Court of King's Bench of Alberta

Citation: La Caille North Point Inc v 2160806 Alberta Ltd and Harmandeep Arora, 2025 ABKB 758

Date: 20251219
Docket: 1901 15765
Registry: Calgary

Between:

La Caille North Point Inc

Plaintiff/ Defendant by Counterclaim

- and -

2160806 Alberta Ltd and Harmandeep Arora

Defendants/ Plaintiffs by Counterclaim

Reasons for Judgment
of the
Honourable Justice Lisa A. Silver

Overview

[1] This action involves a claim and counterclaim arising from the purchase and sale of commercial land. Yet, at its heart, the case is about relationships between people. Real estate development is about land and money, but it is also about forging relationships and making a deal that is expressed through contractual agreements. In this case, the relationship soured, the deal unraveled, and the agreement was unfulfilled. Now, the question is: who is responsible for the failure of the deal under the contractual agreement?

[2] The La Caille Group are local land developers. At the time of the events in issue, La Caille was operated by the President, Peter Livaditis, who started the company in the 1990s, and Alan Schmidt as Vice President.

[3] La Caille was developing large tracts of land in a Calgary community called Sky Pointe. In turn, La Caille offered parcels of the land to other developers interested in building various types of residential and commercial spaces in the Sky Pointe community. Harmandeep Arora was one of those developers. He was interested in building approximately 124 townhome units on two adjacent parcels of land.

[4] A deal between La Caille and Mr. Arora was actively negotiated until the signing of the purchase and sale agreement on May 12, 2017. One term of the agreement required La Caille to consolidate and re-subdivide the two parcels. Another term outlined how the servicing of the parcels would be done and paid for. A third term specified the purchase price and the allocation of that amount between the two parcels including a schedule of four deposits. The total price for the land was $7.625 million dollars.

[5] The closing dates for the purchase of both parcels of land were also particularized in the agreement. Parcel 1 was required to close on November 17 of 2017, 180 days after the signing of the agreement. The closing date of Parcel 1 triggered the closing date for Parcel 2, which closed 240 days later. The closing date for Parcel 1 depended on consolidation and re-subdivision of the two parcels and the parties had difficulties reaching that goal.

[6] Mr. Arora and Mr. Livaditis met on October 5, 2017 to discuss an amending agreement. They agreed to extend the closing date of Parcel 1 because consolidation and re-subdivision were not done. Mr. Arora agreed to take on the responsibility of re-subdividing the parcels. At the end of the meeting, Mr. Livaditis instructed Mr. Schmidt to provide Mr. Arora with a letter authorizing Mr. Arora's architect, Max Tayefi, to apply for a development permit for both parcels. The development permit application was submitted on October 11, 2017, and approved in May of 2018.

[7] The amending agreement was signed on November 17, 2017, and extended the closing date for Parcel 1 to May 31, 2018. The amending agreement did not change the time in which Parcel 2 would close. It remained 240 days after the closing of Parcel 1.

[8] Pursuant to the amending agreement, Mr. Arora agreed to make an immediate payment of $458,883.57 as the fourth deposit. The first deposit of $10,000.00, the second deposit of $400,000.00, and the third deposit of $152,961.19 were already released. Mr. Arora also agreed to pay an additional amount of $800,000, called the closing contribution. The purpose of this last payment was to demonstrate his commitment to closing Parcel 2 and to allow La Caille to fulfill its bank loan commitments. In total, Mr. Arora paid $1,821,844.76 to La Caille on entering into the amending agreement.

[9] Mr. Arora submitted the subdivision application shortly after the amending agreement was signed in November of 2017. The subdivision application was conditionally approved on June 21, 2018, about three weeks after the May 31, 2018 closing date for Parcel 1. On November 29, 2018, the subdivision application was finally approved by the City of Calgary with registration completed on December 11, 2018.

[10] Because the approval was after the May 31 closing date, closing on Parcel 1 did not happen. By this point, the parties' relationship was deteriorating with each party blaming the other for the delays. Finally, La Caille served a Notice of Breach of the agreement on Mr. Arora on July 19, 2018. In the breach notification letter, La Caille's lawyer outlined the terms under which La Caille would consider amending the agreement to extend the closing of Parcel 1.

[11] A Termination Notice was issued on August 31, 2018. By this time, the relationship between La Caille and Mr. Arora had soured. Communications went only through their lawyers by La Caille's request.

[12] To salvage the deal, and despite legal action, the parties verbally agreed to a new closing date for Parcel 1. Finally, on February 19, 2019, Parcel 1 closed, almost 2 years after the agreement was executed but about two months after subdivision was registered.

[13] The closing of Parcel 1 triggered the closing date for Parcel 2, which was set for October 17, 2019. Parcel 2 did not close. On the evening before the closing date, Mr. Arora asked for a six week extension to arrange for the closing money. La Caille initially agreed to a short extension to October 18, 2019 and then later proposed terms for an extension to October 31, 2019. In the end, Mr. Arora did not provide the balance of the monies for closing the deal. La Caille issued a Notice of Termination on October 28, 2019.

[14] In the meantime, Mr. Arora had placed servicing infrastructure into both parcels in anticipation of construction. This work started on June 1, 2019 and was completed by September 30, 2019. In the summer of 2024, without notice to Mr. Arora, and even though there were caveats on Parcel 2 in favour of Mr. Arora, La Caille extracted the services from Parcel 2.

[15] For reasons to follow, I find that Mr. Arora defaulted on the contract by not providing the balance of the purchase price for Parcel 2 on closing. I also dismiss Mr. Arora's counterclaim. I find that La Caille did not breach the terms of the agreement. I further find that La Caille did not act dishonestly or in bad faith during the contractual relationship. Moreover, under the contractual terms, La Caille is not responsible for the reimbursement of the servicing costs. I decline to grant equitable relief from the forfeiture of the deposits paid by Mr. Arora. Finally, there is no basis for a finding of spoliation of evidence by La Caille's actions in removing the servicing from Parcel 2.

[16] Other than forfeiture of the deposits, La Caille seeks monetary damages amounting to the costs paid to remove the servicing from Parcel 2, the property taxes paid on Parcel 2, and the interest on the bank loan for Parcel 2.

[17] For reasons to follow, I decline to award the servicing costs as damages. However, I request further written argument on the damages relating to the property taxes, the bank loan interest, and the additional judgment interest.

Position of the Parties

[18] La Caille claims that Mr. Arora breached the agreement by failing to close Parcel 2 in accordance with the time of the essence clause in the agreement. According to La Caille, the agreement stipulated that the purchaser would be in default of its covenants if the payments were not made when due, entitling La Caille to elect to terminate. As well, the agreement stipulates that upon default, La Caille is entitled to keep the deposits as predetermined liquidated damages.

[19] In defence, Mr. Arora submits that the time of the essence clause was waived through various extensions and no longer applied, and that La Caille unreasonably withheld their consent to extend the closing date for Parcel 2. Alternatively, if the time of the essence clause was still in effect, it would be inequitable to allow La Caille to rely on it in the circumstances. Mr. Arora alleges La Caille was not ready to close on the closing date, was the cause of numerous delays, and was in default due to its numerous breaches of the agreement.

[20] Mr. Arora also counterclaims for damages, alleging that La Caille breached its duty of good faith in its dealings with Mr. Arora throughout the life of the agreement. He alleges that La Caille's breaches of the agreement amounted to bad faith including failing to apply for subdivision, unilaterally changing the servicing approval process, failing to reimburse Mr. Arora for servicing costs, insisting on improper architectural guidelines, interfering in Mr. Arora's economic interests, and the destruction of the deep servicing of Parcel 2.

Issues

[21] There are several questions to decide in this case. I will enumerate each question with a brief answer as follows:

1. Did La Caille breach its contractual duties or the duty to act honestly and in good faith?
    - No. La Caille did not breach its contractual duties, nor did it act dishonestly or in bad faith.
2. Did La Caille waive the "time is of the essence" clause?
    - No. La Caille did not waive the clause as there was no clear and unequivocal intention to abandon their rights under the clause. The closing date for Parcel 2 remained firm.
3. Did Mr. Arora and 2160806 Alberta Ltd. breach the agreement by failing to close on Parcel 2?
    - Yes. Mr. Arora fundamentally breached the agreement by failing to provide the balance of the purchase price on the closing date.
4. Is Mr. Arora entitled to relief from forfeiture of the deposits?
    - No. The deposits were an estimate of liquidated damages, not penalties. There was no unconscionability or unequal bargaining power that would justify relief from forfeiture.
5. Is La Caille liable for reimbursement of the servicing costs?
    - No. La Caille is not liable for reimbursement based on section 7.2(b) and section 11 of the agreement.
6. Did La Caille's removal of servicing infrastructure from Parcel 2 amount to spoliation?
    - No. Removal of the services was not done to destroy evidence relevant to the ongoing litigation.
7. What are the damages on the claim?
    - La Caille is entitled to keep the deposits. Further submissions are required on Parcel 2 property taxes of $159,966.97, the bank loan interest payments of $695,515.03 on Parcel 2, and the additional judgment interest.

General Findings On Key Events

[22] Before discussing the various issues raised, I will comment on my general findings relating to four key events impacting my findings on the legal issues in this case. This discussion will necessarily include findings of credibility.

[23] First, I will discuss the reason for the delay of the closing of Parcel 1 with particular attention to the subdivision and development permit process. Second, I will address both party's approach to the architectural guidelines including the role of Mr. Tayefi, the architect for Mr. Arora, and Mr. Symons, the principal architect for La Caille and the Design Review Consultant on the Sky Pointe project. Third, I will consider Mr. Arora's financial readiness to close Parcel 2 on October 17, 2019. Fourth, I will examine the servicing of the parcels including La Caille's stripping of the services from Parcel 2.

Delay of the Closing of Parcel 1

[24] The closing of Parcel 1 was contingent on the consolidation and re-subdivision of Parcels 1 and 2. In the agreement of May 12, 2017, La Caille was responsible for the re-subdivision. By the fall of 2017, it became clear to both parties that subdivision was not going to happen before the November closing date. The lack of subdivision was the main reason why the parties entered into an amending agreement, shifting the responsibility to subdivide to Mr. Arora and extending the date for closing Parcel 1 to May 31, 2018.

[25] I find that the new closing date for Parcel 1 was chosen based on both parties' assessment that subdivision could be completed by the closing date, which was some 6 months after the amending agreement was signed. In fact, Mr. Arora promptly submitted the subdivision application shortly after this event. Even so, subdivision was not registered until December 11, 2018, slightly over a year after the application was submitted.

