

# Court of King's Bench of Alberta

**Citation: Cedar Peaks Investments Inc v 2167584 Alberta Corp, 2023 ABKB 572**

**Date:** 20231012  
**Docket:** 2103 07522  
**Registry:** Edmonton

Between:

**Cedar Peaks Mortgage Investments Inc**

Plaintiff/Applicant

- and -

**2167584 Alberta Corp and Mark Keates**

Defendants

- and -

**Encore Master Builder Inc**

Respondent

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**Reasons for Decision  
of the  
Honourable Applications Judge L. R. Birkett**

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[1] This is a residential land development triangle of owner, builder, and lender gone wrong. There are limited funds available to the owner, 2167584 Alberta Corp, to pay the unpaid vendor's lien claim of the builder, Encore Master Builder Inc, and the outstanding mortgage of the lender, Cedar Peaks Mortgage Investments Inc.

[2] Cedar Peaks commenced these foreclosure proceedings against 216 as owner of two properties in Edmonton, AB and against Mark Keates as guarantor, being the sole director and shareholder of 216. A redemption order was granted September 2021 and the properties were listed for sale.

[3] In anticipation of a distribution of sale proceeds, Cedar Peaks brought this application to determine the priority between its mortgage and Encore's vendor's lien caveat registered ahead of the mortgage in first place on title to the properties.

[4] Cedar Peaks maintains that Encore was to postpone its caveat to the mortgage. 216 was to ensure the mortgage was the first financial charge on each of the properties. Encore responds that it was not required to postpone its vendor's lien caveat in favour of the mortgage. Encore's agreement with 216 to postpone was subject to 216 meeting certain conditions, which were not met.

[5] The legal issue to be resolved on this application is whether Cedar Peaks is entitled to a postponement of Encore's caveat as a third-party beneficiary of the Purchase Agreement between 216 and Encore, notwithstanding it is not a party to that agreement.

[6] Cedar Peaks argues that the caselaw supports this equitable remedy where the vendor agreed with the purchaser/mortgagor to postpone but did not. Encore argues this remedy is not available to Cedar Peaks because the agreement to postpone was conditional on certain terms being met by 216. There is no privity of contract between Cedar Peaks and Encore. 216 did not meet the conditional terms in the agreement for Encore to postpone its vendor's lien caveat to the mortgage.

[7] Counsel for Encore, Mr. Allen, provided a helpful visual representation of the issue as a right-angled triangle with 216 at the intersection of the horizontal axis representing its contract with Encore and the vertical axis representing its contract with Cedar Peaks. The third side of the triangle represents the equitable claim by Cedar Peaks to the postponement of Encore's caveat in favour of its mortgage.

[8] This triangulation has resulted in Cedar Peaks not having the priority it expected but rather in being left in second place on title by the actions or inactions of the other two parties, being its mortgagor, 216 and the unpaid vendor, Encore. The matter is further complicated by the ineffective trust conditions exchanged among the three legal counsel involved in transferring the titles and registering the mortgages.

[9] My decision on who has priority to the foreclosure sale proceeds as between the mortgagee and the unpaid vendor is based on equitable and contractual principles, rather than triangulation.

### **The contract between 216 and Encore**

[10] The properties were originally purchased as unsubdivided land by a numbered company owned by Mark Keates and transferred to Encore for the purpose of subdividing. Encore subdivided the land into Property 5A and Property 5B and transferred the properties back to Keates through the 216 numbered company for the purpose of obtaining mortgage financing for the construction of a single-family home on each property.

[11] According to the affidavit of Kim Gibbons, Encore's Executive Vice President, Encore entered into a written purchase agreement with 216 whereby it would subdivide, develop, and build a skinny home on each lot. In consideration, 216 would pay Encore \$593,457.90 for each completed home. Attached to the Gibbons affidavit is a copy of each "Encore Master Builder Purchase Agreement" dated August 2, 2019.

[12] The property was subdivided on February 3, 2020. Property 5A was transferred to 216 on July 22, 2020 and Property 5B was transferred to 216 on July 28, 2020.

[13] Gibbons deposes: “To get the draw mortgage on the Properties, the Properties were transferred to 216 but at all times the Properties were and continue to be, held in trust for Encore, pending the completion of the Purchase Agreements.” The affidavit references Clause 12 Acceleration on Default and Clause 14 Default by Purchaser of the Purchase Agreement. Clause 20 specifically confirms the land is held in trust.

[14] Clause 5 of the Purchase Agreement required 216 as Purchaser to pay Encore as Builder (vendor) a total price of \$593,457.90 for the completed single-family home on each of the subdivided properties, paid by a deposit of \$29,672.90 and a new mortgage of \$563,785.00 to be arranged by and at the expense of the Purchaser (Clause 5(g)).

[15] Clause 6 of the Purchase Agreement deals with title and mortgage. The Purchaser agreed that Encore “shall be entitled to register an unpaid vendor’s lien caveat against the Land as security for payment of the Total Price of the Home and Land which shall constitute a mortgage, charge and encumbrance against the Land.” The Builder agreed “to postpone this caveat in favour of a new mortgage by the Purchaser subject to the Purchaser meeting all of the conditions referred to above.”

[16] Prior to the transfers, Encore registered caveats to protect its unpaid vendor’s lien. The caveats were each registered on July 21, 2020.

[17] The conditions referred to in Clause 6 included: “The Purchaser agrees to execute all documents required by the Mortgagee and/or its solicitor and to fulfil any and all conditions imposed by the Mortgagee to advance the mortgage proceeds to the Builder.”

[18] Further: “The Purchaser acknowledges that if the mortgage obtained is for a lesser amount than what is listed in Clause 5(g), the Purchaser shall immediately pay this difference to the Builder.”

[19] And: “All remaining money to be advanced under the new mortgage shall not be due and payable until full or substantial completion and inspection of the Home by the Purchaser subject to Clause 18 (Possession of Premises) and any holdback requirements of the mortgagee.”

[20] The Purchase Agreements were made subject to draw mortgage financing approval on or before August 30, 2019.

### **Cedar Peaks’ mortgages**

[21] According to the affidavit of Mark Pullin, Officer and Director of Cedar Peaks, Keates contacted Cedar Peaks on behalf of 216 in August 2019 to arrange for mortgage financing for the purchase of the properties from Encore and the construction projects to be undertaken.

