NOVA SCOTIA COURT OF APPEAL
Citation: ***Hilchie v. Waterton Condominiums Inc.***, 2012 NSCA 126

Date: 20121221
Docket: CA 377999
Registry: Halifax

Between:

Jayson Hilchie, Amanda Jackson, Gregory Wentzell, Bradford Dempsey

Appellants
(Respondents on Cross Appeal)

v.

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

Respondents
(Appellants on Cross Appeal)

Judges: MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A.

Appeal Heard: October 1, 2012, in Halifax, Nova Scotia

Held: Appeal dismissed and cross appeal allowed per reasons for judgment of MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A. concurring.

Counsel: Allen C. Fownes, for the appellants
Robert G. Grant, Q.C. and Maggie A. Stewart, for the respondents

Reasons for judgment:

[1] Each of the four appellants signed agreements to purchase units in a proposed Halifax condominium project known as The Waterton. There were significant delays and, in the end, the sales were never completed. This appeal involves the fallout from these aborted transactions.

BACKGROUND

The Dispute

[2] Approximately 75 prospective purchasers signed pre-construction agreements, with the appellants signing theirs between May of 2005 and October of 2006. All had hoped to have occupancy in 2008 but, unfortunately, that was not to be. Instead numerous delays led to several amendments extending the closings, with the final extensions to September 30, 2009. But that date came and went without the units being ready for occupancy.

[3] As well, and central to this appeal, September 30th came and went without the condominium project being registered under Nova Scotia's *Condominium Act*, RSNS 1989, c. 85. This, says the developer, rendered all four agreements null and void, as of that date. In advancing this position, it relies upon the following clause (clause D-10):

> (10) The Buyer acknowledges that the Declaration, By-Laws including the Common Element Rules made pursuant to the **Act**, 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 this 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 Condition 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. (Schedule "D")
>
> [Emphasis added.]

[4] In other words, the developer insists that it proceeded with due diligence but, despite its best efforts, the registration was not effected by the last scheduled closing date. So on September 30, 2009, the agreements came to an end.

[5] That at least was the developer's position before the courts. However, as I will explain, its position was less clear at the time these events were unfolding.

[6] For example around mid-October 2009, the developer's then counsel, Mr. Craig R. Berryman, sent the prospective purchasers a letter advising that the units were finally ready for occupancy but that the developer could not pass title because the project had not yet been registered. Nonetheless, Mr. Berryman invited the prospective buyers to take occupancy, with the closings to take place once registration was completed. With this invitation to occupy came several conditions, one of which was highly controversial. Specifically, it called for significantly increased deposits. Furthermore, in the letters to the appellants Hilchie, Wentzell and Dempsey, Mr. Berryman threatened that should these conditions not be met, the developer would consider the contracts at an end. In due course, the appellant Jackson would receive that same threat directly from the developer.

[7] Strangely, however, to justify the developer's position, Mr. Berryman did not refer to clause D-10. Instead Mr. Berryman referred to another clause (Clause C-2) which, as I will explain, appeared to have no relevance to the circumstances at that time. I will use the letter to the appellant Dempsey as an example:

> I understand that you are representing the purchaser in the above-noted transaction, and we are writing to advise that we will be representing the vendor.
>
> 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 her 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: ...

[8] Mr. Berryman's reference to clause C-2 appears misguided. That clause, under the heading "Occupation Prior to Closing", allows a prospective buyer to move in on what would have been the original closing date "if the Unit ... is ready for occupancy ... and the registration of the Condominium has not been completed". The sale would then be completed within 7 days of the project being registered:

> Occupation Prior to Closing
>
> C. (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 a page 2 of this Agreement) go into occupancy of the Unit subject to the following: ...

The agreement then set out various conditions relative to the contemplated early occupancy.

[9] Interestingly, C-2's conditions for occupancy were less stringent than those in the Berryman letters. Specifically, there was no call for an increased deposit which, as noted, represented a major sticking point for the appellants. However, note, as well, the permissive language. Early occupancy would occur only if the developer requested it and, if so, there would appear to be no obligation on the purchaser who instead "may" take occupancy. In other words, this clause bound no one. Furthermore, and in any event, by the time of the Berryman letters, this clause would no longer have been in play because the September 30, 2009 closing date had come and gone.

