CITATION: Central Park Ajax 1 Developments Phase 1 Inc. v. Ajax (Town), 2018 ONSC 5769
OSHAWA COURT FILE NO.: CV-18-0653
DATE: 20180928

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Central Park Ajax 1 Developments Phase 1 Inc. and LeMine Real Estate Consulting Inc. Plaintiffs	Raivo Uukkivi and Jeremy Martin, for the Plaintiffs
– and –	
The Corporation of the Town of Ajax and Rob Ford Defendants	John R. Hart and R. Andrew Biggart, for the Defendants
	HEARD: June 28, 29 and July 3-5, 2018

REASONS FOR JUDGMENT

MULLINS J.:

Introduction

[1] In the Statement of Claim, the plaintiffs have sought damages of three hundred million dollars arising from alleged breach of contract, defamation, libel, slander, slander of title and unlawful interference with contractual relations. In addition to damages, a permanent injunction is sought, as is declaratory relief in relation to any appeal to the Ontario Municipal Board (the "OMB").

[2] The claim was issued on March 14, 2018. By Order dated March 29, 2018, the parties were to attend an expedited trial during the May 2018 sittings, scheduled for 3-5 days, on a peremptory basis. They were to agree upon a procedural Order for the trial, including dates for the exchange of evidence, documents and trial procedure by April 15, 2018. This haste to trial was of some consequence to the evidence allowed. Evidence was truncated and given in chief by affidavit. This Court granted the defendant's motion that the plaintiff not be permitted to tender expert opinion evidence from a planner and declined the plaintiff's submission that an adverse inference ought to be drawn from the possibility of there being privileged communications within the municipality about which the plaintiff remains

ignorant. Reasons were given orally at the time of these rulings, but suffice to say the reasons were premised on the parties' decision to rush to trial and forego a fulsome discovery process. Some of those who had sworn affidavits were cross examined at the hearing and this together with the affidavits and other documents constituted the evidentiary record.

[3] The Court was asked to determine only the following issues:

1. On or prior to July 17, 2017, being the date on which the Town served its Notice of Repurchase, was LeMine "awaiting comments or confirmation of approval on any Application from the Town, or any building permit or other permit from the Town or the Region or Province"?

2. If the answer to Issue #1 is "yes", did that fact render the Notice of Repurchase served by the Town invalid?

    a. If the Notice of Repurchase is valid, then go to Issue #3, *mutatis mutandis*.

    b. If the Notice of Repurchase is invalid, the parties agree that an Agreement remains in force, and that LeMine is entitled to continue performance, with any issues concerning damages and costs to be resolved in a separate proceeding.

3. If the answer to Issue #1 is "no", did the Town on July 17, 2017 possess the right to repurchase all of the Repurchased Lands due to the occurrence of a Town Repurchase Event arising from the fact that LeMine did not start construction by July 16, 2017?

Findings of Facts

[4] LeMine Real Estate Consulting Inc. ("LeMine") carries on business as a real estate developer. Its corporate experience consisted of a project in the US and one in China.

[5] The defendant municipality, the Corporation of the Town of Ajax ("Ajax"), had promulgated a Community Improvement Plan (the "CIP"), with a view to revitalizing its core, in phases. The CIP anticipated that property owned by the municipality would be conveyed to the selected developer. Council was the approving authority under the CIP for any site plan.

[6] A Development Agreement and Agreement of Purchase and Sale (the "Agreement") was, in due course, entered into between Ajax and Windcorp Grand Harwood Place Ltd ("Windcorp"). The Agreement governed development of a Phase 1A, and, at the time, a portion of a Phase 1B of lands within the CIP.

[7] One of the benefits to the developer under the Agreement was a right of first offer for future phases of development.

[8] LeMine assumed the development rights and obligations from Windcorp by way of a tripartite Amending and Assumption Agreement dated June 29, 2015.

