SUPREME COURT OF NOVA SCOTIA

Citation: Hilchie v. Waterton Condominiums Inc., 2011 NSSC 489

Date: 20111230
Docket: Hfx. No. 330169
Registry: Halifax

Between:

Jayson Hilchie, Amanda Jackson, Gregory Wentzell,
Bradford Dempsey and Jacques Rohrer

Applicants

and

The Waterton Condominiums Inc., a body corporate
and 3182673 Nova Scotia Limited, a body corporate

Respondents

Judge: The Honourable Justice Margaret J. Stewart

Heard: November 1 & 2, 2010, January 10, 2011,
June 22, 2011; July 4, 2011, in Halifax, Nova Scotia

Counsel: Allen Fownes, for the Applicants
Robert G. Grant, Q.C., for the Respondents
Maggie A. Stewart, co-counsel for the Respondents

Stewart, J.

[1] By order of Justice Moir, Jacques Rohrer's application was severed from this proceeding. His affidavit was proffered as witness evidence for the four remaining applicants.

[2] Between May 2005 and October 2006, the applicants, Jason Hilchie (Hilchie), Amanda Jackson (Jackson), Bradford Dempsey (Dempsey), and Gregory Wentzell (Wentzell), (the Purchasers) and the respondents, The Waterton Condominiums Inc. (Waterton, the Seller and Developer) entered into Agreements for Purchase and Sale (the Agreements) for condominium (condo) units 206,613,508 and 709, respectively, in Waterton's yet to be constructed and registered Tower One, Halifax condo project. A deposit of $5,000 was paid by each Purchaser for units priced at $169,900; $189,900 and $114,900. Various delays resulted in the need for signed Amendments to the Agreements changing the closing dates and same date registration dates with the Registrar of Condominiums (the Registrar). The last Amendment to each of the Agreements set the closing and registration date at September 30, 2009. Except for Jackson, who had signed an Amendment to occupy her unit, each Agreement provided for occupancy at the Purchaser's discretion if the unit was complete and ready for occupancy before

closing and the Developer requested same, even if the registration had not been completed. The Purchasers never took occupancy either before or after closing date. The sales did not close on the final amended closing date of September 30, 2009. Registration never occurred until October 2010.

Positions

[3] The Purchasers claim that the Developer breached and/or unilaterally terminated the Agreements because they would not go into occupancy on the terms and conditions set out by Waterton in its October 2009 correspondence to their counsel and continued to insist on their discretion with respect to occupancy as expressed in the terms of the Agreements, specifically, Clause C-2. Occupancy was not mandatory. Moreover, due diligence under the terms of the Agreements (Clause D-10) was not exercised by the Developer in its effort to fulfill the conditional requirement of registration. The Developer was motivated by money. It wanted the Purchasers to be in occupancy and paying more deposit money and occupancy fees until registration and closing. Though ending the transactions by delaying registration, Waterton would be able to resell the preconstruction priced condo units of the Purchasers for profit. Furthermore, any analysis centring on the existence of Clause D-10 as a true condition precedent voiding the Agreements

should entail application of Picard, J.A.'s approach in *Kempling v. Heartstone Manor Corp.* 184 A.R. 321 which would negate such a conclusion. They also claim entitlement to damages and alternatively, specific performance.

[4] Waterton claims that by the terms of the Agreements, the Agreements came to an end when the closing date passed for each Agreement prior to effecting the registration of the condominium project with the Registrar. It claims Clause D-10 is a true condition precedent, as interpreted by Harradance, J. in *Kempling*, supra which causes the Agreements to be null and void when the closing date passes without effecting registration of the condominium project. Pursuant to Clause D-10, failure to effect registration of necessary documents with the Registrar on or before closing date mandated the Agreements to be "null and void" and deposit money to be returned without interest or penalty and the Developer was not to be liable to the Purchasers for any costs or damages. No provision for waiver of this condition was provided within the Agreements. There was no requirement that the Developer had to invoke termination in some manner beyond the passing of the closing date. No statute prevented the Developer from bringing an Agreement to an end on the basis that the registration date had passed. Unlike other clauses that gave the Developer the unilateral right to terminate the Agreement for things like

labour disputes and to extend the closing date, Clause D-10 registration clause existed for the benefit of either the Developer or the Purchasers. Neither had a specified right under the clause. Thus, as of October l, 2009, the Purchasers had no entitlement to units in Waterton's project and it was under no obligation to offer units or to otherwise engage in negotiations. It did not terminate or breach the Agreements; rather, the Agreements came to an end by their terms.

[5] Waterton states that after the Agreements were at an end on October 1, 2009, in its October 2009 correspondence to each Purchaser, it made new offers to them in an effort to allow the Purchasers the opportunity to take occupancy of the units they had previously bargained for, pending registration. These new offers were new agreements of purchase and sale. The proposal was that the Purchasers would take possession of the units, pay certain fees inclusive of occupancy fee equivalent to rent and a deposit amount geared to their circumstances and when the building was registered the Purchasers would close the purchase of their units.

[6] Return of the Purchaser's $5,000 deposit per terms of the Agreements and quantum merit compensation for the Purchasers' out-of-pocket expenses related to

upgrades to their units were and are offered by Waterton, as the appropriate remedy in enforcing the terms of the Agreements.