[10] In any event, approximately 60 prospective buyers agreed to take occupancy on the terms set out in the Berryman letters; some with conditions adjusted to meet individual circumstances. Others walked away with their deposits and the costs of individual upgrades returned.

[11] However, the four appellants refused to accept either of the developer's options. Instead, they insisted that they had a right to take early occupancy without the additional conditions. Yet, the developer, considering the agreements void, began to market the units to third parties when the registration was ultimately secured.

[12] This impasse prompted the present action. The appellants sought specific performance based on the original sale price or, alternatively, damages for what they framed as the developer's breach of contract.

[13] The developer maintained that because clause D-10 rendered the agreement null and void as of September 30, 2009, the Berryman letters were no more than new offers which the appellants did not accept.

The Decision Under Appeal

[14] Following several adjournments, the matter was heard on its merits in the Summer of 2011 before Justice Margaret J. Stewart of the Nova Scotia Supreme Court. The decision under appeal was issued in December of that year.

[15] In her decision, Justice Stewart, at the outset, identified the respective positions, beginning with the appellants (2011 NSSC 489):

> ¶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. Through 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 centering 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.

[16] The judge then identified the developer's position:

> ¶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.

[17] Then after detailing the history that brought the parties before the court, the judge addressed clause D-10 to determine whether it represented a true condition precedent that would nullify the agreement:

> ¶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.

[18] Ultimately the judge concluded that this unmet condition did not render the agreement void:

> ¶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 D.L.R. (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) 102 at paras. 17-18.)

[19] In reaching this conclusion, the judge was influenced by the October 2009 Berryman letters which she referred to as “Occupancy Packages” and which she viewed as proposed amendments to the 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". ...

[20] The judge also suggested that, by the same letter, the developer had waived its rights under D-10:

> ¶38 ... 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".

[21] Thus the developer had no right to unilaterally impose new conditions and therefore no right to declare the agreement void simply because these conditions were not met:

> ¶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.

[22] At the same time, the judge rejected the appellants' argument that the developer failed to exercise due diligence in registering the project. I will return to this later.

[23] As for relief, the judge rejected the appellants' request for a separate hearing to address damages. Further, she denied their request for specific performance. Instead, she concluded that the units were not sufficiently unique to force the developer to sell them to the appellants at their agreed upon price.

[24] The judge further concluded that (aside from the return of their deposits and outlay for upgrades they had paid - which were never in issue), the appellants were entitled to only nominal damages of $1,000. each. In other words, they failed to prove with sufficient certainty that the units had increased in value so as to support a loss of bargain claim.

ISSUES

[25] Before this court, the purchasers challenge the judge's decision to deny specific performance. They also say that she erred in awarding only nominal damages and in denying them an adjournment, which would have afforded them a better opportunity to better prove their losses.

[26] The developer cross-appeals, asserting that the judge erred by finding a breach of contract in the first place. In other words, the judge erred by not finding clause D-10 to be a true condition precedent that nullified the agreement.

ANALYSIS

[27] My analysis will begin with the cross-appeal because, as will become evident, that will be enough to dispose of this matter.

True Conditions Precedent

[28] It would be helpful to first review the jurisprudence surrounding true conditions precedent with particular emphasis on clauses similar to D-10.

[29] The leading case on this subject remains a 50-year old decision from the Supreme Court of Canada - **Turney v. Zhilka**, [1959] SCR 578 (*per* Judson, J.). There the agreement to buy land in Toronto had the following condition:

> Providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision.

