CITATION: 2100 Bridletowne Inc. v. Ding, 2021 ONSC 2119
COURT FILE NO.: CV-20-653726
DATE: 20210319

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 2100 Bridletowne Inc.

AND:

Yuan Ding, Zhifeng Ding and Lifang Jin

BEFORE: J.E. Ferguson J.

COUNSEL: Michael A. Currie and Fabian Suárez-Amaya, for the plaintiff

Jonathan Miller and Matilda Lici, for the defendants

HEARD: March 16, 2021

ENDORSEMENT

[1] The plaintiff, 2100 Bridletowne Inc. ("Bridletowne"), a property developer, brings this motion for an interlocutory injunction to obtain a mandatory injunction that the defendants vacate a townhouse condominium unit in Scarborough, and a prohibitive injunction that they are prevented re-entry.

[2] The defendants oppose the relief being sought and in fact brought their own ill-conceived motion for specific performance.

[3] On March 16, 2021, I granted the plaintiff's motion and, as a result, did not hear the defendants' motion for specific performance. I indicated that I would release my reasons as soon as possible and that the appeal period would not commence to run until I released the reasons. These are the reasons.

[4] Bridletowne is the builder and seller of condominium townhouses located at 2100 Bridletowne Circle in Scarborough. It features 60 newly built units with a mix of two-storey stacked townhomes and three-storey traditional townhouses.

[5] The defendant, Yuan Ding (also known as Yvonne Ding) ("Ms. Ding"), entered into an agreement of purchase and sale with Bridletowne on June 3, 2017 (the "APS") to purchase Suite 325, unit No. 22, Level No. 2 at 2100 Bridletowne Circle (the "unit"). Ms. Ding is a real estate agent with approximately 10 years work experience.

[6] The defendants, Zhifeng Ding and Lifang Jin are Ms. Ding's parents (collectively with Ms. Ding, the "defendants"). In March 2020, they executed an amendment to the APS to also become purchasers of the unit. They reside in London, Ontario.

[7] Pursuant to the APS, the defendants could take interim occupancy on the first tentative occupancy date, which was scheduled for November 1, 2018 but subject to amendment (the "interim occupancy"). The APS also contemplated the "unit transfer date", which was the date on which the title to the unit would transfer from Bridletowne to the defendants. Interim occupancy could occur prior to the unit transfer date.

[8] Interim occupancy was governed by the "occupancy license", as defined in the APS. Among other things, the occupancy license required the defendants to pay: (i) interest payable of the unpaid balance of the purchase price; (ii) an amount reasonably estimated by the vendor on a monthly basis for municipal realty taxes attributable by the vendor to the unit; and (iii) the projected monthly common expense contribution for the unit.

[9] The APS further required the defendants to observe and perform all obligations under the APS during interim occupancy. The defendants agreed that if they breached the terms of occupancy, "the vendor in its sole discretion […] may terminate this agreement and revoke the occupancy license whereupon the purchaser shall be deemed a trespasser and agrees to give up vacant possession forthwith. The vendor may take whatever steps it deems necessary to obtain vacant possession and the purchaser shall reimburse the vendor for all costs it may incur".

[10] With respect to defaults, section 26(a) of the APS provided, inter alia, that if the defendants failed to comply with their obligations under the APS, they "shall be obliged to forthwith vacate the unit (or cause same to be forthwith vacated) if same has been occupied (and shall leave the unit in a clean condition, without any physical or cosmetic damages thereto […])". It also provided that "all deposits monies" paid "shall be retained by the vendor as its liquidated damages …".

[11] Section 26(b) of the APS dealt with costs. The defendants agreed that upon default, they would pay Bridletowne $250 per day, plus taxes, and solicitor's fees and $350 per day, plus taxes, in administration costs, and that the remaining balance owed for the unit would accrue interest at Bridletowne's prime bank rate plus 10% per annum:

> The balance, amount or payment and/or adjustment which is due and payable by the Purchaser to the vendor pursuant to this Agreement is not made and/or paid on the date due set out by the vendor, then the vendor may charge the purchaser with the vendor's solicitor's fees for non-payment or non-performance of this agreement of $250 plus taxes per day together with the vendor's administration cost and such amount, payment, and/or adjustment shall be the sum of $350 per day together with the sum in default which shall bear interest at the rate equal to ten (10%) percent per annum above the vendor's prime bank rate […].