[9] Before the assignment from Windcorp to LeMine, a site plan had been approved. The approved site plan called for high density, mixed use development. There were to be two, 10 storey residential towers within a building envelope and two underground parking levels. A Site Plan Agreement had not yet been executed between the parties.

[10] As it so happens, the building site for Phase 1A was near a steam plant. The steam plant, something of a relic dating from the mid-1940s, burns wood to produce steam. The by-product of wood combustion is of environmental concern, notably as it relates to human health. This became specifically relevant to the ambitions of LeMine to gain approval for the construction of a 12 storey, rather than 10 storey structure, with three not just two underground parking levels.

[11] Closing of the Agreement was called for on the 90th day after the purchaser's conditions were satisfied or waived, according to s. 1.12 of the Agreement.

[12] A condition allowed the purchaser to be satisfied at its sole discretion, as to the economic feasibility of the development of Phase 1A. The purchaser had until the first anniversary of the execution date of the Agreement, with the right to extend the date twice for up to six months, to satisfy itself of this condition. This condition was, expressly, for the sole benefit of the developer/purchaser and could be waived at any time.

[13] Timing of commencement of construction was governed by a term in the Agreement. The developer was obliged to proceed expeditiously with the development and, subject to receiving all regulatory approvals, construction of the development on the Phase 1A Lands was to commence no later than three months from the closing date, weather permitting.

[14] Time was said to be of the essence in all respects for the purposes of the Agreement.

[15] The terms of the Agreement defined a right of the municipality to repurchase the lands from the developer/purchaser, in certain eventualities. Pursuant to s. 8.1(a)(ii), a "Town Repurchase Event" was defined to include:

> (ii) provided the Developer is not awaiting comments or confirmation of approval on any Application from the Town, or any building permit or other permit from the Town or Region or Province, the Developer failing to take reasonable steps to proceed with the construction of the Phase 1A Lands and/or the Utility Lands within three (3) months from the Closing Date, weather permitting.

[16] In the event of a Town Repurchase Event, continued the Agreement, the Town had the right to repurchase all of the Phase 1A Lands and other specified lands, subject to giving notice. In the circumstance of a notice being given pursuant to s. 8.1(a)(ii) of the Agreement, the Developer had 90 days to abort a Town Repurchase Event by taking steps to commence construction on the Phase 1A Lands.

[17] The closing date of any repurchase of the Phase 1A Lands was to be 60 days from the date the Town delivered notice.

[18] By way of the tripartite Amending and Assumption Agreement, LeMine and Ajax explicitly agreed that Site Plan Approval meant the approval that had been granted by the Town for a site plan and associated drawings dated April 7, 2015.

[19] There were a number of amendments introduced to the Agreement by the Amending and Assumption Agreement. Section 3.4(a) was amended to read:

> **Following its acquisition of the Phase 1A Lands,** the Developer agrees to proceed expeditiously with the development of the Project Buildings to be located thereon. In this regard the Developer covenants and agrees to commence construction of the building in the Proposed Development **no later than twelve (12) months from the date of the satisfaction or waiver of the Purchaser's Conditions set out in Section 11.1 (d) of the Agreement as amended.** The Developer shall be required to construct the stacked townhouse live/work units in conjunction with the construction of the building in the Proposed Development". [Emphasis added.]

[20] The Amending and Assumption Agreement also served to amend s. 8.1(a)(ii) of the Agreement, by deletion of the words "within three (3) months from the Closing Date" and substitution of "in accordance with Subsection 3.4(a) of this Agreement". By paragraph 17, s. 11.1(d) was amended to delete the words "By the first anniversary of the Execution Date" and substitution of: **"By July 15, 2016"**. [Emphasis added.] Time remained of the essence.

[21] LeMine and Ajax entered into a Site Plan Agreement on December 29, 2015. It called for development in accordance with the site plans which had been approved before the assignment to and assumption by LeMine from Windcorp, which is to say the construction of two 10 storey residential tower(s) with two underground levels for parking.

[22] Ajax licenced land within the development site to LeMine for a sales pavilion. LeMine was successful in selling a significant majority of the residential units called for in the planned towers within two weekends.

