SUPREME COURT OF NOVA SCOTIA
Citation: *Smith v. Bryant*, 2024 NSSC 37

Date: 20240205
Docket: 516639
Registry: Halifax

Between:

Jocelyn M. Smith and Larry B. Smith

Applicants

v.

Neil William Bryant

Respondent

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	June 12, 2023, in Halifax, Nova Scotia
Counsel:	Ian R. Dunbar and Liza Myers, for the Applicants Brian P. Casey, KC, for the Respondent

By the Court:

Background

[1] The Applicants, Larry Smith and his spouse Jocelyn Smith, listed a property located at 87 Tower Road (the "Property") for sale on March 23, 2022. The Property was open to viewing for four days, it was viewed approximately 30 times and the Applicants received six offers. On March 27, 2022, Neil Bryant (the "Respondent") submitted an offer to purchase the Property for $1,220,000. This offer was the highest out of the six offers received.

[2] The parties signed an Agreement of Purchase and Sale ("APS" or the "contract"). The APS stipulated that the Respondent would pay a $10,000 deposit by March 31, 2022, and that the closing date would be April 29, 2022. The APS did not contain any provisions making the closing contingent on the Respondent obtaining financing, or a sale of the Respondent's property.

[3] On March 29, 2022, the Government of Nova Scotia announced two new taxes in relation to property in Nova Scotia, an increase to the Deed Transfer Tax, and the creation of a new Foreign Resident Tax that applies to property owners who do not reside and pay taxes in Nova Scotia (together, the "Taxes"). The Taxes went into effect on April 1, 2022.

[4] On March 31, 2022, the Respondent indicated (through his real estate agent) that he had some reservations about the Nova Scotia government's proposed tax increases. The parties discussed this issue through their real estate agents and agreed to an amended APS to allow the Respondent to pay the deposit on April 1, 2022.

[5] From this point on, the parties treated the APS as binding and acted as if the sale were to happen, satisfying other APS conditions such as reviewing and declaring a lack of restrictive covenants on the Property. On April 25, 2022, the Respondent's real estate agents advised that the Respondent would not complete the transaction. On April 28, 2022, the Respondent advised, through counsel, that the new Taxes changed the financial viability of the Property. Counsel also advised that the Respondent was unable to secure financing for the purchase of the property, because the sale of his property in British Columbia fell through.

[6] On May 1, 2022, the Applicants re-listed the Property. They had an open house scheduled for May 8, 2022. On May 3, 2022, the Applicants received only one offer of $950,000. The Applicants accepted that offer and cancelled the open house. The Property transaction closed on May 20, 2022.

[7] The Applicants have started an application against the Respondent to recover the difference in the purchase price of the Property, $270,000, less the $10,000 deposit. They claim damages of $260,000.

[8] The Respondent opposes this application. He says he did not breach the APS, because the contract was frustrated by the Nova Scotia government's introduction of the Taxes, which made the contract financially unworkable. The Respondent further argues that the Applicants failed to mitigate their damages.

Admission

[9] There was an admission on behalf of the Respondent, executed by the Respondent's counsel on June 7, 2023. The Respondent admits that there was a mandate letter sent on September 14, 2021, which was posted online on September 16, 2021 to the public website "Ministerial Mandate Letters" for the Executive Council of the Province of Nova Scotia. The mandate letter states, *inter alia*:

> "…As Minister of Finance and Treasury Board you will:
>
> Implement an additional, provincial deed transfer tax on any Nova Scotia property purchased by individuals who do not pay taxes in Nova Scotia.
>
> Impose a levy on every non-Nova Scotian taxypayer held property in Nova Scotia of an additional $2 per $100 of assessed property value.

Preliminary evidentiary issue

[10] The parties have disagreed on the admissibility of certain evidence referenced in the Respondent's brief regarding the purchase price of the Property, when it was bought by the Applicants, and the length of time the Applicants owned the Property. They have asked me to rule on the admissibility of this evidence.

Issues

[11] The issues in this application are:

(a) The preliminary evidentiary issue - Should the purchase price of the Property, when the Applicants purchased it, and the length of time that they owned the Property be admitted into evidence?

(b) Did the Respondent breach the APS?

(c) Does the doctrine of frustration of contract apply?

(d) Did the Applicants reasonably mitigate their damages?

Analysis

Issue (a) - Should the purchase price of the Property, when the Applicants purchased it, and the length of time that they owned the Property be admitted into evidence?

[12] In his brief, the Respondent made the following statements concerning the Applicants' purchase of the Property:

> The vendors, the Smiths purchased the Tower Road property as an investment property July 27, 2021 for $700,000, 9 months before selling it to Bryant for $1,220,000. The Smiths were aware that Bryant was a non-resident of Nova Scotia and that Bryant (as they had done) was buying the house as an investment, with the entire house to be rented out.

[13] The Applicants object to these statements, arguing that they are not relevant. The Respondent claims that the information is relevant because it qualifies the Applicants' statement regarding their losses on the Property, and because the Property history shows that the Applicants knew about the Respondent's intended use of the Property.

[14] The Respondent has not convinced me that the previous purchase price is relevant to the issues in this case.

[15] The Applicants are claiming against the Respondent for losses that stemmed from him breaching the APS. The $270,000 of losses that Larry Smith describes in his affidavit represent the difference between the price that the Respondent agreed to pay and the price that the Property ultimately sold for. The previous transactions relating to the Property have no impact on the losses that stem from the Respondent's conduct.

[16] I am also not convinced that the evidence in any way suggests that the Applicants knew that the Respondent was purchasing the Property as an

investment. The Applicants use of the Property has no relevance to the Respondent's use of the Property. Simply because the Applicants knew the Property could be used as a rental, does not mean that they knew the Respondent intended to rent it. There is no evidence that the Respondent communicated that intention prior to the contract formation.

[17] I conclude that the above-noted evidence related to the Applicants purchase of the Property is not relevant and therefore not admissible in this matter.

Issue (b) - Did the Respondent breach the APS?

