IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1319397 B.C. Ltd. v. Far East Consultants (BC) Inc.,* 2023 BCSC 255

Date: 20230221
Docket: S241720
Registry: New Westminster

2023 BCSC 255 (CanLII)

Between:

1319397 B.C. Ltd. and Chetanjeet Singh Sahi

Plaintiffs

And

Far East Consultants (BC) Inc.

Defendant

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Plaintiffs:	J. Virk
Counsel for the Defendant:	I.S. Gill
Place and Date of Summary Trial:	Abbotsford, B.C. September 27, 2022
Place and Date of Judgment:	New Westminster, B.C. February 21, 2023

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Introduction

[1] The defendant applies pursuant to Rule 9-7 of the *Supreme Court Civil Rules*, the summary trial rule, for an order dismissing the plaintiffs' claim with costs.

[2] This case reflects an unfortunate recent trend, in which parties seeking to bring a summary trial application of some complexity reserve a long hearing date months in advance, then wait until the very last day on which such application could be delivered before providing their materials to the application respondent. In this case, the defendant/applicant refused to consider an adjournment and insisted on proceeding with the application.

[3] For the reasons set out below, I conclude that a summary trial is not appropriate on the basis of the present factual record, and the application must be dismissed.

Facts

[4] The defendant has, since April 2019, been the registered owner of property located at 12899 80th Avenue in Surrey (the "Property"). The Property is a commercial strata unit located in the Payal Centre. The plaintiffs at all material times wanted to purchase the Property so the plaintiff, Mr. Sahi, can move his immigration consultancy business to it. He says that the size and location of this particular unit is ideal for his business.

The Contract of Purchase and Sale

[5] On August 14, 2021, the plaintiffs as buyers and the defendant as seller entered into an agreement in writing for the purchase and sale of the Property (the "CPS"). Each party was represented by a real estate agent in the transaction. The CPS is on a standard BC Real Estate Association ("BCREA") / Canadian Bar Association BC Branch ("CBABC") form of contract for Commercial Real Estate. The form consists of:

a) Part 1 – Information Summary, consisting of two pages with sections 1 to 12, all of which contained spaces to be filled in setting out details of the

Property and some of the specific terms of the sale, as well as a list of what other schedules are attached to the CPS;

b) Part 2 – Terms, consisting of four pages with sections 13 to 44, the bulk of which are standard in form, and sections 43 and 44 which provide space for signature by both the buyer making the offer and the seller accepting the offer; and

c) Schedules setting out specific additional terms.

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[6] The CPS in this case identified four schedules that were to be attached. These were Schedules 16A (Buyer's Conditions); 20A (Additional Included Items); 23 (Additional Seller's Representations and Warranties); and 24 (Additional Buyer's Representations and Warranties). Unfortunately, only Schedule 16A was attached to the version of the CPS in evidence.

[7] Part 1 of the CPS shows a purchase price of $1,950,000, a deposit of $100,000 to be paid directly to the seller by September 20, 2021, and a completion date of October 29, 2021.

[8] Part 2 of the CPS includes the following terms:

> 17. Completion: The sale will be completed on the date specified in Clause 6.1 (Completion Date) at the appropriate Land Title Office.
>
> …
>
> 26. Tender: Tender or payment of monies by the Buyer to the Seller will be by bank draft, wire transfer, certified cheque, cash or Lawyer's/Notary's or real estate brokerage's trust cheque.
>
> 27. Documents: All documents required to give effect to this Contract will be delivered in registerable form where necessary and will be lodged for registration in the appropriate Land Title Office by 4 pm on the Completion Date.
>
> 28. Time: Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreement to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and, in such event, the amount paid by the Buyer will be non-refundable and absolutely forfeited to the Seller, subject to the provisions of Section 28 of the *Real Estate*

> *Services Act*, on account of damages, without prejudice to the Seller's other remedies.
>
> 29. Buyer Financing: If the Buyer is relying upon a new mortgage to finance the Purchase Price, the Buyer, while still required to pay the Purchase Price on the Completion date, may wait to pay the Purchase Price to the Seller until after the transfer and new mortgage documents have been lodged for registration in the appropriate Land Title office, but only if, before such lodging, the Buyer has: (a) made available for tender to the Seller that portion of the Purchase Price not secured by the new mortgage, and (b) fulfilled all the new mortgagee's conditions for funding except lodging the mortgage for registration, and (c) made available to the Seller, a Lawyer's or Notary's undertaking to pay the Purchase Price upon the lodging of the transfer and new mortgage documents and the advance by the mortgagee of the mortgage proceeds pursuant to the Canadian Bar Association (BC Branch) (Real Property Section) standard undertakings ("CBA Standard Undertakings").

[9] Schedule 16A (Buyer's Conditions) set out several subject conditions, all of which were for the sole benefit of the buyer, and all of which were to be removed on or before September 10, 2021. Conditions included obtaining suitable financing, obtaining approval for fire insurance, searching and approving title and getting a feasibility study done.

[10] All of the subject conditions were removed by way of a subject removal document signed by the plaintiffs on September 9, 2021. On September 10, 2021, the plaintiffs paid the deposit of $100,000 directly to the defendant.

[11] The standard BCREA/CBABC contract comes with an information sheet that is normally attached to the front of the contract form. This document makes clear at the top, in bold face type, that:

> This information is included for the assistance of the parties only. It does not form part of the contract and should not affect the proper interpretation of any of its terms.