[22] Cedar Peaks confirms through the Pullin affidavit: “Following 216’s initial request for mortgage financing, Cedar Peaks reviewed copies of the Purchase Agreements in or around August 2019, and took specific note of the clause reproduced in Clause 6 of the Purchase Agreements. At all times, Cedar Peaks understood that Encore was required to postpone any unpaid vendor’s lien that it registered against either of the Properties to Cedar Peaks’ eventual mortgage registrations.”

[23] Cedar Peaks issued Commitment Letters to 216 dated June 15, 2020 offering to lend the amount of \$335,000.00 in order to finance the purchase of each property, which financing was to be secured as a first financial charge in favour of Cedar Peaks. The Commitment Letters attached to the Pullin affidavit provide: “The Borrower must provide evidence of satisfactory title to the Lands and the absence of any encumbrances, liens and interests except those permitted by the Lender.” Pullin deposes: “As such, Cedar Peaks required that the registration of its mortgages be registered in first priority over all other encumbrances and liens, or alternatively that any existing encumbrances and liens be postponed or subordinated to Cedar Peaks’ Mortgages.”

[24] The Mortgages were dated July 6, 2020. The 5A Mortgage was registered against title for Property 5A on July 22, 2020; the 5B Mortgage was registered against title for Property 5B on July 28, 2020.

[25] Pullin deposes: “On July 15, 2020, Cedar Peaks’ legal counsel forwarded the cumulative amount of \$216,050.00 (the Mortgage Advances) consisting of a \$108,025.00 draw on Property 5A and a \$108,025.00 [draw] on Property 5B, in trust to 216’s legal counsel, representing the initial draws on the Mortgages.”

[26] According to Pullin: “The Mortgage Advances were sent to 216 on the explicit trust condition that “in the event a Vendor’s Lien in favour of Encore Master Builder Inc is registered on title as first priority to our client’s mortgage... that you will forward to the Alberta Land Titles Office a Postponement of Vendor’s Lien postponing said Vendor’s Lien to our client’s mortgage...”

[27] It is Pullin’s evidence that: “On or about February 5, 2021, prior to advancing the second draw on the Mortgages for the Properties, Cedar Peaks discovered that the Caveats registered on the Properties had not yet been postponed and subordinated to the Mortgages.” As a result, Keates was advised that Cedar Peaks would not be advancing any further funds pursuant to the mortgages.

[28] Encore’s legal counsel wrote to 216’s legal counsel offering to provide a postponement of their unpaid vendor’s lien caveat upon unconditional receipt of the second advance. Cedar Peaks’ legal counsel wrote to 216’s legal counsel confirming no further funds would be advanced until they were in receipt of registrable postponements of the caveats. Pullin deposes that on April 19, 2021, Keates indicated his new lawyers had received postponements in trust from Encore’s lawyers: “Cedar Peaks has never received copies of these postponements.”

[29] According to the Pullin affidavit, Cedar Peaks became aware of disputes taking place between 216 and Encore resulting in construction delays, construction defects, and potential litigation. “By April 2021, 216 had defaulted on its obligations to make payments under the Mortgages. On this basis, Cedar Peaks conclusively resolved not to advance any further funds in exchange for a postponement, as had been offered by Encore’s legal counsel.”

[30] On behalf of Cedar Peaks, Pullin deposes: “At all times, it was a fundamental term of Cedar Peaks’ Mortgage transactions that its Mortgages would have priority over any financial encumbrances, including but not limited to Encore’s Caveats. Had Cedar Peaks known that it would not be provided with a first financial charge on the Properties, Cedar Peaks would not have advanced any funds to the Defendants at all, as it would have no reasonable security to enforce upon in the event of the Defendants’ default on the Mortgages.”

[31] Further, “At no point did Cedar Peaks ever indicate, either explicitly or implicitly, to 216, Mr. Keates or Encore, that it would agree to its Mortgages having a lesser priority position in relation to any encumbrances registered on the Properties by Encore.”

[32] Cedar Peaks commenced this foreclosure action on May 12, 2021. A Redemption Order-Listing was granted on September 9, 2021. The amount owing to Cedar Peaks at that time was \$298,371.00. The Affidavit of Value filed July 22, 2021 appraised Property 5A at a fair market value of \$300,000.00 and Property 5B at \$435,000.00.

[33] Kim Gibbons deposed in the affidavit of September 7, 2021, that based on the level of completion of work and materials provided on the Properties, Encore was owed \$368,765.34 for Property 5A and \$412,493.75 for Property 5B, plus legal fees on a solicitor and client basis.

[34] Mark Pullin states: “Should this be the case, and should the Caveats be valid and enforceable, Cedar Peaks would likely not recover any funds from the sale of Property 5A and would recover only a nominal amount from a sale of Property 5B. Based on the foregoing, Cedar Peaks is experiencing significant prejudice by the failure of 216 and Encore to register postponements of the Vendor’s Liens on the Properties.”

[35] Following the granting of the Redemption Order-Listing, Encore applied for an Order Confirming Sale and Vesting Title to Encore. Gibbons deposed “As Encore is owed more than the appraised values of the Properties, Encore is prepared to purchase the Properties, free and clear of subsequent encumbrances, in accordance with a credit bid (the Credit Bid) as any delay will further prejudice Encore.”

[36] Gibbons suggests that as a subsequent encumbrancer, Cedar Peaks will be unable to recover any proceeds from the Properties and will not suffer any prejudice from the acceptance of the Credit Bid. She also states: “I am informed by my counsel, and verily believe the same to be true, Cedar Peaks has a personal guarantee against Mark Keates and also has a potential claim against ALIA, as such Cedar Peaks has other avenues to collect on their debt which are not available to Encore.”

[37] Encore’s application was adjourned. Given the nature of the relief sought by Encore, the judicial listings in the foreclosure action were cancelled. The properties have been preserved by Cedar Peaks pending the outcome of this application to determine if Encore’s caveats should be postponed to Cedar Peaks’ mortgages.

[38] Cedar Peaks argues that the Purchase Agreements imposed an obligation upon Encore to postpone the caveats to Cedar Peaks’ mortgages. Additionally, Encore or its legal counsel failed to follow trust conditions that were imposed governing the release of the first mortgage draw.

[39] Encore argues that its caveats are valid prior-registered interests in the properties. Cedar Peaks is attempting to litigate around the apparent negligence of its former counsel who failed to ensure Cedar Peaks was legitimately entitled to, and actually secured, the postponement of the caveats to the mortgages.

