IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *iFortune Homes Inc. v. 1011066 B.C. Ltd.,* 2024 BCSC 1974

Date: 20241028
Docket: 233580
Registry: Vancouver

Between:

iFortune Homes Inc.

Plaintiff

And

1011066 B.C. Ltd.

Defendant

Before: The Honourable Justice Matthews

Reasons for Judgment

Counsel for the plaintiff:	C. Poon
Counsel for the defendant:	E.W. Hulshof
Place and Date of Trial:	Vancouver, B.C. April 25, 2024 September 26, 2024
Place and Date of Judgment:	Vancouver, B.C. October 28, 2024

Table of Contents

Overview

[1] The plaintiff, iFortune Homes Inc., seeks summary trial determination of its claim in breach of contract against 1011066 B.C. Ltd., in which iFortune alleges that 1011066 refused to return a deposit that iFortune paid on a contract of purchase and sale pertaining to two properties that 1011066 agreed to, but did not, sell to iFortune.

[2] 1011066 does not dispute that it did not complete the sale, undertake steps it agreed to take to make the sale completable, and did not return the first deposit. 1011066 asserts that the claim is not suitable for summary trial determination because it is much more complicated than a straightforward breach of contract claim and the evidence is not well developed. 1011066 asserts that it was not required to complete by the date that iFortune asserts for several reasons: iFortune had led it to believe that time was not of the essence; iFortune had waived the timing requirement; iFortune is estopped by its behaviour with regard to the timing requirement; iFortune anticipatorily breached the contract by advising 1011066 that it did not have the funds to complete the contract; the first deposit was not a deposit but rather consideration for an option to purchase; and iFortune breached obligation of good faith performance of the contract.

[3] 1011066 submits that if the Court concludes the case is capable of summary trial determination, iFortune's claim should be dismissed for these same reasons.

[4] The issues are:

a) whether the matter is suitable for summary trial;

b) whether 1011066's failure to set completion date was a breach of a material term of the contract;

c) whether iFortune's conduct amounts to waiver or estoppel;

d) whether the plaintiff's conduct and communications amounted to anticipatory breach which 1011066 accepted, permitting it to treat the contract as at an end;

e) whether the first deposit was not a deposit but rather consideration for the option to purchase; and

f) whether iFortune breached its obligation of good faith performance of the contract.

Suitability for Summary Trial

Legal Principles

[5] Rule 9-7(15)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, states that a court may try a matter summarily on an issue or generally unless the court cannot find the necessary facts or it the court is of the opinion that it would be unjust to decide the issues by summary trial.

[6] The factors set out in rule 9-7(15)(a) (i) and (ii), whether the necessary facts can be found and whether it would be unjust to decide the issues raised, are separate but related questions. In some circumstances, it may be unjust to decide a case summarily even if on the whole of the evidence, it is possible to find the necessary facts: *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 at 385–386, 1985 CanLII 147 (C.A.).

[7] The onus is on the party who asserts that the matter is not suitable for a determination by a summary trial to demonstrate unsuitability: *Ekins v. Davey*, 2007 BCSC 1630 at para. 24.

[8] A party who seeks determination by summary trial must put its case forward on the basis that it will be determined summarily including the risk that the claim may be summarily determined against it; similarly, a party who is responding to a summary trial application must take every reasonable step to respond: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 32.

[9] As summarized in *Gichuru* at paras. 30–31, citing *Inspiration Management Ltd.*, (1989), 36 B.C.L.R. (2d) 202 (C.A.), whether it would be unjust to proceed summarily depends on the following factors:

a) the amount involved;

b) the complexity of the matter;

c) its urgency;

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

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

f) the course of the proceedings;

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

h) whether credibility is a crucial factor in determining the dispute;

i) whether the summary trial would create an unnecessary complexity in the resolution of the dispute; and

j) whether the application would result in litigating in slices.

