Court of King's Bench of Alberta

Citation: 1197093 Alberta Ltd. v. 1529771 Alberta Ltd., 2024 ABKB 325

Date: 20240531
Docket: 2003 00698
Registry: Edmonton

Between:

1197093 Alberta Ltd.

Plaintiff

- and -

1529771 Alberta Ltd.

Defendant

Memorandum of Decision
of the
Honourable Justice A.K. Akgungor

I. Introduction

[1] This matter centres around a stately historical property located in downtown Edmonton known as the Oblates Mansion (the "Property"). The Property is designated by the province as a Provincial Historic Resource and by the City of Edmonton as a Municipal Historic Resource.

[2] In accordance with s 20(9) of the *Historical Resources Act*, RSA 2000, c H-9 (the "Act"), no person shall destroy, disturb, alter, restore, or repair any historic resource without the approval of the Minister. Similar language is found in the Order made under the *Act* which designated the Property as a Provincial Historic Resource.

[3] From December 2013 until January 2018, the Property was owned by the Defendant, 1529771 Alberta Ltd. ("152"). At the time the Property was put up for sale in the Spring of 2017, there was damage on the third floor of the building where a metal support lintel had been cut. A lintel is a beam placed across the openings of doors or windows in buildings to support the load from the structure above. The wall around the damaged lintel also had parts of the structural brick, bond beam and clay blocks from the interior wall removed.

[4] The damage to the lintel resulted in concerns about the structural integrity of the wall. As a result of these structural concerns, 152 put in place what it referred to as "standard temporary shoring". This consisted of tele posts placed on 2 x 8 or 2 x 6 beams. The damage to the lintel, the state of the wall, and the installation of the tele posts were obvious to any potential purchasers.

[5] The Plaintiff, 1197093 Alberta Ltd. ("119"), was looking for space to accommodate its growing law practice and became interested in purchasing the Property as a result. The parties entered into an offer to purchase the Property on July 20, 2017 (the "Offer").

[6] During the course of conducting its due diligence, 119 toured the Property with an architect specializing in historical properties and with representatives of Alberta Culture, Heritage Division ("Alberta Culture") and the City of Edmonton. As a result of the tour and discussions with these representatives, 119 became concerned about the state of the third floor and what might be required to remediate the damage.

[7] 119 articulated its concerns to 152, which resulted in the parties entering into an Addendum to the Offer dated November 15, 2017 (the "Addendum"). The Addendum confirmed that 119 would lift conditions on the sale and further provided as follows in relevant part:

> The seller's lawyer shall hold back the sum of $100,000.00 from the purchase price, from which holdback the seller's lawyer shall reimburse the purchaser for any and all expenses, fees, penalties, and any and all costs associated with renovation of the third floor of the property to comply with any City of Edmonton, Province of Alberta, and any other heritage and historical and architectural/structural requirements as directed, to remedy the renovations commenced by the seller.
>
> The hold back shall be held in trust by the seller's lawyer for a period of 2 years from the closing date or such earlier date as follows: (1) in the event direction is received from the City of Edmonton, Province of Alberta, or any other heritage or historical organizations or architect/engineer to remedy the renovations commenced by the seller, the purchaser shall commence such renovations as directed within 1 month and shall provide receipts for such renovations or costs incurred forthwith upon completion of the same, and (2) in the event the City of Edmonton, Province of Alberta, any other heritage and historical organizations, and architect/engineer all approve the third floor renovations as commenced by the seller, the holdback shall forthwith be released to the seller.

[8] Subsequent to the close of the sale in January 2018 and with the approval of Alberta Culture, 119 undertook extensive renovations to the Property. These renovations included work to remediate the third-floor wall and lintel area (the "Lintel Work"). After the Lintel Work was complete, 119 made a request of 152 on March 4, 2019, to release $97,941.25 from the holdback funds. 152 did not agree that the Lintel Work fell within the scope of the Addendum and

accordingly did not authorize the release of holdback funds to 119. It is this dispute that led the parties before this Court.

I. Positions of the parties

[9] 119 takes the position that all conditions of the Addendum were met and accordingly it is entitled to release of the holdback in the amount of $97,941.37. Specifically, 119 renovated the third floor of the Property to comply with structural requirements within the timeframes contemplated, obtained approval from the Province as required by the *Act*, repaired damage to the lintel and the wall, and provided copies of invoices to 152 in support of the expenses.

[10] In the alternative, 119 submits that 152 acted in bad faith when negotiating the terms of the Addendum in that it misled 119 regarding the purpose of the Addendum, failed to disclose the nature of the work "commenced by the seller" at the site of the damaged lintel and/or failed or refused to release the holdback after being provided with support for the costs of the repairs performed by 119.

[11] For its part, 152 maintains that the Lintel Work was excluded from the scope of the Addendum and the Addendum was instead intended to cover other types of work such as work required to remedy steps taken by 152 with respect to the third-floor bathrooms. Further, 152 asserts that the Addendum does not operate in any event as the work 152 undertook with respect to the structural concerns surrounding the damaged lintel was emergency work and did not amount to "renovations commenced by the seller" as contemplated by the Addendum.

[12] In addition, it submits that the work undertaken by 119 on the third floor was not "directed by" the City or the Province as required by the Addendum. 152 also makes a distinction between the quotations provided by 119 with respect to the completion of the Lintel Work and "receipts" as contemplated by the Addendum.

[13] 152 further submits that the costs associated with the Lintel Work were already accounted for between the parties through the negotiation of the purchase price of the Property. 152 maintains that it agreed to reduce the purchase price by $100,000 in exchange for 119 purchasing the Property on an "as is where is" basis.

I. Evidence at trial

[14] In addition to a brief Agreed Statement of Facts, eight individuals testified during the trial. The Court was further assisted by a Joint Book of Exhibits containing 69 exhibits and a further four exhibits entered by the parties through witnesses during the trial. Counsel confirmed that the documents contained in the Joint Book of Exhibits were being put before the Court for the truth of their contents.

[15] In a case of this nature, where many of the relevant facts were introduced through documentary evidence and the issues to be resolved relate to the legal interpretation of a commercial real estate contract, little turns on credibility findings. I will address any discrepancies or concerns in relation to the parties' interpretation of the documents or the facts as required in the background/chronology of events and my analysis of the legal issues.

[16] Five individuals testified on behalf of the Plaintiff:

- Ms. Senia Tarrabain – Ms. Tarrabain is the corporate representative and director of 119. She is also a lawyer but does not practice in the area of real estate.
- Mr. Carlo Laforge – Mr. Laforge works for the Government of Alberta in the role of Heritage Conservation Advisor for Alberta Culture. Mr. Laforge attended at the Property and advised on the renovation work undertaken by 119.
- Mr. Ali Shaben – Mr. Shaben is a real estate broker with Sable Realty. He acted as the commercial real estate agent for 119.
- Mr. Ian Morgan – Mr. Morgan is the Principal of NEXT Architecture ("NEXT"). He is a registered architect with the Alberta Association of Architects. Mr. Morgan prepared a report for 119 on the existing condition of the Property and developed plans for 119's renovation to the Property.
- Mr. James Sousa - At the time of the events in question, Mr. Sousa was a Project Coordinator for Delnor Construction ("Delnor"). He is now a Project Manager. Delnor is the contractor who undertook the renovation work on behalf of 119.

