NOVA SCOTIA COURT OF APPEAL
Citation: ***United Gulf Developments Ltd. v. Iskandar***, 2008 NSCA 71

Date: 20080725
Docket: CA 285973
Registry: Halifax

Between:

United Gulf Developments Limited and
Navid Saberi

Appellants

v.

Esam Iskandar and Pinnacle Developments Limited

Respondents

Judges:	Roscoe, Cromwell and Hamilton, JJ.A.
Appeal Heard:	March 20, 2008, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Cromwell, J.A.; Roscoe and Hamilton, JJ.A. concurring.
Counsel:	Sheree Conlon and Melanie Petrunia, for the appellants Peter Bryson, Q.C., for the respondents

I. INTRODUCTION:

[1] At the trial of the appellants' specific performance action, one question was decided: was a document signed by the parties on November 12th, 2002 a binding contract? The trial judge, Scanlan, J., found it was not and the question on appeal is whether he erred in reaching that conclusion.

[2] I see no reviewable error in the judge's decision. The November 12th document was not a simple agreement of purchase and sale. As the judge recognized, it mapped out how the parties would proceed on a cooperative basis with a substantial residential development. He correctly found that the parties had not agreed on several essential elements of this complex transaction and that they intended to leave these elements for future resolution. I agree with the judge that the November 12th document was not a binding contract but an agreement to agree on several essential matters. I would dismiss the appeal.

II. ISSUES AND STANDARD OF REVIEW:

[3] The issue on appeal is whether the judge erred in finding that there was no binding contract because the November 12th document was simply an "agreement to agree" and because there were essential terms which had not been settled. The appellants contend that the judge misinterpreted the November 12th document, erred in his appreciation of the surrounding circumstances and was wrong to find that there were missing essential terms.

[4] The general principles about the standards of appellate review which apply to these issues is not in dispute. Questions of law are reviewed on appeal for correctness. Questions of fact are reviewed for palpable and overriding (clear and determinative) error. Questions of fact include not only the findings of fact but the inferences drawn from them. Mixed questions of law and fact – the application of legal principles to the facts – are reviewed for palpable and overriding error unless there is an extractable error of law which is reviewed for correctness: see, e.g. **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235; **H.L. v. Canada (Attorney General)**, [2005] 1 S.C.R. 401; **McPhee v. Gwynne-Timothy**, 2005 NSCA 80, 232 N.S.R. (2d) 175 (C.A.).

[5] Applying these principles to the appellants' submissions, I conclude as follows:

1. Contractual interpretation is a question of law and therefore the judge's construction of the November 12th document should be reviewed for correctness: **Voice Construction Ltd. v. Construction & General Workers' Union , Local 92**, [2004] 1 S.C.R. 609 at para. 29.

2. In interpreting a contract, the judge is entitled to consider, where appropriate, the surrounding circumstances. These are matters of fact and the judge's findings in relation to them should be reviewed for palpable and overriding error: see, e.g. **Eli Lilly & Co. v. Novopharm Ltd.**, [1998] 2 S.C.R. 129 at para. 54; **MacDougall v. MacDougall** (2005), 262 D.L.R. (4th) 120, 205 O.A.C. 216 (C.A.) at paras. 23 - 34.

3. Determining whether, in a particular situation, certain terms are essential requires the application of legal principles to the facts. Whether a term is essential is, therefore, a mixed question of law and fact. Absent some extractable error of legal principle, the judge's conclusions should be reviewed for palpable and overriding error.

[6] I should add that the respondents' notice of contention raises other issues but, on the view I take of the case, I need not deal with them.

III. THE JUDGE'S DECISION AND APPELLANTS' POSITION:

[7] The appellants sued the respondents for specific performance and damages. The appellants' position was that the November 12th, 2002 document was a binding contract. The respondents defended on the basis that the agreement was merely an agreement to agree and was incomplete because it required the parties to agree on further terms which were never agreed upon. (The respondents also had a number of alternative defences, but I do not need to address them.) Only the question of liability was tried; the issue was whether the November 12th document was a binding contract.

[8] The trial judge held it was not based on two, related findings. First, he concluded that the November 12th document was expressly subject to a further, formal agreement. Critical to this finding was that the document provided that the parties would sign a more formal agreement and such other documents as their lawyers might reasonably require. The relevant clause, Clause 13, said this:

> 13. The parties further agree to execute and deliver a more formal agreement including standard representations, warranties and covenants of the Vendor normally included in a Share Purchase Agreement and such other documents relevant to the closing of the transaction as the parties' respective solicitors, acting reasonably may require.

Second, the judge concluded that this interpretation of Clause 13 was supported not only by its text, but by the nature of the transaction and the surrounding circumstances. He pointed to a number of matters that he thought were essential to the viability of the transaction and yet had either not been addressed at all or had been left too uncertain to form a binding agreement. Thus, while the judge made two key findings — that the November 12th document was merely "an agreement to agree" and that it lacked essential terms — these two conclusions were closely related.

[9] The appellants take issue with many aspects of the judge's reasoning and conclusions. Stripped to their essentials, there are two main points of disagreement:

1. The appellants say that the judge wrongly approached the November 12th document as an agreement about real estate development rather than as what they submit it was: a straight-forward agreement to purchase the shares of four holding companies and to take an assignment of an agreement for the purchase and sale of a parcel of land. His mischaracterization of the nature of the transaction led the judge, they submit, to find various terms were essential when they were not. At the root of this point is the question of whether the judge was wrong in his characterization of the nature of the transaction.

2. According to the appellants, the judge found the parties intended to create legal obligations by signing the November 12th document. They submit that he should have given effect to that intention rather than

> thwarting it by finding that the agreement was incomplete. They further submit that the judge erred in his interpretation of Clause 13 of the November 12th agreement. At the root of these submissions is the question of whether the judge was wrong in his findings about the intentions of the parties.

