**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Agate Developments Ltd. v. United Gulf Developments Ltd., 2009 NSSC 160

**Date:** 20090422
**Docket:** Hfx No. 279612
**Registry:** Halifax

Between:

Agate Developments Limited

Plaintiff

and

United Gulf Developments Limited

Defendant

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D E C I S I O N

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| **Revised Decision:** | The text of the original decision has been corrected replacing United Gulf Investments Limited with United Gulf Developments Ltd. on January 18, 2010 and replaces the previously distributed decision. |
| **Judge:** | The Honourable Justice Gerald R P Moir |
| **Heard:** | 14, 15, and 22 April 2009 at Halifax |
| **Written Decision:** | Oral decision transcribed, edited, and signed on 20 May 2009 |
| **Counsel:** | Mr. James D MacNeil and Ms. Bryen Hebert, Articled Clerk, for the plaintiff<br>Mr. Norman B Hill for the defendant |

Moir, J (Orally):

***Introduction***

[1] The road that leads from Herring Cove to Ketch Harbour follows the east-facing coast outside the mouth of Halifax harbour. It passes close to the shore at Halibut Bay, Connels Hole, Deep Cove, and Bear Cove, but not so close as would prevent subdivision and the creation of valuable ocean-front lots.

[2] Agate Developments Limited is a land developer. It acquired a large tract of land in the Halibut Bay to Bear Cove area. The tract was divided by the Ketch Harbour Road. To the east of the Road, Agate acquired about a mile of the strip that runs between the road and the ocean. The much larger western side of the tract contains about twelve hundred acres of raw land.

[3] Agate began developing the ocean side into residential lots, many of which would have ocean frontage. By the fall of 2002, the first of several phases for development of this side progressed to the point where final subdivision approval had been received and marketing had begun.

[4] Concept drawings for the second phase on the ocean side had been settled, and municipal approval of those drawings, and tentative subdivision approval, were anticipated. With those approvals, required improvements, such as streets, could be constructed in the second phase of the ocean side development and final subdivision approval could be sought.

[5] Several more phases were planned for the ocean side. The project was completed last year with the sale of the last ocean side lots.

[6] Some time before the fall of 2002, principals of Agate decided to concentrate on short term developments. That decision led to a sale of the large western part to United Gulf Developments Limited. The decision to sell the western part caused a complication. Under the *Municipal Government Act* and bylaws of the Halifax Regional Municipality, a developer is required to provide land, or cash in lieu, for recreational uses. Agate had been planning to transfer land from the western part to discharge some of its obligations arising from the development of the ocean side.

[7] The agreement of purchase and sale between Agate and United Gulf contains terms by which United Gulf would assist in the discharge of Agate's obligations under the bylaw. The terms call for the conveyance by United Gulf to the municipality of up to five acres to be credited to Agate's obligations. The terms also refer to a letter of credit given by Agate to the municipality and provide for circumstances in which United Gulf must indemnify Agate if the letter of credit is cashed.

[8] It turned out that the municipality would not accept a deed to lands from the western side, unless the development plans for that side became more defined than either Agate or United Gulf had done.

[9] The main issue in this case is whether the agreement obliges United Gulf to reimburse Agate for money expended to settle its liability under the bylaw.

***Witnesses***

[10] Agate called Mr. Jack Osmond, one of its principals, and Mr. Tom Swanson, a consulting engineer who specializes in real estate development. United Gulf called its principal, Mr. Navid Saberi.

[11] The testimony of each showed respect for the others. The court is grateful for straight-forward, unembellished evidence. There were few significant inconsistencies.

[12] I found all three witnesses to be highly credible.

***Events Leading to the Contract***

[13] When Agate acquired the tract and was ready to start developing it, the company hired, as its principals had done many times in the past, Mr. Tom Swanson, then of AMEC, to provide all the engineering required for the development and to do the work necessary to obtain municipal approvals. As part of those duties, Mr. Swanson dealt with the Halifax Regional Municipality on the contribution of recreational lands, which was then five percent of the lands under development.

