IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *77 Veterinary Holdings Ltd. v. Maricle,* 2023 BCSC 1194

Date: 20230713
Docket: S131734
Registry: Kelowna

Between:

77 Veterinary Holdings Ltd.

Plaintiff

And

Bruce Victor Maricle and Jean Carla Tobey

Defendants

Before: The Honourable Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:	A. Prior
Counsel for the Defendants:	R.L. Garner
Place and Date of Trial/Hearing:	Kelowna, B.C. June 8, 2023
Place and Date of Judgment:	Kelowna, B.C. July 13, 2023

[1] The plaintiff has applied for summary judgment, seeking specific performance of an option to purchase commercial property located in Kamloops, BC.

[2] The property in issue is the Kamloops location of Valleyview Veterinary Clinic (the "Clinic"). The defendants Dr. Bruce Maricle and Dr. Carla Tobey are the former owners and operators of the Clinic, which they ran through a company, Greenview Enterprises Limited ("Greenview").

[3] Dr. Heather Fraser and Dr. Carolyn Walsh are also veterinarians and were previously employees of Greenview. In January 2020, Drs. Fraser and Walsh agreed to purchase two veterinary clinics from the defendants by way of a share purchase, one of which was the Clinic. Drs. Fraser and Walsh incorporated the plaintiff, 77 Veterinary Holdings Ltd., for the purposes of the transaction.

[4] The defendants, in addition to owning the Clinic through Greenview, also own the property where the Clinic operated. As part of the transaction, the plaintiff leased the property from the defendants. The parties also agreed that the plaintiff had the option to purchase the property, which the plaintiff exercised.

[5] The defendants had previously purchased a General Electric CT Scanner for the Clinic (the "Scanner"). At issue in this case is whether the Scanner is a part of the property such that the plaintiff is obligated to purchase it. The Scanner is not currently functional, and has not worked for approximately two years.

[6] The plaintiff seeks to enforce the option. It says that it does not want and is not obligated to purchase the Scanner. In the alternative, it argues that the Scanner has little to no value.

[7] The defendants argue that the matter is not suitable for summary judgment. In the alternative, they argue first that the Scanner is a fixture that the plaintiff was obligated to purchase, and second that the option expired before its completion.

[8] For the reasons that follow, I find the matter is suitable for determination by way of summary judgment. I find that the option remains extant, and that the

Scanner is a fixture and therefore a part of the property the plaintiff is entitled to purchase. However, I also find that the Scanner has no value.

[9] The plaintiff therefore may purchase the property on a date to be set, in accordance with the terms of the option.

Background Facts

[10] Drs. Fraser and Walsh prepared a letter of intent to buy the Clinic from the defendants, the terms of which were agreed to by the defendants and signed on October 6, 2019 (the "Letter of Intent"). The parties, through their respective counsel, prepared documents to give effect to the agreement in the Letter of Intent. The parties entered into a number of ancillary agreements as part of the transaction whereby the plaintiff bought the Clinic from the defendants:

a) a share purchase agreement, in which Drs. Maricle and Tobey's holding company, Merrick Investments Limited, sold its shares in Greenview to the plaintiff (the "Share Purchase Agreement");

b) a lease agreement, pursuant to which Drs. Maricle and Tobey leased the property to the plaintiff (the "Lease"); and

c) an option to purchase and right of first refusal, in which Drs. Maricle and Tobey gave the plaintiff the option to purchase the property from them on certain terms and conditions (the "Option Agreement").

[11] The essential terms of the Option Agreement are the following:

a) The plaintiff may exercise the option at any time prior to January 31, 2021.

b) The option price is as agreed by the parties. If the parties cannot agree, the purchase price will be the average of three property appraisals:

i. one commissioned by the plaintiff,

ii. one commissioned by the defendants, and

iii. one chosen by the first two appraisers, paid for by the plaintiff,

(the “Pricing Procedure”).

c) The closing date would be 90 days after the date on which the defendants received notice that the option had been exercised (the “Completion Date”).

d) The defendants were obligated to prepare conveyancing documents.

e) Time was of the essence.

[12] The plaintiff gave notice that it was exercising the option with a letter dated January 15, 2021. It concurrently provided a copy of an appraisal previously commissioned by the plaintiff (the “Mirtle Appraisal”).

[13] The defendants acknowledged receipt of the plaintiff's notice by email from counsel dated January 24, 2021. The defendants’ counsel confirmed that his clients had a recent appraisal in hand from February 2020, approximately six months prior to the Mirtle Appraisal, and that they had confirmed that the appraised value had not changed in the intervening 11 months (the “Lane Appraisal”).

[14] The defendants went on to advise of their position that the plaintiff was obligated to purchase certain equipment and fixtures as part of the land. In particular, the defendants claimed that the Scanner was worth $200,000. The defendants expressed their willingness to complete the transaction for the average of the Mirtle Appraisal and the Lane Appraisal plus $200,000.

[15] The Scanner is the primary area of controversy in the interpretation of the various documents.

[16] It is clear that the parties agreed from the outset that the Scanner was not part of the equipment purchased by the plaintiff when it purchased the Clinic. The original agreement in the Letter of Intent specifically excluded the Scanner.