[10] I cannot accept the appellants' position on either of these fundamental points. My view is that the judge rightly assessed the November 12th document in light of the origins and purposes of the proposed transaction. He concluded that the parties' dealings were premised on, and understood by both to have the objective of, facilitating development of the land. I cannot accept the view that the judge found that the parties intended the document to be a binding contract or that he erred in concluding that it left many essential matters to future agreement. It is also my view that the judge properly interpreted Clause 13 of the November 12th document.

IV. ANALYSIS:

A. The Nature of the Transaction:

1. Overview:

[11] The appellants characterize the November 12th document as a straightforward contract for the purchase and sale of shares and the assignment of an agreement of purchase and sale of land. This characterization of the transaction supports the appellants' contention that certain terms were not essential to a transaction of that nature. The respondents, on the other hand, support the approach of the trial judge. He viewed the parties' dealings as one, complex transaction, the object of which was, through cooperation between the parties, to facilitate a large scale residential development. In the judge's view, matters essential to attaining that objective had not been agreed upon.

[12] For the reasons which follow, I am in substantial agreement with the trial judge's characterization of this transaction. While, as the appellants point out, the agreement did not require development, development was its objective. The agreement did not simply deal with the sale of shares and the assignment of an agreement of purchase and sale. The transaction was prompted by the

respondents' concern that they could not develop all of the land they had acquired and by their desire to enter into an arrangement that would lead to its development. Both parties wanted and intended to build. The agreement dealt with conversion of units and transfer of density, with site preparation and with installation of services. It seems to me, respectfully, to be simply unrealistic and blind to the commercial reality of what was being done, to divorce from this development objective the assessment of what terms were essential.

[13] To explain why I have reached these conclusions, I will briefly set out the applicable legal principles, describe the key provisions of the November 12th document and then turn to explain why I agree with the judge's findings about the nature of the transaction and the missing essential terms.

2. Legal Principles:

[14] To have an enforceable contract, there must be agreement between the parties as to all essential terms. To use the language of a leading case, a contract "... settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties": **May and Butcher, Ltd. v. The King**, [1934] 2 K.B. 17 (H.L.) at p.21. Determining what terms are "essential" in a particular case is, however, more difficult than stating the principle. The sort of terms that are considered essential varies with the nature of the transaction and the context in which the agreement is made: **Mitsui & Co. v. Jones Power Co.**, 2000 NSCA 95, 189 N.S.R. (2d) 1 (C.A.) at para. 64.

[15] It follows that the nature of the transaction is key for determining what terms are essential. This brings me to an outline of the terms of the November 12th document before I turn to the judge's assessment of the nature of the transaction and to an examination of some of the critical terms he found were missing.

3. Summary of the Proposed Transaction:

[16] The November 12th document mapped out a transaction in which the appellants would purchase the shares of four of the respondents' holding companies and take an assignment from the respondents of an agreement of purchase and sale of a parcel of land known as the townhouse property. While these two aspects were closely interrelated, it will be helpful to begin by describing

each of them separately in light of some brief background about the parties and their dealings.

(a.) The parties and their dealings:

[17] The respondent, Esam Iskandar, is the president of the respondent real estate development company, Pinnacle Developments Limited. Mr. Iskandar was also the sole shareholder of six holding companies, each of which held one property lot (referred to as Blocks 1 to 6) in the Hemlock Subdivision in Bedford, Nova Scotia. Each of the lots was approved for the development of 58 apartment/condominium units.

[18] The respondents also had an agreement to buy the townhouse property from Kimberly-Lloyd Developments Limited. Although the property was approved for 36 townhouse units, it was judged not to be suitable for development because of its topography. The property was adjacent to some of the six blocks.

[19] Mr. Iskandar acquired these properties for development. However, he decided to sell the shares in the holding companies which held title to the land, because the project was unmanageably large for him and his company: Reasons para. 8.

[20] The appellant, Navid Saberi, is president of the appellant, United Gulf Developments Limited. The appellants were interested in acquiring the blocks owned by the respondents' holding companies as well as the adjacent townhouse property for development purposes.

[21] Mr. Iskandar and Mr. Saberi signed a letter of intent, in September of 2002, for the purchase and sale of the shares of the six holding companies and for acquisition of the townhouse property. Although the letter of intent indicated that it was a legally binding agreement, the parties clearly did not intend it to be one. Negotiations continued and ultimately a further document dated November 12th, 2002 was signed. This is the document which the appellants contend is a legally binding contract but which the trial judge held was not.

[22] I will turn now to describe the two main elements of the transaction.

(b.) The share purchase:

[23] The appellants were to purchase the shares of four of the holding companies which owned four of the six blocks. These blocks were subject to vendor take-back mortgages in favour of Kimberly-Lloyd Developments. The purchase price for the shares was set at $2.9 million. The first $2 million was to be paid by United Gulf assuming the respondents' vendor take-back mortgages with Kimberly-Lloyd with the difference payable to Pinnacle. The remaining $900,000 was to be paid in kind by the appellants transferring nine condominium units in Summer Cove to the respondents or their assignee. The first two units were to be transferred by January 31, 2003, and the remaining seven by April 30, 2003.

[24] The respondents were obliged to assure that the four blocks owned by the holding companies and being acquired by the appellants were endorsed by the Municipality and foundation ready within a year of the closing of the agreement. (Clause 8 of the agreement defines closing as April 30, 2003.) There were provisions to secure the performance of the respondents' obligations and to address how certain costs would be shared:

> Pinnacle was to provide a first collateral mortgage to United over the last two Summer Cove units as security until three of the four condominium sites had been serviced as required.

> Pinnacle was to provide a first collateral mortgage to United Gulf over one of the last two Summer Cove units as security until the fourth condominium site was serviced and as security for the deposit of $100,000 to be paid by the respondents.

