Court of King's Bench of Alberta

Citation: 799869 Alberta Ltd v Hofer, 2025 ABKB 548

Date: 20250922
Docket: 1403 02078
Registry: Edmonton

Between:

799869 Alberta Ltd

Plaintiff

- and -

Roger Hofer, As Personal Representative for the Estate of James Culkin (Deceased)

Defendants

Reasons for Decision
of the
Honourable Justice E.C. Lew

I. Introduction

[1] The Plaintiff, 799869 Alberta Ltd. (the "Buyer"), offered to purchase property (the "Property") in Edmonton, located at 12804 Fort Road from the Defendant, 681154 Alberta Ltd. (the "Seller"), by use of a standard form Commercial Real Estate Purchase Contract dated March 11, 1999 (the "Purchase Agreement"). The Purchase Agreement included conditions. One such condition was a due diligence condition, Clause 3(b) (the "Due Diligence Condition").

[2] The Buyer failed to waive the Due Diligence Condition by the deadline of March 31, 1999. As a result, the Seller terminated the Purchase Agreement.

[3] The Buyer issued a Statement of Claim in Action # 9903 18817 (the "Underlying Action") alleging that the Seller breached the Purchase Agreement by failing to provide documentation required by the Due Diligence Condition, as a result of which the deadline for satisfaction of that condition was suspended until the Seller satisfied its obligations in relation to that condition, which it failed to do. As a result, the Seller wrongfully terminated the Purchase Agreement.

[4] The Property was vacant land except for two billboard advertising signs located on it. The purchase price was $19,500.

II. Procedural Background

[5] The Underlying Action was dismissed for delay. This Action was then initiated against the Defendant, James Culkin, who was counsel who had conduct of the Underlying Action on behalf of the Buyer when it was dismissed. This Action is for professional negligence.

[6] This matter was heard as a streamlined trial pursuant to an Order dated March 26, 2024. The issue at trial was an adjudication of the question of liability in the Underlying Action only.

III. Liability

[7] For the reasons which follow, I conclude that the Seller did not breach the Purchase Agreement.

IV. Key Facts

[8] Most facts were not contested, except with respect to the receipt by the Seller of the Buyer's letter dated March 23, 1999, discussed below.

[9] One day after acceptance of the Buyer's offer and formation of the Purchase Agreement, the Seller sent a letter dated March 12, 1999, authorizing the Buyer to make an application for a development and building permit to the City of Edmonton on the Property. That letter also stated the following in relation to the signs located on the Property:

> We further advise that the signs located on the property are supplied and owned by Pattison Outdoor Group and that there was no contract signed. Pattison presently pay an annual rental fee of $700.

[10] No documentation was sent with that letter. In particular, no signed lease, no Real Property Report and Compliance Certificate were provided by the Seller to the Buyer with that letter or at all. Neither were any plans or specifications provided.

[11] On March 22, 1999, the Buyer entered into a conditional sign lease with Urban Outdoor, a division of Slaight Communications Inc., giving Urban Outdoor the right to install signs on the Property. This lease was conditional on completion of the Purchase Agreement.

[12] On March 23, 1999, the Buyer's evidence was that it sent a letter to the Seller by mail acknowledging receipt of the March 12, 1999 letter and asking a few questions, as follows:

1. Do you own the sign structure? In the absence of a lease or caveat to the contrary, we believe that the sign structure, as is currently on the properly, belongs with the property?

2. In the event that the structure is not part of the property, could you please tell us who is responsible for it's removal?

3. And, in the event that the removal is the responsibility of the Sign Company will they repair the soil to the condition as existed prior to its original placement?

[13] The Seller denied receipt of that March 23, 1999 letter.

[14] On March 24, 1999, the Buyer applied for a development and building permit in relation to the Property, described in the application cover letter as a "replacement sign permit".

[15] On March 31, 1999, about ten minutes after the 4:00 pm Due Diligence Condition deadline, the Seller gave notice of termination of the Purchase Agreement on the basis that the Buyer had failed to waive the Due Diligence Condition. The Buyer has contested the validity of this notice and issued the Underlying Action alleging breach of the Seller's obligations pursuant to the Due Diligence Condition.