Whether the Necessary Facts Can be Found

[10] iFortune's claim pertains to a contract for purchase of sale of two properties on 41st Ave. in Vancouver in the Oak Ridge area.

[11] The parties entered into the contract of purchase and sale on September 1, 2020. The purchase price for the properties provided for in the contract of purchase and sale was $16 million. The contracting for purchase and sale provided for two deposits to be made totaling $2 million as follows: a first deposit was to be paid totaling $1,500,000 within three days of the formation of the contract. The first deposit was to be released to 1011066 when 1011066 lodged an option to purchase against title to the Properties in favour of iFortune. The second deposit, totaling $500,000 was to be paid within 31 days of the formation of the contract provided 1011066 had registered the option to purchase on title.

[12] iFortune paid the first deposit as required. The option to purchase was registered on title and so the first deposit was released to 1011066 in accordance with the terms of the contract for purchase and sale.

[13] At the time the contract of purchase and sale was entered into, there were two certificates of pending litigation registered against the properties pertaining to a claim another property developer, named Zhang, had brought against 1011066 in relation to these properties.

[14] The contract for purchase and sale provided for an initial completion date to be December 15, 2020. The contract for purchase and sale did not complete on December 15, 2020. The parties entered into an amending agreement providing for a new date for completion, and when that date was not met, three subsequent amending agreements.

[15] Each amending agreement provided for the completion date to be set for the first business day that was 90 days after all certificates of pending litigation had been discharged from title to the properties. Each amending agreement provided that if the completion date had not been fixed by a certain day or occurred by a date 60 days after the last date for the completion date, the contract could be terminated by iFortune on written notice to 1011066 in which case the contract would be at an end except for 1011066's obligation to return the first deposit in full.

[16] In each case the parties made these amending agreements in writing. On two occasions, the time to complete the previous agreement had passed by the time the parties made the amending agreement.

[17] The last amending agreement was made on April 27, 2022 and provided for the completion date to be fixed by December 31, 2022 and for the sale to complete by March 31, 2023.

[18] In December 2022, iFortune learned that a third certificate of pending litigation had been filed against the properties by the second mortgagee and that 1011066 was in default of mortgage payments owing on the properties. On

December 15, 2022, the second mortgagee was granted an order *nisi* and redemption date was set for June 15, 2023. In April 2023, iFortune learned that the second mortgagee had been granted conduct of sale for the properties.

[19] On May 1, 2023, iFortune wrote to 1011066 demanding return of the first deposit because 1011066 had not set a completion date nor completed the sale and had not removed the certificates of pending litigation which was being necessary precondition to setting a date for completion.

[20] The facts that I have recited to this point are not in dispute. However, 1011066 asserts that there are other complicating facts.

[21] 1011066 asserts that iFortune was well aware of the difficulties that 1011066 faced in removing the two certificates of pending litigation in existence at the time the contract to purchase and sale was entered into because they arose from the Zhang litigation which was protracted.

[22] 1011066 asserts that it was well understood between the parties that iFortune wanted these properties for a larger development for which it needed to assemble a group of adjoining properties and therefore it did not have concerns about the timing of the close of this deal.

[23] In conjunction with the situation regarding the Zhang litigation, 1011066 asserts that iFortune readily agreed on numerous occasions to extend the time to complete the contract because it was not concerned about when the contract would complete. In addition to raising this as a factual basis for its position that time was not of the essence and for its defences of waiver and estoppel, 1011066 asserts that the differences between the parties as to whether time remained of the essence after the completion date was first extended, are such that this matter is not suitable for summary trial.

[24] In order to understand whether the factual issues that 1011066 points to affect the suitability for summary trial determination, it is necessary to consider the contract interpretation principles that will apply.