### **Encore’s knowledge of Cedar Peaks’ mortgages**

[40] In Clause 6 of the Purchase Agreement between Encore and 216, Encore agrees that if part of the monies payable are coming from the proceeds of a new first mortgage by 216, Encore shall provide a registrable transfer of title to 216, providing certain conditions are met. The first

condition is that Encore is supplied with and approves a copy of the mortgage commitment obtained by 216.

[41] Kimberly Gibbons states in answer to undertakings that Encore was never provided a copy of the Commitment Letter to review and approve as required under the Purchase Agreements. After the issue arose with the postponement of Encore's caveat, Ms. Gibbons requested a copy of the mortgage commitment from Cedar Peaks on August 18, 2021 stating: "As part of Encore's contract with 216 (Mark Keates) we require a copy of that and we never received them on these files (only an email from you asking me to approve the draw schedule on June 1, 2020)."

[42] Ms. Gibbons notes in her response to undertaking: "Further, the Commitment Letter provided did not match the draw commitment which had been provided to Encore by Cedar Peaks' broker and which had been approved by Encore." The broker referred is Kim Nguyen, a mortgage associate with Vine Group, clarified to be Mr. Keates' broker.

[43] There was communication between Ms. Gibbons and Ms. Nguyen in September 2019. On September 4, 2019, Ms. Gibbons wrote to Ms. Nguyen and Mr. Keates "As previously discussed, we need to have the first draw mortgage fund before we can take on another liability. At this time we are way over leveraged on Mark's deals so our lawyer has advised that we must have at least one of the draw fund to add additional security to the deals." At Ms. Nguyen's request, Ms. Gibbons agreed to the draw schedule. However, no details of that draw schedule have been provided.

[44] On May 29, 2020, Ms. Gibbons advised that Encore is ready to schedule the first draw request on these properties. Ms. Nguyen responds on June 1, 2020 asking for approval of the draw schedule. The draw schedule provided then is for total mortgage funding of \$385,000.00, with the first advance of \$173,500.00 less deductions. Ms. Gibbons approved the draw schedule that same date adding: "Please note that we will only call the first advance and then the remainder at possession."

[45] On June 9, 2020, Ms. Nguyen advised Mr. Keates and Ms. Gibbons that the appraisal has been sent over to Cedar Peaks: "The appraisal has dropped by 10k so we need to get the commitment revised to meet that. Note that the final lending amount will reduce accordingly and I'll just need you to re-sign that document so we can get things over to the lawyers."

[46] On June 15, 2020, Ms. Nguyen advised that the revised commitment was signed and sent back to Cedar Peaks for review. Ms. Gibbons responded: "Thanks Kim. I am hopeful to have these funds by the end of this month...".

[47] On June 24, 2020, Ms. Nguyen advised Mr. Keates and Ms. Gibbons the documents were being sent to the lawyer for Mr. Keates' signature and they should be able to request funding right away. The first advance of funds was provided to Encore on July 17, 2020, as set out below.

[48] The copy of the June 1, 2020 email provided by Ms. Gibbons in response to undertakings with the details of the draw mortgage advances totalling \$385,000.00 contains a handwritten comment "amount above does not match amount on contract or amount on Cedar Peaks mortgage commitment with 216". This was likely written after the August 18, 2021 request for a copy of the commitment letters and review of same. There are no records indicating otherwise.

[49] The amount on the Purchase Contract is a new mortgage of \$563,785.00 to be arranged by and at the expense of the Purchaser (Clause 5(g)). The amount on the Cedar Peaks mortgage commitment with 216 is \$335,000.00.

[50] The mortgage commitment construction draw schedule provides for an initial advance of \$150,000.00 less estimated deductions of \$26,500.00 for the interest reserve account and \$15,350.00 for fees and costs. This net first advance was provided on July 15, 2020 when Cedar Peaks' legal counsel forwarded the cumulative amount of \$216,050.00 consisting of a \$108,025.00 draw on Property 5A and a \$108,025.00 draw on Property 5B, in trust to 216's legal counsel.

[51] 216's legal counsel subsequently sent these draws of \$108,025.00 on July 17, 2020 to Encore representing the net first advance from Cedar Peaks for each of Lot 5A and 5B.

[52] No records have been provided to indicate Encore demanded a further portion of the total purchase price from 216 under Clause 6 of the Purchase Agreements. In response to undertakings, Mr. Keates was unable to locate any correspondence with Encore with respect to the difference between the mortgage secured and the total purchase price.

[53] Mr. Pullin provided the undertaking responses on behalf of Cedar Peaks and confirmed there is no record of a conversation with Mr. Keates in relation to his obligations to bring in a shortfall.

[54] Ms. Gibbons confirmed on questioning that she understood the Purchase Agreements required 216 to pay the remainder of the purchase price prior to possession. Ms. Gibbons also confirmed that Encore put default on these properties because Cedar Peaks would not pay the draw requested and therefore 216 was not fulfilling its obligation under the contract.

[55] Encore did not demand 216 pay the difference between the purchase price and the mortgages following receipt of the first to draw on the properties in the amount of \$108,025.00 on each property. The first draw was accompanied by a detailed trust reconciliation report showing the total amount of the mortgage financing was \$335,000.00. The Purchase Agreements anticipated mortgage financing in Clause 5(g) of \$563,785.00 and provided that if the mortgage obtained is for a lesser amount, 216 would immediately pay the difference to Encore.

[56] Encore did not treat 216 as being in default under the Purchase Agreements until the June 22, 2021 demand letters were issued. Encore confirmed that a call on the draw mortgage for payment was made and when no further funds would be provided by Cedar Peaks, advised 216: "As you have not advanced the necessary new mortgage proceeds as required under the Purchase Agreement... you are in breach of the Purchase Agreement and the entirety of the remaining Total Price is now due and owing..."

[57] Counsel for Cedar Peaks submits that by not requiring 216 to immediately pay the shortfall in the mortgage financing, Encore waived any preconditions to be met by 216 prior to a postponement of the unpaid vendor's lien caveats.

[58] Counsel for Encore submits that it had broad discretion whether to require 216 to pay the shortfall in the mortgage financing. Encore was not required to postpone the caveats in favour of the mortgages until the preconditions were met. They were not met. Encore can rely on its caveats as valid prior registered interests in the properties. Cedar Peaks' claim is with its former counsel and Mr. Keates for failure to secure the postponement of the caveats to its mortgages.