> The parties agreed that the cost of curbs and paving of the main road would be shared equally among the owners of all six condominium sites.

[25] Additional elements of the arrangement were these:

> If Pinnacle (or a company controlled by Pinnacle) did not develop Blocks 5 and 6, it would be obligated to sell the shares of Blocks 5 and 6 to United Gulf at a price of $16,500 per unit.

> United/Saberi was to provide a first collateral mortgage of $100,000 on real property to be approved by the respondents as security for the transfer of the first two condominium units.

> The solicitor for Iskandar/Pinnacle would hold the share certificates for the holding companies owning Blocks 1 to 3 in escrow until the nine Summer Cove condominiums were transferred to Pinnacle by April 30, 2003.

> The certificate for the Block 4 holding company would be held until Pinnacle obtained a decision from the Municipality regarding the conversion of units from the townhouse property or December 31st, 2003, whichever was earlier. (I will describe this aspect more fully in the next section.)

(c.) Acquisition of the townhouse property:

[26] The November 12th document provided that the appellants would receive an assignment of the agreement the respondents had with Kimberly-Lloyd Developments for the purchase of the townhouse property. This appears on the surface to be simply an assignment by the respondents to the appellants of an agreement of purchase and sale. However, there was much more to this.

[27] The townhouse property, although approved for 36 townhouse units, was judged unsuitable for development. The expectation of the parties was that the Municipality would allow these approved townhouse units to be converted to a greater number of apartment/condominium units and, in addition, would in effect allow the density associated with these units to be transferred to the six condominium blocks.

[28] To provide for what the parties expected would happen, the November 12th document stated that the respondents would apply to the Municipality to convert the development agreement for the townhouse site to "+/- 54 apartment/ condominium units" (Clause 10). If the application were approved, the condominium units would be distributed over the six blocks and the appellants would buy an unspecified

number of these additional units at a price of $16,500 *per* unit, less their *pro rata* share of the Kimberly-Lloyd vendor take-back mortgage (Clauses 10 and 11).

[29] If conversion proceeded, the agreement did not specify what would happen to the townhouse site itself. If conversion were not approved, the appellants would acquire the townhouse site at a purchase price of $30,000 for each of the 36 townhouse units, less the Kimberly-Lloyd vendor take-back mortgage.

[30] The conversion process was to be completed on or before December 31, 2003 and the closing of the converted units or the townhouse property, whichever was applicable, was to be completed 90 days later.

[31] After the agreement was signed, the appellants' solicitor advised that Pinnacle had actually purchased the townhouse site from Kimberly-Lloyd thereby altering the terms of the agreement with the appellants. Because there was no longer a Kimberly-Lloyd vendor take-back mortgage for the appellants to assume, the mortgage would have to be with Pinnacle instead.

3. Essential Terms:

[32] As noted earlier, the judge characterized this transaction as a complex, cooperative real estate development undertaking. This characterization was central to his conclusions about what terms were essential. The appellants challenge this characterization as well as the judge's finding that various terms on which the November 12th document was silent were essential to a binding contract.

[33] I will now address three aspects of the transaction that the judge thought were essential, but missing: the servicing of the six blocks, the allocation to the six blocks of the converted units from the townhouse lands, and the question of road frontage for Block 5. In the course of doing so, I will explain why, in my view, the judge did not err either as to the nature of the proposed transaction or in deciding that these were missing essential terms.

(a.) Servicing the lots:

[34] The judge's conclusion that the servicing of the lots was an essential but missing term provides the clearest example of where his characterization of the nature of the transaction drove the result.

[35] The trial judge concluded that there were a number of issues that had to be addressed in relation to the servicing of the blocks:

> [24] There are a number of substantive issues that had to be resolved after signing of the November 12th agreement. Those issues affected the servicing of all the blocks, including the blocks retained by the Defendant and those to be acquired by the Plaintiff. These issues included the sharing of services. For example, installation of power poles became an issue. Who was to pay and how much? Where were the services to be located and which blocks were to be serviced first? In addition there were to be common access roads for the various properties that would necessitate agreements as between the various condominium units. The agreement would have to deal with the shared access and expenses. Those agreements had not been finalized and just barely discussed when the agreement was signed. They were to be the subject of negotiations. If negotiations on any substantive issue did not result in an agreement then the November 12th agreement was nothing more than an unenforceable agreement to agree.

[36] The appellants do not submit that the provisions about servicing are sufficiently clear or may be implied. Their submission is simply that the judge erred in finding that these servicing arrangements were essential terms of the agreement. His fundamental error, they say, was to treat the essence of this agreement as being a development agreement when it was not. They submit that the transaction involved the purchase of shares of four separately incorporated companies, each of which held one of the six blocks of land. They emphasize that while the parties to the agreement contemplated development, the agreement did not mandate development. It follows, in the appellants' submission, that the details regarding the development and servicing of the lots cannot be considered essential to a share purchase agreement which does not mandate that development. If the parties could not agree on these issues, the agreement would still be binding, the appellants would own the shares in four of the six companies and the outstanding development issues would have to be addressed in the event that they wished to proceed with development.

[37] The respondents argue that the appellants' submissions on this point ignore the commercial reality of the transaction as well as the express provisions of the agreement. They note that the agreement expressly requires them to provide servicing and, in addition, requires them to sell the remaining two blocks of land if they themselves do not develop them. These servicing provisions and the provision for acquisition of undeveloped land show that development was the very essence of this agreement.