[25] The goal of contractual interpretation is to ascertain the objective intent of the parties at the time the contract was entered into: *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 at para. 49; and *Chudy v. Merchant Law Group*, 2008 BCCA 484 at para. 207. In undertaking this exercise, a decision-maker must read the contract as a whole, giving the words their ordinary and grammatical meaning consistent with the circumstances known to the parties at the time the contract was made. The circumstances at the time the contract is entered into are relevant because the meaning of words can vary depending on the context in which they are used and so it is not necessary to find ambiguity in order for evidence of the surrounding circumstances to be admissible: *Sattva Capital* at paras. 47, 50; and *British Columbia (Minister of Technology Innovation and Citizens' Services) v. Columbus Real Estate Inc.,* 2016 BCCA 283 at paras. 41–44.

[26] Where, even after reading a contract as a whole and considering the circumstances at the time the contract was entered into, there is ambiguity such that there are two reasonable interpretations of the contract, extrinsic evidence, including potentially post contract extrinsic evidence, can be used to resolve the ambiguity: *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459 at paras. 26–27, citing *Canadian National Railway v. Canadian Pacific Ltd.* (1978), [1979] 1 W.W.R. 358 at 372, 1978 CanLII 1975 (B.C.C.A.), aff'd [1979] 2 S.C.R. 668.

[27] The Court of Appeal in *Athwal v. Black Top Cabs Ltd.,* 2012 BCCA 107 describes a hierarchy of inquiry in search of the unambiguous meaning of the words used in the contract. The first step is to start with the words of the contract in the context of the contract as a whole and the surrounding circumstances. If the words of the contract, understood in the context of the whole agreement, including the circumstances in which it was made, are ambiguous, extrinsic evidence of what was said, done or known by the parties when the contract was made is admissible. Its purpose is to determine the parties' common intention. Ambiguity can arise from vague words, words that are inconsistent or in conflict with other provisions of the contract, words that are redundant, or words that are overly general.

[28] Regardless of whether extrinsic evidence is considered of matters extant at the time the contract was entered into or of the conduct of the parties under the contract, contextual evidence may not be permitted to overwhelm the words of the contract such that the court creates a new agreement: *Sattva Capital* at paras. 57, 60. See also *Athwal* at paras. 42–47.

[29] 1011066 argues that the court must consider evidence about the larger project that iFortune was working on and the Zhang litigation that 1011066 was involved in, to determine whether the timing of completion was ever a material term of the contract. The asserted context that iFortune had a long time horizon for the project to which the properties relate is not disputed. iFortune's principal deposed that it wanted to complete the purchase and so agreed to extend the deadlines, but also deposed that iFortune remained concerned about deadlines and so when it agreed to extend them, it did so on the basis that new ones were put in their place.

[30] The contextual facts that the Zhang litigation was in the way of removing the certificates of pending litigation is not disputed on this application.

[31] With regard to whether time ever was of the essence or remained of the essence, the dispute is whether, in light of the context, the contract should be interpreted to mean that the parties did not intend the deadlines to be material, despite that the contract had a time is of the essence provision. It is not disputed that in the amending agreements the parties agreed to new deadlines and affirmed the "time is of the essence" clause that they had agreed to in the original agreement.

[32] Accordingly, the language of the contract is not ambiguous and the context is not in dispute. The answer to the issues on this summary trial is to apply law to the unambiguous language of the contract and mostly undisputed facts.

[33] 101066 also submits that because iFortune repeatedly agreed to extensions of the time to complete, time to complete was not a material term of the contract. Again, this argument is not based on disputed facts. The agreements to amend were made and reduced to writing. The questions of whether they are such that iFortune

cannot rely on the agreed upon deadlines and/or the time is of the essence clause, can be resolved based on the evidence that is not in dispute.

[34] 1011066 seeks to have the Court consider evidence of the parties' conduct under the contract, including that iFortune's conduct should be taken to amount to waiver or estoppel of the agreed upon completion dates. For the same reason I have given immediately above with regard to whether the completion date was a material term of the contract, this submission depends mostly on the evidence of the amendments to the contract and not on disputed evidence and so does not preclude summary trial determination.

