CITATION: Emerald Castle v. FAAN Mortgage, 2021 ONSC 815
COURT FILE NO.: CV-20-00637238-00CL
DATE: 20210202

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
EMERALD CASTLE DEVELOPMENTS INC.	*William Friedman, Stephen Nadler* and *Judy Hamilton,* for the Applicant
Applicant	
– and –	
FAAN MORTGAGE ADMINISTRATORS INC., in its capacity as the Court-Appointed Trustee of BUILDING & DEVELOPMENT MORTGAGES CANADA INC. formerly known as CENTRO MORTGAGE INC., and OLYMPIA TRUST COMPANY	*Michael De Lellis, Jeremey Dacks* and *Mary Paterson,* for the Respondent FAAN Mortgage Administrators Inc., in its capacity as the Court-Appointed Trustee of Building & Development Mortgages Canada Inc. formerly known as Centro Mortgages Inc.
Respondents	
	George Benchetrit and *Saneea Tanvir,* Court-Appointed Representative Counsel for 453 individual investors
	HEARD: November 3, 2020

REASONS FOR DECISION

DIETRICH J.

Overview

[1] In 2014, the applicant, Emerald Castle Developments Inc. ("Emerald"), a land developer, was looking to finance the development of a 48-acre parcel of land in the City of Brampton, Ontario (the "Brampton Property").

[2] On August 25, 2014, Emerald entered into a loan agreement with the respondent Centro Mortgages Inc., now known as Building & Development Mortgages Canada Inc. ("BDMC"), a mortgage broker and administrator (the "Loan Agreement").

[3] On the same day, Emerald entered into a Development Consulting Agreement (the "DCA") with Fortress Real Developments Inc. ("Fortress"). Fortress is a development consultant company, which partnered with Emerald, and was involved in raising initial financing for the Brampton Property development project. Fortress approached BDMC to raise such financing.

[4] BDMC raised funds from 453 individual investors (the "Investors") after it negotiated and executed the Loan Agreement. BDMC used these funds to make a syndicated mortgage loan to Emerald in the principal amount of $21,246,153.85 for a five-year term.

[5] The respondent Olympia Trust Company, which funded a significant portion of the loan, did not appear at this hearing.

[6] BDMC secured the loan by a charge on the Brampton Property and a general security agreement over the personal property and undertaking of Emerald respecting the development of the Brampton Property.

[7] At the end of the five-year term, the "End of Term Event" provision of the Loan Agreement permitted Emerald to discharge BDMC's mortgage and other security by deeming a sale of all vacant lands at the Brampton Property at that time, at a price to be established through appraisals, and by applying the deemed sale proceeds according to a specific formula set out in the "Waterfall" provision of the Loan Agreement.

[8] Relying on the End of Term Event and Waterfall provisions in the Loan Agreement, Emerald calculated that $9,124,574 was due to BDMC. BDMC's assets are now being managed by FAAN Mortgage Administrators Inc. ("FAAN"), which was appointed by this court as trustee in 2018 (the "Trustee"). In addition, Emerald asserted that in exchange for that payment, it was entitled to a full discharge of the security granted.

[9] BDMC asserts that the End of Term Event provision of the Loan Agreement is not enforceable because it is manifestly unfair and was not adequately disclosed to the Investors. Alternatively, it asserts that if the provision is enforceable, Emerald is only entitled to a partial release of the security granted in the amount of the partial payment.

[10] For the reasons that follow, I find that Emerald is permitted to rely on the End of Term Event provision to pay the amount owing pursuant to the End of Term Event and Waterfall provisions; and it is entitled to a full discharge of the security granted to BDMC.

Issues

[11] There are two issues in this matter:

1. Is the End of Term Event provision in the Loan Agreement unenforceable because it is manifestly unfair and because the Investors did not have adequate disclosure of the provision?

