Date: 20231027
Docket: CI 21-01-32945
(Winnipeg Centre)
Indexed as: The City of Winnipeg v. Earl's Holdings (Main Street) Ltd. et al.
Cited as: 2023 MBKB 157

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

THE CITY OF WINNIPEG,	)	Kalyn Bomback
	)	for the plaintiff
plaintiff,	)	
- and -	)	Jamie Kagan
	)	Elizabeth Pappas
EARL'S HOLDINGS (MAIN STREET) LTD., AND 10060193 MANITOBA LTD.,	)	for the defendant, Earl's Holdings (Main Street) Ltd.
defendants.	)	
	)	Jesse Gietz
	)	for the defendant, 10060193 Manitoba Ltd.
	)	
	)	Judgment Delivered:
	)	October 27, 2023

TOEWS J.

Introduction

[1] This trial involves issues raised in two different legal proceedings. In the first proceeding, CI 20-01-29238, Earl's Holdings (interchangeably referred to Earl's or Earls in these proceedings) filed a notice of application in which it sought an order discharging a caveat registered by the City of Winnipeg (the "City") against the title of a parking lot owned by Earl's and located at 219 Main Street in Winnipeg.

[2] The City subsequently commenced an action (CI 21-01-32945) seeking a declaration and an order for specific performance requiring Earl's to transfer title of the parking lot at 219 Main Street to the City. In the action brought by the City, Earl's has filed a statement of defence and a counterclaim against the City seeking the removal of the City's caveat. Essentially the pleadings in the action deal with the claims of both Earl's and the City and to that extent the application is substantively redundant. In any event the application has been adjourned *sine die* and the parties have proceeded with a trial on the action.

[3] At trial, no *viva voce* evidence was called. Rather, the parties filed a statement of agreed facts (Exhibit 1 – referred to herein as the "SAF") and an extensive agreed book of documents (Exhibit 2 – the "ABD"). The material contained in these two exhibits sets out the evidentiary basis underpinning the positions being advanced by the parties.

[4] In very broad terms, the pre-trial judge accurately summarized the nature of the dispute, and it is instructive to reproduce that summary here as a very general introduction to this dispute. The pre-trial judge stated and I accept the following as accurate:

> When Earl's acquired 219 Main Street, the property was subject to a condition that it would revert to the City in exchange for a payment of $619,000 if it was not developed by October 15, 2015. That condition was registered as a caveat against title to 219 Main Street. The City now seeks to enforce that condition. Earl's resists. It alleges, amongst other things, that on May 7, 2015, the City promised Earl's it would not enforce the caveat.
>
> The defendant 10060193 Manitoba Ltd. (1006 Manitoba) is party to an agreement with Earl's to purchase 219 Main Street and two other parcels of property. It therefore has an interest in this litigation and has been named as a party for that reason. However, by agreement of the parties it will not participate in the trial and will simply abide by the eventual outcome of this matter.

[5] In respect of the decision not to participate in the trial, at trial counsel for 1006 Manitoba did decide to make several arguments in favour of the position advanced by Earl's although it did not submit any additional evidence beyond that which the City and Earl's submitted. I have reproduced all the substantive facts as set out in the SAF, although omitting most of the sources of the agreed upon facts which are also set out in the SAF. The sources may be referred to during these reasons as may be required.

The Facts

[6] The SAF sets out the following facts:

The Parties

1. The plaintiff, the City of Winnipeg (the "**City**"), is a municipal corporation continued under *The City of Winnipeg Charter*.

2. The defendant, Earl's Holdings (Main Street) Ltd. ("**Earls**"), is a corporation incorporated pursuant to the laws of Manitoba with a registered head office in the City of Winnipeg.

3. The defendant, 10060193 Manitoba Ltd. ("**1006 Manitoba**"), is a corporation incorporated pursuant to the laws of Manitoba with a registered head office in the City of Winnipeg.

The Property

4. Earls is the registered owner of the property located at 219 Main Street, Winnipeg, Manitoba (the "**Property**"). The Property's legal description is as follows:

   FIRSTLY: PARCELS "A" AND "B" PLAN 55243 WLTO THE SAID PARCEL "B" BEING SUBJECT TO THE RESERVATIONS, PROVISOES AND CONDITIONS RESPECTING MINES, MINERALS, MINERAL OILS AND OTHER MATTERS AS SET FORTH IN OLD SYSTEM INSTRUMENT NO. 232510 WLTO IN RL 1 PARISH OF ST JOHN
   SECONDLY: PARCEL "Q" PLAN 22557 WLTO IN RL 1,2, 3 AND 6 PARISH OF ST JOHN AND IN RL 38, 39 AND 40 PARISH OF ST BONIFACE AND IN PART GOVERNMENT ROAD ALLOWANCES

5. The Property is adjacent to the property located at 191 Main Street. At all material times hereto, Earls operated its flagship downtown Winnipeg restaurant from 191 Main Street (the "**Former Restaurant**").

Purchase of the Property from the City

6. The Property was formerly owned by the City. In January 2012, the City declared the Property to be surplus to its needs and marketed the Property for sale to the public for the price of $690,000.

7. The City required that all interested parties submit an Offer to Purchase in the City's standard form together with their proposed development plans for the Property.

8. On or about March 30, 2012, Earls' affiliated company submitted an offer to purchase the Property for $800,000. Its offer was not accepted.

9. On or about July 9, 2012, the Standing Policy Committee on Downtown Development, Heritage and Riverbank Management approved the sale of the Property to OGGI Investments Ltd. ("**OGGI**") (a non-party in this action) for the price of $690,000.

10. The purchase documents between the City and OGGI consist of the following:

    a) An Offer to Purchase dated May 9, 2012;
    b) A counter-offer dated May 14, 2012;
    c) An amending agreement dated February 6, 2013; and
    d) A second amending agreement dated April 12, 2013. Second Amending Agreement

    (collectively, the "**Purchase Documents**")

11. On July 31, 2013, OGGI assigned its rights as contained in the Purchase Documents to 6752731 Manitoba Ltd. ("**675 Manitoba**") and accordingly, 675 Manitoba thereafter became the purchaser of the Property under the Purchase Agreement.

12. Pursuant to the terms contained in the Purchase Documents as assigned, 675 Manitoba was to develop the Property within 24 months of the "Date of Possession". The Purchase Documents defined the date of possession as follows:

    > The date of possession shall be on the date of completion of the Opening Plan as stated herein.

13. The Opening Plan was described in the Purchase Documents as a plan to effect the legal opening of a portion of the Property required to widen Main Street. The portion of the Property subject to the Opening Plan is shown in the highlighted area of Plan No. 13860/3, which was attached to and formed part of the Purchase Documents.

