In the Court of Appeal of Alberta

Citation: Castledowns Law Office Management Ltd. v. FastTrack Technologies Inc., 2009 ABCA 148

Date: 20090423
Docket: 0703-0210-AC
Registry: Edmonton

Between:

Castledowns Law Office Management Ltd.

Respondent
(Plaintiff/Defendant by Counterclaim)

- and -

FastTrack Technologies Inc.

Appellant
(Defendant/Plaintiff by Counterclaim

- and -

1131102 Alberta Ltd.

Not a Party to the Appeal
(Defendant/Plaintiff by Counterclaim)

- and -

Mike Kozicki, Sylvia Kozicki, Century 21 Royal Real Estate Ltd. and Anthony Holinski

Not a Party to the Appeal
(Defendants by Counterclaim)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment of The Honourable Madam Justice Conrad
Concurred in by The Honourable Mr. Justice O'Brien
Dissenting Memorandum of Judgment of The Honourable Mr. Justice Slatter

Appeal from the Decision by
The Honourable Mr. Justice J.J. Gill
Dated the 13th day of June, 2007
Filed on the 16th day of July, 2007
(2007 ABQB 404, Docket 0603-14617)

Memorandum of Judgment

Conrad J.A. (for the Majority):

I. Introduction

[1] The vendor in this dispute, 1131102 Alberta Ltd. (Vendor),[1] owned a commercial building in Edmonton which it decided to sell. To accomplish this end, it entered into two conditional sales agreements with two different purchasers – FastTrack Technologies Inc. (FastTrack) and Castledowns Law Office Management Ltd. (Castledowns). The agreement with Castledowns (Castledowns agreement) was a second agreement, referred to as a "back-up agreement," made after the agreement with FastTrack (FastTrack agreement), and was conditional on "satisfactory confirmation" that the FastTrack agreement had been terminated.

[2] The Vendor took steps to terminate the FastTrack agreement and FastTrack objected immediately and threatened to sue. The parties then met and negotiated what they described as an addendum to their original agreement. The Vendor, now intending to sell the property to FastTrack, did not give Castledowns written notice that the condition had been satisfied. On the condition date set out in the Castledowns agreement the Vendor advised Castledowns their agreement would not be going ahead because FastTrack was unable to confirm termination of the first agreement.

[3] Castledowns sued and was eventually successful in convincing a justice of the Court of Queen's Bench to grant an order for specific performance. FastTrack appeals that order. While FastTrack has several grounds of appeal, the main issue is whether the trial judge erred in his interpretation and application of the condition in the Vendor's agreement with Castledowns requiring "satisfactory confirmation of termination."

II. Decision

[4] I would allow the appeal. The trial judge erred in law by failing to consider the proper meaning to be attributed to the words "satisfactory confirmation of termination" found in the seller's conditions of the Castledowns agreement. This failure led him to interpret the condition as merely requiring legal termination of the private sales agreement with FastTrack when more was required. The words "satisfactory" and "confirmation", found in the seller's condition, indicate the Vendor was entitled to be satisfied any purported termination had been verified or corroborated by FastTrack. The Vendor wanted to know it no longer had any possible obligations under the first agreement before it became obligated under the second.

[5] Furthermore, the trial judge's decision cannot be upheld when the correct test is applied. Neither the letter of September 7, 2006 from the Vendor's lawyer, nor the subsequent communications and negotiations between the Vendor and FastTrack, amounted to "satisfactory

[1] Not a party to the appeal.

confirmation" by FastTrack that the agreement of August 30th had been terminated. In all of the communications between the Vendor and FastTrack, after the Vendor's initial attempt to terminate the FastTrack agreement on September 7, 2006, FastTrack made clear that it was not prepared to accept that the parties' original agreement had been, or should be, terminated. The condition not being satisfied, there was no further obligation to Castledowns. The Castledowns agreement terminated, therefore, on September 15th when the Vendor failed to give written notice that the condition had been either waived or satisfied.

[6] Thus, the order for specific performance cannot stand. I would allow the appeal, vacate the order for specific performance and declare that the Castledowns agreement ended on September 15, 2006. FastTrack seeks an order enforcing its agreement and conveying the property to it. This issue is not before the court. The formal judgment role discloses that FastTrack and the Vendor entered into a "stand still" agreement prior to trial concerning litigation over the FastTrack agreement. In any event, we are not in a position, on this record, to do more.

III. Background

[7] The Vendor owned a parcel of commercial property at 7708-104 Street in Edmonton, Alberta, known as the Vienna Building. Sometime between August 18 and August 21, 2006, Loren Yaremchuk, the Vendor's owner and chief officer, advertised the property for sale in the *Edmonton Journal*. Shortly thereafter, on August 23, 2006, the Vendor entered into a commercial listing agreement with Century 21, with a listing price of $1,688,000 and an effective date of August 25, 2006. Century 21 agreed that it would not seek commissions if the property was sold to a buyer which had contacted the Vendor as a result of the earlier newspaper advertisement.

[8] FastTrack's designated officer, Mr. Kourizin, is a university professor. He described FastTrack as a spin-off company from the University of Alberta that was engaged in contract work and production development, and was seeking premises near the university. When Kourizin saw the ad in *The Edmonton Journal*, he entered into negotiations with Yaremchuk, which eventually led to FastTrack's entering into an agreement on August 30, 2006 to purchase the property for $1,625,000 with an initial deposit of $10,000. The FastTrack agreement was prepared on a standard real-estate contract form designed for residential homes, and the agreement was subject to the following seller's conditions:

> 8.2 The Seller's Conditions are:
>
> (a) Obtaining Seller's Lawyer Approval regarding this Offer,
>
> before 9 p.m. on September 15, 2006 (the "Seller Condition Day").

> 8.3 Unless otherwise agreed in writing, the Buyer's Conditions are for the sole benefit of the Buyer and the Seller's Conditions are for the sole benefit of the Seller.
>
> 8.4 The Buyer and the Seller may unilaterally waive or satisfy their Conditions by giving Notice to the other party (the "Notice") on or before the stated Condition Day.
>
> 8.5 Provided that the Buyer or the Seller, as the case may be, uses reasonable efforts to satisfy the Condition(s), if the Notice has not been given on or before the stated Condition Day, then this Contract is ended.

[9] The agreement also contained a number of buyer's conditions relating to financing, property inspection, contractor inspection, environmental assessment, lawyer approval and satisfaction with licence requirements, all which had to be completed before September 22, 2006, with the exception of the inspection which did not have to be completed until October 22, 2006. Clause 2.1 of the agreement provided that "[t]he Buyer and the Seller agree to act cooperatively, reasonably, diligently and in good faith."

[10] Soon after this agreement was reached, Century 21 contacted the Vendor to say it had found several other interested buyers for the property. Century 21 arranged an open house where the Vendor could meet with these prospective buyers and, on September 2, 2006, several offers were presented, including one from Castledowns. Yaremchuk chose to negotiate with Castledowns, even though he had not yet sought his lawyer's approval with respect to the FastTrack agreement, and he did not tell Castledowns about the existence of the FastTrack agreement until negotiations were almost complete.

[11] The parties eventually negotiated a sale price of $1,724,250 and then a representative from Castledowns, Holinski, inserted a handwritten condition into clause 4.2 making the agreement subject to "Vendor confirmation of termination of contract dated Aug. 30, 2006." The Vendor's realtor, Mike Kozicki, crossed this condition out and inserted the words: "Subject to satisfactory confirmation of termination of private purchase contract dated Aug. 30 2006." The Vendor told Castledowns he would try to get out of the FastTrack agreement because he was not convinced FastTrack was serious, or able to complete the deal.

[12] The seller's conditions in the Castledowns agreement, found in clauses 4.2 and 4.3, were different and more elaborate than those contained in the FastTrack agreement. Overall, they were more beneficial to the seller. They read:

> 4.2 **Seller's Conditions**: The obligations of the Seller described in this Contract are subject to the satisfaction or waiver of the following conditions precedent, if any. These conditions are inserted for the sole and excusive

> benefit and advantage of the Seller. The satisfaction or waiver of these Conditions will be determined in the sole discretion of the Seller. The Seller agrees to use reasonable efforts to satisfy these conditions. These conditions may only be satisfied or waived by the Seller giving written notice (the "Seller's Notice") to the Buyer on or before 5 p.m. on the 15 day of September 2006, (the "Seller's Condition Day"). If the Seller fails to give the Seller's Notice to the Buyer on or before the Seller's Condition Day, then this Contract will be ended and the Initial Deposit plus any earned interest will be returned to the Buyer and all agreements, documents, materials and written information exchanged between the parties will be returned to the Buyer and the Seller respectively.
>
> > - ~~Vendor confirmation of termination of contract dated Aug. 30, 2006~~. [crossed out]
> >
> > **Subject to satisfactory confirmation of termination of private purchase contract dated Aug. 30 2006**
>
> 4.3 Subject to clauses 4.1 and 4.2, the Buyer and the Seller may give written notice to the other party on or before the stated Condition Day advising that a Condition will not be waived, has not been satisfied and will not be satisfied on or before the Condition Day. If that notice is given, then this contract is ended upon the giving of that notice. (emphasis added)

[13] Castledowns gave its own realtor a deposit cheque for $100,000, which was due within 24 hours of the removal of the seller's conditions. That cheque was not forwarded to the Vendor, its lawyer, or its realtor on September 15, 2006 or at any time thereafter. The Castledowns agreement also contained clause 2.1, which provided that the parties would "... act cooperatively, reasonably, diligently and in good faith."

[14] After negotiating the Castledowns agreement, the Vendor sent both agreements to his lawyer, Mr. Engleking, for review. Engleking expressed concerns about the size of the deposit, and the length of time for removal of the purchaser's condition, in the FastTrack agreement. The Vendor instructed Engelking to terminate the FastTrack agreement and return the deposit. On September 7, 2006, Engelking wrote to FastTrack's counsel, Mr. Caruk, advising that his client was not prepared to remove "the 'subject to condition' in the Seller's favour." He returned the $10,000 deposit and stated that his client considered the transaction at an end.

