Court File No.: CV-16-11529-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ROMSPEN INVESTMENT CORPORATION

Applicant

-and-

206 BLOOR STREET WEST LIMITED

Respondent

RESPONDING MOTION RECORD AND CROSS MOTION OF LINDA ROSENBERG

Dated: November 8, 2016

AMR LLP
Barristers and Solicitors
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Toronto, ON M5J 1H8

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Linda Rosenberg

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Lawyers for the Applicant

AND TO: **THE HONOURABLE COURT**

Court File No.: CV-16-11529-00CL

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N Exhibit "N" – Corporate Profile Report of Romspen Investment Corporation

O Exhibit "O" – Urban Database Search

P Exhibit "P" – HPAC Engineering Article

Q Exhibit "Q" – Yorkville Corporation Website Printout

R Exhibit "R" – Land Registry Information for Units 801, 901, 1201 and 1401

S Exhibit "S" – Opinion Letter of Peter Juretic, MCAP

T Exhibit "T" - Statement of Claim

Court File No.: CV-16-11529-00CL

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206 BLOOR STREET WEST LIMITED

Respondent

NOTICE OF MOTION

THE PLAINTIFF will make a motion to a Judge on November 23, 2016 at 10:00am, or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- [ ] in writing under subrule 37.12.1(1) because it is on consent or unopposed or made without notice;
- [ ] in writing as an opposed motion under subrule 37.12.1(4);
- [x] orally.

THE MOTION IS FOR:

1. A declaration that Linda Rosenberg has a priority interest in the money held in trust by counsel for the defendant 206 Bloor Street West Limited, and an Order to pay to Linda Rosenberg the funds she is entitled to;

2. Summary judgment on the fraudulent conveyance issue;

3. In the alternative, an appointment to determine the issues of prejudgment and post-judgment interest and the responsibility to pay the remainder of the deposit and the costs award given by Justice Myers;

4. An Order consolidating this action with the action bearing court file number CV-16-561221 pursuant to Rule 6.01 of the *Rules of Civil Procedure*;

5. Costs on a substantial indemnity basis; and

6. Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. Rules 1, 2, 3, 6.01, 20, 37, 39, 41, 57 and 60.12 of the *Rules of Civil Procedure*;

Post Trial Events

1. The parties cannot agree on the matter of pre and post-judgment interest, and as a result, require a hearing to determine same;

2. The Judgment debtor refuses to acknowledge the debt;

Summary Judgment

3. Linda Rosenberg claims an equitable lien against the property owned by 206 Bloor Street West Limited, including unit 901, as a consequence of the decision following trial of the Honourable Justice F. L. Myers;

4. This action, as consolidated, is an appropriate case for summary judgment;

5. Further, or in the alternative, Linda Rosenberg claims in the action bearing court file number CV-16-561221 that 206 Bloor Street West Limited acted in a manner that unfairly prejudiced her rights and interests;

6. Further, or in the alternative, Linda Rosenberg claims that the property owned 206 Bloor Street West Limited was fraudulently conveyed to Romspen Investment Corporation ("Romspen"), the mortgagor and/or the developer, and/or the Romspen mortgage was fraudulent, with the intent to defraud creditors;

7. 206 Bloor Street West Limited had actual notice of the proceeding instituted by Linda Rosenberg when the charge against 206 Bloor Street West Limited was registered by Romspen;

8. Linda Rosenberg's equitable lien gives her a prior right to the equity in unit 901 and other property owned by 206 Bloor Street West Limited;

9. Linda Rosenberg has a liquidated claim for the unpaid costs, an unassessed amount for any prejudgment and post-judgment interest payable and the balance of the unpaid deposit;

Consolidation

10. The relief being claimed in the fraudulent conveyance action, CV-16-561221, is the same as the relief being claimed in the post Judgment motion in the herein action;

11. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Affidavit of Linda Paris Faith Rosenberg and all exhibits attached thereto;

2. The pleadings and proceedings in this action;

3. Such further and other material as counsel may submit and this Honourable Court may permit.

Dated: November 8, 2016

AMR LLP
Barristers and Solicitors
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Toronto, ON M5J 1H8

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AND TO: **THE HONOURABLE COURT**

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-and-

206 BLOOR STREET WEST LIMITED

Respondent

AFFIDAVIT OF LINDA ROSENBERG

I am a plaintiff in related litigation and am an interested party in the ligation herein. Therefore I have direct knowledge of the matters deposed to with the exception of matters deposed to on the basis of information and belief, and to the extent that they are, I verily believe same to be true.

Background

1. On August 16, 2010, I purchased unit 901 at 206 Bloor Street West, Toronto, Ontario.

2. 206 Bloor Street West Limited ("206") was the developer and/or owner of the condominium building named MusuemHouse located at 206 Bloor Street West, Toronto, Ontario.

3. I entered into an agreement of purchase and sale and partial upgrade agreement ("the agreements") with 206. These agreements provided, among other terms, that 206 guaranteed certain work would be done to the unit.

4. I verily believe that one of the selling features of 206 is that both the developer/builder, Sheldon Esbin, and the architect/partner, Sol Wassermuhl, reside in the building. Attached to my Affidavit at **Exhibit "A"** is a copy of a newspaper article on 206.

5. I verily believe that at the time the agreements were signed, or shortly thereafter, 206 was aware that they would not be able to provide the unit as guaranteed by the agreements. Subsequently, 206 requested more than $300,000 from me for upgrades to the agreements, most of which they knew they could not provide. The agreements were terminated but 206 did not return my deposit. Attached to my Affidavit at **Exhibit "B"** is a copy of the Cross-Examination Transcript of David Hart, project manager for 206, dated August 18, 2014 (pages 55 – 89).

6. I issued an action against 206 claiming a variety of remedies. The action went to a summary judgment trial and was heard in front of Justice Myers in the summer and fall of 2015.

7. In his reasons released on January 4, 2016, Justice Myers awarded me $514,750 plus interest and summary judgment. On February 12, 2016 he awarded me a further $9,000 and costs in the amount of $225,000. Attached to my Affidavit at **Exhibit "C"** is a copy of the decision dated January 4, 2016 and at **Exhibit "D"** is a copy of the decision dated February 12, 2016.

Post Trial Events

8. My counsel at trial was Shawn Pulver. Following trial, Mr. Pulver and I experienced a breakdown in the solicitor client relationship. As a result, I personally attempted to have the form of Judgment agreed to by counsel for 206, Mr. Preger. There are emails which evidence the efforts I have made to deal with the form of Judgment. They are included as **Exhibit "E"** to this my Affidavit.

9. I verily believe that I was unable to agree on terms of the Judgment with 206.

10. I verily believe based on my communication with opposing counsel there are two main issues remaining to be decided. The first relates to the amount of pre-judgment interest and post-judgment interest to be paid by 206. The second relates to the balance of the deposit and the costs that remain to be paid. I verily believe I am owed $9,000 relating to the deposit monies, costs in the amount of $225,000 and pre and post-judgment interest that 206 must pay.

11. I understand that 206 disputes my entitlement to those amounts.

12. As a result of the Judgment not being issued in a timely manner, I placed a caution against unit 901 of 206 on May 12, 2016.

13. On June 29, 2016, Mr. Preger brought an emergency motion before the Court to remove the caution as 206 Bloor Street West Limited tried to close an agreement to sell unit 901 on June 30, 2016. The Agreement of Purchase and Sale was signed on January 5, 2016, the day after Justice Myers released his decision. Attached at **Exhibit "F"** is a copy of the Agreement of Purchase and Sale.

14. Justice Myers presided at the motion and issued an Endorsement which allowed the Registrar or the Director to remove the caution from title and ordered 206 to pay to Dickinson Wright LLP in trust the sum of $350,000 to the credit of this action until the Court determines the amount of trust funds to be paid out to each beneficiary, myself and 206 Bloor Street West Limited. Attached at **Exhibit "G"** is a copy of the Endorsement.

15. The relationship between myself and 206 has been difficult, particularly post trial. They have not cooperated with me or my counsel to have this matter finalized.

16. On June 30, 2016, the Judgment was issued. Attached at **Exhibit "H"** is a copy of the Judgment.

Summary Judgment

17. I understand that 206 takes the position that there are mortgages against the property which take priority over my interest in having the Judgment satisfied. I verily believe that their position is improper.

18. I verily believe that Romspen Investment Corporation ("Romspen") holds a mortgage over the unsold units of 206. I verily believe that 206 took out a mortgage with Romspen on May 15, 2014, after Romspen had notice of this action. To the best of my knowledge, the only units that remained unsold at that time were units 801, 901, 1201, 1301/1401 and PH01.

19. I verily believe that the mortgages on the property include a United Overseas Bank Limited mortgage registered on January 17, 2013 and discharged on March 11, 2014. The mortgage was for $10 million bearing interest at the Lender's Prime Rate plus 1.25%. A mortgage with Home Trust Company was registered on February 28, 2014 and discharged on April 8, 2015. The mortgage was for $4 million bearing interest at a rate of 5.99% per annum. The Rompsen mortgage was registered on May 15, 2014. It is for $5 million bearing interest at 24%. Attached at **Exhibit "I"** is a copy of the United Overseas Bank Mortgage and at **Exhibit "J"** is a copy of the Home Trust Mortgage.

20. I verily believe that the outstanding balance 206 is claiming to owe Romspen is approximately $12,265,138.34 as of June 30, 2016. The mortgage was registered after I had commenced this action, and therefore actual notice had been given to the Mortgagee/Chargee as to the claim I advanced. Attached at **Exhibit "K"** is a copy of the mortgage and at **Exhibit "L"** is a copy of the parcel register.

21. I verily believe that 206 and Romspen are related companies. 206 is partially owned or directed by an individual named Sheldon Esbin. Mr. Esbin is also a principal in the corporation that holds the mortgage, Romspen. I verily believe there are other ties, specifically in the persons of Wesley Roitman, and Arthur Resnick, each of whom are principals of both 206 and Romspen. The address for service for both companies is the same. Attached at **Exhibit "M"** and **Exhibit "N"** are the Corporate Profile Reports of 206 Bloor Street West Limited and Romspen Investment Corporation.

22. I verily believe that Romspen is not only the mortgagor but also a developer of 206 Bloor Street West Limited. Attached at **Exhibit "O"** is a search of Urban Database indicating that Romspen is a developer of the property and a Toronto Star article.

23. I verily believe that Yorkville Corporation is listed as the owner of MuseumHouse in an article and on Yorkville Corporation's website. Attached at **Exhibit "P"** and **Exhibit "Q"** is a copy of the HPAC Engineering Article and a printout from Yorkville Corporation's website.

24. I verily believe that there is no evidence to substantiate a $12,265,138.34 mortgage valuation.

25. I verily believe that there is no evidence of any funds being advanced from 206 to Romspen, even after the sale of several units. Attached at **Exhibit "R"** is a copy of the Land Registry information for several units sold from June 2014 – July 2016, after the Romspen mortgage was registered. There is no evidence that the proceeds from the units were paid to Romspen to discharge the mortgage or to decrease the amount of debt owing.

26. I verily believe that no demand for payment by Romspen to 206 had been proffered until July 19, 2016. I verily believe that this demand was "artificial" and was done solely for the purpose of Romspen appointing a receiver over 206 to prevent me from executing the Judgment.

27. I verily believe that a mortgage bearing interest at 24% is patently unreasonable.

28. I verily believe that an independent opinion was obtained from the Director of MCAP Financial Corporation, Peter Juretic. He opined that the Romspen mortgage interest rate is high and above a commercially reasonable range. Attached at **Exhibit "S"** is a copy of the Opinion dated November 8, 2016.

29. I verily believe that there is no evidence that upon closing of the available units (801, 901, 1201, 1301/1401 and PH01) that any money was paid to Romspen. The available units were collateral for the Romspen mortgage.

30. I verily believe that only one unit at 206 may be unsold. Its estimated value based on the last MLS Listing is approximately $10.5 million for the unfinished unit and there is a mortgage on it bearing interest at 24%. As such, there is no equity in 206 available to me.

31. I verily believe that when the Romspen mortgage was issued to 206, it was done in the face of threatened legal proceedings, a benefit was retained by 206 and there was a close relationship between 206 and Romspen.

32. I verily believe that 206 did not have the equity in the value of the units to warrant the amount of the Rompsen mortgage.

33. I verily believe that the mortgage is on title to create artificial protection for the developer, as it was put on title with the intent to protect against unsecured creditors like me.

Consolidation

34. On September 26, 2016, I issued a Statement of Claim bearing court file number CV-16-561221 against 206 Bloor Street West Limited carrying on business as MuseumHouse and Romspen Investment Corporation. The pleading seeks, among other things, a declaration that 206 Bloor Street West Limited was fraudulently conveyed to Romspen Investment Corporation. Attached at **Exhibit "T"** is a copy of the Statement of Claim.

35. The relief being claimed in the action bearing court file number CV-16-561221, is the same as the relief being claimed in the post Judgment motion in the herein action;

36. I make this affidavit to ask the court to make a ruling that I have a priority interest in the funds held in trust by Dickinson Wright LLP and to consolidate the companion actions.

34. I make this affidavit to ask the court to make a ruling that I have a priority interest in the funds held in trust by Dickinson Wright LLP and to consolidate the companion actions.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this 8th day of November, 2016.

Linda Paris Faith Rosenberg

A Commissioner for taking Affidavits.

Lauren Hill
LSUC 65921O

A

This is Exhibit "A" referred to in the affidavit of Linda Rosenberg sworn before me, this 08 day of November 2016

A COMMISSIONER FOR TAKING AFFIDAVITS

CELEBRITY HOMES
MIKE D DIDN'T
HAVE TO GO FAR
TO FIND HOME
IN A BROOKLYN
TOWNHOUSE

Sometimes change means you get to barbecue Mike Diamond, better known as Mike D of the Beastie Boys, recently opened his doors to the *New York Times* showing off the $500,000 renovation he and his wife Tamra Davis undertook on their recently purchased Brooklyn townhouse. The rapper had never lived outside Manhattan before taking over the 3,200-square-foot home, but wanted more space for his family, including two young sons. The result is sunny and spacious with white walls, high ceilings, floor-to-ceiling windows, rustic wideplank floors and an eclectic mix of new and old. In the kitchen, a glamorous Tord Boontje chandelier shaped like a budding tree branch hangs over a live-edge harvest table, elsewhere, toile wallpaper and a clawfoot tub highlight the home's history. *National Post*

SOMETHING TO SEE

Yorkville's MuseumHouse offers spectacular views in luxurious surroundings

By Sarah Kelsey

What would you pay to live in a condominium that afforded the best views of Toronto — one that rivalled the famed vantage point of Yorkville's Park Hyatt? How about $12.8-million?

That's the purchase price of the first released penthouse suite at MuseumHouse, a 19-storey tower on the northwest quadrant of Bloor Street and Avenue Road. Brimming with floor-to-ceiling glass windows and offering a nearly 360-degree view of the city, the site is, quite literally, breathtaking. And because the view from the 6,000-square-foot space looks toward historical areas of the city — such as the University of Toronto and heritage homes in Yorkville — it's unlikely to change in the future.

"With these windows and at this height, you appreciate everything, even the weather," says Sol Wassermuhl, the director of Page+Steele/IBI Group Architects, the company that designed the tower. "The rain is more exciting, you can hear the wind, you can experience the seasons."

Standing on one of the penthouse's four terraces and taking the view in for myself, it's hard to argue with what Mr. Wassermuhl is saying. From this vantage point, you can indeed hear the wind rustling the trees along Philosophers Walk, unbelievably, you can even see people dressed in red jumpsuits hanging off the ledge of the CN Tower experiencing its EdgeWalk. It's a spectacular view for the penthouse's buyer — as well as anyone else who buys into the building.

There are 27 half- and full-floor units in MuseumHouse; five are still on the market (including the two-storey penthouse). After almost seven years of preparation, most are finally move-in ready. Part of the reason for the long construction timeline involves getting the look and feel of the building "right."

"MuseumHouse is at the confluence of Bloor, Yorkville and the museum district, and then there are these 'forever' views, so this was a site that couldn't be replaced," Mr. Wassermuhl says. "We came to the conclusion that what this building had to be was something exclusive with high-end finishes. Exclusivity had to be everything."

The other involves customization. Residents were encouraged by Mr. Wassermuhl and Sheldon Eshin, a partner in the project, to decorate and redesign their suites to make them feel "unique." Many of these alterations took time to implement.

"Every unit has been decorated personally," Mr. Eshin says. "Each resident has made their space and this building better [because of this]. Spaces speak to the personality of the residents — no two are alike."

Even the penthouse sits empty, waiting for someone to put their personal stamp on it. "When you're paying a large sum like $13 million for a unit, you want it the way you want it. We built the penthouse space — as with the others — so it was a blank canvas for someone," Mr. Wassermuhl says. "It's great as an entertaining space." One interior designer even suggested the suite be used as an art gallery (A "great idea," Mr. Wassermuhl says.)

It's the lure of this "one-of-a-kind-ness" that prompted Mr. Eshin and his wife to ultimately sell their Forest Hill home and to purchase a 4,300-sq.-ft. full-floor suite in the tower. They're set to move in in a few weeks.

"I've lived in a home all of my life and I couldn't imagine moving into a condo with 260 generic residences," Mr. Eshin says. "[My wife] likes privacy and she doesn't like to share an elevator with a half dozen people. So when this particular lot became available, we thought it was perfect. [Our fellow] buyers are like-minded people who have a high income and can and want to maintain the units."

Even Mr. Wassermuhl and his wife bought a condo in the building because of its character. "Every project I do, the developer suggests half-jokingly, 'Why don't you buy a unit in the building?' and I've never been tempted until MuseumHouse."

It's easy to be tempted when you hear of what the project offers purchasers (aside from the views). Each suite has direct elevator access and limestone-covered terraces. While the penthouses' patio is fully encased in glass, others feature stone walls with stainless steel irrigated flower boxes (to people walking along Bloor Street this will appear as a living wall in the summer). There's a concierge and valet service on duty 24/7 and a two-inch-thick hardwood underlay to eliminate creaky floors. Pricing starts at $1,575-million for a 1,660-sq.-ft. unit.

With only a few weeks to go before everyone has moved into the complex and with a few spaces still available, are Mr. Eshin and Mr. Wassermuhl worried about whether each will sell? Absolutely not, Mr. Eshin says.

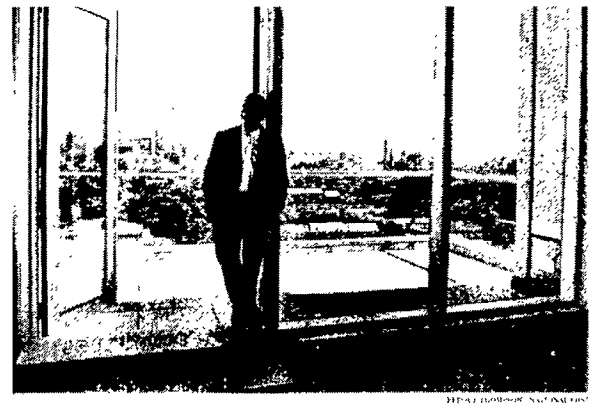
"This was a labour of love. It wasn't a project to make money. ... We've visited the site every day watching progress, evaluating the view and dealing with issues that arose — we wanted this building to be the best." MuseumHouse, he adds, isn't a building for the bulk of Toronto's condominium buyers. The project was marketed to a certain and very select part of the population.

"The city's market is great for some, but there has got to be some spaces for those of us who are empty nesters, who are in their '50s and '60s and who want to live the rest of their years in as much luxury as you can afford. These are legacy homes — things we'll have forever."

And for Mr. Wassermuhl, the ability to sell the units has everything to do with those fantastic views.

"I think if someone were here, they would experience the city in a different way. They'd be a part of it. They'd be a part of the action. They'd be able to watch the city grow and change. MuseumHouse is spectacular ... and really unique that way."

National Post



"Exclusivity had to be everything," says Sol Wassermuhl, director of the firm that designed MuseumHouse.

This is Exhibit "B" referred to in the affidavit of Lucia Rosenberg sworn before me, this 08 day of November 2016.

.....

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partial upgrade agreement.
MR. PREGER: I follow you.
All right.
MR. PULVER: All right?
MR. PREGER: So you want to
turn the witness to the partial --
MR. PULVER:
101 Q. Yes, so that's at page --
so page 154 of my client's record, sir. So were
you familiar -- I mean, we might as well, we were
looking at the document -- were you familiar with
the context of how this agreement, this partial
upgrade agreement, came to be?
A. Yes.
102 Q. What was your
recollection of what happened?
A. My understanding is that
the -- Ms. Rosenberg, during the course of her
meetings with Crayon Design, asked for some
changes to be made to the plan that was included
in the original Agreement of Purchase and Sale.
103 Q. All right.
A. And these changes were
incorporated into a further agreement, the partial
upgrade agreement.