[38] The respondents point out as well that the trial judge's concerns about servicing the land extended to the townhouse lands:

> [25] In relation to the town house lots, I am satisfied on the evidence of Mr. Iskandar that, due to the topography of the land, the services for the town house lands would <u>of necessity</u> have to go on the adjacent condominium sites. This <u>inevitable encroachment</u> on the lots to be retained by the defendant was not discussed as between the parties at the time the agreement was negotiated on November 12th. There were no discussions as to what, if any, compensation may be required as a result of any encroachments.
>
> (Emphasis added)

[39] The servicing of the townhouse lots presented a significant problem. The uncontradicted evidence of Mr. Iskandar – accepted by the trial judge at paragraph 25 of his reasons – was that it was essential to encroach upon blocks four and five for servicing purposes, including a road, for the purposes of building the townhouse lots. There was no agreement between the parties with respect to the nature and extent of encroachment or any compensation for it. Since the agreement clearly contemplated development of the townhouse lots if conversion did not occur, their servicing was essential and how this was to occur had to be agreed.

[40] I substantially agree with the respondents. While, as the appellants submit, the agreement did not mandate development, it did address and create obligations about servicing the various parcels:

> 3. The Vendor represents and warrants as follows:
>
> ...
>
> (ix) <u>the Vendor and Pinnacle Developments Limited warrants that it shall be obligated to make the 4 condominium sites subject to this</u>

Agreement, endorsed by HRM and foundation ready based upon the Purchaser's building footprints for each condominium lot, with the main road, services, laterals, etc., to the individual condominium lot constructed within one (1) year of the closing of the agreement.

...

7. The Vendor shall:

(a) provide a first collateral mortgage to the Purchaser over the last two (2) condominium units referred to in paragraph 6(ii)(a) as security until the Vendor's obligation to service three (3) out of the four (4) condominium sites referred to in paragraph 3(viii) is completed, and at which time the first collateral mortgage shall be released; and

(b) provide a second collateral mortgage over one (1) of the last two (2) condominium units referred to in paragraph (a) above as security until the Vendor's obligation to service the last of the four (4) of the condominium sites referred to in paragraph 3(viii) is completed and to secure the deposit referred to in paragraph 11(b). Upon closing of the transaction for the Converted Units or the 36 Unit Townhouse Site, whichever is earlier, the mortgage shall be released. The Vendor agrees that upon execution of this Agreement the mortgage shall be executed in advance and held in trust by the Vendor's solicitor and registered upon transfer of the condominiums from the Purchaser to the Vendor.

...

9. The Vendor shall assign all right, title and interest in a certain agreement between Kimberly-Lloyd Developments Limited and Pinnacle Developments Limited with respect to a proposed block of land located in Royal Hemlock Subdivision and currently designated as 36 unit townhouse site under the existing development agreement. The Vendor further represents that Kimberly-Lloyd Developments Limited is obligated pursuant to the agreement to either build a road/infrastructure to service the site or provide a credit of an equivalent amount to the purchase price of approximately $400,000.00. Notwithstanding, any other provision of this Agreement, the Vendor warrants that it shall be obligated to obtain endorsement from HRM and make the 36 unit townhouse sites foundation ready based upon the Purchaser's building footprints for each building lot, with all roads, services, laterals, etc. to the individual building lots

> constructed within one (1) year of the closing of the agreement with Kimberly-Lloyd Developments Limited. ...
>
> (Emphasis added)

[41] With great respect to the appellants' submissions, these provisions cannot be dismissed as details of a development process not mandated by the agreement. The agreement provides for security to ensure that these obligations were performed (Clause 7). The purchase price for the townhouse property, in the event that conversion did not proceed, was not payable until the servicing obligations for that property had been honoured: Clause 9. Given the impact of these obligations on security and payment of the purchase price, I cannot accept the appellants' view that the terms about servicing were not essential. The judge did not err in deciding they were.

(b.) Allocation of the converted units:

[42] The townhouse property had been approved by the Halifax Regional Municipality for 36 townhouse units. However, the land was not very suitable for townhouse development because of its steep topography. The parties thought they could get approval to change the number of units to about 54 apartment/condominium units and, in effect, to transfer that density from the townhouse property to the six blocks owned by the holding companies.

[43] The November 12th agreement provided that, if this approval was granted, the converted units were "... to be incorporated into the buildings on the existing six apartment/condominium Block Sites held under Blocks 1 through 6." (Clause 10). The purchase price was $16,500 per unit. The relevant provisions of the agreement are these:

> 10. The Vendor represents that it has obtained consent from Kimberly-Lloyd Developments Limited to apply to HRM to convert the 36 unit townhouse site +/- 54 apartment/condominium units (hereinafter referred to as the "Conversion"). The Vendor confirms that it will make application to HRM for two (2) amendments to the contract development agreement for the 36 unit townhouse site as follows:
>
> (a) to convert the 36 unit townhouse site into +/- 54 apartment/condominium units which upon endorsement is to be incorporated into the buildings on

> the existing six apartment/condominium Block Sites held under Blocks 1 through 6 (hereinafter referred to as the "Converted Units")….
>
> ...
>
> 11. The Vendor represents and warrants that upon closing of the 36 unit townhouse site, that Kimberly-Lloyd Developments Limited shall grant a vendor take back mortgage in the amount of $419,000.00 for a one (1) year term. In the event approval is received for the Converted Units then the parties agree that:
>
> (a) Kimberly-Lloyd Developments Limited vendor take back mortgage or the assignee of the mortgage over the 36 unit townhouse site shall be added to the existing vendor take back mortgages over Blocks 1-6 on a pro rata basis or on any other basis mutually agreed to between the parties;
>
> (b) Pinnacle Developments Limited shall sell the Converted Units to the Purchaser at a purchase price of Sixteen Thousand Five Hundred Dollars ($16,500.00) per unit less the pro rata share of the vendor take back mortgage referred to in paragraph 11(a) above, distributed over the existing vendor take back mortgages, less the $100,000.00 deposit. The $100,000.00 deposit shall be delivered upon execution of this Agreement.
>
> (c) The balance of the purchase price for the Converted Units shall be paid to the Vendor by cash, certified cheque or solicitor's trust cheque ninety (90) days after closing of the transaction for the Converted Units …
>
> (Emphasis added)