[17] Three individuals testified on behalf of the Defendant:

- Mr. Adrian Ambrozuk – Mr. Ambrozuk is an associate partner with Cushman & Wakefield. He acted as the commercial real estate agent for 152.
- Mr. Mick Harold – Mr. Harold is the Property Manager for 152. 152 is owned by his wife, Ms. Laurie Wood.
- Ms. Laurie Wood – Ms. Wood is the owner of 152 and a lawyer. She is married to Mr. Harold.

I. Background and chronology of events

(a) 152's ownership of the Property

[18] 152 bought the Property in December 2013 from Bosco Homes. Mr. Harold and Ms. Wood bought the Property with the intent to house Ms. Wood's law office, Mr. Harold's construction company and their personal residence on the 3rd floor. Mr. Harold testified that when he and Ms. Wood moved into the Property, they discovered certain defects in the building and were forced to do emergency work for reasons of health, safety, and preservation of property.

[19] On the third floor of the Property, Mr. Harold removed a cupboard from one of the bedrooms. He noted that the drywall was balled-in which indicated that something was putting pressure on it. He then engaged in what he referred to as a "destructive investigation" in order to determine what was putting pressure on the wall.

[20] As part of the destructive investigation, Mr. Harold removed the drywall in order to expose the wall and see the cause of the balled-in wall. When the wall was opened up, concrete dust and brick work fell out onto the floor. Mr. Harold testified that he found an abandoned window under the drywall that had been closed in. The lintel was cut, and ducting infringed on the window and bond space leaving about a four-foot section unsupported. To address this issue, Mr. Harold installed temporary beams to spread the load across the ceiling and floor to provide additional support to the roof of the Property.

[21] In addition, the second bathroom on the third floor was leaking sewage which was seeping into the floorspace. The cast iron pipes were cracked, and walls had to be removed so that the pipes could be replaced with ABS piping and brought up to building code standards. There was also an issue with the sewer backing up in the basement of the building as no back-up prevention unit had been installed. Mr. Harold was required to address these issues before he and Ms. Wood could occupy the building.

[22] No approvals were obtained by 152 from the City of Edmonton or Alberta Culture with respect to the work it carried out on the third floor.

[23] 152 filed a Statement of Claim against Bosco Homes with respect to the defects noted above (in addition to other issues). The claim was ultimately discontinued.

[24] 152 also encountered problems with the zoning it had hoped to acquire for the Property. The DC1 zoning that 152 hoped to obtain shortly after purchasing the Property did not come to fruition until 2017. Further, 152 did not receive the funds it expected from an expropriation of its previous property. As a result of these issues, 152 decided to sell the Property.

(a) Purchase negotiations

[25] Ms. Tarrabain became aware of the Property through Mr. Shaben. The Property appealed to her as it was a beautiful standalone building with a lot of character. It was also close to downtown and there was plenty of parking and room in the building for potential tenants. Ms. Tarrabain initially toured the Property on May 23, 2017.

[26] On June 29, 2017, 119 made an offer to purchase the Property for $2 million. The offer contained two standard conditions precedent in favour of 119. One condition provided for satisfactory inspection of the Property and the other condition provided for satisfactory mortgage financing.

[27] 152 rejected this offer and on or about July 4, 2017, went back to 119 with a counteroffer of $2,450,000. The counteroffer also attached title to the Property as Schedule "A" and outlined which encumbrances on title would be discharged (mortgage and caveat) and which would be transferred to 119 (historical designations).

[28] 119 replied with an offer of $2,100,000. 119 did not take issue with the encumbrances outlined on title.

[29] 152 went back to 119 with an offer of $2,350,000. Further, 152 amended the preamble of the offer to read as follows: "We, the undersigned, hereby offer to purchase those lands and premises legally described as Lot 63, Block 10, Plan B and municipally known as 9916-110 Street, Edmonton, Alberta (hereinafter called the "Property") on an "as-is where-is basis" on the following terms and conditions:...". The underlined portion had not appeared in previous iterations of the offers.

[30] On July 19, 2017, Mr. Shaben and Mr. Ambrozuk exchanged email correspondence about the offer. Mr. Shaben advised that 119 was prepared to go to $2,250,000 but that would be the final firm offer. He noted that 119 was paying a premium as the Property had historical designations and would require a substantial renovation. Mr. Shaben also noted that the price per square foot for the above ground office space amounted to $246, which he viewed as "steep".

[31] Mr. Ambrozuk replied to Mr. Shaben and confirmed that 152 was firm at $2,350,000. He noted that average sale prices for comparable properties were $250 per square foot and the average sale price for office condos was $350 per square foot.

[32] There was no discussion in these emails about the "as-is where-is" element of the offer. During the trial, Mr. Shaben testified that "as-is where-is" referred to the historical designations on the title and that 119 would be required to accept the title "as-is where-is". He further testified that "as-is where is" did not affect 119's ability to conduct due diligence or impact its ability to obtain a satisfactory inspection. Mr. Shaben indicated that once 119 had obtained a satisfactory inspection or was otherwise satisfied with its due diligence, it would then be accepting the Property "as-is where-is".

[33] Mr. Ambrozuk testified that he added "as-is where-is" to the purchase offer as he had had discussions with Mr. Shaben about whether or not 119 wanted 152 to complete any work on the Property before the sale. Once it was confirmed that 119 was not requesting 152 to complete any work on the Property, 152 agreed to drop the purchase price to $2,350,000 because 119 was prepared to purchase the Property "as-is where is".

[34] Mr. Harold similarly testified that he agreed to take $100,000 off the purchase price as the Property was being purchased in its existing condition and he would have to do no work to it. When asked whether the reason for the $100,000 deduction was explained to 119, Mr. Harold indicated that he thought it would have been self-evident because the "as-is where-is" appeared at the same time as the $100,000 deduction.

[35] Mr. Harold further testified that he based the $100,000 deduction on two estimates that were prepared in the event that fixes to the Property had to be undertaken. One estimate, in the amount of $49,069.35, was an estimate to restore the building and the other estimate, in the amount of $20,455.20 was to fix the damage to lintel. Two versions of the quote for $49,069.35 were in evidence. The only differences between the two versions is that one quote is dated August 24, 2016, and the other quote is dated September 12, 2017, and is titled "7777 OBLATS BUILDING Estimate to Restore Building if ordered". The quote to fix the damage to the lintel is also dated September 12, 2017.

[36] Mr. Harold testified that he had these two amounts in mind and then in discussion with Mr. Ambrozuk decided to bump up the total amount of about $70,000 ($49,069.35 +$20,455.20) by $30,000 to come up with the $100,000 price reduction.

[37] Ms. Tarrabain described the final terms of the offer as being achieved through the "art of negotiation". She did not receive any explanation for the $100,000 deduction. In her view, the parties just agreed on a price and proceeded from there.

[38] On July 20, 2017, 119 and 152 agreed on an offer to purchase the Property for $2,350,000. While the Property was being purchased on an "as-is where-is" basis, the Offer retained the two conditions precedent in favour of 119 with respect to a satisfactory inspection and financing.

(a) Due diligence phase

[39] Subsequent to the signing of the Offer, 119 retained Mr. Morgan and NEXT, who, in turn retained a structural engineer and Delnor. Alberta Culture was also engaged. NEXT undertook a preliminary building assessment on August 9, 2017. 119 also arranged for an inspection of the Property on August 24, 2017.

[40] The inspection report observed that there had been renovations or work done on the third floor of the property. The report stated: “It appears as though whoever did this renovation or work cut the metal support lintel. This could cause a significant structural issue to the area. It is recommended that a structural engineer is hired to evaluate, and the client follows his or her direction to have this corrected.”