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104 Q. Have you seen these plans
that are attached at 154 and 155 and 156 of the --
my client's motion record?
A. Yes.
105 Q. My client's evidence is
that these were plans that were agreed to in
December of 2010, and that there were subsequent
errors made by your client in meeting these plans.
And her evidence has been that if they were met,
that that would have been all that was necessary
from her end. These were the plans that she was
relying on, and they weren't complied with.
So what I am saying to you now
is -- and to go back to paragraph 7 of your
affidavit, when you talk about being impossible,
to undo certain elements of the work that had been
completed, I am comparing it from this
December 2010 plan, because this is what my client
is saying that she agreed to with 206, and this is
what would be complied with. So I think the
exercise has to compare this plan with the
as-builts.
So I appreciate what your
counsel is saying about us trying to be the ones
to explain to you, but I think the better way

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here, since you have sworn an affidavit saying it
would be impossible to undo certain elements, I am
putting the onus on you, sir, to be able to
explain what those elements that you are talking
about are, and which are the ones that you could
do but that would be costly to be undone. Because
if you are saying there are things that could be
done, and it becomes an issue of costs, and the
evidence is that these errors were not my client's
doing, and the unit could still be supplied to
her, then it shouldn't really matter what the cost
is. Because if it was a mistake, and things got
-- concrete got poured incorrectly, and walls got
put in the wrong places, and the wrong fireplaces
got installed, it shouldn't be my client's fault.
So that's the exercise that I
would like you to entertain. And since you have
given this evidence, I would like you to be able
to explain it. What were you thinking? What was
in mind, paragraph 7, when you gave that
statement?
A. Exactly what you say,
comparing what was actually built with what is
shown in the partial upgrade agreement.
106 Q. Did you write things down

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at the time when you swore this? You had to be
thinking about certain things.
MR. PREGER: He is asking you
what can be undone, what can't be undone.
THE WITNESS: As I said, if
there is any live plumbing stacks, it would be
impossible, because we would have to stop any flow
of water in the building for a period of time, in
days --
MR. PULVER:
107 Q. All right.
A. -- to try and change it.
But some of them are physically impossible to
change. The reason that they were put in the
location they are in is because that was the
limitations of what the plumber was able to do.
108 Q. All right. And there are
some issues with the plumbing stacks that you
swear about -- and my client has evidence -- so we
can get to that issue in due course. But I am
trying to understand, so you are saying any
plumbing-related issues couldn't be. Okay, so
that's one thing.
A. There are some
plumbing-related.

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109 Q. What else?
A. There is -- to change the bathtub would require going into the unit below, opening up their ceilings, and --
110 Q. To make it deeper you mean?
A. No, to change the location of the drain.
111 Q. Of the drain, okay.
A. And we don't know what's below there. There could be duct work, there could be other pipes that are in the way now.
112 Q. All right.
A. That would be difficult. Similarly with the sink in the island unit.
113 Q. All right. What about the shower in the ensuite?
A. I think the shower is basically in the same location if the drain could stay where it is.
114 Q. What about the access ways, the width of the doors?
MR. PREGER: Which doors? The interior doors?
MR. PULVER:

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115 Q. Interior, there is an issue, and we will get to this also about -- that you have sworn about the fact that my client has given evidence that she advised the need to have the access ways to accommodate a wheelchair, and you have sworn there was no discussion about that. So I am -- that's another point I am trying to understand. Could you be changing that around?
A. This was in the second bathroom, and the first time that I was aware of this was at the third meeting that I had with Ms. Rosenberg at Page + Steele's office when she brought up the fact that if her father came he would need to have handicap access.
116 Q. She did mention it to you?
A. Yes.
MR. PREGER: Sorry, I think this is now after the litigation arose, and the parties are dealing with each other on a without prejudice basis.
MR. PULVER: Sir, you keep jumping back and forth. Now that you have said this, I am happy to raise this --
MR. PREGER: I mean, he is a

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layperson, so he doesn't always, I think, appreciate when there is a discussion which is without prejudice with Ms. Rosenberg and when there may be a discussion which is with prejudice.
MR. PULVER: I understand that, but if we are going to now raise that, you know, we might as well deal with it.
117 Q. So your evidence on that point -- to find where you have indicated in your affidavit on that. Paragraph, sir, you address this in paragraph 157 of your affidavit, this particular point about -- we were talking about the -- my client's evidence was that 206 was aware the second bathroom needed to be large enough to allow access to her father's wheelchair, and that the door frame in the unit needs to be a certain width. This is -- that is false. This is your evidence:

"Neither Cheryl nor I ever had any such discussion with Paris, and there are no provisions to this effect in the agreement." (As read)

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A. Mm-hmm.
118 Q. Do you stand by that evidence, sir?
A. Yes.
119 Q. All right. So I want to introduce, sir, as an exhibit -- this would be because it is the third exhibit, the plan will be the second one, right? So this will be the third exhibit --
MR. PREGER: You haven't marked -- have we marked the plan?
MR. PULVER: So this will be the third exhibit. We haven't marked the second.
This is an e-mail, sir, that I can give you a copy of.
So Exhibit 2 will be marked, which is a plan from Page + Steele, level 9 plan, dated July 23, 2013.
EXHIBIT NO. 2: Plan from Page + Steele, level 9 plan dated July 23, 2013
MR. PULVER: All right.
MR. PREGER: I am just still reading it, hold on.
MR. PULVER: I am particularly

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-- my questions are mainly focused on the first page of that e-mail, if that's of assistance.

MR. PREGER: I am not sure if the witness can assist you, but go ahead. I see that it is not -- this was not an e-mail that he appears to have been sent or copied.

MR. PULVER: I appreciate that.

120 Q. But, sir, this is an e-mail that is dated --

--- (Off-record discussion)

MR. PULVER: So we have now entered in as Exhibit 3 on the record an e-mail from the Plaintiff to Ms. Krismer of October 27, 2010.

EXHIBIT NO. 3: E-mail from Plaintiff to Ms. Krismer dated October 27, 2010

MR. PULVER:

121 Q. And, sir, can you identify this e-mail? Have you seen it before? And, sorry, it is a forward from an original e-mail, but it was sent from Ms. Rosenberg to Ms. Krismer on October 27. Have you ever seen

Page 61

this e-mail before, sir?

Just, counsel, we just realized that it is actually in our record as well. I didn't realize that when I was preparing yesterday. It is in tab G of the record, but we have included it, so.

So, sir, do you recall ever seeing this e-mail?

A. I recall seeing something like this, whether it was this particular e-mail -- or I may have gone through the items with Cheryl Krismer.

122 Q. What I am interested, because now -- I know we are going back and forth, but this is in your reference to -- in 157 of your affidavit, you have said it was the evidence of my client that this was discussed with Cheryl is false, and that you didn't know anything about this.

Now clearly, sir, the second sentence of this e-mail references foyer:

"Service door should be hinged on the north side."

And there is a note which

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appears to be from Ms. Krismer saying:

"It may not be able to be hinged on the north side due to OBC requirements for handicap access. I am confirming with architect." (As read)

And the reason I am saying I am assuming it is Ms. Krismer is because my client wouldn't be the one confirming with the architect. Presumably that's Ms. Krismer. Is that --

A. That's reasonable.

123 Q. Is that reasonable to assume?

A. Yup.

124 Q. Do you accept that based on this e-mail this appears to be discussions around 2010 about the handicap access for the door?

A. Yes, and this is -- my understanding is that the Ontario Building Code requires that all entrance doors comply with handicap requirements.

125 Q. Sir, is there anything in this statement that you believe you may want to

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revise or retract, of what you said?

A. No.

126 Q. But you said it is false, so now I am showing you an e-mail where there have been discussions about it.

A. No, no, I'm sorry, I understood that we were -- the discussion was in connection with the size of the second bathroom door. That's an interior door in the unit, this we are discussing here is an entrance door to the unit.

127 Q. But the idea is -- that the issue is my client indicated that her father had a wheelchair, so it required the units to be accommodating for that. So clearly I am saying to you --

A. What I am saying is the first time I heard about a wheelchair was when I met with Ms. Rosenberg --

MR. PREGER: All right. Let's not get into that because that's a without --

MR. PULVER: I am not getting -- I am not asking you to discuss that.

128 Q. But, sir, what I am saying to you is that: What is your normal

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arrangement? Ms. Krismer was retained in some capacity as being an agent for the -- for 206 to provide design and consulting services. Is that fair to say? That was her role, that she was providing design work for 206?

A. She was managing the program whereby purchasers made their finishes selections and any further customization they wanted to make to their units.

129 Q. In paragraph 105 of my client's affidavit, okay, she talks about this, and she says:

"At all times 206 was aware"

-- and 206, my understanding, sir, in this context, would include you --

"At all times 206 was aware that the door frames in the unit needed to be a certain width, and that the size of the second washroom needed to be large enough to allow access for my father's wheelchair. The unit was

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not constructed pursuant to the size guidelines outlined in the plans, including the hallway and both the door frames in the second washroom are much too small to allow access for a wheelchair."

(As read)

And you have responded in your affidavit to this paragraph, and you've said that this affidavit -- that this paragraph is false.

A. Mm-hmm.

130 Q. I am now showing you an e-mail in 2010 where I have asked you, and you said you didn't -- you weren't receiving it. I appreciate that, but that means there was a conversation with Ms. Rosenberg, at the very least with Ms. Krismer, and you are saying to me if that happened that you were never made privy to any conversations about this?

A. I have no knowledge whatsoever. And I am quite confident that if this matter came up, Ms. Krismer would have discussed it with me, because clearly the second bathroom

Page 66

was never designed to be wheelchair accessible. And in order to make it so, the bathroom would have had to have been enlarged.

131 Q. So what is the -- when you're saying "false", that you never heard it, or that the conversation itself never happened?

A. I have no evidence at all that the conversation ever happened.

132 Q. What about the e-mail?

A. The e-mail refers to an entrance door to the unit, it has nothing to do with what happens --

133 Q. But, sir, they are referring to handicap access, isn't it reasonable to assume that --

A. No.

134 Q. -- my client has a father with a wheelchair, whose evidence is that she spoke to 206 about this, isn't that reasonable to assume that if you have one door that accommodates it, that there are other doors that would also need it? You've got a whole unit.

A. As I said, the building code is specific to suite entrance doors. If it requires something within the unit, that would

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have been, I would assume, included in the original schedule C, or in the subsequent partial upgrade agreement. And I can find no evidence in there, I can recall no discussions at all with Cheryl on this matter. And I have --

135 Q. Sir, I am happy to go back. It is my understanding from my client that the references in the agreement to the doors would have been big enough to accommodate the handicap access, and that that was not met. So I am happy to go back and check that with you.

MR. PULVER: Can we just go off the record just for one second?

MR. PREGER: Yes, sure.

--- (Off-record discussion)

--- Break taken at 11:26 a.m.

--- Upon resuming at 11:42 a.m.

MR. PULVER:

136 Q. So, Mr. Hart, before we went off the record we were discussing the issues of the dimensions of the doors in the subject unit.

A. Yes.

137 Q. I want to just take you, sir, to page 103 of your record. This is the

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floor plan from the Agreement of Purchase and Sale. So I know the dimensions are small in this copy. I have reviewed an original copy of the APS that my client has to just check the dimensions, when we were off the record, but in this copy you can see in the top right corner where it says "Bedroom 2" -- all right? What this says is 32, which indicates 32 inches or 2 foot 8. Okay? So can you see that? I know it is small, but -- and I don't have a magnifying glass.

I do -- counsel, if you're prepared, my client does have her original copy of the agreement, which I can show to your client without needing to enter it as an exhibit because it is in the evidence, if that would assist him?

MR. PREGER: Sure.

MR. PULVER: All right.

138 Q. So the reference in the top right corner is to 32 inches, 2 foot 8. Do you see that?

A. That's the entrance door to the bedroom.

139 Q. Yes.

A. Yes.

140 Q. So if those dimensions

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were kept, then that should have satisfied my client's needs, or client's father needs for that particular doorway. Is that accurate?

A. My understanding is we are talking about the bathroom, not the bedroom.

141 Q. In this case, I am trying to be -- it wasn't just -- that last e-mail was looking at one specific area, but we are more concerned with the -- all of the entrance ways.

A. Yeah.

142 Q. It was -- the as-built unit, my understanding, was not built to that dimension. Is that correct?

A. I am not sure. I am just looking...

MR. PREGER: This is A10?

THE WITNESS: This is the door type, it's an A5 door.

MR. PREGER: A5.

THE WITNESS: And A5 is 762 millimetres. However, I am not good at translating that into metric.

MR. PREGER: Into imperial you mean?

THE WITNESS: Yeah.

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MR. PREGER: This refers to millimetres.

THE WITNESS: Yeah. Let me just --

Can I cheat?

MR. PULVER:

143 Q. No, problem.

A. Yeah, that would appear to be a 30-inch wide door, 2 foot 6.

144 Q. Back to my question then: When you have compared the door sizes, what was in the original schedule to my client's Agreement of Purchase and Sale --

A. Mm-hmm.

145 Q. -- that would have accommodated wheelchair access, and what was -- the as-built would not. Is that fair to say?

A. I think it is fair to say that there is a 2 foot 6 door installed there. I am not sure whether a wheelchair can get through a 2 foot 6 door or not.

146 Q. But it is smaller than what my client had originally put in her plans. Is that correct?

A. Correct.

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147 Q. Underneath, sir, the other bathroom, it seems to indicate that that's a 30-inch doorway, and the hallway next to it at 4 feet. Do you see that?

A. Sorry, whereabouts are we looking?

148 Q. In the bathroom ensuite.

A. Yeah.

149 Q. There is a reference to a 30-inch door.

A. Could you point out on here where you are talking about, because I am just not --

150 Q. I am just looking at the original plan. A5, right there.

A. Mm-hmm, yeah.

151 Q. Then compare it to the schedule D, the 30-inch door, where it says -- right underneath where it says "Bath Ensuite".

A. Mm-hmm.

152 Q. That's another area, sir, where the dimensions that were set out in my client's schedule do not appear to have been met. Is that fair to say?

A. Yes.

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153 Q. The last area was the hallway, which was supposed to be 4 feet, which is right under -- below the foyer closet. It says 1,200. Do you see that?
A. Yes.
154 Q. That would be 4 feet, my understanding?
A. Okay.
155 Q. Was that met?
A. It appears that was -- the construction dimension for that was 1,080, so it would be 20 millimetres less.
156 Q. Yes, so --
A. Which is less than an inch.
157 Q. But in all three instances the dimensions were less than what was set out in this original schedule D. Is that correct? We have looked at three different dimensions: the bedroom, the bathroom, and the hallway.
A. I don't see where the bathroom door was dimensioned on schedule D. There is a dimension for the bedroom door. There is no dimension for the bathroom door.

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158 Q. My understanding is that there was an earlier August drawing which had indicated it and it was just to be carried over to this plan. But for these purposes, and given the detail we are looking at, I am just looking, sir, for your evidence of whether or not you acknowledge that there were changes made to the dimensions of these access points that were different than were originally contemplated in schedule D, that's really what I am trying to establish here.
A. I agree with bedroom number -- the entrance door to Bedroom 2 was reduced by two inches. The corridor has been reduced by something less than an inch. I don't -- I can't comment on the bathroom door because I can't see where that dimension was given at this time.
159 Q. Sir, can I just see that for one second?
A. Sure.
160 Q. Sir, I just want to show you the -- this is also part of the schedule, but this was an earlier version of the floor plan that had been signed off by my client, and she has

Page 74

referenced there to the -- to that dimension.
A. I am confused now because this drawing for the bedroom says 30 inches.
161 Q. It is not the bedroom though.
A. No, I know, but we are going around in circles here. I don't see a dimension on here for the bathroom door, I see a dimension of 4 feet here for the corridor, and I am saying the constructed -- the construct dimension was less than an inch --
162 Q. But was a 30-inch door provided? That's the only question, and I don't want --
A. Yeah, I believe a 30-inch door was provided.
163 Q. My understanding is it was 27 inches.
A. That's not a standard door size. It would never be 27 inches. They go in 2 inch increments. It would be 2 foot 6 or 2 foot 8.
164 Q. That's my understanding, sir, is that the -- that particular door was built undersize. But to be clear on the other items we

Page 75

have discussed -- you are obviously disagreeing on that particular one -- but on the rest of them we have discussed, you are acknowledging that they were built smaller than originally anticipated by my client?
A. No, I've said I don't see any evidence as to the size, where the size of the bathroom door was mentioned.
165 Q. Beyond that though, we are talking about the previous items that we looked at.
A. The entrance door to the bedroom on the earlier drawing was 30 inches, on the later drawing was -- would be 32 inches, 2 foot 8. And, in fact, 2 foot 6, a 30-inch door was installed in the bedroom. And the corridor was less than an inch -- there was less than an inch difference between the width in the drawing and the width constructed.
166 Q. Sir, I would like to take you now back to -- when we looked last we were talking about paragraph 6 and 7. So this is where this came up with the doors. So we were talking about some of the items in the unit that would be in your mind impossible, so you were talking about

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the plumbing, then we started talking about -- that's where we came up with the door issue.

A. Mm-hmm.

167 Q. Do you have some other items that you can give evidence to, would be impossible to provide to my client at this juncture?

A. Not necessarily impossible, but it would -- in general, the master ensuite, in particular the tub and the vanities, would have to be completely rebuilt.

168 Q. All right.

A. And there is the issue of the location of the drain for the tub and having access the unit below, get that unit owner's permission, which I would hesitate to say would be very difficult.

169 Q. What about the kitchen, sir?

A. The kitchen also -- the service door has been moved back to the foyer, where it was originally designed to be. There would be major changes in the kitchen. The kitchen would have to be completely rebuilt.

170 Q. Including the island as

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well?

A. Yes.

171 Q. What about the issues of electrical and issues of gas access, gas lines?

A. Yeah, yes, the flooring would have to be taken up completely as well in order to run the gas line.

172 Q. What about the fireplace, sir?

A. The whole area would have to be completely demolished and rebuilt. There were issues with locations of plumbing pipes within those areas as well, which --

173 Q. Yes, we will get to that, but I am trying to understand -- so is your evidence, sir, that the unit that my client contracted for, the Agreement of Purchase and Sale that we have looked at several times, is your evidence that 206 is not able to provide the unit to my client that she contracted for?

A. At this stage, yes.

174 Q. Sorry, yes being they can't provide it?

MR. PREGER: He said at this stage, yes --

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MR. PULVER: At this stage, yes.

MR. PREGER: This stage they cannot provide it?

THE WITNESS: It is a completed building. Before, when the building was not complete, we could do work in other units, which was required to locate plumbing and the like in this unit, but now the building is finished, the units above and below are occupied.

MR. PULVER:

175 Q. Let's go to the timing, so right now we are in August 2014. This unit -- we are talking about a unit that has been in dispute for several years. The most recent closing date was December of 2012. At what point did this unit reach the stage where it could no longer be constructed in accordance with my client's agreement?

A. Certain aspects of it where -- it was not possible to do from the beginning, other items --

176 Q. Sorry, what does that mean? I am not following you. From the time she signed the contract there were things that

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couldn't be provided to her?

A. Yes.

177 Q. When was my client ever told that?

A. I believe there were conversations with Cheryl, some accommodations were made, and I am not too sure of the details --

178 Q. We can work through because what you have now put in your affidavit, and your counsel has described as the eight different finishing lists with various pricings, which we will go through and understand that process, but these were all different times where your client was saying to my client, "Pay more money", for things that my client thought were included in her $2 million-plus Agreement of Purchase and Sale.

So you are now saying that your understanding from the start was that my client had certain things that she couldn't be provided. I am trying to understand what that was and where it was documented to my client, not that she had to pay for it, but that she couldn't be provided for it. That's a big difference.

A. I agree.

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179 Q. Where is the evidence on that, because I don't see anything in your affidavit about that, sir.
A. Basically the issue with the plumbing pipes affected the bulkheads in the units, the ceiling design.
180 Q. We will get to that issue.
A. Okay.
181 Q. But the way you're saying it, I said to you "from the time she signed", you said "you couldn't be provided", so what does it have to do with the fact -- because my client's evidence is clear on this, that plans were approved, that everyone was aware it was happening, and ultimately plumbing lines were put in where doorway entrances were, and in the wrong place, and was being charged to move them.
So what I am getting at is I asked you from the time it was signed, you are indicating that there were things that couldn't be done from the beginning, so what were those things that -- forget -- the plumbing was something that happened a year later, so what -- from the time that she executed --

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A. No, something happened at the beginning. Typically mechanical drawings that show plumbing pipes are considered to be schematic.
182 Q. All right.
A. They don't show all of the pipes involved, they don't show a lot of the vent pipes. So there are generally more pipes to be accommodated than are shown on the drawings.
When the trades come along to build and to instal the pipes, particularly the larger diameter pipes, it is not always possible to instal them exactly as the schematic drawings. They have to work around certain things, the size of pipe fittings, and the like, to get the pipes in. And it is not unusual to have to make some accommodation for that.
183 Q. Okay, but what you are talking to me about, piping movements --
A. Yup.
184 Q. And there was a lot of evidence about that, and we can get to it. I am getting at the unit as a whole, the kitchen, the tiling, the bathroom, are you saying there is anything beyond the location of the piping that

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your client was aware could not be provided to my client once she signed her agreement, because that's what I am not following you on. Because you said something about -- that there were discussions with Cheryl about certain things. There is all kinds of evidence about requests from my client to pay for upgrades, there is lots of evidence on that. I haven't seen evidence where there's anything from anyone at 206, or from Ms. Krismer, saying to my client, "You cannot be provided with A, B, and C in your contract." I haven't seen that, so that's what I am trying to understand.
A. I see. I don't have that detail, but --
185 Q. Because don't you think, sir, if that was the case, if you buy a unit from -- an expensive unit, and it was being advertised as a custom-based project, and there are items, that the client enters into an agreement, don't you think that that person has the right to get what they were contracting for? Do you think that's fair?
A. Yes.
186 Q. And don't you think if

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they can't get it that they should be told that they can't be provided those things?
A. Yes.
187 Q. So what -- I am trying to understand, what was it that -- were you aware of things that you knew couldn't be provided, and was never communicated to my client?
A. I was aware of a number of things that Ms. Rosenberg felt should be standard, but were not, in fact, standard.
188 Q. Sir, that wasn't my question.
A. Okay.
189 Q. I am not talking about the standard/non-standard, charge/upcharge, I am talking about things that you couldn't provide in the unit that you knew, and they were going around in circles for years dealing with this, and nobody ever said, "We can't provide this to you."
MR. PREGER: He said he is not aware of anything further. His evidence was --
MR. PULVER: But further from what though? All he talked about is the piping, but he says he is aware --
MR. PREGER: That's what he

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said. He said -- you said, "Beyond the piping was there anything else", and he said, "I am not aware of anything further."

