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2009 ABQB 647
Alberta Court of Queen's Bench

BA Energy Inc., Re

2009 CarswellAlta 1818, 2009 ABQB 647, [2010] 2 W.W.R. 125, [2010] A.W.L.D. 71, [2010] A.W.L.D. 72, 15 Alta. L.R. (5th) 86, 182 A.C.W.S. (3d) 236, 481 A.R. 365, 63 B.L.R. (4th) 219

In the Matter of the Section 193 of the Alberta Business Corporations Act, R.S.A. 2000, c. B-9, as amended; And in the Matter of the Judicature Act, R.S.A. 2000, c. J-2, as amended; And In the Matter of a Proposed Arrangement involving Value Creation Inc., BA Energy Inc. and the holders of common shares of Value Creation Inc; And In the Matter of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended; And In the Matter of BA Energy Inc.

B.E. Romaine J.

Judgment: November 11, 2009
Docket: Calgary 0801-16292

Counsel: Jean van der Lee, Q.C. for Applicant, Jacobs Canada Inc.
Randal Van de Mosselaer for BA Energy Inc.

Subject: Estates and Trusts; Civil Practice and Procedure; Corporate and Commercial; Contracts

Headnote

Estates and trusts --- Trusts — Constructive trust — General principles

Agent procured goods and services for business for its projects — Payment for goods and services arranged by agent were paid through bank accounts — Agent purchased pumps for business, which totalled $459,518.60 — Agent paid for pumps by wire transfer from own funds, and did not seek reimbursement for several months — Business entered protection under Companies' Creditors Arrangement Act — Agent wrote itself cheque on account for reimbursement, which bounced — Agent brought proceedings for declaration that funds in account were impressed with trust — No trust existed — No express trust in documents — Good conscience constructive trust did not exist — Business had no equitable duty to agent, and duty to place funds in account was merely contractual — No wrongful conduct arose that gave rise to equitable breach — Unfair to other creditors to impose constructive trust — No unjust enrichment occurred as benefit came with contractual liability — Property involved was not unique, but was merely debt.

Estates and trusts --- Trusts — Resulting trust — Rebuttal of presumption of resulting trust — Miscellaneous issues

Agent procured goods and services for business for its projects — Payment for goods and services arranged by agent were paid through bank accounts — Agent purchased pumps for business, which totalled $459,518.60 — Agent paid for pumps by wire transfer from own funds, and did not seek reimbursement for several months — Business entered protection under Companies' Creditors Arrangement Act — Agent wrote itself cheque on account for reimbursement, which bounced — Agent brought proceedings for declaration that funds in account were impressed with trust — No trust existed — No express trust in documents — No implied trust as no certainty of intention or of object — Agent was in most transactions conduit through which money flowed, not beneficiary of trust regarding funds — Documentation showed that agency relationship was intention of parties, not trust relationship — Specific purpose of clearing account did not in itself create trust — Business did not lose control of funds after placed in account — Account was in business's name — Agent did not obtain payment in timely manner — Claim was not post-filing claim.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Ambrozic v. Burcevski (2008), 90 Alta. L.R. (4th) 247, 41 E.T.R. (3d) 1, 429 W.A.C. 25, 433 A.R. 25, 2008 CarswellAlta 652, 2008 ABCA 194, 53 R.F.L. (6th) 242 (Alta. C.A.) — referred to

Bank of Nova Scotia v. Société Générale (Canada) (1988), 1988 CarswellAlta 288, 58 Alta. L.R. (2d) 193, [1988] 4 W.W.R. 232, 68 C.B.R. (N.S.) 1, 87 A.R. 133 (Alta. C.A.) — considered

Canada Deposit Insurance Corp. v. Principal Savings & Trust Co. (1998), [1999] 4 W.W.R. 188, 24 E.T.R. (2d) 239, 1998 CarswellAlta 631, 63 Alta. L.R. (3d) 68, 224 A.R. 331 (Alta. Q.B.) — considered

Caterpillar Financial Services Ltd. v. 360networks Corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 61 B.C.L.R. (4th) 334, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — considered

Luscar Ltd. v. Pembina Resources Ltd. (1994), 24 Alta. L.R. (3d) 305, (sub nom. *Luscar Ltd and Norcen v. Pembina Resources Ltd.*) 162 A.R. 35, 83 W.A.C. 35, [1995] 2 W.W.R. 153, 1994 CarswellAlta 251 (Alta. C.A.) — referred to

McEachren v. Royal Bank (1990), 2 C.B.R. (3d) 29, [1991] 2 W.W.R. 702, 111 A.R. 188, 78 Alta. L.R. (2d) 158, 1990 CarswellAlta 234 (Alta. Q.B.) — considered

Soulos v. Korkontzilas (1997), [1997] 2 S.C.R. 217, 212 N.R. 1, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241 (S.C.C.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

HEARING regarding existence of trust regarding money placed in account used by agent.

***B.E. Romaine J.*:**

Introduction

1 In this proceeding under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), Jacobs Canada Inc. asserted that certain funds that had at one point been deposited into a special bank account by BA Energy Inc. were impressed with an express, implied or **constructive trust**. Jacobs also submitted that it was a post-filing creditor unaffected by a Plan of Arrangement because the breach of trust occurred after B.A. Energy's initial filing date under the **CCAA**. I dismissed Jacobs' application on these grounds, and these are my reasons.

Facts

2 Pursuant to a contract dated July 20, 2004, B.A. Energy retained Jacobs to act as its agent to procure goods and services of third parties as required to complete a project known as the Heartland Upgrader Project ("the Project").

Attached as a schedule to this contract was an agency agreement ("the Agency Agreement") pursuant to which Jacobs agreed to act as agent and bare trustee for B.A. Energy. The Agency Agreement does not contain a reciprocal obligation pursuant to which B.A. Energy would act as agent, or in any other capacity, on behalf of Jacobs. The contract also set out a "Bank Schedule" that outlined a process for funding the purchase of goods and services.

3 In addition, B.A. Energy and Jacobs entered into a written arrangement dated March 23, 2006 clarifying the funding arrangements and establishing a method of making payments to Jacobs through two bank accounts (the "Payment Arrangement"). The Payment Arrangement provided that Jacobs and B.A. Energy would each open a new bank account in their own names at the TD Bank. Through these accounts, B.A. Energy would make payment for invoices in relation to the Project.

4 In accordance with the Payment Arrangement, B.A. Energy opened the "Clearing Account" and Jacobs opened the "Zero Balance Account" with the TD Bank. In the normal course:

> (a) every week, Jacobs would issue to B.A. Energy a list of invoices to be paid;
>
> (b) after it had approved the invoices, B.A. Energy would transfer sufficient funds into the Clearing Account to cover those invoices;
>
> (c) once B.A. Energy had deposited funds into the Clearing Account, Jacobs would write cheques to third party suppliers out of the Zero Balance Account to pay approved invoices; and
>
> (d) at the end of each day, TD Bank would automatically transfer sufficient funds from the Clearing Account to the Zero Balance account to cover any cheques that were cashed that day, so as to maintain a zero balance in the Zero Balance Account.

In the summer of 2008, Jacobs arranged for the procurement of the Flowserve Pumps from an overseas third-party equipment supplier. In early October, 2008, Jacobs received an invoice in the amount of $495,518.60 relating to the Flowserve Pumps, and provided the invoice to B.A. Energy for approval and payment pursuant to the Payment Arrangement. B.A. Energy approved the invoice and deposited funds to the Clearing Account to cover the invoice on November 5, 2008.

5 The supplier required payment via international wire transfer. On or about November 7, 2008, Jacobs paid for the Flowserve Pumps from its own resources. Jacobs did not seek reimbursement out of the Zero Balance Account for several months.

6 On December 30, 2008, B.A. Energy obtained an Initial Order under the **CCAA** in these proceedings. In February, 2008, B.A. Energy withdrew the funds from the Clearing Account. Counsel for the Monitor reported that this was done on the recommendation of the Monitor.

7 On February 11, 2009, Jacobs wrote itself a cheque on the Zero Balance Account in the amount of $495,518.60 to cover the amount forwarded to the supplier to pay the invoice. That cheque was subsequently dishonoured by the TD Bank.

Analysis

8 Jacobs submits that either a trust exists by reason of an intention to create such trust, either express or implied, or that the law should impose a **constructive trust** on the funds.

9 It is clear that there are no express words or agreement in the contractual documents that establish that the funds in question were intended to be beneficially held in trust for Jacobs. The funds were held in the Clearing Account, an account in B.A. Energy's name. Jacobs had no interest in the Clearing Account and no access to the funds unless and

until they were transferred into the Zero Balance Account in accordance with the contractual arrangements between the parties.

10 The issue, therefore, is whether the parties intended to create an express or implied trust. The parties agree that for a trust to exist, there must be three certainties:

> (a) certainty of the subject matter or trust property of the trust;
>
> (b) certainty of the object or persons intended to be the beneficiaries of the trust; and
>
> (c) certainty of intention on the part of the settlor to create a trust.
>
> D.W.M. Waters, Q.C., *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005) at 132.

11 Jacob's submission that an express or implied trust exists fails with respect to both the requirements of certainty of object and certainty of intention.

12 With respect to certainty of the object or person intended to be the beneficiary of the trust, Jacobs appears to argue that, since the Clearing Account was opened to benefit the payees of cheques written on the Zero Balance Account, the funds deposited into that account would benefit Jacobs and that Jacobs was thus the object of the trust. As B.A. Energy points out, this analysis would lead more readily to a finding that the vendors who provided goods and services to B.A. Energy and who would be paid by a cheque on the Zero Balance Account would be the beneficiaries of the trust, if the other certainties were established. Even so, that was not what actually occurred with respect to this specific invoice as Jacobs altered the usual method of payment.

13 Jacobs departed from the Payment Arrangement and paid the vendor for the Flowserve Pumps out of Jacobs' own resources. Jacobs departed further from the Payment Arrangement by failing to write itself a cheque on the Zero Balance Account in the week this transaction occurred. Some four months later, after the CCAA proceedings had been commenced, Jacobs attempted to reimburse itself by writing a cheque on the Zero Balance Account (thus becoming both the payor and the payee of the funds). I accept that it is not plausible or supportable under the contractual arrangements that B.A. Energy ever intended Jacobs to be a beneficiary of money paid into the Clearing Account. Instead, the contracts provide that Jacobs would be a conduit through which funds would flow to third party vendors.

14 Even more problematic for Jacobs is the requirement of certainty of intention. To find certainty of intention, I must find "an intention that the trustee is placed under an imperative obligation to hold the property on trust for the benefit of another.": Eileen E. Gillese, The Law of Trusts, (Concord, Ont.; Irwin Law, 1997) at 39.

15 The intention of the parties as expressed in the Agency Agreement and the Bank Schedule is to create a contractual agency relationship, rather than a trust relationship, with Jacobs as an "agent and bare trustee" for its principal B.A. Energy for the limited purposes of the Agency Agreement. While the reference to "bare trustee" may impose on Jacobs the requirement to convey property it holds for B.A. Energy to B.A. Energy upon demand, there is nothing in the contracts or schedules that supports an intention that through this mechanism, B.A. Energy would settle funds for the benefit of Jacobs, or indeed that it would create a trust to settle funds for the benefit of third party vendors.

16 The contractual provisions set up a process to facilitate the efficient flow of funds through to third party suppliers with Jacobs as agent for B.A. Energy.

17 Jacobs submits that certainty of intention can be ascertained though an examination of the surrounding circumstances and conduct of the parties, citing *Bank of Nova Scotia v. Société Générale (Canada)*, [1988] A.J. No. 332 (Alta. C.A.) at para.9, where Stratton, J.A. held that the creation of a trust does not require express words but can be found where the agreement as a whole shows evidence of an intention to create trust. *Bank of Nova Scotia* involved a situation where the applicants were non-operators involved in joint venture with a bankrupt operator. The non-operators

had provided funds to the operator under an agreement pursuant to which the operator was to act for the non-operators in the exploration and development of lands for the joint account. Similarly, in *McEachren v. Royal Bank*, [1990] A.J. No. 1145 (Alta. Q.B.), an applicant had provided funds to a mortgage company with specific instructions to invest the funds in safe mortgages. In both cases, the party exercising discretion or control over funds provided by the applicants was deemed a trustee.

18 The present situation is quite different. B.A. Energy was providing funds over which Jacobs could exercise control by following the established banking arrangements set out in the Payment Arrangement.

19 The process, if followed strictly by Jacobs, reduces Jacobs' risk under the contract. The problem is that Jacobs failed to protect itself using the contractual mechanisms available to it until the funds were no longer in the Clearing Account.

20 Jacobs asserts that the arrangement was evidence of B.A. Energy's intention to transfer a beneficial interest in the funds to Jacobs for the purpose of paying third party suppliers. There is, however, no indication in the contractual language of such an intention and nothing arising from the circumstances that would support such an assertion. The Payment Arrangement sets out a method of making payments to third parties, not a deposit "in trust' for Jacobs. While the Clearing Account was set up for a specific purpose, that factor alone is insufficient to establish a trust relationship in the absence of other evidence that would indicate such an intention. As B.A. Energy notes, language creating a trust could easily have been incorporated into the Bank Schedule or the Payment Arrangement.

