SUPREME COURT OF NOVA SCOTIA
Citation: *The Dawson Group v. 1259963 Ontario Ltd.*, 2025 NSSC 355

Date: 20251124
Docket: *HFX*, No. 519920
Registry: Halifax

Between:

The Dawson Group

Applicant

v.

1259963 Ontario Ltd., a body corporate and
1259513 Ontario Ltd., a body corporate

Respondents

DECISION

Judge:	The Honourable Justice John A. Keith
Heard:	March 25, 2025, in Halifax, Nova Scotia
Counsel:	Nicholas Mott and Meaghan Kells, for the Applicant Respondents self-represented by directing mind, Robert O'Toole

By the Court:

INTRODUCTION

[1] This dispute originates from an agreement of purchase and sale dated August 27, 1997 (the "**APS**") in which the Respondents purchased from the entire Purcells Island in Prospect Bay, Nova Scotia (the "**Island**") and related access rights for $370,000.00. The Vendors were Charles W. MacIntosh and Brian G. & Paula E. Roberts (the "**Vendors**").

[2] The purchase price paid by the Respondents was partly financed through a $290,000.00 vendor take-back mortgage (the "**VTB Mortgage**").

[3] The APS included:

1. Title in fee simple to the Island;
2. Title in fee simple to a narrow strip of land defined in the APS as the "Allowance". It began on a point along the mainland shore which was separated from the Island by a narrow channel of water about 75 feet in width. The Allowance then ran in a straight line towards the main highway (Prospect Bay Road);
3. Two rights of way:
4. A right of way over Crown lands defined in the APS as the "Easement".[1] It began at the same point along the Prospect Bay shoreline where the Allowance was located (about 75 feet from the Island) but then snaked south toward a different connection to Prospect Bay Road; and
5. A second right of way (and third potential access route to the Island) defined in the APS as the "Bay Right of Way". The lands affected by the Bay Right of Way were owned by a non-party and comprised a very thin parcel of waterfront property located some distance from the northern tip of the Island – near a commercial property called the "Bay Landing". The distance separating the Bay Right of Way from

[1] The Easement was comprised of two separate, contiguous rights of way that combine to create a single continuous right of way.

> the Island was much greater than either the Allowance or the Easement.

[4] The sale closed on October 31, 1997. All parties to the transaction knew before closing that the Vendors had not obtained any legal interest in the lands over which the Bay Right of Way travelled and, therefore, the Vendors did not (and could not) convey any interest in the Bay Right of Way. Yet, the Warranty Deeds and VTB Mortgage exchanged on closing referenced this easement.

[5] The Respondents never made scheduled mortgage payments or paid property taxes, and the debt remained unpaid after the January 31, 2003 maturity date.

[6] In 2009, the Applicant took an assignment of the Vendors' legal interests in the subject property and the VTB Mortgage. In the years which followed the assignment, the Applicant paid all accumulating, outstanding property tax arrears eventually totalling over $130,000.00.

[7] On December 13, 2022, the Applicant/mortgagee[2] commenced an Action claiming default under the terms of the VTB Mortgage and sought to enforce its security. There are two alleged acts of default:

1. Failure to repay the outstanding principal and interest owing under the VTB Mortgage; and
2. Failure to pay property taxes.

[8] On December 5, 2023, the Respondents filed their Statement of Defence which was amended on September 25, 2024.

[9] The Respondents deny default and raise several defences. First, they allege a oral agreement with the original Vendors that arose when closing the 1997 sale. Under this alleged oral agreement, the Vendors—and later the Applicant as assignees—were obligated to convey the Bay Right of Way at some point in the future. The Respondents say that this oral agreement was a fundamentally important aspect of the transaction and critical to the Respondents ability to market and sell lots on the Island. Its absence allegedly caused losses of about $425,000.00. Second, they assert another post-closing oral agreement that arose in 2003 and amended the payment terms under the VTB Mortgage. Under this oral agreement, the Respondents were only obliged to make a mortgage payment when an Island lot was

[2] The Action was eventually converted to an Application. In the interest of uniformity, I use the terms Applicant and Respondents throughout as a means of separating and identifying the parties to this proceeding.

sold. The amount of any such payment was subject to negotiations at the time of the sale. In return, the Respondents allege, interest owing under the VTB Mortgage was increased from 7.5% to 8%. In the years which followed, the Respondents have made three payments which they say are tied to sales. Third, the Respondents argue it was always understood that any property tax payments by the Applicant were separate, unsecured private loans and could neither constitute an event of default nor increase the amounts due under the VTB Mortgage. Finally, the Respondents claim the Applicant's principal, Jeff Dawson, breached fiduciary duties by taking assignment of the mortgage despite being aware of a conflict of interest related to the Bay Right of Way, warranting a constructive trust by which the Applicant holds the VTB Mortgage in trust for the Respondents.

[10] The Applicant subsequently filed a motion for summary judgment. I denied the motion. However, I determined that the residual issues were narrow and focussed. I exercised my discretion under Rule 13.08 and converted the Action to an Application in Court (2025 NSSC 60). With the parties' input and agreement, I established a schedule for the pre-hearing milestones, including an opportunity for all parties to file any additional affidavit materials or evidence they parties sought to rely upon.

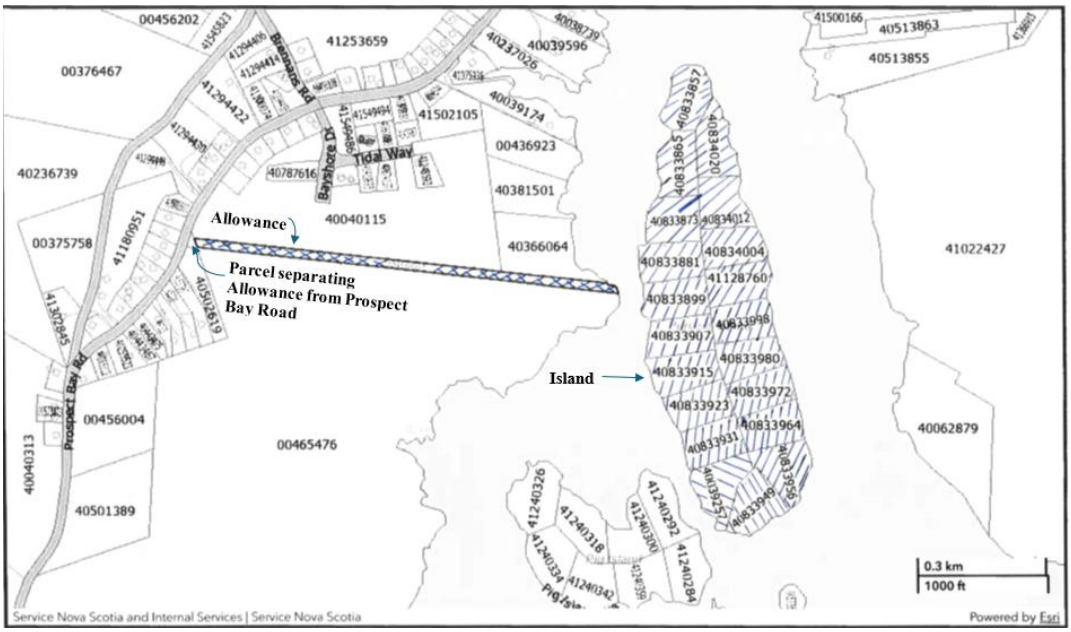
BACKGROUND AND ISSUES

[11] The history of this dispute begins more than 29 years ago, when the Vendors and Robert O'Toole, in trust for the Respondents, signed the APS. Under the terms of the APS, the Respondents were to acquire:

