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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

VICKY JORDAN AND KEITH JORDAN,	)	
plaintiffs,	)	Lynda Troup for the plaintiffs
- and -	)	
DALBIR BAINS AND NAVNEET KAUR-BAINS,	)	Troy Harwood-Jones Jeffrey King for the defendants
defendants.	)	
- and -	)	Stuart Blake Anthony Foderaro
AMIT BINDRA AND RE/MAX EXECUTIVES REALTY, JAMES TWOREK, CANDELA CAPITAL, INC., JOSH SCHUMANN, JOSH SCHUMANN FAMILY CORPORATION, INC. AARON SHAPIRO, THE SHAPIRO LAW FIRM, LLC, RORY LOADER, AND SORTEXPAX HOLDINGS LIMITED,	)	for the third parties
third parties.	)	Judgment Delivered: March 2, 2023

TOEWS J.

Introduction

[1] The plaintiffs, Vicky Jordan and Keith Jordan ("Vicky" and "Keith" or collectively "the Jordans"), the defendants, Dalbir Bains and Naveet Kaur-Bains ("Dalbir" and

"Navneet" or collectively "the Bainses") and the third parties, Amit Bindra ("Bindra") and Re/Max Executives Realty ("Re/Max"), have each brought a summary judgment motion in this action.

[2] The Jordans were the owners of the residential property commonly known as 62 Colchester Bay, Winnipeg, Manitoba ("the Property"). The Bainses submitted an offer to purchase the Property on May 20, 2019, which was accepted by the Jordans the same day. The Jordans take the position that this offer and acceptance constituted a binding contract between the plaintiffs and the defendants, subject only to an inspection of the Property by the defendants. There is no dispute that the inspection took place and that the issues arising out of the inspection were resolved to the mutual satisfaction of the Jordans and the Bainses.

[3] While the Bainses do not take issue with the fact that all issues arising out of the inspection condition were resolved, they take the position that the contract was also subject to the Bainses obtaining financing and since the financing condition was not satisfied, no contract was concluded between the parties.

[4] Bindra is an associate of Re/Max and acted as a common real estate agent and broker to the Jordans and the Bainses. The Bainses brought the third-party action against Bindra and Re/Max for the role that Bindra carried out in facilitating the transaction and representations which he made (or did not make, but should have made) regarding the sale agreement in respect of the Property.

[5] It is noted that the Bainses third partied other individuals and entities but the actions against those additional third parties have been severed from this action by order

of this court. The action against those other third parties is proceeding independently of this action. However, it should be noted that the Bainses maintain that as a result of the failure of the third parties who are defendants in the separate action to provide certain funds, the Bainses were unable to finalize the agreement in respect of the Property. The Jordans, Bindra and Re/Max take the position that since the offer to purchase and the resulting agreement in respect of the Property was not subject to a financing condition, the failure of the Bainses to receive the anticipated funds from the defendants in the other action is not relevant here.

[6] I would also note that although there may be issues of credibility to be determined by the court in resolving this action by way of a summary judgment motion, all parties have advised me that they are satisfied that this action can properly be resolved by way of the summary judgment motions brought by each party. Each party takes the position that the court has before it the necessary evidence without additional *viva voce* evidence in order to make factual findings and apply the relevant legal principles to resolve the claims in their favour. In other words, the court has been encouraged by all parties in this action to proceed on a summary judgment basis and deliver a judgment in respect of the position that each of them is advancing.

[7] It should be pointed out that during the course of the arguments in respect of liability, the defendants initially took the position that the issue of damages is not one that can be dealt with summarily and should be dealt with in the context of a trial. For their part, the plaintiffs and the third parties took issue with that position and stated there is no indication in the materials that the defendants were intending to bifurcate this

matter in that manner. They state that this attempt to bifurcate these proceedings was only raised at the hearing of this matter and not advanced in the materials filed by the defendants. In their brief, the plaintiffs take the position that the defendants have not "seriously challenged" the loss claimed by the plaintiffs and that there is no expert report to suggest any of the costs incurred or loss experienced were inflated or inappropriate. As such, the Jordans argue, there is no issue requiring a trial on damages.

[8] It appears that the issue of proceeding on a summary judgment basis in respect of damages has been resolved by all parties mutually agreeing that the issue of damages should be considered and resolved by the court in the context of these summary judgment motions as a result of further material being filed subsequent to the initial hearing of this matter. Accordingly, the matter of damages proceeded on a subsequent hearing date during which all parties argued the issue of damages on the basis of the materials filed with the court.

The Position of the Jordans

[9] In early March 2019, the Jordans engaged Bindra and Re/Max to list the Property for sale. The Property was subsequently listed for sale in the amount of $2,290,000 later that month by the third parties. In early April 2019, Dalbir contacted Bindra with respect to the prospective purchase of the Property. Although Dalbir advised Bindra that he was waiting on funds that would enable him to pay cash for the Property, Dalbir indicated he was not interested in obtaining a mortgage and that insofar as financing was concerned, he would make an unconditional offer for the Property. Bindra dealt almost exclusively with Dalbir when it came to the purchase of the property on behalf of the Bainses.