[23] On July 8, 2016, LeMine wrote the defendants, nonetheless, asking for an extension of the deadline of July 15, 2016, to be satisfied of the economic feasibility of the Phase 1A component of the development as called for in purchaser's Condition 11.1(d) of the amended Agreement. LeMine reported to Ajax in this letter that the costs of development were now estimated to be $107,171,990.00, as compared with $95,845,407.00 that had earlier been calculated for the project. Increased costs were attributed to building design inefficiencies and associated site works including road construction, building demolition, utilities construction, all of which were required for Phase 1.

[24] LeMine proposed to modify the building design by adding two storeys, making modifications to the west elevation and adding a third level of underground parking. With the Town's blessing to modify the building design, it wrote in the letter, LeMine was prepared to waive the amended condition of s. 11.1(d), which had given LeMine until July

15, 2016 to be satisfied of the economic feasibility of the development. LeMine's intent, it reported, was to proceed with the demolition and associated site works upon obtaining Ministry of Environment approvals and ownership of the lands. LeMine was prepared to forgo any profit for Phase 1A and proceed with acquisitions to enable development of the future phases. In this letter, LeMine explicitly acknowledged an obligation under the 'Development Agreement' to commence construction no later than July 15, 2017.

[25] Ajax rejected LeMine's request to extend the condition governing economic feasibility beyond July 15, 2016.

[26] Discussions ensued between the parties. By letter dated July 15, 2016, counsel for LeMine wrote that he 'agreed with and accepted'; and counsel for Ajax 'accepted' the following:

> a. Based on the assurances given to the Developer by the General Governance Committee members on July 11, 2016 with respect to permitting the Developer to submit an amended Site Plan and an amendment to the Site Plan Agreement for the addition of two storeys, changes to the west elevation (approximately 170 units) and additional underground parking to the Project Building, the Developer hereby waives condition 11.1 (d) as amended by the Amending and Assumption Agreement dated June 29, 2015.
>
> b. The Development Agreement and Agreement of Purchase and Sale dated July 15, 2013 as amended is hereby further amended by the addition of Subsection 11.1 (f) as follows:
>
> > "By October 31, 2016 the Town has granted approval of an amended Site Plan and an amendment to the Site Plan Agreement dated December 29, 2015 that permits the addition of two storeys, changes to the west elevation (approximately 170 units) and additional underground parking to the Project Building. The Developer agrees to submit to the Town a revised Site Plan showing the addition of the two storeys, changes to the west elevation and one additional level of underground parking to the Project Building on or before September 15, 2016. It is understood and agreed that nothing herein obligates the Town to grant such approval. In the event the Town has granted the approval as herein set out this condition shall be deemed to have been satisfied."

[27] According to the evidence of Thomas Liu, CEO of LeMine, the opportunity to submit a revised site plan for due consideration by the municipality afforded some protection as to the economic feasibility of the project. This is why LeMine waived Condition 11.1(d) as and when it did. It was understood, Mr. Liu acknowledges, that Ajax was under no obligation to approve a revised site plan.

[28] (Though the evidence was somewhat scant about this, counsel for the defendant submitted, and counsel for the plaintiff did not correct him, that the stacked townhomes portion of Phase 1 of the development agreement had expired before discussion of a revised plan for 12 storeys of residential towers. For reasons that were not explained, reference to the townhouses was carried forward through the amendments to which the parties agreed. Continuing reference to the stacked townhouses was, I find, nothing more than an irrelevant artefact of earlier iterations. I reject as artifice, the assertions of the plaintiff that it came to understand or believed that it was expected by the defendant or bound to build according to 'obsolete plans', to wit, these townhouses, at any time material to the claims it has pleaded or the issues this court was asked to determine. The entirety of the evidence related to the plaintiff's desire to develop plans for and seek approval to construct only the residential towers, either 10 or 12 storeys.)