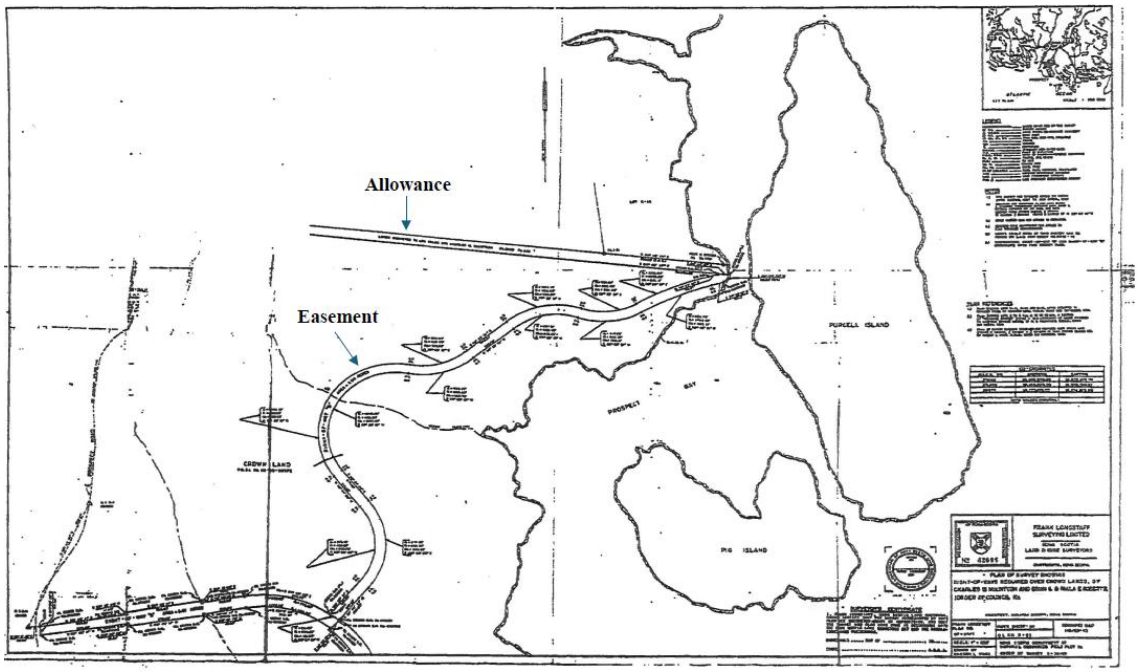
1. Title in fee simple to the Island;
2. Title in fee simple to the Allowance; and
3. Two rights of way: the Easement and the Bay Right of Way.

[12] These property interests are described in paragraph 3 above. However, the following images provide a better sense as to their location, particular in reference to the Island which was the main asset acquired in the sale:

Allowance



Allowance and Easement



Allowance and Bay Right of Way

The purchase price was $370,000.00. Part of the purchase price was paid by way of the VTB Mortgage in the principal amount of $290,000.00. The VTB Mortgage required five annual $40,000.00 payments starting January 31, 1998, with a final payment of all outstanding principal and interest due January 31, 2003.

[13] The transaction was scheduled to close on September 30, 1997 (the "**Original Closing Date**"). However, all parties knew when signing the APS that the Vendors (Charles W. MacIntosh and Brian G. & Paula E. Roberts) had neither a legal interest in nor an ability to convey the two rights of way identified in the APS (i.e. the Easement or the Bay Right of Way). Section 7 of the APS created an option whereby the Respondents could extend the Original Closing Date by another 31 days to October 31, 1997, if this condition was not satisfied (the "**Extended Closing Date**").

[14] The condition was not satisfied by the Original Closing Date. The Respondents exercised their option to extend the Original Closing Date by 31 days (to October 31, 1997). Robert O'Toole on behalf of the Respondents testified that he exercised this option not knowing what, if anything, the Vendor had done to obtain the Bay Right of Way (Affidavit of Robert O'Toole sworn September 17, 2024, para. 10).

[15] The transaction subsequently closed on the Extended Closing Date. Again, Mr. O'Toole testified that he did not know what, if anything, the Respondents had done to obtain the Bay Right of Way as at the Extended Closing Date.

[16] All parties to the transaction (including the Respondents) knew prior to closing that:

1. The original Vendors neither had a legal interest in nor an ability to convey the Bay Right of Way, despite what the Warranty Deeds said;
2. The Respondents had no legal entitlement to encumber the Bay Right of Way, despite what the VTB Mortgage said; and
3. The parties to the transactions neither intended nor were legally entitled to convey or encumber the Bay Right of Way, regardless of what the closing documents said.

[17] Consistent with that understanding, there is no evidence that the Warranty Deeds or VTB Mortgage were ever registered on the lands over which the Bay Right of Way was support to run (i.e. the subordinate tenement).

[18] However, the Respondents say that the significance of including the Bay Right of Way in the Warranty Deeds and VTB Mortgage was not to confirm any enforceable legal rights over the lands affected by the Bay Right of Way. As indicated, all parties knew this did not occur. Rather, the Respondents allege that including the Bay Right of Way in the closing documents is evidence of an underlying oral agreement made prior to closing (the "**First Oral Agreement**").

[19] The terms of this First Oral Agreement superceded s. 7 of the APS which would have otherwise constituted a complete waiver of any continuing claims regarding the Bay Right of Way. Under the terms of this alleged First Oral Agreement, a new post-closing obligation arose whereby the original Vendors agreed to convey the Bay Right of Way at some point in the future.

[20] As further support for the existence of the First Oral Agreement, the Respondents also point to the fact that certain payment terms for the VTB Mortgage as contained in the APS were removed in the final VTB Mortgage given on closing. The deleted terms related to the anticipated subdivision on the Island and essentially stated that the Respondents were only entitled to sever and transfer a subdivided parcel so long as the VTB Mortgage balance stays above $250,000.00 and so long as any proposed severance and transfer did not materially reduce, to the Vendor's detriment, the ocean-frontage-to-land-area ratio of the remaining property on the Island.

[21] The Respondents allege that the Applicant was aware of and assumed all obligations under the First Oral Agreement when they took an assignment of the VTB Mortgage.