[10] On May 20, 2019, the Bainses had Bindra draft the offer to purchase for the Property in the amount of $2,290,000 and later the same day the Jordans accepted the offer. The agreement provided for various terms and conditions including a possession date of August 1, 2019, and a non-refundable deposit payable upon a satisfactory inspection of the Property. The written agreement to purchase did not contain a condition related to the Bainses obtaining the necessary financing for the purchase of the Property. The Jordans maintain that there are no documents to support that when the offer to purchase was accepted that the agreement was subject to financing. The Jordans state that they only became aware that the Bainses did not have the required funding in order to close the deal until after the agreement was entered into and just about a month prior to the anticipated closing date of August 1, 2019.

[11] The Jordans state that prior to entering into the agreement, Dalbir and Bindra had a number of conversations and exchanged correspondence for over a month with respect to how the Bainses were intending to finance their purchase of the Property. Bindra was aware that Dalbir expected to receive the necessary funds as a result of a venture initiative which he was involved in. However, Dalbir chose not to include a financing condition as a term of the offer to purchase prior to submitting it to the Jordans.

[12] The Jordans state that following the execution of the agreement by both parties, and approximately one month prior to the anticipated closing date of August 1, 2019, they became aware that the Bainses did not possess the necessary funds to close. The Jordans state that they made repeated accommodations with respect to providing the

agreed upon deposit and extending the time to close in order to allow Dalbir to acquire the funds that he stated were coming.

[13] After a number of months of attempting to secure the funds, the Bainses were unable to obtain the funds. Keith states that the last correspondence from Dalbir was received on November 27, 2019, and it stated: "let me work on something. There must be a way to get this done."

[14] The Bainses were never able to secure the funds from the venture initiative. After the Bainses failed to secure the funds, the Jordans placed the Property back on the market in February 2020. It was finally sold for $1,550,000 on an "all cash" deal for immediate possession as a result of a private connection of the Jordans.

[15] The total amount of the loss claimed by the Jordans is calculated at $910,383.86 broken down as follows:

a) Difference in purchase prices: $740,000;
b) Storage costs for vacating the Property early to accommodate possession date requested by the defendants: $58,627.51;
c) Rental of alternate accommodations to accommodate possession date requested by the defendants: $55,420;
d) Maintenance costs for the Property not otherwise recovered by rent: $81,336.35; and
e) Less credit of deposit: ($25,000)

The Position of the Third Parties

[16] Since the third parties are advancing a similar position to that of the plaintiffs, I will set out their position before setting out the defendants' position in response to that of the other parties.

[17] Bindra acted as the real estate agent for both the plaintiffs and the defendants with respect to the purchase of the Property. At all material times, he carried out his business in association with Re/Max, which is a real estate brokerage. It is evident that if there is any liability on the part of Re/Max in respect of this action, it arises as a result of Bindra's direct involvement in this matter and the doctrine of vicarious liability.

[18] In April 2019, Bindra was contacted by Dalbir with respect to the Property as Dalbir and Navneet were in the market for purchasing a house. That same month Bindra showed the property to Dalbir on more than one occasion, eventually resulting in Dalbir making an offer to purchase the Property.

[19] Bindra states that on or about April 23, 2019, Dalbir asked Bindra to provide him with a blank standard offer to purchase form so that he could prepare a draft offer to purchase the Property. Bindra states that Dalbir told him that he was well-versed in reviewing contracts, so he did not require assistance from Bindra to prepare the draft. Bindra took the position that in view of Dalbir's business background and experience in financial and corporate matters this made sense.

[20] On April 24, 2019, Dalbir sent Bindra an e-mail attaching what he said was a rough draft of an offer to purchase the Property. While the draft was a cursory one, Dalbir indicated that it contained most of the key points that he wanted to include in any offer.

Bindra set out additional items in the offer to purchase that should be specified in connection with any purchase of the Property, such as a mechanical and structural review, whether the sale would include the furniture, and the possession date. Notably, there was no financing condition included in the draft offer, nor was one indicated in the list of issues that Dalbir also wanted addressed.

[21] Bindra states that he met with Dalbir to review the draft offer to purchase in late April 2019. Bindra states he specifically asked Dalbir if he and Navneet wanted to include any conditions in the offer, particularly one with respect to a home inspection or financing. He states that Dalbir stated that he was expecting to receive some funds that would enable him to pay cash for the property, and that he was not interested in obtaining a mortgage.

[22] In early May 2019, Bindra again followed up with Dalbir about making an offer. At this time Dalbir again told Bindra that he was expecting funds and that he expected to be able to make an offer to purchase the Property without funding conditions by May 15, 2019. Following this conversation, Dalbir forwarded Bindra an e-mail that Dalbir was expected to receive $75 million (USD) as a result of a joint venture in which he was involved and that he intended to use part of these proceeds to purchase the Property. Bindra states that at no time did Dalbir indicate that any offer would be conditional on receipt of any funds arising out of this joint venture.