[16] The Buyer discovered, in July 1999, some time after the Purchase Agreement was terminated, that there had been a signed lease agreement in relation to the signs on the Property. The Buyer obtained a copy of that lease agreement directly from the sign owner, Pattison, in July 1999, after the Seller had terminated the Purchase Agreement. That lease is between Norphil Enterprises as lessor and Hook Outdoor Advertising, a division of Pattison as lessee. It provided for payment of $250 per face annually. I interpret "per face" to refer to each of the two signs, for a total annual rent of $500. It is dated September 13, 1985, and was for a term of three years. It included a clause that, at the end of the term, the lessee (Pattison), had the option of renewing the sign lease from time to time under the same terms and conditions so long as the lessor (Norphil) remained as owner, tenant, or agent of the property.

[17] It was the evidence of Mr. Phillips, the Seller's principal, that he was a director of Norphil in 1985 and following, that there were no written amendments, extensions, or new lease agreements between Norphil and Pattison, and, as far as he was aware, that sign lease expired in 1988. Subsequently, the Seller entered into a verbal agreement with Pattison with respect to the sign lease to pay a total rent of $700 per year.

[18] The Buyer also subsequently discovered that Pattison had in its possession plans it relied on in support of a building permit for the signs which were on the Property.

V. The Purchase Agreement

[19] Following are the relevant provisions of the Purchase Agreement, either quoted verbatim or paraphrased.

[20] The Due Diligence Condition, Clause 3(b) of the Purchase Agreement, read as follows:

> Conditions Precedent for the sole and exclusive benefit of the Buyer and which may be satisfied or waived unilaterally by the Buyer in its sole discretion, but only in writing, signed by the Buyer and delivered to the Seller's Agent by mail, fax or personally. Failure to remove all of the conditions precedent in writing by the respective condition dates will result in the return of all deposits to the Buyer without deduction of any kind. This contract shall then be void and neither party

shall have any claim upon the other. A condition date may be extended by written agreement.

> 3(b) DUE DILIGENCE CONDITION: It is a condition precedent to this Offer that the Buyer shall have until up to 4:00 PM on the 31st day of March 1999 to inspect and to accept the Property, the Permitted Encumbrances and all relevant information and records relating thereto ("DUE DILIGENCE"). Should this condition not be waived/removed, then this Offer shall become null and void. For this purpose, the Seller agrees to allow the Buyer reasonable access for inspection and provide the following documents if available within five (5) business days after the Date of Acceptance: [*emphasis added*]
>
> > ii. copies of all other contracts currently pertaining to the Building and Property (copies of signed contracts with any and all tenants) – *[portion in parentheses handwritten]*
> >
> > vi. a Real Property Report with Compliance Certificate from the Municipality having jurisdiction. The Seller shall bear the costs of any Legal Surveys and Certificates that may be required for this purpose;
> >
> > vii. any plans and specifications relating to the original construction and improvements to the Property, including without limiting the generality of the foregoing, "as built" drawings, and plans for leasehold or tenants' improvements all of which such as are in the possession or control of the Seller.

[21] Clause 3(c) of the Purchase Agreement added an additional condition for the Buyer to acquire appropriate development and building permits from the City of Edmonton, to be fulfilled or waived by May 15, 1999.

[22] Clause 4 of the Purchase Agreement required the Seller to provide the Buyer, within five business days, with a letter authorizing the Buyer to apply for "a permit on the Property". Clause 5 provided for a possession date of June 18, 1999 and specified that the Property shall be vacant of all tenancies except for those listed, and no tenancies were listed.

[23] The Purchase Agreement terms may be summarized as follows:

1. The Seller was to provide documentation required by the Due Diligence Condition, 3(b), by March 18, 1999 (five business days following acceptance on March 11, 1999);
2. The Seller was also required by Clause 4 to provide a letter authorizing the Buyer to apply for "a permit on the Property" by the same deadline as the Due Diligence Condition, March 18, 1999;

3. The Buyer then had until March 31, 1999 within which to waive or remove the Due Diligence Condition; and
4. The Buyer had until May 15, 1999 to waive or fulfill the condition permitting it to acquire "appropriate development and building permits" from the City.

