.

[14] 648 requested changes to the specifications for the construction of the commercial units which changes were accepted by 734 including:

a) the height of the ceilings were increased to 11 feet;

b) the location of doors were changed; and

c) the number of commercial units were reduced from 10 to 9, although the building comprised the same number of square feet.

[15] The lead architect on the construction project was Mr. Daniel Serhal, a registered architect in the province of Manitoba and principal of Affinity Architecture Inc. On September 30, 2019, Mr. Serhal certified completion of the construction in accordance with the specifications and certified the units for occupancy in an application to the City of Winnipeg. The architect executed and delivered a Certificate of Construction dated September 30, 2019, providing his opinion that the construction was carried out in

substantial compliance with the applicable provisions of the Manitoba Building Code, the Manitoba Energy Code for buildings, the Manitoba Plumbing Code, the Manitoba Fire Code and the plan submitted in support of the application for the building permit. The architect also stated that he was not aware of any substandard workmanship, materials or assemblies that would compromise code compliance. Certifications were also provided by the other sub-consultant engineers on the Project certifying completion on or before September 30, 2019.

[16] An e-mail dated June 24, 2019 from the lawyer for 734, Mr. Garry Sinnock ("Mr. Sinnock") to the lawyer for 648, Mr. Richard Stefanyshyn ("Mr. Stefanyshyn"), advised that it was anticipated that on September 30, 2019 "… all should be complete so I need to know from you whether your client wishes to wait for titles or close earlier with Interim Occupancy Agreements."

[17] On July 3, 2019, Ms. Wendy Neufeld (assistant to Mr. Stefanyshyn) responded on behalf of Mr. Stefanyshyn to Mr. Sinnock by e-mail as follows:

> With respect to the above noted matter, our client cannot pay for the condos as they have been sold to customers who are placing mortgages against the property and our client is awaiting receipt of those funds, which would be registered in series with transfers from the developer. Our client does need access to commence their leasehold improvements immediately, if possession is to occur later this summer or early fall. Our client will comply with all safety requirements, building codes, but will need access evenings and weekends for construction purposes.
>
> There is a further problem in that our client paid a premium for 11 foot ceilings. Currently, they are not 11 foot ceilings; sprinkler pipes have been hung below the ceiling level, as well as additional duct work. It is the developer's intention to comply with the agreement for 11 foot ceilings by moving the offending material in the near future or if not, there would have to be compensation for the inability to deliver, as was set forth in the Offer to Purchase, including a return to the additional monies paid for the high ceilings and compensation for the aesthetics of "other" matter below 10 feet.

[18] Mr. Sinnock advised that he would look into the matter regarding ceiling heights and have the architect verify the actual height.

[19] A further exchange of e-mails between the lawyers occurred on August 2, 2019 as follows:

a) E-mail from Mr. Stefanyshyn to Mr. Sinnock on August 2, 2019 at 9:23 a.m.

> … Possession remains problematic. There was a clear breach of the agreement in not providing 11 foot "clear ceilings" As per offer for which purchaser paid $5 extra per square foot. Now they have unhappy commercial clients …

b) E-mail from Mr. Sinnock to Mr. Stefanyshyn on August 2, 2019 at 10:09 a.m.

> The decision to resell these units was your client's alone. It is not part of the contract between our clients. Your client can rant all he wants about 11-foot ceilings but the Architect has inspected and certified compliance with the agreed upon specs.
>
> What evidence do you have to contradict the Architect?
>
> As to possession all you need to tell me is what option your client prefers.
> Possession now based on an Occupancy Agreement or wait until Condo titles issue.
>
> Par. 2b of the offer states "the Vendor does not guarantee completion…".
> Par 8 contemplates a pre-occupancy inspection and listing of any deficiencies.
> Par 13 requires payment of the full cash balance (plus adjustments) on the date of possession where the Date of Closing is delayed pending receipt of condo titles.
>
> We are trying to accommodate your client by asking for his preference but in fact once the architect determines the units ready for occupancy we will set a date for the inspection and date of possession.
> Your client is obliged to pay the balance of $2,118,675.00 plus adjustments on that date.
>
> If in fact he has made deals to resell units where financing is required he has done so at his own peril.
> Until condo titles issue your client will have 9 Occupancy Agreements which he may have to assign to his individual buyers.