21 Jacobs submits that once funds were deposited into the Clearing Account, B. A. Energy lost control of them. That this was not the case is clearly evidenced by what actually happened. Jacobs' protection under the contractual arrangements arose from its ability to act diligently to access the funds through the Payment Arrangement. Its failure to do so does not convert a purely contractual arrangement into a trust. It is important to note that B.A. Energy does not deny that Jacobs is a creditor, but submits that it must rank with other unsecured creditors for the purpose of a Plan of Arrangement. Jacob has not established the requisite certainty of intention that would elevate its claim through the finding of an express or implied trust above those of other unsecured creditors.

22 With respect to whether the funds should be impressed with a **constructive trust**, the parties are in agreement with respect to the requirements that must be met before a court makes such a finding. The remedial **constructive trust** is recognized as an appropriate remedy in two situations:

> (a) where there has been a wrongful act, such as fraud or breach of duty of loyalty (a "good conscience" trust); and
>
> (b) where there has been unjust enrichment and corresponding deprivation (a trust based on unjust enrichment).

Ambrozic v. Burcevski, 2008 ABCA 194 (Alta. C.A.) at para. 48.

23 In *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.) at para. 45, McLachlin J. identifies four conditions that generally should be satisfied before a court imposes a **constructive trust** based on good conscience:

> 1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> 2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> 3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
>
> 4) There must be no factors which would render the imposition of a **constructive trust** unjust in all the circumstances of the case; e.g. the interests of intervening creditors must be protected.

24 McLachlin J. also addresses at para. 33 the equitable foundations and rationale underpinning the imposition of the good conscience trust, stating that:

> Good conscience addresses not only fairness between the parties before the court, but the larger public concern of the courts to maintain the integrity of institutions like fiduciary relationships which the courts of equity supervised ...
>
> The **constructive trust** imposed for breach of fiduciary relationship thus serves not only to do the justice between the parties that good conscience requires, but to hold fiduciaries and people in positions of trust to the high standards of trust and probity that commercial and other social institutions require if they are to function effectively.

25 While it is not necessary for the purpose of this application to determine if a fiduciary relationship existed between B.A. Energy and Jacobs arising from the Agency Agreement, any fiduciary obligations imposed under that agreement were imposed on Jacobs as agent for B.A. Energy, and not on B.A. Energy as a principal. While it is clear that a **constructive trust** may arise in the context of a fiduciary relationship, it does not follow that this is always the case: *Waters' Law of Trusts* at 43.

26 In this case, the relationship between B.A. Energy and Jacobs does not evidence the conditions that will generally be required to be present before a good conscience **constructive trust** is imposed. B.A. Energy had no equitable duty or obligation to Jacobs. Its duty to place funds in the Clearing Account was a contractual duty only. While a breach of contractual obligation, if one occurred, may give rise to the imposition of a **constructive trust**, it appears that this generally arises where, as in *Soulos*, the breach of contract is related to specific property and involves "the acquisition of that property in a way which is causally connected to the breach." *Waters' Law of Trusts* at 507.

27 As there was no equitable breach that arose when B.A. Energy finally withdrew the funds from the Clearing Account, there was no "wrongful conduct" of the type generally thought necessary to engage the equitable jurisdiction of the court or that would move the court to impose a **constructive trust** on the basis of the good conscience. The relationship between B.A. Energy and Jacobs was a commercial relationship between sophisticated business entities, well-documented through detailed contracts. This relationship does not engage the wider considerations and deterrence factors generally present where there has been the imposition of a **constructive trust**.

28 Unfortunately for Jacobs, it was the victim of its failure to claim payment through the Payment Arrangement in a timely manner. It would be unfair to B.A. Energy's other creditors to impose a **constructive trust** in the circumstances. As noted in *Canada Deposit Insurance Corp. v. Principal Savings & Trust Co.*, [1998] A.J. No. 756 (Alta. Q.B.) at para. 44, because a **constructive trust** is an equitable remedy imposed by the court, the effects of imposing such a remedy on all parties must be considered prior to making such an order.

29 With respect to a **constructive trust** based on unjust enrichment, it is doubtful whether Jacobs could establish that B.A. Energy has obtained an enrichment because "where there exists a contract under which parties are governed, and one party gains by a breach of the same, that party is not truly enriched, because the breaching party takes that gain subject to its liability for breach of contract: *Luscar Ltd. v. Pembina Resources Ltd.* (1994), 162 A.R. 35 (Alta. C.A.) at para. 117.

30 Thus, even if B.A. Energy breached the Payment Arrangement by closing the Clearing Account before Jacobs attempted to access the funds, this would be merely a breach of the contractual provision between the parties. While a breach of contract can give rise to the imposition of a **constructive trust**, this situation does not involve property of a unique nature that should be returned to its rightful owner, but an indebtedness owed by B.A. Energy to Jacobs. As noted previously, B.A. Energy does not deny its indebtedness to Jacobs.

31 Even if the criteria of enrichment and corresponding deprivation could be established, however, there exists a juristic reason for the enrichment in Jacobs' failure to access the funds when that option was open to it. The situation is similar to the situation that existed in *Caterpillar Financial Services Ltd. v. 360networks Corp.*, [2007] B.C.J. No. 22

(B.C. C.A.), where Tysoe, J. found that Caterpillar's failure to perfect its security interest resulted in the secured lenders having priority with respect to these unperfected interests. As the court noted at para 62:

> ... it is clear that when Caterpillar entered into the leases, it intended to secure the obligations owed by 360 by retaining title to the units. Pursuant to the PPSA, Caterpillar could perfect its security by registration. The failure to register or perfect its security meant that, as between Caterpillar and any third parties, Caterpillar was a general creditor in respect of its units 2 and 3. Although Caterpillar had negotiated with 360 to be a secured creditor, it ultimately failed to protect its status as a secured creditor under the PPSA. As such, Caterpillar must be taken to have accepted the risk posed by 360's eventual insolvency. In my view, Caterpillar should not be able to invoke **constructive trust** principles to alter its reduced creditor status.

32 In this case, B.A. Energy withdrew funds from the Clearing Account when Jacobs failed to attempt to access them in a timely way in accordance with the Payment Arrangement. Jacobs thus lost its right to assert a claim over the funds, and ought not be given priority over other unsecured creditors through the use of the **constructive trust** remedy.

Conclusion

33 Jacobs failed to establish an intention to create a trust, express or implied, and failed to establish that it was entitled to the imposition of a **constructive trust**. Given that no trust existed, B.A. Energy's obligation to reimburse Jacobs for the payment Jacobs made on its behalf arose on or about November 5, 2009 and Jacobs' claim cannot be characterized as a post-filing claim.

Order accordingly.

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Extension of time for proceeding on caveat

140 On application to a judge at any time before the expiration of the time limited for proceeding on a caveat, the judge, for sufficient cause shown and subject to any conditions that seem proper, may extend the time for proceeding on the caveat for a further period to be specified in the order.

RSA 2000 cL-4 s140;2009 c53 s95

Application to discharge caveat

141(1) In the case of a caveat filed, except a caveat filed by the Registrar as hereinafter provided, the applicant or owner may at any time apply to the court, subject to the *Alberta Rules of Court*, calling on the caveator to show cause why the caveat should not be discharged, and on the hearing of the application the court may make any order in the premises and as to costs that the court considers just.

(2) If a caveat has been filed with the Registrar pursuant to section 130 and the caveat is based on an unregistered mortgage or encumbrance, the Registrar shall cancel the memorandum of it

(a) on the certificate of title to the land affected by the caveat on the production of a certificate signed by a judge certifying that the judge is satisfied of the payment of all money secured by the mortgage or encumbrance and that the mortgagee or encumbrancee is living, or if dead, that no succession duty or other tax is payable to the Crown in right of Alberta with respect to the mortgage or encumbrance, or

(b) on production of a certificate signed by a judge certifying that all obligations, the performance of which has been secured by the mortgage or encumbrance, have been performed and have come to an end.

RSA 2000 cL-4 s141;2009 c53 s95

Order for security

142 In any proceedings in respect of a caveat the court

(a) may order that the caveator give an undertaking or security that the court considers sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed or to answer the costs of the caveatee,

(b) may direct the Registrar to delay registering any instrument dealing with the land, mortgage or encumbrance during the time the order of the court provides,

14

1990 CarswellAlta 433, [1990] A.W.L.D. 578, [1990] A.J. No. 643, 107 A.R. 346

Most Negative Treatment: Distinguished
Most Recent Distinguished: We Believe (1988) Land Corp. v. Marquis Scenic Acres Development Corp. | 1991 CarswellAlta 759, 126 A.R. 30, [1991] A.W.L.D. 685, 28 A.C.W.S. (3d) 726 | (Alta. Q.B., Aug 9, 1991)

1990 CarswellAlta 433
Alberta Court of Queen's Bench

Makowecki v. St. Martin

1990 CarswellAlta 433, [1990] A.W.L.D. 578, [1990] A.J. No. 643, 107 A.R. 346

Boris Makowecki and Brenda Makowecki Plaintiffs (Defendants by Counterclaim) v. D'Arcy St. Martin Defendant (Plaintiff by Counterclaim)

Fraser J.

Judgment: July 23, 1990
Docket: Doc. Edmonton 8803-14661

Counsel: *J. Odishaw* for Plaintiffs.
J. Power for Defendant.

Subject: Property; Contracts

Headnote

Sale of Land --- Agreement of purchase and sale — Formation of contract — Requirements for validity — Certainty

Subject-matter — Essential components.

The key ingredients required in a contract for the sale of land are the parties, the land description and the price.

Sale of Land --- Agreement of purchase and sale — Interpretation of contract — Conditions — Conditions precedent — Approval of municipal planning authorities

Vendor's failing to disclose to purchaser fulfilment of condition precedent rendering vendor unable to complain of purchaser's failure to tender.

A clause in the contract executed by purchaser and vendor for the sale of land entitled purchaser to a refund of the deposit on the event that the proposed subdivision on which the lot was located was not completed. Purchaser sought an order for specific performance upon vendor's failure to convey title of such lot to him. Vendor defended the action on the ground that purchaser failed to tender the cash to close on or before the closing date. Held, the order for specific performance was granted. The clause constituted a true condition precedent, and as such, impliedly obligated vendor to apply for and to use his best efforts to obtain subdivision approval. As no evidence was led to confirm that the original plan was submitted to the subdivision approving authority, vendor, having breached his implied obligation, was not entitled to rely on the non-fulfilment of the condition precedent and the failure to tender as a defence to purchaser's breach of contract action. No proper notice was ever given by vendor to purchaser confirming fulfilment of the condition precedent.

Specific Performance — Grounds for refusal — Effect of change to size of property

Size of lot increasing following execution of contract.

Purchaser sought an order for specific performance as a result of vendor's breach of contract and failure to convey title of a lot to him. Purchaser, on executing the contract of sale, was adamant that he wanted "the lot at the top of the crest" for the purpose of constructing his home. Although the lot in question was approximately twice the size than that contemplated under the original plan, the additional land did not increase the size of the lot on which purchaser could construct his home, nor did it enhance the aesthetics of the lot. Held, purchaser was entitled to specific performance, subject to the condition that vendor be paid an amount representing the cost of acquiring the additional land as well as the cash required to close the transaction.

Agreements for sale — Remedies of purchaser — Specific performance.

The plaintiffs alleged they had a valid subsisting agreement for the purchase of a lot in a subdivision which the defendant was developing and on which they intended to build a house. The plaintiff husband claimed that in September 1986 he and the defendant, with a contractor hired by the defendant, staked a lot containing 2.32 hectares and designated as Lot 9 on the original subdivision plan (Lot 7 on the final plan). The plaintiffs gave the defendant a cheque for $20,000. When the defendant requested another $5,000, the plaintiffs had a written agreement executed. It provided for a $20,000 deposit with the $5,000 balance to be paid 30 days after title registration. In the contract the defendant agreed to pay 10 per cent annual interest on the $20,000, and to refund all of it should the subdivision fail to complete. In consideration for the extra $5,000, the plaintiffs included a term that the defendant would clear the lot. However, clearing cost more than anticipated, and the parties agreed to share the $3,000 cost. The plaintiffs' cheque for their share of the clearing costs was eventually deposited in the account of the defendant's holding company. The defendant then asked the plaintiffs to sign a new contract in blank, which they did. The defendant advised the plaintiffs that he would fill it in later. This contract referred to Lot 9 as containing 2.72 hectares, and required the plaintiffs to pay more money for the increase in size. The defendant did not execute this subsequent contract, and the plaintiffs never received a copy of it. Between November 1986 and December 1987 the plaintiffs did not inquire about the registration process as they had been told it would take at least six months. In December 1987 the defendant requested another $10,000 for the lot because he had been required to purchase 10.84 acres of adjoining environmental reserve land which he intended to attach to the subdivision lots. Thus Lot 7 as it was now known increased from 2.32 hectares to 4.6 hectares; however, the extra land was steep hillside and was virtually unusable. The plaintiffs did not tender the balance owing under the original contract within the stipulated time. They claimed they did not know the subdivision had been registered until they learned their lot was for sale under an April 1988 listing agreement for $38,500. The plaintiffs filed a caveat against Lot 7 and sued the defendant for specific performance or alternatively for damages for breach of contract. They sent their counsel a letter confirming that they had sufficient funds in trust to close the transaction. The defendant disputed all of the plaintiff's testimony, claiming the $20,000 had been a loan secured by the original contract. He denied that he had ever negotiated to sell Lot 7, and argued that the subsequent contract rescinded the original one. He said that in any event, the original contract was contingent upon fulfillment of a condition precedent - i.e., registration of the subdivision as proposed in the original plan — which was never fulfilled through no fault of the defendant. He was willing to return the plaintiffs' deposit with interest, and he counterclaimed for an order that the caveat was wrongly filed and for damages resulting therefrom. *Held*, judgment for plaintiffs; specific performance ordered. The defendant's evidence on all key points was weak and not credible, particularly in the face of evidence from other witnesses which corroborated the plaintiff's version. Therefore, based on the evidence, the defendant did agree to sell Lot 9, which later became Lot 7, to the plaintiffs pursuant to the original contract. This contract contained all the key ingredients required to effect the sale of land and was not intended, nor did it constitute, a security instrument for a loan. Moreover, it remained in full force and effect as the subsequent contract neither replaced, amended nor rescinded the original contract. It contained a true condition precedent in that the defendant's obligation to convey title was contingent upon his securing all required subdivision approvals contemplated under the Planning Act. An implied obligation rested on the defendant to apply for subdivision in accordance with the original plan and to use his best efforts to obtain it. The defendant did not discharge this onus; he led no credible evidence to confirm that he ever submitted the original plan to the subdivision approving authority or that the plan was ever