THE WITNESS: I know there were issues with the duct work, and Ms. Rosenberg came up with her own layout to instal the duct work. Whether or not that could have been installed that way or not, I don't know.

MR. PULVER:

190 Q. Let me get this at a different way. When you've looked -- and, sir, you have seen her Agreement of Purchase and Sale before, and have seen the schedules? We have looked at it before, but --

A. Yes.

191 Q. Before this case started, the litigation, had you reviewed her agreement before? Do you ever remember looking at her agreement before you knew the litigation?

A. Yes.

192 Q. All right. So from beyond the piping, is there anything -- once you now look at that agreement -- I know -- I appreciate the fact the unit has been completed in a certain way, I understand that. But when you

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look at that agreement, are the things that -- when you now look back -- and saying, "I couldn't -- we could never have provided her that"? That's what I want to know.

A. Mm-hmm. The agreement, in particular schedule C, describes items in a fairly general way.

193 Q. All right.

A. I think the problems arose when they got into the details.

194 Q. All right.

A. And some of the details that Ms. Rosenberg wanted were not possible. Several items in the kitchen, and things like that, they just weren't available.

195 Q. Where was that communicated to my client, I am asking you.

A. I think it was communicated very well to her. First of all --

196 Q. No, I think -- sir, to be fair, what was communicated well to my client was that she owed more money for something that she thought was included in her agreement. That was communicated abundantly well from your client, sending out eight different lists of upgrades of

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things, which I will take you through, which should have been included in her agreement. That was abundantly clear. What I am asking you is where was it clear --

MR. PREGER: Sorry, are you -- did you just put a question to him?

MR. PULVER: I am trying to finish if you didn't cut me off.

MR. PREGER: All right. I didn't mean to cut you off, but -- if your question is predicated upon the factual foundation you have just described, then you should put it to my client that, in fact, what you have described is correct.

MR. PULVER: Why don't you let me finish the question before you complain about it.

MR. PREGER: I haven't heard a question yet --

MR. PULVER: I am in the middle of doing it before you complained.

197 Q. So what I am getting at, sir, is that there is lots of evidence in this record about the attempts that 206 made to get my client to pay what you believe were upgrades,

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okay? There is lots of evidence about that. But what I don't see evidence about is any -- coming from 206 saying, "You cannot be provided this, it doesn't matter if it is an upgrade or not", and that's the distinction I am trying to draw here, and I don't understand exactly what you are saying.

MR. PREGER: At what point in time are you asking?

MR. PULVER: Right from the time that she entered into the agreement, and when they started -- the first time they sent out a request.

MR. PREGER: So you are asking -- your question now is limited to the period of time beginning when and ending when, just so I understand the question.

MR. PULVER:

198 Q. When she executed the agreement until the agreement was terminated in July of 2013, that entire period. I don't see anything in these thousands of pages of documents where someone from 2006 or Ms. Krismer was saying, "You cannot be provided this." It was always, "You can do this, but we are going to charge you

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more money." And maybe I am missing something, so I am asking you to point that out to me, because I don't get it. This dispute that we are having is all about the fact the unit wasn't provided, the fact that your client had a purchase price and then wanted all these other upgrades.

So I know there were changes back and forth, what I am trying to get at with you is: What did you believe could not be provided to her, and did you ever communicate that to Ms. Krismer or anyone else on behalf of 206? Did you ever write to anyone saying, "We cannot provide these things to Ms. Rosenberg, it is impossible"?

A. Not specifically, but Ms. Krismer and I had many discussions, and looking -- how we could provide certain things, but there -- generally I think what happened was that the schedule C was seen as a starting point, and its interpretation was where the disagreements occurred.

199 Q. Do you have other purchasers that you ran into the same problem with, sir?

A. I can sit here and tell

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you quite categorically no. We had minor things with purchasers, but nothing compared to this. It wasn't in our interest to prolong this. Our goal was to build the building, to finish the units, to sell them, that was the objective. None of us had any reason to delay this any longer than it had to be.

200 Q. To finalize on this point: Do you have any other communication that hasn't been produced so far in this litigation between you and Ms. Krismer, or you and -- or any other representative of 206 when you communicated that it was impossible to provide some of the items that were set out in the agreement to my client?

A. To the best of my knowledge, no.

201 Q. Sir, I want to keep going here to paragraph 10 of your affidavit. I'm sorry, before we get to that, just so it is clear, when I was talking to you before about the agreement and when it could be provided, and maybe I missed this, but I wanted to get an idea on the timing. So I think I started and didn't finish that point.

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So when -- do you have an idea of when the kind of the point of no return came for the unit, of when you no longer could satisfy any of my client's various items in the agreement, like when it could be undone, because we were talking about the items that you said could no longer at this point be undone.

A. Mm-hmm.

202 Q. But was there a time that was reached where it became impossible that you can point to?

A. Probably late summer of 2011.

203 Q. 2011?

A. Yeah. That's when the units above and below would have been finished, been in the finishing stages.

204 Q. You are aware, sir, that as I said the agreement -- your client's law firm only purported to terminate this agreement in July of 2013. So you are saying in that entire intervening period that the unit could not have been constructed for my client, is that what you're saying?

A. On certain aspects of it.

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205 Q. All right. So is there any way you can elaborate on that? You are saying "certain aspects", I mean, we started off with what could now be done, and you are saying most things are impossible, so what could have been done --

A. I go back to the plumbing stacks, they were a major issue.

206 Q. All right. So what about beyond the plumbing stacks, if there was a way of working that out beyond 2011? Could the kitchen have been saved from 2011? Could you still have constructed the kitchen that my client agreed to purchase?

A. Generally, yes.

207 Q. Could you have still constructed the same bathroom and shower and bathtub?

A. It would have been difficult because that -- because that would depend on the drain location --

208 Q. Plumbing.

A. -- and having to open up ceilings in the unit below.

209 Q. You are basing that 2011

This is exhibit "C" referred to in the affidavit of Lindsay Rosenberg sworn before me, this 08 day of November 2016.

Rosenberg v. 206 Bloor Street West Limited, 2016 ONSC 6
COURT FILE NO.: CV-12-469391
DATE: 20160104

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

LINDA PARIS FAITH ROSENBERG

Plaintiff

– and –

206 BLOOR ST. WEST LIMITED carrying on business as MUSEUM HOUSE, CRAYON DESIGN COMPANY INC., also known as CRAYON DESIGN CO. INC. and CHERYL KRISMER, also known as CHERYL ANN KRISMER

Defendants

REASONS FOR JUDGMENT

F.L. Myers J.

Released: January 4, 2016

CITATION: Rosenberg v. 206 Bloor Street West Limited, 2016 ONSC 6
COURT FILE NO.: CV-12-469391
DATE: 20160104

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
LINDA PARIS FAITH ROSENBERG Plaintiff	Shawn Pulver and Lauren Sigal, counsel for the plaintiff
– and –	
206 BLOOR ST. WEST LIMITED carrying on business as MUSEUM HOUSE, CRAYON DESIGN COMPANY INC., also known as CRAYON DESIGN CO. INC. and CHERYL KRISMER, also known as CHERYL ANN KRISMER Defendants	David Preger and Thomas Arndt, counsel for the defendants
	HEARD: June 17, 18, August 24, 25, October 20, 21, 22, December 16 and 17, 2015.

F.L. Myers J.

The Motion

[1] By agreement of purchase and sale dated August 16, 2010 and amended thereafter, the plaintiff Paris Rosenberg purchased a luxury residential condominium in a building being developed by the defendant 206 Bloor St. West, Limited. The agreed purchase price was $2,059,000. The plaintiff paid deposits of over $500,000.

[2] Try as they might, the parties could not agree on final specifications and plans for the condominium unit. The developer has purported to terminate the agreement of purchase and sale and claims that it is entitled to keep the funds on deposit. Ms. Rosenberg wants her deposit back.

[3] Both sides have moved for summary judgment. They agree under rule 20.04(2)(b) that the claim should be determined summarily. Moreover, I am satisfied that I can find the facts and

apply the law on the material that is now before the court so that it is in the interests of justice that summary judgment be granted in this case. This motion was argued over the course of nine days. Oral evidence was heard. Overall, in my view, the use of a customized, hybrid procedure allowed the parties to focus on the key issues and avoid a full trial that would have taken much longer and cost each of the sides much more. At the same time, the evidence presented illuminated the fundamental issues so that I have full insight into the facts that underpin the parties' positions, counsels' narratives, and the legal issues.

[4] For the reasons that follow, I find that the plaintiff is entitled to the return of her deposit funds.

The Agreement of Purchase and Sale

[5] The developer marketed its proposed building as a very high-end, luxury residence. As befits multi-million dollar units in the heart of city, the developer provided buyers with opportunities to customize the design and finishes for their condominium units. Unfortunately, the parties became so bogged down in the customization process that they became deadlocked.

[6] The resolution of this case turns on a very few contractual provisions governing the customization process. Para. 12 (a) of the agreement provides:

> **Within 21 days after notification by the Vendor, the Purchaser shall complete the Vendor's colour and material selection form for those items of construction or finishing for which the Purchaser is entitled to make selection pursuant to this Agreement, failing which the Vendor may complete the same in its sole and absolute discretion, on behalf of the Purchaser and the Purchaser shall be bound by the Vendor's selection,** and the Vendor shall not be liable for any delays in having the Property ready for occupancy on the Confirmed Possession Date. **The Purchaser acknowledges that only the items set out in Schedule C are included in the Purchase Price, and those [*sic*] furnishings, decor, improvements and samples are for conceptual and display purposes only and are not included in the Purchase Price unless specified in schedule C.** The Purchaser shall have no selection whatsoever insofar as exterior colours, designs and materials are concerned. The Purchaser further acknowledges that selections of exterior colours, designs and materials may be subject to architectural approval from a third party or the Municipality, over which the Vendor has no control. **All selections of items of construction or finishing for which the Purchaser is entitled to make selection pursuant to this Agreement are to be made from the Vendor's samples. If the Purchaser's colour, material, construction or finishing selections are unavailable for any reason whatsoever, the Vendor shall give the Purchaser 21 days prior written notice of such unavailability, during which period, the Purchaser may make an alternate selection. If the Purchaser fails to make an alternate selection as aforesaid, the Vendor may substitute in its sole and absolute discretion, without the consent of the Purchaser, materials or finishing which are of equal or better quality, whether the same are different in colour and/or finish.** The opinion of the Consultant as to the difference in quality is final and binding on the Purchaser. The Purchaser acknowledges that the colour, finish, grain, texture

and/or shading of wood finishes, marble, granite, carpet, tiles, kitchen cabinetry or other manufactured finishing materials or natural [*sic*] may vary from that of those selected by the Purchaser from the Vendor's samples, due to the variations or shading in dye lots produced or manufactured by suppliers. [Emphasis added]

[7] The process for customization set out in this paragraph therefore can be described in the following steps :

a. Only the items set out in Schedule C to the agreement are included in the purchase price for the unit;

b. All selections of items of construction or finishing for which the purchaser is entitled to make a selection are to be made from the vendor's samples;

c. Within 21 days after notification by the vendor, the purchaser shall complete the vendor's colour and material selection form for those items of construction or finishing for which the purchaser is entitled to make a selection, failing which the vendor may make the selection(s) in its sole and absolute discretion;

d. If the purchaser's selections are unavailable, the vendor shall give the purchaser 21 days written notice in which to make alternate selection(s); and

e. If the purchaser fails to make alternate selection(s) within that time, the vendor may substitute materials or finishes of equal or better quality at its sole and absolute discretion.

[8] One therefore starts with Schedule C of the agreement, to see what details are included in the price of the unit. Then, where the vendor gives the purchaser choices of different items to satisfy a particular element, the vendor is required to provide samples of the items to the purchaser for her to make her choices. The purchaser makes her choices by completing the vendor's colour and material selection form. If she fails to complete the vendor's colour and material selection form within 21 days after notification by the vendor that the form is due, the vendor can complete the form and make the choices for her.

[9] Much of the case, and almost all of the oral evidence heard, concerned the information that the vendor provided to Ms. Rosenberg and why she claimed to be unable to finalize the choices necessary to complete the design of her unit. However, there are two facts that are not in dispute at all and which are important to understanding the customization process in this case:

a. First, the vendor had no "colour and material selection form." It did not provide a piece of paper to Ms. Rosenberg listing all of the choices to be made by Ms. Rosenberg or for her to list her choices. Instead, the parties engaged in an extensive amount of communication that for the bulk of the material time had no clear delineation of the precise decisions to be made.

b. Second, while the vendor had extensive samples available for the typical choices set out in its basic Schedule C, it was not ready for the plaintiff. The plaintiff is a

> designer by trade. She is very knowledgeable, intelligent, and energetic. She is detail oriented in the extreme. For the hearing, for example, she produced a 75 page chronology highlighted in five colours detailing nearly every interaction between the parties. There is no hyperbole in describing the plaintiff's presentation as ultra-intense bordering on compulsive. There is no doubt that the defendants found the plaintiff's approach off-putting. Several of the representatives of the defendants who had been engaged in dealing with the plaintiff wrote internal emails that left no doubt about what they thought of dealing with her. They were not nice characterizations.

[10] The parties engaged in many meetings prior to the agreement of purchase and sale being signed. The plaintiff negotiated extensively to customize the description of the items to be included in the price of her unit that were to be listed in Schedule C to the agreement. After finishing negotiations and entering into the agreement, the vendor understood that Ms. Rosenberg was going to be a very difficult customer. Mr. Rusonik called her "unbelievable" as early as September 2, 2010. Mr. Hart, the project manager, later lamented that the developer knew what it was getting into with the plaintiff early on. Perhaps many purchasers of luxury condominium units are content to leave the precise, picky design and pricing details to others. Ms. Rosenberg was not such a purchaser. She took full advantage of the vendors' willingness to allow customization of her unit. As a result of her negotiation, the vendor agreed to include in her Schedule C a number of items that were unique to her unit. Ms. Rosenberg wanted to be involved and know every detail of every choice that was available to her and the precise pricing impact of each. While the vendor had many details available in its presentation centre and in its customizations binder, it did not have samples of all of the items listed in Schedule C to Ms. Rosenberg's contract including the items that were unique to her unit. Moreover, pricing of alternatives is necessarily an iterative process that depends on what alternatives the purchaser seeks and what the vendor will allow.

[11] It should be noted that it was not only the standard items that were included in the price of the unit that were to be picked from the vendor's samples. Rather, the vendor was required to have samples of *all* standard choices and *all* available upgrades from which the plaintiff could choose. Under para. 12(a) of the agreement, all of her selections were to be made from the vendor's samples.

[12] Para. 12(b) of the agreement requires the purchaser to pay the vendor in advance, forthwith upon demand, for all extras or changes that she orders. In order to build the unit therefore, the purchaser must make all of her choices and pay for them.

[13] It is implicit in the agreement as drafted therefore, that to make the choices required of her, the purchaser must know what she was entitled to as the standard items contained in Schedule C that are included in the price of the unit and all of the choices of upgrades that the vendor is willing to allow her to make. The vendor was required to provide samples for all of the choices or upgrades that the vendor made available. It was also required to provide cost details for each available upgrade in order for the plaintiff to be armed with the information required to make the necessary choices.

[14] When faced with a purchaser who could not or would not make her choices, the vendor had the authority under para. 12 (a) of the agreement to make choices for the purchaser and to proceed with the construction of the unit on that basis. The vendor did not proceed in that manner however. Rather, it alleges that the failure of the purchaser to make timely choices amounted to a default and entitled the vendor to terminate the agreement.

[15] Para. 25(a) of the agreement provides for the following terms to govern defaults by the purchaser:

> Upon default of the Purchaser of any of the covenants, representations, stipulations, warranties, acknowledgments, agreements and obligations to be performed under this Agreement, which continues for 7 days, then, in addition to any other rights or remedies which the Vendor may have, the Vendor may deem the Purchaser in fundamental breach of this Agreement and in such event, all deposit monies paid hereunder (including all monies paid to the Vendor by the Purchaser) shall become the absolute property of the Vendor, and may also terminate this Agreement and claim for damages in excess of deposit monies. The Vendor is not obliged to give notice to the Purchaser that the Vendor has deemed the Purchaser to be in fundamental breach, nor is the Vendor obliged to act on the Purchaser's breach promptly or to make an election to terminate at any time prior to the delivery to the Purchaser of notice that the fundamental breach is to be treated as grounds for termination. The taking of a fresh step by the Vendor shall not be a waiver of the Vendor's rights herein, unless the vendor waives any existing breach in writing. The Vendor may, in its sole discretion, offer the Purchaser an opportunity to cure his/her breach, but the making of such an offer, or the failure for any reason by the Vendor to communicate the offer to the Purchaser shall be deemed not to be a waiver of the Vendor's right to terminate the Agreement for the breach.

[16] By contrast, if the agreement is terminated through no fault of the purchaser, para. 26 provides that the deposit money shall be returned to the purchaser with interest from the termination date. It goes on to state however, that in no event shall the vendor be liable for "any costs or damages whatsoever, including, without limitation, any loss of bargain, relocation costs, loss of use of deposit monies or for any fees, professional or otherwise, expended in relation to this transaction."

[17] Among her legal arguments, Ms. Rosenberg claims that the vendor failed to terminate the agreement on a timely basis and she relies upon common law precedents that stand for the propositions that:

a. a party faced with a breach of contract must act upon the breach within a reasonable time; and

b. if the party intends to terminate the agreement consequent upon a repudiation, it must say so within a reasonable time.

[18] As undoubted as those common law principles are, they do not apply to this agreement. Para. 25(a) is clear in its deliberate wording to oust the elements of common law relied upon by

the plaintiff. Under this agreement, the vendor is entitled to wait before acting upon a breach and it could give the plaintiff opportunities to cure a breach without waiving the breach. Moreover, it could terminate the agreement by written notice that was not promptly given as would otherwise be required by the common law. Ms. Rosenberg's counsel was not able to point to any basis in law to prevent competent, adult parties, each of whom had independent legal advice, from agreeing to contractual terms to expressly and clearly oust the common law from their private transaction.

Ms. Krismer's Position – This was a Production Build

[19] Ms. Krismer is an employee of the defendant Crayon Design Company Ltd. Crayon was the vendor's designer and agent. Ms. Krismer was the face of the vendor, the architect, the designer, and the builder to the plaintiff. Mr. Preger accepts that the developer is bound by Ms. Krismer's (and Crayon's) acts on its behalf in her dealings with the plaintiff. In reliance on that admission, the plaintiff let Crayon and Ms. Krismer out of the action during the case management process that preceded the hearing of these summary judgment motions.

[20] Ms. Krismer gave important evidence orally concerning the differences between a condominium development process and the construction process associated with a typical private residence. Ms. Krismer was not put forward by Mr. Preger as an expert witness on the design process. However, her understanding of her role with Ms. Rosenberg drew upon her background understanding of the process in which she was engaged. Some of Ms. Krismer's reactions are better understood in terms of her understanding of the process. I take her evidence then as illuminating her approach and her frustration rather than as an abstract or authoritative dissertation on the construction industry.

[21] Ms. Krismer testified that unlike a custom house project, in a production building process, such as a condominium building, there are significant limits imposed on parties' flexibility. The building has a fixed design. Unit designs are fixed as set out in the agreements of purchase and sale. The developer can agree to allow limited choices if it chooses to do so. Typically, the developer will enter into agreements with trades and suppliers and will have cost surveyed all of the available choices in advance. Purchasers are not given allowances to fill-in whatever they want for a price. Rather, there is a menu of available standard items and optional, fully-costed upgrades. Samples of all of the standard items and the available upgrades are then displayed at the vendor's presentation centre so that purchasers can come and see and touch them as desired. Tiles, for example, need to be seen to be assessed. Seeing a list of tile names does nothing to help a purchaser make subjective design choices. In this project, the developer also had a binder prepared for each unit that contained additional choices for items that may or may not have also been available to view at the presentation centre.

[22] The timing of the project is also a major difference between a production build project and building a private house. In a private scenario, the owner can take as much time as he or she likes for a price. In a production build, efficiency has to rule. Trades are scheduled to go through the building in a sensible order as the building is built. Pipes and ducts and similar building services have to be built and run through lower units to get to upper units. For finishes, rough-ins for electric, mechanical, and plumbing need to be completed in order and on time for

the arrival of the next set of trades. While this is true in a house too, in a production build, once the trades have finished a floor, they move on to other floors. The contracts with the trades make it prohibitively expensive to let purchasers dictate when trades should attend at each of their units.

[23] In addition, instead of there being a relatively intimate group making and implementing all decisions (such as owner, designer, and general contractor in a house) in a production build there are large numbers of people involved. There are multiple, large commercial enterprises engaged. Unions may assign labour. There is substantial government oversight. Controls are needed. Changes require a paper trail from purchaser to designer to architect to builder to trades in order to keep track of what may amount to thousands of customizations in a project. Ms. Krismer testified that in light of the complexity of the communication and paper work processes, the vendor would only finalize floor plans for a unit through the necessary channels once a purchaser signed an upgrade agreement and had paid for her customization selections. Then, the plans were finalized and released to the builder and its trades on site. Those plans were fixed in stone.

[24] As I noted previously, all of this background understanding goes some way to help illuminate the reasonableness of the defendants' ongoing efforts to cajole and demand that the plaintiff make her selections so she could sign her upgrade agreement. The defendants' frustration with the plaintiff's ongoing requests for more information is palpable in their contemporaneous communication.