14. Subsection 13(3) of the Purchase Documents provided that:

> 3. Should the Opening Plan not be completed and given preliminary approval by the Winnipeg Land Titles Office within 390 days (or such later date as mutually agreed to) from Date of Approval as provided in the above clause, the City may, at its option, cancel the sale and retain the deposit as liquidated damages.

15. The Date of Approval was July 9, 2012. Therefore, the deadline for completion of the Opening Plan pursuant to subsection 13(3) of the Purchase Documents was originally contemplated to be August 3, 2013.

16. Subsection 13(5) of the Purchase Documents provided that:

> 13. In consideration of the sale of the Lands by the City to the Purchaser, the Purchaser covenants and agrees as follows:
>
> (5) That development must occur within 24 months after the Date of Possession. In the event the Purchaser does not build within the timeframe as stated herein, the Purchaser shall then surrender the property to the City of Winnipeg for the amount paid minus ten percent (10%).
>
> (the "**Development Clause**")

17. The Purchase Documents did not contain any specific terms regarding the nature of the development plans for the Property.

18. Section 6 of the Offer to Purchase stated that "the sale of the Lands to the Purchaser shall be subject to the provisions of the By-laws of the City of Winnipeg and all amendments thereto".

19. By August 23, 2012, OGGI had made the required application to the City to effect the Opening Plan in accordance with the Purchase Documents.

20. On March 20, 2013, after being advised that the Opening Plan proposed by OGGI had been considered by all affected City departments and public utilities, City Council approved that the Director of Legal Services and City Solicitor be instructed to prepare the necessary by-law for submission to Council to effect the Opening Plan.

21. In mid-April 2013, the Opening Plan was deposited with the surveys branch of the Winnipeg Land Titles Office.

22. The Opening Plan was given preliminary approval by the Winnipeg Land Titles Office on July 24, 2013. This occurred when Land Titles authorized

the surveyor to produce the mylars of the plan for execution and registration. On July 24, 2013, the surveyor produced and signed the mylars.

23. Between April 4, 2013 and January 2014, legal counsel for OGGI/675 Manitoba and legal counsel for the City exchanged correspondence regarding the transaction respecting the purchase of the Property. The relevant emails are contained in the Agreed Book of Documents as follows:

a) Email from Soronow, dated April 4, 2013.
b) Email from Soronow, dated July 11, 2013.
c) Email from Soronow, dated July 23, 2013.
d) Email from Wolfgang Tiegs ("Tiegs"), dated July 31, 2013.
e) Email from Soronow, dated August 2, 2013.
f) Email from Soronow, dated August 8, 2013.
g) Email from Tiegs, dated August 14, 2013.
h) Email from Soronow, dated August 20, 2013.
i) Letter from Soronow, dated October 15, 2013.
j) Letter from Tiegs, dated October 16, 2013.
k) Email from Soronow, dated October 17, 2013.
l) Email from Soronow, dated November 7, 2013.
m) Email from Tiegs, dated November 14, 2013.
n) Email from Soronow, dated November 20, 2013.
o) Letter from Tiegs, dated December 4, 2013.
p) Letter from Soronow, dated January 29, 2014.
q) Email from Tiegs, dated January 30, 2014.

24. On September 25, 2013, the City passed By-Law No. 98/2013 in relation to the Opening Plan.

25. On October 1, 2013, the Opening Plan was certified by the Director of the City's Planning, Property, and Development Department.

26. On or about October 15, 2013, legal counsel for 675 Manitoba provided a trust letter to counsel for the City, together with a trust cheque in the amount of $110,000, representing partial payment to the City for the purchase of the Property.

27. On or about October 16, 2013, the City provided its own trust letter to counsel for 675 Manitoba in which it enclosed the following documents:

a) Certified copy of By-Law No. 98/2013;
b) Mylars and Deposit Memorandum relating to the Opening Plan;
c) Request to Issue Title (for the purposes of the Opening Plan);
d) Transfer of Land in favour of 675 Manitoba; and
e) Caveat to be registered in respect of 675 Manitoba's obligation to develop the Property pursuant to the Purchase Documents.

28. On or about December 4, 2013, the City provided a replacement form of caveat to 675 Manitoba to be registered on title to the Property (the "**Caveat**").

29. The Caveat specified a date of October 15, 2015 by which "substantial development" of the Property was to be completed. The Caveat was prepared by the City.

30. On January 6, 2014, the Property was registered in the name of 675 Manitoba. On that same date, the Caveat, By-Law no. 98/2013, and the Opening Plan were registered on title to the Property.

31. On October 6, 2014, pursuant to a share purchase agreement dated January 30, 2014, Earls purchased all the shares of 675 Manitoba for the price of $1 million. As a result of this share purchase, 675 Manitoba became the wholly owned subsidiary of Earls' parent company.

32. On May 19, 2017, 675 Manitoba changed its name to Earl's Holdings (Main Street) Ltd. (Earls, the party to this action). Thereafter, on May 16, 2018, Earls registered a Request to Issue Title to the Property into its name and title issued accordingly.

Efforts to Develop the Property

33. Beginning in early 2014, Earls took steps to develop the Property, including by retaining an architectural firm to prepare a design and development plan for the Property (the "**Development Plan**"). The Development Plan contemplated the construction of a new restaurant on the Property, the tear-down of the Former Restaurant, the construction of a new commercial space on the Former Restaurant's site, and a shared parking lot between the two buildings.

34. Earls also retained a second architectural firm to assist with the preparation of a subdivision application (the "**Subdivision Application**"), which was intended to facilitate the Development Plan by subdividing the Property to create two separate lots for the future construction of a restaurant and accessory parking area.

35. On June 12, 2014, Earls submitted its Development Plan to the City's Urban Design Advisory Committee (the "**UDAC**"), where it received a favourable response. The UDAC provided several recommendations, which were addressed by Earls in December 2014. At that point, the UDAC approved Earls' Development Plan in principle.

36. In February 2015, the City's Planning, Property and Development department advised Earls that the proposed Development Plan was not in compliance with amendments that had been made to the City's downtown

Winnipeg zoning by-law in May 2014. Those amendments included the following:

a) the creation of a new 35-foot building height minimum for properties on Main Street; and

b) the requirement that a developer obtain City approval for any accessory parking at properties on Main Street.

37. The Development Plan that Earls had prepared complied with the former downtown zoning by-law. However, the City took the position that the Development Plan had to comply with the amended by-law.

38. Upon direction from the City, Earls made the following applications:

a) DAV 15-108045/B: an application to vary the downtown Winnipeg zoning by-law to permit the construction of a building at a height of 21.4 feet instead of the minimum 35 feet (the "**Variance Application**"); and

b) DCU 15-107697/B: an application for conditional use under the downtown Winnipeg zoning by-law to permit the establishment of a non-accessory parking facility at grade use (the "**Conditional Use Application**").

39. On February 26, 2015, the City's Director of Planning, Property and Development rejected both the Variance Application and the Conditional Use Application.