rejected. Moreover, even if the original plan had been rejected because of the requirement to buy the environmental reserve land, there was no evidence that subdivision approval was conditional on attaching the adjacent land to Lot 7. Having breached his implied obligation in this regard, he could not rely on non-fulfillment of the condition precedent as a defence to breach of contract. Nor was it significant that the plaintiff's had not tendered the cash to close on time. When a closing date is linked to fulfillment of a condition precedent in the contract, it is an implied term that the vendor has to inform the purchaser that the condition precedent has been met. If he does not, he cannot argue that the purchaser has failed to tender cash to close on or before the closing date. Moreover, the plaintiffs' letter to their counsel confirmed that they were ready, willing and able to close the transaction. As the defendant had already listed Lot 7 for sale, which amounted to an anticipatory breach of contract, the plaintiffs needed to do nothing further. The courts are generally willing to grant specific performance unless the purchaser is buying for immediate resale or investment. This was not the situation here. The fact that the lot was now much larger than originally contemplated should not prevent the application of the same general principle employed in cases where the lot is smaller; providing it would not be unjust, unfair or highly unreasonable to do so, the court could order specific performance with an appropriate adjustment of price. The purchaser would then have the option of taking the larger parcel and paying an additional amount, or alternatively, it could treat the contract as rescinded with a right to a refund of all moneys paid, with interest. A third alternative would be damages for the breach. Specific performance was a reasonable remedy here: the increase in the size of the lot was of little use and less aesthetic value and it was easy to calculate the price adjustment. The cost of the reserve was about $700 per hectare, meaning the cost of the extra 2.3 hectares in Lot 7 was about $1,600. The plaintiffs had paid $25,000 for a lot of the same size, so the increase in value was minor, relative to the increase in size. Consequently, the lots described in the original and final plans were essentially the same. Specific performance was an appropriate remedy on the condition the plaintiffs paid the defendant the extra $1,600, in addition to cash to close within 30 days. If they did not elect to take title on this condition within that time, the defendant should return their deposit plus the $1,500 (for clearing) plus interest as specified in the original contract. In this latter event, the plaintiffs were to remove their caveat against Lot 7. In the circumstances, a monetary award of damages was inappropriate.

***Honourable Madam Justice C.A. Fraser*:**

REASONS FOR JUDGMENT

1 Boris and Brenda Makowecki decided to buy a lot in a proposed new residential subdivision near Whitecourt, Alberta called St. Martin Ridge. Whether they succeeded in doing so, and which lot they bought, are both issues in dispute in this case. The Makoweckis contend that a valid, subsisting interim agreement (Original Contract) for the purchase of what is now Lot 7, Block 1, Plan 882 0512 has been concluded between D'Arcy St. Martin, as vendor, and the Makoweckis as purchasers. Because St. Martin has refused to convey title to such Lot to the Makoweckis, they are seeking an order for specific performance of the subject Original Contract or alternatively, damages for breach of contract.

2 St. Martin denies that an agreement for the sale of any lot in St. Martin Ridge has been concluded. He asserts that the Original Contract signed by the parties was intended only as collateral security for the Makoweckis' loan to him in the sum of $20,000.00. He further argues that the Lot described in the Original Contract is not what is now Lot 7, but rather what is now Lot 8. In addition, he contends that the Original Contract was in any event replaced by a later contract which expressly contemplated the Makoweckis' paying an additional $2,000.00 per acre for any increase in size of the Lot referred to in the Original Contract. Finally, St. Martin submits that in any case, the Original Contract was contingent upon the fulfilment of a condition precedent which was never fulfilled through no fault of his. On these grounds, he defends the action for specific performance and remains willing to return to the Makoweckis the deposit paid by them together with interest thereon.

3 Further, because the Makoweckis have filed a Caveat against Lot 7 to protect their interest therein, St. Martin has counterclaimed for an order confirming that the Makoweckis' Caveat has been wrongfully filed and for damages arising from such wrongful filing.

I. ISSUES

4 Given the diametrically opposed positions advanced in this case by the litigants, there are several issues requiring resolution:

1. Did the Original Contract signed by the parties on October 29, 1986 constitute an agreement for the sale of land or was it a security instrument only?

2. If it was an agreement for the sale of land, to what land did it relate?

3. Was the Original Contract replaced or amended by the agreement (Subsequent Contract) signed by Boris Makowecki on November 9, 1986?

4. Did St. Martin discharge the onus on him to prove that he took such steps as he was required to do in order to fulfill the condition precedent contemplated in the Original Contract?

5. Assuming there was a valid and binding agreement for the purchase of a Lot in St. Martin Ridge, did the Makoweckis fail to tender the purchase price to complete the purchase of the subject Lot within the time frame contemplated in the applicable contract?

6. Finally, again assuming the existence of a valid agreement for the purchase of a Lot in St. Martin Ridge, is this in any event a case in which the Court should exercise its discretion and grant specific performance in favour of the Makoweckis?

II. THE FACTS

5 The Court's decision in this case turns in large part on the credibility of the key witnesses, Boris Makowecki and St. Martin. The evidence given by these two witnesses is totally and utterly irreconcilable. Makowecki alleges he bought a Lot. St. Martin denies this. Makowecki asserts that it is what is now Lot 7. St. Martin says no--the agreement referred to Lot 8. St. Martin alleges a replacement agreement was agreed to. Makowecki denies there was ever any intention to replace, rescind or amend the Original Contract. Makowecki says he and St. Martin walked and staked Lot 7. St. Martin denies this. St. Martin alleges he advised Makowecki once registration of the plain of the subdivision had been effected. Makowecki denies he ever received any such notice. What then happened in this case?

6 Makowecki, a licensed real estate agent, testified that in 1986, he expressed interest in buying from St. Martin, a developer who Makowecki had known for 15 to 20 years, one of the residential lots in the St. Martin Ridge subdivision which St. Martin was then planning. Makowecki was adamant that he and St. Martin, along with the owner of a cat tractor which was then on site, a Bud Hellekson, walked a lot in September, 1986 and staked a 1 acre building site with survey ribbon to indicate where the cat operator was to clear the lot. The cat operator, Bobby Astle, was present as well. The lot staked at this time was Lot 7. Thereafter, Makowecki confirmed his agreement to buy the Lot for $20,000.00 and gave St. Martin a cheque in this amount. No written agreement was executed documenting such purchase.

7 Shortly thereafter, Makowecki indicated he was approached by St. Martin who stated that he had someone interested in the same Lot who was willing to pay $25,000.00. This motivated the Makoweckis to secure an agreement in writing for the purchase of the Lot and thus, the Original Contract was signed. It provided for a $20,000.00 deposit (St. Martin had not yet cashed the cheque originally given to him by Makowecki) with the balance of the sum of $5,000.00 to be paid 30 days after title registration. The Original Contract also provided as follows:

> Vendors acknowledges and agrees to pay as of Oct. 29-86 (10)% interest to purchasers per year, compounded monthly on the $20,000.00 deposit and return or refund the complete $20,000 deposit in evant (sic) the proposed subdivision does not complete.

8 Makowecki advised that he was upset about having to pay an extra $5,000.00 for the Lot. But he was determined to get something for it. Thus, he asked for and secured the inclusion of a term which provided that St. Martin would be "Responsible to Clear & Complete Burn All Brush-Trees-Stumps On Minimum of 1 Acre and 50' R/W From Reg. Road Plan To Building Site".

9 Makowecki also testified that the Lot described in the Original Contract as "proposed Lot 9" was shown as such on the plan then referred to as Schedule "A". He indicated that the plan (Original Plan) entered as Exhibit 11 and dated June, 1986 in the bottom right hand corner was the plan which he reviewed at the time of execution of the Original Contract. This Plan indicates that Lot 9 on such Plan is now Lot 7 on the registered subdivision plan (Final Plan). It reflects that the size of proposed Lot 9 was then 2.32 hectares, although Makowecki could not recall at trial what the Lot size was on such plan, only that it was typed in hectares.

10 Subsequent to execution of the Original Contract, Makowecki was approached again by St. Martin who advised that the amount of cat time consumed in completing the agreed work on the Lot had been greater than anticipated. The end result of this discussion was that Makowecki agreed to split with St. Martin the sum of $3,000.00, it being Makowecki's understanding that this amount represented the additional costs St. Martin incurred in clearing the Lot. Makowecki gave St. Martin a cheque dated November 10, 1986 for $1,500.00. This cheque was deposited on November 10, 1986.

11 The other relevant document introduced in evidence is a bank transfer memo dated November 13, 1986 confirming that Makowecki's bank had transferred to Marla Holdings Ltd., a company controlled by St. Martin, the sum of $20,000.00. This had apparently occurred as a result of the $20,000.00 cheque Makowecki had given to St. Martin prior to execution of the Original Contract not clearing Makowecki's bank account. Although the date of deposit was not confirmed at trial, I have concluded, on all the evidence, that such deposit occurred sometime following execution of the Original Contract on October 29, 1986 and before November 13, 1986. When St. Martin was advised the cheque had not cleared his account, he instructed the bank, at Mrs. St. Martin's request, to transfer $20,000.00 to Marla Holdings Ltd.

12 St. Martin agreed with virtually nothing that Makowecki stated. He indicated that he first started planning the subject subdivision in 1985. At the time of his initial discussions with Makowecki, he indicated "money was a problem". He noted that he had had certain financial problems in 1981-82. He testified that Makowecki indicated that he might consider a loan and that eventually, Makowecki lent him $20,000.00. When the Original Contract, prepared by Makowecki, was brought to his house for signature, St. Martin assumed that the purpose of the Contract was to serve as security for the loan. With respect to the question of whether a given Lot was to serve as security, he acknowledged "I guess we did discuss a specific lot". It was his understanding that if the selected Lot were subsequently sold, Makowecki would simply pick another lot. He also testified that he had tried to "put him onto a cheaper lot". This statement does not fit with St. Martin's assertion that the Original Contract constituted a security transaction. If it were a security transaction, what lot Makowecki chose should not have been of real concern to St. Martin because under these circumstances, repayment of the loan would result in a release of Makowecki's security interest in such lot.

13 Further, when asked a perfectly obvious question, namely why the Original Contract referred to $25,000.00 rather than the amount of the loan, namely $20,000.00, St. Martin's response was "I don't know how we arrived at that". Clearly, this inconsistency warranted a credible explanation if St. Martin's evidence as to the $20,000.00 loan were to be believed. None was offered. He also testified that he "couldn't say" whether he had a discussion with Makowecki concerning wanting $25,000.00 for proposed Lot 9 before the Original Contract was signed. But on one point, he was absolutely adamant---he never negotiated to sell what is now Lot 7. In fact, he testified that he considered "maybe" relocating to Lot 7 himself.

14 As for clearing Lot 7, he asserted that this was for merchandising purposes only (Lot 7 having a view of the river) and had nothing to do with Makowecki's purchase of such Lot. He testified that a realtor had recommended he do this. But, as on other key issues, his evidence was tenuous. Initially, he admitted it was possible they attended at the site in

1988. Then, he testified that he thought he took the realtor to visit the site in 1986, before finally acknowledging that it was indeed possible that he took the realtor to the site at a later date.

15 St. Martin did not agree that the Original Plan was the Schedule "A" referred to in the Original Contract. Instead, he testified that he believed Exhibit 22 was a copy of Schedule "A". Lot 9 on Exhibit 22 is now, under the Final Plan, Lot 8. He also denied ever having walked Lot 7 with Makowecki and Hellekson. Instead, he maintained, he walked such lot only with Hellekson and confirmed to him the area he wished cleared on the site. And it was at this time, he stated, that he flagged the site. However, in cross-examination, he was asked whether he walked Lot 7 with Makowecki and his response was "It's possible."

16 His evidence on what Lot Makowecki wanted was weak. At one point in cross-examination, he indicated that it was "possible" that Makowecki wanted what is now Lot 6 and not Lot 8. He was then confronted with his evidence at examination for discovery where he clearly indicated an agreement was made to change to Lot 6:

Q When you signed Exhibit 3 with Mr. Makowecki, what land were you prepared to sell to him?

A Actually it was originally lot 8.

Q It was lot 8?

A Right.

Q Did it change to a different lot?

A Yes.

Q What lot did it change to?

A Six.

Q So you agreed to sell them lot 6?

A Right.

Q When did it change to lot 6?

A A month or two after this, a month or so after this thing was signed.

Q So what you are saying is that a month or two after October 29, 1986 you changed it to a different lot?

A Right.