<u>This was Not Just a Production Build</u>

[25] There is one very significant problem with Ms. Krismer's evidence. The agreement as drafted and Ms. Krismer's understanding of a standard production build all turn on the builder costing and providing samples to a buyer at the outset for all of choices that a buyer can possibly make. Recall that the agreement requires that all selections be made from the samples provided by the vendor. All of the choices are to be listed on a colour and selection form under para. 12(a) of the agreement. Ms. Krismer said that in a production build all of the options are cost surveyed in advance and are available at the presentation centre or in the binder. But her reliance on her understanding of a typical production build was inapplicable in this case on two counts.

[26] First, the plaintiff was able to negotiate some items in her Schedule C that were unique to her unit. The vendor did not have standard or upgrade choices available for these items on day one as these items had understandably not been included on the vendor's menu previously. No prior cost surveying had been done on the items that were unique on the plaintiff's agreement. There is internal correspondence shortly after the plaintiff signed her agreement in which Ms. Krismer instructed colleagues concerning the need to obtain additional choices and upgrade the customization binder for the unique items in Ms. Rosenberg's Schedule C.

[27] Of greater significance however, was a decision by the vendor to allow purchasers to go "off-menu." This building was marketed as offering a unique amount of customization for ultra-luxurious units. The vendor allowed purchasers to go out and source their own choices. Notwithstanding Ms. Krismer's understanding of the process applicable on a typical production

build, for this project, purchasers were *not* limited to the menu of selections assembled, costed, and offered by the vendor in advance. Indeed they were invited to go "off-menu" by Ms. Krismer and the defendants' other representatives. Ms. Krismer and others invited the plaintiff to speak to the vendor's suppliers herself to find other choices that the vendor could then price for her.

[28] At the time of the plaintiff's agreement, the vendor had not yet finalized its contracts with all of its finishes suppliers. In directing the plaintiff to the vendor's approved suppliers, it was Ms. Krismer's hope that she might have some success incorporating the plaintiff's choices with those suppliers into the final contracts to be entered into between the suppliers and the vendor.

[29] Ms. Rosenberg gave evidence of the suppliers working with her and telling her that her choices were standard choices that should come at no cost to her. In addition to being inadmissible hearsay evidence, the pricing of upgrades between the vendor and the purchaser was not the suppliers' decision. It was up to the vendor to price upgrades. In that process the vendor looked not only at the price of goods that needed to be purchased but at handling costs, installation costs, labour, scheduling efficiency, and any number of other variables that were open to it to consider.

[30] So, not only did the vendor not have samples for all of the plaintiff's Schedule C items that it was bound to provide for the contract price, it was faced with the prospect of pricing and supplying an infinite universe of available "off-menu" upgrade choices that the defendants expressly made available to the plaintiff. Perhaps the outcome was inevitable given this plaintiff and the range of choices made available to her. But it was the vendor's decision to run the project as it chose. Ms. Krismer was clear and resolute that purchasers were allowed to go off-menu to an unusual degree on this project. This meant that instead of having all the upgrade choices costed with samples displayed in the presentation centre or in the customization binder on day one, under para. 12(a) of the agreement, Ms. Krismer had to continually price and obtain samples of whatever choices the purchaser brought to her in real time.

[31] The requirements of para. 12(a) of the agreement created serious practical difficulties to Ms. Krismer and her team in dealing with ongoing off-menu upgrades sought by the plaintiff. However, it was open to the vendor to word its contract as it chose. It could have amended its contractual wording to deal with its amended process. It could have imposed all manner of limits or lessened its burden to price and supply samples for off-menu selections. It did not do so. The fact that off-menu purchases were allowed and fell to be dealt with under para. 12(a) of the agreement was expressly accepted by Mr. Preger in argument. That issue is discussed in greater detail below.

The Evolution of the Mini-Trial Process

[32] The parties' positons evolved as the argument of these motions was heard. Each started with a broad, extreme claim that the other simply refused to perform its contractual obligations. As the events unfolded however, the real positions were much more complicated and nuanced.

[33] The parties entered into the agreement of purchase and sale and quickly finalized the descriptions and initial floor plans in Schedules C and D to the agreement respectively. There was time pressure on the defendants to get the basic layout of the plaintiff's unit settled quickly because construction of the building was already under way by the time the plaintiff bought her unit. While details of finishes could wait a bit, the floor plan had to be finalized quickly to allow the unit to be constructed with the walls in the right places and with appropriate rough-ins for services.

[34] The architect prepared draft plans based on Schedules C and D as agreed in September, 2010. The defendants forwarded the initial plans to the plaintiff with her customization binder in October, 2010.

[35] In para. 89 of her factum, Ms. Rosenberg pleaded that her binder:

> ...did not include any standard choices for stones, tiles, hardwood floors, granite or stainless steel counters, the *en suite* tub filler, back splashes, etched-glass, crown moulding, doors, door casings, baseboards, accessories for the washroom, laundry and kitchen, fireplace mantles, tubs, sinks or faucets for the laundry room, kitchen or island sink. Although being advised that the Binder would be updated, at no time did Krismer provide Rosenberg with an updated Binder that reflected the standard finishes for the unit.

[36] Ms. Rosenberg grossly over-stated her case in this argument. Ms. Rosenberg attended the vendor's presentation centre many times while she negotiated her agreement. To the extent that materials were there, she had plenty of access to them. Moreover her complaint that she was not invited back into the presentation centre until late 2011 rings hollow. Had she wanted to go, she could have set up an appointment to do so. She was never barred from attending. In light of her intelligence, including a near photographic memory that she repeatedly displayed throughout the hearing, I have no doubt that she had a very good handle on what was there. She did not demand to go back in because she was looking elsewhere as she was invited to do by the vendor and Ms. Krismer.

[37] The blanket denial in para 89 of the plaintiff's factum was repeated and generalized orally at the first hearing by Mr. Pulver. Ms. Rosenberg essentially denied seeing standard samples for the bulk of her unit. This led me to call for greater details to provide clarification as to how the binder could have been so empty. On the next return of the cross-motions, the parties had prepared a thick record that established that samples of many of the items were indeed provided to the plaintiff in the presentation centre, in her binder, and on a one-off basis throughout the piece despite the plaintiff's bald assertion to the contrary.

[38] The second return of the hearing confirmed for me however, that there were a host of individual issues that led to the parties' stalemate. The cause of the termination of the agreement could not be ascribed simply on the basis of saying either that the vendor did not give *any* standard samples as essentially alleged by the plaintiff or that the plaintiff simply *refused* to make her choices as was essentially alleged by the defendants. Neither extreme position made sense and neither conformed to the very large amount of correspondence on over 200

individualized, detailed items discussed by the parties in real time. Therefore, with input from counsel, I ordered that Ms. Krismer and Ms. Rosenberg give oral evidence on a select number of individual items that the parties would agree were in issue and were illustrative of the 200 or so total issues noted.

The Partial Upgrade Agreement

[39] As mentioned above, Ms. Krismer said that the floor plans and upgrades are normally finalized in an upgrade agreement. It is only once this agreement is signed and money paid for agreed upgrades that the architect prepares final plans to be released to the site. In this case, as time was so short, the parties agreed to enter into a partial upgrade agreement containing the minimum choices needed for the architect to complete the electrical, plumbing, and other basic plans required for the unit to be built with other finishing and design choices deferred for a time.

[40] Although the vendor never provided a material and colour selection form as contemplated by paragraph 12(a) of the agreement, it prepared a Finishes Selections & Upgrades form to record the upgrades chosen by Ms. Rosenberg as choices were made or were priced and offered by Ms. Krismer. The form went through multiple drafts as will be discussed below. The third Finishes Selections & Upgrades form provided by the vendor was attached to the Partial Upgrade Agreement between the parties dated December 17, 2010.

[41] The Partial Upgrade Agreement recited that the parties desired "certain additional improvements, changes, upgrades and/or extras" as set out in the Finishes Selection & Upgrades appendix. The agreement is silent on standard items where no upgrades are chosen.. In the Partial Upgrade Agreement, the vendor covenanted to install and complete all of the upgrades listed in the appendix. It provides that funds paid for upgrades are not refundable even if the transaction is not completed.

[42] The Partial Upgrade Agreement also provides that there will be "no further changes, revisions, deletions to the upgrades permitted" except for discontinued items. Under that agreement, once an item was selected and priced, it was supposed to be final. The vendor and Ms. Krismer complain about the plaintiff's subsequent changes to the plans. However, the vendor allowed her to make changes and Ms. Krismer priced them for her. The vendor could have stuck to its guns but it chose not to do so for its own reasons.

[43] It is also significant that para. 4(a) of the Partial Upgrade Agreement continues to track para. 12(a) of the agreement of purchase and sale in that it also confirms expressly that upgrades are to be selected from samples provided by the vendor. While the defendants argued that the evidence discloses the unreasonableness of Ms. Rosenberg's conduct in failing to make her final choices on a timely basis, it seems to me that the contract provided the vendor with the ability, if not the responsibility, to control the customization process. It was wholly within the vendor's ability to have the samples in one place at one time and to require the purchaser to attend and make choices or have the choices made for her. It could have provided and given the plaintiff 21 days to complete a colour and selection form in which it listed all choices for the plaintiff to make or had her do so as contemplated by para. 12(a) of the agreement of purchase and sale. It

was the vendor's choice to allow off-menu choices without altering the applicable contractual terms that it now seeks to enforce.

[44] The total price for the partial upgrades agreed to in the Partial Upgrade Agreement was $36,441.58. The vendor required Ms. Rosenberg to pay $9,000 on signing the Partial Upgrade Agreement and she did so.

[45] The Finishes Selection & Upgrades appendix to the Partial Upgrade Agreement lists 80 choices. But most are described as "not selected" indicating that a choice was still outstanding. Several of the prices provided for choices that were made were noted to be estimates that were subject to finalization by the vendor with its trades. The Partial Upgrade Agreement also has attached the revised drawings that were based on the plaintiff's selections after reviewing the first drawings that had been prepared by the architects in October.

[46] The defendants had the architects prepare drawings based on the Partial Upgrade Agreement and continued to press the plaintiff for her other choices. The plaintiff continued to make changes to the layout in January that she said reflected errors made by the defendants in their drawings or further choices that she was making as she was being asked to do.

[47] On February 11, 2011, the plaintiff gave her signoff on plans. She wrote "As far as I can see all the changes have been incorporated. Ta daaa!!!...You have my blessings and gratitude that this part is done." She noted only one outstanding issue in her email.

[48] At the hearing, much time was spent discussing the "Ta da" email. It is plainly a signoff by the plaintiff and intended as such. The defendants complain that the changes to the plans in January and February included changes from the Partial Upgrade Agreement that was supposed to have been written in stone. Be that as it may, they accepted the "ta da" drawings and issued plans to site shortly after.

The Vendor puts Construction of the Plaintiff's Unit on Hold

[49] Efforts then focused on all remaining finishings choices. By email dated February 29, 2011, Ms. Krismer wrote to Ms. Rosenberg:

> When we signed off on the electrical, mechanical and floor plan on December 17, 2010, it was with the understanding that these were the final plans. We have since reviewed and revised architectural and mechanical plans several times since, as a result could [*sic*] not issue them to site. We are not doing that with electrical, which we have reviewed for compliance to the signed off drawings and are issuing to the site this week. There can be no further revisions to the drawings. Anything else that may need revision, will have to be priced and approved before we issue. The trades are continuing to build your suite on their contract drawings and will not wait. They have a timeline, which they are required to maintain. As discussed in December, we need all of your final design as soon as possible. The absolute deadline for completion of all finishes, details, specifications must be March 21, 2011....

> As a result of you not being able to issue Mechanical drawings once we did the first review in January, the drawings did not get to site prior to stacks for plumbing being installed. At this time, in order to achieve the layout we have been working towards on site, we are now faced with making several stack revisions. This work is not included in the quoted prices we gave you in December, so I do need to review it with you and have you advise how to proceed.

[50] Under para. 12(b) of the agreement of purchase and sale, if the structural change caused by unilateral placement of the plumbing stack by the vendor was material, the plaintiff had ten days in which she was entitled to cancel the agreement. The placement of the stack affected the kitchen design and layout so the plaintiff may well have had grounds to exercise her termination right. However, she did not do so.

[51] The plaintiff had also learned that the layout for the kitchen set out in the plans did not work. There was insufficient depth for the refrigerator as specified so that if the refrigerator door opened to 90 degrees it would have bumped into the kitchen island. Mr. Arndt argued that this was not a significant issue as there was no impairment of the refrigerator's function. But Ms. Rosenberg fairly noted that in a $2 million condominium, the refrigerator door should not be bumping into another element. It certainly interferes with the flow of movement and therefore the functionality of the kitchen. Moreover, it is just inappropriate to suggest that a fridge door should not be able to open fully and should actually risk bumping into an island each time it is opened. So in addition to the plumbing stack issue, Ms. Rosenberg had started redesigning the kitchen to move appliances and walls to fix the layout problem. The redesign was extensive.

[52] I am not assessing a breach here. Rather, this dispute between the parties informs a major element of the overall dispute. Given Ms. Rosenberg's concerns, Ms. Krismer sent Ms. Rosenberg to work with the vendor's cabinet designer The Gracious Living Centre ("TGLC") to help her finalize a design her kitchen. Ms. Rosenberg says she worked with the owner of TGLC who helped her design a kitchen for the space and assured her that he was bringing it in within budget so that there should be no extra cost.[1]

[53] While the plaintiff was out working with the vendor's various suppliers, the March deadline that had been set by Ms. Krismer was amended and then passed. As the plaintiff had not made all of her selections by May 2, 2011, Ms. Krismer told the plaintiff that the vendor had put the finalization of her unit "on hold." The plaintiff then proceeded throughout the rest of 2011 to try to work with the vendor's suppliers to finalize plans for finishes.

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[1] I have already indicated that such hearsay assurances from tradespeople are not admissible for the truth of its contents. Neither would it be binding on the vendor. The fact that it was said just informs an understanding of the plaintiff's conduct and the reasonableness of her discontent with being charged extra for the kitchen as redesigned with the supplier when the vendor could not deliver the kitchen on the initial plans as agreed.

[54] Ms. Rosenberg came back to Ms. Krismer with a revised kitchen layout in the summer. Ms. Krismer pointed out several major changes in the design and layout that Ms. Rosenberg had worked on with the supplier. Rather than rejecting the new design however, Ms. Krismer priced it and told Ms. Rosenberg that it would cost an additional $14,000. Ms. Rosenberg could not understand why that would be. She had not been given standard plans. Schedule C was very general in its description of the cabinetry that was included in the kitchen. It turned out that the vendor had internal ideas about the quantities and qualities of different lines of cabinetry offered by TGLC that it would treat as standard or included. It did not share that information with her at the outset however. Ms. Rosenberg says that the vendor never gave her shop drawings for a standard kitchen to which she could compare her design. In fact, Ms. Krismer gave her drawings but not until November, 2011. That communication just begged the question, how could the plaintiff have known what was included or not before November 11, 2011 at the earliest? That was six months after the vendor had put her unit on hold and ten months after it had demanded that she make her final choices. Even in November, 2011, it is not clear to me that the vendor told the plaintiff what aspects of the Neos brand or Rational brand cabinetry lines were included in the price of her unit and which were upgrades.

[55] Ms. Rosenberg testified that Ms. Krismer had offered to speak to the supplier in order to clarify with it what was standard or not. Ms. Krismer did not deny this. Neither did she speak to the supplier for Ms. Rosenberg. In fact, she expressly refused to attend a meeting with the plaintiff and the kitchen supplier. She felt that the design was for the plaintiff and the supplier. The cost was for the developer. She probably did not want to be squeezed by the supplier in front of the client. The way Ms. Krismer handled "off-menu" items was that the plaintiff would bring forward her requests and Ms. Krismer would price them and announce whether they were an upgrades and at what price. But the vendor never told Ms. Rosenberg what she could change to eliminate the $14,000 charge or how she could get her kitchen made with standard components in light of the placement of the plumbing stack and without the refrigerator being cut off by the island.

[56] I am not finding a breach in this part of the story either. What it illustrates is that the design process is an iterative one. If the vendor could not or would not provide a list of samples for all choices required and it was willing to let Ms. Rosenberg go "off-menu," then she cannot be faulted for trying to do so. This is not to ignore however that the burden put on Ms. Krismer by the plaintiff's delays and volume of ongoing inquiries became significant in 2011. Rather than continue pricing one-off requests, Ms. Krismer determined to wait until she had received nearly all of the plaintiff's design plans before pricing them *en masse*. This accounted for most of 2011. Ms. Krismer followed up periodically seeking to push Ms. Rosenberg forward. For her part, Ms. Rosenberg was equally frustrated as she was working with suppliers as she had been invited to do, but she did not know in any comprehensive way what she was entitled to have as standard designs and how she could keep her designs within the defined terms of Schedule C.

[57] The inter-personal relationship between Ms. Krismer and Ms. Rosenberg also became strained in this interregnum. Ms. Rosenberg tried to enlist the assistance of other representatives of the developer and was told that Ms. Krismer was the only person with whom she was to communicate.

[58] Ms. Krismer confirmed in cross-examination out of court that while she had the means to provide a full listing of what was standard and included in the unit (at least before Ms. Rosenberg's customizations were included) she did not do so. Mr. Hart, the project manager, confirmed in cross-examination that the defendants understood that Ms. Rosenberg was moving forward during the mid-2011 interregnum.

Enter the Lawyers

[59] On November 17, 2011, Ms. Rosenberg had her real estate lawyers write to the lawyers for the vendor.[2] She expressed willingness to pay for upgrades to which she had agreed to that time and expressed her need for information as to her remaining options. She complained that no one was getting back to her.

[60] In response, Ms. Krismer wrote to Ms. Rosenberg on November 17, 2011. She opened with "I hope you are well, and you've had a great fall." thereby confirming a period of silence as alleged. In an attempt to move matters forward, Ms. Krismer said that she had sought prices for Ms. Rosenberg's plans for the kitchen, bathroom, and laundry room so that the plaintiff should be ready to receive prices and make her choices shortly. It is also in this email that Ms. Krismer agreed to provide Ms. Rosenberg shop drawings for the Rational brand cabinetry line, "as well as a copy of the base contract drawings, which will give you a reference about why the costs of revisions are what they are." Ms. Krismer also asked Ms. Rosenberg to identify any areas where she knew that she did not want to pay for an upgrade as this would save Crayon from wasting time obtaining unnecessary pricing for those issues. Finally, Ms. Krismer enclosed a new Finishes Selections & Upgrades Form reflecting a few further prices obtained by Ms. Krismer to that point.

[61] By letter dated December 22, 2011, the vendor's lawyers responded with their understanding of the situation:

> As provided in our correspondence dated June 28, 2011, the Purchaser is not purchasing a 'custom unit'. The Purchaser is only entitled to make selections of finishes and features within the Unit as per the Purchase Agreement.
>
> The Vendor and its representatives have been more than available and cooperative with the Purchaser and finalizing the selections the Unit. Correspondence between the Purchaser and its representatives evidence this. Further, our client advises that the Purchaser has consistently delayed the making of decisions with respect to the selection of finishes and features within the Unit. In addition, the Purchaser has consistently modified her selections, once she has made her selections. The Purchaser's delays and constant changes to the selections result in delays in finishing the Unit.

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[2] The lawyers for both parties at the outset were not with the same firms as counsel who appeared on these motions.

> Pursuant to section 12 (a) of Schedule "A" of the Purchase Agreement, this letter is to serve as written notice to the Purchaser that the Purchaser is to complete the Purchaser's selections of finishes and features for all items for which the Purchaser is entitled to make selections as per the Purchase Agreement on or before Thursday, January 12, 2012 at 5:00 p.m. (Toronto time). In the event that the Purchaser does not complete the selections by this time, the Vendor shall, in accordance with section 12 (a) of the Purchase Agreement, complete the selection of features of finishes within the Unit in the Vendor's sole and absolute discretion, on behalf of the Purchaser. The Purchaser shall be bound by the Vendor's selections in this regard. [Emphasis in original]

[62] The letter also advised that as a result of the purchaser's delays, the Confirmed Possession Date for the unit under the agreement was extended to June 28, 2012.

[63] This letter is notable for several points. First, the one sentence that the author chose to highlight with underlining was not completely correct. It is true of course that all purchases are covered by para. 12(a) of the agreement. But, as noted previously, the vendor concedes that the purchaser was entitled to look off-menu. Second, it is telling that there is no reference, or allegation, that the plaintiff was committing any breach of the agreement. Rather than alleging a breach and threatening termination, the vendor threatened to exercise its right under para. 12(a) of the agreement to make Ms. Rosenberg's choices for her. Third, the vendor purported to give the 21 day notice under para. 12(a) of the agreement, but in slightly different words than are used in that paragraph of the agreement. Recall that para. 12(a) provides that the plaintiff is required to "complete the Vendor's colour and material selection form for those items of construction or finishing for which the Purchaser is entitled to make selection pursuant to this Agreement." Instead, the counsel insisted that the purchaser complete her "selections of finishes and features for all items for which the Purchaser is entitled to make selections as per the Purchase Agreement." By deleting reference to the "Vendor's colour and material selection form" the vendor was eliminating or ignoring the plaintiff's key concern. Her complaint was that she did not know which items were standard under the agreement and which items were extra or upgrades. Had the vendor provided a form listing the "selections of finishes for all items for which the purchaser is entitled to make selections as per the Purchase Agreement," the matter would have been resolved readily or at least brought to a head. In fact, the vendor's threat to make the choices for the plaintiff under para. 12(a) must have been particularly galling to Ms. Rosenberg as it suggested that the vendor had the ability to identify and make each of the choices and yet it continued to decline to share that information with the plaintiff.

The Vendor Fills the Purchaser's Shopping Cart

[64] The parties met on January 4, 2012 with many of the samples from the presentation centre having been moved to the site of the meeting. Ms. Rosenberg made further choices that day. A Crayon employee who was present with Ms. Krismer recorded the following conversation:

> [Purchaser] does not want to spend extra, if something has an extra charge, then present this to [Purchaser] and she will decide whether or not to proceed [with] extra. If she decides against extra then we will steer in [standard] direction.