[17] The Share Purchase Agreement also specifically excludes the Scanner in its definition of “Assets”:

> (a) "Assets’’ means all property or assets of any nature or kind, whether real or personal, tangible or intangible, corporeal or incorporeal, and include but are not limited to;
>
> (i) Various diagnostic and treatment medical equipment, including small hand instruments;
>
> (ii) Various computer equipment, including display screens, printers, etc., together with a licensed copy of a veterinary management information software;
>
> (iii) Inventory as defined in paragraph 1.1(q) herein;
>
> (iv) Leasehold interest of and any sublease interests in the operating premises of Valleyview Veterinary Clinic located at 1662 Valleyview Drive, Kamloops, British Columbia, V2C 4B5 and Chase Veterinary Clinic located at 622 Shuswap Avenue, Chase, British Columbia, VOE IM0;
>
> . . .
>
> (together, the "Assets")
>
> But shall specifically, *exclude:*
>
> . . .
>
> e. Any legal or beneficial interest in the CT Scanner diagnostic equipment installed and located in the basement section at Valleyview ("CT Scanner")

[18] Leasehold improvements are defined in the Lease at para. 1.1(p):

> (p) “Leasehold Improvements” means all fixtures (other than the Tenant’s trade fixtures), improvements, additions, partitions, equipment, and alterations from time to time made to or installed in the Premises by any person, specifically including the CT Scan unit located at the Promises <u>which remains the property of the Landlord</u>.
>
> [Emphasis added.]

[19] Premises is defined in the Lease as follows:

> (v) “Premises” shall mean, the Building and Land, with any exclusions as indicated on Schedule A, together with the Leasehold Improvements;

[20] As such, the premises that the plaintiff leased from the defendants included the Scanner because the definition of “Premises” incorporates the “Leasehold Improvements”.

[21] The Lease included another section devoted solely to the Scanner:

> 15.12 CT Scanner
>
> The Landlord is the owner of the CT Scanner located on the Premises.
>
> The Landlord and Tenant agree that the Tenant shall assume the Landlord's obligations under the CT Scanner maintenance contract with GEHC dated July 13, 2018, In addition, the Tenant shall be responsible for the regular maintenance of the wear and tear of the CT Scanner.
>
> The Tenant shall not be responsible for any major repairs of the CT Scanner, such repairs to include the replacement of the CT Scanner tube.
>
> The Landlord shall be responsible for all major repairs of the CT Scanner, including the replacement of the CT Scanner tube. However, the Landlord shall not be obligated to perform the said major repairs in the event the repairs or replacement, in the Landlord's discretion acting reasonably, are not financially viable.
>
> In the event that the CT Scanner becomes non-operational due to the fact that the major repairs exceed the value of the CT Scanner, then the non-operational CT Scanner may remain on the Premises and the Annual Basic Rent shall not be reduced on account of the non-operational CT Scanner.
>
> The Landlord covenants with the Tenant that the Landlord shall not grant access to the CT Scanner to any other party but the Tenant.

[22] As for the Option Agreement itself, it contains no mention of the Scanner.

[23] Following the exchange of the appraisals but prior to the Completion Date, discussions continued between the parties' counsel. Notwithstanding the Pricing Procedure and the need for the two appraisers to choose a third appraiser, the majority of the negotiations focused on the Scanner.

[24] In May 2021, the plaintiff proposed having the appraisers identify the third appraiser in furtherance of determining the purchase price under Pricing Procedure, but received no response to that request. This action was commenced in July 2021. The defendants filed a response to civil claim and counterclaim in September 2021, alleging an oral agreement beyond the transaction documents referred to earlier.

[25] In September 2021, the plaintiff's appraiser contacted the defendants' appraiser to identify the third appraiser, and a third appraiser was so identified. The plaintiff retained that appraiser and paid the cost of that appraisal as contemplated in the Option Agreement.

The Scanner

[26] The defendants purchased the Scanner for $23,000 in December 2015. The contract to purchase was in the name of “Valleyview Vet Clinic” and included a further payment of $18,000 for what was described in the contract as “combined technical services". The plaintiff did not know the Scanner’s purchase price when it purchased the Clinic.

[27] According to the plaintiff, the Scanner stopped working in the early summer of 2021. When the plaintiff contacted GE, it discovered that the defendants had previously received a letter from GE confirming the impending end of GE’s technical support of the Scanner (the “End-of-life Letter”). The End-of-life Letter states the following:

> General Electric Canada, operating as GE Healthcare, (“GE Healthcare”) is committed to working with you to manage the lifecycle of your equipment. We understand that proactive and long-term capital planning is critical to help you deliver exceptional patient experiences and this is why we give you advance notice of changes in the lifecycle status of your equipment.
>
> Our records indicate that your facility currently has the following equipment, which is designated End of Life (EOL) and for which we will no longer be able to provide full coverage service contracts after the EOPL Date. Our support on this equipment will end after the EOSL Date stated below.
>
> *Please review the following list of equipment and sign and return the acknowledgement below to confirm receipt of this letter:*
>
> | **Equipment Description** | **Product Code** | **EOL Date** |
> |---|---|---|
> | LIGHTSPEED ULTRA | 250374CTULTRA | EOPL: February 28th, 202 – EOSL: February 28th 2021 |
>
> However, if this equipment has been scrapped, returned, or is no longer in use, please inform us so we can update our records.
>
> There are two reasons for this decision:
>
> - As equipment ages and technology advances, outside suppliers cease to produce many of the parts and components contained in older systems, which leads to a parts shortage. At times, it may even be difficult for GE Healthcare to find certain replacement parts with some components expected to be inaccessible in the near future.
> - As the number of systems in operation declines, our service representatives have increasingly less experience in repairing and

> maintaining them. That impairs our ability to provide the efficient and effective service you expect from GE Healthcare.
>
> We know you understand the evolution of technology and that eventually, every machine becomes functionally obsolete, too costly to service, or otherwise ready for retirement. . . .