[14] The ocean side lands were developed in four phases that eventually produced forty-four lots. In the first phase, twenty-one lots were created and approved on the ocean side of the tract but without ocean frontage. The remaining twenty-three lots would all have ocean frontage. They are accessed by the streets created for the first twenty-one lots, or by Ketch Harbour Road itself. (In the first phase, seven lots also got subdivided on the west side, each fronting on Ketch Harbour Road.)

[15] United Gulf and Mr. Saberi are also long-standing clients of Mr. Swanson. He was aware of Mr. Saberi's interest in acquiring land for long term development, and had referred several opportunities to Mr. Saberi in the past. Therefore, he introduced Mr. Saberi to the opportunity of purchasing the western part of the tract after Agate decided to concentrate on short term developments.

[16] Mr. Saberi was interested. An offer was formulated, and negotiations were carried out through Mr. Swanson. Although Mr. Swanson often acted for Mr. Saberi, it was clear to all that Mr. Swanson was speaking for Agate on this occasion.

[17] In his testimony, Mr. Swanson described Mr. Saberi's approach to real estate development. He develops large pieces of land into "marketable communities", rather than going for the quick return involved in dividing land into lots that are readily marketable on their own and by virtue of their location. This approach requires time and deliberation.

[18] Mr. Swanson testified that, before the negotiations with Mr. Saberi, his staff and Halifax staff had reached an agreement that Agate's obligations to provide recreational lands on account of the ocean side development could be discharged by conveyance of a one acre look-off park from that development, with the western side providing the rest. The look-off park had to be improved by Agate to provide ocean access for the public. Agate had to construct a parking lot and a walkway down to the shore. Mr. Swanson testified that the need for an additional conveyance from the western side "is the reason for" clause 1(o) of the agreement of purchase and sale.

[19] Mr. Swanson said that agreement had not been reached with the city on what exactly would happen on the western side. Discussions had settled some principles. The land had to be suitable for active recreation, such as ballfields or

walking trails. Access had to be provided away from Ketch Harbour Road. The lot had to be specifically identified. A master plan had to be prepared for where the park would be. Mr. Saberi was told about all of these subjects.

[20] Mr. Swanson also testified about a letter of credit the city required. Because of concerns about owner's liability, it would not take title to the look-off park until the improvements, the parking lot and the walkway, were finished. So security, in the form of a letter of credit, was required in the meantime. Mr. Swanson referred to his letter of August 1, 2002 as showing what was agreed to by the Halifax Regional Municipality for security until the improvements were finished.

[21] The letter of credit was to have a $59,700 limit. The condition was to be that, on or before July 31, 2003, Agate fails to "provide a warranty deed for parkland and/or parkland improvements" that meets "the full parkland requirements associated with the approval of the subdivision" of lands in the Phase 1 development. The bank would, on default, be obligated to pay the "deficiency of parkland contribution under HRM standard policies to the full amount of $59,700." Mr. Swanson's letter to Mr. Osmond continues: "I believe that this letter of credit and the clearing of sight distance for Lot 14W are the only outstanding issues delaying approval of the first block of lots."

[22] The Bank of Montreal issued a letter of credit on August 12, 2002 that conformed with Mr. Swanson's recommendations. It was to expire on August 9, 2003, but it provided for automatic one-year renewals, without amendment, unless the bank gave notice otherwise before the expiry. The letter of credit was amended once, and once only. The amendment only changed the bank's reference code. The letter was not cancelled until early 2004.

[23] The agreement of purchase and sale was prepared by United Gulf's in-house solicitor. The result was, however, the product of negotiations. Mr. Swanson provided the background information on which clause 1(o) is based.

[24] Mr. Saberi also testified about the events leading to the agreement. He was not shown a copy of the letter of credit or the correspondence leading to it. In his experience, a letter of credit is often required by a municipality before subdivision approval of lands for which obligations are outstanding to the municipality. I find he did not know the details of the letter of credit and would have taken it to be as described in clause 1(o) of the agreement of purchase and sale.

***Terms of the Contract***

[25] The agreement of purchase and sale was made in early October, 2002. It provides for the sale of "Block 2 (584.4 acres), Block 6 (489.48 acres) and Block 4 (186 acres)" at a purchase price of $2,100,000. (The agreement contains an option to purchase an ocean lot, and the price is reduced by $250,000 if the option is not exercised. It was not exercised.)