[44] The judge decided that the allocation of the added density was an essential term of the agreement and that the agreement could not be interpreted to provide an answer to the allocation issue. The judge put it this way:

> [21] ... The initial agreement contemplated the defendants would apply to have the 36 town house units approved for conversion to 54 unit condominium/apartment units to be distributed amongst the other six blocks. That would include those blocks being sold and those being retained by the defendant. The parties anticipated that the approval would be forthcoming but had no control over the timing of those approvals. There was no provision made for the specific allocation of the town house lots as amongst the other blocks …

> [23] The agreement was deficient in terms of addressing the ... allocation as to the number of units as between the various blocks if conversion were approved. On the last point the agreement set a price per unit but not an allocation as to the numbers each party was to obtain. I am satisfied it was an issue which was to be negotiated.
>
> (Emphasis added)

[45] The appellants submit the judge was wrong on both counts. They say that the allocation was not essential but even if it was, a *pro rata* allocation could be implied from the express terms of the November 12th document. I disagree.

(i.) the allocation was essential:

[46] The appellants say that the allocation was not essential: if there were no agreement about how the units were to be allocated, the result would be that the respondents could not be compelled to sell any converted units. The appellants would still be left with their four blocks and the agreement could be completed.

[47] I do not accept this submission. As the respondents point out and the trial judge found, the issue of the townhouse property was an integral part of the transaction. The density issue was a key element of the planned development and how the density was to be allocated determined the purchase price.

[48] It was crystal clear from the evidence that, in the event of conversion, the sale of the density to be lifted from the townhouse site was the very essence of the agreement. The trial evidence of the appellant, Mr. Saberi, and his lawyer, Mr. Ling shows this:

> Mr. Saberi AB, p. 393
>
> Q. ... So your interpretation, Mr. Saberi, is that's what happens if you buy the land and if there's a conversion you don't buy the land at all?
>
> A. That's right. It's not that I don't buy the land. It ... at that point the land doesn't matter because the only thing that matters is the density of the land. ...
>
> ...

> A. I thought my obligation was I buy the land for the townhouses at $30,000 a unit or I buy the density at 16,500 per approved unit. [emphasis added]
>
> Mr. Ling AB, 214
>
> ...
>
> A. ... But the fact remains when you look at this and reflect upon it, the subject matter is the density, and once the density is gone, the land has no value, so it would stay with the developer. ...
>
> ...
>
> A. The fact remains in this agreement that once the density ... When you look at this agreement, once the density came off the property, that was the subject matter.

[49] How much of this density was to be transferred to the appellants was, therefore, a central component of the overall transaction in the event the conversion was approved. This, of course, was what the parties anticipated would happen. In addition, the allocation of the units would dictate the purchase price. It was agreed that the converted units would be worth $16,500 each. But without an agreement about how many of these units would be allocated to each lot (or at least about how many units the appellants would acquire overall), the purchase price could not be determined. As the respondents' lawyer, Mr. Innes, put it in his evidence:

> Q. ...so if we don't know how many units he's getting, how does Mr. Saberi know how many he's paying?
>
> A. Well, he doesn't ...
>
> Q. What he's paying, I mean.
>
> A. He doesn't at that point obviously.

[50] There is no more essential aspect of a transaction than the price to be paid. In my respectful view, it is not commercially reasonable to find that how these units, if approved, were to be allocated was not an essential aspect of the agreement. The judge did not err in reaching that conclusion.

(ii.) a pro rata allocation cannot be implied:

[51] The appellants second point is that, if the allocation is an essential term, it is clear as a matter of implication from the express terms of the November 12th agreement that the allocation was to be *pro rata*. They rely on **Mitsui**, **supra**, for the proposition that it is important not to equate difficulties of interpretation with uncertainty in law: **Mitsui,** para. 74. As stated in **Mitsui**, *supra* at paras. 82 and 88:

> [82] The question of certainty does not relate to the correct meaning of the words, but rather to whether the words are capable of being given a reasonably certain meaning
>
> …
>
> [88] … That an interpretation is difficult or controversial does not mean the agreement fails for uncertainty.

[52] The appellants submit that, while the agreement could have been clearer on this point, it is a reasonable implication that the intent was to divide the units equally among all six blocks just as it was agreed that the mortgages would be divided *pro rata* among the sites. The appellants support this interpretation by arguing that it is consistent with the conduct of the respondents and their counsel. After the execution of the agreement, the respondents questioned whether, on conversion, there would be any one bedroom units, alleging that without them, there would be an overall decrease of six units. The respondents claimed an additional amount of $66,000 to account for this. The appellants submit that this request for an additional $66,000 is premised on the converted units being distributed equally among the six sites. The appellants point to the February 5, 2003 letter to Mr. Ling from Mr. Innes:

> Of the remaining items on page 3 of my memo, I am aware that your client has resisted the payment of $66,000 noted at the bottom of page 3 of the memo. I think it is in everyone's best interest to have no one-bedroom units as part of the conversion and in order to accomplish this, it means that Pinnacle loses the equivalent of six units, one for each block. Pinnacle's two blocks will absorb two of these units and the remaining four to be allocated to your client's blocks …

(Emphasis added)

[53] Respectfully, these submissions are based on selective references to the evidence and ignore the highly deferential standard of review that applies to the trial judge's assessment of credibility and findings of fact.

[54] The implication of a *pro rata* distribution is not consistent with the way the parties intended to carry out the development. This was the subject of a great deal of evidence before the trial judge. The judge accepted the explanations given by Mr. Iskandar and his lawyer, Mr. Innes. Mr. Iskandar explained that the parties did not, and could not at the time, commit to a *pro rata* distribution of the converted units. He said, in effect, that if construction on some of the lots was completed before the conversion was approved, a *pro rata* distribution would make no sense: the subsequently approved transfer of density would obviously not benefit a lot on which construction had already been completed. There would be no point in, as Mr. Innes put it, "leaving available units on the table." (AB 818) The evidence was that this could easily occur given the plans to build immediately on some blocks and the fact that it could take a year to complete the conversion.