[18] I am satisfied that there was a fully executed APS dated April 1, 2022, between the Applicants and the Respondent for the purchase of the Property. The parties agree that the APS was a valid contract. There is no dispute that the transaction did not close as agreed on May 1, 2022. Additionally, there is no dispute that the Applicants were ready, willing, and able to complete the transaction on the closing date, and that on April 25, 2022, the Respondent advised the Applicants (through their respective real estate agents) that the Respondent was not going to complete the transaction.

[19] For these reasons, I am satisfied that the Respondent breached the APS by failing to complete the sale of the Property and pay the Applicants the remainder of the purchase price.

Issue (c) - Does the doctrine of frustration of contract apply?

Positions of the parties

[20] Was the APS frustrated by the introduction of the Taxes? The Respondent argues that he purchased the Property as a real estate investment. When looking for properties he indicated to his real estate agents that he wanted to purchase a property where the rent he collected would cover the property expenses, including the mortgage and taxes. He claims this was fundamental to the contract, as this investment purpose was the foundation of his offer and therefore was directly referable to the contract.

[21] The Respondent argues that the Applicants knew he was purchasing the Property as an investment. The Applicants say that they had no knowledge of the Respondent's intentions to use the Property as a real estate investment when they accepted his offer. They only knew that the Respondent was a resident of British

Columbia, and say they were not aware of his investment intentions until after March 31, 2022. The Applicants say that the Respondent's subjective intentions cannot impact the interpretation of the contract because they were not made apparent to all the contracting parties and were not indicated anywhere in the contract.

[22] The Applicants argue that the Respondent had been aware that the Taxes were going to be imposed, yet still chose to enter into the APS by sending in the $10,000 deposit by April 1, 2022.

[23] The introduction of the Taxes had been announced in a ministerial mandate letter in September 2021. The Applicants further argue that the Respondent had explicit knowledge of the Taxes when he amended the APS to allow for the deposit to be sent a day later than they originally agreed. From this point on, the Respondent behaved as if the transaction was going to proceed before ultimately backing out of the APS four days before closing. The Applicants argue that the Respondent chose to amend the contract on April 1, 2022, with full knowledge of the potential tax implications. According to the Applicants, this negates the Respondent's claim that the contract was frustrated by the Taxes.

[24] The Respondent says that he was not aware that the Taxes were going to be imposed when he made his offer. He further argues that, even if he had read the ministerial mandate letter, it was aspirational, not law, and did not provide a timeline indicating when the Taxes would be implemented. Therefore, the Respondent denies that it was foreseeable that the Taxes would impact this property transaction. The Respondent claims that the Taxes changed the financial viability of the purchase of the Property and says, that had he known there was going to be a change in the costs associated with the Property, he would not have offered the price he did.

[25] The Respondent says that when he determined that the sale was not financially viable, he advised his real estate agents that he would not go through with the APS. The Respondent claims that he was advised by his real estate agent that the APS was not binding until he paid the deposit. He was later informed that this was incorrect and paid the deposit.

[26] The Respondent argues that as a non-resident, the imposition of the Taxes radically changed his ability to keep up with payments, let alone financially benefit from the Property purchase. He claims that going through with the purchase would be so onerous that it would be possible only at huge expense, stating that this

"practical impossibility" of performance is enough to show that the contract has been frustrated.

Applicable Legal Principles

[27] *Force majeure* is a concept used in contract law to excuse the contracting parties from performance. Klaus Berger and Daniel Behn have described its meaning in "Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study", (2019-2020) 6 MJDR 78-130, at para. 12:

> *Force majeure* ("*vis major*" in Latin) is sometimes translated in English as "Act of God", but literally translates to "superior force". The force majeure doctrine relates to supervening unforeseen events that make performance impossible. It covers cases of subsequent impossibility, i.e. external supervening events occurring after contract formation, that are beyond the control of the aggrieved party such as fires, floods, droughts, earthquakes, civil riots, terrorist attacks, etc., which render the performance of a party's contractual obligations not just excessively onerous as in hardship-type situations, but impossible, whether on a temporary or permanent basis.
>
> (footnotes omitted)

[28] As Berger and Behn note, the doctrine of frustration acts as a variation of the force majeure doctrine. English case law developed to allow reliance on the doctrine where it made contract performance impossible, or where performance was possible but would be useless because the essential element of the contract was destroyed or rendered useless (paras. 30-32). The strict standard required by English courts comes from *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (H.L.) where the House of Lords held that the supervening event must have caused a radical change to the obligation itself, not just to the circumstances which would make the obligation more expensive or onerous to fulfill.

[29] This standard was adopted by Canadian courts in *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, [1960] S.C.R. 361, and subsequently affirmed in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58. In *Naylor*, Binnie J. writing for the court held:

> [54] Earlier cases of "frustration" proceeded on an "implied term" theory. The court was to ask itself a hypothetical question: if the contracting parties, as reasonable people, had contemplated the supervening event at the time of contracting, would they have agreed that it would put the contract to an end? The

> implied term theory is now largely rejected because of its reliance on fiction and imputation.
>
> [55] More recent case law, including *Peter Kiewit*, adopts a more candid approach. The court is asked to intervene, not to enforce some fictional intention imputed to the parties, but to relieve the parties of their bargain because a supervening event (the OLRB decision) has occurred without the fault of either party. For instance, in the present case, the supervening event would have had to alter the nature of the appellant's obligation to contract with the respondent to such an extent that to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agreed to under the tendering contract…

[30] In *Naylor*, Binnie J, writing for the court, found that the parties could have foreseen the supervening event, based on the history of their contractual relations. For that reason, the court held that there was no supervening event that could have frustrated the contract. A similar holding was made in *Taseko Mines Ltd v. Franco-Nevada Corp*, 2023 ONSC 2055, where Penny J, discussed the concept of foreseeability in relation to supervening events and, following the reasoning in *Naylor*, held:

> [77] … there is no conflict between what the Supreme Court said in *Peter Kiewit* and *Naylor*, or what the Court of Appeal for Ontario said in *Capital Quality*, and a consideration of whether, in determining if a supervening event makes performance of a contract radically different from what was contemplated, the supervening event was foreseen.
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> [78] The role of foreseeability is, in any event, not just an Ontario-specific point of view. The same approach has been taken in Alberta and in British Columbia as well. The Alberta Court of Queen's Bench described foreseeability as "an essential element" in cases of frustration: *Troika Land Development Corp. v. West Jasper Properties Inc.*, 2009 ABQB 590 at para. 41. The British Columbia Court of Appeal found that neither *Peter Kiewit* nor *Davis Contractors* "obviate the need to show that the supervening event was not foreseeable": *Ballenas Project Management Ltd. v. P.S.D. Enterprises Ltd.*, 2007 BCCA 166 at paras. 27 to 29.
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> [79] Ontario and other Canadian courts have carefully defined the test for frustration. This is both proper and necessary because contracts are presumptively enforced. Frustration is a limited exception to this presumption and applies only when "the occurrence of the unexpected event is so much outside the range of risks that the agreement allocates...that the values favouring enforcement are outweighed": Stephen Waddams, *The Law of Contracts*, 7th ed. (Toronto: Thomson Reuters Canada Limited, 2017), p. 249.

[31] Courts have tended to use the term "supervening event", which assumes that there were two things: 1) an intervening event, and 2) that the intervening event was also unforeseeable. I will separately analyse whether the event was intervening and then consider the foreseeability of the event. To maintain consistency with the case law, I will continue to use the term "supervening event" throughout my reasons.

[32] The principles outlined in the caselaw establish that the party claiming frustration must prove:

a) A supervening event occurred through no fault of either party;
b) The supervening event was not a reasonably foreseeable outcome when the contract was formed;
c) The supervening event was directly or indirectly referable in the contract (i.e., the supervening event impacted a material element of the contract); and,
d) The supervening event altered the nature of the obligation to make it radically different than the obligation stated in the contract.

A preliminary point

[33] Before analyzing the doctrine of frustration in relation to the Property purchase, I wish to address the argument made by the Applicants that the reason the Respondent did not complete the transaction was because he failed to sell his Property in British Columbia and could not finance the Property purchase. The Respondent argues that they had indicated, through a letter from counsel on May 28, 2022, that he had made "good faith efforts" to secure financing to purchase the Property, even after the sale of his property in British Columbia fell through. These efforts, the Applicants submit, indicate that the introduction of the Taxes did not frustrate the contract. Instead, the Respondent's inability to finance the purchase was the downfall of the contract.

[34] The Applicants argue that this situation is akin to *Gilbert v. Marynowski*, 2017 NSSC 227, because the intended purchaser in that case did not include a clause that would make the transaction subject to the sale of the purchasers' other properties but did include a financing clause in the agreement of purchase and sale. Though factually similar, this case is of little precedential value here, as the issues in *Gilbert* centered around the alleged negligent representation by the realtors

involved in the transaction and the amount of damages the purchasers may be liable for as a result of terminating the agreement of purchase and sale. In addition, the purchasers in that case did include a financing clause but did not actually seek financing. Though the Respondent, in the case before me, may have a claim against his real estate agents, it is not the subject matter of this litigation.

[35] In *Saturley v. Lund*, 2005 NSSC 309, the court considered a similar issue. The defendant buyer did not go through with the sale of a house. The defendant claimed that the contract was frustrated because they could not finance the purchase of the house, having been unable to sell their current home. The court found that there was no financing condition included in the agreement of purchase and sale and refused to imply such a term in the agreement, noting that the plaintiff sellers were not made aware that the defendant's financing was contingent on the sale of their current home (para. 13). I find *Saturley* analogous to the case before me.

[36] However, the Respondent has not claimed that his failure to finance the purchase of the Property caused the contract to be frustrated. He says that he arranged financing by obtaining a mortgage and securing a loan from a friend. Therefore, he says that the purchase was not contingent on the sale of his home in British Columbia, though he planned to use the proceeds of the sale to repay the mortgage and loan. I note that the mortgage he was approved for was conditional on the sale of his house (Affidavit of Neil Bryant, at para. 45). However, I still conclude that the Respondent's inability to sell his property in British Columbia did not frustrate the contract.

Impact of the Taxes

[37] The impact of the introduction of the Taxes on the transaction is the primary issue between the parties. The Respondent claims that the introduction of the Taxes was the supervening event that frustrated the contract.

Was the contract frustrated?

a) Was there a supervening event that occurred without fault of either party?

[38] The introduction of the Taxes was an event that occurred between the signing of the APS and the intended closing. Neither party was responsible, nor at fault, for this event. This was a decision made independently by the provincial government.

b) Was the supervening event a reasonably foreseeable outcome?

[39] *Taseko Mines* provides helpful examples of when an event is "unforeseeable":

> [23] *Perkins v. Sheikhtavi*, 2019 ONCA 925, was factually similar to *Bang*. A legislative change suppressed property values in the purchaser's area such that she no longer wished to conclude the purchase. The Court of Appeal for Ontario held that the supervening event did not constitute frustration of the agreement because it was "contemplated by the parties at the time of contracting and was provided for or deliberately chosen not to be provided for in the contract": at para. 16.
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> [24] *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2021 ONCA 201 is another case concerned with the purchase of land where government planning changes occurred after the agreement was entered into. The Court of Appeal held, at para. 239, that "the possibility of planning changes was within the parties' contemplation when they entered into the 2005 August Agreement. Despite that, they made no provision for such a possibility - as, for example, through the insertion of a "drop-dead" provision. Therefore, even if the planning changes were a supervening event, the 2005 August Agreement is not frustrated".

[40] I would add that though the court in *Perkins v. Sheikhtavi*, 2019 ONCA 925, found that the policy change was a supervening event, it did not make performance of the contract "radically different" because the thing being contracted for, the sale of a home, was unchanged by the new policy.

