

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *M. & T. Johal Enterprises Limited v.*
1178789 B.C. Ltd.,
2025 BCSC 273

Date: 20250220
Docket: S242569
Registry: Vancouver

Between:

M. & T. Johal Enterprises Limited

Plaintiff

And

1178789 B.C. Ltd.

Defendant

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Hearing:

New Westminster, B.C.
January 15, 2025

Place and Date of Judgment:

Vancouver, B.C.
February 20, 2025

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Introduction

[1] The defendant, 1178789 B.C. Ltd. (the “Seller”) applies under the summary trial rule (Rule 9-7) for a declaration as to the interpretation of a key provision of a contract of purchase and sale between it and the plaintiff, M. & T. Johal Enterprises (the “Buyer”). The agreement concerns a parcel of land in Surrey that the Buyer intends to develop into a 45-unit townhouse complex. The sale is conditional upon the Seller constructing certain services to the lot boundary and filing a subdivision plan that legally creates the lot to be sold. The sale is to complete 45 days after these two conditions precedent are fulfilled (the “Completion Date”). Both conditions precedent require certain approvals from the City of Surrey and thus are not fully in either party’s control. The agreement sets an “Outside Date” of “February 29 [sic], 2022” by which the Buyer may elect to either terminate the contract if the Completion Date has not yet occurred or extend the Outside Date “for such period of time as the Buyer, in its sole discretion, deems advisable.”

[2] At issue in this application is whether the Buyer may extend the Outside Date more than once or whether it is confined to only one extension. The dispute arises because the two conditions precedent were not be fulfilled by the end of February 2022 (the original Outside Date) or by December 31, 2024 which is the first date to which the Buyer elected to extend the Outside Date. As the extended Outside Date approached, the Buyer purported to further extend the Outside Date but the Seller now says it has no right to do so and the contract has come to an end.

[3] For the reasons that follow, I find that the parties’ agreement does not limit the Buyer to only one extension of the Outside Date. Provided that the Buyer makes an election as contemplated in the relevant provision of the agreement, that provision does not provide for the automatic termination of the agreement on the Outside Date as the Seller argues.

Background

[4] The Seller owns a 4.76-acre lot at 18611 72nd Avenue in Surrey. By contract of purchase and sale dated January 15, 2021, the Buyer agreed to buy a proposed

2.045-acre subdivided portion of that lot for \$11.25 million. The sale is conditional upon the Seller registering a subdivision plan that legally creates the proposed subdivided lot and constructing certain offsite services to lot line. The Buyer plans to build a 45-unit townhouse complex on the lot and wants the offsite services needed for that development in place before it completes the purchase. Both the subdivision plan condition and the offsite services condition require certain approvals from the City of Surrey before the Seller can complete them.

[5] The contract of purchase and sale was made using the standard MLS form (the “Contract”). It provides for a first deposit of \$1,125,000 on removal of certain conditions precedent that were for Buyer’s sole benefit (not the conditions for the subdivision plan and offsite services). A second deposit of \$1,000,000 is due within seven days of the Seller receiving a draft servicing agreement from the City of Surrey.

[6] The Contract sets the completion date at 45 days after the subdivision plan is fully registered and the Seller has constructed the offsite services. It was set in this way because at the time the contract was made, neither party knew when the two conditions precedent might be fulfilled. Parm Garcha, the Seller’s principal, deposed that at the time the contract was signed, Surrey had not approved any servicing plans for the lot and no servicing agreement had been reached between Surrey and the Seller. Thus, Mr. Garcha was not aware of what specific offsite services would be needed or what specifications they would have to be constructed to. Mandeep Johal, the Buyer’s principal, deposed that he was aware that the Seller’s completion of the offsite services could be delayed due to Surrey’s requirements or other reasons. With this uncertainty, the Completion Date could not be ascertained at the time the contract was signed.

[7] After the parties signed the Contract, Mr. Johal became concerned that the terms did not adequately protect the substantial deposit the Buyer was required to pay. He worried that the construction of the offsite services or obtaining subdivision approval could take longer than the one or two years he anticipated and he wanted

to have an option to terminate the Contract and recover the deposit in the event completion was unduly delayed. To address this and other concerns with the Contract, the parties agreed to an addendum to the Contract (the "Addendum") that, among other things, set an "Outside Date" by which the Completion Date was to occur. If completion did not occur before the Outside Date, the Buyer could elect to either terminate the parties' agreement or extend the Outside Date "for such period of time as the Buyer, in its sole discretion, deems advisable."

