CITATION: Saint-Fort v. Ashcroft Homes – Eastboro Inc., 2024 ONSC 651
COURT FILE NO.: CV-20-85354
DATE: 2024/01/31

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Jean Jacquelyn Saint-Fort, Audrey Pierre, Blaise Tongace Traore, Briana Brissette, Mario Pleau, Fatoumata Diallo, Naji Youssef Zourob, Ziad Jaber, Tania Maruf, Michel Lebeau, Jeremy Nantel Saint-Fort, Samuel Stewart, Eyr Technologies Inc., Abbas Sobh, Hanadi Dawi, Tania Dawi, Bilal Balaa, Haissam Balaa, Mounawar Jammal, Abd El Hadi Balaa, Nada Nasri, Fraz Tabassam, Nasr Balaa, Ghulam Hakim, Luc Boudreau, Sheri Boudreau, Lise-Anne Boal, Kenneth Boal, Asjad Mahmood Malik, Moazzam Iqbal, Jean Denis Labrosse, Lise Labrosse, Hanan Talabeh, Samer Mardini, Rahaf Seahdh, Summera Azam, Najma Kouser, Mushtaq Ahmed Shahid, Fahmida Jahangir, Michel Brissette, Khaled Makkouk, Nooraddin Albaghjati, Muhammad Aamir Shehzad, Sumera Ameer Khan	)	Pierre Champagne, Louis-Pierre Grégoire, and Graeme Macpherson for the Plaintiffs
Plaintiffs	)	
– and –	)	
Ashcroft Homes – Eastboro Inc.	)	Brett Hodgins for the Defendant
Defendant	)	
	)	**HEARD:** March 20, 21, 22, 23, 24, June 5, 6, 7, and July 4, 2023

REASONS FOR JUDGMENT

RYAN BELL J.

Overview

[1] In late 2017 or, in some cases 2018, each of the plaintiffs entered into a standard form agreement of purchase and sale for a residential home to be built by the defendant Ashcroft Homes – Eastboro Inc. as part of Ashcroft's Eastboro development in Orleans. By regulation, each purchase agreement incorporated the provisions of the Tarion Addendum which permits certain types of early termination conditions.

[2] Schedule U to the purchase agreement, drafted by Ashcroft, is an appendix to the Tarion Addendum and sets out additional early termination conditions. Condition 2 provides that Ashcroft's acceptance of the purchase agreement is conditional on Ashcroft "having completed the subdivision construction of the roads and offsite services sufficient to enable the issuance of a building permit for the dwelling." The "Approval Authority"[1] for condition 2 is identified as "the Vendor", in other words, Ashcroft. The date for the fulfillment of condition 2 is "June 2020."

[3] On July 6, 2020, Ashcroft purported to terminate the plaintiffs' purchase agreements, relying on condition 2 of Schedule U.

[4] The plaintiffs say Ashcroft was not entitled to rely on condition 2 of Schedule U to terminate the purchase agreements because condition 2 is contrary to the terms of the Tarion Addendum. The plaintiffs also say Ashcroft was, in any event, out of time to terminate the purchase agreements. They also argue the registration of a caution was not contrary to s. 28 of the purchase agreement and that Ashcroft was not entitled to terminate the agreements on this basis. Finally, the plaintiffs maintain Ashcroft breached its contractual obligation to take all commercially reasonable steps within its power to satisfy condition 2 of Schedule U. They seek orders and declarations consistent with the positions they advance.

[5] For its part, Ashcroft maintains that condition 2 of Schedule U is consistent with and permitted by the terms of the Tarion Addendum, it was entitled to rely on condition 2 to terminate the purchase agreements, and it did so in a timely manner. In the alternative, Ashcroft says the plaintiffs breached s. 28 of the purchase agreement and that entitled Ashcroft to terminate. Ashcroft argues that it met its contractual obligations and there is no evidence before the court that it "did not take steps in good faith to meet deadlines" and no evidence that it "never intended to follow through with its obligations."

[6] For the following reasons, I conclude that condition 2 of Schedule U is consistent with the Tarion Addendum and Ashcroft was entitled to invoke condition 2 to terminate the plaintiffs' purchase agreements. I further find that Ashcroft did so in a timely manner. Finally, I do not find

[1] The Tarion Addendum uses the term "Approving Authority." Condition 2 of Schedule U uses the term "Approval Authority."

that Ashcroft breached its contractual obligation to take all commercially reasonable steps within its power to satisfy condition 2 of Schedule U. The action is therefore dismissed, with costs.

The purchase agreement

[7] The purchase agreement is a standard form prepared by Ashcroft, with the terms and conditions being the same for all plaintiffs: each plaintiff provided Ashcroft with a deposit, Ashcroft promised to build/construct a specific model of residential home, and agreed to transfer title to the home once construction was complete.

[8] The Tarion Addendum is Schedule T to the purchase agreement. It includes a statement of critical dates. Ashcroft confirmed that commencement of construction was expected to occur by October 1, 2018.

[9] In the Tarion Addendum, under the heading "Setting and Changing Critical Dates", paragraph 6(b) provides:

> The Vendor is not permitted to include any conditions in the Purchase Agreement other than: the types of Early Termination Conditions listed in Schedule A; and/or the conditions referred to in paragraphs (j), (k) and (l) below. Any other condition included in Purchase Agreement for the benefit of the Vendor that is not expressly permitted under Schedule A or paragraphs (j), (k) and (l) below is deemed null and void and is not enforceable by the Vendor, but does not affect the validity of the balance of the Purchase Agreement.