[41] As a result of these observations the “Structure” component of the inspection report was given a condition rating of “Significant Issues”. “Significant Issues” denotes a system or component that is considered significantly deficient, inoperable, or unsafe. No other aspect of the third floor was given a condition rating in the inspection report as serious as “Significant Issues”.

[42] After receiving the inspection report, NEXT undertook a further site investigation on August 30, 2017, with Mr. Laforge and a Heritage Planner at the City of Edmonton. Mr. Morgan testified that during the tour of the Property, a number of issues were observed on the third floor. These issues revolved around modifications to a window opening which looked to have previously been an outside window. The lintel had been cut and the brick arch of the window had been significantly compromised. Brick work had also been compromised and there were significant cracks through the mortar. Mr. Morgan noted that these types of interventions would not have been permitted by the Standards and Guidelines for the Conservation of Historic Places in Canada (“Standards and Guidelines”). Mr. Laforge testified that the Standards and Guidelines are used to evaluate interventions to historical resources.

[43] Subsequent to the tour, Mr. Shaben wrote to Mr. Ambrozuk by email on September 11, 2017. In that email, Mr. Shaben indicated that both provincial and city representatives had raised concerns with the work that was attempted by 152 on the top [third] floor. The work had been done without any approvals. Mr. Shaben advised that given the uncertainty of the work done and the concern about the levels of government coming back to 119 for penalties, 119 felt that a reduction in price was necessary. The need for a structural engineer and the work required were estimated at a cost in excess of $150,000. Mr. Shaben confirmed that 119 would not proceed with the sale unless 152 was prepared to reduce the price by $150,000 to make up for the structural work that needed to be done and the potential liability of historically designated materials having been removed and now needing to be restored.

[44] Mr. Ambrozuk forwarded Mr. Shaben’s email to Mr. Harold the following morning, on September 12, 2017. Mr. Harold replied to Mr. Ambrozuk on the same date and advised that the work that was done to the third floor was performed on an emergency basis for the reasons of health, safety and preservation of property. Mr. Harold also noted that a lawsuit was commenced against Bosco Homes in this regard.

[45] Mr. Harold further indicated to Mr. Ambrozuk that 152 had prepared an estimate of $50,000 to restore the Property back to its original configuration in case 152 was ordered to do but 152 had received no such orders from the City or Province. Mr. Harold explained that 152 had not proceeded with the work as the architectural needs of 119 might conflict and it would be a waste of money to undertake work that might simply be undone by 119. Mr. Harold then indicated that this was the basis of the accepted offer to purchase. He then advised Mr. Ambrozuk that he was nevertheless amenable to creating an escrow for $50,000 to be used to restore the building to its original configuration, if so ordered.

[46] On the basis of Mr. Harold’s instructions, Mr. Ambrozuk responded to Mr. Shaben the next day advising that 152 was proposing that $50,000 be held in escrow if the wall that was removed

for reasons of health, safety and preservation of property needed to be restored within a 1-year period. Further discussions between the parties led to an agreement that there would be a $100,000 holdback.

[47] Mr. Ambrozuk testified that he forwarded Mr. Harold's email to Mr. Shaben. Mr. Shaben did not recall receiving it but acknowledged that he may have. Given that the subject line of Mr. Ambrozuk's September 12, 2017 email to Mr. Shaben is "FW: 9910-110 St. Wood Law" (the FW meaning "Forward") and considering that the time of Mr. Harold's email was 3:17 p.m. and Mr. Ambrozuk's email to Mr. Shaben was sent at 3:35 p.m., it is more likely than not that Mr. Harold's email was forwarded on to Mr. Shaben with Mr. Ambrozuk's email.

(b) Preparation of Addendum

[48] The Offer contemplated a condition removal date of November 15, 2017. If the two conditions in favour of 119 were not removed by 5:00 p.m. on that date, then, according to the terms of the Offer, the agreement for sale of the Property would not proceed.

[49] On that date, Mr. Shaben sent a first draft of the Addendum to Mr. Ambrozuk at 9:40 a.m. The draft Addendum was sent by Mr. Ambrozuk to Mr. Harold at 10:08 a.m.

[50] At some point later in the day, Mr. Shaben contacted Mr. Ambrozuk and told him not to worry about having 152 sign the first version of the Addendum. Mr. Shaben advised that he was going to send a second version of the Addendum for signature. Mr. Shaben testified that a second version of the Addendum was sent as more clarity was required than was provided for in the first version.

[51] The second and final version of the Addendum was signed by 152 prior to 5:00 p.m. on November 15, 2017. Accordingly, 119 lifted the conditions and the sale of the Property went on to close on or about January 19, 2018. 152 did not suggest any revisions to the Addendum prior to signing.

(c) Post-closing events

[52] After the sale of the Property closed, 119 carried on with its plans to renovate the Property. On January 24 and 25, 2018, NEXT undertook a detailed building assessment and developed a conservation plan for the Property. Mr. Laforge remained involved in the development of the renovation plans on behalf of Alberta Culture.

[53] Mr. Laforge prepared a Provincial Historic Resource Project Pre-Certification dated October 26, 2018. This document contained a detailed description of all the interventions proposed for the Property. Intervention 1 was described as "third floor masonry wall repairs and new exterior wall access points". The description included the following statement: "One of the first steps will be to reverse the physical damage on the third floor caused (without approval) by the previous owner. An extant masonry opening was widened without proper support and will need to be reinstated. The room that it leads to is proposed to be a conference room that will require a larger door opening to allow for barrier-free access." The intervention type was described as "Rehabilitation*"*.

[54] On October 31, 2018, the Province issued a Project Approval allowing 119 to proceed with the work described in the Project Pre-Certification document. The work being done to the Property was much more extensive than just the Lintel Work. The Project Approval summarized the interventions as "third floor masonry wall repairs and revisions; new exterior wall access points;

interior rehabilitation and layout revisions; elevator and stairwell edition; window and exterior element repairs; landscaping; and electrical/mechanical systems."

[55] The costing initially prepared by NEXT was for all of the work being done to the Property. After the work was completed, 119 asked NEXT to prepare a scope of work document that detailed only the Lintel Work. The scope of work document dated February 27, 2019, and described as "Oblates Mansion – Repair of Historic 3rd Floor Opening", set out the cost of the work done by NEXT in relation to the third-floor window and wall at $15,200. Mr. Morgan confirmed that this amount was paid by 119.

[56] Similarly, Delnor was asked to prepare costing related to the Lintel Work. The Re: line in Delnor's costing document states "Structural Repairs and Associated Restorations on the 3rd floor of the Oblates Mansion/Tarrabain Law". Delnor's costs in this regard amounted to $78,801.25. This amount did not include GST. GST amounted to $3,940.00. Mr. Sousa prepared the costing based on quotes received from the various subtrades who were engaged in the repairs to the third-floor window and wall. The quotes were broken out from the larger quotes provided for the entirety of the project work being done to the Property. Mr. Sousa confirmed that this amount was paid by 119.

On receipt of the costing information for the Lintel Work from NEXT and Delnor, 119 sought release of the holdback from 152 in the amount of $97,941.25 ($78,801.25+$3,940+$15,200). 152 declined to release the holdback. Mr. Harold testified that there was no basis on which to release the holdback as there was no evidence as to what had been done, at what cost or at whose direction.

I. Issues

(1) Was the cost of the Lintel Work already accounted for by a $100,000 reduction in the purchase price of the Property?