[7] Waterton's counsel in its pretrial brief, provides a factual summary drawn mostly verbatim from the affidavit evidence of Michael Quiqley, Waterton's Assistant General Manager, as well as Navid Saberi, the President of Waterton. I have repeated portions. A substantial amount of the Developer's evidence surrounding construction delays and registration remained uncontradicted.

Factual Background

[8] When the Agreements were signed and initialled in 2005 and 2006, Waterton believed the estimated registration date for Tower One project by the Registrar to be June of 2008. The closing date was also the outside date for Waterton "obtaining acceptance for registration of the necessary" condo declaration, by-laws and regulation documentation.

[9] During the course of completing the project, there were delays that affected both the construction of the Tower and its registration with the Registrar. Some of these related to construction delays and labour issues and others related to

difficulties that were experienced registering the condominiums in light of a unique geothermal component of the project as well as the functioning of the Registrar's office itself. As noted, the legitimacy and the motive for the registration delay is raised and questioned by the Purchasers, i.e., to force termination of lower priced pre construction Agreements in order to be able to resell the units at an increased market value and the October 2009 Waterton proposal with respect to occupancy and conveyance being a method of "cash harvesting" on the Developer's part by requesting further deposit payments and fees not previously calculated.

[10] There were any number of construction delays; specifically, construction did not start in the fall of 2006, as anticipated; but, on the uncontradicted evidence of Navid Saberi, was initiated in September of 2007 on the advice of senior project manager at the time, Jacques Rohrer, who believed that it was not possible to undertake the concrete work in the winter months. There were issues with picketing for several months. In February 2007, when the work was scheduled to begin, the concrete form company cancelled the contract and the Developer had to find a new contractor for this work. The company ultimately hired was not prepared to start immediately; consequently, there were delays while the contractor located a crane and a licensed crane operator. Work finally started in August of

2007, a year later than what Waterton had initially anticipated. Unfortunately, with the crane requiring frequent repairs work did not progress as scheduled. Similarly, from February 2007 to June 2009 the contractor's lack of experience in concrete form work caused construction to progress at a slow pace. Weather also proved to be inclement and slowed down the work. There were issues with the other contractors undertaking the remaining construction work. Design changes like exterior cladding required the sign off authority of another architect.

[11] The major construction work was completed by June 2009 and deficiencies identified by municipal inspectors remedied by October 2009. The Occupancy Permit for the project was issued on October l, 2009. Occupancy was not available on closing date.

[12] While the construction progressed, the Developer took steps to initiate the registration of the Tower with the Registrar. The registration was delayed significantly by the Developer's modified plan to use geothermal infrastructure for heating and cooling the Tower, as research proved it to be the most efficient and cost effective means. However, as the $3,000,000 capital costs associated with installing the geothermal facilities would significantly increase the per unit cost, it

was Waterton's intention to retain ownership of the infrastructure and sell the power to the unit owners at a cost which would provide Waterton, over time with recovery and a return on its investment and still be a lower cost method for the unit owners to heat and cool their units than other alternatives. This was not contradicted.

[13] On September 9, 2008, in a meeting with Waterton's representatives, the Registrar insisted that the geothermal infrastructure could not be separately owned if located on the same parcel of land as the Tower. It either had to be a common element in the condominium project or located on a separately owned parcel of land. This was not anticipated to be an impediment to registration. Legal counsel for Waterton worked to resolve this issue over the next seven months. This involved, among other things, going through the process of subdividing the property and amending the development agreement with the Halifax Regional Municipality in order to approve such a use on a separate lot. Although the geothermal facility was acknowledged as efficient and desirable by both the Registrar and Halifax Regional Municipality, neither had dealt with such a plan before.

[14] In the spring of 2009, the geothermal issue had not been fully resolved. Waterton pressed ahead. The Letter of Intent, the first step in finalizing the registration, was filed with the Registrar on April 23, 2009. The Draft Declaration and By Laws were filed on August 4, 2009. When, over the summer of 2009, it became apparent that the registration was going to be unusually challenging, Waterton hired a full time staff person, Patrick LeRoy to oversee and manage the registration.

[15] Besides the unique nature of the infrastructure extending the time that it took to complete registering the units, changes in the Registrar's office also led to protracted time in processing as the office restructured its criteria and approach and experienced new staff. Things like standard Occupancy Permit forms were questioned and a turn around time of three weeks created for what had been a basic routine process. Joanne Hamilton, Registrar, remained constant until the end of March 2010 when a new acting Registrar became involved, as Hamilton approached retirement. Positions stated were later changed.

[16] The registration took over a year of Patrick LeRoy's full time efforts. The Tower was registered on October l, 2010, more than 17 months after the Letter of

Intent was filed and a year after the Occupancy Permit was issued and closing date had passed. Waterton's President, Navid Saberi with some fifteen years experience in property development in the Halifax area, relayed how it typically took 90 days from the date that the Occupancy Permit is issued to complete the registration of a condominium. In the case of Tower One project, it took a full year. A time period that had not been anticipated.