[23] On May 20, 2019, Navneet and Dalbir met with Bindra to sign the offer to purchase the Property. Bindra's recollection is that it was Dalbir who made the request for the meeting, that the meeting took 45 minutes to an hour and that the only condition that

Dalbir wanted to include was a home inspection. He states that he told the Bainses what a financing condition was and asked them whether they wanted to include one but that the Bainses chose not to include one in the offer.

[24] It is Bindra's evidence that from his initial meetings about the Property with the Bainses they, and specifically Dalbir, did not want a financing condition in any offer to purchase. His evidence is also that while Dalbir initially proposed a July 1, 2019 possession date, Bindra suggested a possession date of August 1, 2019 to allow more time for Dalbir to procure the funds. He states that he told the Bainses that if they signed the offer to purchase it would be a binding contract if the Jordans accepted it and the conditions as to inspection were satisfied.

[25] The position of Bindra and Re/Max is that the offer to purchase contains clear and unambiguous language. It is a standard residential offer to purchase with clear provisions stipulating that it contains all of the terms of the purchase and that anything not contained in the offer has no force and effect. Specifically, it states at paragraph 11(e)(iii)(A):

> This agreement contains all of the promises, agreements, representations, warranties and terms between the parties relating to the transaction hereby contemplated, and
> (A) anything not included in writing in this agreement will have no force and effect whatsoever;

[26] The third parties state that on May 31, 2019, the Bainses confirmed that the offer's only condition – the home inspection condition – was satisfied, and at that time the offer became unconditional and therefore a legally binding contract.

The Position of the Bainses

[27] The Bainses state that the agreement to purchase the Property was conditional on the Bainses receiving certain venture funding. In the alternative, the Bainses argue that the agreement to purchase the Property was varied to be conditional on the Bainses receiving the venture funding.

[28] It is admitted by the defendants that the offer to purchase does not contain any express reference to the agreement being conditional upon the receipt of funds by the defendants. However, relying on various statements by Keith on behalf of the plaintiffs and Bindra on behalf of the third parties at cross-examinations on affidavits produced by the respective parties, the Bainses maintain that the evidence makes it abundantly clear that the purchase of the Property was conditional on the receipt of the venture funding by the Bainses.

[29] In particular, the defendants point to various statements made by Bindra at his cross-examinations apparently acknowledging that the Jordans were willing to work with the Bainses regarding what the defendants characterize as the funding condition precedent to the offer to purchase and that Bindra was aware of the Bainses intention to use the venture funding to purchase the Property. The Bainses argue Bindra was cognizant of providing more time for the Bainses to procure the venture funding and that he was required to and therefore deemed to have disclosed this to the Jordans.

[30] Similarly, the defendants point to the cross-examination of Keith as evidence that he understood that once the funds were received the Bainses would close on the sale of the Property. The defendants argue that these cross-examinations reveal that the

Jordans always understood before the signing of the offer to purchase on May 20, 2019, that there would be delays and extensions and that when signing the offer to purchase the Jordans were willing to work with the Bains on this basis.

[31] The Bainses take the position that there was an understanding by the Bainses, the Jordans and Bindra that before signing the offer to purchase that the offer to purchase was conditional on the receipt of the venture funding which was a future uncertain event dependent upon those individuals with whom Dalbir was working with to obtain the funding. Furthermore, the Bainses argue that even if the offer to purchase was not originally contingent and conditional on the receipt of the venture funding by Dalbir, the agreement was repeatedly and consensually varied from the offer to purchase resulting in the agreement being contingent and conditional on the receipt of the venture funding by Dalbir.

Discussion and Analysis

[32] There is no dispute on the evidence that the Jordans, at all material times, were prepared to offer possession of the Property to the Bainses on the date of possession initially stipulated in the agreement, that is on August 1, 2019, and that the Bainses failed to tender the agreed upon purchase price of the Property to allow the transaction to close. However, the Bainses argue that the failure to tender the agreed upon purchase price by the initial possession date does not constitute a breach of the agreement by the Bainses. It is their position that the agreement was subject to financing and since they were unable to obtain the anticipated financing, the agreement was never finalized or otherwise concluded.

[33] The only evidence that the agreement was subject to financing is from Dalbir who states that he told Bindra that it was subject to financing. However, the offer itself contains no financing condition and Bindra denies he was ever told that the offer was subject to financing.

[34] Despite arguments being raised by the defendants that Dalbir was not a sophisticated businessman, particularly in respect of real estate matters, it is clear that he is a very sophisticated businessman. Exhibit 1 to the cross-examination of Dalbir includes a very extensive "Linkedin" resume. Dalbir is identified in this posting that he is the president, chairman and CEO of a company involved in the area of pharmaceutical health services across Canada. His experience, both in business and in volunteer positions, and his formal education, including a Bachelor of Commerce in Finance (University of Manitoba 1990-1994) and a Certified Financial Analyst designation (CFA Institute 1994-1997), speak to his sophistication. His past corporate experience since 1997 as stated in his resume sets out a very impressive involvement in the area of, inter alia, corporate mergers and acquisitions indicating that he has led and supported acquisitions totaling over $5 billion over the course of his career, investor relations, operational efficiencies, human resources and the raising of capital.