(2) Is 119 entitled to a release of holdback funds pursuant to the Addendum?

a) Was the Lintel Work excluded, either expressly or implicitly, from the scope of the Addendum?

b) Did 152 undertake "renovations commenced by the seller" as contemplated in the Addendum?

c) Was direction received from the City of Edmonton, Province of Alberta or any other heritage or historical organizations or architect/engineer to remedy the renovations commenced by the seller?

d) Did 119 commence the Lintel Work as directed within one month?

e) Did 119 provide receipts for the Lintel Work or costs incurred forthwith on completion of the same?

I. Analysis

(a) Law on contractual interpretation

[57] Determining whether 119 is entitled to the holdback funds engages an exercise in contractual interpretation. The goal of the exercise is to ascertain the objective intent of the parties at the time the contract was made ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at para

49 ("***Sattva***"); ***Trico Developments Corporation v El Condor Developments Ltd***, 2020 ABCA 132 at para 28 ("***Trico***").

[58] When interpreting a contract, the Court 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. Consideration of surrounding circumstances recognizes that ascertaining contractual interpretation can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning: ***Sattva*** at para 47.

[59] In interpreting a contract, a trial judge must consider the relevant surrounding circumstances even in the absence of ambiguity: ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 82 ("***IFP****").*

[60] Surrounding circumstances should consist only of objective evidence of background facts at the time of execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract: ***Sattva*** at para 58.

[61] Examining the surrounding circumstances allows a court to consider what a reasonable observer would have thought was the aim of the transaction, if that person knew the facts available to both parties at or before the date of contracting: ***541788 Alberta Ltd* v *Bourgeois & Company Ltd***, 2018 ABCA 310 at para 34 ("***541788****").*

[62] Negotiations preceding the conclusion of an agreement are also relevant to the extent that they shed light on the surrounding circumstances. While evidence of negotiations themselves may not be admissible as part of the factual matrix, nor generally are prior drafts of an agreement, evidence of negotiations is relevant insofar as that evidence shows the factual matrix, for example by helping to explain the genesis and aim of the contract. Moreover, written evidence of those negotiations is far more objective evidence of the parties' intentions than after-the-fact evidence from opposing parties about oral statements made during negotiations: ***IFP*** at para 85.

[63] Further, courts ought not to sanction contractual interpretations disconnected from economic reality. Commercial contracts should be interpreted in accordance with sound commercial principles and good business sense: ***Trico*** at para 29.

[64] While surrounding circumstances must be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement: ***Sattva*** at para 57. Further, examining the surrounding circumstances does not allow a court to receive direct evidence of intent, still less allow such evidence to contradict the contract or to create ambiguities: ***541788*** at para 35. Subjective evidence of a party's intentions does not determine the proper meaning of a contract: ***Sattva*** at para 59.

(a) Issues

(1) Was the cost of the Lintel Work accounted for by a $100,000 reduction in the purchase price of the Property?

[65] Prior to turning to the interpretation of the Addendum, I will address first whether or not the cost of the Lintel Work was accounted for by the parties through a $100,000 reduction in the purchase price of the Property.

[66] There is no dispute that the damage to the lintel and surrounding window and wall area was known to 119 prior to entering into the Offer. Mr. Harold testified that during the tours of the Property with prospective buyers, including 119, the damage to this area was the subject of much discussion. Mr. Harold indicated to all purchasers that 152 would be willing to put the damage back together before the sale.

[67] Mr. Harold initially recalled touring the Property with Mr. Morgan and Mr. Morgan indicating that it was not yet clear what would be done with the building in terms of renovation or re-design so that 119 did not require the damage to be fixed prior to sale. However, on cross-examination, Mr. Harold conceded that Mr. Morgan likely did not tour the Property until after the Offer was finalized.

[68] According to Mr. Harold, during the purchase negotiations, he was willing to reduce his sale price of $2,450,000 by $100,000 as 119 would be taking the Property on an "as-is where-is" basis. To him, this meant that the building was being purchased in its existing condition and 152 would have to do no work to it. There is no dispute that the term "as-is where-is" was added to the Offer at the same time as the purchase price was reduced by 152 from $2,450,000 to $2,350,000.

[69] Mr. Ambrozuk testified to the same understanding. He indicated that once he confirmed with Mr. Shaben that 119 did not want 152 to do any work, 152 was prepared to come back with a lower counteroffer because 119 would be buying the Property "as-is where-is". Mr. Ambrozuk indicated in his evidence that there was an email to that effect.

[70] However, as noted in ***IFP***, written evidence of negotiations is far more objective evidence of the parties' intentions than after-the-fact evidence about oral statements made during the negotiations. Similarly, written evidence of negotiations is more objective than after-the-fact evidence about a party's subjective understanding or intent. Accordingly, it is important to examine the emails exchanged between Mr. Shaben and Mr. Ambrozuk during the purchase negotiations.

[71] While there is some reference in the emails to the Property requiring a substantial renovation "today or in 5 years", the bulk of the e-mail discussion between Mr. Shaben and Mr. Ambrozuk appeared to revolve around the price point for the Property. In his July 19, 2017 email, Mr. Shaben indicated that 119 was initially firm at $2,100,000 but was prepared to bump up its offer to $2,250,000 as "[Ms. Tarrabain] understood [152]'s investments and motivation not to lose too much money". This is followed by a stated concern that the price per square foot is $246 which is characterized as "steep".

[72] Mr. Ambrozuk replied to Mr. Shaben on the same date and indicated that 152 was firm at $2,350,000. Mr. Ambrozuk also advised that he "looked into sale comps within 2017 for Office properties sold in Edmonton" and attached his findings for Mr. Shaben's review. Mr. Ambrozuk stated: "taking the average Suburban Office Sale, the average price is $250 per square foot. Taking the average Suburban Office condo sales, the average sale price is $350 per square foot". While there is a reference to Mr. Ambrozuk "being confident that the dollars spent within the building will be for the betterment of the property and in [his] opinion fully recoverable plus some if [119] ever chose to sell in the future", there is no express reference or clear implication that 152 is reducing the price in exchange for the purchase being made on an "as-is where-is" basis.

[73] Rather, the discussion is very much centered on the appropriate price point for the Property given market comparables and rates for square footage. By contrast, the tenor of the discussions is not that the price needs to be reduced to account for work that may need to be done on the Property.

[74] Further, when asked by his counsel whether the reason for the $100,000 deduction was ever explained to 119, Mr. Harold stated that he would have thought it was self-evident because the reduction in price appeared at the same time as the "as-is where-is" clause. Mr. Harold stated that he would not have taken $100,000 off the price if he had to do another $50,000 in work.

[75] For her part, Ms. Tarrabain does not recall any discussion about the "as-is where-is" term being added as a quid pro quo for 152 coming down in price by $100,000. Her understanding was that the $2,350,000 price was achieved through the normal back and forth of negotiation. Mr. Shaben understood the "as-is where-is" phrase to have been added to clarify that 119 would have to accept the title of the Property "as is where is" given that the title would retain the restrictions associated with the historical designations.

[76] Another matter for consideration is Mr. Harold's evidence that he arrived at the $100,000 price reduction on the basis of the costs that he would have had to incur to perform the Lintel Work. One of the estimates in evidence, for $49,069.35, is dated August 24, 2016, and to this extent, the Court accepts that this number could have been in Mr. Harold's mind at the time of the purchase price negotiations in July 2017. However, the second estimate on which Mr. Harold says he relied (the $20,455.20 estimate) to come up with the $100,000 deduction is dated September 12, 2017. Accordingly, it is difficult to see how Mr. Harold could have relied on this figure back in July 2017 when he was determining the price reduction.

