IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: van Dishoeck v. Centre Stage Holdings Ltd., 2023 BCSC 1500

Date: 20230828
Docket: S171671
Registry: Victoria

Between:

Anthonie Ewout van Dishoeck and Judith van Dishoeck

Plaintiffs

And

Centre Stage Holdings Ltd.

Defendant

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiffs:	M. Velletta M. Tokkal, Articling Student
Counsel for the Defendant:	M. Drouillard B. Love
Place and Date of Trial:	Victoria, B.C. May 8 and 9, 2023
Place and Date of Judgment:	Victoria, B.C. August 28, 2023

I. INTRODUCTION

[1] The plaintiffs seek a summary judgment of their claim for breach of a contract for the purchase and sale of real estate from the defendant.

[2] At separate times, the parties contracted to purchase and sell two adjacent parcels of land located on Galiano Island: Lot 1 and Lot A. The sale of both parcels was complicated since the local Snuneymuxw First Nation ("SFN") asserted an interest in ancestral burial grounds that neighboured the parcels. However, the sale for Lot 1 was successfully completed in April 2013, and the plaintiffs have since constructed a home on the land. The dispute arises from the failed sale of Lot A, which the parties were unable to subdivide from a larger parcel.

[3] For the reasons that follow, I grant judgment for the plaintiffs and award them $420,000 in damages or equitable compensation.

II. BACKGROUND

A. The Legends Development

[4] The plaintiffs are a husband and wife who retired to Galiano Island.

[5] The defendant, Centre Stage Holdings Ltd., is operated by a single director and shareholder, Ms. Glenna Borsuk, a real estate agent. Her husband Mr. Donald Gatley is a former lawyer who provided assistance to the defendant, which has been developing property in a project known as "the Legends", on Galiano Island, one of the Gulf Islands in British Columbia.

[6] It is not controversial, and I find that Mr. Gatley in his dealings with the plaintiffs was acting as the defendant's agent.

[7] In the course of the defendant's development and subdivision efforts, the defendant had to deal with the Islands Trust. The Trust is empowered under the *Islands Trust Act*, R.S.B.C. 1996, c. 239, to act as the regional district board for the Gulf Islands off the coast of mainland BC. These powers include regulation of land

use and subdivision approvals: *Islands Trust Act* at s. 29. The ultimate object of the trust is described at s. 3 of the *Islands Trust Act*:

> 3 The object of the trust is to preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust area and of British Columbia generally, in cooperation with municipalities, regional districts, improvement districts, First Nations, other persons and organizations and the government of British Columbia.

[8] The development consists of a 130-acre parcel of land referred to as the "NE ¼ Parcel" and a 160-acre parcel of land referred to as the "SW ¼ Parcel". The parties referred to the parcels collectively as "the Parent Parcel", some or all of which is located on lands over which the SFN asserts Aboriginal and treaty rights. At the time the Legends development property was purchased by the defendant, the zoning of the Parent Parcel permitted subdivision into smaller, 20-acre parcels.

[9] Since the earliest days of the Legends development, the SFN have asserted an interest in the Parent Parcel, the significant spiritual and cultural sites it contains, and asserted that they were prepared to take legal action to protect these sites.

[10] In October 2002, the defendant obtained an archaeological impact assessment report for the Parent Parcel from archaeologists from I.R. Wilson Consultants Ltd. (the "Wilson Report"), which identified and located several archaeological sites on the NE ¼ Parcel, and accidentally disturbed a previously unidentified shell midden. This accidental disturbance led the SFN to write to the defendant, noting that it had asked the BC Archaeology Branch to "monitor the situation" and, if it were unable to do so, the SFN would seek an injunction to end any development of the Parent Parcel until the SFN could be assured that their spiritual and cultural sites would be protected.

[11] The Parent Parcel was later rezoned as part of a rezoning and density transfer application made by the defendant in or about August 2004 to permit subdivision into even smaller lots (the "Rezoning/Density Transfer").

[12] After the Rezoning/Density Transfer process was complete, the defendant applied to the department now known as the Ministry of Transportation and

Infrastructure (“MOTI”) for approval to subdivide the Parent Parcel into 49 lots; 25 lots on the SW ¼ Parcel and 24 lots on the NE ¼ Parcel.

[13] After receiving the subdivision approval, the defendant proceeded to subdivide the SW ¼ Parcel as Phase I of the Legends development.

[14] Throughout 2005, the SFN wrote to the Islands Trust several times, asserting that all governments were required to consult with them with respect to development of lands they had an interest in. It was at this time that the SFN also expressed that, in their view, consultation required meetings and “not just mailing out a referral checklist”. The SFN described the Parent Parcel as land that should have been part of a reserve, and for which they were considering making a specific claim. It said that any portion of the Parent Parcel containing archaeological sites should be protected and contained within a single parcel, so that they would not have to deal with multiple owners to ensure they were protected.

[15] Discussions between Islands Trust and the SFN led to a covenant being registered on title to the Parent Parcel in favour of the Islands Trust under s. 219 of the *Land Title Act*, R.S.B.C. 1996, c. 250 on September 14, 2005 (the “Section 219 Covenant”).

[16] The Section 219 Covenant required that the defendant:

a) use its best efforts, in good faith, to locate as many Indigenous heritage sites of interest as possible, as identified in the Wilson Report, and locate them on as few lots as possible; and

b) that covenants to be registered on title to any parcel containing archaeological sites, including sufficient provisions to protect the archaeological sites identified in the Wilson Report.

[17] The Wilson Report did identify burial sites in the bluff immediately to the south of a lot that the plaintiffs purchased from the defendant and where they built their

home (“Lot 1”). The land that was proposed to be a second lot, adjacent to Lot 1, to be sold to the plaintiff is the subject of this litigation (“Lot A”).

[18] On or about November 17, 2006, the defendant received preliminary layout approval (“PLA”) for the 49-lot subdivision subject to a number of conditions. This included the requirement to build a road referred to as Bonnieview Rd and a condition that the defendant create a thin, 10-metre panhandle strip of land starting at Bonnieview Rd and running along the western edge of the NE ¼ Parcel, immediately to the west of the land that was to be subdivided to become Lot 1 (the “Panhandle”).

[19] Lot 44 of the proposed subdivision contained burial sites identified in the Wilson Report, and the Panhandle was identified as a means of access for the burial sites in the bluff immediately south of the proposed Lot 1 and the later proposed Lot A. The PLA also required that the Panhandle provide adequate access to Lot 44.

[20] The Wilson Report identified no archaeological sites on the SW ¼ Parcel, so subdivision of that parcel did not require the same considerations as would be required for subdivision of the NE ¼ Parcel. Thus, the defendant proceeded to subdivide the SW ¼ Parcel under the PLA, and develop the properties as Phase I of the Legends development.

B. Lot 1

[21] By 2010, Phase I of the Legends development was complete.

[22] In September 2010, the plaintiffs met Mr. Gatley, and entered into discussions about purchasing a lot on the NE ¼ Parcel. The NE ¼ Parcel remained intact, and the subdivision of that parcel, known as Phase II of the Legends development had not started, but included what came to be know as Lot 1.

[23] Mr. Gately conceded that in 2010 the defendant was not ready to proceed with Phase II since it needed the revenues from Phase I to finance the development.

However, the defendant's agents were willing to expedite the subdivision and sale of a lot for the plaintiffs separately from the Phase II development.

[24] In February 2011 the plaintiffs confirmed that they wished to purchase a Galiano Island lot from the defendant and offered to purchase the proposed Lot 1 for $400,000, inclusive of all taxes. That lot is located at the top of a bluff that overlooks the ocean, and came to be registered as:

> Lot 1, Sec 3, Gabriola Island, Nanaimo District Plan EPP 19453, PID 028-985-834.

[25] The defendant retained Madrone Environmental Services Ltd. ("Madrone") to re-examine the archaeological sites identified in the Wilson Report and survey their boundaries. It received a report from Madrone with this information and a number of recommendations on April 27, 2011.

[26] Despite the subdivision not yet having been approved, in August 2011, the defendant allowed the plaintiff to begin preparing Lot 1 to build their new home.

[27] On April 30, 2012, the parties entered into a memorandum of understanding which included the following term:

> [The defendant] will apply its best efforts to ensure that all relevant formal legal stipulations and approvals with respect to [Lot 1] will be secured within a reasonable time period, expected not too [sic] exceed three months from the date of this Understanding.

[28] On July 27, 2012, the defendant received the Islands Trust's subdivision referral report for proposed Lot 1. Among other things, it required the SFN be consulted regarding the proposed Lot 1.

[29] The defendant asserts that it had designed proposed Lot 1 so that no archaeological sites were within its boundaries, and that the SFN had been consulted in the past, and that they would be consulted prior to future subdivision of any lots with archaeological significance. The Islands Trust therefore approved the creation of the proposed Lot 1.

