In the Provincial Court of Alberta

Citation: Barth v. Axxess (Summerwood SP) Developments Inc., 2010 ABPC 70
Date: 20100304
Docket: P0890301928
Registry: Edmonton

Between:

Russell Alexander Barth

Plaintiff

- and -

Axxess (Summerwood SP) Developments Inc.

Defendant

Decision of the Honourable Judge K. Haymour

[1] The Plaintiff, Russell Barth (hereinafter referred to as the "Purchaser"), a civil engineer with ISL Engineering submitted an offer to purchase a condominium unit on April 26, 2007. The written offer of the Plaintiff was to purchase the condominium unit in a proposed condominium plan located at the property legally described as plan 0521786, block 1, lot 6 (hereinafter the "Property"). Attached to the offer to purchase were several schedules including the proposed condominium plan, the proposed bylaws of the condominium, the site plans and specifications, the proposed budget and condominium fees, the dual agency disclosure statement, condominium corporation management agreement, the purposed easement of common property units and common property, the proposed restricted covenant regarding the parking, the proposed exclusive use agreement regarding parking, a proposed access parking easement and the easement plan. The developer of the condominium project, the Defendant, Axxess (Summerwood SP) Developments Inc. (hereinafter the "Developer" or "Axxess") accepted the offer to purchase on or about the 27th day of April, 2007. The total purchase price inclusive of extras and GST was a sum of $275,176.00 and the Plaintiff tendered a deposit of $13,250.00. The accepted offer to purchase was in the form of a fill in the blanks document printed on the Defendant's standard form agreement (hereinafter the "Axxess Agreement" or "Contract").

[2] There was no date for completion of the condominium project set out in the Axxess Agreement and the Plaintiff stated in evidence that he anticipated that it would take two years to complete the condominium project. Mr. Barth could not advise as to how he arrived at the time frame for completion other than the fact that he had understood that phase one had not even

commenced and that the condominium that he was purchasing was in phase two. On February 17, 2008 the Defendant sent a notice to the Plaintiff confirming that the Plaintiff "... will be expected to close on your condominium on March 29 at 8:00 a.m." (Exhibit 2 in these proceedings). Mr. Barth testified that a couple days after receipt of the February 17, 2008 letter from the Defendant he received a phone call from one of the two realtors involved in the transaction advising that the closing date had been altered and that the new closing date would be Wednesday, April 23, 2008 at 8:00 a.m.; he noted this on the February 17, 2008 letter in his own handwriting. On April 7, 2008 the Plaintiff's legal counsel received a facsimile from counsel for the Defendant regarding the pending closing of the transaction confirming "please note that we do not have the re-division plan registered yet, therefore, we will be providing you with an agreement for possession at this time. Upon plan registration we will forward a transfer and trust letter to you" (Exhibit 3 in these proceedings). Mr. Barth testified that he then proceeded to check with his bank and confirmed that they would not advance funds for him to close the transaction without title and bank security being registered. No written confirmation of this was tendered at trial from Mr. Barth's financial institution. Mr. Barth testified that he then contacted his lawyer to see if he could back out of the transaction. On April 22, 2008 legal counsel for the Plaintiff provided correspondence to counsel for the Defendant's rescinding the offer to purchase on the grounds that the re-division plan had not yet been registered citing s. 94 of the *Land Titles Act* that "no lots shall be sold under agreement for sale or otherwise ... until the plan creating lots has been registered" (Exhibit 4 in these proceedings). The Plaintiff then testified that on or about May 6, 2008 he received an undated letter from the Defendant confirming a new possession date of May 23, 2008 at 9:00 a.m. and confirming "in order for Axxess Summerwood customer service representative to release your keys, all documentation must be completed with your lawyer. All monies, including upgrades must be received by Axxess Summerwood's legal representatives, Ogilvie LLP, Barristers and Solicitors prior to your scheduled possession. If funds are not received on the possession date, interest will begin to accumulate. Please refer to article 6 in your offer to purchase for more details" (Exhibit 5 in these proceedings).

[3] On May 5, 2008 the Plaintiff filed a civil claim for the recovery of the deposit in the amount of $13, 250.00. On May 15, 2008 the Defendant through it's legal counsel forwarded correspondence to counsel for the Plaintiff confirming that the Plaintiff did not have the right to rescind the offer to purchase and that s. 94 of the *Land Titles Act* was not applicable to the contract between the parties. Correspondence went on to indicate that the Defendant's counsel would "... forward to you the transfer of land to give your client the opportunity to close. If your client refuses to close we will treat it as repudiation of the contract and the deposit will be forfeited. We will also leave open the right to pursue your client for damages" (Exhibit 6 in these proceedings). Subsequent to the correspondence from the counsel for the Defendant no closing documents were sent by the Defendant's counsel to the Plaintiff's counsel. On June 23, 2008 the Defendant was successful in the registration of a re-division plan at the Alberta Land Titles office creating the condominium unit which is the subject matter of the litigation before this Court. On July 11, 2008 the Defendant was successful in securing the occupancy permit for the unit from the County of Strathcona. It was not clear from Mr. Barth's evidence why he wanted out of the transaction. He alludes to his inability to secure financing without registration of the title and also that closing was occurring much earlier than he anticipated. The evidence is

clear, however, that the condominium market had experienced a significant correction and that the value of the unit in question had dropped significantly below the purchase price of $275,176.00

[4] Lisa Feist, the director of sales marketing for the Defendant took the stand and testified on behalf of the Defendant. She confirmed that she had been with the Defendant approximately five years and was involved with the development of marketing both phase one and phase two of the Axxess at Summerwood in Sherwood Park. She confirmed that it was a very busy development with anticipated completion for each of the phases being 12 months from date of commencement of that phase. She testified that customers who purchased units in either project were constantly informed of the stages of construction. She added the Contract between the Plaintiff and the Defendant was a standard form of contract which had been drafted by the Defendant's lawyers. In cross-examination Ms. Feist reviewed the various Contract clauses and noted that while it calls for five days advance notice of closing from the Developer, Axxess actually sent out a 30 day advance notice of prospective closings. Ms. Feist testified that she did not know the Plaintiff personally and that communication for closing and possession of his unit was made by her sales team. She further testified that when she was informed that the Plaintiff was cancelling the Contract she released the unit in question back for sale after adjusting for current market pricing. Ms. Feist testified that the condominium re-division plan was not registered by the Defendant until June 23, 2008 (Exhibit 8 in these proceedings). She also testified that the occupancy and inspection by Strathcona County, hence the occupancy permit was not issued until July 11, 2008 (Exhibit 9 in these proceedings). In cross-examination she conceded that the Contract does not specify a closing date but rather the closing date was to be determined as reflected by the letters in clause 6 "TBD". Ms. Feist testified that the unit in question was re-listed for sale in January 2009 with the unit being sold by agreement for sale dated February 11, 2009 for the sum of $218,500.00 (Exhibit 7 in these proceedings). As to the reason for the large gap between the date that the Plaintiff purported to repudiate the Contract and the date that it was re-listed for sale Ms. Feist testified that this was due to internal matters that had to be considered. She also testified that the Defendant tended to leave the door open for customers that may change their minds and come back and decide that they wish to close the transaction. Ms. Feist agreed that the first offer she received from a third party to purchase the unit in question was accepted shortly after the property was listed.