[26] The purchase price of $2,100,000 was to be paid by $100,000 in cash and a mortgage payable in four annual installments. No interest is required except "Any mortgage installment in default shall bear interest at the rate of 1% per month until paid."

[27] The provisions for conveyance of recreational lands are in clause 1(o). It is made up of seven sentences. The first sentence is a recital about an agreement between Agate and the municipality. It reads:

> The parties acknowledge the Vendor has entered into an agreement with HRM to comply with the subdivision by-laws and regulations of HRM requiring the transfer of parkland suitable for development for active recreation purposes and acceptable to HRM parks and recreation department containing an area of not more than five (5) acres on or before July 31, 2003, from either block 2 or 6 subject to HRM's site selection and negotiations between HRM and AMEC E&C Services Limited.

[28] In the second sentence United Gulf promises to convey land so that the agreement between Agate and the municipality can be fulfilled. It reads:

> The Purchaser agrees to donate the first up to five (5) acre parcel for parkland dedication from the Property, for the benefit of the remaining lands of the Vendor and prior to any other parkland dedication for the benefit of the Property.

[29] The third sentence establishes the deadline by which United Gulf is to convey the parkland. The deadline is November 15, 2006, which contrasts with July 31, 2003 in the recital. The third sentence reads: "The up to five (5) acre parcel shall be dedicated on or before the last installment due under the vendor take back mortgage."

[30] The fourth sentence of clause 1(o) is either a recital about Agate's intention or an express promise by Agate to maintain "the letter of credit". Despite the use of the definite article, nothing otherwise in the agreement defines or gives reference to a letter of credit. The fourth sentence reads:

> The Vendor shall maintain the letter of credit requirement to HRM for the up to five (5) acre parcel for parkland dedication until such time as the up to five (5) acre parkland parcel is transferred to HRM or HRM are no longer prepared to extend time for transfer of the up to five (5) acre parkland parcel or calling of the letter of credit.

[31] The fifth sentence begins with the phrase "At that time", which refers to the three alternatives in the fourth sentence. It requires United Gulf to provide the promised deed or reimburse Agate on the letter of credit. It says:

> At that time, the Purchaser shall either deed lands to the Municipality or in the event the Vendor's letter of credit has been called, the amount of payment called under the letter of credit shall be added to the next installment due under the vendor take back mortgage.

[32] The sixth and seventh sentences provide for United Gulf to receive any rebate if the deed is delivered after the letter of credit is paid and for United Gulf to take credit for excess lands conveyed to the municipality. Neither their subject nor their text is helpful to resolving the issues in this case.

***Recitals vs. Reality***

[33] The text of clause 1(o) assumes that arrangements between the municipality and Agate had been settled to a degree much greater than had been achieved in reality. The recital says that "the Vendor has entered into an agreement with HRM to comply with the subdivision by-laws ... requiring the transfer of parkland". It says that the agreement calls for "an area of not more than five(5) acres". It says that the acreage is to come from "either block 2 or 6" in the western part. It says that the transfer is to occur "on or before July 31, 2003". The only qualification is that the transfer is "subject to HRM's site selection and negotiations between HRM and AMEC". Thus, the recital in clause 1(o) suggests that Agate and the municipality have agreed on the concept of transferring lands from the western part to the credit of obligations arising from the development of the eastern part, that they have agreed on a maximum size of five acres, that the general location in

blocks two or six is settled, and that the closing date is agreed. With the "subject to" phrase, the recital suggests that exact location and configuration are all that is left to be agreed.

[34] The fourth sentence of clause 1(o) assumes that there is a letter of credit in place from Agate's banker in favour of the municipality.

[35] A letter from Mr. Swanson to a development technician for the municipality makes it clear that negotiations were far less advanced than the recital represents. The letter is dated January 27, 2003, just three months after the agreement of purchase and sale. It opens:

> AMEC and our client Agate Developments Limited, are very concerned and disturbed by the approach and position taken by HRM Parks and Recreation representatives in relation to parkland requirements for Phase 2 of The Breakers at Bear Cove at a meeting to discuss approval of the concept plan on December 11, 2002.

