CITATION: Helmsbridge Holdings ULC v. Integration International Capital Limited, 2024 ONSC 6194
COURT FILE NO.: CV-24-716193 and CV-00722852-0000
DATE: 20241112

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HELMSBRIDGE HOLDINGS ULC, Plaintiff(s)/Applicant(s)

AND:

INTEGRATION INTERNATIONAL CAPITAL LIMITED, Plaintiff(s)/Applicant(s)

AND RE: INTEGRATION INTERNATIONAL CAPITAL LIMITED, Plaintiff(s)/Applicant(s)

AND:

HELMSBRIDGE HOLDINGS ULC, Defendant(s)/ Respondent(s)

BEFORE: Akazaki J.

COUNSEL: Chris Reed, for Helmsbridge Holdings ULC

Michael Simaan, for Integration International Capital Limited

HEARD: October 2, 2024

REASONS FOR DECISION

OVERVIEW

[1] In competing applications, the parties sought the court's interpretation of the payment provisions of a Purchase and Sale Agreement in respect of a commercial property at the downtown Toronto intersection at Queen and Spadina. The parties, who had acquired the property in the name of a mutually owned holding company, decided to end the joint venture. Integration International Capital Limited would purchase Helmsbridge Holdings ULC's shares in the holding company. The consideration for the transfer of shares entailed IICL paying $11,000,000 plus half of the principal owing under the existing mortgage financing of about $4,000,000.

[2] The agreement also provided that IICL replace the existing $293,000 letter of credit posted with the City of Toronto to secure compliance with certain landscaping requirements. On completion of the work, the City would release the landscaping LOC. Plazacorp Group, a

Helmsbridge affiliate, had originally posted the LOC as a condition of site plan approval. The issuing bank, RBC had secured it as part of the mortgage.

[3] Prior to closing, IICL discovered that its bankers required $293,000 in cash collateral, a 1%-3% service fee, and an annual maintenance fee to replace the existing LOC and maintain it annually. The collateral entailed purchasing a low-risk security such as a term deposit with the issuing bank. IICL demanded that the $293,000 be credited toward the cash portion of the purchase price, relying on a clause in the payment provisions about the replacement LOC. IICL contended that the clause implied a deduction of the $293,000 from the price before settling the balance of the purchase price on closing.

[4] Helmsbridge did not agree with IICL's interpretation of the payment provision and demanded full payment of the fixed cash portion in the amount of $11,000,000. (There had been no deposit.) IICL paid it, so as not to prevent the closing of a $15,000,000 deal, but under reservation of rights to claim the $293,000 after closing. However, it has not posted a replacement LOC as required under the agreement. The parties were therefore deadlocked in competing demands, as reflected in the two applications before the court:

- Helmsbridge seeks an order requiring IICL to post a replacement Landscaping LOC with the City and does not accept IICL's contention that IICL was entitled to a deduction of the $293,000 cost of replacing the LOC. Although Helmsbridge's notice of application does not employ the words, "specific performance," that is the nature of the remedy it seeks.

- IICL seeks an order requiring Helmsbridge to pay $293,000, which it will then use to collateralize the LOC with its bank. It also sought payment of 50% of the auditor's fees, calculated at $3,100.00, although IICL stated it was not pressing the issue. IICL submitted that it did not deny its breach of the covenant to replace the LOC and did not oppose Helmsbridge's application, provided the court ordered Helmsbridge to pay the $293,000.

[5] The parties' competing interpretations of the agreement focused on the following three issues:

1. Whether the $293,000 should have been an adjustment to the purchase price on closing, as contended by IICL's auditor – a point which also determined the claim for 50% of the auditor's fee.

2. Whether the interaction between ss. 3.1 and 3.5 regarding the replacement landscaping LOC allows IICL to deduct $293,000 from the purchase price on closing.

3. Whether Helmsbridge is entitled to an order for specific performance requiring IICL to replace the LOC and obtain the return of the existing CIBC LOC.

[6] For the reasons that follow, I dismiss both applications. I have concluded the contractual provisions must each be read in accordance with their ordinary and grammatical reading and do not bear an interdependent meaning, at least with respect to the balance of the

purchase price on closing. The $293,000 could not fall into the definition of an adjustment. However, Section 3.1(1)(c) allowed IICL to pay part of the purchase price by replacing the LOC but failed to do so. Accordingly, IICL was liable to pay the whole $11,000,000 on closing. Helmsbridge is not entitled to an award of specific performance, because its damages have not yet accrued and may be discharged once the landscaping is complete.