[22] The First Oral Agreement becomes relevant in this proceeding because:

1. The Respondents argue that the Bay Right of Way was an absolutely critical component of the transaction and, as such, the alleged oral agreement was equally fundamental;
2. The Respondents further argue that original Vendors and then the Applicant (as assignees of the VTB Mortgage) breached their oral agreement and, after more than 28 years, failed to deliver the Bay Right of Way; and
3. This breach severely hindered the Respondents' ability to market and sell Island lots and causing substantial losses. As to quantum, there is no evidence regarding the extent to which the absence of a Bay Right of Way may have compromised the value of Island lots. However, Mr. O'Toole (on behalf of the Respondents) recalls that he was "personally responsible for researching local real estate values, determining the value of the property purchased under the OPSA and negotiating the purchase price". And that "based on [his] analysis at the time, [he] estimated that [he] allocated 15% of the purchase price under the [APS] for the [Bay Right of Way], or $55,000." (Supplemental Affidavit of Robert O'Toole sworn March 18, 2025, paras. 6 and 11) In other words, the value of property received by the Respondents is $55,000.00 less that what they were due had the Bay Right of Way been conveyed. Adding accrued interest over the intervening years, Mr. O'Toole says that this loss of value currently

> translates into about $425,000 or about 65% of the entire amount claimed under the VTB Mortgage.
>
> (Supplemental Affidavit of Robert O'Toole sworn March 18, 2025 at para. 20).

In highlighting the importance of the Bay Right of Way and the extent to which the loss of this easement has prejudiced the Respondents, Mr. O'Toole further says:

> Today the Respondents' extreme need for the [Bay Right of Way] can not be overstated. Forced lot sales seem to be immanent [sic.] either under foreclosure or otherwise. A forced sale environment will cause prices to be low to begin with but with no legal access in place for prospective buyers sales prices will be tragically low and a financial nightmare for the Respondents. That nightmare would be extremely unfair for two reasons: invoking a forced sale when for 25 years the Respondents relied on a structured Mortgage payment arrangement that matched its business strategy; and the lack of [Bay Right of Way] access would depreciate lot sales prices but the lack of the [Bay Right of Way] was caused by the Applicant.
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> (Supplemental Affidavit of Robert O'Toole sworn March 18, 2025 at para. 40).

[23] Even if there is default under the terms of the VTB Mortgage, the Respondents seek to set their losses off against any amounts owing under the VTB Mortgage.

[24] That said, the Respondents also deny the acts of default being alleged by the Applicant.

[25] With respect to the first act of default alleged by the Applicant (i.e. failure to repay the outstanding principal and interest owing under the VTB Mortgage), the Respondents alleged that in or around June 9, 2003 (several months after all amounts under the VTB Mortgage came due), the original Vendors/mortgagees and the Respondents entered into a second oral agreement under which any existing default to fully repay the VTB Mortgage was forgiven and the parties entered in new payment terms where the Respondents were only required to pay an undetermined amount to be negotiated if/when a lot on the Island was sold. If no lots on the Island were sold, there could be no default. In exchange, the Respondents say that the interest owing under the VTB Mortgage was increased from 7.5% to 8% (the "**Second Oral Agreement**").

[26] The Respondents say that the Applicant assumed and are bound by this Second Oral Agreement when they took an assignment of the VTB Mortgage.

[27] As evidence of the Second Oral Agreement, the Respondents say that they did pay certain amounts under the mortgage when lots were sold. In the more than 20 years since this oral agreement was made, the Respondents made the following payments:

1. $20,000.00 on June 9, 2003, when the alleged oral agreement was reached;
2. $20,000.00 on July 4, 2003; and
3. $60,230.00 on December 24, 2012.

[28] The Respondents say that these payments roughly corresponded with the dates upon which a lot on the Island was sold, taking into account the fact that some additional time would be required to conduct the negotiations around payment that the Second Oral Agreement required (Affidavit of Robert O'Toole sworn September 17, 2024, para. 18 and Supplemental Affidavit of Robert O'Toole sworn March 18, 2025, para. 28).

[29] No payments have been made since 2012 because, the Respondents say, no lots have been sold. As indicated, Respondents argue that the poor sales stem chiefly from the Applicant's breach of the First Oral Agreement (i.e. the failure to convey the Bay Right of Way).

[30] As to the second alleged act of default (i.e. the failure to pay property taxes), the Respondents do not dispute that the VTB Mortgage obliges them to pay those taxes in a timely fashion. The Respondents also do not dispute that the Applicant (not the Respondents) paid the property tax arrears. On this, the accounting evidence is clear that the Applicant paid $38,668.79 on March 2, 2010 – almost three years after taking an assignment of the VTM Mortgage on April 15, 2007. Since that time, the Applicant has paid a further $91,907.97 for property tax arrears. The total amount of property tax paid by the Applicant (excluding any applicable interest) is $130,576.76.

[31] However, the Respondents say that Jeff Dawson (the Applicant's directing mind) was formerly an officer and director of the Respondents who was responsible for all accounting responsibilities, among other things. The Respondents further say that Mr. Dawson or his representatives (not the Respondents) received paid all property tax notices directly. The Respondents argue that there was an

"arrangement" whereby the payment of property taxes by the Applicant represented a private, unsecured loans to either the Applicant or Mr. Dawson personally – and were not to be added to the secured VTB Mortgage debt (the "**Third Agreement**"). At para. 19 of his affidavit sworn September 17, 2024, Mr. O'Toole states:

> These private loans [to pay property taxes] were unsecured debt repaid by the Defendants from proceeds of lot sales. This arrangement that began at the time of the Property purchase has continued uninterrupted. Even when DGI was a Mortgagee and shareholder this arrangement continued so that all payments were private loans to the Defendant. To the best of my knowledge and belief this mortgage payment arrangement continued even after DGI no longer was a shareholder and was only a Mortgagee.

[32] In the circumstances, the Respondents insist that the Applicant cannot now suggest that payment of property tax was added to the VTB Mortgage debt and/or suggest that the Applicant paying all property tax arrears constitutes a default under the VTB Mortgage. Rather, the Respondents say, whatever payments were made by the Applicant for property taxes must be deemed a separate and private loan made by either the Applicant or Mr. Dawson personally with no specific terms of repayment.

[33] Finally, the Applicant argues that Mr. Dawson breached his fiduciary duty and placed himself in an irreconcilable conflict when the Applicant took an assignment of the VTB Mortgage. Mr. O'Toole testified that prior to proposed assignment, he:

> …discussed with the Vendors and requested that the Mortgage not be assigned to DGI due to the conflict of interest that would be created between DGI and the Defendants particularly with respect to a resolution of the Bay Right of Way matter.
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> (Affidavit of Robert O'Toole sworn September 17, 2024, at para. 23).

[34] The Respondents maintain that the Applicant proceeded with the assignment despite his warning. In doing so, the Respondents say that Mr. Dawson breached his fiduciary obligations and that the VTB Mortgage must now be deemed to be subject to a constructive trust in favour of the Respondents.

[35] The issues in dispute are:

1. Whether the original Vendors/mortgagees and the Respondents entered into an oral agreement prior to closing the transaction

whereby the obligation to convey the Bay Right of Way survived closing and became an ongoing obligation that:

a. Binds the Applicant as assignee under the VTB Mortgage and otherwise at law or in equity; and

b. Was breached by both the original Vendors/mortgagees and the Applicant as assignee of the VTB Mortgage - impairing the anticipated marketing and sale of lots on the Island and causing damages that should be set off against any VTB Mortgage debt.