[15] On September 8, Caruk e-mailed FastTrack about the purported termination. FastTrack's response was forceful and immediate; it instructed Caruk to challenge the purported cancellation. Caruk then wrote to Engleking on September 11, 2006 and expressed in unequivocal terms his client's displeasure and its intention to enforce the agreement through the courts. He wrote:

> We have received your correspondence of September 7th, 2006. Needless to say we are not impressed and neither is our client.
>
> Your attempt to cancel our clients contract arbitrarily is unacceptable. Any clause purporting to make an offer subject to lawyer's approval does not extend to the substance of the deal. If there are terms regarding procedure, especially here where the form of the contract may not be particularly appropriate for a commercial transaction, that need to be addressed then we can modify same for the benefit of both out clients.
>
> Otherwise, if your justification for not removing the seller's "subject to" condition is other than a matter of price, kindly advise as to what possible changes may be required. If it is solely a matter of price then your client has a problem.
>
> Following execution of the subject contract, we are advised by our client that your client verbally advised our client that notwithstanding that your client had apparently received other higher offers respecting this property, that your client was proceeding with this transaction notwithstanding same. Based upon those representations my client has proceeded to obtain financing and incur costs associated with this transaction.
>
> Let us be clear. Our client wishes to proceed with this transaction, there is a signed contract wherein any irregularities can be resolved without cancellation of the deal and utilizing the subject to lawyer's approval clause to cancel the contract as you have is not proper.
>
> **We have delivered a Caveat to protect our client's interest in this property. Be further advised that other than completing this transaction out client will be seeking damages for this non-completion and compensation for the amounts expended by our clients with regard to this matter already with respect to this matter. Time is a consideration as well since our client has a "subject to financing" deadline of September 15th, 2006.**
>
> **May we please hear from you immediately.** (emphasis added)

[16] Upon learning of FastTrack's reaction, Yaremchuk immediately met with FastTrack, without either his lawyer or his realtor, to try to resolve the issues surrounding the purported termination. The parties negotiated changes to their original agreement which they incorporated into an "Addendum" to that agreement (Addendum). The changes included a slightly higher price, a higher deposit, a rent-free lease back to the Vendor for one year, a different closing date and consideration

of the GST, and it expressly removed the condition that the transaction was subject to approval by the Seller's lawyer. The Addendum was dated September 12, 2006.

[17] Meanwhile, Castledowns was concerned that it had not received written notice that the condition had been either waived or satisfied. On September 14, 2006, Castledowns' representative, Holinski, called Engelking and was advised that a letter had been written to FastTrack purporting to terminate the FastTrack agreement and returning the deposit. Engleking did not, however, confirm in writing that the seller's condition had been met, nor did he confirm that there had been a satisfactory confirmation of termination. The next day, September 15, 2006, after speaking with his client, Engelking sent a letter to Castledowns' realtor stating that his client "is unable to confirm termination of the private purchase contract dated August 30, 2006, and consequently the back up offer from Castledowns Law Office cannot be satisfied and our client considers that offer to be at an end."

[18] Castledowns' lawyer wrote back, on September 18, 2006, advising that it was filing a caveat to protect its rights and it was filing a statement of claim. On October 13th, approximately one month later, Castledowns wrote to the Vendor waiving the buyer's conditions. Even though it was taking the position the Castledowns agreement was still alive, Castledowns did not forward the $100,000 deposit to either the Vendor, his solicitor, or his realtor.

[19] The Vendor refused to complete the Castledowns agreement and on November 21, 2006, Castledowns sued the vendor, *inter alia*, for specific performance. It also sued FastTrack for tortious conspiracy, and inducing breach of contract, damages, and removal of its Caveat No. 062453925, registered on October 7, 2006, to protect its agreement for purchase.

[20] For its part, the Vendor counterclaimed for a declaration removing Castledowns' caveat from its property, for damages for slander of title, interest and costs. FastTrack defended and counter-claimed for interference with contractual relations, wrongful filing of caveats, exemplary and other damage and costs. Century 21 and its realtors were included in the counterclaim. All of the actions were eventually consolidated and set down for trial on an expedited basis. The court was advised there was a standstill agreement between FastTrack and the Vendor.

[21] The trial judge granted Castledowns' claim for specific performance, directed discharge of FastTrack's caveat, and dismissed all the other claims. FastTrack now appeals the order granting specific performance and discharging its caveat.

IV. The Trial Judgment

[22] The trial judge concluded that the FastTrack agreement had terminated when the Vendor wrote to FastTrack on September 7, 2006, saying the condition would not be waived and the agreement was at an end. In the alternative, he found that the FastTrack agreement terminated when the parties agreed to the Addendum on September 12th because the negotiation of the Addendum amounted to a counteroffer which terminated the first agreement. In either event, and without

attempting to interpret the meaning of the words "satisfactory confirmation of termination..." as those words appeared in the handwritten condition in the Castledowns agreement, the trial judge held that the purported termination of the FastTrack agreement amounted to "satisfactory confirmation of termination." He appears to have equated "satisfactory confirmation of termination" with simple "termination". In addition, the trial judge held that once the Vendor terminated, it was obliged to act reasonably and in good faith and give notice that the agreement had been terminated. It could not, therefore, rely on its own default in giving notice to thwart the condition. Finally, and in the alternative, the trial judge held that written notice was not required and that Engleking gave effective notice orally, on the Vendor's behalf, when he spoke to Castledowns' representative on September 14th: *Castledowns Law Office Management Ltd, v. 1131102 Alberta Ltd.*, 2007 ABQB 404, 159 A.C.W.S. (3d) 452.

[23] The trial judge also considered whether it mattered that neither the Vendor, its realtor, nor its lawyer had ever received Castledowns' deposit of $100,000 as required by the Castledowns agreement, had it been in force. He concluded this was not fatal to Castledowns' claim. He also found both FastTrack and Castledowns had acted in good faith and that neither was guilty of tortious conduct towards the other. In the end, the trial judge granted Castledowns' application for specific performance, discharged FastTrack's caveat and dismissed all of the remaining claims and counterclaims.

V. Grounds of Appeal

[24] FastTrack advances four grounds of appeal. It submits the trial judge erred by:

(a) incorrectly interpreting the condition precedent in Castledowns agreement;

(b) incorrectly holding the respondent was not obligated to pay its deposit;

(c) incorrectly finding that specific performance was an appropriate remedy in the circumstances; and

(d) incorrectly interpreting real estate practice by allowing verbal variation or confirmation of a written contract.

VI. Analysis

A. Issue One – Did the trial judge err by incorrectly interpreting and applying the condition precedent in the Castledowns agreement?

[25] FastTrack submits the contract expired for lack of notice and that the trial judge misinterpreted and misapplied the seller's condition in the Castledowns agreement by failing to give meaning to the words "satisfactory confirmation of termination of [the] private purchase contract

dated Aug 30, 2006". FastTrack suggests that had the trial judge properly considered these words, he would have been forced to conclude that the condition was never met.

[26] I agree with those propositions. This was an application by Castledowns for specific performance. To demonstrate that it had a right to this remedy, Castledowns had to prove it had an enforceable agreement for sale and that FastTrack did not have a valid caveat protecting its prior agreement.

[27] Clause 4.2 of the Seller's Condition in the Castledowns agreement provided that the seller's condition was for the sole and exclusive benefit of the seller. It also provided that "...These conditions may only be satisfied or waived by the Seller giving written notice (the "Seller's Notice") to the Buyer on or before 5 p.m. on the 15 day of September, 2006, (the Seller's Condition Day"). If the Seller fails to give the Seller's Notice to the Buyer on or before the Seller's Condition Day, then the Contract will be ended" in which case the deposit, if it has been received, will have to be returned. The Vendor's written notice on the 15th does not confirm that the conditions were either satisfied or waived. To the contrary, the Vendor wrote on September 15, 2006 that the condition could not be satisfied and his client considered the contract at an end. As a result, the contract was at an end unless the trial judge was correct in determining that the condition was met and that the Vendor was prohibited from relying on the lack of notice, or alternatively, oral notice was sufficient and satisfied by a telephone conversation with the Vendor's lawyer advising that a termination letter had been sent.

[28] Prior to addressing the trial judge's findings regarding notice, it is necessary to examine whether the trial judge correctly interpreted the seller's condition in the Castledowns agreement. The trial judge was obliged to look at the words of the condition to discover how it could be satisfied. As the Supreme Court noted in *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at para. 54:

> The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.

[29] The trial judge did not do this here. Instead, he confined his analysis of the seller's condition to the issue of whether the Vendor had to give written notice before the condition could be removed and the Castledowns agreement could come into effect (see decision paras. 73 and following). He never offered any interpretation of the words "satisfactory confirmation" and simply equated "satisfactory confirmation of termination" with legal termination, which takes no cognizance of the words used and ignores the intention those words indicate. The trial judge simply assumed that if the FastTrack agreement was terminated in a legal sense then the condition was met. His failure to analyse the wording of the agreement is an error that does not attract deference: *Partec Lavalin Inc. v. Meyer*, 2001 ABCA 145, 281 A.R. 339 at para. 11; *Jager v. Liberty Mutual Fire Insurance Co.*, 2001 ABCA 163, 281 A.R. 273 at para. 14.

[30] Had the trial judge interpreted the words of the seller's hand-written condition he would have been forced to consider the effect of the words "satisfactory" and "confirmation" on the seller's condition, and examine the whole of the agreement in the surrounding circumstances to arrive at the proper intention for inserting this seller's condition.