[65] The next day, Ms. Rosenberg delivered a set of plans detailing the status of her choices as far as she understood them after the meeting. Ms. Krismer plainly understood that, as set out in her colleague's notes, Ms. Rosenberg was bridling against paying extra charges and wanted to get the unit built without paying extra as much as she could. With this understanding, Ms. Krismer testified that she proceeded to obtain prices for the new plans based on a "shopping cart" analogy. That is, she obtained and presented prices for the items shown in Ms. Rosenberg's plans on the express, mutual understanding that for each item, Ms. Rosenberg could keep the item in her shopping cart and pay the price claimed by the vendor or remove the item and go with the standard promised by the contract.

[66] It sounds simple enough. What happened?

[67] On February 17, 2012, Ms. Krismer provided another draft of the Finishes Selections & Upgrades form containing near final pricing of all elements sought by the plaintiff. The form lists 205 choices with a total price of $230,618.91 (not even including the kitchen).

[68] The plaintiff was aghast.

[69] Ms. Rosenberg responded with a lengthy email dated February 22, 2012. The soured relationship between Ms. Krismer and Ms. Rosenberg is reflected in the tone of the email. Ms. Rosenberg claimed that 90% of the items priced as upgrades by Ms. Krismer were actually included in Schedule C of the agreement of purchase and sale. She identified in a painstaking, item-by-item basis, those items that she felt were included in her Schedule C (and should have been included in the contract price) and made other comments about problems and errors in the pricing provided.

[70] Ms. Krismer responded, in part, as follows:

> The price of the extras sent to you on Feb 17 is based entirely on your APS and is accurate to the standards for the project. Statements such as I have had this information for 7 months is incorrect. I have had the final information since Jan 6th and only final kitchen drawings since Jan 30 of 2012. It took over a year to receive the finishes for your suite after the Dec 17 2010 sign off on the floor plans.
>
> I will be ready to meet with you as soon as we have all the pricing completed. This is not refusal to meet with you, this is refusal to waste more time. The meeting will not be productive until we can discuss your suite in the light of pricing. I must have all documentation in place in order to provide you with accurate numbers and I rely on the trades to give me these prices which I have told you before. This also requires review of all the quotes to ensure they are correct.
>
> **This is a collaborative undertaking and should be done with respect and professionalism which includes allowing me the time to get correct numbers.** If you want to meet on Feb 29th I will estimate these final numbers to ensure we have covered potential costs. [Emphasis added]

[71] The overwhelming nature of the pricing task to Ms. Krismer is clear from her plea for time in face of her ongoing criticism of the amount of time that the plaintiff had taken already.

[72] On February 29, 2012, Ms. Krismer provided a detailed response to Ms. Rosenberg's itemized issues. Ms. Krismer explained to Ms. Rosenberg that changes to the plans have to be built by the builder and its trades so that if Ms. Rosenberg wants an extra, she has to pay their prices that include six levels of supervision which cannot be overridden. She wrote "[a]s a result, pricing that I have given you is not negotiable and is accurate." Confirming the shopping cart approach, she continued, "[y]our decision is either to accept the price, or to select standard."

[73] By letter dated April 3, 2012, the vendor's lawyers confirmed that Ms. Rosenberg made all of her design and finishing selections by February 6, 2012, but noted that she had not yet accepted the pricing or made arrangements to pay for those choices.[3] Counsel recited para. 12(b) of the agreement requiring the purchaser to pay on demand for all extras specifically ordered. The vendor agreed "as a courtesy" to allow the purchaser to finalize her selections, accept pricing, and pay for her upgrades by April 25, 2012, failing which, "the Vendor will complete the Unit based upon the selections that the Purchaser has last finalized without upgrades and for those items that the Purchaser has not finalized, the Vendor shall, pursuant to section 12(a) of the Purchase Agreement, make such selections on behalf of the purchaser."

[74] The letter continued.

> **The Vendor will not be offering the Purchaser another or further opportunities to finalize selections for the Unit. This is the Purchaser's last opportunity to finalize your selections for the unit.** [Emphasis in original]

[75] Finally, counsel extended the Confirmed Possession Date under the agreement to December 3, 2012.

[76] Also on April 3, 2012, the vendor provided its next Finishes Selection & Upgrades form that lists 226 matters with the total price of $314,268.20. The form expressly notes that a few of the prices were not yet finalized.

[77] By letter dated April 24, 2012, Ms. Rosenberg's counsel responded, in part, as follows:

> Given that Ms. Rosenberg has not had the opportunity to properly review and choose her selections with full particulars of what is included in the Purchase Price and what is extra,

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[3] To avoid confusion I note that the reference to Ms. Rosenberg having completed her selections in February meant that she had advised Ms. Krismer fully of what she wanted. Ms. Krismer was pricing those choices and there still remained a final selection process to decide what items remained in Ms. Rosenberg's shopping cart and which were to be removed depending on the pricing (and resolution of any disagreements as to whether they were standard or upgrades). To that extent, selections remained outstanding.

> the Vendor is not entitled to make unilateral selections on Ms. Rosenberg's behalf. Rather, as the stage of the Unit is such that a few more weeks will not cause undue delay, Ms. Rosenberg ought to have at least a few more weeks to make her selections. Accordingly, I would suggest that upon receipt of the list of the Vendor's standard selections, the opportunity to see the samples reference thereon and confirm pricing of any extras, Ms. Rosenberg will be in a position to make her selections within 2 weeks of receiving those items. Given the breakdown in the relationship between Ms. Rosenberg and Ms. Krismer, I would ask that another representative of the Vendor deal directly with Ms. Rosenberg.
>
> Please confirm that this arrangement is acceptable to your client, provide me with a copy of the Vendor's original standard selection list and advise of dates to set up a meeting for Ms. Rosenberg to see the selections available to her.

[78] By letter dated April 30, 2012, delivered on a "with prejudice" basis, counsel for the vendor took umbrage at the plaintiff's allegations that she "has not been given a fair opportunity to fully complete the Vendor's colour and selection with respect to those items that require selection for the unit." The omission of the word "form" is, once again, significant. Counsel then alleges that the customization binder that had been provided to the plaintiff outlined "in detail what constituted standard finishes for the Unit." That is only correct to the extent that items were included in the binder. As noted previously, many standard items were also contained in the presentation centre and some were provided by Ms. Krismer throughout. If counsel was suggesting that the vendor has ever provided a full listing of standard items for all the items set out in Schedule C of the agreement of purchase and sale, she has been contradicted by Ms. Krismer's evidence. Moreover, I find that this is not so.

[79] The vendor's lawyer continued:

> If the Purchaser is in any way unclear on what constitutes an upgrade, we refer you to the Purchase Agreement, the Standard Finishes Binder and the [April 3, 2012 Finishes Selection & Upgrades]. These documents explicitly provide details on what is a standard finish included [in] the purchase price for the Unit and what is an upgrade for the Unit.

[80] Counsel once again ducked the issue. The plaintiff understood that Ms. Krismer was claiming up to 226 extras. But the plaintiff could not understand is why the bulk of those items were claimed to be upgrades and were not included as standard under her Schedule C. Moreover, to the extent that some were extra, the plaintiff wanted to see what her alternative standard option was. Despite counsel's assertion to the contrary, neither the binder nor the further disclosures made by the vendor dealt fully with unique items contained in Ms. Rosenberg's schedule C and her off-menu discussions with suppliers.

[81] Continuing the trend, it also appears that the language that counsel chose to highlight in his April 3, 2012 letter (stating that there would be no further extensions of time) was another hollow threat despite its bold font as the vendor agreed to provide yet another two weeks as a final, final opportunity for the plaintiff to make her selections and pay for them. Counsel then reiterated the vendor's (equally hollow) threat that if the plaintiff did not comply, it would

complete the unit based on the plaintiff selections without upgrades and make choices for the plaintiffs choices have not been made under paragraph 12(a). The vendor also insisted that only Ms. Krismer could work with the plaintiff going forward.

[82] Counsel continued to exchange letters in which, like ships passing in the night, the plaintiff's lawyer asked for comprehensive set of standard finishes and counsel for the vendor continued to assert that the binder was complete.

[83] A meeting was held between the clients on May 9, 2012. On May 28, 2012 counsel for Ms. Rosenberg provided a 25 page detailed list of her responses to all of the claimed extras explaining why she believed some to be standard, where she needed to see a standard alternative, and removing others from the shopping cart. Realistically, that is where matters ended. No final Finishes Selections & Upgrade form was ever provided by the vendor. Ms. Krismer washed her hands of the plaintiff and did not deal with her further.

Findings on the Substance of the Upgrades Disputes

[84] As is apparent from the foregoing recitation, the parties' positions had become entrenched. The relationship among individuals was beyond repair. However, in order to try to assess who was "right" or who was "reasonable" and, perhaps, who was complying with the contract and who was in breach, it is necessary to dig into some of the details of the 226 upgrades claimed by vendor.

[85] In the discussion that follows, references to item numbers are to the listing set out in the vendor's April 3, 2012 Finishes Selections & Upgrades form.[4]

a. Item 20 - Foyer Tile - $2,640

[86] The plaintiff claims that Jura limestone and Greystone marble should be included in her foyer tile. Schedule C provides that flooring in the foyer includes "marble, limestone or granite tiles." The defendant produced pictures of the presentation centre, as well as a copy of the tile list sent to the plaintiff in January, 2012. Although the plaintiff claims that she saw Greystone marble in the presentation centre, this is inconsistent with her repeated denials of being provided access to the presentation centre in any meaningful way. Under the terms of para 12(a) of the agreement, the defendant is entitled to choose the standards and upgrades for the unit as long as they meet the description in Schedule C. In addition, the plaintiff advises that the styles that she picked were less expensive than some of the vendor's standards. As noted previously however, the vendor was not obliged to pass on its wholesale costs of materials. In setting a price, the vendor was entitled to consider its other costs associated with the plaintiff's choices. If the

[4] Readers are advised that all of the information needed to understand the outcome of the factual recitation that follows is summarized in para. 112 below. This lengthy section of the Reasons is recited out of deference to the parties who lived through the issues and gave evidence about them and for completeness.

plaintiff did not wish to pay the vendor's price, she was free to take these tiles out of her "shopping cart."

[87] This is one example, therefore, in which it appears to me that the position of the vendor was correct. I note in passing however, that the vendor only provided its list of standard tiles to the plaintiff in January, 2012, almost a year after it had purported to demand that the plaintiff make her choices and nine months after it put her unit on hold.

b. Item 27 – Knife Edge Detail - $9,000

[88] This charge relates to a design detail proposed for the drop ceiling in the gallery. Under Schedule C, the plaintiff was entitled to determine ceiling heights where possible. As a result of work done by the vendor in building out the unit, the ceiling in the gallery had to be dropped. The gallery also functioned as part of the return air system for the unit. The plaintiff claimed that she was entitled to receive the knife edge detail in return for the defendant having dropped the height of the ceiling. In cross-examination, Ms. Krismer advised that regular grills or crown molding were standard finishes to accommodate return air.

[89] This is another example of the plaintiff overstating the case. It is clear from Schedule C that the ultimate choice for ceiling heights has to and does belong to the vendor. The plaintiff confirmed that she had told Ms. Krismer to delete design elements that carried an extra cost. The only issue with this item then is why it continues to remain in the shopping cart and carry a cost as at April 3, 2012.

c. Item 38 – Microwave Drawer - $1,450

[90] The plaintiff was entitled to a combined microwave convection oven. She chose instead a microwave steam oven. TGLC told her that her cabinetry design for her chosen microwave would not work. The plaintiff deleted this item from the shopping cart and yet it continued to show up in the vendor's April 3, 2012 listing.

d. Item 39, Wall Oven $500

[91] The plaintiff is entitled to a particular wall oven as set out in the customization binder as a standard product included within schedule C of her agreement. In addition, she chose a microwave oven of the same brand, but a 2012 model. Ms. Krismer thought that the plaintiff would want to upgrade her wall oven to the 2012 model so that the handles matched the handle on the newer model microwave. In their February 17, 2012 Finishes Selections & Upgrades form, the 2012 model wall oven was listed with no extra cost. In the March 26, 2012 iteration of the form, the vendor proposed to charge Ms. Rosenberg $2,135 just to change from the 2010 to 2012 model year. In the April 3, 2012 form, the vendor proposed a price of $500.

[92] It seems to me that this item presents an example of the iterative design process working. Ms. Krismer made a helpful design suggestion that probably would have been accepted by Ms. Rosenberg, all things being equal. Ultimately, Ms. Rosenberg determined that she could live without matching handles for the price offered.

[93] The evolution of the pricing is also interesting. The vendor's position has vacillated on pricing throughout. Ms. Krismer conceded in examination that there were times where she would offer changes to the standard item at no cost provided that she was satisfied that the change could be made conveniently and at no cost to the vendor. At other times, Ms. Krismer stated that pricing was solely a matter for the vendor and there was some correspondence suggesting that once the defendants were fed up with Ms. Rosenberg, the vendor determined to treat any deviation at all from any element of Schedule C or the plans at Schedule D of the agreement as a change that entitled it to charge for the item in full as an upgrade. At the outset of the motion, much stress was laid by the vendor's counsel on any change suggested by Ms. Rosenberg, no matter how trivial, as justification for treating items as an extra or upgrade completely. Ultimately, however, some reason has prevailed and a more realistic price for the upgraded model was arrived at. As I said previously, had the matter resolved in the ordinary course, I expect that Ms. Rosenberg would have accepted this extra. It was plainly open to her however eliminate it from her shopping cart and she chose to do so.

e. Items 70 and 71 – Stainless Steel Countertops

[94] Schedule C to the agreement expressly entitles the plaintiff to choose from a selection of countertops in stone, Corian, and stainless steel (with 1 ½ inch square edged nosing). In January, 2012, Ms. Krismer advised Ms. Rosenberg that she believed that it would be possible for her to obtain ¾ inch nosing at no extra cost. Previously, Ms. Krismer had obtained a quotation from the vendor's steel supplier and determined that the steel countertop sought by the plaintiff, "is coming in less than the 125 /sq ft budget, but more than the price of stone." Yet at that time, she reported to the project manager that she was, "inclined to charge her for the 'custom' nature of the counter, as well as, add extra money in for site work just in case." That is, Ms. Krismer understood that she could obtain the plaintiffs desired countertop within the budget set by the vendor with its supplier and yet she proposed to charge Ms. Rosenberg for it anyway because she could. Ultimately, however, the plaintiff's January 5, 2012 drawings increased the quantity of steel required for the kitchen. In addition, Ms. Krismer testified that she had simply been wrong in the January meeting (when she suggested that it might be a no charge upgrade) because the nosing detail desired by the plaintiff had to be fabricated by hand.

[95] As to the quantity of steel required, the plaintiff pointed out that as a result of the changes to the kitchen cabinetry necessitated by the problem discussed above with the refrigerator depth, the wall behind the oven had changed from a gabled wall (that TGLC advised it could not make) to a glass wall. This led to a change in the cooktop and necessitated design changes that increased the amount of steel countertop. All of this seems quite reasonable in a cooperative, iterative design process. Ms. Rosenberg understands that she would have to pay extra for increased square footage of steel. However, when the parties left off, she was extremely dubious of the extra charged and her suspicion has been borne out by Ms. Krismer's internal pricing memo.

[96] In my view, this matter was unresolved but was soluble had the parties been able to continue discussions in good-faith.

f. Item 74 – Starfire Back Splash - $4,850

[97] This charge related to an upgrade for low iron glass. The plaintiff had vacillated in her instructions. She originally sought this high-end product throughout the unit. But, as noted above, she ultimately asked Ms. Krismer to remove design upgrades where possible

[98] Ms. Krismer was very clear that this was included in the April 3, 2012 form simply as an option for the plaintiff to consider and to remove from her shopping cart if she so desired.

g. Item 76 Island Sink - $2,150

[99] Schedule C of the agreement provided that the plaintiff was entitled to a single bowl stainless steel undercount sink on her island in the kitchen. The customization binder only showed a Franke brand professional series sink for the kitchen. Ms. Krismer claimed that plaintiff was only entitled to a "bar" sink on the island and that this was the only unit in the building that had one. As the Franke brand professional series did not include a bar sink, Ms. Krismer determined that a different brand of sink would be the standard. The sink that she chose was tiny and generally useless. . It certainly did not befit a luxury unit. Nor would it be especially useful to someone preparing food on the island. Be that as it may, it was not in the binder. In fact, it was not disclosed as the standard until February, 2012. I am not sure where Ms. Krismer determined that the sink on the island was to be a bar sink as the description in Schedule C does not contain that description. Once again, the timing is also significant. In addition, this is one clear example of an item that was not in the binder or the presentation centre at all. The whole exchange demonstrates the inaptness of the vendor's former counsel's ongoing responses and unwillingness to engage with the plaintiff, despite Ms. Krismer referring to the process as a "collaborative undertaking."

[100] By April 3, 2012, Ms. Rosenberg knew what the vendor claimed as the standard. But she disagreed with the plaintiff's entitlement to choose a dysfunctional bar sink instead of the matching sink that she sourced. This was an item in *bona fide* dispute at the time. Had the vendor purported to choose its standard on Ms. Rosenberg's behalf, a neat issue would have been joined for negotiation, mediation, or perhaps even small claims court. But its position here is that Ms. Rosenberg was in breach of the agreement in failing to choose one way or the other.

h. Item 77 Faucets - $7,770

[101] According to Schedule C, the plaintiff was entitled to a "designer quality faucet with vegetable spray in chrome or matte nickel finish." The vendor's standard sample in the binder did not come in matte nickel finish. Moreover, it did not have a vegetable spray. The faucet head could be pressed so as to make the water shoot out in a spray pattern. That is simply a dual-function faucet. I accept Ms. Rosenberg's evidence that a vegetable spray is a separate or extendable head on a flexible hose to be used to wash vegetables. It was Ms. Krismer's testimony that Ms. Rosenberg saw the standard at the presentation centre and saw that it functioned *like* a vegetable spray. The cost of the standard faucet shown in the binder at the retail store Taps was approximately $1,300.

[102] In my view, a faucet that functions like a vegetable spray is not a vegetable spray. This item was not properly an extra or an upgrade.

i. Items 89 – 20 Studs for Fireplace – @$220 = $4,400

[103] Schedule C provided that Ms. Rosenberg was entitled to a specific model of three-sided fireplace. Initially, the vendor determined that it could not deliver the three-sided fireplace that it agreed to provide because it was not yet approved for sale in Canada. Ms. Krismer suggested that Ms. Rosenberg look in the binder and choose a two-sided unit up to 6 feet in width. Ms. Rosenberg chose the 52 inch model. In addition, Schedule C provided that Ms. Rosenberg was entitled to "a selection of plaster or wood mantles and the choice of selected stone surround and hearth." Initially, the plaintiff agreed to finish the fireplace wall herself in the Partial Upgrade Agreement. Then she asked for a stone wall above the fireplace.

[104] Ms. Krismer claims that the 52 inch fireplace chosen by Ms. Rosenberg was not standard. But this was not an issue of standard or not. The vendor was in breach of its obligation to provide the specified model and Ms. Krismer had offered up another model in return. Whether that was just an initial suggestion or a binding compromise, the question of whether the item chose was standard or not was not the appropriate question for this item.

[105] Ms. Krismer said that to accommodate such a large fireplace and the stone wall desired by Ms. Rosenberg required extra bracing studs for the wall. It is significant again that Ms. Krismer did not price fireplace alternatives until after receiving Ms. Rosenberg's plans in January, 2012. Ms. Rosenberg had no basis to know that the vendor would consider the 52 inch model that she selected from the binder at Ms. Krismer's suggestion to be an extra. This issue only arose in the spring of 2012 therefore. Ultimately, the original three-sided fireplace that the parties had agreed upon became available in Canada. Had the parties not become deadlocked, they might have gone back to original contract item that included installation (and hence studs). The vendor did not establish that it was entitled to charge this item as an upgrade.

j. Item 114 – Main Bathroom Vanity - $2,080

[106] Under Schedule C, the plaintiff was entitled to a "quality wood vanity cabinet." No wood option was ever shown to the plaintiff by the vendor. The vendor's standard cabinetry was faux wood with a lacquer finish. Having said that, the plans attached to the Partial Upgrade Agreement and referenced in the "ta da" email, show a simple rectangular vanity. The plaintiff's design included a cabinet of double height.