[12] Bridletowne re-scheduled the interim occupancy date to March of 2020. At the defendants' request, Bridletowne provided two separate extensions to April 30, 2020 and then to June 30, 2020.

[13] On June 30, 2020, the defendants took interim occupancy of the unit. During this time, the defendants let "affiliates" stay in the unit as a "COVID hotel".

[14] On July 13, 2020, Bridletowne advised all purchasers via email, including the defendants, that closing would take place by October of 2020 (the "July notice"). Bridletowne recommended that purchasers contact their mortgage specialists to prepare for closing.

[15] On cross-examination, Ms. Ding claimed not to have received the July notice. I agree with Bridletowne that this is improbable (in fact I find not believable). Bridletowne sent the July notice to callyvonnenow@gmail.com, which is the email address Ms. Ding provided to Bridletowne as the best means of communication. She acknowledged this continues to be her work email for real estate clients and that she uses it regularly. Ms. Ding used this email in previous communications with Bridletowne, and in subsequent communications with Bridletowne.

[16] On September 11, 2020, Bridletowne notified the defendants and their real estate lawyer that the unit transfer date would take place on October 1, 2020, which was consistent with the timeframe provided in the July notice. On the same day, Bridletowne sent all necessary closing information to the defendants' real estate lawyer, Xin Sun ("Mr. Sun").

[17] On September 25, 2020, Mr. Sun advised that the defendants were "overseas", and wrote "in the meantime, I do hope an extension could be granted" without any further explanation.

[18] On September 30, 2020, Mr. Sun again requested an extension to the closing date, citing the "physical impossibility of logistics for closing with such short notice". He also referred to "major deficiencies potentially in violation of the Ontario Building Code in the property" without any specificity or support. The same day, Bridletowne's real estate lawyer, David Nakelsky ("Mr. Nakelsky"), responded with the following:

> […] if the purchaser is not available to close tomorrow as legally scheduled, the vendor is prepared to grant an extension to close but based on reasonable terms […] We wish to be fair to the purchaser so that she does not return in the midst of the pandemic and become ill. But there are conditions to obtain the extension and if not followed, the extension cannot be granted and default will occur […] the terms of the extension agreement are intended solely to assist the purchaser in this difficult time and are made without prejudice to the vendor's rights under the Agreement of Purchase and Sale which continue.

[19] Mr. Nakelsky attached an extension agreement to the email which was not executed by the defendants.

[20] On October 1, 2020, Mr. Nakelsky informed the defendants that they had failed to close the transaction and did not execute the extension agreement. He notified them that they were in default of the APS. However, because of the unprecedented nature of the pandemic, Bridletowne offered on a without prejudice, good faith basis, to continue to work with the defendants to close the transaction.

[21] On October 12, 2020, nearly two weeks after the defendants failed to close, they moved into the unit for the first time.

[22] On October 23, 2020, Mr. Nakelsky sent the defendants a further extension agreement. He asked them to sign and execute it by October 27, 2020. The defendants did not do so.

[23] After the defendants failed to execute the second extension agreement, Mr. Nakelsky informed the defendants that they were in default under the APS; that Bridletown would terminate the defendants' rights under the APS; and that Bridletowne would pursue legal action for possession of the unit and for damages.

[24] The defendants made no further inquiries about receiving an extension or about closing the transaction until February 10, 2021 – weeks after Bridletowne commenced this action. They have refused to provide vacant possession of the unit.

[25] Since October of 2020, the defendants have altered the unit. For example, the defendants have erected a doorframe and header, a door, a door threshold, and a partition wall mid-staircase. In 2021, the defendants changed the locks to the unit.

[26] Schedule "C" of the APS, at section C.6, prohibits alterations to the unit prior to closing without the vendor's consent. The defendants never sought Bridletowne's permission to make these alterations.

[27] Further Ms. Ding engaged in bullying, abusive and harassing behaviour against Bridletowne, its employees and have disparaged Bridletowne to Tarion. The examples include the following:

(i) "a basement Ponzi scheme"

(ii) "TARION WILL BE IN TOUCH TO ESCALATE IMMEDIATE ACTION"

(iii) "You would think that a tub stopper is part of a tub wouldn't you? Now show me the page reference in your toxic aps that has wording to explicitly state that, did David also come up with a way to save $3 on rubber droppers? I'm curious. Just pathetic".