RELEVANT PROVISIONS OF THE AGREEMENT OF PURCHASE AND SALE

1. Interpretation

[7] Article 1 of the agreement defined the purchase price simply as follows:

> **"Purchase Price"** means $11,000,000 plus 50% of the principal amount outstanding under the Existing Financing as of the Closing Date, exclusive of any applicable taxes.

[8] The issue between the parties concerned the $11,000,000 portion of the purchase price. Neither side raised the collateralization of the existing LOC through the mortgage as affecting the value of the deduction from the purchase price sought by IICL. In any event, the contractual wording, and not the economic permutations, govern. Article 1 also contained standard clauses excluding the headings and table of contents from interpretation of the contract and stating that the written document constituted the entire agreement of the parties.

[9] The agreement provided two additional relevant definitions:

> **"Closing"** means the closing of the Transaction of purchase and sale of the Purchased Assets contemplated by this Agreement, including the satisfaction of the Purchase Price and the delivery of the Closing Documents on the Closing Date.
>
> **"Closing Date"** means December 20, 2023.

2. Purchase Price

[10] The dispute arose from Article 3, entitled "PURCHASE PRICE." It consisted of the following sections, of which 3.1, 3.3, and 3.5 figure in the analysis:

> 3.1 Purchase Price
>
> 3.2 Deposit
>
> 3.3 General Adjustments

3.4 Realty Tax Appeals

3.5 Replacement Letter of Credit

[11] Section 3.1(1) also bore the title, "Purchase Price," and read as follows:

3.1 Purchase Price

(1) Payment of the Purchase Price. The Purchase Price shall be paid and satisfied by the Purchaser as follows:

(a) If the Vendor requires that the Purchaser so submit same, as to the sum of **$1,100,000** (the "Deposit"), by wire transfer to the Purchaser's Solicitors, in trust, within three Business Days after the Execution Date, to be held in trust as a deposit and invested in accordance with the provisions of Section 3.2 pending the completion or other termination of the Transaction and to be paid to the Purchaser on the Closing Date in partial payment of the Purchase Price;

(b) as to the computed amount equal to 50% of the principal amount owing under the Existing Financing as of the date of Closing by the repayment by the Purchaser of such computed amount, and it being understood that such computed amount relates to the Vendor's responsibility for the Existing Financing, and it being agreed that the costs of discharge and other charges payable to the lender under the Existing Financing shall be paid by the Vendor only and shall not be payable by the Purchaser;

(c) as to the CIBC letter of credit to the City of Toronto (No. SBGT1 11345) (the "**Landscaping LC**"), by its replacement with a new letter of credit to the City or its cash collateralization;

(d) as to the balance (the "**Balance**") of the Purchase Price on Closing, subject to the Adjustments, by wire transfer to the Vendor's Solicitors, in trust or as re-directed by the Vendor's Solicitors.

[12] The word "Balance" was defined in s. 1.1 as "the meaning given to it in Section 3.1(1)(d)." Section 6.2 provided that the purchaser would deliver the "Balance of the Purchase Price" on or before closing.

[13] Hemsbridge did not require a deposit, and therefore ss. 3.1(1)(a) and 3.2 never applied.

[14] Section 3.3 dealt with the adjustments on closing. I will reproduce s. 3.3(1) in particular, when dealing with Issue 1.

[15] Section 3.4 dealt with realty tax appeals, a subject having no bearing on the dispute.

[16] Section 3.5 contained the following provision:

> **3.5 <u>Replacement Letter of Credit</u>**
> From and after Closing, the Purchaser shall forthwith post a replacement letter of credit with the City of Toronto, in a form reasonably satisfactory to the City of Toronto and make all reasonable commercial efforts to have the Landscaping LC returned to the Vendor for cancelation.

[17] Unlike s. 3.1(1)(c), s. 3.5 did not provide the option of "cash collateralization." It only required IICL to replace the LOC.

ISSUE 1: Was the $293,000 an Adjustment?

[18] The statement of adjustments prepared by Helmsbridge contained ledger entries for mortgage interest and municipal realty taxes that reduced the balance on closing to $10,943,649.42. IICL appointed an auditor who disagreed with the statement and stated IICL ought to have been credited a deduction of $293,000.

[19] "Adjustments" were defined in s. 1.1 with reference to s. 3.3. Subsection 3.3(6), in particular, provided that the cost of a purchaser-appointed auditor be shared equally. IICL's auditor, Song Han, determined in his June 4, 2024, report that the $293,000 ought to have been an adjustment to the purchase price. The report did not deal with any other item in contention, with respect to the adjustments on closing.