[35] Furthermore, with respect to residential housing agreements, the plaintiffs point out in their argument that Dalbir had previous experience in buying homes and with the residential offer to purchase form.

[36] The parties agree there is no written financing condition included in this contract. It is also my conclusion that the evidence establishes that the Bainses were fully aware

of the nature of a condition in a standard form residential offer to purchase given the fact that, after Bindra's inquiries, the Bainses chose to include a home inspection condition in the offer to purchase.

[37] The case law is clear that when the parties have reduced the terms of their agreement to writing, in a clear and unambiguous manner, the express terms define the obligations of the parties. As noted in ***Hassel v. Khoshgoo***, 2010 BCSC 233, 2010 CarswellBC 431 (QL), at para. 15, which quotes ***Osooli-Talesh v. Emani***, 2008 BCSC 119, 2008 CarswellBC 582, at para. 254 as follows:

> … Extrinsic evidence is generally not admissible to vary, modify, or add to the express terms of a written contract. The rule is consistent with the approach that courts generally take to determine the intention of contracting parties – an objective analysis, rather than considering what the parties testified their intentions to be.

[38] In ***Hassel***, the court considered the effect of an explicit "entire agreement" clause as well as an express bolded and capitalized notice to buyers submitting an offer similar to that found in the offer to purchase in this case. As the court observed in that case at para. 19:

> … One would not require a sophisticated facility with the English language to understand from those words that the contract would be binding.

[39] In ***Wilson v. Upperview Baldwin Inc.***, 2019 ONSC 4013, [2019] O.J. No. 3434 (QL), the court rejected the evidence of the defendant purchasers that the standard form agreement to purchase should be read to include implied "subject to" conditions. In ***Wilson*** the court held that:

> **41** While the court can look to surrounding circumstances when interpreting contracts, "courts cannot use them to deviate from the text such that the court

effectively creates a new agreement": see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 57.

42 The Supreme Court of Canada also notes at para. 59 of *Sattva* that:

> The parole evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing. To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties. The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract. [Citations omitted.]

[40] In my opinion the following conclusions in ***Hassel*** are equally applicable here:

14 As already noted, the written contract contains no "subject to financing" clause. As well, the written contract explicitly states: "There are no warranties, representations, guarantees, promises, or agreements other than those set out herein, all of which shall survive the completion of the sale." The only evidence of some collateral agreement relating to financing comes from the defendant's affidavit, where he deposes at paragraph 6, "Wayne Walfram Hassel knew that I was required financing to complete purchase of the premises and the agreement to purchase the property was to be subject to financing, despite what he wrote in the purchase contract."

15 To admit that evidence would be inconsistent with the parol evidence rule. A concise explanation of that rule may be found in *Osooli-Talesh v. Emami*, 2008 BCSC 119, at para. 254:

> It may be stated this way: when parties have reduced the terms of their agreement to writing, in a clear and unambiguous manner, the express terms define the obligations of the parties. Extrinsic evidence is generally not admissible to vary, modify, or add to the express terms of a written contract. The rule is consistent with the approach that courts generally take to determine the intention of contracting parties – an objective analysis, rather than considering what the parties testified their intentions to be.

16 As that case notes, the rule is not absolute and may be subject to certain exceptions. However, I am satisfied that none of the exceptions are applicable here, and I would not admit the parol evidence for the purpose of contradicting the express terms of the written contract.

[41] In this case I have no doubt on the basis of the evidence that the defendants were certain that the anticipated venture funding would arrive in a timely fashion in order to

meet their obligations pursuant to the agreement to purchase the Property. I also find that despite Bindra suggesting to the defendants that they consider including a subject to financing condition in the offer to purchase, the defendants chose for their own reasons not to include such a condition.

[42] In my opinion any changes to the agreement to purchase the Property after the acceptance of the offer to purchase, primarily if not exclusively the postponement of the possession date, were in no way a recognition or evidence of an admission by the plaintiffs that the agreement was subject to a financing condition. The mutually agreed upon changes were simply an accommodation offered by the plaintiffs to the defendants and in their own self-interest to prevent the deal from falling apart when it became apparent after the acceptance of the offer to purchase that the receipt of the funds which the defendants were awaiting were not forthcoming on a timely basis. These accommodations by the plaintiffs in no way absolved the defendants of their unconditional obligation to purchase the property once the inspection condition was satisfied.