[20] By letter dated September 9, 2019, Mr. Sinnock advised Mr. Stefanyshyn that they would be tendering the closing documents on September 30, 2019. The affidavits filed on behalf of 648, including the affidavits affirmed by Pardeep Bhullar on October 22, 2019 and August 14, 2020, confirm that the plaintiff was concerned about the possession date being continuously delayed and made repeated requests for updates as to the possession date.

[21] Mr. Bhullar identified certain deficiencies in the commercial units (see para. 18 of Mr. Bhullar's affidavit of October 22, 2019) as follows:

> …
>
> a. The Commercial Unit ceiling height was not 11 feet but closer to 9 feet;
> b. The layout of the piping along the ceiling prevented the installation any heating ducts, or in the alternative, installation of said heating ducts would result in the further one-foot reduction in ceiling height;
> c. The plumbing and sewer hook-ups contained underneath the Commercial Units were fixed in an orientation and placement that presented minimal access and severe issues with installation of plumbing utilities in the Commercial Units; and
> d. Only 9 air-conditioning units, or which there were supposed to be 10, one for each Commercial Unit;
>
> (… the "Deficiencies")

[22] At paragraph 21 of Mr. Bhullar's affidavit affirmed October 22, 2019, he states that 648 approached 734 in September 2019 with proposed amendments to the Agreement, which included a number of terms including the fact that possession of the commercial units be finalized as of September 30, 2019.

[23] Although the proposed amendments requested by 648 were not accepted by 734, the parties agreed on the possession date of September 30, 2019.

[24] On September 26, 2019, Mr. Sinnock delivered to Mr. Stefanyshyn, a trust letter dealing with the closing of the transaction pursuant to the terms of the Agreement.

[25] On September 27, 2019, Mr. Sinnock forwarded a statement of adjustments and closing letter to Mr. Stefanyshyn.

[26] 648 did not tender the balance due and owing on September 30, 2019.

[27] Two extensions were granted to tender the balance due on closing. The first extension was to October 1, 2019 at 4:00 p.m. and the second extension was to October 3, 2019 at 4:00 p.m. 648 did not tender by either deadline or confirm financing to pay the balance due on closing.

[28] On October 1, 2019, Mr. Sinnock, e-mailed Mr. Chris Lange, a lawyer filing in for Mr. Stefanyshyn, granting the first extension of the closing date to October 3, 2019 at 4:00 p.m. In the e-mail, Mr. Sinnock, stated:

> … This is strictly on the understanding that my client is not waiving its claim that this transaction was to close September 30, 2019 and your client has failed to tender the full amount due.
>
> If an acceptable solution is not reached by this deadline my client considers the transaction breached and the deposits are forfeited.

[29] Mr. Lange, on behalf of Mr. Stefanyshyn e-mailed Mr. Sinnock on October 3, 2019, requesting certain amendments to the Agreement. Mr. Sinnock responded advising that the amendments were not acceptable.

[30] By e-mail dated October 4, 2019 from Mr. Sinnock to Mr. Lange and Mr. Stefanyshyn, Mr. Sinnock advised "… The reality is that my instructions are to advise you that this deal is dead based upon your client's failure to tender payment on September 30." In a further e-mail on the same day, Mr. Sinnock advised "At this moment the deal is dead and deposits forfeited. Monday my client will list the commercial units for sale."

[31] On October 7, 2019, Mr. Sinnock wrote Mr. Stefanyshyn and Mr. Lange making a proposal "… in hopes of resurrecting this transaction."

[32] On the same day, October 7, 2019, Mr. Lange wrote Mr. Sinnock enclosing nine signed Occupancy Agreements and an Addendum Agreement based on new terms which were not consistent with the Agreement. 734 did not agree to the terms of the Addendum Agreement. The parties did not dispute the occupancy date.

