SUPREME COURT OF NOVA SCOTIA
Citation: *United Gulf Developments Limited v. UROM Inc.* , 2021 NSSC 195

Date: 20210616
Docket: Halifax No. 445603
Registry: Halifax

Between:

United Gulf Developments Limited

Plaintiff

v.

UROM Inc.

Defendant

Decision

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	April 6, 7 and May 18, 2021, in Halifax, Nova Scotia
Counsel:	Brian Awad, Q.C., Counsel for the Plaintiff Tim Hill, Q.C., Counsel for the Defendant

By the Court:

Introduction

[1] The Plaintiff, United Gulf Developments Limited ("United"), is an established large-scale property developer – its principal is Navid Saberi; the Defendant, UROM Inc. ("UROM"), was incorporated as a vehicle to manage small real estate developments on behalf of the Haghgouei family which had moved to Canada in 2006.

[2] The father, and President of UROM, Mahmoud Haghouei, had been involved in construction developments before coming to Canada. His daughter Selvana had completed her engineering studies and received her Professional Engineer designation in civil engineering by 2011. Her brother obtained a business degree in 2009. Together they had hoped to use their collective experience and educational backgrounds to make UROM an ongoing real estate development business.

[3] In April/May **2012**, United was in the midst of developing its Voyageur Lakes Subdivision in Halifax, when it agreed to sell ("**the Agreement**") to UROM for $800,000, **lots 24B, 25A, 25B, and 26A** in that bare-land condominium (Halifax County Condominium Corporation No 314 hereafter "**HCCC No. 314**") project. Both parties were represented by counsel at all material times.

[4] The Agreement obligated UROM to build duplexes on each of the four lots. It was a condition of the Agreement and the Vendor take-back Mortgage "that one

lot shall be paid out within one year, and an additional lot paid out every six months thereafter."

[5] **In 2015**, **United sued UROM for its default on a $780,000 loan** United had made to UROM to allow it to purchase the four lots.

[6] **UROM defended, and counterclaimed that United breached implied conditions, and specifically clause 6 of the Agreement and clause 2 of** Amendment "C" thereto ("time shall be of the essence") which obligated United to diligently and expeditiously take all necessary steps to incorporate the lots as "condominiums" into HCCC 314.

[7] **Alternatively, UROM says the parties' mutual intentions contained within the Agreement were legally frustrated** by "Stop Orders" initially registered by the Registrar of Land Titles on June 24, 2013, against lots 25B and 26A, and another superseding it on October 25, 2013, regarding only lot 25B, which it says effectively prevented UROM from dealing with those two lots for such a lengthy period of time, that it was unable in a timely manner to sell lot 26A or to obtain financing to complete the duplex on lot 25B. UROM says therefore it should **not** be bound by the Agreement, and this court should rescind the Agreement.

[8] I am satisfied that:

1. United did not breach the Agreement and it is entitled to its claim on the debt; and
2. UROM is not entitled to rely on the doctrine of frustration.

[9] In summary, I am satisfied that United's claim is successful and UROM's counterclaim is not.

Background

[10] No buildings were constructed on **lots 24B and 25A - they were re-conveyed to United by a Partial Settlement Agreement dated March 25, 2019**, which granted UROM a $340,000 credit therefor.

[11] Therefore, the material issues remaining in dispute are the parties' legal obligations in relation to lots 26A and 25B.

[12] Ultimately, **the duplex on lot 26A was "completed"** on **March 19, 2013,** as evidenced by the issuance of an "occupancy permit".

[13] The **duplex on lot 25B was made "roof tight" after March 19, 2013**, however it remains **uncompleted inside**.

[14] The trial was efficiently presented by counsel. A large Joint Exhibit Book ["JEB"] greatly reduced the necessity for calling evidence, but it nevertheless required the court to carefully examine that documentation. Only two witnesses testified. Navid Saberi for United; and Selvana Haghgouei for UROM.

[15] When witnesses testify, courts will consider their *veracity* or intention to honestly communicate what they believe are the facts, as well as their *reliability*, which is the level of confidence that the court has that their evidence is also factually accurate. When courts speak of a witness's "credibility", generally they intend to communicate a conclusion about the witness's veracity and reliability, although in some instances credibility and reliability will be treated as distinct concepts.

[16] Generally, I accept the evidence of Mr. Saberi to be credible. For example, I accept his evidence that UROM's **construction on lots 26A and 25B was well underway by December 17, 2012**.

[17] As I shall explain later, although I found Ms. Haghgouei's evidence generally credible, on some important matters her evidence was deserving of less weight, which diminished her overall credibility.

The Agreement – and building duplexes on lots 26A and 25B

[18] The Agreement, dated May 9, 2012, was structured as follows:

1. The intention was that United would deed to UROM the four lots - and UROM would build a duplex on each of the lots within a specified time interval;

2. Once a constructed duplex was *completed* on a lot, UROM was to convey that lot back to United in trust ("the re-conveyancing sequence"), to allow United as "the declarant" to register the lot with Halifax County Condominium Corporation No. 314, and then re-convey it to UROM - which would be free to sell the duplex or otherwise profit therefrom, after paying down the loan it received from United;

3. The UROM purchase of the lots was primarily financed by a $780,000 loan/vendor take back mortgage dated July 17, 2012. It was anticipated that UROM would independently finance the duplexes' construction costs.

[19] As will become apparent, some of the wording in the Agreement is inelegant, and confusing. At times both parties did not abide by the strict wording thereof.

[20] Selvana Haghgouei, Secretary of UROM at all material times, testified that she had read the Agreement, and I infer that she intended to communicate that she had done so before it was finalized and signed, as well as after it had been signed. She did not suggest that she or any other representative of UROM did not understand the contents of the Agreement.

[21] She stated that the Haghgouei family was going to use their own money to finance the building of the duplex on lot 26A, and then UROM would, as needed, seek bank financing to fund the completion of construction of the duplex on lot 25B.

[22] UROM's business plan was premised on somewhat simultaneously beginning construction of duplexes on lots 26A and 25B, and using the monies generated from their sales once construction was completed to pay down the United loan/mortgage, and that of the Royal Bank of Canada ("RBC") and to move on to duplex constructions on lots 24B and 25A.

[23] Construction on lot 26A was effectively completed on or about **March 19, 2013**.

[24] UROM obtained its financing from RBC, by way of a collateral mortgage dated April 3, 2013, in the amount of $630,000 secured only by lot 25B with the partially constructed duplex thereon and lot 26A with the completed duplex thereon.

[25] To assist UROM in obtaining bank financing, United signed a Postponement of Mortgage dated April 4, 2013.

[26] Based on the testimony that I accept and the contents of the documents in the JEB Volume 6, including the Summary of Expenses at Tab 39, I am satisfied in relation to the construction on the **lot 25B** duplex that:

- UROM paid a construction permit fee on or about May 16, 2012, which I infer meant it could proceed with construction;
- The foundation was in place on or about September 12, 2012;
- Framing thereof was likely finished by sometime in June/July 2013 (see the May 4, 2013, Kent Building Supplies bill for $71,553.80), though the placement of doors, the siding for the building, masonry work, and removal of construction garbage suggest it was not "roof tight" until August 2013.

[27] The Boutilier and Associates residential appraisal report contained in Exhibit 7 regarding 20 Kelso Green/PID number 41285636/**lot 25B** includes photos of the property in 2019 showing the degree of its completion. The author states, based on his belief and information available to him at that time:

> The dwelling was completed to roof tight in 2013 and construction was halted… The subject units are considered to be about 45% completed 'as is'.[1]

[28] On a review of the documentary evidence, there appears to have been a lull in construction activity on lot 25B between January and May 2013. The advent of the RBC collateral mortgage dated April 3, 2013, provided construction financing.