2. If the End of Term Event provision is enforceable, can a partial payment of the loan be made in exchange for an equivalent partial discharge of the BDMC's security?

Background Facts

[12] In addition to the Loan Agreement and the DCA, both of which included the End of Term Event and Waterfall provisions, there were two other agreements related to the loan. They were: a) a letter of indemnity dated August 25, 2014 from BDMC to Emerald; and b) a letter from Fortress, of even date, confirming the use of $810,000 of the loan to fund a $200,000 payment to unidentified third parties; a $225,000 fee to Emerald as a consulting fee; a $375,000 payment to Fortress as an additional placement fee; and $10,000 as a donation to a charity selected by BDMC.

[13] The Loan Agreement includes the following key provisions:

(a) the loan proceeds were to provide funding: (i) to pay the Borrower the sum of $12 million being 50% of the agreed-upon Borrower's equity in the Brampton Property; (ii) to pay for the Borrower's soft or hard costs to be incurred up to $1 million; and (iii) to pay for 100% of the fees/costs payable to the Development Consultant, Fortress under the DCA;

(b) the loan would be advanced in instalments, with the Lender being required to fund the entire loan within 11 months following execution of the Loan Agreement;

(c) the maturity date would occur on the expiry of a term of five years commencing on the date of the first advance of the loan;

(d) interest at the rate of 8% per annum would accrue and be capitalized, and be repayable on the maturity date only in accordance with, and subject to the Waterfall and the End of Term Event provisions; (emphasis added)

(e) the loan principal and all accrued interest would become due and payable on the maturity date in the manner and priority set forth in the Waterfall and End of Term Event provisions; (emphasis added)

(f) the Waterfall provision (section 7.2.A) details the manner and priority in which available cash flow is to be paid out, which includes (in part) the following order of distribution: i) repayment of principal and interest under the existing first mortgage of $8,150,000 or any refinancing thereof, and under any project construction loans; ii) payment to the Borrower of unpaid project management fees and a guarantee fee of 2.5%; iii) the sum of $13 million to each of the Lender and the Borrower, on a *pro rata* basis, on account of: in the case of the Lender, the portion of the loan principal that excludes the amount of Fortress' fees/costs; and in the case of the Borrower, the Borrower's remaining Borrower's equity; iv) payment to the Lender and the Borrower, on *pro rata* basis, of

the 8% accrued interest to the Lender and an 8% annual return on the Borrower's equity to the Borrower; v) any remaining cash flow to be distributed *pro rata* to Fortress and to the Borrower, and from the amount to be distributed to Fortress there shall be deducted and paid to the Lender any remaining amount owing on the loan;

(g) as part of the security that the Lender is to receive for the loan, the Borrower is to provide the Lender with a mortgage on the Brampton Property for the principal sum of $22 million, which mortgage shall rank *pari passu* with the Borrower's *pari passu* mortgage for the same principal amount securing repayment of the Borrower's equity (the "Emerald *Pari Passu* Mortgage"), and both mortgages are entitled to distribution per the Waterfall; (emphasis added)

(h) per the End of Term Event (section 14), in the event the loan is not repaid by the maturity date, and despite any provisions of the Security, the Lender shall only be permitted to exercise its rights under the security in the event that the Borrower does not adhere to the following procedure: each party shall obtain its own appraisal of any portions of the project not under construction for either servicing or house construction ("Vacant Lands*"*), failing which the appraisal obtained by the one party shall govern as to the value, and where both appraisals are obtained within the 60 days, then the average of the two appraisals will apply. The Borrower shall then have the option to obtain a partial discharge of the Security as against the Vacant Lands upon payment of the appraised value less specified deductions pursuant to the Waterfall in section 7.2 (the "paydown"). Upon payment of the paydown in accordance with the Waterfall, the Lender shall provide partial discharges of all of its security in respect of the Vacant Lands, and the same shall no longer be security for the loan. In the event the Borrower does not exercise the foregoing option to obtain the discharges, the lands shall be listed for sale with a reputable commercial real estate agent; (emphasis added)