[41] The Respondent distinguishes *Perkins*, saying that the purchaser chose not to include a financing clause even though they contemplated the problem of financing. The Respondent says he did not make a calculated decision to take such a risk because the imposition of the Taxes was entirely unforeseeable. I find that the Respondent, in choosing not to include a financing clause, did exactly what he argues he did not: he chose not to build in protection based on financing, and ultimately breached the contract based on the financial implications of the purchase.

[42] In the case before me, the Taxes were not yet introduced by the time that the contract was formed. However, their eventual introduction was foreseeable based on the information released by the Nova Scotia government about the upcoming Taxes and the subsequent announcement in March 2022. A reasonably informed real estate agent ought to have known about the eventual changes to taxation for non-residents, especially when acting for a non-resident purchaser. If the

Respondent was not informed of the potential tax implications of this purchase, that is unfortunate, but it does not make the event unforeseeable.

[43] In the admission, the Respondent admits that the Nova Scotia government announced its intention to introduce a deed transfer tax on or about September 14, 2021. This announcement was followed by a mandate letter which explicitly stated that the Taxes would apply to every property owned by people who do not pay taxes in Nova Scotia. The letter also announced an additional levy on non-resident property owners based on the property assessment value. In his affidavit the Respondent says he was not aware of the impending introduction of the Taxes at the time he agreed to the APS and did not become aware of them until the formal announcement on March 29, 2022. However, the admission satisfies me that the Respondent had the opportunity to investigate the potential tax consequences before the formal announcement. If he intended to purchase property in Nova Scotia, he cannot fail to inform himself of readily available information and then claim that the policy changes were unforeseeable. I find the policy changes were not only foreseeable but were certain to occur.

[44] The evidence before me establishes that the Respondent became aware of the Taxes when they were formally announced on March 29, 2022. At that time, the Respondent contacted his real estate agents and received advice about the potential tax implications. The "lawyer review" condition in the APS expired on March 31, 2022. The Respondent and his real estate agents did not rely on that condition in the APS to withdraw from the purchase. The Respondent had the opportunity, during the two days after the Taxes were announced, before the expiry of the lawyer review condition, to discuss the consequences of the Taxes. He chose to proceed with the transaction despite his knowledge that there could be adverse tax consequences, "relying on assurances that he could avoid the tax" (Respondent's brief, at para 29).

[45] The Applicants say that the Respondent had a chance to include a provision in the contract to protect against the impact of the Taxes but chose not to. The Respondent's choice to amend the APS on April 1, 2022, to allow for a later deposit, tellingly, did not include any condition about the tax consequences. There is also no evidence before me that the Respondent even requested such a condition.

[46] I find that the imposition of the Taxes was a reasonably foreseeable outcome which would bring my frustration analysis to an end leading to the conclusion that the contract was not frustrated. However, in the event I am incorrect on this point

that the imposition of the Taxes was reasonably foreseeable I will proceed with the remainder of the test.

c) Was the supervening event directly or indirectly referable to the contract?

[47] In this case, the supervening event that impacted the parties' course of conduct was the Nova Scotia government's implementation of the Taxes, which occurred after the APS was signed but before the agreed closing date.

[48] As noted by the Respondent, the circumstances surrounding the formation of the contract will impact whether it has been frustrated (*Wilkie v. Jeong*, 2017 BCSC 2131, at para. 30). In *Saturley*, the court held that an intervening event must be directly or indirectly referable to the contract for the doctrine of frustration to apply. This excludes events that are extraneous to the contract (para. 17). Hall J. applied this principle to find that a financing issue that was not included as a condition in the agreement of purchase and sale of a house could not be an intervening event because it was extraneous to the contract.

[49] Though the Respondent argues that the Applicants were aware that he was purchasing the Property as an investment, there is no evidence before me that establishes that they knew of the Respondent's intention when the offer was drafted or when the APS was signed. Furthermore, even if the Applicants had been aware that the Respondent meant to use the Property as an investment property, this imposes no additional obligations on them to advise him of the tax consequences of the sale, nor does it make the tax consequences a material aspect of the contract, there being no condition to that effect in the APS.

[50] However, a contract does not need to expressly include a term for it to be a material element. In *Krell v. Henry*, [1903] 2 K.B. 740 (C.A.), the court held that the purpose of the contract to rent a room was to watch the King's coronation procession, even though the contract made no mention of it. The court found that the surrounding circumstances, such as an advertisement expressly stating that the rooms were being rented for the purpose of watching the coronation, made clear that the procession formed the foundation of the contract. By contrast, in the case before me, the Respondent's intended use of the Property was not expressed to the Applicants at the time of the contract formation. The Property description does say that the Property would be a great investment, but also says that it could be used as a family home.

[51] I do not read the listing description as analogous to the advertisement in *Krell*, and I decline to impute any meaning to the description of the Property as "a fabulous investment" as anything more than an opinion. It obviously did not purport to establish that prospective buyers could rely on the Property for significant investment income based on the listing alone. Any reasonable investor would do their own risk-analysis and would not rely solely on the listing description. In fact, this is what the Respondent did when evaluating his monthly expenses, as he deposed in his affidavit.

[52] The Respondent argues that this case is akin to the court's use of a listing agreement in *KBK No 138 Ventures Ltd v. Canada Safeway Ltd*, 2000 BCCA 295. The court in that case held that the purchaser relied on precise measurements listed in the agreement, found that the vendor was aware of the purchaser's reliance, and had indeed incorporated provisions in the contract to reflect this. In this case before me, there is no precise description, the Applicants were not aware of the Respondent's intended use, and the evidence is that the Respondent did not rely on the listing description, choosing to do his own calculations of expenses. This case is wholly distinguishable.

[53] The Respondent asks this Court to consider the "purpose of the purchase" when determining if the contract was frustrated. He says the Court should infer from his subjective intentions to use the Property as an investment and rent out the two units that the purpose of the contract was for him to obtain a financial benefit from the Property.

[54] I agree that the factual matrix surrounding the creation of a contract is essential to the determination of whether the contract is frustrated. Courts must be careful not to stray too far into the hypothetical future benefits of a contract. At its core this contract is about the sale of a house, not about the profits (or lack thereof) that will result from the sale.