[1] This statement is not admissible for the truth of its contents. Moreover, there is no qualification in relation to on what basis the opinion that the duplex on lot 25B was "about 45% completed" was reached – was it intended to suggest that one could use the claimed existing construction expenditures of $360,000 as a baseline cost, and by deduction calculate that $800,000 – excluding the cost of the land – would have been required to complete it? I consider it unreliable evidence as well, deserving no weight.

There was some activity in May and June, and to a lesser extent in July and August after the June 24, 2013 Stop Order.

[29] Shortly after March 19, 2013, lot **26A** was effectively in a state of readiness to sell - yet UROM says the June 24, 2013, Stop Order prevented it from doing so. It was unable to sell either of the units until July 2015, when Mr. Haghgouei bought one of them after he sold his own residence in Bedford.

[30] Since the duplex on lot **25B** was never completed the re-conveyancing process was never triggered - and therefore has never been available for UROM to sell.

[31] As of March 2013, UROM had not brought duplex construction on lot **25B** to a "roof tight" standard. According to Ms. Haghgouei it did bring lot 25B to a roof tight standard "later" - I infer from all the evidence that it was likely so around August 2013.

[32] On this important fact she was either unable or unwilling to be more precise in her estimation.

[33] It also troubled me that she was imprecise in her evidence about when UROM became aware of the existence of the June 24, 2013, and October 25, 2013, Stop Orders. As I understand her evidence, it communicated that the Haghgoueis

were unaware until sometime in 2014 of the existence of the October 25, 2013, Stop Orders. She said they were not aware of the June 24, 2013, Stop Order until even later.[2]

[34] The June 24, 2013, Stop Order included both lots 26A and 25B. The October 24, 2013, rescission of the Stop Order related to all of the lots affected by the June 24, 2013, Stop Order. The October 25, 2013, Stop Order did *not* include lot 26A, but did include lot 25B.

The delay chronology asserted by UROM

[35] Ms. Haghgouei asserted that UROM was unable as late as 2019 to obtain further monies to complete the duplex on lot 25B. I infer that she was referring to the time before the Partial Settlement Agreement of March 25, 2019.

[36] Ms. Haghgouei asserted **they had no more money available because of the delay in receiving back the deed for lot 26A from United, and the Stop Orders of June 24, 2013, and October 25, 2013,** which interfered with their profiting from the duplexes on those properties either by sale, rental, or otherwise **and** they were also unable to obtain further financing to continue construction of the duplex on lot 25B.

[2] In its post-trial brief, UROM candidly confirmed this uncertainty: " UROM Inc. was unaware of the issuance of the Stop Orders until sometime after they had been issued."

[37] Let me then examine more closely the asserted delay chronology.

[38] A "Stop Order" is a Form 34 document under the *Land Registration Act* which contains wording that **"**no further registrations or recordings be made with respect to the above-noted parcel. In accordance with subsection 56(2) of the *Act* no further registration or recording may be made contrary to this order and no certificates of registered ownership may be issued with respect to the above-noted parcel until this order has been rescinded.**"**

[39] On March 19, 2013, UROM received an "occupancy permit" for the duplex on lot **26A** since it had sufficiently completed its construction. United postponed its Vendor take-back mortgage regarding lot 25B on April 4, 2013, which made it possible for UROM to borrow from RBC - which it did.

[40] As required by the Agreement, United was to initially transfer ownership of **lots 25B and 26A** to UROM by the closing date - May 30, 2012. As referenced in Mark Coffin's June 20, 2013, email, that conveyance, which was intended by the Agreement, is what caused the Registrar of Land Titles to initially place Stop Orders on those lots as of June 24, 2013, and renew the Stop Order on October 25, 2013, on lot 25B. Both parties were aware of the potential for such delays and could have foreseen the difficulties that delayed the re-conveyancing process-and taken earlier steps to avoid them.

[41] Notably, clause 22 of the Agreement reads:

> Once construction is completed. **The Buyer is responsible for the registration of the completed phase of condominiums.**

[42] Clauses 1, 2, and 7 of Amendment "C" read:

> 1-**Upon completion of construction** on … the lots **the Buyer will convey the lots to the Seller** for the purpose of the Seller incorporating same into a part of Halifax County Condominium Corporation number 314.
> 2-**Upon the lots being incorporated into the Condo Corp. (which shall be completed within 60 days of the conveyance) the Seller will cause the Condo Corp. to reconvey the lots to the Buyer.**[3]
>
> 7-**In the event that the Seller is unable to comply for any reason with the Seller's obligations hereunder, at the option of the Buyer the Buyer may require the Seller to purchase the lots (and for the purpose of clarity, the buildings thereon) at the fair market price** of the lots which might be charged had the lots been re-conveyed to the Buyer in the condition specified in paragraph 3 of this amendment "C".

[43] On June 10, 2013 Patrick LeRoy of United sent an email to United's counsel Ms. Greenwood [including as an attachment the occupancy permit for lot **26A**] in which he characterized the construction of the duplex on lot 26A as complete.

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[3] I note that Mr. Saberi is the driving force behind United, and was also a signing authority for HCCC No. 314. He explained that typically once a duplex is completed, the "normal practice" is that the buyer conveys the lot in trust to the seller, who incorporates it into the condo corporation, and that during this time willing buyers can pay an occupancy fee to live in the condo before it is reconveyed after incorporation to the buyer. He stated that in such typical cases, **the 60-days period would run from the date on which the lot was incorporated into the condominium corporation**, and ready to be reconveyed to the buyer. He added that regarding the wording in this agreement: "no condo can be done within 60 days" and that in this case "it should have said – within 60 days of registration [as a condominium]". While that is interesting, that is not how the Agreement here was drafted. The record reflects that Mr. Hill, Q.C., was involved in the negotiation on behalf of UROM in having the Agreement's drafting customized to UROM's requests.

[44] **On June 19, 2013,** Ms. Greenwood wrote to Mark Coffin, the Registrar of Condominiums, and provided a draft legal description for lot **26A**. In her letter she stated that: "To assist you with your review of the documents you should be aware that our client independent of our office transferred title to lots 26B, 26A and 23A**, so we have the current registered owners consenting as encumbrancers** in Schedule "B" of the Amended Declaration and we are in the process of preparing documents to transfer title back to one of the Declarants prior to the registration of these phases."

[45] On June 20, 2013, Mark Coffin responded to Ms. Greenwood that there was a problem because, *inter alia*, lots 25B and **26A** were transferred by United to UROM **before** they became units in the Condominium Corporation, and that **he would suggest deeding the lots back to United.**

[46] I observe that that is what the Agreement contemplated – the parties therefore must have understood the potential implications of the re-conveyancing process.

[47] In her August 7, 2013, letter, Ms. Greenwood wrote to Mr. Hill, Q.C., regarding lot 26A:

> While you and I had no communications or contact in connection with the conveyance of lot 26A to your client, I understand that our client advised your client that before the registration of the phase of HCCC No. 314 including lot 26A could proceed, the registered

> ownership of all of the lands for the phase in which that lot was included must be in the name of one of the Condominium Declarants, either United Gulf Developments Limited or 3218738 Nova Scotia Limited. In order to accomplish this, I have prepared and attach a number of documents as follows… .[4]

[48] **On June 24, 2013 the Registrar of Condominiums placed Stop Orders on lots 25B and 26A** - pp. 15-16 Volume 1 Tab B.

[49] The evidence confirms that United's counsel wrote to Mr. Hill, Q.C., **on August 7, 2013,** enclosing the necessary documents to be signed by UROM to address the Stop Order concerns, and to effect the transfer of lot **26A** to United.