[26] La Caille blames Mr. Arora for this delay and indeed, one reason La Caille issued a termination notice was because of this lack of progress. In La Caille's view, the delay was caused by Mr. Arora's decision to concurrently apply for a development permit and subdivision. By submitting both applications, the subdivision process was held up, resulting in an unnecessary delay of the closing of Parcel 1. Moreover, the development permit application was contrary to the terms of the agreement. According to that agreement, the architectural plans had to be approved by La Caille before submitting a development permit. This was not done by Mr. Arora until after the development permit was issued.

[27] La Caille also complained about Mr. Arora's lack of communication on the progress of the subdivision application. Mr. Schmidt contacted the City, without advising Mr. Arora, to gather information on the progress of the application. By March of 2018, the trust and congeniality between the parties was diminishing.

[28] The parties also disagree on why an amending agreement was necessary. According to La Caille, Mr. Arora had failed to provide the information they needed to re-subdivide the parcels. Because of Mr. Arora's delay, the immediate release of the deposits and the additional monies delivered for the closing contribution were required to help La Caille with paying the interest on the bank loan. In any event, Mr. Arora was not ready to close.

[29] Conversely, Mr. Arora maintained he gave La Caille all the information they needed to re-subdivide the parcels. La Caille simply did not act on the information. The delay was because of La Caille. Mr. Arora agreed to provide the immediate release of the deposits and a closing

contribution to make the deal work and to help La Caille. Mr. Arora's actions were not an admission that he was to blame for the amending agreement.

[30] I find that Mr. Arora was not fully responsible for the delay. According to Vivian Barr, a senior architectural technician at the City involved in subdivision and development permit approvals, the City preferred applicants who submit subdivision and development applications at the same time. Such a practice could shorten the approval process because of the consistency between the development and subdivision plans. In Ms. Barr's view, submitting a development permit and subdivision permit application at the same time was the most efficient approach because it avoided re-submissions if the property boundaries changed.

[31] Ms. Barr also explained that there is no fixed time for subdivision approvals because the approval process depended on conditions and reviews made by multiple City business units. She acknowledged that while every submission was different, the process can be lengthy and sometimes extend to close to a year.

[32] Mr. Schmidt suggested that the City of Calgary placed the subdivision application on hold due to missing overlays of the site plan, which were not provided until months later. Ms. Barr agreed that the subdivision application was deemed premature because the development permit, which was also submitted, needed to align with the subdivision plan. However, the development permit was approved in May of 2018 and the subdivision plan was conditionally approved only a month later in June of 2018.

[33] In my view, a seven month process for approval is reasonable considering approvals are subject to rectification and conditions before registration can take place. For instance, here the subdivision was approved in June, about 7 months after Mr. Arora applied, but the approval was conditional for various reasons. Some of these reasons were more substantial than others and took some time to resolve.

[34] Moreover, the time it took to rectify the deficiencies was not unreasonable. Mr. Arora was developing the land on his own. He had the assistance of an engineer and his architect Mr. Tayefi. Mr. Tayefi and Mr. Arora had some financial issues with one another. Although this caused some delay, this kind of delay does not mean Mr. Arora was not serious about the project and was dragging his feet. Moreover, Mr. Tayefi was not completely in tune with the project. For instance, he missed the fact that the architectural guidelines he received from Mr. Arora were not correct even though he had provided drawings consistent with the correct guidelines for another client in the Sky Pointe development project.

[35] There was much finger pointing between the parties on whether Mr. Arora provided La Caille with enough information to apply for re-subdivision pursuant to the original agreement. Mr. Arora testified that La Caille had the proposed site plan after July 10, 2017, when his architect sent revised site studies to the City. That site plan had two options. According to Mr. Arora, he likely provided Mr. Livaditis with the plan when he met with him on October 5, 2017. Mr. Arora explained that the option 2 plan, which he finally decided to use, was most cost-efficient for servicing. Accordingly, Mr. Arora suggested La Caille had the information they needed to apply for re-subdivision.

[36] Mr. Schmidt testified that La Caille did not receive the subdivision plan until November 7, 2017. In any event, the site plans provided were not sufficient to make an application for re-subdivision. Mr. Schmidt admitted that at no time did La Caille hire anyone to work on the

application. Mr. Livaditis recalled that it was after the October 5, 2017 meeting that Mr. Arora undertook the responsibility of making the application. He also suggested that it was made clear to Mr. Arora that they would only re-subdivide on his behalf if he gave them the plans.

[37] I find that as a savvy developer, La Caille would not agree to do something they were not prepared to do. They did not have anyone designated to do the re-subdivision. The plans submitted by Mr. Arora were very preliminary and changed overtime. The plans may have been insufficient for the application, but La Caille was not earnestly working on a solution before October, which was only a month before closing. In my view, both parties contributed to this delay.

[38] I appreciate the amending agreement not only extended the closing date and shifted the burden onto Mr. Arora to make the re-subdivision application but also required Mr. Arora to provide further deposits. This suggests that Mr. Arora was the reason for the delay. Mr. Arora explained that he agreed to the immediate release of the deposits and made a further closing contribution as a show of good faith. Mr. Arora also maintained that he was ready to fund the closing of Parcel 1. I find although One Stop Mortgage was prepared to fund the venture, there were no real or concrete steps towards funding Parcel 1 other than a document suggesting they would. Neither Mr. Arora nor One Stop Mortgage took any steps to obtain these funds.

[39] I therefore find that the delay of closing from November 2017 to May 2018 is attributed to both parties and that both parties accepted the delay. The notion of entering into an amending agreement was a mutual decision to ensure the deal would move forward and not collapse. This was for the benefit of both parties because La Caille did not want the responsibility to re-subdivide the property, and Mr. Arora wanted more time to gather the funds for closing. Simply put, at that time both parties wanted the deal to work.

The Architectural Guidelines

[40] There was varying evidence from the parties on the importance of the architectural guidelines. It is undisputed that La Caille initially sent Mr. Arora the wrong architectural guidelines and placed the wrong architectural guidelines on title. La Caille never rectified the title issue but La Caille's architect, David Symons, sent Mr. Arora's architect Mr. Tayefi, the correct architectural guidelines in November of 2017.

[41] Mr. Symons sent the guidelines to Mr. Tayefi in response to Mr. Tayefi's request for the guidelines to assist with two projects Mr. Tayefi was working on. One was Mr. Arora's project but the other was not. Notably, Mr. Tayefi's drawings for the other project complied with the correct architectural guidelines and were promptly sent for Mr. Symons' approval.

[42] Based on Mr. Tayefi's evidence, La Caille suggested that Mr. Arora was aware the first guidelines sent to him were wrong and therefore had no excuse for why the drawings that were ultimately submitted to Mr. Symons in December of 2018 were not in compliance. Indeed, Mr. Symons advised Mr. Arora to resubmit the plans for review in 2019, which Mr. Arora never did. La Caille also pointed to Mr. Tayefi's evidence to support their position that Mr. Arora was also aware that Mr. Symons was the design reviewer for the proposed plans.

[43] Mr. Arora testified that he was unaware that he had the wrong architectural guidelines until December of 2018 but that he did not receive the correct guidelines until March of 2019, which was well after the development permit was approved in May of 2018. Although Mr. Symons did not give a detailed response on why Mr. Arora's drawings were deficient in his

December 20, 2018 email, he did request resubmission in January of 2019. Notably, Mr. Arora chose not to resubmit the design package.

[44] I find that it was never made clear to Mr. Arora in 2017 that the architectural guidelines he first received were not the correct ones. I further find that Mr. Tayefi knew but forgot by the time he started working on Mr. Arora's plans and simply followed the guidelines he received from Mr. Arora. Notably, La Caille as well as Mr. Symons were unaware that they sent the wrong guidelines until much later in these legal proceedings.

[45] In my view, the issue of the architectural guidelines was a misstep on the part of both parties.

Mr. Arora's Financial Readiness to Close Parcel 2 on October 17, 2019

[46] Mr. Arora's brother and Mr. Spadavecchia of One Stop Mortgage Corp testified that they were willing and able to provide the funds for the closing for Parcel 2. Mr. Arora also testified that he had some monies to augment those funds. On this basis, Mr. Arora testified he was able to close on October 17, 2019, or at minimum, would be able to close if given a reasonable extension of the closing date. I reject this evidence and find that Mr. Arora did not have the funds needed for closing Parcel 2 on October 17, 2019. Moreover, the evidence does not establish that Mr. Arora was guaranteed to have the funds anytime in the near future.

[47] I also reject the evidence of Mr. Arora's brother, the mortgage broker, Mr. Spadavecchia, and Mr. Arora's evidence on the issue. I further find the evidence of Mr. Spadavecchia and Mr. Arora's brother was presented in a way to assist Mr. Arora for family and friendship reasons.

[48] Mr. Arora's brother testified that all the money in the personal bank account he shared with his spouse, his savings account, and in his business account were unconditionally available to Mr. Arora if he needed it. All Mr. Arora need to do is ask. Mr. Arora's brother had already provided some funds for the deposits. I have no doubt that Mr. Arora's brother would do all he could to help his brother, but I do not accept that the brother would place his own family at financial risk to do so. There is a difference between providing some monies for a deposit and giving all the monies you have available to help a family member pay millions of dollars for a piece of land.

[49] The brother also suggested he was part of the deal. There is absolutely no evidence, other than providing funds for some of the deposits that the brother was a partner. There was nothing in writing regarding this alleged partnership. Considering Mr. Arora's brother was a seasoned entrepreneur and successful business owner, this lack of a written agreement is suggestive. Nor, in my view, would the brother simply hand over such a large sum of money with no conditions attached and with no legal protection of his interest.

[50] In any event, Mr. Arora did not advise La Caille at the time of closing that he had access to the money through his brother. Nor did Mr. Arora send La Caille proof of access to this money to assuage La Caille's concerns. Considering the money was sitting in the brother's bank accounts, Mr. Arora could have easily satisfied La Caille that he had access to sufficient funds for closing. Instead, when asked by La Caille to substantiate his funding, Mr. Arora sent La Caille inadequate proof that he had access to funds by sending a mere offer by RBC to discuss a loan. Notably, the RBC offer was dated October 11, 2019, a mere 6 days before closing.

[51] Mr. Arora and Mr. Spadavecchia had a long-standing and lucrative business and personal relationship. Mr. Spadavecchia was a confidante and friend, but I find, for several reasons, that Mr. Arora did not intend to fund Parcel 2 through One Stop Mortgage.