[10] Paragraph 6(c) states "The Vendor confirms that this Purchase Agreement is subject to Early Termination Conditions that, if not satisfied (or waived, if applicable), may result in the termination of the Purchase Agreement" with boxes to be "ticked" either "yes" or "no." Only 12 of the plaintiffs' purchase agreements had a check mark at paragraph 6(c).

[11] Paragraph 6(d) then provides:

> If the answer in (c) above is "Yes", then the Early Termination Conditions are as follows. The obligation of each of the Purchaser and Vendor to complete this purchase and sale transaction is subject to satisfaction (or waiver, if applicable), of the following conditions and any such conditions set out in an appendix headed "Early Termination Conditions."

[12] Paragraph 6(d) provides a space for vendors to "fill in" early termination conditions. Schedule U is referred to in this space on some of the plaintiffs' purchase agreements, but on many of the agreements, the space is blank.

[13] Contracting out of the protections provided by the Tarion Addendum is prohibited. Under paragraph 13 of the Addendum, the vendor and purchaser agree not to include any provision in the purchase agreement that "derogates from, conflicts with or is inconsistent with" the provisions of the Addendum except where the Addendum expressly permits the parties to agree or consent to an

alternative arrangement. Paragraph 13 also states that the provisions of the Tarion Addendum prevail over any offending provision.

[14] Schedule A to the Tarion Addendum specifies the "types" of permitted early termination conditions. Paragraph 1(a)(v) of Schedule A provides that the vendor of a home is permitted to make the purchase agreement conditional on the receipt of "Approval from an Approving Authority" for "completion of hard services for the property or surrounding area (i.e. roads, rail crossings, water lines, sewage lines, other utilities)."

[15] Paragraph 4(a) of Schedule A to the Tarion Addendum states that the vendor is not permitted to make the purchase agreement conditional upon receipt of a building permit.

[16] Each plaintiff signed their purchase agreement and each plaintiff initialled each page of the agreement, including the Tarion Addendum and Schedule U.

[17] Under Schedule F to the purchase agreement, each plaintiff had five business days from the date of acceptance to have the purchase agreement reviewed and approved by independent legal counsel. Schedule F requires that the purchaser notify Ashcroft in writing as to their inability to satisfy this condition within the time period, failing which the condition is deemed to have been satisfied. None of the plaintiffs notified Ashcroft as to their inability to satisfy this condition. Indeed, the plaintiffs went further, and waived the "lawyer's approval" condition.[2]

[18] Paragraph 6(i) of the Tarion Addendum also provides important context. Paragraph 6(i) provides:

> If a Purchase Agreement or proposed Purchase Agreement contains Early Termination Conditions, the Purchaser has three (3) Business Days after the day of receipt of a true and complete copy of the Purchase Agreement or proposed Purchase Agreement to review the nature of the conditions (preferably with legal counsel). If the Purchaser is not satisfied, in the Purchaser's sole discretion, with the Early Termination Conditions, the Purchaser may revoke the Purchaser's offer as set out in the proposed Purchase Agreement, or terminate the Purchase Agreement, as the case may be, by giving written notice to the Vendor within those three Business Days.

[19] None of the plaintiffs invoked the option provided in paragraph 6(i) of the Tarion Addendum.

[20] The plaintiffs highlight that Ashcroft's sales personnel did not describe or explain any particular provisions of the purchase agreement to the plaintiffs and Ashcroft's acknowledgment that it did not provide training to its sales staff regarding how to complete the purchase agreement. However, there is no evidence that the plaintiffs were misled or signed their agreements in error.

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[2] In addition to the financing condition.

The July 6, 2020 termination letter

[21] On July 6, 2020, Ashcroft sent each plaintiff a letter purporting to terminate their purchase agreement. The text of the letter to Michel Brissette is representative:

> The purpose of this letter is to advise you that, in accordance with Schedule "U" of the agreement of purchase and sale (Appendix to Tarion addendum RE Additional Early Termination Conditions), Ashcroft has been unable to meet the condition regarding the servicing of the subdivision within the time permitted.
>
> Please find the condition to the cause below and a copy has been attached for reference:
>
> **"2. The Vendor having completed the subdivision construction of the roads and offsite infrastructure services sufficient to enable the issuance of a building permit for the dwelling – June 2020"**
>
> In consequence the Agreement of Purchase and Sale has become null and void and your deposit is being returned to you without interest or penalties.
>
> We sincerely apologize for the inconvenience this may have caused you.
>
> It will be our priority that as soon as we are ready to relaunch the affected homes we will contact you to offer you an opportunity to purchase at a VIP preferred price.

[22] There is no dispute that the copy of Schedule U attached to each termination letter was Schedule U for Lot 68, which stated the deadline to be June 1, 2020. Ashcroft admits that this was an error on its part. There is no dispute that Schedule U to the plaintiffs' purchase agreements specifies "June 2020" as the deadline for the fulfillment of condition 2.

[23] The deposits of all the plaintiffs were fully refunded.