(iv) "You are lying through your teeth"

(v) “DOES THE BUILDER NOT UNDERSTAND THE TERM LIABILITY?? OR IS IT BECAUSE THEIR LAWYER DIDNT BOTHER TO EXPLAIN TO THEM???”

(vi) “Glass Instructions are the trades assembly guide so don't you ever tell me the shower is supposed to be that way. You know god well it is not, stop lying to our face!!!!”

(vii) In an email titled “IMMEDIATE TERMINATION OF MARISA DA SILVA”, a message reading “I'm sure it's no surprise to anyone at this point that Marisa is not doing her job and conducting herself in a poor and inefficient manner[...] If you do not come up with a replacement for her by end of day today. I will have the courts order Les & Nancy to revisit all their employees and audit how reps conduct themselves onsite and in their interactions with homeowners”.

(viii) In an email titled “Department of Labour investigation into Kirk and Marissa Da Silva”, a message reading “I was told Marissa shows up to work whenever she wants. I have started an investigation with the Department of Labour into Kirk’s nature of employment and contract to ensure he is aware of his rights and not taken advantage of”.

(ix) An email titled “MELISSA WHERE THE FUCK ARE YOU CALL ME ASAP”, with no message body. The Vendor believes Ms. Ding was referring to Marisa Da Silva, one of the Vendor’s employees.

In November and December of 2020, they made the following statements about Bridletowne and its employees:

(i) “liars and crooks”;

(ii) “How do you sleep at night, knowing you’re a liar and a cheat????”;

(iii) “If you continue to hide behind your veil of passive aggressive double timing, this latest episode will be the final nail”;

(iv) “you are just going to send your handyman Kirk… to come in and do a half ass job”;

(v) “If you wanna play this game, I will throw back everything in your face. With my health and schedule affected by this garbage of a townhouse, I really have nothing else to lose at this point”;

(vi) “The most recent event of sanding my stairs without covering my furnishings and total denial to clean professionally was extremely traumatizing to me as a home owner”.

I am not certain as to what sort of adult engages in such horrific bullying and unbecoming behaviour.

[28] In light of the defendants' conduct, and their failure to close, on December 17, 2020, Bridletowne served a notice of default on the defendants pursuant to the APS.

[29] The notice of default required the defendants to provide immediate vacant possession of the unit, consistent with the terms of the occupancy license. The notice of default also informed the defendants that they are trespassers, and that if the defendants failed to provide immediate vacant possession, Bridletowne would commence court proceedings. The defendants have refused to vacate the unit. Days later, Bridletowne commenced this action.

[30] Bridletowne is seeking a prohibitive/restrictive injunction, restraining the defendants from trespassing on Bridletowne's property. The first part of the test for a prohibitive/restrictive injunction is whether Bridletowne has raised a serious issue to be tried.

[31] However, if the court views the relief as a mandatory order, (which I do) in that it requires the defendants to vacate the unit, the first part of the test requires Bridletowne to establish a "strong prima facie case" rather than a serious issue to be tried.[1] The other two parts of the test are:

(b) Bridletowne will suffer "irreparable harm" if the injunction is refused; and

(c) The balance of convenience favours the granting of an injunction.[2]

[32] The elements of the test are not "watertight compartments".[3] The overarching consideration is the interests of justice.[4] It is in the interests of justice to grant this order.

[33] A strong prima facie case requires that, based on the material before it from both sides, the court is satisfied there is a strong likelihood that Bridletowne would succeed at trial. I agree that Bridletowne has established a strong prima facie case based on the facts as described above and the cumulative effect of the irreparable harm suffered by Bridletowne and the balance of convenience described below.

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[1] *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 SCR 196, at para. 18 [*R. v. CBC*].
[2] *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, at para. 48 [*RJR*]; *R. v. CBC*, *supra* note 24, at para. 12.
[3] *Circuit World Corp. v. Lesperance*, 33 OR (3d) 674, at para. 8; *H.E. v. M.M.*, 2015 ONCA 244, at para. 3.
[4] *Longley v. Canada (Attorney General)*, 2007 ONCA 149, at para. 15.