2. Whether the terms of payment under the VTB Mortgage were amended by way of a different, subsequent oral agreement some time after closing the transaction such that payments would be due only if/when a lot on the Island is sold. If so:

a. Whether the Applicant complied with the terms of that oral agreement such that there is no default of payment;

b. Whether payments being made by the Applicant in respect of property taxes ought properly be characterized as payments from the Applicant/mortgagee (thus representing a default under the Mortgage) or, alternatively, as payments made on behalf of the Respondents/mortgagors (thus representing compliance with the terms of the Mortgage);

c. Whether the property tax payments by the Applicant are properly characterized as a separate and private loan from either the Applicant or Mr. Dawson personally - and not a default of the Respondents obligation to pay property taxes under the terms of the VTB Mortgage; and

d. Whether Mr. Dawson, as directing mind of the Applicant, placed himself in a conflict of interest and otherwise breached a fiduciary duty owing to the Respondents when he permitted the Applicant to take an assignment of the VTB Mortgage. If so, whether the appropriate remedy is declaration that the Applicant holds the VTB Mortgage in a constructive trust in favour of the Respondents.

[36] As will be seen below, the resolution of these issues is primarily driven by findings of fact. The legal issues are, by comparison, uncomplicated and relatively straightforward.

ISSUE 1: THE BAY RIGHT OF WAY AND THE FIRST ORAL AGREEMENT

[37] As indicated, the Respondents allege that the First Oral Agreement arose at the Extended Closing Date whereby the Vendors agreed to a convey the Bay Right of Way at some point in the future.

[38] In addressing this claim, it is necessary to first review the background facts leading up the First Oral Agreement.

[39] As indicated, the Bay Right of Way, the Easement, and the Allowance were identified in the APS as alternative access routes to the Island from a location on the mainland shoreline. The Vendors had the ability to convey title in fee simple to the Allowance, so it was not a problem. However, the Vendors (Charles W. MacIntosh and Brian G. & Paula E. Roberts) and the Respondents (represented by their directing mind, Robert O'Toole) all knew that the original Vendors did not have any legal interest in either the Easement or the Bay Right of Way and thus had no ability to convey either right of way to the Respondents.

[40] Section 7 of the APS sought to address these problems as follows:

1. The transaction was made conditional upon the Vendor "at its sole cost and expense, completing all matters that may be necessary so that each Vendor has good and marketable title to the Easement and to the Bay Right …." Moreover, the Vendor was required to "use all reasonable efforts to satisfy this condition";
2. In the event this condition was not satisfied by the Original Closing Date (September 30, 1997) "…the Purchaser alone may either waive the condition or elect to extend the [Extended Closing Date, October 31, 1997];
3. If the Respondents elected extend the Original Closing Date, the original Vendors remained under an obligation to use all reasonable efforts to satisfy this condition; and
4. If the Vendors were still unable to satisfy this condition by the Extended Closing Date and provided the Vendor acted reasonably, s. 7 stated that: "…the Purchaser shall elect to either waive the condition completely or terminate the Agreement."

[41] Again, all parties to the transaction (including the Respondents) knew at the time of the Original Closing Date that the Vendors were unable to satisfy the section 7 condition and convey either the Easement or the Bay Right of Way. The Respondents elected to exercise their option to extend the closing date by 31 days.

[42] By the time the Extended Closing Date arrived, all parties to the transaction (including the Respondents) knew that the Vendors had obtained the required legal interest in the Crown lands over which the Easement ran; and were able to convey that Easement to the Respondents. However, all parties to the transaction (including the Respondents) also still knew that the Vendors still had no legal interest in, and could not convey, the Bay Right of Way.

[43] In the circumstances, the strict contractual choice as of the Extended Closing Date was binary: the Respondents "shall elect to either waive the condition completely or terminate the Agreement" (emphasis added). However, the Respondents allege that the parties developed a third option. They say that the parties reached the First Oral Agreement which amended and superceded s. 7 and gave rise to a new post-closing commitment to convey the Bay Right of Way in the future.

[44] In my view, the alleged First Oral Agreement was neither reached nor could be legally enforceable in any event. Rather, I am strongly compelled to the conclusion that the parties agreed to close the transaction without they Bay Right of Way and, instead, focussed exclusively on accessing the Island through the Allowance and the Easement. Section 7 of the APS applies such that the Respondents are deemed to have completely waived the condition requiring the Vendor to secure good and marketable title to the Bay Right of Way.

[45] This conclusion is supported by the following findings of fact:

1. The two critical points of access to the Island were clearly the Allowance and the Easement. Both the Allowance and Easement terminated at the same point along the mainland waterfront which was only separated from the Island by a narrow channel of water about 75 feet or so in width. They were the logical and geographically sensible point for accessing the Island.
2. The Respondents' plan was to subdivide the Island and install a small bridge traversing that narrow channel of water between the Island, on one side, and the Easement and Allowance on the other. As at the date of closing, all parties understood that the bridge was to be the

primary method of accessing the Island. Thus, the Warranty Deeds conveying title to the Island expressly refer to a right of way on the Island which would terminate at:

> …the point where a bridge or causeway may from time to time be located to carry traffic from the mainland to the Island, (the precise location of the right of way to permit the most appropriate subdivision into lots of the servient lands) as agreed by the parties or in the absence of agreement by an independent land surveyor.

3. The Vendors took reasonable steps to convey the Easement. When signing the APS, all parties knew that the Vendors had also not acquired any legal interest in the Easement. The description of the Easement attached to the APS was entitled "Preliminary" and contained the following incomplete introduction to what was obviously a proposed (not agreed) metes and bounds description for the Easement:

> A Right-of-way depicted on a Plan prepared by Frank Longstaff surveying Limited, dated the xxxxx day xxxxx. A.D. titled "Plan of survey showing right-of-way required over Crown lands by Charles w. MacIntosh and Brian G. Roberts and Paula E. Roberts, (Order in Council No. xxxxxx), Prospect, Halifax County, Nova Scotia.
>
> (Emphasis added).

As at the Original Closing Date, the Vendors had not yet managed to obtain the right to convey the Easement. However, they did secure the required legal interest by the Extended Closing Date. The previously incomplete preamble attached to the description for the Easement in the APS now read:

> … on Frank Longstaff Surveying Limited Plan No. 97-3546 titled "Plan of Survey Showing Right-Of-Way Required Over Crown Land By Charles W. MacIntosh and Brian G. & Paula E. Roberts, Prospect, Halifax County, Nova Scotia", signed by Frank Longstaff, N.S.LS. dated 9th day of June 1997, and which said Right Of Way "B" may be more particularly described as follows:…
>
> (Emphasis added).

Moreover, the metes and bounds description for the Easement also contained the following new additional language not found in the APS:

> INCLUDING ALL RIGHTS AND PRIVILEGES thereto as contained in the conveyance from Her Majesty the Queen in the Right of Her Province of Nova Scotia to Brian G. Roberts, Paula E. Roberts and Charles MacIntosh dated the 30th day of September, 1997 and recorded in the Registry of Deeds at Halifax on the 2nd day of October, 1997 in Book 6126 at Page 770 as document number 42738.

Thus, by the Extended Closing Date, the Vendors obtained what I find had been identified as the two key property rights for access to the Island: the Easement and the Allowance.