[12] While clearly not a term of the contract, the following provision from the information sheet provides useful background information:

> 3. Completion: (Clauses 6.1 and 17) Unless the parties are prepared to actually meet at the Land Title Office and exchange title documents for the Purchase Price, it is, in every case, advisable for the completion of the sale to take place in the following sequence:

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a. The Buyer pays the Purchase Price or down payment in trust to the Buyer's Lawyer or Notary (who should advise the Buyer of the exact amount required) several days before the Completion Date, and the Buyer signs the documents.

b. The Buyer's Lawyer or Notary prepares the documents and forwards them for signature to the Seller's Lawyer or Notary who returns the documents to the Buyer's Lawyer or Notary.

c. The Buyer's Lawyer or Notary then attends to the deposit of the signed title documents (and any mortgages) in the appropriate Land Title office.

d. The Buyer's Lawyer or Notary releases the sale proceeds at the Buyer's Lawyer's or Notary's office.

Since the seller is entitled to the Seller's proceeds on the Completion Date, and since the sequence described above takes a day or more, it is strongly recommended that the Buyer deposits the money and the signed documents AT LEAST TWO DAYS before the Completion Date, or at the request of the Conveyancer, and that the Seller delivers the signed transfer documents no later than the morning of the day before the Completion Date.

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Steps taken toward Completion

[13] The plaintiffs retained Aman Cheema to act as their solicitor for the transaction. The defendant retained two lawyers at RJD Law to act on its behalf: Raymond Barreto and Rupinder Dhillon. It is not clear which of them was dealing with what issue, as most of the emails appear to be sent from Rupinder Dhillon's email address, but have Raymond Barreto's name in a signature block at the end of the email. Given this confusion, I will simply reference RJD Law as the author and recipient of the various emails.

[14] On October 28, 2021, Mr. Cheema sent a package of closing documents to RJD Law. That day, the defendant through its real estate agent Mr. Kaushal requested a delay in the closing date from October 28 to November 1, 2021. The plaintiffs agreed to this and an addendum was signed by the parties.

[15] The documents in evidence included a series of emails from Mr. Cheema to RJD Law over the morning and early afternoon of November 1, 2021, asking with increasing urgency that the seller's documents for the sale be provided to it so the transaction could be closed. There was no response to these emails.

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[16] At some point on November 1, 2021, a lawsuit was filed by a Ms. Kaur, who claimed to have provided the defendant with some part of the purchase price for the Property, and that she was a 50% owner of it even though not on title. At 2:48 pm on November 1, 2021, she filed a certificate of pending litigation ("CPL #1").

[17] Mr. Cheema emailed RJD Law at 2:59 pm on November 1, 2021, confirming that his client was ready, willing and able to complete the transaction. RJD Law responded at 4:15 pm that "My clients instructions are to deal with the CPL. We do not have vendor's executed documents."

[18] Mr. Datta, the principal of the defendant, said he did not sign the seller documents for the November 1, 2021 completion because he knew that CPL #1 had been filed. The timing is somewhat suspect, given that CPL #1 was not filed until well after the documents should have been signed and provided to the buyer's lawyer.

[19] That evening, there were negotiations between the real estate agents, which resulted in the parties signing a further addendum changing the completion date from November 1 to November 16, 2021.

[20] Mr. Sahi gave evidence that he was subsequently approached, through his real estate agent, with a request that he agree to cancel the CPS and that if he did so, the deposit would be returned to him and the real estate agents would receive their commission. Mr. Datta denied providing any instruction to his agent to make such a proposal.

[21] On November 15, 2021, Mr. Cheema emailed RJD Law noting that the closing was scheduled for November 16, that his clients were ready to complete the contract, but that he had not yet received any executed seller's documents. RJD Law replied on the afternoon of November 16, 2021, advising that Ms. Kaur was not willing to release CPL #1, but that the seller was prepared to release the deposit to the plaintiff if it would agree to void the CPS. Mr. Cheema responded that afternoon

confirming once again that his clients were ready, willing and able to complete the CPS.

[22] On November 17, 2021, the plaintiffs commenced the present action and filed a certificate of pending litigation ("CPL #2") against title to the Property.

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[23] The defendant's evidence was that at some point in early December 2021, it settled its differences with Ms. Kaur. The evidence included a consent dismissal order signed by the defendant's conveyancing solicitor (Mr. Barreto) and litigation counsel for Ms. Kaur (Mr. Gill). The copy of this order in the application materials was not entered.

[24] I note at this point that the plaintiffs' theory of the case is that property values were steadily rising in the fall of 2021, that the defendant wanted to get out of the CPS so that it could realize a higher price, and that all of its actions from October 28, 2021 onward were directed at that goal. The defendant denies this.

[25] The plaintiffs point to various facts including:

a) The fact that the defendant did not retain litigation counsel to defend the action commenced by Ms. Kaur;

b) The complete lack of documentation with respect to Ms. Kaur's alleged claim (other than the pleadings filed or to be filed in court); and

c) The fact that the lawyer who commenced the action on behalf of Ms. Kaur against the defendant (Mr. Gill) is the same lawyer who is defending the present action on behalf of the defendant.

[26] Mr. Datta's response to this is that:

a) He did not need counsel for the Kaur claim because he knew that money was owed, and it was "simply a matter of accounting";

b) Any other documents with respect to his dealings with Ms. Kaur, including the terms of settlement, are confidential; and

c) With respect to Mr. Gill, "I am aware that Mr. Imraj Gill was Ms. Kaur's lawyer".

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[27] On December 15, 2021, the parties signed a further addendum to the CPS, changing the completion date from November 16 to December 22, 2021.

[28] On December 16, 2021, Ms. Kaur's lawyer (Mr. Gill) signed a letter authorizing release of CPL #1.

[29] On December 19, 2021, Mr. Sahi signed all of the documents required for his proposed new mortgage financing with Roynat.