[30] Although the subdivision did not occur within the three months expected by the parties, the sale of Lot 1 was completed:

a) subdivision was effected on or about February 19, 2013;

b) the parties executed a contract of sale for Lot 1 on April 8, 2013; and

c) the plaintiffs became the registered owners of Lot 1 on or about April 15, 2013.

C. Lot A

[31] The plaintiffs assert that in July 2012, Mr. Gatley offered to sell them the land adjacent to Lot 1, at a preferred price. The parties referred to this lot as the proposed Lot A, which was still part of the Parent Parcel. The plaintiffs assert that they were interested in the purchase for several reasons, including a desire to secure privacy from close neighbors to the east. Mr. van Dishoeck and Mr. Gatley discussed a price and agreed upon $200,000 plus GST for the proposed Lot A, with a $20,000 deposit.

[32] In September 2012, Mr. Gatley agreed to draft a contract of purchase and sale for the proposed Lot A. On October 1, 2012, Mr. Gatley produced a draft contract and he and Mr. van Dishoeck emailed back and forth about the draft contract and in particular about a view covenant for the proposed Lots 1 and A. Discussions continued until April 8, 2013, when the parties signed a contract for the purchase and sale of the proposed Lot A.

[33] The April 8, 2013, agreement executed by the parties was a pre-printed template from the Real Estate Board of Greater Vancouver, with some sections left blank. The terms included a pre-printed entire contract clause and an addendum where the parties agreed to the following for the completion date:

> Completion shall be between October 1, 2013 and the earlier of October 1, 2016 or 14 days after the registration of the subdivision creating the Lot.

[34] The total purchase price agreed to was $200,000, including a $20,000 deposit and the latter was duly paid.

[35] Also, in April 2013, the plaintiffs paid for clearing on the proposed Lot A to improve the view for Lot 1.

[36] Notably, the parties signed the contracts of sale for Lot A at the same time as executing the contract of sale for Lot 1. This was about a week before the plaintiffs became the registered owners of Lot 1, and was done without Lot A being subdivided from the Parent Parcel at the time.

D. Efforts to Subdivide Lot A

[37] On November 8, 2013, MOTI issued a further PLA to the defendant regarding the subdivision of five lots from the Parent Parcel, including the proposed Lot A. These lots, referred to as Lots A through E, were intended to run in a row, beginning with Lot A adjacent to the eastern boundary of Lot 1, and ending with proposed Lot E at the eastern edge of the Parent Parcel (the “Five Lot Subdivision”).

[38] The PLA secured from MOTI had to be periodically renewed by the defendant. The 2013 version of the PLA repeated the requirement from the PLA issued in 2006 of constructing Bonnieview Rd, near the proposed Lots 1 and A before the Five Lot Subdivision could be registered.

[39] Curiously, Lot 1 appears to have been subdivided without needing to complete construction of Bonnieview Rd, which was not done until 2017.

[40] Throughout 2014 and 2015 the defendant was occupied with selling lots in Phase I in order to fund the Five Lot Subdivision. It seems that noise from a local gun club was frustrating sale efforts, leading to litigation between the defendant and the club. During this time, no work was apparently done to build Bonnieview Road.

[41] On December 22, 2015, the defendant emailed MOTI advising that it wished to complete the subdivision under the PLA, including the creation of the proposed Lot A.

[42] On January 11, 2016, MOTI reminded the defendant that its PLA had expired because it was only valid for one year and no activity had taken place on the PLA

since it was issued on November 8, 2013. Mr. Gatley responded and requested a further extension of the PLA.

[43] MOTI granted the extension on February 17, 2016 for one year. If the development took longer, a further extension would be required. At the same time, MOTI confirmed that the defendant had permission to construct Bonnieview Rd. The extension still imposed the condition of completing construction of Bonnieview Rd and included that additional conditions of:

a) a parkland dedication;

b) the registration of covenants on title to protect archaeological sites; and

c) consultation with the SFN with respect to the Five Lot Subdivision.

[44] On February 23, 2016, MOTI wrote to Mr. Gatley, informing him and Ms. Borsuk that their 2016 PLA was subject to an Islands Trust/SFN Protocol Agreement that had not been in place during Phase I of the Legends development.

[45] On March 10, 2016, Ms. Borsuk wrote back to MOTI and responded to the additional conditions on the renewed PLA, stating that:

a) the parkland dedication already occurred;

b) no archaeological covenants should be needed because no archeological sites were within the lots being created; and

c) further consultation with the SFN should not be necessary.

[46] In March 2016, MOTI and the Islands Trust confirmed that the parkland dedication had been met, but advised that the archeological covenants and SFN consultation had to proceed.

[47] The Islands Trust referred the proposal to the SFN on March 14, 2016.

[48] On March 15, 2016, the Islands Trust confirmed it would accept a letter of undertaking regarding the archeological covenants.

[49] On April 26, 2016, the Islands Trust determined that the SFN had not responded to the defendant's subdivision application, and confirmed that the deadline for response had passed. The Islands Trust noted that SFN consultation would be required for future applications, but that it would "move forward with this application accordingly."

[50] On May 7, 2016, Ms. Borsuk provided the letter of undertaking to the Islands Trust regarding future archeological covenants, and that the final condition to the creation of proposed Lot A was the completion of the Bonnieview Rd construction. Therefore, Ms. Borsuk deposed in her affidavit of April 27, 2023, that by May 7, 2016, it was her belief that the SFN consultation conditions for subdivision were satisfied.

[51] At some time during the first seven months of 2016, the defendant engaged a contractor, J.E. Anderson, who cleared some lots for Phase II of the Legends development, before beginning the Bonnieview Rd construction.

[52] The contractor was instructed to spend time during July 2016 upgrading driveways in Phase I. Mr. Gatley offered to have a driveway made exclusively for the proposed Lot A, but the plaintiffs assert that they declined because they only wanted that lot as part of their Lot 1 and did not need a separate driveway.

[53] On August 5, 2016, Mr. Gatley emailed Mr. van Dishoeck and told him that he expected road construction to be done in a few weeks and that then Lot A could then be created and inquired which professional the plaintiffs would have represent them in the transfer of the proposed Lot A. On August 18, 2018, the plaintiffs retained a notary for the conveyance of the proposed Lot A and copied Mr. Gatley on their email to the notary.

[54] Bonnieview Rd was substantially built in the summer of 2016. However, due to delays with the contractor and weather concerns, the asphalt paving could not be completed in 2016. Ultimately, the road would not be built until 2017.

[55] In the interim, the October 1, 2016 completion date, passed without the parties communicating with respect to closing the sale for Lot A. The plaintiffs did not transfer the purchase price however, the communications between the parties indicate that the defendants continued to attempt to subdivide Lot A and complete the sale.

[56] MOTI indicated on November 10, 2016, that it would accept a bond assuring it that the road would be built in 2017. Therefore, by November 10, 2016, it seems that the relevant regulators had been satisfied that the conditions for subdividing Lot A were met.

[57] However, Ms. Borsuk deposed in her affidavit April 27, 2023, that in August 2016 during the construction of Bonnieview Rd, she realized that the Panhandle was far too steep to provide adequate access to the burial sites south of Lots 1 and A. Therefore, she no longer believed that the Panhandle would be sufficient to comply with the requirements to subdivide and register the Five Lot Subdivision.

[58] This apparent realization by Ms. Borsuk led to a series of attempts to communicate and meet with Mr. Chris Good, a representative of the SFN, starting on September 12, 2016.

[59] After various emails, some of which went unanswered by Mr. Good, Ms. Borsuk and Mr. Gately were able to secure a meeting with Mr. Good on April 20, 2017. According to Mr. Gately, Mr. Good indicated at this meeting the Panhandle would be inadequate to meet the SFN's interests in the land and that he suggested that Lot A should be attached to the land containing the burial sites to ensure contiguous access to the sites. I do not accept these hearsay statements as proof of what would have satisfied the SFN's requests.

[60] On May 2, 2017, Ms. Borsuk emailed Mr. Good of the SFN asking him to come to Gabriola Island to look at the defendant's property. Mr. Good is alleged to have said that the SFN might be interested in buying land from the defendant.

[61] The plaintiffs allege that Ms. Borsuk responded on May 3, 2017 and expressed interest in selling land to the SFN, but the defendant denies that it had an interest in selling its land to the SFN.

[62] There was further exchange of emails throughout June 2017 where Mr. Gately attempted to arrange for Mr. Good to visit the lands in question.

E. Breakdown of the Sale of Lot A

[63] In February 2017, the defendant allegedly purported to repudiate the contract for the purchase and sale of the proposed Lot A during a phone call between Mr. van Dishoeck and Mr. Gatley, relying on the October 1, 2016 completion date.

[64] On February 21, 2017, Mr. Gatley emailed Mr. van Dishoeck and offered to return the $20,000 deposit for the purchase of proposed Lot A, but Mr. van Dishoeck declined the return of the deposit.