The caution registered on title

[24] On July 27, 2020, one of the plaintiffs registered a caution on title under s. 128 of the *Land Titles Act*.[3] Ashcroft advised the plaintiffs that, without prejudice to its earlier termination, it was invoking s. 28 of the purchase agreement to terminate the contracts. Section 28 provides:

> The Purchaser covenants and agrees not to register this Agreement or any notice or other indication thereof, including any *lis pendens* or certificate of pending litigation, on the title to the Real Property without the express written consent of the Vendor. Breach of this paragraph by the Purchaser

[3] R.S.O. 1990, c. L.5.

> shall be deemed to be a fundamental breach of this Agreement entitling the Vendor to rescind this Agreement.

The offer to purchase at "VIP pricing"

[25] There was evidence at trial that Ashcroft contacted the plaintiffs in January 2021 with an opportunity to purchase the lots in Eastboro development at "VIP pricing." However, disclosure of the VIP price was made conditional on the plaintiffs signing a full and final release. None of the plaintiffs did so.

The issues

[26] The issues I must determine are:

(i) Is condition 2 of Schedule U contrary to the terms of the Tarion Addendum?

(ii) If Ashcroft was entitled to rely on condition 2 to terminate the plaintiffs' purchase agreements, did it do so in a timely manner?

(iii) Was Ashcroft entitled to terminate the purchase agreements in reliance on s. 28?

(iv) Did Ashcroft breach its contractual obligation to take all commercially reasonable steps within its power to satisfy condition 2 of Schedule U?

Issue 1: Is condition 2 of Schedule U contrary to the terms of the Tarion Addendum?

[27] The plaintiffs argue that condition 2 of Schedule U is contrary to the terms of the Tarion Addendum because: (i) condition 2 does not fall within the "types" of early termination conditions permitted by paragraph 6(b) of the Tarion Addendum; (ii) condition 2 makes the purchase agreement conditional upon the receipt of a building permit, contrary to the prohibition in Schedule A to the Tarion Addendum; (iii) Ashcroft failed to check the box at paragraph 6(c) of the Tarion Addendum; and (iv) Ashcroft improperly identified itself as the "Approval Authority" in condition 2 of Schedule U.

[28] The parties have referred me to *Reddy v. 1945086 Ontario Inc.*,[4] an application for a determination of contractual rights that depended on the interpretation of an early termination provision in a pre-construction agreement of purchase and sale for condominium units. At paras. 28 and 29 of *Reddy,* Penny J. summarizes the applicable principles of contractual interpretation:

> 28. While it is true that words in a contract are presumed to have meaning, this principle of contract interpretation is one of many, and must be placed in proper context. One of the well-accepted, more

[4] 2019 ONSC 2554.

> comprehensive formulations of contract interpretation is that a contract is to be interpreted:
>
> (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the cardinal presumption that they have intended what they said;
>
> (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and to the extent there is any ambiguity in the contract,
>
> (d) in a fashion that accords with sound commercial principles and good business sense and that avoids a commercial absurdity.
>
> *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 (CanLII), [2007] O.J. No. 1083 (C.A.) at para. 24.
>
> 29. The Supreme Court of Canada considered the principles of contract interpretation in *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53. The overriding concern is to determine the intent of the parties. To do so the court must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own. No contract is made in a vacuum. Subjective evidence of intention, however, is not admissible in the guise of "surrounding circumstance."

[29] Applying these principles to the issue and the circumstances of this case, I conclude that condition 2 of Schedule U is not contrary to the terms of the Tarion Addendum. My reasons are the following.

[30] First, the plaintiffs submit that condition 2 of Schedule U was not included in the "list" of the types of early termination conditions that could be included in the agreement as set out in paragraph 6(b) of the Tarion Addendum. However, the addition of an appendix, such as Schedule U, with additional early termination conditions, is expressly permitted by paragraph 6(e) of the Tarion Addendum. Paragraph 6(e) reads: "There are no Early Termination Conditions applicable to this Purchase Agreement other than those identified in subparagraph (d) above *and any appendix* listing additional Early Termination Conditions." (emphasis added) Therefore, the Tarion Addendum explicitly contemplates an appendix containing additional early termination conditions, provided those conditions are consistent with Schedule A of the Addendum.

[31] Ashcroft submits that the "essence" of condition 2 is the completion of hard services for the property or surrounding area (including roads, rail crossings, water lines, sewage lines, and other utilities) sufficient to enable the issuance of a building permit. Ashcroft argues that condition 2 is consistent with paragraph 1(a)(v) of Schedule A to the Tarion Addendum which provides that the vendor is permitted to make the purchase agreement conditional on approval from an Approving Authority for the "completion of hard services for the property or surrounding area."

[32] The plaintiffs' argument to the contrary is summarized at para. 24 of their closing submissions:

> Section 1(a)(v) does not allow Ashcroft to terminate the APS based on the completion of hard services for the property or surrounding area. What it actually does is it allows Ashcroft to terminate the APS if it is *unable* to receive *Approval* from an Approving Authority for such hard services. This makes sense, as it would not be sensible to force Ashcroft to build homes when obtaining approval is not possible. However, for the clause to make sense, this Approval must be from a third party. The clause in Schedule U relied upon by Ashcroft, as written by Ashcroft, does not do so. Instead, the clause is conditional upon [...] Ashcroft itself performing the mentioned actions, which is not permitted.