[43] Even if I am mistaken in arriving at this conclusion on the evidence, it is my opinion the following observations and point of law set out in ***Aconley et al. v. Willart Holdings Ltd.***, [1964] M.J. No. 38, 47 D.L.R. (2d) (Man. Q.B.) (QL) are applicable. At paras. 36 and 37, Smith J. states:

> **36** I have repeatedly read and studied the evidence in this case. On that evidence I find myself unable to reach a conclusion that satisfies my mind on a balance of probabilities concerning the discussions claimed to have taken place between the solicitors about the alleged condition. The evidence of the defendant's solicitor is positive and detailed. The evidence of the male plaintiff's solicitor is equally positive and his conduct indicates that, whatever may have been said on

> these occasions, no impression was left on his mind of a condition of the kind herein described attaching to the contract.
>
> **37 The onus is always on defendant to prove the existence and terms of any verbal condition precedent to which a written contract is claimed to be subject. The defendant has failed, on a balance of probabilities, to discharge this onus.**
> *(emphasis added)*

[44] In this case the defendants have similarly failed to meet their onus to prove the existence of a verbal condition or even a collateral contract to which the defendants claim the written agreement is to be subject.

Conclusion as to Liability

[45] Based on the forgoing reasons, it is my conclusion that the contract is clear and unambiguous. There is no financing condition or collateral agreement contained in the offer to purchase nor any other financing condition or collateral agreement between the defendants and the plaintiffs. The only condition to which the sale of the Property was subject to was the inspection condition. Once the inspection condition was satisfactorily addressed by the parties, the contract to purchase the Property was no longer subject to any conditions and was legally binding on both of the parties.

[46] Furthermore, the evidence that I accept and have set out in these reasons demonstrate that the third-party Bindra, and consequently Re/Max, properly and prudently advised the defendants to include a financing condition in the offer to purchase but that the defendants for their own reasons declined to follow that advice. The defendants have failed to establish that the third parties did not carry out the obligations, fiduciary or otherwise, which they were required to perform in respect of their responsibilities to the defendants.

[47] Accordingly, the summary judgment motion of the plaintiffs against the defendants, subject to the determination of the appropriate award of damages in favour of the plaintiffs as set out in the following paragraphs, is granted. The claim by the defendants against the third parties is dismissed with costs.

Damages Generally

[48] The total amount of the loss claimed by the Jordans as damages is calculated at $910,383.86 and is broken down as follows:

a) Difference in purchase prices: $740,000;

b) Storage costs for vacating the Property early to accommodate possession date requested by the defendants: $58,627.51;

c) Rental of alternate accommodations to accommodate possession date requested by the defendants: $55,420;

d) Maintenance costs for the Property not otherwise recovered by rent: $81,336.35; and

e) Less credit of deposit: ($25,000)

[49] The plaintiff argues that the basic principle for assessing damages for breach of contract that applies in this case is that the award of damages should put the injured party as nearly as possible in the position it would have been if the contract had been performed. In the context of a real estate transaction the plaintiff states that in a falling market the court should award the vendor damages equal to the difference between the contract price and the highest price obtainable within a reasonable time after the

contractual date for completion following the making of reasonable efforts to sell the property commencing on that date.

[50] The defendants agree generally with the plaintiffs' position in respect of the basic principle for assessing damages for breach of contract in this matter. In their brief on damages (Court Document 72) they rely on the decision of the Supreme Court of Canada in ***Southcott Estates Inc. v. Toronto Catholic District School Board***, 2012 SCC 51, [2012] 2 S.C.R. 675 (QL), which states at para. 23 that:

> **23** This Court in *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633, cited (at pp. 660-61) with approval the statement of Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Co. v. Underground Electric [page686] Railways Company of London, Ltd.*, [1912] A.C. 673, at p. 689:
>
> > … The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but **this first principle is qualified by as second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damages which is due to his neglect to take such steps.**
> >
> > *(Emphasis as set out in the brief of the defendants)*

[51] It is the plaintiffs' failure to take all reasonable steps to mitigate the losses consequent to the breach which the defendants state limits the plaintiffs' ability to recover the damages to the extent claimed by them.

Damages in Respect of the Purchase Price of the Property

[52] I am satisfied that based on the evidence here that the plaintiffs did take all reasonable steps to mitigate the losses in respect of the purchase price of the Property. In my opinion they did not improperly delay in putting the Property back on the market. The evidence establishes that while the plaintiffs did not immediately relist the Property when the defendants failed to provide the funds to close on the date stipulated in the

offer to purchase, namely August 1, 2019, it was reasonable for them not to do so given the defendants' representations and promises that the funds would be arriving within weeks, if not days.

[53] These representations by the defendants that the funding would be forthcoming in order to close the deal, continued right up until almost the end of November 2019. Both parties were interested in seeing that the purchase was successfully concluded and the plaintiffs repeatedly accommodated the delay occasioned by the defendants' failure to produce the necessary funds on August 1, 2019, in order to facilitate a successful conclusion of the purchase agreement.

[54] As argued by the plaintiffs in their brief, when it became clear in early December 2019, that the defendants would not be buying the Property, it was reasonable for them not to put the Property back on the market, given the winter season and the market conditions at the time. Furthermore, within months of that decision, COVID–19 and the associated lockdowns occurred, creating further problems with trying to sell the Property.

[55] The Property was listed at the same price on February 28, 2020, as agreed to by the parties in the offer to purchase. It was kept on the market until October 2020, when Bindra advised the plaintiffs to remove the Property from the market due to the number of days it had been listed. After the relisting, the plaintiffs reduced the asking price on several occasions, but those reductions did not generate a successful offer.