[30] The purchaser wanted to waive that provision and sought specific performance to force the seller to transfer the property on the remaining terms. The Supreme Court of Canada ultimately disagreed explaining at pp. 583-84:

> But here there is no right to be waived. The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party—the Village council. This is a true condition precedent—an external condition upon which the existence of the obligation depends. Until the event occurs there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise

> there can be no breach of contract until the event does occur. The purchaser now seeks to make the vendor liable on his promise to convey in spite of the non-performance of the condition and this to suit his own convenience only. This is not a case of renunciation or relinquishment of a right but rather an attempt by one party, without the consent of the other, to write a new contract. Waiver has often been referred to as a troublesome and uncertain term in the law but it does at least presuppose the existence of a right to be relinquished.

[31] Note then the ingredients and consequences of a true condition precedent:

- the condition represents a future uncertain event, the occurrence of which is beyond the parties' control;
- neither party reserves the right to waive the condition; and
- there can be no breach of contract should that event not occur.

[32] Professor Stephen Waddams, *The Law of Contracts*, 6th ed (Aurora, Ontario: Canada Law Book, 2010) at p. 456 explains the relevance of true conditions precedent in the sale of property context as follows:

> It is common in agreements for the sale of land for the agreement to be made conditional on some occurrence such as the consent of a planning authority to a proposed use. Such a condition is generally aimed at protecting the purchaser, but in a number of cases the purchaser has sought to waive the condition and to take the land notwithstanding the absence of planning consent. Where the terms of the agreement expressly reserve the purchaser's right to waive such conditions, the purchaser may undoubtedly do so. But where such a power is not reserved, especially when an agreement is stated to be "null and void" if consent is not forthcoming, or "subject to" the obtaining of consent, it has been held in several cases that the granting of the consent is a "true condition precedent" and that the vendor, no less than the purchaser, is excused if the consent is not granted.

[33] The Supreme Court of Canada has revisited **Zhilka** in a number of cases and each time, it has reiterated this test. For examples, see: **Barnett v. Harrison**, [1976] 2 SCR 531 at pp. 552-53; **Dynamic Transport Ltd. v. OK Detailing Ltd.**, [1978] 2 SCR 1072 at pp. 1082-83; and **F.T. Developments Ltd. v. Sherman**, [1969] SCR 203 at p. 207.

[34] That said, there have been some Supreme Court of Canada decisions that distinguished **Zhilka** by finding that the provisions in question were not true

conditions precedent. For example, see **McCauley v. McVey**, [1980] 1 SCR 165 and **Hechter v. Thurston**, [1980] 2 SCR 254. However, in both cases the alleged conditions precedent were the responsibility of one of the parties as opposed to a third party. As such, they were not viewed as true conditions precedent in the **Zhilka** sense.

[35] In addition to the these Supreme Court of Canada cases, there have been several court of appeal decisions, some of which held clauses similar to ours to be true condition precedents. The most recent is **Leasing Group Inc. v. Prospect Developments (2003) Inc**., 2011 ABCA 83, where the Alberta Court of Appeal applied **Zhilka** and found the following clause (very similar to our clause D-10) to be a true condition precedent:

> 4. CONDOMINIUM CONDITION
>
> The Purchaser hereby acknowledges and agrees that the Unit is contained within the title to Units 3 and 4 of Bare Land Condominium Plan 9611593, and that registration of the Re-division Plan at the Land Titles office ("Condominium Approval") must be obtained to create a title to the Unit from the title to the said Bare Land Condominium Plan. *Accordingly, the developer and the Purchaser hereby agree that their respective obligations to sell and purchase the Unit is conditional upon Condominium Approval being obtained on or before January 31, 2009 (The "Condominium Condition Date"), failing which this agreement shall be null and void and the deposits shall be returned to the Purchaser.* The Developer and the Purchaser acknowledge and agree that the condition set out in this Section may not be waived at all, whether unilaterally by the Developer or by mutual agreement of the parties. The developer reserves the right (without the consent or approval of the Purchaser) to make nonmaterial amendments to the Plan that may be required by The Town of Canmore.
>
> Notwithstanding the foregoing, if the Developer is unable to register the Re-division Plan at the Land Titles Office on or before the Condominium Condition Date, then the Developer may extend the Condominium Condition Date to a date no later than January 31, 2010 by providing written notice to the Purchaser on or before January 15, 2009, failing which this agreement shall be null and void and the deposits shall be returned to the Purchaser.
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> [Emphasis added.]