4. In the years immediately following closing, the Respondents focussed exclusively on subdividing the Island and executing the plan to build a bridge from the Allowance and Easement to service and support the plan of subdivision. The subdivision plan was logically and naturally premised on the Island being accessed from the narrow channel of water which separated the Island from the Allowance and the Easement. The Respondents confirm that close to $200,000.00 of capital was spent pursuing the bridge option (Supplementary Affidavit of Robert O'Toole sworn March 17, 2025, para. 31).

5. The Bay Right of Way was intended to be secondary or minor and temporary in nature, effectively a stop-gap pending completion of the bridge. It was many hundreds of feet away from the northern tip of the Island. Indeed, under the terms of the APS, it was always supposed to be extinguished once a bridge to the Island was completed. The metes and bounds description for the Bay Right of Way contained in the APS describe it as the "second right of way" and, more importantly, states that it shall "cease upon completion of a permanent bridge or causeway to serve as a highway crossing to the Island". Again, the underlying reasoning was obvious: a temporary land base other than the Allowance or the Easement may be necessary pending completion of the bridge.

6. There is evidence that the Respondents subsequently substituted the bridge with a system of docks and mooring sites for the owner of Island lots. However, again, I find that the focus remained on the Allowance and the Easement, in my view. By letter with a fax trace of April 20, 1999 (the "**April, 1999 Letter**" sent about 1 ½ years after the Extended Closing Date), Mr. O'Toole advised that the Respondents will "commence shortly to build a dock by the narrows

that will serve as the community dock for all owners." I understand the "narrows" to mean that same narrow channel of water that separated the Island from the Allowance and the Easement. During this same period of time, there is no evidence that any money was spent or thought was given to the Bay Right of Way.

7. As at the Extended Closing Date, the Bay Right of Way is more fairly described as a minor after-thought that no longer concerned the Respondents. Indeed, the Respondents sworn evidence is that they had no information to suggest that the Vendors had taken any steps to obtain the Bay Right of Way as at the Original Closing Date. When the Extended Closing Date arrived, the Respondents still had no information as to whether the Vendors had taken any steps towards obtaining the Bay Right of Way. In my respectful view, that is evidence of its relevance insignificance in the contractual scheme – not its importance.

8. There is no compelling evidence of reliance on the Respondents or part-performance regarding the alleged First Oral Agreement. As indicated, in the years following closing, the Respondents were focussed on the bridge between the Allowance or the Easement and the Island. For many, many years, there is absolutely no evidence to suggest that anything was done regarding the Bay Right of Way – or that the Respondents expected anything to be done. This lack of part-performance is consistent with the admission that the Respondents had no information that anything was being done regarding the Bay Right of Way leading up to closing the transaction. The absence of evidence leads to the conclusion that the First Oral Agreement neither arose nor could be enforceable.

[46] Respectfully, in all the circumstances, I also find that the Respondents' evidence regarding the First Oral Agreement is not credible and am unable to accept it. Among other things:

1. The Respondents suggest that the First Oral Agreement was reached because the parties understood that the Bay Right of Way was critical. For the reasons given above, that is not true;

2. The Respondents suggest that the Bay Right of Way became the single, primary point of access for the Island. They assessed damages for the breach of the alleged First Oral Agreement as if access to the

Island depending on the Bay Right of Way. Thus, they say, the Bay Right of Way had to support a dock and 20 mooring sites (one for each subdivided lot on the Island). And they suggest that the damages associated with installing that infrastructure as part of the Bay Right of Way (i.e. damages for the breach of the First Oral Agreement) greatly reduce the VTB Mortgage debt. Respectfully, the suggestion entirely ignores the Allowance and the Easement – as if the Bay Right of Way was the only point which might support access to the Island, including a dock and mooring sites. Again, for reasons discussed, that is neither reasonable nor credible based on the evidence before me. The Allowance and the Easement were clearly the more logical point of access. In all the circumstances, respectfully, I do not find that it is reasonable to infer that the parties expected or understood that the Respondents retained the sole, unfettered discretion to simply abandon the Allowance and the Easement at any time (including any bridge to the Island) as the primary and dominant points of access to the Island and somehow insist that the more distant Bay Right of Way was the lynchpin;

3. The Respondents' post-closing actions and statements further undermine their credibility. I again refer to the April, 1999 letter referenced above. In that letter, the Respondents write to the Vendors with a proposal for temporarily amending the existing payment schedule. I return to this issue and this letter below. For present purposes, the letter is notable in that it says nothing about the Bay Right of Way at all – even though this easement was allegedly critical and, yet, the Respondents still had no information whatsoever regarding an ongoing breach of the First Oral Agreement. Yet, the letter begins by thanking the Vendors for their "past accommodation and cooperation" and concludes by stating the Respondents appreciate the Vendors "cooperation and apologize for [their] delays in moving the project along" (Affidavit of Robert O'Toole sworn September 17, 2025, Exhibit 3). Respectfully, these statements are inconsistent with the alleged First Oral Agreement. On this, I also do not accept the Respondent's explanation as credible. Mr. O'Toole testified in this proceeding that that he deliberatively avoided discussing the Bay Right of Way for decades became he:

> …could not let anything caustic like pushing aggressively for the [Bay Right of Way] to create any conflict. Accordingly [he] adopted

> an overall position not to challenge the [Bay Right of Way] unless it was necessary. [He] deliberately decided that until the Mortgage debt was under better control by the Respondents procrastination regarding the [Bay Right of Way] was the best strategy for them.
>
> (Supplementary Affidavit of Robert O'Toole sworn March 18, 2025, para. 28).

Respectfully in my view, this does not reasonably explain decades of silence regarding the Bay Right of Way. It also does not reconcile with Mr. O'Toole's subsequent statements that the breach of the alleged Bay Right of Way significantly reduced or even exceeded the VTB Mortgage debt. If the breach of the alleged First Oral Agreement had such a significant impact of the VTB Mortgage debt, controlling mitigating that debt (and mitigating the related financial risk) required that the issue be confronted or at least spark inquiries into the status of any effort to obtain the Bay Right of Way – not avoided; and

4. Based on the evidence before me, the Bay Right of Way only became an issue when the Applicant was about to take an assignment of the VTB Mortgage – almost 10 years after the Extended Closing Date. Again, by this time, there is still no compelling evidence to suggest that anything was being done regarding the Bay Right of Way – or that there was any reliance or part performance on the part of the Respondents. I pause to note here that that the Respondents' attribute the paucity of evidence, at least in part, to a fire that burned almost all of their records. I am obviously sympathetic to the loss and have not drawn an adverse inference. At the same time, the Respondents alleged an oral agreement and are required to prove it. I am compelled adjudicate the dispute based on the evidence before me and obviously cannot make a determination based on theoretical assumptions around information that may (or may not) have existed. In this case, at a minimum, I have no evidence of reliance or part performance of the alleged First Oral Agreement for many, many years. The more reasonable inference is that silence suggests the lack of an agreement – not the existence of one.