VI. The Parties' Positions

[24] The Buyer argued that the Seller breached its obligations in the Due Diligence Condition by failing to:

1. provide the written lease agreement between Norphil and Pattison dated September 13, 1985;
2. provide a Real Property Report and Compliance Certificate ("RPRCC") as required by subparagraph 3(b)(vi);
3. provide plans and specifications relating to the improvements on the property; and
4. generally failing to provide all relevant documentation.

[25] In addition, the Buyer argued that the Seller breached clause 5 of the Purchase Agreement and made a misrepresentation by failing to list Pattison as a tenant in that clause.

VII. Law

[26] A party has the obligation to satisfy a condition in a purchase contract to use reasonable efforts to attempt to have that condition satisfied: ***Dynamic Transport Ltd. v OK Detailing Ltd.***, [1978] 2 SCR 1072 at p 1083. The following are passages from that case which help illuminate this concept, as follows (at pp 1083 – 84):

> 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: see Cheshire and Fifoot's *Law of Contract*, 9th ed. (1976), at pp 137-8:
>
> > Where there is a contract but the obligations of one or both parties are subject to conditions a number of subsidiary problems arise. So there may be a question of whether one of the parties has undertaken to bring the condition about … There is a clear distinction between a promise, for breach of which an action lies and a condition, upon which an obligation is dependent. But the same event may be both promised and conditional when it may be called a promissory condition. A common form of contract is one where land is sold 'subject to planning permission.' In such a contract one could hardly imply a promise to obtain planning permission, since this would be without the control of the parties but the courts have frequently implied a promise by the purchaser to use his best endeavours to obtain planning permission.
>
> There are many cases in which provisions of a contract were subject to the condition precedent of an approval or a licence being obtained, and one party was

> by inference in the circumstances held to have undertaken to apply for the approval or licence: see ***Hargreaves Transport Ltd. v Lynch*** [8]; ***Brauer & Co. (Great Britain) Ltd. v James Clark (Brush Materials) Ltd.*** [9]; ***Société d'Avances Commerciales (London) Ltd. v Besse & Co. (London) Ltd.*** [10]; and ***Smallman v Smallman*** [11]. This type of case is merely a specific instance of the general principle that "the court will readily imply a promise on the part of each party to do all that is necessary to secure performance of the contract": 9 Hals. (4th ed.), p 234, para 350: see also *Chitty on Contracts*, "General Principles", (23rd ed.) p 316, para 698, where it is said: "The court will also imply that each party is under an obligation to do all that is necessary on his part to secure performance of the contract."

[27] The Court then considered who had the obligation to apply for subdivision of the land, because it was not clearly spelled out in the contract. It concluded that the vendor did. The Court stated (at pp 1084 - 85):

> This is the only way in which business efficacy can be given to their agreement. In the circumstances of this case, the only reasonable inference to be drawn is that an implied obligation rested on the vendor to apply for subdivision.

[28] The matter of relative obligations with respect to the exercise of the Due Diligence Condition, Clause 3(b) of the Purchase Agreement, is at issue in this matter. The case law is helpful for context but none of the cases cited by the parties was truly analogous to this matter.

[29] The following cases were cited for consideration by the parties with respect to their relative obligations in the exercise of the Due Diligence Condition:

> The Plaintiff: ***Fossum v Visual Developments Ltd.***, [1997] A.J. No. 1255 (Alta. Q.B.) (***Fossum***)
>
> The Defendant: ***Dynamic Transport Ltd. v OK Detailing Ltd.***, [1978] 2 SCR 1072; ***Acquest/Alberta Mining Inc v Barry Developments Inc.***, 1999 ABQB 511; (***Acquest***)

[30] For additional guidance, I have also considered the following cases: ***3081169 Nova Scotia Ltd. v Lunar Fishing (New Brunswick) Inc.***, 2010 NSSC 147 (***Lunar Fishing***); ***1534818 Alberta Ltd. v Tissot Management Ltd.***, 2011 ABQB 75 (***Tissot***); ***North Pacific Properties Ltd v Bethel United Churches of Jesus Christ Apostolic of Edmonton***, 2020 ABQB 791 (***North Pacific***) (upheld on appeal at 2022 ABCA 224).