[77] Rather, keeping in mind that the issue of a price reduction or holdback for the Lintel Work was first raised by 119 on September 11, 2017, and given that there is a second estimate for $49,069.35 dated September 12, 2017, and the $20,455.20 estimate is dated September 12, 2017, it is much more likely, based on the timing, that these estimates were relied on to determine the amount of the holdback which is the subject of the Addendum, rather than being figures relied on by Mr. Harold in assessing whether he was prepared to reduce the purchase price by $100,000 in July of 2017.

[78] Mr. Harold contends that it was plain that the price reduction was in exchange for the "as-is where-is" purchase. However, based on the lack of any express communication between the parties that the $100,000 was to cover the costs associated the Lintel Work, or even that the $100,000 price reduction was in exchange for the "as-is where-is" purchase; considering that at least one of the estimates on which Mr. Harold indicated that he based the $100,000 price reduction was not available to him at the relevant time; and given that the email discussions at the time were focused on the appropriate price for the Property in light of market comparables (and not in light of outstanding work that might have to be done to the Property), I am not prepared to find that the parties were in agreement at the time that the Offer was made that the cost of undertaking the Lintel Work was addressed by 152 agreeing to reduce the purchase price by $100,000.

[79] In reaching this conclusion, I have not ignored the fact that "as-is where-is" was added to the Offer at the same time as the price was reduced by $100,000. However, I do not read the "as-is where-is" clause to mean that, as of July 20, 2017, when the Offer was signed, 119 was bound to purchase the Property "as-is where-is" no matter what. If that was the case, then it would have rendered the condition precedent for a satisfactory inspection of the Property meaningless. The

Offer was plainly conditional on 119 obtaining a satisfactory inspection of the Property. If that condition was not satisfied in the timeframe specified, then the Offer itself provided that the respective rights and obligations of 119 and 152 as set out in the Offer would be "fully terminated and cancelled".

[80] The "as-is where-is" clause can be read together with the condition precedent in that once the condition for satisfactory inspection was met and the condition lifted in accordance with the terms of the Offer, only at that point would 119 be purchasing the Property on an "as-is where-is" basis.

[81] Further, given that at the time the Offer was signed in July 2017, 119 had not yet completed an inspection and did not yet have a thorough understanding of what might be involved in carrying out the Lintel Work or what the associated costs might be, it seems very unlikely that it would have agreed during purchase negotiations that the $100,000 price reduction was provided as compensation for having to carry out the Lintel Work. Further, it is clear that Alberta Culture had not yet had any involvement in assessing the Lintel Work and accordingly 119 did not have the benefit of Alberta Culture's guidance on how the Lintel Work should be undertaken or what it might cost.

[82] While 152 may be of the view that the $100,000 price reduction was intended to cover the Lintel Work, the objective evidence does not support that that was the agreement of the parties when it reached the final terms of the Offer. Mr. Harold's subjective understanding of what led him to reduce the purchase price by $100,000 cannot override the objective evidence surrounding the purchase negotiations.

[83] It follows then that the notion that the $100,000 price reduction was intended to cover the Lintel Work was not an "objective fact known to both parties" at the time of entering the Addendum.

[84] Given the importance of considering surrounding circumstances when interpreting the Addendum, it was necessary to determine whether the $100,000 price reduction was intended to cover the Lintel Work. Had the parties come to an agreement in this regard, the fact of this agreement could well have been a significant "objective fact" in informing the scope and interpretation of the Addendum. However, as I have determined that there was no such agreement, I need not consider the impact of any such agreement on the interpretation of the Addendum.

(2) Is 119 entitled to a release of holdback funds pursuant to the Addendum?

[85] I turn now to the interpretation of the Addendum. The analysis must begin with the words of the Addendum and the intent of the parties at the time they entered into the Addendum: ***Trico*** at para 34. The language of the Addendum contemplates a number of different elements for its operation: renovations being commenced by the seller; direction being received from Alberta Culture or the City of Edmonton to carry out the Lintel Work; the Lintel Work being commenced within one month of the Alberta Culture or City of Edmonton direction; and receipts being provided by 119 for the cost of the Lintel Work. Each of these elements will be discussed in turn.

(a) Was the Lintel Work excluded, either expressly or implicitly, from the scope of the Addendum?

(i) The Lintel Work was not expressly excluded from the Addendum

[86] Mr. Harold was clear in his evidence that he did not understand 119's concern in requesting the Addendum to be the Lintel Work. Rather, he understood 119's concern to be the bathroom drainage and leaky plumbing. Further, in his Questioning (read in at trial), Mr. Harold stated as follows when responding to a question about specific discussions that occurred while drafting the Addendum: "I don't believe that there was any detailed discussion regarding the meaning of those things, but I can tell you our realtor specifically called their realtor and excluded that lintel. That is not part of this amendment. It was specifically excluded by our realtor to their realtor."

[87] While that may have been Mr. Harold's recollection, I do not accept that the Lintel Work was expressly excluded from the scope of the Addendum. There is no express language in the Addendum which purports to exclude the Lintel Work. The Addendum refers only to "renovation of the third floor of the property". There is no limiting wording to suggest that the "renovation of the third floor of the property" applies only to the work done with respect to the bathrooms or elsewhere on the third floor and not the work done to the wall or to the lintel. Rather, the express language of the Addendum is broad and is sufficient to capture any "renovation of the third floor of the property".

(ii) The Lintel Work is not implicitly excluded from the Addendum

[88] Even if the Addendum does not expressly exclude the Lintel Work, 152 takes the position that it was nevertheless implicitly excluded from the Addendum because 152 was not the party that cut and removed part of the lintel. Rather, any damage caused to the lintel or, perhaps more aptly, any renovations undertaken to the lintel (presumably by cutting into it) were carried out by Bosco Homes and not 152. Therefore, any "renovations commenced by the seller" could not include the lintel because the renovations to the lintel had been commenced by Bosco Homes and not the "seller" 152.

[89] 152 asserts that 119 ought to have known that 152 did not damage the lintel because 152 sued Bosco Homes, in part with respect to the damage caused by the lintel. 152 states that the lawsuit against Bosco Homes was disclosed to 119 during the due diligence phase. The fact of the lawsuit was further referenced in Mr. Harold's September 12, 2017 email which was forwarded to Mr. Shaben by Mr. Ambrozuk as part of the negotiations surrounding the Addendum. 152 submits that, with this knowledge in hand, 119 would have known or ought to have known when it negotiated the Addendum that the Addendum did not include the Lintel Work because the renovations to the lintel wall were commenced by Bosco Homes and were not "renovations commenced by the seller".

[90] Neither Mr. Shaben nor Ms. Tarrabain recalled seeing the Statement of Claim against Bosco Homes during the due diligence phase. 119 asserts that it was impossible for it to know who had caused the damage to the lintel. From their perspective, it could have been 152 just as easily as Bosco Homes.

[91] I agree here with 119. To the extent that 152 relies on references to the Statement of Claim as clothing 119 with the knowledge that Bosco Homes commenced the renovations with respect to the lintel, I do not find this reasonable. First, the Statement of Claim contained only 152's allegations against Bosco Homes. None of the claims were proven in court as the claim was discontinued. Second, while there is a portion of the claim that refers to Bosco Homes removing sections of a load bearing wall, the word lintel is not specifically mentioned in the claim. In the circumstances, I do not view the references to the Statement of Claim or the Statement of Claim

itself as providing sufficient notice to 119 that the Lintel Work was excluded from the scope of the Addendum.