[35] 1011066 seeks to have the court consider evidence that iFortune advised 1011066 that it was having financial problems, did not have the funds to complete the purchase, and was seeking investors to obtain the funds to complete the purchase. 1011066 argues this was anticipatory breach and it was entitled to treat the contract as at an end, precluding iFortune from seeking a return of the first deposit.

[36] iFortune has not expressly disputed that it had advised 1011066 that it was having financial difficulties and was seeking investors. iFortune submits that such communications do not amount to an anticipatory breach but if they did, 1011066 did not accept any anticipatory breach as a repudiation and in failing to do so did not elect to treat the contract as at an end. iFortune argues that given the principles of law that govern anticipatory breach, and the lack of any evidence that 1011066 accepted any repudiation by iFortune, this is a matter of applying the law to undisputed facts and does not preclude summary trial determination. I agree.

[37] 1011066 conducted an examination for discovery after the first day of hearing of this summary trial and before its continuation some months later. It left outstanding requests at that examination for discovery pertaining to what communications iFortune made to 1011066 about whether it had the financial means to complete the contract for purchase and sale. iFortune has not answered those outstanding requests.

[38] I do not consider these outstanding requests to be a reason to not decide this matter at a summary trial. When this summary trial application was filed, five months before it was initially heard, it was the obligation of 1011066 to take steps necessary to put itself into a position to defend the summary trial application. There is no explanation that has been given as to why it did not conduct the examination for discovery sooner. While it took the position that the matter was not suitable for summary trial when this matter first came on for hearing in April 2024, it did not take the position that it had been precluded from conducting an examination for discovery.

[39] Second, the communications it has sought are communications that iFortune sent to 1011066. Clearly, 1011066 should be in a position to produce those written communications as evidence if they exist. 1011066 asserts that the Zhang litigation is related to an investigation by the Chinese government pertaining to allegations of corruption that have been made against Zhang's father, and Hang Yin, one of the principals of 1011066, has been compelled to participate in that investigation. 1011066's counsel has explained that the Chinese government has limited Mr. Yin's access to his electronic records. There is some evidence about this from Mr. Yin but it is extremely vague and is insufficient to accept that 1011066 does not have communications relating to this litigation which it asserts that iFortune sent to it.

[40] Third and finally on this point, Yan Chun Liu, another principal of 1011066, deposed that iFortune's principal, Peter Luan, communicated to her that iFortune did not have the financial wherewithal to complete the purchase and was looking for investors because of that. There is nothing in the evidence to indicate that the written communications that 1011066 asserts should be produced would be different from the substance of the evidence before the court.

[41] I do not consider the outstanding examination for discovery request to be a reason to not decide this matter by summary trial.

Whether It is Just to Decide the Matter by Summary Trial

[42] 1011066 argues that because these properties were being acquired by iFortune as part of a bigger development and that the properties were encumbered by certificates of pending litigation filed by a party to the Zhang litigation, this matter is much more complex than it seems at first glance. 1011066 argues that this is not a simple breach of contract case because of these other factors at play.

[43] Because of the clear language of the contract, I do not consider these contextual matters to be to render the interpretation of this contract too complex for a summary trial.

[44] 1011066 also argues that the amount in issue, a $1.5 million deposit as part of a $16 million contract for purchase and sale, is such that a summary trial is not appropriate.

[45] I disagree. While the amounts in issue are such that the matter could bare the cost of a conventional trial, large amounts in issue do not preclude a summary trial or make a conventional trial the only appropriate means of proceeding. Such a conclusion is contrary to Rule 1-3(1) of the *Supreme Court Civil Rules* that provides that every matter is to be determined on its merits in the manner that is most speedy, inexpensive and just in the circumstances.