[52] First, unlike Parcel 1, there was no written evidence that One Stop Mortgage would fund Parcel 2. Moreover, Mr. Arora did not use One Stop Mortgage for Parcel 1 even though he had a written offer. Rather, Mr. Arora mortgaged Parcel 1 through an entirely different mortgage company.

[53] Second, there were no preparations made by Mr. Spadavecchia to advance the offer, even if it was only verbal, such as lawyer instructions or a request to discharge the builders' lien that was registered on Parcel 2 on October 2, 2019.

[54] Third, Mr. Spadavecchia suggested that he was willing to give Mr. Arora a personal loan from his own monies. I accept Mr. Spadavecchia would do anything to help his friend, and perhaps Mr. Spadavecchia would have helped Mr. Arora if asked, but I do not accept that Mr. Spadavecchia was asked by Mr. Arora to fund Parcel 2. Being ready for closing must be concrete and genuine. There is no evidence of any genuine or concrete steps to fund the project other than Mr. Arora's preliminary attempt, late in the day, to get funding from RBC for construction that may have also included the land.

[55] Fourth, Mr. Arora did not advise La Caille that he had money readily available from One Stop Mortgage when he sent them the RBC documents to support his request for an extension. Moreover, if the money was available within ten days, there is no reason why Mr. Arora could not accept La Caille's terms for an extension even though it required a further deposit. The non-refundable deposit of one million dollars could have been obtained from his brother who testified he had an immediate source of funds that Mr. Arora could access without conditions. According to the evidence, the brother had 1.7 million dollars immediately available.

[56] Fifth, Mr. Arora had no commitment from RBC to fund Parcel 2. I find RBC, by the date of closing, did not make an offer to Mr. Arora to finance the project. Rather, RBC had agreed to consider financing conditions. One of the conditions to consider financing the project was the payment of a $20,000 deposit together with a formal application. This was never done by Mr. Arora. The RBC letter was not an offer to fund but a discussion on whether to entertain funding. Moreover, the discussion involved construction financing, not just bare lands.

[57] Finally, Mr. Arora in fulfilling his undertaking given at Questioning to provide the other sources of funds for closing on Parcel 2 other than RBC, did not reference funding from his brother. The Undertaking also failed to reference the other financial institutions like ATB and Canadian Western Bank for which Mr. Arora, in his testimony, suggested he also contacted about funding. The only other financing referenced in the response to the Undertaking was a verbal commitment to fund both parcels of land by Mr. Spadavecchia on behalf of One Stop Mortgage in July of 2017. I therefore draw an adverse inference from this failure to disclose the availability of his brother's financing before trial.

[58] In the end, at the time of closing, I find that Mr. Arora did not have financing in place for the closing of Parcel 2.

Servicing of the Parcels and Authority to Start Construction

[59] The issue of the servicing of the parcels and the ultimate pulling out of those services by La Caille begins with whether Mr. Arora on October 5 of 2017 was granted the authority by La Caille to start development of the lands.

[60] After Mr. Arora met with Mr. Livaditis on October 5, 2017, Mr. Livaditis instructed Mr. Schmidt to provide Mr. Arora with an authorization letter to apply for a development permit on Parcels 1 and 2. La Caille submits that this letter was typically provided for the future when all the prerequisites required for construction under the agreement were fulfilled including the approval of the site plan drawings. I find that the letter gave Mr. Arora the authority to apply for a development permit because the letter was not conditional on the terms of the agreement. In fact, consistent with this authorization, Mr. Arora almost immediately applied for a development permit on October 11.

[61] Construction on the lands before transfer of title was contemplated under section 9.l of the agreement. Specifically, section 9.1(p) gave Mr. Arora "the right to commence construction on Parcel 2 (subject always to the provisions of this Agreement, including without limitation Article 9)" provided the closing on Parcel 1 was completed, the third and fourth deposit paid, and La Caille had registered an unpaid Vendor's lien as first charge on the property. Section 9 outlined the various warranties and covenants including requiring compliance with the architectural guidelines and approval of the site plans before applying for a development permit.

[62] At the time of providing the letter, the terms of the amending agreement were negotiated including the new closing date of May 31, 2018, for Parcel 1. By providing an authorization letter, Mr. Arora would be able to start construction as soon as subdivision was registered. This scenario would benefit both parties, who believed the deal would happen and who, at that time, had a congenial working relationship. Additionally, approval of the architectural drawings required in the agreement was not necessarily an obstacle because compliance with that approval was subject to the discretion of La Caille.

[63] The letter is clear and unequivocal in its intent to give Mr. Arora the authority to apply for a development permit. There is nothing in the letter suggesting it is contingent on terms and conditions in the agreement. There would be no reason to provide such a letter before it was needed. If the letter of authorization was dependent on conditions found in the agreement, it would be a simple matter to get the letter after those conditions were fulfilled.

[64] In my view, the letter was an act of good faith on the part of La Caille who wanted the deal to work. It was also an act of good faith considering the October meeting was to discuss and negotiate the amending agreement. It may be that in hindsight La Caille regretted this action but at the time it made good business sense. Particularly because such an application would take months and by that time the other conditions for construction in the agreement would be fulfilled. In fact, the development permit was not approved until May of 2018, some seven months after it was submitted. Moreover, La Caille, as seasoned land developers, would not give such unconditional and broad authority in the abstract. I find this letter was given to permit Mr. Arora to apply for a development permit expecting that Mr. Arora would start construction pursuant to the agreement.

[65] The next question is whether under the agreement, Mr. Arora was permitted to start construction on the land. Notably, at the time of construction the land was re-subdivided into two new parcels. Mr. Arora had title over Parcel 1 and closing was pending on Parcel 2.

[66] La Caille argued that Mr. Arora failed to obtain La Caille's prior approval of their contractor for the servicing before starting the work as required in the agreement. Mr. Arora admitted that the company he used, Kang Construction, was not formally presented to La Caille for their approval. However, La Caille was aware he was using Kang before construction began because he advised IBI Group, La Caille's site supervisor. Moreover, LBCO, which he did present to La Caille for approval, was more expensive than Kang. Kang was city-indemnified and the best option.

[67] I find that Mr. Arora was required under the agreement to seek La Caille's approval of Kang Construction before the work was started. The approval was connected to the reimbursement terms under the agreement. Even if ultimately the deep servicing of the lots was not fully compliant with the agreement, I find that La Caille, through their conduct and actions, condoned the construction relating to the deep servicing because of the letter of authorization they gave Mr. Arora to apply for a development permit, and because La Caille made no comments or complaints regarding the construction. Rather, they continued to make ready for closing on October 17, 2019. Moreover, reimbursement of the servicing work was in issue before closing and La Caille was prepared to deal with the issue. La Caille at that time did not suggest the work was improperly done. Instead, La Caille prepared to close.

[68] Mr. Arora started installing deep servicing within both parcels of land in the summer of 2019. Mr. Arora testified that pursuant to the agreement, IBI Group, the company retained by La Caille to supervise construction, was advised. Michael Wylie from the IBI Group confirmed they were advised at least by June 18, 2019, that the installation of the deep servicing was about to start. On July 10, 2019, IBI Group invoiced Mr. Livaditis as President of La Caille for the inspection services connected to this supervision.

[69] There was no evidence of which individual from La Caille paid for IBI's invoices. According to IBI, they billed La Caille on a regular basis. Mr. Livaditis travelled abroad over the summer months and often into the early fall. Mr. Livaditis and Mr. Schmidt testified they were not personally aware that Mr. Arora was installing the deep servicing into Parcels 1 and 2 until September of 2019.

[70] I find that it is possible that neither Mr. Schmidt nor Mr. Livaditis were personally aware of the construction on the lands. However, La Caille as a corporate entity knew that construction was happening. Le Caille's site supervisors knew and invoiced for that work. La Caille never objected to the work nor was there any evidence that La Caille refused to pay IBI for their inspection of that work. I therefore find that La Caille was aware the deep servicing was being installed by Mr. Arora before the work started.

[71] I also find that La Caille extracted the deep servicing infrastructure from Parcel 2 in the summer of 2024. This was done without advising Mr. Arora and in contravention of caveats that were placed on Parcel 2 pending this litigation.

Analysis of the Issues

[72] I now turn to the legal claims between the parties.

1 - Did La Caille breach the agreement and its duty of good faith?

[73] Mr. Arora submits that La Caille breached the agreement in numerous ways prior to the October 17 closing and that this behaviour also amounted to a breach of its general duty of good faith.

[74] Mr. Arora submits that La Caille breached the agreement on several bases, including the following:

a. Failing to apply for subdivision under section 2.5 of the agreement.

b. Failing to retain any consultant or professional to submit a subdivision application to the City despite having the required information from Mr. Arora.

c. Improperly attempting to terminate the agreement on August 31, 2018, when it was not in a position to close.

d. Unilaterally changing the servicing approval process in contravention of section 7.2 of the agreement.

e. Refusing to simply consider and approve (or not approve) the contractor (LBCO) proposed by Mr. Arora.

f. Failing to reimburse Mr. Arora for servicing costs as per the formula set out in section 7.2 of the agreement.

g. Arbitrarily rejecting all servicing costs, even those that were clearly attributable to the servicing work performed in accordance with the DSSP (Detailed Servicing and Stormwater Plan) approved by the City.

h. Imposing further extraneous conditions not found in the agreement, including a requirement that all servicing-related communications be conducted solely through legal counsel.

i. Failing to review or engaging their engineers to review and set out why the submitted costs were not acceptable and the amounts that they should have been invoiced at.

j. Providing the 2010 guidelines to Mr. Arora and registering the same on title and then insisting that Mr. Arora comply with the unregistered 2016 guidelines.

k. Refusing to correct the registration of incorrect guidelines on title.

l. Refusing to review Mr. Arora's submitted site plans or to issue a deficiency list, despite repeated formal requests and the submission of the site plans.

m. Destroying the services installed by Mr. Arora.

n. Failing to repay the Promissory Note dated November 28, 2017, despite the unconditional nature of the instrument.

[75] Mr. Arora argues that these actions and La Caille's approach to the performance of the agreement amounts to bad faith. He argues that La Caille's approach was combative rather than cooperative. He cites other actions of La Caille to support this argument, such as La Caille's approach to resolving the issue of the improper guidelines, the change to requiring three quotes before reimbursing Mr. Arora, and recharacterizing the letter of authorization to suggest Mr. Arora could not apply for a development permit without compliance with the guidelines.