40. On March 10, 2015, Earls appealed the decision to reject the Variance Application and the Conditional Use Application to the City's Standing Policy Committee on Downtown Development, Heritage and Riverbank Management (the "**Standing Committee**").

41. The appeal before the Standing Committee took place on April 10, 2015. Following the hearing, the Standing Committee voted on the Variance Application and the Conditional Use Application. The result was a tied vote, which was deemed to be a loss pursuant to City by-laws. Accordingly, Earls' appeals were denied.

42. The Standing Committee adjourned the consideration of Earls' Subdivision Application to a future hearing.

43. After the hearing before the Standing Committee, Earls contacted the Winnipeg Mayor's Office to arrange a meeting to discuss the development of the Property. The meeting took place on May 7, 2015 (the "**Meeting**") and was attended by Earls' representatives, representatives from the City's

Planning, Property and Development Department, and the Mayor of Winnipeg.

44. During the Meeting, it became clear that the parties had incompatible visions for the development of the Property. The City wanted Earls to develop a multi-storey building development. Earls did not believe that this type of development was economically viable for it as it was not in the business of land development.

45. The meeting concluded with an understanding between the parties that the City would continue to work with Earls on options for it to develop the Property.

46. As a result of the Meeting, Earls understood that the City would not exercise the Development Clause to attempt to re-acquire the Property upon the expiry of the deadline for development of the Property or thereafter. The City was of the understanding that it would not immediately exercise the Development Clause while it continued to work with Earls.

47. Following the Meeting, Earls withdrew the Development Plan and the Subdivision Application from consideration by the City. It is Earls' evidence that it did so in reliance on and based upon its understanding that the City would not take any steps to take back the Property in accordance with the Development Clause under the Purchase Documents. The City denies that this understanding was mutual.

48. Had Earls understood otherwise, it would have sought to challenge in Court the rejection of the Variance Application and the Conditional Use Application to support the Development Plan then in existence.

49. In August 2015, Earls submitted a revised Development Plan to the City; however, it was rejected on September 30, 2015, as the City took the position that it was substantially similar to the previous development plan that had already been rejected. Thereafter, no further development plans were put forward by Earls, none were requested by the City, and ultimately, no development of the Property occurred.

50. Between 2013 and 2020, the Property was used as a parking lot for overflow parking for the Former Restaurant.

51. During that time, neither the City nor Earls took any steps to vacate the Caveat from title to the Property.

52. Between 2015 and November 2020, the City did not take any steps to re-acquire the Property nor did it pay Earls the sum of $621,000 as contemplated by the Development Clause. On several occasions within that window of time, the City considered whether it should attempt to re-acquire

the Property pursuant to the Development Clause; however, it did not to take any steps to do so during that time.

53. Each year, Earls used the Property for parking purposes, and the City taxed Earls on the assessed value of the Property.

54. As the Property had been sold, the City did not include the Property as an asset on its own financial statements after the deadline for development of the Property pursuant to the Purchase Documents had expired.

The Sale of the Property to 10060193 Manitoba Ltd.

55. On or about September 10, 2020, Earls entered into an agreement with OGGI for the sale of the Property, the Former Restaurant site, and another nearby site. Pursuant to the terms of the agreement, the price allocated to the Property was $1.2 million (the "**Sale Transaction**").

56. The Sale Transaction was initially scheduled to close on December 2, 2020, subject to a number of conditions in favour of the purchaser, including a condition that the Caveat registered against title to the Property be discharged. Earls was advised by OGGI that it was not willing to purchase the Property unless the Caveat was discharged from title.

57. On November 3, 2020, legal counsel for OGGI contacted the City to request that the Caveat be discharged.

58. On November 9, 2020, legal counsel for Earls contacted the City to request that the Caveat be discharged.

59. On November 25, 2020, OGGI nominated the defendant, 10060193 Manitoba Ltd. ("**1006 Manitoba**"), as purchaser of the Property pursuant to the Sale Transaction.

60. On November 26, 2020, the City advised Earls that it was not prepared to discharge the Caveat and that it intended to rely upon the Development Clause and the Caveat to acquire the Property. The City did not at that time tender the price to be paid for the acquisition of the Property pursuant to the Purchase Documents.

61. On December 4, 2020, Earls served the City with a Notice of Application seeking that the Caveat be discharged and damages associated therewith (the "Earls Application").

62. In or around December 2020, OGGI agreed with Earls to the following:
    a) Earls would make all reasonable efforts to discharge the Caveat from title to the Property;
    b) If Earls was able to discharge the Caveat on or before December 31, 2025, then Earls would sell the Property to 1006 Manitoba;

c) The price to be paid for the Property will be $1.2 million; and
d) The Closing Date for the purchase of the Property is 30 days after Earls gives written notice to 1006 Manitoba that the Caveat has been discharged from title to the Property.

63. On December 24, 2020, 1006 Manitoba registered a caveat against title to the Property, claiming an interest in the Property pursuant to the Sale Transaction.

64. On October 6, 2021, the City again confirmed to Earls that it intended to take all steps necessary at law and otherwise to acquire title to the Property in accordance with the Development Clause as set out in the Offer to Purchase. It also stated that the City "will pay to [Earls] the amount contemplated in the Offer to Purchase and, in exchange, would require the necessary Transfer of Title documents to be prepared and executed".

65. The City did not at that time, nor has it since then, tendered the price to be paid for the acquisition of the Property pursuant to the Purchase Documents.

66. Throughout 2021, Affidavits were filed by both the City and Earls in relation to the Earls Application, cross-examinations took place in October 2021, briefs were filed, and a hearing date of November 12, 2021 was scheduled. That hearing was converted into a pre-trial conference at which the parties agreed to adjourn the Earls Application sine die and proceed with the within action.

Current Status of the Property

67. As of April 1, 2021, the City has assessed the value of the Property at $1.231 million.

68. The Property has been sold conditionally to a developer who wishes to proceed with a substantial development on the Property and adjacent land. The developer has been meeting and continues to meet with the City to discuss the terms and conditions of a development that would be mutually satisfactory to both parties.

69. The Property is currently still being used as overflow parking for the restaurant located at 191 Main Street. Since being sold in July 2012, the only proposed development in respect of the Property was the development plans submitted by Earls and rejected by the City.

70. Earls has since relocated and is now the anchor tenant of the property located at 300 Main Street in Winnipeg, Manitoba.

71. The City's Winnipeg Transit Master Transit Plan was adopted on April 29, 2021.

72. The City has obtained an appraisal of the Property, which values the Property as of November 30, 2020 at $1.4 million.

The Position and Argument of the City

[7] These trial proceedings commenced with the City initially making its arguments for specific performance based on what it characterizes as the reversionary clause (referred to as the Development Clause in the SAF) and a declaration of its rights arising out of the reversionary clause as embodied in the Caveat.