[29] LeMine's project manager, Jenny Thyagarajah, wrote Ajax on July 12, 2016, requesting that LeMine be provided with a list of items required for submissions in support of a revised site plan. The defendant immediately replied with such a list. It outlined requirements for updated elevation drawings, roof plans, traffic and air quality studies and renderings.

[30] Ajax having agreed to consider a revised site plan, Mr. Liu deposes, LeMine was working with the Town and awaiting approval and comment. There were telephone discussions between counsel for the parties about the inter-relation between approval of revised plans and the transfer of the lands from the municipality to the developer. LeMine wanted the land to be transferred to it, in order to obtain the financing it needed for the project. Ajax was concerned, understood Mr. Liu, that LeMine would not build the approved 10 storey project if the revised submissions for 12 storeys was rejected and, accordingly was chary of transferring the lands. Accordingly, LeMine gave a written undertaking to Ajax that LeMine would build the 10 storey building called for under the approved site plan and extant site plan agreement, even if its revised submission in relation to 12 storeys was rejected.

[31] At a meeting of August 24, 2016, LeMine asked for the transfer of the Phase 1A Lands from Ajax. The prospects of approval of a 12 storey building were discussed. Ajax agreed that it would review a revised site plan if one was submitted. The prospect of LeMine waiving Condition 11.1(f), which called for LeMine to submit a revised site plan on or before September 15, 2016 and for Ajax to approve it or not by October 31, was raised.

[32] By way of correspondence from LeMine to Rob Ford, the chief administrative officer of the Town of Ajax dated August 25, 2016 it was agreed between the parties that:

> 1. LeMine will waive the condition imposed by Subsection 11.1(f) of the Ajax Agreements on closing; and
>
> 2. LeMine hereby requests that the Town transfer the lands referenced in the Ajax Agreements, which are at this time owned by the Town, to LeMine no later than August 31, 2016.

[33] Ajax transferred the land for Phase 1 to LeMine albeit somewhat after the date called for, in the middle of September 2016.

[34] According to the evidence of Mr. Liu, a revised site plan was submitted to the defendant on November 1, 2016. The plaintiff and defendant 'got to work on it together.' The revised plan was, in his view, 'complete' and 'submitted' within the meaning of the agreement with Ajax. The Town's website acknowledged the receipt of a revised submission. The only nagging issue pressed by the defendant, to Mr. Liu's understanding, concerned air quality. There was a continuing joint endeavour, in the eyes of Mr. Liu, to process the revised site plans, until Ajax began 'suggesting' it preferred the original 10 storey plan. The municipality dropped a bombshell, says Mr. Liu, by serving a Notice to Repurchase pursuant to s. 8.1(a)(ii), based on the plaintiff's failure to begin construction by July 15, 2017.

[35] By contrast, the evidence of Ajax's planner, Mr. Romanowski, is to the effect that the material filed by LeMine did not, at any time, constitute a fully realized site plan application. Specifically, sufficient mechanical plans for the roof, renderings of the proposed new elevations and a fully realized traffic study, all of which were required, were never filed. He told Ms. Thyagarajah in the fall of 2016, he says, that no decision would be made until all the required documentation was filed, staff was able to review it and make its report and recommendations to council. Mr. Romanowski issued a Status Report on the site plan status on March 30, 2017. Among other items he listed for action by LeMine, was a problem with the evaluation of air quality.

[36] An email from CEO Rob Ford to CEO Mr. Liu of April 20, 2017, forewarned as follows:

> ... As I stated to you in our impromptu meeting on April 7 in my office as well as in prior communications, the Town has serious concerns about LeMine's ability to fulfill the terms of the agreement to commence construction of Building 1A by the July 15, 2017 deadline. The Town's concerns are based on a number of factors including but not limited to, LeMine's failure to restore the sales pavilion, complete the required intersection works, ignoring and/or not responding to e-mails, failure to clear the construction liens, not meeting agreed to deadlines on numerous occasions and the inability to secure project financing (both short term and construction). As has been stated to you previously, the Town will not be granting any further time extensions.