## **Transactions and trust conditions**

### **Encore to 216**

[59] On July 6, 2020, counsel for Encore as vendor sent transfers of land to counsel for 216 as purchaser in trust on conditions that the documents not be used until it was confirmed the purchaser had a draw mortgage and all requirements of the mortgagee were met to advance mortgage proceeds unconditionally and without delay.

[60] Specifically, counsel for Encore required “That once you have satisfied the above trust conditions, you will forthwith submit the enclosed Transfer of Land and the Purchaser’s new mortgage, if any, for registration, in that order without intervening registration. Please note that we have filed an Unpaid Vendor’s Caveat on behalf of our client. Please be sure to refer to this instrument on your document registration request to avoid delay in registration.”

[61] The trust conditions also required the purchaser to execute a Transfer of Land Back to be used in the event the transaction did not conclude pursuant to the terms of the Purchase Agreement. In the event the vendor was unable to recover title, then Encore would rely on the rights and remedies pursuant to its unpaid vendor’s lien caveat previously registered.

[62] The July 6, 2020 letter then set out the process for closing prior to possession being granted, including Encore’s understanding that 216 will be making up any shortfall in the payments provided for in the Agreement should the mortgage proceeds be insufficient to cover same and stated “Upon unconditional receipt of all funds due and owing to Encore Master Builder Inc. under the contract we undertake to discharge the Builders Unpaid Vendor’s Caveat.”

### **Cedar Peaks to 216**

[63] On July 15, 2020, counsel for Cedar Peaks advised counsel for 216 that the sum of \$108,025.00 would be deposited in their firm’s trust account, representing the net mortgage proceeds for the first draw on each of the mortgages. The funds were sent on trust conditions that the Cedar Peaks’ mortgage and caveat be registered on title subject to no other registrations and “That in the event a Vendor’s Lien in favour of Encore Master Builder Inc. is registered on title as first priority to our client’s mortgage and Caveat re: Assignment of Rents, that you will forward to the Alberta Land Titles Office a Postponement of Vendor’s Lien postponing said Vendor’s Lien to our client’s mortgage and Caveat re: Assignment of Rents.”

### **216 to Encore**

[64] On July 17, 2020, counsel for 216 sent their firm’s trust cheque in the sum of \$108,025.00 to Encore representing the net first advance from Cedar Peaks for each of Lot 5A and 5B, as set out on an enclosed Trust Reconciliation prepared by counsel for Cedar Peaks. Counsel for 216 advised counsel for Encore: “The funds are provided to your office pursuant to your undertakings in your letter dated July 6, 2020 AND to provide a registerable Postponement of Vendor’s Lien postponing your Caveat currently in for registration to mortgage and caveat re: assignment of rents in favour of Cedar Peaks Investments Mortgage Inc.”

### **Encore to Cedar Peaks**

[65] Counsel for Encore did not provide a registerable Postponement of Vendor’s Lien, notwithstanding the mortgage advance funds were provided to them by counsel for 216 pursuant to a request for that undertaking. Counsel for 216 did not provide a postponement of the vendor’s lien caveat to the land titles office, notwithstanding they received the funds pursuant to a trust



condition imposed by counsel for Cedar Peaks. No one followed up on these outstanding undertakings and trust conditions.

[66] In January 2021, Encore was looking for a second draw on the mortgage. Prior to advancing the second draw on the mortgages, Cedar Peaks discovered the vendor's lien caveats had not been postponed to the mortgages.

[67] On February 25, 2021, counsel for Encore offered to provide a postponement of the unpaid vendor's lien caveat to counsel for 216 upon unconditional receipt of the second mortgage advance.

[68] On March 4, 2021, counsel for Cedar Peaks advised counsel for 216 they would not be advancing any further funds under the mortgages until such time as they were in receipt of a registerable postponement of Encore's vendors lien caveats.

[69] On March 25, 2021, counsel for Encore communicated with counsel for Cedar Peaks and counsel for 216 on the belief there was an agreement in principle to get the funds advanced in exchange for the postponement. To facilitate this, Encore offered to forward the postponements directly to Cedar Peaks and receive the mortgage draw funds directly them.

[70] By April 2021, this had not been resolved. 216 had defaulted on its obligation to make payments under the mortgages and was facing potential litigation with Encore over construction delays and defects. Cedar Peaks was not prepared to advance any further funds in exchange for a postponement. On June 22, 2021, as no further funds were advanced, Encore issued a default notice against 216.

[71] In May 2021, Cedar Peaks commenced the foreclosure proceedings against 216. The Redemption Order - Listing was granted September 9, 2021. Cedar Peaks brought this application to have Encore's vendor's lien caveats discharged or postponed.

[72] In October 2021, Encore brought an application to take title free and clear of the Cedar Peaks' mortgages to be able to complete construction and sell the properties.

[73] Those applications were adjourned to allow the issue of priorities to be determined.

### **Issues**

[74] The legal question to be resolved on this application is whether Cedar Peaks is entitled to a postponement of Encore's caveat as a third-party beneficiary of the Purchase Agreement between 216 and Encore. This is a discretionary equitable remedy.

[75] Whether that equitable remedy is available to Cedar Peaks requires a consideration of equitable and contractual principles, including the exercise of contractual discretion and the doctrine of waiver. Consideration must be given to the purpose of the agreement between the parties, the intentions and conduct of the parties, and the trust conditions exchanged between counsel.

[76] Specifically, were there enforceable preconditions to be met by 216 prior to Cedar Peaks being entitled to a postponement of the caveats and did Encore waive the preconditions by its conduct?

## Resolved Issue

[77] Cedar Peaks had also applied for an order directing the Registrar of Land Titles to discharge the caveats registered by Encore due to deficiency in the description of the interest supporting the caveats. The caveats state that Encore "... claims an interest as Unpaid Vendor by way of a lien respecting the unpaid portion of the purchase price due to the Caveator by 2167584 Alberta Corp. pursuant to the Sales Agreement made in writing dated December 13, 2019..."

[78] The contract between Encore and 216 is a Purchase Agreement dated August 2, 2019. Cedar Peaks points out that the Sales Agreements made in writing dated December 13, 2019 refer to entirely different agreements executed in relation to properties located on other land.

[79] Section 131 of the *Land Titles Act*, RSA 2000 c L-4 requires that a caveat must state "the nature of the interest claimed and the grounds on which the claim is founded."

[80] Cedar Peaks submits that the nature of the interest claimed and the grounds on which the claim is founded are substantially deficient and incorrect as the caveats do not properly refer to the Purchase Agreements but to agreements executed in relation to different properties entirely.