[17] As a result of the delays, Waterton amended the closing date in the Agreements, a series of times. Each Purchaser agreed to and signed a number of Amendments to the Agreements advancing the closing date. The last closing date for all Agreements at issue was September 30, 2009, as Jackson's last signed Amendment on September 24, 2009 advancing the closing date to October 30, 2009 was not executed by Waterton.

[18] All four Agreements in Schedule "D" General Conditions under heading "Delay and Extension to Closing" provide the following Clause D-10:

> Delays and Extensions to Closing
>
> . . .
>
> (10) The Buyer

> The Buyer acknowledges that the Declaration, By-Laws including the Common Element Rules made pursuant to the **Ac**t, and the regulations made pursuant to the said **Act** (hereinafter referred to as the "Regulations") have not as yet been accepted for registration. This Agreement and all the terms hereof are conditional upon the Seller obtaining acceptance for registration of the necessary documents to have the Condominium Project containing the property made subject to the **Act** on or before the Closing Date or any extension thereof pursuant to the Agreement. The Seller undertakes and agrees to proceed with all due diligence to have the necessary documents accepted for registration and fulfill all other requirements ordered to bring the Condominium project under the **Act** as soon as possible. If the Seller is unable to fulfill the requirements of the **Act** on or before the Closing Date, or any extension thereof, this Agreement shall be null and void and the deposit shall thereupon be returned to the Buyer without interest or penalty and the Seller shall not be liable to the buyer for any costs or damages.

[19] As noted, it is Waterton's contention that by operation of Clause D-10 of the Agreements, when the September 30, 2009 closing passed without effecting the registration, the Agreements were at an end as the criteria for a true condition precedent existed and there was no mutual agreement to extend the closing date and waive the condition.

[20] Each Agreement also provides in Schedule "C" Use and Occupancy under heading "Occupancy Prior to Closing" that the Purchasers, upon request of the Developer, "may" go into occupancy of their unit on the closing date, in circumstances where the unit is complete and ready for occupancy even though the

registration has not been completed and the parties therefor could not convey title and close. It reads as follows:

> <u>Occupation Prior to Closing</u>
> ...
>
> (2) If the Unit forming part of the property is complete before the Closing Date, and is ready for occupancy by the Buyer and the registration of the condominium has not been completed, the Buyer at the request of the Seller may, on the Closing Date (as described in paragraph (7) on page 2 of the Agreement) go into occupancy of the Unit subject to the following:

[21] Unique to Jackson, in her last Amendment forming part of her Agreement, besides extending the closing date to September 30, 2009, she also agreed to the additional condition that she, the "Customer shall take occupancy if the registration is not complete."

[22] On September 30, 2009 closing date, the Occupancy Permit was yet to be issued and the registration had yet to be effected. The Occupancy Permit was not issued until October l, 2009 and the registration effective date remained an unknown and unpredictable.

[23] The delay in obtaining the registration proved to be a great concern for Navid Saberi, as Waterton had to carry the entire construction cost of the project without any incoming revenue until it could sell the units upon registration. Because registration and closing date had passed, Waterton's bank penalized it some $600,000 to extend its financing and interest rate raised from one point five percent (1.5%) above prime to seven percent (7%) above. When, unlike past experience, it became impossible to predict when registration would take place, Waterton did not want to carry the cost of finished units indefinitely. Occupancy provided revenue in the form of payment of a monthly use and occupancy charge equivalent to rent and not credit, common area fees and payment of unit real property taxes. A decision was made to take steps to encourage perspective Purchasers to occupy their units pending registration and closing. Navid Saberi's evidence is that although the previous Agreements had come to an end when the last closing date of September 30, 2009 passed without registration, Waterton wanted to provide an opportunity to the Purchasers to take occupancy of and ultimately purchase the units that they had previously contracted to purchase.

[24] In what Saberi describes as an effort to balance Waterton's desire to allow the Purchasers to buy a condo unit in the Tower with the financial realities that the

project was facing, the Developer's then counsel, Craig Berryman, some two to three weeks after closing had passed, on October 14 and 15, 2009, wrote to counsel for Hilchie and Dempsey as well as to Wentzell's counsel by letter dated October 21, 2009 requesting and proposing, as he had to the other 75 or so prospective purchasers, the following:

> ...
>
> We have been advised by our client that the occupancy permit is now in place regarding your client's unit.
>
> Accordingly, at this time, pursuant to Section 2 of Schedule "C" of the Agreement of Purchase and Sale, your client is being asked to take occupancy of their unit. If they are unable or unwilling to take occupancy immediately, our client will consider this transaction to be at an end.
>
> Our client is willing to allow your client to enter into possession of the above unit, prior to the final conveyance, on the following terms and conditions:
>
> 1. . . .

[25] A series of thirteen terms and conditions setting out various occupancy requirements, some individualized to each Purchaser followed. Most of the terms mirrored and/or referred back to those in Schedule C-2 of the Agreements, others modified aspects of those terms and others like a purchaser's payment of a "further deposit" prior to occupancy were new. The Developer only offered occupancy under these October 2009 terms.