[37] Efforts by each of the parties to reconcile air quality concerns with the plaintiff's desire to build economically and, evidently, obtain financing for the project, sputtered along. LeMine, even with the considerable efforts of Mr. Romanowski could not deliver sufficient data to ensure accurate testing and assessment of the air quality to which residents of the two upper storeys of the proposed 12 storey building might be exposed. In the absence of mitigation at the steam plant itself, the best that could be suggested, testified an architect on behalf of LeMine, was that windows on the proposed levels 11 and 12 be sealed and mechanical ventilation only, be relied upon. This option was not, testified Mr. Romanowski, something he as a planner would have endorsed.

[38] Ajax served a Repurchase Notice, purportedly pursuant to s. 8.1(a)(ii) of the Agreement of July 15, 2013. As a result of the failure by the Assignee and the Developer to commence construction of the building on the Phase 1 Lands no later than July 16, 2017, the notice specified, a Town Repurchase Event as defined in the Agreement had arisen.

[39] According to correspondence which followed, as of July 22, 2017, Mr. Liu said he was looking forward to working closely with the Town of Ajax to move on with the development. On July 31, email exchanges resulted in Mr. Liu's written confirmation that LeMine was 'going with' 10 storeys above ground and two underground parking, as was called for under the approved site plan and site plan agreements. Mr. Liu was told that council would not entertain an extension of the 90 day cure period following the Notice, unless his financing was firm, all liens lifted, and all creditors paid. Taking the view there was no satisfactory response or action, in light of service of the Notice or requests for reassurances, Ajax demanded a re-conveyance of the lands.

Legal Principles Cited

[40] Both parties posit this case as one of contractual interpretation. They agree on the principles to be applied. The decisions in *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 and *RBC Dominion Securities Inc. v. Crew Gold Corporation*, 2017 ONCA 648 were cited. These stand for the propositions that courts are to:

1. **Construe the contract as a whole**, in a way that gives meaning to all its terms, and avoids an interpretation that renders one or more of its terms ineffective;

2. Consider the **objective evidence of the factual matrix underlying the contract's negotiation**, and not the subjective evidence of the parties' intentions.

3. Interpret in accordance with **sound commercial principles** and good business sense, while avoiding commercial absurdity;

4. If there is ambiguity, the court can resort to extrinsic evidence to clarify.

5. If a transaction involves executing several documents comprising part of a composite whole, and each agreement is entered on faith that the others will be executed, then the court can interpret by drawing from the related agreements.

[41] A decision of the Supreme Court of Canada, *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 [*Creston*], stated that contractual interpretation is not simply a matter of law, but one of mixed fact and law. Contractual interpretation is inherently fact specific, and also often limited to the obligations between the parties. It requires consideration of each term in the contract, surrounding circumstances, the purpose of the agreement, the nature of the relationship, and the ordinary meaning of each word:

quoting Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98 (U.K. H.L.), at para. 48:

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

[42] As stated at para. 47 in *Creston*, courts have an obligation to consider the "intent of the parties and the scope of their understanding" which means they can consider the surrounding circumstances. The SCC cautioned at para. 57, however, that those considerations cannot "overwhelm the words of [the] agreement". But in the end, the words of a contract alone should not determine a case, the context must be considered.

Position of LeMine

[43] The Repurchase Notice should be set aside, submits LeMine, as void. The plaintiff was awaiting confirmation of the Town's approval of LeMine's submissions in support of a 12 storey building, wherefore within the meaning of ss. 8.1(a)(ii) and 8.2 of the Agreement, Ajax was not entitled to effect a repurchase.

[44] The submissions made by LeMine in support of a 12 storey structure were received and processed by Ajax in a manner that was consistent with the iterative process by which site plans mature for approval. Mr. Romanowski's evidence that the plaintiff's submissions were incomplete should be rejected. In particular, his evidence was inconsistent, when he said he never rejects site plan applications while also claiming that LeMine's submissions were insufficient to warrant approval or rejection. It is worthy of note, as well, submits LeMine, that the Town's solicitor backed away from having endorsed Mr. Romanowski's contention that LeMine's submissions in support of a 12 storey structure were incomplete.