Conversely, Mr. Arora argues that he took a collaborative and cooperative approach to the agreement, such as agreeing to take over responsibility for submitting the subdivision plan and providing funds earlier than originally required under the agreement.

[76] Mr. Arora also makes specific allegations of bad faith regarding the closing of Parcel 2, which will be dealt with later in these reasons.

[77] La Caille submits that there were no breaches of contract on the facts, nor a breach of the duty of good faith. It submits this was a commercial contract and that when La Caille exercised its contractual rights, or gave notices of default, it did so after engaging in communication that was fair and substantive.

[78] The parties agree on the law that applies to the duty of good faith. The duty is an organizing principle of contract law that generally requires parties to "perform their contractual duties honestly and reasonably and not capriciously or arbitrarily": ***Bhasin v Hrynew***, 2014 SCC 71 at para 63.

[79] In contractual dealings, parties are expected to have "appropriate regard" for the "legitimate contractual interests of the contracting partner": ***Bhasin*** at para 65. This is a context dependent duty and does not require a party to abandon its self-interest. It does not require a contracting party to serve the other party's interests in all instances and is not the same as a duty of loyalty in a fiduciary relationship. It only requires a contracting party not seek to undermine the other's interests in bad faith: ***Bhasin*** at paras 65, 69-70.

[80] The duty of good faith must be applied consistently with common law principles of contract that "places great weight on the freedom of contracting parties to pursue their individual self-interest": ***Bhasin*** at para 70. Moreover, in contractual dealings, acting in good faith "means being honest, reasonable, candid, and forthright": ***Potter v New Brunswick Legal Aid Services Commission***, 2015 SCC 10 at para 99, citing ***Bhasin*** at para 66.

[81] There are several duties associated with good faith: ***Bhasin*** at paras 49-51, 73. Parties have a duty to cooperate to achieve the objects of a contract, a duty of honesty in their contractual performance, a duty to exercise a discretion in the contract in good faith, and a duty not to evade contractual obligations in bad faith. See also: ***Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District***, 2021 SCC 7 at para 128.

[82] I find that Mr. Arora has not met the burden of proving breach of contract nor the duty of good faith.

[83] A party alleging a breach of contract has the burden of proving the breach on a balance of probabilities: ***Hudson King v Lightstream Resources Ltd***, 2020 ABQB 149 at para 110, citing ***Grafikom Speedfast Limited v Heidelberg Canada Graphic Equipment Limited***, 2013 ABCA 104 at para 21; and ***C(R) v McDougall***, 2008 SCC 53 at para 49. That burden has not been met for any of the alleged breaches.

[84] Because several of the alleged breaches fall within the same factual matrix, I will discuss the following alleged breaches together: first, I will discuss (a) and (b) relating to the subdivision application; second, I will discuss (d) to (i) relating to the servicing conditions including the process for reimbursement; third, I will discuss (j) to (l) relating to the architectural guidelines; and then I will consider the alleged breaches under (c), (m), and (n).

[85] First, Mr. Arora suggests that there was a breach because La Caille did not apply for subdivision pursuant to the agreement and did not hire a professional to do so. I have found that both parties contributed to the failure to apply for the consolidation and re-subdivision of the property. It is questionable whether the site plan provided by Mr. Arora was sufficient for such an application, but La Caille had not taken any steps to further such an application.

[86] In the end, both parties agreed to an amending agreement that shows an intention to change that requirement of the agreement. The amending agreement was agreed to before the closing date in the agreement and therefore neither party was in breach of the subdivision requirement because the amending agreement rectified the issue.

[87] Further, although Mr. Schmidt spoke of hiring a professional to assist in a re-subdivision application, there is nothing in the agreement requiring La Caille to hire a professional to arrange for the re-subdivision.

[88] Second, Mr. Arora argued that La Caille breached section 7.2 of the agreement when it came to the servicing of the lands because they unilaterally changed the provisions of the agreement and added terms to the servicing approval process. According to Mr. Arora, the changes required Mr. Arora to obtain two quotes for servicing, gave La Caille the ability to also obtain a quote, and required servicing costs be incurred before reimbursement. Mr. Arora also suggests that La Caille breached this section by not reimbursing for the services before closing.

[89] The agreement provides that the purchaser's servicing of the lands "shall only be constructed by a contractor or contractors approved by the vendor, and all such work is to be supervised by the vendor's engineers, at the Purchaser's sole expense." The agreement is silent as to the process that applies to the servicing approval by La Caille. By necessary implication, therefore, La Caille, who has the right of approval, also has the right to implement a process for that approval. Such process however must be reasonable and not arbitrary.

[90] In my view, the process implemented by La Caille was not unreasonable nor was it arbitrary. In fact, by requiring more than two quotes and permitting La Caille who is paying a substantial part of the costs to review those quotes, La Caille ensures that the chosen subcontractor is efficient, adept, and cost-effective. This is particularly important because the contract allows for construction on the lands before the purchaser has title. In this way, La Caille has some control over what is being done on their land. I therefore find that La Caille's request was neither exceptional nor surprising.

[91] The agreement also provides for reimbursement by La Caille under section 7.2(b) dependent on certain conditions. Under that section, La Caille shall "reimburse" Mr. Arora for the costs "associated" with the "installation of the services within the lands" in accordance with a formula. The contract sets a minimum floor and ceiling for 100% reimbursement of the servicing costs. La Caille must reimburse 100% of the servicing costs "in excess of $750,000.00, but less than $1,000,000.00." Once the servicing costs are greater than one million dollars, La Caille must reimburse 50% of the costs. Mr. Arora only provided documents to support reimbursement on the evening before the closing of Parcel 2.

[92] I find that La Caille properly advised Mr. Arora that the closing of Parcel 2 and reimbursement of servicing costs were unconnected. There is nothing in the agreement requiring the servicing costs to be paid before closing. Indeed, servicing could happen at a time after closing.

[93] I also find that La Caille was within its rights to take time to review the reimbursement documents. The agreement required Mr. Arora to spend the money on those costs before repayment. The agreement was not for La Caille to pay for servicing up front. Rather, it was Mr. Arora who was required to pay for the expense first before seeking re-payment or reimbursement from La Caille. This interpretation is clear from the use of the word "reimburse" which means to pay back money for an expense incurred: see the definition for "reimburse" in the *Canadian Oxford Dictionary*, 2nd ed, which is to "repay (a person who has expended money)". La Caille therefore properly needed time to confirm the expenses were paid and that the expenses were for servicing costs.

[94] At trial, Mr. Arora provided what he suggested was the servicing costs La Caille was responsible for under the agreement. I have reviewed the list of costs provided and find that not all the costs were for servicing and not all the costs were actually paid by Mr. Arora before the agreement was terminated. For instance, Mr. Arora charged as "servicing costs" bookkeeping services. Mr. Arora also relied on quotes for the servicing rather than actual costs Mr. Arora paid. Mr. Arora also listed servicing costs he paid for after termination. For example, Mr. Arora referenced payments to Kang Construction which were made well after termination. I therefore find that Mr. Arora at the time of closing had only paid a fraction of the servicing costs to Kang Construction.

[95] Arguably, Mr. Arora had not spent the $750,000 minimum amount under the agreement before La Caille was required to provide reimbursement. Moreover, under section 11 of the agreement, upon default and termination, La Caille is no longer obliged to reimburse Mr. Arora.

[96] Finally, I see no breach occasioned by the change in mode of communication between the parties. There are no provisions in the agreement related to communication. To insist that communication go between the lawyers at a time when the relationship between the parties soured significantly is not only reasonable but also prudent.

[97] Third, Mr. Arora posits that La Caille's provision of the wrong guidelines and their refusal to correct the registration of the wrong guidelines on title also breached the agreement. As I found there were missteps on both sides relating to those guidelines, these missteps do not amount to a breach of the agreement by either party.

[98] Fourth, Mr. Arora submits that La Caille was not ready for closing when they issued a notice of termination of the agreement on August 31, 2018. The fact that La Caille was not ready to close on that date is directly connected to Mr. Arora's lack of readiness. The subdivision application, for which Mr. Arora was responsible, was not approved. La Caille moved to terminate as was their right under the agreement. One of the reasons for termination was Mr. Arora's failure to close as required on May 31, 2018 in accordance with the time is of the essence clause. La Caille did not act contrary to their rights, and their actions were not improper.

[99] Fifth, Mr. Arora submitted that La Caille unreasonably and improperly destroyed the services installed by Mr. Arora within Parcel 2. The destruction of the services was done well after termination and is not indicative of a breach of that agreement.

[100] Sixth, Mr. Arora suggests that La Caille failed to repay the Promissory Note dated November 28, 2017, despite the unconditional nature of the instrument. This is also not a breach of the agreement because, in the end, Mr. Arora breached the agreement and the monies were properly viewed as liquidated damages.

[101] I will now consider the Defendants' argument that in breaching the agreement, La Caille failed to fulfill its contractual obligations with good faith. This argument is considered in the context of the parties' actual contractual bargain and the circumstances surrounding it. I start with the premise that there is a comprehensive purchase and sale agreement, negotiated in a commercial setting between experienced parties with counsel. It is a transactional contract, albeit one that was expected to take some time to complete. The fulfillment of the contract required cooperation between the parties for city approvals and the hiring and supervising of contractors. But ultimately, the agreement was a business deal to sell land for real estate development.

[102] I have found, La Caille did not breach the terms of the agreement. I further find that La Caille did not breach their duty of good faith nor did they act dishonestly for several reasons.

[103] First, as mentioned, the parties' relationship, which started out friendly and cooperative, deteriorated to such a degree that communication was only between lawyers and the objective was to get the deal done as soon as possible. La Caille was not required to accommodate Mr. Arora to the detriment of the agreement or against their own interests. Indeed, La Caille was allowed to act in its self-interest as long as La Caille did not undermine Mr. Arora's interests.

[104] I find that La Caille did not undermine Mr. Arora's interests during the life of the agreement. Any difficulties Mr. Arora may have faced during the contract were either part of the normal course of business dealings that were resolved between the parties, such as the initial subdivision delay, or were of Mr. Arora's own doing, such as his lack of funding at the time of Parcel 2 closing. Moreover, the conduct complained of was clearly within La Caille's rights under the agreement. For example, La Caille's notice of default and termination in the summer of 2018, was pursuant to La Caille's contractual rights and was not an action amounting to bad faith.