[107] While the plaintiff seems to have been asking for something extra, I find that the vendor also never provided a standard sample that met the description Schedule C as well. This matter remains unresolved with both sides deviating from Schedule C.

k. Item 181 – Master Ensuite Vanity - $7,815

[108] Under Schedule C, the plaintiff was entitled to "custom vanity cabinetry in a selection of finishes" in the master *ensuite* bathroom. The vendor's standard was provided to Ms. Rosenberg by Ms. Krismer on November 17, 2011. They are not "custom cabinetry" at all, but rather were

all pre-fabricated factory standard models. However, the plaintiff certainly added to the vendor's design. This matter too therefore remained unresolved with both sides deviating from Schedule C.

l. Item 123 – Main Bathroom Shower Assembly - $915

[109] Schedule C provided that the plaintiff was entitled to a "showerhead on a slide bar and a toe faucet." This item was unique for Ms. Rosenberg's unit. Ms. Rosenberg understood that Hansgrohe brand faucets were the standard used by the vendor generally. Ms. Rosenberg was not able to obtain a Hansgrohe showerhead on the slide bar with a toe faucet from the vendor's supplier. When Ms. Krismer indicated that this would be an extra, the plaintiff used the binder and picked separate components to suffice. It was during the mini-trial that Ms. Krismer advised for the first time that she had determined that a Rubinet brand shower and toe faucet were standard for the project.

m Item 156 - Master Ensuite Additional Stone Flooring - $780

[110] The plaintiff was entitled to stone flooring in the master *ensuite* in accordance with Schedule C. On the plaintiff's plans, the *ensuite* opened directly into the bedroom with no clear wall or other demarcation. There was a makeup table included by the plaintiff as part of the *ensuite* cabinetry design. Ms. Krismer determined that the demarcation between the stone flooring of the *ensuite* and the commencement of the wood flooring of the bedroom would essentially bisect the makeup table. It is apparent that Ms. Krismer was concerned that because of the placement of the makeup table, the plaintiff had extended her *ensuite* so that area of the stone floor would exceed the amount of stone normally installed by the vendor in the standard *ensuite*. Nothing in the contract entitled the vendor to draw an arbitrary line where it said the *ensuite* ended and the bedroom began that did not conform to the actual floor plans. This matter was not properly an upgrade therefore. Having said that, had the vendor fairly disclosed its concern that it normally budgets for X square feet of stone and that Ms. Rosenberg's design required an additional Y square feet there was probably a fair basis for a discussion.

n. Item 197 – Tub Filler - $3,390

[111] Schedule C provided that the plaintiff was entitled to a "floor mounted tub filler for freestanding tub." This was another unique fixture for the plaintiff's unit that was not in the binder or the presentation centre. When the vendor constructed the unit, it failed to rough-in plumbing along the side of the tub where the freestanding faucet assembly was meant to go. (This is the same placement regardless of the no-charge change in the tub model agreed by the parties.) The plaintiff proposed a multi-piece faucet set that she sought in lieu of what she had bargained for. Ms. Krismer purported to provide a standard alternative in May, 2012, and suggested that the vendor could install a freestanding tub filler at the end of the tub. While complying with the words of the contract in that she was offering a tub filler, this made precious little sense from a function or a design viewpoint. It was not an offer within the parties' reasonable expectations in my view. This matter remains unresolved as it was caused by the vendor's failure to rough-in the correct plumbing.

Conclusions from the Survey of Upgrade Claims

[112] I have not recited all of the examples on which the parties gave evidence at the mini-trial, let alone the 226 total items listed in the April 3, 2012, Finishing Selections & Upgrades form. There is no benefit to going further. Nor are there any real surprises in the foregoing recitation. The individual items represented the give-and-take and back-and-forth that one would expect in a normal iterative, collaborative design and build undertaking. In some examples, the plaintiff overreached and tried to claim as standard items that she knew or should have known exceeded the vendor's offering. In others, the vendor failed to provide a standard sample that met the description of the items for which Ms. Rosenberg had bargained. In some cases the vendor's form still included prices for items when it knew that the plaintiff had selected to go with the standard. In many, neither side was completely right or wrong and had the parties been able to sit down and negotiate in good faith, the matter should have been resolved. I reject, again, the extreme positions adopted by each party. The vendor did not fail to provide standard samples of nearly everything as alleged in paragraph 89 of Ms. Rosenberg's factum. Neither did Ms. Rosenberg simply refuse to make choices when confronted with understandable samples of the vendor's standard offering and upgrade options. In most cases, there is much gray between the black and white asserted by the parties.

[113] However, saying that the parties ought to have been able to settle by negotiating in good faith does not resolve the contractual issue. But it is necessary to set out the nature of these disputes to inform the endgame.

Re-Enter the Lawyers

[114] By letter dated October 29, 2012, Ms. Rosenberg's counsel advised that she had retained the services of an engineer to map the unit as it then existed. This exercise led Ms. Rosenberg to conclude that, "there are numerous deficiencies in the construction of the unit, which cannot be corrected without major construction, if at all." The letter concludes with the following:

> Accordingly, it will be necessary to proceed with litigation of this matter. Would you kindly confirm you will accept service of the statement of claim.

[115] The vendor retained its current counsel to carry the litigation. By letter dated November 21, 2012, Mr. Preger advised that he had instructions to accept service of a statement of claim. However, first, he made an inquiry:

> As a preliminary matter, however, I would ask you to confirm in writing whether your client intends to complete the Agreement. If I do not have response by 5 pm on November 27, 2012, my client will proceed on the basis that your client does not intend to complete the Agreement.

[116] It was apparent to the vendor that the plaintiff's position had changed significantly. Prior to October 29, 2012, she was asking for details to allow her to make final design choices. However, in her counsel's October 29, 2012 letter she indicated that she would proceed with litigation because deficiencies in construction meant that the unit that she agreed to buy could

not be built without major construction, if at all. In response, Mr. Preger's question was certainly an appropriate one.

[117] Rather than responding with a letter, the plaintiff issued her statement of claim on December 6, 2012. In the statement of claim, the plaintiff sought specific performance of the agreement, damages of $1 million in the alternative, a declaration that the vendor frustrated or fundamentally breached the agreement in the further alternative, rescission of the agreement in the further alternative, an order restraining the vendor from selling the unit, an order restraining the vendor from completing the unit without her agreement or order of the court, an oppression remedy, and further damages.

[118] The plaintiff's position was as clear as mud. At one and the same time she said that the unit could not be constructed in accordance with the agreement, yet she wanted specific performance of the agreement. She wanted specific performance, yet she wanted the return of her deposit. She wanted the return of her deposit, yet she wanted expectancy damages for loss of bargain. She wanted expectancy damages, yet she sought the remedy of rescission. Moreover, while waiting for the court to determine whether the plaintiff is entitled to rescind the agreement or declare it at an end, the plaintiff sought an injunction to prevent the plaintiff from selling the unit that she knew could no longer be built in accordance with her agreement without major construction if at all.

[119] The plaintiff argues that as at December, 2012 she was unsure as to whether she would be able to induce the vendor to close the sale and she had to cover all of her basis. If her goal was to induce the vendor to close, her lawyer's letter of October 29, 2012 and the statement of claim were opaque tactics to achieve that end.

[120] The vendor responded with its statement of defense and counterclaim dated January 11, 2013. In the counterclaim, the vendor sought a declaration that the plaintiff had repudiated the agreement and forfeited her deposit. In addition, the vendor sought damages of $1 million for potential losses on the re-sale of the unit plus compensation for its out of pocket carrying costs.

[121] In July, 2013, the plaintiff moved to her current lawyers who inquired as to the status of her deposit. The vendor's real estate lawyer advised that the plaintiff failed to complete the transaction on the scheduled closing date and was therefore in fundamental breach of the agreement. Counsel continued:

> This breach entitled the Vendor to immediately terminate the Agreement and forfeit her deposits, without prejudice to and reserving the Vendor's remedies at set forth in the said Agreement and at law. Notwithstanding, these deposits have been insured and released to the Vendor in accordance with Section 81(7)(b) of the *Condominium Act*.

[122] There was a conversation between counsel in which the vendor's real estate lawyer asked the plaintiff's lawyer to ignore her letter. She then sent a further letter confirming that the plaintiffs deposits totaling $514,750 were insured and therefore had been released to the vendor as allowed by the statutory scheme. There was no reference to a breach or termination of the agreement in the second letter from the vendor's real estate counsel.

[123] The plaintiff's counsel responded and said that the plaintiff had never received written notice from the vendor that the agreement had been terminated as required under para. 25(a) of the agreement. Counsel objected to the release of the deposit to the vendor and demanded that the deposit funds be returned to counsel's trust account, failing which "will be required to name your firm as a defendant in this matter."

[124] By letter dated July 25, 2013, the vendor's real estate lawyer responded that the release of the deposit to the vendor was in accordance with the *Condominium Act, 1998* because the obligation to return of the deposit was insured as allowed by the statute. In addition, counsel recited a discussion with Mr. Preger who advised that the vendor's position was that Ms. Rosenberg repudiated the agreement so that the transaction was at an end.

[125] Some without prejudice discussions ensued in the fall of 2013. As the parties were not able to settle, the plaintiff insisted on proceeding with a motion for the issuance of a certificate of pending litigation. The vendor consented to an "interim" certificate being issued under an order that explicitly reserved its rights

[126] I began case managing the parties' motions in November, 2014. At the first case conference, the plaintiff's counsel said that the plaintiff was very concerned with the costs and pace of the proceeding. The parties advised me that the unit had, by that time, been completed by the vendor based on its view toward enhancing the marketability of the unit. That is, notwithstanding its repeated threats to act under para. 12(a) of the agreement to make choices on the plaintiff's behalf, it did not do so. It was living or dying with its position that the plaintiff was in breach and that it was entitled to and had properly declared the agreement to be at an end.

[127] It was obvious that the remedy of specific performance could not be available to the plaintiff in the circumstances. Not only would it be very difficult to show that a residential condominium was "unique" at the best of times, no court would order and supervise the vendor as it demolished and re-constructed the unit to meet the plaintiffs agreement (especially where five years into the piece there were continuing disputes as to what the unit was to entail).

[128] It was also then that the parties advised that the vendor had acknowledged that Crayon and Ms. Krismer acted as its agent.

[129] Through the case management process, the parties ultimately agreed to the removal of the certificate of pending litigation, the elimination of the claim for specific performance, and the dismissal of the claims against Ms. Krismer and Crayon. Doing so, focused the case on the discrete central issues and enabled the parties to move forward to summary judgment.

The Termination of the Agreement?

[130] In its letter of April 3, 2012, the vendor's lawyer set the Confirmed Possession Date under the agreement at December 3, 2012. The occupancy permit was issued in January, 2013. These dates came and went without the vendor tendering or otherwise suggesting that it expected the plaintiff to commence interim occupancy under the agreement.

[131] Plaintiff argues that Mr. Preger's letter of November 21, 2012 inquiring whether she wished to close was a confirmation that the agreement was still in force at that time. I do not think this is necessarily correct. If the plaintiff was right that by that time the unit could no longer meet the requirements of the agreement, as was asserted by her prior counsel, then Mr. Preger's inquiry could have been an offer to sell the unit as it then was to the plaintiff outside of the agreement.

[132] The vendor argues, by contrast, that the plaintiff's statement of claim was a repudiation of the agreement. By seeking damages, rescission, an oppression remedy, and a declaration that the plaintiff had committed a fundamental breach entitling her to terminate, the vendor argues that it was the plaintiff who first evinced an intention not to be bound by or to terminate the agreement. I do not accept that position either. As legally confused as it was, the first relief listed in the statement of claim was an order for specific performance of the agreement. The plaintiff was not sure at that time whether the agreement could be completed or not. Her lawyer's letter of October, 29, 2012 left open the possibility of completion, albeit with some major construction. Settlement negotiations ensued at various times. It is not unheard of to close on amended terms after negotiation. I do not see the plaintiff expressing a clear intention to no longer be bound by the agreement by any act up to and including the delivery of the statement of claim.

[133] The counterclaim, however, left no doubt of the vendor's position. It claimed that the plaintiff was a breach and had forfeited her deposit. It claimed damages from her for the breach. The damages were predicated upon losses that the vendor might incur on the resale of the unit to a third party purchaser. The plaintiff acted thereafter as if it was freed of its obligations to the plaintiff. Rather than choosing to finish the agreement on her behalf, it proceeded to construct the unit as it chose and bore the risk of doing so.

[134] The stutter steps in the vendor's counsel's correspondence the ensuing summer are without consequence in my view. First, the initial issue under discussion was the whereabouts of the deposit funds rather than an explication of the vendor's legal position. In any event, the position was clarified in a short period of time with no change of position by the plaintiff in the interim. The clarification by Mr. Preger was short on details of the breaches relied upon and the timing of the declaration, but it plainly confirmed the position that the vendor adopted in its counterclaim that the vendor had terminated the agreement. As I noted at the outset of these reasons, in the event that the counterclaim was not sufficient written notice of termination, the passage of time from the delivery of the counterclaim to the letters six months later is of no consequence under the express provisions of para 25(a) of the agreement in any event. Therefore the letters from counsel sufficed to terminate the agreement at the latest.

But was the Vendor Entitled to Terminate? Was the Plaintiff in Default?

[135] The outcome of the case therefore resolves to the question of whether the plaintiff was in default of any of the obligations to be performed under the agreement for 7 days as is required under para. 25(a) in order for the vendor to declare her to be in fundamental breach of the agreement.

[136] The vendor argues that the plaintiff committed two breaches that entitled it to declare her to be in fundamental breach. First, she failed to complete her selections of finishes on a timely basis under para. 12(a) of the agreement. Second, she failed to pay for upgrades including the $36,000 that remained outstanding under the Partial Upgrade Agreement.

[137] Dealing with the second issue first, the plaintiff never failed to pay an amount that was due. The Finishes Selections & Upgrades documents were not invoices. They were lists of Ms. Rosenberg's shopping cart contents from which she was to make choices that would have led to an invoice or a final upgrade agreement in all likelihood. The last Finishes Selections & Upgrades form dated April 3, 2012 was incomplete on its face. Ms. Krismer plainly admitted in cross-examination in court that it was not a final document intended to be an invoice. It contained several items that Ms. Krismer knew were to be deleted. It contained items that were expressed as estimates only. The vendor would have had to make the plaintiff's choices for her in order to finalize an invoice and demand payment under para. 12(b) of the agreement. It chose not to do so despite its repeated threats.

[138] As to the amount remaining from the Partial Upgrade Agreement, those amounts are repeated and subsumed in the ongoing Finishes Selections & Upgrades forms. The vendor never made demand for the outstanding amount. Nor could it have reasonably done so before the ongoing process and been completed.

[139] So the $500,000 question is "was the plaintiff in breach of her obligations under paragraph 12(a)". The vendor points to its real estate counsel's repeated letters establishing deadlines for the plaintiff to complete the process, make choices, and pay for all upgrades that she chose.

[140] I note first that counsel never asserted in those letters that Ms. Rosenberg's failure to complete selections by the dates set would be a breach of the agreement. This is not determinative of the question however.

[141] It strikes me as difficult to argue that the failure to make choices on a timely basis can be seen to be a fundamental breach or an expression of an unwillingness to be bound by a contract where (a) the purchaser asks for more information; and (b) the vendor has it within its power to either provide the information or to make the choices required to keep construction on schedule. One could argue that under the terms of para. 12(a), as drafted, the plaintiff is not in breach by failing to take a step that simply allows the vendor to take the step for her. In my view however, this confuses a failure to fulfill a positive contractual obligation with the remedy for that failure. Moreover, I am not inclined to narrowly construe a contractual term that on its face is designed to maximize a party's remedial flexibility. Para. 25(a) provides that the default remedy under that paragraph is "in addition to any other right or remedy which the Vendor may have." Accordingly, I proceed on the basis that if the plaintiff failed to fulfill her obligations under para. 12(a), then the vendor was entitled to declare her in fundamental breach and declare the agreement to be at an end.

[142] For convenience, I repeat the key wording of the plaintiff's obligations under para. 12(a):

> Within 21 days after notification by the Vendor, the Purchaser shall complete the Vendor's colour and material selection form for those items of construction are finishing for which the Purchaser is entitled to make selection pursuant to this Agreement... All selections of items of construction or finishing for which the Purchaser is entitled to make selection pursuant to this Agreement are to be made from the Vendor's samples.

[143] I am unable to conclude on the facts proven before me that the plaintiff failed to fulfill her obligations under this covenant. A precondition of the plaintiff making her choices was necessarily that the vendor had to provide her with samples of all selections of items of construction or finishing for which she is entitled to make her selections under the agreement. Providing samples necessarily also entailed providing cost information so that the plaintiff could understand financial implication of her choices.

[144] While the vendor tries to argue that it provided samples to the plaintiff early on justifying its putting the unit on hold as early as May 2011, the recitation of the evidence on individual items above makes it clear that in many cases there were no standards provided to the plaintiff until well into 2012. Prices were not finalized even in the April 3, 2012 Finishes Selections & Upgrades form which says on its face that there were more to come.

[145] Most of the disputes that were discussed before me appeared to be *bona fide*, soluble disputes. Without doubt, the degree and particularity of the plaintiff's engagement was well beyond what the defendants experienced with other purchasers on this project. In many cases the tone adopted by each side was less than ideal if the goal was to encourage a collaborative undertaking. However, the plaintiff's basic position that she was entitled to a luxurious, customized condominium specifically described in the heavily negotiated Schedule C of her agreement was not unreasonable. Nor was it unreasonable for her to demand to understand precisely what the vendor proposed as standard for each item agreed upon and what upgrades were available to her. Para 12 (a) provides for this.

[146] In retrospect, the defendants may rue the day when they unleashed the plaintiff on their suppliers rather than spending the time to work on her designs with her and collect standard samples for each design element and samples for those items where upgrades would be offered to her. They may equally regret having failed to make the plaintiff's choices for her despite repeatedly threatening to do so. They may regret failing to amend their form of contract document to reflect better the practical difficulties associated with the vendor's decision to allow purchasers to make selections "off-menu." However, regrets are not synonymous with a default. At the time that the agreement was declared to be at an end, I cannot find that the plaintiff was in breach or unreasonably failing to make final choices. As noted in the survey of items above, in some cases the vendor was in the wrong. In many there was good reason for discussions as both parties were neither fully right nor fully wrong. It was the vendor's choice to engage in an iterative process with the plaintiff. I see no provision of the agreement that gave it the right to unilaterally declare the process over in the absence of full performance on its own side.

[147] A party cannot claim that its counterparty is in default where the first party has failed to do things it was required to do so as to enable the other to fulfill her obligations,. *Chairman's Brands Corp. v. Association of Danube-Swabians*, 2014 ONSC 6722 (CanLII), at paras. 27 and 28.

[148] Even ignoring the technicality that the vendor did not have a "colour and selection form," the fact that the agreement anticipated that all of the choices would be listed on one form within three weeks of demand and that all choices would be made from samples provided by the vendor, necessitated that the vendor actually go out and cost survey all of the contractual choices and provide them to the plaintiff in an intelligible way with samples of each and every one. Ms. Krismer said as much in the background portion of her examination-in-chief where she repeatedly stressed the standardized process of a production build. The presentation centre and the binder, she said, were supposed to have the standard and upgrade finishes that were available with samples and fixed prices for all upgrades on display

[149] However, because the plaintiff negotiated unique additions to her Schedule C and was entitled to go off-menu, the presentation centre and binder did not display samples of all of the standard items and upgrade choices for the her unit. The defendants resented the plaintiff's inquisitiveness and decided not to spend the time at the outset to give her the details of all the standard items to which she was entitled under the agreement. Instead, they ended up disclosing much of the material to her in late 2011 and in early 2012. The plaintiff made her choices based on what was disclosed when it was disclosed. But she was left facing a $300,000 claim that was largely inexplicable based on the information that had been provided to her. As I noted in my conclusions on the survey of individual construction items above, the plaintiff was correct on some issues; the defendant on others. The remaining debates were, in the main, gray issues that ought to have been soluble in a collaborative undertaking.

[150] In my view, the vendor's failure to arm the plaintiff with all of the contractually required samples and pricing information in the contractually required form or in an intelligible, comprehensive, functionally equivalent basis, prevents an interpretation that would find the plaintiff to be in breach of para. 12(a) of the agreement.

[151] As a result, the vendor terminated the agreement through no fault of the plaintiff and it is therefore required refund her deposit under para. 26 of the agreement.

<u>Other Issues</u>

[152] The plaintiff asks for a further hearing to deal with the issue of damages. I note that paragraph 26 expressly precludes many heads of damages. However, I leave that issue to further argument.

[153] The plaintiff did expressly raise the issue of punitive damages at the hearing of the summary judgment motions. While the defendants' internal emails suggest some ill feelings toward the plaintiff, there is no indication that they committed any independently actionable tort. The defendants did not commit sufficiently reprehensible conduct to justify an award of punitive damages in my view.

[154] Finally, for completeness, I note that had I found the plaintiff to have been in breach of the agreement, I would not have found this case to be an appropriate one for relief from forfeiture. The burden is on the plaintiff to prove that the forfeiture of her deposit would amount to an unconscionable penalty. While a $500,000 deposit is a substantial amount of money, deposits of 25% have been upheld. This is particularly so in cases like this where the contract involves construction and there is a real likelihood of very substantial damages to the builder or vendor in the event that the purchaser defaults. The plaintiff's argument that the amount is too high does not, in my view, fulfill the burden of proof that is upon her in the circumstances.

Outcome

[155] The vendor is therefore adjudged liable to pay to the plaintiff the sum of $514,750 plus interest at the rate prescribed under the *Condominium Act, 1998* from the date of delivery of the vendor's statement of defence and counterclaim. The vendor's motion for summary judgment and its counterclaim are dismissed.

[156] The parties are to arrange a case conference with my office at which any outstanding issues in the litigation will be scheduled in January, 2016. The costs of these motions are reserved to me and will also be scheduled or otherwise dealt at the case conference.

F.L. Myers J.

Released: January 4, 2016

This is Exhibit "D" referred to in the affidavit of Linda Rosenberg sworn before me, this 28 day of November 2016

A COMMISSIONER FOR TAKING AFFIDAVITS

CITATION: Rosenberg v. 206 Bloor Street West Limited, 2016 ONSC 1111
COURT FILE NO.: CV-12-469391
DATE: 20160212

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Linda Paris Faith Rosenberg, Plaintiff

AND:

206 Bloor St. West Limited carrying on business as Museum House, Crayon Design Company Inc., also known as Crayon Design Co. Inc. and Cheryl Krismer, also known as Cheryl Ann Krismer, Defendants

BEFORE: F.L. Myers, J.