17 This evidence is significant given St. Martin's testimony that sometime in the spring of 1988, he approached Makowecki and asked him if he would release his interest in Lot 8 as St. Martin then wished to sell Lots 8 and 9 (as they then were) to a Mr. Calbum who lived immediately to the south of these lots. One might reasonably ask why such approach would even have to be made if, as testified by St. Martin at examination for discovery, Makowecki had already changed from buying Lot 8 to Lot 6 before the end of 1986. When asked this very question, St. Martin's answer was vague and not helpful. He stated only that the Makoweckis had indicated they would consider Lot 6.

18 St. Martin's evidence on the reason for Makowecki's payment of $1,500.00 was confused and inconsistent. When cross-examined as to why he would have asked Makowecki for an additional $1,500.00 (given the fact there was only a loan transaction between the parties), St. Martin indicated that it was given to him so that he could develop a lot for Makowecki "if he chose to buy one". When pressed as to whether he ever did any clearing on any lot for Makowecki, his response was "I wasn't compelled to was I? He never decided what lot he wanted."

19 But this evidence contradicts other evidence given by St. Martin concerning the reason for Makowecki's paying the $1,500.00. Makowecki's evidence was that it was for the clearing of Lot 7. St. Martin admitted that when he received the $1,500.00 cheque from Makowecki, Lot 7 had then been cleared, but he denied that he ever requested reimbursement for the expenses involved in clearing Lot 7. Later in cross-examination, he confirmed, contrary to his earlier evidence, that no work had been done on Lot 7 prior to receipt of the $1,500.00. But he was again confronted with his evidence at examination for discovery in which the following exchange occurred:

Q Did you go back to Mr. Makowecki and ask him for any other money as it related to this lot?

A I don't believe so. No.

Q You never received any more money from him?

A Yes, I did.

Q What did you receive the additional money for?

A I believe I received $1,500.

Q What was that for, sir?

A Construction of a road to the building site.

20 The building sites he was referring to, as evidenced by subsequent testimony, were Lots 6 and 7. Later, in examination for discovery, he acknowledged that the $1,500.00 was for building a road and that the only road built was to Lot 7. At pp. 18 and 19, the following questions and answers are documented:

Q Mr. St. Martin, how did you come to get $1500 from Mr. Makowecki? Would you tell me what that was about? I know you told me something with road construction, but I want to know how you arrived at the figure of $1500.

A It was as a deposit to build the road.

Q Who was going to pay? Whose responsibility was it to pay for the road to be built?

A I was going to build it because I had Cats there. I was going to build it.

Q Did you in fact build the road?

A Yes.

21 As noted earlier, the only road constructed at that time was to Lot 7. The obvious question raised by this testimony is why Makowecki would pay $1,500.00 to build a road to a Lot he had not bought. But notwithstanding his evidence at examination for discovery, St. Martin continued to maintain that when he received the $1,500.00 from Makowecki, no work had been done on the Lot Makowecki had tied up. He was confronted with other evidence given at examination for discovery. At page 44, the following exchange took place with respect to the Original Contract:

Q In respect to this offer did you prepare a minimum one acre site?

A I believe I did, yes.

Q Did you also prepare a 50-foot right-of-way from the registered road plan to the building site?

A It would be approximately 50 feet. I am guessing.

Q If you would just look at Exhibit 2 for a moment and tell me where you cleared the one-acre building site, please.

A Exhibit 2? On which lot are we referring to here?

Q Well, you said you prepared it. You tell me where you prepared the one-acre site.

A On 6 and 7.

22 The implication of this testimony is that the work done on Lots 6 and 7 was done pursuant to the Original Contract. When asked to reconcile this evidence with his evidence at trial that no work had been done on any Lot Makowecki had tied up before he received the $1,500.00 from Makowecki, his response was "Did I say that?" He then indicated that he had obviously misunderstood the question. This is highly doubtful. It is true that St. Martin had extreme difficulty in reconciling his evidence at trial with the evidence he had given at examination for discovery. However, in my view, this problem arose, not because he failed to understand the questions asked at discovery, but rather because the evidence given at examination for discovery is simply not consistent in more than one key area with his evidence at trial. I have in mind, in particular, his evidence relating to what Lot the Makoweckis wanted, why the $1,500.00 was paid and what it was paid for.

23 Brenda Makowecki testified that she and her husband discussed making an offer to purchase what she described as the "lot at the top of the crest". She confirmed that this is now Lot 7 on the Final Plan. She also indicated that she and her husband walked Lot 7 before they decided to conclude an agreement with St. Martin to purchase it. St. Martin was not present at that time. The purchase price was to be $20,000.00. After the verbal agreement to purchase the Lot was concluded, St. Martin asked for another $5,000.00. At this stage, Mrs. Makowecki wanted a written agreement signed and it was. She was adamant that she and her husband never looked at buying any other lot in the St. Martin Ridge subdivision. As explained by her, from the beginning, they wanted the Lot at the top of the crest. Plans were subsequently prepared for the house they intended to build.

24 Both Mrs. Makowecki and her husband presented as credible, candid witnesses whose evidence is wholly consistent with the documentary evidence submitted in this case. Moreover, and most importantly, the Makoweckis' evidence is also corroborated by the evidence given at trial by Bud Archie Hellekson, the owner of Troy-Dean Construction Ltd. Troy Dean had been retained by St. Martin to build the main road on the St. Martin Ridge Subdivision.

25 Hellekson confirmed that one afternoon, while his cat operator, Bobby Astle was working on building a road in the subdivision, he, Makowecki and St. Martin walked through the bush onto the subject Lot and marked the area which was to be cleared. At that time, St. Martin advised Hellekson that Makowecki was buying the Lot. Hellekson recalled Makowecki's remarking on what a nice place it was to build and what a nice view it was from the Lot. Hellekson confirmed that he quoted the sum of $1,000.00 for clearing the site.

26 Documentary evidence introduced at trial reflected that 10 hours of cat time were spent in clearing the Lot and that this work was done on September 23 and 24, 1986. He also confirmed that thereafter, while working on the subdivision, he saw Makowecki on Lot 7 on several occasions and that Mrs. Makowecki was often there as well. In fact, he confirmed that the day he, Makowecki and St. Martin walked the site and staked it, that Mrs. Makowecki returned later with only her husband to see the Lot. He recalled her saying that it "sure will be a nice place to build a house".

27 Hellekson's evidence corroborates Makowecki's testimony that he walked and staked Lot 7 with St. Martin and it also corroborates the existence of an agreement, albeit a verbal one, to purchase the Lot which predated the execution of the Original Contract. His testimony also confirms Mrs. Makowecki's evidence concerning her viewing of Lot 7. By contrast, Hellekson's testimony directly contradicts St. Martin's evidence. Although Hellekson was somewhat confused as to the dates upon which various invoices were rendered and the amount thereof, as well as the work they related to, this confusion in no way undermines the substance and veracity of his core evidence. Hellekson presented as a somewhat unsophisticated witness who was doing his very best to be precise about dates and times. Whatever confusion he may

have expressed about his invoicing procedures, it was obvious that he had no doubt whatsoever as to the visit to Lot 7 by St. Martin and Makowecki and as to the fact that he was advised that Makowecki was buying Lot 7 itself. In cross-examination, he was asked whether it was possible he was mistaken about St. Martin's walking the Lot with Makowecki. He responded that St. Martin was there, "no doubt about it". He acknowledged that at that time, he did not know the Lot number itself, but when the culvert was subsequently put in, he knew it would be Lot 9 on the Original Plan. This Lot, of course, is now Lot 7 under the Final Plan.

28 At this point, I pause to emphasize that in determining what plan was attached as Schedule "A" to the Original Contract, no assistance can be gained from reviewing the dates on the various plans. The individual who prepared such plans, Mr. Sexauer, of Landmarks Consultants Ltd., was not called as a witness by St. Martin. The Original Plan has endorsed on it in handwriting the date "June, 1986". Whether this was the date of issuance of the Plan or some other date of significance was not established at trial. The plan which St. Martin alleges constitutes Schedule "A" has endorsed on it in handwriting the date "Jan 15, 1987". St. Martin testified this was not the date of its preparation but rather the date on which it was submitted to the subdivision approving authority for approval. However, no evidence was led at trial to confirm the key question and that is, the date on which it was prepared.

29 Accordingly, I have concluded on all the evidence that St. Martin did agree to sell proposed Lot 9 to the Makoweckis pursuant to the Original Contract. I have also concluded that proposed Lot 9 under the Original Plan is in fact Lot 7 under the Final Plan. In reaching these conclusions, I have accepted the evidence given by the Makoweckis and Hellekson and I have rejected, in total, the evidence given by St. Martin on these matters. St. Martin's evidence at trial was contradictory, inconsistent, both with other witnesses' evidence and the documentary evidence, and simply not credible on the key points in dispute. He appeared on many occasions to be endeavouring to tailor his evidence at trial with evidence given at discovery. In this task, he was unsuccessful.

30 Following execution of the Original Contract, Makowecki signed the Subsequent Contract. St. Martin argues that this Contract, signed November 9, 1986, resulted in the rescission of the Original Contract. The Subsequent Contract referred to Lot 9 and indicated that it contained 2.72 hectares. It also referred to "$2,000.00 per acre for additional Acres", and to "$1,500.00 Additional Cost to clear road and 1 acre site, Road Construction Cost Plus - Maximum $4,000.00". The Subsequent Contract also included the following term:

> If title is not supplied by July 1, 1988, then interest at a rate of 10% will apply on the deposit with interest adjustment date as at October 29, 1986.

31 Makowecki testified that the circumstances giving rise to the execution of the Subsequent Contract were as follows. He was advised by St. Martin that he wasn't pleased with the Original Contract in that it was "too messy". St. Martin wanted a new typed one prepared. When Makowecki attended at St. Martin's house, he was presented with the Subsequent Contract for execution. However, none of the blanks were completed at that time. This evidence should be contrasted with that given by Makowecki at examination for discovery in which he indicated that some of the blanks had been completed prior to his signing the same. But on reflection, he stated, and I accept this evidence, that he was in error in the evidence given at discovery and that the Subsequent Contract was totally blank when signed by him. At no time, he testified, did he ever receive a signed copy of the Subsequent Contract.

32 St. Martin disputes this version of events. He testified that Makowecki brought the Subsequent Contract form to his house and St. Martin's wife typed it up while he and Makowecki were having coffee. He asserts that the form was completed in total before execution by Makowecki. In fact, he testified that his wife first completed a worksheet, entered in evidence as Exhibit 23, before typing up the Subsequent Contract. However, he acknowledged that certain portions of the writing on the worksheet are his. Interestingly, one of his handwritten insertions refers to the lot size of Lot 9, which happens to conform with the size designated for Lot 9 on Exhibit 22.

33 It is noteworthy that Mrs. St. Martin was not called as a witness notwithstanding the directly contradictory evidence on whether the Contract had in fact been typed up by Mrs. St. Martin prior to Makowecki's execution of the

same. She could have testified on this point. As well, she could have given evidence concerning the circumstances under which she came to fill in a portion of the worksheet and presumably as to the circumstances under which her husband completed such worksheet. Given the importance of this documentary evidence, and given St. Martin's evidence that his wife typed up the Contract before Makowecki signed it and given Makowecki's contradictory evidence on this point, the adverse inference that I draw from the failure to have Mrs. St. Martin testify in this case is that her evidence would not be supportive of St. Martin's version of events. [See *Rivercrest Properties Ltd. v. Ng* (1985) 62 A.R. 280 and *Levesque et al v. Comeau et al*, [1970] S.C.R. 1010].

34 Even in the absence of this adverse inference, I would have concluded that based on Makowecki's testimony, the Subsequent Contract was not completed when signed by him and that he executed the same only for the purpose of confirming the terms and conditions of the Original Contract. I reject St. Martin's evidence on this point, in the same manner I have rejected the core evidence given by St. Martin on the issue of the sale versus the alleged loan and on the question of which Lot was sold to Makowecki.

35 Consequently, the Subsequent Contract did not rescind, replace or amend the Original Contract in any way whatsoever and accordingly, it is of no force and effect. Even if I were wrong in my conclusion that the Subsequent Contract was blank at the time of execution by Makowecki and that Makowecki's execution of the Contract was intended to do nothing more than confirm the terms and conditions of the Original Contract, the Subsequent Contract should not, in any event, be construed as rescinding, replacing or amending the Original Contract since the evidence is clear and uncontradicted that at no time did St. Martin ever accept the Subsequent Contract by executing the same.

36 Makowecki acknowledged in cross-examination that between November of 1986 and approximately December, 1987, he never pressured St. Martin or requested any information as to how registration of the subdivision plan was proceeding. His explanation, which there is no reason to doubt, was that he had originally been told it would take at least 6 months for registration of the subdivision plan and it was apparent to him that it was taking longer than anticipated because he had heard nothing further from St. Martin.

37 Makowecki testified that approximately two to three months prior to registration of the subdivision plan, St. Martin mentioned to him that he wanted $10,000.00 more for Lot 7. This conversation took place around December, 1987. Makowecki did not recall his wife being present at this discussion. St. Martin attempted to justify this request by explaining that he had been obliged to buy the environmental reserve adjacent to the subject subdivision and that the area covered by it would be attached to individual lots in the St. Martin Ridge subdivision. But as Makowecki testified, and this was not disputed by St. Martin, the additional land attached to Lot 7, which had the result of increasing the Lot, in the Final Plan, to 4.6 hectares from 2.32 hectares, is unusable. It consists of all the area below the top of the bank, that is, the hillside area going down into the valley which Lot 7 overlooks.