[105] Second, La Caille did not act dishonestly during the contractual relationship nor did it try to evade its contractual obligations. La Caille wanted the deal to close. Much of what happened to stall the agreement was mutual or out of their control such as the time it took for the City to approve the permit and the missteps surrounding the architectural guidelines.

[106] Third, La Caille's approach to the servicing costs was reasonable. La Caille could not reimburse servicing invoices without spending time reviewing them. Moreover, the agreement was terminated soon after and La Caille properly did not reimburse Mr. Arora based on the default term of the agreement.

[107] Fourth, I have already found that using lawyers to communicate when things switched over to being "all business" was reasonable in the circumstances and not bad faith. Moreover, Mr. Arora knew this was La Caille's preference, yet still insisted on sending direct emails to Mr. Livaditis and Mr. Schmidt.

[108] Fifth, at all times La Caille was candid and forthright that they would rely on the default clause. This is confirmed by La Caille relying on the clause in the summer of 2018, which started litigation between the parties. Mr. Arora was therefore clearly and obviously put on notice that La Caille would continue to enforce the default clause.

[109] Sixth, I have already considered the architectural guideline issue but the Defendants also rely on La Caille's failure to rectify title with the correct guidelines and La Caille's cursory review of their plans for approval as evidence of bad faith.

[110] I reject both suggestions. La Caille was unaware that they registered the wrong guidelines on title until much later in the legal proceedings. Although La Caille had not rectified this mistake by the time of trial, La Caille showed no bad faith during their contractual relationship with Mr. Arora on this issue. La Caille was not intentionally misleading anyone.

[111] Further, Mr. Symons explained why he did not do a detailed analysis of the design plans supplied by Mr. Arora. He testified, and I accept, that the plans were so obviously not in compliance with the guidelines that a deep review would not be appropriate nor would it be helpful. He did however give Mr. Arora an opportunity to resubmit, which Mr. Arora declined to do.

[112] I find neither of these actions show bad faith or dishonesty on behalf of La Caille.

[113] Seventh, in the end, La Caille had the right to require strict adherence to the agreement and in my view, bad faith cannot be found in relying on agreed upon terms such as the time of the essence clause: ***Rahbar v Parvizi***, 2022 ONSC 2136 at paras 40-42 [***Rahbar ONSC***], aff'd 2023 ONCA 522. More will be said about this ground later.

[114] Finally, Mr. Arora complained that Mr. Schmidt interfered with potential buyers and Mr. Livaditis ordered the removal of the services. Although I agree this was poor behaviour on La Caille's part and not worthy of seasoned developers, this misconduct happened well after the agreement was terminated and when the parties were in the throes of litigation. I reject Mr. Arora's suggestion that this misconduct can be used to find that La Caille acted in bad faith or acted dishonestly during the agreement: ***CNOOC Petroleum North America ULC v 801 Seventh Inc***, 2025 ABKB 145 at para 964. The behaviour was not connected to the performance of the agreement.

[115] Although not necessarily a relevant consideration in assessing La Caille's good faith, much of La Caille's approach to the contractual relationship was triggered by Mr. Arora's own conduct. For instance, Mr. Arora tended to approach the purchase of the lands as a "done deal." Mr. Arora put a sales office on the lands in August of 2017, before the closing of Parcel 1 while knowing that the required re-subdivision was not done nor had an application even been made. Another example is Mr. Arora's own lack of response to the architectural guidelines. Mr. Arora, after the agreement was terminated, complained that La Caille did not respond to his design plan submissions in a good faith manner. Yet, at the time of the rejection of the plans, Mr. Arora did not resubmit the plans nor did he respond by formally asking for a waiver for the approval of the plans.

[116] I therefore find Mr. Arora has failed to establish that La Caille acted dishonestly or without good faith during the business relationship.

2 – Was La Caille entitled to terminate the agreement by relying on the time of the essence clause for the closing of Parcel 2?

[117] A time of the essence clause is often included in contracts for the sale of land. It signals that late performance will not be tolerated by the parties in their bargain. Such clauses (or equivalent conduct) set out an expectation of strict compliance with deadlines in the contract: ***1159465 Alberta Ltd v Adwood Manufacturing Ltd***, 2011 ABCA 259 at para 16.

[118] Where a party to a contractual agreement breaches the clause, the non-breaching party may terminate the agreement: ***H&C Holdings PTE Ltd v Pengrowth Energy Corporation***, 2019 ABQB 956 at para 63, aff'd 2020 ABCA 473.

[119] Time of the essence clauses are often strictly enforced strictly by courts: Brandon Kain, *Good Faith in Canadian Contract Law* (Toronto: LexisNexis Canada, 2024) at 2081-82. There are two exceptions which may offer the breaching party relief: 1) proof of waiver, or 2) satisfying the court that equitable relief is warranted in the circumstances.

[120] The first exception, waiver, considers whether the clause was still in effect at the time of closing. Waiver occurs when one party to a contract foregoes reliance on an obligation of the other party. Waiver can be formal, effected through written communications, or it can be inferred by a party's conduct. In either case, the party relying on waiver must meet a stringent test. The party waiving the obligation must have had full knowledge of their rights and had "an unequivocal and conscious intention to abandon" those rights: ***Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co***, [1994] 2 SCR 490 at 500, 1994 CanLII 100 (SCC).

[121] The second exception considers whether circumstances exist which would make it inequitable to enforce the clause. An equitable remedy is available if it would be unfair for the non-breaching party to rely on the time of the essence clause. In ***Bowlen v Digger Excavating (1983) Ltd,*** 2001 ABCA 214, the Alberta Court of Appeal discussed the three conditions that are considered before a court will enforce a time of the essence clause. The party seeking to rely on the clause: 1) must have been ready and willing to carry out the agreement itself; 2) cannot be the cause of the delay or in default; and 3) cannot have subsequently recognized the agreement as subsisting. Proving these specific conditions has become less essential over time with courts asking the more general question of whether the party relying on the clause acted in good faith: ***Bowlen*** at paras 18-19.

[122] The parties agree that their agreement contained a time of the essence clause at section 13.3:

> Time shall be the essence of this Agreement. In the event of any extension of time granted by the Vendor for the performance of an obligation of the Purchaser under this Agreement, time shall continue to remain of the essence hereof, notwithstanding such extension. In the event that any dates specified, or any date contemplated, in this Agreement shall fall upon a day other than a Business Day then such date shall be deemed to be the next following Business Day.

[123] There were also other clauses in the agreement that signaled the importance of making payments on time. Section 11, the default clause, states that failure to make payments "when due" gives the vendor the right to terminate the agreement and keep all monies paid to date.

[124] When the parties amended the agreement, the amending agreement stated that "time shall remain of the essence" in section 13.

[125] Mr. Arora argues that La Caille waived reliance on the time of the essence clause by playing fast and loose with timelines over the course of the business relationship. He points to La Caille's actions regarding the closing of Parcel 1, where La Caille was content to use the term "closing" loosely to its own benefit. Similarly, La Caille sought flexibility when seeking to review the servicing invoices but would not give Mr. Arora a reasonable extension in return. Mr.

Arora asserts that by the second closing, La Caille had acted in a manner inconsistent with its assertion that time was of the essence.

[126] He also asserts that the assignment of the agreement to his numbered company in October established a waiver of the clause because it was a new entity that was now entering into the agreement.

[127] Alternatively, Mr. Arora argues that equitable relief should be granted if the clause was not waived because La Caille was not ready and willing to close on Parcel 2. He cites La Caille's failure to deliver all necessary closing documents for Parcel 2 seven days in advance, specifically the Guarantee Acknowledgement Certificate for the assignment and the Statement of Adjustments for Parcel 2.

[128] As both waiver and equitable relief require me to review the circumstances surrounding the closing of Parcel 2 more closely, I will provide my findings of fact regarding that period of time and then consider Mr. Arora's claims.

[129] I find that in the fall of 2019, the parties were both proceeding, through their lawyers, towards the closing of Parcel 2 understanding that the transaction would close on October 17th, which was 240 days after the closing of Parcel 1 as stipulated in the agreement. The lawyers for both parties exchanged emails about the closing of Parcel 2 starting on October 8, 2019. Moreover, Mr. Arora had completed putting in the services by the end of August in anticipation of closing.

[130] On October 8 and 9, 2019, the parties corresponded and exchanged documents to prepare for the closing. On October 8, Mr. Bhangu requested that the Transfer of Land use Mr. Arora's new numbered company and noted this would require another Assignment of Contract, as had occurred for Parcel 1. That same day, Mr. Bhangu left a voicemail with Mr. Shapiro stating he had instructions from Mr. Arora indicating that "they should be good for closing" and that he would be getting mortgage instructions in the next couple of days. Mr. Bhangu expressed that they should be able to get everything done quickly and "close as scheduled".

[131] Mr. Shapiro responded on October 9 with a letter enclosing the executed Transfer of Land to the numbered company. Mr. Shapiro also sent La Caille's other deliverables for the Parcel 2 closing, including a Statement of Adjustments, GST Certificate and Indemnity, Certificates of Representations and Warranties, Vendor's and Purchaser's Undertakings to Re-Adjust, and the Assignment Agreement. All documents needing to be executed by La Caille in the package were executed. The letter also specified the next steps for closing, including the payment of a security deposit in accordance with the offer to purchase and noting that after forwarding the full cash to close and documents "in any event no later than October 17, 2019", Mr. Arora would submit the Transfer of Land to the Land Titles Office.

[132] The letter also included a specific clause regarding the timing for payment, being noon on October 17, 2019. The clause allowed for an exception for delay, at the Vendor's option, only if the delay was due to the Land Titles Office requiring additional processing time:

> (d) All monies are to be received by this office on a business day no later than 12:00 o'clock noon on October 17, 2019. Interest shall be payable from October 17, 2019, on the Cash to Close at the stipulated rate ... where the Vendor accepts a delay in closing, which the Vendor shall only do where the delay is attributable solely to the land titles office taking additional processing time to effect

registrations; otherwise, the full Cash to Close shall be releasable to the Vendor in full on October 17, 2019.

[133] Following this clause was a reiteration that: "(e) Time shall remain the essence throughout this transaction."

[134] An issue emerged at trial regarding the Statement of Adjustments. Mr. Arora argued that it was not included in the bundle of documents attached to the trust letter because the document was missing in the exchange of records leading up to trial. This related to Mr. Arora's argument that La Caille itself was not ready to close the transaction.