[5] Mr. Randell Wyton from Exxex Appraisal Group testified on behalf of the Defendant. He is a real estate appraiser specializing in condominium appraisals having received his designation in 1990. He testified that he was retained to appraise the condominium unit, suite 307 at 42 Summerwood Boulevard, Sherwood Park, Alberta which is the unit that is the subject matter of today's proceedings (hereinafter the "Unit"). Mr. Wyton testified that the condominium market hit its stride or peak sometime in the middle of 2007 and has been on a steady decline ever since. He added that the current condominium market was anywhere between 15 and 20 percent lower than at the peak in mid 2007. His evaluation in February 2009 for the Unit was the sum of $215,000.00 as reflected in the appraisal which became Exhibit 12 in these proceedings. In response to questions in cross-examination Mr. Wyton confirmed that in his opinion the value of suite #307, 42 Summerwood Boulevard, Sherwood Park, Alberta in May 2008 would have been $20,000.00 greater or the sum of $235,000.00. He added that his belief

was that the value of the Unit in March 2007 was marginally higher namely the sum of $2,000.00 for the Unit value of $237,000.00.

[6] It is clear from the evidence before the Court that the Plaintiff, a civil engineer, had read and understood the Contract. He was familiar with these types of transactions for the purchase of condominiums where the plans had not yet been registered. He had purchased two other condominiums yet to be constructed and closed both of those transactions. The Plaintiff testified that while he was not given a completion date with respect to the Unit, he was given a construction schedule and formulated an opinion and expectation as to when this Unit would be completed, namely, two years from the date that he signed the Contract.

[7] The issues before the Court respecting both the claim of the Plaintiff and the counterclaim of the Defendant are as follows:

1. Is the Contract between the Plaintiff, Russell Alexander Barth, and the Defendant, Axxess (Summerwood SP) Developments Inc. enforceable, or is it void?

2. If the Contract is enforceable was it validly rescinded by the Purchaser, Russell Alexander Barth, for uncertainty?

3. If the Contract is enforceable, and was not validly rescinded for uncertainty, was it breached by the Defendant, Axxess (Summerwood SP) Developments Inc. entitling the Plaintiff to rescind it?

4. If the Contract is enforceable, was the contract breached by the Purchaser, Russell Alexander Barth, such as to entitle the Defendant, Axxess (Summerwood SP) Developments Inc., to maintain an action by way of counterclaim for damages against the Plaintiff?

[8] Before I delve into an assessment of the legal arguments before the Court I believe there are preliminary matters that need to be addressed. Firstly, the trial of this matter and partial argument, both written and oral, were heard on April 5, 2009. Further written argument was provided by counsel for the Defendant, Courtney E. Keith, to the Court and to counsel for the Plaintiff on April 7, 2009. Written argument and response was provided to both the Court and Ms. Keith by counsel for the Plaintiff, Kari L. Sejr on April 14, 2009. It is also important to note that the argument before the Court expanded far beyond the pleadings listed in the Plaintiff's civil claim. Specifically, the Plaintiff's pleadings are restricted to a narrow claim for recovery of the deposit in the amount of $13,250.00 based on the Plaintiff's right to rescind the purported Axxess Agreement declaring that it was illegal and not binding on the Plaintiff as it contravened the provisions of s. 94 of the *Land Titles Act* RSA 2000 c. L-4. However, the evidence and argument that was presented before the Court covered numerous additional heads so as to include the Plaintiff's entitlement to:

(a) repudiate the Axxess Agreement for uncertainty of its terms;

(b) rescind of the Axxess Agreement for breach of the same by the Developer; and

(c) rescind of the Axxess Agreement for failure of the Developer to tender closing documents at closing in breach of the "time is of the essence" clause.

[9] The *Provincial Court Act* RSA 2000, c. P-31 as amended at s. 34 reads:

"34(1) At a hearing, the parties are confined to the particulars set out in the civil claim and the dispute note.

(2) If the Court is satisfied that sufficient cause is shown, it may allow the civil claim or dispute note to be amended."

[10] In the evidence and argument presented, the Plaintiff did not confine his claim to the narrow issue of illegality of the Contract on the basis of the application of s. 94 of the *Land Titles Act*. The Plaintiff's arguments were expanded to suggest illegality of the Contract based on its failure to comply with s. 12 of the *Condominium Property Act*. Further the Plaintiff expanded its argument based on the evidence tendered, to the submission, if the Contract was enforceable it was validly rescinded by the purchaser due to the wording of the Contract being contrary to the provisions of the legislation. Furthermore, the Contract provided for no specified date for closing, any conditions precedent in the Contract had no specified date and were never satisfied nor waived by the Defendant, and the Developer had a right to declare the Axxess Agreement null and void after closing if it did not obtain a condominium re-division plan within a reasonable time even after closing had taken place. The Plaintiff argues that the Contract between the parties is void for uncertainty in that it contains provisions clearly inserted for the sole benefit of the Defendant, which clearly contravene the protections afforded to a purchaser pursuant to ss. 12 through 17 of the *Condominium Property Act* R.S.A. 2000, c. C-22. In oral submissions Ms. Sejr furthered argued that the Contract is void for uncertainty because it offends the Statute of Frauds by providing no closing date which is essential to any contract for the sale of land. This argument was not part of the pleadings as required under Rules 109 and 123 of the Alberta Rules of Court. As a further argument, counsel for the Plaintiff, presented evidence and submissions that the Plaintiff was entitled to rescind the Axxess Agreement where the Defendant breached the contract by failing to comply with the provisions of the Contract such as: time being of the essence, that notices must be in writing, and the tender of documents on the closing date.

[11] It is important to note that Defence Counsel in the Defendant's pleadings, evidence and argument explicitly dealt with these expanded allegations or submissions notwithstanding the fact that they were not contained in the pleadings of the Civil Claim. Ms. Keith, counsel for the Defendant, lodged no objection to any of the Plaintiff's unplead claim but rather participated by way of a vigorous defence to the same. I am satisfied that sufficient cause has been shown for the Court to address these expanded pleadings notwithstanding the fact that they were not contained in the Civil Claim proper. With the exception of the argument relating to the consideration of the Statute of Frauds, which I will not allow for failure to comply with the requirements of the Alberta Rules of Court, I find there is no prejudice to the parties in allowing

the amendment and I would therefore amend the pleadings so as to conform with the evidence and argument presented to this Court.