[56] I have considered the evidence contained in the affidavit of Rebecca McClure, an appraiser whose qualifications in my opinion allow her to provide the expert opinion in respect of market trends for upper end valued residential single family detached real

estate located in the Tuxedo area of Winnipeg in which the Property is situated. This affidavit and opinion, sworn on December 20, 2022, was filed by the plaintiffs to support their decisions with respect to the listing price of the property, the decision to de-list the Property and when to relist the Property, the decision to decrease the list price of the Property and the decision to accept an all-cash offer in April 2021 for a reduced amount.

[57] I have also considered the affidavit evidence filed by the defendant Dalbir, affirmed on November 29, 2022, challenging the decisions made by the plaintiffs in respect of the listing and sale of the Property subsequent to the collapse of the purchase agreement between the plaintiffs and defendants.

[58] I note that the plaintiffs have raised numerous objections to the evidence contained in Dalbir's affidavit of November 29, 2022, and ask that a significant portion of the affidavit be struck or expunged, or in the alternative that no weight be given to the impugned provisions. They argue the inclusion of a report of an expert as an exhibit, thereby shielding the expert from being challenged on cross-examination, is also improper. Further objections to the evidence include objections by the plaintiffs that the statements in the affidavit violate the rules against hearsay, that they are argumentative, and that they rely on facts or conclusions not properly admitted into evidence, including the concern that those statements draw improper conclusions of fact or law.

[59] Rather than striking an affidavit or a portion thereof, my general practice is to consider the objections to the impugned material and if I accept those objections as raising valid concerns about the substantive content of the affidavit, I then factor those

objections into my decision as to how much weight, if any, can be assigned to the impugned evidence.

[60] I accept the concerns of the plaintiffs in respect of the evidence set out in Dalbir's affidavit of November 29, 2022. Those objections are laid out in detail in the plaintiffs' supplemental motion brief (Court Document 71) at pages 11 through 21. While much of the impugned evidence should be given little or no weight, in my opinion the attachment of the expert report by Leigh Nanton as an exhibit to that affidavit is clearly not appropriate. I agree with the plaintiffs that it improperly shields the maker of the report from cross-examination and a proper testing of the opinion being proffered in that exhibit. I note that the defendants filed that expert report as a separate affidavit by Leigh Nanton on January 26, 2023, approximately a week before this hearing and a day after the plaintiffs filed their supplemental brief setting out their concerns about the inclusion of the initial report by Leigh Nanton as an exhibit to Dalbir's affidavit.

[61] Clearly the report by Leigh Nanton as an exhibit to Dalbir's affidavit cannot be utilized for its intended purpose and must be struck from that affidavit. In respect of the affidavit by Leigh Nanton, given that the plaintiffs did not have a realistic opportunity to cross-examine the affiant, its weight must be reduced accordingly for that reason alone.

[62] It is Leigh Nanton's opinion in her report that the Property had a value of $1,997,600 in May 2019, and that its market value in April 2021 would be $1,931,600. Those dates approximate firstly with the date of the offer to purchase (May 20, 2019) and secondly, the date on which the Property was finally sold by the Plaintiffs in April 2021. Accordingly, the defendants argue, the loss and consequential damages suffered

by the plaintiffs in respect of the purchase price of the Property is the difference between Leigh Nanton's valuation of the Property in May 2019 and on April 2021. This amounts to $66,000.

[63] Aside from the fact that the plaintiffs did not have an appropriate opportunity to cross-examine the affiant in respect of that opinion, in my opinion the conclusions of Leigh Nanton in respect of the damages suffered by the Jordans are flawed. The value of the Property on the date the offer to purchase was accepted is not a matter of opinion. It is a matter of fact that, as evidenced by the offer to purchase itself, the value both parties ascribed to the Property in May 2019 was $2,290,000. Furthermore, the prima facie value of the property in April 2021 was $1,550,00 as evidenced by the sale of the Property for that price. It is only if the plaintiffs did not take reasonable steps to mitigate their damages, that another figure might be substituted for that which the Property was sold.

[64] In arriving at that conclusion, I rely on the reasons of the court in ***Panegos v. O'Byrne***, 2019 BCSC 679, [2019] B.C.J. No. 770 (QL) (reversed on other grounds, 2020 BCCA 352), which in my opinion summarizes the applicable law on this issue in Manitoba as well. The court there held:

> **38** In *Greenberg*, Dillon J. wrote:
>
> > [23] Basically, the date chosen for assessment must be fair on the facts of the case. In a falling market, an innocent vendor who makes reasonable efforts to resell a property within a reasonable time after the breach may be awarded the difference between the contract price and the resale price. As stated by Laskin J.A. in *642947 Ontario Ltd. v. Fleischer* (2001), 2001 CanLII 8623 (ON CA), 56 O.R. (3d) 417, 209 D.L.R. (4th) 182 (C.A.) at para. 41:
> >
> > > [41] The judgment of Morden J.A. in *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 1978 CanLII 1630 (ON CA), 20 O.R. (2d) 401, 88 D.L.R. (3d) 1 (C.A.), is the principal authority in this court on the assessment of damages for breach