[34] Harm is irreparable where it cannot be quantified in monetary terms, or an award of damages would not adequately compensate the moving party for its loss.[5] Irreparable harm is a relative and flexible part of the test and should not be viewed narrowly.[6]

[35] I agree that Bridletowne is suffering irreparable harm in two forms:

(d) the defendants are trespassers on its property; and

(e) the defendants are harassing Bridletowne's staff and are harming Bridletowne's reputation by making unfounded allegations.

[36] Trespassing presumptively causes irreparable harm. Property rights are sacrosanct.[7] Injunctive relief is an appropriate remedy in such circumstances.[8]

[37] Where trespass is deliberate and continuing, such as in this case, a prohibitive injunction is justified.[9] Substituting a damages award in lieu of injunctive relief amounts to "expropriation without legislative sanction".[10]

[38] The Ontario Court of Appeal held, "where the plaintiff complains of an interference with property rights, injunctive relief is strongly favored. This is especially so in the case of direct infringement in the nature of trespass".[11] This is clearly a case of trespass.

[39] The Ontario Court of Appeal also held that an injunction more closely reflects the nature of property rights than an award of damages.[12] An owner should not be deprived of property rights without consent.[13] Only an injunction vindicates the owner's property rights.[14] A damages award permits the defendant to continue interfering with the plaintiff's property.[15]

[40] Ontario courts have considered the relationship between property rights and injunctive relief many times and regularly grant this relief. For example:

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[5] *Saint Mary's University v. U Sports*, 2017 ONSC 6749, at para. 56.
[6] *Sandbanks Summer Village Resort Management Inc. v. Prince Edward Vacant Land Condominium Corporation No. 10*, 2021 ONSC 989, at para. 33.
[7] *Enbridge Pipelines Inc. v. Jane Doe*, 2014 ONSC 4716, at para. 10; see also *Whyte v. Binczak*, 2019 ONSC 4068, at para. 30 [*Whyte*].
[8] *Durland Properties Inc. v. Intracorp Projects Ltd.*, 2012 ONSC 389, at para. 16 [*Durland Properties*]; *9646035 Canada Limited et al. v. Kristine Jill Hill et al.*, 2017 ONSC 5453, at paras. 44-46 [*964035 Canada*].
[9] *Durland Properties*, *supra* note 33, at para. 16.
[10] *Ibid*.
[11] *1465152 Ontario Limited v. Amexon Development Inc.*, 2015 ONCA 86, at para. 23. [emphasis added]
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*.
[15] *Ibid*.

(a) In *Durland Properties*, the plaintiff leased land. As part of the lease agreement, the defendant operated a construction trailer/office on the leased land.[16] The defendant dumped mounds of topsoil and placed refuse bins on the property.[17] The court held that preventing the plaintiff from using its property cannot be easily translated into damages. The infringement on the plaintiff's property rights amounted to irreparable harm.[18] The court granted an interlocutory injunction restraining the defendant from trespassing and a mandatory interlocutory injunction requiring the defendants to remove its topsoil and refuse bins from the plaintiff's property;[19]

(b) In *Whyte*, the applicant's property was historically accessible by an access road. The respondent withdrew permission to use the access road in 2016.[20] The applicant sought to renew the road access on an interlocutory basis until the matter was determined finally. The court held that the applicant was suffering irreparable harm.[21] Where property rights are concerned, damages are "most often presumed to be inadequate and unquantifiable";[22]

(c) In *Caledon*, the court held that injunctions enforcing property rights are "readily granted" and awarded an injunction preventing further trespass and a mandatory injunction to remove fencing on the moving party's property.[23] The court relied on the Court of Appeal's comments about property rights and injunctive relief in *Amexon Development*.[24]

[41] There is no dispute that the defendants are trespassers at common law and under the APS. They failed to close. They have no right to occupy the unit. They are in default of the APS and the occupancy license has been revoked.

[42] At common law, trespass to land is committed by "entry upon, remaining upon, or placing or projecting any object upon land in the possession of the plaintiff without lawful justification".[25] The defendants' continued use and continued presence in the unit all amount to trespass.

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[16] *Durland Properties*, *supra* note 33, at para. 8.
[17] *Ibid*, at para. 9.
[18] *Ibid*, at para. 17.
[19] *Ibid*, at para. 18.
[20] *Whyte*, *supra* note 32, at paras. 3-6.
[21] *Ibid*, at paras. 28-32.
[22] *Ibid*, at para. 31.
[23] *The Corporation of the Town of Caledon v. Darzi Holdings Ltd. et al.*, 2019 ONSC 5255, at para. 8.
[24] *Ibid*, at para. 11.
[25] *964035 Canada*, *supra* note 33, at para. 50.