[30] Mr. Sahi deposed as to his understanding that, on Monday, December 20, 2021, Mr. Cheema forwarded the documents that required signature by the seller to RJD Law. Unfortunately, this fact is not confirmed by any non-hearsay evidence, and any covering letter with respect to those documents was not in evidence.

[31] There are, however, emails exchanged between RJD Law and Mr. Cheema with respect to the proposed documents. At 2:50 pm on December 20, 2021, RJD Law wrote asking:

> Please revise the SSOA to reflect the 6 months rent deductions.
>
> Kindly send same asap, as my client is likely to execute the documents tomorrow at 11:00 am.

[32] Mr. Cheema responded at 4:44 pm, advising that:

> My client has already signed the documents. My client has informed that as the rent back is maximum for 6 months and it is not a fixed term. They will take month to month rent and they don't need adjustment.

[33] It appears from these and other emails that the parties had agreed to a rent-back arrangement, by which the defendant would rent the Property from the plaintiffs for up to six months following completion. It is not clear whether this rent-back

arrangement was part of the CPS (perhaps being reflected in one of the schedules that was not in evidence) or in a separate agreement.

[34] At 10:09 am the next morning, being Tuesday, December 21, 2021, RJD Law advised Mr. Cheema that the defendant would not accept the GST Certificate provided by the corporate plaintiff without being provided with independent confirmation that it was registered for GST. RJD also asserted that:

> Our client will not SSOA without rental adjustments as the rent back of the property is a fundamental term of the Contract of Purchase and Sale.

[35] At 10:51 am, Mr. Cheema responded that he was advised that the parties had agreed that there would be no rent-back adjustment.

[36] At 1:57 pm, RJD Law emailed Mr. Cheema stating:

> Further to our telephonic conversation, please provide our office with a copy of the estoppel certificate to state that the lease in issue is fixed term lease for 6 months and the same can be terminated at the option of the Seller with 60 days notice and the monthly rent is $5,000.00.
>
> Kindly provide same to our office prior to the execution of the same and we require the certificate to be witnessed by notary.

[37] Mr. Sahi's evidence was that, although in his view there was no requirement in the CPS for an estoppel certificate, he immediately left his work in order to attend before a notary to sign this new document. Mr. Datta denied that he had instructed RJD Law to obtain an estoppel certificate, but said that he understood the lawyers were "acting in Far East's best interest at all material time".

[38] At 2:44 pm that afternoon, RJD Law requested strata documents for review, which Mr. Cheema provided at 2:49 pm.

[39] It appears that at some point on December 21, 2021, Mr. Datta signed the seller's closing documents. None of the affidavits filed by the defendant state when this happened. However, the documents that were eventually provided to Mr. Cheema are all dated December 21, 2021.

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Events of December 22, 2021

[40] December 22, 2021, was the scheduled closing date.

[41] As the day began, Mr. Cheema had not yet received the defendant's closing documents. At 9:07 am, he emailed RJD Law stating:

> Please send us form A and other documents asap. Lender needs executed form A before advance.

[42] As noted above, counsel for Mr. Kaur had signed a letter authorizing cancellation from title of CPL #1 on December 16, 2022. For some reason not clear on the record, that letter had not been previously filed at the land title office. At 9:51 am on the closing date, RJD Law filed the letter.

[43] In preparation for completion, Mr. Cheema filed documents to cancel CPL #2 from title as well.

[44] At 10:48 am, Mr. Cheema had still not received any closing documents from RJD Law, so he sent a follow-up email, stating:

> Hi Rupinder,
>
> We have been advised by the lender that in case they do not receive the executed form A and CPL release today by 11:30 am, they will not be funding today. Be please be advised that if we could not complete the file due to above reason, then your client will be responsible for all the costs and damages.

[45] RJD Law responded to this email at 11:14 am, stating:

> Hi Aman,
>
> As per the CPS my clients are to provide documents today until 4:00 on the completion date, it is not my clients' obligation to meet deadline of your client's lenders.
>
> We will provide documents within the time constraints of the CPS.

[46] Fifteen minutes later, at 11:29 am, a further email with several attachments (including the seller's statement of adjustments and the Form A transfer) was sent by RJD Law to Mr. Cheema. One of the attachments was a cover letter which set out undertakings upon which the documents were provided, including:

1. You will not attempt to register the Transfer until such time as you hold in your trust account sufficient funds which, when added to the proceeds of any new mortgage to be filed concurrently therewith, will allow you to complete this transaction in accordance with the contract of purchase and approved statement of adjustments.
2. To the best of your knowledge and if applicable, the Buyer has fulfilled all the new lender's conditions for funding except for submitting the new mortgage for registration and you know of no reason why the new mortgage should not be registered and funds disbursed thereunder in the ordinary course of business.
3. Upon acceptance of your application for registration by the appropriate registry offices, and upon receipt of satisfactory post index searches, and upon receipt of new mortgage funds, if applicable, you will pay to us the funds payable to the Seller as per the Seller's statement of adjustments.
4. If, for any reason, you are unable to comply with the above undertakings, you will, on demand, return the unregistered Transfer to us, or, if it has been submitted for registration, request its withdrawal and return it to us upon its receipt.

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[47] There is hearsay evidence from Mr. Sahi that he "understands" that Mr. Cheema forwarded these documents to the lender, Roynat, at 11:42 am – 13 minutes after they were received by him.

[48] At 12:45 pm, Mr. Cheema emailed RJD Law stating:

> Please be informed that completion is to proceed today. Please provide me with your CPL release letter.

[49] At 12:50 pm, RJD Law responded that:

> It has been attached to you earlier. It is re-attached for your convenience.