[55] The judge also accepted the explanation of the $66,000 figure offered by Mr. Innes and Mr. Iskandar during their testimony. There was an extensive exchange on this point between the trial judge and Mr. Innes in which the trial judge in effect suggested to Mr. Innes that the agreement to allocate four of the "lost" units to the four lots to be sold suggested a *pro rata* distribution. Both Mr. Iskandar and Mr. Innes explained that the later agreement to spread the "lost" units did not reflect any agreement to distribute the converted units *pro rata*. It is apparent that the trial judge accepted their evidence.

[56] The trial judge, faced with the extensive evidence from both sides about the realities of the transaction and having considered the wording of the agreement, rejected the appellants' contention that agreement on a *pro rata* distribution ought to be implied. In my view, he made no error of law or fact in reaching that conclusion.

[57] Once that implied term is rejected, the agreement is silent on how the density, if obtained, would be allocated and, for that matter, on how much of it the appellants would acquire. For reasons given earlier, I agree with the judge that this was an essential term and the agreement was not complete without it.

(c.) Public road frontage**:**

[58] There is a third example of how the nature of the transaction drives the analysis of whether or not a term is essential. The issue is whether frontage on a public road for Block 5 was an essential term.

[59] In order for a block of land to be developed, it must have frontage on a public road. The public road might or might not actually provide access to the block, but public road frontage of some nature is a legal requirement. This requirement posed a potential problem for the development of Block 5, one of the two blocks to be retained by the respondents. The townhouse site was between Block 5 and the public road. If the townhouse site was conveyed to the appellants, then the respondents would lose the means to provide Block 5 with frontage on a public road. This would make it undevelopable.

[60] The issue of road frontage was not addressed in the November 12th document. The trial judge found that this was an essential, but missing term:

> [26] One issue that was of grave concern to the defendant related to road frontage on one of the blocks he was to retain. It is clear the parties anticipated development of blocks one through six. In fact, as I have already mentioned, the agreement obliged the defendant vendor to convey blocks five and six to the plaintiff purchaser if they were not developed by the defendant. Having noted this, I refer to the fact that one of the blocks as retained by the defendant could not be developed due to the fact that it did not have public road frontage. The need for frontage was not reflected nor discussed at the time of the November 12th agreement. It would of necessity be something that was subject to negotiation by the parties subsequent to the execution of the November 12th agreement. The purchaser subsequently came up with a proposal to deal with the cost to the defendant of acquiring some of the town house lands to give him frontage.
>
> [27] It is clear that it was not the intention of the parties to enter into an agreement which prevented Pinnacle from developing that block as retained by Pinnacle . Entering into such an agreement would leave Pinnacle as a virtual hostage to the plaintiff in relation to that lot. It is not enough that the plaintiffs now say they made a reasonable offer back to Pinnacle in relation to Pinnacle gaining road frontage for that block. I am satisfied this is one of the types of contingencies the defendant had in mind when they indicated the agreement was dependant upon the execution of a more formal agreement. The defendant intended to rely upon the agreement that was negotiated and drafted over a period

> of a few hours in November of 2002 but both the defendant and plaintiff knew there were other substantial issues which were yet to be negotiated.
>
> (Emphasis added)

[61] The appellants submit that the judge erred in this conclusion. It is submitted that although road frontage was an important issue to the respondents, it was not an essential term of the agreement; there was nothing about the issue of road frontage that precluded the respondents from proceeding with the agreement. The fact that a contract is not favourable to one of the parties does not, the appellants say, make it unenforceable.

[62] I agree with the judge that public road frontage was an essential element of the agreement. Its absence would substantially deprive Pinnacle of a key benefit of the transaction – the right to develop a block of land which the parties themselves valued at $16,500 per unit and therefore at approximately $1,000,000. The whole objective of the agreement was to proceed in a cooperative way with the development of all six blocks. Unless the public road frontage point were sorted out, that objective would be thwarted. It is untenable, in my respectful view, to argue that such a term was not essential.

[63] Under the agreement, if the respondents did not develop the blocks they were to retain (i.e., Blocks 5 and 6), they were obliged to sell them to the appellants. Clause 12 of the Agreement provides in part:

> 12. In the event the Vendor does not develop Blocks 5 and 6 by himself or in a company controlled by him then the Vendor shall be required to sell the shares of Blocks 5 and 6 … to the Purchaser at a purchase price of $16,500.00 per unit.

[64] If there were no road frontage for Block 5, it could not be developed and Pinnacle's failure to develop it would then trigger the right of the appellants to buy both blocks. This sort of arrangement does not make commercial sense in light of the parties' intention to proceed in a cooperative way with the development of all six blocks. Moreover, the appellants' position on this point is inconsistent with their argument with respect to the allocation of converted units. As noted earlier, the appellants maintain that the units were to be allocated to the six units on a *pro rata* basis. Of course, it does not make commercial sense in the context of this

transaction to allocate units to an undevelopable parcel of land. But that would be the effect of allocating units to Block 5 unless the frontage issue were sorted out.

[65] I agree with the judge that there could be no complete agreement absent agreement on the issue of frontage for Block 5.

(d.) Other terms:

[66] The judge also found other missing terms to be essential to a binding contract. These related to the costs of curbs and paving, the title to the townhouse property if conversion proceeded, the question of the respondents' cross-guarantees with Kimberly-Lloyd and whether the converted units would be counted as one, two or three bedroom units. Because I agree with the trial judge's conclusions that the three essential terms I have discussed were missing, it is not necessary for me to address these additional issues.

4. The Parties' Intentions:

[67] The appellants contend that the judge found the parties intended to be bound and further that, even if he did not make this finding, he ought to have done so. The respondents, on the other hand, say that the judge correctly found that there was no common intention to create a final and binding contract.