[31] Turning first to the words used, the usual meaning of the word "satisfactory" is: "sufficient for the needs of the case, adequate" (*Online Oxford English Dictionary*). The use of this word in a conditional sales contract, however, gives rise to the question: Sufficient or adequate to whom? The British Columbia Court of Appeal dealt with this issue in *Griffin v. Martens*, [1988] B.C.J. No. 828, 27 B.C.L.R. (2d) 152 in the context of a conditional agreement to purchase. In that case, the agreement was made "subject to the purchaser being able to arrange satisfactory financing." The court confirmed that the clause was inserted for the benefit of the purchaser. In assessing the meaning of "satisfactory financing" in that context the court opined at 154:

> What is meant by "satisfactory financing"? There are four rational alternatives:
>
> 1. "satisfactory to a reasonable person making the purchase about whom nothing else is known";
>
> 2. "satisfactory to a reasonable person in the objective circumstances of the purchaser";
>
> 3. "satisfactory to a reasonable person with all the subjective but reasonable standards of the particular purchaser"; and
>
> 4. "satisfactory to the particular purchaser with all his quirks and prejudices, but acting honestly".

[32] The court ruled out the first alternative because it did not give sufficient meaning to the word satisfactory in the context of the interim agreement. It also ruled out the fourth alternative because such a meaning could have been better expressed by using the words "financing satisfactory to him", meaning the purchaser, and that such an interpretation would turn the agreement into an option. The court went on to conclude:

> The second and third meanings both combine subjective and objective standards. They are very similar in effect. I favour the third meaning as best expressing the actual intention of the parties by giving the most accurate interpretation to the words they chose to express their intention. The third meaning gives "satisfactory" a full and subjective significance but, at the same time, retains the commitment of the purchaser to use his best efforts, on a similar combined standard to obtain financing.

[33] The handwritten condition in the Castledowns agreement does not say specifically who must be satisfied that termination has been confirmed. The remainder of clause 4.2, however, is of assistance – in particular, the words: "These conditions are inserted for the sole and excusive benefit and advantage of the Seller. The satisfaction or waiver of these Conditions will be determined in the sole discretion of the Seller." In my view, these sentences make clear that it is the Vendor who must be satisfied that termination has been successfully confirmed, or, at the very least, applying the third category in *Griffin*, "a reasonable person with all the subjective but reasonable standards of the particular purchaser".

[34] The trial judge was also obliged to consider the parties' use of the word "confirmation". Having regard to the circumstances in which the condition was drafted, I am satisfied the parties simply intended "confirmation" to have its ordinary, non-ecclesiastical, meaning. According to the *Online Oxford English Dictionary*, that meaning includes:

> The action of making firm or sure; strengthening, settling, establishing (of institutions, opinions etc.).
> ...
> The action of confirming, corroborating, or verifying; verification, proof...
> A confirmatory statement or circumstance;

[35] As with the word "satisfactory", the parties' use of the word "confirmation" in a conditional sales contract requires the court to consider the question: Confirmed by whom or to whom? In my view, the agreement is sufficiently ambiguous on this point to require consideration of the general circumstances that brought it into being. Both parties knew this was a second conditional sales agreement with respect to the Vienna Building. Castledowns' principal, Holinski, inserted the condition: "Vendor confirmation of termination of contract dated Aug. 30, 2006." This condition was not enough to satisfy the Vendor's agent, the realtor Kozicki, and he crossed it out and replaced it with the words: "Subject to satisfactory confirmation of termination of private purchase contract dated Aug. 30, 2006."

[36] Viewing this contract in the circumstances here, I am satisfied that the logical and reasonable purpose behind this handwritten seller's condition contained in the Castledowns agreement was to ensure the Vendor did not become liable under two agreements. This is supported by the change made to the wording of the agreement by the Vendor's agent, Kozicki. In these circumstances, with a "back-up" agreement, the Vendor would want to ensure that it was out of one contract before being liable on another, and that it would not be facing the expense and inconvenience of a legal challenge if and/or when it attempted to terminate the FastTrack agreement. The way to achieve this purpose was to provide that the Vendor would have confirmation of termination from FastTrack before the Castledowns agreement could come into effect. This confirmation did not have to be in writing. If FastTrack had accepted the return of its deposit, without complaint, this might have sufficed. However, the Vendor, acting reasonably, had to be satisfied that its purported termination would not be challenged.

[37] In summary, I conclude that the condition in the Castledowns agreement required the Vendor, or in the alternative, a reasonable person with all the subjective but reasonable standards of the Vendor, be satisfied that FastTrack had made "sure," "ratified," "corroborated," or "verified" that the purported termination was accepted without challenge.

[38] It remains to be asked whether the test was met in this case.When FastTrack heard about Engelking's September 7th letter purporting to terminate the agreement, it objected immediately and instructed its lawyer to challenge the cancellation. Counsel's response was unequivocal. In FastTrack's view, the Vendor had been expected to use reasonable efforts to satisfy the condition and take the agreement to his lawyer for advise without going out soliciting other offers. He wrote to the Vendor saying that FastTrack was prepared to sue to enforce its rights, and that it would proceed immediately to file a caveat. Although counsel did say FastTrack was willing to negotiate minor matters, he made it clear that FastTrack was not about to abandon the August 30th agreement. In my view, this response to the purported termination could not have been interpreted as satisfactory ratification, corroboration, or verification by FastTrack that the FastTrack agreement had been terminated – applying any of the possible standards discussed by the British Columbia Court of Appeal in *Griffin*.

[39] I would add that even if confirmation of termination could come from some other source, such as the Vendor's lawyer, this is not a case where FastTrack's proposed litigation was an idle threat. Here the Vendor was obliged to use reasonable efforts to secure its lawyer's approval of the FastTrack agreement. It did not forward the FastTrack agreement to its lawyer, however, until after it entertained other offers, and had negotiated a back-up agreement with Castledowns on more favourable terms. Only then did it go to its lawyer. The Vendor's principal, Yaremchuk, even testified that he had assured Castledowns he would try to terminate the FastTrack agreement. It is arguable, therefore, that in seeking lawyer's approval, only after it had a higher offer in hand, the Vendor was in breach of the contractual duty to using reasonable efforts to satisfy the condition precedent.

[40] What about FastTrack's subsequent behaviour? Did the negotiation of the Addendum amount to satisfactory confirmation of termination? Parties to a contract are entitled to vary their obligations, through re-negotiation, without terminating the contract. While I acknowledge there may be situations where re-negotiation is so extensive as to amount to the execution of a new agreement,[2] whether the parties intended to rescind or vary must be determined in light of all of the circumstances of the case.

[2] The distinction between variation and rescission was discussed by Rowbotham J. (as she then was) in *Garner v. W.R. Kirk Holdings Ltd.*, 2000 ABQB 1, 256 A.R. 139 (Q.B.).

[41] In my view, it is not possible to conclude from the evidence that the parties intended to rescind the first agreement. Here the parties went into negotiations over the Addendum without their lawyers, and under threat of being sued. FastTrack had already stated that it was not prepared to accept termination of the original agreement and that it was only prepared to negotiate minor changes. The parties negotiated changes and put them into an Addendum to the original agreement, rather than execute a new agreement. There is nothing in the Addendum indicating it was intended to replace the original agreement. To the contrary, the parties expressly stated their intention that the Addendum "shall form a part of the original agreement entered into by the parties dated August 30, 2006." Given these facts, neither the Vendor, nor a reasonable person with all the subjective but reasonable standards of the Vendor, would have understood that the re-negotiations amounted to FastTrack's confirmation that the August 30, 2006 agreement had been rescinded. Moreover, even if it were a new agreement, it was negotiated under threat of lawsuit and all the evidence points to the fact that FastTrack was never going to relieve the Vendor from its obligations arising from the first agreement. At best, therefore, this was a settlement of those obligations, not confirmation that they did not exist. In other words, the condition that there be satisfactory confirmation of termination of the FastTrack agreement was never met.

[42] The final question is whether the handwritten condition in the Castledowns agreement was met, nonetheless, because the Vendor failed in its duty to use reasonable efforts to satisfy the condition. First, this condition is not akin to a condition where a purchaser must take reasonable steps to obtain a licence or a mortgage. In my view, the condition did not require the Vendor to cancel the FastTrack agreement as that would be akin to an agreement to interfere with contractual relations of another or to induce a breach of contract. In light of the trial judge's finding that Castledowns and FastTrack conducted themselves appropriately, and in good faith, this surely cannot be the proper interpretation. The only way the Vendor could make reasonable efforts to satisfy the condition in the Castledowns agreement was by taking legitimate steps to try and terminate the FastTrack agreement, which the trial judge found it did. Furthermore, while there may be occasions when a party is obliged to take legal steps to satisfy a condition, this does not include embarking on "difficult or uncertain litigation" (*Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072, 85 D.L.R. (3d) 19 at 28) such as the threatened litigation here. I am satisfied, therefore, that the Vendor was not obliged to defend the threatened lawsuit by FastTrack to comply with its duty to use reasonable efforts to satisfy the condition in the Castledowns agreement.

[43] In conclusion, I am satisfied that the condition in the Castledowns agreement was never satisfied nor waived. As a result, there was no obligation to give notice and the trial judge erred in concluding that the Vendor could not rely on the terms of the Seller's Condition that terminated the contract where no notice was given. And although not necessary to my decision, I find that he also erred when he concluded that an oral notice would suffice. First, no oral notice of satisfactory termination was given here. Second, the trial judge was not entitled to overrule clause 4.2 of the FastTrack agreement by substituting the "oral" for "written" notice. Nor was an estoppel in this regard either pleaded or established. The Castledowns agreement expired on September 15, 2006, because the condition had been neither satisfied nor waived. There was no basis, therefore, upon which the trial judge could grant an order for specific performance.

[44] Finally, even if the trial judge was correct, and all that was required to satisfy the condition precedent was the legal termination of the FastTrack agreement, the FastTrack agreement was never terminated. Engleking's letter of September 7, 2006 did not terminate the FastTrack agreement because the agreement did not contain a mechanism for unilateral termination before the Condition Day. Here the parties agreed that the FastTrack agreement would be conditional upon the Vendor obtaining lawyer approval (clause 8.2), and they also agreed that if this approval was not obtained prior to the Condition Day – September 15, 2006 at 9:00 p.m. – the contract would end (clause 8.5). But this time-line could only be shortened, unilaterally, by the Vendor giving notice that the condition had been waived or satisfied prior to the Condition Day (clause 8.5). Thus, the Vendor did not have the right in this agreement to terminate the agreement early by giving notice that the condition had not been met. The contract could not end for lack of waiver or satisfaction until September 15, 2006, and, by September 12, 2006, the Vendor had waived the condition when it entered into the Addendum.