[33] In fact, paragraph 1(a)(v) does not allow Ashcroft to terminate the purchase agreement on any basis. Paragraph 1(a)(v) merely permits Ashcroft to include an early termination condition addressing the situation where it is unable to obtain approval from the Approving Authority for the completion of hard services. The plaintiffs acknowledge that it would be unfair to Ashcroft to force it to build homes when obtaining approval is not possible. I add that it would also be unfair and contrary to sound commercial principles and good business sense if Ashcroft were denied the ability to protect itself from the risk of an indefinite delay in obtaining the necessary regulatory or governmental approval for the completion of hard services. The Tarion Addendum does not mandate that specific language be used in the early termination conditions: *Reddy*, at para. 31.

[34] The plaintiffs argue that because Ashcroft did not terminate all the purchase agreements in the Eastboro development and it has continued to sell lots in the development, "it is clear that it was able to continue with the project and meet its obligations." On this basis, the plaintiffs say that the rationale and protections behind the permitted early termination conditions in the Tarion Addendum do not apply. I reject this submission for two primary reasons: (i) the purchase agreements that were not terminated are not relevant to the issues I must determine; and (ii) evidence as to what happened with the development project following the terminations is irrelevant to the issues of contractual interpretation before me.

[35] Second, I do not agree with the plaintiffs' argument that, as drafted, condition 2 in Schedule U allows Ashcroft "to act as judge, jury and executioner" because Ashcroft wrote the condition, Ashcroft has sole control over whether the condition is satisfied, and Ashcroft is the designated "Approval Authority" that can determine whether the condition is satisfied. This interpretation

fails to recognize that Ashcroft required governmental approval – essentially the "go ahead" – before it could proceed with hard services both onsite and offsite.

[36] The plaintiffs' argument also fails to account for Ashcroft's obligation at paragraph 6(f)(3) of the Tarion Addendum to take all commercially reasonable steps within its power to satisfy the early termination conditions. This obligation is in direct conflict with the plaintiffs' interpretation that condition 2 would give Ashcroft unfettered discretion to terminate the purchase agreement in reliance on condition 2: *Reddy*, at para. 37. And paragraph 13 of the Tarion Addendum, to which I have already referred, requires the provisions of the Addendum to prevail over any inconsistent provision inserted into the purchase agreement: *Reddy*, at para. 38. In interpreting a contract, the court will prefer to give the provisions of the contract a meaning that will make them lawful, rather than unlawful: *Reddy*, at para. 43.

[37] In my view, at the very least, condition 2 of Schedule U raises an ambiguity as to Ashcroft's obligation to take all commercially reasonable steps within its power to satisfy the early termination conditions as opposed to being in a position to act as "judge, jury and executioner" as the plaintiffs contend. The doctrine of *contra proferentem* requires that, in the face of an ambiguity, I adopt the interpretation of condition 2 that is more favourable to the purchaser. That would be to interpret condition 2 in accordance with paragraphs 6(f) and 13 of the Addendum and require Ashcroft to comply with its obligation to take all commercially reasonable steps within its power to obtain approval from an Approving Authority for the completion of hard services for the property or the surrounding area: *Reddy*, at para. 42.

[38] Third, I do not agree with the plaintiffs' argument that, by listing itself as the "Approval Authority" in condition 2 in Schedule U, Ashcroft invalidated the condition. Paragraph 2 of Schedule A of the Tarion Addendum defines "Approving Authority" as "a government (federal, provincial or municipal), governmental agency, Crown corporation, or quasi-governmental authority (a privately operated organization exercising authority delegated by legislation or a government)." Ashcroft concedes that a vendor, developer, and a party to the contract are not contemplated by this definition of "Approving Authority."

[39] A similar issue arose in *Reddy* where the vendors identified themselves as the "Authorizing Authority" in relation to an early termination condition based on financing. Justice Penny addressed the issue at para. 35:

> ... To the extent this represents an attempt to confer on themselves some kind of unlimited discretion over something, it was in respect of a capacity the Vendors simply did not have. Reading the words of the agreement, as I must, in a way that prefers the interpretation which is more favourable to the purchaser, the Vendors are not an Authorizing Authority and the attempt, if that is what it was, to confer on themselves an unlimited discretion, in that or any other capacity must fail. The sentence regarding the Authorizing Authority adds nothing and is effectively meaningless in the context...

[40] I adopt the same approach in this case. Ashcroft is not an "Approving Authority" as defined and any attempt to confer on itself an unlimited discretion in that or any other capacity must fail. In the context, the designation as to the "Approval Authority" in condition 2 of Schedule U adds nothing and is effectively meaningless.

[41] Fourth, I do not agree with the plaintiffs' argument that condition 2 contravenes the prohibition against an early termination condition based on the receipt of a building permit. The words "sufficient to enable the issuance of a building permit" establish a benchmark for the construction of infrastructure, but the condition itself does not make the purchase agreement conditional upon receipt of a building permit. My previous observations regarding paragraph 13 of the Tarion Addendum are of equal importance here. These provisions and the applicable interpretive principles require that the interpretation more favourable to the purchasers, and the one which is consistent with the Tarion Addendum – requiring Ashcroft to take all commercially reasonable steps within its power to satisfy the condition – be adopted.