[68] It follows that there are two main points to be addressed: what the judge decided and whether he erred in reaching that decision. In my view, the judge found that the parties did not intend to create a final, binding agreement when they signed the November 12th document and that he did not err in reaching this conclusion.

(a.) What the judge decided:

[69] My view is that when the judge's reasons are read as a whole, they show that he found the parties did not intend the November 12th document to be a final and binding agreement. The judge found that:

> "... both the [respondents] and the [appellants] knew there were other substantial issues which were yet to be negotiated" (Reasons para. 27);

> by agreeing "... to execute and deliver a more formal agreement...", both parties understood "... that there were additional substantive issues to be resolved..." (November 12th document, Clause 13; Reasons para. 28),

> the final terms of the contract were wholly contingent upon the successful negotiation of outstanding issues (reasons para. 50),

> both parties understood that the "... agreement was contingent upon events that were within the control of other parties..." and must be taken to have understood "... that the agreement as drafted on November 12th could not have been completed as drafted because the power to complete that agreement was ultimately with the control of non parties." (Reasons para. 35), and

> the fact that the appellants engaged in "... negotiations of ... outstanding substantive issues right from the beginning is reflective of their appreciation that there were additional substantive issues to be resolved." (Reasons para. 28)

[70] The appellants say that while the reasons are not entirely clear on this point, the judge was satisfied there was an intention to create a contract. They point to paragraph 37 of his reasons where the judge wrote: "The November 12th contract was not so general as to be uncertain or invalid in many respects. To the extent that it was complete it was not dependent upon the making of a formal contract." They submit that, having found the parties intended to create a binding agreement, the judge ought to have given effect to that intention: see, e.g., **Mitsui, supra** at paras. 61-64.

[71] I do not agree with the appellants' interpretation of the judge's reasons. In my view, paragraph 37 of the judge's reasons simply makes the point that there were some elements of the proposed transaction on which the parties had reached agreement. This passage, however, must be understood in context. Immediately

after the passage the appellants rely on, the judge went on to say: “I am however satisfied there were a number of essential provisions which had not yet been settled or agreed upon.” This paragraph of the judge’s reasons, read as a whole, does not detract from his clearly expressed conclusions. He found that (1.) the text of the November 12th document indicated a mutual understanding that there was as yet no final, binding agreement and, (2.) that this conclusion was reinforced by the knowledge of the parties when the document was negotiated and their conduct afterwards.

(b.) Did the judge err in this respect?

[72] The appellants submit that if the judge found that the parties did not intend to create contractual obligations, he erred in doing so. They make three main points. They submit that the text of the agreement is inconsistent with the judge’s conclusion, that extrinsic evidence should not have been relied on to contradict the clear words of the agreement and, in any event, the conduct of the parties is consistent only with their mutual understanding that there was a binding, enforceable agreement in place.

[73] Respectfully, I do not agree.

[74] Clause 13 of the November 12th agreement, as noted earlier, provides that the parties agree to execute and deliver a more formal agreement including standard representations, warranties, and covenants of the vendor normally included in a share purchase agreement and such other documents relevant to the closing of the transaction as the parties’ respective solicitors acting reasonably may require. The question is whether this is a provision that makes the agreement subject to a future formal contract to be negotiated, as the respondents contend, or whether, as the appellants submit, this clause is a mere expression of the desire of the parties to confirm the manner in which the transaction would be completed.

[75] Parties may agree that they will execute a future, more formal document. If they have agreed on all of the essential terms and it is their intention that their agreement be binding, there is an enforceable contract; it is not unenforceable simply because it calls for the execution of a further formal document. The question is whether the further documentation is a condition of there being a bargain, or whether it is simply an indication of the manner in which the contract already made will be

implemented. Professor Waddams, in **The Law of Contracts**, 5th ed. (Toronto: Canada Law Book, 2005) puts the question well:

> Is execution of the formal contract a step in carrying out an already enforceable agreement, like a conveyance under an agreement to buy land, or is it a prerequisite of any enforceable agreement at all? ... [T]he test must be the reasonableness of the parties' expectations. Has the promisor committed himself to a firm agreement or does he retain an element of discretion whether or not to execute the formal agreement? In the former case there is an enforceable agreement. In the latter there is none." (section 51 page 36,)

[76] This is a matter of the proper construction of the agreement, viewed as a whole and in light of its origins and purposes: **Calvan Consolidated Oil & Gas Co. Ltd. v. Manning,** [1959] S.C.R. 253 at 260-61; **Bawitko Investments Ltd. v. Kernels Popcorn Ltd.** (1991), 53 O.A.C. 314, 79 D.L.R. (4th) 97(C.A.) at 103-04; **Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co., supra** at para. 67.

[77] The judge adverted to Clause 13 of the agreement and concluded, in effect, that the parties' agreement "... to execute and deliver a more formal agreement including standard representations, warranties and covenants of the Vendor normally included in a Share Purchase Agreement..." made this agreement conditional on the execution of a more formal agreement and other documents relevant to the closing.

[78] The appellants submit that the judge erred in this conclusion because he ignored provisions of the agreement and aspects of the surrounding circumstances. The appellants point out that the document is called an agreement, as opposed to a letter of intent into which the parties had previously entered. The appellants also note that the agreement provides that it shall enure for the benefit of and be binding upon the parties, their heirs etc. and that it contains a severability provision (Clauses 14 and 16). These provisions, together with the text of Clause 13, are said to demonstrate the parties' intent that the agreement be a binding contract. They also say the judge improperly relied on inadmissible extrinsic evidence and ignored the parties' conduct after the November 12th document was signed.

[79] I cannot accept these submissions. Clause 13, when viewed in the context of this transaction, was far more than an agreement to put what had already been agreed upon into a more formal document. The judge, in my opinion, gave the clause an

interpretation that was consistent with its text and with the origin and objectives of the transaction.