[135] According to Mr. Shapiro's testimony, the Statement of Adjustments would have been included with the other documents sent with the trust letter on October 9, 2019 because that was his usual practice. Mr. Shapiro explained that when making copies for his file his office may have photocopied any documents with signatures but not documents that did not require signatures, like the Statement of Adjustments, which could explain why it was missing prior to trial. However, he felt confident the Statement of Adjustments would have been sent and noted it was not raised as an issue at the time.

[136] I find the Statement of Adjustments was sent and received by Mr. Arora's lawyer before closing. Mr. Shapiro is an experienced commercial lawyer and I found his explanation of why the document was missing at trial credible. Further, there was no comment made by Mr. Arora's real estate lawyer to Mr. Shapiro that the Statement of Adjustments was not included in the package when he received it. Specifically, in none of the communications between the lawyers or between Mr. Arora and his lawyer did anyone comment on or complain about a missing Statement of Adjustments prior to closing. This issue is a red herring.

[137] On Tuesday October 15, Mr. Shapiro emailed Mr. Bhangu noting he had left a few voice messages and wanted to make sure they were on track for closing. He asked when Mr. Arora would be coming in to sign documents and if everything was lined up for closing on Thursday.

[138] On Wednesday October 16, Mr. Bhangu replied to the email. He noted that he had left a detailed message previously that they should be fine with closing on October 17 as he had no other instructions at the time. However, Mr. Arora emailed Mr. Bhangu advising La Caille owed a credit for the servicing costs pursuant to section 7.2 of the agreement that should be on the Statement of Adjustments. Mr. Arora, in the afternoon of October 16, sent Mr. Bhangu a spreadsheet with calculations totalling $889,452. Mr. Bhangu then emailed the servicing repayment request with the spreadsheet to Mr. Shapiro advising that if La Caille was agreeable to reimbursement of the servicing, "closing could be completed very quickly". Mr. Bhangu advised that if the issue was not resolved, he would return the trust documents, as he would be in no position to accept the trust conditions and close the transaction.

[139] Mr. Shapiro responded by email promptly that his client had not received an invoice for the servicing costs and would need time to review and assess. Mr. Shapiro noted that he had previously spoken to Mr. Itterman, Mr. Arora's previous counsel, about this and that receiving it one day before closing was not reasonable. He noted that as discussed with Mr. Itterman, the reimbursement was not a condition of closing, but a reimbursement that would be provided after appropriate review. Mr. Shapiro ended the email with "(i)f your client fails to close as scheduled, he would be in default of the purchase contract. Has he come in to sign yet?".

[140] Shortly after, Mr. Shapiro emailed his paralegal and Mr. Bhangu asking the paralegal to send the Guarantee Acknowledgement Certificate for the assignment, as he wasn't sure it was previously attached. He also wrote "[i]f you need a couple extra days to get this document signed, please let me know".

[141] A couple of hours later, Mr. Shapiro emailed Mr. Bhangu to advise he had spoken with his client La Caille. Mr. Shapiro requested the backup invoices and documentation for the servicing reimbursement. He also advised that under section 7.2 of the agreement, all work was to be done by contractors approved by La Caille and supervised by La Caille's engineer at Mr. Arora's expense. Mr. Shapiro advised that this had been discussed at length with Mr. Arora's previous counsel when Parcel 1 was closed. Mr. Shapiro stated that as these requirements had not been satisfied, they were surprised to receive a spreadsheet with no supporting documentation a day before closing. He advised that La Caille was agreeable to a holdback and paying the amount into court if needed. He reiterated that the holdback/reimbursement issue was not a part of or condition to closing. Mr. Shapiro stated that they expect to close tomorrow as scheduled but could accommodate an extension to Friday if needed. He reiterated that a failure to close by Friday would constitute a default under the agreement.

[142] Mr. Bhangu replied that afternoon enclosing the invoices and agreed that an extension until Friday "would help to work on closing given a resolution is reached by tomorrow morning".

[143] Mr. Shapiro responded, noting he expected it would take a few weeks for La Caille's engineer to review and advise of approval or non-approval of the invoices.

[144] Mr. Shapiro and Mr. Bhangu planned a late-afternoon call to discuss things further, but Mr. Bhangu was not able to call at the planned time. At 6:50 PM that evening, Mr. Bhangu emailed Mr. Shapiro stating his client agreed to close with a holdback in trust but would prefer the review be completed sooner and dealt with prior to closing. Mr. Bhangu also advised that he was in receipt of Mr. Arora's mortgage approval document and understood the lender would be able to close the transaction by the end of November 2019 but that they were pushing for mid-November. He wrote that "it does not seem that we will be able to close on coming Friday" and that his client requested a further extension to get the mortgage, which would also allow La Caille to complete reviewing the invoices.

[145] At 8:49 PM, Mr. Shapiro responded by email advising that he could be reached by phone. He reiterated that the holdback was okay but that the reimbursement was a separate issue the parties could deal with post-closing. He stated that he would seek instructions about an extension but noted "[m]y client will be surprised that your client's lender is not ready to fund." Mr. Shapiro stated: "I don't think they will have an appetite for an extension, but I will seek their instructions on what terms, if any, they would be willing to grant the requested extension."

[146] On the following day, October 17, Mr. Bhangu sent Mr. Shapiro an email providing eight necessary conditions for La Caille to grant a further extension to October 31, 2019. The conditions included Mr. Arora providing an additional deposit of $1 million by October 21 to be credited to the closing, provision of the $50,000 security deposit by October 21, paying interest on the late closing fees, paying for La Caille's engineer to review the servicing invoices, paying the legal costs associated with the late closing, and preparing and signing an amending agreement for October 18, the next day. The letter closed with the following warning:

> This offer is open until 12:00 PM on Friday, October 18, 2019, failing acceptance of which (or closing tomorrow, as the case may be), your client will be in default of the purchase agreement, and my client will exercise its rights accordingly.

[147] Mr. Arora did not respond to the offer of an extension.

[148] On October 28, Mr. Shapiro sent a "Notice of Termination" letter to Mr. Arora stating that his failure to pay the purchase price was a breach of the agreement. The letter notified Mr. Arora that pursuant to section 3.3(a)(iii) La Caille had elected to terminate the agreement and that any deposits or security were forfeited.

Waiver

[149] Mr. Arora's first argument is that the time of the essence clause is unenforceable because it was waived by La Caille. He argues that after waiver of a time of the essence clause, the waiving party is required to provide reasonable notice for reinstatement of the clause and that the closing need only occur within a reasonable time. He argues that in order for the new closing date to be reasonable, it needed to allow for the resolution of outstanding matters like the servicing costs and architectural guidelines. He argues that he could have provided the financing within a reasonable time and that the agreement should be reinstated on that basis.

[150] Mr. Arora has not provided evidence to meet the stringent test set out in ***Saskatchewan River Bungalows*** for waiver. He points to no specific conduct, nor oral or written communications, to support La Caille having an unequivocal and conscious intention to waive the time of the essence clause, or the requirement that payment be due on the closing date for Parcel 2.

[151] In fact, I find the opposite to be true. La Caille was consistent in emphasizing the closing date and that failure to meet it would result in default. In the communications in early October 2019, La Caille raised the October 17 closing date and was assured closing would occur as scheduled. October 17 was the date on the closing documentation sent by La Caille on October 9. The only provision allowing delay was to be at La Caille's option and only if the Land Titles Office necessitated the delay. Time of the essence was reiterated in the closing documents.

[152] On October 16, when it became apparent that Mr. Arora was likely not ready to close by Friday, La Caille warned that Mr. Arora would be in default of the agreement if he failed to close. There was no formal or informal intention expressed by La Caille to waive that consequence. La Caille did offer to extend the closing by one day to Friday but again reiterated that failure to close Friday would constitute a default.

[153] La Caille's position was consistent with the time of the essence clause in section 13.3 of the agreement. Section 13.3 contemplated extensions of time and stated that notwithstanding an extension, time remained of the essence: "[i]n the event of any extension of time granted by the Vendor for the performance of an obligation of the Purchaser under this Agreement, time shall continue to remain of the essence hereof, notwithstanding such extension".

[154] I find that providing this one day extension was just that, the provision of a one day extension. It was not a waiver. Agreeing to an extension of time "does not itself indicate a waiver of a time of the essence clause": ***Bowlen*** at para 17, citing ***Landbank Minerals Ltd v Wesgeo Enterprises Ltd***, [1981] 5 WWR 524 (Alta. Q.B.). In this case, the extension is a mere "substitution of a later date for the one stipulated in the agreement": ***Landbank Minerals*** at 535. The offer to extend does not in any way affect reliance on time being of the essence.

[155] In the circumstances here, La Caille was clear that a failure to close by the Friday would amount to default and the extension was not a waiver of the time of the essence clause.

[156] Although the parties entered into discussions about a further extension to October 31, which La Caille was willing to grant on specific conditions, no agreement was reached. The offer was not accepted by Mr. Arora verbally, nor did he act upon any of the conditions which included a written acceptance by October 18 and payments commencing on October 21.

[157] Absent a waiver of the time of the essence or default clause, this is not a circumstance where Mr. Arora can assert that he only needed to pay within a reasonable time: ***Gateway Alliance Church v Boodhoo***, 1999 ABQB 918 at para 29.

[158] The assignment to Mr. Arora's numbered company was also not an unequivocal and conscious intent to abandon La Caille's right to rely on the time is of essence clause. The surrounding circumstances here show both parties, by their words and conduct, readying for a closing date of October 17 when the assignment was arranged on October 8/9. I find that both parties intended to be bound by the same contractual terms in the agreement. In fact, the assignment contract between Mr. Arora and his company 806 specifically acknowledges the time is of the essence clause.

[159] If Mr. Arora's argument is that the time of the essence clause was waived much earlier in time, due to the delayed closing of Parcel 1 which both parties acquiesced to, that argument is also rejected.

[160] Mr. Arora may have assumed that La Caille's acceptance of the delays in closing Parcel 1 meant it also would accept delays in closing Parcel 2. In my view, this assumption was unreasonable considering the break-down in the relationship between the parties. There were several indicators of the breakdown of this relationship.

[161] First, La Caille took legal steps to enforce the agreement when the closing of Parcel 1 was delayed past the second extended closing date of May 31, 2028. This caused La Caille to issue a termination notice in August 2018. A lawsuit ensued. The lawsuit resolved because there was still an appetite to close Parcel 1, which happened in February of 2019.

[162] Second, before the closing of Parcel 1, La Caille's design consultant rejected the architectural drawings. Mr. Arora points to this conduct as a show of bad faith and failure to deal honestly under the agreement. I did not find this to be bad faith, but in my view, La Caille's conduct shows, again, an intention to hold Mr. Arora to the strict terms of the agreement.