[50] Ms. Greenwood did acknowledge that she would make arrangements upon return of the documents from UROM to record them, and that United "will need to have the Stop Order currently in place against the PID removed before the Deed without Covenants is registered… At this point, we have submitted all of the required initial documents in connection with these phases to the Registrar of Condominium's office. The Registrar of Condominiums review of these documents will not proceed any further until after all the lands in the proposed phases 6, 7 and 8, are registered in the name of a Declarant. **As you know we have no control over the review and processing time that the Registrar's office needs in connection with any condominium registration**… If you have any

[4] Mr. Coffin's opinions about who was responsible for this delay are contained in his October 2013 email at JEB Volume 2 Tab D p. 2 and Deputy Registrar of Land Titles Ms. Janice McNeely's November 23, 2015 email to Tim Hill, Q.C., copied to Mark Coffin.

questions, please feel free to contact me at your convenience or have your client contact either Navid Saberi or Patrick LeRoy of United Gulf Development Limited directly."

[51] The Deed without Covenants and [UROM's] Grantor's affidavit were dated as **signed on August 26, 2013.**

[52] There is no evidence that between March 19, 2013, when construction was completed thereon, and June 24, 2013, the date of the Stop Order, UROM attempted to transfer lot **26A** back to United in trust.

[53] Ms. Greenwood sent a Form 24 (to transfer the property back to United in trust) respecting lot **26A** to the Registrar of Land Titles on or **about September 24, 2013**.

[54] Carol Pierre's September 24, 2013, email [**Subject** re: HCCC No 314 – The Shoppes at Voyageur Lakes - registration of phases 6, 7 and 8 - Removal of Stop Orders on PIDs 41285586, 41285664, and 41285628] to Ms. Greenwood (Volume 1 Tab C p. 62 JEB) states in response:

> I have reviewed the attached documents. It appears that you are ready to register phases 6, 7 and 8, which I believe are lots 23A, **26A** and 26B. This is what I found..
>
> 26A PID 41285664 is <u>not correct it should be 41285644 and the deed was attached in a separate email from Kristin Haayer …</u>

[55] Ms. Greenwood responded by email September 25, 2013:

> I confirm you are correct. My apologies for the PID errors in the letter… I trust this clarification is all you require. If there anything else required, please let me know. I look forward to hearing about the lifting of the stop orders for lots 23A, **26A** and 26B so I can move forward with the registration of the deeds. In the meantime, if there's anything further your office requires before it can move forward with the review of these phases, please let me know.

[56] Ms. Greenwood certified the Form 24 in relation to lot 26A on **October 3, 2013,** which was emailed to the Registrar of Land Titles that same day, including the following statements:

> Please lift the stop orders from the PIDs. Should we send the deeds to the LRO tomorrow via courier for registration or should we wait until you advise that all is in order before we send the documents for registration.

[57] In his email to Ms. Greenwood of **October 24, 2013**, Mr. Coffin stated:

> We met with Land Programs today. **The stop orders have been rescinded for phases 6–8 to allow you to register deeds. I understand you already agreed to the wording of a TQ as part of the F24… We therefore will expect the deeds into the declarant and the TQs to be registered ASAP.**

[58] Thus, the way was cleared for the Stop Order to be removed regarding lot **26A**.

[59] However, the Registrar placed a new "Stop Order" on lot **25B** on October 25, 2013 – Volume 4 JEB Tab 19.[5]

[60] Again, there was no deed yet transferring title from UROM to United, as required by the Registrar of Land Titles. But this was because *UROM had not sufficiently completed its construction to have an occupancy permit issued.*

[61] **On November 8, 2013** Ms. Greenwood sent Mr. Hill, Q.C., a letter that enclosed (respecting lot **26A** only) a Deed without Covenants dated August 26, 2013, signed by UROM, and a Declaration of Trust dated **September 26, 2013,** signed by both United and UROM

[62] Thus, **the process to have the Stop Orders removed from lots 25B and 26A persisted from June 24, 2013, until when they were all initially rescinded on October 24, 2013,** as a result of Ms. Greenwood's communication of September 24, 2013, and her filing of the Form 24 regarding lot 26A dated October 3, 2013, which was agreed to by the Registrar of Land Titles on or about October 3, 2013 - see JEB Volume 1 Tab C pp. 66 and 82.

[5] See also p. 12, Tab "D", Volume 2 JEB - the Registrar of Condominium's email of October 15, 2013, to Ms. Greenwood, and correspondence from United's counsel by email November 18, 2013, enclosing documents to convey **lot 26A** back to United - pp. 1-10 and 42 Tab "D" Volume 1 JEB.

[63] **The initial Stop Order regarding lot 26A was lifted by October 24, 2013, and none was re-imposed** on that lot.

[64] The Declaration of United evincing incorporation into the Condominium Corporation was dated in January 2014 and accepted by the Registrar of Land Titles on February 5, 2014 - see pp. 4-5, Tab G, Volume 3. UROM had consented to the condominium registration, as did RBC.

[65] On **January 14, 2014**, Ms. Greenwood formally sent the documentation to the Registrar of Condominiums.

[66] By copy of her January 16, 2014, email to Mr. Hill, Q.C., Ms. Greenwood communicated to UROM that: "we are very close to completion of the submissions to the Registry of Condominiums to complete the registration for phases 6, 7 and 8."

[67] By email of **February 5, 2014,** Ms. Greenwood advised Mr. Hill, Q.C., and others: "the Registrar of Condominiums accepted the registration of phases 6, 7 and 8 of HCCC No. 314 this morning… Once that process is complete, we will advise and work with our client to get the transfer back deeds out to you for your clients." (p. 26 Volume 3 Tab G – JEB)

[68] Ms. Haghgouei testified that UROM was unable to sell lot 26A until it was incorporated into HCCC 314, and UROM was financially unable to complete the duplex on lot 25B or start construction of duplexes on the remaining two lots, because it could not sell lot 26A *and* could not borrow any more money from RBC against lot 25B until it too had the Stop Order removed and was registered with HCCC No. 314.[6]

[69] In his **June 6, 2014,** email to Mark Coffin, the Registrar of Condominiums, under the Subject heading: HCCC 314 Voyageur Lakes – Consolidation/Final Registration, Patrick LeRoy of United stated:[7]

> … Please find attached the most recent survey we've prepared showing phase sequencing…
>
> NEW
>
> 3. May we please have the stop order lifted on lot 25B as this is impeding UROM from completing these residential semis.
>
> **ANSWER: Mark asked how the order provided an impediment. I offered that the order would not allow UROM to draw down on construction funds as their bank holds the unit as security. I also indicated that we wish to keep the unit under the UROM name during construction as opposed to transferring title (to us/declarant), later… after unit completion, just before registration. Mark: 'As long as your lawyer is in a position to undertake to the Registrar General that she is in possession of a deed and will register it once the stop orders lifted? I will not oppose the lifting of the Order. But it is not my order.'**
>
> **June 12, 2014: I dropped by the Mark's office this a.m. to deliver surveys. While he was not in, I spoke to Ian. I indicated to Ian that we would transfer back to the**

[6] I keep in mind that UROM asserts although the June 24, 2013, Stop Order on lot 26A ended on October 24, 2013, the ensuing process of incorporation persisted until United reconveyed it to UROM in February 2014.

[7] The bolding was added by Mr. LeRoy as a follow-up of later events that he recorded.

> **Declarant after unit completion as we had done for phases 6, 7 and 8. Both Ian and Mark agreed to this in the last go around. Ian said he'd speak to Mark.**
>
> **… .**

[70] Regarding Mr. LeRoy's statement that "I offered that the order would not allow UROM to draw down on construction funds as their bank holds the unit as security," I understand him to have said this not as his own statement of fact, but that this was the position that UROM was taking with United.

[71] This conclusion seems borne out by the following chain of correspondence.