[36] See also **Goetz et al. v. Whitehall Development Corp. Ltd.**, [1978] OJ No 3277 (Ont CA), and **Kempling v. Hearthstone Manor Corp.** (1996), 41 Alta LR (3d) 169 (Alta CA) [where the majority agreed in the result but disagreed on whether the impugned clause was a true condition precedent].

[37] Finally, there is one appeal level decision that found a clause similar to our clause D-10 not to be a true condition precedent. It is **Aita et al v. Silverstone Towers Ltd**., [1978] OJ No 3362. I will return to **Aita** in more detail later.

Was Clause D-10 a True Condition Precedent?

[38] With this backdrop, I will now consider whether our clause D-10 represents a true condition precedent so as to nullify the agreement.

[39] In answering this question, I will apply a *correctness* standard of review since it involves a pure question of law, namely the proper interpretation of a contract. In other words, should we disagree with the trial judge's interpretation of the contract generally and this clause specifically, our view shall prevail. See **White v. E.B.F. Manufacturing Ltd.**, 2005 NSCA 167 at paras. 15 and 16.

[40] In my respectful view, clause D-10 has all the hallmarks of a true condition precedent. For example, the project had to be registered prior to September 30, 2009 and this condition represented a future uncertain event. As well, the parties acknowledge that this occurrence was within the discretion of the Registrar of Condominiums and therefore beyond the parties' control.

[41] Furthermore, there is nothing to suggest that either party could unilaterally waive this requirement or, on this record, can it be suggested that it was mutually waived by the parties.

[42] Therefore, in my respectful view, the conclusion is inescapable - after September 30, 2009, with no registration, this contract came to an end. Thus there could be no breach of contract and, respectfully, the judge erred by finding otherwise.

[43] Furthermore, and respectfully, the judge's conclusion (at para. 38) that the developer waived this condition by its Berryman letters reflects further error

because, as noted: (a) neither party had the right to unilaterally waive this condition, and (b) in any event, the Berryman letters were written after the contract would have been rendered a nullity.

[44] That said, I can fully understand why the judge would be tempted to conclude (again at para. 38) that the "occupancy package" contained in the Berryman letters was "a document to be read in conjunction with and as an amendment to their existing agreements and not a new agreement". That seems to be what the letter misguidedly suggests. However, again, these letters were weeks after September 30, 2009. They could not serve to resurrect an agreement that would have already been rendered null and void. The language of the contract was clear - the project had to be registered before the closing date or the contract would be at an end. The facts are equally clear - the closing date came and went without registration. The result is therefore unavoidable - the contract was at an end and the Berryman letters can only be viewed as new offers for the appellants to either accept or reject. For the same reason, the concept of estoppel could have no place in this analysis.

Due Diligence

[45] At the same time, I am mindful that, under clause C-10, the developer was under a duty to "proceed with all due diligence to have the necessary documents accepted for registration ...". However, the judge was careful to highlight that the developer did in fact meet this obligation:

> ¶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.

[46] For all these reasons, in my respectful view, the developer did not breach its contracts with the appellants.

[47] In reaching this conclusion, I realize that while the weight of authority supports my conclusion, the Ontario Court of Appeal's decision in **Aita**, *supra*, may not. However, in my view, this case is distinguishable for the following reasons.

[48] Here is **Aita**'s clause equivalent to our D-10:

> 5. This Agreement and the transaction arising therefrom are conditional upon the following:
>
> ...
>
> (b) the registration by the Vendor of a Condominium Plan, description, and of the Declaration and By-law No. 1 on or before...
>
> In the event that either condition has not been complied with, this Agreement shall be null and void and all moneys paid by the Purchaser shall be returned without interest or deductions subject however to paragraph 7 hereof.