[42] Finally, contrary to the plaintiffs' argument, Ashcroft's failure to check the box at paragraph 6(c) of the Tarion Addendum does not render condition 2 of Schedule U invalid. In support of their position, the plaintiffs have referred me to *Eyelet Investment Corp. v. Song*[5] and *Grandfield Homes (Kenton) Ltd. v. Chen*.[6]

[43] In *Eyelet Investment*, O'Brien J. overturned an arbitral award that allowed for the termination of an agreement of purchase and sale by the purchasers because the tick boxes in paragraph 6(c) of the Tarion Addendum had not been checked. As O'Brien J. observed at para. 39, the terms of the Tarion Addendum make it clear that certain blanks in the Addendum are more important than others. For example, the terms specifically emphasize that the purchaser may terminate the agreement for failure to complete blanks related to critical dates. There is no similar provision for the failure to complete other blanks in the Addendum.

[44] At para. 42 of *Eyelet Investment*, O'Brien J. characterized the failure to check the yes/no box as a "minor or technical breach, particularly given that it was clear there were no ETCs in the Agreements." While the plaintiffs suggest that O'Brien J.'s comment "clearly connotes" that in circumstances where a vendor is going to rely on early termination conditions, the failure to check the box would be no minor breach, I disagree. Ashcroft is correct that the Tarion Addendum has no provision setting out the consequences for failing to check the tick boxes at paragraph 6(c). And it is also important to place O'Brien J.'s comment in context, including the absence of any evidence that the purchasers had been misled or harmed by the failure to check the tick boxes. In this case, there is no evidence that any of the plaintiffs were misled, they initialled each page of the purchase agreement, including the Tarion Addendum and Schedule U, and none of the plaintiffs invoked the "lawyer's protections" set out in Schedule F. In these circumstances, I would characterize the failure to check the yes/no box as a minor breach.

[5] 2019 ONSC 5910.
[6] 2020 ONSC 5230.

[45] In my view, *Grandfield Homes* does not assist the plaintiffs. In that case, the vendor did not tick the box at paragraph 6(c), but did expressly include the financial resources early termination condition on a page that was initialled by the purchaser when she signed the agreement of purchase and sale. Kimmel J. concluded that "[t]here can be no implicit dispute about the Purchaser's theoretical understanding about the inclusion of ETC's where an ETC has been expressly included under Condition #1."[7] Similarly, in this case there can be no dispute about the plaintiffs' understanding about the inclusion of additional early termination conditions in an appendix, expressly permitted by paragraph 6(d) and initialled by each plaintiff.

[46] I conclude condition 2 of Schedule U is not contrary to the terms of the Tarion Addendum.

Issue 2: Did Ashcroft terminate the plaintiffs' purchase agreements in a timely manner?

[47] Given my conclusion that condition 2 of Schedule U, properly interpreted in the context of the whole of the purchase agreement, is consistent with the Tarion Addendum, it follows that Ashcroft was entitled to rely on condition 2 to terminate the plaintiffs' purchase agreements. The issue that then arises is whether Ashcroft exercised its right to terminate the purchase agreements in a timely manner.

[48] In the plaintiffs' purchase agreements, the date for the fulfillment of condition 2 is "June 2020." Ashcroft takes the position that "June 2020" is to be read as "June 30, 2020." Ashcroft delivered written notices of termination to the plaintiffs on July 6, 2020, the third business day following June 30, 2020.

[49] The plaintiffs say that Ashcroft's notices of termination were delivered too late. They argue that to comply with the timing set out in Schedule U, Ashcroft would have had to deliver written notices of termination within five business days of June 1, 2020.

[50] The plaintiffs refer to the purchase agreements of other purchasers of lots in the Eastboro development that list the date for condition 2 of Schedule U as June 1, 2020. These purchasers did not have their agreements terminated. Mr. DiFilippo of Ashcroft testified that the decision to terminate the plaintiffs' purchase agreements was taken at the beginning of July 2020, specifically because (at least in Ashcroft's view), those agreements were still within the timeframe to terminate.

[51] While the plaintiffs invite me to draw an adverse inference against Ashcroft for refusing to produce particulars of the "non-terminated" purchase agreements, I decline to do so. The non-terminated purchase agreements are irrelevant to the issues of contractual interpretation before me on this trial.

[52] Ashcroft argues that the plain language meaning of "on or before" as used in Schedule U includes that date. I agree with Ashcroft that an event occurring on June 25, 2020 would satisfy any condition referring to an event occurring "on" the month of June.

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[7] *Grandfield Homes*, at para. 55.

[53] Some guidance may also be gleaned from s. 89(4) of the *Legislation Act*.[8] Section 89(4) states that "[a] period of time described as beginning or ending on, at or with a specified day includes that day." Ashcroft argues that by analogy, a period of time described as ending on a specified month should be interpreted to include that month.

[54] In the end, the principles of contractual interpretation require that the purchase agreements be interpreted by determining the intention of the parties in accordance with the language they used in the written document – "June 2020" – and based upon the "cardinal presumption" that they intended what they said: *Ventas*, at para. 24. The parties' subjective intention plays no role in this determination.

[55] Giving meaning to the terms of Schedule U and without rendering any of its terms ineffective requires that condition 2 be interpreted to mean the condition could have been satisfied any time up to and including on the month of June 2020, in other words, any time during that month.

[56] I find the notices of termination delivered by Ashcroft to the plaintiffs on July 6, 2020 were timely.