[46] There is no significant concern that proceeding by summary trial will result in some matters being resolved while others are still outstanding. While iFortune also seeks a constructive trust in the properties or a declaration that it has a proprietary interest in the properties through the option to purchase, that option to purchase is behind the mortgages, the mortgages are in default, and 1011066 did not redeem them in the redemption period. As 1011066 pointed out, any proprietary remedy sought by iFortune, would have to be pursued in the foreclosure proceedings.

[47] I am persuaded that this matter can be justly determined on its merits through summary trial determination.

iFortune's Claim in Breach of Contract

[48] 1011066 did not remove the Zhang litigation certificates of pending litigation in time for the completion date to be set by December 31, 2022 and for the sale to complete by March 31, 2023. By the time the third certificate of pending litigation had been registered against the properties, there were foreclosure proceedings resulting in an order *nisi* in favour of the second mortgagee.

[49] On May 1, 2023 iFortune wrote to 1011066 demanding return of the first deposit on the basis that 1011066 had not met its contractual obligation to set the completion date and complete the sale. 1011066 did not reply to the demand. 1011066 did not redeem the properties by the redemption date and the properties were listed for sale by the second mortgagee pursuant to an order of the court.

[50] On July 5, 2023, iFortune wrote to 1011066 stating that it considered the contract to be at an end and demanding the return of the first deposit. 1011066 did not reply.

[51] 1011066 does not dispute that it has not set a completion date, completed the purchase, or returned the first deposit. It asserts that iFortune is not entitled to demand a return of the first deposit for the reasons I set out above. I turn to those now.

Whether 1011066's Failure to Set a Completion Date was a Breach of a Material Term of the Contract.

[52] The contract for purchase and sale contained a clause that time is of the essence. Each of the amending agreements, including the fourth and last amending agreement, contained a clause confirming the agreement of purchase and sale as follows:

> The Purchase Agreement, as amended by this amending agreement, including all covenants and obligations contained therein and herein, is hereby confirmed in all respects, shall remain otherwise unamended (except as may be required to implement the amendments and other terms contained in this amending agreement) and shall continue in full force and effect with time remaining of the essence.

[53] The contract for purchase and sale set out a completion date. By agreement, the parties extended the time for completion in each of the four amending agreements. The provision pertaining to the completion date in the fourth amending agreement reads as follows:

> The Completion Date shall be the first Business Day that is 90 days after all Certificates of Pending Litigation (including for greater clarity those registered under CA8503336 and CA8503340) are discharged from title to the Property provided that in no event shall the Completion Date be earlier than July 31, 2022. If the Completion Date has not been fixed in accordance with this clause by December 31, 2022 or occurred by March 31, 2023, this Contract may be terminated by the Buyer at any time thereafter on written notice to the Seller whereupon this Contract shall be at an end except for the Seller's obligation to return the First Deposit in full. The Seller acknowledges and agrees that the Buyer shall not be obligated to discharge the Option to purchase until such time as the first deposit is returned in full.

[54] 1011066 argues that the context in which the contract for purchase and sale and each of the amending agreements was made was that iFortune was purchasing the properties for a larger development for which it needed to assemble a number of properties. 1011066 led evidence that it was clear to its principals that this was a multiyear long-term project and therefore the timing of completion was immaterial. While iFortune does not expressly dispute (nor does it expressly agree) with 1011066's understanding that it was acquiring the properties as a part of a long-term project, it disagrees that timing was immaterial. It points to what the parties agreed to in the contract and in each of the four amending agreements in support of its assertion that timing was material.

[55] I do not accept this argument as advanced by 1011066. It would require the Court to allow 1011066's subjective understanding of iFortune's timing plans to override the clear and unambiguous language of the contract that time was of the essence and that failure to complete entitled iFortune to treat the contract as at an end and demand the first deposit be returned to it. Subjective understandings are not a tool to interpret contracts. Even if the contextual evidence was objective, it does not follow that a party with a long term project does not require deadlines for completion dates to be adhered to.