[33] On October 9, 2019, Mr. Sinnock e-mailed Mr. Stefanyshyn requesting a response to his inquiries of October 7, 2019 and advised that if they were not acceptable, the transaction would remain terminated.

[34] The deal was not resurrected and on October 18, 2019 and October 21, 2019, correspondence was sent by Mr. Sinnock to Mr. Stefanyshyn and Mr. Lange advising that third party prospective purchasers were willing to purchase some of the commercial units from 734. In the e-mail sent on October 18, 2019, Mr. Sinnock stated "If I don't hear from you by 4 pm, Monday October 21 my client will accept offers from these interested parties." No response was received from 648.

[35] When the transaction contemplated in the Agreement did not close, 734 proceeded to sell the nine commercial units. According to 734, none of the unit holders complained about the alleged deficiencies with the commercial units.

[36] The project architect responded to the deficiencies alleged by 648 and filed an affidavit in these proceedings dealing with the ceiling heights in the commercial units and the other alleged deficiencies.

[37] 648 relies upon a report prepared by Arthur Consulting dealing with the alleged deficiencies. There is a dispute between 648 and 734 regarding the alleged deficiencies.

[38] On October 24, 2019, 648 issued a statement of claim seeking damages against 734. The statement of claim was amended and then re-amended to include a claim for specific performance and a pending litigation order. 648 sought an injunction and a pending litigation order respecting the property and that motion was dismissed by this court by interim order made January 6, 2020.

[39] 734 seeks summary judgment dismissing the plaintiff's claim and forfeiture of the deposits held pursuant to the Agreement and the interim order.

Issues

[40] Two issues must be determined:

i) Is this an appropriate case for summary judgment to be granted dismissing the plaintiff's claim?

ii) Whether 648's failure to tender the balance due on closing, is a full answer to 648's claim?

Analysis and Decision

i) Is this an appropriate case for summary judgment to be granted dismissing the plaintiff's claim?

[41] The principles governing summary judgment are set out in the Supreme Court of Canada's decision in ***Hryniak v. Mauldin***, 2014 SCC 7, [2014] 1 S.C.R. 87 (QL) and have been adopted in the Court of Queen's Bench Rules. Pursuant to Queen's Bench

Rule 20.03(1), "The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." In ***Hryniak***, the court stated at paras. 49 and 50:

> **49** There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> **50** These principles are interconnected and all speak to whether summary judgment will provide [page 107] a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[42] On a summary judgment motion, the moving party bears the onus, on a balance of probabilities, of establishing that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial (see ***Dakota Ojibway Child and Family Services et al. v. MBH***, 2019 MBCA 91, 438 D.L.R. (4th) 693, at paras. 108-109 and 111).

[43] 648 submits that this is not a case that is appropriate for summary judgment. 648 submits that there are numerous factual issues in dispute which require the court to assess the credibility of witnesses and adjudicate on the evidence and therefore a trial is required.

[44] 648 submits that the factual issues requiring a trial include: (see motion brief of plaintiff, page 5, at para. 3)

a. Whether 11-foot ceilings free and clear was the intention of the parties hereto;
b. Conflicting expert reports regarding the actual height of the Property ceilings and whether further construction deficiencies exist;
c. whether the Plaintiff's failure to tender the balance due and owing on closing, is not a full answer to the Plaintiff's claim;
d. That the three deposits/payments on account totaling $726,825.00 paid by the Plaintiff are refundable to the Plaintiff despite the defendant's failure to tender the balance due and owing on closing due to the absence of an agreement as between the parties to a new Closing Date.

[45] 734 submits that applying the principles in ***Hryniak*** to the facts in evidence set out in the various affidavits allows the court to make the necessary findings of fact, apply the law to the facts and determine that 734 is entitled to summary judgment.

[46] I agree with the submission of 734 that the evidence presented in the affidavits permit the court to make a fair and just adjudication of the matters at issue without requiring a trial. The primary issue that must be decided requires an interpretation of the Agreement which is a question of mixed fact and law. The affidavits filed allow the court to make the necessary findings of fact, interpret the Agreement and apply the law to the facts. I agree that there may be factual disputes on some of the deficiencies. However, in my view, the alleged deficiencies, if proven, do not amount to a fundamental breach of the Agreement which would have justified 648 failing to tender the balance due on closing.