[72] By November 2014 United remained unpaid on the debt. Mr. Hill, Q.C., was forwarded Patrick LeRoy's November 25, 2014, email containing United's concerns by Stephen Ling, who was briefly consulted by United. Mr. Hill, Q.C., responded on **December 16, 2014**:

> Your client is in breach of its obligations under the Agreement of Sale to UROM. In particular, there has been an active Registrar's Stop Order on lots 24B, 25A and 25B for many months. **My client is prevented from obtaining mortgage funding or engaging in further construction on these properties.** For all intents and purposes, they are useless. **I am taking instructions with regard to an action against United Gulf seeking damages sustained by my client and requiring United Gulf to repurchase the lots pursuant to Amendment "C" of the Agreement of Purchase and Sale**.…
>
> [My bolding added]

[73] Patrick LeRoy composed a response which Mr. Ling sent to Mr. Hill, Q.C., on or about **January 2, 2015**:

> **We regard your argument as baseless. The Stop Order is simply in place so the property may not be transferred to another party. The subject order has no impact on financing.** As evidence you already have mortgages on the properties and the Registrar has always agreed to accommodate any financing. **The Stop Order hasn't prevented your client to arrange financing on units already constructed or completing the first two units**.… We are left with two options. Either act on our security or sell the mortgage to an interested party and let the chips fall where they may. Unless we have an acceptable resolution with respect to our outstanding mortgage, we will proceed with that option which is in our best interest.
>
> [My bolding added]

[74] On **November 19, 2015, United filed its Notice of Action**/Statement of Claim.

[75] **In summary**, after construction was completed on or about March 19, 2013, the delay in making lot **26A** available for sale was occasioned by the necessity to remove the Stop Order which persisted from June 24 to October 24, 2013 - thereafter the process of incorporating lot 26A into the Condominium Corporation persisted from October 24, 2013, to February 5, 2014.

[76] **On February 5, 2014**, **UROM was in a position to offer for sale or otherwise deal with lot 26A**.[8]

[77] Once the duplex on lot **25B** was completed beyond the "roof tight" threshold, the re-conveyancing process set out in the Agreement would be

[8] See Ms. Greenwood's letter of January 14, 2014, including Property Online printout dated January 14, 2014, at pp. 21-23, Tab "E", Volume 2 JEB. UROM received the lot 26A deed from United by letter dated February 26, 2014 - p. 69, Tab "G", Volume 3 JEB.

triggered. UROM was responsible for and in control of construction of that duplex since 2012, but has not completed it. **UROM has never been in a position to start the re-conveyancing process for lot 25B.**

Position of the parties

[78] In summary:

1. United claims that UROM owes it the unpaid portion (plus interest) of the remaining debt outstanding - assessed as $575,313 at present;[9]

   It says UROM's counterclaim should be denied, but if successful the court should reduce the amount due to United by that "set off";

2. UROM's Defence and its Counterclaim against United substantially overlap;

   Its position is that "time was of the essence" in the Agreement [clause 6 of the Main Agreement reads: "*time shall be of the essence in this Agreement*, which may be extended in writing by the parties' respective solicitors and, in the event of such extensions, time shall continue to be of the essence"], and that United breached the Agreement by taking too long to reconvey lot 26A back to UROM once construction was completed and it had received the deed (between late August 2013 and February 2014), particularly since Amendment "C" to the Agreement included a clause that read: "Upon the lots being incorporated into the Condo Corp. (*which shall be completed within 60 days of the conveyance* [by the Buyer to the Seller]) the Seller will cause the Condo Corp. to reconvey the lots to the Buyer".[10]

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[9] UROM did not dispute this calculation, and I attach it as Appendix "A" hereto.

[10] I interpret "within 60 days of *the conveyance*" as the parties' mutual intention that it be 60 days after the conveyance of the deed and associated documentation by the Buyer back to the Seller. Strictly speaking, the Agreement required the following of UROM: that upon construction being "completed" it must expeditiously create the deed and any other necessary documents and have those *registered* on the Land Titles Register parcel PID; and

[79] I am satisfied that the parties intended and understood that the "construction is completed" threshold will have been met once an occupancy permit had issued – i.e.: March 19, 2013, for lot 26A (which therefore, according to the Agreement, started the re-conveyancing clock running on March 20, 2013, against UROM, which "is responsible for the registration of the completed phase of condominiums".)[11]

[80] UROM asserts that United did not act diligently and expeditiously with the result that UROM did not have the monies from the *anticipated earlier sale* of lot 26A to fund its completion of construction of the duplex on lot 25B, and thus was unable, *inter alia*, to repay the outstanding debt owed to United.

[81] UROM also asserts that the contract's performance was *frustrated in law* because of the Registrar of Land Titles issued "Stop Orders" filed on June 24, 2013, in relation to lots 24B and 25A *and* 25B, and 26A, and again in relation to all those lots except 26A on October 25, 2013, which precluded any further registrations and recordings (including of sales with the attendant transfers of title, and encumbrances of those lots) on the Land Titles Register for those parcels.

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to provide the *registered* deed to lot 26A to United, so that it could begin the process of registration of the lot with HCCC No. 314.

[11] Perhaps awkwardly written but, the Agreement does read that "the Seller will cause *the Condo Corp.* to reconvey the lots to the Buyer". Yet the Agreement does not require UROM to convey the property to the Condo Corporation.

[82] On March 25, 2019, United and UROM reached a "without prejudice" partial settlement agreement, which dealt with lots 24B and 25A. As a result thereof, that es agreed that UROM remained indebted to United for a principal balance of $265,000. The parties acknowledged *at that time* that the court would remain seized with the following issues:

i) The extent of UROM's liability, if any, to pay United accrued interest on the UROM debt;

ii) The extent of UROM's entitlement (if any) to a return of any of the three $30,000 deposit amounts that it had provided to United in connection with its earlier purchases of lots 24B, 25A, and 25B;

iii) The liability of the parties *inter se* for the property taxes paid or owing with regard to lots 24B, 25A, and 25B; and

iv) Such other issues as may be placed before the court for decision which have not been resolved between the parties.

Why UROM's breach of contract and frustration of contract arguments fail

[83] UROM claims the parties' mutual intentions were frustrated by "Stop Orders" initially registered by the Registrar on June 24, 2013, against lots 25B and 26A, which effectively prevented it from dealing with those two lots for such a

lengthy period of time that it was unable in a timely manner to sell lot 26A or obtain financing to complete the duplex on lot 25B.

[84] Regarding the latter point Ms. Haghgouei testified: "we could have got $250,000 if not for the Stop Order", from the RBC collateral mortgage.[12]

[85] **Firstly**, *vis-à-vis* **lot 26A**, I question the premises underlying UROM's position that: after receiving its occupancy permit on March 19, 2013, lot 26A could have been offered for sale, and *would have sold*, which *sale would have alleviated the financial strain* of which UROM now complains.

[86] There is no direct evidence, and no reliable indirect evidence about the housing market during March 2013 to March 2014 and later, specifically in relation to lot **26A**.[13]

[87] Moreover, there is no detail from Ms. Haghgouei, or evidence otherwise, as to what prices the property would have sold for during that year interval. She did

[12] She expressly testified that RBC "refused" UROM's request for more money. She suggested $250,000 remained available on the collateral mortgage. However, she gave no details: not *when* RBC was requested (and for how much money); not *how often* at the material times RBC was requested to do so; not *why* RBC refused to do so; and not one shred of independent evidence to support her claim. It is difficult to believe that UROM made no inquiries of RBC as to *why* RBC refused to provide the $250,000 she references - and that, if refused, that RBC did not tell them it was because of the existence of the Stop Orders. Yet, she also testified that the Haghgouei family and UROM, were unaware until 2014 of the existence of the Stop Order. She also testified that RBC was unaware of the Stop Orders until later.

[13] There was an "as if completed" appraisal in relation to lot 25B in 2019, but those I conclude are not a reliable comparator to infer the value of the duplex on lot 26A in 2013-14.

not expressly say when they put lot 26A on the market; for how long,and at what price and conditions; and through what intermediary (such as a realtor), if any.