[45] A critical distinction is to be drawn, submits LeMine, as between a 'complete' site plan application and a site plan application that is 'approval ready'. Borrowing from the logic of decisions from the OMB, (now LPAT), even notice of a complete application means no more than confirmation an application is complete enough to be assessed: see *1540 BSW Developments Inc. v. Toronto (City)*, 2010 CarswellOnt 1673, 64 O.M.B.R. 464 (OMB). Deficiencies in site plan applications are no impediment to the application being considered complete. Commonly, submissions are revised and deficiencies remedied in the iterative process of site plan applications and approval: see *Re MacIntosh*, 2010 CarswellOnt 8198, 66 O.M.B.R. 455 (OMB). Here, the submissions of the plaintiff were circulated to all relevant departments and agencies, this in keeping with the Town Site Plan Review Manual. There was nothing signifying that the submissions of the plaintiff were rejected by the defendant.

[46] By its conduct in processing the submissions of the plaintiff, quite obviously, the defendants were following a standard, formal procedure reserved only for complete applications. The Town's evidence ought to be rejected, among other reasons, as it is

contrary to the operation of statute and policy that site plan approval is a factual matter falling completely within the discretion of the municipality or its staff.

[47] LeMine submits that the site plan application was complete and that Ajax could have rejected the application at any time. LeMine submits that they were protected from repurchase due to the outstanding site plan application given that it was not approved or rejected.

[48] Section 3.4(a) is broken, a Frankenstein. The plaintiff's obligation to build can only be said to begin after the acquisition of the lands, wherefore it did not crystallize until the Phase 1A Lands were acquired by the plaintiff from the defendant. Even if still serviceable, the terms of s. 3 are such that LeMine had 12 months following its acquisition of the Phase 1A Lands to commence construction of the building, which was until September 16, 2017.

[49] Alternatively, there was a conditional waiver of s. 11.1(d) based on assurances given at the General Governance Committee meeting of July 11. LeMine submits that s. 11.1(f) was intended to replace s. 11.1(d) for all purposes, including the operation of s. 3.4(a). An email written by the Town's counsel, Mr. Hawkshaw, confirms that the most commercially reasonable way to interpret the amendments and waivers, is that both parties understood the effect of ss. 11.1(d) and 11.1(f) to be that the clock was reset and LeMine was no longer under an obligation to commence construction by July 15, 2017.

Position of the Defence

[50] The defendants submit that the wording of s. 3.4(a) is clear. In consideration of agreeing that LeMine could and would submit an amended site plan which the defendant could, but was not obliged to approve, LeMine had waived the condition of satisfying itself of the economic viability of the project on July 16, 2016 and, pursuant to s. 3.4(a), was obliged to begin construction no later than 12 months later, the defendant having declined to extend the date of expiry of the condition beyond that date. In consideration of the closing of the land transaction, Condition 11.1(f) was waived on August 25, 2016.

[51] The terms of the agreement provided that the conditions under s. 11 were for the sole benefit of the developer/purchaser. Failing waiver or satisfaction of the conditions, the agreement called for termination without any obligation between the parties, other than those specified. As such, had the defendant approved LeMine's submissions for a revised site plan calling for 12 storeys, Condition 11.1(f) would have been satisfied. Had the defendant not approved the submissions in support of the 12 storey site plan, LeMine would either have had to waive the condition or terminate the agreement. Along the way, LeMine acquired the contractual right to make the revised site plan submission by September 15, 2016 with the corollary obligation upon the defendant to approve or not by October 31, 2016. In effect, the defendant had until July 15, 2017 to commence construction of a 10 storey building or a 12 storey structure for which it had gained approval. Having waived s. 11.1(f), the plaintiff had undertaken the risk that the defendant would not approve a 12 storey structure. There was, submits the defendant, no amendment to the deadline to commence construction by July 16, 2017.