[47] The Agreement contains a mechanism for dealing with deficiencies or unfinished work on the date of possession and in my view, the parties contemplated tendering the balance owing on closing and holding funds in trust pending a resolution of those deficiencies. (see para. 8 of the Agreement)

[48] The legal argument advanced by 648 based on its interpretation of paragraph 35 of the Agreement is addressed by making the necessary findings of fact, applying the law to the facts and assessing the submissions advanced by the parties.

[49] In my view, this is an appropriate case for summary judgment in accordance with the principles established in ***Dakota Ojibway*** and ***Hryniak*** and adopted in the Queen's Bench Rules. Proceeding to trial in this case would not be proportionate, timely or cost effective. This case can be determined in a fair and just manner on the basis of the evidence that has been filed and does not require a trial.

ii) Whether 648's failure to tender the balance due on closing, is a full answer to 648's claim?

[50] The starting point for analysis of this issue is a review and interpretation of the Agreement. The principles of contract interpretation are not in dispute. The primary principle of contract interpretation is to determine the parties' intention from the plain, primary and natural meaning of the words that are used set out in the entire context of the whole contract. (see Thomas G. Heintzman, Bryan G. West & Immanuel Goldsmith, *Heintzman and Goldsmith on Canadian Building Contracts*, 5th ed (Toronto: Thomson Reuters, 2019); ***Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)***, 2010 SCC 4, [2010] 1 S.C.R. 69; ***Eli Lilly & Co. v. Novopharm Ltd.***, [1998] 2 S.C.R. 129 (S.C.C.) (QL); ***Geoffrey L. Moore Realty Inc. v. Manitoba Motor League (c.o.b. CAA Manitoba)***, 2003 MBCA 71, 173 Man.R. (2d) 300 (QL); ***Dunn v. Chubb Insurance Co. of Canada***, 2009 ONCA 538, 97 O.R. (3d) 701; ***Syncrude Canada Ltd. v. Hunter Engineering Co.***, [1989] 1 S.C.R. 426

(S.C.C.); and ***Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53, [2014] 2 S.C.R. 633 (QL))

[51] In ***Geoffrey L. Moore Realty Inc.***, the Court of Appeal summarized the principles at para. 26 as follows:

> **26** In brief summary then, to determine the intentions of the parties expressed in a written contract, one looks to the text of the contract as a whole. In doing so, meaning is given to all of the words in the text, if possible, and the absence of words may also be considered. If necessary, the text is considered in light of the surrounding circumstances as at the time of execution of the contract. The goal is to determine the objective intentions of the parties in the sense of a reasonable person in the context of those surrounding circumstances and not the subjective intentions of the parties. If, after that analysis, the text in question is ambiguous, extrinsic evidence may be considered.

[52] The Supreme Court of Canada in the decisions of ***Eli Lilly & Co.*** and ***Sattva Capital Corp.*** make it clear that it is unnecessary to consider any extrinsic evidence at all when the written contract being interpreted is clear and unambiguous on its face. (see ***Eli Lilly & Co.*** at para. 55)

[53] In ***Sattva Capital Corp.***, the Supreme Court of Canada dealt with interpretation of a written contractual provision and the factual matrix at para. 57 as follows:

> **57** While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[54] In ***Fontaine v. Canada (Attorney General)***, 2014 MBCA 93, 310 Man.R. (2d) 162 (QL), the Manitoba Court of Appeal followed the approach in the ***Geoffrey L. Moore Realty Inc.*** case and stated at para. 71:

> In addition to evidence of the objective intention of the parties, the factual matrix can also include evidence of the commercial purpose of the contract, its aims and objectives and evidence of the nature or custom of the market or industry in which the contract was executed. See *King* at para. 72.

[55] The goal of the court, as pointed out in the ***Geoffrey L. Moore Realty Inc.*** case, is to determine the objective intentions of the parties in the sense of a reasonable person in the context of the surrounding circumstances.