[12] Ms. Sejr, for the Plaintiff, submits that the Axxess Agreement contravened s. 4 of the *Land Titles Act*, by providing for the sale of a lot before a subdivision plan creating the lot was registered. The first prong of her submission is to apply the doctrine of illegality by invoking the classic model as set out by the Federal Court of Appeal in *Still v. Minister of National Revenue* 221 N.R. 127 at paragraph 17:

> "Case law fully supports the understanding that if the making of a contract is expressly or impliedly prohibited by statue than it is illegal and void *ab initio*."

Ms. Sejr cites the Alberta Court of Appeal decision of *Abbott v. Ridgeway Park Ltd.* 8 Alta. L.R. 314, which held as summarized in the preamble:

> "Where land described in an agreement for sale thereof according to a registered plan which in fact is not registered until after an action for rescission by the purchaser is brought, the purchaser who repudiates as soon as he has knowledge of the non-registration of the plan is entitled to the rescission of the agreement under sub-sec. 7, sec. 124 of the Land Titles Act (*currently section 94*) enacting that no lot should be sold under agreement for sale according to a townsite or sub-division plan unless the same has been duly registered, providing that the said section should not apply to any plan then in existence and approved by the Minister."

Her submission is that the language in s. 94 of the *Land Titles Act* is mandatory and therefore the contract which is the subject matter of the current proceedings was void *ab initio*.

[13] In the alternative, Ms. Sejr, enlists the modern approach to the doctrine of illegality by looking to the legislative intent of the relevant statutory provisions. She cites the Supreme Court of Canada decision in *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072 as a case where the court applied the modern approach to illegality by finding that the provisions of then s.19(1) of the *Planning Act* of Alberta imposed conditions precedent on the vendor there to obtain subdivision approval where the contract between the parties was silent. In the *Dynamic Transport Ltd. v. O.K. Detailing Ltd., supra*, the respondent, vendor, had accepted an offer from the appellant, purchaser, to purchase part of its property and then purported to cancel the sale on the grounds that the contract was unenforceable: firstly, because the description of the land was so vague and uncertain so as to make that identification impossible and secondly, for the contract being silent as to which party was to obtain subdivision approval required under the terms of the *Planning Act*. The Supreme Court of Canada's reasoning with respect to the second ground is the only portion relevant to the current proceedings and is stated at page 1082:

> "Both parties are aware that the subdivision approval, pursuant to the *Planning Act*, was required, but the agreement is silent as to whether the vendor or purchaser would have obtained this approval. The statutory prerequisite became

> an implied term of the agreement. The obtaining of subdivision approval was, in effect, a condition precedent to the performance of the obligations to sell and buy."

Then at page 1084:

> "In a purchase-and-sale situation, the "person who proposes to carry out a subdivision of land" is the intending vendor. It is he who must divide the parcel of land, which has hitherto been one unit, for the purpose of sale. If a purchaser carried out the actual work in connection with the application, he could only do so in the vendor's name and as his agent. The vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale."

[14] Ms. Sejr submits that in the current case, the Court is not in a position to imply a condition precedent of subdivision approval where the Axxess Agreement clearly states that the Contract is not subject to subdivision approval. Unlike *Dynamic Transport Ltd. v. O.K. Detailing Ltd., supra*, the Axxess Agreement clearly establishes that the Developer is not obligated to secure condominium re-division approval. Ms. Sejr cites the Alberta Court of Appeal decision in *Sullivan v. Newsome* 78 A.R. 297, for this proposition where at paragraph 20 the court states:

> "20 The case at bar is distinguishable from **Dynamic Transport** supra for in that case the requirement of obtaining subdivision approval was a condition precedent to the performance of the obligations to buy and sell. Notwithstanding the judgment of this Court in **Dynamic Transport** it has always been a rule that a Court should be cautious in implying terms into a written contract in order to give it business efficacy."
>
> (Emphasis in original.)

The facts in *Sullivan v. Newsome, supra*, are that the plaintiff owned a certain parcel of property which he transferred to R. pursuant to an agreement which provided that the plaintiff would have the right to purchase half of the land for one dollar at any time before or after subdivision of the property and that R. would transfer this half to the plaintiff after subdivision. The plaintiff filed a caveat protecting its interests under the agreement. No plan of subdivision was ever registered. The defendants entered into an interim agreement with R. to purchase the lands while aware of the plaintiff's caveat between the plaintiff and R. The property was ultimately transferred to the defendants who gave notice to the plaintiff to commence proceedings on the caveat which action was commenced by the plaintiff. The court held that although s. 88 (predecessor to s. 94) of the *Land Titles Act* made agreements to sell land pursuant to an unregistered subdivision plan illegal, where it is the duty of the party to register a subdivision plan the party can not use the section as shield in a civil action. Here however, the agreement was silent as to who had the duty to apply for approval of the subdivision. The court stated that it had to be cautious in implying terms into a written contract in order to give it business efficacy. In short without the contract being clear as to who had the obligation to apply for subdivision approval the court was not about rewrite the contract. In conclusion the Court of Appeal found that it was not necessary to decide

whether the agreement between R. and the plaintiff was one where the plaintiff sold half of the property and maintained the other half as this dealt with the sale of unsubdivided lands which offended what is now s. 94 of the *Land Titles Act*, or whether the transaction involved the sale of the whole of the property from the plaintiff to R. with an option to repurchase half of the property which clearly offended the rule against perpetuities; in either case the court felt the contract was void.

[15] The Alberta Court of Appeal decision of *Gainers Inc. v. Pocklington Holdings Inc.* 81 Alta. L.R. (3d) 17 held at paragraph 18 that "... no implied term can be inconsistent with or contrary to the express terms of the contract." Ms. Sejr submits that clause 12 of the Axxess Agreement clearly contemplates the closing of the transaction before subdivision plan is registered and title is issued. She submits that the Court should not imply a term into a contract to make it compliant with a statute where the contract is specifically drafted to circumvent the statute. In further support of her proposition she cites the Supreme Court of Canada decision in *Bank of Toronto v. Perkins* (1883), 8 S.C.R. 603 at page 610:

> "It would be a curious state of the law if, after the Legislature had prohibited a transaction, parties could enter into it, and, in defiance of the law, compel courts to enforce and give effect to their illegal transactions."

Consequently, Ms. Sejr argues Mr. Barth was entitled to treat the contract as void and seek the recovery of his deposit.