1. **Issue 1: On or prior to July 17, 2017, being the date on which the Town served its Notice of Repurchase, was LeMine "awaiting comments or confirmation of approval on any Application from the Town, or any building permit or other permit from the Town or the Region or Province"?**

[52] It was acknowledged by counsel during submissions that the plaintiff was not awaiting comments from the Town. It remains to be determined therefore, only as to whether it was awaiting confirmation of approval on any Application. The answer to this question, within the meaning of the contractual obligations between the parties, I find, is no.

[53] The defendant was contractually obliged to receive and consider the submission from the plaintiff of materials in support of a site plan, or a revised site plan, to construct 12 storey residential towers with three levels of underground parking, by October 31, 2016. The process for the receipt and consideration of site plans was, on the evidence, iterative. The plaintiff asked for and received a list of the materials required of it for the defendant's consideration. According to the evidence of Mr. Romanowski, which I accept, the plaintiff's submissions were received and circulated to those departments and outside authorities who had a stake in the approval process, in keeping with the usual practises of the staff of the defendant to whom this responsibility fell. I also accept Mr. Romanowski's evidence, and find accordingly, that at no time had the plaintiff made all of the required submissions. Specifically, I accept his evidence, with which that of Mr. Liu largely accords, that at no time did the defendant receive fully realized roofing plans, or any elevations for the proposed 12 storey building. As well, the requirements for approval of a 12 storey building were never fully addressed as to a traffic study. Critically, the plaintiff did not deliver adequate materials to address and obtain the necessary environmental approvals as to air quality for the higher building. I reject the evidence of Mr. Liu that the plaintiffs' submissions were obviously complete and obviously accepted.

[54] The evidence of Mr. Romanowski is more than sufficient to establish that it is planning staff at the municipality who gather and vet all necessary submissions in support of site plans. Only when a site plan, or amendments thereto, are sufficient, meaning that all necessary aspects of a site plan have been addressed, are they submitted by staff to the approval authority. The approval authority for the site plan submissions of the plaintiff, under its agreement with Ajax, was council for the Town of Ajax. I find, as fact, and within the meaning of the contractual documents between the parties, that the plaintiff was not awaiting confirmation of approval on any Application from the Town at the time of service of the Notice. LeMine had had never made a complete site plan submission within the meaning of its contract with the defendant, which is to say sufficient for council to consider and approve or reject.

[55] The defendant issued a Status Report with respect to the plaintiff's submissions and this and other communications advised the plaintiff of the deficiencies in its submissions, though the obligation rested throughout upon the plaintiff, not the defendant, to have ensured its submissions to build a 12 storey structure with three underground levels were adequate and complete. As owner of the property once it had been conveyed to it from the municipality, the plaintiff had a statuary right to submit site plan applications. Neither this, nor the defendant's continued efforts to accommodate the plaintiff's desire to be able to

construct a larger building than had been approved alters the contractual rights and obligations between these parties at the times material to this proceeding.

2. If the answer to Issue #1 is "no", did the Town on July 17, 2017 possess the right to repurchase all of the Repurchased Lands due to the occurrence of a Town Repurchase Event arising from the fact that LeMine did not start construction by July 16, 2017?

[56] In construing the contract as a whole, it is worthy of consideration that the contract assumed by LeMine gave it the right to purchase and develop a phase of development that was already the subject of an approved site plan. That site plan was for a 10 storey building. Time was said to be of the essence of the agreement. The developer/purchaser was called upon to proceed expeditiously. There was a deadline to commence construction at s. 3.4(a). LeMine later entered into a site plan agreement in relation to that approved site plan.

[57] As to avoiding an interpretation that renders one or more of its terms ineffective, which is one of the outcomes urged by the plaintiff, the challenge here arises, it seems, because of the amendment to s. 3.4 introduced in the Amending and Assumption Agreement made on June 29, 2015 by which LeMine stepped into Windcorp's shoes.