[163] Third, after La Caille issued the first termination notice on August 31, 2018, the parties had little direct communication with one another. Even when the parties did communicate, the tension between the parties was evident. For instance, after issuing the notice, La Caille agreed to revive the agreement subject to various conditions, which Mr. Arora refused. Mr. Arora was advised that refusal meant the deal was dead. On September 1, 2018, Mr. Arora emailed Mr. Schmidt and Mr. Livaditis that La Caille was in breach of the contract because they failed to re-subdivide the lands under the original agreement. Mr. Schmidt's response was clear and unequivocal. La Caille took the position that the deal was dead because Mr. Arora did not accept their terms for revival. Mr. Schmidt advised Mr. Arora that he would no longer communicate directly with Mr. Arora and thereafter all communications were through the lawyers. La Caille's lawyer consistently held Mr. Arora to the contract terms.

[164] This change in tone of the relationship was a marked difference from the start of the business relationship where Mr. Arora and Mr. Livaditis met in person, dined with one another, and enjoyed a mentor and mentee relationship. I find that Mr. Arora knew or should have known that by the summer of 2018, the relationship was no longer an easy one. Rather, the relationship was purely business.

[165] Fourth, Mr. Arora was also not communicating as freely with Mr. Livaditis or Mr. Schmidt. Mr. Arora did not directly share with Mr. Livaditis or Mr. Schmidt the steps he was taking to service the lands. Although La Caille as a corporation knew construction was happening because Mr. Arora contacted La Caille's site engineers who attended the site, Mr. Livaditis and Mr. Schmidt only personally became aware that construction started when they drove by the site in September of 2019.

[166] Based on this history of events, it was unreasonable for Mr. Arora to make any assumptions that the extensions which were allowed for Parcel 1's closing would extend to Parcel 2's closing.

[167] I appreciate that the deal had been saved once in 2018 but, considering the conduct of the parties since, there were no signs it would be saved a second time. In my view, Mr. Arora was wilfully blind in his belief that he did not need to have the money available for closing because he could get an extension of the time. In other words, Mr. Arora was deliberately ignorant of the true state of affairs.

[168] La Caille is in the business of purchasing and selling land for development. There is no question La Caille was aware of its rights flowing from the time is of the essence clause. It would not waive a time of the essence clause lightly and its conduct in allowing delays for the closing of Parcel 1 was not a waiver of its rights for the closing of Parcel 2

[169] The communications between the parties in October 2019 made it even clearer to Mr. Arora that there had not been, and was not, any waiver of La Caille's right to enforce the time of the essence or default clause. There is no support in the evidence of an unequivocal waiver of rights.

[170] Mr. Arora's arguments on waiver before the closing of Parcel 2 also fail factually because they depend on him proving that he had the financial means to close with a short extension, which I have rejected.

Equitable Relief

[171] Mr. Arora's next argument is that it would be unfair for La Caille to rely on the time of the essence clause in these circumstances, relying on the criteria in ***Bowlen*** at paras 18-19:

> The rule that the equitable jurisdiction of the court is not triggered where time is of the essence is not absolute. Courts have held that a party may only rely on a time of the essence provision where three qualifications have been met. These qualifications are found in the "commonly cited rule", set out in *Shaw v. Holmes*, [1952] 2 D.L.R. 330 at 334 (Ont. C.A.):
>
> > Time may be insisted upon as of the essence of the agreement by a litigant, (a) who has shown himself ready, desirous, prompt and eager to carry out his agreement: ... (b) who has not been himself the cause of the delay or in default; ... and (c) who has not

> subsequently recognized the agreement as still subsisting; he must not play fast and loose at his pleasure: ... [citations omitted].
>
> Recent case law describes this more generally, requiring the party seeking to rely on a time of the essence clause to be acting in good faith. ...

[172] Again, I disagree.

[173] The argument that La Caille was not ready, prompt and eager to close Parcel 2 is not supported by the evidence. La Caille took the lead in attempting to close Parcel 2 on time and provided the documentation necessary in advance of closing. Moreover, Mr. Arora was adhering to the time is of the essence clause through his actions. He gave instructions to his lawyer to close, to obtain an assignment that was completely for his own benefit, and to receive the closing documents and the trust letter.

[174] The issue of missing documents, in my view, deflects from the reality of the situation. La Caille was ready, willing and able to close and Mr. Arora, the night before the closing, was not. Even if there had been a minor issue with a closing document, it was not remotely responsible for preventing the purchase: ***Watts v Strezos***, [1955] OR 615 (Ont. H.C.J.) at 618-21. Nor was the issue raised as a potential reason to prevent the closing at the time.

[175] I am satisfied that had Mr. Arora provided the payment owing, La Caille was ready to perform. The only barrier to closing was Mr. Arora's failure to pay. There is no unfairness based on this factor.

[176] The next factor to consider is whether La Caille is prevented from relying on the clause because it is responsible for the delay or default. I earlier found that both parties contributed to the failure to apply for the consolidation and re-subdivision of the property. However, there is no suggestion that those delays, which impacted the closing of Parcel 1, contributed to delay in closing Parcel 2. As I found earlier, both parties were moving towards closing Parcel 2 as scheduled until Mr. Arora's counsel signalled a problem existed the day before closing. The two issues that arose on October 16 were the servicing costs and time to pay. The agreement for a holdback addressed the servicing cost issue quickly. That left the only barrier to closing being Mr. Arora's failure to pay the balance owing. La Caille was not responsible for the delay or default so the result is not unfair to Mr. Arora in that sense.

[177] The third factor typically considered was not raised and does not appear on the evidence.

[178] The last consideration is whether the party seeking to rely on the time of the essence clause is doing so in good faith.

[179] Bad faith will be found when the party insisting on the time of the essence clause caused or contributed to the failure of the closing, and usually involves misconduct or a party acting on improper or ulterior motives: ***Fortress Carlyle Peter St Inc v Ricki's Construction and Painting Inc***, 2019 ONSC 1507, aff'd 2019 ONCA 866; ***Leung v Leung***, 75 OR (2d) 786 (Ont. Gen. Div.). One example would be delaying a closing in order to be able to take advantage of a rapidly rising real estate market: ***Leung***.

[180] Absent such circumstances, insisting on a timeline when time is of the essence is not bad faith. Parties are entitled to enforce terms and conditions that they have bargained for. The cases reviewed in ***Tang v Rong***, 2021 ONSC 8058 at paras 25-30 show that courts enforce these

clauses, even if they may appear harsh, for the sake of certainty and accountability. The following quote from an Ontario court illustrates this point:

> It would be tempting to let principles of fairness and equity direct a finding that a three day delay in the closing in the four year history of the Agreement, is a minor breach resulting in a financial windfall to the builder and, therefore, the Agreement should be upheld.
>
> **However, in my view, it would be wrong in law to find that insisting on compliance with a term of the agreement, agreed to by both parties with the assistance of counsel, amounts to bad faith depriving a party of the ability to strictly enforce an agreement where time is of the essence. Such a determination would mean that no party could insist on strict compliance of the term of an agreement because to do so would or might amount to bad faith. This would throw the law of contract into chaos by creating uncertainty in the enforcement of contracts. [Emphasis added]**
>
> ***Deangelis v Weldan Properties (Haig) Inc,*** 2017 ONSC 4155 at paras 41-42, quoted in ***Tang*** at para 30.

[181] The Privy Council similarly notes the difficulties that arise if being "slightly" late becomes acceptable:

> The fact is that the purchaser was late. Any suggestion that relief can be obtained on the ground that he was only slightly late is bound to lead to arguments over how late is too late, which can be resolved only by litigation.
>
> ***Union Eagle Ltd v Golden Achievement Ltd,*** [1997] 2 All ER 215, quoted in ***Tang*** at para 25.

[182] Here, with the assistance of counsel, La Caille and Mr. Arora negotiated both the agreement and the amending agreement to include time of the essence clauses. Absent some sort of misconduct or contribution to the delayed closing on the part of La Caille, I see no basis in equity for the court to intervene.

[183] There is no evidence that La Caille's conduct misled Mr. Arora or caused him to be unable to perform his obligation to pay on time: ***Bowlen*** at para 24. The evidence of Mr. Arora's real estate lawyer was clear and unequivocal. He was instructed by Mr. Arora to close and he so advised La Caille's lawyer. The instruction to ask for an extension came unreasonably late, being the evening before closing. Based on the evidence of Mr. Arora's lawyer, the instructions not to close was not tied to La Caille's stance on reimbursing the servicing expenses because Mr. Arora's lawyer accepted that the issue could be resolved through a holdback. There was no reason not to close but for Mr. Arora's inability to pay the balance due on closing. There is no basis here for equity to intervene to relieve Mr. Arora of the consequences of the time of the essence clause.

[184] Ultimately, there was a failure to close due to Mr. Arora's inability to obtain financing, which was a fundamental breach of the agreement. Section 11 of the agreement stipulated that the purchaser would be in default if the payments under the agreement were not made when due and section 13.3 reinforced that time was of the essence when performing obligations. Neither waiver nor equity apply here to save Mr. Arora from that consequence. La Caille was within its rights to terminate the agreement.

3 – Is Mr. Arora entitled to relief from forfeiture?

[185] Mr. Arora asks the Court to grant relief from forfeiture under s 10 of the *Judicature Act*, RSA 2000, c J-2. This section permits the court to "relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit".

[186] It is common for agreements of purchase and sale to include forfeiture clauses which allow a vendor to keep a deposit if the purchaser defaults. The clause is meant to compensate the vendor for the property being off the market and for the loss of bargaining power that comes from disclosing the price the vendor would sell at: ***Bowlen*** at para 33.

[187] Courts will grant relief from forfeiture when certain conditions are met. A court will assess a) whether the funds in question are in the nature of a penalty rather than liquidated damages and b) whether it would be unconscionable for the vendor to retain the funds: ***Harter v Longhorn Ventures Inc***, 2013 ABQB 491 at paras 24-25; ***Bowlen*** at para 36.

[188] The first inquiry is whether the deposits are a genuine pre-estimate of damages or a penalty. A court reviews the circumstances at the time the contract was made, not when default occurs. A forfeiture provision becomes a penalty when it goes beyond a genuine pre-estimate of damages and becomes more akin to a prepayment of the purchase price. If the deposit is out of proportion to the damage suffered, it may be a penalty: ***Bowlen*** at paras 34-36.