[8] This new provision, found at Article 13 of the Addendum, is the one in dispute in this application. It reads as follows:

13. COMPLETION: The sale will complete at the appropriate Land Title Office (the "LTO") 45 days (45) days after the Seller has both:

- (a) Constructed the Offsite Services to the extent that the City is willing to issue building permit(s) for the construction of townhouses on the Property upon the receipt of acceptable plans; and
- (b) fully registered the Subdivision Plan which creates the Property [the "**Subdivision Registration**" and together with "Offsite Services", the "**Seller's Work**"],

(the "**Completion Date**"). The Seller will diligently pursue completion of the Offsite Services and registration of the Subdivision Plan and will promptly thereafter deliver written notice to the Buyer confirming same, and in the event that the Offsite Services are not fully completed by the Completion Date, the Seller will diligently pursue the completion of any incomplete aspects of the Offsite Services.

In the event that the Completion Date does not occur by February 29 [sic], 2022 (the "**Outside Date**"), the Buyer may elect within a reasonable period of time thereafter, at its sole discretion, to either:

- (a) terminate this Contract, in which case, the Seller will within 5 business days repay the Deposits to the Buyer, this Contract shall become null and void, and each of the parties hereto shall have no further obligations to nor rights against the other in respect of this Contract (but for greater certainty, the Option shall not be discharged from the title of the Property until such time as the Deposits have been repaid to the Buyer);
- (b) extend the Outside Date for such period of time as the Buyer, in its sole discretion, deems advisable.

[Emphasis added]

[9] At issue is the interpretation of the emphasized words. Specifically, the question is whether Article 13 permits the Buyer to extend the Outside Date more than one time or whether the parties' agreement comes to an end if the Completion Date has not occurred before the original or extended Outside Date.

[10] The Addendum and the Contract are to be read together but the Addendum prevails in the event of an inconsistency. I will refer to the Contract and the Addendum together as the "Agreement". I note the Outside Date specified in the Addendum – February 29, 2022 – does not exist since 2022 was not a leap year. However, the parties have treated the Outside Date as the last day of February in 2022 and neither party suggests the error has an impact on the Agreement.

[11] Neither the subdivision plan condition nor the offsite services condition was fulfilled by the end of February 2022. Thus, by letter dated March 15, 2022, the Buyer, through counsel (neither of whom were counsel on this application), gave notice to the Seller of its election to extend the Outside Date to December 31, 2023. That letter states in part:

We understand the Seller has not yet completed its obligations with respect to the construction of the Offsite Services and or arranged for the registration of the Subdivision Plan to create the Property.

Accordingly, in accordance with the paragraph 13 of the Addendum, **please accept this letter as notice that the Buyer has elected to extend the Outside Date to December 31, 2023**, without limiting the Buyer's option, at its sole discretion, to further extend the Outside Date.

[Emphasis in original]

[12] Neither the Seller nor its (then) lawyer specifically responded to this letter, including to the last sentence which purported to preserve a right to further extend the Outside Date.

[13] By December 2023, the two conditions were still unfulfilled such that the Completion Date would not occur by December 31, 2023. Thus, by letter dated December 14, 2023, the Buyer notified the Seller that it elected to *further* extend the Outside Date to December 31, 2024.

[14] There was no immediate response to this letter. The Seller continued to work with the Buyer on finalizing materials needed for building permits, clarifying information requested by the Seller's architects for the purposes of the offsite services, and selecting consultants and contractors who would build the offsite services and ultimately work with the Buyer on the development. On December 22, 2023, Mr. Garcha told the Buyer, through its realtor, that the Seller should be ready to close the purchase in the second or third quarter of 2024.

[15] However, on February 12, 2024, the Seller's new legal counsel wrote to the Buyer's former lawyers advising that the Seller "do[es] not accept that the Contract allows for a **further** extension at the buyer's election" or "afford the Purchaser the ability to further extend the outside completion date" [emphasis in original]. From the Seller's perspective, the Agreement came to an end when the extended Outside Date of December 31, 2023 passed without the Completion Date having occurred. It maintains the Buyer had no right under the Agreement to further extend the Outside Date. It advised the Buyer that it intended to bring a petition in this Court to seek an interpretation of Article 13 of the Addendum.

[16] The Buyer obviously does not agree with the Seller's interpretation. It commenced this action on April 19, 2024 seeking, among other relief, damages for breach of contract and specific performance. In view of this action, the Seller did not proceed with the petition but instead brought this summary trial application seeking the same relief it would have sought by petition. Although the Buyer initially maintained that the matter is not suitable for summary trial disposition, it has since abandoned that position.