[65] On March 20, 2017, Mr. Gatley wrote to Mr. van Dishoeck and again offered to return the deposit, but this offer was not accepted by the plaintiffs.

[66] On March 29, 2017, counsel for the plaintiffs wrote to the defendant and demanded that it perform the contract respecting the proposed Lot A.

[67] On May 2, 2017, the plaintiffs filed their notice of civil claim seeking, among other things, specific performance of the contract for sale of Lot A.

[68] Lot A was never subdivided. However, the defendant did subdivide and register the other four lots in the Five Lot Subdivision in July 2017.

[69] On July 11, 2017, Mr. Gatley and Ms. Borsuk attended at the SFN's office in Nanaimo, BC, to discuss modifications the defendant had made to the Five Lot Subdivision to try to address the SFN's concerns, yet, it seems that Mr. Good was

unavailable. The most significant modification was that, instead of registering the subdivision plan to create five lots, on July 18, 2017, the defendant only created four lots: A, B, C, and D. The land that was proposed to be Lot A was renamed Lot E, but remained part of the Parent Parcel.

[70] Following the subdivision, the Parent Parcel was legally described as:

> PID: 003-134-806
>
> NORTH EAST ¼ SECTION OF 3, GABRIOLA ISLAND, NANAIMO DISTRICT, EXCEPT PARCEL A (DD 773261) AND EXCEPT PART IN PLAN EPP 19453 AND EPP66666.

[71] The defendant proceeded to sell the four lots between August 2019 and July 2020.

[72] The defendant attempted to subdivide Lot A and the remaining portions of the Parent Parcel in June 2020. This included redefining Lot A to include the burial grounds and creating access to the burial sites from Bonnieview Rd. However, MOTI and the Island Trust opposed the subdivision due to concerns over consultations with the SFN. This occurred in a series of exchanges between MOTI, the Island Trust, and the defendant throughout late 2020 and early 2021. The SFN also indicated that they did not consent to the subdivision.

[73] As part of these exchanges, MOTI indicated that the defendant needed to conduct further archeological studies. The defendants secured a further review from Madrone in June 2020, who opined that the sites remained unchanged from 2011. However, MOTI appeared to require further testing.

[74] The SFN, in an April 14, 2021 letter, asserted that they were opposed to past and further development around the material lands. They cited concerns over potentially unidentified archeological sites. They also asserted treaty and Aboriginal rights over the land.

[75] The final correspondence referred to by Ms. Borsuk in her affidavit was a letter from the Islands Trust from July 7, 2021, stating that it opposed the further

subdivision of the Parent Parcel. It cited the need to "reconcile" the SFN's interests as a specific concern.

[76] The defendant has continued to communicate with the SFN, but has made no progress in satisfying its requests.

F. Construction on Lot A

[77] In June 2013, the plaintiffs extended an existing driveway that came up just short of Lot 1. The driveway was built entirely on Lot A and was intended to be used for the plaintiffs' builders to access Lot 1. After the construction on Lot 1 was completed, the plaintiffs continued using the driveway to access Lot 1.

[78] Around the same time, the plaintiffs "decommissioned" what they described as a "temporary driveway" that provided access to their home on Lot 1. The decommissioning occurred as they placed trees and large rocks on the Lot 1 driveway, and they built an elevated parking area that cannot be accessed from that driveway now.

[79] The defendant admits that the driveway on Lot A was built with its knowledge and permission. The defendant took no steps to stop the plaintiffs from using the Lot A driveway after the construction on Lot 1 was completed. And Mr. Gately was silent while observing the plaintiffs stop using the driveway on Lot 1. The defendant also accepts that it sold the plaintiffs the gravel to built the Lot A driveway; however, Mr. Gatley denied knowing that the gravel was for this purpose.

[80] There is evidence that in 2020, the defendant attempted to settle the dispute over the use of the Lot A driveway by building an alternate driveway on Lot A, but closer to the edge of Lot 1. The plaintiffs appear to insist that this alternate driveway is inadequate.

[81] In about August 2014, the plaintiff installed a propane tank and electrical generator close to the property line between Lot 1 and Lot A. On May 30, 2017,

Mr. Gatley had the location of the utilities assessed and determined that they were slightly over the property line and actually on Lot A.

III. ISSUES TO BE DETERMINED

[82] The plaintiffs have applied for summary trial pursuant to R. 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*].

[83] There is substantial agreement between the parties regarding the factual record. The disagreement is with regards to whether the defendant breached the contract to sell Lot A to the plaintiffs.

[84] The plaintiffs submit that the defendants are in breach of the contract and ask for an order of specific performance. They also submit that they are entitled to an equitable easement for the propane tank, generator, and driveway that they built on Lot A in expectation of completing the sale. In the alternative, they ask for damages to compensate them for the breach of contract and the costs of installing the driveway and utilities.

[85] The defendant argues that there was no breach of contract since the sale of Lot A was subject to a true condition precedent that it be able to subdivide the lot first. It argues that it made best efforts to subdivide Lot A, but was unsuccessful due to the SFN's asserted interests in Lot A. In the alternative, it argues that specific performance and the equitable easement should not be awarded. It also disputes the plaintiffs' valuation of the cost of the driveway, the utilities, and Lot A.

[86] From the parties' submissions, the following legal issues emerge:

a) Is this action suitable for resolution by summary trial?

b) Did the defendant breach a contract for the purchase and sale of proposed Lot A?

c) Can this Court order specific performance of the purchase and sale of proposed Lot A?

d) If this Court cannot order specific performance of the purchase and sale of proposed Lot A, are the plaintiffs entitled to damages in lieu of specific performance of the contract?

e) Are the plaintiffs entitled to an equitable easement for the driveway, generator, and propane tank that is presently wholly or partly on proposed Lot A?

IV. DISCUSSION

A. Summary Trial

[87] The parties agree, and I find, that this action is suitable for resolution by summary trial as contemplated by *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.).

B. Breach of Contract

[88] The disposition of this issue requires the consideration of the terms of the contract, express and implied, if any.

1. Contractual Terms

[89] The parties agree that the agreement executed on April 8, 2013, was a contract to sell Lot A. As I noted, the contract to sell Lot A was based on a template from the Real Estate Board of Greater Vancouver which included pre-printed terms and blank spaces for the parties to fill in items.

[90] The contract included a pre-printed entire contract clause from the template, which stated that there were no representations, warranties, guarantees or agreements other than those in the contract.

[91] The “Completion” term in the contract that the parties executed reads:

> 4 COMPLETION: The sale will be completed on see Addendum yr _____ (Completion Date) at the appropriate Land Title Office.

[92] For clarity, the words “see Addendum” were written in by the parties, and referred to an addendum they drafted and executed at the same time. The disagreement is as to the interpretation of the completion date clause included in the addendum, which again reads:

> Completion shall be between October 1, 2013 and the earlier of October 1, 2016 or 14 days after the registration of the subdivision creating the Lot.

[93] The defendant submits that this term creates a true condition precedent to its obligation to convey Lot A. Therefore, if it exercised best efforts and failed to secure the subdivision of Lot A by October 1, 2016, then it would not be in breach of contract. The plaintiffs disagree, and argue that there is nothing in the contract creating a condition precedent nor any reason for the Court to imply such a term.

[94] The rules of contractual interpretation are well known and were aptly summarized by Justice Stephens in *Han-Earl Consulting Ltd. v. 1048661 BC Ltd.*, 2022 BCSC 1073 at para. 28:

> [28] Contractual interpretation requires a practical, common sense approach not dominated by technical rules of construction. The overriding concern is to determine the objective intent of the parties and the scope of their understanding. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract, otherwise known as a “factual matrix”: *Penguin Enterprises* at para. 31 (relying on *Sattva Capital Corp. v. Creston Moly Corp*, 2014 3CC 53 at para. 47; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, 1993 CanLII 145 (SCC), [1993] 1 S.C.R. 12 at 23-24); *Group Eight Investments v. Taddei*, 2005 BCCA 489 at para. 20, and *Sandhu BCCA* at para. 39. The factual matrix is the background facts both parties must clearly have been taken to have known and to have in mind when they composed the written text of their agreement and at the time the contract was executed: *Tang BCCA* at para. 16; *Sandhu BCSC* at para. 41. However, surrounding circumstances cannot overwhelm or contradict the words employed in the contract. In addition, where the words of an agreement are unambiguous, extrinsic evidence is not permissible to alter, vary, interpret, or contradict the words in the contract: *Sandhu BCSC* at para. 40, following *One West Holdings Ltd. v. Greata Ranch Holdings Corp.*, 2014 BCCA 67 at para. 27.

[95] It is also settled law that a true condition precedent makes the existence of the parties' obligations under the contract subject to a future external event that is

dependent on the will of a third-party. If the event does not occur, then there can be no breach of contract since the parties' obligations are never triggered: *Turney v. Zhilka*, [1959] S.C.R. 578 at 583–84, 1959 CanLII 12 [*Turney*]. Whether the contract contains a true condition precedent is a matter of contractual interpretation. The court must determine whether the parties intended to make their obligations contingent on a future event: *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.*, 2009 ONCA 328 at para. 90.