[16] Ms. Sejr extends this reasoning to the requirement of a Developer to provide an occupancy permit under s. 12 of the *Condominium Property Act*. She submits that the purpose of s. 12 of the *Condominium Property Act* is consumer protection. It ensures that a condominium unit complies with the *Safety Codes Act* so that the purchaser is not forced to take possession of a condominium unit in which they cannot reside. The Contract specifically provides that the Developer may choose the date on which the purchaser must take possession and no where provides for the procurement of an occupancy permit before closing. Rather, she argues clause 4 of the Axxess Agreement specifically provides that the issuance of an occupancy permit, and the date on which the purchaser is required to take possession, may be different, in contravention of the *Condominium Property Act*. She argues that if the failure of the Contract to provide for a procurement of an occupancy permit does render it unenforceable. A condition that the occupancy permit would be obtained on or before the closing date must be implied in order to save the Contract and comply with s. 12 of the *Condominium Property Act*. Ms. Sejr reiterates that here where the Contract specifically provides otherwise, the Court should not imply a condition precedent into the Contract to make it enforceable and compliant with the statute.

[17] Ms. Keith for the Defence, submits that the Axxess Agreement purports to sell a unit under a registered plan that does exist at law under the *Land Titles Act*. This she submits is distinguishable from the decision in *Abbott v. Ridgeway Park Ltd., supra*, where the land as described in the agreement for sale was in fact not registered until after an action for recision by the purchaser was brought. I purpose to deal with this argument in a summary fashion. There is

no doubt that the defendant here is selling a proposed unit in an existing subdivision which must be further subdivided to establish a lot or condominium unit; Mr. Barth is not purchasing the existing lot re-division by virtue of the existing plan but a condominium unit plus undivided shares in a non-existing condominium re-division plan. In fact clause 12 of the Contract makes it clear that the Developer may declare the Contract null and void where the re-division does not occur. Apart from such declaration the contract would be frustrated if the re-division does not take place notwithstanding the fact that a subdivision plan exists. The same was true for the sale of property in the *Dynamic Transport Ltd. v. O.K. Detailing Ltd., supra*, where there was a plan of subdivision which needed to be further subdivided to create the title to the parcel being carved out of the original subdivision plan for sale to the purchaser. In both *Dynamic* and here there is a proposal to sell a portion of a property that is subdivided but, it needs to be further subdivided in order to carve out and establish a legal title to that portion being acquired by the purchaser. Ms. Keith's argument must fail.

[18] On the issue of whether the Axxess Agreement is void *ab initio*, Ms. Keith cites that in both *Dynamic Transport Ltd. v. O.K. Detailing Ltd., supra*, and *Carruthers v. Tioga Holdings Ltd.*, [1999] A.J. No. 191, referred to in the Plaintiff's submissions, the transactions dealt with a purchase of unsubdivided land by way of agreement for sale. In both cases subdivision approval had not been achieved at that time of entering into the contract. In both cases the courts found the developers were obliged to obtain subdivision approval and ordered them to do so. Ms. Keith submits that on the facts of those cases the Contract is not void *ab initio*. Where there is no re-division of the subdivision plan registered, the court is saying go get it, the contract is still valid, there is no illegality with having a contract in place and therefore the Contract cannot be void *ab initio* as submitted by the Plaintiff.

[19] I accept the submission of Ms. Keith, and find, that s. 94 of the *Land Titles Act* does not render the Contract void *ab initio.* In this I adopt the reasoning of the Alberta Court of Appeal in the *Carruthers v. Tioga Holdings Ltd.*, *supra*, at paragraph 4:

> "4. The law applying to a contract to sell part of a parcel of land is clear. Government subdivision approval is a condition precedent to conveying part of the parcel. But it is not a condition precedent to the existence or validity of the contract to sell part. Indeed, if no more is said, it is an implied term of the contract that the vendors/owners of the full parcel will apply for and in good faith seek subdivision approval, and once it is secured, will convey the new parcel covenanted to be sold. ..."

And at paragraph 5:

> "5. In our view, that clear law sets most of the stage on which the issues in this present appeal must be played out. In particular, the need to apply for and get subdivision approval is clearly machinery necessary to convey title and perform the contract (option), but it is not really an obstacle to, or hole in, the contract or its obligations. It is subsidiary to the contract in several senses."

And at paragraph 6:

> "Furthermore, most or all of these conveyancing matters need not really be spelled out in the contract of sale, because in the absence of clear words to the contrary, the courts will imply them."

Furthermore for reasons that will be set out in my subsequent analysis herein of the interplay of the *Land Titles Act*, with the *Condominium Property Act*, it will become abundantly clear that a sale of a unit under the *Condominium Property Act* cannot be found to be void *ab initio* by virtue of the application of s. 94 of the *Land Titles Act*.

[20] The Plaintiff's alternative submission is that by application of the modern approach to the doctrine of illegality the legislative intent of both s. 94 of the *Land Title Act*, as well as the *Condominium Property Act*, would render the Axxess Agreement void. Ms. Keith for the Defendant submits that it is very difficult to read a very strict interpretation of s. 94 of the *Land Titles Act* in conjunction with the *Condominium Property Act* (specifically s. 12 of the *Condominium Property Act*). She submits that s. 12 of the *Condominium Property Act* reinforces the ability of a developer to sell condominium units by way of plan, or proposed plan, which contemplates a re-division plan not yet completed; this is clearly at a variance with the strict application of s. 94 of the *Land Titles Act*. Ms. Keith argues that not only does s. 12 of the *Condominium Property Act* contemplate the sale of proposed unregistered condominium units but that it clearly sets out the mechanism and consumer protection provisions that facilitate such transactions. The *Condominium Property Act* contemplates the sale by a developer of condominium units that do not yet exist and has legislated that it is not illegal to do so. Ms. Keith submits that to provide a narrow interpretation of s. 94 would defeat the overall purpose of the extended legislation reflected in the *Condominium Property Act*.

[21] I propose to deal with the issue of whether the legislative intent of both s. 94 of the *Land Title Act* and the provisions of the *Condominium Property Act* would render the Axxess Agreement void. Section 94 of the *Land Titles Act* sets out that:

> "94 (1) No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until a plan creating the lots has been registered.
>
> (2) A person who contravenes subsection (1) is guilty of an offence.
>
> (3) No party to a sale or agreement for sale is entitled in a civil action or proceeding to rely on or plead the provisions of this section
>
> (a) if the plan of subdivision by reference to which the sale or agreement for sale was made is

registered when the action or proceeding is commenced, or

(b) if, pursuant to the arrangement between the parties, it was the duty of the party who seeks to rely on or plead the provisions of this section to cause the plan of subdivision to be registered."

The relevant provisions of the *Condominium Property Act* for the current exercise are:

"3 For the purposes of Part 17 of the Municipal Government Act and the Land Titles Act, a condominium plan is a plan of subdivision.