[55] In *Innotech Aviation, a division of IMP Group Ltd. v. Skylink Express Inc.*, 2017 NSSC 176, Justice Gabriel made the following comments in relation to the interpretation of contracts:

> [22]… I am to attempt to determine "the mutual and objective intentions of the parties as expressed in the words of the contract" (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at para. 57).
>
> [23] In so doing, I am entitled to consider the surrounding circumstances to the extent necessary to ascertain the parties' mutual and objective intentions, but must

> remain rooted, first and foremost, in the text or words with which the parties have chosen to express themselves. Patently, this does not confer upon me a license to rewrite the contract. "Surrounding circumstances" as noted in *Sattva* at para. 58 consist "... only of objective evidence of the background facts at the time of execution of the contract ... that were or reasonably ought to have been within the knowledge of the parties at or before the date of contract."
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> (Emphasis added).

[56] An example of how the parties' intentions are interpreted in a contract can be found in *Gingras v. Wijnhorst*, 2021 BCPC 4. In this case, the claimants rented a cabin in rural BC. They argued that the contract was frustrated by wildfires in the area, because they had contracted for a family vacation. The respondent argued that the contract was simply for a place to stay and maintained that the contract was not frustrated because the cabin was not in a wildfire evacuation zone. The court considered the actions of the parties, in particular the respondent communicating as "Birch Haven Vacations", and the terms of the rental agreement stipulating that the property was to be used for recreational purposes only, providing access to a boat to be used on the nearby lake, and providing campfire wood to be used for outdoor campfires. The court held that the "claimants contracted for more than simply a place to stay for 14 days. They bargained for an experience in a rural vacation setting" (para. 52).

[57] In contrast, there is nothing in the APS in this case that points to the Respondent's intention to use the Property for an investment. The evidence demonstrates that the Applicants were not aware of the Respondent's intentions at the time of contracting, and there is no reason to believe that they ought to have known of his intentions, given that the contract was simply for the sale of the Property. The contract was not contingent on conditions related to the Respondent's investment aspirations. There was no reason for the Applicants to know, or to care, about how the Respondent intended to use the Property once he purchased it.

[58] The Respondent suggests that the Applicants' knowledge on March 31, 2022, that he planned to rent out the Property for investment purposes impacted the contract. He claims that the contract was not final before the lawyer review clause expired on March 31, 2022, and that the Applicants understood by this point that his purpose for purchasing the Property was as an investment. This is nothing more than a bald assertion without any reasonable factual basis. This assertion does not in any way change the Applicants' obligations, or the interpretation of the contract. The contract was created on March 28, 2022, at which time the

Applicants were unaware of the Respondent's investment aspirations. I see no reason why a lawyer review clause would impact my interpretation of the contract, or why the Applicants' subsequent knowledge of the Respondent's intentions, would impose any obligation on them or alter the nature of the contract. On the contrary, I view the lawyer review clause as an opportunity for the Respondent to seek legal advice on the tax implications of the purchase, an opportunity he did not make use of in time to rely on the clause.

[59] In *Grafton Developments Inc v. Allterrain Contracting Inc*, 2022 NSCA 47, Bryson JA, writing for the court, held:

> [23] Accordingly, post-contractual conduct should only be considered if, following interpretation of the provision that is in dispute, in light of the contract as a whole and the circumstances that existed at the time of contractual formation, there remains an ambiguity that supports different reasonable alternative interpretations…

[60] In this case, after considering the circumstances at the time of formation, and the wording of the contract, I find no ambiguity about the purpose of the contract. However, I will turn my mind to post-contract conduct in relation to the amendment made on April 1, 2022.

[61] The evidence indicates that the parties had turned their mind to the possibility of the introduction of the Taxes (through correspondence between real estate agents on March 31, 2022). After these conversations, the APS was amended, but still did not include a provision related to the Taxes, though it was clearly on the minds of the parties. The parties having chosen not to include a provision related to the Taxes in the APS, it follows that a supervening event related to the introduction of the Taxes was not referable to the contract.

[62] However, in the event I am wrong in my conclusion on this issue, I will continue with the analysis and determine whether the Taxes radically altered the nature of the contract.

d) Did the supervening event radically change the contract?

[63] The Respondent frames this aspect of the test as "did the imposition of the tax radically transform the nature of [his] investment in 867 Tower Road." The evidence before me suggests that the introduction of the Taxes did not substantially alter the nature of the contract. My reasons follow.

[64] The Respondent claims that his purchase of the Property for an investment purpose was frustrated by the Taxes. He says that ownership of the Property became financially unworkable when the Taxes were introduced because it would significantly increase his monthly expenses, such that these expenses could not be compensated by increasing the rent he charged for the two units. However, this argument is undermined by the fact that the Respondent purchased the Property expecting a $500-$1,000 shortfall when balancing rental income and expenses. Based on his tabled calculation of his estimated monthly expenses of $7,123, and his anticipated rental income of $5,346 ($2,346+$3,000), his actual shortfall is approximately $1,776 per month. The Respondent claimed that he had a surplus of funds that could cover the shortfall for the first six months but did not explain how he expected to address the shortfall afterwards. He noted that the rental cap increases of 2% per year was going to be in place until December 2023 (21 months after the anticipated closing date for the Property). Furthermore, the imposition of the Taxes (based on the Respondent's own calculations of monthly expenses) would only increase his shortfall by another $1,372 ($8,495-$7,123) per month (Affidavit of the Respondent, paras. 28, 34, 37, 40, 43, 54, 57, 89, 109-112). While this amount is not insignificant, I fail to see how this additional cost would be so burdensome to an already expected shortfall that it would frustrate the purchase when the Respondent was willing to live with an already substantial shortfall for an extended period. I make these comments to highlight the inconsistency of the Respondent's argument, not to accept his reasoning that the change in financial obligations radically changed the nature of the contract.