[20] The adjustments referable to the auditor were defined in s. 3.3(1), as follows, in which I insert a conceptual break for ease of reading:

> (1) <u>Adjustments.</u> The Adjustments shall include realty taxes, local improvement rates and charges, water and assessment rates, prepaid amounts, or current amounts payable under the Assumed Contracts, operating costs, utilities, fuel, licenses necessary for the operation of the Property and all other items normally adjusted between a vendor and purchaser in respect of the sale of a property similar to the Property.
>
> In addition, the Adjustments shall include the interest on the Existing Financing for which each of the Purchaser and the Vendor is responsible for half of the interest and the other matters referred to in this Agreement stated to be the subject of adjustment and, notwithstanding the foregoing, shall exclude the other matters referred to in this Agreement stated not to be the

> subject of adjustment. All amounts that are held in bank accounts for or on behalf of the Co-owners relating to the Property shall be adjusted for on Closing.

[21] The specific items after the general term, "Adjustments," do not restrict the generality of the word. The *ejusdem generis* rule, a.k.a. the 'limited class rule,' does not apply where general terms are followed by specific terms and connected by the word "including": *National Bank of Greece (Canada) v. Katsikonouris*, 1990 CanLII 92 (SCC), [1990] 2 SCR 1029, at 1040-41. Rather, the specific adjustments only clarify the provision by leaving no doubt that they are to be included. Despite this, one cannot stretch the meaning of "Adjustments" to mean a $293,000 line item of which the amount is known prior to closing.

[22] It is obvious from the list of eligible adjustments in the first part that they are to be standard adjustments to the financial terms on closing and to not entail changes to the payment of the purchase price. They are typical items allocating to the precise day of closing portions of operating costs and liabilities to third parties and utility operators that are billed monthly or quarterly. Parties agree to adjust because of the uncertainty of the exact amounts as of the closing date. The second part of the subsection added the interest portion of the 50% assumption of the mortgage financing and interest in the joint venture's operating bank accounts.

[23] The words, "subject to the Adjustments" in s. 3.1(1)(d), could not have meant a reduction of the purchase price, because the "Balance" already included the LOC in s. 3.1(1)(c). One cannot adjust a balance with an item already factored into the balance calculation, without double-counting.

[24] Thus, with all due respect to Mr. Han, the $293,000 could not be deducted from the purchase price as an adjustment, because it was not an adjustment. Since the sharing of the auditor's fees only applied to disputes over adjustments and not over general contract interpretation, Helmsbridge was not obligated to pay 50% of the fees for completing a report that did not deal with adjustments.

ISSUE 2: Did ss. 3.1(1)(d) and 3.5 allow IICL to deduct $293,000 from the Purchase Price?

[25] The agreement inserted the replacement LOC into the components of s. 3.1(1) for the "Payment of the Purchase Price." But s. 3.5 also deferred the purchaser's requirement to replace it after the closing. The apparent ambiguity created by the references to the LOC in these locations lies at the heart of the dispute.

[26] The evidence in the affidavits revealed a consensus that s. 3.5 was a late amendment to the agreement. Beyond that, the parties disagreed on the significance of it. According to IICL, it suggested the insertion "for clarity that the obligation to replace the LOC would take place AFTER closing, by which time IICL would have received the value of the cash collateralization that was required of it to fund the replacement LOC." Helmsbridge's

evidence was that there were no grounds to foresee that IICL would rely on s. 3.5 "to seek a reduction in the purchase price." IICL's late discovery that it would need another $293,000 in funds could support Helmsbridge's contention that the late addition had nothing to do with the purchase price and everything to do with IICL's need for more time to replace the LOC than they had, prior to the negotiated closing date.

[27] The practical financial effect of replacing the LOC is that the LOC obtained by Helmsbridge's affiliate would be released, and IICL would be required to reserve $293,000 as collateral for the LOC to the City. Apart from the opportunity cost of being able to invest the funds in instruments yielding better return, the real economic value of the swap would have been neutral. On the completion of the landscaping obligation, the LOC would be released no matter whose LOC it was. The practicalities of the LOC could form part of the surrounding circumstances of the contract, in that the $293,000 LOC is only a contingent liability. The term deposit is only security, in the sense that the land is security – in the same way the existing LOC was secured by the mortgage.