Issue 3: Was Ashcroft entitled to terminate the purchase agreements under s. 28?

[57] Given my conclusions that Ashcroft was entitled to rely on condition 2 of Schedule U to terminate the purchase agreements and that it did so in a timely matter, it is not necessary for me to consider this issue.

Issue 4: Did Ashcroft take all commercially reasonable steps within its power to meet the deadline in condition 2 of Schedule U?

[58] The plaintiffs allege that Ashcroft did not take all commercially reasonable good faith steps required to meet the deadline in the early termination condition it relied on. The plaintiffs rely on paragraph 6(f) of the Tarion Addendum: "The Vendor agrees to take all commercially reasonable steps within its power to satisfy the Early Termination Conditions identified in subparagraph (d) above." The plaintiffs also rely on the duty to contract honestly and in good faith: *Bhasin v. Hrynew*.[9]

[59] The parties agree that Ashcroft, as the party that terminated the purchase agreements, has the onus of showing the termination was justified in accordance with the terms of the contract: *Abco One Corporation v. Pomerleau Inc.*, at para. 81.[10] Ashcroft says the evidence adduced at trial demonstrates that it acted in a commercially reasonable manner in an attempt to satisfy condition 2 in Schedule U. Condition 2 refers to both onsite and offsite work.

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[8] S.O. 2006, c. 21, Sch. F.
[9] 2014 SCC 71.
[10] 2019 ONSC 4852, citing *McKenna's Express Ltd. v. Air Canada*, 1992 CarswellPEI 67 (PEI SCTD), at para. 18.

[60] Both Mr. DiFilippo and Mr. Kilborn of Stantec, Ashcroft's engineering consultant on the project, provided evidence about Ashcroft's efforts to advance the project. Ashcroft and Stantec's correspondence over the years with the City of Ottawa and the City's drainage engineer comprised many of the exhibits at trial.

[61] Mr. DiFilippo testified that Ashcroft intended at all times to comply with its obligations under the purchase agreements by advancing construction of the Eastboro development. As he explained, it would not make sense for Ashcroft to enter into the purchase agreements if Ashcroft did not intend to follow through with them. Mr. DiFilippo testified to the significant financing and carrying costs incurred by Ashcroft to advance the project. Schedule U to the purchase agreement identifies different risks/events beyond Ashcroft's control and was included to mitigate the business risk to Ashcroft in the event the identified milestones could not be met.

[62] It was Mr. DiFilippo's evidence that for Ashcroft to move forward with the offsite work – the public roads and the storm and sanitary sewers that would feed into the "EUC Pond 2" (a large stormwater management pond south of the development) – Ashcroft required confirmation that a draft drainage report by the City's engineer was "on circulation" to the appropriate agencies. The drainage report was originally expected in 2017. As time progressed, Ashcroft "ran out of runway to continue on this path." They had no indication by June 2020 when it would be received and the "risk of waiting with the uncertainty was too great." Because of this, at the end of June 2020, Mr. DiFilippo made the decision to invoke the condition and terminate the purchase agreements.

[63] Mr. Kilborn testified that Stantec first became involved with the Eastboro project on behalf of Ashcroft in 2008. In 2015, it was identified that an extension to the existing municipal drain would be required. Ashcroft petitioned the City and, in 2016, the City approved the appointment of Andy Robinson of Robinson Consultants Inc. as the engineer of record to prepare a report under the *Drainage Act* to address the need for a "legal and sufficient outlet" for stormwater from Ashcroft's subdivision. The associated stormwater infrastructure included the proposed EUC Pond 2. Mr. Kilborn also testified that for Ashcroft to move forward with the offsite work, the draft drainage report had to be out on circulation to the appropriate agencies.

[64] Mr. Kilborn explained that in 2019, when Stantec and Ashcroft realized they would not receive the drainage report in a timely fashion, Stantec developed the concept of a dry storm water management pond as an interim measure that would store and drain storm water from Ashcroft's site until the EUC Pond 2 was approved and constructed. It was a way for the development to keep moving forward. It was Mr. Kilborn's evidence that this proposed interim measure did not allow Ashcroft to proceed with offsite works.

[65] Mr. Kilborn testified that Stantec followed up repeatedly with the City and Mr. Robinson regarding the municipal drainage report. It was his evidence that the report took far longer to be completed that he expected; according to Mr. Kilborn, it "typically it takes about a year."

[66] In his report, the plaintiff's expert, Martin Rendl, described the interim dry pond as a "prudent and reasonable" measure. Mr. Rendl opined in his report that "nothing prevented Ashcroft from completing the construction of infrastructure services sufficient to enable the issuance of building permits for dwellings in the Eastboro subdivision by June 2020." However,

on cross-examination, Mr. Rendl repeated his conclusion that Ashcroft's plans and actions were prudent and reasonable and agreed that Ashcroft could not commence construction before the City issued a commence work notification. His suggestion that it was "within the realm of possibility" that the City could have issued the commence work notification earlier is speculative.

[67] While the plaintiffs say "they do not necessarily agree" with Ashcroft's characterization of what was required to perform onsite and offsite works, the evidence of Mr. Kilborn and Mr. DiFilippo that the draft drainage report had to be out on circulation for the offsite work to commence was uncontradicted and I accept it.