[88] The only evidence before the court is Ms. Haghgouei's conclusory statements, wherein she implies that a buyer who would pay the price required by UROM could have been found between these dates. However, she also testified that it was difficult to find tenants to rent either of the units before it was sold. Once UROM was free to sell lot 26A (i.e. from March 19 to June 23, 2013 and after February 2014), Ms. Haghgouei testified, it did not sell – she testified in cross-examination that it had been "on the market for a long time". Notably, it sold much later, after the Stop Order ended on October 24, 2013, and the incorporation into HCCC No. 314 had been finalized (February 2014).[14]

[89] If the concern truly was to alleviate the financial strain on UROM, the burden of proof to show such financial strain is on UROM:

a) Why, immediately upon being in receipt of an occupancy permit, did UROM not take action to put lot 26A on the market for sale? Had they efficiently conveyed a deed to United[15] and received it back, presuming their present optimistic view of a potential sale were also

[14] Ultimately her father bought one of the units in **July 2015** - 18 Kelso Green for $100,000 and other consideration - p. 8, Tab "I", Volume 3, JEB; whereas the other unit (16 Kelso Green) was foreclosed upon, and in that fashion she and her husband bought it in **February 2021** for $395,000.

[15] Which Mr. Saberi credibly stated, United would have accepted, since as is the practice in the industry, and consistent with the Agreement, construction is considered "completed" once an occupancy permit has issued.

accepted as reasonable at the time, the property might have sold before the June 24, 2013, Stop Order, or shortly after October 24, 2013, when the order in relation to lot 26A was rescinded, and during which time the incorporation process was already underway;[16]

b) Moreover, had UROM moved quickly to put lot 26A on the market for sale, it is likely it would have earlier become aware of the Stop Order of June 24, 2013;[17] and why did UROM, once on notice about the Stop Order, not then immediately, or even later, demand that United buy back the property ("and for the purpose of clarity, the buildings thereon") at fair market value as per clause 7 of Amendment "C"? The Stop Order would not have prevented this clause from operating between the parties *inter se*, though no registration or recording could be done until the Stop Order was removed. Though these questions were not expressly asked of Ms. Haghgouei, they have been argued by United as relevant. I am satisfied that once aware of the Stop Order, UROM found it not to be in its interests to rely upon clause 7.

[90] Ms. Haghgouei testified that: UROM had starting capital of **$450,000** exclusively available for construction financing of duplexes on lots 25B and 26A at Voyageur Lakes Subdivision throughout 2012 which she testified was finally exhausted around March/April 2013;[18] and that in the Spring of 2013, they had only $250,000 remaining from the 630,000 RBC mortgage that could be borrowed. Simple math suggests that, to date, they had borrowed $**380,000** from RBC which

[16] Ms. Haghgouei testified that lot 26A was still being rented between September 2013 and February 2014, and that they intended to stop offering it as rental units once it was put up for sale.

[17] Perhaps even before at the latest August 7, 2013, which is by when I have found UROM was constructively or actually aware thereof.

[18] The two shareholders were her father and a friend of his in equal proportions - I noted that in her testimony she always referred to UROM as "we", which was clearly her reference to her family.

had been spent on construction. They had therefore spent a combined total of $**830,000** to that point to build duplexes on lot 26A (completed sufficiently for an occupancy permit to issue) and 25B (roof tight likely by August 2013, but close to roof tight earlier).

[91] I had expected that she would expressly and clearly detail how and why she reached her basic conclusion that UROM had no further funds available. She did not do so.

[92] While the voluminous documentation is of some assistance to the Court, the process of accumulating that knowledge was made unnecessarily labourious. For example, as United pointed out, it is noteworthy that we have in evidence the operating chequing account of UROM, but *not* the RBC loan statements related to the collateral mortgage. We have no evidence from an accountant who could have succinctly presented this evidence.

[93] There is also uncertainty around the ebb and flow of funds into and out of the operating/chequing account of UROM. At times significant contributions were made by her father, and possibly others, to the account, which would appear to be from private sources (albeit some were later in time): see in Volume 6, Tabs 1-5: UROM's operating account statements show repeated influxes of money, that often seem to be targeted at bringing the account into a positive balance, and other large

infusions including: on June 6, 2013- **$29,375**; September 4, 2014- $5000; November 5, 2014- $3000; May 29, 2015- **$60,000**; August 24, 2015- $5000; February 9, 2016- $5000; February 29, 2016-$**45,000**.

[94] While I can draw no clear conclusions from these bare numbers, the burden is on UROM to establish the financial hardship it claims at the material times.

[95] Ms. Haggouei testified that by March/April 2013 UROM had spent $**700,000** in total on the construction of the "completed" duplex on lot 26A and the incomplete duplex on lot 25B - she claimed this was all the money they had available: $450,000 of UROM money and $**250,000** from RBC (which is not consistent with her testimony elsewhere indicating that $**380,000** had been borrowed from RBC and hence the total spent was **$830,000**).[19]

[96] She elaborated that as of March/April 2013, **$240,000 of RBC monies were spent on lot 26A unit 16**; and approximately **$50,000 RBC monies were spent on lot 26A unit 18** – and a further **$50,000 of RBC monies were spent on the lot 25B duplex construction**. That cumulates to **$340,000 borrowed from RBC.** So how much RBC money did they borrow to April 2013-$250,000, $380,000 or

[19] The $380,000 borrowed from RBC figure is derived as follows (see Tab J-9, Volume 4, JEB): $630,000 initially available from RBC less $250,000 un-borrowed in the Spring 2013. I believe Ms. Haghgouei may also have referenced elsewhere the initial total available as $600,000, which would mean in the Spring of 2013 the borrowed amount was $350,000. I prefer the $630,000 figure as more representative of the evidence that I accept, which is the amount shown in the mortgage.

$340,000? I have not discounted the possibility that RBC did not refuse to make further money available until after March/April 2013 and this may account for the discrepancies in Ms. Haghgouei's estimates of the money expended on construction of the two lots 26A and 25B. However, I am satisfied that UROM likely borrowed $340,000 from RBC, relying on her breakdowns thereof for lot 26A ($290,000) and lot 25B ($50,000).

[97] **In summary**, her express testimony suggests that the total "construction costs" for the two duplexes to September 2013 was approximately $700,000.[20] On closer examination, her testimony also suggests that UROM had spent all its own capital ($450,000) in addition to the RBC financing ($340,000). Thus, her estimates of **the total spent on "construction" suggest a total between $700,000 and $790,000 (being a cumulation of $450,000 + $340,000)**. I conclude $790,000 is a reasonably accurate estimate for present purposes.

[20] In her testimony, Ms. Haghgouei used the term "construction costs" to refer to UROM's expenditures (apart from the initial $175,000 per lot) made in relation to lots 26A and 25B. She included therein significant items that are not strictly speaking "construction costs". I have examined the items at Tab 39, Volume 6, JEB, which are costs incurred in relation to lot 25B. Relevant to present purposes are expenses that arise no later than September 2013. Removing those post-September 2013 expenses leaves approximately $280,000 that is associated with the duplex construction on the lot 25B duplex. The estimate is more relevant to the (cashflow) financial circumstances of UROM regarding its position that in 2013 United's actions/inaction caused UROM to suffer financially, even if the direct construction costs are closer to $220,000.

[98] I acknowledge that Ms. Haghouei relied on the lot 25B expenditures recorded in the documentary evidence to conclude that UROM spent $360,000 in getting the duplex on lot 25B roof tight – of which $50,000 were RBC monies.[21]

[99] I accept that: RBC's $340,000 funded lot 26A ($290,000) and lot 25B ($50,000); and that if a total of $280,000 was spent on lot 25B "construction" at the material times, therefore, UROM had spent $230,000 of its $450,000 on lot 25B. To calculate how much UROM spent on lot 26A, we can deduct $280,000 (lot 25B) from $790,000 (the total for lots 26A and 25B) which leaves $510,000 for lot 26A.