[96] The circumstances in *Turney* are analogous to the facts of this case: the parties agreed to the sale of a property that still needed to be subdivided, which was subject to the approval of a village council. However, in that case, the parties included the following condition in the contract (582):

> Providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision.

[97] The parties also made the closing date "60 days after plans are approved": *Turney* at 582. The Court found that these terms created a true condition precedent since it made the obligation to convey the property subject to the approval of a third-party. Thus, the defendant was not in breach of contract for ultimately failing to sell the land (583–584).

[98] The defendant asserts that the completion date clause made subdivision a true condition precedent to the proposed Lot A contract. It argues that all parties knew at the time that contract was executed that the proposed Lot A had not yet been subdivided, and that subdivision was required before the proposed lot could be conveyed to the plaintiffs. Thus, the defendant's submission is that the completion date clause, properly construed, means that if the defendant was unsuccessful in creating the subdivision by October 1, 2016, then it did not have the obligation to convey Lot A to the plaintiffs.

[99] The defendant relies in part for this assertion on evidence given by Mr. van Dishoeck at his examination for discovery:

> Q Okay. Try and focus your attention. I know it's hard. This is a difficult process. I'd ask you to focus your attention on the question that I ask, because that would be helpful.
>
> The question is; having received this email from Kate Manvill on April 19, 2013, you'll agree that you knew or were told that the piece of land was hypothetical and that your deposit would be forfeited if Centre Stage was unable to complete?
>
> A Yes.

[100] However, from how the question was posed, it was unclear whether Mr. van Dishoeck was confirming he knew those things or that he was merely told those things.

[101] More importantly, neither Mr. van Dishoeck's knowledge at the time or what he was told is determinative as to what the parties contracted to. Ultimately, the issue is what is the proper interpretation of the contract as it is the evidence of what the parties agreed to at the time.

[102] As I read the completion date clause in the context of the rest of the contract, on its face it does not create any condition precedent to the conveyancing of Lot A to the plaintiffs. Unlike in *Turney*, the completion date clause leaves open the possibility that the completion date would trigger without subdivision occurring. The effect of the completion date was defined in the body of the contract as the date the sale would be completed and refers to completing the sale at the Land Title Office. This implies that Lot A should be registerable on the completion date. The latest completion date possible under the clause is October 1, 2016. This would be the completion date in the event that October 1, 2016, was earlier than 14 days after the date of subdivision of Lot A. As actually happened in this case, October 1, 2016 passed without subdivision occurring. By the terms of the contract, this was the completion date.

[103] Considering the factual matrix in early April 2013 that led to executing the contract, I am satisfied that the parties knew and understood that Lot A was not yet subdivided and that various steps were necessary to create Lot A. I also find that the parties intended that it was the defendant who would take the necessary steps to

subdivide Lot A. The defendant had been the one dealing with the regulators to subdivide Lot 1, and it was the party with the ability to fulfill the conditions set by the regulators.

[104] It is also clear that the parties did not expect subdivision to be an issue. Subdivision of Lot 1 had just occurred in February 2013, and that sale was set to close soon. Subdividing Lot A would require a similar process. Around the same time, the plaintiffs paid to clear Lot A and improve their view from Lot 1. Also in 2013, the plaintiffs built the driveway on Lot A with the defendant's consent. From this objective evidence, I find that the parties were treating subdivision as a mere formality and they all expected subdivision to occur.

[105] Reading the completion date clause within the surrounding context does not support the defendant's proposed interpretation. Rather, it reaffirms my finding that neither party expected the subdivision to be an issue, or at most would take three years given the need to construct Bonnieview Rd.

[106] Therefore, this case is a situation where the seller promised to sell something that did not exist, the buyer agreed to buy something that did not exist, and neither clearly turned their mind to who would bear the risk of the property never coming into existence. Thus, it falls to the Court to determine who bore this risk.

[107] The defendant, argued in the alternative, that the agreement must be taken to have had an implied term that it need only use its best efforts to create the proposed Lot A by subdivision, which it maintains it did, and if subdivision was not possible despite best efforts, then the contract would be at an end.

[108] In response, the plaintiffs submitted that the defendant contracted to produce Lot A, and the fact that Lot A did not yet exist when the parties made the contract does not automatically require a condition precedent to be read into the contract.

[109] The plaintiffs contend that it was open to the defendant to include clear language in the contract to absolve it from liability if Lot A was not created. They say

that a commercial absurdity would follow if the defendant is not held responsible for failing to deliver the proposed Lot A.

[110] The law regarding when a term can be implied into a contract is set out in *Athwal v. Black Top Cabs Ltd.,* 2012 BCCA 107. Justice Smith, writing for the Court, described the test as follows at para. 48:

> [48] There is a presumption against adding an unexpressed term to a contract by implication unless: (i) it is necessary to do so in order to give the contract business efficacy (this does not include a test of reasonableness for the contract); (ii) to correct an obvious oversight for which there is "no dispute" that the parties intended to include such a term in the contract (i.e. the implied term "goes without saying"); (iii) the term can be clearly and precisely formulated; and (iv) the term will not conflict or be inconsistent with an express term of the contract. However, a term of a contract may only be implied where it is necessary to give legal effect to the parties' presumed intention, as expressed in the contract, and to give business efficacy to the contract. The onus is on the party seeking to establish an implied term of a contract. See *Perin v. Shortreed Joint Venture Ltd.*, 2009 BCCA 478 at para. 27.

[111] The plaintiffs argue than none of these situations apply. They point to the entire contract clause, and submit that implying a new term into the contract would run contrary to this express term. Also, they referred me to *Dobson v. Columbia National Investments Ltd.*, 2009 BCSC 1353 [*Dobson*], in support of their argument.

[112] In *Dobson*, a developer of strata townhouses pre-sold a residential property under a contract of purchase and sale which included a statutory disclosure statement. The disclosure statement stated that the developer had received approval from the municipality, had a PLA, and had received a development permit, but the developer intended to request a change of the lot layouts that was subject to approval from the municipality.

[113] However, the disclosure schedule was silent on the fact that the subdivision of the lots had not yet been completed or approved. Subsequent amendments of the disclosure schedule make mention of the anticipated date for when the property would be registered, and extend the completion date to accommodate delays.

[114] The disclosure statement in *Dobson* did not refer to approval of the overall subdivision not having been granted, and the changes to the lot layout proposed in the disclosure statement were relatively minor and there was no clause in the contract making it subject to subdivision, but the defendant argued that that type of clause should be read in.

[115] Justice Dillon found that the developer diligently pursued subdivision, but was unable to meet the requirements of the municipality and did not get approval. She noted that conditions precedent that a contract shall not take effect until a condition is fulfilled are exceptional: *Dobson* at para. 14.

[116] Justice Dillon found that there were no external agreements, noting that the final contractual addendum stated the expectation that subdivision was forthcoming without any mention that approval of the city was a condition precedent. Time was of the essence in the contract, but the completion date was extended several times.

[117] Justice Dillon refused to imply such a condition precedent, noting that the disclosure statement said that subdivision approval had been obtained, and concluded that the defendant's failure to register the subdivision plan was a breach of the contract.

[118] I agree with the defendant in this case that unlike *Dobson*, there was no disclosure schedule implying that subdivision had been approved. Rather, the parties here understood that Lot A still needed to be subdivided and was subject to conditions before the sale could be completed.

[119] However, I also read *Dobson* as determining that whenever a seller has sold land that is still subject to approval for subdivision, the law will not, out of necessity, imply a condition precedent that the obligation to sell the land is subject to successfully subdividing the land.

[120] The plaintiffs assert that due to the permissions that the defendant obtained at various times, both before and after signing the contract, it had preliminary approval to create the proposed Lot A. Thus, they argue, it was not a situation where

approval had not been sought and was uncertain, but rather one where the approving authority had given preliminary approval and a list of requirements for the defendant to fulfill in order to obtain final approval. In these circumstances the plaintiffs argue that it is unnecessary to imply a condition precedent into the contract to give it business efficacy. Instead, the simple conclusion is that the defendant had, at the time it entered the contract, sufficient confidence that it could create the proposed Lot A as it contracted to do. I agree.

[121] Ultimately, while it is clear that Lot A needed to be subdivided before it could be sold, I am not persuaded that the parties' intended that this be a condition to the existence of their obligations. Therefore, I will not imply such a term into the contract, nor is it necessary to imply the term to give the contract business efficacy.

[122] The evidence before me is the plaintiffs were ready to pay for Lot A on October 1, 2016, but acquiesced to pushing back the completion date, and continued to insist that they close the sale. To the contrary, the seller could not provide Lot A on the agreed upon date since it was unable to subdivide Lot A.