[8] In respect of the legal nature of the Development Clause, the City takes the position that it cannot be characterized as a right of first refusal or an offer to purchase as argued or inferred by Earl's. Rather, this clause is properly characterized as a "right of repurchase", designed to encourage the active use of land within the City. This clause, the City argues, creates an immediate interest in the Property and therefore properly the subject of a caveat.

[9] The City states that both named defendants are in the same position in respect of any entitlement to the Property. I would also note that the defendants do not disagree with that position and further, that the parties have made no distinction between the legal position or rights of Earl's and its predecessor or related corporations in respect of their dealings with the Property. I have adopted the same approach in these reasons in respect of these corporations and their dealings with the Property.

[10] The City submits that the Development Clause did not obligate the City to take the land back upon the expiry date of October 15, 2015, which it states is the date of the deadline for substantial completion of the development determined by the Purchase

Documents. It states that the City was willing to work with Earl's at all material times to assist it in bringing its development to fruition, including extending the deadline for substantial completion.

[11] The City argues that it was prepared to hold off exercising its right to exercise its reversionary interest for the purposes of its continued endeavours to work with Earl's to develop the Property in accordance with a plan that was mutually agreeable to both Earl's and the City. However, it categorically denies that it ever agreed to never exercise its reversionary interest on the basis of what occurred at a meeting that took place between the City and Earl's on May 7, 2015. It states that throughout 2015 and 2016, Earl's continued to approach the City with various proposals for developing the Property and at no time between 2012 and November 2020, did either of those parties take any steps to have the Caveat removed. This, it argues, is consistent with the City's position that absent an agreement which contemplated the City not relying on its reversionary interest, there was no reason for the Caveat to be vacated.

[12] In respect of the assertion by Earl's that a contract in which the City agreed not to exercise its reversionary interest as a result of a meeting on May 7, 2015, the City submits that the essential terms of an agreement or contract cannot be met in this case. It states that the test to be met here is whether a reasonable person in the same shoes as Earl's would have believed and understood that the other party was agreeing to identical terms and that Earl's has not met the requirements of this test. Specifically, there was not an intention to contract, the essential terms of the contract were not settled, and the terms of the alleged agreement are not sufficiently certain.

[13] The City acknowledges that for specific performance to be available as a remedy, the Property must be sufficiently unique. This aspect of specific performance is summarized at ***Global First Ltd. v. 1237007 Alberta Ltd.***, 2008 ABQB 65, 90 Alta. L.R. (4th) 33 (QL), where the court held at paras. 23-25:

> **23** The Vendors argue that, even if the Purchasers' actions are not summarily dismissed, the caveats should be discharged, as at best the Purchasers may be entitled to a damages award. The Vendors argue that specific performance is not an available remedy in this case because the Purchasers' interest in the properties is purely commercial.
>
> **24** The Alberta Court of Appeal recently confirmed that a caveat may be discharged on this ground: ***1244034 Alberta Ltd. v. Walton International Group & Brent Bailey***, 2007 ABCA 372 (***Walton International***) (para. 17, per Berger J.A. for the majority):
>
> > Alberta's law is well settled that on an application to discharge a caveat based on an agreement for the purchase and sale of land, a finding that damages would be an adequate remedy is sufficient to discharge the caveat. … Once it has been determined that damages are an adequate remedy, there is no "interest in land" capable of protection by caveat. With no interest in land required to be protected, there is no basis to tie up development of the land pending resolution of the litigation.
>
> **25** However, the issue is dependant on the facts of the case. There is no rule that specific performance is not available, or that a caveat should be discharged, with respect to commercial or investment property. The majority in ***Walton International***, *supra*, summarized the law as follows (at paras. 2-6):
>
> > The decision of the Supreme Court of Canada in ***Semelhago v. Paramadevan***, [1996] 2 S.C.R. 415 held that it should no longer be presumed that specific performance should always be granted in the case of contracts dealing with the sale of land. The Court did not conclude that specific performance will never be available in the case of property acquired for investment purposes. Rather, the relevant inquiry will be whether the property is "unique" or whether damages are an adequate remedy. If follows that specific performance remains a matter of discretion for the trial judge. The following passages (at paras. 21 and 22 of ***Semelhago***) make that clear:
> >
> > > It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases.
> > >
> > > …

> Specific performance should, therefore, not be granted as a matter of course absent evidence that its substitute would not be readily available.

In other words, each situation is to be determined on its facts. The law is best summarized in an Ontario General Division case, ***904060 Ontario Ltd. v. 529566 Ontario Ltd.*** (1999), 89 O.T.C. 112 (at para. 14):

> … [T]he presumption of uniqueness has not (yet) been replaced by a presumption of replaceability, and that what the Supreme Court did in Semelhago was to open the door to a critical inquiry as to the nature and function of the property in relation to the prospective purchaser …

The inquiry by a trial judge is not a mere consideration of the nature and function of the land. The relevant inquiry with respect to whether or not the property is "unique" is whether the evidence of replaceability for the purchasers' purposes is sufficient.

The author of Anger and Honsberger, *Law of Real Property*, 3rd ed. Looseleaf, (Aurora: Canada Law Book, 2007) points out at p. 23-22 that:

> In the post-*Semelhago* era, purchasers seeking to specifically enforce contracts for the sale of land in Canada bear the onus of establishing that damages would be an inadequate remedy in the particular circumstances. Should the purchaser be attempting to obtain the lands merely for investment purposes such onus would be exceedingly difficult to satisfy ...

The author adds that the Court must determine the true intentions of the plaintiff so as to avoid a speculative lawsuit for profit. The test for determining the uniqueness of commercial properties includes both subjective and objective elements. Professor La Forest explains (at pp. 23-24):

> … What is emerging is a 'business rationale' test for which the (subjective) business case for desiring the particular commercial property is examined through a due diligence (objective) appraisal by the court. Thus, the court will examine the nexus between the plaintiff's business plan and the amenities of the subject property. Specific performance may be granted if those amenities cannot readily be found elsewhere.

[14] In this respect, the City submits that this requirement has been met when the land is considered in the context of the amendments that had been made to the City's downtown Winnipeg zoning by-law in May 2014 and the City's Winnipeg Transit Master

Transit Plan which was adopted on April 29, 2021. It argues that the Property cannot be replaced or exchanged.

[15] In response to Earl's position that the City's action here is statute barred, the City takes the position that the now repealed legislation, ***The Limitations of Actions Act***, R.S.M. 1987, c. L150, is applicable. Under that Act, and specifically ss. 25 and 26, the applicable limitation period for the recovery of land is 10 years. The City submits that it has meet that requirement.