[45] Similarly, the FastTrack agreement did not terminate when the parties negotiated the Addendum. Parties to a contract are entitled to vary the terms of their agreement without rescinding the old agreement and entering into a new one. Whether such re-negotiation results in a new agreement is a matter of fact and is largely a question of the parties' intent – as measured objectively through the eyes of a reasonable person.[3] I have already found that the negotiation of the Addendum did not amount to satisfactory confirmation of termination, and implicit in that finding is the conclusion that the parties did not intend their negotiations to result in the termination of the underlying agreement. For the reasons set out above, therefore, I am satisfied that a reasonable person would conclude the parties did not intend to rescind their original agreement and enter into a new one when they negotiated the Addendum.

B. The Remaining Grounds of Appeal

[46] Given my conclusion above, there is no need to discuss the remaining grounds of appeal. Having said this, I express one small concern about the trial judge's reasoning when he found that Castledowns was not required to pay the deposit because the Vendor had failed to "trigger" the obligation. If Castledowns was truly of the view that the condition had been satisfied, it would have been required to forward the deposit. The conduct of Castledowns was inconsistent in advancing the position that the condition had been met, while at the same time withholding the deposit which was never paid to either the Vendor or its real estate agent.

[47] I would add one further note regarding FastTrack's status on this appeal. Counsel for the appellant advised the court that the Vendor chose not to participate in the appeal. The trial judge noted at the outset of his judgment that the action involved competing claims for specific

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[3] The test for determining contractual intention is described by Lord Wilberforce in *Reardon Smith Line v. Hansen - Tangen*, [1976] All E.R. 570 at 574.

performance. Clearly, both FastTrack and Castledowns were challenging the agreements entered into by the opposite party. No issue of status was raised either at trial or on the appeal. The decision of the Vendor not to participate in the appeal does not affect FastTrack's entitlement to seek relief as it may be entitled to – including restoration of its caveat.

VII. Conclusion

[48] The appeal is allowed and the order for specific performance is overturned. The matter is returned to the Court of Queen's Bench for the resolution of any outstanding issues that flow from this result.

Appeal heard on January 29, 2009

Memorandum filed at Edmonton, Alberta
this 23rd day of April, 2009

(as authorized) Conrad J.A.

I concur:

O'Brien J.A.

Slatter J.A. (dissenting):

[49] The issue on this appeal is which of two competing purchasers of a commercial building are entitled to take title to that building. The trial judge concluded that the respondent had a binding contract to purchase the building, and was entitled to the property: ***Castledowns Law Office Management Ltd. v. 1131102 Alberta Ltd.***, 2007 ABQB 404, 79 Alta. L.R. (4th) 109.

Facts

[50] The vendor numbered company was interested in selling its building known as the Vienna Building. After some negotiations, the vendor and the appellant FastTrack entered into an interim agreement of purchase and sale on August 30, 2006. The agreement was typed up on a pre-printed form designed for use in purchasing and selling residential properties. Some of the key provisions are as follows:

> 2.1 The Buyer and the Seller agree to act cooperatively, reasonably, diligently and in good faith.
>
> . . .
>
> 8.1 The Buyer's Conditions are:
>
> (a) Financing Condition . . .
> (b) Property Inspection Condition . . .
> (c) Contractor Inspection . . .
> (d) Environmental Assessment . . .
> (e) Zoning and Building Usage . . .
> (f) Additional Buyer's Condition:
> a) Buyer being satisfied with all business license requirements:
> b) *Buyer obtaining lawyer approval regarding this Offer and all Buyer's conditions*,
>
> Before 9 p.m. on the Buyer Condition Day.
>
> 8.2 The Seller's Conditions are:
> (a) *Obtaining Seller's Lawyer Approval regarding this offer.*
> Before 9 p.m. on September 15, 2006
> (the "Seller Condition Day")
>
> 8.3 Unless otherwise agreed in writing, the Buyer's Conditions are for the sole benefit of the Buyer and the Seller's Conditions are for the sole benefit of the Seller.

8.4 The Buyer and the Seller may unilaterally waive or satisfy their Conditions by giving a Notice to the other party (the "Notice") on or before the stated Condition Day.

8.5 Provided that the Buyer or the Seller, as the case may be, uses *reasonable efforts* to satisfy the Condition(s), if the Notice has not been given on or before the stated Condition Day, then this Contract is ended. (emphasis added)

[51] It came to the attention of other potential buyers, including the respondent Castledowns Law Office Management, that the Vienna building was on the market. A realtor arranged for a meeting on September 2, 2006 at which all the potential purchasers could present their offers privately to the vendor.

[52] Castledowns presented its offer to the vendor. Late in the meeting Castledowns was advised of the pending agreement with FastTrack. Castledowns was disappointed with this news, but was prepared to make a "backup" offer on more favourable terms than the FastTrack offer. The vendor entered into an agreement with the respondent Castledowns on September 2, 2006. Again a preprinted form was used, this one designed for the purchase and sale of commercial properties, some of the key provisions being:

2.1 The Buyer and the Seller agree to act cooperatively, reasonably, diligently and in good faith.

. . .

4. Conditions

4.1 Buyer's Conditions: The obligations of the Buyer described in this Contract are subject to the satisfaction or waiver of the following conditions precedent, if any. These conditions are inserted for the sole and exclusive benefit and advantage of the Buyer. The satisfaction or waiver of these conditions will be determined in the sole discretion of the Buyer. The Buyer agrees to use reasonable efforts to satisfy these condition. These conditions may only be satisfied or waived by the Buyer giving written notice (the "Buyer's Notice") to the Seller on or before 5 p.m. on the *15* day of *October 2006*, (the "Buyer's Condition Day"). If the Buyer fails to give the Buyer's Notice to the Seller on or before the Buyer's Condition Day, then this Contract will be ended and the initial Deposit plus any earned interest will be returned to the Buyer and all agreements, documents, materials and written information exchanged between the parties will be returned to the Buyer and the Seller respectively. . . .

(a) Financing Condition . . .
(b) Due Diligence Conditions:
 (i) acceptable physical viewing/inspection of the Property;

(ii) acceptable review of legal title for the Property and any Unattached Goods;
(iii) acceptable review of any Permitted Encumbrances;
(iv) acceptable review of Accepted Tenancies;
(v) acceptable review of financial records and statements respecting the Property and any operating agreements that the Buyer is to assume;
(vi) acceptable review of all engineering, mechanical, electrical, plumbing, roof, heating, ventilation, construction or similar reports, studies, assessments, plans, drawings, specifications, correspondence or work orders;
(vii) acceptable review of all environmental reports;
(viii) acceptable review of all real property reports; and
(ix) acceptable review of the following additional agreements/documents/materials: ________________________
(x) The Buyer may also, at its expense, retain its own consultants to conduct such inspections, reviews and tests and to produce such observations, reports or assessments regarding the Property. . . .
(xi) acceptable appraisal, acceptable design of office layout

(c) Additional Buyer's Conditions:
- *review of rents rolls; financial statements for the property for the last 2 years.*
- *satisfactory property inspection;*

(d) subject to approval of all partner[s] September 6, 2006 at 5:00 p.m.

4.2 Seller's Conditions: The obligations of the Seller described in this Contract are subject to the satisfaction or waiver of the following conditions precedent, if any. These conditions are inserted for the sole and exclusive benefit and advantage of the Seller. The satisfaction or waiver of these Conditions will be determined in the sole discretion of the Seller. The Seller agrees to use reasonable efforts to satisfy these conditions. These conditions may only be satisfied or waived by the Seller giving written notice (the "Seller's Notice") to the Buyer on or before 5 p.m. on the *15* day of *September 2006*, (the "Seller's Condition Day"). If the Seller fails to give the Seller's Notice to the Buyer on or before the Seller's Condition Day, then this Contract will be ended and the initial Deposit plus any earned interest will be returned to the Buyer and all agreements, documents, materials and written information exchanged between the parties will be returned to the Buyer and the Seller respectively.

- ~~*Vendor confirmation of terminations of contract dated Aug. 30, 2006.*~~

- *Subject to satisfactory confirmation of termination of private purchase contract dated Aug. 30, 2006.*

The provisions shown in italics were handwritten onto the pre-printed form.

[53] Anthony Holinski, an officer of Castledowns, wrote in the original condition: "Vendor confirmation of termination of contract dated Aug. 30, 2006". Mike Kozicki, the vendor's realtor, crossed out those words and inserted: "Subject to satisfactory confirmation of termination of private purchase contract dated Aug. 30, 2006". None of the witnesses had a clear recollection of discussing the significance, if any, of the change in wording.

[54] Both FastTrack and the vendor had stipulated that their agreement was "subject to lawyer's approval". The vendor sent both the FastTrack and Castledowns contracts to its lawyer, who expressed some concern about the size of the deposit and the long condition removal date in the FastTrack contract. On the instructions of the vendor, the vendor's lawyer wrote to FastTrack's lawyer on September 7, 2006 as follows:

> That contract is subject to approval by the Seller's lawyer on or before 9:00 p.m. on September 15, 2006. We have discussed the matter with our client and based upon our discussions and the information provided to him our client is not prepared to remove the "subject to condition" in the Seller's favour. Accordingly we enclose herewith our firm's trust cheque in the amount of $10,000.00 payable to your firm representing the refund of your client's deposit. Our client considers this transaction at an end.

The day before the letter was sent, the vendor's realtor advised Castledowns' realtor that the FastTrack agreement was not going ahead, and that the deposit had been returned. This information was passed on to Castledowns.

[55] FastTrack's lawyer meanwhile reported to his client, and replied to the vendor on September 11, 2006:

> We have received your correspondence of September 7th, 2006. Needless to say we are not impressed and neither is our client.
>
> Your attempt to cancel our clients contract arbitrarily is unacceptable. Any clause purporting to make an offer subject to lawyer's approval does not extend to the substance of the deal. If there are terms regarding procedure, especially here where the form of contract may not be particularly appropriate for a commercial transaction, that need to be addressed then we can modify same for the benefit of both our clients.