[26] The purpose of the deposit is expounded upon in Navid Saberi's June 10, 2010 affidavit at paragraphs 25-27. It reads as follows:

> 25. We also requested that the purchasers pay a deposit prior to taking occupancy; we did not want the purchaser to go into occupation and become, in effect, tenants who could then refuse to close. A purchaser who does not have an interest in closing the sale may abandon the unit prior to the closing. This would burden the newly registered condominium corporation with a unit that is devalued by wear, tear and general deterioration of condition through use and occupancy.
>
> 26. While we wanted the deposit to be sufficient to ensure that the prospective purchasers would complete their transactions, we also were concerned about each purchaser's ability to pay the deposit. Consequently, we took steps to ensure that the deposit requested of each purchaser was calculated based upon the amount of down payment that this type of purchaser would pay to their mortgage provider: 5% for new home owners, 10% for home buyers who already owned property and up to 25% for purchasers who intended to use their unit as a rental property.
>
> 27. Sixty purchasers accepted the terms of occupancy and ultimately closed on their units when the building was registered. Of this group, some were unable to pay the full deposit that was requested due to personal circumstances, such as the need to sell their present residence before being able to pay the full amount of the additional deposit. In a number of cases, after the purchaser brought their individual circumstances to our attention, we negotiated directly with the purchasers and reduced the amount of the deposit that was required.'

[27] Although Jackson by Amendment had contracted to take occupancy of her unit, the letter dated October 13, 2009 that Jackson's counsel received from Waterton's counsel mirrored the other correspondence, inclusive of being asked to take occupancy, pursuant to Section 2 of Schedule "C"; but, it did not state that his

client would consider the transaction to be at an end if Jackson was unable or unwilling to take immediate occupancy.

[28] By a formal letter dated October 28, 2009, in response to Jackson's counsel's letter questioning the proposed terms, Jackson was told by Michael Quigley, Assistant General Manager for Waterton that her contract with the September 30, 2009 closing date was now terminated and their contractual relationship at an end. Confirmation of any upgrade payments was required in order for the upgrade costs and deposit to be paid prior to November 10, 2009.

[29] The October 30, 2009 correspondence from Michael Quigley to Dempsey's counsel, who on behalf of his client had been pressing for occupancy under the terms of the Agreement, mirrored the same ending of the contract and their contractual relationship pronounced in his correspondence to Jackson and also requested confirmation of upgrade costs before reimbursement of those costs and the deposit would be forthcoming. Similar correspondence was not sent to Hilchie or Wentzell. However, in response to his and his counsel's numerous efforts to connect about the Agreement, Hilchie did, in March 2010, receive via a voice message left by Quiqley, Waterton's position that their Agreement was at an end,

as Hilchie had not occupied the unit per Waterton's October 14, 2009 occupancy proposal. Quiqley's voice message says the following:

> "Good day Mr. Hilchie, my name is Mike Quigley. I'm calling from the Waterton Condominiums. I did get your message there last week. I do apologize for not getting back to you sooner. Um, the situation on your particular file is that we had sent out through our solicitors to your lawyer our closing or occupancy package for our clients and this was done for all of our clients, sent out the package to them to take occupancy of their units and to um, proceed with the closing once the registration takes, took place. Ah, once we sent that letter out, we indicated in that letter that if you were willing to accept the terms and conditions of the occupancy, that would be fine and ah, you could proceed. If not, then we would consider your contract to an end. We did receive your lawyer's response and in that, your lawyer's response, I think it was a two or three page ah, rendition of the different clauses and different points of view of himself in terms of his review of your contract, and from that it was indicated that you did not want to take occupancy of your unit prior to registration. So at that point we considered your contract to be at an end and once the registration does take place we will do, will do a, do a further assessment of our, of our project and of our customers and so forth. So that's the current status and our position hasn't changed, it's, it's been the same from, from day one when we sent out the original package to our client and to yourself. Your position, based on your solicitor's letter is very clear. You did not want to take occupancy of your unit prior to registration and so, because you did not accept our, our, our occupancy closing requirements, we consider the contract to be, to come to an end. If you have any further questions, by all means please give me a call. My direct line is 493-3063. Thank you very much. Have a great day."

[30] What followed Waterton's October 2009 proposal was a series of correspondence and phone calls from Purchasers' counsel querying and seeking explanation and elaboration from Berryman and later, from Quigley about the tone and the contractual basis for the occupancy and for the proposed occupancy terms entailing such things as "further deposit", payment of common fees in addition to

occupancy fees, adjustment to bulk taxes now, rather than at closing, as well as the logistics of occupancy inspection. Written expression of willingness to take occupancy were given to the Developer by Dempsey within two days and by Wentzell in March 2010 and into April 2010; but, without explanation, they were only prepared to do it on the terms expressed in their Agreements. Shortly after receipt of the Developer's October occupancy proposal, steps were taken by Wentzell to talk directly to Quigley and Saberi, as he considered accepting the terms and paying the $32,000 deposit through use of his assignment clause. Jackson did not accept occupancy on the Developer's proposed terms. Her counsel rejected Waterton's October 28, 2009 formal letter terminating the Agreement as without contractual basis and as late as March 17, 2010 continued to express Jackson's willingness to complete the transaction upon registration. Hilchie's counsel detailed inquiries between October 15, 2009 and February 26, 2010 concerning such things as the contractual basis for fees and deposits, need to confirm location of the unit and parking spot, inspection prior to occupancy, list of unit deficiencies, status of registration and conveyance went unacknowledged and unanswered. He, like the others, did not waiver in his desire to close.