AMEC was very concerned and disturbed by Parks and Recreation's demand for land in Phase 2 of the ocean side development. The letter records that AMEC had "...provided a concept plan to HRM Parks and Recreation both for an oceanfront viewing park and for active recreation lands across Highway 349 from the ocean frontage."

[36] The state of negotiations for a contribution from the western lands is apparent from this:

> AMEC staff discussed and provided sketches to HRM for a possible active recreation park across Highway 349, which HRM staff indicated were generally in line with Parks and Recreation Division desires but that more detail would be required prior to its approval. ...They further indicated that until such time as detailed planning could be carried out for lands across Highway 349 and reviewed by Parks and Recreation, to ensure that any proposed active recreation park meets HRM's requirements, a letter of credit could be posted in order to obtain approval of lots on the oceanfront side of the highway.

The reference to the letter of credit shows that the described discussions were held long before the agreement of purchase and sale was executed.

[37] It does not appear that the municipality had agreed to anything. Not the acreage, not the location in block 2 or 6, and not a July 31, 2003 closing date.

***Events After Contract***

[38] Clause 1(o) assumes that there is an agreement, at least in principle, under which Agate must transfer up to five acres from the western side and, in the fourth sentence, that there is a letter of credit in place to secure that obligation. The January, 2003 letter contains a proposal that offers this approach as one of three alternatives. The letter offers the following:

> 1. Our previous submission proposed to transfer a parcel of land at the corner of Kestral Court and Highway 349 to HRM. This parcel exceeds the area of land required under the regulations for parkland. HRM turned this parcel down but we would again offer it should you wish to reconsider this position.
>
> 2. Failing the above, we request that HRM agree to accept parkland on the other side of Highway 349; and accept a letter of credit as security until planning and development of that side of the highway are advanced to the point where lands can be transferred. Our client would fully understand that if the land is not transferred within a reasonable time, that the letter of credit would be cashed and monies retained in lieu of parkland.
>
> 3. If neither 1 or 2 above are acceptable, we request that you provide us with a copy of a motion by HRM Council approving payment of the difference in value between HRM's parkland entitlement under the Subdivision Regulations and the full value of Lot 22.

United Gulf was not informed of this proposal, although one of the options involved transferring its land.

[39] Mr. Swanson testified about the city's response to this proposal. They were not interested in the Kestral Court property, and they were not interested in land from the western side until they had a concept plan for that side.

[40] Mr. Swanson asked Mr. Saberi about preparing the concept plan, and possibly offering the municipality a plan of just the area that would contain a park rather than a concept plan for the whole western side. He showed Mr. Saberi concept plans Agate had developed, which were for part, not the whole, of the

western side. Mr. Saberi wanted to develop a master plan for the whole area and did not want to tie his company down to any one location for the park before it knew how it was going to develop the whole.

[41] In cross-examination, Mr. Saberi said he recalled discussing with Mr. Swanson doing a concept plan, and he said he was not ready to do that when the discussion occurred. He denies any discussion of a concept plan in the context of United Gulf's obligations under clause 1(o).

[42] Based on my assessment of the testimony of both witnesses, I am satisfied there was a discussion of the municipality's recent rejection of the concept of western side lands for ocean side obligations. There was a discussion of the municipality's reason for that rejection, and of the possibilities of doing a concept plan for the western side or convincing the municipality to accept a plan for the park and the area around it. I find that these discussions bore no reference to United Gulf's obligations to Agate. Mr. Swanson was asking whether United Gulf could assist Agate and did not suggest that United Gulf was obligated to do so. In light of his description of Mr. Saberi's approach to land development, it would not have come as a surprise that Mr. Saberi was not prepared to rush into a development of the western side.

[43] From February until April of 2003, Mr. Swanson, or staff working under him, met with, and corresponded with, municipal officials. Agate's obligation to provide recreational lands, or cash in lieu of land, was settled for phases one and two on the ocean side.

[44] About four thousand square metres were required to satisfy the obligation arising from the development of Phase 1. Another four thousand were required for Phase 2A. The dedication of the look-off park satisfied the Phase 1 obligation and provided a substantial credit towards 2A. In addition, Agate received a thirty thousand dollar credit for the improvements it made to the look-off park.