[47] There are other reasons that reinforce the conclusion that there is no enforceable First Oral Agreement. In an email dated January 16, 2018 written by

Mr. O'Toole to the Applicant's directing mind (Jeff Dawson), Mr. O'Toole cautioned that the Applicant's "bigger concern" is that it:

> … remain exposed to pay for 20 mooring sites on the mainland if I don't build a bridge and that exposure could become very pricey for you - $15K each? That liability is probably greater than the VTB loan amount.
>
> (Supplemental Affidavit of Robert O'Toole sworn March 18, 2025, Exhibit A).

[48] This statement was obviously premised upon the existence of the First Oral Agreement. However, in my view, it supports the conclusion that there was no enforceable agreement. The Bay Right of Way was intended as an easement "through and over" the lands it encumbered. Its express terms neither referenced nor included mooring sites and docks.

[49] It is ancient and trite to say that there must be a *consensus ad idem* (or meeting of the minds) to form a binding agreement. Even were I to accept this evidence (and I do not), Mr. O'Toole's understanding of the Bay Right of Way was much different and more expansive that what the proposed language of the easement might bear. At a minimum, it demonstrates that there was no meeting of the minds.

[50] Finally, I note that the Respondents have known about the alleged breach of the First Oral Agreement for many years and did nothing. Belatedly raising this issue as a defence to this proceeding (including a related claim for offset) raises issue around an expired limitations period. However, given my findings above, it is not necessary to address those issues further.

[51] In sum, all parties knew and understood that the reference to the Bay Right of Way in the Warranty Deeds and VTB Mortgage had no legal impact in terms of confirming an existing property right. Its only potential legal effect was in form of written evidence supporting the alleged First Oral Agreement. For the reasons given, no such agreement arose. Instead, for the same reasons given above, I find that the Respondents must be deemed to have completely waived the right to insist upon the Bay Right of Way under s. 7 of the APS. The reference in the Warranty Deeds and VTB Mortgage is reduced to a drafting mistake in that it is unenforceable. All parties to that transaction shared the common view that no proprietary interest was conveyed or security interest granted over the lands affected by the Bay Right of Way – despite this drafting error.

ISSUE 2: REPAYMENT TERMS AND THE SECOND ORAL AGREEMENT

[52] At closing, part of the purchase price was paid by way of the VTB mortgage in the principle amount of $290,000.00 registered on November 4, 1997. As indicated, the VTB Mortgage required five annual $40,000.00 payments starting January 31, 1998, with a final payment of all outstanding principal and interest due January 31, 2003.

[53] The Respondents allege that the written repayment terms of the VTB Mortgage were amended with the Vendors' agreement. Under the terms of this alleged Second Oral Agreement:

1. Any existing default under the VTB Mortgage was forgiven;
2. Future payments under the VTB Mortgage would only be due when a lot was sold. If no lots on the Island were sold, no monies were owing and there could be no default;
3. The actual amount of payment that was due when a lot was sold was to be discussed and determined by negotiation; and
4. In exchange, the interest rate payable under the VTB Mortgage was increased from 7.5% to 8%.

(Affidavit of Robert O'Toole sworn September 17, 2024 at para. 17 and Supplemental Affidavit of Robert O'Toole sworn March 18, 2025 at para. 25).

[54] Thus, In exchange, the Respondents say that the interest owing under the VTB Mortgage was increased from 7.5% to 8% (the "**Second Oral Agreement**"). The Respondents raise this oral agreement as a positive and complete defence to this Application. They bear the burden of proving it.

[55] Respectfully, I do not find that the alleged oral agreement arose.

[56] An agreement to agree is neither binding nor enforceable. In the frequently quoted case of *Foley v. Classique Coaches Ltd.,* [1934] 2 K.B. 1, Maugham, L.J. wrote:

> An agreement to agree in the future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it.

[57] Here, the proposed oral agreement effectively eliminates any meaningful obligation to repay the VTB Mortgage. The Applicant/mortgagee is left only with a commitment to negotiate an amount to be paid if/when a lot was sold. There is not

even a mechanism or process to determining whatever amount might be payable if/when a lot is sold, let alone the factors or considerations that might guide any such process or mechanism. At most, the only limiting provision under the alleged oral agreement is that any further amounts paid towards the VTB Mortgage must be mutually acceptable.

[58] Were it necessary to do so, I would alternatively find that the Respondents bear the burden of proving a Second Oral Agreement; however, the evidence is insufficient to satisfy that burden.

[59] In the April, 1999 letter referenced above, Mr. Toole wrote to the original Vendors/mortgagees. He began by confirming an intention to spend $65,000.00 to improve the Island and finalize the process of subdividing the land and selling the lots. He also identified a target of 5 lots being sold between June 15, 1999 and September, 1999. With respect to a new mortgage payment schedule, Mr. O'Toole proposed to:

1. Calculate interest on "overdue amounts at 8% per year". [Note: not in letter but how could there be anything "overdue", if there was an oral agreement];
2. Pay "…all amounts now due by installments of $28,000 at the end of July, $28,000 by the end of August and $14,000 by the middle of September"; and
3. Pay a further $12,000.00 each time a lot is sold and the mortgage discharged on each lot sold." These $12,000.00 payments would "be applied towards the mortgage payments that are due in January 2000".

[60] I note that the Respondents do not say that this letter confirms the Second Oral Agreement. Rather, the Second Oral Agreement was reached on or around June 9, 2003 – almost 6 months after all principal and interest owing under the VTB Mortgage came due (January 31, 2003). Nevertheless, the Respondents say that this letter sets out their original negotiating position which eventually evolved into the Second Oral Agreement – particularly in terms of an increased interest rate which the accounting records show clearly occurred as of June 9, 2003.

[61] In my view, it simply is not credible to suggest that a clear proposal such as was made in this April 20, 1999 letter was neither accepted nor honoured but, nevertheless, the parties were subsequently prepared to proceed on the basis of a

much looser, oral arrangement for which there is virtually no documentary support with much looser contractual terms.

[62] The Respondents' explanatory and supportive evidence is scant. Effectively, the Respondents suggest that the informality surrounding the alleged oral agreement was due to a friendly relationship with the original Vendors. However, again, that is inconsistent with the formality that surrounded the April, 1999 Letter. Respectfully, again, I cannot accept that:

1. The negotiations around the Second Oral Agreement were initiated with the formality of the April, 1999 Letter but then consummated with an entirely informal, loose oral agreement more than 4 years later and in the circumstances of significant default (almost 6 months after all monies owing under the VTB Mortgage was due);
2. Despite all the existing defaults, the original mortgagees were suddenly prepared to abandon any meaningful payment schedule and let the entire debt drift; and
3. All of these significant changes were possible because the Respondents and the Vendors enjoyed a friendly relationship despite the fact that, by email dated January 18, 2018, Mr. O'Toole is highly critical of one of the Vendors (Brian Roberts), apparently using expletives to describe his character.

[63] I accept that the relationship between parties can change dramatically over time. However, at a minimum, some form of clearer explanation with a measure corroboration from the original Vendors/mortgagees would have been needed for the Court to simply accept a significant amendment which completely upends the payment terms of a registered mortgage.