[31] All the Purchasers felt they were being ignored with unanswered phone calls and letters and full voice boxes. Their concerns and questions were not at the forefront and were not being addressed. None of the Purchasers took occupancy of their units. They were not prepared to accept they had to take occupancy or pay further deposits under the Agreements.

[32] Sixty purchasers accepted the terms of the occupancy proposal and ultimately closed on their units when the building was registered a year later in October 2010. Fifteen purchasers declined to take occupancy and received the refund of their deposit and reimbursement for out of pocket expenses. These units have been resold. Of the four units in this proceeding, Jackson's unit has been resold.

[33] Tower One project is in the Northwest Arm Drive area where there are numerous condominiums and apartment buildings.

Analysis

[34] As argued by Waterton, the focus of disposition is on the proper construction to be placed upon the Agreements and more specifically, the particular contractual wording of the Agreements' Schedule D-10 clause. As confirmed by the Alberta Court of Appeal in *Leasing Group Inc. v. Prospect Developments (2003) Inc. 2011* ABCA 83 at para. 9, the process is a simple matter of interpreting an agreement, as it was settled by the parties. Agreements should be concluded according to their own terms. That being the case, the Court went on in *Leasing* to consider context for the phrase "null and void", in a clause which, like D-10, stated failure to register mandated the agreement "null and void" and the deposit "returned to the Purchaser". The appeal court at para. 10 determined;

> 10 . . . the agreement was not nullified or voided in its entirety, because the duty of the appellant to refund the deposit to the respondent remained. What was cancelled under the terms of the agreement was the obligation of the respondent to buy and of the appellant to sell the subject real property, which was what the clause characterized as "conditional". That cancellation was part of the agreement just like the refund obligation was. Those terms came into effect because the factual triggers for doing so occurred.

[35] In so stating, the court in essence questioned Harredance, J.A.'s conclusion about a similar clause in *Kempling, supra* being clear and unambiguous, so as to be a true condition precedent capable in word and criteria of voiding the contract with non-compliance of the event.

[36] Applying the same analysis, I conclude plain language interpretation of the Agreements provides for the Agreements to be capable of cancellation not void in their entirety on September 30, 2009 when the registration was not effected. The failure of compliance did not void the Agreements inclusive of any imposed obligation of good faith performance on one or both parties. In this context, I have considered the principles of contract interpretation (*Scanion v. Castlepoint Development Corp*. (1992), 99 DLR (4th) 153 at para. 179 (Ont. C.A.); leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 62*; Gilchrist v. Western Star Trucks Inc. (2000),* 73 B.C.L.R. (3d) 109 at paras. 17 -18.)

Was the Developer in breach of the Agreements?

[37] Knowing it had neither an occupancy permit or effective registration, the Developer did not insist on cancellation. Waterton chose to simply let September 30, 2009 closing and registration date pass and then extended the date. Prior to that date, it chose not to respond to Hilchie's counsel's September 11, 2009 written

query about readiness for occupation if not for the final closing. Minutes of Quigley's and LeRoy's September 11, 2009 meeting reflect their musings and the fact that they were in contact with counsel. A "final draft Agreement of Purchase and Sale" by counsel contemplated at their September 11, 2009, meeting to be ready "by mid next week" for review, never came to fruition. Rather, some two weeks later, in what Quigley would later in March of 2010 reference as an "Occupancy Package", Waterton, by correspondence from its counsel, informed all four Purchasers that, pursuant to Section 2 Schedule "C" of their Agreement a request for occupancy was being made and if the Purchasers, in particular, Hilchie, Quigley and Wentzell were unwilling or unable to take immediate occupancy, their transaction, i.e., the "purchase from Waterton Condominiums Inc." would be considered "at an end". Taking occupation for all four Purchasers, "prior to final conveyance" also entailed complying with specific terms and conditions not in their Agreements.

[38] The wording of the occupancy package clearly reveals it to be a document to be read in conjunction with and as an amendment to their existing Agreements and not a new agreement. The request is made, "pursuant to" the terms of their Agreements. While at the same time new terms and conditions are proposed,

others are "pursuant to" sections of the Agreements and the specific deposit requirement is a "further deposit". The transactions are to be "at an end" if occupancy cannot take place immediately with no reference made to voiding or cancelling because of the failure to effect registration. Rather, it is waived. Although no specific closing date is set, both the closing and the registration dates are extended, as the Purchasers are told that upon registration being achieved, they "will close the transaction without delay or condition". Delivery of the keys necessitates Waterton's counsel being in receipt of a cheque for the "further deposit" and specific fees as well as written confirmation that the Purchasers take "occupancy of the units subject to and in agreement with the contents of this letter".