[45] The municipality calculated the balance for cash in lieu of land resulting from the Phase 1 and Phase 2 subdivisions at $60,760.55. This was paid several months later, on July 31, 2003. At the same time, Agate delivered a deed to the look-off park.

[46] The relationship between the $60,760 payment and clause 1(o) was summed up this way in a letter written by Mr. Aubrey Palmeter for Agate to Mr. Bigelow of the Halifax Regional Municipality:

> We had included a clause in our sale agreement that required United Gulf to provide HRM with 5 acres of parkland to address the parkland issues on the remaining lands of Agate to the east of the highway.
>
> Subsequent discussions with your department precluded this agreement and instead we have agreed to a lump sum payment of $60,760.55 as full consideration in addressing your requirements.

[47] United Gulf was not a party to these dealings between Agate and the municipality. Mr. Saberi was not aware of the agreement that had been reached.

[48] Agate maintains that United Gulf should have come forward on July 31, 2003, the date mentioned in the first sentence of the recital of clause 1(o), to tender a deed. United Gulf did not do that, nor did Agate seek anything from United Gulf at that time.

[49] Mr. Swanson testified that the letter of credit was extended past August, 2003. It was cancelled, at the request of Agate, five months later in January, 2004.

[50] United Gulf took no interest in Agate's dealings with the municipality, and Agate never suggested that United Gulf had any liability arising out of those dealings until February, 2007 when Agate attempted to pay off the mortgage.

[51] At first Agate provided a payout statement for principal of $250,000, interest of $7,561, and a release fee of $150. Two days later Agate withdrew the payout statement. Its solicitor wrote:

> ...there is, as well, due under the terms of the mortgage a sum paid by our client to HRM with respect to the parkland allotment as called for in subparagraph 1(o) of the agreement.

Mr. Boyne explained:

> HRM would not accept five acres from these lands and as a consequence, our client was required to pay the amount in cash having first provided the city with a

> letter of credit (certified cheque). The amount was either $63,000 or $66,000. My client will forward particulars to me the first of the week which I will forward to you.

[52] United Gulf denied liability for the payment made in 2003 to the municipality, and thus began the dispute that led to the trial of this action.

[53] Whether or not the $60,760 could be added to the mortgage, the balance came due in February, 2007. United Gulf refused to pay not only the $60,760 but also the balance of principal and interest. Agate obtained a summary judgment, but some of the claim for interest remains in dispute. That is the second issue, and I shall come back to it after dealing with the first.

***The Meaning of Clause 1(o)***

[54] Mr. MacNeil refers me to G.H.L. Fridman, *The Law of Contract in Canada*, 4th ed. (Toronto; Carswell, 1999) at 477 - 478 for the general principal of contractual interpretation:

> The contents of any express term or terms are basic to a true understanding of the nature, scope and extent of the contractual rights and duties of the parties. What has been spoken or written by them as part of the contract is the prime source of knowledge of their intentions. (p. 477)
>
> Words of ordinary use in a contract must be construed in their ordinary and natural sense. The paramount test of the meaning of words in a contract is the intention of the parties. That is to be determined in the operative sense by reference to the surrounding circumstances at the time of signing the contract. (p. 478)

[55] Justice LaForest and Justice, later Chief Justice, McLachlin express it this way at para. 9 of *BG Checo International Ltd.* v. *British Columbia Hydro and Power Authority*, [1993] S.C.J. 1:

> It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole.

[56] The contract between Agate and United for the sale of the western part of the tract acquired by Agate does not impose on United Gulf any obligation to develop

the western part in the near future, or any time for that matter. Clause 1(o) does, however, impose on United Gulf an obligation to develop the western part to the extent necessary for performance of an agreement between Agate and the municipality, and it prescribes the consequences of failure by United Gulf.

[57] Clause 1(o) provides for land from the western side to be conveyed by United Gulf to the Halifax Regional Municipality to discharge some of Agate's obligation to provide recreational land on account of subdivision in the ocean side.