[28] The End-of-life Letter was dated October 19, 2019, and was received and signed by the defendant Dr. Maricle on behalf of the Clinic on December 12, 2019. As such, it was received and signed after the Letter of Intent was signed, but before the transaction documents were finalized and signed.

[29] The plaintiff says the Scanner stopped working in mid-2020, and has not worked since. Dr. Fraser deposes that she only learned of the End-of-life Letter when she called to get the Scanner serviced.

Legal framework for a summary judgment application

[30] The plaintiff's application is brought pursuant to R. 9-6(2) of the *Supreme Court Civil Rules*, which provides as follows:

> (2) In an action, a person who files an originating pleading in which a claim is made against a person may, after the person against whom the claim is made serves a responding pleading on the claiming party, apply under this rule for judgment against the answering party on all or part of the claim.

[31] The power of the court on such an application is set out in R. 9-6(5):

> (5) On hearing an application under subrule (2) or (4), the court,
>
> (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
>
> (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
>
> (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
>
> (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[32] At issue in this application, based upon the submissions, is the extent to which the court may consider evidence on a summary judgment application.

[33] Rules 9-5, 9-6 and 9-7 all allow a party to apply for an order to dispose of a matter short of a full trial. The rules differ in the extent that evidence may be considered. At one end of the spectrum is an application pursuant to R. 9-5, in which no evidence is admissible: R. 9-5(2). In a R. 9-5 application, the court is asked to strike out a pleading on one of the grounds enumerated under R. 9-5(1):

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[34] At the opposite end of the spectrum is an application brought under R. 9-7, the summary trial rule. In a summary trial, the court reviews and may weigh the evidence. The court's options are set out in R. 9-7(15), which provides as follows:

> (15) On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
>
> (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
>
> (c) award costs.

[35] The court may therefore weigh the evidence on a summary trial, while continuing to consider whether the evidence presented can support the necessary findings of fact, and whether or not it would be unjust to do so. The court can also

make additional orders that may assist in determining a matter summarily, including ordering cross-examination on affidavits should the circumstances so dictate.

[36] The use of evidence in a summary judgment application lies somewhere between an application to strike and a summary trial application. The Court of Appeal discussed the treatment of evidence in a summary judgment application in *McLean v. Law Society of British Columbia*, 2016 BCCA 368. The Court of Appeal rejected the notion that a factual dispute precluded determination under R. 9-6. Justice Saunders stated the following:

> [36] In my respectful view, the judge erred in principle in saying the rule was not available when there are disputed facts in the pleadings and in declining to consider the evidence on the Rule 9-6 application. In *Lameman*, the Supreme Court of Canada explained the importance of the summary judgment rule. This Rule has advantages to the administration of justice that are different from those provided by a summary trial such as we have long had in British Columbia. The court said:
>
> > 10 This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.
> >
> > 11 For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.*, (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of

> fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30.
>
> [Emphasis added.]

[37] The critical portion of the above quotation is the underlined final sentence quoted from *Lameman*: the chambers judge may draw inferences based on undisputed facts so long as the facts strongly support those inferences. In other words, it is insufficient for a party resisting a summary judgment application to assert general denials without some evidence. It is important to recognize the distinction between drawing inferences from undisputed facts with weighing or assessing evidence. The latter can only be done summarily in a summary trial application, not under the summary judgment rule.

[38] The difference between Rules 9-5 and 9-6 was discussed by Justice Low in *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149:

> [9] Rules 9-5 and 9-6 are quite different. The former is an attack on the pleadings on the basis that the action or the defence, as pleaded, cannot succeed as a matter of law. It raises a matter of law only. The latter is an assertion that the claim or the defence is factually without merit. It raises an issue of fact only or, at most, an issue of mixed fact and law, unless under subrule (5)(c) the court determines that "the only genuine issue is an issue of law", in which case it "may determine the question [of law] and pronounce judgment accordingly."
>
> [10] Rule 9-5 is concerned only with the sufficiency of pleadings. It provides in subrule (1) that the court may strike or amend any pleading, in whole or in part. Subrule (2) prohibits the filing of evidence on an application under subrule 1(a). An order striking a pleading could not be the basis for a *res judicata* defence in subsequent proceedings.
>
> [11] Rule 9-6 permits an application for summary judgment, either allowing a claim in whole or in part or dismissing a claim in whole or in part. It is clear that the result sought by the application would support a future pleading of *res judicata*.

[39] A party resisting an application for summary judgment must "put [its] best foot forward" with respect to the existence of disputed material facts: *McLean* at para. 38. It is insufficient to simply point out factual contradictions in the pleadings as a basis for opposing a summary judgment application. More is required.

Positions of the Parties

[40] The defendants' primary position is that the matter is not suitable for determination by summary judgment.

[41] As for the plaintiff's claim on the merits, the defendants say that the parties' obligations under the Option Agreement ended when the Completion Date passed.