11 Every agreement to sell a unit imposes on the developer selling the unit and the purchaser of the unit a duty of fair dealing with respect to the entering into, performance and enforcement of the agreement.

12 (1) A developer shall not sell or agree to sell a unit or a proposed unit unless the developer has delivered to the purchaser a copy of

(a) the purchase agreement,

(b) the bylaws or proposed bylaws,

(c) any management agreement or proposed management agreement,

(d) any recreational agreement or proposed recreational agreement,

(e) the lease of the parcel, if the parcel on which the unit is located is held under a lease and the certificate of title to the unit or proposed unit has been or will be issued under section 5(1)(b),

(f) any mortgage that affects or proposed mortgage that will affect the title to the unit or proposed unit or, in respect of that mortgage or proposed mortgage, a notice prescribed under subsection (2), and

(g) the condominium plan or proposed condominium plan.

(6) A developer shall provide to a purchaser of a unit prior to or at the time that the purchaser takes possession of the unit or proposed unit an occupancy permit or permission in writing to occupy the unit or proposed unit that is issued or given pursuant to the regulations under the Safety Codes Act.

13 Every developer who enters into a purchase agreement shall include in the purchase agreement the following:

(a) a notification that is at least as prominent as the rest of the contents of the purchase agreement and that is printed on the outside front cover or on the first page of the purchase agreement in bold face, in upper case and in larger print than the rest of the purchase agreement stating as follows:

"The purchaser may, without incurring any liability for doing so, rescind this agreement within 10 days after its execution by the parties to it unless all of the documents required to be delivered to the purchaser under section 12 of the Condominium Property Act have been delivered to the purchaser not less than 10 days prior to the execution of this agreement by the parties to it.";

(b) where the units and the common property are not substantially completed at the time that the purchase agreement is entered into, a description, drawing or photograph showing

(i) where there is a building, the interior finishing of and all major improvements to the common property located within a building,

(ii) all major improvements to the common property, other than those to which subclause (i) applies,

(iii) any significant utility installations, major easement areas, retaining walls and other similar significant features,

(iv) the recreational facilities, equipment and other amenities to be used by the persons residing in or on the residential units,

(v) the equipment to be used for the maintenance of the common property,

(vi) the location of roadways, walkways, fences, parking areas and recreational facilities,

(vii) the landscaping, and

(viii) where there is a building, the exterior finishing of the building,

as they will exist when the developer has fulfilled the developer's obligations under the purchase agreement;

14 (1) For the purposes of this section,

(e) "substantially completed" means, subject to the regulations,

(i) in the case of a unit, when the unit is ready for its intended use, and

(ii) in the case of related common property, when the related common property is ready for its intended use.

(3) A developer shall hold in trust all money, other than rents or security deposits, paid by the purchaser of a unit up to the time that the certificate of title to the unit is issued in the name of the purchaser in accordance with the purchase agreement.

(4) Notwithstanding subsection (3), if a unit is not substantially completed, the developer shall hold in trust money, other than rents or security deposits, paid by the purchaser of the unit so that the amount of money held in trust will be sufficient, when combined with the unpaid portion of the purchase price of the unit, if any, to pay for the cost of substantially completing the construction of the unit as determined by a cost consultant.

(5) Notwithstanding subsection (3), if the related common property is not substantially completed, the developer shall hold in trust money, other than rents or security deposits, paid by the purchaser of the unit so that the amount of money held in trust will be sufficient, when combined with the unpaid portion of the purchase price of the unit, if any, to pay for the proportionate cost of substantially completing the construction of the related common property as determined by a cost consultant based on the unit factors of the units sharing the same related common property.

(6) The developer who receives money that is to be held in trust under this section shall forthwith deposit the money into an interest-bearing trust account maintained in a financial institution in Alberta.

(7) Money deposited under subsection (6) is to be kept on deposit in Alberta.

(8) If money is being held in trust under this section and the purchaser of the unit takes possession of or occupies the unit prior to the certificate of title being issued in the name of the purchaser, the interest earned on that money from the day that the purchaser takes possession or occupies the unit to the day that the certificate of title is issued in the name of the purchaser is to be applied against the purchase price of the unit.

(15) Once the unit or the related common property, or both, as the case may be, in respect of which money is being held in trust under this section are, as determined by a cost consultant, substantially completed, any money remaining in trust may be paid to the developer.

80 (1) This Act applies notwithstanding any agreement to the contrary and any waiver or release given of the rights, benefits or protections provided by or under sections 12 to 17 is void.

(2) A remedy that a purchaser of a unit has under this Act is in addition to any other rights or remedies that the purchaser has.

(3) A purchase agreement may be enforced by a purchaser notwithstanding that the developer failed to comply with this Act."

[22] I am satisfied that the wording of s. 12(1)(g) of the *Condominium Property Act* clearly contemplates the ability of a developer to sell a condominium unit by way of proposed condominium plan. What is of further significance is that s. 13(3) of the *Condominium Property*

Act clearly contemplates that a purchaser may pay a developer all monies related to the completion of a condominium unit with such funds to be held in trust by the developer until such time that the certificate of title to the unit is issued in the name of the purchaser. Section 13(8) of the *Condominium Property Act* contemplates that a purchaser of a unit can take possession of it or occupy it prior to the certificate of title being issued in the name of the purchaser. In summary I am satisfied that the legislative scheme set out under the *Condominium Property Act* clearly contemplates the ability of a developer to sell a condominium unit by way of a proposed plan prior to the actual issuance of the re-division plan creating the condominium plan and unit. It further contemplates the ability of the developer to collect the entire balance of the purchase price with funds to be held in trust pending the issuance of the certificate of title in the name of the purchaser and clearly contemplates that the purchaser may take possession or occupy a unit prior to the issuance of a certificate of title.

[23] The rules of construction for statutory interpretation have been set out by the courts on numerous occasions and are clear: where specific legislation differs from general legislation on subject matter contained in both, the specific legislation must govern. In the current circumstances I am satisfied that where the general provisions of s. 94 of the *Law Property Act* prohibiting the sale of unsubdivided lots is in conflict with the specific provisions contained in the *Condominium Property Act* permitting the sale of condominium units by way of proposed plan, the latter must prevail. In conclusion I find that the provisions of the *Condominium Property Act* apply and the Axxess Agreement is a valid contract between the parties.