[64] To further undermine the Respondents' credibility, I have no evidence as to the date upon which lots were sold after the alleged Second Oral Agreement arose; or the negotiations giving rise to payments after the alleged Second Oral Agreement arose. Again, the Respondents say that their records were destroyed by fire but evidence regarding any alleged sales would be available to help establish some form of partial performance of the Second Oral Agreement (e.g records of lot sales which can be obtained from the local registry office or even on-line).

[65] I am also compelled to note that there is almost no evidence to suggest that the Respondents have taken reasonable efforts to market and sell the lots on the

Island. In my view, this fact merely accentuates the difficult associated with the alleged Second Oral Agreement. The possibility of exploiting this alleged oral agreement as a basis for doing nothing to discharge the VTB Mortgage debt is another basis for questioning the credibility of the self-serving allegations. On this issue, concerns arise having regard to *Bhasin v. Hrynew*, 2014 SCC 71, the Supreme Court of Canada established a general organizing principle of good faith and a duty of honest performance applicable to all contracts (paras. 63–74) – particularly where the Respondents explain their inactivity is due to the loss of the Bay Right of Way (i.e. their efforts to market and sell the Island have been impaired and severely compromised due to the loss of that easement). However, respectfully:

1. As indicated, I do not accept that there was an ongoing entitlement to the Bay Right of Way; and
2. The Respondents had access to the Allowance and Easement both of which terminated at a point much closer to the Island than the Bay Right of Way. There was no evidence presented to explain why they could not serve as a preferable mainland base for accessing the Island other than an uncertain reference to financial constraints.

[66] I acknowledge that the Applicant's accounting suggests an increase in the applicable interest from 7.5% to 8% as of as of June 9, 2003. And, as well, there were two payments of $20,000.00 each made within a month of allegedly entering into this agreement. This may be some evidence in support of the inference that a Second Oral Agreement arose.

[67] However, in my view, the more reasonable inference based on the evidence is that Vendors and then the Applicant were prepared to forbear (not waive) enforcement under the VTB Mortgage in exchange for an increased rate of interest. In support of that inference, I note that the VTB Mortgage was already in arrears with all interest and principal outstanding. On the same day of the alleged Second Oral Agreement (June 9, 2003), there was a payment of $20,000.00. This was the first payment since August, 2002. Less than a month later, on July 4, 2003, there was another $20,000.00 payment. Again, I have no evidence to confirm that these payments corresponded with two sales of two different lots – or any other evidence as to how these sums were negotiated. Again, it is difficult to draw a factual inference in favour of the Respondent when available evidence to support their position (e.g. lot sales) might have been presented but was not. In my view, the evidence surrounding the June 9, 2003 increase in interest is more reasonably consistent with a certainty urgency to placate the mortgagee in circumstances where

there had been default and all monies owing under the VTB Mortgage were due and outstanding.

[68] More evidence indicative of ongoing forbearance occurs when the Applicant subsequently took an assignment of the VTB Mortgage on April 15, 2009, the VTB Mortgage had been due and outstanding for many years. Yet, the interest rate was immediately reduced the rate owing to the original 7.5% (Affidavit of Robert O'Toole sworn September 17, 2024, Exhibit 4, assumption 3). In my view, the possible inferences are:

1. The Applicant and Respondents discussed the Second Oral Agreement and somehow agreed a further amendment of the Second Oral Agreement whereby the interest rate was reduced; or
2. The Applicant and Respondents did not discuss (and the Applicant was not aware of) the Second Oral Agreement and simply decided to forbear enforcing the VTB on more generous terms than presently existed.

[69] There is no evidence that the Applicant and Respondents discussed the Second Oral Agreement in 2009 and decided to amend the interest terms. Had that evidence existed, it would have been incumbent on the Respondents to bring it forward. They did not. In my view, the more reasonable inference is that the Applicant and Respondents did not discuss (and the Applicant was not aware of) the Second Oral Agreement and simply decided to forbear enforcing the VTB on more generous terms.

[70] I am fortified in this inference when considering the subsequent actions of the parties.

[71] Consider the accounting entry of April 19, 2014 when the Applicant paid $18,865.79 for property tax arrears. On that same day, there is another accounting entry of $8,000.00 added to the VTB Mortgage debt and described as "Incentive per O'Toole re o/s property taxes paid." This suggests an ongoing attempt to forbear enforcement and actually advance additional monies to assist the Respondents in their efforts to keep the Island project alive.

[72] Almost four years later, there is an email dated January 16, 2018 from Mr. O'Toole to Jeff Dawson (directing mind of the Applicant). Almost 9 years have passed since the assignment and the accounting records indicate that the Applicant would have already paid a total of $91,085.82 in property tax arrears. In this email,

Mr. O'Toole provides Mr. Dawson with an update on his discussions with mortgage brokers seeking to restructure the VTB Mortgage debt and pay it out (Supplementary Affidavit of Robert O'Toole sworn March 18, 2025, Exhibit "A"). Notably, Mr. O'Toole makes no mention of the Second Oral Agreement despite the fact that it allegedly relieves the Respondents of any ongoing obligation to repay the VTB Mortgage – let alone restructure the debt. Mr. O'Toole also does not provide any details of his discussions with these mortgage brokers and, in particular, how the terms being negotiated might in any way be better than the alleged Second Oral Agreement. The failure to address these issues either in the email itself or in Mr. O'Toole's supporting affidavit undermines the existence of a Second Oral Agreement and enforces the alternate inference (forbearance pending arrangements to buy out the VTB Mortgage)

[73] Further, in this email, Mr. O'Toole acknowledges that it would be "good" if the Applicant was repaid. However, he warns the Applicant's of potential exposure related to the Bay Right of Way. This warning is clearly based on the alleged First Oral Agreement creating an obligation to convey the Bay Right of Way. Setting aside my findings above, Mr. O'Toole again fails to provide any evidence to explain why he would issue these warnings based on the First Oral Agreement and a potential damages claim for the breach of that agreement when there was another more relevant Second Oral Agreement which more clearly precluded the need to pay or restructure the VTB Mortgage. In other words, there was no need for a warning. I also note that, in terms of credibility assessment, this warning is inconsistent with Mr. O'Toole's evidence that he was attempting to avoid conflict regarding the Bay Right of Way (see para. 46(3) above). In this case, he was using the Bay Right of Way to create conflict even though he could have simply relied on the Second Oral Agreement, if it existed.

[74] In my view, again, the more reasonable inferences are that there was no Second Oral Agreement; by 2018 at least, the Applicant was becoming insistent that the VTB Mortgage be retired or the underlying debt restructured; and that the mortgagor's actions throughout are better characterized as forbearance.

[75] Finally, I also acknowledge that there has been delay by the Applicant in seeking to enforce the VTB Mortgage. However, this has also benefitted the Respondents in terms of giving additional time to market and sell the Island, having regard to my finding above related to the Easement and the Allowance (including the anticipated bridge) and, as well, the Bay Right of Way. In any event, this fact does not support the alleged oral agreement. Again, based on the totality of

evidence, the more reasonable inference is that the Applicant was patient and prepared to voluntarily forbear – not surrender its right to enforce.

[76] In sum, I conclude that the alleged oral agreement purporting to amend the payment terms of the VTB Mortgage did not arise. I find that there has been default of the payment terms under the VTB Mortgage and that the full amount owing under the VTB Mortgage are due and outstanding subject to an accounting and complete calculation of all amounts properly owing under the VTB Mortgage.