[39] Basically, the Developer exercised its right to extend the closing date, and thereby set a new registration date, waived cancellation for failure to effect registration and fulfilled its obligation under each Agreement to request occupancy on receipt of the Occupancy Permit. At the same time, as each of the Purchasers counsels' correctly pointed out in correspondence, Waterton without a contractual basis imposed on three of the Purchasers a non existing duty under their Agreement to take occupancy and on all four Purchasers non negotiated terms of

occupancy and then terminated the Agreements for the failure of the Purchasers to respond and abide. The basis for termination being the failure to occupy under the dictated occupancy terms was clearly reiterated in Quigley's voice message to Hilchie in March of 2010. Quigley also advised Hilchie the same occupancy proposal and rational for terminating was relayed to all the other clients in the Tower.

[40] Jackson may have contracted to take occupancy; but, like all the others, she sought performance under the existing terms of the Agreement, exclusive of unnegotiated "further deposit" payments in any amount. Counsel advised Quigley of her financing specifics. There was no allowance for a further deposit and basis for same eluded him and he was in need of an explanation.

[41] At paragraph 14 of his August 20, 2010 affidavit, Navid Saberi summarized Waterton's position as follows:

> 14. Once September 30, 2009 passed, we could have sent out letters refusing to extend the closing dates any further and treated four of the these PAS Agreements as terminated but we thought of a compromise whereby both sides would achieve their goals.

[42] Waterton's compromise was a unilateral termination of the Agreements on the basis of non existent contractual right and terms. Under the Agreements, three of the four Purchasers had the right to choose whether they took occupancy of their units prior to registration being effected. Occupancy was discretionary not mandatory. There was no requirement for payment of further deposit or fees. The Purchasers never acted as if the Developer was entitled to a further deposit. There were no provisions allowing the Developer to impose contractual rights and terms which provided for cancellation on failure to abide. Waterton was not entitled to impose such terms and conditions and to act upon them by unilaterally terminating the Agreement. The Purchasers wanted the sale to close under the terms of their Agreements.

[43] Here, the facts are the Developer extended the closing date and thereby the registration date and then cancelled the Agreements because the Purchasers failed to abide by unnegotiated terms imposed unilaterally by the Developer. In failing to perform according to the Agreements, the Developer breached the Agreements. The evidence of the breach is the letters demanding occupancy and imposing new terms without a contractual basis and Waterton's subsequent conduct.

[44] This is not a case of cash harvesting by the Developer because it could not continue without achieving occupancy. Two years after the registration finally occurred in 2010, the Developer still owns the project and continues to sell the units. Waterton's experience had been a 90 day wait for registration and therefore closing from the date of the issuance of the Occupancy Permit and thus, leaving occupancy to the discretion of the Purchasers, as per the Agreements was not a great concern. However, in this instance, given the history of the registration, Waterton, in breach of the Agreements, attempted to mitigate loss by reason of the delay in registration; i.e. bank penalties and high interest rates.

[45] To complete the analysis, on the evidence, I conclude the delay and ultimate failure to register the project on closing date did not have its genesis in the lack of due diligence on the Developer's part. Waterton exercised its obligation to proceed with all due diligence in effecting registration and in fulfilling all other requirements to bring the Tower One project under the Condominium Act as soon as possible per the Agreements. It follows therefore, neither was there any abuse by Waterton delaying registration in order to resell preconstruction priced units at market price advantage. These conclusions are reached for the following reasons:

- Waterton wanted to register and close the project as soon as possible. It was in the Developer's best financial interest to do so or face more bank penalties and increased interest rates.

- Construction delays did occur but they were not linked to lack of diligence on Waterton's part. There were issues such as late start up times due to contractors decisions concerning weather conditions, inclement weather, lost tradesmen, inexperienced tradesmen, tradesmen's own agenda, ill functioning equipment, labour difficulties, no shows and performance issues with contractors. These were all issues that any construction project could face. Both Saberi and Quigley pressed for and made honest efforts to move construction along.

- Waterton made design changes just as one would expect in a construction project. It was provided for in the Agreements. None other than the geothermal infrastructure change were so substantial as to be possibly linked to want of due diligence on Waterton's part.

- Late registration centred around late construction; change of personnel at the Registrar's Office and a decision by Waterton to install a geothermal infrastructure. Surveys required to identify areas covered by the Tower could not proceed and be filed with the Registrar until the construction was finished. Registration was effected by change in personnel inclusive of the Registrar in March of 2010, as well as the process and the methodology for registration in the Registrar's office changed. It was more difficult and steps took longer. There is uncontradicted evidence from both Quigley and Saberi that the installation of a geothermal infrastructure and subdividing it from the common area to address ownership issues was not perceived to be a problem early on by the Registrar; but, later the exchange of e-mails and letters between the Registrar and Waterton exhibited in Hilchie's affidavit reveals years of frustration and perseverance by Waterton as new concerns and approaches were identified by the Registrar and pursued. The documents show counsel for the Developer, Mr. Grant worked at resolving the geothermal issue for seven months, including subdividing the property and amending

the development agreements. Waterton retained Patrick LeRoy for the express purpose of overseeing the registration process to completion. It required a year of his full time efforts to see it through.