[42] They argue that the Option Agreement contemplates a two-step process to determine price. First, the parties see if they can agree on a price. Second, and only if the first process fails, the Pricing Procedure takes effect, whereby the price is an average of appraisals from each party and a neutral third appraisal selected by both parties' appraisers. The defendants argue that the plaintiff had to ensure that the Pricing Procedure was complete, with all three appraisals obtained and a price so determined, in time for the plaintiff to pay that price by the Completion Date.

[43] Even if the Option Agreement remains extant, the defendants say the current price is now higher than those set out in the parties' appraisals. In 2022, the defendants received an offer to buy the property for $1,750,000. The defendants also obtained an updated higher appraisal from their appraiser with an effective date closer to the option date. The defendants argue that it would be unfair not to take the increased value into account if I grant relief to the plaintiff.

[44] The defendants also argue that both the Mirtle Appraisal and the Lane Appraisal predate the exercise of the option and therefore should be considered stale-dated for the purpose of determining the option price.

Issues

[45] The issues to be decided on this application are as follows:

a) Is the matter suitable for determination under the summary judgment rule?

b) If yes, did the option expire when the Completion Date passed?

c) If the Option Agreement remains extant, is the Scanner part of the property to be purchased?

d) What is the value of the Scanner?

e) What is the appropriate remedy?

[46] I will discuss each of these issues below.

Discussion

Suitability for summary judgment

[47] The defendants argue that the matter is not suitable for determination under R. 9-6 because the court must weigh the evidence in order to make the findings sought by the plaintiff.

[48] The defendants argue that a weighing of evidence is required with respect to the Pricing Procedure. They say that the Pricing Procedure was a two-step process, with an initial "negotiations stage" to be followed by the appraisals stage if no agreement could be reached. The Option Agreement reads as follows:

> 2. The purchase price of the Optionors' Lands shall be by mutual agreement of the Optionors and the Optionee. In the event that the Optionors and the Optionee cannot agree on the purchase price, then the purchase price shall be arrived at by taking an average of a property appraisal commissioned by the Optionee, a property appraisal commissioned by the Optionors and a third appraisal conducted by an appraiser chosen by agreement between the Optionee's appraiser and Optionors' appraiser which said third appraisal shall be performed at the Optionee's cost.

[49] I do not agree that the interpretation of the Pricing Procedure involves a weighing of evidence. Regardless of whether the Pricing Procedure contemplates a two-step process or not, there is no evidence before the Court that would suggest that there were any legally significant communications, negotiations or discussions between the parties, other than the correspondence between counsel. There is therefore no evidence to weigh. Rather, it is a matter of reading the communications that are in evidence and the Option Agreement.

[50] The defendants say that two issues relating to the Scanner also require a weighing of evidence: its value, and whether it is a fixture or not.

[51] I will address both of these questions later in these reasons. For now, I will say that the materials put before me do not engage a weighing exercise. Rather, the Court is able to draw inferences from the evidence in the materials filed, including the price paid by the defendants, the uncontroverted evidence that the Scanner is not functioning, the lack of evidence as to why, and the End-of-life Letter.

[52] As for the question of whether the Scanner is part of the land, the plaintiff's concession that it is affixed to the concrete floor of the building with bolts means that there is little weighing required.

[53] Each party must put their best foot forward. None of the evidence tendered is controverted. I am satisfied that I can make the necessary factual findings regarding the Scanner with inferences drawn from the undisputed facts.

[54] I conclude that the matter is suitable for determination by summary judgment.

Did the option expire when the Completion Date passed?

[55] The Option Agreement provides that the Completion Date is 90 days after the defendants received notice that the plaintiff was exercising the option. There was some dispute between the parties as to whether the date of receipt was January 15 or January 27, 2021. In my opinion, the latter date is the correct one as the date on which the defendants acknowledged receipt.

[56] However, the circumstances of this application mean that it is not necessary to know the date of receipt or the Completion Date with precision. Well prior to either possible Completion Date, both parties had provided their appraisals to one another and the defendants had sought an additional $200,000 for the value of the Scanner.

[57] The plaintiff disputed the value of the Scanner, and therefore the parties had not reached agreement on the purchase price under the Option Agreement. A third

appraisal was required under the agreement, but the parties had not taken the steps necessary to have that third appraisal in hand prior to the Completion Date.

[58] The defendants had also not prepared the closing documents, as they were obliged to do.

[59] Completion was not possible on the Completion Date because the price had not been determined, and the questions of whether the Scanner was included and, if so, its value remained unresolved.

[60] The defendants suggest that once the Completion Date had passed, the Option Agreement was at an end, although the parties continued to negotiate as both were interested in completing the transaction.