[50] At 2:38 pm, Mr. Cheema emailed RJD Law again, stating:

> Please see the attached.
>
> Lender's lawyer has advised us that they will release the funds tomorrow as paperwork got late today. Could you please give me your consent to close the file tomorrow.

The record before me did not include the attachment to this email or indicate its nature.

[51] At 2:58 pm, RJD Law responded:

> Please note that we are asking for instructions from our client, once we have instructions we will advise you accordingly.

[52] At 3:17 pm, Mr. Cheema followed up with RJD Law, stating:

> Please confirm if your clients agree for completion tomorrow. My client has instructed me to get this confirmation within 15 minutes else they want to file CPL. Please advise me if your clients consent for tomorrow closing as lender could not release funds today as there was delay in sending documents.

[53] At 3:23 pm, RJD Law responded as follows:

> There was no delay in providing the documents, as the same were sent to you before by 11:30 as requested. In any event the [CPS] has no provisions for the Seller's documents to be sent to you by 11:30 on the closing date.
>
> Further please note our client instructed us that it is not prepared to extend the Completion Date.
>
> Our Client remains ready, willing and able to complete.
>
> Time remains of the essence.

[54] Mr. Sahi's evidence is that, immediately upon hearing of this, he began calling friends and business colleagues in an attempt to arrange bridge financing to cover the amount that he was expecting to fund with the Roynat mortgage. By 4:00 pm, he had identified friends who were willing to advance him a total of $1,125,000 (of the $1.85 million required) and were willing to go to their banks and obtain drafts that afternoon.

[55] At 4:04 pm, RJD Law sent a further email to Mr. Cheema, stating:

> Please do not proceed with the lodging of the Form A for registration as the cut off time of 4:00 pm as per the clause of 27 of the [CPS] for lodging the documents have passed.
>
> Further please return the unused documents to our office forthwith as per the undertakings exchanged. As your clients failed to complete the transaction pursuant to the [CPS].

[56] Mr. Sahi's evidence is that he understands that Mr. Cheema followed this demand.

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Events Subsequent to December 22, 2021

[57] The plaintiffs filed a further certificate of pending litigation ("CPL #3") at 9:03 am on December 23, 2021.

[58] There appears to have followed somewhat of a hiatus in the litigation. Neither party took any issue with the timing of steps to advance the claim.

[59] On May 20, 2022, the plaintiffs filed an amended notice of civil claim pleading the events of December 22, 2021, and asserting:

> 15. The defendant withheld the vendor documents with an intention to cause the plaintiff's failure to receive funding from the financial institution in a timely manner.
>
> 16. Further, at 4:00 pm on December 23, 2021, (sic) the defendant advised the plaintiff that it will not complete the sale of the contract pursuant to the Purchase Contract, and amendments, thereto, and further directed the plaintiff to return all the vendor documents, unused, back to the defendant.
>
> 17. The defendant unilaterally breached the Purchase Contract by refusing to complete the sale of the Property to the Plaintiff pursuant to the Purchase Contract.

[60] The defendant's Response to Amended Civil Claim, filed on June 13, 2022, pleads with respect to those assertions that:

> 15. … Far East denies that it withheld vendor documents to cause the Plaintiff's failure to receive funding from the financial institution in a timely manner, and puts the Plaintiff to the strict proof thereof.
>
> 16. … Far East states that the Plaintiff was not ready, willing, and able to complete, and as such, Far East terminated the Purchase Contract.
>
> 17. … Far East denies that it breached the Purchase Contract, and states that the Plaintiff did not have the funds to complete. Far East further states it terminated the Purchase Contract as the Plaintiff was not ready, willing and able to complete.

[61] On June 14, 2022, defendant's counsel wrote to plaintiffs' counsel inquiring about potential availability in September 2022 for a summary trial application. A further letter in July 13, 2022, confirmed that a one-day hearing had been booked for the week of September 26, 2022.

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[62] On September 6, 2022, the plaintiffs delivered a list of documents. Counsel for the plaintiffs wrote asking about dates for an examination for discovery of Mr. Datta.

[63] On September 7, 2022, the defendant filed and served a summary trial application. Rule 8-1(8) requires service of a summary trial application at least 12 business days before the return date. By my calculation, the last possible date for service of an application returnable on September 26, 2022, was September 7, 2022.

[64] On September 8, 2022, the defendant delivered its list of documents. In accordance with Rule 7-1(1), that list of documents was due within 35 days after the defendant filed its Response to Amended Civil Claim, which would mean that it was due by the end of July. The defendant was thus in default of Rule 7-1 at the time it filed and served its summary trial application.

[65] An examination for discovery of Mr. Datta occurred on September 14, 2022. A number of requests for information were left outstanding after this discovery.

[66] On September 19, 2022, counsel for the plaintiffs wrote to follow-up on the outstanding information requests and to request an adjournment of the summary trial.

[67] Counsel for the defendant responded the same day taking the following position:

> We put you on formal notice that in the event your clients elect not to file an application response by 4:00 pm on September 19, 2022, our client will take the position that your clients do not have standing and will proceed with its summary trial application. … It is abundantly clear that your client is attempting to frustrate the summary trial process by not taking every reasonable step to prepare.

[68] The plaintiffs filed their application response the next day. At the time it was filed, the defendant had not yet responded to the outstanding requests from the

examination for discovery. The defendant did provide its responses later on September 20, 2022, then filed its reply materials on September 21, 2022.

[69] It appears that at some point the plaintiffs put their former solicitor, Mr. Cheema, on notice of a potential claim against him. An application was filed to add him as a defendant to this action, but that application had not been pursued at the time of hearing.