> Otherwise, if your justification for not removing the seller's "subject to" condition is other than a matter of price, kindly advise as to what possible changes may be required. If it is solely a matter of price then your client has a problem.
>
> Following execution of the subject contract, we are advised by our client that your client verbally advised our client that notwithstanding that your client had apparently received other higher offers respecting this property, that your client was proceeding with this transaction notwithstanding same. Based upon those representations my client has proceeded to obtain financing and incur costs associated with this transaction.
>
> Let us be clear. Our client wishes to proceed with this transaction, there is a signed contract wherein any irregularities can be resolved without cancellation of the deal and utilizing the subject to lawyer's approval clause to cancel the contract as you have is not proper.
>
> We have delivered a Caveat to protect our client's interest in this property. Be further advised that other than completing this transaction our client will be seeking damages for this non-completion and compensation for the amounts expended by our clients with regard to this matter already with respect to this matter. Time is a consideration as well since our client has a "subject to financing" deadline of September 15th, 2006.
>
> May we please hear from you immediately.

[56] Further discussions and negotiations ensued between the vendor and FastTrack. On September 12, 2006, without the assistance of either their lawyers or realtors, they signed a document entitled "Addendum & Additional Terms to the Agreement entered into by the parties by agreement dated August 30, 2006". In this document the vendor removed the condition in the original FastTrack agreement that it was "subject to lawyer's approval". The price and other terms of the sale were made more favourable to the vendor. The Addendum stated that it would "either amend or replace the terms contained in the original agreement", and that it would form a part of the original agreement.

[57] On September 14, 2006, the vendor's lawyer confirmed to Mr. Holinski of Castledowns that the letter of September 7 had been sent terminating the FastTrack agreement. But on instructions from the vendor, the vendor's lawyer wrote to Castledowns on September 15, 2006 stating that the vendor was "unable to confirm termination of the private purchase contract" with FastTrack, and that the offer with Castledowns was therefore at an end.

[58] This litigation followed. The trial judge found that the FastTrack agreement had been terminated when the "lawyer's approval" condition failed. He found at paras. 61, 63 that the non-approval was "based on bona fide reasons":

> The Vendor clearly had a frank discussion with his lawyer who raised some legitimate substantive concerns and did not approve the First Agreement. The Vendor acted on that advice as he was entitled to do.

Whether FastTrack agreed or not was irrelevant, because the termination letter was clear. Alternatively, he found that the first FastTrack agreement was terminated by the Addendum Agreement, which was effectively a counteroffer.

[59] The trial judge concluded that the "satisfactory termination" condition in the Castledowns agreement had been satisfied:

> [86] By any reasonable interpretation of clause 4.2 the condition precedent to the Second Agreement (i.e. subject to "satisfactory confirmation of termination") was satisfied when the First Agreement was terminated by the Vendor instructing his lawyer to send the September 7, 2006 letter. How can the Vendor now assert in good faith that this was not a satisfactory termination of the First Agreement?

Given the covenant to act in good faith, and the requirement to take reasonable steps to fulfill the conditions, the vendor could not rely on its failure to send a written notice confirming the satisfaction of the condition. Since the vendor would not accept that the condition had been satisfied, Castledowns was not required to pay the deposit, as it was ready, willing and able to close the transaction at all times.

[60] The trial judge found that the Castledowns agreement was binding. Since the vendor was prepared to transfer title as directed by the court, the trial judge granted an order for specific performance notwithstanding the objections of FastTrack. This appeal resulted. A stay was denied: ***Castledowns Law Office Management Ltd. v. 1131102 Alberta Ltd.***, 2007 ABCA 262. The property was subsequently conveyed to Castledowns.

Standard of Review

[61] The standard of review for questions of law is correctness. The findings of fact of the trial judge will only be reversed on appeal if they disclose palpable and overriding error: ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235, 2002 SCC 33 at paras. 8, 10, 25. Findings of credibility and of good faith are a part of the fact finding process, and are subject to the same standard of review.

[62] The interpretation and application of contract principles to a settled set of facts is a question of law reviewed for correctness: ***Diegel v. Diegel,*** 2008 ABCA 389 at para. 20; ***Alberta Importers and Distributors (1993) Inc. v. Phoenix Marble Ltd.***, 2008 ABCA 177, 88 Alta. L.R. (4th) 225, 432 A.R. 173 at para. 9; ***McDonald Crawford v. Morrow***, 2004 ABCA 150, 348 A.R. 118 at paras. 5 and 43. However, when the court has to make fact findings in order to determine the essential terms of a contract, those findings warrant deference absent palpable and overriding error: ***Double N Earthmovers v. Edmonton (City)***, 2005 ABCA 104, 363 A.R. 201 at para. 16, aff'd, [2007] 1 S.C.R.

116, 2007 SCC 3; ***Jiro Enterprises Ltd. v. Spencer***, 2008 ABCA 87 at para. 10. A trial judge's determination of the factual matrix surrounding the contract in light of the evidence as a whole (including if appropriate extrinsic evidence) is a matter of fact, although the determination may be influenced by legal concepts: ***Diegel*** at para. 20; ***Jiro Enterprises*** at para. 10; ***Double N Earthmovers*** at para. 16.

[63] The remedy of specific performance, like all equitable remedies, is discretionary: ***Wewaykum Indian Band v. Canada***, 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 107. Accordingly, a judge's decision to grant specific performance is insulated from appellate review in the absence of palpable and overriding error, unless based on an error in principle or of law: ***Jiro Enterprises*** at para. 9; ***Hennig v. Canadian Rocky Mountain Properties Inc.***, 2005 ABCA 223, 45 Alta. L.R. (4th) 204 at para. 13.

Issues on Appeal

[64] The appellant FastTrack mounts several overlapping attacks on the decision of the trial judge:

(a) It argues that the condition precedent in the FastTrack agreement never failed, because:

(i) A "subject to lawyer's approval" clause cannot be invoked unless "valid reasons" exist, solicitor-client privilege is effectively waived, and those reasons are communicated to the other contracting party when the clause is invoked.

(ii) A lawyer's disapproval under a "subject to lawyer's approval" clause must be based on "legal" considerations, and not business considerations such as price.

(iii) The termination letter sent by the vendor to FastTrack was, despite its unequivocal wording, merely designed to test the resolve of FastTrack, and it was not really intended to terminate the FastTrack contract.

Since the FastTrack agreement was first in time, if it was not terminated it prevails over the Castledowns agreement.

(b) It argues that the condition precedent in the Castledowns agreement was never met, because there was never a "satisfactory confirmation" that the FastTrack agreement had been terminated, because:

(i) Any termination was never acknowledged or acquiesced in by FastTrack, which meant there was no "satisfactory confirmation" of termination.

(ii) Whether there was "satisfactory confirmation" was a purely subjective matter, depending exclusively on the state of mind of the vendor. Whether the FastTrack contract was actually terminated in law is irrelevant.

(iii) An "entirely subjective" condition precedent turns the agreement into a mere option or a bare offer. Since the "satisfactory confirmation" condition was purely subjective, the Castledowns agreement was not really an agreement at all, but a mere offer that could be withdrawn by the vendor at any time.

(iv) Even if the condition precedent was satisfied in fact, the vendor never sent written confirmation of that, as required by the agreement.

(c) In any event, Castledowns cannot succeed because it never tendered the deposit required under its agreement.

(d) Even if the Castledowns agreement was valid and enforceable, the trial judge erred in granting the discretionary equitable remedy of specific performance.

Conditions Precedent

[65] The presence of conditions precedent does not prevent creation of a binding agreement. The performance of the provisions of that agreement are not due unless and until the conditions are fulfilled, but that in no way negates or dilutes the force of the obligations imposed by the contract, in particular, the obligation of the vendor to sell and the obligation of the purchaser to buy. These obligations are merely in suspense pending the occurrence of the event constituting the condition precedent: ***Dynamic Transport Ltd. v. O.K. Detailing Ltd.***, [1978] 2 S.C.R. 1072 at p. 1082. It follows that both FastTrack and Castledowns had binding agreements with the vendor that were in suspense pending compliance with the conditions.

[66] If the conditions fail, the contract is at an end. This does not prevent the parties from thereafter renegotiating the arrangement, such as by effectively waiving the conditions precedent. Whether this amounts to a whole new contract, or a revival of the previous contract, will not in most cases make any difference. However, where intervening rights have arisen, as when a "backup" offer has been signed, the renegotiation cannot revive the earlier contract to the detriment of the intervening rights. This would be the result through the ordinary principles of equity, but an attempt to revive the earlier contract to the detriment of the intervening rights would also violate the "good faith" clause in the backup agreement.

[67] Some authorities hold that a "true" condition precedent cannot be waived. Other cases discuss whether the contracting parties have a duty to act reasonably or diligently to have the conditions met. Neither of those issues need to be discussed here. Both contracts specifically provide that the conditions can be waived. They both have "good faith and diligence" and "reasonable

efforts" clauses. Of course what amounts to good faith, diligence, and reasonable efforts will vary depending on the nature of the condition.

[68] Subject to what is said in the next section of these reasons, the original FastTrack agreement clearly terminated when the letter of September 7 was sent indicating that the lawyer's approval was not forthcoming. That letter was unequivocal. It is not open to the vendor to now assert this letter was merely a bluff. The subsequent negotiation and execution of the Addendum Agreement could not operate to revive the original FastTrack agreement to the detriment of Castledowns.