[61] The Court of Appeal addressed the legal position of the parties when neither is in a position to complete an agreement in which time is of the essence in *Shaw Indust. Ltd. v. Greenland Ent. Ltd.* (1991), 54 B.C.L.R. (2d) 264, 1991 CanLII 3955 (C.A.):

> [35] The court having held that neither party was ready to close on the contractual date i.e. 2nd July, said at 455–56:
>
> > There are cases that say that a plaintiff cannot get specific performance if he does not show that he was able, ready and willing to close; LeBel, J., quoted from and followed them in *Watts v. Strezos*, [1955] O.R. 615, [1955] 4 D.L.R. 126. If applied literally, they cannot be reconciled with cases holding that the contract still subsists if *neither* party is ready to close, and in my view cannot be applied at all in such cases . . .
> >
> > It has been found as a fact that the defendants were neither ready nor willing to close on July 2nd. Therefore, the argument based upon time being of the essence fails. *Normally, in this situation, when both parties let the time go by, and one of the parties wishes to reinstate time as of the essence, it is necessary to serve a notice upon the other party, fixing a new date for closing. which must be reasonable, and stating that time is to be of the essence with respect to the new date*. Neither side did this in this case. However, the findings of the trial Judge as to the efforts of B to close on July 2nd, July 3rd and July 4th lead inevitably to the conclusion that it was entirely reasonable to insist upon a closing on July 4th and that there was no reason in law for the vendor to refuse to close on the basis of the documents which B then had and which he tendered to D. [Emphasis in *Shaw*.]

> [36] I accept this as a correct statement of the law and it follows that I agree with Miss Satanove's answer.

[62] This Court recently followed *Shaw* in *Grewal v. Lal*, 2021 BCSC 844 at paras. 142–43.

[63] The law is therefore that if neither party is in a position to complete the contract on the completion date even though time is of the essence, then time ceases to be of the essence in the contract and the contract remains alive. Either party may then re-set time to be of the essence, subject to the new date being a reasonable one in all of the circumstances.

[64] It follows that the option for the plaintiff to buy the property from the defendants survived the passing of the Completion Date because neither party was in a position to complete. I therefore reject the defendants' argument that the contract ended when the Completion Date passed.

[65] Indeed, such a conclusion would be unreasonable in the circumstances of this case. Although the defendants had provided their appraisal shortly after the option was exercised, it would have been very difficult to compel the defendants to obtain an appraisal, and it also could have been problematic if the parties' appraisers could not agree on the third appraiser.

[66] Not only is the defendants' submission unreasonable in the circumstances, it would also appear to be contrary to the positions taken by parties at the time.

[67] In May 2021, after the Completion Date had passed, the defendants suggested via correspondence from their counsel that the wrong form of appraisal had been obtained. Counsel for the plaintiff disagreed that a unique form of appraisal was required. In her letter of May 18, 2021, Ms. Wrzesniewski for the plaintiff wrote as follows:

> Further to our email of May 5,2021, we confirm we haven't heard back from you. Accordingly, we need to discuss the formal steps contemplated by the Option and re-set appropriate timelines to ensure the purchase completes in a timely fashion. Your email of April 30, 2021 suggests the wrong form of

appraisal has been obtained. With respect, we disagree and do not understand how such an assertion can be made. The Option makes no reference to some form of speciality appraisal based on abnormal terms. Both parties were able to obtain their first appraisals and we note your client's appraisal certainly does not try to set out some form of contractually agreed "special" appraisal. Appraisers follow an industry standard for appraising commercial buildings, the Option makes no reference to a special term appraisal and in the circumstances, there is no basis for your client to suggest a unique appraisal should be obtained. Certainly your client had the opportunity to bargain for something unique and abnormal in the Option - but having failed to do so, it cannot alter the terms of the bargain.

With respect to the scanner, we confirm that our client has obtained subsidiary appraisals and offered a collective amount for the land and scanner based on the combined appraisals. Your client has taken the position the scanner is a fixture and has obtained an appraisal for the lands (which by necessity includes the scanner) that did not exclude any specific fixtures from the value of the lands. Therefore, all that is required is the third appraisal.

Accordingly, the next step is clear - my client and your client need to instruct their respective appraisers to contact each other to choose a third appraiser. We would-propose a reasonable timeline for this step to be completed is by no later than 4:00 pm on Friday, May 28, 2021 (the "Retainer Notice"). Please confirm when your client has instructed its appraiser and we will do the same. Time is of the essence with respect to this notice.

The next step is also clear - once retained, the third appraiser will need to prepare their report. We understand due to the busy real estate market, it can take some time to obtain an appraisal. Accordingly, we would propose the following as a reasonable step and timeline: The third appraiser shall be instructed to prepare an appraisal in accordance with the Option (which we confirm is at our client's cost) with the value as of the date our client exercised the option which was confirm was January 15, 2021. The third appraiser shall be provided with any appraisals of the scanner and shall be empowered to obtain their own equipment appraisal if they deem necessary. The third appraiser's report shall be prepared and provided no later than 90 days from the Retainer Notice and the parties shall have until 90 days from the Retainer Notice to review the third appraisal (the "Appraisal Date"), Again, time will be of the essence with respect to this notice.

Once the third appraisal is provided, the final step will be the closing of the transaction on a new Completion Date. We would therefore propose that the new Completion Date will be 60 days after the Appraisal Date and our client will have the option to move that date to an earlier date if its financing is in place. Your client will provide the required documents before the Completion Date as per the terms of the option. Time will be of the essence with respect to this notice.

We look forward to hearing from you as soon as possible, and in any event no later than Friday, May 28,2021 as our client is anxious to get the purchase back on track and closed.