(i) in the event there is a shortfall once all the project lands have been sold and the Lender's rights under the End of Term Event provision have been fully exercised, the Lender agrees to waive its rights to repayment of any remaining amount owing on the loan and provide a release of the Borrower and a discharge of all remaining security; (emphasis added)

(j) the Waterfall spells out how funds are to be paid to either the Borrower or the Lender and/or Fortress as and when received from the sale of the project in whole or in part; (emphasis added)

(k) the Loan Agreement and related documents constitute the entire agreement between the parties; and (emphasis added)

(l) time shall be of the essence.

[14] Individual Investors entered into an Investor Participation and Servicing Agreement with BDMC under which Investors provided cash to BDMC to be loaned to Emerald.

[15] As provided for the in the Loan Agreement, each of Emerald and BDMC had a *pari passu* mortgage. Each such mortgage secured the same principal sum, each ranked *pari passu* with each other, and each would be entitled to a distribution under the Waterfall provision.

[16] The BDMC mortgage was registered on title to the Brampton Property on November 24, 2014 and secured the sum of $10 million. As further advances were made, the principal secured was increased and by June 2015, amounted to $21,246,154. The mortgage is currently registered to BDMC and Olympia Trust Company.

[17] The Emerald *pari passu* mortgage was registered on title to the Brampton Property on November 25, 2014 securing the principal sum of $22,000,000 in respect of its owners'/borrower's equity in the project.

[18] BDMC lent the first tranche of the loan on November 24, 2014. The maturity date was, therefore, November 24, 2019.

[19] Of the $21.5 million funded by investors, approximately 35% was paid to various parties, mostly related to Fortress, as fees.

[20] The remaining 65% was paid to Emerald. Of that amount, $12 million was paid to the owners of Emerald to repatriate their equity and create the Emerald *Pari Passu* Mortgage. Emerald also paid $1.38 million to one of its owners as project management fees.

[21] As the maturity date approached, FAAN, the Trustee of BDMC, entered into settlement discussions with Emerald. A year earlier, the Trustee had requested and received a Waterfall calculation. Emerald made an offer to pay $9,500,000 in full and final satisfaction of all of its liabilities under the Loan Agreement as an alternative to a repayment of the loan in accordance with the End of Term Event process. On October 21, 2019, the parties entered into a settlement agreement whereby Emerald would pay the Trustee $9,500,000. By October 31, 2019, the parties agreed to increase the settlement amount to $10,450,000.

[22] The Trustee brought a motion to approve the settlement and filed with the court its Twelfth Report of the Trustee. In the Twelfth Report, it outlines the reasons why it and Representative Counsel for the Investors were recommending the settlement, including its view that a 45% recovery on the outstanding principal was reasonable.

[23] In the Twelfth Report the Trustee states:

> Among other things, the End of Term Event Clause precludes BDMC, in its capacity as lender to the Castlemore Project, from exercising its rights under its Security (as defined in the Castlemore Loan Agreement), provided that certain procedural steps are followed by the Castlemore Borrower. These steps include, among other things, obtaining updated appraisals for the Property ("Updated Appraisals"). After obtaining Updated Appraisals, the Castlemore Borrower then has the option of either (i) paying out the

> Castlemore Individual Lenders in the manner and priority described by the Loan Agreement ("End of Term Process") using the average value of the Updated Appraisals for distribution purposes, subject to certain deductions; or (ii) listing the Property for sale with a reputable commercial real estate agent and then distributing the proceeds from the sale in accordance with the End of Term Process.

[24] Ultimately, based on additional Investor feedback, the Trustee did not proceed with the motion. The settlement agreement expired and on December 6, 2019, Emerald notified the Trustee of its intention to proceed to apply the End of Term Event provision of the Loan Agreement.