[28] The only purpose for which the court could consider the evidence of the parties regarding the insertion of s. 3.5 would be to deepen the understanding of the mutual and objective intentions of the parties as written in the contract: the so-called rubric of "surrounding circumstances" in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 SCR 633, at para. 58. If clarity was IICL's aim, s. 3.5 plainly stated the replacement of the LOC described in s. 3.1(1)(c) was understood as its obligation after closing. That is about all the court can glean from its insertion. There is an elegant logic to IICL's contention that s. 3.5 deferred to the post-closing period performance of an obligation for which it intended to credit in the balance ledger on closing. The question for the court is whether the written words also bear that meaning.

[29] Beyond the surrounding context, the parties' subjective intentions or representations prior to the execution of the agreement cannot form part of the contractual interpretation, if the contract contains a standard 'entire agreement' clause. As Epstein J.A. stated in *Soboczynski v. Beauchamp*, 2015 ONCA 282, at para. 43: "An entire agreement clause is generally intended to lift and distill the parties' bargain from the muck of the negotiations."

[30] If the court had to give up trying to resolve the meaning contextually, as a last resort the rules of contract interpretation require the meaning to be construed against IICL as the *proferens*, the one who adduced the provision in the agreement – the *contra proferentum* rule: *Consolidated-Bathurst v. Mutual Boiler*, 1979 CanLII 10 (SCC), [1980] 1 SCR 888, at 893-94. In *St. Lawrence Cement Inc. v. Wakeham & Sons Ltd*. (1995), 26 O.R. (3d) 321, citing *Canada Steamship Lines Ltd. v. The King*, 1952 CanLII 260 (UK JCPC), [1952] A.C. 192 793-94, Dubin C.J.O., outlined a more nuanced three-part application of the rule. These parts can be simplified thus:

1. If the clause expressly helps the *proferens*, the person in whose favour it is made, the court will give effect to it.

2. If the clause does not expressly favour the *proferens*, the court must consider whether the ordinary meaning is wide enough.

3. If the ambiguity is such that another meaning is as valid, the *proferens*' interpretation must fail.

[31] Section 3.5 in itself is not ambiguous. It clearly deferred the post-closing interval IICL's requirement to register with the City a replacement landscaping LOC from before closing to after it. Evidently, the absence of a definite time limit reflected the lack of urgency to the replacement. It is the insertion of ss. 3.5 into an agreement already containing s. 3.1(1)(c) that created the ambiguity, the possible inference either that s. 3.5 allowed the post-closing performance of a closing obligation or that Helmsbridge paid for (by reduction of purchase price) a commitment to replace the LOC.

[32] Construing the effect of s. 3.5 *contra proferentum* against IICL as the party adducing the section, the absence of a clear reduction of the purchase price or a credit toward the purchase price in either section could mean IICL should receive no reduction or credit. I do not consider that to be a fair result of the application of the rule of construction. Rather, the result should be that the insertion of s. 3.5 does not help IICL's interpretation that s. 3.1(1)(c) was intended to be a reduction of the purchase price or a credit to be applied to it when calculating the balance on closing. The *contra proferentum* construction resulting from IICL's insertion of s. 3.5 only has the effect of negating IICL's preferred combined reading of the two provisions. It does not necessarily follow that s. 3.1(1)(c) cannot be read as providing a reduction or credit in favour of IICL.

[33] I am therefore unconvinced that the insertion of s. 3.5 affects the meaning of s. 3.1(1)(c), either by clarification or by alteration. Section 3.5 only deferred the timing of the replacement LOC, and it would be an unreasonable stretch to read anything further into it. Had they been intended to be read together in that manner, the parties could have employed additional connective language. Instead, the two sections are more appropriately read independently in the same document. The most reasonable and harmonious construction therefore entails a reading of the two provisions connected by timing.

[34] In the plain grammatical reading of s. 3.1(1)(c), it starts with the phrase, "The Purchase Price shall be paid and satisfied by the Purchaser as follows," followed by the list of four items. Each of the four expressed a form of payment:

(a) The deposit, which was never paid.

(b) An amount required to discharge Helmsbridge's 50% obligation under the mortgage. Helmsbridge, as vendor, undertook to pay for the cost of discharge of its mortgage obligation.

(c) Either a replacement LOC for the CIBC LOC, "or its cash collateralization." In context, I would construe "cash collateralization" as providing the City with security by way of a payment or pledge of cash. (The advantage of this

would presumably be the avoidance of bank fees associated with issuance and maintenance of a LOC.)

