SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N°: 500-17-038134-071

DATE : June 10, 2010

PRESIDING: THE HONORABLE BRIAN RIORDAN, J.S.C.

CHÂTEAU DRUMMOND INC.
Plaintiff

v.

SALAH HASHIMI
Defendant

JUDGMENT RENDERED FROM THE BENCH

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[1] Defendant Hashimi promised to purchase from Plaintiff (the "**Developer**") unit 1403 (the "**Unit**") in the Roc Fleuri condominium building (the "**Project**") by way of a "preliminary contract" signed on March 4, 2004 (the "**Contract**": Exhibit P-1). The Contract and its various schedules foresaw the following:

a. The purchase included one interior parking place situated on the 3rd level of the underground garage;

b. The purchase price of the Unit before taxes was $1,012,823.30;

c. The purchase price of the parking place was $35,000;

d. The total purchase price with taxes was $1,205,258.75;

e. Three deposits totalling $261,895.83 were required within sixty days of the acceptance by the Developer of the Contract;

f. The expected completion time of the Unit was Fall 2004 (Section 5.1 of Schedule A);

g. The Developer should promptly notify Hashimi in the event of a delay in the completion date and Hashimi waived all recourse he might have against the Developer for any and all delays, accepting that the Developer would not be liable for any fees, disbursements or prejudice incurred or prejudiced (sic) by Hashimi for such delays (Section 5.1 of Schedule A);

h. Should Hashimi fail to close in accordance with the terms of the Contract, the Developer had the right, *inter alia*, "to cancel the (Contract) ..., in which event all deposits ... shall be forfeited to (the Developer) in payment of damages suffered by (the Developer) as a result of such failure ... and (the Developer) shall be entitled to dispose of the (Unit) as it wishes" (Section 5.3 of Schedule A).

[2] Hashimi, who resides in Dubai, made the three deposits required under the Contract, but failed to close in spite of at least three written calls to do so. The Developer alleges that it suffered damages as a result of Hashimi's default and petitions the Court to confirm the cancellation of the Contract and to declare the deposits forfeited to it as liquidated damages.

[3] Hashimi initially pleaded by way of cross demand that the deposits should be returned to him, with interest. Shortly before trial, he learned that the Unit had been sold in March 2009 for a total price, including taxes, of $1,275,000 (the "**Resale**"). After obtaining information provided by the Developer at trial, he accepted that the losses suffered by the Developer should be compensated, but maintained that the balance of the deposits should be returned.

[4] From the documents filed at trial by the Developer, and its representatives' testimony, its losses can be summarized as follows:

a. $30,000 net on the Resale, plus or minus $17,000 of "internal commission" that Hashimi contests, alleging that it would have been payable on his sale, as well, although there is no proof made on the point, plus

b. $203,855 resulting from condo fees and taxes that the Developer had to pay on the Unit between April 2006, when Hashimi should have purchased, and March 2009, the date of the Resale.

[5] Hashimi argues that he should be credited the amount of the interest earned on the deposits until now, at 6.61%, which is the rate of interest the Developer is using to calculate its losses. His lawyer argues that this represents some $34,625.

[6] Based on these amounts, Hashimi's position now appears to be that he should be reimbursed about $80,000, being the difference between the deposits ($261,000) and his evaluation of the Developer's losses, i.e., $183,000 ($234,000 - $17,000 - $34,000).

[7] From these figures, the Court concludes that, at best, the Developer's losses were in the vicinity of $180,000 and, at worst, they were around $234,000.

[8] The Developer admits that the date of delivery of the Unit was April 2006, rather than the Fall of 2004 and that it knew in March 2004 that the Fall target could not be met. It alleges that one of the main reasons for that was the application to the various levels of government to increase the height of the building from 18 to 24 stories. This application was eventually successful to the extent of augmenting the height to 22 stories. This process is foreseen in the Contract at section 15, although it does not mention any resulting additional delay.

[9] Hashimi sees bad faith in the fact that he was not advised of this delay at the signing of the Contract, bad faith that is multiplied by his not being advised of the Resale.