[70] The unfortunate result of this was that the plaintiffs defended the summary trial application without the benefit of an affidavit from Mr. Cheema.

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Positions of the Parties

The Defendant/Applicant

[71] The defendant argues that the plaintiffs' claim is ill-founded and should be dismissed on a summary basis. It says that this is a simple case of the plaintiffs' failure to complete in accordance with the contractual deadline. It says that the facts necessary for the court to come to this conclusion are all clear on the factual record, that this is a dispute that simply requires contractual interpretation, and that there are no credibility issues to be resolved.

[72] The defendant says that it met the timeline required by the *Supreme Court Civil Rules* for service of its application, and that the onus is on the plaintiffs to respond to a summary trial application within the timelines imposed by the *Rules*. If the plaintiffs did not properly respond, that is the plaintiffs' problem.

[73] The defendant argues that s. 27 of the CPS provided a 4:00 pm deadline by which the Form A transfer must be lodged for registration, and that the provision in s. 28 stating that time is of the essence means that the deadline must be strictly observed. It argues that the evidence is undisputed that, by the 4:00 pm deadline, the plaintiffs were not in a position to complete as they did not have the funds required to close that day.

[74] The defendant says that there was no contractual deadline for it to provide the seller's documents to the plaintiffs' solicitor, and that in any event, it provided the documents before 11:30 am which it says was the deadline communicated by the plaintiffs' solicitor. As a result, the defendant says that it cannot be said that it was the cause of any delays in the completion process. It says that any problems with the receipt of mortgage funding are the responsibility of Mr. Cheema and that the plaintiffs should pursue their claims against him.

[75] The defendant argues it was entitled to terminate the CPS at any point after 4:00 pm, and that it did so at 4:04 pm by way of the email sent at that time.

[76] The defendant says that the fact that it was in breach at the time of the November 16, 2021 completion date is irrelevant to the facts in issue here. The plaintiffs affirmed the contract, the completion date was eventually extended, and once the contract was back afoot, the plaintiffs were required to comply with their own obligations.

The Plaintiffs

[77] The plaintiffs argue that this case is not appropriate for resolution by way of summary trial. They argue that the question of the defendant's good faith should go to trial, that there is a missing key witness (Mr. Cheema), and that the plaintiffs were unable to prepare a fulsome response to the application in time given the last-minute delivery of the defendant's application. The plaintiffs commissioned an appraisal of the Property, but as of the hearing date for the summary trial, it had not arrived.

[78] The plaintiffs argue that the defendant was in breach of the CPS through its failure to provide the seller documents in a timely manner. They say the defendant was aware that the plaintiffs were obtaining mortgage financing, and that the seller documents were required in order for the mortgage lender to advance funds. The seller documents had all been signed prior to the completion date, but the defendant's solicitors intentionally held on to them until it was too late to obtain financing.

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[79] In particular, the plaintiffs note that Mr. Cheema had emailed RJD Law twice on the morning of December 22, 2021 expressing urgency with receiving the documents. Both emails made it clear that the lender required the seller documents before funding. The second email specifically stated that if the lender did not have the documents by 11:30 am, it would not be in a position to fund that day. The plaintiffs say that the defendant and its solicitors would have known that, if they were to email the documents at 11:29 am, there was no way the documents could be received, reviewed and forwarded on to the lender in the one minute remaining until 11:30 am.

[80] The plaintiffs say that as a result of the defendant's breach of the CPS, time was no longer of the essence, and that the defendant's purported termination of the CPS at 4:04 pm was itself a repudiation of the CPS. They say that they were in the process of seeking bridge funding that would have allowed them to complete on the completion day, but were prevented from completing that task by the defendant's precipitous actions in demanding return of the Form A transfer.

[81] The plaintiffs say they affirmed the CPS by filing CPL #3 and by seeking specific performance. They have advanced a claim to specific performance and that claim should properly be resolved at a trial.

Legal Framework

Appropriateness for Summary Trial

[82] Rule 9-7(15) provides that:

> (15) On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
>
> (b) impose terms respecting enforcement of the judgment, including a stay of execution, and

(c) award costs.

[83] The leading case on appropriateness under Rule 9-7 is *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.). At para. 48, McEachern C.J. noted that the summary trial rule provides certain safeguards aimed at ensuring the proper attainment of justice, including an extended notice period, the rule that a chambers judge cannot give judgment unless able to find the facts necessary to decide the issues of fact or law, and the ability of a chambers judge, even if able to find the facts, to nevertheless decline to give judgment if it would be unjust to do so.

[84] Chief Justice McEachern noted as well at para. 54 that:

> . . . the absence of an affidavit from a principal player in the piece, unless its absence is adequately explained, may cause the judge to conclude either that he cannot find the facts necessary to decide the issues, or that it would be unjust to do so.

[85] In *Gichuru v. Pallai*, 2013 BCCA 60, the court identified a number of factors at paras. 30-31 that may be considered in determining whether it would be unjust to give judgment on a summary trial:

a) The amount involved;

b) The complexity of the matter;

c) Its urgency;

d) Any prejudice likely to arise by reason of delay;

e) The cost of taking the case forward to a conventional trial in relation to the amount involved;

f) The course of the proceedings;

g) The cost of the litigation and the time of the summary trial;

h) Whether credibility is a critical factor in the determination of the dispute;

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i) Whether the summary trial may create an unnecessary complexity in the resolution of the dispute;

j) Whether the application would result in litigating in slices; and

k) Any other matters which arise for consideration on this important question.

Compliance with Contract / Time of the Essence

[86] A number of cases deal with the question of whether the seller in a case like this has an obligation to provide its closing documents in a timely manner.