[68] I have carefully reviewed all the correspondence in the record, which includes correspondence between Stantec and the City and Mr. Robinson between 2016 to 2020. I make the following observations.

[69] Mr. Kilborn's email to Mr. Robinson of November 16, 2017 provides an early example of Stantec's efforts to follow up with Mr. Robinson and provide him with any requested information: Mr. Kilborn asks for a quick note as to where Mr. Robinson is at in the "Municipal Drain/Legal Outlet" process and invites Mr. Robinson to call. In January 2018, in response to a meeting with Mr. Robinson, Stantec provides the information requested "to move forward with the Municipal Drain Update."

[70] In relation to at least one area, Stantec stepped in to assist Mr. Robinson. Mr. Kilborn testified that the erosion threshold assessment was an assessment Mr. Robison required in order to complete the drainage report. While the assessment would normally be prepared by the drainage engineer, the City asked Stantec to prepare it, which Stantec did, and provided in a timely fashion.

[71] That Ashcroft was anxious for the process to move forward is readily apparent from the correspondence. For example, in Mr. Kilborn's email of April 3, 2018 to the City. Mr. Kilborn noted Stantec's meeting with Mr. Robinson in late January and Stantec's provision of all outstanding information, stating: "I would hope that we should see a draft report shortly so we can show something to the MOE."

[72] Mr. Kilborn's frustration at the delay is plainly evident in his October 25, 2018 email to the City:

> The proposed timing for completion of the Municipal Drain Update at the end of 2019 is not acceptable and this will not align with the proposed development plan which Ashcroft is proposing to start construction in the spring of 2019.
>
> I am going to be honest, I was a bit taken aback reading the amount of time still required to complete this update, as all of the information on Ashcroft's development plan and Pond 2 reports which feeds into the overall drain update were supplied over 1 year ago...

[73] To the same effect is Mr. Kilborn's email of June 27, 2019 in which he states "[w]e have been waiting on information from your office for some time and made multiple requests without

receiving the requested information. We feel that significant progress is not being made." I accept Mr. Kilborn's evidence that they had no "leverage" over Mr. Robinson's process.

[74] In May 2020, Mr. Kilborn expressed to Ashcroft that "I think we may finally be close [to being out on circulation]." By early June 2020, Mr. Kilborn believed that they should be able to move forward with applications in "3-4 weeks." That did not occur. Stantec first learned on August 18, 2020 that the draft drainage report had been circulated.

[75] The correspondence supports Mr. DiFilippo's testimony that by the end of June 2020, Ashcroft still did not know when they would receive confirmation that the draft drainage report was out on circulation.

[76] At this juncture, I turn to the plaintiffs' specific arguments on the issue of whether Ashcroft took all commercially reasonable steps within its power to meet the deadline in condition 2 of Schedule U. The plaintiffs' arguments are summarized at paras. 119-120 and 126 of their written submissions:

> 119. The plaintiffs submit that Ashcroft's motivation to not honour its contractual obligations was clear. Ashcroft had a monetary incentive to terminate the APSs so that it could resell the properties for more money. It is currently doing exactly that. Ashcroft was not forced to rely on Schedule U, as it has pleaded. Ashcroft is responsible for the following delays:
>
> (a) It failed to provide Robinson with adequate information on a timely basis.
>
> (b) It caused eleven months of unexplained delays in the process of obtaining the commence work notification, which it only followed up on shortly after it terminated the APSs.
>
> (c) It failed to take the requisite steps to assure the relevant authorities that their environmental concerns had been addressed within a reasonable time; and
>
> (d) It failed to act on an interim backup plan which would have resolved the drainage report delays.
>
> 120. It is clear that Ashcroft did not do everything commercially reasonable it could to satisfy the requirement of Schedule U. It proceeded in this manner for its own financial gain.
>
> ...
>
> 126. Ultimately, far before June 2020, it was clear that as a result of a variety of factors, the project was behind schedule due to oversights, delays and choices of Ashcroft. Ashcroft was thus faced with a choice in the circumstances: it could honour its agreements or exploit these delays

> (as well as its own vague contractual language) to terminate them and resell the same homes for a higher price. It took the latter choice. This, the plaintiffs submit, cannot be found to be contracting in good faith.

[77] I begin with the plaintiffs' assertions about Ashcroft's intentions and motivations. They echo, to some degree, the allegation at para. 54 of the statement of claim that Ashcroft never intended to follow through with its obligations under the purchase agreements. There is no evidence to support this allegation. Mr. DiFilippo's evidence that Ashcroft always intended to comply with its obligations under the purchase agreements was clear, logical, and credible. I accept his evidence. The documentary evidence does not support the plaintiffs' allegation. To the contrary, there is considerable evidence that Ashcroft and Stantec were endeavouring to move the project forward and were in regular contact with the City and its drainage engineer. The only issue is whether their efforts were sufficient to satisfy the "all commercially reasonable steps" standard set out in paragraph 6(f) of the Tarion Addendum.

[78] There is no evidence to support the plaintiffs' allegation that Ashcroft failed to provide Mr. Robinson with adequate information on a timely basis. To the contrary, the totality of the evidence supports a finding that Ashcroft and Stantec were responsive to Mr. Robinson's requests for information. Indeed, the evidence is that Stantec complained to the City about why the completion of the drainage report was taking so long when "the information which feeds into the overall drain updates [was] supplied over one year ago." Mr. Rendl, too, acknowledged the delays in the process and described Ashcroft's efforts to "push" the City as prudent and reasonable.