[24] Plaintiff's counsel submits that s. 12(6) of the *Condominium Property Act* requires the developer to provide a purchaser with an occupancy permit or permission in writing to occupy, at the time the purchaser takes possession, in compliance with the regulations under the *Safety Code Act*. Clause 4 of the Axxess Agreement reads:

> "4. **CLOSING DATE AND ADJUSTMENT DATE**
>
> Taxes, rents, condominium fees, and interests shall be adjusted at noon on the Closing Date (as hereinafter defined) or the date possession is taken, whichever shall first occur, provided that the Developer in its discretion may make such adjustments on the 15th of the month where the Closing Date is in the first half of the month and on the 1st of the following month where the Closing Date is in the second half of the month. The Developer proposes to have construction substantially completed on or about TBD, however the Developer shall give the Purchaser five (5) days notice in writing of the actual date the Purchaser is required to take possession of the Units (the "Closing Date"). The Purchaser acknowledges that, notwithstanding that notice in writing setting the Closing Date is given to the Purchaser, the Closing Date is an estimate only and the Developer shall have no liability or responsibility if such estimated Closing Date is not reached, even by a substantial degree, and the Developer shall be entitled to issue further notice or notices setting one or more amended Closing Dates. The date the Units are substantially complete and ready for occupancy shall be determined by the Developer in its discretion. In the event an occupancy

> permit is issued by the municipality then in the absence of the Developer determining that the Units are substantially complete on a different date, the issuance of such permit shall be deemed to be conclusive evidence as against the Purchaser that the Units are substantially completed and ready for occupancy. If the Developer shall be unable to substantially complete the Units for occupancy within a reasonable period of time after the designated Closing Date, the Developer may, at its sole option, return any deposits it holds and the Developer shall not be liable to the Purchaser for any damages in that regard. The Purchaser shall not be entitled to take possession of the Units until the balance of the purchase price, together with adjustments as herein provided, has been paid. Prior to accepting possession, the Purchaser may inspect the Units together with a representative of the Developer, and any such taking of possession shall be conclusive evidence as against the Purchaser that at the time thereof, that the Units (save as shown on a deficiency list in writing to be agreed upon by the Purchaser and the Developer before the Purchaser takes possession of the Units) were in good and satisfactory condition and that all undertakings, if any, of the Developer in respect of the Units and the condition thereof have been fully satisfied and performed by the Developer. The Developer shall rectify the deficiencies, if any, contained in the said list within a reasonable time."

Ms. Sejr argues that clause 4 of the Axxess Agreement requires the purchaser to take possession of the Unit at a time determined in the sole discretion of the Developer, or where no such determination is made by the Developer, on a date for which an occupancy permit has been issued by the municipality, effectively requiring the purchaser to take possession even if the possession date is prior to the issuance of an occupancy permit by the municipal authorities. She adds that the manner in which a purchaser is forced to take possession where no occupancy permit is issued is exacerbated by the mandatory wording contained in clause 6 of the Axxess Agreement which reads: "subject to this Agreement, the Developer shall deliver vacant possession of the Units on the Closing Date to the Purchaser and the Purchaser shall accept possession on such date." Plaintiff's counsel submits that the Court should not imply a condition precedent that the developer first obtain the occupancy permit so as to render the Axxess Agreement in compliance with s. 12(6) of the *Condominium Property Act*.

[25] I find however that there is no need for the Court to imply such a condition where the wording of s. 80(1) of the *Condominium Property Act* clearly renders any purchaser's waiver of the rights contained in s. 12(6) of the *Condominium Property Act* void. Simply put, the requirement in clause 4 of the Axxess Agreement where the purchasers take possession before an occupancy permit is issued would be inapplicable. I am satisfied that the provisions of the *Condominium Property Act* make it clear that any agreement requiring a purchaser to take possession prior to the issuance of a occupancy permit is a waiver of a consumer right which is void. This does not render the entire Axxess Agreement void but rather only the waiver of any purchaser's rights.

[26] In oral argument, Ms. Sejr further submits that the Axxess Agreement was too uncertain to enforce. Specifically clause 4, setting the closing as "TBD" is simply too vague. I accept the

evidence that "TBD" stood for the wording "to be determined" and that no fixed date was contained in the Contract.

[27] Ms. Keith for the Defence argued that TBD is not a vague concept but rather the Axxess Agreement sets out a formula in which a reasonable closing date may be arrived at. She further submits that in the busy construction climate which existed at the time, where there is heavy reliance on the delivery of goods and services by material-men and trades, a fixed date on such projects is not feasible. She referred to the testimony of Ms. Feist that closing would occur within one year of the date that construction commenced on any specific phase. This would also appear to have been Mr. Barth's understanding who testified that he believed the project would be completed within two years from the date of the contract being executed because phase one of the project had not yet been commenced at that time. Ms. Keith submits that Mr. Barth, a civil engineer, was sophisticated in matters of construction and closing where he had purchased two other condominium units in the same fashion as this one and understood how a closing date would be arrived at. In the current case the closing date is not an essential term of the contract for the very reason that it was an ongoing construction project. In support of this proposition she cites the decision of the Supreme Court of Canada in *McKenzie v. Walsh* (1920), 61 S.C.R. 312 at page 313 and 314:

> "It seems to me that these three essential terms of a contract – parties, property and price— are all included.
>
> I have read most carefully the judgments delivered in the court below (54 N.S.R. 26), and concur with the opinion of Chief Judge Harris that the written memorandum or receipt discloses a contract in writing sufficient to satisfy the *Statute of Frauds* and that the arrangements subsequently made for a time of completion and possession were in the nature of appointments merely to carry out the contract and not varying its terms."

[28] In reviewing clause 4 of the Axxess Agreement I am satisfied that, at the very least, it is poorly drafted. The clause starts out in the first sentence using the disjunctive "or" to distinguish the closing date from possession date by its wording: "*... adjusted at noon on Closing Date (as hereinafter defined)* ***or*** *the date of possession is taken,* ***whichever shall first occur*** *...*" (emphasis is mine). The clause then incorporates the concept of substantial completion which is a separate and distinct concept but purports then to merge closing, possession and substantial completion, together, part way through the clause where it reads: "*The Developer proposes to have construction substantially completed on or about TBD, however the Developer shall give the Purchaser five (5) days notice in writing of the actual date the Purchaser is required to take possession of the Units (the "Closing Date")*". While I will delve into the interpretation of this clause in further detail later in this decision, with respect to the narrow issue of whether the contract is void for uncertainty as to the closing date, I find that it is not. Section 11 of the *Condominium Property Act* also imposes on the purchaser (and the developer) of a unit a duty of fair dealing. Mr. Barth was aware that the closing date in clause 4 of the Contract suggested a date to be determined and was aware that he was to receive five days advance written notice of the date of closing. By his own testimony he understood that the Unit would not be ready for

possession and closing for two years from the date that he executed the Axxess Agreement, namely on or before April 26, 2009. I find that the agreement of the parties to set a closing date, to be determined by the Developer, which was accepted by a sophisticated purchaser, in a volatile real estate market where the Developer would need to rely on numerous third party trades, does not render the Contract void for uncertainty. The Developer performed well within the time lines and stated expectations of the Plaintiff. I find the structure for closing set out in clause 4 of the Contract reasonable in the circumstances where "... most or all of these conveyancing matters need not really be spelled out in the contract of sale, because in the absence of clear words to the contrary, the courts will imply them" (*Carruthers v. Tioga Holdings Ltd., supra*, paragraph 17 herein).