ISSUES 3 AND 4: PAYMENT OF PROPERTY TAXES AND FIDUCIARY DUTIES

[77] As indicated, the Applicant alleges default under the mortgage for failure to pay property taxes. Given my findings above regarding default of payment terms, it may be unnecessary to make any further findings of default.

[78] That said, out of an abundance of caution, I would also dismiss the Respondent's allegation that the payment of property taxes constitutes a separate, private debt that cannot be charged against the VTB Mortgage.

[79] In support of this allegation, the Respondents' point to an email from Mr. Dawson to Mr. O'Toole dated January 17, 2018, Mr. Dawson says:

> I am expecting to receive the property tax assessments for the unsold lots (average value approx ~$60K I believe per lot) and I will scan them to you when received. The assessments are obviously lower than your estimate of current FMV, so although that is a good thing for the companies, they are lower than the value you are representing to the lender, so you may or may not decide to share this info.
>
> **As for the ~$15K in outstanding property taxes, I may clear them up and add them to the VTB ... or not in which case I will do so for the three lots that are not part of the eight lot deal, so HRM may be looking to you to cover the arrears when the conveyance from the existing companies to the new company occurs**.
>
> (Affidavit of Robert O'Toole sworn September 17, 2024, Exhibit 5, emphasis in exhibit)

[80] Mr. O'Toole interprets this email as confirmation that

> …the taxes [Mr. Dawson] has been paying is private debt owed to him. In the correspondence, Mr. Dawson acknowledges that he had been paying the taxes personally but that he was considering adding the debt to the Mortgage debt. But as at that time he had not elected to do so.

(Affidavit of Robert O'Toole sworn September 17, 2024, para. 20)

[81] Respectfully, I disagree. By using the word "I" in his January 17, 2018, Mr. Dawson is not communicating a personal commitment to pay property taxes which would then be recorded as a separate, private loan between himself and the Respondents. He is clearly speaking informally on behalf of the Applicant (not himself personally). From that perspective, his statements are consistent with all of the Applicant's accounting recording which indicate that the payment of property taxes is added to the VTB Mortgage debt.

[82] I do not agree that there is any reasonable point of confusion. This email reflects the normal, informal way of speaking, even though (technically) a person is representing the physical and temporal embodiment of a corporate entity. Context makes that clear. Thus, in the same way:

1. When Mr. Dawson told Mr. O'Toole in the same January 17, 2018 email that "HRM may be looking to you to cover the arrears when the conveyance from the existing companies to the new company occurs.", Mr. Dawson was obviously not saying that he thought Mr. O'Toole that he was personally responsible to pay property tax arrears – as opposed to the corporate Respondents;
2. When Mr. O'Toole sent Mr. Mr. Dawson and email the day before (January 16, 2018):
3. Mr. O'Toole said "I" made some proposals to mortgage brokers to pay out the VTB Mortgage. Mr. O'Toole was clearly not suggesting that he personally was trying to restructure the VTB Mortgage debt or otherwise personally assuming responsibility for that debt; and
4. Mr. O'Toole also said that it "would be good for <u>you</u> too to get <u>your</u> VTB money returned" (emphasis added). Mr. O'Toole was not confused about the identity of the mortgagor or suggesting that Mr. Dawson personally (not the Applicant) was due whatever monies were owing under the VTB Mortgage.

(Affidavit of Robert O'Toole sworn September 17, 2024, Exhibit 5 and Supplementary Affidavit of Robert O'Toole sworn March 18, 2025, Exhibit "A").

[83] On this issue, I return to the accounting entry confirming that the Applicant on April 29, 2014, the Applicant paid outstanding property taxes owing by the Respondents in the amount of $18,865.79. On that same day, the Applicant added

$8,000.00 to the VTB Mortgage debt as "incentive per O'Toole re. o/s property taxes paid – merged with mortgage. (Affidavit of Robert O'Toole sworn September 17, 2024, Exhibit 4) Mr. O'Toole does not address this payment or its meaning. In my view, the payment of an incentive fee for property tax payments is supportive of an inference that payments of the property tax formed part of the VTB Mortgage debt, not a separate private debt. It is not difficult to see how a mortgagee might be prepared to accept an "incentive" fee to provide financial assistance which helps sustain a project where it holds a secured interest. From that perspective, the "incentive" payment is properly merged with the mortgage debt. It is much more difficult (and less reasonable) to see how an $8,000.00 payment to Mr. Dawson would somehow constitute an "incentive" in respect of a project that he otherwise had not interest. At a minimum, evidence from the Respondents explaining an alternate reasonable inference would have been helpful. None was forthcoming.

[84] Finally, there is a suggestion that Mr. Dawson breached his fiduciary obligations as a former officer and director of the Respondents when either taking an assignment of the VTB Mortgage or otherwise adding property tax payments to the VTB Mortgage debt.

[85] The Respondents' evidence on this issue is again limited. There is no direct evidence that Mr. Dawson was an officer or director of the Respondents or when Mr. Dawson may have served as an officer or director of the company. The Court was only provided with Mr. O'Toole's affidavit evidence.

[86] As indicated, Mr. O'Toole explained that the Respondents' corporate records were burned in a fire but it was not clear why they could not have been recreated using, for example, the records held with the Registrar of Joint Stock Companies. In the end, I unable to determine with reasonable satisfaction when Mr. Dawson may have been impressed with fiduciary obligations to the Respondents.

[87] Moreover, the alleged breach of Mr. Dawson's fiduciary obligations were framed as a conflict of interest which arose as a result of the ongoing obligations to convey the Bay Right of Way. Mr. O'Toole testified that at some point prior to the assignment of the VTB Mortgage on April 15, 2009, he "…discussed with the Vendors and requested that the Mortgage not be assigned to DGI due to the conflict of interest that would be created between DGI and the Defendants particularly with respect to a resolution of the Bay Right of Way matter" (Affidavit of Robert O'Toole sworn September 24, 2024, at para. 23).

[88] Mr. O'Toole does not mention any such discussion with Mr. Dawson or any other representative of the Applicant. Indeed, there is some evidence to support an inference that the Respondents would be reluctant to raise a concern with the Applicant given that its property tax account was in significant arrears. Within a year, on March 2, 2010, the Applicant would be called upon to pay $38,668.79 in property tax arrears.

[89] In any event, based on my findings regarding the First Oral Agreement, there was no legal conflict regarding the Bay Right of Way that might have given rise to a fiduciary breach in connection with the assignment of mortgage.

CONCLUSION

[90] The Respondents' defences are struck.

[91] I find that the Respondents have committed the following acts of default under the terms of the VTB Mortgage:

1. The Respondents failed to pay all interest and principal outstanding and due under the VTM Mortgage; and
2. The Respondents failed to pay property taxes in accordance with the terms of the Mortgage. The Applicant has paid property taxes otherwise owing by the Respondents.

[92] The security granted under the terms of the VTB Mortgage as described above is valid. The Applicant may proceed to enforce its security subject to a full accounting and Court approval of the current amount properly owing under the VTB Mortgage.

Keith, J.