[87] In *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072, 1978 CanLII 215, the appellant had agreed to buy a three-acre portion of a lot from the respondent. Their agreement was relatively informal and made no specific provision for who was responsible to obtain subdivision. After concluding there was sufficient certainty as to the specific land to be conveyed, the court went on to consider the responsibility to obtain subdivision approval. Justice Dickson (as he then was) noted that both parties were aware that subdivision approval was required, and was a statutory prerequisite to completion. He went on to comment at pp. 1083-1084:

> There are many cases in which provisions of a contract were subject to the condition precedent of an approval or a licence being obtained, and one party was by inference in the circumstances held to have undertaken to apply for the approval or licence … This type of case is merely a specific instance of the general principle that “the court will readily imply a promise on the part of each party to do all that is necessary to secure performance of the contract”: 9 *Hals.* (4th ed.), p. 234, para. 350: see also *Chitty on Contracts,* “General Principles”, (23rd ed.) p. 316, para. 698, where it is said: “The court will also imply that each party is under an obligation to do all that is necessary on his part to secure performance of the contract.”

[88] Applying those principles to the case before him, he noted at p. 1084 that:

> In a purchase and sale situation, the “person who proposes to carry out a subdivision of land” is the intending vendor. It is he who must divide his parcel of land, which has hitherto been one unit, for the purpose of sale. If a purchaser carried out the actual work in connection with the application, he could only do so in the vendor’s name and as his agent. The vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale. I cannot accept the proposition that failure to fix responsibility for obtaining planning approval renders a contract unenforceable. The common

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> intention to transfer a parcel of land in the knowledge that a subdivision is required in order to effect such transfer must be taken to include agreement that the vendor will make a proper application for subdivision and use his best efforts to obtain such subdivision. This is the only way in which business efficacy can be given to their agreement.

[89] In *Walia v. Lee*, 2003 BCSC 237, the plaintiff had agreed to buy a house from the defendants. The parties agreed to extend the completion date to July 4, 2002. The vendor's lawyer received documents from the purchaser's notary on June 26, 2002 and sent them to the vendors who resided in Hong Kong. On July 4, 2002, he advised that because of the U.S. holiday on July 4, 2002, the courier would not be able to deliver the documents until July 5, 2002. The purchaser declined to agree to extend the completion date, and sued to recover the deposit. The parties were all aware that the vendors resided in Hong Kong. However, the vendor's lawyer had not advised that he required the transfer documents to be provided to him by any specific date.

[90] Justice Garson (as she then was) discussed and applied the applicable law at paras. 8-9, 11-12 and 15:

> [8] In *Salama Enterprises (1988) Inc. v. Grewal* (1992), 90 D.L.R. (4th) 146 (B.C.C.A.), Goldie J.A. discussed the applicable law relating to enforcement of a 'time is of the essence' clause. At 158, he adopted the analysis of Hetherington J. (as she then was) in *Landbank Minerals Ltd. v. Wesgeo Enterprises Ltd.* (1981), 21 R.P.R. 220, [1981] 5 W.W.R. 524 (Alta. Q.B.):
>
>> I think that where time is of the essence of an agreement and there is an extension of time for performance of an obligation under the agreement to a specified date, the effect of the extension on the essentiality of time must be determined in the context of the circumstances of the case. If there are circumstances which make it unjust or inequitable for a party to insist that time is of the essence, the Court may refuse to give effect to this provision in the agreement. In the absence of such circumstances, however, the extension of time simply results in the substitution of a later date for the one stipulated in the agreement. I do not think that it in any way affects the provision in the agreement that time is of the essence.
>
> [9] In *Salama*, the Court found that inequitable or unjust circumstances exist where a party, who is also in default, seeks to rely on a 'time of the essence' provision. Similarly, if a party engages in conduct making it "impossible in any practical sense" for the other party to complete its obligations, then such conduct will amount to unjust or inequitable circumstances.

> …
>
> [11] … I also conclude that the transfer documents were delivered in time for Mr. Lundrie to secure the signatures of the vendors in Hong Kong. If Mr. Lundrie was concerned when he received the documents on June 26, 2002, that he could not get the documents turned around in time for the July 4, 2002, closing date, surely he would have said something….
>
> [12] … I am not satisfied on the evidence that the plaintiff's delivery of the documents can be construed as late delivery.
>
> …
>
> [15] … The court's discretion is not a balancing of the equities. It is simply an analysis of whether the non-defaulting party's conduct can be construed as contributing to the cause of the non-performance of the party seeking to enforce the transaction. I have already found that is not the case here.

[91] A similar approach was taken by Justice Strathy (as he then was) in *Walker v. Jones* (2008), 298 D.L.R. (4th) 344, 2008 CanLII 47725 (Ont. S.C.J.) – albeit with a different result. In that case, the contract provided for completion by 6:00 pm on November 30, 2007. The purchaser in that case was obtaining a part of the sale proceeds from the sale of her existing home, which was scheduled to complete the same day.

[92] On November 27, 2007, an appraiser sent by the mortgagee for the purchaser was denied access to the house by the vendor. The vendor's lawyer did not reply to correspondence sent that day expressing concern about this. At 6:13 pm on November 28, 2007, the purchaser's lawyer faxed a letter marked "Urgent", reiterating concern and noting that "Without the appraiser, the purchaser's mortgagee will not be in a position to fund the above transaction on the scheduled closing date." Ultimately, the appraiser was given access on November 29, 2007. Justice Strathy concluded that the vendor unreasonably obstructed and delayed this process.