[10] Whether there was bad faith in March 2004 or not, Hashimi renounced to any rights he might have had in that regard. Throughout 2005 he worked with the Developer on the lay-out and interior of his Unit. By then, he was well aware that the Fall 2004 date would not be met, yet he never complained of this in his numerous e-mails.

[11] Moreover, he never complained of the delay in delivery until July 2006, four months after the Unit was offered to him in March 2006 for the next month. True, in February 2006 he asked the Developer to try its best to sell the Unit for him, but in no way did he put it in default.

[12] The case law on penalty/liquidated damages clauses establishes that an abusive clause, even a good-faith abusive clause, can be cancelled or the amount of the penalty reduced. The Court of Appeal opined as follows in 2007:

> [51] Il ressort de la jurisprudence qu'une cause pénale peut avoir un caractère abusif intrinsèque, lorsqu'il y a disproportion entre la pénalité prévue et la contrepartie ou l'importance de l'obligation qu'elle sanctionne. Le caractère abusif peut aussi être circonstanciel, lorsque la pénalité, qui est raisonnable dans certaines

> circonstances d'inexécution de l'obligation, ne l'est pas dans d'autres, parce qu'elle est disproportionnée au préjudice réellement subi.[1]

[13] That court goes on to cite Baudouin and Jobin,

> [55] Selon les auteurs Baudoin et Jobin, trois repères sont retenus par la jurisprudence pour fixer une pénalité acceptable, soit le dommage cause, le caractère comminatoire de la peine et les circonstances particulières:
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> > ... Bien qu'on ne puisse pas parler de méthode de calcul, trois points de repère peuvent être signalés. Premièrement, le débiteur ne devrait pas être forcé de payer au créancier une somme très supérieure à celle qui lui serait attribuée si aucune faute n'avait été commise et si le contrat avait été exécuté comme prévu, autrement la clause violerait le principe de l'enrichissement injustifié. Deuxièmement, afin de préserver le caractère comminatoire de la clause, la pénalité, une fois réduite, doit demeurer substantiellement supérieure aux dommages-intérêts qu'aurait obtenus le créancier si aucune clause pénale n'avait existé. Troisièmement, des circonstances doivent être prises en compte pour apprécier le caractère abusif (tels la gravité ou le caractère délibéré de la faute, les répercussions financières de la pénalité sur le débiteur).

[14] As such, in the Court's view, the case boils down to deciding whether Hashimi should receive back the $80,000, taking his calculations for the sake of argument, in spite of his default. The Court thinks not.

[15] The Project here, a $60,000,000 luxury condominium development, was subject to strict scrutiny by its bank, as such projects tend to be. One of the principal elements of the bank's willingness to lend was the non-refundable nature of the deposits by all promising purchasers. It is of crucial importance for such projects, and for business in general, that clauses designed to motivate a party to respect its obligations be given due respect, particularly when defaults could cause serious financing problems.

[16] Here, the clauses are reasonable in a business context and Hashimi accepted them with open eyes. His default caused significant damages to the Developer that, by good luck, ended up being less than the total of the deposits, but not by a big amount. The Court is convinced that the deterrence factor in these circumstances is important and that the amount involved, a sum between $27,000 and $80,000, in the context of this type of contract is reasonable. We shall grant Plaintiff's action.

[17] Given that, the cross demand will be dismissed.

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[1] *Robitaille c. Gestion L. Jalbert inc.* 2007 QCCA 1052.

[18] Nevertheless, we shall not grant costs in this case. Had all the financial information concerning the Resale been provided to Hashimi in a timely manner, this case might have been settled out of court. The Court faults the Developer in this regard.

[19] **BASED ON THESE REASONS, THE COURT:**

[20] **GRANTS** Plaintiff's action, as amended;

[21] **CONFIRMS** the cancellation of Defendant's accepted offer concerning unit 1403 of the Project (Exhibit P-1);

[22] **DECLARES** forfeited to Plaintiff as liquidated damages the deposits of $261,895.83 from the dates said deposits were made;

[23] **DISMISSES** Defendant's cross demand;

[24] **THE WHOLE** without costs.

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BRIAN RIORDAN, J.S.C.

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Hearing Date: June 10, 2010