[92] Finding otherwise would be to put 119 through the exercise of essentially conducting a treasure hunt. It was not for 119 to string the pieces together, connect the dots, and conclude, for the purposes of the negotiation of the Addendum, that 152 was of the view that Bosco damaged the lintel and therefore any renovations commenced to the lintel wall were commenced by Bosco and therefore the renovations were not commenced by the "seller" (i.e.152) and therefore the Lintel Work is excluded from the scope of the Addendum. To require this amount of sleuthing by 119 is not a reasonable exercise of commercial interactions.

[93] The fact is that 119 was contracting with 152. 152 had custody and ownership of the Property, which included a damaged lintel on the third floor. If 152 had intended that the Lintel Work be excluded from the scope of the Addendum, it was open to 152 to use clear and express language to that effect.

(iii) Exclusion of the Lintel Work is not consistent with the surrounding circumstances

[94] Further, exclusion of the Lintel Work from the scope of the Addendum is not consistent with the surrounding circumstances. During argument, counsel for 152 reinforced that the Addendum was meant to apply in circumstances other than with respect to the Lintel Work. By way of example, counsel stated that if 152 had knocked down walls to get at the pipes and those walls were historically significant and had to be restored, that work would be caught by the Addendum. Counsel gave another example with respect to the alignment of the hall and noted that if the bathroom demolition had disrupted the alignment and government officials indicated that the walls had to be replaced, then the Addendum would trigger.

[95] Counsel explained 152's view of the Addendum as a request by 119 to deal with the unknown. He stated that the Addendum was speculative and designed to address 119's fear of the unknown should further issues arise when they were undertaking their renovation to the Property.

[96] I pause to note here that the idea that the Addendum was negotiated to address 119's fear of the unknown appears to be somewhat inconsistent with the fact that the Property was purchased on an "as-is where-is" basis after conditions were removed. Having insisted that the Offer include the "as-is where-is" provision, it seems unlikely that 152 would have gone on to negotiate an Addendum which provided 119 with up to $100,000 in the event it discovered unknown issues during the renovation. Similarly, for its part, if 119 had legitimate concerns about unknowns that might be revealed during its renovations, it seems unlikely that 119 would have agreed to a $100,000 cap in the Addendum to cover unknown issues without having any sense of the scope or costs of these unknowns.

[97] Rather, in all the circumstances, it seems much more likely that the Addendum was negotiated with the specific concern of the Lintel Work in mind. Indeed, a review of the objective evidence set out in the emails which led to the negotiation of the Addendum supports this conclusion.

[98] As noted earlier, the issue was first raised by Mr. Shaben in a September 11, 2017 email to Mr. Ambrozuk. In that email, he advises Mr. Ambrozuk that the Alberta Culture and City representatives raised a concern with the "work that was attempted on the top floor". He advises that "given the uncertainty of the work done and the concern about the levels of government coming back to my client for penalties, we feel a reduction is necessary." Mr. Shaben confirms

that 119 won't be proceeding with the purchase unless 152 is prepared to pull back the price by $150,000 "to make up for the structural work that has to be done and the potential liability of removing any historical designation materials that may need to be restored."

[99] Mr. Ambrozuk replied the next day and advised that 152 was proposing that $50,000 be held in escrow "if the wall that was removed for the reason of health, safety and preservation of property needed to be restored within a certain period of time". He went on to state "I think this is a great property for your client and hope that they reconsider their position as we are dealing with something that may or may not be an issue for them in the first place, and if it is we are putting money into escrow to deal with the issue should it arise."

[100] The language used in these emails is significant. The work is referred to by Mr. Shaben as "structural work" and work that "was attempted on the top floor". There is no evidence before me of any structural work which was required on the top floor beyond the wall with the broken lintel. Similarly, Mr. Ambrozuk referred to the "wall that was removed". Again, it is apparent that the wall being discussed is the wall with the broken lintel.

[101] Notably, none of the emails expressly refer to the bathroom work on the third floor or any other aspects of the third floor that might need to be addressed beyond the "structural work" and the "wall that was removed" (i.e. the Lintel Work).

[102] When asked what he understood Mr. Shaben to be referring to in his September 11, 2017 email when he used the term "work done", Mr. Harold testified that he did not understand the work done to be the lintel wall, but the main concern was bathroom drainage.

[103] During cross-examination, Mr. Ambrozuk was similarly asked what he understood the work that was being referred to in these emails to mean. He repeatedly indicated that he could not recall as the events had taken place in 2017. When pressed, he acknowledged that the lintel was a structural item, but he did not want to comment on something that occurred in 2017.

[104] The email thread between Mr. Shaben and Mr. Ambrozuk, which initiated the discussions surrounding the Addendum, plainly referenced the Lintel Work. Not only was the Lintel Work referenced in the email exchanges, but it appeared to be the main impetus for the Addendum. There are no express references in the email exchanges to concerns about the work done to the bathrooms or other areas of the third floor.

[105] Indeed, it is difficult to understand how 152 would have formed the view that 119's concern in negotiating the Addendum arose from the bathroom issues or other areas of the third floor unrelated to the wall and the broken lintel. At the time of the negotiation of the Addendum, 119 had in hand a property inspection report which identified "Significant Issues" with the metal support lintel and accompanying structural issues. No other aspect of the third floor was given a condition rating as serious as "Significant Issues". While I appreciate that the inspection report may not have been shared with 152, it is difficult to conceive in the circumstances that 119 would have been communicating concerns about the bathroom issues to 152 or requiring an addendum to address the bathroom issues when the inspection report clearly identified the lintel issue as the most significant and pressing concern.

[106] Further, two quotes for work were prepared by 152, both dated September 12, 2017. According to Mr. Harold's evidence, the quote for $49,069.35 was to restore the bathrooms and the quote for $20,455.20 was to fix the wall with the cut lintel. If the Lintel Work was intended to be excluded from the scope of the Addendum, then it begs the question why Mr. Harold was

preparing cost estimates for the Lintel Work the day after Mr. Shaben first raised the issues that led to the negotiation of the Addendum.

[107] While 152 may hold a subjective belief that the Lintel Work was excluded from the scope of the Addendum, the surrounding circumstances compel the opposite conclusion.

[108] Having determined that the Lintel Work was included in the scope of the Addendum, I turn now to address whether there were "renovations commenced by the seller" that triggered the application of the Addendum in the present case.

(b) Did 152 undertake "renovations commenced by the seller" as contemplated by the Addendum?

[109] The operation of the Addendum is premised in part on there being "renovations commenced by the seller". Much was made during the course of the trial over the meaning of "renovations" and whether or not 152 had made any renovations to the third floor. It was noted in the evidence that there is no industry-accepted standard definition of "renovations".

[110] There is no dispute between the parties that certain steps were taken by 152 with respect to the area around the lintel on the third floor of the Property. As noted in Mr. Harold's testimony, he conducted a "destructive investigation" which included opening up the wall and exposing the area around the window and the lintel to determine what was causing the drywall to ball out. In response to what he discovered, Mr. Harold installed jack beams as temporary shoring supports to spread the load across the floor and ceiling. Mr. Harold stated that the roof was compromised by the cut lintel, and he addressed that concern by installing the tele posts. He indicated that the next step would have been to repair the lintel itself and that masonry would be required to fix the brick wall.