[25] Pursuant to the Loan Agreement, each of Emerald and the Trustee was then required, within 60 days of the maturity date, to obtain an appraisal of the Brampton Property, which remained Vacant Lands for the purposes of the Loan Agreement. Owing to ongoing planning appeals, Emerald had been unable to proceed with the development prior to the maturity date. Both Emerald's expert and the Trustee's expert agree that the development will not likely be completed until 2025.

[26] On January 7, 2020, Emerald obtained an appraisal from CBRE. It provided the appraisal to the Trustee together with a Waterfall calculation showing $9,124,574 due to the Trustee on behalf of BDMC/Olympia Trust in accordance with the End of Term Event and Waterfall provisions.

[27] Though outside the 60-day requirement for obtaining an appraisal, the Trustee also provided an appraisal of the Brampton Property that it obtained from Jones Lange LaSalle Real Estate Services. On delivery of the appraisal, the Trustee took the position that it did not attorn or agree to the End of Term Event process.

[28] In March 2020, in the Trustee's Nineteenth Report to the court, the Trustee took the position that Emerald was not entitled to exercise the End of Term Event in the Loan Agreement. The Trustee gave no explanation for its change in position and Representative Counsel's change in position from the positions they took in the Trustee's Twelfth Report.

[29] On March 2, 2020, Emerald brought this application, contrary to the stay of proceedings. The Trustee consented to Emerald commencing this application while reserving its rights.

Positions of the Parties

[30] Emerald asserts that the Loan Agreement was negotiated for nearly a year between arm's length commercial parties, each of which was represented by senior commercial legal counsel throughout the negotiations. The Loan Agreement should, therefore, be enforced.

[31] Further, Emerald asserts that there were no Investors at the time the Loan Agreement was being negotiated. The Investors made their investments in the syndicated mortgage after the Loan Agreement had been finalized. The Trustee only became involved some three and a half years after the Loan Agreement had been negotiated.

[32] The Trustee asserts that despite the fact that Emerald owes nearly $30 million to the investors in the syndicated mortgage, Emerald seeks to rely on the End of Term Event provision to pay only $9.1 million and escape all obligations under the Loan Agreement. If Emerald's application is granted, the result could be an extinguishment of the debt, a full discharge of the security, a full release from BDMC and the Investors, and the ability to develop the Brampton Property for its sole benefit and profit. The Trustee asserts that Emerald should not be entitled to enforce the End of Term Event provision because Emerald was wilfully blind to the manifest unfairness and poor disclosure to the Investors.

[33] Alternatively, the Trustee asserts that if the End of Term Event provision is enforceable, the provision permits Emerald to make a partial payment of the loan in exchange for a partial release of the security granted equivalent to the partial payment. It further asserts that the End of Term provision, on its face, does not permit Emerald to make a partial payment on the loan, keep the Brampton Property, and walk away from its remaining debt obligations.

Analysis

Is the End of Term Event provision unenforceable?

[34] The Trustee and Representative Counsel argue that Emerald's interpretation of the End of Term Event provision is manifestly unfair. They submit that Emerald did not ensure that the Investors were adequately notified of the End of Term Event provision or of Emerald's interpretation of that provision and the Waterfall provision. Accordingly, they argue that this lack of proper disclosure renders the provision unenforceable.

[35] For the reasons that follow, I do not find that the End of Term Event provision is manifestly unfair, or that there was inadequate disclosure by Emerald that should render the End of Term Event provision unenforceable.

[36] In support of their position, the Trustee and Representative Counsel rely on the decision of the Court of Appeal for Ontario in *MacQuarie Equipment Finance Ltd. v. 2326695 Ontario Ltd. (Durham Drug Store)*, 2020 ONCA 139. In that decision, the Court of Appeal held that inadequate notice of a particularly unfair term may render that term unenforceable.