[81] Encore submits that the nature of the interest claimed and the grounds on which the claim is founded are clear as the caveat states the interest as unpaid vendor respecting the unpaid portion of the purchase price due to Encore by 216 pursuant to an agreement in writing. The misdescription of the title and date of the agreement is not significant.

[82] After considering the written arguments of counsel and the discussion of s 131 of the *Land Titles Act* by the Alberta Court of Appeal in *Sewak Gill Enterprises Inc v Bedaux Real Estate Inc*, 2020 ABCA 125, I concluded that the caveat provided sufficient notice of Encore's claim. I advised counsel that the caveats would not be discharged due to deficiency, notwithstanding the misdescription of the agreement between the parties as to its title and date executed.

[83] The oral hearing was then focused on the issue of postponement of the Encore caveats to the Cedar Peaks' mortgages. The relevant facts have been set out above. The law and arguments advanced by the parties follow.

## Law and argument

### Postponement to a third-party beneficiary

[84] Counsel for Cedar Peaks provides case law from Alberta, Saskatchewan, and Ontario to establish where an instrument provides for a postponement of interests in favour of a subsequent encumbrancer, that subsequent encumbrancer can enforce the right of postponement as a third-party beneficiary. Accordingly, Cedar Peaks as subsequent mortgagee is a third-party beneficiary of the Purchase Agreement between Encore and 216 for the purpose of the postponement clause which should operate in its favour.

[85] It was argued in *Canada Trust Co v Queensland Management Services Ltd* (1980), 13 R.P.R. 156 (Ont. H.C.) that there were no authorities holding that a third party can take advantage of a right of postponement contained in a mortgage to which it is not a party. Eberle J stated "There are cases in which it has been held that a covenant to provide a discharge of a mortgage runs with the land and may be taken advantage of by a successor. ... I am unable to see any distinction between the case of a postponement of a mortgage and a discharge of a mortgage.

... the applicant Canada Trust is entitled to take advantage of the postponement clause in accordance with the principle referred to.”

[86] The headnote describes the issue as “Third party beneficiaries - Whether second mortgagee can exercise right of postponement granted by first mortgagee to mortgagor in first mortgage.” and reports the Court held, the second mortgagee was entitled to a postponement of the first mortgage.

[87] Master Funduk found this to be the case in *Yarley (China) Developments Co v Amber Equities Inc*, 1996 CanLII 10469 (AB KB) at paragraph 48:

In the present lawsuit the Plaintiff is not a party to the Suntree mortgage. However, there is authority that a subsequent mortgagee can enforce a right to postponement in a prior mortgage because he is a “third party beneficiary”: *Canada Trust Co. v. Queensland Management Services Ltd.* (1980), 13 R.P.R. 156 (Ont. H.C.).

[88] Master Mason, as she then was, considered this decision of Master Funduk in postponing the tenant’s rights under a commercial lease to a subsequent mortgagee where it was a requirement of the financing and specifically provided for in the lease. The tenant had in fact signed the postponement, but it was not registered. Mr. Ramessar, who was then counsel for the successful mortgagee, provided a copy of the proceedings before Master Mason in *Connect First Credit Union Limited v 1342390 Alberta Ltd.*, (January 14, 2021) Calgary QB (Unreported).

[89] The Saskatchewan courts have applied similar principles. In *Royal Trust Co v H.A. Roberts Group Ltd.*, 1995 CanLII 6094 (SK KB), Baynton J found at paragraph 71: “Postponements of mortgages... are common in commercial practice and effectively alter the priorities between the parties that would otherwise pertain under the applicable registration system in the jurisdiction.” And at paragraph 72: “no authority was cited to me on this point, I doubt that the privity of contract principle can provide a litigant with immunity from the consequences of a subordination provision he or she has agreed to in writing and that affects the priority of a third party’s security.” See also *Farm Credit Canada v Mainline Pulse Inc*, 2005 SKQB 175 (CanLII) and *R.M. of Chaplin No. 164 v Farm Credit Canada*, 2006 SKCA 7 (CanLII).

[90] Encore agrees when an agreement unconditionally requires a contracting party to postpone its interest to a third party’s interests, the third party is entitled to rely on that agreement. However, no authority was located suggesting a third party is automatically entitled to subordinate a contracting party’s interest when the subordination was conditional upon a contracting party satisfying conditions.

[91] Encore says that the issue is not whether Encore would have been required to postpone the caveats to the mortgages but when it was required to do so. The Purchase Agreements provided Encore with unlimited discretion as to when they would postpone the caveats and that such postponement would only occur after the purchaser fulfilled all the applicable conditions. The Purchase Agreements also gave Encore unlimited discretion as to when it would hold the purchaser in default.

[92] Cedar Peaks says Encore was required to postpone the caveats to the mortgages when it failed to require 216 to meet the applicable conditions and when it accepted the first mortgage advance on trust conditions to provide a registrable postponement.

[93] Encore maintains its entitlement to priority over Cedar Peaks. 216 failed to fulfil the required conditions. Encore was not required to postpone its interests to Cedar Peaks. Encore's decision to refrain from postponing the caveats was commercially reasonable. Encore was entitled to protect its interests in the properties.

[94] The position taken by Encore requires a consideration of the reasonable exercise of its contractual discretion. The position taken by Cedar Peaks requires a consideration of the doctrine of waiver.

#### **Exercise of contractual discretion**

[95] Encore argues that the Purchase Agreements imposed a conditional obligation upon Encore to postpone its caveats to the Cedar Peaks' mortgages. Encore's decision not to postpone the caveats was a commercially reasonable exercise of its discretion in the circumstances because Encore had unfettered discretion as to when postponement would occur until 216 advanced the full purchase price. Cedar Peaks advanced the first mortgage draw with knowledge of Encore's discretion. The preconditions of postponement were not met. There is no evidence Encore acted in a manner which was ulterior or extraneous to its intentions under the Purchase Agreements.

[96] The common law duty to exercise contractual discretion in good faith was recognized by the Supreme Court of Canada in *Bhasin v Hrynew*, 2014 SCC 71. The Court further determined the contours and constraints of this duty in *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at paragraphs 62 and 63:

... Expressed as an organizing principle, this standard is that parties must perform their contractual duties, and exercise their contractual rights, honestly and reasonably and not capriciously or arbitrarily (*Bhasin*, at paras. 63-64).