[68] By this date, the Completion Date had passed. In his May 25, 2021 email response to Ms. Wrzesniewski's letter, Mr. Cavanagh for the defendants wrote:

> Further to your letter of May 19th.
>
> I am not sure what you are suggesting regarding bargaining for something unique in the option, as that is a bit nonsensical. We would not be putting specifics into an option regarding what an appraiser should be considering. That is their job. Should we have included in the option that the appraiser is not to consider residential properties as comparables? My clients have yet to receive an appraisal for a specific building similar to that we are dealing with an again, it is nonsensical to suggest that the provisions of the option and 'the next steps are clear' as you point out in a few instances, are complied with through the provision of any appraisal. As indicated, my clients are endeavouring to obtain a new appraisal with respect to the option and the building as a going concern. Once they have done so, if you clients are not in agreement, then we can avail ourselves of the 3rd party appraiser provisions. The previous appraisal my clients obtained was not in the context of the applicable value in relation to determining the purchase price under the option.

[69] Regardless of the merits of the parties' competing positions as to the nature of the necessary appraisals, Mr. Cavanagh's reference to the third-party appraiser is only consistent with the Option Agreement remaining extant. As such, there can be no doubt that the parties remained of the view that they were bound by the Option Agreement and that the price still needed to be determined, whether by agreement or with reference to a third appraisal.

[70] The legal position of the parties would be no different even if the defendants were the only parties in breach. That is, the plaintiff would be entitled to affirm the contract and then insist that the contract be performed.

Is the Scanner a part of the land?

[71] The Scanner had previously been owned by the local hospital in Kamloops. It was purchased through an intermediary for reasons immaterial to this case.

[72] Dr. Maricle deposed that before the Scanner was installed, the room had to be engineered for it. The Scanner could only be taken into the building through the garage door, and three interior walls had to be removed and then replaced once the

Scanner had been situated. According to Dr. Maricle, retaining bolts were installed "to maintain the alignment of the components".

[73] A cinderblock wall and engineered window would need to be demolished if the Scanner were to be removed from the premises. All told, Dr. Maricle deposed that the defendants spent approximately $100,000 to install the Scanner, including all of the associated works.

[74] The parties' dispute about the Scanner is rather unusual. In most debates as to whether an item is a fixture or a chattel, both parties seek to retain the property: the purchaser argues that it was a fixture, and the seller that it was a chattel.

[75] In this case, the plaintiff as the buyer does not want the Scanner. It says it has no value and would prefer it gone.

[76] The defendants do not want the Scanner either. They argue that the Scanner is a fixture, and therefore the plaintiff must purchase it even if it does not want it.

[77] The leading authority in this province with regard to the distinction between fixtures and chattels is the Court of Appeal's decision in *La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.* (1969), 4 D.L.R. (3d) 549, 1969 CanLII 740 (B.C.C.A.) [*La Salle*]. The Court of Appeal summarized the authorities as follows at 554–55:

> A study of these and other authorities has led me to the conclusion that the principles to be applied are stated accurately by Meredith, C.J., speaking for a Divisional Court in *Stack v. T. Eaton Co*., [1902] 4 O.L.R. 335 at p. 338 as follows:
>
> > I take it to be settled law:—
> >
> > (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
> >
> > (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.
> >
> > (3) That the circumstances necessary to be shewn to alter the *primâ facie* character of the articles are circumstances which shew the

> degree of annexation and object of such annexation, which are patent to all to see.
>
> (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

Haggert v. Town of Brampton (1897), 28 S.C.R. 174, was a dispute between mortgagor and mortgagee where the mortgage charged [p. 179] "'. . . all the real estate of them the mortgagors, including all the machinery there was or might thereafter be annexed to the freehold, and which should be known in law as part of the freehold.'" Delivering the judgment of the Supreme Court of Canada King, J., after referring to certain authorities, commented on the object of annexation as follows at p. 182:

> In passing upon the object of the annexation, the purposes to which the premises are applied may be regarded; and if the object of setting up the articles is to enhance the value of the premises or improve its usefulness for the purposes for which it is used, and if they are affixed to the freehold even in a slight way, but such as is appropriate to the use of the articles, and showing an intention not of occasional but of permanent affixing, then, both as to the degree of annexation and as to the object of it, it may very well be concluded that the articles are become part of the realty, at least in questions as between mortgagor and mortgagee.

Special attention must be given to the use of the word "permanent" in this context. I note the word is used in contradistinction to "occasional". When used with reference to affixing or annexing chattels to realty I cannot believe that "permanent", a relative term, means remaining in the same state and place forever or even for an indefinitely long period of time. Especially must this be so where the chattels being considered are subject to wear and tear through use. Moreover, I think regard must be had to the fact that the use is in a modern hotel where changes from time to time in colour schemes and decor may become important for the purpose of efficient commercial operation of the hotel as a hotel. In my opinion the word "permanent" as used by King, J., should be interpreted for the purposes of this appeal as indicating the object of having the carpeting remain where it is so long as it serves its purpose. I think the permanency of the original affixing, in this sense, is not affected by the consideration that it might well be intended to replace the carpeting if it should later become worn or stained or be of a colour or pattern then thought unpleasant or undesirable for the purpose of the hotel operation.

[78] In *2105582 Ontario Ltd. v. 375445 Ontario Ltd.*, 2017 ONCA 980, the Ontario Court of Appeal summarized the test for distinguishing fixtures from trade fixtures:

> [38] The above cases -- as well as *Richardson* and *Starmark Property* -- demonstrate that the determination of whether an asset is a fixture versus a trade fixture or chattel is a question of mixed fact and law. In this case, the trial judge applied the three requisite elements of the legal test for a trade fixture: (i) whether the asset is affixed to the ground by the tenant; (ii) whether

> the asset is used for the purpose of a trade or commerce; and (iii) whether the asset can be removed without material damage to the premises. Only element (iii) was in question at trial.