[69] Conditions precedent have sometimes been divided into categories depending on the extent to which compliance with the condition is within the subjective control of the contracting party: ***Mark 7 Development Ltd. v. Peace Holdings Ltd.*** (1991), 53 B.C.L.R. (2d) 217 at p. 224 (C.A.), leave to appeal refused [1991] 3 S.C.R. ix, adopting the reasoning in ***Wiebe v. Bobsien***, [1986] 4 W.W.R. 270, 64 B.C.L.R. 295 at paras. 15-6 (C.A., Lambert, J.A. dissenting). It has sometimes been suggested that a completely subjective condition negates the contract. For example in ***Murray McDermid Holdings Ltd. v. Thater*** (1982), 42 B.C.L.R. 119 it was held that a condition "subject to President's approval" was so subjective that it defeated the entire contract. It is difficult to see why that would be so in principle. The law as stated in ***Dynamic Transport*** is that the contract is in a state of suspension until the conditions are met, but when they are met the contract is binding. If the President in fact gives his approval, how can it be suggested that there is no contract? Many organizations have internal approval processes that must be followed. For example, a contract with a municipality may have to be subject to the approval of its executive committee. In this case the Castledowns contract was "subject to partners' approval". Since that approval was almost immediately forthcoming, on what basis can it be argued that the very presence of the condition prevented there ever being a contract? The existence of a subjectively based condition does not prevent the formation of a contract, although the subjective nature of the condition will be relevant to what amounts to good faith, diligence, and reasonable efforts in satisfying the condition.

[70] Attempting to identify conditions precedent that are "wholly subjective" would create great uncertainty. The contracts here contain many conditions that are incapable of definitive objective analysis. Some examples are "Buyer's approval of a property inspection", "Buyer being satisfied with all business license requirements", "new mortgage loan on terms acceptable to the buyer", and "acceptable review of financial records". The "subject to lawyer's approval" clauses are not the only ones that invoke the discretion of a third party. Others include "subject to partners' approval", "acceptable appraisal", and "approval of a satisfactory inspection done by a qualified contractor". It is unhelpful to try to divide these conditions into those that are "fully subjective" (and so prevent the very formation of a contract) and those that are conditions that merely suspend the duty to perform.

[71] In any event, whether a document is a contract subject to conditions precedent or merely an option depends on the proper construction of its terms: see, for example, ***Black Gavin & Co. Ltd. v. Cheung*** (1980), 20 B.C.L.R. 21; ***Tau Holdings Ltd. v. Alderbridge Development Corp.*** (1991), 60 B.C.L.R. (2d) 161 (C.A.) at para. 13. In this case both the FastTrack and Castledowns contracts

contain clauses reading "This Contract is intended to create binding legal obligations", "The Buyer offers to buy the Property . . . according to the terms of this Contract", and "The Seller accepts the Buyer's offer and agrees to sell . . . according to the terms of this Contract". This wording is inconsistent with the agreements being mere unenforceable options pending satisfaction of the conditions precedent.

[72] To enhance certainty, contracts often provide that fulfillment of the conditions must be communicated in a formal written manner. However, at least in a contract containing a good faith and diligence clause, a party cannot defeat the contract simply by refusing to send the necessary confirmation. For example, if the contract is "subject to development permit", and the permit is obtained, the contracting party cannot in good faith attempt to defeat the contract simply by refusing to send the letter confirming fulfillment of the condition. The good faith clause extends to confirming fulfillment of the conditions. The vendor cannot escape its obligations merely because it did not confirm termination of the FastTrack agreement in writing.

The Role of the Lawyer

[73] Should a "subject to lawyer's approval" clause be given any special interpretation? It is argued by FastTrack that the lawyer's role in approving the contract is somehow constrained, even though there are no limiting words in the written contract. It is suggested the lawyer can only withhold approval based on "legal" considerations. Firstly, such an interpretation would be inconsistent with the principles of contractual construction. Secondly, it would introduce great uncertainty into real estate practice, as the distinction between "legal" considerations and economic and business considerations is often unclear. Are a small deposit and a lengthy condition period a legitimate concern of a lawyer? But thirdly, and most importantly, it would be inconsistent with the role that lawyers play in the affairs of their clients.

[74] Absent words limiting the lawyer's discretion, the ordinary principles of contractual interpretation prevent the insertion of such words. This is not, for example, a case where the condition is "subject to lawyer's approval of title", or "subject to lawyer's approval of lease document". In ***Megill Stephenson Co. v. Woo*** (1989), 59 D.L.R. (4th) 146 at p. 150, 58 Man. R. (2d) 302 (C.A.) the Court held with respect to a similar clause:

> But I conclude that there is no binding contract because the entire transaction was made subject to the approval of Mr. Woo's solicitor, and in that respect, I wholly endorse the similar conclusion reached by the learned trial judge. Allen made it clear that there would be no agreement until it was reviewed by the lawyer Mercier. Solicitor's approval meant more than a review of the wording to ensure that all things were properly in place. It meant that there could be no deal without the concurrence of the lawyer, and consequently Woo was free to accept an intervening offer before the intended meeting at Mercier's office.

On their ordinary meaning, the words of the approval power are unlimited, except by the express "good faith" clause in the contract.

[75] The appellant argues it is implied that the lawyer must exercise the power given to him on "reasonable grounds" or based on "legal considerations". Relying on ***Rahall v. Tait***, 2006 ABQB 587, 62 Alta. L.R. (4th) 19 it also argues that the lawyer must give "valid" grounds for not approving the contract, and that the vendor must waive solicitor-client privilege so that the lawyer's rationale can be examined. These arguments overlook the fundamental principles underlying the solicitor and client relationship.

[76] The relationship between the lawyer and the client has been studiously protected by the courts. The courts are prepared to recognize a unique privilege over communications respecting legal advice between the solicitor and client. That privilege is so entrenched, there are virtually no exceptions to it: ***Canada (Privacy Commissioner) v. Blood Tribe Department of Health***, [2008] 2 S.C.R. 574, 2008 SCC 44 at paras. 9-10.

[77] The law also recognizes that clients may go to lawyers with their most important, intimate, and momentous problems. As Cory, J., concurring, observed in ***MacDonald Estate v. Martin***, [1990] 3 S.C.R. 1235 at p. 1266:

> . . . a client will often be required to reveal to the lawyer retained highly confidential information. The client's most secret devices and desires, the client's most frightening fears will often, of necessity, be revealed. . . .

Clients routinely consult their lawyers not only about legal matters, but about business matters, family matters, and personal issues. As an immediate example, a lawyer with a busy real estate practice may have as much knowledge as anybody in the community as to property values, and whether the business terms of the sale of land are commercially reasonable. The boundary between "purely legal" issues and other matters on which lawyers are routinely consulted is impossible to define. When a contracting party stipulates for its lawyer's approval, it should be presumed to encompass wide ranging advice on what is in the client's best interests. If nothing else, it follows that if any limits are to be placed on a clause that a contract is "subject to lawyer's approval", those limitations must be set out in the contract. The parol evidence rule effectively requires that anyway.

[78] The law recognizes that a lawyer cannot have split loyalties. As the Court said in ***R. v. Neil***, 2002 SCC 70, [2002] 3 S.C.R. 631 at para. 12:

> . . . the defining principle -- the duty of loyalty -- is with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained: . . . Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be

> a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies . . .

The lawyer's duty is to his or her client in both litigious and non-litigious matters. The lawyer owes no duty to protect the interests of the opposing client: ***Baypark Investments Inc. v. Royal Bank of Canada*** (2002), 57 O.R. (3d) 528 at para. 33; ***Ross v. Caunters***, [1979] 3 All E.R. 580 (Ch.D.) at p. 599; ***Abacus Cities Ltd. (Trustee of) v. Bank of Montreal*** (1986), 48 Alta. L.R. (2d) 247, 74 A.R. 53. Any such duty would put the lawyer in an impossible position when giving advice to the client. When a lawyer exercises a power to approve a contract, the lawyer must do so entirely with the lawyer's client's best interests in mind.

[79] In this legal context it is entirely artificial to think that the lawyer would exercise the power to approve the contract contrary to the wishes or best interests of the client. The following scenarios might be imagined:

(a) The client says to the lawyer: "I had my doubts about this contract, but I signed it because I knew it was subject to your approval, and I was quite sure you wouldn't approve it."

(b) The client says to the lawyer: "I signed this contract, but I'm really having second thoughts about it. Here are my concerns; do you agree?"

(c) The client says to the lawyer: "I signed this contract, but my [spouse, accountant, associates] point out that I overlooked an important [personal, tax, business] consequence of the deal. I don't want you to approve it."

(d) The client says to the lawyer: "Look at this fantastic contract I negotiated!!"

Because of solicitor-client privilege the other contracting party will not know which scenario has unfolded. In all of them (even the last one) the diligent lawyer will discuss the pros and cons of the contract with the client, and go through any concerns of the client. If at the end of the meeting the client has been satisfied, the lawyer will undoubtedly grant the necessary approval. However, if at the end of the meeting the client is unwilling to proceed with the contract (even though the client may initially have been enthusiastic) the lawyer has no alternative but to withhold approval. That is exactly why the lawyer's approval was contracted for, and that is exactly what the parties must be taken to have intended. Absent express wording to the contrary, any other interpretation is inconsistent with the role of lawyers.

[80] A similar clause was considered in ***Chung v. Jim***, [1984] B.C.J. No. 1353 (Q.L.), where the Court held:

> [18] The clause itself, of course, is the place to start when considering what the rights of the parties were arising out of this agreement, and the clause in my view

> was one, and I find was one which was put in at the request of the Defendants. It was put in so that they would have an opportunity to consult their solicitor. *The wording, it seems to me, is clear that they sought and obtained by this wording the right to take advice with respect to the interim agreement, and if their solicitor did not approve it then this would be their way out of the agreement. They reserved unto themselves, it seems to me, that right.* The limitation which was put on it was that they had until the 10th of April to do something in this regard.
>
> [19] . . . [The solicitor] acted reasonably and with great despatch, it seems to me, to deal with the question of searching and the suggestions which he put forward to the Defendants as to how this agreement might be made into an acceptable agreement insofar as the Defendants were concerned.
>
> [20] But does that mean that the Defendants were obliged to go out then and renegotiate with the Plaintiffs the agreement to find out whether or not the Plaintiffs would accept the suggestions of their solicitor, Mr. Yoke Lam? I can find in the agreement no such requirement.
>
> [21] The simple test is whether or not their lawyer approved the agreement. He did not approve it as it was drawn and that, therefore, put them in the position where they were not obliged to complete. [emphasis added]

In this case the vendor also reserved unto itself the right to take and act on its lawyer's advice, and it cannot object to the purchaser's reliance on the same right.