[37] In *MacQuarie,* a pharmacy owner entered into a contract with a telemedicine provider. She was then presented with a second contract that, unbeknownst to her, was with a medical equipment lessor. The termination provisions in the two contracts were different from each other and she did not review the second contract, nor was she notified about the difference in the termination provisions. Enforcing the termination provision under the second contract would have meant that the pharmacy owner would have had to continue to make payments for equipment even if other parties defaulted in providing telemedicine services, which would render the equipment useless. The Court of Appeal held that the lack of disclosure was so unfair that it rendered the termination clause unenforceable. The Court of Appeal made this determination even though the clause was commonplace and not, on its face, harsh or oppressive; and the lessor seeking to enforce it had no intention to mislead the pharmacy owner: paras. 37-38.

[38] The Trustee and Representative Counsel submit that even if Emerald did not intend to mislead the Investors, it could not have reasonably believed that investors would have agreed to loan over $21,000,000 in exchange for security worth less than $10,000,000. Further, they argue that the investors in the syndicated mortgage were repeatedly told that their investment was fully secured on the Brampton Property. They submit that the Investors were not told that the "benchmark of value" of $32 million for the Brampton Property was not directly linked to the fair market value of the property but rather was based on the number acceptable to Emerald, or that the benchmark of value was intended to be diluted by a *pari passu* mortgage obtained by Emerald's owners to secure their equity in the project.

[39] The Trustee argues that, like in *MacQuarie*, the promotional materials provided to the Investors did not clearly disclose the nature of the security, but rather assured the Investors of the priority of their security. The Trustee further argues that the Investors were not notified of the End of Term Event provision or Emerald's interpretation of it, which is onerous and conflicts with the assurances the Investors received.

[40] Representative Counsel argues that it was not disclosed to the Investors that Emerald would place a mortgage on the Brampton Property that would rank *pari passu* with the second ranking mortgage in favour of BDMC, thereby depriving the Investors of much of the collateral for their loan.

[41] Representative Counsel also argues that the DCA, which set out Fortress' compensation in the form of fees and distribution of profits was never provided to the Investors and its terms were not disclosed to them.

[42] The Trustee and Representative Counsel argue that Emerald, in the DCA, negotiated for the right to pre-approve all marketing and advertising materials for the Brampton Property project. However, it now seeks to distance itself from those materials that induced investors to invest and it did not conduct any oversight on Fortress or its representations to the Investors.

[43] The evidence in support of what the Investors were told is contained in the affidavit of Dr. Michael Pizzuto, one of the 453 Investors. He attests that he was given promotional materials that stated that if Emerald defaulted on the loan and could not repay on the maturity date, Emerald would find a solution that could include a payment to investors for an extension, or refinancing to buyout the investors, or a sale of the Brampton Property to recover the investor monies. The Trustee and Representative Counsel assert that the Investors were not notified of Emerald's interpretation that if the loan was not repaid by the maturity date, the investors would lose most of their investment, the debt would be extinguished, they would lose their security, Emerald would be released from its obligations, and would be entitled to keep the Brampton Property.

[44] The Trustee and Representative Counsel further assert that, like the pharmacy owner in *MacQuarie*, the onerous provision was not brought to Dr. Pizzuto's attention; he did not have the opportunity to receive independent legal advice; and he did not have the opportunity to carefully read the documents provided to him. Dr. Pizzuto also attests that he did not receive independent

legal advice about the Waterfall provision and that it was not explained to him that this provision could effect Emerald's obligation to repay the principal and interest owing under the loan.