[17] As of December 2024, the subdivision and offsite services conditions were still unfulfilled and on December 13, 2024, the Buyer sent another notice to the Seller purporting to further extend the Outside Date to December 31, 2026.

Issue

[18] The central issue is whether Article 13 of the Addendum restricts the Buyer to only one extension of the Outside Date such that the Agreement came to an end

once the extended Outside Date of December 31, 2023 passed without the Completion Date occurring.

Legal Principles

[19] This dispute invokes basic principles of contractual interpretation as articulated in *Sattva Capital Corp. v. Creston Molly Corp.*, 2014 SCC 53. In essence, contracts are to be interpreted by reading the contract as a whole and giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time the contract was formed: *Sattva* para. 47. The overriding concern is to determine the parties’ intent and the scope of their understanding. Justice Rothstein cautioned at para. 57 of *Sattva* that while evidence of the surrounding circumstances at the time the contract was made is relevant to deepen the court’s understanding of the parties’ mutual and objective intentions as expressed in the words of the contract, this evidence must not overwhelm the words used. He added:

[57] ...The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[58] The nature of the evidence that can be relied upon under the rubric of “surrounding circumstances” will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.

Discussion

Suitability for Summary Trial

[20] I am satisfied this matter is suitable for summary trial. Although it seeks a determination on a question only of contractual interpretation that may not fully dispose of the proceedings, it is an important point that will materially shape the balance of the case and could well lead to a resolution without further proceedings. As stated in *Tangerine Financial Products Limited Partnership v. Tangerine FP*

Investments Ltd., 2012 BCCA 521 at para. 29: “Issues of contractual interpretation are particularly amenable to resolution by way of summary trial.” The parties have tendered evidence of surrounding circumstances known to them at the time the Agreement was made and there are no material conflicts in that evidence. Further, as I have said, both parties now agree the issue is suitable for the summary trial.

[21] If I had a reservation, it is the bifurcation of the contractual interpretation issue from other matters in the pleadings and the potential for an appeal to proceed on one issue in advance of the rest of the case. However, the issue is so fundamental to the overall dispute that I am satisfied a decision on it now will assist in the efficient resolution of the larger dispute and that outweighs concerns about bifurcation.

Contractual Interpretation

[22] Turning to the substantive issue, the Seller argues that Article 13 of the Addendum fixes the Outside Date as a date certain by which the Agreement will come to an end. Further, it argues Article 13 “clearly and unambiguously” limits the Buyer to only one extension of that end date. It argues the Outside Date serves to “ensure that the temporary suspension of closing obligations was not open-ended” and that the Agreement terminated when those conditions were not satisfied by that date. It argues:

...the parties specified that if the Completion Conditions had not been met by the Outside Date, then the Contract was at an end. This was subject only to the Plaintiff’s limited right to extend the Outside Date once, as outlined in Section 13, in which case it would end on the expiry of that date.

[23] I cannot agree with this submission. While that Article 13 does not expressly contemplate more than one extension of the Outside Date, it also does not expressly limit the number of extensions. More importantly, there is nothing in Article 13 that brings the Agreement to an end unless the Buyer elects to terminate it or, perhaps, if the Buyer makes no election at all within a reasonable time after the Outside Date.

[24] There are two parts to Article 13. The first part sets the Completion Date at 45 days after the Seller fulfills the two conditions and requires the Seller to diligently pursue completion of those conditions. The second part, which introduces the

Outside Date, specifies what is to happen if the Completion Date does not occur by February 29 [sic] 2022, which is then defined as the “Outside Date”.

[25] Contrary to the Seller’s argument, there is nothing in that second part of Article 13 that brings the Agreement to an automatic end if the Completion Date does not occur before the Outside Date. Rather, it triggers an election that the Buyer may make within a reasonable time after the Outside Date to either terminate the Agreement or extend the Outside Date. If the Buyer elects to terminate, the Agreement comes to an end and the Buyer is entitled to a refund of its deposit within five days. If the Buyer elects to extend the Outside Date, the Agreement remains in force and a new “Outside Date” is set. Both the election itself and the fixing of the new Outside Date are in the sole discretion of the Buyer.

[26] In other words, the second part of Article 13 is about the Buyer’s election to terminate or continue the Agreement. If the Buyer does not make an election within a reasonable time after the Outside Date, the contract would presumably come to an end. However, Article 13 is not about fixing an automatic end to the Agreement, it is about the buyer’s election to either terminate or continue with the Agreement. To read it as automatically bringing an end to the Agreement at the Outside Date would be to imply a term that simply is not there.

