

COURT FILE NUMBER        2001-03117

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COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE OF CALGARY

PLAINTIFF                    DARREN TODD

DEFENDANT                 AVLI DEVELOPMENTS LTD.



DOCUMENT - CHAMBERS

ENDORSEMENT

Comments/Reasons:

The plaintiff Todd signed an offer to purchase (“OTP”) dated November 24, 2014, for the purchase, from the defendant Avli Developments Ltd., of a residential condominium unit to be constructed.

Todd says it took too long for the unit to be constructed, and he wants his deposit back.

Possession and closing of the sale was expected to take place on approximately April 1, 2017, some two and a half years after the OTP was signed. The OTP allowed Avli to set the actual possession and closing date. The question is whether that entitlement to set a possession date was constrained expressly or impliedly by the OTP.

Avli says that it initially set the possession date for September 18, 2019 and then extended it to September 27, 2019. This was almost 5 years after the OTP was signed.

Todd says this was too late. He says that by September of 2019 he was entitled to repudiate the OTP due to Avli's delay.

Todd brings this summary judgment application for the return of his deposit of \$50,385.00.

Avli's principle response to the summary judgment application is that this matter is not suitable for summary determination as the record before the Court is not sufficient to establish the facts on which a just and equitable decision can be made.

Avli also maintains that the possession dates in September of 2019 were allowable under the OTP.

I will now consider the two substantive issues: (i) whether the September 2019 assigned possession dates were contrary to the express provisions of the OTP, and (ii) whether the September 2019 assigned possession dates were outside of an implicit term of the OTP that the possession date be within a 'reasonable' time.

### **Was the possession in September of 2019 contrary to the express wording of the OTP?**

The answer to this question turns on whether the contractual provisions quoted below deal with the setting of one date – the possession date – or whether they deal with the setting of a possession date and then (if the situation arises) an extension to the possession date initially set.

To word it another way, is there an 'initial' possession date, with the possibility of a 'reset' possession date?

Clause 6(b), quoted below, deals with the choice by Avli of a possession date:

#### **6(b) Possession Date**

The approximate possession date for the Unit shall be the 1st day of April 2017, which date shall be established conclusively by the Developer by notice in writing to at least thirty (30) days prior to the possession date (the "Possession Date"), PROVIDED THAT if the Developer is unable to grant possession on such date the Possession Date shall be deemed to be postponed to the date on which such possession is actually granted. The Purchasers covenant to take possession of the Unit when the Interior of the Unit thereof is substantially completed, even though all exterior work, concrete works paving and the landscaping may not at such time be fully complete. The Developer agrees to complete any such outstanding work within a reasonable period of time after the Possession Date having regard to weather conditions and the availability of labour and materials. The

Purchasers acknowledge that the Possession Date may be delayed by strikes, weather, inability to obtain goods or labour, acts of God or other occurrences beyond the reasonable control of the Developer.

Clause 18(b), quoted below, also deals with the possession date. As mentioned earlier, the question is whether this clause constrains Avli in its choice of an initial possession date, or, to the contrary, does it only constrain Avli in the resetting (in other words, extension) of a possession date already set?

18(a) - the Developer may extend the Possession Date for a reasonable period, for any reason, not to exceed two hundred and seventy-five (275) days (the "Extension Period");

b) in the event:

(i) of fire, loss or other damage to the Unit or Project which Would delay the Possession date, or,

(ii) a development permit or building permit for the Unit is not released on or before June 1, 2015.

then the Developer, in addition to the Extension Period, shall be entitled to extend the Possession Date an additional ninety (90) days.

### **Analysis of clauses 6(b) and 18(b)**

The first question which arises is the reason for the phrase in clause 6(b) that ‘the approximate possession date for the Unit shall be the 1st day of April 2017’.

According to Avli’s interpretation of the contract there is no meaning to be given to these words. They could have as easily been placed in an advertising brochure or in a recital to the contract because, according to Avli, there were no constraints on when Avli could set the possession date.

In my view, the date of April 1, 2017 provides the function of the start date for possession as contemplated by clause 18(b). The time limit of April 1, 2017 is the date from which Avli may extend the possession date for any reason not to extend 275 days. In other words, the possession date cannot be extended beyond December 31, 2017. Is it a co-incidence that December 31, 2017 is exactly 275 days past April 1, 2017? I do not think so. To me the meaning of the combined clauses is that, while the anticipated possession date is April 1, 2017, Avli had until December 31, 2017 to provide actual possession.

If one were to adopt Avli’s interpretation, clause 18(b) would make no commercial sense. Why would Avli need such a lengthy period, i.e. 275 days, to reschedule a possession date already set on a 30 day trigger? Why would Avli not simply wait

until the unit was completed or nearly completed before setting the possession date? What commercial function would be served by having a further 275 day ‘possession reset clause’?

The correctness of this interpretation is best illustrated by looking at clause 18(b)(ii) i.e. “In the event: ... a development permit or building permit for the Unit is not released on or before June 1, 2015, then the developer, in addition to the Extension Period, shall be entitled to extend the Possession Date an additional 90 days.” In my view, the triggering of this clause would extend the possible initial possession date for another 90 days (in other words 275 days plus 90 days) until April 1, 2018.