[31] The following quotes from ***Tissot*** were of assistance in framing the parties' relative obligations in respect of a contract condition such as the one at issue here:

> A party to a contract cannot avoid or frustrate a contract by failing to do all that is necessary to secure performance of the contract. The Court will readily imply a promise on the part of each party to do all that is necessary to secure its performance of a contract: ***Dynamic Transport Ltd. v OK Detailing Ltd.*** 1978 CanLII 215 (SCC), 1978 CarswellAlta 62 at paras 20-22 (S.C.C.) [at para 51]
>
> Where discretion is lodged in one of the parties to a contract, it must be exercised in good faith; what is done must be done honestly: ***Mesa Operating Ltd. v Amoco***

> ***Canada Resources Ltd.***, 1994 ABCA 94 (CanLII), [1994] A.J. No. 201 at paras 16, 19, 22-23 (Alta. C.A.) ("***Mesa***"). [at para 52]
>
> All of the circumstances must be examined to determine if Tissot acted reasonably, honestly and in good faith in rejecting the personal financials provided by Skovberg and Hinz. [at para 54]

[32] A party who has the obligation to satisfy a condition in a purchase contract is obliged to use reasonable efforts to attempt to have that condition satisfied. This is covered extensively in ***Lunar Fishing*** which case was cited with approval in ***Tissot***. In ***Lunar Fishing***, the Nova Scotia court cited the following passage with approval:

> Where a condition is inserted in an agreement for the benefit of one party, that party cannot take advantage of the condition unless it satisfies the court that it took all reasonable steps or used its best efforts to fulfil the condition. The law implies a duty on the part of the person for whose benefit the condition was inserted to take such steps. [at para 51, quoting from para 57 of ***Marleau v Savage***, [2000] O.J. No. 2399 (S.C.J.)].

VIII. Analysis of Alleged Breach of the Due Diligence Condition

[33] The Due Diligence Condition has been excerpted above. The full condition included a fairly comprehensive list of documents to be provided by the Seller. It included contracts currently pertaining to the building and property, engineering reports, environmental reports, as well as an RPRCC, amongst other things.

[34] The Purchase Agreement was a standard form commercial real estate purchase contract. It is clear both from the fact that this was a standard form, and from a review of the list of documents in the Due Diligence Condition, that not all of the documents listed in that clause will be in existence, relevant or available for every transaction.

[35] The Buyer who enters into a standard form contract of this nature may have some idea, but is not certain, what documentation it will receive from the Seller. The documents which are in existence and in the possession of the Seller are, generally speaking, the documents that the Buyer should expect to receive. However, the Buyer will not know with certainty what those specific documents are until the Seller provides them.

[36] The Due Diligence Condition created a process for determination and disclosure of the documents the Buyer was to receive.

[37] First, it created an obligation on the Seller to provide documents. It stated:

> For this purpose, the Seller agrees to allow the Buyer reasonable access for inspection and provide the following documents if available within five (5) business days after the Date of Acceptance.

[38] The condition had a deadline of March 31, 1999. The offer was made on March 10, 1999. The offer was accepted and the agreement entered into on March 11, 1999. Five business days following acceptance expired on March 18, 1999. That allowed the Buyer from March 18 to March 31, 1999, to examine the documents and withdraw that condition.

[39] As stated above, each party has a duty to do all that is necessary to secure performance of the contract. The Buyer pointed to the Seller's failure to provide the Pattison lease as well as the

Seller's failure to provide an RPRCC and plans and specifications relating to the Property as breaches of the Due Diligence Condition. The Buyer argued that, as a result of these breaches, the time is of the essence clause was suspended pending the Seller's satisfaction of its obligations. The Buyer argued that this suspended the March 31, 1999 deadline pending satisfaction of the Seller's obligations to provide these documents and that, therefore, the Seller was not in a position to terminate the Purchase Agreement for the Buyer's failure to waive the Due Diligence Condition on March 31, 1999.