COUNSEL: *Shawn Pulver* and *Lauren Sigal*, for the Plaintiff

David Preger and Thomas Arndt, for the Defendants

HEARD: February 10, 2016

COSTS ENDORSEMENT

[1] For reasons released January 4, 2016, reported at 2016 ONSC 6, the court granted summary judgment and ordered the defendant 206 Bloor St West Limited to refund to the plaintiff her deposit of $514,750 on a failed condominium purchase. The parties agree that the plaintiff is also entitled to a refund of a further $9,000 that she paid under the Partial Upgrade Agreement as a result of my having found that the agreement was terminated due to the vendor's default. Accordingly, my order is amended to correct that amount.

[2] Counsel are working on settling the determination of prejudgment interest. If they are unable to do so they may each deliver up to five pages of written submissions on the issue – plaintiff first followed by the defendant one week later. Submissions should canvass the questions of whether in circumstances where the interest formula prescribed under the *Condominium Act, 1998* produces a prejudgment interest rate of zero or less than zero, prejudgment interest is available under the *Court of Justice Act*, the *Interest Act*, or in equity. Under the *CJA*, the issue is whether under s.128(4)(g) interest "is payable by right other than under this section" when interest is payable under *Condominium Act, 1998* but the prescribed rate is zero or below.

[3] The applicant seeks costs of $483,236 all-in on a substantial indemnity basis or $330,874 on a partial indemnity basis. The defendant submits that the plaintiff should be entitled to costs on a partial indemnity basis fixed at $100,000.

[4] The plaintiff says that her actual costs are $523,645. The defendant's actual costs are $309,461.22. It can be seen at once that the plaintiff spent about the same amount in costs as was in issue.

[5] In *DUCA Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601 (CanLII) at para. 5, Cumming J. described the basic approach to awarding costs as follows:

> Costs are in the discretion of the Court: s. 131, Courts of Justice Act, R.S.O. 1990, c. C.43 and Rule 57.01 of the Rules of Civil Procedure. In Ontario, the normative approach is first, that costs follow the event, premised upon a two-way, or loser pay, costs approach; second, that costs are awarded on a partial indemnity basis; and third, that costs are payable forthwith, i.e. within 30 days discretion can, of course, be exercised in exceptional circumstances to depart from any one or more of these norms.

[6] In *Yelda v. Vu*, 2013 ONSC 5903 (CanLII) (leave to appeal denied, 2014 ONCA 353 (CanLII)) at para. 11, Arrell J. confirmed the long-standing principle that a successful party is entitled to costs except for good reason. He states as follows:

> The principle that costs follow the event should only be departed from for very good reasons such as misconduct of the party, miscarriage in procedure, or oppressive or vexatious conduct of proceedings.

[7] The Divisional Court listed several principles to be considered in considering costs in *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557:

> 1. The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): *Boucher [Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291], *Moon [Moon v. Sher (2004)*, 2004 CanLII 39005 (ON CA), 246 D.L.R. (4th) 440], and *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 2005 CanLII 1042 (ON CA), 75 O.R. (3d) 638 (C.A.).
>
> 2. A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher*. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier* (2002), 119 A.C.W.S. (3d) 341 (Ont. C.A.), at para.
>
> 3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).

4. The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantive results": *Murano v. Bank of Montreal* (1998), 1998 CanLII 5633 (ON CA), 41 O.R. (3d) 222 (C.A.), at p. 249.

5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher*.

[8] In my view, the plaintiff was successful and is entitled to her costs. To fix the costs under Rule 57.03(1)(a), I need to consider first, what scale of costs is appropriate; and second, what amount is appropriate in that scale.

The Scale of Costs

[9] The plaintiff seeks costs on a substantial indemnity basis because, she says, she tried to engage the defendant in settlement discussions throughout and it was unwilling to make a counter-offer or to mediate formally. I do not understand there to be an obligation on the defendant to make offers. Nor is the failure to make an offer itself sufficiently reprehensible conduct to justify an award of substantial indemnity costs. *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.) leave to appeal refused 19 O.R. (3d) xvi (note).

[10] The plaintiff

[11] had an option to try to increase the scale of costs that she might recover. She could make an offer to settle under Rule 49 with a sufficient compromise so that she could beat her offer in the judgment.

[12] The plaintiff actually made four written offers. The first two did not meet the requirements of a Rule 49 offer. The plaintiff's next two offers both sought 100% of her deposit back and used other currency to suggest a compromise. In the first of the two, dated April 3, 2014, she sought a refund of the deposit, plus $30,000 in legal fees, reimbursement of another $50,000 or so in interest expenses that she incurred on borrowing the funds used for her deposit, repayment of $9,000 that she paid under the Partial Upgrade Agreement (that she won as discussed above) and another $17,000 or so for engineering fees and expenses. In her offer dated March 10 2015, the plaintiff offered to take the deposit (including the Partial Upgrade Agreement amount), plus $80,000 for legal fees, and over $9,900 for engineering fees. The engineering fees were not in issue at the motion and were not awarded to the plaintiff. Regardless, the plaintiff says that she beat this offer because she will likely receive more in costs in this endorsement than the total that she was willing to take in legal and engineering costs at least in the fourth offer if not the third.

[13] I only need deal with the fourth offer. It was delivered expressly on the basis that it replaced the prior offer. *Hagyard v. Keele Plumbing & Heating Ltd.* (1989), 15 W.D.P.C. 375 (Ont. Div. Ct.)

[14] While the inclusion in an offer to settle of a fixed amount for costs is not a bar to success under Rule 49, *Brown v. Township of Ignace*, 2010 ONSC 348 (CanLII), in cases where the numbers are close, it creates a problem. *Noyes v. Attfield*, 1994 CanLII 7286 (ON SC). The plaintiff chose not to compromise one penny on the principal amount of her claim. For me to tell then whether the plaintiff's offer represented a compromise when it was made, I would have to assess the amount of costs to which the plaintiff would have been entitled as at March 10, 2015. Even if I were to do that now, how was the defendant to know what the plaintiff's assessable costs were on a partial indemnity basis at that date? It did not have counsels' dockets. It had no way to know that the plaintiff's firm was incurring costs at a far higher pace that its own law firm was. The defendant had no way to know if the offer of $80,000 in costs plus $9,900 in engineering fees was a compromise over the partial indemnity costs to which the plaintiff might have otherwise been entitled at that time.

[15] Making an offer with no compromise in principal is entirely proper and is also not a bar to being awarded substantial indemnity costs. But where, as here, there is serious uncertainty as to the costs entitlement at the date of the offer and other, non-assessable fees are included in the offer which then have to be accounted for to gauge success, it seems to me that the offer loses the predictability that is central to the success of the Rule 49 regime. Parties should be encouraged to make offers to settle that include a clear, genuine, understandable compromise. The Rule should apply almost automatically when one beats one's offer. But where there is no clear compromise and the other side cannot readily determine where it stands under the offer, then applying the Rule will incentivize a strategic game whereby counsel try to put enough certainty of compromise in an offer to fool the judge but leave enough uncertainty to fool the defendant. It seems to me that the incentives should be otherwise. Rule 49 should be interpreted so that clear, understandable, genuine compromise is rewarded and clever efforts to obtain the benefit of the Rule without making a meaningful, clear, and understandable compromise are not.

[16] I find that the plaintiff has failed to meet her burden to establish that the judgment is as favourable or more favourable than the terms of her offer to settle under Rule 49.10(1). The plaintiff then is not entitled to costs on a substantial indemnity basis from the date of the offer. Rather, she is entitled to costs on a partial indemnity basis throughout.

The Quantum of Costs

[17] I do not view it as my role to assess the plaintiff's costs on anything like a docket-by-docket or even a particularly mathematical basis.

[18] The fixing of costs is a discretionary decision under section 131 of the *Courts of Justice Act*. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01 of the *Rules of Civil Procedure*. These include the principle of indemnity for the successful party (57.01(1)(0.a)), the expectations of the unsuccessful party (57.01(1)(0.b)), the amount claimed and recovered (57.01(1)(a)), and the complexity of the issues (57.01(1)(c)). Overall, the court is required to consider what is "fair and reasonable" in fixing costs, and is to do so with a view to balancing compensation of the successful party with the goal

of fostering access to justice: *Boucher v Public Accountants Council (Ontario)*, 2004 CanLII 14579 (ON CA), (2004), 71 O.R. (3d) 291, at paras 26, 37.

[19] I accept, as does counsel for the defendant, that the rates charged by the plaintiff's lawyer were discounted and were very reasonable.

[20] The plaintiff says that the matter was complex. It was complex factually in that there were literally over 200 small, individual disputes between the parties. Unfortunately it took many days of evidence to provide clarity on the facts after legal submissions did not provide the clarity required to determine the issues.

[21] But the case was not complex legally. It turned on one clause in a contract that should have been the focus throughout. The plaintiff approached the case with a scattergun of causes of action against multiple parties that made the case much more complex to resolve. While lawyers frequently sue everyone in sight especially in the insurance field, the risks of doing so in a commercial case are obvious. Here the plaintiff has incurred costs equal to her judgment if not more. I know from seeing the detailed dealings that she had with the defendant and others and the excessively detailed documents that she prepared for the purposes of case, that the plaintiff was very active in her own claim. Much as her zeal caused the defendants to incur much undesired time and expense in dealing with the condominium purchase, her approach to the litigation made it disproportionately expensive.

[22] Not every possible claim has to be made. For example, the Statement of Claim sought both rescission of the agreement of purchase and sale and specific performance of the same agreement. The two are mutually exclusive.

[23] The decision to seek a CPL also was unnecessary and, in my view, an unreasonable step at the late date what it was taken. By then, the plaintiff would only have closed if the defendant assured her that she was getting the unit built as she wanted it. I said in a prior endorsement that no court would order specific performance of this residential condominium agreement. Not only is the condo not unique in law, but here, the parties could not agree on how it was to be built. No court could or would superintend the re-design and construction processes with 200+ open decisions on which the parties could not agree. The plaintiff actually wanted her deposit back. Subsection 103(6)(a)(i) of the *Courts of Justice Act*, RSO 1990, c.C.43, specifically provides for the discharge of a CPL where money is sought in the alternative to the interest in land. You cannot get your deposit back and claim to own the land at the same time.

[24] Similarly, the decision to sue Crayon Design Company Inc. and its employee Ms. Krismer for a myriad of torts, while legally permissible, caused significant wasted costs. It drove a wedge between the vendor and its agent and thereby caused the vendor to use Mr. Hart as its witness while Ms. Krismer was represented by her insurer. This doubled the number of affidavits and the cross-exanimations. Ultimately, after the vendor admitted that it was bound by its agent Crayon and Ms. Krismer, and case management had been implemented, the plaintiff agreed to let Crayon and Ms. Krismer out of the action and to discharge the CPL so as focus the case on the deposit. However, the plaintiff included in her Bill of Costs all the time she spent

suing the Crayon and Krismer and pursuing the CPL. Those costs do not lie at the feet of the vendor.

[25] I am not ignoring that the defendant did not make it easy for the plaintiff. It did agree to allow the CPL to be issued on consent under a reservation of rights. But it was slow to respond at times and it was strategic in its decision-making to be sure. Even once deals were made to remove the CPL or to let Crayon and Krismer out of the action, for example, it took months to implement the deals because of positional play on all sides.

[26] Moreover, I am mindful that while the defendant won on all but one issue at the summary judgment motion, there was no divided success. The plaintiff won her deposit back which was 100% of the money that was realistically at issue. It is true that she lost on her claim for punitive damages but that claim never had an air of reality in a contract case and it had little or no effect on the costs incurred.

[27] The plaintiff's failure to focus matters down to their essence resulted in unnecessary proceedings. The CPL, the shotgun of causes of action, the naming of Crayon and Krismer, and the plaintiff's initial allegation about the square footage of the unit that was made but never pursued, were all unnecessary issues that caused significant costs that did not contribute to the outcome. The plaintiff's gross over-statement of her case was referenced in para 36 of my Reasons. It resulted in at least two days of the hearing being wasted just trying to figure out which samples the plaintiff was shown and which were not provided and when. While the plaintiff repeatedly accuses the defendant of being unwilling to negotiate with her, her positions fanned the flames throughout.

[28] Finally, while I will not tax dockets closely at all, 179 hours of student time, especially time preparing for and attending to watch examinations is excessive. Students should freely be brought to examinations and to court to watch and to learn. But where there are already two billing counsel in attendance, the student learning time is overhead to the firm unless the students' are making a contribution of value in the proceeding.

[29] I have considered the fact that there was a 12 day motion/mini-trial, several case management hearings, and many days of examinations out of court. It seems to me that there was much duplication in the examinations of Krismer and Hart that was avoidable. There was a full banker's box containing over a dozen thick volumes of documents demanded as answers to undertakings and put before the court by the plaintiff with only one or two individual documents ever being referred to.

[30] In short, there were excessive and unnecessary steps taken by the plaintiff throughout the proceeding seemingly uninhibited by economic rationality. In *Marcus v. Cochrane*, 2014 ONCA 207, at para. 15, Goudge J.A. remarked:

> The comparison of what this dispute was about and what was spent on it is stark and difficult to justify. While undoubtedly Mr. Marks, as counsel asserting the claim, must bear the greater responsibility, the principle of proportionality which is fundamental to any sound costs award cries out for application by both counsel. With the assistance and

indeed the direction of the trial judge if need be, counsel simply must cut the cloth to fit. The health of the justice system depends on it. Trial costs cannot serve as an incentive to look away from this important challenge.

[31] It took active case management to undo the CPL, end the claim for specific performance to require the defendant to re-build the condo unit, and to get Crayon and Krismer released from the claim so that the action could focus on the real issue under the agreement of purchase and sale.

[32] There was excessive time allocated to the defendant 206 Bloor for the proceedings against Krismer, Crayon, and for students. I also find that in conducting its own settlement calculus, the defendant cannot be taken to have reasonably anticipated that the plaintiff would incur costs anywhere near to the value of her entire claim. That just cannot be a proportional approach.

[33] The hourly rates charged by counsel for the defendant were higher than those charged by counsel for the plaintiff. Yet their bill to their client came in just over $300,000. It seems to me that on a partial indemnity basis it is fair, reasonable, and appropriate for the defendant to have considered itself at jeopardy for partial indemnity costs of $225,000 all-in and I fix the costs that it is to pay to the plaintiff at that amount.

F.L. Myers J.

Released: February 12, 2016

This is Exhibit "E" referred to in the
affidavit of Lindia Rosenberg
sworn before me, this 08
day of November 20 Co

A COMMISSIONER FOR TAKING AFFIDAVITS

Don Rollo

From:	L. Paris <l.paris@rogers.com>
Sent:	June-28-16 5:08 PM
To:	Don Rollo
Subject:	Fwd: Rosenberg v 206 Bloor St. W. Limited CV-12-469391
Attachments:	image001.png; ATT00001.htm; image002.png; ATT00002.htm; image003.jpg; ATT00003.htm; ATT00004.htm; ATT00005.htm; ATT00006.htm; Judgment #2.docx; ATT00007.htm

Begin forwarded message:

From: Shawn Pulver <SPulver@msmlaw.net>
Subject: RE: Rosenberg v 206 Bloor St. W. Limited CV-12-469391
Date: 11 March, 2016 8:16:52 AM EST
To: "David P. Preger" <DPreger@dickinson-wright.com>
Cc: "Thomas W. Arndt" <TArndt@dickinson-wright.com>, Lauren Sigal <lsigal@msmlaw.ca>, Alison Duffy <ADuffy@msmlaw.net>, "Christina E. Corrente" <CCorrente@dickinson-wright.com>

David:

Further to my email from yesterday, I have attached a draft version of the Judgment for your approval as to form and content. As discussed, we propose to address the interest issue by way of separate Judgment.

I trust that my client will be receiving payment today from your client.

Best regards,

Shawn Pulver | Partner | T. 416.364.1077 | spulver@msmlaw.ca

Macdonald Sager Manis LLP Barristers & Solicitors and Trade-Mark Agents
150 York Street, Suite 800, Toronto, Ontario, M5H 3S5 Canada | T. 416.364.1553 | F. 416.364.1453 | www.msmlaw.ca
"Lawyers who speak your language."™

From: Shawn Pulver
Sent: March-10-16 11:30 AM
To: 'David P. Preger'
Cc: 'Thomas W. Arndt'; Lauren Sigal; Alison Duffy; 'Christina E. Corrente'; Nancy Avison (navison@millerthomson.com) (navison@millerthomson.com)

Don Rollo

From: L. Paris <l.paris@rogers.com>
Sent: June-28-16 5:08 PM
To: Don Rollo
Subject: Fwd: Rosenberg v 206 Bloor St. W. Limited CV-12-469391
Attachments: image001.png; ATT00001.htm; image002.png; ATT00002.htm; image003.jpg; ATT00003.htm; ATT00004.htm; ATT00005.htm; ATT00006.htm; Judgment #2.docx; ATT00007.htm

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From: Shawn Pulver <SPulver@msmlaw.net>
Subject: RE: Rosenberg v 206 Bloor St. W. Limited CV-12-469391
Date: 11 March, 2016 8:16:52 AM EST
To: "David P. Preger" <DPreger@dickinson-wright.com>
Cc: "Thomas W. Arndt" <TArndt@dickinson-wright.com>, Lauren Sigal <lsigal@msmlaw.ca>, Alison Duffy <ADuffy@msmlaw.net>, "Christina E. Corrente" <CCorrente@dickinson-wright.com>

David:

Further to my email from yesterday, I have attached a draft version of the Judgment for your approval as to form and content. As discussed, we propose to address the interest issue by way of separate Judgment.

I trust that my client will be receiving payment today from your client.

Best regards,

Shawn Pulver | Partner | T. 416.364.1077 | spulver@msmlaw.ca

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From: Shawn Pulver
Sent: March-10-16 11:30 AM
To: 'David P. Preger'
Cc: 'Thomas W. Arndt'; Lauren Sigal; Alison Duffy; 'Christina E. Corrente'; Nancy Avison (navison@millerthomson.com) (navison@millerthomson.com)

Subject: RE: Rosenberg v 206 Bloor St. W. Limited CV-12-469391
Importance: High

David:

As I have previously advised you, my client requires the T5 statements before she can finalize her instructions on the interest issue.

In terms of the balance of the Judgment, you and your client have been aware for some time now of the monies owing to our client.

We would like to settle on the form of the Judgment that pertains to the principal and the costs.

We can agree for there to be a separate Judgment to deal with the interest, if an agreement is reached on the amount or if Justice Myers is required to make a ruling.

We have prepared a draft Judgment which we will be forwarding to you shortly.

Please note that if you don't agree to produce the T5 statements we will be requesting a case conference for directions and to have the Judgment signed. We will also be claiming post-judgment interest.

We trust that your client will be arranging payment of the $29,000.00 (which is the balance owing after we receive the $494,750.00 payment from Miller Thomson) and the $225,000, by tomorrow.

Best regards,

Shawn Pulver | Partner | T. 416.364.1077 | spulver@msmlaw.ca

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150 York Street, Suite 800, Toronto, Ontario, M5H 3S5 Canada | T. 416.364.1553 | F. 416.364.1453 | www.msmlaw.ca

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From: Shawn Pulver
Sent: March-09-16 11:50 AM
To: 'David P. Preger'
Cc: 'Thomas W. Arndt'; Lauren Sigal; Alison Duffy; 'Christina E. Corrente'; Nancy Avison (navison@millerthomson.com) (navison@millerthomson.com)
Subject: RE: Rosenberg v 206 Bloor St. W. Limited CV-12-469391

David:

Can you please confirm if you have heard back from your client regarding the payments referred to below?

I have also copied Ms. Avison on this email. The endorsement was released on January 4, and my client has still not received any payment. I remind you again that post-judgment interest continues to accrue.

Best regards,

Shawn Pulver | Partner | T. 416.364.1077 | spulver@msmlaw.ca

From: Shawn Pulver
Sent: March-07-16 4:14 PM
To: 'David P. Preger'
Cc: Thomas W. Arndt; Lauren Sigal; Alison Duffy; Christina E. Corrente
Subject: RE: Rosenberg v 206 Bloor St. W. Limited CV-12-469391

Hi David:

Have you heard back from your client about the **$29,000.00** (the balance of the deposit, including the additional $9,000.00) and
the **$225,000** cost order?

Please confirm.

Best regards.

Shawn Pulver | Partner | T. 416.364.1077 | spulver@msmlaw.ca

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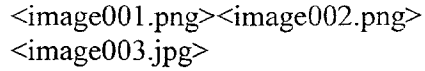
Please consider the Environment before printing this E-Mail

From: David P. Preger [mailto:DPreger@dickinson-wright.com]
Sent: March-03-16 6:16 PM
To: Shawn Pulver
Cc: Thomas W. Arndt; Lauren Sigal; Alison Duffy; Christina E. Corrente
Subject: RE: Rosenberg v 206 Bloor St. W. Limited CV-12-469391

Shawn, I am arguing an application tomorrow and will not be in position to respond within that timeframe. I will attempt to respond by the close of business on Monday. It is not at all clear to me from the caselaw you rely upon that a court in this Province has analyzed the legal issue of whether interest is payable under the CJA when it is clearly not payable under the Condo Act due to prevailing interest rates. Also, I don't believe that any interest was earned by my client on the deposit although I am trying to clarify that point.

David P. Preger Partner
199 Bay Street
Suite 2200
Commerce Court West
Toronto ON M5L 1G4

David P. Preger Partner
199 Bay Street
Suite 2200
Commerce Court West
Toronto ON M5L 1G4
Phone 416-646-4606
Fax 416-865-1398
Email DPreger@dickinsonwright com


From: Shawn Pulver [mailto:SPulver@msmlaw.net]
Sent: Thursday, March 03, 2016 6:10 PM
To: David P. Preger
Cc: Thomas W. Arndt; Lauren Sigal; Alison Duffy; Christina E. Corrente
Subject: RE: Rosenberg v 206 Bloor St. W. Limited CV-12-469391

Thank you David.