Clause 18(b)(ii) makes no sense if one interprets the contract as advocated by Avli.

In 2017, if the building was not progressing as quickly as hoped, why would Avli find occasion to look back and say “it’s a good thing we provided in clause 18(b)(ii) that we could get another 90 days, because, as we did not get our building permit two years ago by June 1, 2015, we now we need the additional 90 days” if in fact Avli already had an unlimited number of “additional” days, as they could set their own initial possession date without any constraint?

The above interpretation is arrived at without applying ‘contra proferentum’, but if another reader were to find the interpretation ambiguous, contra preferentum would indicate that the interpretation should be in favor of Todd, as the contract was Avli’s standard form contract.

### **Avli can only pick a possession date within a ‘reasonable’ time?**

If my interpretation of the OTP as providing an express constraint on the setting of a possession date, as discussed above, is incorrect, in my view Avli’s right to set the possession date is subject to the limitation that the possession date must be set within a reasonable time. After all, one could presumably choose a hypothetical possession date that everyone would agree would fall outside the scope of Avli’s right to set a possession date, for example, 10 years.

This view is supported by the decision of Romaine J. in *Centurion Mortgage Capital Corporation v. The Bridges Steps Limited Partnership (Giustini Bridges Inc)*, 2019 ABQB 276, 2019 CarswellAlta 736.

Centurion deals with a very similar issue. A land developer had sold units in a 122 unit condominium project to be built. The terms of the contract were similar (but not identical) to the terms of the OTP in this case.

The question before the Court was whether the developer, subject to a receivership order, (or an assignee of the developer’s contracts) could hold purchasers to

possession dates which were (just as in the case before me) approximately 5 years after the purchase contracts were signed.

Here are some of the observations of Romaine J. (emphasis added):

para 4 - The application for the order assigning the purchase contracts to Centurion was vigorously opposed by a number of purchase contract holders (the Holders), on the basis that the Debtors' failure to perform its obligation to complete the project in a timely manner constituted a repudiatory breach that entitled them to terminate the contracts.

para 9 - However, I dismissed the application to assign the purchase contracts to Centurion, on the basis that the vendor, Giustini Bridges Inc as General Partner for and on behalf of Bridges Steps Limited Partnership, has breached the purchase contracts by failing to complete the units by the occupancy date stipulated in the contracts, or any properly extended occupancy date within a reasonable period of time. Breach of this condition, which goes to the root of the contracts and deprives the Holders of their entire benefit, is a repudiatory breach that entitles the Holders to terminate the contracts.

para 33 - Although the purchase contracts do not include a provision specifically allowing the Holders to terminate the contracts for delay, it is commercially unreasonable to interpret the contracts in such a way that would allow the Debtors to extend or postpone a specified Occupancy Date indefinitely, particularly after the expiration of the original date. These were contracts of adhesion, and most be construed in case of doubt against the grantor: Galichowski v. Shaw GMC Pontiac Buick Hummer Ltd., 2009 ABCA 390 (Alta. C.A.). Commercial contracts of this type should be construed in accordance with sound commercial principles and good business sense: Scanlon v. Castlepoint Development Corp. (1992), 11 O.R. (3d) 744 (Ont. C.A.).

para 36 - While what constitutes a reasonable period of time is not fixed, but dependent upon the factual matrix within which a dispute arises (Roberge v. 1102940 Alberta Ltd., 2012 ABQB 717 (Alta. Q.B.) at para 56), this is clearly a case of unreasonable breach. The law will imply completion within a reasonable time: Haqq v. Steininger, [1975] B.C.J. No. 703 (B.C. S.C.).

para 37 - It is therefore apparent that the inability of the Debtors to complete the construction of the units within a reasonable time would allow the Holders of the purchase contracts to terminate them as a consequence of a repudiatory breach by the Debtors: The Law of

Contracts, Second Edition, John D. McCamus, Irwin Law Inc, 2012 at page 676. The contracts are not enforceable against the Holders.

If I am in error in my interpretation of the express provisions of the OTP, my view is that Avli is in breach of an implied term that it must complete the Todd unit within a reasonable time, and having failed to do so, Todd is entitled to terminate the OTP.

### **Waiver**

Avli sought to argue 'waiver' on the part of Todd, but had neither pleaded or adduced evidence in that regard.

### **Conclusion**

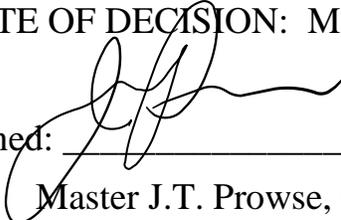
Todd is entitled to repudiate the OTP and to summary judgment for the return of his deposit.

### **Costs**

If the parties cannot agree on a costs outcome, they may submit written arguments to me in that regard.

DATE OF DECISION: March 23, 2021

Signed: \_\_\_\_\_

  
Master J.T. Prowse, Q.C.