[79] Although both parties made some reference to the difference between fixtures and trade fixtures, I do not find the analysis helpful here. The distinction between fixtures and trade fixtures arises in commercial tenancies, generally at the end of a lease when a tenant seeks to remove certain items from the leased premises. In this case, although the plaintiff was—and indeed remains—a tenant of the property, the tenancy did not exist when the Scanner was bolted to the ground. It was always owned by the landlord defendants. There is therefore no need to consider whether the Scanner could be considered a trade fixture because it clearly could not be.

[80] In *Chemainus Gardens RV Resort Ltd. v. British Columbia*, 2020 BCSC 478, the Court considered whether park model trailers were fixtures or chattels. The Court found they were chattels, writing as follows:

> [37] The Park Model trailers here are attached to the land by more than their weight and "affixed to the land even slightly" by virtue of their water and sewer hook-ups. The skirting, decking, and stairs surrounding the Park Model trailers add some weight to the notion that the water and sewer connections operate to affix the Park Model trailers to the land. Prior to attaching the skirting, decking and stairs surrounding the Park Model trailers, the degree of annexation was slight. However, the degree of annexation became more significant upon the installation of the skirting, decking, and stairs surrounding each Park Model trailer. The purpose of annexation was to better enjoy the use of the trailers, not to increase enjoyment of, or improve, the land on which they sit. Circumstances that clearly show the Park Model trailers are intended to continue to be chattels include that the Park Model trailers are sold for significant prices to buyers, yet are sitting on a site to which the buyer has no more than a license or perhaps lease right to occupy. It is difficult to accept that the 39 owners of these Park Model trailers agreed to pay significant sums for their trailers expecting that their investments would become fixed to and part of the land on which they sit, because of servicing connections that are relatively easily undone.

[81] The Court then discussed the Court of Appeal's decision of *Scott v. Filipovic*, 2015 BCCA 409. In *Scott*, the Court of Appeal concluded that chattels can become fixtures if they are affixed to the land and also subsequently revert to chattels if later severed, depending on the circumstances. The Court in *Chemainus* wrote:

> [38] But chattels can become affixed to land, becoming part of the land, and subsequently severed from the land, resuming their status as chattels. This was the case of blueberry bushes issue in *Scott*, which had been planted by a tenant on leased land, and which the Court of Appeal found had become fixtures or affixed to land for the duration of the lease of the land, but which could be removed or detached from the land at the end of the lease. The Court said at paras. 26–28:
>
> > [26] Removal of the plants at the end of the lease may return them to their status as chattels. It does not mean that they were not fixtures prior to that time. In my view, the plants clearly were affixed to the land. The purpose or object of the annexation was to grow the plants so they could yield marketable crops of blueberries.
> >
> > [27] I agree with the appellant that the fact the plants were to be removed at the end of the lease does not inform their characterization as fixtures or chattels during the term of the lease. The parties agree that the appellant was concerned with the aesthetics of his land. It is apparent that he did not want an unfarmed field of blueberry plants; it was to be returned to Timothy grass.
> >
> > [28] In summary, although I do not agree that the blueberry plants were chattels, in this case, the tenant had the right to remove the blueberry plants at the end of the lease. The appellant prevented their removal, but that is not determinative of this appeal.

[82] Machinery that is affixed principally for the purpose of the efficient use of the machine, as opposed to improvement of the land, will usually remain a chattel. Indeed, the only evidence about the reason for the bolts that attach the Scanner to the floor is Dr. Maricle's affidavit, which refers to the need to "maintain the alignment of the components". This comment seems more consistent with the purpose of affixation being the use of the item as opposed to the improvement of the land.

[83] It is perhaps surprising that the parties failed to address what would happen to the Scanner if the plaintiff exercised the option, given that they went to great lengths to clarify that the Scanner remained the property of the landlord defendants in the earlier Letter of Intent, Share Purchase Agreement and Lease. The Option Agreement could have contained a mechanism for determining the value of the Scanner, as well as a recognition that the valuation of used medical equipment is clearly outside the scope of a commercial real estate appraiser. The agreement could alternatively have clarified that the plaintiff would buy the building but not the Scanner, and not assume the costs associated with its removal.

[84] I conclude that the Scanner is a fixture. It is affixed to the land by way of retaining bolts, and the nature of the renovations that were done to accommodate it, and would be necessary to remove it, satisfy me that it was intended to be permanent. As the Court of Appeal said in *La Salle*, the permanency of the original affixing is not affected by the consideration that the fixture might become obsolete or otherwise need replacing. The Scanner is more strongly affixed than the carpets in *La Salle* were and it was expected to remain in the building.

[85] As such, when the plaintiff exercised its option to purchase the property, the Scanner was included with the property.

[86] The next question is whether the inclusion of the Scanner with the property increases the price the plaintiff has to pay.

What value should be attributed to the Scanner?

[87] In their arguments regarding the value of the Scanner, both parties referred to the Lease. For its part, the plaintiff refers to the following paragraph from part 15.12:

> In the event that the CT Scanner becomes non-operational due to the fact that the major repairs exceed the value of the CT Scanner, then the non-operational CT Scanner may remain on the Premises and the Annual Basic Rent shall not be reduced on account of the non-operational CT Scanner.