[93] On November 29, 2007, there were urgent requests for the vendor's lawyer to provide a statement of adjustments, mortgage statement and direction regarding funds, all of which were necessary for the closing. The vendor's lawyer was unable to provide the latter two documents as he had not yet received a mortgage discharge statement. Although he had requested the discharge statement on

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November 13, 2007, it did not arrive until 10:31 am on the completion date. The evidence at trial indicated that normally these documents are provided prior to the completion date or at least by the morning of closing.

[94] The purchaser's mortgage financing was approved (notwithstanding the late appraisal) and her lawyer received the mortgage proceeds on the completion date. Urgent requests that morning to the vendor's lawyer seeking the vendor's documents were not responded to, as the lawyer was out of the office from 10:30 am to approximately 1:30 pm. The vendor's lawyer faxed the mortgage discharge statement and statement of adjustments to the purchaser's lawyer at 2:19 pm. This enabled the purchaser's lawyer to coordinate with the lawyer acting on the sale of the purchaser's existing property.

[95] After faxing these documents, the vendor then put together the vendor's closing documentation and provided it to a courier at or shortly after 3:00 pm. He anticipated that it would arrive within 30 to 40 minutes.

[96] Ultimately, the purchaser's lawyer was able to release funds at 5:30 pm. She called the vendor's lawyer and advised him that the funds were on their way to him. He advised that he would only be present until 6:00 pm.

[97] The envelope containing the sale proceeds was delivered by a Mr. Johnson who did accounting work for the purchaser's lawyer. While normally the trip between the law offices would take 10-15 minutes, due to snow conditions Mr. Johnson did not arrive until some point between 6:15 and 6:25 pm. Mr. Johnson went to hand the package to the vendor's lawyer, but the lawyer told him that "My client does not want to take the documents".

[98] At 6:24 pm, the vendor's lawyer faxed a letter to the purchaser's lawyer stating that he had not received the funds by 6:00 pm and as a result, the transaction can not be completed.

[99] Having reviewed the extensive evidence before him, Strathy J. concluded at p. 367 that the purchaser was ready, willing and able to close the purchase, and that

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the primary and most substantial cause of the delay in their delivery of the closing documentation and certified funds was the failure of the vendor's lawyer to deliver the mortgage discharge statement and direction as to funds in a reasonable time.

[100] It is noteworthy that in *Walker*, Strathy J. had the benefit of evidence from one of the lawyers that, in her experience as a real estate lawyer, a vendor should provide the closing documents to the purchaser generally one to two days before closing. He accepted the evidence of the purchaser's lawyer that, had she received the documents on a timely basis, there would have been ample time to complete both transactions (the sale of the prior home and the purchase of the new home) by 6:00 pm.

[101] Justice Strathy engaged in a detailed analysis of the legal effect of a time of the essence clause, beginning at p. 374, where he dealt with the issue of "was the contract breached and, if so, who breached it":

> Dealing with this first issue, time was expressly of the essence of the contract for the sale of Mount Fuji. It is settled law that this is a condition of the contract, the breach of which entitles the innocent party to treat the contract at an end and to elect to terminate it. It is equally settled law that a party seeking to rely on time of the essence may not do so where he or she was not ready, willing and able to close on the agreed date or where he or she was responsible for the later performance of the other party: …

[102] He quoted the comments of Mackay J.A. in *Shaw v. Holmes*, [1952] 2 D.L.R. 330, 1952 CanLII 285 (ONCA) at paras. 19 and 21:

> Time may be insisted upon as of the essence of the agreement by a litigant, (a) who has shown himself ready, desirous, prompt and eager to carry out his agreement; (b) who has not been himself the cause of the delay or in default; and (c) who has not subsequently recognized the agreement as still subsisting; he must not play fast and loose at his pleasure ...
>
> I am of the opinion that even where time is of the essence, the duty to make tender does not arise until the vendor has done that which it was incumbent upon him to do in order to close the sale. It was the duty of the defendants to prepare the conveyance and submit the same for approval. The obligation on the plaintiffs to make payment did not arise until after the completion of the unfulfilled duty of the vendor …
>
> [Citations omitted.]

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[103] Justice Strathy then went on at pp. 374-375 to cite *Watts v. Strezos*, [1955] O.R. 615, 1953 CanLII 164 (S.C.), for the proposition that specific performance would be available to a purchaser if he could show that the fault for failing to meet the closing deadline was attributable to the vendor. At p. 376, he noted *Leung v. Leung* (1990), 75 O.R. (2d) 786, 1990 CanLII 6866 (S.C.), where Justice Yates held that:

> Where a vendor acted contrary to good faith in his performance of the contract, the law precludes him from relying on the "time of the essence" provision to terminate the contract …

With respect to this proposition, Strathy J. commented:

> The principle does not require evidence of bad faith. The principle is simply that a party cannot take advantage of a state of affairs which he or she has produced.

[104] Justice Strathy also noted that, in *Leung*, Yates J. cited *Dynamic Transport* for the proposition that "a vendor is under a duty to act in good faith and to take all reasonable steps to complete the contract".

[105] Applying these legal principles to the facts before him, Strathy J. concluded at p. 377 that, as a result of his conclusion that the substantial cause of the delay in closing was the failure of the vendor's solicitor to deliver the vendor's closing documents on a timely basis, the vendors were not entitled to terminate the contract through reliance on the "time of the essence" clause. He granted an order of specific performance.

[106] I have reviewed the *Walker* judgment in some detail, both because there are many factual similarities to the present case, and also because it makes clear that the court, in considering whether it was open to a party to rely on a time of the essence clause, is not necessarily required to find a subjective intention to act in bad faith. Rather, if the court having reviewed objectively the overall conduct of the parties concludes that the substantial cause of the delay or default in closing is the failure of one party to do what was necessary on its part to secure performance of

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the contract (for example, to deliver closing documents) on a timely basis, then that party will not be entitled to rely on the time of the essence clause.