Accordingly, a discretionary power, even if unfettered, is constrained by good faith. To exercise it, for example, capriciously or arbitrarily is wrongful and constitutes a breach of contract. Even unfettered, the discretionary power will have purposes that reflects the parties' shared interests and expectations, which purposes help identify when an exercise is capricious or arbitrary, to stay with the same example. Like the duty of honest performance considered in *Bhasin* and *Callow*, the duty to exercise discretionary power in good faith places limits on how one can exercise facially unfettered contractual rights. When the good faith duty is violated, the contract has been breached. The question is what constraints this particular duty puts on the exercise of contractual discretion.

Stated simply, the duty to exercise contractual discretion in good faith requires the parties to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract, or, in the terminology of the organizing principle in *Bhasin*, to exercise their discretion reasonably.

[97] The role of the court is not to ask whether the discretion was exercised in a morally opportune or wise fashion from a business perspective but is only to ensure the discretion was not exercised in ways unconnected to the purposes for which the parties granted the power. See *Wastech* at paragraphs 73 and 74.

[98] Encore argues this doctrine allows them “some elbow-room for the aggressive pursuit of self-interest” in not postponing their unpaid vendor’s lien caveats in favour of the Cedar Peaks’ mortgages.

[99] That argument assumes Encore has the discretion to postpone its caveats. Encore relies on the provision in Clause 6 of the Purchase Agreements which says “The Builder agrees to postpone this caveat in favour of a new first mortgage by the Purchaser subject to the Purchaser meeting all of the conditions referred to above.”

[100] Had Encore simply constructed the two new homes with only the initial deposit and the commitment for new mortgage financing for the balance of the total purchase price, there would be no need to postpone their caveats until possession and closing. The timing of the postponement of Encore’s caveats in favour of Cedar Peaks’ mortgages has been complicated by the arrangement for draw mortgage financing.

[101] Had there been no draw mortgage financing, once the homes were complete, Encore would provide transfers of land in trust for the balance of the total purchase price. On receipt of the funds, Encore would postpone their caveats in favour of the mortgagee providing those funds. Any difference in the mortgage funds obtained and the mortgage funds anticipated in Clause 5(g) of the Purchase Agreement would be immediately paid by the purchaser as cash to close. This process is reflected in portions of the July 6, 2020 trust letter prepared by Encore’s counsel and sent to counsel for 216.

[102] However, the arrangement between Encore and 216 was for Encore to transfer title to 216 so 216 could obtain draw mortgage financing. As advised by Ms. Gibbons on September 4, 2019, Encore required the first draw mortgage funds as additional security to Encore’s deals with Mr. Keates.

[103] The Purchase Agreements do not provide the detail in Clause 5 for the advance of funds by the purchaser for the stages of completion. Clause 29 provides that the Purchase Agreement is subject to draw mortgage financing approval on or before August 30, 2019, being a condition in favour of the purchaser. The arrangements for draw mortgage financing were confirmed in the September 2019 correspondence between Ms. Gibbons and Ms. Nguyen.

[104] By May 29, 2020, Encore was ready to schedule the first draw request. The lawyers facilitated the transactions with the registration of the unpaid vendor’s lien caveats, transfers of land, and mortgages. On July 17, 2020, counsel for 216 sent the sum of \$108,025.00 to Encore representing the net first advance from Cedar Peaks for each of Lot 5A and 5B.

[105] By January 28, 2021, Encore was calling for a second draw on the Cedar Peaks’ mortgages. It was discovered Encore had not postponed its caveats to the mortgages. With not enough money to go around, Encore is not willing to postpone now, relying on its exercise of discretion in the Purchase Agreements.

[106] Encore submits it was not required to demand 216 immediately pay the difference between the \$563,785.00 new mortgage proceeds anticipated in Clause 5(g) and the \$335,000.00 draw mortgage arranged, nor to hold 216 in default of that payment. Encore had no obligation to postpone their caveats in favour of the Cedar Peaks’ mortgages unless and until 216 met the condition to pay the difference in mortgage financing and all other conditions.

[107] Encore’s position is that the Purchase Agreements provided Encore with unlimited discretion with respect to when they would postpone the caveats. Their decision not to postpone

the caveats on receipt of the first draw mortgage funds was a commercially reasonable exercise of its contractual discretion in the circumstances.

[108] Encore has a duty to exercise its contractual discretion in good faith as set out by the SCC in *Bhasin* and in *Wastech*. The issue is not whether the discretion was exercised in a morally opportune or wise fashion from a business perspective but was it exercised in ways connected to the purposes for which the parties granted the power and that reflect the parties shared interests and expectations. See *Wastech* at paragraphs 73 and 74. To exercise contractual discretion capriciously or arbitrarily is wrongful and constitutes a breach of contract. See *Wastech* at paragraph 62.

[109] However, this application is not about breach of contract between Encore and 216. It is about the equitable remedy available to Cedar Peaks to require the postponement of Encore's caveats in its foreclosure action.

[110] Cedar Peaks does not need to show Encore acted capriciously or arbitrarily or otherwise acted in bad faith and thereby breached their contractual obligation to postpone.

[111] That does not mean I cannot consider the commercial standard set out in *Bhasin* and *Wastech* expressed as an organizing principle and expect the parties to exercise their contractual rights honestly and reasonably. I can and do expect Encore to exercise its contractual discretion in good faith and in a manner consistent with the purposes for which it was granted in the Purchase Agreements and the parties' shared interests and expectations.

[112] The Purchase Agreements were executed for the purpose of 216 obtaining draw mortgage financing to assist Encore in constructing the homes.

[113] The Purchase Agreements required 216 to execute all documents required by the mortgagee and/or its solicitor and fulfil any and all conditions imposed by the mortgagee to advance the mortgage proceeds to Encore.

[114] The Purchase Agreements allowed Encore to register an unpaid vendor's lien caveat as security for payment of the total purchase price. Encore agreed to postpone the caveat in favour of a new first mortgage. The agreement to postpone was subject to 216 meeting certain conditions, including the conditions imposed by the mortgagee, and including the condition to pay the difference in financing, and ultimately to pay the total purchase price.

[115] The conditions imposed by the mortgagee are set out in Cedar Peaks' Commitment Letters to 216 dated June 15, 2020 requiring its mortgages to be registered in first priority over all other encumbrances and liens, such that any existing encumbrances and liens be postponed or subordinated to Cedar Peaks' mortgages. Those conditions were reflected in the trust letter dated July 15, 2020 sent by counsel for Cedar Peaks to counsel for 216 enclosing the mortgage documents and first draw funds.