[45] I find that the facts of this case can be readily distinguished from those in the *MacQuarie* case. In *MacQuarie*, the two contracts contained inconsistent termination provisions: one allowed the pharmacy owner to terminate the lease if the supplier defaulted, whereas the other did not. When the pharmacy owner discovered that the supplier had acted fraudulently, she tried to terminate both contracts, but the finance company sought to enforce the second contract in reliance on the "no cancellation" provision. The Court of Appeal found that "in the highly unusual circumstances of this case", the pharmacy owner could terminate the second contract because she had signed the contract in a hurried manner, without having been told it was a different contract than the one previously sent to her, she had had no opportunity to negotiate the terms, and had had no legal advice. Further, she had never been provided with a copy of the second signed contract, which was printed on two tightly-packed pages with extremely small font making it difficult to read: *MacQuarie*, at paras. 38 and 41. By contrast, according to Dr. Pizzuto's own evidence, he did not make his investment in a hurried manner and he received some legal advice over the phone (albeit from a Fortress lawyer). There is no evidence to suggest that he was denied an opportunity to seek further legal advice or that he did not receive copies of all agreements he signed or that those agreements were in small print or difficult to read.

[46] In fact, Dr. Pizzuto received many documents relating to his investment. Apart from the Loan Agreement, Dr. Pizzuto would have received documents indicating how the loan proceeds of $21,256,153 would be applied. Specifically, the Project Fact Sheet disclosed the repayment of 50% of the Borrower's equity; the payment toward the Borrower's project costs; and the payment of the Development Consultant's fees. The Project Fact Sheet also described the distribution of revenue in accordance with the Waterfall provision, including principal equity advances *pari passu*, with a direction to refer to the Loan Agreement for "in-depth details."

[47] While Emerald admits that Dr. Pizzuto may not have been provided a copy of the DCA, it submits that it was not hidden from him. I agree. There are several references to it in the Loan Agreement and in an Acknowledgement that Dr. Pizzuto signed. The Investors or their advisors could have easily requested a copy. Dr. Pizzuto was also provided with a document summarizing the Waterfall provision.

[48] Dr. Pizutto's own evidence includes copies of documents that he received that warned him that "Investments in syndicated mortgages are speculative and involve a high degree of risk" and "The development of a project may not be completed within the anticipated time frame, or at all, which in turn could delay payment to participants or put payment at risk."

[49] In my view, the disclosure that Dr. Pizutto received is not in any way comparable to the disclosure that the pharmacy owner in the *MacQuarie* case received. The mechanics of the End of Term Event provision and the Waterfall provision were clearly set out in the documents provided to Mr. Pizutto. If his consultation with the Fortress lawyer left him with additional questions, he could have sought additional legal advice before entering into his investment agreement with mortgage broker FFI Capital Inc.

[50] The End of Term Event and Waterfall type provisions were not unique to the Loan Agreement with Emerald. In the Trustee's First Report to the court, the Trustee made the following general comments about the 44 Centro/BDMC syndicated mortgage loan projects over which it was appointed as Trustee:

> …significant portions of the sums advanced by Investors through BDMC were used to pay 'development consultant fees'. The development consultant fees were in an amount that generally appears to be equal to approximately 35% of the principal amount advanced under the applicable BDMC syndicated mortgage loan. A portion of this fee (approximately 50%) would be paid to the Investors' brokers…
>
> …Moreover, many Investors agreed to terms that permit repayment 'waterfalls' that, at least in some instances, appear to permit owners of the real estate (including the borrowers and owners of the borrowers) to recover some of the amounts they invested in the developments in priority to the amounts loaned by the Investors." (emphasis added)

[51] BDMC negotiated and entered into the Loan Agreement with Emerald after negotiations that spanned many months, with the assistance from senior legal counsel experienced in commercial matters. It agreed to the terms of the Loan Agreement, including the End of Term Event and Waterfall provisions. At no point following the execution of the Loan Agreement did BDMC attempt to renegotiate the terms. BDMC was aware of Emerald's *Pari Passu* Mortgage, which is described in clear terms in section 8 of the Loan Agreement.

[52] It is uncontradicted that there were no investors for the nearly full year while the Loan Agreement was being negotiated or at the time it was executed. Centro/BDMC, Fortress and Olympia Trust began raising their funds sometime thereafter. They would have done so with the knowledge of the terms of the Loan Agreement.