38 Although Mrs. Makowecki was not present at the meeting in December, she recalled that in the fall of 1987, St. Martin advised the Makoweckis that the subdivision was not yet finished and that the lot size and description would be changing. He offered the Makoweckis their money back because of the passage of time involved in effecting registration of the subdivision plan. But they declined. Mrs.Makowecki testified that at this meeting, no request was made by St. Martin for any more money. She was of the distinct impression that all three of them understood that the incorporation of any land below the top of the bank would make no difference to the value of the Lot.

39 St. Martin's evidence on the question of whether he ever asked for any more money for Lot 7 or any other Lot for that matter was, like much of his other evidence, problematic. In cross-examination, he was asked whether he ever had any discussions regarding needing more money, and his answer was yes. He also indicated that he had discussions with Makowecki concerning Lot size. When asked if that included a specific discussion about Lot 7, he said "It's possible". Then he stated he couldn't recall a specific conversation about Lot 7 and then proceeded to again say it was possible it occurred. When asked if he requested $10,000.00 more at a coffee meeting at which he apparently indicated the subdivision plan had been registered, he said no. Then, he was asked if he recalled asking for $5,000.00 more and

he said he didn't recall that. But he was then confronted with his testimony at examination for discovery in which the following questions and answers were given:

> Q Sir, did you in the spring of 1988 approach Mr. Makowecki with regard to concluding your business transaction with him and transferring a lot to him?
>
> A Did I suggest that to him you ask me?
>
> Q Did you have a meeting with him in the spring of 1988?
>
> A I had lots of meetings with Mr. Makowecki.
>
> Q And did you request of Mr. Makowecki that he pay not 5,000 additional monies, as was required pursuant to Exhibit D-13 (sic), but in fact that he pay $10,000 additional money?
>
> A It's possible.

40 After having this testimony re-read to him, St. Martin then acknowledged that it was "possible" he did have a discussion with Makowecki in which he requested an additional $5,000.00. And when pressed as to whether this was with respect to Lot 7, he maintained it was not and when asked what lot it was they were in fact discussing, his answer was that it is possible that it was Lot 6.

41 I accept Makowecki's evidence that St. Martin asked for another $10,000.00 for Lot 7 in December 1987. Likewise, I am satisfied that earlier in the fall, the Makoweckis and St. Martin met and discussed the matters related by Mrs. Makowecki.

42 St. Martin's evidence on the question of registration of the subdivision plan was equally problematic. The date of registration is important because St. Martin argues that Makowecki never tendered the balance of the money owing under the Original Contract within the stipulated time, that is 30 days following title registration. He testified that he told Makowecki that the subdivision plan had been registered a number of times. He related one specific example which occurred while he, Makowecki and others were having coffee one day after March, 1988 at the Whitecourt Motor Inn. Title to Lot 7 had been registered in St. Martin's name on March 8, 1988. He testified that he had indicated to the "boys" at the table that he had subdivision finalized and that someone was in default under his agreement and he should take his money. It was clear that in relating this evidence, St. Martin was referring to an agreement which he had with Makowecki. It will be readily apparent that this statement is, of course, completely inconsistent with St. Martin's position at trial that he never concluded an agreement with Makowecki for the purpose of any Lot. St. Martin also indicated that it was his understanding from the surveyor, Mr. Sexauer of Landmarks Consultants Ltd., that Mr. Sexauer advised Makowecki that day that registration of the subdivision plan had been effected.

43 After that incident, St. Martin testified that he told Makowecki that the Lot he had tied up was not available (he indicated that he was referring to Lot 8 which was to be transferred to Calbum and if so, it will also be apparent this is inconsistent with his evidence at examination for discovery that by this time, Makowecki had already changed from Lot 8 to Lot 6) and that Makowecki should either choose another lot or he would return his money. He did acknowledge having subsequently received a letter from Makoweckis' counsel dated May 19, 1988 confirming that the Makoweckis had filed a Caveat against Lot 7. This letter also confirmed their willingness to proceed with the transaction and advised that sufficient funds were in trust to complete the subject transaction.

44 Makowecki testified that he was never told by St. Martin that registration of the plan of subdivision had been effected. Nor does he ever recall Mr. Sexauer advising him that this had occurred. But he does acknowledge having spoken to Sexauer about the registration of the plan and he further acknowledged having been advised that registration of the plan was proceeding.

45 Makowecki testified that he found out Lot 7 had been listed after he saw a "For Sale" sign on it. Makowecki, who used to work for Noram Realty, the listing agent, approached the company to confirm whether Lot 7 had been listed. He determined that a Listing Agreement had been signed on or about April 22, 1988. The listing agreement reflects that Lot 7 and Lot 6 were each listed for sale at $38,500.00. St. Martin explained the listing agreement by saying that it was in error. He alleges he had signed the form in blank and had given it, along with a number of others he had signed, to his sister-in-law. He testified he never intended to list for sale either Lot 7 or Lot 6. I do not accept this evidence. St. Martin's sister-in-law was not called to give evidence in this trial.

46 Nor, it should be noted, did St. Martin call as a witness either of the two individuals who were apparently present at the meeting in the coffee shop in the Whitecourt Motor Inn at which time St. Martin indicated he had told Makowecki that registration of the plan of subdivision had occurred. I have therefore concluded on all the evidence that Makowecki never received notice of registration of the Final Plan.

III. DISCUSSION

47 St. Martin's counsel argued that the Court should refrain from making a deal for the parties where the agreement is so poorly drafted that the terms and conditions of the alleged purchase and sale are unclear. What constitutes the essential terms and conditions in a contract for the sale of land has been the subject of much judicial comment. The key ingredients required are the parties, the land description and the price. All are present in this case and it is unnecessary to infer any terms into the Contract other than the fact (and this was not argued in any event) that the proposed subdivision was to be completed within a reasonable time.

48 As noted above, I concluded that the Original Contract constituted an agreement for the sale of land and was not intended as, nor did it constitute, a security instrument in respect of a loan. St. Martin agreed to sell and the Makoweckis agreed to buy proposed Lot 9 under the Original Plan. This is now Lot 7 under the Final Plan. The Original Contract remains in full force and effect as the Subsequent Contract did not replace, amend or rescind it.

49 Therefore, this leaves for consideration the fourth, fifth and sixth issues noted herein.

A. Condition Precedent

50 The decision of the Supreme Court of Canada in *Turney v. Zhilka*, [1959] S.C.R. 578 marked the genesis of the true condition precedent approach to the interpretation of contracts. As observed by G.H.L. Fridman, Q.C. in *The Law of Contract*, Second Edition at p. 415:

> The court differentiated what was called "a true condition precedent--an external condition upon which the existence of the obligation depends" from an ordinary or *internal* condition ... If a condition is a true condition precedent, there is no contract until it is satisfied. If a condition is the other sort of condition, then, in the event of its non-fulfilment, there may still be a binding contract between the parties, depending on the way in which the innocent party, guiltless of any breach, reacts to a breach of the condition. It follows from *Turney v. Zhilka*, therefore, that a distinction now exists between a condition relating to the *existence* of any contractual obligation and a condition that is precedent to *performance* of a contractual obligation by the other party, not the one subject to fulfilment of the condition precedent.

51 In this case, the condition dealing with subdivision provides that the deposit paid by the Makoweckis is to be refunded "in evant (sic) the proposed subdivision does not complete". In the circumstances of this case, I have concluded that this condition is in fact a "true condition precedent". Both parties were well aware that St. Martin's obligation to convey title was contingent upon his securing all required subdivision approvals contemplated under the Planning Act. In this sense, therefore, his obligations were contingent as opposed to constituting some promise on the part of St. Martin that subdivision would necessarily be effected.

52 Was the condition precedent satisfied? Given the wording of the same, it is arguable that all that was required was that the subdivision of St. Martin's Ridge be completed in accordance with some plan and not necessarily strictly in accordance with the Original Plan. This conclusion has some merit since it would only be in the most unusual of cases that a final plan of subdivision were identical in all respects to an earlier plan. Minor changes are inevitable in the subdivision process. Further, in this case it is obvious that the number of lots is the same and their basic configuration vis-a-vis one another remains substantially the same as under the Original Plan. However, for the purposes of this analysis, I have assumed what is the best possible position for St. Martin and that is, that the condition precedent was not fulfilled. If it had been, then it likely follows that the Final Plan is, in substance, what the Original Contract contemplated. In such event, the Makoweckis would, subject to any issue relating to tender of funds, be entitled to specific performance.

53 Proceeding on the assumption, therefore, that the condition precedent has not been fulfilled, it is necessary to consider what obligations were imposed upon St. Martin with respect to such condition precedent. The fact that the Original Contract is subject to a "true condition precedent" does not mean that St. Martin had no obligations with respect to subdivision. As the owner of the subject lands, he was the person who was entitled to apply for subdivision. And as such, the Courts have been prepared, in circumstances comparable to this case, to imply a promise on the part of the owner of property to take steps to bring about the fulfilment of the condition precedent. This approach is evident in the decision of Dickson, J. in *Dynamic Transport Ltd. v. O.K. Detailing Ltd.* [1978], 2 S.C.R. 1072 in which he observed:

> The existence of a condition precedent does not preclude the possibility of some provisions of a contract being operative before the condition is fulfilled, as for example, a provision obligating one party to take steps to bring about the event constituting the condition precedent....
>
> In appropriate circumstances the Courts will find an implied promise by one party to take steps to bring about the event constituting the condition precedent....
>
> The common intention to transfer a parcel of land in the knowledge that a subdivision is required in order to effect such transfer must be taken to include agreement that the vendor will make a proper application for subdivision and use his best efforts to obtain such subdivision. This is the only way in which business efficacy can be given to their agreement.

54 This rationale remains equally applicable today. Developers in Alberta often enter into contracts for the sale of land prior to having the necessary subdivision plans fully approved by the appropriate subdivision approving authority or, for that matter, prior to having all necessary zoning approvals in place. Pre-selling of unsubdivided lots is now a fact of life for developers particularly where many municipalities have adopted the requirement that developers front-end all development costs. Often times, concluded interim agreements are used by a developer to assist in securing the necessary interim financing to permit such developer to proceed with and complete the proposed subdivision. The reason problems arise in the context of an agreement such as that now before the Court is that the *Land Titles Act*, R.S.A. 1980, c. L-5 and the *Planning Act*, R.S.A. 1980, c. P-9, for wholly legitimate public policy and planning reasons, provide, in effect, that no lots shall be sold under agreement for sale or otherwise unless and until an appropriate plan of subdivision has been registered at the Land Titles Office. Were it not for these restrictions, a contract for the sale of unsubdivided lots would be enforceable at common law.

55 Accordingly, I am satisfied that an implied obligation rested upon St. Martin to apply for subdivision in accordance with the Original Plan and to use his best efforts to obtain such subdivision. Has he discharged the onus on him to establish that he has done so? In my view, the answer is no.

56 Although St. Martin testified that he was required to purchase the environmental reserve as a condition of securing the subject subdivision, no credible evidence was led to confirm that the Original Plan was ever submitted to the subdivision approving authority, the Yellowhead Regional Planning Commission, by or on behalf of St. Martin or that it was ever rejected by the Commission. No documentary evidence to this effect was produced nor were any witnesses

from the Commission called to testify as to what their requirements were. Nor, as noted above, was Mr. Sexauer, the surveyor called to give evidence confirming that the Original Plan was at any time the subject of a subdivision application on behalf of St. Martin.

57 In fact, St. Martin acknowledged in his testimony that he could not say how the eight different plans marked as Exhibit 21 (and by admission representing all the various plans prepared by Landmarks Consultants Ltd.) had evolved. Further, it is interesting to note (although I hasten to add no explanatory evidence was led on this point) that the plan, marked as #4 of Exhibit 21, with the handwritten date November 12, 1985 endorsed on it, also has a handwritten notation marked "Approved" on it. So does the plan included as part of Exhibit 21 which is identical to the Final Plan, leading one to wonder whether not only the Final Plan, but also the November 12, 1985 plan, was approved by the Yellowhead Regional Planning Commission. It was explained that the handwritten date, in the context of the Final Plan (marked as #6 of Exhibit 21), represented the date such Plan was submitted to the Commission. Thus, by analogy, this would mean that the plan marked as "Approved" had been submitted to the Commission on November 12, 1985. This "Approved" notation is significant because although this plan predates the Original Plan, it is virtually identical to the Original Plan (and predates it by a number of months only). Although no lot sizes were marked on the November 12, 1985 plan nor were the lots identified by number, the configuration and sizes of the lots appear to be the same as those in the Original Plan.

58 Further, even assuming that St. Martin had established that the Original Plan had been submitted and rejected by the Yellowhead Regional Planning Commission, this would not have been an end of the matter. Being required to repurchase the environmental reserve and being required to attach it to individual lots in the St. Martin Ridge subdivision, and in particular to Lot 7, are two entirely different matters. St. Martin indicated that buying back the reserve and having it attached to a number of the lots made it a better subdivision for the lands and people involved in the subdivision. But I am not satisfied on all the evidence that it was a mandatory condition of achieving subdivision that St. Martin consolidate the environmental reserve adjacent to Lot 7 with Lot 7. There may well have been a number of other options equally acceptable to the Commission. But, regardless of whether this was the case, no credible or compelling evidence was led to confirm that the attachment of the environmental reserve to Lot 7 was the only alternative acceptable to the Commission.