[40] The Buyer referenced the following authorities in support of this argument: ***Gill v Zhang***, 2016 CarswellBC 2249 at para 97, ***0706612 B.C. Ltd. v Calibur Facilities Management Ltd.***, 2006 BCSC 2044 at para 18 and ***Toor v Dhillon***, 2020 BCCA 137 at para 51. These cases address the innocent party's options to accept a repudiation by the breaching party, or to affirm the contract and proceed. Where the innocent party affirms and proceeds, then it may give notice of its intention, and a new deadline may be set for performance of the obligation by the breaching party. Until the breaching party performs, the innocent party's deadline is suspended accordingly.

[41] The Buyer also cited *Remedies and the Sale of Land, 2nd ed.* (Toronto: Carswell, 1998) at p 45 for the proposition that a party cannot rely on the deadline for the satisfaction of a condition precedent when the failure to meet the deadline is a consequence of the party not having proceeded diligently or in good faith to satisfy the condition.

[42] I cannot accept the Buyer's characterization of relative responsibilities for the breach of the Purchase Agreement. The Buyer has cast itself in the role of the innocent party and the Seller in the role of the breaching party. This is not accurate.

[43] This interpretation puts all of the risk and obligation of satisfaction of the Due Diligence Condition on the Seller. It ignores the Buyer's obligations with respect to satisfaction of the Due Diligence Condition.

[44] Clause 3 stated that the Due Diligence Condition was for the sole benefit of the Buyer. The primary obligation to ensure satisfaction of Clause 3 in general, including the Due Diligence Condition, was on the Buyer, not the Seller. The Buyer had the duty to "inspect and to accept the Property, the Permitted Encumbrances and all relevant information and records relating thereto". The Buyer had discretion in analyzing the information provided and determining if it was willing to proceed with the transaction. It could have waived the condition even if the document production provided by the Seller was deficient.

[45] The Buyer had to engage in the due diligence process and decide if it was satisfied with the documentation it received and whether it chose to proceed with the transaction. In doing so, it had to act reasonably, honestly, and in good faith: ***Tissot*** at para 54; ***Lunar Fishing*** at para 51. It had significant discretion built into this contractual condition: to assess the merits of the information in the documentation and even to waive the condition without adequate disclosure.

[46] The Due Diligence Condition was intended to give the Buyer the information it needed to assess whether to continue with the transaction or abandon it.

[47] In order to give effect to this condition, there was a related obligation on the Seller, which was to provide the documents specified. However, that obligation was circumscribed by a variety of limiting language: that access was to be "reasonable" and documents were to be provided "if available".

[48] Balancing these relative obligations, if the Buyer expected to receive a document under the Due Diligence Condition which it had not received, and if it still intended to pursue the transaction, then there was an obligation on the Buyer to raise deficiencies in the document production with the Seller prior to the condition deadline. This arises as a consequence of its obligation to exercise diligence in satisfying this condition.

[49] The Buyer failed to give any notice of deficiencies in the due diligence documentation prior to expiry of the Due Diligence Condition deadline. Once the Seller terminated the Purchase Agreement, it was no longer open to the Buyer to point to defects in the Seller's disclosure of which it clearly knew or ought to have known at that time.

[50] The Buyer's proposed interpretation is contrary to the principles of business efficacy and contractual certainty. The Buyer's proposed interpretation is, essentially, that despite silence by the Buyer as to the adequacy of the due diligence disclosure, the condition deadline was suspended due to the Seller's failure to provide a document or documents.

[51] If this interpretation is accepted, it would leave a seller in a state of uncertainty as to whether the seller had satisfied its obligations to provide documentation. While there may be instances where the seller's failure to provide documents is obvious to both parties and may suspend the condition deadline, this is not such a case.

[52] There was a process to the proper function of this Due Diligence Condition. Both parties had a role to play in its satisfaction.

IX. The Real Property Report and Compliance Certificate (RPRCC)

[53] A notice requirement would apply most obviously to the RPRCC and any document the Buyer had a clear expectation of receiving. The Buyer did not give notice of its expectation of receiving the RPRCC (or any other document) when the Seller failed to provide it by the Seller's initial five business day deadline.