> of an agreement of purchase and sale. In that case, the purchaser agreed to buy an apartment building but repudiated the contract before closing. The vendor sued for damages and both the trial judge and this court held the purchaser liable. The main issue in this court was when the damages should have been assessed. At the risk of doing a disservice to the thorough and thoughtful reasons of my colleague, I summarize what he wrote about the choice of the date for assessing damages for breach of an agreement to buy land in the following … propositions, which are relevant to this appeal:
>
> > (1) The basic principle for assessing damages for breach of contract applies: the award of damages should put the injured party as nearly as possible in the position it would have been in had the contract been performed.
> >
> > (2) Ordinarily courts give effect to this principle by assessing damages at the date the contract was to be performed, the date of closing…
> >
> > (3) The court, however, may choose a date different from the date of closing depending on the context. Three important contextual considerations are the plaintiff's duty to take reasonable steps to avoid its loss, the nature of the property and the nature of the market.
> >
> > (4) Assessing damages at the date of closing may not fairly compensate an innocent vendor who makes reasonable efforts to resell in a falling market. In some cases, the nature of the property – for example an apartment building – hampers the vendor's ability to resell quickly. Thus, if the vendor takes reasonable steps to sell from the date of breach and resells the property in some reasonable time after the breach, the court may award the vendor damages equal to the difference between the contract price and the resale price, instead of the difference between the contract price and the fair market value on the date of closing.
> >
> > (5) Therefore, as a general rule, in a falling market the court should award the vendor damages equal to the difference between the contract price and the "highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date" (at p. 421).
>
> **39** As the plaintiffs took all reasonable steps to resell their properties as soon as possible, they are entitled to damages equal to the difference between the original contract price and the resale price.

[65] On that basis, the conclusions in respect of damages suffered by the plaintiffs set out in the report of Leigh Nanton are not based upon the appropriate considerations. Accordingly, I do not accept those conclusions.

[66] As I stated earlier in these reasons, I am satisfied on the evidence here the plaintiffs did take all reasonable steps to mitigate the losses in respect of the purchase price of the Property. In my opinion, the plaintiffs did not improperly delay in putting the Property back on the market. The evidence demonstrates that in light of the steps the plaintiffs took and the decisions the plaintiffs made in order to try to sell the property once it was back on the market, it was reasonable for the plaintiffs to finally sell the Property on April 16, 2021 for the price agreed upon at that time with a third-party purchaser. The sum of $1,550,000 in my opinion was the "highest price obtainable within a reasonable time after the contractual date for completion following the making of reasonable efforts to sell the property commencing on that date." (See Morden J.A. in ***100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.*** (1978) 20 O.R. (2d) 401, 88 D.L.R. (3d) 1 (Ont. C.A.))

[67] Accordingly, the plaintiffs are entitled to the difference in the purchase price set out in the offer to purchase and the eventual resale of the Property on April 16, 2021. This amount is $740,000 for which the defendants are liable to the plaintiffs in damages.

Consequential And Other Damage Claims by the Plaintiffs ("Consequential Damages")

[68] The Consequential Damages claimed by the plaintiffs are:

a) Storage costs for vacating the Property early to accommodate possession date requested by the defendants: $58,627.51;

b) Rental of alternate accommodations to accommodate possession date requested by the defendants: $55,420;

c) Maintenance costs for the Property not otherwise recovered by rent: $81,336.35

[69] I accept the evidence of the plaintiffs that they commenced building a house in August 2019, which was ultimately not complete until April 2021. I further accept that in order to accommodate repairs requested by the defendants, the plaintiffs moved into an apartment at One Evergreen Place. Furthermore, I have no difficulty in accepting that certain damages arising out of the rental of alternate accommodations, storage costs for vacating the Property and certain maintenance costs are recoverable by the plaintiffs.

[70] In respect of the rental of the apartment at One Evergreen Place, the plaintiffs advised the defendants of their intention to do so and the defendants made no objection in that regard. Clearly the move at that time was required in order to facilitate the repairs requested by the defendants and by the fact that between August 1, 2019, and the beginning of December 2019, the defendants continued to express every intention of going through with their purchase of the Property.

[71] The plaintiffs' position in that regard was not challenged on cross-examination by the defendants. It is not appropriate to simply put forward an alternate reason for why the plaintiffs chose to vacate the property by suggesting another reason in the affidavits of Dalbir. As argued by the plaintiffs, the rule in ***Browne v. Dunn***, (1894) 6 R. 67, [1893] J.C.J. No. 5, dictates that this alternate reason, namely that the Jordans left in order to move their primary residence to Miami Florida, be put to the plaintiff Keith when he was cross-examined on his affidavit. Yet, on the cross-examination of Keith on his

affidavit, the defendants chose not to contradict the reason given by the plaintiffs as to why they left the Property when they did.