[27] In this respect, the Outside Date in this Agreement is different to the outside dates in *A & G Investment Inc. v. 0915630 B.C. Ltd.*, 2014 BCCA 425 and *Peier v. Cressey Whistler Townhomes Limited Partnership*, 2012 BCCA 28, both relied upon by the Seller. The contracts in those cases, like the present one, identified an uncertain completion date that was contingent upon the fulfillment of certain conditions precedent. However, unlike this Agreement, those contracts also stated they would come to an end if completion had not occurred by the outside date.

[28] For example, in *A & G Investments* the relevant provision of the contract read:

It is a condition precedent (the “**Condition Precedent**”) of this Contract that items (b) (i), (ii), (iii) and (iv) above will be completed prior to the Completion Date, subject to extensions to the Completion Date pursuant to paragraph 5 and 6. In the event that the Condition Precedent has not been met by the

later of December 31, 2013 (the “**End Stop Date**”), or such other revised Completion Date pursuant to paragraph 5 and 6, the Contract shall come to an end, the Deposit shall be refunded to the Buyer and neither party will have any further obligation to the other.

[Bold in original, emphasis added]

Elsewhere, the contract gave the seller the option to extend the completion date but not the End Stop Date.

[29] This provision is materially different to Article 13. Article 13 does not say “the contract shall come to an end” on the Outside Date if the Completion Date does not occur by then. It says the Buyer may make an election within a reasonable time after the Outside Date to either terminate the Agreement or extend the Outside Date.

[30] Likewise, in *Peier*, the contract set an outside date by which it would come to an end if the completion date had not occurred. The Seller had an option to extend the outside date but only by a maximum of 120 days. Unlike the present case, neither party was given the option to either terminate the contract or extend the outside date beyond the stated 120 day option.

[31] In other words, the outside dates in *A & G Investments* and in *Peier* automatically terminated the contract whether it was on the original outside date or an extended date. Neither party to the contracts in those cases had the discretion to decide on the outside date if the contract terminated or was extended. By contrast, the Outside Date in this case puts the Buyer to an election to decide, in its sole discretion, whether to terminate or continue the contract after that date. It says nothing about automatic termination.

[32] The Seller also points to the requirement that an election must be made “within a reasonable period of time” after February 29 [*sic*], 2022. It argues that a further election to extend the Outside Date for a second time (here made on December 15, 2023) is not “a reasonable period of time” after February 29 [*sic*], 2022. However, by operation of the express language of Article 13, once the first election is made, the “Outside Date” is extended to a new date. That new date is still defined as the “Outside Date” but it now falls on a later date in the calendar. If the

Completion Date does not occur before the new Outside Date, the Buyer will again be put to an election within a reasonable period of time after the new Outside Date and the process continues.

[33] I would add that once the Buyer makes an election to continue the Agreement and sets a new Outside Date, it is bound to complete the Agreement once the conditions precedent are fulfilled and the Completion Date arrives, provided that happens before the extended Outside Date. Thus, the Seller receives the benefit of certainty once the Buyer selects a new Outside Date.

[34] The Seller also argues that the parties could not have intended for the Buyer to have the unlimited option to extend the Outside Date as many times as it wishes. It argues this would lead to a commercially absurd result in which the parties' contractual obligations might be suspended indefinitely. On its face, this argument appears to have some merit. One might envision a hypothetical scenario in which the city council withholds approval of the subdivision or development plans such that the Seller cannot fulfill the conditions precedent. The Buyer might then use the right of election to keep the Agreement and the property suspended at the Seller's expense for property taxes and carrying costs, perhaps awaiting the election of a more sympathetic city council.

[35] However, while this scenario is imaginable, it is improbable. At some point, Surrey will decide on the subdivision plan and the proposed development. If it rejects either, the Seller will be unable to fulfill the conditions precedent under Article 13 and the Agreement will necessarily be at an end since completion will no longer be possible. It seems highly unlikely that Surrey would simply not respond to the subdivision and development plans.

[36] There is no doubt that Article 13 could have been better drafted. It would have been preferable for it to clearly state that the Buyer could extend the Outside Date more than once or that the number of extensions was limited as was done in *Peier*. However, this does not necessarily make it ambiguous. An ambiguity exists only where "on a fair reading of the agreement as a whole, two reasonable interpretations

emerge such that it cannot be objectively said what agreement the parties made”: *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459 at para. 26. That is not the case here. The Seller’s proposed interpretation of Article 13 is not supported by the ordinary and grammatical meaning of the words in that provision, read in light of the entire Agreement. Rather, as I have said, the provision puts the Buyer to an election as to whether to terminate the contract or extend the Outside Date. The agreement would likely come to an automatic end if the buyer made no election under Article 13 within a reasonable time after the expiration of the Outside Date, but that is not what happened here.