Can I please hear back from you by the close of business tomorrow regarding the $29,000.00 (the balance of the deposit, including the additional $9,000.00) and
the $225,000 cost order. Post judgment interest will continue to accrue until payment is received.

I look forward to hearing from you.

Best regards,

Shawn Pulver | Partner | T. 416.364.1077 | spulver@msmlaw.ca

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From: David P. Preger [mailto:DPreger@dickinson-wright.com]
Sent: March-02-16 3:45 PM
To: Shawn Pulver
Cc: Thomas W. Arndt; Lauren Sigal; navison@millerthomson.com; Alison Duffy; Christina E. Corrente
Subject: Re: Rosenberg v 206 Bloor St. W. Limited CV-12-469391

Shawn, I too have spoken to Nancy. I think that she only requires a release in favour of the deposit insurer. I understand that the deposit insurer's liability is limited to what Nancy advises she is prepared to release to your client. You will have to satisfy yourself of that. As far as payment of the balance is concerned, I do not have instructions. I will review the case law you just sent me and respond to the issue of interest within the next several days. Thanks.

Sent from my iPhone

On Mar 2, 2016, at 3:25 PM, Shawn Pulver <SPulver@msmlaw.net> wrote:

> David:
>
> I heard back this morning from Nancy Avison at Miller Thomson, who I have copied on this email.

She advised me that she will be in the position to transfer **$494.750.00** once a release has been agreed to between the parties. As I mentioned in my email from yesterday, my client obviously cannot provide a complete release until she receives the full amount owing under the Judgment.

If we assume that Miller Thomson will be releasing the $494,750 this week, your client will still be responsible for the following payments:

a) $29,000.00 (the balance of the deposit, including the additional $9,000.00; and
b) $225,000 (cost order)

There is also the issue of interest on the deposits that we are trying to work out (both pre-judgment and the post judgment interest that in our view has been accruing since January 4, 2016). Before I can finalize my instructions on the interest, we would like to see the T5 statements that should have been prepared for the 2010-2015 tax years. There presumably would have been interest collected on the deposits when they were being held by Miller Thomson. There presumably was also interest accruing when the $494,750.00 was bonded and placed in an escrow account at Miller Thomson. If your client received interest from these monies, then they should be directed to our client.

The attached cases also support our position that our client is entitled to pre-judgment interest on the deposits.

Can I please have your position forthwith as to when your client expects to be making payment of the additional $29,000.00 owing on the deposit and the $225,000.00 cost order.

I look forward to your response.

Best regards,

Shawn Pulver | Partner | T. 416.364.1077 | spulver@msmlaw.ca

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<Ram_v._Talon_International_Inc.,_[2015]_O.J..doc>
<Bank_of_America_Canada_v._Mutual_Trust_Co.,_.doc>
<J._Lockwood_Leasing_Ltd._v._Brown,_[1991]_O. (1).doc>

David P. Preger Partner
199 Bay Street
Suite 2200
Commerce Court West
Toronto ON M5L 1G4
Phone 416-646-4606
Fax 416-865-1398
Email DPreger@dickinsonwright com

Don Rollo

From:	L. Paris <l.paris@rogers.com>
Sent:	June-28-16 4:54 PM
To:	Don Rollo
Subject:	Fwd: Rosenberg v 206 Bloor St. W. Limited CV-12-469391
Attachments:	image001.png; ATT00001.htm; image002.png; ATT00002.htm; image003.jpg; ATT00003.htm; image001.png; ATT00004.htm; image002.png; ATT00005.htm; image003.jpg; ATT00006.htm; ATT00007.htm; ATT00008.htm; ATT00009.htm; Judgment #2.docx; ATT00010.htm
Importance:	High

Begin forwarded message:

From: Shawn Pulver <SPulver@msmlaw.net>
Subject: RE: Rosenberg v 206 Bloor St. W. Limited CV-12-469391
Date: 18 March, 2016 11:10:44 AM EDT
To: "David P. Preger" <DPreger@dickinson-wright.com>
Cc: "Thomas W. Arndt" <TArndt@dickinson-wright.com>, Lauren Sigal <lsigal@msmlaw.ca>, Alison Duffy <ADuffy@msmlaw.net>, "Christina E. Corrente" <CCorrente@dickinson-wright.com>

David:

I appreciate that you have been out of town, but I expect that you will be able to provide your approval as to form and content for the Judgment by the close of business on Monday. The language of the Judgment should not be an issue, and this is not something that should take you long to review.

I trust that we will not need to bring a motion to approve the Judgment, and that I will hear back from you by the **close of business on Monday.**

Best regards,
Shawn Pulver | Partner | T. 416.364.1077 | spulver@msmlaw.ca

Macdonald Sager Manis LLP Barristers & Solicitors and Trade-Mark Agents
150 York Street, Suite 800, Toronto, Ontario, M5H 3S5 Canada | T. 416.364.1553 | F. 416.364.1453 | www.msmlaw.ca

From: David P. Preger [mailto:DPreger@dickinson-wright.com]
Sent: March-15-16 3:06 PM

Don Rollo

From:	L.Paris <l.paris@rogers.com>
Sent:	June-28-16 4:50 PM
To:	Don Rollo
Subject:	Fwd: ATTENTION TIME SENSITIVE
Attachments:	Judgment_#2-5.pdf; ATT00001.htm
Importance:	High

Begin forwarded message:

From: L. Paris <l.paris@rogers.com>
Subject: ATTENTION TIME SENSITIVE
Date: 25 April, 2016 12:40:10 PM EDT
To: DPreger@dickinson-wright.com, DPreger@dickinsonwright.com
Cc: Shawn PULVER <SPulver@msmlaw.net>
Bcc: Walter Aronovitch <waronovitch@amrlaw.ca>

April 25, 2016,

Mr. Preger, I have yet to receive a response from you.
I intend to advise the Law Society of your failure to discharge your professional obligation.

Linda Rosenberg

April 22, 2016,

Mr. Preger,
Can I please have the courtesy of a response to my letter regarding the attachment below.

Regards,

Linda Rosenberg

April 20, 2016

David P. Preger
Dickinson Wright
Commerce Court West
199 Bay Street
Suite 2200
Toronto, Ontario
M5L 1G

Dear Mr. Preger:

Re: Rosenberg v. 206 Bloor St. W. Ltd.

As you are aware, I am represented by Shawn Pulver in the above matter. He has consented to this direct communication.

Please also find a draft judgment, which was amended per your request.

I would ask that you approve same as to form and content and return it to me as soon as possible.

Yours very truly,

Linda P. Rosenberg

Encl

April 28, 2016

Complaints Services
The Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto Ontario
M5H 2N6

Dear Sirs:

Re: David Preger

I am a party to a litigation which proceeded to trial and concluded with judgment in my favour rendered on January 4, 2016. I am represented by Shawn Pulver and counsel for the defendant is David Preger.

My lawyer has on numerous occasions attempted to communicate with Mr. Preger in an effort to agree to the form and substance of the judgment to be issued.

My lawyer wrote to Mr. Preger on April 7, 2016 in response to some changes Mr. Preger had asked for in the wording of the judgement (copy attached). Mr. Preger has not seen fit to respond since.

Out of frustration, I asked my lawyer if I could communicate directly with Mr. Preger in an effort to resolve the issue. With my lawyer's consent, I attempted to communicate with Mr. Preger on three occasions without success (copies of emails attached).

My lawyer send one final email to Mr. Preger on April 27, 2016 on my behalf, once again there is no reply. (attached)

I would very much appreciate if you would investigate this matter.

Yours very truly,

Linda P. Rosenberg
487 St. Germain Ave.
Toronto, On. M5M 1W9
416-782-1464

Encl.

Don Rollo

From:	L.Paris <l.paris@rogers.com>
Sent:	June-28-16 4:49 PM
To:	Don Rollo
Subject:	Fwd: 206 Bloor Street West Limited et al ats Linda Paris Faith Rosenberg

Begin forwarded message:

From: "L. Paris" <l.paris@rogers.com>
Subject: Re: 206 Bloor Street West Limited et al ats Linda Paris Faith Rosenberg
Date: 3 May, 2016 9:20:00 AM EDT
To: "David P. Preger" <DPreger@dickinson-wright.com>
Cc: Shawn Pulver <SPulver@msmlaw.net>, "Christina E. Corrente" <CCorrente@dickinson-wright.com>
Bcc: Walter Aronovitch <waronovitch@amrlaw.ca>

David,
If the date is indeed is a clerical error then perhaps you can amend the draft to the correct date of January 4, 2016.

Linda Paris Rosenberg

On 2016-05-03, at 8:55 AM, David P. Preger wrote:

Do not sign anything on my behalf.

Sent from my iPhone

On May 3, 2016, at 8:39 AM, L. Paris <l.paris@rogers.com> wrote:

> David,
> The draft attached looks fine except for the date of the post judgement interest.
> I assume that the date omitted on the draft is a clerical error so I will change it to January 4, 2016 for the $523,750.00 Judgement
> I will proceed and endorse the draft "approved as to form and content" on your behalf and submit it to court today.

Regards,

Linda Paris Rosenberg

On 2016-05-02, at 5:11 PM, David P. Preger wrote:

Shawn, I emailed you my proposed amendments to your form of judgment on March 22, 2016. On April 6, 2016 you emailed me a revised judgment which incorporated virtually none of my proposed amendments and was not formatted. I have now taken the opportunity to revise the judgment in msword, a copy of which is attached. Although your client is emailing me directly, I intend to continue communicate with you while copying her. Thanks,

David P. Preger Partner

199 Bay Street
Suite 2200
Commerce Court West
Toronto ON M5L 1G4
<3c64ba.png>

<73c6b5.png>

Phone 416-646-4606
Fax 416-865-1398
Email DPreger@dickinsonwright.com

<image0de0b1.JPG>

David P. Preger Partner

199 Bay Street
Suite 2200
Commerce Court West
Toronto ON M5L 1G4

Phone 416-646-4606
Fax 416-865-1398
Email DPreger@dickinsonwright.com

<279962.png><62dde2.png>
<image12063b.JPG>

<TORONTO-#1150529-v4-Judgment.DOC>

From: L. Paris [mailto:l.paris@rogers.com]
Sent: Tuesday, May 03, 2016 8:39 AM
To: David P. Preger
Cc: 'Shawn Pulver'; Christina E. Corrente
Subject: Re: 206 Bloor Street West Limited et al ats Linda Paris Faith Rosenberg

David,
The draft attached looks fine except for the date of the post judgement interest.
I assume that the date omitted on the draft is a clerical error so I will change it to January 4, 2016 for the $523,750.00 Judgement
I will proceed and endorse the draft "approved as to form and content" on your behalf and submit it to court today.

Regards,

Linda Paris Rosenberg

On 2016-05-02, at 5:11 PM, David P. Preger wrote:

Shawn, I emailed you my proposed amendments to your form of judgment on March 22, 2016. On April 6, 2016 you emailed me a revised judgment which incorporated virtually none of my proposed amendments and was not formatted. I have now taken the opportunity to revise the judgment in msword, a copy of which is attached. Although your client is emailing me directly, I intend to continue communicate with you while copying her. Thanks,

David P. Preger Partner
199 Bay Street
Suite 2200
Commerce Court West
Toronto ON M5L 1G4
<image001.png>

<image002.png>

Phone 416-646-4606
Fax 416-865-1398
Email DPreger@dickinsonwright.com

<image003.jpg>

Don Rollo

From: L.Paris <l.paris@rogers.com>
Sent: June-28-16 4:49 PM
To: Don Rollo
Subject: Fwd: 206 Bloor Street West Limited et al ats Linda Paris Faith Rosenberg

Begin forwarded message:

From: "L. Paris" <l.paris@rogers.com>
Subject: Re: 206 Bloor Street West Limited et al ats Linda Paris Faith Rosenberg
Date: 4 May, 2016 1:00:08 PM EDT
To: "David P. Preger" <DPreger@dickinson-wright.com>
Cc: Shawn Pulver <SPulver@msmlaw.net>, "Christina E. Corrente" <CCorrente@dickinson-wright.com>
Bcc: Walter Aronovitch <waronovitch@amrlaw.ca>

David,
I cant understand why you are being so uncooperative.
The judgement is a forgone conclusion.
We can do this 2 ways,
You make the correction to the judgement you had prepared to reflect the correct dated for the post judgement interest
or,
I take the judgement you had prepared and add a note for the judge so that he can correct it when he signs it.

Either way this is happening today.

Regards,

Linda Paris Rosenberg

On 2016-05-03, at 8:55 AM, David P. Preger wrote:

Do not sign anything on my behalf.

Sent from my iPhone

On May 3, 2016, at 8:39 AM, L. Paris <l.paris@rogers.com> wrote:

David,

The draft attached looks fine except for the date of the post judgement interest.
I assume that the date omitted on the draft is a clerical error so I will change it to January 4, 2016 for the $523,750.00 Judgement
I will proceed and endorse the draft "approved as to form and content" on your behalf and submit it to court today.

Regards,

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David P. Preger Partner

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Toronto ON M5L 1G4
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<TORONTO-#1150529-v4-Judgment.DOC>

Confidentiality Warning This message and any attachments are intended only for the use of the intended recipient(s), are confidential and may be privileged If you are not the intended recipient you are hereby notified that any review, retransmission, conversion to hard copy, copying circulation or other use of this message and any attachments is strictly prohibited If you are not the intended recipient please notify the sender immediately by return e-mail and delete this message and any attachments from your system

Information confidentielle Le présent message, ainsi que tout fichier qui y est joint, est envoyé à l'intention exclusive de son ou de ses destinataires; il est de nature confidentielle et peut constituer une information privilégiée. Nous avertissons toute personne autre que le destinataire prévu que l'examen, la retransmission, l'impression la copie la distribution ou toute autre utilisation de ce message et de tout fichier qui y est joint est strictement interdit. Si vous n'êtes pas le destinataire prevu veuillez en aviser immédiatement l'expéditeur par retour de courriel et supprimer ce message et tout document joint de votre système

Don Rollo

From: L.Paris <l.paris@rogers.com>
Sent: June-28-16 4:46 PM
To: Don Rollo
Subject: Fwd: YOUR ATTENTION IS REQUIRED

Begin forwarded message:

From: "L. Paris" <l.paris@rogers.com>
Subject: Fwd: YOUR ATTENTION IS REQUIRED
Date: 11 May, 2016 9:25:02 AM EDT
To: Walter Aronovitch <waronovitch@amrlaw.ca>

I was thinking that I could ask he to provide the clause in my APS and in the Act that he is relying on to support his position that there is no post interest on the deposit

Begin forwarded message:

From: "David P. Preger" <DPreger@dickinson-wright.com>
Subject: Re: YOUR ATTENTION IS REQUIRED
Date: 10 May, 2016 4:39:20 PM EDT
To: "SPulver@msmlaw.net" <SPulver@msmlaw.net>
Cc: "Christina E. Corrente" <CCorrente@dickinson-wright.com>, "L. Paris <l. paris@rogers. com>" <l.paris@rogers.com>

Shawn, We are not ad idem on the question of whether post judgment interest on the principal amount of the judgment is governed by the Condominium Act or the Courts of Justice Act. My client says it is the former; your client the latter. We are at an impasse on this issue. I will not approve your client's form of judgment as to form and content.

Sent from my iPhone

On May 10, 2016, at 4:28 PM, L. Paris <l.paris@rogers.com> wrote:

> David,
> Since you had mis read my previous email to you about a clerical error I have taken the liberty to correct the Judgement document myself.
> If you take a moment to read it I am sure that any confusion you might have had in understanding my concern about an error has been eliminated.
> The interest amounts are to follow the dates of the decisions.

I would appreciate your immediate response in this matter.

Linda Paris Rosenberg

<TORONTO-#1150529-v4-Judgment.pdf>

David P. Preger Partner

199 Bay Street
Suite 2200
Commerce Court
West
Toronto ON M5L 1G4

Phone 416-646-4606
Fax 416-865-1398
Email DPreger@dickinsonwright.com

Profile | V-Card

DICKINSON WRIGHT PLLC

This is Exhibit "F"
affidavit of Linda Rosenberg
sworn before me, this 08
day of November 20 16

A COMMISSIONER FOR TAKING AFFIDAVITS

All reference to days shall be business days

MuseumHouse Suite No. 901
Residential Unit No. 01 Level 09
Floor Plan 901

206 BLOOR STREET WEST

CONDOMINIUM AGREEMENT OF PURCHASE AND SALE

FOR COMPLETED UNITS

1. PROPERTY

The undersigned Brian R. Golden and Lydia Lee (collectively or individually, as the case may be, the "Purchaser") agrees with 206 Bloor Street West Limited (the "Vendor") to purchase the following property (the "Property" or the "Residential Unit") being the Residential Unit noted above, substantially as shown for identification purposes only on the floor plan attached hereto as Schedule "D" and finished substantially in accordance with the finishing package described in Schedule "C" hereto annexed, together with one (1) parking unit and zero (0) locker unit, and together with an undivided interest in the common elements appurtenant thereto, including any common element areas designated as being for the exclusive use of the Residential Unit, all in accordance with Toronto Standard Condominium Plan No. 2254, registered in the Land Titles Division of the Toronto Registry Office (No. 66) together with a right-of-way in the nature of an access easement in common with others entitled thereto over Part of Lot 1 west of Avenue Road, Plan 289 York, designated as Part 2 on Plan 66R-22283 (the "Right-of-Way"), as more particularly and currently shown on the site plan attached to the Vendor's disclosure statement (the "Lands"), on the terms and conditions hereinafter set out.

2. PURCHASE PRICE

The purchase price for the Property shall be the sum of $1,750,000.00 (CAD) (the "Purchase Price"), inclusive of all Harmonized Sales Tax (hereinafter referred to as "HST" or "Harmonized Sales Tax") (hereinafter defined) (but net of any applicable rebate) (as hereinafter defined) which shall be assigned to the Vendor, as set out in Schedule "E" - HST Included in the Agreement of Purchase of Sale price, attached hereto. The Purchase Price shall be payable as follows:

(a) The sum of $175,000.00 (CAD) submitted with this Agreement, as an initial deposit; and

(b) The balance of the Purchase Price by certified cheque payable to the Vendor's Solicitors (or as they may direct) on the Closing Date, subject to the adjustments hereinafter set forth.

3. CLOSING DATE

Subject to the rights of the Vendor set out below, the transfer of title to the Unit shall be completed on the 30th day of June, 2016 (the "Closing Date"). ~~Notwithstanding the foregoing, it is expressly understood and agreed by the parties hereto that the Vendor shall be entitled to unilaterally extend the Closing Date, on one or more occasions, for one or more periods of time, not exceeding three (3) months in the aggregate from the date specified above without any prior notice whatsoever and for any reason whatsoever and under no circumstances shall the Purchaser be entitled to terminate this transaction or otherwise rescind this Agreement as a result thereof or make any claim for any compensation.~~

4. SCHEDULES

The following schedules are integral parts of this Agreement and are contained on subsequent pages:

Schedule "A"	-	Additional Provisions of this Agreement
Schedule "B"	-	(intentionally deleted)
Schedule "C"	-	Standard Residential Unit Finishes

Schedule "D"	-	Floor Plan of Residential Unit
Schedule "E"	-	HST Included in Agreement of Purchase and Sale Price

All deposit cheques shall be made payable to the Vendor's Solicitors, in trust. All funds shall, subject to what is contained in this Agreement to the contrary, be held in trust by the Vendor's Solicitors or replaced by security of a prescribed class in accordance with subsection 81(7) of the Act pending completion or other termination of this Agreement, and shall be credited on account of the Purchase Price on the Closing Date.

The Purchaser acknowledges that he or she has received all pages of, schedules and addendums to, this Agreement.

Notwithstanding anything herein contained to the contrary, if the Purchaser has not delivered to the Vendor an acknowledgement of receipt of each of the Vendor's disclosure statement (the "Disclosure Statement") and a copy of this Agreement accepted by the Vendor in order to evidence the commencement of the Purchaser's ten (10) day statutory rescission period by no later than the third (3rd) day following the date of the Purchaser's execution of this Agreement, then the Vendor may terminate this Agreement at any time thereafter upon delivery of written notice to the Purchaser. If the Purchaser does not execute the said acknowledgement while at the sales office, the Purchaser may deliver the acknowledgement in the manner provided in this Agreement, provided it is delivered within the afore-referenced time period.

DATED this 5 day of January 2016.

SIGNED, SEALED AND DELIVERED

In the presence of) _____ (Signature)
WITNESS:) Purchaser: Brian R. Golden
) D.O.B. May 16, 1962 S.I.N. _____
) D.L.# G6224-09676-20516
) Address: 79 Glenview Avenue, Toronto, ON, M4R 1P7
)
) Telephone (H): 416-946-8519 (B)
) Telefax:
) Email: bgolden@rotman.utoronto.ca

) _____ (Signature)
WITNESS:) Purchaser: Lydia Lee
) D.O.B. July 8, 1965 S.I.N. _____
) D.L.# L2158-49606-55708
) Address: 79 Glenview Avenue, Toronto, ON, M4R 1P7
)
) Telephone (H): 416-946-8519 (B)
) Telefax:
) Email: lydia.lee@uhn.ca

The undersigned hereby accepts the offer and its terms, and agrees to and with the above-named Purchaser(s) to duly carry out the same on the terms and conditions above mentioned.

ACCEPTED this 5 day of January, 201__.

Vendor's Solicitors	Purchaser's Solicitors	SIGNED, SEALED AND DELIVERED
MILLER THOMSON LLP Barristers & Solicitors Suite 5800, 40 King Street West Toronto, ON M5H 3S1 Attn: Mr. Odysseas Papadimitriou Telephone: 416.595.8559 Facsimile: 416.595.8695		206 BLOOR STREET WEST LIMITED Per: _____ Authorized Signing Officer: I have the authority to bind the Company