[72] I accept that had the plaintiffs received clear confirmation from the defendants on or before August 1, 2019, that they did not have the funds to close, the plaintiffs could have, and indeed, would have been obligated to take immediate steps to relist the property.

[73] However, the defendants continued to assure the plaintiffs throughout the Fall of 2019 that they intended to provide the necessary funds and close the deal. Accordingly, certain damages in respect of renting the apartment, the storage of some of the plaintiffs' property and the maintenance of the Property naturally flowed from the defendants' breach ("consequential damages"). The plaintiffs argue that although they knew by December 2019 that the defendants were unwilling or unable to close the deal, the consequential damages continued to flow after that date owing to the fact that "winter season" and market conditions generally made it unadvisable to immediately list the Property at the beginning of December 4, 2019. The advent of Covid-19 further complicated the ability of the plaintiffs to sell and thus mitigate their losses immediately.

[74] The defendants state that the plaintiffs failed to mitigate their damages by failing to immediately place the Property back on the market and that damages in respect of the Property purchase price as well as any other damages be assessed as of August 1, 2019.

[75] I have already stated in these reasons why the actions of the plaintiffs in respect of their decisions relating to the relisting of the Property were reasonable and that their

conduct in that respect in terms of mitigating their damages in respect of the purchase price of the Property was appropriate.

[76] An alternate position advanced by the defendants is that once the plaintiffs knew with certainty that the deal had fallen apart on December 4, 2019, they should have moved back into the Property and thereby reduced the consequential damages by living in the Property. In my opinion there is merit to that argument.

[77] While it may not have been feasible to do so immediately, I fail to see why the plaintiffs could not have moved back into the Property within a reasonable time after December 4, 2019. Owing to their lease in respect of the apartment at One Evergreen Place they may have had certain commitments under that lease, but I fail to see why those commitments should have continued for the entire period claimed even if they were unable to sublease or otherwise terminate that lease before its expiry.

[78] Similarly, I fail to understand why it was necessary to store their personal property with a third party when the Property itself was available to them after December 4, 2019. While there may have been additional moving costs with moving that personal property back to the Property, or indeed personally moving back to reside in the Property, I am not satisfied that it could not have been done or that it would have detracted from their ability to sell the Property.

[79] In my opinion, the plaintiffs have failed to establish that the consequential damages to the extent claimed naturally flowed from the defendants' breach of the agreement. The plaintiffs were entitled to a reasonable amount of time to make that

transition back to residing in the Property, but the time period claimed for exceeds that reasonable period of time.

[80] My review of the evidence leads me to the conclusion that the period of time for the calculation of the consequential damages, with the exception of the interest claimed on account of money that the plaintiffs borrowed in order to finance the construction of a new home, includes the time period from August 1, 2019 to the end of March 31, 2020.

[81] In respect of the interest paid by the plaintiffs on account of money that the plaintiffs borrowed in order to finance the construction of a new home, the plaintiffs are entitled to the entire amount, namely $51,122.25 as set out in Exhibit DD to the affidavit of Keith dated June 28, 2022. All other amounts claimed under the heading of Maintenance costs for the Property not otherwise recovered by rent as set out in Exhibit DD to the affidavit of Keith dated June 28, 2022 are recoverable by the plaintiffs as against the defendants in respect of the amounts incurred between August 1, 2019 and ending on March 31, 2020.

[82] Accordingly, the plaintiffs are entitled to the consequential damages claimed from August 1, 2019 to the end of March 31, 2020 under all headings of consequential damages claimed by the plaintiffs with the exception of the interest claimed at Exhibit DD which amount is recoverable against the defendants in the entire amount of $51,122.25.

[83] I accept the calculation of those damages on the basis advanced by the plaintiffs in their arguments. I will leave it to the plaintiffs and the defendants to calculate that precise amount, but if they are unable to agree upon a specific amount, they may each provide me with a written submission in the form of a letter setting out their position in

that respect. This amount should also take into account the $25,000 deposit credit provided to the plaintiffs by the defendants if not otherwise accounted for. I will determine the amount of the consequential damages on the basis of that correspondence as well as my review of the evidence already before the court.

Conclusion

[84] In the result the motion for summary judgment brought by the plaintiffs Vicky Jordan and Keith Jordan against the defendants Dalbir Bains and Navneet Kaur-Bains is granted whereby the defendants Dalbir Bains and Navneet Kaur-Bains are ordered to pay the plaintiffs Vicky Jordan and Keith Jordan the following amounts:

a) $740,000, being the difference in the purchase price set out in the offer to purchase and the eventual resale of the Property on April 16, 2021;

b) The consequential damages as calculated in paragraphs 81, 82 and 83 above; and

c) Costs based on the appropriate tariff.

[85] The third-party claims against the third parties Bindra and Re/Max are dismissed with costs against the defendants Dalbir Bains and Kaur-Bains on the basis of the appropriate tariff. By virtue of the result in the summary judgment motion brought by the Jordans, the summary judgment motion brought by the Bainses against the Jordans is dismissed.

_____ J.