[56] In addition, 1011066 argues that the evidence that the completion deadline was extended by agreement, and on some occasions after the deadline had already expired, is such that the completion deadline must be interpreted to not be a material term of the contract. I do not accept this argument. Each time the deadline was extended, it was extended for a matter of months to a new fixed date. It was never extended indefinitely and each amending agreement affirmed that time was of the essence.

[57] 1011066 relies on *Salama Enterprises (1988) Inc. v. Grewal*, 90 DLR (4th) 146, 1992 CanLII 4035 (B.C.C.A.) for the proposition that a court may refuse to give effect to a time is of the essence clause when it would be unjust or inequitable for a party to insist that time is of the essence and where the party relying on a time of the essence clause engages in conduct that makes it impossible for the other party to complete the transaction, citing *1319397 B.C. Ltd. v. Far East Consultants (BC) Inc.,* 2023 BCSC 255.

[58] 1011066 asserts that iFortune made representations that time was not of the essence and then opportunistically took advantage of the foreclosure proceedings to purchase the properties for less funds.

[59] In support of this, 1011066 relies on the evidence of its principals that they took the amending agreements, sometimes entered into after the previous deadlines had expired, to mean there was no rush. The timing of the amending agreements does not amount to evidence of representations made by iFortune that the date of completion was immaterial. It is evidence of the subjective understanding of the principals of 1011066 that is inconsistent with the plain language in the contract and the amending agreements.

[60] In addition, there is no evidence that iFortune opportunistically declared a breach and took advantage of the foreclosure proceedings to procure the properties at a lower price.

[61] 1011066 has led evidence from Mr. Yin and Ms. Liu about financials problems that iFortune had.

[62] Mr. Yin deposed that in 2022 or 2023 he “learned” that Mr. Luan, the principal of iFortune, was experiencing financial issues and did not have the funds to pay the purchase price. This evidence is hearsay with the source not identified and so is inadmissible.

[63] Mr. Yin also deposed that Mr. Luan had expressed that the purchase price was too high. This evidence is admissible but it is not evidence that Mr. Luan communicated that iFortune did not intend to complete the purchase.

[64] To the contrary, Ms. Liu deposed that “at all times”, Mr. Luan expressed to her that he intended to buy the properties. She deposed that she learned he was having financial difficulties in 2022, although she does not identify the source of this information and so it is not admissible. Ms. Liu also deposed that, at a time that she did not identify, Mr. Luan told her that he was experiencing personal hardship, did not have the money to close the sale, and was sourcing outside investors to finance the purchase price. This evidence is admissible.

[65] In summary, the admissible evidence is that iFortune, through Mr. Luan, communicated that iFortune intended to complete the purchase, and that at some point, it did not have the funds but was looking for outside investors. In order for this evidence to support the proposition that iFortune was not ready to meet its obligations under the agreement, there would have to be evidence that despite iFortune’s intention to complete, iFortune was not able to make the payment at time it was required to do so. There is no evidence as to the time iFortune communicated its financial difficulties and the proximity of the communication to any of the completion dates. It could not have been at a time that was close to the requirement for iFortune to make a payment because 1011066 never set the completion date by removing the certificates of pending litigation. There were to be 90 days between the setting of the completion date by removing the certificates of pending litigation and

the completion, so at any given time iFortune was at least 90 days away from having to make the payment.

[66] There is no evidence that would cause me to conclude that it is unjust to give effect to the completion deadline clause of the contract.

[67] I conclude that the completion date, as amended, remained a material term of the contract and, as the contract provided, failure to meet it entitled iFortune to treat the contract as at an end except for demanding the return of the first deposit.

Waiver or Estoppel

[68] 1011066 has not pleaded waiver or estoppel in its response to the amended notice of civil claim.