[29] The Plaintiff's next prong of challenge to the Axxess Agreement is that if it was an enforceable Contract it was validly rescinded by the Purchaser. Plaintiff's counsel submits that the conditions precedent to the Contract were neither satisfied nor waived. She references the conditions precedent contained in clause 9 of the Contract requiring mortgage approval and registration of the bare land condo plan in the sole discretion of the Developer. None of the conditions in clause 9 provide for a date by which they must be completed. I accept the Plaintiff's argument that these clauses provide for no time lines within which the Developer must satisfy or waive these conditions. No evidence was led at trial that these conditions precedent were either satisfied or waived by the Defendant. At best all that can be said about these conditions precedent is that they are not governed by specific time lines but rather by pre-sales requirements. I find that these conditions precedent for the benefit of the Developer must be read in conjunction with s. 11 of the *Condominium Property Act*, and interpreted by the court as to what is reasonable in the circumstances. No evidence was led on the issue of whether the Developer secured blanket mortgage financing. Implicit from the fact that the Developer proceeded with construction, however, is that either the blanket mortgage financing was obtained, and hence the condition was satisfied, or alternatively that the Developer has waived the condition and proceeded without blanket mortgage financing; the failure to insert a date for completion of this condition is not fatal to the Contract. Additionally no evidence was led with respect to registration of the bare land condominium plan or its waiver. Again implicit in the fact that the Developer proceeded with construction is the satisfaction of this condition; no planning approval or building permit could issue to the developer without it. I am satisfied that the satisfaction or waiver of these conditions is self evident from the fact of construction of the project proceeding.

[30] In the alternative, should I be incorrect in my analysis and interpretation of the clause 9 conditions precedent, I am satisfied that they should be read *contra proferentem*, against the Developer who is the author of the Axxess Agreement. In so doing where the Contract fails to provide for a date for completion of the Developer's conditions precedent then the Developer would not be entitled to rely on them. In short they would be read as invalid conditions precedent to be struck from the Axxess Agreement leaving the balance of the Contract intact.

[31] I turn now to Ms. Sejr's submission that the Plaintiff was entitled to rescind the Contract which allows for subdivision approval after closing where the statutes make it clear that these conditions must be satisfied, at the very least, by the closing date. In view of my earlier finding

that the specific legislation, the *Condominium Property Act*, should govern this Contract, I purpose an analysis of the relevant provisions addressing the issue of re-division plan and registration. Clause 12 of the Contract clearly reserves onto the Developer the right to declare the agreement null and void and reads:

> "If the Condominium Redivision Plan to create the Units is not registered by the Developer as provided herein or within a further reasonable period of time after the Closing Date as determined by the Developer in its sole discretion, then the Developer may but shall not be obligated to give notice declaring this agreement null and void as though never made upon returning to the Purchaser an amount equal to any monies which the Purchaser has paid the Developer, not including any rental monies."

This clause must be read in conjunction with the requirement of fair dealing set out in s. 11 of the *Condominium Property Act*. Clause 48 of the Axxess Agreement incorporates by reference the *Condominium Property Act* of Alberta and even had it not, I am satisfied that the *Condominium Property Act* would apply to govern this Contract. Section 13(b) *Condominium Property Act*, contemplates a purchaser and developer entering into a purchase agreement where condominium units and condominium property are not yet substantially complete. Possession by a purchaser prior to title being issued is contemplated by s. 12(6) of the *Condominium Property Act*. Section 14(3) of the *Condominium Property Act* contemplates all money paid by a purchaser be held by the developer in an interest bearing trust account in Alberta (s. 14(6) *Condominium Property Act*) until such time that the certificate of title to the unit is issued in the name of the purchaser. Section 14(8) of the *Condominium Property Act*, outlines circumstances in which the purchaser of the unit takes possession or occupies the unit prior to a certificate of title being issued in the name of the purchaser, with all interest earned on any money be held in trust by the developer, to be applied against the purchase price of the unit. It is clear from these provisions that the *Condominium Property Act* creates consumer protection for the purchaser arising from the sale of condominium units. Most telling is s. 80 of the *Condominium Property Act* which clearly stipulates that the waiver of any rights of the purchaser under the consumer protection provisions of sections 12 through 17 of the *Condominium Property Act* are void. I am satisfied that the provisions of the *Condominium Property Act* contemplate transactions for sale of condominium units by way of proposed subdivision plan (s. 12(1)(g) of the *Condominium Property Act*) with possession and closing before a certificate of title is issued to the purchaser. The *Condominium Property Act*, does not require that the condition precedent, subject to re-division approval, be completed at the very latest by the closing date. I find that clause 12 of the Axxess Agreement does not offend the provisions of the *Condominium Property Act*. Under the circumstances I am satisfied that Mr. Barth was not entitled to rescind the Axxess Agreement on the grounds that the condition precedent in clause 12 had to be satisfied or waived before closing.

[32] I now address the Plaintiff's submission that Mr. Barth was entitled to rescind the Axxess Agreement due to breach of the same by the Defendant when the latter set the closing date and failed to meet its obligations to close on that date. Ms. Sejr for the Plaintiff submits that by letter dated February 17, 2008 (Exhibit 1 in these proceedings), the Defendant did notify the purchaser

in writing the closing date of the transaction was now set for March 29, 2008. Mr. Barth testified that one of the relators contacted him and advised him verbally that the closing date had been moved to April 23, 2008 at 8:00 a.m. No further notice in writing amending the closing date was provided to the Plaintiff as required pursuant to the provisions of clause 4 or clause 55 of the Axxess Agreement. Clause 4 was reprinted earlier in this judgment and Clause 55 reads:

> "55. **NOTICES**
>
> Any notice provided for herein shall be in writing and shall be effected by delivery addressed to the Purchaser at his address shown on the first page hereof and to the Vendor at ***Axxess (Summerwood SP) Developments Inc.***, 1870A - 6 Avenues SW, Medicine Hat, Alberta T1K 7X5 and any notice shall be deemed to have been received by the Vendor on the date of delivery and to have been received by the Purchaser on the second day following its deposit, postage prepaid, at a post office or box in the Province of Alberta."
>
> (Emphasis in original.)

Ms. Sejr submits once the closing date was set the Defendant breached the Contract when he failed to complete; at this point the Plaintiff was entitled to rescind the Contract and seek recovery of his deposit.