[53] Dr. Pizutto attested that he made his investment decision based on discussions with a representative of FFM Capital Inc. and its representative Mr. Mazzoli with whom he had invested previously. Dr. Pizzuto's allegations of misrepresentation, as set out in his affidavit, are directed at FFM Capital Inc., and to a lesser extent, Fortress. There is no evidence to suggest that he ever met or communicated with Emerald. Further, any alleged misrepresentation to Dr. Pizzuto was made after the Loan Agreement had been executed. Dr. Pizzuto entered into his investment transaction with Centro/BDMC on November 25, 2014, which was three months after the Loan Agreement had been executed and the day after the first advance had been made to Emerald.

[54] There is no evidence to suggest that Emerald had any knowledge of, or involvement with, how or from whom Centro/BDMC, Fortress and Olympia Trust were raising their funds for the loan.

[55] Desi Auciello, on behalf of Emerald, attested that Emerald had no knowledge of any of the communications, representations or dealings that Centro/BDMC, Olympia Trust, their mortgage brokers, or Fortress had with any of their investors; nor did Emerald communicate with those investors or know who they were. On examination, he did concede that it was Fortress' business model to go to the public to raise funds and that it was possible that salespersons may be involved in the process.

[56] Mr. Auciello attested that Emerald had no knowledge of the agreements between these entities and their respective investors. Further, his evidence is that Emerald had no involvement in how Centro/BDMC/Fortress dealt with their fees, commissions to brokers or the return to their respective investors.

[57] I agree with Emerald's submission that the failure of the brokers and advisors, like FFM Capital Inc., and possibly Fortress, to properly explain the investment opportunity to Dr. Pizzuto and other investors cannot ground a finding that two key provisions of the Loan Agreement negotiated and agreed to between Emerald and BDMC, being the End of Term Event provision and the Waterfall provision, are unenforceable.

[58] In interpreting the terms of a contract, the court looks to the language used by the parties and gives effect to their written agreement. It is not for the court to re-write the terms or create terms that are not contained in the contract. The court must look to the four corners of the document to ascertain the intention of the parties: *General Refractories Co. of Canada v. Venturedyne Ltd.*, [2002] O.J. No. 54, at para. 56.

[59] The parties to the Loan Agreement were Emerald and BDMC, in trust. There were no investors at the time it was negotiated and executed. Emerald did not contract with any of Centro/BDMC's or Olympia Trust's investors and, therefore, cannot be said to owe them a duty of care. BDMC entered into the contract as trustee. It was incumbent on BDMC, as a fiduciary, to act in the best interests of those whose beneficial interests it was representing. Under the Loan Agreement, Emerald's obligations, including its obligation to make a payment, are to the Lender (Centro/BDMC), not the Investors.

[60] The quantum of that payment is calculated in accordance with the End of Term Event and Waterfall provisions.

[61] I do not find that it is unfair that arm's length commercial parties, who specifically negotiated and agreed that any repayment of the loan would be in accordance with the Waterfall provision, and who further agreed to a mechanism that would terminate the loan at the end of its term through appraisals, or a listing and sale of the Brampton Property, with the revenue flowing through the Waterfall, should be held to their bargain.

[62] It is not for the court to rewrite contracts to reflect changed circumstances or more equitable results to accord with a court's after-the-fact assessment of what is just and equitable. This is especially so when dealing with commercial agreements negotiated at arm's length by sophisticated parties: *Adamson v. Steed,* 2008 ONCA 375, at para. 4; *J.S.M. Corporation (Ontario) Ltd. v. The Brick Furniture Warehouse Ltd.*, 2008 ONCA 183, at para. 60.

[63] I find that the Trustee and Representative Counsel have not shown the manifest unfairness and inadequate disclosure by Emerald that would be required to render the End of Term Event and Waterfall provisions unenforceable.