[111] 152 took the position throughout that it had not carried out any "renovations" to the third floor. Rather, the steps taken by 152 were "emergency work" necessary for the preservation of health and safety. During argument, counsel for 152 asserted that too much was being read into the word "renovations". He suggested that the case remained exactly the same if the word "work" was used to replace renovations. According to counsel, 152 did not do "work". It did not commence any major construction. However, it is not clear that substituting the word "work" for "renovation" assists 152. Rather, in my view, "work" is an even broader term than "renovation" and would be capable of capturing work done of any nature whether for emergency purposes or not.

[112] In determining whether there were "renovations commenced by the seller", I find assistance from a description of renovations provided by Mr. Harold during his testimony. While he was clear that he did not view the steps he had taken as renovations, he also stated that "renovation starts with removing something. And then putting something back. We did not do any renovations to put it back."

[113] The evidence is clear that 152 did not do any renovations to restore the steps taken by the "destructive investigation". Indeed, this made good sense, as noted by both parties, when 119's plans for the Property were still unknown and any work undertaken by 152 to restore the damage from the destructive investigation might have been redone by 119 in any event when its plans for the Property were finalized.

[114] However, I find that 152 did start the renovation process by removing the drywall and brick around the lintel area and by installing the tele posts. That it was this work that was contemplated

by the Addendum is underscored by the parties' use of the words "renovations commenced by the seller". The parties did not use the words "renovations carried out by the seller" or "renovations completed by the seller". The parties specifically used the words "renovations commenced by the seller". In my view, taking down the wall, removing the bricks and clay blocks and installing the tele posts were "renovations commenced by the seller". It was not necessary for the renovations to be completed in order for the Addendum to trigger.

[115] Further, the difficulty with 152's proposition that it did not commence any renovations, is that, if it were correct, it would lead to a situation where, as noted by counsel for 119, the Addendum was not worth the paper it was written on.

[116] A plain and ordinary reading of the Addendum reveals that it contemplated two outcomes. The first outcome provided that "in the event that direction is received from the City of Edmonton, Province of Alberta, or any other heritage or historical organizations or architect/engineer to remedy the renovations commenced by the seller, the purchaser shall commence such renovations as directed within 1 month and shall provide receipts for such renovations or costs incurred forthwith upon completion of the same". The second outcome provided that in the event the City of Edmonton, Province of Alberta, any other heritage or historical organizations, and architect/engineer all approve the third-floor renovations as commenced by the seller, the holdback shall be forthwith released to the seller.

[117] Either outcome turns on there being "renovations commenced by the seller". If 152 was of the view at the time that the Addendum was being negotiated that it had never commenced any renovations, then it was negotiating an Addendum that it knew could never be triggered.

[118] It cannot be the case that the parties intended to negotiate a hollow promise. At best, this would be viewed as commercially unreasonable and at worst, this would be viewed as bad faith.

(a) Was direction received from the City of Edmonton, Province of Alberta or any other heritage or historical organizations or architect/engineer to remedy the renovations commenced by the seller?

[119] As noted, a plain and ordinary reading of the Addendum reveals that it contemplated two outcomes. The first outcome provided that in the event that direction is received from the City of Edmonton, Province of Alberta, or any other heritage or historical organizations or architect/engineer to remedy the renovations commenced by the seller, the purchaser shall commence such renovations as directed within 1 month and shall provide receipts for such renovations or costs incurred forthwith upon completion of the same. The second outcome provided that in the event the City of Edmonton, Province of Alberta, any other heritage or historical organizations, and architect/engineer all approve the third-floor renovations as commenced by the seller, the holdback shall be forthwith released to the seller.

[120] It was clearly known to both 119 and 152 at the time of entering into the Addendum, by virtue of the Property's historical designations and the associated encumbrances on title, that 119 could not take any steps to destroy, disturb, alter, restore, repair, or remove any historic object without the approval of the historical authorities, namely, in this case, Alberta Culture.

[121] In other words, both parties contemplated the involvement of Alberta Culture. The question was whether Alberta Culture's involvement would lead to the first outcome, or the second outcome as contemplated by the Addendum. There is no question that the second outcome contemplated by the Addendum did not come to pass. There was no approval by the City, Alberta Culture, or any

other heritage or historical organization of the work undertaken by 152 as it stood at the time of purchase. Indeed, Mr. Laforge testified that the shape of the lintel and the wall at the time of the purchase of the Property was a perfect example of what not to do to a mason wall.

[122] There can be no doubt that the process commenced by 152 could not be allowed to remain as it was. The renovations that were commenced had to be completed. Mr. Sousa testified that occupancy for the Property would not have been granted without the Lintel Work being undertaken. As such, I must determine the intention of the parties with respect to the first outcome set out in the Addendum.

[123] The parties appear divided on whether the direction received was intended to be direction to carry out the work in the first place or whether it was direction on how to carry out the work that would clearly be taking place. In other words, did the parties intend that the direction from Alberta Culture would amount to guidance or supervision or did the direction have to amount to an instruction or order?

[124] A review of the surrounding circumstances known to the parties at the time of the drafting of the Addendum is helpful in determining the parties' intention with respect to the term "direction".

[125] In the initial September 11, 2017 email that triggered the discussions around the Addendum, Mr. Shaben advises that 119 has a concern about the levels of government coming back to his client for penalties and that a price reduction is required to "make up for the structural work that needs to be done and the potential liability of removing any historical designation materials that may need to be restored."

[126] In the email exchange between Mr. Harold and Mr. Ambrozuk on September 12, 2017, Mr. Harold states that "in preparation for a proposal to the City we had a structural engineer examine the building and design a fix for the wall. We prepared an estimate to restore the property back to its original configuration in case we were ordered to but have not been so instructed. The estimate is for $50,000 and is attached." He goes on to state "it is not reasonable to expect us to reduce the agreed price for something which may or may not happened. However, in the interest of accelerating the closing, we would be amenable to creating an escrow for the $50,000 to be used to restore the building to its original configuration, if so ordered."

[127] Based on his discussions with Mr. Harold, Mr. Ambrozuk went back to Mr. Shaben with the following advice: 152 is "proposing that $50,000 be held in escrow if the wall that was removed for the reason of health, safety and preservation of property needed to be restored within a certain period of time. My discussion with the vendor was framed around a one-year time period."

[128] Further, while initially agreeing under cross-examination that a project approval is a "written direction", Mr. Harold later clarified his understanding that a direction is a "formal legal document from an authority having jurisdiction saying this is wrong, you must fix it". He stated that if Alberta Culture was that worried about the steps that 152 had taken, he would have expected two things to happen. One, Alberta Culture would have issued a directive stating, "you have violated the *Act*, you must fix it" and two, Alberta Culture would have issued a penalty to 152.

[129] For its part, 119 takes the position that the Project Approval document issued by Alberta Culture (and the underlying Project Pre-Certification document) amounted to "direction" as contemplated in the Addendum. In considering this argument, I am mindful that when applying the ordinary and grammatical sense of the words, an approval is not necessarily the same thing as

a direction. However, a review of the substance of the Project Approval document reveals that it places specific conditions on how the work may be carried out by 119. In particular, there are three specific conditions that must be followed by 119 with respect to the third-floor masonry wall repairs. It is clear that 119 was not free to carry out the Lintel Work as it saw fit. The Lintel Work could only be carried out in the manner directed by Alberta Culture.