[100] Thus, lot 26A costs were ($290,000 + $220,000 from UROM) around $510,000; and lot 25B costs were ($230,000 +$50,000) around $280,000.[22]

[101] I bear in mind that the lot 26A duplex was completed to the threshold required for the issuance of an occupancy permit. Moreover, this figure of $510,000 for construction completed to the occupancy permit threshold, appears

[21] The $360,000 estimate does not include the cost of the land, although it does include the $30,000 deposit paid – and as I noted earlier she referenced all expenditures associated with the construction as "construction costs". See Tab 39, Volume 6, JEB.

[22] These calculations are estimates, and I bear in mind lot 25B duplex was significantly incomplete, and that of the $280,000 only $220,000 can be said to be true building costs.

consistent with the evidence that the construction costs for the merely "roof tight" duplex on lot 25B had reached $280,000.

[102] Lot 26A required modest further construction, whereas lot 25B required substantial further construction, before they each could be said to be finally completed to the threshold required to have a reasonable chance to obtain a maximum price on resale. This meant that more money to fund construction was required to achieve that threshold. But there is no reliable evidence regarding how much more money was required at the material times to complete construction of the duplexes on lot 25B and 26A.

[103] If I give credence to Ms. Haghgouei's testimony that if only UROM could have had access to the remaining $250,000 available under the RBC mortgage (it could have been as high as $290,000 i.e. $630,000 - $340,000), it could have completed the duplex on lot 25B, presumably the cost to finish that duplex was no more than that, and may well have been less. However, neither in her testimony or anywhere in the evidence otherwise, is there a reliable estimate of how much more money was required to complete, to that threshold, the two duplexes on lot 26B and 25A.

[104] Arguably if "construction" costs to complete lot 26A were modestly more than $510,000, say $525,000, then lot 25B may well have also required $525,000 in total, or a further $245,000 to complete in 2013.

[105] I understood Ms. Haghgouei to suggest that $250,000 was required to complete lot 25B. Therefore, in addition to the $280,000 already expended, UROM would have required a buyer who would pay more than $705,000 ($530,000 + $175,000 for the land).

[106] It is reasonable to infer that UROM would have been reluctant to accept an offer from a buyer who would not pay more than the costs it incurred in relation to lot 26A. Without a reliable evidentiary foundation to assess the costs to UROM of finally completing the duplex on lot 26A, and how much more time and money needed to be expended on completing the duplex on lot 25B, the court cannot confidently conclude that UROM has established the claimed financial strain it urges in its case against United.

[107] While these calculations are rough, on the incomplete record before me they do give a sense that between March 2013 and March 2014 UROM may have been financially vulnerable, and give rise to a concern regarding whether UROM had invested so much money in its properties that it made it difficult in the housing market at the relevant times to achieve a reasonable profit even had the lot 26A

duplex been put on the market once a reasonable period of time was allowed for its incorporation into HCCC No. 314.

[108] **Secondly**, in respect to UROM's breach of contract and frustration arguments regarding lot 26A, the initial Stop Order started on June 24, 2013, and ended on October 24, 2013.

[109] I accept that construction was substantially completed on or about March 19, 2013 – when the occupancy permit was issued. The process of incorporation into the Condominium Corporation was therefore triggered shortly thereafter. UROM provided United with the necessary documents in August and September 2013. The delay attributable to United is difficult to articulate because a large part of the delay is also attributable to the inherent coordination efforts required between counsel and parties, and the machinations of the provincial government offices involved – which the parties, with the benefit of legal counsel, should reasonably have anticipated.

[110] Let me first note that clause 22 of the Agreement reads:

> Once construction is completed. **The buyer is responsible for the registration of the completed phase of condominiums.**

[111] The Agreement places the initial responsibility on UROM to start the process of reconveyance of title. UROM is required to forward the proper documentation (transferring title) to United.

[112] Lot 26A received an occupancy permit on March 19, 2013, and the parties appeared to agree that this is a reliable indicator of the construction having been completed for purposes of the Agreement.

[113] Clause 1 of Amendment "C" then requires that "**the Buyer** will convey the lots to the Seller for the purpose of the Seller incorporating same into [HCCC No. 314]". However, UROM did not take the lead in the conveyance of the lot to United for incorporation into HCCC No. 314. Had it done so, it would have undoubtedly earlier become aware of the June 24, 2013, Stop Order.

[114] By email dated June 20, 2013, Mark Coffin (Registrar of Condominiums) alerted United that UROM must convey the deed to United, who must then effect the incorporation of the lot into the Condominium Corporation.

[115] The documentation was transferred to United (a Deed without Covenants and a Declaration of trust signed by UROM officials) on or about **August 13, 2013**. The Declaration of trust was countersigned by United dated September 26,

2013; the reconveyance from United to UROM via Trustees' Deed was dated **February 24, 2014**.

[116] At the latest, I find that UROM was effectively informed of the existence of the Stop Orders affecting lots 25B and 26A by the letter dated August 7, 2013, from United's counsel, Kelly Greenwood, to Mr. Hill, Q.C., counsel for UROM.

[117] I infer that Mr. Hill, Q.C., and UROM had lately taken note of the importance of incorporating lot 26A into the Condominium Corporation, although it was their initial responsibility to start the re-conveyancing process.

[118] As I interpret the Agreement, the parties were in agreement that United had only 60 days after the conveyance to United was completed, to effect the incorporation.

[119] In UROM's post-trial brief, at paragraph 16, we find:

> UROM was unaware of the issuance of the stop orders **until sometime after they had been issued** [having referenced both the June 24 and October 28, 2013 stop orders issued].

[120] Ms. Haghgouei testified that she and the members of her family were not aware of the existence of the Stop Orders until at least sometime in 2014 – at one point in her testimony she described it as "late 2014". Her testimony is difficult to reconcile with the objective facts, which I accept as reliable, and include that:

- By August 7, 2013, UROM's counsel was aware of the June 24, 2013, Stop Orders' existence (and hence constructively so was UROM); and

- UROM provided United the executed Deed without Covenants dated August 26, 2013 and the Declaration of Trust dated September 26, 2013 (signed by Ms. Haghgouei and her father), which were necessitated only in order to return title to United so it as the declarant could have lot 26A registered as a condominium in HCCC No.314, and then return title to UROM[23]

[121] Moreover, she stated that *after March 2013,* UROM did not have the funds to complete the duplex on lot 25B, though they did bring it to "roof tight" condition sometime later.

[122] If the April 3, 2013, RBC mortgage provided UROM up to $630,000 in financing, and the duplex on lot 26A had been effectively completed, then no material amount of funds from the RBC mortgage would be required for that lot - leaving only lot 25B urgently in need of funding. It is hard to understand why UROM would have been under financial strain from April 3, 2013, to April 2014, if it had used the RBC mortgage only for funding lot 25B construction.

[123] Ms. Haghgouei's testimony is difficult to reconcile with her statements that the bank refused to release any further funds for lot 25B construction as a result of the Stop Order yet it was unaware of the Stop Orders until 2015 (even if I infer her evidence might be construed as suggesting it was earlier, such as at the point of a

[23] See the reference in Ms. Greenwood's November 8, 2013, return letter to Mr. Hill, Q.C., enclosing the completed documentation.

yearly mortgage review in April 2014 – I note her testimony was also that her family was unaware of the June 2013 Stop Order until "late 2014").

[124] Ms. Haghgouei's testimony suggests that if needed, UROM would have quickly approached RBC for more money to complete the duplex on lot 25B. Yet she gives no general timeframe within which they asked for additional funding to continue construction thereon, and consequently there is no established timeframe in evidence as to when, and why, if at all, RBC did refuse to provide those monies as she claims.

[125] Ms. Haghgouei stated in cross-examination that if they had received more money, they would have continued construction on lot 25B until it was in condition to resell. She testified that UROM could have received $250,000 of further monies from RBC [based on an April 3, 2013, collateral mortgage in the amount of $630,000] if not for the Stop Orders on lot 26A and 25B.