[65] The law of frustration does not ask for an assessment of the long-term consequences of the supervening event. It asks whether the supervening event impacted the essential terms of the contract itself, not whether the benefits of the contract will be varied by the supervening event. Therefore, my assessment will concern itself with the impact of the imposition of the Taxes on the face of the APS, and not on the benefits to the Respondent's investment. Similarly, I will not consider his income and ability to make mortgage payments when determining whether the contract is frustrated.

[66] In *FSC (Annex) Limited Partnership v. Adi 64 Prince Arthur LP*, 2020 ONSC 5055, the court commented on the change in market conditions and financial viability of a project:

> [25]… Even if there were a general freezing of liquidity, that would also not constitute frustration because restrictive lending practices are not unforeseen and

> are a common feature of economic downturns. Moreover, it is also a risk against which a purchaser can protect itself by making the purchase conditional upon financing.
>
> [26] Adi responds that it could not make the purchase conditional upon financing because a conditional purchase was not valid under the buy/sell provision. That misses the point. At its highest, that simply means that Adi did not have the financial wherewithal to exercise the purchase option and should not have done so. Adi must bear the risk of its choice.
>
> [27] It would be entirely unfair to let Adi exercise the purchase option and then let it claim frustration when it could not obtain financing as a result of an economic downturn. The potential for an economic downturn is an inherent risk in any purchase decision and is not one from which a purchaser should be protected by the doctrine of frustration.

[67] In the case before me, the Respondent also must bear the risk of choosing to purchase an investment Property when market conditions could change and make the investment less prosperous. That is the risk one takes when making an investment.

[68] The Respondent relies on *First Real Properties Ltd. v. Biogen Idec Canada Inc.*, 2013 ONSC 6281, in that case, according to the Respondent, a contract for the lease of workspace was frustrated because the installation of windows that was negotiated for in the contract would cost about ten times more than contemplated. This assertion is incorrect. In *Biogen*, the court found that the contract was frustrated, not merely because the windows would be more expensive, but because the cost of installing the windows exceeded the capped budget for renovations set out in the contract, and the only way not to exceed the budget was to install smaller windows. Furthermore, the court found that the placement of the windows was material to the contract, as it was important for the lessee to have natural light on that side of the office, which was known to both parties at the time of the contract and was incorporated into the building plans. In concluding the court held:

> [44] The discovery that the east wall was a weight bearing wall and would not receive the windows depicted in the offer to lease was an unforeseeable event which occurred without the fault of either party. There was no provision in the offer to lease to adjust the rights and obligations of the parties. The narrow window offered to Biogen meant that the performance of the agreement within the landlord's "cap" left Biogen with an office not fit for its desired purpose. *This was at the heart of the agreement.* To compel Biogen to proceed with the smaller windows would be to order Biogen to do something "radically different" from what the parties had agreed to (*Naylor*, at para. 55). The estimate was ten times the forecast cost for the windows. Performance of the agreement was impossible

> at that amount without disregarding the material aspects of their bargain. In my view, it would be unjust to hold Biogen to the offer in light of the new circumstances. The discovery that the wall was weight bearing was a "supervening event" which renders the agreement frustrated and unenforceable.
>
> (Emphasis added).

[69] This case shows that the size of the windows was important to the lessee, that this was known by the lessor before signing the contract, and that the installation of the windows, at that size, was provided for in the contract. If we apply the factual pattern from *Biogen* to this case, it is distinguishable. The Respondent did not make known his intention to rent out the Property before signing the contract and did not seek a provision relating to the investment potential of the project in the contract. In short, he did nothing to indicate that financial gain from the Property was material to the contract.

[70] *Fram Elgin Mills 90 Inc. v. Romandale Farms Ltd*, 2021 ONCA 201, is another example of a radical change to a contract that is distinguishable from this case. In that case, the agreement was frustrated because the parties contemplated a residential development being constructed within a few years. Policy changes resulted in the land not being available for residential use anymore, postponing the development for decades. This change is contrasted with the case before this Court, where the Property itself remained the same, as did the purchase price.

[71] Unlike in *Fram*, the Respondent's situation is like *Wilkie v. Jeong*, 2017 BCSC 2131, where the imposition of a new foreign buyer's tax increased the cost of completing the transaction. In determining that the contract was not frustrated, Justice Warren held:

> [33] From the terms of the Contract itself, it is apparent that its fundamental purpose was simply the transfer of the land; in other words, the provision of clear title in exchange for the purchase price. The seller was obliged to provide the transfer document and the buyer was obliged to pay the purchase price. There is nothing in the record concerning the circumstances existing at the time the Contract was entered into suggesting any different purpose. The question then is whether the effect of the Foreign Buyer Tax is of such a nature that performance of the Contract would result in something radically different from that contracted for.
>
> [34] As a result of the imposition of the Foreign Buyer Tax, there was an eight-fold increase in the property transfer taxes Ms. Jeong had to pay, from $58,040 to $458,240. Her overall financial obligation to complete the transaction increased about 15%. There is no doubt that the imposition of the Foreign Buyer Tax made

performance of the Contract by Ms. Jeong more onerous than she expected. However, it is well-established that increased expense or hardship alone does not frustrate a contract. Again, as stated by Lord Radcliffe in *Davis Contractors* at 729:

> ... it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

This statement was quoted with approval by the Supreme Court of Canada in *Peter Kiewit Sons' Co*, at 368 and by the Court of Appeal of this province in *KBK* at para. 13.

[38] That a lack of money to perform does not, generally, give rise to frustration is not surprising because, as noted, frustration arises from a supervening event that results in performance becoming a thing radically different from that which was undertaken. While a lack of money affects a party's ability to perform an obligation, it does not normally alter the nature or purpose of the obligation itself.