- The Developer's decision to change the heating and cooling approach from electrical to a geothermal solution with electrical alternative in the units is not necessarily a reflection of want of due diligence in pressing ahead with registration. The Agreements provide for changes in specifications in completing the project provided they are equivalent. Saberi testified that the geothermal heating and cooling solution makes the project more attractive as it is better for the occupants. Indeed, the Registrar did not disagree. Both heating solutions are provided with geothermal not only being environmentally friendly and a cleaner solution, but also cheaper than oil and the alternate electrical system. It works fine and is embraced and enjoyed by the owners and occupants. As noted, the documentation demonstrates Waterton pushing hard and doing whatever it could do to effect registration throughout the process.

[46] There is no demonstrated self induced steps or motivation for the Developer in this case to delay the registration. Some 75 or so of the 154 units were under contract and Waterton wanted as many to be closed as possible.

Remedy

[47] The Purchasers during the course of the hearing sought to limit the hearing to liability with damages to be determined at a subsequent hearing. No formal application was made and the Developer objected. As such, this proceeding was for determination of both liability and damages.

[48] During the course of oral argument, the Purchasers in response to the court, argued specific performance but indicated a preference for damages. The onus of proving entitlement lies on the party seeking the remedy.

[49] In examining the actual findings in the seminal Supreme Court of Canada decision *Semelhago v. Paramedevan*, [1996] 2 S.C.R.415, Roscoe, J.A. highlighted

that; 1) it is no longer appropriate to assume that specific performance is always the suitable remedy for a breach of contract for the sale of land; 2) that specific performance should not be granted as a matter of course; 3) there is need for evidence that the property is unique to the extent that its substitute would not be readily available. (*United Gulf Developments Ltd. v. Iskardar* 2004 NSCA 35, leave to appeal denied [2004] S.C.C.A. No. 172 @ para. 16 and 17).

[50] Post *Semelhago*, specific performance is an appropriate remedy where a piece of real estate is "unique" in the sense that it has a quality or qualities that make it especially suitable for the proposed use that cannot be reasonably duplicated elsewhere and a substitute property is not readily available and where damages would not afford the purchaser an adequate remedy (*Coulin v. Minhas*, [2009] A.J. No. 74 (para. 43)); *United Gulf Developments Ltd.*, supra @ para. 17, referencing *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.*, [2001] O.J. No. 4397 @ para. 49-60)). The relevant inquiries are as to whether the property is "unique" as elaborated in the case law and whether damages are an adequate remedy.

[51] In this instance, the Purchasers led no evidence of the uniqueness of the property and its intrinsic value to them. Nothing was submitted to substantiate any such claim. They did not demonstrate that the property has characteristics or distinctive features that make an award of damages inadequate for them. Granted the burden is not to prove a negative and demonstrate the complete absence of comparable properties (*John E. Dodge Holdings Ltd.*, supra @ 57 and 60); but, evidence is required to substantiate their position. Certainly, as of hearing, Saberi's evidence reveals substitute property is readily available in the general vicinity of the Northwest Arm. Within Tower One alone, some 80 units with marginal differences from one to the other remain unsold. There is nothing to suggest otherwise as of the time of the breach. The Purchasers failed to discharge the onus with respect to specific performance of the contract. It is a remedy not available in the circumstances. The Purchasers' remedy lies in an award of damages for breach of the contract.

[52] The purpose of damages is outlined by Fridman in the *Law of Contracts in Canada,* 5th ed. (Toronto, Ont: Thomson Canada Ltd., 2006) at p. 751 by quoting the words of Lord Atkinson in *Wertheim v Chicoutimi Pulp Co.* [1911] A.C. 301 @ 307;

> [a]nd it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed . . .That is a ruling principle. It is a just principle.

[53] Compensatory damages are the usual remedy for breach of contract. The party that has been breached is entitled to the value of the promised performance. Recoverability is in accordance with the *Hadley v. Baxendale* principle ((1854), 156 E.R. 145). Damages for breach of contract are limited to the ordinary consequences which follow in the usual course of things for such breach or for the consequences of the breach which might reasonably be supposed to have been in the contemplation of the parties at the time they made the contracts (Fridman, supra at p. 720).

[54] The breached party is also entitled to be restored to the position it was in prior to entering the contract by awarding recovery of deposits and out of pocket expenses incurred in reliance on the contract.

[55] Focussing on the advantage that they feel Waterton realized as result of it's breach of contract, the Purchasers also argue disgorgement damages. Jackson

submits that the unit she had agreed to purchase was subsequently sold by the Developer at a profit. The submission is the difference between the amount she had agreed to purchase the unit for and the amount the Developer subsequently sold it for is $45,000. The Developer, besides denying entitlement to any damages other than out of pocket expenses and deposit, also challenges any use of a gross amount, given the many expenses incurred in carrying and readying the unit for sale. There also appears to be a suggestion that the court in measuring damages speculate a similar “profit” with respect to the other Purchasers units which to date have not been resold.

[56] As noted, an assessment of an applicant's actual loss is normally done in contract cases. "What is to be recovered by way of damages is the loss which the plaintiff has suffered and not the profit which the defendant has made." (*Cheshire, FiFoot & Farmston's Law of Contract*, 13th ed. Butterworth, London, 1996 p. 608). Professor John D. McCamus in his section on "Disgorgement of Profits Secured" in the *Law of Contracts*, at page 972 describes the kind of damages that can flow from circumstances where a contracted for property is sold to a third party.