[69] In its application response on this summary trial application, 1011066 asserts that iFortune, by its conduct, waived the deadlines in the fourth amending agreement. The conduct specified is entering into amending agreements after the deadlines for setting a completion date had expired. 1011066 submits that the parties had a pattern of expired deadlines but continued to move towards closing and that iFortune knew that 1011066 relied on this pattern continuing, to its detriment.

[70] 1011066 submits that in the period October 2022 to December 2022, it was "under the impression" that the closing date would be extended further. It has not led any evidence to that effect or the reason that it had that impression, other than that it thought the deadline was flexible because of the previous amending agreements.

[71] 1011066 does not expressly say what detriment it suffered by relying on its understanding that the deadlines were flexible. Its principal has deposed that it was ready and willing "to complete the steps necessary to close the sale" and that if he had thought there were strict deadlines for closing the sale of the properties, "[w]e would have taken more steps to remove the CPLs". Mr. Yin does not say what steps 1011066 could have taken. Mr. Yin deposed that the Zhang litigation was

protracted, and that 1011066's principals were in China, and could not leave the country because he was compelled to be a witness in a Chinese government investigation into the father of the plaintiff in the Zhang litigation. Mr. Yin deposed that the Chinese government confiscated his driver's licence and passport, and for a period of time he has had limited access to his cell phone.

[72] In its application response, 1011066 asserts that the Zhang litigation had a trial date "within a few months" and iFortune would have the opportunity to remove the certificate of pending litigation at that point. 1011066 does not provide any evidence to make this a coherent submission, ie: how the pending trial date would allow iFortune to remove the certificates of pending litigation registered against the title of property owned by 1011066.

[73] 1011066 submits that because of this incoherent submission, iFortune is estopped from enforcing the provision of the fourth amending agreement requiring that a completion date be set after the certificates of pending litigation were removed by December 31, 2022.

[74] In the legal section of the application response, 1011066 does not cite any law pertaining to waiver or advance a legal analysis based on the doctrine. It merely asserts that the connection between the properties and iFortune's larger project, the extension of the completion deadlines in the amending agreements, including those made after deadlines had passed, and iFortune's conduct and expressions amount to waiver of its rights to enforce the deadlines.

[75] iFortune did not relate the facts it relies on for waiver to legal principles pertaining to when waiver arises and the legal effect of waiver if it arises. 1011066 relies on *Landbank Minerals Ltd. v. Wesgeo Enterprises Ltd*., [1981] 5 W.W.R. 524, 1981 CanLII 1209 (Alta. Q.B.) at paras. 15–29 in which Justice Hetherington provided an extensive review of the authorities and concluded that where there is a contract with a time of the essence provision, and a party extends a deadline, the extension of time simply results in a later date being stipulated and does not amount

to waiver or in any way affect the requirement for timeliness, unless there are circumstances making it unjust or inequitable to enforce the deadlines.

[76] I have determined there are no circumstances that make it unjust or inequitable to enforce the completion deadlines. I reject the waiver defence.

[77] 1011066 has not drawn the Court's attention to any law or legal analysis with regard to estoppel. For that reason, I do not accept that iFortune is estopped from relying on the completion deadline provision of the fourth amending agreement.

Anticipatory Breach

[78] In these reasons I have set out the evidence led about Mr. Luan's financial difficulties and I have determined that the evidence that he told Ms. Liu, at an unspecified time, that he had financial difficulties, did not have the funds to complete, and so was looking for outside investors is admissible. In addition, Ms. Liu's evidence that Mr. Luan expressed at all times that he intended to complete the purchase is admissible evidence.

[79] 1011066 asserts that Mr. Luan's financial hardship amounts to anticipatory breach.

[80] The parties relied on *Zoleta v. Singh and RE/*MAX *Twin City* Realty, 2023 ONSC 5898 for the principles pertaining to anticipatory breach. The Ontario Superior Court's summary of those principles are similar to how the doctrine was reviewed and summarized by the Court of Appeal for British Columbia in *Kaur v. Bajwa*, 2020 BCCA 310.