[39] The Contract does not expressly anticipate the imposition of a significant new tax liability that has to be satisfied by the buyer on application for registration of the transfer. The provision in the Contract requiring the buyer to pay all taxes, rates and other charges from the adjustment date is directed towards liabilities that, until the adjustment date, are liabilities of the seller. The Foreign Buyer Tax is a liability imposed on the buyer that was never a liability of the seller. While a change in the amount of the property purchase tax payable by a buyer of real estate in British Columbia may well be foreseeable, a change of this magnitude (an additional 15% of the fair market value) applicable to contracts already in existence prior to the announcement of the change was not reasonably foreseeable. It almost goes without saying that the Foreign Buyer Tax was not the fault of either party and was not self-induced. In these circumstances, the imposition of the Foreign Buyer Tax is a qualifying supervening event.

[40] However, the imposition of the Foreign Buyer Tax did not destroy the basis for the Contract. It did not radically change the nature of the parties' contractual obligations and performance of the Contract would not result in something different from that which was undertaken by the parties. To the contrary, the fundamental purpose of the Contract, namely, the transfer of title to the property in exchange for the purchase price, was entirely unaffected. The supervening event caused hardship to Ms. Jeong because it gave rise to an unexpected ancillary obligation to a third party, but it did not change the nature of her fundamental contractual obligation or undermine the foundation of the Contract.

[41] For these reasons, the Contract was not frustrated.

[72] Given the substantially similar fact pattern in this case, I have no trouble adopting Warren J.’s reasoning and coming to the same conclusion, that the

contract in this case was not frustrated. The introduction of the Taxes did not impact any of the terms of the APS, did not impact the purchase price, and did not impact how the Respondent could use the Property once it was purchased. The Taxes would impact the amount that the Respondent would pay in property taxes in subsequent years, but this consequence was not related to any of the material terms of the contract and, as the Applicants point out, would only impact the Respondent if he chose to retain the Property and to remain an out-of-province resident.

[73] Accordingly, the introduction of the Taxes did not change the Respondent's obligations or radically alter what he was purchasing. It simply made the Property less appealing, as it would be more expensive in subsequent tax years. Though it may have created collateral consequences for the Respondent, those consequences are just that, collateral to the contract. The Respondent cannot claim frustration of the contract based on these consequences.

Conclusion on frustration

[74] I conclude that the imposition of the Taxes was a foreseeable event that was not provided for within the contract. Additionally, the contract was not fundamentally altered by the imposition of the Taxes, because the purpose of the contract was the transfer of the Property for the stated purchase price, not the investment potential that the Property afforded to the Respondent. For these reasons I find that the contract was not frustrated.

Issue (d) - Did the Applicants reasonably mitigate their damages?

Positions of the parties

[75] The Applicants argue that they acted immediately to mitigate their damages by re-listing the Property on May 1, 2022, only three days after it became clear that the Respondent was not going to complete the transaction. The Applicants say that the Property received less attention on the second listing, and only had one offer, which they accepted. The affidavit of Jeffery Smith notes that the Applicants were concerned that the real estate market would not improve due to rising interest rates, and that they would not receive a better offer.

[76] The Respondent argues that the Applicants' decision to accept the first offer on the Property, despite having an open house scheduled after the first offer, did not maximize the value that the Applicants could have received from the Property.

The Respondent says that the Applicants bore no risk in waiting to ensure that they received the best possible price for their "million-dollar asset" (Respondent's brief, para. 85).

Applicable legal principles

[77] The long-held principle of damages for breach of contract is to award the aggrieved party expectation damages. In *CM Callow Inc. v. Zollinger*, 2020 SCC 45, Kasirer J., writing for the majority, described expectation damages as follows:

> [107] The ordinary approach is to award contractual damages corresponding to the expectation interest (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para. 108). That is, damages should put Callow in the position that it would have been in had the duty been performed.

[78] In *Roy v. 1216393 Ontario Inc.*, 2016 BCSC 1635, Harvey J. set out the general principle of expectation damages in relation to the failed sale of property:

> [75] The clearest statement of the law regarding the assessment of damages in real estate cases where sellers have breached the contract of sale is set out in Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 3rd ed. (Toronto: Irwin Law, 2014) at p. 75, where the learned authors observe as follows:
>
> > Expectation damages in real estate cases will be the difference between the contract price and the market price of the land, For example, if the vendor refuses to deliver the property at a contract price of $100,000, and its value has increased to $110,000 at the time of the breach, the vendor will be liable for $10,000 (and the buyer will be entitled to the return of any deposit paid). Likewise, if the buyer is in breach, and the land has decreased in value, the vendor will be entitled to the loss.
> >
> > (Emphasis added).

[79] Harvin Pitch and Ronald Snyder in *Damages for Breach of Contract*, 2nd ed., (Thomson Reuters: 2023), discussed the general principle underlying the duty to mitigate at § 10:1:

> The basic principle that a wronged party will be compensated for all pecuniary losses that result naturally from a breach of contract is subject to the important qualification that the wronged party must take all reasonable steps to prevent further losses once aware of the breach.
>
> …

> The Courts have generally been strict in requiring the plaintiff to mitigate damages. If a plaintiff fails in this obligation to mitigate, the damage award is reduced by the amount of the loss which could have been avoided.

[80] It is well-established that a party claiming damages has a duty to take all reasonable steps to minimize its loss. In *Duchene v. Veniot*, 13 A.C.W.S. (3d) 210, 230 A.P.R. 74, Burchell J., stated:

> 3 ... On this aspect of the case the defendants rely on the following summary of relevant principles extracted from Waddams' *The Law of Damages* (Toronto: Carswell, 1983) beginning at p. 695:
>
> > The leading case on mitigation is generally taken to be *British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London Ltd.*, where Viscount Haldane said:
> >
> > > The fundamental basis [of a damage assessment] is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps.