[16] Furthermore, the City argues that even if, as submitted by Earl's, the six-year limitation period in respect of contract is applicable, its action was commenced before the six-year deadline. It is the City's position that the limitation period in respect of contract expires after the six years following October 15, 2015, that is, on October 15, 2021. The October 15, 2015 date relied upon by the City is the date it states by which time the substantial development of the Property was to have been completed by Earl's. This action was commenced on October 12, 2021.

[17] The City argues that the arguments in favour of one or all of three doctrines of estoppel advanced by Earl's to prevent the City from advancing its claim to the reversionary interest are not applicable here. Those three doctrines include estoppel by representation, promissory estoppel and estoppel by convention.

[18] In summary, the City's position in respect of opposing the applicability of estoppel in any form is:

a) There is no evidence that the City represented or otherwise agreed to not act upon its reversionary interest if Earl's elected to sell the Property to a third party rather than continuing its ongoing efforts to develop the land;

b) Even if it can be said that the discussions that occurred between the parties at the meeting of May 7, 2015, in some way amounted to legal relations between the City and Earl's being affected, there is no evidence that the matters being discussed extended to include any promise or representation to change legal relations in the event that Earl's abandoned its efforts to develop the Property, in favour of a plan to sell the Property instead; and

c) There is no mutual assumption that could ground Earl's alleged belief that the City would not seek to take the land back if Earl's ceased its efforts to develop, and instead, elected to dispose of the Property to a third party.

[19] Finally, the City submits that Earl's is not entitled to damages for losses sustained as a result of the City's conduct in refusing to discharge the Caveat. It states that in this case, its reluctance to act upon the Caveat or its reversionary interest at an earlier date was done in good faith and with a view towards assisting Earl's with facilitating development in the City's downtown area. It takes the position that when Earl's abandoned its development in 2020 by electing to dispose of the Property, it became clear that the opportunity and desire on the part of Earl's to develop had been extinguished. Accordingly, it was only at that point appropriate for the City to give notice of its intention to exercise its reversionary interest when it did on November 26, 2020.

The Position and Argument of Earl's

[20] Earl's submits that the Caveat ought to be discharged from the title to the Property. It is Earl's position that in order to resist the discharge of the Caveat, the City bears the onus of proving that it has a valid interest in the Property. Earl's argues that the City is unable to meet this burden for two reasons:

a) The City has expressly waived its right to the reversionary interest in the Property evidenced by the Caveat because of a verbal agreement entered into between the parties after a meeting on May 7, 2015; and

b) In the alternative, the City is estopped from asserting an interest in the Property by virtue of its representations and course of conduct since the meeting of May 7, 2015 between the parties and the expiry of the deadline for development of the Property as set out in the Caveat.

a) The City has expressly waived its right to the reversionary interest in the Property evidenced by the Caveat because of a verbal agreement entered into between the parties after a meeting on May 7, 2015

[21] Earl's states that the verbal agreement of May 15, 2015 included the following terms:

a) Earl's would not proceed with a further appeal of the development plan that had been rejected by the City nor with a subdivision application in respect of the Property;

b) The City would not seek to rely upon the reversionary interest; and

c) The City would not pursue its rights under the Caveat.

[22] Earl's submits that in reliance upon this agreement, it withdrew the development plan and the subdivision application from consideration by the City. It states that although officials from the City do not recall the reversionary interest being raised or discussed at the meeting, they are unable to dispute the existence of the agreement. At the same time, it argues that the evidence from Earl's representatives is clear and unequivocal that an agreement was reached at the meeting. It submits that given the purpose and circumstances of the meeting, the City's suggestion that the reversionary interest was not discussed is beyond belief.

[23] Earl's states that this agreement contains all the elements of a binding contract, including:

a) The parties had an intention to contract and to negotiate a resolution to the ongoing dispute concerning the development of the Property;

b) The essential terms of the agreement were settled – Earl's agreed it would withdraw its development plan and subdivision application in exchange for the City's agreement to not pursue its rights under the Caveat and to not rely on the reversionary interest; and

c) The terms of the agreement were straightforward, clear and unequivocal and are further evidenced by the conduct of the parties since the agreement was reached at the meeting.

b) In the alternative, the City is estopped from asserting an interest in the Property by virtue of its representations and course of conduct since the meeting of May 7, 2015 between the parties and the expiry of the deadline for development of the Property as set out in the Caveat.

[24] Earl's states that no development of the Property occurred before or after the Caveat's deadline of October 15, 2015, nor were any steps taken by the City following the expiry of the deadline to assert its rights under the Caveat or to pay Earl's for its surrender of the Property. Furthermore, it argues that the agreement and the verbal representations made by the City during the meeting of May 7, 2015 to the effect that it would not seek to rely upon the Caveat, gives rise to promissory estoppel.

[25] Earl's states that promissory estoppel is established here as a result of the agreement and the conduct confirming that agreement throughout the period that followed the May 7, 2015 meeting. Its decision not to pursue its reversionary interest was acted upon by Earl's in its decision to withdraw its development plan and subdivision application from consideration by the City and in electing not to develop the Property within the framework required under the Caveat. Earl's argues that in the circumstances here it is clear that the City intended that the legal relations between it and Earl's, as evidenced by the Caveat, be altered such that the City's rights under the Caveat would not be enforced.

[26] In respect of its argument of estoppel by convention, Earl's submits that it is evident from the dealings between both parties following the meeting of May 7, 2015, it can be inferred that the parties shared an assumption that the Caveat was no longer valid, and that the City did not intend to act upon its reversionary interest in the Property. It states that it acted upon the shared assumption of fact by, initially, withdrawing the

development plan and subdivision application, then by not taking steps to develop the Property either before or after the October 15, 2015 deadline and, most recently, by relocating its downtown restaurant to a new site on Main Street and entering into a muti-million dollar sale of the Property. It argues that Earl's would suffer significant loss and damage by way of the loss of the sale of the Property, should it be held that the City has a valid interest in the Property and therefore the court should act to prevent such loss and damages in these circumstances.

[27] Earl's also advances a separate claim for damages pursuant to s. 160(a) of ***The Real Property Act***, C.C.S.M. 1988, c. R30, stating that the City is liable to Earl's since the unreasonable continuation of the Caveat here resulted in loss to Earl's. The City's delay over the five years following the time when the Caveat became actionable amounts to arbitrary and unreasonable conduct and demonstrates a wanton disregard of the interests of Earl's.

[28] Earl's also argues that in the circumstances here, the City should not be entitled to rely a change in the governing legal framework in May 2014, after it had purchased the Property. It states that it was clear that the development plan regarding the Property was shared and discussed with the City prior to the purchase of the Property by Earl's. The development plan that Earl's had prepared complied with the downtown zoning by-law in force at the time of the purchase.

[29] However, once the Property was purchased, and the development plan submitted to the City for the Property, and after an initial favourable response by the City, Earl's was advised that the development plan did not comply with amendments made to the

City's downtown Winnipeg zoning by-law in May 2014. The City took the position that the development plan had to comply with the amended by-law.