[126] Again, this is difficult to reconcile with her position that *the Hahgoueis* /UROM itself were unaware of the Stop Orders until February or later in 2014, and her testimony that the bank was not aware of the Stop Orders until 2015 when she made RBC aware of them.

[127] Given her precise recollection and testimony regarding the extensive banking records of UROM, and the certitude with which she gave her evidence on other matters, I noted that she was asked in cross-examination when the duplex on lot 25B was “roof tight”, and she answered: “I don’t recall the exact date”. She did not even venture an approximate date.

[128] There was no independent evidence before me regarding: when RBC became aware of the June and October 2013 Stop Orders; or when, if at all, RBC, which had committed to the funding, at any time changed its position regarding the availability of those funds during the currency of the Stop Order, June 24, 2013 – February 2014. Nor were the RBC loan statements in evidence.

[129] Based on the reliable evidence I accept, and from which I draw reasonable inferences, I conclude that the President and significant staff of UROM were likely constructively, if not actually, aware of the June 24, 2013, Stop Order no later than August 7, 2013.

[130] If under the urgent financial strain claimed by UROM, why did UROM not at any time threaten to or actually repudiate the Agreement, based on either the effect of the Stop Orders, or the argued breaches by United of the general “time is

of the essence" clause, and specifically Clause 2 Amendment "C",[24] as it arguably could have done by relying on Clause 7 of Amendment "C".[25]

[131] Nor did UROM make a timely complaint to United about its alleged failure to respect Clause 6 of the Agreement ["time shall be of the essence in this Agreement, which may be extended in writing by the parties' respective solicitors and, in the event of such extensions, time shall continue to be of the essence"]; or characterize its concerns as amounting to a claim of "frustration" of the Agreement. Instead, it carried on with the Agreement, which caused some of its own obligations to United to be fulfilled late – i.e. beyond agreed-to deadlines.

[132] Under the terms of the Agreement per Amendment "A", UROM agreed that "it shall be a condition of the mortgage that one lot shall be paid out within one year [from May 9, 2012 i.e. lot 26A ($195,000 paid out by **May 9, 2013**] and an additional lot paid out every six months thereafter [lot 25B ($195,000 paid out by **November 9, 2013**); and lots 24B and 25A $195,000 each paid out by **May 9, 2014** and November 9, 2014 respectively]. I infer that UROM was well aware of

[24] Which reads: "Upon **the lots being incorporated into the Condo Corp. (which shall be completed within 60 days of the conveyance**) the Seller will cause the Condo Corp. to reconvey the lots to the Buyer."

[25] Which reads: "In the event that the Seller is **unable to comply for any reason** with the Seller's obligations hereunder at the option of the Buyer, the Buyer may require the Seller to purchase the lots (and for the purpose of clarity, the buildings thereon) at the fair market price of the lots which might be charged had the lots being reconveyed to the Buyer in the condition specified in paragraph 3 of this Amendment "C"."

this and that its business plan was premised on having to make that payment a priority in any event.[26]

[133] UROM was in a position on or after March 19, 2013, to convey lot 26A to United to have it registered as a condominium unit, yet did not provide the documentation until August 2013 which is four months later-arguably it did not act with a concern that "time was of the essence". Yet it complains of United's five-month delay, until February 5, 2014, to have the Stop Order issue resolved, and the lot registered with the Condominium Corporation.

[134] When UROM signed the final documents to convey title for lot 26A back to United (August/September 2013), so it could be registered with the Condominium Corporation, it must have anticipated (as I find it was at least constructively aware thereof) a reasonable period of time that the Stop Order on lot 26A would remain in place. Moreover, the process was expressly built into the Agreement – some period of administrative delay must have been anticipated as well. The Stop Order on lot 26A was terminated on October 24, 2013.

[135] Although the inclusion of lot 26A in HCCC No. 314 was not finalized until February 2014, I conclude that five-month time interval was reasonable, and it was

[26] The payment regarding lot 26A was not paid out until July 31, 2015 – p. 43, Tab "I", Volume 3 JEB.

not sufficient to constitute "frustration" of the Agreement, standing alone or in combination with the effect of the "Stop Orders".

[136] I agree with Geoff Hall, who, in his text *Canadian Contractual Interpretation Law*, 2nd edn. (Lexis Nexis, 2012), states, in relation to "time is of the essence" clauses:

> The phrase is meant to evoke the notion that failure to observe stipulations in a contract as to when certain events are to occur will entitle the other party to rescind the contract. However, the case law makes it clear that the phrase imports at least two other notions as well. First, in order to take advantage of the time is of the essence provision the innocent party must itself be ready, willing and able to perform at the stipulated time. Second, if neither party is prepared to perform at the stipulated time, one of the parties can subsequently revive a time is of the essence clause by serving notice of a new date for performance, which must be a reasonable one, and specifying the time is of the essence with respect to the new date. Time is of the essence clauses can, at least in theory, be implied as well as express, and the courts have developed special rules for when such a provision should be implied into a contract… [*In Sail Labrador Ltd. v The Challenge One*, [1999] 1 SCR 265] the court noted that 'commercial parties should be familiar enough with the applicable law to know that they must use very precise words if their intention is to make time the essence of the contract', both because the very reason for inclusion of a time is of the essence clause is to provide certainty about the consequences of breach and because the risk of unjust enrichment requires a court to be certain that it was the party's intention to allow any breach of the timing of performance to justify rescission." (pp. 324-6)

[137] Hall goes on at page 327: "Put another way, when both sides are in breach of obligations under a contract in which time is of the essence, as a matter of law time ceases to be of the essence… It has been justified on the theory that a party which is not ready, willing and able to perform at the stipulated time is deemed to have waived the time stipulation."

[138] UROM made no early express complaint to United during the material times that it considered the Agreement frustrated due to the delay associated with the Stop Orders - see e.g. Mr Hill, Q.C.'s, December 16, 2014, email, written in response to Patrick LeRoy's November 25, 2014, email to Stephen Ling (another counsel for United) wherein Mr. LeRoy stated:

> … approximately a year ago we closed several property purchases with UROM. Related mortgages are now past due. To date we have not received any indication of the Principal's intent to repay. In order to protect our interest relative to this matter we are left with no other alternative than to either notify UROM's lender (RBC) to secure our position, or demand that outstanding interest owed is brought up to date along with an extension of terms. As a result of this situation our security is being diminished. Also of note, condo fees have not been paid since the registration of their units. Stephen, could you please prepare correspondence to UROM Inc. advising them of this situation.

[139] Without reference to lot 26 A, Mr. Hill, Q.C., responded to Mr. Ling (who had attached Mr. LeRoy's statements in his email):

> I would like to say that I am surprised that your client's position, but I am not. Your client is in breach of its obligations under the Agreement of sale to UROM. In particular, there has been an active Registrar's stop order on lots 24B, 25A, and 25B for many months. My client is prevented from obtaining mortgage funding or engaging in further construction on these properties. For all intents and purposes, they are useless. **I am taking instructions with regard to an action against United Gulf seeking damages sustained by my client and requiring United Gulf to repurchase the lots pursuant to amendment "C" of the Agreement of purchase and sale**. My client has never received an account for condo fees. Please submit same and it will be paid.

[140] Given my factual and legal conclusions regarding the "time is of the essence" issue, the foundation for UROM's frustration argument is somewhat undermined.