[123] In these circumstances, the seller did not expressly represent or warrant that subdivision would be approved. However, it implicitly took on the risk that the subdivision would not be approved by promising to sell a lot that did not exist. Therefore, it was incumbent on it to do all it could to effect the subdivision, otherwise it would be unable to perform its obligations.

[124] In sum, I reject that the parties agreed that approval of the subdivision was a condition precedent to the obligation to convey Lot A, or that such a condition should be implied into the contract. Thus, I find that the defendant breached the contract to sell Lot A by not completing the sale to the plaintiffs.

2. Best Efforts

[125] Despite my conclusion above, I will address the parties' submissions on whether the defendant used its best efforts to create and convey Lot A.

[126] It was common ground between the parties that the defendant was responsible for subdividing Lot A. The parties also agreed that if subdivision were a true condition precedent to the obligation to sell Lot A, then there would be an implied term that the defendant had to exercise best efforts to secure the subdivision. They rely on *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072, 1978 CanLII 215 [*Dynamic Transport*].

[127] In *Dynamic Transport*, the Supreme Court of Canada dealt with the issue of how to interpret a contract for sale of land still to be subdivided, when the contract was silent as to who would obtain subdivision. The Court concluded that a vendor who contracts to sell un-subdivided land is under an implied obligation to make a proper application for subdivision and to use their best efforts to obtain subdivision.

[128] I agree with the parties' interpretation of *Dynamic Transport*, and find that if there were a true condition precedent in the contract to sell the lot, then there would also be an implied term that the defendant use its best efforts to create Lot A.

[129] The concept of "best efforts" in law implies a high level of effort. Justice Dorgan in *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*, [1994] 5 W.W.R. 719 at para. 71, 1994 CanLII 16658 (B.C.S.C.), reviewed the case law, and summarized the principles around "best efforts" as follows:

> 1. "Best efforts" imposes a higher obligation than a "reasonable effort".
> 2. "Best efforts" means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned.
> 3. "Best efforts" includes doing everything known to be usual, necessary and proper for ensuring the success of the endeavour.
> 4. The meaning of "best efforts" is, however, not boundless. It must be approached in the light of the particular contract, the parties to it and the contract's overall purpose as reflected in its language.
> 5. While "best efforts" of the defendant must be subject to such overriding obligations as honesty and fair dealing, it is not necessary for the plaintiff to prove that the defendant acted in bad faith.
> 6. Evidence of "inevitable failure" is relevant to the issue of causation of damage but not to the issue of liability. The onus to show that failure

> was inevitable regardless of whether the defendant made "best efforts" rests on the defendant.
>
> 7. Evidence that the defendant, had it acted diligently, could have satisfied the "best efforts" test is relevant evidence that the defendant did not use its best efforts.

[130] The defendant also referred me to *Grewal v. Singh*, 2003 BCSC 1836 [*Grewal*], a case that also concerned a sale of land that needed to be subdivided before the completion date. In *Grewal*, the parties agreed to a closing and possession date of June 15, 2002. However, they also agreed to the following term (para. 25):

> Possession and completion will be 15 days after City approval. Both parties hereby agree to extend completion and possession dates should delays to servicing occur.

[131] It is unclear whether Justice Groberman considered these terms as collectively creating a true condition precedent to the obligation to sell the property, as he also mentioned that the contract may have been “frustrated” if subdivision had been “impossible or not reasonably practical” and the contract would have “been at an end” if that had occurred: *Grewal* at para. 40. However, Groberman J., relying on *Dynamic Transport*, found that there was an implied term that required the seller to use best efforts to secure the subdivision: *Grewal* at para. 43. He also found that the seller did not use their best efforts since they abandoned the application, and hence was in breach of contract: *Grewal* at para. 42.

[132] The defendant argued that this case is the opposite of *Grewal*, whereby it did use its best efforts to subdivide the land, but was ultimately unsuccessful. As a result, the contract should be treated as “being at an end”, such that the defendant is not in breach of the contract for failing to convey Lot A.

[133] The defendants submitted that I should consider the totality of their efforts to subdivide Lot A from 2013 to the present, and should not limit my analysis to the time leading up to October 1, 2016. I agree with this submission given my finding that the plaintiffs accommodated an extension of the closing date before claiming for specific performance.

[134] The effect of a claim for specific performance is to revive the contract "to the extent that the defendant who has failed to perform can avoid a breach if at any time up to the date of judgment, performance is tendered": *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 at para. 15, 1996 CanLII 209 [*Semelhago*]. Thus, it is proper to consider all of the defendant's efforts to subdivide Lot A to the present.

[135] Considering the evidence before me, I find that the defendant did not exercise best efforts to subdivide Lot A.

[136] I agree with the plaintiffs that there appears to have been no work done towards securing the subdivision between October 2013 and November 2015. During this time the PLA issued in 2013 had lapsed and the defendant had to begin corresponding with MOTI and the Islands Trust again regarding renewing the PLA. The defendant cited various issues that it had with its development during this time, including sales for Phase I, funding Phase II, and the gun club litigation. Despite these issues, the fact remains that no efforts were made during this time to perform the Lot A contract.

[137] The defendant knew about the requirement to build Bonnieview Rd from 2006, yet it took ten years for the road to be re-staked and substantially constructed. Only on April 30, 2016 did Mr. Gatley write to J.E. Anderson and state that the road construction could proceed. It was not until May 30, 2016 that Mr. Gatley emailed J.E. Anderson about re-staking the Bonnieview Rd outline, leaving the defendant with only four months to complete the road and register the subdivision before October 1, 2016.

[138] Work on excavating the road was not started until July 2016, and the defendant did not arrange a paving contractor to work on the road until August 2016, for a planned start in early September. Leaving the road construction and paving until then created predictable problems when the paving contractor was unable to pave the road due to delays on other projects and uncooperative weather.

[139] I agree with the plaintiff's submission that the defendant seems to have left construction of the road until the last minute, and then construction was further delayed until 2017. This is not consistent with taking "all reasonable steps" and "leaving no stone unturned". However, the largest deficiency was failing to take steps to apply and register for subdivision when the regulators indicated that it considered the PLA conditions had been satisfied.

[140] The defendant concedes that by May 6, 2016 it met the requirements of the Islands Trust concerning that entity's position on adequate consultation with the SFN, being a 30-day opportunity for the SFN to provide comment. By November 10, 2016, MOTI accepted a bond in satisfaction of the condition that Bonnieview Rd would be built. Therefore, there was a time when the regulators agreed that the conditions for subdivision were met. Using best efforts, on the facts of this case, required the plaintiffs to at least attempt to subdivide Lot A when it had an indication that it would be approved.

[141] Ms. Borsuk deposed that she had "actual knowledge" of the SFN's concerns with the proposed Lot A subdivision in August 2016, and this is why the defendant failed to subdivide Lot A despite all other conditions being satisfied. However, I find that this conflicts with her evidence that she was only able to meet with Mr. Good in April 2017. While Ms. Borsuk may have suspected that the SFN would have concerns with the Panhandle, she could not have confirmed this until April 2017.

[142] Moreover, Mr. Good has not given evidence in this proceeding. The only statements regarding the SFN's actual concerns with the subdivision of Lot A are hearsay, namely Mr. Borsuk and Mr. Gately's affidavit evidence and the defendant's email correspondence with the SFN. Thus, it is unclear precisely what the SFN's concerns were regarding Lot A in October 2016.

[143] In the latest correspondence from the SFN tendered by the defendant, the April 14, 2021 letter, the SFN appeared to indicate that their opposition to the Legends development was not limited to Lot A. Therefore, it is unclear why the

defendant was more concerned about its consultation obligations relating to certain parcels and not others.

[144] Mr. Gatley and Ms. Borsuk tried to explain why they proceeded with the Five Lot Subdivision with the exception of Lot A by saying that although they did not fully understand the SFN's concerns with respect to what they required in terms of access to, and protection of the spiritual sites, Lot A would be the closest parcel to the burial sites. By keeping Lot A as part of the Parent Parcel, the defendant was able to ensure access to the burial sites and other archaeological sites south of Lot 1 and Lot A from the north and this would also mean that no one would alter Lot A such that the spiritual nature of the site and surrounding area could be protected until Island Trust better understood the SFN's concerns in this regard.

[145] However, this explanation is unpersuasive. The Five Lot Subdivision was subject to the same conditions for subdivision as Lot A, conditions the defendant claimed to believe they did not satisfy, namely ensuring that the Panhandle gave adequate access to Lot 44. Yet, it went ahead and subdivided the four other lots in the Five Lot Subdivision. It is also notable that the defendant sold these other lots. If the SFN's concern truly was access to Lot 44, then selling these lots that were contiguous with Lot A only served to limit how the defendant could seek to accommodate the SFN's concerns.

[146] More specifically, according to Mr. van Dishoeck, Lot B (re-designated as Lot D) next to proposed Lot A could have provided vehicle access to the SFN and was a gentler and shorter route than through proposed Lot A. Notwithstanding this alternative, the defendant sold this lot, removing the possibility of using it to provide access and maintaining its contractual obligations to the plaintiffs.