[54] The Buyer seems to presume that it was a foregone conclusion that the Seller was obliged to provide the RPRCC and that the Purchase Agreement itself was "the ask". The Purchase Agreement is ambiguous on this specific point. The Due Diligence Condition preamble limits production of all documents listed "if available". Clause 3(b)(vi) has a specific comment that the "Seller shall bear the costs of any Legal Surveys and Certificates that may be required for this purpose". This language suggests costs will be incurred by the Seller, suggesting the RPRCC is expected to be obtained and provided even if it is not available.

[55] On the other hand, the parties' conduct does not suggest that either party had an expectation that the Seller would obtain the RPRCC for the Buyer. There was no written discussion about it nor was their evidence of any oral discussion about it. The Property only had two signs on it, which the Seller confirmed were on the Property in the March 12, 1999 letter. The Buyer had no difficulty entering into a new sign lease with Hook Outdoor for establishment of new signs on the property without the benefit of the RPRCC. The Seller's principal testified he never "saw" the obligation which I take to mean he never noticed it. While that may not relieve the Seller of performance of an obligation, it is an indication that neither party subjectively focused on it and one can conclude that neither party anticipated that the Seller would be obtaining a new RPRCC.

[56] The Buyer had the discretion to waive the Due Diligence Condition whether or not it received a full set of documents. I conclude neither party expected the Seller to provide the RPRCC.

X. The Norphil Lease

[57] The Buyer's position is not clear as to whether it was expecting written leases or not. It did not seek clarification in its March 23, 1999 letter if it did. The Buyer only found out about the existence of the Norphil lease sometime after termination of the Purchase Agreement.

[58] The failure by the Seller to provide the Norphil lease does not assist the Buyer. I accept the Seller's position that the written lease had expired and was no longer in force and therefore, the failure to produce it was not a breach of its obligations in respect of the Due Diligence Condition. Even if there was uncertainty at the time of the transaction as to whether the lease was in force, it would impose an unreasonable burden on the Seller to ground a breach for failing to produce it in this case.

[59] The Buyer's position is also not logical. It has argued that time was suspended while it waited for the Seller to satisfy its document production obligation. If the Buyer was not aware of the existence of the Norphil lease, it could not have been waiting for it from the Seller.

[60] Neither was there any loss that could have resulted from this non-disclosure. The Buyer did not want the current tenant. It signed a new lease with a new sign tenant. There was no apparent harm or loss arising from the Buyer's failure to receive this lease, even if it was in force. Harm might have arisen had the Buyer withdrawn the condition and completed the purchase, only to find that there was a written lease for the tenant which it was not aware of. That did not happen.

[61] I therefore find no breach by the Seller for failing to provide the Norphil lease.

XI. The Letter of March 23, 1999

[62] The Seller denied receipt of the Buyer's letter dated March 23, 1999, but had it been received, it would not alter the outcome.

[63] The letter did not give notice of any deficiencies in the production of documentation. It did not refer to an expectation of receipt of any signed leases, plans, specifications, or the RPRCC. It requested information by asking questions. Strictly speaking, the Due Diligence Condition did not require the Seller to answer questions, it required the Seller to produce documents.

[64] There was no evidence that the Seller was in a position to answer the questions asked. It is not necessary to address the issue of the denial of receipt of the letter by the Seller. However, if it is material, I find that the Buyer has failed to prove receipt by the Seller.

[65] The Seller denied receipt of the March 23, 1999 letter. It was apparently sent by mail. The *Interpretation Act*, RSA 2000, c I-8 provides some guidance as to how to resolve this issue. Section 23 provides that service of a document sent by certified or registered mail is presumed unless it is not received by the addressee, proof of which lies with the addressee. In this case it was not sent by registered mail so there was no way to track it. The Seller's principal swears it

was not received, and the Buyer has no other documentation to confirm delivery. In this circumstance I find that the Buyer bears the onus to prove receipt and has failed to.

XII. Plans and Specifications

[66] With respect to the specific allegation that the Seller breached Sub-Clause 3(b)(vii) of the Due Diligence Condition by failing to provide plans and specifications, the Buyer failed to provide notice of this deficiency as well. However, in addition, this condition was subject to the additional requirement that such documents were in the possession or control of the Seller.