[79] The plaintiffs argue that Ashcroft "caused" over 11 months of delay in receiving the commence work notification for onsite works "by sitting on its hands." They point to gaps in the timeline from May to September 2019, from December 2019 to April 2020, and from April to July 2020. They argue that "had Ashcroft acted with any dispatch the commence work notification would have been obtained long before the June 2020 deadline in Schedule U." As evidence of Ashcroft's alleged bad faith, the plaintiffs point to the receipt of the commence work notification on August 11, 2020, which they claim was achieved after Ashcroft "made a simple follow up with the City on July 29, 2020", after the Schedule U deadline had lapsed.

[80] This argument is problematic for several reasons. First, I am not prepared to infer the delay in receipt of the commence work notification for onsite works was caused by Ashcroft, nor am I prepared to find on the evidence that Ashcroft was "sitting on its hands." The evidentiary record is to the contrary.

[81] Second, and more importantly, there is no evidence to support the claim that had Ashcroft acted with greater dispatch, the commence work notification for onsite work would have been obtained before June 2020. To the contrary, on April 9, 2020, immediately after it had delivered the required documents and payment for the early servicing agreement, Ashcroft asked the City what steps remained to be completed in order to issue the commence work notification. A few days later, the City responded that it was waiting on certain confirmations from the City planner. On April 16, 2020, Ashcroft again followed up with the City. There was further follow up in July. Then, on August 7, 2020, Ashcroft emailed the City writing: "With all of the conditions being met, and the payment made months ago – can we expect the Early Servicing Agreement next week?"

[82] This brings me to my third reason: the plaintiffs' claim that the commence work notification for onsite works was achieved after a "simple follow up" with the City in late July is belied by the evidence. The plaintiff's own expert described Ashcroft's efforts as prudent and reasonable. And, while Mr. Rendl suggested that through its exchanges with the City, Ashcroft "could have" become aware of any matters delaying issuance of the early servicing agreement for onsite works, his suggestion is nothing more than speculation.

[83] The plaintiffs say Ashcroft failed to take the requisite steps to assure the relevant authorities that their environmental concerns had been addressed within a reasonable time. I disagree. Mr. Kilborn testified that the habitat enhancement report provided to Mr. Robinson in May 2020 was "not a standard request" and was "not flagged as a requirement" before May 2019. I also accept Mr. Kilborn's uncontroverted evidence that Mr. Robinson did not require the report for the draft drainage report. In any event, I note that while the habitat enhancement report was provided before the June 2020 deadline in condition 2 of Schedule U, the draft drainage report was not on circulation until August 2020.

[84] Finally, and contrary to the plaintiffs' argument, the evidence is that the proposed interim measure of the water management pond would not have allowed Ashcroft to proceed with the offsite work. It would not have "resolved" the drainage report delays as the plaintiffs contend.

[85] In summary, I find that Ashcroft and its agent Stantec endeavoured to move the Eastboro project forward and they were in regular contact with the City and its drainage engineer in their efforts to do so. I find they acted prudently and reasonably. The evidentiary record before me amply supports the finding that Ashcroft took all commercially reasonable steps within its power to meet the June 2020 deadline in condition 2 of Schedule. U.

Conclusion

[86] For these reasons, the action is dismissed, with costs.

[87] In the event the parties are unable to agree on costs of the action, they may make written submissions limited to a maximum of three pages, excluding relevant attachments. Ashcroft shall deliver its costs submissions by February 14, 2024. The plaintiffs shall deliver their responding costs submission by February 28, 2024. There shall be no right of reply. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves.

Released: January 31, 2024

Madam Justice Robyn M. Ryan Bell

CITATION: Saint-Fort v. Ashcroft Homes – Eastboro Inc., 2024 ONSC 651
COURT FILE NO.: CV-20-85354
DATE: 2024/01/31

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Jean Jacquelyn Saint-Fort, Audrey Pierre, Blaise Tongace Traore, Briana Brissette, Mario Pleau, Fatoumata Diallo, Naji Youssef Zourob, Ziad Jaber, Tania Maruf, Michel Lebeau, Jeremy Nantel Saint-Fort, Samuel Stewart, Eyr Technologies Inc., Abbas Sobh, Hanadi Dawi, Tania Dawi, Bilal Balaa, Haissam Balaa, Mounawar Jammal, Abd El Hadi Balaa, Nada Nasri, Fraz Tabassam, Nasr Balaa, Ghulam Hakim, Luc Boudreau, Sheri Boudreau, Lise-Anne Boal, Kenneth Boal, Asjad Mahmood Malik, Moazzam Iqbal, Jean Denis Labrosse, Lise Labrosse, Hanan Talabeh, Samer Mardini, Rahaf Seahdh, Summera Azam, Najma Kouser, Mushtaq Ahmed Shahid, Fahmida Jahangir, Michel Brissette, Khaled Makkouk, Nooraddin Albaghjati, Muhammad Aamir Shehzad, Sumera Ameer Khan

Plaintiffs

– and –

Ashcroft Homes – Eastboro Inc.

Defendant

REASONS FOR JUDGMENT

Ryan Bell J.

Released: January 31, 2024