[130] Mr. Harold's understanding that the Addendum would trigger only where there is an order by Alberta Culture followed by a penalty does not appear consistent with the language of the Addendum itself. First, the Addendum does not use the term "order" and second, the Addendum is plainly not limited to the reimbursement of penalties. The Addendum specifically contemplates reimbursement for "any and all expenses, fees, penalties and any and all costs associated with the renovation of the third-floor property…". I am mindful here that Mr. Shaben's September 11, 2017 email initially referred to 119's concern about the levels of government coming back to 119 for penalties. However, the final language of the Addendum clearly expanded beyond a concern about penalties and included reimbursement for any and all expenses, fees, penalties, and costs associated with the renovation of the third-floor property.

[131] Considering both the language of the Addendum and the surrounding circumstances, I am satisfied that the parties did not intend that the application of the Addendum be limited to a scenario where City or the Province issued a penalty and a demand for corrective action. Rather, the parties intended that the Addendum would trigger in the event that Alberta Culture provided direction to 119 as to whether and how the Lintel Work needed to be carried out. Such direction was received in this case.

(b) Did 119 commence the Lintel Work as directed within one month?

[132] This issue was not the subject of any significant dispute between the parties during the trial. The Project Approval issued by Alberta Culture was dated October 31, 2018. It is unclear when specifically, the Project Approval was provided to Delnor. However, Mr. Sousa testified that Delnor had "boots on the ground" to commence the work in December 2018. He further testified that Delnor was in 6 months of "pre-construction" prior to physically commencing the work on site. This involved onboarding contractors and subtrades and reviewing drawings and construction options. Further, Mr. Sousa confirmed on re-direct that the Lintel Work was undertaken right at the beginning of the larger property renovation project. I accept that the "pre-construction" work was an essential part of carrying out the Lintel Work.

[133] Accordingly, I am satisfied, on the balance of probabilities, that 119 commenced the Lintel Work within one month of receiving direction from Alberta Culture.

(c) Did 119 provide receipts for the renovations or costs incurred forthwith on completion of the same?

[134] 152 took issue with the costing information for the Lintel Work provided to it by 119. 152 states that the costing information from Delnor and NEXT with respect to the Lintel Work was in the form of quotations and not in the form of receipts so as to fall with the scope of the Addendum. I agree that in the March 4, 2019 letter sent by 119 to counsel for 152 seeking release of the holdback that the costing information was described as "quotations". Further, when Delnor submitted the costing information to 119 by letter dated January 23, 2019, it likewise described the costing as a "quotation". However, the February 27, 2019 information from NEXT with respect

to the cost of the Lintel Work does not use "quotation" language. It simply refers to the information provided as "time commitment and cost".

[135] Mr. Sousa testified that he prepared the Delnor costing for the Lintel Work based on quotes that he obtained from the subtrades performing the work. He explained that these subcontractors were "absolutely" bound by the quotes that they submitted with respect to the cost of the work. In other words, there was a degree of certainty with respect to the costs incurred by the subtrades and a corresponding degree of certainty in terms of the cost of the Lintel Work charged to 119. Mr. Sousa explained that the costing information had been prepared in this manner as he had been asked to isolate the costs associated with the Lintel Work from the larger renovation project that was being undertaken at the Property. Delnor further confirmed in an email to 119 that 119 had paid all the costs associated with the quotation for the Lintel Work.

[136] Similarly, Mr. Morgan confirmed in his testimony that he had prepared the costing information for the Lintel Work by treating the Lintel Work as a standalone project. He further confirmed that 119 had paid NEXT for its costs associated with the Lintel Work.

[137] While the Delnor costing information was referred to as a "quotation", the evidence nonetheless supports a finding that the amounts set out in the costing information from Delnor and NEXT were costs related to the Lintel Work and were costs incurred and paid by 119 with respect to the Lintel Work. Further, it is difficult to conceive of any other reasonable way for this information to have been obtained given that the initial costing for the Lintel Work was prepared as part of the larger renovation being carried out at the Property. In these circumstances, it is highly unlikely that specific receipts related to only the Lintel Work would have been available in any event.

[138] In my view, in requiring 119 to provide receipts as contemplated in the Addendum, the parties intended that 119 would provide documented substantiation of the costs that it incurred with respect to the Lintel Work. The fact that the Delnor costing information is referred to as a quotation is simply a "form" issue and should not defeat the fact that 119 otherwise provided substantive confirmation to 152 of the costs it incurred with respect to the Lintel Work.

[139] Mr. Sousa further testified that once the Lintel Work was started it took about 10-15 days plus a wait of 6-8 weeks for materials in order to complete the work. Assuming the Lintel Work commenced shortly after the Project Approval was granted on October 31, 2018, it would have been completed likely around mid-January 2019. This timing makes sense given that the costing information was obtained from Delnor shortly after this, on January 23, 2019. The NEXT costing information was not provided until February 27, 2019. The costing information from both Delnor and NEXT was then provided to 152 by 119 on March 4, 2019. In these circumstances, I am further satisfied that the costing information was provided "forthwith" as required by the Addendum.

(d) Conclusion

[140] I have made the following findings with respect to the Addendum:

- The Lintel Work was not excluded, either expressly or implicitly, from the scope of the Addendum;
- 152 undertook "renovations commenced by the seller";
- Direction was received from Alberta Culture to remedy the renovations commenced by the seller;

- 119 commenced the Lintel Work as directed within one month; and
- 119 provided receipts forthwith for the Lintel Work as contemplated by the Addendum.

[141] Accordingly, having satisfied all the requirements of the Addendum, 119 is entitled to a release of the holdback funds in its favour.

[142] I will comment here on one further issue. Although not strenuously argued by counsel for 152, there was a suggestion during the course of the trial that the principle of *contra proferentum* should be applied against 119 as it was 119 who drafted the Addendum and provided it to 152 for signature. However, I do not find that this is an appropriate case for the application of *contra proferentum.*

[143] First, it is my understanding that an ambiguity must be found prior to the application of *contra proferentum*: ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37 at para 51. I have not found in this case that the Addendum was ambiguous.

[144] Second, while the evidence was clear that the parties were under some time pressure to have the Addendum signed given the impending condition removal date, there was no suggestion that 152 was under duress when it signed the Addendum or that it did not otherwise have an opportunity to contribute to the wording or negotiation of the Addendum. Counsel for 152 fairly conceded that 152 could have suggested changes to the Addendum if it so desired. Further, there was evidence that the parties had previously extended deadlines with respect to the sale of the Property so it is unclear why an extension to the condition removal date could not have been sought by 152 if it truly felt that it needed more time to consider the Addendum.

[145] In the absence of any duress, the Addendum was signed by two commercially sophisticated parties, each with their own realtor and access to legal counsel. *Contra proferentum* should not be applied where there are sophisticated parties, represented by lawyers and each had a meaningful opportunity to participate in the negotiation of the instrument: ***Royal Bank of Canada v Swartout***, 2011 ABCA 362 at para 48.

I. Conclusion

[146] The Plaintiff's claim is established. Having concluded that 119 satisfied all the requirements of the Addendum, 119 is entitled to a release of the holdback funds in the amount of $97,941.25.

[147] As the successful party in this matter, 119 is entitled to its costs of this action. If the parties cannot agree on costs, costs may be spoken to within 60 days.

Heard on the 9-12th of January, 2024.
Dated at the City of Edmonton, Alberta this 31st day of May 2024.

A.K. Akgungor
J.C.K.B.A.

Appearances:

Lisa K. Martens
for the Plaintiff

Robert D. Gillespie
for the Defendant