59 For these reasons, I have concluded that St. Martin has failed to discharge the onus on him to establish that he endeavoured to fulfill the condition precedent as he was required to do. It follows, therefore, that he has breached his implied obligation in this regard. That being so, he is not entitled to rely on the non-fulfilment of the condition precedent as a defence to the Makoweckis' action for breach of contract. Before addressing the issue of whether this is an appropriate case for the Court to order specific performance, the matter of the Makoweckis' alleged breach in failing to tender the balance of the purchase price on a timely basis must be considered.

B. Tender of Purchase Price

60 St. Martin attempts to rely upon the principle expressed in a number of cases that the onus is upon the purchaser of property to tender the funds required to close on or before the prescribed closing date in order to establish that he is ready, willing and able to complete the transaction. There is no doubt that this is so in Alberta. However, in circumstances where a condition precedent is to be met, and the vendor is under an obligation to meet such condition precedent, and the closing date is linked to the date of fulfilment of the condition precedent, it is, in my view, an implied term of the subject contract that the vendor is obliged to inform the purchaser that such condition precedent has been met. If he fails to do so, he is in no position to argue that the purchaser has failed to tender the cash to close on or before the closing date. Any other approach would be unreasonable and inconsistent with what the parties presumably intended since it is the vendor who is privy to the information concerning fulfilment of the condition precedent. One can hardly suggest that in these circumstances, the burden should be on the purchaser to phone the vendor daily to determine the status of the condition precedent and whether it has yet been met.

61 In this case, I have assumed that the condition precedent was not fulfilled, and thus the issue of whether the Makoweckis tendered the cash to close on a timely basis is academic. Even if this were not the case, I have already determined, in any event, that no proper notice was ever given by St. Martin confirming fulfilment of the condition

precedent. Accordingly, the Makoweckis were not in breach of the Original Contract at the time they forwarded through their counsel a letter confirming that sufficient funds were in trust to close. This letter, in my view, constituted confirmation that they were ready, willing and able to complete the subject transaction. And given the fact that St. Martin had already listed Lot 7 for sale, which constituted an anticipatory breach of contract by St. Martin, nothing more needed to be done by the Makoweckis.

C. Specific Performance

62 Assuming, as I have done, that the condition precedent has not been met, is this an appropriate case to order specific performance or should damages be awarded in lieu thereof? Ordinarily, in cases where a claim is advanced for breach of an implied obligation in circumstances in which a condition precedent is not fulfilled, the claim is for damages for breach of contract and not for specific performance. But this need not necessarily be so. [See *Steiner v. E.H.D. Investments Ltd.* (1977), 78 D.L.R. (3d) 449 (Alta. C.A.)].

63 Specific performance is a discretionary remedy and as a general principle where one is dealing with land, the Courts have accepted that it should ordinarily be granted given the unique nature of land.If there is evidence that the purchaser is buying the land for immediate resale or for investment purposes, then notwithstanding the fact land is involved, the Courts have on occasion declined to exercise their discretion and grant specific performance.But there is no indication that this is so in this case. In fact, the evidence is clear that the Makoweckis intend to construct a home for themselves on Lot 7.

64 However, the problem in this case is that the Lot is now much larger than that contemplated under the Original Plan. Had the Lot been smaller, the authorities are clear that in these circumstances, absent any compelling reason not to grant specific performance, Makowecki would be entitled to specific performance if he so wished, with an appropriate abatement of price. This principle was explained by Lord Eldon in *Mortlock v. Buller* (1804) 10 Ves. 292 at p. 315 in the following terms:

> If a man, having partial interests in an estate, chooses to enter into a contract, representing it and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract; and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole.

65 Of course, there are limitations on a Court's exercise of its **discretion** to grant **specific performance**. The general principle which emerges from the decided cases is that in determining whether to grant **specific performance**, the Court should consider all of the **equities** arising between the parties and, in particular, whether such grant would be, in the circumstances of the case, unjust, unfair or highly unreasonable.

66 Why should not the same principle apply where a vendor who is in breach of contract now happens to be the owner of a larger parcel than that which he bargained to sell? The vendor should no more be entitled to defend an action for specific performance on the basis he now happens to own a larger parcel than he agreed to sell than he would be entitled to defend such action on the basis the parcel is now smaller. Whether or not specific performance should be granted in favour of an innocent purchaser should not be contingent upon, nor dictated by, the manner in which a vendor has chosen to breach a contract for the sale of land. Regardless of whether the parcel is now larger or smaller, surely the general principle should be equally applicable to both cases and that is, that providing it would not be unjust, unfair or highly unreasonable to do so, the court could order, if it so elects, specific performance---with an appropriate adjustment of price, in favour of the vendor, if the parcel is larger and an abatement of price, in favour of the purchaser, if the parcel is smaller. The purchaser would then have the option to elect to take the larger parcel, and pay the additional amount, or alternatively to treat the contract as rescinded with a right to the return of all monies paid (together with interest thereon). The third alternative would be to receive damages for the breach of contract.

67 Is there any reason to consider that it would be unjust, unfair or highly unreasonable in the circumstances of this case to order specific performance of the Contract? I think not. What we have here is a case in which subdivision has been effected, but the Lot which was the subject of the Original Contract is now approximately twice as large as it was under the Original Plan. If one were to simply look at the two plans of subdivision, the Original Plan and the Final Plan, and compare the relative size of Lot 7 in the two Plans, one would conclude that there is no comparison between the two. But this is a simplistic approach because in this case, the tremendous increase in size is, from both an aesthetic and utilitarian perspective, of questionable value. The evidence was clear that the additional land is below what would otherwise be considered to be the top of the bank. As such, it may have some possible use for a children's tree house or for a picnic table. But it does not otherwise increase the size of the Lot on which the Makoweckis would be able to construct their home and other permanent improvements.

68 Nor does it enhance the aesthetics of the Lot. This is not a case in which the addition of the land improves, for example, the view which the owners of Lot 7 would otherwise have. The Lot was a view lot before the addition of the subject land and it is a view lot now. What has been added are a number of acres of hillside land which, according to St. Martin's evidence, the Improvement District in which the land was located, was not interested in retaining.

69 While there may well be cases in which the calculation of an abatement or an adjustment in purchase price will prove extraordinarily difficult, thereby militating against a Court's inclination to grant specific performance, this is not one of them. St. Martin testified that he paid between $7,000.00 to $8,000.00 in 1988 for the 10.84 hectares of environmental reserve. Assuming he paid $7,500.00 for the subject reserve area (which number I consider to be reasonable for the purposes of this case and the remedy I intend to order), this would amount to approximately $700.00 per hectare. Lot 7 increased from 2.32 hectares to 4.6 hectares, an increase of approximately 2.3 hectares. This would mean a cost to St. Martin of approximately $1,600.00 for the additional land now forming part of Lot 7.

70 Compare this with the purchase price of $25,000.00 payable by the Makoweckis under the Original Contract made two years earlier (when market conditions, given the evidence at trial, were less favourable than those in 1988) for what is essentially the same size of land, namely 2.3 hectares. What this means is that the increase in size of Lot 7, from 2.32 hectares under the Original Plan to 4.6 hectares under the Final Plan, bears no relationship whatsoever to any increase in value. The increase in size is great (approximately 100% over original size) while the increase in value is minor (approximately 6.5% over the purchase price). Consequently, in my view, the two Lots (that described in the Original Plan and that described in the Final Plan) are from a commercial perspective, substantially the same.

71 Therefore, under all the circumstances of this case, I have concluded that it is appropriate that an order for specific performance be granted in favour of the Makoweckis subject however to the condition that they pay to St. Martin the further sum of $1,600.00 in addition to the cash to close the subject transaction. It is to be understood that this will be contingent upon the Makoweckis' electing, at their option and within a period of 30 days from the date hereof, to take title to Lot 7 on this condition and tendering the total cash to close. The order shall also provide that in the event they do not so elect within the prescribed time period, St. Martin shall return to the Makoweckis the deposit paid by them plus the sum of $1,500.00 (for the site clearing) plus interest on such amounts calculated in the manner and at the rate specified in the Original Contract. In this latter event, the order shall also direct the removal of the Caveat filed by the Makoweckis against the title to Lot 7. I do not consider this case to be one in which a monetary award of damages would be appropriate and thus, I have made no such award as an alternative to the order for specific performance.

72 Costs may be spoken to, if necessary.

73 DATED at the City of Edmonton, Province of Alberta, this 23rd day of July, A.D. 1990.

15

2007 ABQB 396
Alberta Court of Queen's Bench

Roma Construction Ltd. v. Excel Venture Management Inc.

2007 CarswellAlta 820, 2007 ABQB 396, [2007] A.W.L.D. 3726, 159 A.C.W.S. (3d) 454, 81 Alta. L.R. (4th) 77

Roma Construction Ltd. (Plaintiff) and Excel Venture Management Inc. (Defendant)

A.D. Macleod J.

Heard: February 12-13, 2007
Judgment: June 15, 2007
Docket: Calgary 0601-04125

Counsel: Darren J. Petersen for Plaintiff
James M.B. Clark for Defendant

Subject: Contracts

Headnote

Remedies — Specific performance — Availability in particular contracts — Sale of land

Defendant acquired title to parcel of land through foreclosure proceeding — Defendant learned of some potential contamination issues with property and obtained phase one environmental report — Plaintiffs were looking for property on which to store large vehicles and industrial waste bins — Plaintiffs contracted with defendant for purchase of land for $500,000 — Defendant obtained phase two environmental report in interim between agreement and proposed closing date — Report indicated minimal environmental issues with land — Plaintiffs made demand for further clean-up of land by defendant — Defendant claimed deal had lapsed and refused to close deal on original terms — Plaintiffs brought action for specific performance — Action allowed — Land was unique to plaintiffs — Plaintiffs had special storage requirements, which were not satisfied easily by other properties — Plaintiffs were ready, willing, and able to close deal on closing date — Plaintiffs' demand for further clean-up of land was outside ambit of original deal — However, such demand was not condition on which parties' intention to close deal hinged — Plaintiffs had agreed to purchase land in condition it was in on date of initial agreement.

Table of Authorities

Cases considered by *A.D. Macleod J.*:

Baird v. Red Bluff Inn Ltd. (1997), 32 B.L.R. (2d) 249, 1997 CarswellBC 1149 (B.C. S.C.) — considered

Basra v. Carhoun (1993), 82 B.C.L.R. (2d) 71, 31 B.C.A.C. 288, 50 W.A.C. 288, 32 R.P.R. (2d) 161, 1993 CarswellBC 208 (B.C. C.A.) — followed

Begeman v. Bender (2007), 2007 ABQB 266, 2007 CarswellAlta 527, 55 R.P.R. (4th) 49, 73 Alta. L.R. (4th) 70 (Alta. Q.B.) — followed

Chevaliers de Maisonneuve v. Société immobilière Maisonneuve Ltée (1952), 1952 CarswellQue 58, [1952] 2 S.C.R. 456 (S.C.C.) — considered

Digger Excavating (1983) Ltd. v. Bowlen (2001), 2001 CarswellAlta 1135, 2001 ABCA 214, 44 R.P.R. (3d) 11, 286 A.R. 291, 253 W.A.C. 291, [2001] 11 W.W.R. 618, 97 Alta. L.R. (3d) 41 (Alta. C.A.) — considered

Semelhago v. Paramadevan (1996), 1996 CarswellOnt 2737, 1996 CarswellOnt 2738, 197 N.R. 379, 3 R.P.R. (3d) 1, 28 O.R. (3d) 639 (note), 136 D.L.R. (4th) 1, 91 O.A.C. 379, [1996] 2 S.C.R. 415 (S.C.C.) — considered

1072194 Alberta Inc. v. Ninety North Construction & Development Ltd. 2003 (2005), 2005 ABQB 751, 2005 CarswellAlta 1443 (Alta. Q.B.) — followed

ACTION for specific performance of agreement of purchase and sale.

A.D. Macleod J.:

I. Background

1 This is a claim for specific performance or, alternatively, damages. The Plaintiff Roma Construction Ltd. ("Roma") contracted with the Defendant Excel Venture Management Inc. ("Excel") for the purchase of a parcel of land (approximately three quarters of an acre) in Calgary. Excel subsequently refused to close and took the position that the agreement had lapsed.

II. Issues

2 The issues in this case are:

1. Did Excel breach the contract?

2. If so, what is Roma's remedy?

III. The Evidence

3 Excel is owned entirely by Arumuga Jayanthan, who was a chartered accountant in England for 15 years prior to coming to Canada. For the last five years he has been a licenced real estate agent in the Province of Alberta. He goes by the name of Jay Arumuga and I will refer to him as such.

4 In the summer of 2005, through a foreclosure proceeding, Excel acquired title to the property in question (the "Property"). It wanted to "flip" the Property but there were some contamination problems. Excel obtained an appraisal, which was not before me, and a phase one environmental report, which was.

5 According to the evidence, environmental reports come in consecutively numbered phases. The first phase may or may not identify a problem; if there is a problem, subsequent phases may deal with resolving it. In this case, the initial report (the "Phase One Environmental Report") identified a problem which, according to Roma's evidence, made the Property unmarketable without a subsequent report (the "Phase Two Environmental Report") quantifying the cost of remediation.

6 In October 2005, someone on behalf of Excel contacted Mr. John Marra, who was looking for a piece of property on which to store heavy equipment utilized in his concrete construction business. Mr. Marra in turn contacted Mr. Domenic Arcuri, who was looking for land on which to store waste bins belonging to one of his companies. Mr. Arcuri is the principal of Arcuri Homes Inc. and Mr. Marra is the principal of Roma. Mr. Naser Khan, who also gave evidence, is an accountant for Arcuri Homes Inc.