(d) The balance "on Closing." Because the balance on closing was a fixed moment in time, the balance could only be the payments under clauses (a), (b), and (c).

[35] Had IICL replaced the CIBC LOC with a new LOC, the Helmsbridge group's LOC would be rescinded together with its contingent liability. The reasonable and grammatical reading of s. 3.1(1)(c) would be to recognize the $293,000 value as payment toward the purchase price under the head clause starting with "The Purchase Price shall be paid …" The extinguishment of a contingent liability has value. The insertion of the replacement LOC in s. 3.1 signified an incentive for IICL to relieve Helmsbridge of the exposure prior to closing, without requiring that to be done.

[36] Instead of replacing the LOC or providing the City with cash collateral as security for the landscaping undertaking, IICL paid Helmsbridge the full $11,000,000 plus Helmsbridge's 50% of the outstanding loan amount. Since IICL had neither registered a replacement LOC with the City nor provided a cash collateral, the amount for the calculation of the balance on closing to pay and satisfy the purchase price – the very purpose of s. 3.1(1) – would have been $11,000,000. Therefore, IICL's payment of the whole $11,000,000 discharged what it owed on closing.

[37] Counsel for the parties cited practical and economic arguments for and against such an interpretation. One argument against it is that Helmsbridge emerges with a $293,000 windfall, or IICL with an unexpected penalty, by having paid $11,000,000. Had IICL replaced the LOC prior to closing, it would eventually have seen the return of the use of the money. Helmsbridge, however, would have received $293,000 less, in return for the cancellation of a contingent liability.

[38] The court cannot extract a meaning that the wording does not support, based on *ex post* arguments such as these. The contract may be "badly drafted and … difficult to comprehend." However, the court's function is not to rewrite the relevant clauses despite the urge to make them logically reflect the elements of the transaction: *AXA Insurance (Canada) v. Ani-Wall Concrete Forming Inc*. (2008), 91 O.R. (3d) 481, 2008 ONCA 563, at paras. 29-30. This case also does not entail an unlawful penalty or other form of coercive unfairness arising from power imbalance. As in the *Axa* case, the root of the issue is unclear contract wording. The court cannot impose on the parties its own opinion of what the parties could have intended to do.

[39] Helmsbridge is therefore under no obligation to refund $293,000 from the payment it received on closing. Consistent with the insertion of s. 3.5 sometime after s. 3.1(1)(c), IICL could have replaced the LOC on or before closing and availed itself of a deduction from the purchase price. Its failure to do so meant it had to pay the full price. In principle, the situation was no different from any other situation in which a party fails to take advantage

of a contractual time-limited discount, whether in a multi-million dollar transaction or a department store sale.

ISSUE 3: Is Helmsbridge entitled to an order for specific performance on s. 3.5?

[40] There remains the effect of s. 3.5. Helmsbridge seeks specific performance on the obligation to replace the LOC and to make all reasonable "commercial efforts" to have the LOC returned to Helmsbridge for cancellation. Unlike s. 3.1(1)(c), there was no express option to provide the City a cash collateral to release the existing LOC.

[41] Counsel for Helmsbridge limited the legal submission on this point to a statement that IICL was required by contract to replace the LOC and has not done so. I do not intend to criticize this submission, but it is perhaps a reflection on the weakness of the demand for a mandatory order where the legal consequence to Helmsbridge remains contingent on the owner's failure to complete the landscaping. If I do not make the order it seeks, it would remain exposed to the liability to the CIBC on the LOC if IICL, its holding company, or a successor, failed to fulfill the landscaping undertaking. In that instance, Helmsbridge would have to sue IICL for breach of the covenant to replace the LOC. What governs the issue here is the availability of the remedy of specific performance.

[42] Specific performance is an equitable remedy in which the court orders a party to perform a contractual obligation as described in s. 3.5. As in the case of all equitable remedies, it is a discretionary remedy that is not available as of right: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 SCR 245, at para. 107; *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87, at para. 9.

[43] In contract law, courts have reserved specific performance ordinarily to situations where an award of damages would be an inadequate remedy. Historically, the English courts treated it as applicable to real estate transactions and not to personalty, because all land was unique, and all other forms of property were market commodities. That distinction eroded to the point that Supreme Court ended any principled distinction of the availability of the remedy primarily to realty and rarely to personalty: *Semelhago v. Paramadevan*, 1996 CanLII 209 (SCC), [1996] 2 SCR 415, at paras. 11-21. Nevertheless, a party seeking the performance of a contract in respect of non-land property climbs uphill against the idea that the default award of damages should be granted where the purchaser can use the damages to purchase identical or equivalent goods: *Semelhago*, at para. 13.