[147] The defendant also submitted that its "best efforts" to consult and accommodate the SFN must be read consistently with the *United Nations Declaration on the Rights of Indigenous Peoples* [*UNDRIP*] being a Schedule to the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 [*DRIPA*]. I

note that *DRIPA* had not been enacted in 2017 when the defendant purported to back out of the contract.

[148] The defendant maintained that a best-efforts standard read in context with *UNDRIP* did not require it to subdivide and create the proposed Lot A and disregard a First Nation's interests given that:

a) it had actual knowledge that the SFN were not satisfied with the access provided by the Panhandle;

b) the SFN had raised additional concerns about protecting the spiritual and cultural importance of land around archaeological sites, including Lot A; and

c) the SFN did not consider the 30-day referral process engaged in by Islands Trust in the spring of 2016 sufficient.

[149] This argument consisted mostly of the defendant citing portions of *UNDRIP* related to consultation of Indigenous peoples and the rights they hold with respect to land. The defendant did not provide any guidance as to how it proposed that *DRIPA* or *UNDRIP* shapes the obligations between two private parties and a First Nation that is not privy to a contract.

[150] In this context, it is unnecessary for me to comment on the scope of how *UNDRIP* or *DRIPA* should be interpreted in the context of private law. Even if *UNDRIP* applied to the parties' dealings despite *DRIPA* not being enacted during the material period and it not being clear how it would create obligations for private parties, it does not serve to justify the defendant's failure to make best efforts. Specifically, the defendant's submission on *UNDRIP* does not explain why it failed to subdivide Lot A when there was no express opposition from the SFN and the regulators indicated subdivision could proceed. The defendant's alleged concern for Indigenous rights is also at odds with its inconsistent treatment of the SFN's concerns, whereby it considered that it had addressed the SFN concerns for some lots but not Lot A.

[151] In sum, I find that the evidence detailed above shows that the defendant did not use its best efforts to complete the subdivision of Lot A. It left steps to the last minute and failed to take reasonable steps that were readily apparent. Also, I find that in November 2016 the defendant could have and did not subdivide Lot A. While following August 2016 the defendant claimed to be concerned about the SFN's interests in the land, its conduct creating and selling the Five Lot Subdivision is at odds with this apparent justification for failing to subdivide Lot A.

C. Failure to Tender

[152] However, in order to successfully claim specific performance, the plaintiff must show that they were and are ready to perform the contract: *Norfolk v. Aiken*, 64 D.L.R. (4th) 1 at 19, 1989 CanLII 245 [*Norfolk*] at paras. 20, 23.

[153] Notwithstanding its position that the completion date was "flexible", the defendant alleges that the plaintiffs failed to tender on the contractual completion date of October 1, 2016, and have not proven that they were able to complete on that date.

[154] The plaintiffs contend that they were not concerned with the passage of time because they believed that the purchase of the proposed Lot A was following a similar process to their purchase of Lot 1, where they were given *de facto* ownership and control over the lot while the defendant worked for about 20 months to complete the subdivision.

[155] I am not persuaded that the plaintiffs are entitled to assert reliance on the completion date for some purposes, and to ignore it for others, but I am equally unpersuaded that the issue is of any importance with respect the tendering of the purchase price, as I will explain below.

[156] The plaintiffs deny that they had a legal obligation to tender on October 1, 2016, but contend that they have established that they could have completed the transaction on that date if the defendant had fulfilled its obligations under the contract. They rely on the decision of our Court of Appeal in *Norfolk*, where the Court

concluded that when a party makes it clear that they will not be able to complete, then the other party to the transaction is not required to go through the formal step of tendering.

[157] This principle was applied in *Grewal* at para. 44, where Justice Groberman stated that:

> [44] … It was clear to all concerned that the parcels could not be purchased on that date because they had not yet been created as legal entities. There would have been no point in going through the charade of tendering payment or pretending that the closing was going to occur.

[158] Mr. van Dishoeck swore that the plaintiffs did not have their notary prepare documents because they knew that Lot A did not exist on October 1, 2016, but also swore that they had the funds available to close on proposed Lot A if it had existed on October 1, 2016.

[159] Ms. van Dishoeck swore that she handles the plaintiffs' finances, and they had sufficient funds to close the purchase, and provided a bank statement showing sufficient funds to close the transaction in October 2016.

[160] After October 1, 2016, the defendant purported to repudiate the contract when Mr. Gatley told Mr. van Dishoeck that the defendant would not complete the contract. On March 29, 2017, the plaintiffs' counsel wrote to the defendant, affirming the plaintiffs' willingness to complete the transaction, inquiring when the transaction could close.

[161] I find that the plaintiffs were capable of tendering the balance of the purchase price for the proposed Lot A on the completion date, but were not obliged to do so, as Lot A had not yet been created. Therefore, specific performance is not barred.

D. Specific Performance

[162] The plaintiffs refused to accept the defendant's alleged repudiation of the proposed Lot A contract in February 2017, and seek an order of specific

performance, requiring the defendant to attempt to subdivide proposed Lot A (now E) and convey it to them.

[163] To show specific performance may be available, the plaintiffs must establish that Lot A is unique, and a substitute is not readily available: *Semelhago* at para. 22.

[164] The plaintiffs contend that the uniqueness of Lot A is immediately apparent. When the contract was agreed upon, they had already agreed to purchase Lot 1 and had signed the Lot 1 MOU in April 2012. By the time that the defendant breached the contract, they had resided on Lot 1 for some time, and had built their driveway, generator, and propane tank on the proposed Lot A. The plaintiffs contend that the proposed Lot A is completely unique and irreplaceable, as there is no substitute in the market that would afford them the privacy that they wished to obtain by purchasing Lot A.

[165] In the result, the plaintiffs assert that the only issue regarding specific performance is whether I can order specific performance in light of the fact that the proposed Lot A has not yet been created. They submitted that a conditional order for specific performance is appropriate in the circumstances.

[166] The plaintiffs cited *Brar v. Illihae Dairy Farms Ltd.*, 35 R.P.R. (2d) 191, 1993 CanLII 1474 [*Brar*], for the proposition that since the defendant has not proven that performance of the contract is “impossible” then the Court should order specific performance.

[167] *Brar* also concerned the sale of un-subdivided land. Justice Clancy, at para. 41, considered *Phipps and Phipps v. Pickering and Pickering*, 8 B.C.L.R. 101, 1978 CanLII 269 [*Phipps*], where Justice Verchere refused to grant specific performance of a land sale since it was not possible to subdivide the property at the time due to a statutory “land freeze”.

[168] Justice Clancy distinguished the circumstances in *Phipps*, as subdivision was not proven to be impossible in the case before him. He also cited *Dynamic Transport*, where the Supreme Court made an order for specific performance of the

sale of land, conditional on making best efforts to obtain the required subdivision. Therefore, Clancy J. found that it was possible to make a conditional order for specific performance, but declined to do so since the plaintiff was bound by laches.

[169] The plaintiffs argued that, in the unique circumstances of this case, a conditional order is appropriate, requiring the creation of Lot A within 12 months, failing which the parties may return to court to determine the appropriate damages in lieu of specific performance at that time. They contend that such an order will provide appropriate incentive to the defendant to create the proposed Lot A, which is necessary given its failure to make best efforts to create the proposed Lot A in the past.

[170] In turn, the defendant here claimed that creation of proposed Lot A is impossible because the SFN have not consented to the 2020 subdivision application, but the completion of the entire Phase II of the subdivision is of no consequence to the creation of just the proposed Lot A.

[171] The defendant here argued that the situation in this case, in which the SFN have refused to consent to any additional subdivision of the NE ¼ Parcel, and the Islands Trust will not sign off on any additional subdivision without the SFN's consent, is analogous to the situation in *Phipps* with respect to impossibility of performance.

[172] The defendant also cited *CareVest Capital Inc. v. CB Development 2000 Ltd.*, 2007 BCSC 1146 at para. 14, which states: "Nor is [specific performance] available in respect of matters over which the court does not have complete control such as the modification of financing arrangements in order to obtain the funds required to complete construction." The defendant submitted that neither it nor the Court have control over whether the regulators or the SFN will consent to the subdivision of Lot A.

[173] I agree with the plaintiffs that Lot A was unique, and under usual circumstances, I would award specific performance of the sale of Lot A. However,

this case has factual complexities that weigh against me awarding specific performance.

[174] Specific performance is a discretionary equitable remedy. This discretion is exercised judicially, with consideration to the established principles of equity: *Webb v. Dipenta*, [1925] S.C.R. 565 at 571, 1924 CanLII 41 [*Webb*]. These factors include potential hardship to third parties: *Webb* at 575. They also include whether the court will have to supervise performance of the order which could lead to further costly litigation: *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.*, [1998] A.C. 1 at 12 (U.K.H.L.) per Lord Hoffman; see also *CareVest Capital Inc. v. CB Development 2000 Ltd.*, 2007 BCSC 1146 at para. 14.