Does the End of Term Event provision permit Emerald to make a partial payment of the amount owing and receive, in exchange, an equivalent partial release of the security?

[64] The Trustee asserts that the End of Term Event provision only precludes the Lender BDMC/Trustee from enforcing its security and does not result in the discharge of its security.

[65] I do not agree with this interpretation of the provision. The End of Term Event provision precludes the Lender/Trustee from exercising its rights under its security and also, at clause 14(i)(B)(I) of the Loan Agreement, expressly gives the Borrower/Emerald the right to obtain a discharge of the Lender's Security as against the Vacant Lands. The End of Term Event does not contemplate a "partial payment" by the Borrower. The payment contemplated is a payment pursuant to the formula: the appraised value of the Brampton Property, less specific deductions, which amount is then applied to the Waterfall provision to determine the payment to the Lender to obtain a discharge of the security as against the Vacant Lands.

[66] The reference to "partial discharge" in section 14(B)(II) of the Loan Agreement must be read in context. Section 14 is prefaced with "notwithstanding the provisions of the Security", and clause (B)(II) states that "the Lender shall provide *partial discharges* of *all* of its Security *in respect of such Vacant Lands* and [the same] shall no longer form part of the Security held by the Lender for the Loan." The Security in question is "all" of the security in respect of the Vacant Lands. On the maturity date, there were only Vacant Lands comprising the Brampton Property. A partial discharge would occur in a situation in which there were Vacant Lands and lands that were not Vacant Lands, i.e. lands that were being developed. The provision does not make any reference to a discharge of security in an amount equivalent to the payment made. Section 14(E) of the Loan Agreement confirms that any partial discharge refers to "Vacant Lands" as opposed to "Servicing or House Construction Lands."

[67] This End of Term Event provision, in combination with the Waterfall provision, provides Emerald with a termination mechanism by which it can obtain a discharge of the security on all the Vacant Lands by deeming a sale of those lands with the sale price to be established through appraisals.

[68] I observe that the Trustee took no issue with the interpretation of these terms in its Twelfth Report to the court or on its motion to approve the settlement, which had the support of Representative Counsel.

[69] Again, I note that it is not for the court to re-write the terms of a contract or add terms that are not contained in the contract: *General Refractories*, at para. 56.

[70] The standard for implying a term into a contract is very high. The Court will not rewrite contracts to reflect changed circumstances or more equitable results: *Adamson*, at para. 4.

Disposition

[71] I declare that the End of Term Event and Waterfall provisions in the Loan Agreement entitle the applicant, Emerald Castle Developments Inc., to the orders and relief sought in its application, respecting the Loan Agreement, provided that any dispute concerning the calculation of the payout by the applicant to the Trustee on behalf of BDMC pursuant to the End of Term Event provision and the Waterfall provision shall be the subject of a separate hearing by this court, if required. No order shall issue until the calculation of the payout is resolved.

Costs

[72] The parties are strongly encouraged to agree on the matter of costs. If they are unable to do so, they may make written submissions on costs. Those submissions shall not exceed three pages in length (not including a bill of costs or costs outline and any offer to settle). The applicant shall make its submissions by February 16, 2021 and the Trustee and Representative Counsel shall make their submissions by March 2, 2021.

Dietrich J.

Released: February 2, 2021

CITATION: Emerald Castle v. FAAN, 2021 ONSC 815
COURT FILE NO.: CV-20-00637238-00CL
DATE: 20210202

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

EMERALD CASTLE DEVELOPMENTS INC.

Applicant

– and –

FAAN MORTGAGE ADMINISTRATORS INC., in its capacity as the Court-Appointed Trustee of BUILDING & DEVELOPMENT MORTGAGES CANADA INC. formerly known as CENTRO MORTGAGE INC., and OLYMPIA TRUST COMPANY

Respondents

REASONS FOR DECISION

Dietrich J.

Released: February 2, 2021