[189] The second inquiry is whether it would be unconscionable for the vendor to keep the deposit. Relevant factors include inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of good faith negotiations, the nature of the relationship between the parties, the gravity of the breach, and the conduct of the parties: ***Redstone Enterprises Ltd v Simple Technology Inc***, 2017 ONCA 282 at para 30; ***Rahbar ONSC*** at para 60.

[190] Mr. Arora paid four deposits pursuant to the agreement and a closing contribution. The first and second deposits and the closing contribution were applied to the purchase price of Parcel 1, which closed, and are not at issue. The third deposit of $152,961.19, and the fourth deposit of $458,883.57 were to be applied to the purchase price of Parcel 2 and are at issue. The total of the two deposits is $611,844.76. The parties agree the deposits for Parcel 2 amounted to just over 13% of the purchase price.

[191] Mr. Arora submits that the deposits here are out of proportion to the damages suffered. He argues Parcel 2 increased in value at closing by $1.5 million dollars, from approximately $4.6 million dollars to $6 million dollars. He suggests that the rise in value means there was no loss to La Caille, in reliance on ***Edmonton (City) v A & M Developments Ltd***, 1981 ABCA 135. There, the purchaser had paid a deposit of over 14% but then defaulted on a covenant to build a motor hotel on the site, which deprived the vendor City of taxes on the site. The agreement was terminated by the city. At the time of trial, the land had increased from the purchase price of $771,012 to $5.1 million dollars. The Court of Appeal granted relief from forfeiture of an option payment, finding the increase in value more than compensated the city.

[192] Mr. Arora also relies on ***Tanouye v KJM Developments Ltd*** (1980), 25 AR 200 (ABQB), suggesting La Caille's poor conduct should result in relief from forfeiture. In ***Tanouye*** the Court

granted relief from forfeiture to a purchaser who paid approximately 15% of the purchase price for a condominium unit. The Court found in the circumstances of the case it would be unfair for the vendor to keep the deposit. During the transaction, the vendor acquiesced to the purchaser's default, however, when the purchaser later attempted to remedy the default, the vendor misrepresented that the unit had been resold.

[193] La Caille's position is that the third and fourth deposits should be forfeited pursuant to the clear wording in section 11 of the agreement. Section 11 states that upon termination for default "all monies paid hereunder (including without limitation the Deposits, the Security deposit and any other security or deposit provided by the Purchaser pursuant to this Agreement) shall be retained by the Vendor as predetermined liquidated damages and not as a penalty..." [emphasis added]. It argues that both parties negotiated and agreed to this term and is dispositive of the penalty issue.

[194] La Caille further submits that the deposits amounting to 13% of Parcel 2 are not a penalty and are within the typical range for deposits. It cites ***Gagliardi v Al-Karawi***, 2023 ONSC 6853 at paras 71-72, for the proposition that deposits up to the 20-30% range have been found reasonable by courts. If the purchaser has agreed to pay the deposit in the agreement and if the amount is reasonable, "it is difficult to see how it could be unconscionable to make the buyer pay what it agreed and expected to pay": ***Gagliardi*** at para 72.

[195] I reject La Caille's first submission. Although the wording used in section 11 is a strong indication of the parties' intentions, it is not conclusive: ***Hughes v Lukuvka*** (1970), 14 DLR (3d) 110 (BCCA) at 113-14. The onus to invalidate the clause is on the party seeking the court's intervention: ***Pleasant Developments Inc v Iyer***, 2006 CanLII 10223 (ON SCDC) at para 14.

[196] Despite that finding, I agree with La Caille's other submission that the deposits in this case are not disproportionate to the purchase price. Deposits totalling 13% of the sale price are reasonable. Further, these were two sophisticated parties in the business of selling and developing land who negotiated the amount of the deposits and understood the consequences of default.

[197] Although Mr. Arora states that the value of the land has increased by $1.5 million dollars, so there is no loss, this is based on a valuation that includes the installed services, which have now been removed. (More will be said later regarding this.) Without the services, the increase in value is approximately half that amount. Increased value is a factor to consider, but not one that sways my finding that the original deposits were proportionate at the time the contract was negotiated and were agreed to by experienced real estate developers: ***Rahbar ONSC*** at para 3. The discrepancy in value is much less than in the ***Edmonton (City)*** case.

[198] Moreover, it is debateable whether the services, which were meant to integrate with the services in Parcel 1, actually increased the value of Parcel 2. There was evidence that for the services in Parcel 2 to work independently of Parcel 1, more work was required. This modification was costly and subject to City approval.

[199] I do not find it unconscionable for La Caille to retain the deposits. There was no evidence of unequal bargaining power, an unfair negotiation or bargain, or an unsophisticated or vulnerable party who was taken advantage of here. This was a business deal where there was a failure to pay,

a major default and breach of a condition of the contract. It is clearly distinguishable from the unfair conduct in ***Tanouye***.

[200] The request for relief from forfeiture is denied.

4 – Spoliation

[201] Mr. Arora alleges that La Caille's removal of the services on Parcel 2 amounts to spoliation of evidence. Spoliation occurs when a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation: ***McDougall v Black & Decker Canada Inc***, 2008 ABCA 353 at para 18. If the inference is made out, a presumption arises that the evidence would have been unfavourable to that party. The presumption is rebuttable if the "spoliator" proves that his actions were not aimed at affecting the litigation: ***McDougall*** at para 18.

[202] Spoliation is alleged here due to La Caille's unilateral actions in removing the services when it knew the services were integral to Mr. Arora's position on the installation and ownership of infrastructure on Parcel 2. Mr. Arora alleges the removal deprived him of the ability to conduct further investigations, present expert evidence on the nature and value of the services installed and support his counterclaim. Given La Caille's knowledge of the ongoing dispute, Mr. Arora alleges it is reasonable to infer the removal of services was to eliminate critical evidence.

[203] If an inference is established, Mr. Arora states it should support his argument that the services were installed in accordance with the agreement and the DSSP, countering La Caille's claim that they were not. Further, the inference should be used to support his claim that the costs inferred were accurate.

[204] La Caille responds that the services were removed five years after the termination of the agreement and does not affect the evidence this court needs to determine issues of dispute or damages.

[205] I agree with La Caille. There is documentation in evidence from Kang Construction regarding the scope of work when the services were installed and from Volker Stevin with regard to what was removed. The DSSP outlined what the services were and how they were laid out. Michael Kitchen, an engineer who prepared the DSSP for Mr. Arora after La Caille disconnected the services between the parcels, testified on the issue. The services did not need to remain in the ground as evidence for trial and I do not draw an inference the services were destroyed to affect the litigation.

5 – Costs for Servicing by Mr. Arora

[206] I find Mr. Arora has no claim for the servicing costs. When the agreement was terminated, he had not paid more than $750,000.00 for the installation of the services. Most of the money he owed to Kang Construction for the installation of the services had not been paid. Mr. Arora therefore had not expended the minimum amount required for reimbursement.

[207] Further, after termination, La Caille was no longer responsible to pay for those servicing costs, based on section 11(b) of the agreement.

6 – Damages

[208] Mr. Arora's third and fourth deposits, totalling $611,844.76, are forfeited to La Caille.

[209] I deny La Caille's claim for the costs of removing the services from Parcel 2. I find that La Caille acted improperly when they extracted the services from Parcel 2 before litigation was completed. La Caille did this despite pending litigation about the ownership of the land (i.e. this trial) and while there were caveats and easements on the lands. In fact, La Caille attempted to have the caveats and easements discharged in July 2023 before an applications judge but its application was dismissed. The applications judge noted "the right to ownership of parcel 2 is squarely an issue in the litigation".

[210] Despite this, La Caille removed the services from Parcel 2 without notice to Mr. Arora. Mr. Arora became aware of the removal in November 2024 when his counsel received a mediation brief from La Caille which contained invoices relating to the removal of services.

[211] In my view, La Caille's conduct in removing the services despite the Court's findings was akin to breaching a court order. Accordingly, I decline to grant La Caille's claim for the engineering costs and construction costs for removal of the servicing work removal costs of the servicing.

[212] La Caille also seeks other damages it alleges resulted directly from Mr. Arora's breach of the agreement:

a) Interest on the bank loan of $695,515.03, based on expenses paid to June 2023;

b) Property taxes of $159,966.97, based on expenses paid to December 31, 2024;

c) Interest pursuant to section 11 of the purchase and sale agreement or interest pursuant to the *Judgment Interest Act*;

d) Costs and indemnity, including legal costs on a solicitor and own client basis for dealing with the Kang Lien against Parcel 2.

[213] The parties did not make submissions on these claims for damages and will be given an opportunity to do so.

Conclusion

[214] La Caille's claim is allowed and Mr. Arora's counterclaim is dismissed.

[215] I decline Mr. Arora's request to declare the agreement is valid and subsisting. I confirm the reimbursement obligations of La Caille are extinguished under the agreement. I further confirm the warranties and covenants related to Parcel 1 remain in effect.

[216] An order shall follow directing the Registrar of Land Titles to discharge forthwith the Arora Purchasers' Caveats, bearing the following registration numbers:

- Purchaser Lien, registered January 3, 2018, bearing registration number 181 000 709;
- Agreement Charging Land, registered January 3, 2018, bearing registration number 181 000 710;

- Agreement Charging Land, registered on October 3, 2018, bearing registration number 181 214 332; and
- Purchaser Lien, registered on October 3, 2018, bearing registration number 181 214 333.

[217] As referenced in above, the issue of whether I order damages based on the payment of the property taxes and the bank loan interest payment for Parcel 2 requires further submissions from both parties. The parties shall each submit no more than an eight page brief plus supporting case authorities on the two issues, to be served and filed by the parties on January 9th, 2026. The parties will have no right of response to each other's submissions.

[218] After the final decision on the outstanding damage claims, the parties have 60 days to arrive at an agreement on costs. If the parties cannot agree on the costs after that period, they may each submit to me through my judicial assistant no more than a five page concise letter on costs plus any relevant attachments for my review.

Heard on the 17th day of March, 2025 to the 4th day of April, 2025 and June 13, 2025.
Dated at the City of Calgary, Alberta this 19th day of December, 2025.

Lisa A. Silver
J.C.K.B.A.

Appearances:

Brent W. Mescall, Justin W. Hamilton, and Joshua J. Marych
Parlee McLaws LLP
for the Plaintiff/ Defendant by Counterclaim

Guy Lacourciere, Mehtab Hundal, and Omar Tabsh
Lacourciere LLP
for the Defendants/ Plaintiffs by Counterclaim