[49] Clause 5 looks very much like a true condition precedent. However, in holding otherwise, the court focussed on the agreement's early occupancy clause [7] which would be the equivalent of our clause C- 2:

> 7. If the Unit is completed and fit for occupancy by the date fixed for closing hereunder but prior to the date of registration of the Condominium Plan, Description, Declaration and By-law Number 1 and the Purchaser has been approved by the First Mortgagee, then the Purchaser shall pay to the Vendor the balance of the purchase moneys and shall take occupancy of the Unit on the date fixed for closing hereunder on a rental basis at a rental of $338.62 per month in

> advance commencing on the date of occupancy and payable on the same date of the next succeeding month during the term of such occupancy until the agreement of purchase and sale can be completed in accordance with the provisions hereof. Any prepaid rent shall be adjusted on completion of sale.

[50] Note this clause's imperative language. It stipulated that the purchaser "shall" take early occupancy (if the unit were ready prior to registration). In other words, this suggests that, despite the language in clause 5, the parties did not contemplate an end to the agreement should the closing date pass without registration. Instead the parties agreed to mandatory early occupancy. In fact, this was central to the court's analysis:

> [15] In this case, the parties themselves contemplated that the closing date might arrive before the requisite registrations of the condominium documents had been effected. They did not agree that in such event, the agreement was at an end. On the contrary, they agreed in para. 7 that if the unit was completed and fit for occupancy by the closing date, the plaintiffs would pay the balance of the purchase price, without getting title, and take occupancy of the unit on a rental basis, at the amount of rent stipulated in the agreement. [*Per* Arnup, J.A.]

[51] Yet, as opposed to mandatory early occupation, our clause C- 2 represents quite the opposite. As noted, it is totally permissive and bound no one:

> 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 a page 2 of this Agreement) go into occupancy of the Unit subject to the following...
>
> [Emphasis added.]

[52] This, in my view, is a crucial distinction. In **Aita** with the parties bound to occupy before registration, I can understand why the court would not see registration as a crucial aspect of the agreement. Here, however, there was no such obligation. Instead, our clause C-2 commits neither party and therefore it does nothing to diminish the significance of clause D-10.

[53] Finally, although not raised by the parties, let me deal with a unique aspect of the appellant Jackson's agreement. While her main agreement included the permissive early occupancy clause C-2, her final amendment (dated September 2, 2009) in addition to extending the closing to September 30th also had inserted by

hand: "customer shall take occupancy if the registration is not complete". This leaves us with two contradictory clauses regarding early occupancy: one making it mandatory; the other permissive.

[54] However, a review of the record makes it clear that at no time did the appellant Jackson ever consider acting on this handwritten insertion. In fact, in her supporting affidavit before the court (dated May 12, 2010), she insisted that early occupancy was permissive:

> 7. The second Amendment signed on September 2, 2009 [Exhibit "C" hereto], extending the Closing Date to September 30, 2009 says that I will take early occupancy if the registration is not complete. I say that it was understood by all that I was using mortgage financing and that the closing and occupancy date would be when the Developer conveyed me a good title that I could mortgage to my lender. I was not committing to enter occupancy without the ownership first being transferred and the agent for the developer well knew this.

[55] Further, in response to her Berryman letter, Ms. Jackson's lawyer, Mr. Robert C. Hines, at the time confirmed that, in his view, early occupancy would be permissive:

> Further to your letter of October 13, 2009, I have perused the Agreement of Purchase and Sale with my client and she has the following concerns:
>
> (1) Section 2 of Schedule "C" indicates the Buyer, at the request of the Seller, may go into occupation. Nowhere did I read where the buyer must go into occupation. ...

[56] Furthermore, and in any event, Ms. Jackson's contract, under any interpretation, called for early occupancy before September 30, 2009. This did not happen. Therefore, clause D-10 served to render her contract null and void as well.

DISPOSITION

[57] For all these reasons, I would allow the cross-appeal and order the appellants to return to the developer the $1,000 damages paid to each appellant, together with the return of all costs ($11,000) and disbursements paid under the original order. I would further order the appellants to pay the developer $2,500

costs on appeal, together with its reasonable disbursements on appeal (to be agreed upon or taxed). Consequently the main appeal is dismissed.

MacDonald, C.J.N.S.

Concurred in:

Oland, J.A.

Fichaud, J.A.