[44] Helmsbridge's demand for an order for specific performance does not concern the land itself. The conveyancing part of the transaction has already concluded with the transfer of shares. In theory, a LOC is a unique instrument, because its value depends on the contingent legal relationship among the issuing bank, the buyer, and the beneficiary. However, in the circumstances where the contract contemplates the City's acceptance of a replacement LOC issued to another party, IICL, there is an inherent absence of uniqueness. The value to Helmsbridge of obtaining the return of the LOC under s. 3.5 is that the contingent

liability will be extinguished. For the liability to accrue, IICL or any successor on title would have to default on the landscaping undertaking, such that the City would perform the work and trigger the bank's funding under the LOC. There can be no compensable value to Helmsbridge's relatively advantageous banking terms, because the contract contemplates the cancellation of the LOC, as opposed to making use of it for another transaction.

[45] I therefore conclude that Helmsbridge is not entitled to an order against IICL requiring the latter to replace the LOC. If IICL does not perform its obligation under s. 3.5, Helmsbridge will eventually see the return of the LOC when the landscaping is finished. If IICL defaults on the landscaping and the City acts on the LOC, IICL will be liable to Helmsbridge for up to $293,000 in damages. Not every contractual breach will result in immediately accrued damages. When the damages accrue, the wronged party can sue. If damages do not accrue, there is no cause of action.

[46] I am mindful of two considerations that could render any interpretation of s. 3.5 less than satisfactory in terms of the justice or fairness of the outcome. They arise from the difficulty of granting a remedy where the breach of contract appears to bear no real consequence at the time of the hearing.

[47] First, s. 3.5 required IICL as purchaser to do everything commercially reasonable to replace the LOC and to obtain the return of the CIBC LOC to Helmsbridge or its affiliate, and that the requirement was forthwith "From and after Closing." IICL is therefore in breach of s. 3.5. Its counsel conceded the breach, but he also argued that the agreement contemplated a $293,000 reduction in the purchase price to enable IICL to obtain the LOC. I have already found that the meaning of the words in the contract cannot be stretched to support that premise, if it failed to replace the LOC on or before the closing. The rules of equity require the court to award damages in lieu of an order for specific performance unless damages would not suffice. However, how is the court to rule when damages have not yet accrued even though the breach has occurred?

[48] Second, the facts of this case are that IICL paid Helmsbridge $11,000,000 (subject to some adjustments), even though it could have closed the transaction for $293,000 less, if it had replaced the LOC or provided cash collateral to the City. The decision not to replace the LOC prior to closing seems to have been based on an intention on the part of IICL to have its cake and eat it too, by seeking the benefit if s. 3.1(1)(c) without performing it. Helmsbridge rightly relies on s. 3.5 as a backstop to a decision by IICL to close without the benefit of s. 3.1(1)(c). However, the post-breach enforceability of s. 3.5 is limited by the limitations on the court to award a remedy.

[49] Ultimately, these two problems stemmed from the late insertion of s. 3.5. Without it, the clear meaning of s. 3.1(1)(c) would have been an obligation to provide the replacement LOC at the time of closing and that the value of the LOC would be applied toward payment and satisfaction of the purchase price. IICL was aware of the replacement issue in the preceding draft of the agreement and should have checked with its bankers first and then bargained for the desired mechanism for completing the transaction. If Helmsbridge must

wait for the breach to be enforceable in damages, it is not as undesirable as the consequence to IICL in having paid Helmsbridge $293,000 in cash when it could have satisfied that amount of purchase price by purchasing a LOC which would likely be returned to it.

CONCLUSIONS

[50] To summarize the outcomes of the applications, both are dismissed. In particular:

1. Helmsbridge's application for an order for specific performance on s. 3.5 of the agreement is dismissed.

2. IICL's application for an award of damages in the amount of $293,000 and payment of half of the auditor's invoice is dismissed.

[51] At the hearing, counsel reserved the opportunity to make submissions regarding costs. I encourage the parties to settle the costs of the applications, especially having regard to the outcome. In the event no settlement is possible, they may each deliver costs submissions within 20 days hereof, of no longer than three pages. They will then each have 10 days to deliver responding submissions of no longer than two pages.

Akazaki, J.

Date: November 12, 2024