[81] The British Columbia Supreme Court in ***Jung v. GNR Property Management Inc.***, 2006 BCSC 1692, 60 B.C.L.R. (4th) 217 at para. 44 held that a "subject to lawyer's approval" clause turned the contract into a mere unenforceable option. This is, however, one of the line of cases that holds that a subjective condition precedent prevents the formation of a contract. As discussed *supra*, para. 69, these cases do not appear to reflect the law on the subject.

[82] It is not accurate to describe the effect of a "subject to lawyer's approval" condition as functionally turning the contract into a mere option. A binding contract exists but its performance is suspended: ***Dynamic Transport***. It is true that the presence of any condition precedent means that no performance is due until the condition is satisfied or waived. The more subjectively based the condition, the more it may look like an "option", but it is still a binding agreement subject to the condition being met or waived. If the parties sign a contract containing a "subject to lawyer's approval" clause, they must accept that, while they have an "agreement in principle", the party stipulating for that clause wishes to have a sober second thought after consulting its closest adviser. There is nothing inherently unfair or commercially unreasonable about that, especially where (as in this case) both the vendor and FastTrack stipulated for such a clause. There are many good reasons why one or both parties might want to "lock-in" the terms of the deal before taking the contract to their lawyer or other advisors.

[83] It is true that the generic "good faith" clause applies to the "subject to lawyer's approval" clause. That only means, in this context, that the client may be obliged to take the contract to the lawyer and instruct the lawyer to review it: ***Dartington Properties Ltd. v. Harris***, [1979] B.C.J. No. 729 at para. 10 (C.A.) (QL). The good faith clause does not mean that the client has to try to talk the lawyer into approving the contract. The whole point of the clause is that the lawyer will give the client advice, not the other way around.

[84] The proper approach to clauses of this type is set out in ***Gordon Leaseholds Ltd. v. Metzger***, [1967] 1 O.R. 580 at p. 585-6, 61 D.L.R. (2d) 562:

> Not infrequently the performance of a contract may depend upon the opinion or approval of a third person in respect to particular matters which may arise, or are to be performed, in the course of the contract.
>
> Ordinarily, the purpose of making the opinion of a specified person an ingredient in the existence of a right, makes the opinion of that person and not the opinion of a Court, the criterion for determining whether the facts give rise to the right. In such cases the question for the Court is not whether in its opinion the facts which give rise to the right exist, but whether the specified person has formed the opinion. If he has, it is implicit that the opinion must be honestly held, even though it may be unreasonable: *Caney v. Leith*, [1937] 2 All E.R. 532, where the English authorities are reviewed (see particularly p. 538).

Where the clause is unrestricted in its scope, a lawyer who declines to give his approval because the contract is not in his or her client's best interest is acting in good faith.

[85] In conclusion, the "subject to lawyer's approval" clause in the FastTrack agreement is legally enforceable. The vendor's lawyer's discretion to approve the contract was not limited, and could be exercised on any basis that impacted on the vendor's best interests. The letter from the vendor's lawyer of September 7 had the legal effect of terminating the FastTrack contract.

<u>"Subject to Satisfactory Confirmation of Termination"</u>

[86] Once the FastTrack contract was terminated by failure of the condition precedent respecting lawyer's approval, the backup contract made by Castledowns came into play. It too was subject to a condition precedent, relating to the "satisfactory confirmation" that the FastTrack agreement had been terminated.

[87] The appellant FastTrack argues that the condition precedent "satisfactory confirmation of termination of private purchase contract" meant that the termination had to be satisfactory to FastTrack. The premise is that the vendor was primarily concerned with avoiding any litigation over the contract, and would not proceed with the Castledowns backup agreement unless FastTrack acknowledged that its prior agreement had been terminated. In other words, what the vendor wanted

by inserting this clause was that FastTrack would acknowledge or acquiesce in any termination. The respondent argues that the covenant to act "cooperatively, reasonably, diligently and in good faith" colours the meaning of "satisfactory confirmation", and that the vendor had to act reasonably in determining if the condition had been satisfied. The condition did not intend to give FastTrack an effective veto over the Castledowns agreement.

[88] The premise that the vendor did not want to get into a lawsuit over the two contracts depends on this interpretation being both (a) the common intention of the parties at the time they signed the agreement, and (b) the intention of the parties derived from the plain wording of the agreement. The common intention of the parties must be derived from the wording, as the parol evidence rule precludes either party from interjecting its personal expectations if they are inconsistent with the plain wording: ***Innovative Insurance Corp. v. E.P.A. Ultimate Concepts Inc.***, 2007 ABCA 358, 417 A.R. 273 at para. 5. As the Court made clear in ***Gainers Inc. v. Pocklington Financial Corp.,*** 2000 ABCA 151, 81 Alta. L.R. (3d) 17 at para. 20:

> The intent of the parties is to be determined from the words which they put in their written contract; their subjective intent is irrelevant: *Eli Lily & Co. v. Novopharm* [1998] 2 S.C.R. 129, 166, 161 D.L.R. (4th) 1, 27. Subjective intent cannot even be used to interpret the written words, if they are clear: id. at pp. 27-29 (D.L.R.).

No one party can foist its secret intentions on the other unless the wording of the contract supports that. But once the proper interpretation of the condition precedent in the contract is determined, parol evidence can be used to determine if the condition was met: ***Guaranty Properties Ltd. v. Edmonton (City)***, 2000 ABCA 215, 85 Alta. L.R. (3d) 61 at para. 23.

[89] It should first be noted that FastTrack's standing to raise this argument is not obvious. FastTrack is not a party to the contract containing this condition precedent. Under the normal third-party beneficiary rule, FastTrack is not in a position to attempt to enforce the condition precedent, as there is no indication that Castledowns and the vendor intended to confer benefits under the contract on FastTrack: ***Landex Investments Co. v. John Volken Foundation***, 2008 ABCA 333, 440 A.R. 368 at para. 9. The vendor has not appeared on the appeal, and was content to convey the property to Castledowns after the trial decision was rendered. In the circumstances, it does not easily lie in the mouth of FastTrack to interpose its interests and expectations into the Castledowns agreement.

[90] Even if some evidence of the conduct and intention of the vendor was allowed, it certainly cannot be said that the conduct of the vendor was focused on avoiding a lawsuit. It first instructed its lawyer to terminate the FastTrack contract and return the deposit, and after that was communicated to Castledowns, it instructed its lawyer to cancel the Castledowns contract. Then, without the involvement of its lawyer, it entered into the Addendum Agreement. If anything, the vendor was reckless about triggering a lawsuit. The trial judge specifically found at para. 26 that the vendor was primarily motivated by price. There is no evidence on this record to support the theory that the vendor was motivated in whole or in part by a desire to avoid litigation.

[91] It is also noteworthy that the letter of September 7 sent by the vendor's lawyer to FastTrack did not ask it to confirm or acknowledge the termination. The request for such an acknowledgment would be likely if the clause was intended to signify that termination must be satisfactory to FastTrack.

[92] The interpretation of the condition precedent proposed by FastTrack would make the Castledowns contract subject to the whims of Castledowns's rival and competitor for the property: FastTrack. Both Castledowns and the vendor agreed that they would act reasonably and in good faith, yet FastTrack would not appear to be under any such constraint under this theory of the case. FastTrack could defeat the Castledowns agreement by any spurious argument, so long as it was vigorously asserted. It was one thing for Castledowns to be prepared to make a backup offer. It is quite another thing to suppose that Castledowns would be prepared to make a backup offer that was subject to the whim of its primary rival. If it was the common intention of the parties that "satisfactory confirmation" meant "satisfactory to FastTrack", one would have expected precise language to that effect. It should be noted that it was the vendor's realtor who drafted the clause, and if anything it should be construed against the vendor.

[93] Even if one assumes that any rejection by FastTrack of the purported termination had to be reasonable, the argument fails. Besides "not being impressed", the only reason given by FastTrack for rejecting the termination was that the "lawyer's approval" had to be based on matters "other than price". As previously discussed, this is not the proper interpretation of the clause. In any event, the trial judge found at paras. 37, 61, 63 that the withholding of the lawyer's approval was done in good faith based on matters other than price.

[94] The Castledowns agreement provides that the Seller's Conditions are "inserted for the sole and exclusive benefit and advantage of the Seller". In the face of this language it cannot be argued that the condition was inserted for the benefit of FastTrack. This language also leads to the conclusion that "satisfactory confirmation" means "satisfactory to the vendor". A reasonable contracting party like Castledowns could not be expected to interpret it any other way. The vendor's lawyer, on instructions from the vendor, wrote to FastTrack stating that the "lawyer's approval" had not been forthcoming, and that the contract was terminated. The vendor's realtor and counsel then advised two representatives of Castledowns that the FastTrack contract had been terminated. Given the covenants to act reasonably and in good faith, it cannot be argued that there was not "satisfactory confirmation of termination of [the FastTrack] private purchase contract".

[95] As previously mentioned, the overriding covenant in clause 2.1 of the Castledowns agreement to act "cooperatively, reasonably, diligently and in good faith" should be interpreted as encompassing the conditions precedent as well. The exact impact of clause 2.1 will depend on the nature and context of the condition precedent in issue. While the conditions clause (4.2) states that the "satisfaction" of the conditions will be determined "in the sole discretion of the Seller", it immediately goes on to state that the Seller will "use reasonable efforts to satisfy these conditions". "Reasonableness" denotes an objective standard, or at least an objective element in the term

"satisfy", which is used in the general provisions of clause 4.2 concerning the conditions, as well as the specific condition "satisfactory confirmation of termination".