[81] In order to establish repudiation prior to the time for performance, also known as anticipatory breach, there must be objective evidence that the party repudiating does not intend to be bound by the contract and that evidence must be clear and unequivocal: *Kaur* at paras. 13–15. Repudiation does not terminate the contract unless it is accepted and the evidence of acceptance must also be clear and unequivocal: *Kaur* at paras. 26–32.

[82] The evidence pertaining to iFortune's alleged anticipatory breach is not clear and unequivocal. Indeed, the evidence is that despite financial hardships and not having the money to complete, iFortune was seeking financing in order to complete, and "at all times" expressed the intention to complete.

[83] In any event, there is no evidence that 1011066 accepted the repudiation. 1011066's evidence is only consistent with it intending to complete, although failing to take the steps for completion in the time required by the fourth amending agreement.

Whether the First Deposit was a Deposit or Consideration for the Option to Purchase

[84] 1011066 argues that the first deposit was consideration for the option to purchase, which was part of an ongoing larger property development, and since iFortune still has the option to purchase, it cannot demand return of the first deposit.

[85] The connection of the option to purchase to a larger property development, as opposed to the purchase of these properties, has no basis in evidence. While the principals of 1011066 deposed that the purchase of these properties was part of iFortune's planned larger development, there is no evidence that 1011066 was connected to that larger property development such that the option to purchase was separate from the purchase price for the properties as asserted by 1011066.

[86] The language of the fourth amending agreement makes it clear that while the first deposit was to be paid out of trust to 1011066 once the option to purchase was filed against title, it was to form part of the purchase price and it was to be paid back to iFortune if the completion date was not set by December 31, 2022 or the sale did not complete by March 31, 2023. Those terms are not ambiguous.

[87] I conclude that the first deposit was a deposit and not merely consideration for the option to purchase. I conclude that the option to purchase and the purchase of these properties were not contractually connected to a larger development converting the first deposit into something other than a deposit.

[88] Accordingly, I do not accept the argument that 1011066 is not obligated to return the first deposit based on the argument that it is not a deposit or is connected to a larger development.

Breach of the Duty of Honest Performance and Good Faith in Contractual Performance

[89] 1011066 submits that because iFortune was not in a position to complete the sale, because iFortune wanted to purchase the properties at a lower price than it had agreed to, and because iFortune created the impression that the completion date was not a strict deadline, it breached the duty of honest performance in contract, as a manifestation of the organizing in principle of good faith, as created in *Bhasin v. Hrynew*, 2014 SCC 71.

[90] I have not accepted the factual arguments that iFortune was not in a position to complete the sale. With regard to the assertion that iFortune wanted to purchase the properties at a lower price, there is no evidence that supports that assertion. There is no evidence that iFortune attempted or succeeded to purchase the properties during the court-ordered sale process. Counsel for 1011066 advised the Court that iFortune had not purchased the properties.

[91] I have rejected the proposition that the time is of the essence clause in the contract for purchase and sale which was confirmed in all of the amending agreements was no longer governing. For the same reasons, I reject the proposition that iFortune created the impression that timing was immaterial and it would extend the deadline again.

[92] 1011066 does not, in its application response, relate the facts it asserts to the principles set out in *Bhasin* except in a very cursory way. 1011066 did not expand on this submission during oral arguments.

[93] I have not accepted the facts that 1011066 asserts to ground its bare assertion of a breach of the duty of honest performance. I conclude that 1011066 has not successfully raised this doctrine as a defence to this action.

Disposition

[94] This matter is suitable for summary trial determination. I allow iFortune's summary trial application and grant judgment in favour of iFortune against 1011066 in the amount of $1,500,000.

[95] iFortune seeks costs. 1011066's position is that if the matter is suitable for summary trial determination, iFortune's claim should be dismissed with costs payable to 1011066.

[96] iFortune has been successful. I award costs of the action in its favour payable by 1011066.

"Matthews J."