[80] The judge properly instructed himself on the law; no issue is taken with the three legal propositions he set out at para. 34 of his reasons:

> [34] I accept that the applicable law provides that there will be no binding contract when:
>
> 1. Essential provisions intended to govern the contractual relationship have not been settled or agreed upon.
>
> 2. Where the contract is too general or uncertain to be valid in itself and is dependant upon the making of a formal contract.
>
> 3. The understanding or intentions of the parties is that their legal obligations are to be deferred until a formal contract has been approved and executed.

[81] The judge did not, in my view, give any weight to the subjective intentions of the parties. He did not rely on any evidence that contradicted the express terms of the written document. He did not ignore the evidence about the conduct of the parties after the signing of the November 12th document.

[82] The judge sought, as he should, to determine from the perspective of an objective, reasonable bystander, in light of all the material facts, whether the parties intended to contract and whether the essential terms of that contract could be determined with a reasonable degree of certainty: see G.H.L. Fridman, **The Law of Contract in Canada**, 5th ed. (Toronto: Thomson Carswell, 2006) at p. 15. While evidence of one party's subjective intent has no independent place in this interpretative exercise, it has long been settled that whether the legal effect of a document is conditional on future agreements must be decided having regard, not only to the terms of the document, but to the "genesis and aims of the transaction.": **Hillas & Co., Ltd. v. Arcos, Ltd.**, [1932] All E.R. Rep. 494 (H.L.) *per* Lord Wright at 502; **Canada Square Corp. v. Services Ltd.** (1982), 34 O.R. (2d) 250 at 258.

[83] That this is what the judge did is particularly clear at paras. 28 and 31 of his reasons. In these passages, it is apparent that the judge is looking to the text of the November 12th document as a whole, assessed in light of the "genesis and aims" of the transaction as understood by both parties. He did not ignore the conduct of the

parties after the document was signed; he found that it supported the respondents' position:

> [28] ... It is all well and good for the plaintiff to now suggest the outstanding issues were nothing more than issues contemplated under the November 12th agreement. I am satisfied that without resolution of these issues by mutual consent the agreement could never have reached a final state. I am convinced these were the types of issues Mr. Innes and Mr. Iskandar contemplated as being outstanding and being subject to further agreement. The fact that Mr. Ling and his client engaged in negotiations of those outstanding substantive issues right from the beginning is reflective of their appreciation that there were additional substantive issues to be resolved. Until or unless all those issues could be resolved there was no final agreement. It is not enough now for the plaintiff to say that they offered a reasonable solution to these issues. They were matters that involved tens or even hundreds of thousands of dollars. They had to be resolved through negotiations in order for the transaction to be completed. In reality this was a complex series of negotiations. There were a number of offers and counter offers and compromises. The parties never did get to the same place at the same time in terms of resolving all the outstanding issue. At best the parties were close to resolving the outstanding issues at some points. I do not accept the plaintiff's position that the terms in the November 12th agreement were meaningless when it stated:
>
> > the parties further agree to execute and deliver a more formal agreement...
>
> ...
>
> [31] The severability provisions in paragraph 16 do not save the agreement. The various substantive terms of the agreement were so intertwined and interdependent that it would be impossible for the Court to, for example deal with the sale of the shares related to blocks one through four and not to deal with the town house lots and/or the requirement to develop blocks five and six.
>
> (Emphasis added)

[84] Moreover, the judge was careful not to give independent weight to the evidence about the subjective intention of one party, but rather to assess what the parties intended from the perspective of a reasonable and objective onlooker. This is particularly clear in para. 35 of his reasons:

> [35] In the present case I refer to the evidence of those present at the time the agreement was negotiated. In relation to point number three above [the text of point 3 just above para. 35], I accept the evidence of Mr. Iskandar and Mr. Innes

> that they would not have signed the agreement of November 12, 2002, if paragraph 13 were not included. This was a complex transaction, more correctly described as a complex series of transactions. The agreement which was sketched out on November 12, 2002, reflected the general intention of the parties. Both Mr. Iskandar and Mr. Saberi were aware of the fact the transaction as reflected in the November 12th agreement was contingent upon events that were within the control of other parties. For example I accept the evidence of Mr. Iskandar when he says he informed the plaintiff as to the existence of non-party agreements which could have made it impossible to complete the transaction if those non parties agreements could not be extinguished. It was clearly the intention of Mr. Iskandar and Mr. Innes that their legal obligations were to be deferred pending release of these other agreements. Mr. Iskandar made it a point to keep Mr. Saberi apprised as to his dealing with those non parties. Mr. Saberi must be taken to understand that the agreement as drafted on November 12th could not have been completed as drafted because the power to complete that agreement was ultimately within the control of non parties.
>
> (Emphasis added)

[85] For the reasons I have given, my view is that the judge did not err in his construction of the November 12th document or in his assessment of the evidence.

[86] The appellants relied heavily on **Mitsui** in support of their position, but in my view, that reliance is misplaced. There are critical distinctions between that case and this one. In **Mitsui**, the purpose of the agreement was to settle all outstanding disputes in order to allow an ongoing joint project to go forward. There was a clear finding, supported by the evidence, that both parties intended to and thought that they had achieved that purpose by signing the document in question. No missing terms, essential to the achievement of that objective, were identified. In each of these ways, the present case is unlike **Mitsui**.

V. DISPOSITION:

[87] I would dismiss the appeal. It is not necessary to address the notice of contention. Both counsel were of the view that $7,500 would be an appropriate range for costs. I would, therefore, order the appellants to pay the respondents costs fixed at $7,500 plus disbursements as taxed or agreed.

[88] Counsel were most helpful in their written and oral submissions and the Court appreciates both the skill and the care they exhibited.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.
Hamilton, J.A.