[58] That, in my assessment, is the inner logic of clause 1(o). That is: an obligation to transfer up to five acres to the municipality, a recognition that United Gulf will not be able to do so in one year and may not be able to do so in time to satisfy the municipality, and an alternative obligation to indemnify Agate when a letter of credit is cashed.

[59] The contract needs to provide answers to two questions:

> In what events does the alternative obligation arise?
>
> What letter of credit do the parties look to in the event that the alternative obligation does arise?

In my assessment, the contract answers both of these questions expressly and clearly.

[60] *What events?* United Gulf's primary promise is contained in the second sentence of clause 1(o). It promises to convey the parkland referred to in the recital. Clause 1(o) contemplates that United Gulf will not be in a position to convey the lands before the deadline in the recital, July 31 of 2003. Indeed, it sets a much later deadline of November 15, 2006 in the third sentence. And, in the fourth and fifth sentences, it provides for what happens if time runs out.

[61] The fourth sentence introduces the reader to "the letter of credit requirement to HRM". Then it sets out three possible events:

- "the up to five (5) acre parkland parcel is transferred to HRM"
- "HRM are no longer prepared to extend time for transfer of the ... parcel"

- "calling of the letter of credit"

The fifth sentence, "At that time" is hinged on the happening of one of these *three* events. Either United Gulf conveys the parkland or "the amount of payment called under the letter of credit shall be added to the next [mortgage] installment."

[62] As I interpret the contract, United Gulf undertook no obligation to convey parkland for the benefit of the Agate development until one of those three things happened. The text does not allow for a fourth event, that Agate fails to enter into the assumed agreement with the municipality.

[63] *What letter of credit?* Clause 1(o) is premised on the municipality having agreed to, or being willing to agree to, a transfer from the western side to the credit of Agate's obligations on the development of the ocean side.

[64] The recital says "the vendor has entered into an agreement with HRM". The phrase at the end of the recital, "subject to HRM's site selection and negotiations between HRM and AMEC" suggests exact location and boundaries remain to be negotiated. An interpretation of this phrase that gives it the meaning that the entire agreement is up for negotiation, clashes with the strong opening words "has entered into" and with the highly specific references in the recital to agreed terms.

[65] The clause explicitly refers to a letter of credit that secures the performance of an agreement for transfer of the five acres of western parkland. The fourth sentence requires Agate to maintain a letter of credit "for the up to five (5)acre parcel for parkland dedication".

[66] The letter of credit referred to in clause 1(o) is a letter of credit securing a promise to convey up to five acres on the western side. The fact that Agate did not have, and never obtained, such a letter of credit cannot change that interpretation. The text does not support the interpretation that United Gulf must indemnify Agate on whatever letter of credit exists for the ocean side development. The logic behind the text is to make United Gulf liable for Agate's losses if the five acres are not transferred.

***Whether Conditions of Liability Arose?***

[67] The parkland was never transferred. No letter of credit was ever cashed. Mr. MacNeil argues that we are within "HRM are no longer prepared to extend time for transfer of the ... parkland parcel".

[68] Mr. MacNeil submitted that Mr. Saberi knows well the process by which the five acres would be conveyed. No doubt that is so. Mr. MacNeil says that Mr. Saberi should have prepared for the July 31, 2003 deadline referred to in the recital by having land ready for conveyance then. Because Mr. Saberi was not prepared to get on with a master plan for his development, he effectively put extensions out of reach.

[69] Respectfully, I have three problems with this submission. First and foremost, the event giving rise to liability is premised on an agreement being in place between the municipality and Agate. There was no agreement and nothing for the municipality to extend or to choose "no longer" to be prepared to extend. Since no agreement was made with the municipality, it could never come to pass that the municipality was "no longer prepared to extend time".

[70] Secondly, the evidence does not suggest that Mr. Saberi frustrated Agate in its attempt to make an agreement with the municipality. The municipality led Mr. Swanson to believe it would agree to the five acre transfer. The agreement of purchase and sale was premised on Agate having, or obtaining, such an agreement and on the municipality agreeing to extensions as late as November, 2006. Instead, the municipality required that the entire two thousand acres be taken to the conceptual development stage. United Gulf never undertook an obligation to do that.