[56] Paragraph 1(a) of the Agreement makes it clear that in the event that the purchase is not completed by reason of the default of the vendor, the deposit and interest is returned to the purchaser. In the event the purchase is not completed by reason of the default by the purchaser, the deposit and interest shall be forfeited immediately to the vendor. Paragraph 26 contains similar language. Although it contains a typographical error as it refers to the purchaser as "purchase" it provides the vendor an option to cancel the offer to purchase and retain the deposits and/or take whatever remedies it may have at law.

[57] In my view, the terms and provisions of the Agreement are clear and unambiguous regarding how the deposit would be handled in the event of a default by one of the parties. The objective intentions of the parties was that the failure to tender the balance due on closing is a fundamental requirement of the purchaser.

[58] The authorities support the general rule that a default by one party entitles the other, in the absence of an estoppel, or a waiver of the default or an acquiescence in

such default, to cancel or determine the contract and to resist a claim for specific performance. The onus is on the purchaser to tender the funds required to close in order to establish that the purchaser is ready, willing and able to complete the transaction. If the purchaser fails to do so, then, in the absence of an estoppel, or a waiver of the default, the purchaser loses its right under the agreement and the ability to seek specific performance and other remedies that may be available at law. (see ***William Anthony Holdings Ltd. v. Belevetz***, [1977] 4 W.W.R. 135, [1977] M.J. No. 154 (Man. Q.B.); ***Centurian Ridge Farms Ltd. v. Boyle***, 1978 CarswellAlta 139 (Alta. Q.B.); ***Minshull v. Hudniuk et al.*** (1970), 11 D.L.R. (3d) 713, [1970] S.J. No. 315 (Sask. C.A.), ***Peg-Man Ltd. v. Pallen***, 2009 MBQB 120, 239 Man.R. (2d) 189 (QL) at para. 33; Victor Di Castri, Q.C., *The Law of Vendor and Purchaser*, 3rd ed. (Carswell, 1988) vol. 2 (loose-leaf updated March 2011, release 2 and updated August 2013, release 8) at 12-81 to 12-85.

[59] Applying these principles to the facts of this case, there is no dispute that 648 did not tender the balance to close on September 30, 2019, or arrange financing to close with funds being tendered as soon as a mortgage was registered against the Property in series with the transfer of land.

[60] Instead, well after the fact, 648 submits, relying upon paragraph 35 of the Agreement, that the possession date was unilaterally extended by 734 from June 30, 2018, approximately seven times without notice or explanation to 648. 648 submits that in accordance with paragraph 35, a written agreement to extend the time for the

closing date was required. Since there was no written agreement, 648 submits that is fatal to 734's claim and the deposit must be refunded to 648.

[61] The facts set forth in the various affidavits and a review of the Agreement establish that the transactions were originally contemplated to close on June 30, 2018 or earlier by mutual written consent (see paragraph 2(a) of Agreement). 648 ought to have been ready, willing and able to close the transaction as at that date. In accordance with paragraph 2(c), the vendor was entitled to extend the possession date by reason of delay beyond the control of the vendor, including for "usual construction delays". The affidavit evidence establishes that there were delays in completing the construction beyond the control of 734 and that information was provided to 648. Although that fact is disputed by 648's representative, Mr. Bhullar, I accept the evidence of the representative of 734, Mr. Fridson and Mr. Serhal that the delays were reported to the parties and that information was provided to 648's lawyer regarding the construction delays.

[62] Submissions were made about whether some of the delay was caused by changes requested to the specifications by 648. However, it is unnecessary to decide that issue to rule on the summary judgment motion. The parties knew and the Agreement contemplated that the possession date could be extended as a result of usual delays in construction and the objective intentions of the parties based on the context of the Agreement as a whole was that the purchaser would take possession when construction was substantially complete, the units were certified for occupancy and 734 provided the transfer of land to convey title to the units to 648.