[33] Ms. Keith submits that clause 4 unequivocally states that "the purchaser acknowledges that notwithstanding that notice in writing setting the Closing Date is given to the Purchaser, the Closing Date is an estimate only and the Developer shall have no liability or responsibility if such estimated Closing Date is not reached, even by a substantial degree, and the Developer shall be entitled to issue further notice or notices setting one or more amended Closing Dates." The Defendant's submissions in this regard are that notwithstanding the notice setting the closing date in writing for March 29, 2008 a subsequent oral notice was provided to the Plaintiff suggesting a different closing date. The Defence argues that by virtue of clause 4 outlining that a closing date is an estimate only, it was entitled to fix any alternate closing date, at any time, with no liability or responsibility attaching to the Developer.

[34] The clause however is silent as to whether a notice amending a closing date must be given before the first proposed closing has arrived, or whether the Developer is allowed to suggest an alternative closing date at any time, whether before or after the first proposed closing date has arrived. In relation to the issue of the verbal notice communicated by the one of the realtors to Mr. Barth, I am satisfied that this notice is invalid and in clear contravention of the stated written requirements of the Contract in clause 4 "... the developer shall give the Purchaser five (5) days notice in writing ..." as well as clause 55 "Any notice provided for herein shall be in writing and shall be effected ...".

[35] The February 17, 2008 notice set the closing for March 29, 2008. The letter from solicitors for the Defendant, Ogilvie LLP, to the Plaintiff's solicitor dated April 7, 2008 is for the purposes of requesting information in order to proceed with the closing of the transaction

however, does not stipulate a closing date but rather suggests that the closing date is pending. The undated letter, Exhibit 5 in these proceedings, from the Defendant to the Plaintiff confirms in writing a new possession date of May 23, 2008 at 9:00 a.m. Clause 4 clearly merges the concept of possession into the definition of "Closing".

[36] Clause 45 of the Axxess Agreement which stipulates that time shall be of the essence reads:

> "45. **TIME OF THE ESSENCE**
>
> Time shall be of the essence of this Agreement in all respect and any waiver of the time period in connection with any provisions shall not be effective unless in writing and shall not affect the requirements of any other provision and time shall continue to be of the essence of all other provisions except where so waived."

Ms. Lisa Fice, director of sales and marketing for the Defendant testified that the Axxess Agreement was drafted and prepared by counsel for the Defendant. I have outlined some of my concerns with the draftsmanship of clause 4 of this contract earlier in the decision.

[37] I am satisfied that the Contract contemplating that the Developer shall have no liability or responsibility if it is unable to achieve the closing date set out in a notice in writing is vague, in that it does not stipulate whether the amendment of the closing date must be made prior to a first set closing date or can be amended after a set closing date has passed. To interpret this clause in the manner suggested by Defendant's counsel would leave open to the Developer the ability to set a closing date in writing, then have the closing date pass, with nothing being sent to the purchaser, and then several months later propose a new closing date; this could go on *ad infinitum* with no consequence or liability to the Defendant. This interpretation allowing the Developer to set closing date, miss the closing date, and then set a new date after the fact would render the "time is of the essence" clause, clause 45 in the Contract a nullity having no force and effect. It would appear that the more logical interpretation here is that the Developer may give several notices of closing dates without incurring liability, as long as the new, or amended, notice of a closing date is served on the purchaser before a date already set for closing has expired. If the closing date has not come and gone then the closing can be extended by advance written notice in the sole discretion of the Developer. Once the closing date has passed any subsequent notice must be a nullity.

[38] There is no doubt in my mind that where this clause is ambiguous as to when the Developer must give notice in writing of a different closing date, the ambiguity must be construed *contra proferentem,* or unfavourably against the drafter of the clause; here the Defendant. Under the circumstances I am satisfied that the only way the Developer would have no liability or responsibility pursuant to clause 4 is if it proposed a new closing date, in writing, prior to March 29, 2008. This was not the case here, rather the Defendant selected a closing date by letter dated February 17, 2008. Once the Developer set the closing date for March 29, 2008, time became of the essence to close on this date. This closing date expired when the Defendant failed to provide a notice in writing of a change in the closing date prior to March 29, 2008. The

Developer not only failed to close the transaction but based on the evidence before the Court it was in no position to do so.

[39] To summarize, the wording of clause 4 stating that the substantial completion and closing date is TBD (to be determined) is a valid provision allowing for a formula or mechanism to set the closing date in a reasonable manner. Once the Defendant, in its sole discretion, set the closing date this triggered the clock running on the fundamental term in the contract that "time is of the essence." The parties were now required to perform in accordance with the contractual terms. By virtue of the wording of clause 4 in the Axxess Agreement the Defendant in its sole discretion was entitled to set a new closing date, if it did so before the date initially set for closing, and reset the clock in relation to time being of the essence. The Developer's failure to tender closing documents, in whatever form they would have taken, having regard to the *Condominium Property Act*, was a breach by the Developer of a fundamental provision in its own standard form Contract. In this regard I reject Ms. Keith's submissions that the Developer was not required to tender closing documents where the Plaintiff had given notice it was rescinding the Contract. The evidence is that Mr. Barth gave notice of rescission after the March 29, 2008 closing date had expired. The Defendant's breach entitled the purchaser to rescind the Axxess Agreement. By correspondence dated April 22, 2008, the Plaintiff exercised his right to rescind and sought the return of his deposit in the amount of $13,250.00.

[40] The Defendant's counter-claim against the Plaintiff is for damages arising from Mr. Barth's breach of the Axxess Agreement. Specifically, the Defendant alleges breach of the Contract when the Plaintiff refused to complete the same. Having found that the Defendant had breached the Contract entitling the Plaintiff to rescind, and that the Plaintiff did in fact rescind the Contract, I cannot find that Mr. Barth breached the Contract by refusing to complete as alleged in the counter-claim. I would therefore dismiss the Defendant's counter-claim against the Plaintiff.

[41] There will be judgment in favour of the Plaintiff, Russell Alexander Barth against the Defendant Axxess (Summerwood SP) Developments Inc. in the amount of $13,250.00. Subject to further submissions as to costs within fourteen days from the date of the issue of this judgment, I grant costs in favour of the Plaintiff in the amount of $1,000.00. Pursuant to s. 3(a) of the *Judgement Interest Act* R.S.A. 2000 c. J-1, as amended, I decline the award of pre-judgment interest where it was not pled or claimed by the Plaintiff.

Heard on the 5th day of April, 2009.

Dated at the City of Edmonton, Alberta this 4th day of March, 2010.

K. Haymour
A Judge of the Provincial Court of Alberta

Appearances:

Kari L. Sejr
for the Plaintiff

Courtney E. Keith
for the Defendant