[30] Despite the attempts made by the parties to achieve a resolution of this dispute, they were unable to do so. During the meeting of May 7, 2015, it became clear that the parties had incompatible visions for the development of the Property. (See SAF paras. 35-44)

[31] It is the position of Earl's that although the purchase agreement for the Property made it clear that the terms of the agreement were subject to the by-laws of the City, including any future amendments to the by-laws, the City is not entitled to rely on an amendment to the applicable by-law in order to prevent Earl's from complying with what it undertook to develop.

[32] In support of its position, Earl's relies upon the decision of the court in ***Bhasin v. Hrynew***, 2014 SCC 71, [2014] 3 S.C.R. 494 (QL). In ***Bhasin***, the position Bhasin advanced is found at para. 29 of that decision which states:

> 29 … [Bhasin's] broad submission is that the Court should recognize a general duty of good faith in contract. The duty arises where the agreement gives the defendant the power to unilaterally defeat a legitimate contractual objective of the plaintiff and it does not clearly allow the defendant to exercise its power without regard for that objective: A.F., at para. 51. This duty of good faith prevents conduct which, while consonant with the letter of a contract, exhibits dishonesty, ill will, improper motive or similar departures from reasonable business expectations. Mr. Bhasin contends that common law in Canada is increasingly isolated as other jurisdictions embrace a greater role for good faith in contract law: A.F., at paras. 27-32. The recognition of a general duty of good faith would constitute an incremental advance in the law, given the numerous specific situations that already give rise to a duty of good faith. Mr. Bhasin relies on the findings of the trial judge that the respondents improperly and dishonestly used their non-renewal right to compel Mr. Bhasin to merge with his competitor. Mr. Bhasin contends that the respondents had no legitimate business reason for not renewing the contract. He also says that the entire agreement clause should be construed narrowly, and that express language is needed for such a clause to derogate from a duty of good faith: A.F., at para. 83.

[33] In adding a general duty of honest contractual performance, the court set out this development in Canadian common law, stating at paras. 92 and 93:

> **92** I conclude that at this point in the development of Canadian common law, adding a general duty of honest contractual performance is an appropriate incremental step, recognizing that the implications of the broader, organizing principle of good faith must be allowed to evolve according to the same incremental judicial approach.
>
> **93** A summary of the principles is in order:
>
> (1) There is a general organizing principle of good faith that underlies many facets of contract law.
>
> (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.
>
> (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

[34] Earl's specifically references the prior decision of the Supreme Court of Canada in ***Mason v. Freedman***, [1958] S.C.R. 483, and referred to by the court in ***Bhasin***, where the court considered the type of situation in which a duty of good faith arises, this being the situation where a contractual power is used to evade a contractual duty. In summarizing the ***Mason*** decision, the court in ***Bhasin*** held at para. 51:

> **51** … In that case, the vendor in a real estate transaction regretted the bargain he had made. He then sought to repudiate the contract by failing to convey title in fee simple because he claimed his wife would not provide a bar of dower. The issue was whether he could take advantage of a clause permitting him to repudiate the transaction in the event that he was "unable or unwilling" to remove this defect in title even though he had made no efforts to do so by trying to obtain the bar of dower. Judson J. held that the clause did not "enable a person to repudiate a contract for a cause which he himself has brought about" or permit "a capricious

> or arbitrary repudiation": p. 486. On the contrary, "[a] vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner": p. 487.

[35] Earl's argues that while the City is entitled to carry out its legislative functions, that is, in the passing of by-laws within its jurisdiction, it is nevertheless required to comply with the application of the principles identified in ***Bhasin*** in the course of its contractual dealings. Accordingly, Earl's submits that as a contractor the City is not entitled to rely on changes made by a by-law that it passed which would have the effect of effectively preventing Earl's from carrying out its commitment to develop the Property within the 24 months stipulated in the agreement.

[36] Finally, Earl's submits that the City's action for specific performance is statute barred. In this regard, Earl's relies on the SAF which provides at para. 12 that the Purchase Documents define the date of possession as "the date of completion of the Opening Plan as stated herein."

[37] It notes at para. 24 of the SAF that on September 25, 2013, the City passed By-law No. 98/2013 in relation to the Opening Plan. Accordingly, the date of possession is September 25, 2015. On that basis, Earl's argues that the breach of the agreement occurred 24 months after the date of possession, namely on September 25, 2015, when the development clause ended and the City was in a position to demand its reversionary interest given that there was no substantial completion of the development by that date.

[38] Earl's argues that the cause of action here is contract and the applicable limitation period to commence an action in contract is six years from the date of the breach as set

out in the now repealed, but nevertheless applicable ***The Limitation of Actions Act***. Accordingly, Earl's argues, the claim is barred as of September 25, 2021.

The Position and Argument of 1006 Manitoba

[39] Although 1006 Manitoba by in large adopted the position advanced by Earl's it is instructive to briefly summarize some of the arguments which it advanced.

[40] The first argument advanced by 1006 Manitoba is that in failing to be ready to transfer the Property on the date of the breach, the City has abandoned its rights in respect of the revisionary interest it is advancing. In this respect, it relies on ***Malka v. Racz***, 2022 ONSC 1362, [2022] O.J. No. 994 (QL), where the court held at paras. 72 and 73:

> **72** In the immediate case, both parties breached their obligations on the date fixed for closing and neither party took the appropriate steps to restore time of the essence. Both parties are not in a position to enforce the swap properties transaction.
>
> **73** In *Remedies and the Sale of Land* (2nd ed.), [8] which I wrote with Bruce Engell, we discuss the problem presented by the immediate case with another problem associated with the dilemma of both parties being in default and time no longer being of the essence. At page 49, we state:
>
> > Finally, with respect to time of the essence, if neither party performs as scheduled, then with the further passage of time, it may be inferred that neither party wishes to complete the transaction. In such circumstances, the court may treat the contract as abandoned and unenforceable [9] or repudiated by both sides and unenforceable. [10] The doctrine of contractual abandonment has received considerable analysis in England where it has been explained as depending upon the parties' conduct leading to a necessary inference of an implicit agreement to abandon the contract. Alternatively, the doctrine has been explained on the basis of estoppel. The estoppel arises where, because of the conduct of one party, the other party is justified in relying and acting on the understanding that the contract is over. [11]

[41] In advancing this argument, 1006 Manitoba also relies on ***Fraser v. Robinson***, [1952] S.J. No. 34, 7 W.W.R. (N.S.) 378 (Sask. Q.B.) (QL), which provides at para. 14:

> **14** In the case which has been referred to, the onus is put on the plaintiff, and the usual plea in actions for specific performance is that the plaintiff is and always has been ready and willing to carry out the contract. Sec. 922 of *Fry on Specific Performance* reads:
>
> > "With regard to the matters to be done by the plaintiff according to the terms of the contract, it is, from obvious principles of justice, incumbent on him, when he seeks the performance of the contract, to show, first, that he has performed or been ready and willing to perform; and, secondly, that he is ready and willing to do all matters and things on his part thereafter to be done; and a default on his part in either of these respects furnishes a ground upon which the action may be resisted."