[37] In my view, the interpretation I have outlined is the ordinary and grammatical meaning of Article 13. That interpretation is consistent with the surrounding circumstances known to the parties at the time they made the Agreement and, specifically, the Addendum. The unchallenged evidence is that the Outside Date provisions were introduced through the Addendum to address the Buyer’s concern about indefinitely tying up the deposit. The wording of Article 13 clearly favours the Buyer in that only the Buyer can extend the Outside Date and can do so for “such period of time as the Buyer, in its sole discretion, deems advisable”. This gives the Buyer considerable discretion in extending the Outside Date. There is no evidence that the Seller was concerned about fixing an Outside Date for its benefit. Again, had that been the parties’ intention, one would expect to see a clause like the ones found in *A & G Investments* and *Peier*.

[38] The Seller further argues its interpretation of Article 13 is supported by an option to purchase that was prepared concurrently with the Agreement and filed in the Land Title Office. Under the Contract, the Seller agreed to allow the Buyer to register an option to purchase on the title of the parent property that is to be subdivided. The Addendum sets out more particulars of the option, including that the Agreement prevails over the option if there are any inconsistencies.

[39] The option provides that the Buyer may exercise the option at any time on or before 4 p.m. on the “Closing Date”, defined in the option as February 29, 2022.

That, of course, is the Outside Date in the Addendum. The Seller argues this supports its argument that the parties intended February 29, 2022 to be a true Outside Date.

[40] I disagree. The option is not required to give effect to the transaction since the Agreement itself binds the parties to the sale. Neither party made submissions on the purpose of the option but I infer it was to ensure the priority of the Buyer's right to purchase the lot was secured under the Land Title Registry, pending completion. To the extent the option is to be read alongside the Agreement, the two are inconsistent in that the option makes no provision for the Buyer extending the February 29, 2022 "Closing Date" even once whereas that is clearly provided for in the Addendum. As noted, the Agreement prevails over the option in the case of an inconsistency. Moreover, Article 3.1 of the option states that it "does not replace or modify the terms of any other agreement between the parties hereto ... made in respect of the Property". I find the option is not of assistance in interpreting the Agreement.

[41] Finally, the Buyer points to evidence of the Seller continuing to treat the Agreement as being in force after the Buyer gave notice of the second extension of the Outside Date. It argues this conduct is evidence of the parties' mutual understanding and intention that the Buyer could elect to extend the Outside Date more than once. In my view, it is neither necessary nor desirable to look at subsequent conduct to ascertain the parties' mutual intention in this case. As the Court of Appeal said in *Wade v. Duck*, 2018 BCCA 176 at para. 28, evidence of subsequent conduct should only be admitted if the contract remains ambiguous after considering the text and the factual matrix surrounding its creation. Even then, such evidence must be treated with significant caution: *Wade* para. 30. As I have said, while Article 13 could have been better drafted, I do not find it ambiguous and it is unnecessary to consider evidence of subsequent conduct.

Conclusion

[42] In summary, I find that the ordinary and grammatical meaning of the words of Article 13 of the Addendum, read in light of the entire Agreement and the

surrounding circumstances at the time the Agreement was made, leads to the following interpretation: the Outside Date, so defined, is the date that triggers the Buyer's right to elect to either terminate the contract or set a new Outside Date. There is nothing in Article 13 that brings the Agreement to an automatic end at the Outside Date, be it the original Outside Date or the extended one, unless perhaps the Buyer makes no election within a reasonable time after the Outside Date. If the Buyer elects to extend the Outside Date, more time is given to fulfill the conditions precedent in Article 13 and thus to trigger the Completion Date. The Buyer remains obligated to complete the transaction if the Completion Date arises before the extended Outside Date arrives. If the Completion Date does not occur before the extended Outside Date, the Buyer is again put to the election of terminating the Agreement or extending the Outside Date.

[43] If events unfold so that the conditions precedent in Article 13 cannot be fulfilled (i.e., if Surrey declines to approve either the subdivision or the development plans), the Agreement will necessarily come to an end because the conditions needed to trigger the Completion Date will not materialize. This does not leave the Agreement suspended for an indefinite period because, at some point, the Surrey will accept or reject the subdivision plan and/or the development plan.

[44] The defendant's application for the declarations it seeks is dismissed with costs to the plaintiff at scale B.

“Kirchner J.”