[63] The Agreement contains a number of references to "Closing Date" and possession date or "Date of Possession". Paragraph 7 of the Agreement defines the "Closing Date" as the later of the date of possession or the provision of the Transfer of Land to convey Title to the units to 648. Paragraph 13 states:

> 13. It is understood and agreed that if amendments to the Declaration, and Plan sufficient to create an individual title to the Unit has not been registered prior to the Date of Possession, then, in that event, the Purchaser shall take occupancy if the Unit on the Date of Possession and shall pay to the Vendor the cash balance of the Purchase Price payable on the Date of Possession and the Purchaser's contribution to the reserve fund in accordance with paragraph 1 hereof. …
>
> Upon title being created to each of the Units, the Vendor shall provide written notice to the Purchaser as to the Closing Date. On the Closing Date the Vendor shall provide a Transfer of Land, in registerable form for the Units and the Purchaser shall make payment in accordance with paragraph 1.

[64] Paragraph 19 of the Agreement states:

. . . . .

> The Purchaser acknowledges that the Closing Date shall be the later to occur of:
> (a) the Date of Possesion; or,
> (b) on or before Thirty (30) days after the completion of the registration of the amendments of the Declaration and Plan creating the individual title to the Units.

[65] The plain, primary and natural meaning of the words contained in the Agreement regarding the closing date are ambiguous as they reference different times and dates for closing. However, in my view, the objective intentions of the parties in the sense of a reasonable person in the context of the whole of the Agreement and the surrounding circumstances was that the date of possession could be prior to closing, but no later than the date 734 could convey title to the units to 648. The possession date was agreed to be the date the construction work was substantially completed and the units

were ready for occupancy and, in any event, no later than when 734 could convey title to the units. If the registration of the Declaration and Plan were delayed, and they were, 648 was still required to tender the balance due pursuant to the terms of the Agreement.

[66] Paragraph 13 of the Agreement states that the vendor shall provide a transfer of land in registrable form for the units and the purchaser "shall make payment in accordance with paragraph 1". Paragraph 1 is not the correct reference as that paragraph deals with payment of the deposit. However, in my view, the objective intentions of the parties in the context of the whole of the Agreement is that 648 was required to tender the balance due on the date of possession or pay interest on the cash to mortgage at a rate, the greater of, the rate specified in its mortgage or 5% per annum. 648 failed to tender and did not confirm that it had arranged financing to pay the cash by way of mortgage financing.

[67] Further, when Mr. Sinnock advised Mr. Stefanyshyn that the possession date and closing date would be September 30, 2019, the expected date of completion and the units being ready for occupancy (see e-mail dated June 24, 2019), 648 did not dispute the date. 648, through its lawyer's e-mails, confirmed the possession date. 648 did not seek to rescind or repudiate the Agreement by reason of the vendor's default or delays in completion of the units. 648 raised two issues. The first issue was that 648 could not raise the cash required because the clients 648 had sold the units to were expected to register mortgages against the condominium titles and the funds would not be available on closing.

[68] The failure to raise the funds to close is usually met with the purchaser arranging financing pending receipt of funds from the purchasers of the individual units. This was an option contemplated in the Agreement and in the trust letter sent by Mr. Sinnock to Mr. Stefanyshyn just prior to closing. Mr. Sinnock also granted short extensions to permit 648 time to tender or arrange financing.

[69] The second issue raised was the height of the ceilings in the commercial units. A plain and ordinary reading of the specifications and the amendment to the Agreement dealing with the ceiling heights satisfies me that the objective intentions of the parties was that the ceiling heights were agreed to be measured as stated, from the top of the floor slab to underside of structure. "Dropped ceilings and ductwork installed by the Purchaser or future tenants would, as a result, be below this height." I accept the evidence of Mr. Serhal regarding the measurement and his opinion that the units comply with the specifications attached to the Agreement. The responding affidavit of Karminder Kaur Boparai, affirmed October 29, 2020, attaches the Arthur Consulting report. Mr. Boparai conducted the site inspection of the Property on August 6, 2019. In my view, Mr. Boparai's affidavit and the report confirms that the ceiling measurements he performed were not in accordance with the agreed upon specifications in the Agreement and this evidence does not prove that 734 breached the ceiling height specification. In my view, this is not a factual issue which requires a trial.