[81] As noted in *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, the onus to prove a failure to mitigate rests on the party alleging a lack of mitigation. Justice Karakatsanis writing for the majority held:

> [24] In *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74 (S.C.C.), at para. 176, this Court explained that "[l]osses that could reasonably have been avoided are, in effect, caused by the plaintiff's inaction, rather than the defendant's wrong." As a general rule, a plaintiff will not be able to recover for those losses which he could have been avoided by taking reasonable steps. Where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible (*Michaels v. Red Deer College* (1975), [1976] 2 S.C.R. 324 (S.C.C.); *Asamera Oil Corp.*; *Evans v. Teamsters, Local 31*, 2008 SCC 20, [2008] 1 S.C.R. 661 (S.C.C.), at para. 30).
>
> [25] On the other hand, a plaintiff who does take reasonable steps to mitigate loss may recover, as damages, the costs and expenses incurred in taking those reasonable steps, provided that the costs and expenses are reasonable and were truly incurred in mitigation of damages (see P. Bates, "Mitigation of Damages: A Matter of Commercial Common Sense" (1991-92), 13 *Advocates Q.* 273). The valuation of damages is therefore a balancing process: as the Federal Court of Appeal stated in *Redpath Industries Ltd. v. "Cisco" (The)* (1993), [1994] 2 F.C.

> 279 (Fed. C.A.), at p. 302,: "The Court must make sure that the victim is compensated for his loss; but it must at the same time make sure that the wrongdoer is not abused." Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the case.

[82] In *Saturley v. Lund*, 2007 NSSC 387, Coughlan J., addressed an alleged failure to mitigate for a property sale that fell through. He held that the defendant's duty to show a failure to mitigate was "not a light one" (para. 11). Justice Coughlin found that the plaintiffs did have a duty to mitigate their damages, and that their choice not to accept an offer on the house was unreasonable.

[83] When assessing reasonableness of mitigation, Pitch and Snyder in *Damages for Breach of Contract*, 2nd ed., (Thomson Reuters: 2023) are quick to also point out that a court should not impose an exacting standard on the innocent party, as they note at §10:12:

> In determining whether the plaintiff's efforts at mitigation were reasonable, the Court considers the plaintiff's actions in terms of the facts which existed when the contract was breached, i.e., when the plaintiff was faced with the obligation to act immediately. In so doing, the Court places its sympathy squarely with the plaintiff. In *Banco de Portugal v. Waterlow & Sons Ltd.*, Lord Macmillan explained the rationale for not imposing an exacting standard of reasonableness as follows:
>
> > … Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extract himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken….
>
> This sympathy in favour of the innocent party must not be ignored when reading judgments dealing with mitigation. The Court does not impose upon the innocent plaintiff an exacting standard but instead adopts a practical perspective in line with business realities.
>
> (footnotes omitted)

Analysis

[84] As noted in the Respondent's brief, the imposition of the Taxes reduced the number of non-resident buyers in the Nova Scotia market. Additionally, the Respondent says that if the Taxes had been announced earlier that the Applicants would "never have been able to sell the property (at least to [the Respondent]) at that price" (Respondent's brief at para. 63). Although this statement is speculative, I do accept that the Taxes narrowed the market of prospective buyers and may have impacted the sale price of the Property. This could be a factor to explain the slow-down of the market as described by Ms. Hopgood in her affidavit and is relevant to the reasonableness of the Applicants' mitigation efforts.

[85] The doctrine of mitigation is often used to evaluate a claimant's inaction to address their losses. In this case, the Applicants acted with almost no delay in their mitigation efforts. Their contract with the Respondent fell through on April 28, 2022. The Respondent indicated on April 26, 2022 that he was not going through with the Property purchase, but the Applicants did not receive a formal letter from the Respondent's counsel until April 28, 2022. Even if I were to accept April 26, 2022 as the breach date, this does not change my analysis. The Property was relisted on the following Monday, May 1, 2022.

[86] The Respondent says that the Applicants should not have cancelled the open house that had been scheduled. He notes that the first time the Applicants put the Property on the market they had over 30 showings and received six offers. He claims that if the Applicants had left the house on the market for a month without receiving much interest or many offers then it would be reasonable to accept a lower offer, such as the one they accepted. He argues that the Applicants would risk nothing by leaving the house on the market.

[87] However, accepting this reasoning requires me to assume that additional offers would be forthcoming. Though this is certainly a possibility, there was no guarantee that the open house would produce additional offers on the Property, or that those offers would be higher than the offer they accepted. Why would the Applicants risk turning down an offer for the chance at a higher offer, especially when that offer was equal to the second highest offer they received when the Applicants first put the Property on the market?

[88] If the Applicants did not receive an offer similar to the Respondent's offer (the Respondent's offer was $270,000 more than the second highest offer) after over 30 showings in a more active market, it is entirely reasonable that they would

not expect to receive a similar offer for the Property its second time on the market, when it "received significantly less interest" (Affidavit of Brehannah Hopgood, at para. 27). Indeed, in Jeffery Smith's affidavit he deposed that he did not think that the market would improve (para. 16).

[89] The Respondent correctly states that he would be responsible for reimbursement of the carrying costs for the Property if he is found liable, he does not account for the fact that the Applicants would need to pay those carrying costs in the interim, and indeed may never recoup those costs if he is not found liable. Contrary to the Respondent's statement, there was a risk to the Applicants if they left the Property on the market for an extended period.

[90] If the circumstances were reversed and the Applicants had rejected the first offer, held an open house, did not receive a higher offer, and eventually accepted a lower offer, the Respondent would likely be arguing that the Applicants did not reasonably mitigate their damages by virtue of having turned down a higher offer.

Conclusion on mitigation of damages

[91] Applying fairness and common sense to this analysis, I conclude that the Respondent has not met his burden of proving that the Applicants did not mitigate their damages.

Conclusion

[92] The Respondent breached the APS by failing to complete closing transactions on the Property. The APS was not frustrated by the introduction of the Taxes. The Applicants acted reasonably to mitigate their damages by re-listing the Property shortly after the sale fell through and accepting a reasonable offer without delay. The offer that the Applicants accepted was lower than the Respondent's offer, and the Applicants suffered a loss.

[93] I order the Respondent to pay $260,000 to the Applicants which represents the difference in the Property sale between the Respondent's offer and the final sale price of the Property, less the $10,000 deposit. I would ask that counsel for the Applicants prepare the order.

[94] The parties have not made submissions on costs. If the parties are unable to agree to costs, I will accept written submissions within 30 days from the date of this decision.

Bodurtha, J.