> "One possible motive for a deliberate breach of contract could be a decision to attempt to secure a greater profit from performance than was provided under the existing agreement. Thus, a seller, for example, might refuse to perform an existing contract for the sale of goods in order to supply the goods at a higher price to a third party. Under traditional doctrine, the nature and extent of any profits secured through breach is irrelevant to the calculation of the buyer's claim for damages for breach of contract. Under the governing expectancy principle, buyers in such circumstances are entitled only to recovery of sufficient money to put them in the position they would have been in if the contract had been performed. The purchaser, for example, could recover only the difference, if any, between the contract price and the market price the buyer would be required to pay in order to acquire substitute goods. In a particular set of facts, of course, the buyer's expectancy damages may be equivalent to the seller's profit as, for example, where the seller breaches the contract in order to sell the goods at the market price to a third party. Where the seller's price to the third party is higher than the market price, however, the excess over the market price is not recoverable by the buyer. In its recent decision in *Attorney General v. Blake,* [43] however, the House of Lords held that in exceptional circumstances the victim of breach of contract may sue for an accounting of profits as an alternative to the claim for damages for breach of contract. (43. [2000] 4 All E.R. 385 (U.R.A.L.)),

[57] The Developer did not breach the contract in order to sell the units at market price to third parties. At the time of the breach, the units were yet to be closed. The required registration did not occur for a year. All but one remain unsold. Evidentiary wise, at best there is an acknowledgement that the Purchasers' contract price, given the stage of development on signing and as an incentive to sign, is probably less than what would be market price on completion. There is no evidence as to what amounts, if any, would have been the difference in market price and contract price and potential profit over that unknown difference, at the

time of breach. The only evidence as to market price relates to one unit and is a market price years after the breach and is inclusive of carrying charges and readying expenses which, without particulars from the Developer, calls for speculation by the court to calculate any potential deductions.

[58] There is no reliable evidence of the market price or even assessed value of the Jackson's unit on breach or with respect to any of the units, of any lost opportunity to acquire another suitable unit which had value greater than they contracted for at the pre construction contract price. The other units remain unsold and no market price, ie expectancy damages or price higher than market, ie. profit has been secured through the breach.

[59] Even with evidence of profit, this is a breach of a purely commercial contract. Exceptional circumstances do not exist. Lord Nicolls in *Blake*, supra elaborated on what would not be a sufficient basis for departing from the general principle of expectancy damages. The mere fact that the breach was "cynical and deliberate", the fact that the breach enabled a defendant to enter into a more profitable contract, or the fact that the defendant breached an undertaking not to do something are not sufficient reasons for an award of profit to be an appropriate

remedy. Something more is required. The relationship between the purchasers and the Developer did not give rise to fiduciary obligations and it was not so close and breach so heinous or unusually wrongful, as described by Professor McCamus in the *Law of Contracts*, at p. 974 so as to equate to a breach of fiduciary obligations. Remedy of an account of profits for breach of contract is not justified and not open to Jackson and certainly not to the other Purchasers whose units have not been resold.

[60] The evidentary foundation presented by the Purchasers is insufficient to support an award of damages with the exception of out of pocket expenses and deposit and, as follows, nominal damages.

[61] The onus of establishing damages is always on the applicant. In this instance, the Purchasers have failed to produce such evidence. However, it is clear that the Developer, as I have found, intentionally breached the Agreements for the sales to the Purchasers of their respective units. Apart from the deposit and the cost of upgrades to their units, they have not established any financial loss. They are however, entitled to the court's recognition that the Developer breached the Agreements. "It is in circumstances such as these that courts have tended to award

nominal damages: that is, where a breach has occurred but the plaintiff.....is unable to prove resulting damage." (*Captial Placement of Canada (C.P.C.) Ltd. v. Wilson* 83 N.S.R. (2d) 170 (NSCA) at para. 43).

[62] Nominal damages are defined in *Chitty on Contracts* (27th ed.) General Principles, Vol. l, para. 26 - 004:

> Nominal Damages. Wherever the defendant is liable for a breach of contract, the plaintiff is in general entitled to nominal damages although no actual damage is provided; the violation of a right at common law will usually entitle the plaintiff to nominal damages without proof of special damage. Normally, this situation arises when the defendant's breach of contract has in fact caused no loss to the plaintiff, but it may also arise when the plaintiff, although he has suffered loss, fails to prove any loss flowing from the breach of contract, or fails to prove the actual amount of his loss. A regular use of nominal damages, however, is to establish the infringement of the plaintiff's legal right, and sometimes the award of nominal damages is "a mere peg on which to hand costs."

[63] Such recognition, in the circumstances, warrants a finding of $1,000 nominal damages in favour of each of the Purchasers in addition to the agreed upon deposit and upgrade expenses payable to each Purchaser; Jackson $5,000; Dempsey $12,107.70; Wentzell $10,102.75 and Hilchie $11,037.75.

[64] There remains to be dealt with the issue of costs. If the parties cannot resolve same then written submissions on costs from counsel should be filed not later than the end of next month.

J.