[141] I agree with John McCamus when he states in *The Law of Contracts* (Irwin Law, 2005) in his chapter on "Frustration":

> As a general matter, then, performance that is rendered more onerous by changing circumstances that are foreseeable are not likely to ground a frustration defence [citing by footnote: *Kasmat investments Inc. v. industrial Canadian indemnity Co.* (1985) 70 NSR (2d) 341 (NSCA)]. The mere fact that a particular change in circumstance was foreseeable or foreseen may not necessarily lead to the conclusion, however, that the risk of its occurrence has been assumed. Further, some cases suggest that a change in circumstances that reduces, but does not eliminate, the value of performance for the other party will not constitute frustration… The cases on temporary impossibility indicate that the risk of short-term delay is normally assigned to the party awaiting performance but that prolonged delay resulting from supervening circumstances is not allocated to either party, with the result that the doctrine of frustration is applicable. (See pp. 582-3)

[142] In support of its claim for damages, by not having timely sufficient funds to complete the duplex on lot 25B, UROM relies not only upon the existence of the Stop Orders, which it says prevented it from selling lot 26A, which could have generated money to fund completion of the duplex on lot 25B, but also it claims it had no other source of funding available to it between March 2013 and February 2014 which it could have used to fund completion of the duplex on lot 25B.

[143] The only evidence regarding the unavailability of further sources of private or institutional funding for UROM's activities, was given by Ms. Haghgouei. She testified that specifically for the completion of the remaining interior work on construction of the duplex on lot 25B, whether by the Haghgouei family, other private investors - such as Ms. Haghgoei's father-in-law (after her marriage April

7, 2017), who assisted her husband and her to purchase unit 16 at a foreclosure sale in February 2021 for $395,000) - or a bank, such as, in this case, the Royal Bank of Canada – UROM could not find the funds to complete the duplex on lot 25B.

[144] Most significantly, she stated that RBC refused to lend them any more money. Mr. Awad objected that this was inadmissible hearsay. Mr. Hill, Q.C., argued that it was not. I agree that it is inadmissible hearsay – moreover, even if it were admissible, I would give that evidence very little weight because it is not supported by any other evidence – and such evidence, I infer, was readily available from a representative of the RBC - an adverse inference could also be drawn.

[145] As I noted elsewhere, Ms. Haghgouei's testimony left the court with the distinct impression that until late 2014 or 2015, UROM and the Haghgoueis did not know of the existence of the initial Stop Order of June 24, 2013, affecting lots 25B and 26A; nor of the October 24, 2013, Stop Order affecting only lot 25B.[27] There was no Stop Order on lot **26A** after October 24, 2013.

[146] Thus, the remaining delay was due to the machinations of the process of incorporation of lot 26A into the Condominium Corporation, which started after

[27] I have concluded that they were aware of this requirement on or before August 7, 2013, and provided United the necessary documentation, the Deed without covenants dated August 26, 2013/and the Declaration of Trust dated September 26, 2013; and Ms. Greenwood sent the materials to the Registrar on or about September 24, 2013; I infer that they were not returned by the Registrar to United before February 15, 2014.

the Buyer/ UROM had conveyed the property to United and ended when United returned the confirmatory documents on February 26, 2014.

[147] Scrutinized through the language of the Agreement, although the delay between the end of August 2013 and the end of February 2014 is six months, I conclude that the period after which UROM had triggered the "60 days" is after its "conveyance" of lot 26A to United, which begins to run once UROM's documents are registered and returned to United. However, UROM did not present United with *registered* documents, but left it to United to handle the processing. From the evidence available I am unable to ascertain precisely when the 60-day period triggered by the registering of the "conveyance" by way of Deed without Covenants executed August 26, 2013, was in fact registered, although it appears it was returned to UROM by Ms. Greenwood with her correspondence of February 2014.

[148] Notably, the Declaration of Trust associated with that deed, contained the following language – for clarity, UROM is the beneficiary and United is the trustee:

> The beneficiary agrees to transfer the property, subject to the mortgage, to the trustee to hold in trust for the beneficiary in accordance with the terms of this Declaration of trust; **Following the transfer of the property, the trustee undertakes, covenants and agrees to take all reasonable steps necessary or advisable to obtain registration of the phase of HCCC No. 314 including the property**;

…

Except as otherwise specifically provided herein, **the trustee covenants and agrees to deal with the property only as the beneficiary may from time to time direct in writing**; The trustee, following the registration of the property pursuant to the Condominium Act (Nova Scotia) as a phase of HCCC No. 314, agrees to deliver a trustee's deed of the units created on the property in HCCC No. 314, namely units 45 and 46 (the "units") made out in the name of the beneficiary as grantee or as the beneficiary shall direct from time to time as it sees fit, and the trustee at the beneficiary's request shall cooperate and execute all such documents and instruments as may be necessary to effect the said conveyance and transfer;

The trustee agrees that it shall, if directed in writing by the beneficiary, enforce on behalf of the beneficiary, at the sole cost and expense of the beneficiary, all rights remedies or claims which may be available to the trustee affecting the property;

…

The beneficiary shall be responsible to obtain any consent required for the transfers of the property and the units contemplated herein pursuant to the mortgage, and **the trustee shall use reasonable commercial efforts to facilitate the same if requested to do so by the beneficiary**; this declaration of trust shall enure to the benefit of and be binding upon the trustee and the beneficiary and each of its or their heirs, executors, administrators, personal representatives, legal representatives, successors and assigns.

[149] What is significant about this document is that United was legally bound (in relation to lot 26A) to follow the instructions of UROM once the September 26, 2013, Declaration of Trust was executed. Therefore, if UROM was concerned about delays in the registration of lot 26A into HCCC No. 314, it could have insisted on answers from United, and instructed United regarding expediting the registration and the return of the required documentation to UROM. However, there is nothing in the record that shows UROM gave directions to United, during a time interval which UROM now says was an unreasonable delay.

[150] At the material times, the existence of the Stop Orders is the reason cited for UROM being unable to get further monies in March 2013 and, later, to continue financing construction on lot 25B – either from the sale of lot 26A, from the RBC, or otherwise from private investors.

[151] There was no evidence from authorities associated with RBC; no "financial statements" from UROM put into evidence, and no reliable evidence otherwise, that would permit the court to draw conclusions about the available cash flow of the company and other potential sources of financing to complete the duplex on lot 25B.

[152] Though there were banking documents that were said to be UROM's operating account statements with RBC, these were tendered to show the expenses/damages it has suffered as a result of the breach of the Agreement by United. These do not lead reliably to establishing it is more likely than not that UROM had no other source of financing reasonably available to it other than the sale of lot 26A in order to finance completion of the duplex on lot 25B.

[153] Even if the effect of the Stop Orders might otherwise be capable of constituting "frustration" of the parties' intentions evinced in the contract, which I do not find as a fact in any event, no material damages legally associated therewith have been proven.

[154] Lastly, UROM did not invoke clause 7 of the Agreement which provides that, “In the event that the Seller is unable to comply for any reason with the Seller’s obligations hereunder, at the option of the Buyer the Buyer may require the Seller to purchase the lots [and, for the purpose of clarity, the buildings thereon] at the fair market price of the lots which might be charged had the lots been reconveyed to the Buyer in the condition specified in paragraph 3 of this Amendment “C”.”

[155] If UROM truly felt aggrieved by what it now argues is the claimed “frustration” of the contract, including the delay caused by either the Stop Orders or the delay by United or the Registrar in returning the property as an incorporated unit to UROM, those delays could have arguably qualified as a basis upon which UROM could have insisted that United buy lot 26A for its fair market value. But again, UROM remained passive. It did so at its own peril. This reinforces my conclusion that UROM’s counterclaim has not been established.

Conclusion

[156] I find United’s claim successful - UROM is responsible for repayment of the debt and accrued interest. I am satisfied that the tabulation of the amount outstanding as provided to the court on May 17, 2021, of $575,313 is the appropriate amount of principal and interest owing.

[157] I have found UROM's counterclaim to be without merit.

[158] I will hear the parties on costs if they cannot agree. The court is hopeful that if there is no agreement the parties will agree to have the court receive written submissions only. I direct that the parties confirm their positions to me within 14 days of this decision.

Rosinski J.