[116] In keeping with the Purchase Agreements, Mr. Keates executed the documents as required by the mortgagee and complied with the conditions imposed by counsel for Cedar Peaks in advancing the mortgage proceeds to Encore. Counsel for 216 provided the first draw funds to counsel for Encore pursuant to the undertakings in Encore's letter dated July 6, 2020 and to provide a registerable postponement of Encore's vendor's lien caveat.

[117] Counsel for Encore accepted trust cheques sent on July 17, 2020 by counsel for 216 each in the sum of \$108,025.00 representing the net first mortgage advance from Cedar Peaks for Lot 5A and 5B. Encore did not provide registerable postponements of their vendor's lien caveats.

[118] Counsel for Encore did not advise counsel for 216 that Encore would not be providing postponements of its caveats in favour of the Cedar Peaks' mortgages, nor were the mortgage funds returned unused. Encore had requested this additional monetary security from 216 and accepted the first draw mortgage funds provided by Cedar Peaks while maintaining its priority position on title.

[119] Considering the commercial standard set out in *Bhasin* and *Wastech* expressed as an organizing principle, I find Encore had a duty to exercise their contractual rights honestly and reasonably. Encore is required to exercise any contractual discretion it has in postponing its caveats in favour of the Cedar Peaks' mortgages in good faith and in a manner consistent with the purposes for which that discretion was granted and consistent with the parties' shared interests and expectations.

[120] The shared interests and expectations between Encore and 216 included the obtaining of draw mortgage financing to allow Encore to build two single homes for 216. 216 expected to pay the balance of the total purchase price when the homes were available for possession. Encore expected to secure that balance with its unpaid vendor's lien caveat. The equitable interest of Cedar Peaks in the postponement clause in the Purchase Agreement was not adequately addressed when the first draw mortgage funds were provided.

[121] The July 6, 2020 trust letter sent by counsel for Encore to counsel for 216 enclosing the transfers of land, identified the unpaid vendor's lien caveats and the terms upon which they would be discharged. There was no discussion of the caveats remaining as a first charge or being postponed to the anticipated mortgage financing.

[122] The July 17, 2020 trust letter sent by counsel for 216 to counsel for Encore enclosing the first draw mortgage funds and specifically requesting a postponement of the caveats to the mortgages, went unanswered.

[123] Encore takes the position it was not required to postpone its caveats relying on its contractual discretion to not enforce the unmet preconditions set out in the Purchase Agreements. It casts the blame on counsel for 216 for not obtaining the postponements and suggests Cedar Peaks can recover its loss from the personal guarantees of Mr. Keates.

[124] Cedar Peaks focuses its argument on showing Encore waived any preconditions to its obligation to postpone the caveats. The record shows 216 was not asked to immediately pay the difference between the amount of the mortgage listed in Clause 5(g) and the amount of mortgage financing obtained. Cedar Peaks argues Encore cannot now rely upon the total price clause because it waived its enforcement of that provision and was therefore obligated to provide the postponements.

[125] Encore submits that the record does not support a finding of waiver. The trust letters between counsel for Encore and counsel for 216 confirm that Encore would discharge its caveats on full payment. By not providing a registerable postponement, Encore deliberately exercised its discretion to insist on full payment prior to postponing the priority of its caveats. Encore did not waive its rights under the Purchase Agreements. Encore's conduct, viewed objectively, does not



support an inference that Encore intended to waive its rights. The legal test for waiver has not been met.

### **The equitable doctrine of waiver**

[126] The test for whether a waiver has occurred is set out in *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co*, 1994 CanLII 100 (SCC), [1994] 2 SCR 490, at pages 499-500:

Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: *Mitchell and Jewell Ltd. v. Canadian Pacific Express Co.*, 1974 ALTASCAD 18 (CanLII), [1974] 3 W.W.R. 259 (Alta. S.C.A.D.); *Marchischuk v. Dominion Industrial Supplies Ltd.*, 1991 CanLII 59 (SCC), [1991] 2 S.C.R. 61 (waiver of a limitation period). The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):

The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

[127] *Saskatchewan Rivers* refers an old English case of *Hartley v Hymans*, [1920] 3 K.B. 475 at 486. An excerpt from *Hartley* is cited in *Lestrangle et al v Juda et al*, 1972 CanLII 449 (ON SC):

Tindal, C.J. said: "If the party waives the condition he is in the same situation as if it had never existed." It is to be noted that although in that case the waiver was not by writing but by conduct only it yet was held effective. The rule as to waiver is stated broadly in Blackburn on Sale, 3rd ed., pp. 212, 213, as follows: "Where there is a condition precedent to the duty of either party to do some act, it is a good defence to an action for not doing that act to say that the condition precedent has not happened or been performed. But that defence is no longer available if the party wishing to set it up has waived his right to insist upon the performance of it, as, for example, where, after the time when the condition ought to have been performed, he accepted any benefit under the contract."

[128] Cedar Peaks submits that the evidence demonstrates Encore had full knowledge of its right to insist 216 immediately pay the difference between the mortgage proceeds expected in



Clause 5(g) of the Purchase Agreement and the draw mortgage and made an unequivocal and conscious intention to abandon that right.

[129] Further, according to the case law, if there is a condition precedent requiring 216 to pay the difference in mortgage proceeds prior to postponement, Encore has a good defence to an action for not providing the postponement to say that the condition precedent has not happened or been performed. That defence is no longer available if Encore has waived the right to insist upon the performance of the condition where, after the time when the condition ought to have been performed, Encore accepted the benefit under the contract of the first mortgage draw funds.

[130] In June 2021, after Cedar Peaks' refusal to provide a second draw on the mortgage, Encore held 216 in default of the Purchase Agreements for failure to advance the necessary new mortgage proceeds. Encore did not find 216 in default for failure to pay the difference between the draw mortgage financing and the mortgage amount set out in Clause 5(g).

[131] Cedar Peaks says it can be inferred from Encore's conduct that it had the conscious intention to relinquish the right to insist 216 to pay the difference in the mortgage amounts as a precondition to postponement of its caveats. As a result of this waiver, Encore had an obligation to provide postponements of its caveats to Cedar Peaks when demanded.