[88] The plaintiff says that the fact that rent would not be reduced even if the Scanner did not function is indicative of the fact that it was of little value and of minimal significance in the deal between the parties.

[89] For their part, the defendants point to the preceding paragraph in the Lease, which reads as follows:

> The Landlord shall be responsible for all major repairs of the CT Scanner, including the replacement of the CT Scanner tube. However, the Landlord shall not be obligated to perform the said major repairs in the event the repairs or replacement, in the Landlord's discretion acting reasonably, are not financially viable.

[90] The defendants argue that the fact that there was no adjustment of the rent simply reflects that the plaintiff had use of the Scanner ostensibly for free, and that

the defendants would derive no benefit from effecting any of the repairs as there was no financial motivation for them to do so. Financial viability in this context would suggest that even relatively minor and inexpensive repairs would not be financially viable from the perspective of the defendants.

[91] I do not accept that the defendants' past costs of installing the Scanner enhance its value. The Scanner was in the building and the renovations had been competed some years before the plaintiff bought the Clinic from the defendants. The state of the building was the same when the Option Agreement was entered into and when the appraisals were conducted. To the extent the renovations undertaken by the defendants have any value, which is doubtful given the current status of the Scanner, the Pricing Procedure already accounts for that value.

[92] The defendants have taken no steps to ascertain why the Scanner is not working, nor have they tendered any evidence to suggest either the value of the Scanner or the costs of its repair. This action has been ongoing for two years and there has been ample time to obtain such evidence. There is no suggestion that the defendants have been denied access to the Scanner in order to investigate.

[93] I note that there would be little reason for the plaintiff to obtain this evidence. First, the plaintiff's position is that the Scanner is excluded from the transaction. Second, the obligation to effect repairs, or at least major repairs, rests with the defendants pursuant to section 15.12 of the Lease:

> The Tenant shall not be responsible for any major repairs of the CT Scanner, such repairs to include the replacement of the CT Scanner tube.

[94] The plaintiff does not presently own the Scanner, which was expressly reserved to the defendants. Just as there is no reason for the defendants to repair the Scanner because they derive no financial benefit from doing so, there is similarly very little reason for the plaintiff to incur the cost of investigating what is wrong with it when it does not own it and believes it has no value.

[95] I do not accept that the Scanner has any value, based on the inferences that may be drawn from all of the surrounding circumstances and the evidence before the Court. The defendants only paid $23,000 for the Scanner in December 2015, plus a further $18,000 for a now-expired service program. The present situation is that:

a) The Scanner has become seven-and-a-half years older;

b) GE has stopped supporting the Scanner as of February 2021, as evidenced by the End-of-life Letter;

c) The Scanner has stopped working for reasons unknown to either party;

d) Neither party has taken any steps during the intervening two years to investigate why it no longer works; and

e) Neither party wants the Scanner.

[96] As to the last point, on March 14, 2022, the plaintiff offered to cover the cost of the removal of the Scanner from the building, provided the defendants were responsible for transportation costs thereafter. This offer was met with no response, despite a follow-up from the plaintiff shortly thereafter.

[97] The only logical inference to be drawn from the defendants' refusal to accept the return of the Scanner on those terms is that they must consider its value to be less than the cost of transporting it to a purchaser.

Remedies

[98] For the reasons outlined above, the plaintiff is entitled to purchase the property for the value determined by the Pricing Procedure.

[99] The defendants obtained an updated appraisal from Mr. Lane effective December 9, 2021. I do not agree that an updated appraisal was necessary.

[100] In my view, the date the option was exercised is the proper valuation date. The Option Agreement contained no express term as to the date of the appraisals in the Pricing Procedure. When the defendants initially provided the Lane Appraisal, they intended to rely on it to establish value even though it was already dated. They similarly voiced no objection to the plaintiff using the Mirtle Appraisal, which also was dated from prior to the date the option was exercised.

[101] The fact that the defendants received a third-party offer is irrelevant. Any appreciation in the value of the property since the date the option was exercised is similarly irrelevant: the Pricing Procedure in the Option Agreement governs the price the plaintiff must pay as of the date the option was exercised. Accordingly, the plaintiff is entitled to purchase the property for its value as of that time.

[102] I therefore conclude that the value of the property is $1,148,333.33, which is the average of the Mirtle Appraisal ($1,100,000), the Lane Appraisal ($1,175,000) and the Thompson Rivers Appraisal ($1,170,000). The Completion Date will be 60 days after the date of the release of these reasons.

[103] As for the Scanner, I have already set out above that the plaintiff is entitled to the Scanner. However, if the defendants are of the view that it has value, I will provide them with an opportunity to remove it. Accordingly, the defendants will have 30 days from the date of these reasons to remove the Scanner from the property. If they choose to do so, the removal is at the defendants' cost, and the defendants are also responsible to repair any damage caused to the property by the removal.

[104] These orders are dispositive of the plaintiff's claim. The defendants have a counterclaim which is unaffected by this decision.

[105] The plaintiff would ordinarily be entitled to its costs at Scale B, but if either wishes to address the question of costs, they may arrange to speak to the matter by contacting Supreme Court Scheduling within 21 days of the date of these reasons.

"Wilson J."