[107] In *Toor v. Dhillon*, 2020 BCCA 137, after signing an agreement, the vendors changed their mind about selling the property and advised the real estate agent that they did not want to go ahead with the transaction. Three days later, they declined to give access to a mortgage appraiser who was to appraise the house for purposes of the purchasers' mortgage financing. While much of the analysis of Justice Hunter deals with issues surrounding the mechanics of payment of the deposit, and the vendor's refusal to sign closing documents at all, it is noteworthy that at para. 45, he cited with approval the judgment in *King v. Urban & Country Transport Ltd*. (1974), 1 O.R. (2d) 449, 1973 CanLII 740 (C.A.), which itself cited some of the cases relied on by Strathy J. in *Walker* (including *Shaw* and *Watts*).

[108] The specific proposition relied upon by Hunter J.A. from these cases – that time of the essence may only be relied upon by a party "who has shown himself ready, desirous, prompt and eager to carry out his agreement" – differs somewhat from the proposition relied upon by Strathy J. – that a party who is the cause of the delay or default may not rely on time of the essence. However, both are part of the principle stated by Mackay J.A. in *Shaw*, which I have quoted above, and the legal and equitable principles underlying both are the same.

Analysis

[109] In this case, the defendant advanced the summary trial on a specific theory: that the CPS provided no deadline for the seller to deliver its documents, and that in any event, the seller provided its documents by what was said to be the time requested by the buyer. In reliance on that theory, the defendant's submissions focused on cases that presume that the buyer is in breach and confirm the seller's right to elect to terminate a CPS.

[110] In my view, the facts of this case do not support that underlying theory. The cases I have cited above consistently make clear that a seller who has, through

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unreasonable delay, been the cause of the buyer's inability to meet a contractual deadline is not in a position to rely on a time of the essence clause.

[111] The defendant says, in this case, the plaintiffs' solicitors advised that the defendant's closing documents were not required until 11:30 am, and that the defendant provided its documents in advance of that deadline (specifically, at 11:29 am). However, the email sent by Mr. Cheema at 10:48 am said something different. It said that if the lender did not receive the executed Form A and CPL release by 11:30 am, it would not be funding that day. It seems unlikely that the defendant could have expected that delivery of the documents to Mr. Cheema at 11:29 am would have allowed for them to be provided to the lender by 11:30 am.

[112] I note as well that the email was not the first email of the day to stress the urgency of receiving the documents. Mr. Cheema's email of 9:07 am had already made it clear that the plaintiffs' lender would not advance funds until it had seen the executed Form A transfer.

[113] That said, I am not clear what to make of Mr. Cheema's email of 12:45 pm stating that the completion would proceed and requesting a copy of the CPL release letter. It is not clear whether that email reflected that the difficulty with the receipt of seller's documents at 11:29 am had been overcome. Similarly, Mr. Cheema's key email of 2:38 pm references an attachment that is not in evidence.

[114] More generally, there are aspects of the evidence which are hearsay only as a result of the absence of evidence from Mr. Cheema.

[115] While it is perhaps not surprising that an affidavit of Mr. Cheema was not available, given that the plaintiffs had put him on notice of a potential claim, that absence leaves the evidence in a state of uncertainty.

[116] I also note that, in this case, there is no evidence as to any sort of standard practice as to when vendor's documents should be delivered to a purchaser's solicitor. That information was significant to the decision in *Walker*. While the evidence in *Walker* is consistent with what is set out on the Information Sheet

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attached to the CPS in this case, it would be preferable to have evidence on that matter specific to conveyancing practice in British Columbia in 2021.

[117] In my view, I am not able to make the findings of fact necessary to determine either liability or an appropriate remedy in this matter. There are certainly strong indicators in the evidence that the defendant's delay in providing the required closing documents was the effective cause in the plaintiffs' difficulty in obtaining an advance of their financing on the completion date. However, there are important questions left unanswered, and the absence of Mr. Cheema's evidence is particularly problematic.

[118] Even if I was in a position to draw a conclusion as to the impact of the defendant's delay, it is my view that the evidence as to the appropriate remedy is insufficient. Although an appraisal was commissioned by the plaintiffs, it was not available at the time of hearing. While the plaintiffs have sought specific performance, the question of whether specific performance is appropriate for a commercial strata lot is complex and the evidence as to the plaintiffs' specific interest in the Property is minimal.

[119] With respect to the question of whether it would be unjust to decide this case on a summary trial application, based on the present record, I would note that:

a) The amount involved includes, at the very least, the $100,000 deposit as well as any increase in value in the Property that may be established on appraisal evidence. Without knowing the quantum of this increase in value, it is difficult to opine on the cost of taking the case forward to a conventional trial in relation to the amount involved;

b) While the case is not overly complex, as it focuses on the events of a couple of days leading up to the closing of a specific transaction, it is sufficiently complex to require more care and attention in the development of a factual record; and

c) With respect to the "course of the proceedings", the defendant has pushed forward with this summary trial application based on theories as to both

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the facts and the law that I am unable to accept. Its refusal to consider the plaintiffs' reasonable requests for adjournment so that the factual record could be more properly developed has led to a situation in which the summary trial application is inappropriate. The fact that 12 business days' notice is the minimum required for a summary trial application does not mean that 12 days will be appropriate or sufficient in every case.

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Conclusion

[120] For all of these reasons, I conclude that on the present factual record, I am unable to find the facts necessary to decide the issues that have been placed before the court. I also conclude that on the present factual record, and given the course of the proceedings to date, it would be unjust to decide the issues on the application.

[121] The application is dismissed.

"Veenstra J."