[132] Encore acknowledges that the conduct of a party, viewed objectively, may be considered in finding an unequivocal and conscious intention to abandon one's rights. "Such conduct is relevant because of the premise that a person intends the natural consequences of his or her acts." See the discussion on the waiver in *1242311 Alberta Ltd v Tricon Developments Inc*, 2021 ABCA 418 at paragraphs 21 to 32. Encore emphasizes the conduct must be viewed objectively and be consistent with an intentional and unequivocal waiver of rights.

[133] I note the comment in *Saskatchewan River* that the creation of such a stringent test is justified because no consideration is given by the party in whose favour the waiver operates. "An overly broad interpretation of waiver would undermine the requirement of contractual consideration."

[134] Encore agrees it had full knowledge of its rights under the Purchase Agreements and states it made a deliberate decision not to exercise its broad discretion to enforce those rights. This contradicts Cedar Peaks' assertion that Encore's decision not to immediately hold 216 in default is tantamount to an admission of waiver. Encore says its conduct demonstrates it intended to preserve its unfettered discretion not to prematurely postpone the caveats. Its conduct does not show an unequivocal and conscious intention to abandon its rights to insist 216 met the conditions precedent to postponing the caveats.

[135] I find a stringent test is appropriate when applying the equitable doctrine of waiver to determine if one party to a contract has taken steps to forgo reliance on some known right or defect in the performance of the other party to the contract. See *Saskatchewan River*.

[136] However, this application is not about a waiver by Encore to forgo reliance on the contractual right to have preconditions met by 216. It is about the equitable remedy available to the third party, Cedar Peaks to require the postponement of Encore's caveats in its foreclosure action.

[137] Cedar Peaks does not need to prove Encore waived the conditions precedent to its contractual obligation to 216 to provide a postponement of its caveats. Encore does not need to

persuade the court that it did not unequivocally and conscientiously intend to forgo its rights to insist that 216 meet its conditions under the Purchase Agreements.

[138] That does not mean I cannot consider whether Encore took steps or failed to take steps which amount to foregoing reliance on its right to insist 216 meet the preconditions to providing a postponement of its caveats in favour of the mortgages.

[139] It is clear Encore did not intend to waive its entitlement to an unpaid vendor's lien unless and until the full purchase price was paid. That is set out in the July 6, 2020 trust letter sent by counsel for Encore to counsel for 216.

[140] It is not so clear Encore did not intend to waive or postpone the priority position of its caveats on title. The July 6, 2020 trust letter does not mention priority of the caveats or postponement to the mortgages. Encore received the first mortgage draw funds sent in exchange for a registrable postponement. Encore says, in defence of not providing the postponements, it does not have to postpone its caveats because 216 did not meet its conditions under the Purchase Agreement.

[141] I find in the context of Cedar Peaks being a third-party beneficiary to the Purchase Agreements between Encore and 216, that defence is no longer available to Encore. Encore can no longer insist upon 216's performance of the preconditions prior to providing a postponement to the Cedar Peaks' mortgages where, after the time to do so, it has accepted the first draw mortgage funds. The time for Encore to insist 216 perform the condition and make up the shortfall was immediately upon 216 obtaining the mortgage for a lesser amount than what is listed in Clause 5(g). That time was as early as September 2019 and as late as July 17, 2020, when counsel for Encore received the \$108,250.00 with a trust reconciliation statement showing the total draw mortgage to be \$335,000.00, not the \$563,785.00 expected in Clause 5(g). See *Hartley*.

## Conclusion

[142] Postponements of mortgages are common in commercial practice and effectively alter the priorities between the parties which would otherwise pertain to the applicable land titles registration system. The privity of contract principles cannot provide a litigant with immunity from the consequences of a subordination provision agreed to in writing that affects the priority of a third party's security. See *Royal Trust Co* at paragraph 71.

[143] Postponement to a third-party beneficiary is available when there is an agreement to do so in a contract between two other parties. Neither the ability to exercise contractual discretion or the ability to apply the doctrine of waiver are determinative of the availability of this equitable remedy. The issue is not whether the terms of the contract should be upheld as between the contracting parties. The issue is whether a third party can benefit from the agreement to postpone in its favour.

[144] I find the purpose and intent of the Purchase Agreements was to allow 216 to obtain draw mortgage financing for the use of Encore in building two new single homes on a subdivided lot. Encore agreed to postpone its unpaid vendor's lien caveat in favour of a new first mortgage. Although the contract between Encore and 216 required 216 to meet conditions prior to the postponement, Encore is not entitled to immunity from the consequences of the agreement to postpone where it affects Cedar Peaks' security.

[145] Encore is required to exercise any contractual discretion it has in postponing its caveats in favour of the Cedar Peaks' mortgages in good faith and in a manner consistent with the purposes for which that discretion was granted and consistent with the parties shared interests and expectations in obtaining financing for the construction. Encore has a duty to exercise its contractual rights honestly and reasonably as set out in *Bhasin* and *Wastech*.

[146] I find Encore is required to postpone its unpaid vendor's lien caveats to the Cedar Peaks' mortgages. Encore entered into an agreement with 216 to allow for draw mortgage financing. 216 was required to comply with the terms of the mortgagee, which included having the mortgage registered as a first charge. Encore accepted the first draw mortgage funds without protest to the request for a registrable postponement.

[147] Encore is not able to refuse to postpone its caveats in favour of Cedar Peaks by arguing 216 has not met the preconditions for a postponement. Encore accepted the first mortgage funds after the time passed for it to insist on 216 paying the difference between the mortgage obtained and the mortgage expected. In considering whether Cedar Peaks is entitled to a postponement as a third-party beneficiary to the agreement between Encore and 216, I find Encore can not rely on the preconditions set out in the Purchase Agreement as a defence to providing the postponements. See *Hartley*.

[148] Cedar Peaks is entitled to have Encore's caveats postponed to its mortgages. The residential land development triangle of owner, builder, and lender has been righted with the lender entitled to be paid from the proceeds of sale of these properties in the foreclosure action in priority to the unpaid vendor's lien claim of the builder.

[149] Cedar Peaks' application for an order directing the Registrar of Land Titles to postpone the subject caveats, being Land Titles Registration 202 147 882 and 202 147 885 to the Cedar Peaks mortgages is granted.

[150] If the parties are unable to otherwise agree, I will hear an application to determine costs in morning chambers.

[151] I thank counsel for their thorough materials and helpful oral argument.

Heard on the 13<sup>th</sup> day of June, 2023.

**Dated** at the City of Edmonton, Alberta this 12<sup>th</sup> day of October, 2023.

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**L. R. Birkett**  
**A.J.C.K.B.A.**

**Appearances:**

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