7 In the transaction as it subsequently unfolded, Roma made the offer as a vehicle of convenience. Ultimately, the Property was to be held by a company owned by Mr. Arcuri and Mr. Marra, because it was going to serve both their companies. Roma was going to use the Property to store its heavy equipment and Arcuri Homes Inc. was going to use it to store its waste bins.

8 According to the evidence of Mr. Arumuga, the first meeting occurred at the Property and was attended by him, Mr. Marra and a real estate agent. According to Mr. Arumuga, he stressed that he simply wanted to flip the Property and did not want to retain any of the risk. He said the sale was to be quick, for cash and on an "as is" basis. There was a further meeting on October 18, 2005 at Excel's offices attended by Mr. Marra, Mr. Arcuri and Mr. Khan. They were all aware of the Phase One Environmental Report and the appraisal. Mr. Arumuga recalled that the appraisal was in the area of $630,000.00. However, as noted above, the appraisal was not before me; therefore, I have no way of knowing what assumptions went into it and whether it assessed the value of the Property before or after clean-up.

9 Mr. Khan was charged by Mr. Arcuri with drawing up an agreement. There were various draft agreements in evidence. However, none of the drafts reflects the actual agreement reached between the parties. It was obvious from the evidence that a form of agreement was being used and that there was an attempt to adapt it to this transaction. As is often the case, however, given that Mr. Khan was a non-lawyer attempting to draft a legal agreement, the result was a written agreement which was at odds with the actual deal. Indeed, Mr. Arumuga observed that there were a lot of mistakes in the agreement and that, even though he signed off on it on October 19, 2005, he wanted to have his lawyer review it and this occurred by October 24, 2005.

10 The evidence called by Roma consisted of the testimony of Mr. Khan, Mr. Arcuri and Mr. Marra; Mr. Arumuga testified on behalf of Excel. Exhibit 1, a book of documents, was entered by agreement. With respect to the meeting held at Excel's offices, the evidence is generally consistent that price was an important negotiating point. There is some dispute, though, as to how the price was arrived at. Mr. Khan and Mr. Arcuri specifically recalled that the price agreed upon on October 18, 2005 was $490,000.00. However, Mr. Khan testified that Mr. Arumuga later telephoned him and said that the clean-up costs relating to removing tires, drums and other debris on the Property was going to be greater than expected and that he required an extra $10,000.00, resulting in a price of $500,000.00. Mr. Arumuga does not recall it that way. He says that the price agreed upon was $500,000.00 and that there was no later adjustment for clean-up. His position was that he was to do nothing further with respect to the Property; he asserts that he made no promise to clean it up and no commitment to Roma to obtain a Phase Two Environmental Report. Excel's counsel points out that the written agreement makes no reference to a Phase Two Environmental Report and indeed states that the purchaser accepts the land on an "as is" basis.

11 The witnesses on behalf of Roma were consistent in their evidence that a Phase Two Environmental Report was required. Mr. Arcuri's evidence was particularly convincing that the deal was simply "not on" unless the Phase Two Environmental Report was obtained. In fact, he said that the Property was not marketable and that Mr. Arumuga understood this and assured the prospective purchasers that he was cleaning up the Property and was obtaining the Phase Two Environmental Report. Mr. Arcuri's position was that everyone understood that the deal was to be closed as quickly as possible but that the Phase Two Environmental Report was essential to any deal. Moreover, the Phase One Environment Report was in everyone's hands before any negotiation occurred with respect to the Property and it had indicated a problem.

12 After Mr. Arumuga had his lawyer look at the agreement prepared by Mr. Khan, he sent Mr. Khan a facsimile (the "October 24, 2005 Fax") on October 24, 2005. The October 24, 2005 Fax, which was entered as tab 5 of Exhibit 1, is a critical document because it is the only writing which reflects the actual deal.

13 Mr. Arumuga concedes that he sent the October 24, 2005 Fax after meeting with his lawyer. The top part of the document and the date are in Mr. Arumuga's handwriting. The handwriting beginning with the word "offer" is that of Excel's lawyer.

14 Mr. Arumuga said that, because of the changes made to the agreement arising out of the October 18, 2005meeting and the numerous mistakes therein, he had suggested to Mr. Khan that they redo the agreement so that they would have a clean and complete copy. However, this never occurred and the point of sending over the October 24, 2005 Fax was to put down the key elements of the deal and to keep it as simple as possible. Words under the word "offer" in Excel's lawyer's handwriting include:

1. Cash Offer of $500,000.00

2. Deposit of 25,000.00

3. Conditional upon clean Envir. Report acceptable for financing and purchaser

4. Condition Date — Nov 5, 2005

5. Closing Date — Nov 15, 2005

6. Deposit held by Vendor's Lawyer or if by Purchaser's lawyer it is to be sent to Vendor's lawyer on fulfilment of condition re Environment report

7. Time is of the essence

PHH Arc

Chris Gill

15 The notations "PHH Arc" and "Chris Gill" at the bottom on the page are in Mr. Khan's handwriting and it is interesting that they are the initials of the firm Mr. Arumuga retained to do the Phase Two Environmental Report and the name of the individual at that firm who ultimately did the work. Mr. Arumuga said that he made enquiries about the cost and parameters of such a report on October 24, 2005 and gave the go-ahead on November 5, 2005. He testified that this was not so much because of the pending sale to Roma but because he needed a Phase Two Environmental Report in any event no matter to whom he sold the Property. Indeed, Mr. Arumuga said that he suspected that the deal with Roma would not close, although Mr. Marra kept repeating that they were anxious to do the deal and there is no evidence that Roma was not capable of completing the transaction.

16 In my view, therefore, as of October 24, 2005, the parties were agreed on the essential elements of the deal. The price of the Property was $500,000.00, $25,000.00 of which was to be placed on deposit with Roma's lawyers and to be sent to Excel's lawyers once the Phase Two Environmental Report condition had been fulfilled.

17 I am satisfied that Excel wanted to close the deal as quickly as possible and that this was the reason for the early closing date. I am also satisfied that Roma was prepared to close on that day provided that it was content with the Phase Two Environmental Report that was to be obtained. Nonetheless, those early dates were totally unrealistic. Mr. Arumuga conceded that it takes at least four to six weeks to get a Phase Two Environmental Report. While he had made enquiries of PHH Arc in October 2005, he didn't finalize arrangements with them until November 5, 2005, which was the Condition Date referred to in the October 24, 2005 Fax. There was no way that the Phase Two Environmental Report could have been obtained in time for a closing date of November 15, 2005. When this became obvious, Mr. Khan and Mr. Marra said that they still wanted to purchase the Property and encouraged Mr. Arumuga to get the Phase Two Environmental Report as soon as he could. Mr. Marra was in contact with Mr. Arumuga almost on a daily basis, enquiring as to the status of the report. Mr. Marra constantly asked Mr. Arumuga about the report and Mr. Khan testified that he also contacted Mr. Arumuga directly on a number of occasions, although Mr. Arumuga denied this.

18 On Friday, December 9, 2005, Mr. Marra received a call saying that the Phase Two Environmental Report had arrived but that, because Mr. Arumuga was going out of the city for the weekend, he would leave it in his mailbox.

Mr. Marra picked up the report and informed Mr. Arcuri that it had finally arrived. They met on Saturday and, after reviewing the report with Mr. Khan, Mr. Arcuri informed his lawyers that they were ready to close the transaction.

19 On Monday, December 12, 2005, Roma's lawyer wrote Excel's lawyer as follows:

> I confirm by fax our recent telephone conversation which we had today, that I act on behalf of Roma Construction Ltd. in their purchase of #412 — 30 th Avenue N.W., Calgary, Alberta from Excel Venture Management Inc. My clients, Roma Construction Ltd., were in receipt of the environmental report on December 9, 2005 from your clients. This was a condition of the contract in which your client has now met. My clients have informed me that they will be reviewing the environmental report over the next three (3) days, and upon satisfactory review, will proceed to complete the transaction.
>
> Please kindly authorize PHH Arc Environmental to provide me client's bank with a transmittal letter. We trust you will find the following to be satisfactory. However, please do not hesitate to contact myself if you have any questions or concerns. Thank you.

20 On December 13, 2005, Excel's lawyer responded as follows:

> I have spoken to my client about the contents of your letter of December 12, 2005, and would advise that in his opinion there is no contract of sale. The environmental report (phase 1) was provided to your client on October 26, not December 9 th . In addition, the condition date has long since passed. I understand that your client met with my client on December 9 th and attempted to revive the sale by altering the offer to purchase by changing many of its provisions. My client did not agree to the altered or changed offer. My client has advised that he will not accept the offer of your client(s).

21 On December 16, 2006, Roma's lawyer responded as follows:

> I have spoken with my clients concerning the contents of your letter. They are at a loss as to your client's position in this matter. Contrary to your client's claim, my client was in receipt of the environmental phase 2 report on December 9, 2005 as indicated on the report date itself. Furthermore, at no time did my client attempt to re-negotiate the Purchase agreement as purported by your client.
>
> Please be advised that my clients intend to enforce this contract and they will take all necessary measures to protect their position.

22 On Friday, December 23, 2005, Messrs. Arcuri, Khan and Marra were meeting in the offices of Arcuri Homes Inc. when Mr. Marra received a call on his cell phone from Mr. Arumuga. According to Mr. Marra, Mr. Arumuga said he wanted to go ahead with the deal on the terms previously agreed. Mr. Marra stated that when he relayed that information to Mr. Arcuri, the latter immediately instructed his counsel to go ahead and close the transaction. Mr. Arumuga's recollection is different. He states that, prior to receiving the Phase Two Environmental Report, he had told Mr. Marra that the deal was off and that if Roma wanted the benefit of that report, they would have pay for it. Moreover, he had already told Mr. Marra that they would have to pay more than $500,000.00 for the Property. He said that in the phone call on December 23, 2005, he told Mr. Marra that he would take $535,000.00. Mr. Marra denies that he was ever told the deal was dead and stated that the first inkling he had that everybody wasn't heading towards a closing was the letter of December 13, 2005 from Excel's lawyer. Mr. Arumuga does say that it was difficult to hear during his phone call of December 23, 2005.

23 In any event, on December 23, 2005, Roma's lawyer wrote to Excel's lawyer as follows:

> This letter is to confirm that I have spoken with my client on the above noted matter and they have informed me that your clients wish to proceed with this transaction. We kindly ask that you provide us with the following items at your earliest convenience after you have spoken with your client.
>
> 1. Executed copies of Phase 1 and Phase 2 of the Environmental Reports;
>
> 2. Immediate timetable for when the property will be cleaned;
>
> 3. Timetable concerning the possession date and transfer of title;
>
> If you could provide us with this information at your earliest convenience, we would greatly appreciate this. We thank you for your cooperation in this matter and please do not hesitate to contact me if you have any questions or concerns. Thank you.

24 Apparently there was a response, but it was not put into evidence. I take it that Excel refused to close unless it was paid something more than the $500,000.00. I assume this was either the $535,000.00 referred to by Mr. Arumuga or the $540,000.00 set out in para. 15 of the Statement of Claim, which says:

> At 2:27 pm of the same day [i.e. December 23, 2005], the Defendant's solicitor responded by letter that there was no deal in place. However, they would now be prepared to renegotiate and sell the said property at $540,000.00.

IV. What Was the Deal Between the Parties?

25 Notwithstanding the numerous draft agreements that went back and forth between the parties, I am satisfied on the evidence before me, including the October 24, 2005 Fax, that Roma insisted as a term of the deal that a Phase Two Environmental Report be obtained and that it be satisfactory both for financing purposes and to Roma. I am satisfied that Mr. Arcuri in particular recognized that the Property was not marketable and was a potential liability unless such a report was obtained. I am also satisfied that Mr. Arumuga understood this. While Mr. Marra may not have been as concerned because of the use he intended to make of the property, he generally deferred on financial matters to Mr. Arcuri, who was more sophisticated in this area. Indeed, Mr. Arumuga testified that Mr. Marra claimed to be controlled by somebody else. I think in fact Mr. Arumuga understood that Mr. Arcuri was in control of the transaction. While he is somewhat vague in his recollection of Mr. Arcuri, I do not think he could have failed to recognize that Mr. Arcuri was in charge and I cannot think that Mr. Arcuri was other than crystal clear in his demand for a clean Phase Two Environmental Report. I find this explanation to be most consistent with the evidence before me.

26 Based on the Phase Two Environmental Report, it became clear that the environmental risk was less than the parties had feared. Because real estate prices in Calgary had continued to escalate in the meantime, the Property was worth more at that point than what Mr. Arumuga had agreed to sell it for. He may well have made an effort to extract more money from the deal in his conversation with Mr. Marra on December 23, 2005. However, I am not persuaded that Mr. Marra agreed to any further amount and I believe that Mr. Arumuga would have understood that, in order to increase the amount, Mr. Marra would have to get the agreement of Mr. Arcuri.

27 I conclude that the deal was as set out in the October 24, 2005 Fax; the price was $500,000.00, $25,000.00 of which was to be held by Roma's lawyer until a satisfactory Phase Two Environmental Report was obtained. While the closing date originally had been agreed upon, it was mutually agreed that the closing would be postponed until a reasonable time after the Phase Two Environmental Report was made available so that it could be evaluated by Roma and, if necessary, its financier.

28 As to the clean-up of the Property, those testifying for Roma indicated that Mr. Arumuga had told them that he would have to clean up the Property in order to do the Phase Two Environmental Report. It is not clear to me why that would be so unless samples were to be taken from an area which was occupied by a drum or some other debris. Mr. Arumuga denied that he undertook to clean up the Property any further than he did. He testified that he had removed

hundreds of tires and some other debris but I understood from the evidence that there still was a lot of "junk" on the Property after the Phase Two Environmental Report was completed. Perhaps that was the reason that Roma's lawyer, in his letter dated December 23, 2005, asked for a timetable for clean-up of the Property.