[175] Here I must consider the fact that the SFN has asserted a number of interests in Lot A and the surrounding lands. I also have evidence that the relevant regulators have raised concerns about the adequacy of the defendant's efforts at consulting and accommodating the SFN's concerns. This is a significant distinguishing factor from the cases relied on by the parties, and I am hesitant to make any order that compromises the interests of the SFN in the lands.

[176] I also accept the defendant's submission that the Court has no control over the consultation process with the SFN or even whether the SFN will agree to engage in discussions with respect to the defendant's plans to subdivide the NE ¼ Parcel. Nor can I order the Islands Trust to change their position on the consultation with the SFN. Therefore, the only order I could make is to order the defendant to use best efforts to continue trying to complete the subdivision. And, as I found above, the defendant complicated its ability to create the proposed Lot A because it sold the other four lots it created along Bonnieview Rd to non-SFN buyers between August 2019 and July 2020.

[177] I thus decline to exercise my discretion to order specific performance of the contract. I accept that conditional orders have been awarded in other land sales where subdivision still needed to be completed. However, given the complex interests of the SFN, the essential conditions outside of the Court's control, the

defendant's own conduct which complicated the subdivision, and the years of efforts to subdivide the lands, I am not persuaded that specific performance is an appropriate remedy and would not simply result in further litigation.

E. Damages in Lieu of Specific Performance

[178] The plaintiffs contend that if the defendant has made it impossible through its own actions in disposing of the other lots and otherwise frustrating the creation of the proposed Lot A, then it should be liable for damages in lieu of specific performance.

[179] I agree that since I have declined to grant specific performance, despite Lot A being unique to the plaintiffs, they are entitled to damages in lieu thereof: *Lalani v. Chow*, 2011 BCCA 499 at para. 21.

[180] The correct date to value the property for purposes of calculating the plaintiff's loss is the date of judgment.

[181] The majority in *Semelhago* held that the effect of claiming specific performance is to revive the contract such that the defendant can avoid being in breach of contract by performing the contract before the date of judgment. Thus, the claim for specific performance postpones the date of the breach to the date of judgment (paras. 15–16). Further, the damages are supposed to compensate the plaintiff fully for not having the unique land. For these reasons the date of valuation for the loss should be the date of judgment: *Semelhago* at para. 14. See also *Lalani* at paras. 22–24.

[182] Our Court of Appeal stated the principle succinctly in *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610 at para. 164 [*Inmet*]:

> [164] Where the court finds that a claim for specific performance is appropriate because of the unique nature of the property, damages awarded in lieu of specific performance are to be a true substitute: *Semelhago* (at para. 16), *Wroth* (at pp. 58-9). Thus, it has been found to be appropriate to assess the damages as of the date that the remedy of specific performance is no longer available (because it is abandoned, cannot be enforced, or the court refuses to grant it)

[183] The plaintiffs rely upon the expert report of Victor Sweett who opined a value for the proposed Lot A of $576,000 as of August 12, 2022. This is based on the proposed size of 2.68 acres for Lot A.

[184] This appraisal specifically states that the market value as of August 12, 2022 cannot be relied on to estimate the market value at any other date, except with further advice of the appraiser.

[185] The plaintiffs also tendered property assessments for what were to be Lots B through E, but are now Lots D through A as follows:

Lot and Description	2022 Land Valuation
Plaintiffs' Lot 1 (3.237 acres)	$534,000
Lot D (2.52 acres)	$554,000
Lot C (2.693 acres)	$561,000
Lot B (2.545 acres)	$555,000
Lot A (4.967 acres)	$664,000

[186] The plaintiffs thus submitted that, based on Mr. Sweett's appraisal of $576,000, they are entitled to damages in lieu of specific performance of $376,000 after deducting the $200,000 that they would have had to pay for proposed Lot A.

[187] The defendant offered no appraisal of the value of the proposed Lot A, but complained that Mr. Sweett's appraisal evidence is now nearly nine months old and cannot be relied on at this time to assess the damages which would permit the plaintiffs to purchase or obtain a substitute with respect to the proposed Lot A at this time.

[188] In addition, the defendant complains that interest rates have changed four times since August 12, 2022, and asserts that the appraisal is also an unreliable estimate of value and cannot be reasonably used to assess damages because:

> a) The report uses the assumption that "The property rights are the fee simple interest rights in the deeded land, unencumbered," whereas

the Parent Parcel is encumbered with numerous charges which would transmit to the proposed Lot A if it were subdivided and the parent title cancelled when a subdivision occurred. Despite this, no analysis of the possible relevancy of these charges to market value is provided, with no comparison of the types of charges existing on the comparables provided.

b) It is furthermore assumed that there are "no encroachments, encumbrances, restrictions, leases or covenants that would in any way affect the valuation, except as expressly noted herein". However, no analysis of any of the encumbrances on title to the parent parcel is even considered. It is unclear if the appraiser reviewed the encumbrances because the appraiser does not confirm if he reviewed title. Also, counsel to the plaintiffs provided title searches for Lots A to C. The appraiser only confirms that he reviewed "market trends, influences and other significant factors" and that he reviewed "any plans and specifications provided". The appraiser recognizes that encumbrances could affect value, but not does confirm having reviewed any of the encumbrances on title or the encumbrances on title to the comparables used.

c) The title searches attached to the appraiser's affidavits are incomplete, and attach only the first page. This omission must be viewed in the context of the other contents of the report described above, and further indicates that the appraiser did not consider whether the charges on title to the property might affect market value, or whether the comparables used were appropriate.

d) Proposed Lot A involves the appraisal of property which does not exist, and is a "prospective appraisal" as defined by the appraiser. That kind of report requires the appraiser to use hypothetical conditions and extraordinary assumptions (defined terms within the report). The appraiser failed to consider whether the effect of consultation, a necessary step for subdivision in light of the position of Islands Trust, may have an affect on value, particularly if the creation of Lot A might require conferring a benefit onto the SFN.

e) Overall, the appraiser failed to grapple with the fact that he was asked to value a property which does not exist, and whose existence depends on the satisfaction of conditions. The appraiser even makes the assumption that "title to the property is good and marketable", yet there was no title to examine for this lot which does not exist. The appraiser fails to take into the account of the cost of subdividing the lot, and the steps involved in satisfying the conditions and his analysis is based on omitted material information. It is unreliable evidence of value.

[189] The defendant argued that the plaintiffs were required to present their best case, including evidence of damages, when they applied for summary trial of this matter, but have not provided reliable evidence of damages on a balance of

probabilities, in accordance with the principle that damages be assessed as of either the date of breach or the date of trial.

[190] The defendant also referred me to the decision in *Guraya v Kaila*, 2018 BCSC 1182 at para. 26 [*Guraya*] where Justice Shergill concluded:

> [26] … By asking that the issue of damages be determined at a different time than liability is a request to litigate the case in slices. This is not consistent with Rule 1-3(1), which is the just, speedy and inexpensive determination of every proceeding on its merits.

[191] *Guraya* does not assist the defendant, as in that case, Shergill J. was addressing the situation where liability and damages are litigated at different times. This is not relevant to merely deciding the date that damages should be assessed.

[192] I am not persuaded that the Sweett report is unreliable, in particular given the property assessments for Lots B–D set out above, which are comparable in size to what Lot A would have been: 2.68 acres.

[193] I acknowledge that property assessments are not completely reliable as discussed in *Dosanjh v. Liang*, 2015 BCCA 18 at para. 63 [*Dosanjh*], where the Court stated that in non-family cases “there is, absent agreement, no scope for using assessments in place of expert opinion evidence”. The issue generally with assessments is that the court cannot test their cogency since the assessor is not presenting the evidence: *Dosanjh* at para. 67. But I find that here, the assessments provide some evidence of the value for the adjoining lots and help support the expert appraisal.

[194] In the absence of any evidence of valuation from the defendant, the best evidence for Lot A’s current value is that in the Sweett report and the assessments of Lots A–D, and warrants the award of $376,000 that the plaintiffs seek. I therefore assess their damages in lieu of specific performance at $396,000 adding in the deposit paid by the plaintiffs to the defendant.

F. Equitable Easement and Additional Damages for Breach of Contract

[195] The plaintiffs maintain that if the defendant breached the contract, then they should receive an equitable easement over the driveway and encroachment of the generator and propane tank, or in the alternative the cost of moving these structures in the amount of $29,000.

[196] A court may grant an equitable easement under the doctrine of proprietary estoppel: *Erickson v. Jones*, 2008 BCCA 379 at para. 38. Proprietary estoppels are used to avoid the inequities that arise where parties have conducted themselves in a certain way, and then insists on their strict legal rights: *Cowper-Smith v. Morgan*, 2017 SCC 61 at para. 16 [*Cowper-Smith*].