[70] Even if I accept that there were deficiencies, as alleged by 648, in my view, the objective intentions of the parties is clear regarding alleged deficiencies or unfinished work. The parties agreed to a mechanism for dealing with deficiencies or unfinished

work. Paragraph 8 of the Agreement states that the purchaser shall pay all amounts as and when due, without deduction, to the vendor's solicitor and the vendor's solicitor shall hold back an amount stipulated in a list of unfinished items, pending a completion of those items. As agreed by the parties, any deficiencies ought to have been dealt with in accordance with paragraph 8 of the Agreement by tendering the balance due on closing and submitting that a holdback was required to be held by the vendor's lawyer.

[71] Further, the affidavit evidence filed on behalf of 648 establishes that 648 was concerned about the numerous delays in completion of the Project and wanted the transaction to close earlier. 648 did not advance the position that the delays amounted to a default by 734 or a fundamental breach of the transaction and attempt to repudiate the Agreement, requesting a return of its deposit. Instead, the evidence satisfies me that 648 intended to close the transaction and did not object to the possession date and closing on September 30, 2019.

[72] The objective intentions of the parties set out in the Agreement and a review of all of the evidence supports the position that the parties agreed to a closing date of September 30, 2019, which is consistent with the date the Property was certified as substantially complying with the applicable codes, the units were ready for occupancy and 734 provided a transfer of land to convey title to 648. The parties could have agreed to an earlier possession date, but they did not. Mr. Sinnock tendered all documents required to close by trust letter on September 26, 2019. The revised statement of adjustments was sent on September 27, 2019. 648 failed to tender the

balance due on closing on or before September 30, 2019. 648's lawyers did, however, submit nine signed occupancy agreements to Mr. Sinnock on October 7, 2019.

[73] At the time of closing, 648 did not raise a breach of paragraph 35 of the Agreement as a basis for failing to close. The interpretation of paragraph 35 of the Agreement now advanced by 648, is inconsistent with the objective intentions of the parties when one considers the terms and conditions of the Agreement as a whole. 648 submits that because there was no extension agreement in writing signed by 648 and 734, that 734 was in breach of the contractual obligations to the plaintiff and the term dealing with forfeiting the deposit is unenforceable. There is no doubt that paragraph 35 makes it clear the parties agreed time is of the essence.

[74] However, I am not satisfied paragraph 35 was intended by the parties to mean that rights and obligations under the Agreement are unenforceable if the parties fail to sign a written extension agreement. Paragraph 35 specifically contemplates an extension agreement being made by their respective lawyers. E-mails exchanged between the respective lawyers do confirm the possession date of September 30, 2019. Further, paragraph 35 must be interpreted within the text of the Agreement as a whole in the context of the surrounding circumstances at the time of signing the Agreement.

[75] I am satisfied the objective intentions of the parties was to close the transaction as soon as possible once construction was completed and the units were certified as ready for occupancy. The Agreement contemplated the possession and closing being extended to allow the construction to be completed. If the condominium Declaration and Plans were not registered when the Project was ready for occupancy, 648 was to

take possession pursuant to occupancy agreements. The evidence establishes that the parties and their lawyers did not dispute the closing would occur when the construction was certified as complete which was September 30, 2019. The primary disputes were the deficiencies and the fact that 648 advised it would not be able to pay for the balance due because the units had been sold to clients who were placing mortgages against the Property and 648 was waiting for those funds in order to close the transaction with 734.

[76] I agree with the position advanced by 734 that the decision made by 648 to resell the units is not a term of the Agreement contemplated by the parties when the Agreement was signed. That eventuality was not contemplated by the parties as a basis to delay closing the transaction. In my view, 648 was required to tender the balance due on closing either by cash or an agreement to advance funds secured by a mortgage registered against the Property on the possession date of September 30, 2019. 648's failure to tender the balance due or arrange financing at the time of possession was a default by 648 and was contemplated by the parties to result in the deposit being forfeited.