[67] The Buyer argued that Pattison retained plans and specifications relating to the signage and that had the Seller requested them from Pattison, they would have been provided to it. The evidence the Buyer points to was from Mr. Roubekas, an employee of Pattison. Mr. Roubekas' evidence was that plans and specifications would have been required in 1985 in support of a city building permit and that Pattison retained the application materials in their records.

[68] There is no evidence that the Seller was aware that Pattison retained this information. To require the Seller to make such an enquiry of its tenant, Pattison, particularly in the context of this transaction, is unreasonable and I do not find that the failure to do so was a breach by the Seller.

[69] If the Buyer expected the Seller to request plans and documents from third parties, it should have given the Seller notice of that expectation. There were photos in evidence of the billboard signs on the property. Both of them were clearly marked with the name of tenant, Pattison. The Buyer's principal was in the sign business. If he expected Pattison to have relevant documents which he required, he should have pointed this out to the Buyer. The Buyer's lawyer applied for a "replacement sign permit" on March 24, 1999, prior to expiry of the Due Diligence Condition period. The Buyer knew there was an existing sign permit. This application was supported by engineered drawings. All of this helps explain why the Seller did not bother to explicitly seek plans and specifications from the Seller.

XIII. Conclusion: Breach of the Due Diligence Condition

[70] I therefore find that the Seller did not breach the Due Diligence Condition.

XIV. Analysis of the Alleged Breach of Clause 5 of the Purchase Agreement

[71] The Buyer also argued that the Seller breached Clause 5 of the Purchase Agreement by failing to list the sign lessee as a tenant in the Purchase Agreement. I do not accept this argument, and I do not find a breach of this clause by the Seller.

[72] Clause 5 required the Seller to deliver vacant possession of the Property, subject only to those tenancies listed. It was not a representation as to existing tenancies. It was a contractual obligation that would only arise on closing. This transaction did not close so one cannot determine if the Seller may have breached it.

[73] It is also not a reasonable interpretation to point to the Seller as having sole responsibility for this clause. It is more reasonable to interpret it as the Buyer's expectation on closing, that the Property shall have no tenancies. It was clearly the Buyer's intention to put new signage on the Property, so the absence of tenancies is consistent with the Buyer's expectation.

[74] There was some evidence about the challenges of removal of the existing signs on closing. It is not clear whether the Seller understood those challenges, and it is not clear if the Seller had an expectation that he was obligated to remove the existing physical signs. If the Seller may have breached on closing by failing to remove the existing signs, it never happened and it is idle to speculate on it. It has no impact on the outcome of this trial.

XV. Misrepresentation

[75] The Buyer has not framed this claim as a misrepresentation by omission with respect to the documentation the Seller failed to provide. It has framed it quite specifically as a suspension of the Buyer's deadline to withdraw the Due Diligence Condition. A claim for misrepresentation for failure to provide documentation is beyond the scope of this dispute.

[76] The Buyer's argument in respect of breach of Clause 5 could be interpreted as a misrepresentation allegation. Clause 5 was not a statement of an existing fact regarding the status of tenancies on the Property at the time of contract, it was a commitment as to the status of the property (ie. tenant free) on closing. It was not a representation.

XVI. Conclusion: Liability

[77] I therefore find that the Seller did not breach the Purchase Agreement.

XVII. Costs

[78] The Defendant is awarded costs of this trial. If the parties are unable to agree on costs, they can seek direction from me.

[79] The Defendant seeks release of the funds paid into court pursuant to an Order of Applications Judge Schlosser dated October 27, 2022. Those funds shall be available for release to the Defendant in payment of a costs award made either by agreement, assessment, or Court Order.

Heard on the 4th day of June, 2025.
Dated at the City of Edmonton, Alberta this 22nd day of September, 2025.

E.C. Lew
J.C.K.B.A.

Appearances:

Michael Simaan and Rahul Gandotra
Kramer Simaan Dhillon LLP
for the Plaintiff

Kember Handzic and Kirsty Vogelesang
Emery Jamieson LLP
for the Defendants