[42] The second argument presented by 1006 Manitoba is that for the City to successfully advance a case for specific performance, it must demonstrate that the Property is unique. If not, the only remedy available to the City is damages if those can be demonstrated. In support of this argument, it relies on ***Vend-All Marketing Inc. v. Hunter***, 2014 MBQB 11, 302 Man.R. (2d) 51 (QL), where McKelvey J. of this court commented on the uniqueness aspect of remedy of specific performance. She states:

> 42 My conclusion … negates a need to significantly expand upon the "uniqueness" aspect of the specific performance request by Vend-All. However, in light of the arguments presented, I am persuaded that some comment is advisable. The cases of ***Semelhago***, ***Trinden Enterprises Ltd.***, ***Southcott Estates Inc. v. Toronto Catholic District School Board***, 2012 SCC 51, [2012] 2 S.C.R. 675, and others have served to set out the authorities as regards the issue of specific performance based upon the uniqueness of real property. Professor Jeffrey Berryman, ***The Law of Equitable Remedies***, 2d ed. (Toronto: Irwin Law Inc., 2013) at 351-52, further described this area of the law:
>
> > … What can be concluded generally in all cases where specific performance is sought is that the plaintiff must now adduce some evidence of uniqueness of the property before being entitled to specific performance. A failure to provide evidence will prove fatal to the plaintiff's action. However, few courts have systematically explored varying concepts of uniqueness.
> >
> > For the plaintiff to prove that she has some fair, real, and substantial justification for specific performance, she must now demonstrate that damages are an inadequate remedy. This approach will presumably reconcile the availability of specific performance with the position taken when seeking other equitable remedies. It also requires courts to articulate inadequacy criteria in a much more systematic way than in the past.

[footnotes omitted]

43 The issue of uniqueness must be considered with respect to the particular physical characteristics of the property, the particular transactional characteristics of the property, and the personal or subjective attributes of the plaintiff in wishing to purchase the particular property. Professor Berryman also made reference to the ***John E. Dodge Holdings Ltd.*** decision where a number of observations were made (at p. 355 of ***The Law of Equitable Remedies***):

> First, ***Semelhago*** reminds us that the fundamental question is whether the plaintiff has demonstrated that damages would be an inadequate remedy such that a specific award of the property would better serve justice between the parties. Second, it is for the plaintiff to provide proof of uniqueness but this does not require the plaintiff to "prove a negative and demonstrate the complete absence of comparable properties." Third, uniqueness has both subjective and objective characteristics. It is subjective in the sense that the plaintiff must provide evidence that at the time of contracting there were particular aspects of the property which uniquely fulfilled the plaintiff's expressed requirements. It is objective in the sense that it is for the court to determine whether the plaintiff has proved that awarding damages would be inadequate compensation for the plaintiff's losses. The subjective criteria are less likely to be present in commercial transactions as compared to residential transactions. Fourth, uniqueness does not mean singularity. The plaintiff does not have to demonstrate that the property is *incomparable*, only that the property, taken as a whole, has a quality or a number of qualities that make it especially suitable for the plaintiff and which would make damages an inadequate remedy. …
>
> Later court decisions have largely endorsed Lax J.'s observations, in essence reducing them to two main criteria: (1) proof of the subjective characteristics that make the disputed property unique in the eyes of the plaintiff, and (2) proof that there are no comparable substitute properties which are readily available.

[43] Justice McKelvey's decision was upheld on appeal, however the appeal court's decision focused on procedural matters rather than the issue or definition of uniqueness. (See: ***Vend-All Marketing Inc. v. Hunter***, 2015 MBCA 10, 315 Man.R. (2d) 84)

Analysis and Decision

[44] At the onset of this analysis, I note that this dispute may have prevented further development of the Property in any manner at all over the past ten years. As noted by the parties at para. 69 of the SAF:

> 69. The Property is currently still being used as overflow parking for the restaurant located at 191 Main Street. Since being sold in July 2012, the only proposed development in respect of the Property was the development plans submitted by Earls and rejected by the City.

[45] However, it is not my role to judge or critique the policy choices of the elected City officials and the directions they provide to the public servants in carrying out their responsibilities within the various departments of the City. I raise this issue only to address a concern raised by counsel for Earl's. At the onset of its submissions to the court, counsel suggested this lack of development of the Property is attributable to foot dragging or indeed perhaps even bad faith on the part of certain bureaucrats who remain opposed to the development of the Property as a restaurant site.

[46] In his submissions, counsel for Earl's even referred to one particular bureaucrat who was singled out by a judge of this court in a recent decision also involving the City. In that decision, styled as ***6165347 Manitoba Inc. et al. v. Winnipeg (City)***, 2023 MBKB 114, [2023] M.J. No. 195, McCarthy J. ruled former chief Winnipeg planner Braden Smith along with another senior city planner were liable for misfeasance in public office for taking actions that stymied efforts by a land developer to develop 19 hectares in the northwestern corner of Fort Garry.

[47] In this case, it is clear from various e-mail exchanges between employees of the City, which included Braden Smith, some City employees or even branches of the City's

bureaucracy were supportive of other uses of the Property. This support included support for the Transit Department's intention to reacquire the Property for its purposes rather than the position that the Real Estate Department was instructed to take when the Property was originally declared as surplus by the City and sold. However, it would be unfair to suggest based on the evidence before me that Mr. Smith did anything inappropriate in this case, especially since, unlike the case before McCarthy J., he is not a named party to this action and therefore does not have the right to personally participate and respond to allegations of this nature in these proceedings.

[48] In arriving at my conclusion in this matter, it is my opinion that this issue can be resolved on the basis of one argument advanced by the defendants. My conclusions in respect of that argument are dispositive of the other legal arguments and consequently the broader legal dispute between the parties to this action.

[49] It is my opinion that in the circumstances of this case, the City is not entitled to specific performance in respect of the return of the Property and consequently, the Caveat placed on the title to the land by the City must be vacated. The decision not to grant the City's request for specific performance is based on a number of facts which I will set out in the following paragraphs.

[50] First, I agree with the position advanced by Earl's that although the City is entitled to enact by-laws governing the use of property, where its actions as a legislative body create an impediment for a party to a contract with the City from fulfilling its responsibility under that contract, it is not then entitled to rely on that impediment as the basis on which to repudiate the contract.