[58] As originally worded, s. 3.4 (a) had called for construction to commence no later than three months from the Closing Date, weather permitting. The Amending and Assumption Agreement called for the commencement of construction no later than 12 months of the date of satisfaction or waiver of the purchaser's conditions. To the extent that s. 3.4(a) begins in both versions with the sentence "Following its acquisition of the Phase 1A Lands, the Developer agrees to proceed expeditiously with the development of the Project Buildings to be located thereon" and the next sentence with the words "In this regard", the questions to be decided may be understood to be: should s. 3.4(a) be interpreted to mean that construction was to have begun within 12 months of the waiver of conditions or, the accrual of both a 12 month period post acquisition (closing) **and** waiver of conditions. Alternatively is 3.4(a) a broken Frankenstein and unenforceable relative to a repurchase event?

[59] There is really no evidence as to the factual matrix underlying the negotiations of s. 3.4(a) other than as may be found in the four corners of the agreements. The amended version substitutes a fixed 12 month period relative to waiver of conditions and no longer allows for two six month extensions of the condition at s. 11.1(d) for the purchaser to be satisfied of the economic viability of the development. This, in my view, militates in favour of an interpretation that the parties intended to fix the period within which construction was to start relative to the event of the waiver or satisfaction of the purchaser's conditions and eliminate the contractual right to extend the condition for two six month periods. There was always a stand-alone condition calling for acquisition, or closing, within 90 days from waiver of the purchaser's conditions, in s. 1.

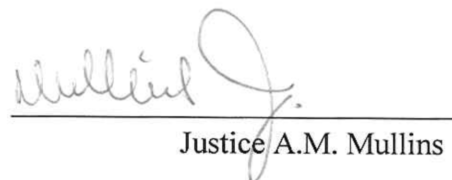
[60] There is considerable evidence relating to negotiation of the terms by which the purchaser's conditions were untimely waived. LeMine wrote to the defendant on July 8, 2016, seeking an extension of the condition of economic feasibility and acknowledged that it was obliged

to commence construction by July 15, 2017. This and other evidence establishes that the subjective understanding of both parties was that s. 3.4(a) meant construction was to have started by July 15, 2017.

[61] The plaintiff says that it would be a commercial absurdity for the plaintiff to have been expected to commence construction by July 15, 2017 regardless of the proximity of that date to waiver of the condition at s. 11.1(f). However, Condition 11.1(f) was not alive when s. 3.4(a) was amended, so it is of no import in interpretation of the parties' intentions at that time.

[62] Applying the reasoning of the Supreme Court of Canada, it is open to the Court to consider the intent of the parties and the scope of their understanding, i.e. the context, providing these considerations do not overwhelm the words of the agreement. It may be that s. 3.4(a), when the principles of contractual interpretation as expressed by the Court of Appeal are applied, is equally capable of the competing interpretations as to the triggering event or events of the 12 months to commence construction. All of the evidence, however, intrinsic and extrinsic to the words of the contracts and the written words later exchanged between the parties points to a mutual interpretation that the plaintiff was obliged to commence construction by July 15, 2017. If the court is to avoid interpretations that render the terms of a contract ineffective, on balance, the evidence tips in favour of the conclusion that the defendant municipality did have the right to serve its Notice of Repurchase as it was understood and agreed by the parties that construction was to have begun by July 15, 2017, one year following waiver of Condition 11.1(d), and did not.

[63] The parties may make submissions as to costs in writing. The defendant shall have 30 days to do so, the plaintiff 45 days.



Justice A.M. Mullins

Released: September 28, 2018

CITATION: Central Park Ajax 1 Developments Phase 1 Inc. v. Ajax (Town), 2018 ONSC 5769

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Central Park Ajax 1 Developments Phase 1 Inc. and LeMine Real Estate Consulting Inc.

Plaintiffs

– and –

The Corporation of the Town of Ajax and Rob Ford

Defendants

REASONS FOR JUDGMENT

Justice A.M. Mullins

Released: September 28, 2018