[96] The record does not disclose that, in fact, the vendor acted out of any concern that the FastTrack agreement had been "satisfactorily" terminated. The evidence of Mr. Yaremchuk, the principal of the vendor, is telling. Firstly, it is clear he intentionally terminated the Fasttrack agreement:

> Q. Okay. And did you correct -- or tell the Kozickis that once you knew that the -- Castledowns had removed that clause subject to approval by all partners that you were going to terminate the private purchase contract?
> A. I said I was trying through my lawyer to do so.
> Q. I put it to you, sir, that you instructed your lawyer to terminate the FastTrack agreement.
> A. Yes.
> Q. And that's what you did. You had your lawyer send the September 7th letter, correct?
> A. Yes. (AB 201, l. 33-45; AB 201, l. 4-11)

Remarkably, Mr. Yaremchuk never testified that he was unsure that the FastTrack agreement had been "satisfactorily" terminated. Indeed, he was never asked that question. The vendor relied at all times on the fact that no written confirmation of satisfaction of the condition precedent had been sent, not on whether the condition had in fact been satisfied. The vendor never turned its mind to whether there was any doubt about the termination. It proceeded at all times on the mistaken belief that the vendor had the right to choose between the two purchasers, notwithstanding the termination of the FastTrack agreement. Even if the appellant's interpretation of the condition precedent is correct, the record does not contain the factual basis for invoking it.

[97] Mr. Yaremchuk appeared to believe that the vendor had an unfettered ability to choose between the two purchasers. To begin with he did not appear to understand the Castledowns agreement was a binding contract:

> Q. All right. Now, after this addendum was concluded, what did you do in relation to the Castledowns agreement?
> A. Really nothing. I called my lawyer and I -- I was -- because it was a backup offer I was not even aware that -- my understanding was that I don't have to really do anything. If I don't contact them, or -- I just -- I got done talking to lawyer and I assumed that it was a dead deal. (AB 194, l. 1-9)

[98] Mr. Yaremchuk testified that he had entertained the back up offer in the first place because one of the realtors had convinced him (AB 217, l. 9-21; AB 218, l. 6-15) that FastTrack might be a speculator, and might not have the ability or the motivation to close the deal:

> . . . So it [the Castledowns offer] was live and in my face and it was there. I said okay, I'll try and get out of the other offer because I was not convinced that the other purchases were (a) serious or (b) going to follow through and I was skeptical based on -- based on my experience and conversations with Mike [Kozicki] so it was -- that's what happened. (AB 190, l. 22-27).

He testified he felt pressured into entering into a back up agreement. He described the realtor as “unrelenting”, “aggressive”, “intimidating” and a “powerful speaker and very influential” (AB E487, l. 3-9; AB E496, l. 5, 15). Although he had initially told Castledowns that he would “try to get out of the FastTrack offer” (AB 191, l. 11-12), he lost that motivation once the terms of the deal were improved, and he became convinced that FastTrack was serious.

[99] Mr. Yaremchuk testified that the vendor decided to sell to FastTrack as “a deal is a deal” (AB 239, l. 22-27) and he now knew that FastTrack was a serious purchaser with the ability to remove its conditions and close the deal:

> Q. And if they [FastTrack] weren't serious, they would have just accepted it [the termination], walked away, and you'd go on with the next deal; is that right?
>
> A. That's correct. When I -- when I found out they were upset with the letter and responded probably just minutes after receiving it based on instructions from my lawyer then I understood I had a serious player and that they really could pay for it, do it, and were wanting to go ahead with it from -- from what they said and how...
>
> Q. And the way I remember you telling me your evidence in January was that you were actually pleased and surprised that they had responded in that way, that they were very clear that they wanted to do the deal, they were going to do the deal with you.
>
> A. Mm-hm.
>
> Q. They thought they had an agreement and you said a deal was a deal. And you actually were happy that they turned out to be the kind of guys you thought they were in the first place.
>
> A. Yes. (AB 211, l. 15-36; AB E562, l. 20-26) . . .

> Q. And so when you went to that meeting on September 11th with them it was your intention and their intention to work out the details of your agreement; isn't that right?
>
> A. Correct. I -- from my position in this whole matter I just wanted to sell the building to a party that was able to follow through with the condition removal and the payments. (AB 211, l. 15-36)

He felt that as a matter of honour he had to close the FastTrack deal (AB E547, l. 9-25; E564, l. 10-26), not realizing that once he had signed the Castledowns agreement and terminated the FastTrack agreement his options were limited.

[100] While Mr. Yaremchuk acknowledged that FastTrack had threatened litigation, he indicated there was "no pressure" to renegotiate the deal (AB 203, l. 12-18), and neither party wanted litigation (AB 211, l. 26-30; AB 238, l. 23-4; AB 240, l. 14-6). The prospect of litigation was "not an issue" (AB E566, l. 10-21). Mr. Yaremchuk never testified that the avoidance of litigation or any concerns about the termination of the first agreement was his motivation in not following through with the Castledowns agreement. His lawyer was the obvious source of any concerns about the efficacy of the termination of the FastTrack agreement, yet his lawyer was not even consulted on that issue. His lawyer did not testify. Mr. Yaremchuk mistakenly believed the termination of the FastTrack contract was of no consequence, and he could choose between the two purchasers. The signing of the Addendum Agreement was the act that signified which of the two purchasers the vendor would favour, and Mr. Yaremchuk did that without consulting his lawyer, demonstrating that the efficacy of the termination of the Castledowns agreement was not the operative factor (AB 269, l. 12-19; AB 270, l. 1-11).

[101] It is clear Mr. Yaremchuk never turned his mind to whether the first FastTrack agreement had been terminated, whether "satisfactorily" or not. He simply decided to renegotiate the deal with the purchaser he favoured. Once he "rectified" the first agreement (AB E322, l. 1-7), he lost interest in the back up offer. He was never concerned that the original FastTrack agreement had not been "satisfactorily terminated", as his state of mind was that he had renegotiated it - it was not in his mind a "terminated" agreement at all. In his view it was a continuing "live" agreement (AB E575, l. 15-25), and he never turned his mind to it as a "terminated"agreement. It cannot be suggested that Castledowns agreed to such an interpretation or application of the condition precedent. In any event, the record does not show that the vendor ever formed the opinion that the FastTrack agreement had not been satisfactorily terminated, which was required under the clause. There is no factual basis to support a failure of the condition precedent.

[102] Further, the vendor was at least required to act in good faith in determining whether there had been "satisfactory confirmation of termination". The trial judge asked the rhetorical question "How can the Vendor now assert in good faith that this was not a satisfactory termination of the First Agreement?". This inference of bad faith was open to the trial judge on the record, and cannot be interfered with on appeal in the absence of palpable and overriding error.

[103] The trial judge found that the vendor was motivated by price, not by any concerns about whether the FastTrack agreement had really been terminated. The termination of the FastTrack agreement was unequivocal. But the vendor then went on to negotiate the Addendum Agreement. For the vendor to refuse to even consider whether there had been confirmation of termination because a better deal had now been struck is not good faith, nor is it either "reasonable" or "diligent". Once the vendor agreed to enter into a backup agreement with Castledowns, the vendor's ability to renegotiate the FastTrack agreement, while still acting in good faith vis-à-vis Castledowns, was severely curtailed. The trial judge was entitled to find that it was bad faith for the vendor to refuse to confirm termination of the first FastTrack agreement, merely because the vendor had managed to renegotiate a more advantageous contract after it had signed the Castledowns agreement. Even if one assumes the "satisfactory confirmation" clause depended on the subjective views of the vendor, it does not pass the "good faith" test.

[104] As discussed, once the condition was satisfied, the good faith clause required the vendor to so inform Castledowns in writing. The vendor cannot rely on its own failure to comply with this obligation to terminate the contract. Therefore, the conditions precedent in the Castledowns agreement were satisfied, the agreement became enforceable, and Castledowns was entitled to conveyance of the Vienna building.

<u>Payment of the Deposit</u>

[105] FastTrack argued that Castledowns was in default of its agreement with the vendor, because it never paid the deposit. The trial judge found at para. 33 that Castledowns provided a deposit cheque to its realtor in the sum of $100,000. It is therefore not entirely accurate to say that Castledowns never provided the deposit. The contract provided:

> The Initial Deposit shall be delivered in trust to: *~~Remax Accord~~ C-21 Royal Real Estate*. Unless otherwise agreed in writing the Initial Deposit shall accompany the offer. *Initial deposit payable in 24 hours upon removal of Seller's condition.*

The words in italics were written into the printed form. Castledowns' realtor Remax Accord was proposed as the holder of the deposit, but its name was struck out and Century 21 Royal Real Estate, the vendor's realtor, was substituted. The cheque was provided to Remax Accord to deliver to Century 21 Royal Real Estate in accordance with the contract.

[106] The deposit became payable on "removal of Seller's condition". Since the vendor never fulfilled its obligation to advise Castledowns that the FastTrack agreement had been terminated, the time for turning over the deposit never came. The vendor cannot now rely on any failure of Castledowns to perform. The vendor first advised orally that the FastTrack agreement had been terminated, and then changed its mind and purported to terminate the Castledowns contract. The trial judge found that Castledowns was ready, willing and able to provide the deposit and close at all times. The vendor refused to close. In the circumstances, the vendor cannot complain about not receiving the deposit.

Specific Performance

[107] The trial judge concluded that Castledowns had a valid agreement to purchase the Vienna building, and granted it specific performance. The vendor was content to sell the property, and has not appealed the order for specific performance. The vendor has not argued that Castledowns should be left to its remedy in damages. In the circumstances, it is not necessary to consider further whether Castledowns has shown uniqueness or other equitable considerations that would entitle it to specific performance on these facts, if the vendor had been resisting that remedy.

Conclusion

[108] In conclusion, the original FastTrack agreement was terminated when the "lawyer's approval" condition precedent failed. The termination of the FastTrack agreement satisfied the condition precedent in the Castledowns agreement for "satisfactory confirmation of termination" of the FastTrack agreement. The Castledowns agreement was therefore valid and binding. Castledowns had not committed any breach of that agreement which would disentitle it to enforcement of the agreement. The appeal should be dismissed.

Appeal heard on January 29, 2009

Memorandum filed at Edmonton, Alberta
this 23rd day of April, 2009

Slatter J.A.

Appearances:

E.M. MacInnis and P.G. Kirman
for the Respondent

J.A. Caruk
for the Appellant