[71] Thirdly, Agate's present position contradicts what it said to the municipality about HRM's about-face. Mr. Palmeter referred to the agreement requiring "United Gulf to provide HRM with 5 acres of parkland". He complained that HRM "precluded this agreement", and he said that the Agate agreed to pay the $60,760 "instead".

[72] I find that none of the events set out in the fourth sentence of clause 1(o) ever arose. Therefore, United Gulf was never under an obligation to indemnify Agate.

***Whether There is a Letter of Credit under Clause 1(o)?***

[73] Even if a condition of liability arose, there is no letter of credit to which the indemnity in clause 1(o) could apply.

[74] There is no letter of credit "for the up to five(5) acre parcel". The only letter of credit secures Agate's general obligation to provide residential lands, or cash in lieu of it. It says nothing about the five acre transfer.

[75] Furthermore, the letter that does exist only applies to the first phase of the development on the ocean side of the tract. The liability it secures was not only discharged in August 2003 by the conveyance of the look-off park, a substantial credit towards future liabilities for second phase was also created.

[76] It makes no difference that the letter was extended in August, 2003 until it was cancelled in January, 2004. It still only secured obligations for the first phase and those obligations were discharged. There was no amendment extending the letter of credit to the next phases, and certainly there was no arrangement with the bank that could bind United Gulf.

[77] Incidentally, the only letter of credit is limited to $59,700. This shows how disconnected Agate's demand of February, 2007 was from the contractual obligations formed in October, 2003.

***Interest***

[78] Associate Chief Justice Smith released her decision on Agate's motion for summary judgment in May, 2008: *Agate Developments Limited* v. *United Gulf Developments Limited*, [2008] N.S.J. 207 (SC). She allowed the principal amount of $250,000 and interest to February 15, 2007. She found that there was a genuine issue to be tried about whether Agate was estopped from claiming interest after that date.

[79] The evidence provided at trial differed from that on the summary judgment motion. I do not have any evidence of a promise or representation, or of detrimental reliance, as could found a promissory estoppel.

[80] The argument for United Gulf went to the fairness of it being charged interest on the principal debt. It was given a correct payout statement. Two days

later, Agate added $60,760 to which it was not entitled. The liability in connection with recreational lands is not even mentioned in the mortgage instrument.

[81] It is said that the unjustified insistence prevented United Gulf from being able to provide Mr. Saberi with an assignment of the mortgage in exchange for his personally financing the payout.

[82] The evidence makes it clear to me that, inconvenient and annoying though the unjustified demand may have been, it caused no serious loss to United Gulf. United Gulf had no, and still has no, plans for development or resale of the western side. There were ways of securing the loan for Mr. Saberi besides obtaining an assignment of the Agate mortgage.

[83] The $250,000 debt was due. Its payment is provided for in the agreement of purchase and sale, and in the mortgage. Interest of one percent a month on arrears is provided for in both instruments. It is not argued that the provision for interest is not legal.

[84] Unlike prejudgment interest under the *Judicature Act*, this court does not have a broad discretion over contracted interest. I do not have the power to refuse contracted interest, unless the contract is contrary to law. (The remedy of foreclosure and sale is equitable and there may be some discretionary control over contractual interest to the extent that the court could refuse the remedy, but the discretion would arise on the remedy, not the fact of a mortgage.)

***Counterclaim***

[85] United Gulf counterclaimed for damages in connection with Agate's use or occupation of the western side after it was conveyed to United Gulf. The parties agreed to sever, or counsel advised me that the word under the new *Nova Scotia Civil Procedure Rules* is "separate", the counterclaim from the main claim. I made a ruling about costs on that, and I have signed an order on that subject.

***Conclusion***

[86] I will grant an order dismissing Agate's claim for $76,717 made up of $60,760 claimed under clause 1(o) and $15,957 in interest on that claim. I will grant an order for judgment against United Gulf in the amount of $37,581.83 for interest on $250,000 from the extended due date of February 15, 2007 until the debt was paid on May 12, 2008.

[87] The parties may submit briefs on costs before the end of June, and they are each entitled to a brief written reply before the middle of July.

J.