29 All of the witnesses agreed that the final written agreement prior to the October 24, 2005 Fax was the document contained at tab 11 of exhibit 1 and dated October 19, 2005. In paragraph 7 thereof, Roma agreed to purchase the Property on an "as-is, where-is and with all faults basis...". Therefore, I am unable to conclude that Excel agreed to any clean-up other than that which was necessary to obtain the Phase Two Environmental Report. In other words, I do not find that the deal included any further obligation on Excel to clean up the Property after receiving the clean Phase Two Environmental Report. Such an obligation would have been contrary to the written agreement.

V. Is Roma Entitled to Specific Performance?

30 At the opening of the case, I asked Roma's counsel whether it was seeking damages if it was not entitled to specific performance. The answer was yes, but the main thrust of Roma's claim was for specific performance.

31 Until recently, it was generally thought that, provided the conditions were met, agreements for the purchase of land would *prima facie* be enforced by an order for specific performance. This has been thrown into some doubt by *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.). I do not have to deal with the controversy from that case in detail because of the view I take of the agreement between the parties before me. What is significant about that case for the present purposes is the Supreme Court of Canada's holding that a piece of real estate should not be presumed to be unique and must instead be proved to be so. The Court held as follows at pp. 428-9:

> While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Residential, business and industrial properties are all mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.
>
> It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. ...
>
> Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.

32 Nevertheless, I find that the Property was unique in the sense that it met the storage requirements both of Mr. Arcuri's waste company and of Roma. I find support for this in Mr. Arcuri's testimony that he still has not found a substitute property for his waste bins. It is likely that Mr. Marra was contacted initially because someone knew what he was looking for and thought that the Property suited his purposes. Moreover, Mr. Arcuri and Mr. Marra agreed upon a joint venture so that their two businesses could utilize the Property for storage. Finally, there are contamination problems with the Property which do not interfere with the use to which the joint venture was going to put it but might interfere with its use for other purposes. Accordingly, whatever is the test regarding the uniqueness of the Property and its suitability as a subject of a specific performance order, I am satisfied that Roma has met the test.

33 That, however, is not the end of the matter. To succeed in an action for specific performance, a plaintiff must demonstrate that it is "ready, willing and able" to perform its end of the bargain. The following passage from Victor Di Castri, Q.C., *Law of Vendor and Purchaser*, 3d ed., vol. 2, looseleaf (Toronto: Carswell, 2007) at §788 illustrates the rationale behind this requirement:

> The granting of equitable relief by way of **specific performance** rests in the judicial **discretion** of the court and is exercised as far as possible by fixed rules and principles, yet the **discretion** is more elastic than in the administration of other judicial remedies; an important element to which the court gives particular attention is the conduct of the

> plaintiff. He will not be granted **specific performance** if he approaches **equity** with unclean hands or unable to show that he has performed all his own obligations under the contract, or has tendered performance, or is ready and willing to do so.

34 As noted above, the letter sent by Roma's counsel to Excel's counsel on December 23, 2005 asked for three things: (i) executed copies of the Phase One Environmental Report and the Phase Two Environmental Report; (ii) an immediate timetable for when the property would be cleaned; and (iii) a timetable concerning the possession date and transfer of title. Clearly, the third item is not objectionable. Given my finding that the Phase Two Environmental Report was part of the parties' agreement, the first item is also acceptable. The second item, however, is more troubling.

35 As discussed above, I do not believe that further clean-up (beyond that necessary to obtain the Phase Two Environmental Report) was part of the parties' agreement. Since Roma had the Phase Two Environmental Report as of December 9, 2005, that much clean-up manifestly had been done by that point. Therefore, I do not believe that Roma was within its rights to demand any further clean-up. What, then, is the effect of the request for a clean-up timetable?

36 A demand by one party for something beyond the terms of the contract may amount to a repudiation of that contract. Romilly J. took note of this possibility in *Baird v. Red Bluff Inn Ltd.* (1997), 32 B.L.R. (2d) 249 (B.C. S.C.) at p. 257:

> Counsel for the Defendants drew my attention to *Bentall Properties Ltd. v. Transalta Resources Corp.* (August 26, 1994), Doc. Vancouver C927314 (B.C.S.C.) where Wong J. wrote at para. 18:
>
> > There is also authority for the proposition that if a party dictates terms different from those found in the agreement it may amount to a refusal to complete the agreement as written and will therefore constitute a repudiation of the agreement. That was the finding of La Forest J. in *Wile v. Cook* (1986), 31 D.L.R. (4th) (S.C.C.) in which a fire occurred between the date the parties made an agreement for the purchase of land and the closing date which destroying (sic) a building on the property. A clause in the agreement stipulated that in the event of damage to the premises the purchaser could elect to have the proceeds of the insurance held in trust by the vendor and complete the sale or cancel the agreement. The purchaser filed a declaration electing to complete the sale if the premises were restored or if sufficient insurance money was available to effect the restoration. The addition of these terms constituted a repudiation of the written agreement as there was a refusal to complete the agreement as written.

37 In *Baird*, the alleged repudiation arose from a comment made by one of the parties during a dispute about payment. Romilly J. rejected this argument, saying at p. 258 that there was no way it could be said that the party's outburst amounted to "an intimation of an intention to abandon or altogether to refuse performance of the contract". I am of the same view in this case. I am satisfied that once the Phase Two Environmental Report had been received and reviewed, Roma intended to proceed with the transaction and was not expecting further clean-up. Both Mr. Marra and Mr. Arcuri were asked by their lawyer if they understood the three things listed in the December 23, 2005 letter to be the "outstanding items" and, strangely, both said yes. And yet, in his testimony, Mr. Marra repeatedly said that the Property had to be cleaned up in order for the Phase Two Environmental Report to be done. Mr. Arcuri also testified that the Phase Two Environmental Report couldn't be done until the Property had been cleaned. Neither made any reference to clean-up beyond what was necessary to obtain that report. In fact, Mr. Arcuri testified that Roma would take the Property on an "as is" basis once a satisfactory Phase Two Environmental Report was received. This statement seems inherently contradictory, but it does lead me to the conclusion that further clean-up was not expected. Therefore, I am satisfied that the reference to clean-up in the December 23, 2005 letter does not amount to a repudiation of the contract by Roma. It may even have been a mistake on the part of Roma's lawyer. No issue was ever taken by the vendor with respect to that condition because of course the vendor's position was that there was no deal unless there was more money. The statement of claim makes no reference to that specific condition and at trial the evidence was that the plaintiff was prepared to close the deal upon receipt of the Phase Two Environmental Report.

38 Therefore, notwithstanding that the letter of December 23, 2005 overreached in the sense that it was requiring a further cleaning, which I have concluded was not a part of the deal, it does not disentitle the plaintiff from seeking specific performance if it can demonstrate that it is "ready, willing and able" to close in accordance with the terms of the deal at a later date. In this connection, the British Columbia Court of Appeal in *Basra v. Carhoun* (1993), 82 B.C.L.R. (2d) 71 (B.C. C.A.), made the following comments at paras. 30, 34, 45 and 47:

> More problematic is the issue of when must it be proved that the purchasers were ready, willing and able to complete. ... in order to succeed in a claim for specific performance the purchasers must prove that they were ready, willing and able to complete. But when?
>
> . . . . .
>
> With regard to when readiness, willingness, and ability to perform must be proved to exist it is my view that, in these circumstances, it is not necessary for the plaintiffs to prove these elements as at the original completion date, but only as at the new, later completion date to be set by the order of the court.
>
> . . . . .
>
> On the basis of *Shaw* and *King* it is apparent that a plaintiff can succeed in an action for specific performance despite not being ready, willing and able to perform at the original completion date if the plaintiff is ready, willing and able to perform at some later date, to be determined by the giving of reasonable notice or fixed by the court.
>
> . . . . .
>
> Finally, I refer to Spry, *The Principles of Equitable Remedies*, 3rd ed., (1984: Canada, Carswell) at pp.212-13:
>
> > Usually, however, it is found that when the readiness and willingness of the plaintiff to perform his obligations is spoken of, reference is being made to his ability and intention as at the time when the proposed relief is to be granted. There are indeed statements that suggest that the plaintiff must be able and willing to perform all of his obligations that are then still unperformed. Yet that to impose so strict a general requirement would not be in accordance with equitable principle is suggested by cases where specific performance has been granted although inessential breaches are shown to have already taken place on the part of the plaintiff. The better view is that both past and prospective breaches that are inessential are not necessary bars to relief but are merely relevant considerations in the exercise by the court of its discretion, especially where questions of hardship arise.

39 This rationale has been approved by our Court in at least two cases: *Begeman v. Bender*, 2007 ABQB 266 (Alta. Q.B.), and *1072194 Alberta Inc. v. Ninety North Construction & Development Ltd. 2003*, 2005 ABQB 751 (Alta. Q.B.).

40 Given the view I have taken as to the agreement which was reached and that the plaintiff has not insisted on a further clean up since its counsel's letter of December 23, 2005, and given that the defendant has never relied upon the cleanup condition because it took the position that there was no deal unless the Plaintiff was prepared to pay to pay more money, I conclude that it is within my discretion to grant the plaintiff specific performance.

41 At para. 4 of its Statement of Defence, Excel alleges that Roma "has never tendered and is not entitled to the remedy of specific performance." However, it is clear that Excel had refused to carry through with the transaction. Mr. Justice Robert J. Sharpe notes in *Injunctions and Specific Performance*, looseleaf (Toronto: Canada Law Book, 2006) at §10.630 that "... it is also well established that where the defendant has made it clear that performance will not be forthcoming and the formal tender would be futile, the plaintiff's failure to tender will not be fatal to the specific performance claim." A similar statement was made by the Supreme Court of Canada in *Chevaliers de Maisonneuve v. Société immobilière Maisonneuve Ltée*, [1952] 2 S.C.R. 456 (S.C.C.) at 472:

> A tender was not required when as was apparent from the actions of the appellant and from the proceedings and evidence at the trial, the appellant never intended to perform the contract.

42 Finally, I note that Di Castri, in the passage quoted above, states that a plaintiff seeking specific performance is required *either* to tender *or* be ready and willing to do so. Therefore, the lack of tender does not prevent Roma from seeking specific performance. I am satisfied that Roma was prepared to tender the funds, but did not do so in the face of Excel's repudiation of the agreement.

43 Excel also stated in its Statement of Defence that Roma could not have closed on November 15, 2005 because it did not have mortgage financing in place on that date. I accept the evidence of the plaintiff that it had the necessary financing in place and was able to close.

44 The defendant also argued that the written agreement provided at the time was of the essence and that there was no agreement to extend the Closing Date beyond November 15, 2005 and therefore the agreement lapsed.

45 As I stated above, the Closing Date of November 15, 2005, was completely unrealistic since it was not possible to obtain a Phase Two Environmental Report by that date. Therefore, it was clear that the closing date would have to be extended and I am satisfied that Roma agreed to an extension as necessary to allow for the report to be obtained. As I have found that obtaining such a report was part of Excel's obligations under the agreement, Excel cannot be heard to argue that it did not agree to the necessary extension.

46 It is true that all versions of the written agreement, including the October 24, 2005 Fax, provided that time was of the essence. In *Digger Excavating (1983) Ltd. v. Bowlen* (2001), 286 A.R. 291 (Alta. C.A.), the Court of Appeal made the following comments in respect of such a provision:

> "The mere fact that the parties previously agreed to an extension of time does not of itself indicate a waiver of the time of the essence clause. Madam Justice Hetherington correctly set out the law applicable in Alberta in *Landbank Minerals Ltd. v. Wesgeo Enterprises Ltd. and Tri-Link Resources Ltd.*, [1981] 5 W.W.R. 524, 30 A.R. 300 (Q.B.). She stated at page 535:
>
> > I think that, where time is of the essence of an agreement and there is ane extension of time for performance of an obligation under the agreement to a specified date, the effect of the extension on the essentiality of time must be determined in the context of the circumstances of the case. If there are circumstances which make it unjust or inequitable for a party to insist that time is of the essence, the court may refuse to give effect to this provision in the agreement. In the absence of such circumstances, however, the extension of time simply results in the substitution of a later date for the one stipulated in the agreement. I do not think that it in any way affects the provision in the agreement that time is of the essence."

47 The Court went on at para. 28 to say that "[t]he party which has fully performed its obligations under a contract is entitled to insist on performance by the other party." In this case, it is Excel that had not complied with its obligations (i.e., obtaining the Phase Two Environmental Report) as of the Closing Date of November 15, 2005. In my view, this is a circumstance that makes it unjust for Excel to insist on November 15, 2005 as the Closing Date. Indeed, by its actions Excel concurred in the extension of the closing date to a reasonable period following the obtaining of the Phase Two Environmental Report.

VI. Conclusion

48 Taking into account all of the circumstances, I am satisfied that this is an appropriate case for the exercise of my discretion to grant specific performance. Guided by *Basra*, *1072194* and *Begeman*, I am prepared to set a new date for the closing of the transaction. Therefore, I order that the closing date shall be July 31, 2007. However, in the event the parties are able to agree on a different date, they may do so.

49 In light of my conclusion in respect of specific performance, I need not consider damages.

50 Roma shall have its costs on a party-and-party scale.

Action allowed.

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