[197] The test for proprietary estoppel was set out by Chief Justice McLachlan in *Cowper-Smith* at para. 15:

> An equity arises when (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word.

[198] It is well understood that a representation does not need to be an express statement; rather, it can be implicitly made through conduct or a course of conduct: See B. MacDougall, *Misrepresentation and (Dis)honest Performance in Contracts*, 2nd ed (Toronto: LexisNexis, 2021) at §2.235.

[199] Regarding the reasonableness of the reliance, the assurance must be “clear enough”, and it must appear “to have been intended to be taken seriously”: *Cowper-Smith* at para. 26.

[200] In this case, Mr. Gatley represented on more than one occasion that the plaintiffs would acquire the proposed Lot A, without expressing any doubt about that eventuality.

[201] Mr. Gatley gave express permission to build the driveaway over Lot A in 2013 and took no steps to prevent the plaintiffs from using it after construction had finished on Lot 1. Mr. Gately also witnessed the de-activation of the plaintiffs' steep original driveway without comment. The defendant even sold the plaintiffs the gravel used to construct their new driveway over the proposed Lot A.

[202] The defendant also expressly represented to the plaintiffs that it would sell them Lot A, and offered to build them a separate driveway on the lot in the summer of 2016.

[203] Indeed, as I found above, the parties' conduct shows how they treated the subdivision as a mere formality.

[204] The defendant denied that by granting permission to the plaintiffs to use the driveway, including extending it so that their tradespeople could access Lot 1 during the construction of the plaintiffs' home, it was representing to the plaintiffs that they would absolutely acquire proposed Lot A or that this somehow overwrote the Lot A contract or the knowledge of the parties that subdivision was required before proposed Lot A could be acquired by the plaintiffs.

[205] The defendant submitted that the parties' relationship was defined by the contract, and the contract does not warrant that subdivision would occur, nor should its conduct be taken as making such a promise. Thus, the defendant argued that since it never promised that subdivision was certain, the plaintiffs encroached and built on Lot A at their own risk.

[206] I disagree. The defendant's conduct with respect to the driveway was a further indication that it believed that it would be able to subdivide Lot A without issue, just as it had done with Lot 1. These express representations and Mr. Gately's conduct indicated to the plaintiffs that it would be of no issue to build and use the driveway on Lot A since, after all, the parties believed it was going to be the plaintiffs' land anyways. It does not matter that representations were made based on a mistaken assumption: *Cowper-Smith* at para. 16.

[207] I am satisfied that the plaintiffs reasonably relied on the representations made by the defendant and its agent to build and then use the driveway on Lot A to access their home. The conduct of allowing the plaintiffs to build and then continually use the driveway indicates that the assurance was meant to be taken seriously.

[208] The plaintiffs detrimentally relied on the representations as they de-activated their original driveway, constructed a forecourt parking area which rendered the original driveway path obsolete, and planted trees in the path of the original driveway.

[209] I am satisfied that the plaintiffs have proven their case for a proprietary estoppel with respect to the driveway on Lot A.

[210] With respect to the utilities, the plaintiffs also constructed their generator and propane tank partially on proposed Lot A because of the defendant's representations that they would acquire the proposed Lot A.

[211] The defendant notes that Mr. van Dishoeck in his examination for discovery testified that he placed the utilities on Lot A unknowingly. In the result, the defendant argued that the plaintiffs could not have relied, reasonably or otherwise, on any representations it made with respect to proposed Lot A to place their utilities on that lot if they did not even know they were on Lot A at the time they were installed.

[212] However, again, reasonably relying on the defendant's conduct which represented that the plaintiffs would be the future owners of Lot A, Mr. van Dishoeck placed the utilities without considering the property line. The reliance was detrimental since the utilities are on the defendant's land. I am satisfied that the plaintiffs have also met the test for a proprietary estoppel with respect to the utilities.

[213] Since proprietary estoppels are equitable in nature, they are subject to the usual limits on equitable remedies, including consideration of the interests of third-parties: *Webb* at 575; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 34, 1997 CanLII 346; B. MacDougall, *Estoppel*, 2nd ed (Toronto: LexisNexis, 2019) at §6.217.

[214] Further, proprietary estoppels are a flexible remedy, but courts will only grant the plaintiff "the minimum relief necessary to satisfy the equity in their favour": *Cowper-Smith* at para. 47.

[215] Following my decision above regarding specific performance, given the SFN's asserted interests in Lot A and the surrounding lands, I am unwilling to grant the plaintiffs a proprietary remedy and risk further compromising the SFN's asserted claims. Moreover, I am satisfied that a monetary remedy would be sufficient to satisfy the plaintiff's equity they accrued through their detrimental reliance on the defendant's representations. Indeed, the parties pleaded, in the alternative, that the cost of moving the utilities and creating driveway access to Lot 1 would be a sufficient remedy.

[216] The plaintiffs claim the cost of constructing a new driveway would be approximately $20,000 and the relocation of the generator and the propane tank would cost between $4,000 and $9,000.

[217] The defendant argues that the plaintiffs have not provided any evidence in the form of quotes or other documentation in support of these costs. It also submits that there is no need to build a new driveway, only to re-activate the existing driveway on Lot 1. Yet the defendant proposed no alternate estimate of the award that should be made.

[218] On the limited evidence before me, I accept the plaintiffs' evidence regarding the costs of creating driveway access to Lot 1, which is based on past experience building driveways on their land, and of moving the utilities at the lower estimate of $4,000. In the result, I award the plaintiffs $24,000 in addition to the award discussed above.

V. CONCLUSION & ORDERS

[219] In summary, I accepted the plaintiffs' submissions that the contract to sell Lot A was not subject to subdividing Lot A as a true condition precedent. While Lot A needed to be subdivided in order for the defendant to perform its obligations under

the contract, this alone did not make the existence of the parties' obligations contingent on the subdivision. The seller agreed to sell something that did not exist and it bore the risk of not being able to deliver Lot A. Since Lot A has not been subdivided, the defendant is in breach of contract.

[220] In the alternative, I found that even if the sale of Lot A was subject to a true condition precedent and an implied term to make best efforts to subdivide Lot A, then the defendant failed to make best efforts to subdivide the land.

[221] Regarding the appropriate remedies, I am unwilling to grant the plaintiffs either specific performance of the sale of Lot A or an equitable easement for the driveway and the utilities they built on Lot A. This was primarily due to the SFN's asserted claims over Lot A, the regulators' indication that the SFN was inadequately consulted, and the evidence of burial sites on the lands around Lot A.

[222] That said, I do award the plaintiffs damages, or equitable compensation, instead of the interests in Lot A that they sought. Had the defendant delivered Lot A, the plaintiffs would own land valued at $576,000, for which they would have had to pay a further $180,000 ($200,000 minus the $20,000 deposit paid). This amounts to a loss of $396,000. I also accepted that the plaintiffs will have to spend $24,000 curing their detrimental reliance on the defendant's representations.

[223] Regarding pre-judgment interest, I did not receive submissions on this point. However, our Court of Appeal addressed pre-judgement interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, in the context of specific performance in *Inmet*. The Court at para. 215 found that a vendor who was awarded specific performance and did not benefit from the purchase money from the date of the breach was entitled to pre-judgment interest:

> [215] The rationale for an award of prejudgment interest applies equally, in my opinion, whether the contract remained open until the trial date or was closed at the date of breach: the unpaid vendor has not received the benefit of the purchase money while the defaulting purchaser has had the use of the money throughout.

[224] In effect, the Court held that the loss of the vendor-plaintiff who claimed specific performance could be valued as of the date of judgment, and interest could be awarded as of the date of the initial breach of contract.

[225] However, the Court went on to the discuss the risks of a windfall when interest is awarded on damages measured on the property's increased value at the date of judgment: *Inmet* at para. 217. Precisely this risk exists in this case where the plaintiffs will benefit from the 11 percent annual growth of the value of Lot A over the last ten years, despite not owning the land or losing the use of the purchase price monies.

[226] Further, in their Notice of Application, the plaintiffs only sought interest on the deposit paid pursuant to the *Court Order Interest Act* in the further alternative if the Court did not award specific performance or damages in lieu thereof.

[227] I find that pre-judgment interest is not available given the risk of a windfall to the plaintiffs. Following in *Semelhago*, on the facts of this case, I prefer to treat the contract as "alive" or open until the time of judgment given the plaintiff's claim for specific performance; therefore, the contract was only breached as of that time. In the result, no interest is payable on the damages awarded for the value of the Lot A.

[228] Since the costs associated with modifying the driveway and moving the utilities have not been incurred yet, no interest is payable on the $24,000 award: *Court Order Interest Act* at s. 2(a).

[229] In sum, I award the plaintiffs $420,000 in damages. And since they were successful in their action I award plaintiffs costs in accordance with Scale B of Appendix B of the *Rules*.

"The Honourable Chief Justice Hinkson"