[77] The parties were represented by legal counsel familiar with commercial transactions and while an actual extension agreement was not signed by representatives of 648 and 734, the lawyers acting on behalf of the parties exchanged e-mails which satisfy the requirement of paragraph 35 that the parties agreed the closing date was September 30, 2019. The evidence does not satisfy me that the parties were waiving compliance with the terms of the Agreement including the time is

of the essence provision. This date is also consistent with the objective intentions of the parties in the context of the Agreement as a whole. In accordance with the Agreement, Mr. Sinnock delivered a trust letter on September 26, 2019 tendering the transfer of land to convey title to the units to 648.

[78] Further, the Agreement contemplates the purchaser inspecting the property on or before the possession date and creating a holdback for unfinished work. Nothing in the Agreement contemplates 648 failing to tender the balance due on closing to preserve remedies pursuant to the Agreement. Quite the opposite. 648 was required to tender the balance due on closing, notwithstanding the alleged deficiencies, to enforce remedies at law, including specific performance. (see paragraph 8 of the Agreement)

[79] The plaintiff relies upon two authorities (***Hutts v. Hancock***, [1954] O.R. 105 (Ont. C.A.) and ***Lakeshore Landmark Development Corp. v. TCI Realty Holdings Inc.***, 2016 ONSC 2313, [2016] O.J. No. 1774 (QL)) as support for its submission that the plaintiff's failure to tender the balance due and owing on closing is not a full answer to its claim. In ***Hutts***, the court held that the vendor, by his conduct, had waived or lost the right to say that time was of the essence and was not entitled to treat the contract as at an end. The Ontario Court of Appeal held that the vendor was required to give the purchaser a reasonable time in which to complete the transaction before the vendor could treat the contract as at an end. The vendor's conduct in that case satisfied the court that the vendor had waived compliance with the time is of the essence provision.

[80] In my view, the facts of this case are distinguishable from the facts in ***Hutts***. The parties contemplated that possession and closing would be delayed in order to complete construction. 648 entered into agreements with third parties to sell or lease the units and wished to have the construction completed and take possession as soon as possible. Further, as I have found, the parties agreed to the possession and closing date of September 30, 2019.

[81] As well, I am satisfied that 734 gave reasonable notice to 648 that the possession and closing date would be September 30, 2019. (see e-mail from Mr. Sinnock of June 24, 2019)

[82] The ***Lakeshore Landmark Development Corp.*** case is a decision of the Ontario Superior Court of Justice dealing with a motion to discharge a certificate of pending litigation on the basis that the plaintiff had no interest in the property and that the deposits paid by the plaintiff to the defendants be forfeited. The court considered the ***Hutts*** decision and specifically whether the time of the essence clause in an agreement was waived. The court found that there was no such waiver as the extensions where agreed to by amendments to the original agreement. The court referred to an article written by Paul M. Perell (as he then was) entitled "Putting together the Puzzle of Time of the Essence", The Canadian Bar Review vol. 69 no. 3 September 1990 at pp. 452-454. The court referred to page 453 of Mr. Perell's article in which he describes a waiver of a time of the essence clause as follows: "waiver involves one party leading the other to understand that the strict rights of a contract will not be insisted upon."

[83] While 648 and 734 did not sign written agreements to extend the possession and closing dates, I am satisfied that the parties agreed that the possession date could be extended and did agree on the possession and closing date of September 30, 2019. At no time did 734 lead 648 to understand that the strict rights of the Agreement would not be insisted upon. Quite the contrary, 734, through its lawyers, communicated a consistent position regarding possession and closing and that it expected 648 to tender the balance due on closing in accordance with the Agreement on or before September 30, 2019.

[84] The court in ***Lakeshore Landmark Development Corp.***, went on to consider whether the deposits paid by the purchaser under the two amending agreements should be forfeited to the vendor. In reviewing the terms of the two amending agreements, the court was satisfied that the deposit should be forfeited and granted that relief. In my view, the same rationale applies in this case and the deposit is therefore forfeited to 734 and the plaintiff's claim is dismissed.

Conclusion

[85] The defendant's motion is granted with costs in accordance with the Court of Queen's Bench tariff.

[86] The plaintiff shall pay the costs of the defendant, 734 in this motion and the action generally. If the parties are unable to agree, they may contact the trial coordinator to schedule a one-hour hearing before me.

_____ J.