[51] In this case, the City and Earl's, as well as its predecessors, had extensive discussions prior to the decision to purchase the Property. During those discussions the details of the proposed development were presented to the City. The City officials were provided with drawings of the proposed restaurant development as is evident from various e-mail exchanges between city officials. For example, on February 19, 2013, in an e-mail, the senior negotiator for the City's Real Estate Division advised a senior manager in Service Development of Winnipeg Transit in respect of the Property that (see ABD, Tab 14):

> We are going forward [sic] this sale. I don't have any formal drawings for their intended development. It's a restaurant and they've provided me with the attached drawing. …

[52] Clearly, disappointed by the decision of the City to sell the Property for the purposes of a restaurant, the recipient official from Transit replied by e-mail later the same day:

> … Having anything built here is definitely a loss for Transit because this was to be our main downtown access to a future rapid transit phase …

[53] However, at least one City councillor was quite excited about the prospect of the restaurant being developed on the site of the Property, advising the above referenced senior negotiator, in respect of the proposed restaurant development: "Conceptually I'm okay with what is being proposed. … I am looking for an aggressive [ground-breaking and construction] schedule." And further that "I'd like to see a construction commencement date of no later than JUNE 2014." (emphasis in the original) (see e-mails dated January 23 and 24, 2013, Tab 12 of ABD)

[54] Both parties, including the senior staff of the City knew substantially, if not exactly, what was being proposed in terms of the development of the Property, even if certain City officials were not pleased with this turn of events.

[55] The evidence is clear that the decision to purchase the Property was based on that proposed development. Notwithstanding that common understanding and intention of both parties, in May of 2014, the applicable zoning by-law was altered, and the once compliant (at least on a *prima facie* basis) proposal was rejected by the City as it was no longer considered compliant. As set out in the SAF, applications to the City for a variance to allow the development were similarly rejected.

[56] In my opinion, this situation falls squarely within the scope of the concerns expressed by the court in ***Bhasin*** where it cited Judson J., in ***Mason***, holding at para. 51 of the ***Bhasin*** case:

> **51** … The issue was whether [the vendor] could take advantage of a clause permitting him to repudiate the transaction in the event that he was "unable or unwilling" to remove this defect in title even though he had made no efforts to do so by trying to obtain the bar of dower. Judson J. held that the clause did not "enable a person to repudiate a contract for a cause which he himself has brought about" or permit "a capricious or arbitrary repudiation": p. 486. On the contrary, "[a] vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner": p. 487

[57] While it may be the case that specific performance should not be denied in this type of case if this was the only factor to be considered, there are other concerns which are evident here, which, when coupled with this factor, militate against granting an equitable remedy to the City for specific performance.

[58] Another factor identified in the case law as being an important consideration in deciding whether to grant specific performance involves a determination of whether this

land is "unique". As argued by counsel for 1006 Manitoba and as recognized in ***Vend-All*** by McKelvey J. the uniqueness aspect is important. In that decision McKelvey J. cites with approval the following at para. 42 of her decision:

> **42** … Professor Jeffrey Berryman, ***The Law of Equitable Remedies***, 2d ed. (Toronto: Irwin Law Inc., 2013) at 351-52, further described this area of the law:
>
> > … What can be concluded generally in all cases where specific performance is sought is that the plaintiff must now adduce some evidence of uniqueness of the property before being entitled to specific performance. A failure to provide evidence will prove fatal to the plaintiff's action. …

[59] At para. 43 of the ***Vend-All*** decision, McKelvey J. goes on to state:

> **43** The issue of uniqueness must be considered with respect to the particular physical characteristics of the property, the particular transactional characteristics of the property, and the personal or subjective attributes of the plaintiff in wishing to purchase the particular property. …

[60] In this case, the determination of that issue is simplified by the fact that the City declared the Property surplus to the needs of the City and gave the direction that it be sold. This direction was then carried out by the Real Estate Division of the City. On the evidence before me I see no proposal by the City, pressing or otherwise, to enhance the transit system and in respect of which this property is uniquely situated and therefore necessary to accomplish that result.

[61] The same considerations in respect of enhancing the transit system were under consideration by the City prior to the City declaring the Property surplus to the needs of the City, yet nevertheless it instructed the City's Real Estate Department to sell the Property. The various expressions of preference for a course of action related to the City's transit system by various employees of the City contained in the ABD do not

constitute persuasive evidence of the uniqueness of the Property for the purposes of this action. In considering the factors identified in the case law and specifically in ***Vend-All***, it is my opinion that the City has failed to demonstrate that the Property is unique in the sense identified by the case law when considering the applicability of the remedy of specific performance.

[62] Throughout the years that followed the rejection of the plan by councillors, the use of the Property has remained unchanged and without any apparent significance being attributed to the Property by the City. Throughout those years Earl's has explored various options and engaged in discussions with city officials. Importantly, it also paid the property taxes due and owing. No doubt there were meetings from time to time, but it was only when the City became aware of Earl's intention to sell the Property to another interested party that the City became focused on exercising its reversionary interest. Even then, nothing substantive was done by the City to demonstrate that it was or is ready and willing to claim the Property by taking steps to exercise its reversionary interest.

[63] In this context, I would note that in response to a request from the court, legal counsel for the City provided me with a letter dated October 16, 2023, in which it was pointed out that City officials had been authorized to re-purchase the subject property upon the terms and conditions set out in the Purchase Documents as early as July 2012. (see Appendix "A" to these reasons)

[64] In my opinion, while Appendix A may demonstrate that the City had the financial authorization for the past decade to follow through with a demand for the transfer of the

Property from the titleholder, this on its own does not demonstrate a readiness or willingness to claim the Property in a timely fashion. The onus is on the plaintiff to demonstrate that it is and always has been ready and willing to carry out the contract. The City in this case has failed to meet this onus. (See ***Fraser*** at para. 14)

[65] In arriving at the decision not to grant the City's request for the equitable remedy of specific performance does not leave the City powerless to acquire the Property should the City wish to acquire it in the future. The City retains the ability to do so through the proper exercise of its powers of expropriation. Furthermore, having said that, the refusal to grant specific performance and ordering the removal of the Caveat does not absolve any present or future owner of the Property from complying with the applicable by-laws in the context of any proposed or future development. The obligation to comply with those requirements continues to run with the land. The decision to deny the City specific performance simply has the effect of not permitting the City to exercise the reversionary interest set out in the original Purchase Documents relating to the development of the Property within 24 months after the Date of Possession.

[66] In view of the foregoing reasons, there is no need for me to consider the other arguments raised here, including the arguments related to the applicable limitation period, estoppel or the existence of a new agreement arising out of the May 7, 2015 meeting, and I decline to do so.

Conclusion

[67] In the result, the City's action for specific performance is dismissed. Consequently, as requested by the defendants it is also ordered that the Caveat be vacated. The defendants shall have their costs on the basis of the appropriate tariff.

_____ J.