[43] Moreover, by modifying the unit, the defendants are further interfering with Bridletowne's property rights. The alterations to the unit are extensive and unlawful.

[44] I agree that the defendants should not be permitted to usurp Bridletowne's property rights. Bridletowne is suffering irreparable harm.

[45] It is also clear that the defendants are causing harm to Bridletowne's employees and reputation.

[46] The Supreme Court of Canada has held that damage to a business' reputation or goodwill can constitute irreparable harm.[26] The facts of a case will determine whether harm to reputation or goodwill amounts to irreparable harm meriting injunctive relief.[27]

[47] I agree that the defendants' communications go beyond a genuine intention to address issues related to the unit. They represent attempts to intimidate and belittle Bridletowne.

[48] As well as the outrageous comments set out above, Ms. Ding has disparaged Bridletowne to Toronto Fire Services. In an email dated February 4, 2021, copying three members of Toronto Fire Services, Ms. Ding wrote:

(a) "FACTS ARE FACTS, THE ONLY PLACE YOUR WEB OF LIES WILL GET YOU IS PRISON".

(b) "DO NOT DELINEATE FROM THE ORIGINAL EMAIL CHAINS AND START YOUR OWN REPLY. ON AVERAGE, HALF OF ALL UNITS AT BT ARE COMPLAINING EVERY DAY ABOUT SOMETHING WARRANTABLE IN THEIR UNIT. SOMETHING THAT YOU HAVE BEEN ASKED TO FIXED BUT HAVE NOT, THERE IS NO EXCUSE".

(c) "WE DON'T HAVE TIME TO MERGE YOUR CONVERSATIONS. WE ADVISE YOU TO SPEND YOUR TIME TAKING RESPONSIBILITY AND COMING UP WITH SOLUTIONS THAT ARE ACTIONABLE INSTEAD OF PLAYING THIS POLITICAL CAT AND MOUSE GAME. YOU WILL NOT WIN. YOU WILL BE HELD RESPONSIBLE, THERE ARE CONSEQUENCES TO VIOLATING THE BUILDING CODE".

[49] Ms. Ding has also disparaged Bridletowne to City of Toronto employees. In an email thread about remediating ice forming on downspouts, Ms. Ding made baseless assertions that there was imminent risk of death and bodily injury, despite Stuart Brown of Tarion informing her the issue was not an emergency.

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[26] *RJR*, *supra* note 25, at para. 64; *Sadlon Motors Incorporated v. General Motors of Canada Limited et al.*, 2011 ONSC 2628, at para. 85.

[27] *Landmark Solutions Ltd. v. 1082532 B.C. Ltd.*, 2021 BCCA 29, at paras. 60-65.

(a) In an email dated December 18, 2020 at 1:01 p.m., Ms. Ding wrote: “This is Day 5 of the eavestrough situation […] we cannot risk anyone or their affiliates to injury and death on-site”;

(b) In an email dated December 18, 2020 at 1:03 p.m. (two minutes after the previous email), Ms. Ding wrote: “WE REPEAT, THESE ARE EMERGENCIES AND HAZARDS TO THE BT COMMUNITY”;

(c) In an email dated December 22, 2020, at 6:29 p.m., Ms. Ding wrote: “Anybody? Or shall we have a death on Christmas Eve to solicit a response?”;

(d) An email dated December 24, 2020, at 11:40 a.m., accusing the vendor of unspecified “illegal practices”.

[50] In emails with various Tarion representatives, Ms. Ding has accused Bridletowne of unethical, unprofessional, and even criminal behaviour. These communications include:

(a) Copying Tarion representatives on the February 4, 2021 “Web of lies” email set out above;

(b) An email to a Tarion representative dated December 22, 2020 at 11:18 p.m. stating:

  (i) “Builders, especially bad ones, will often lie but pictures never lie”;

  (ii) Seeking emergency assistance from Tarion to “hopefully prevent the loss of a human life/bodily harm and injuries/additional property damages on-site”;

  (iii) This email took place after two separate messages from Tarion on December 22, 2020 indicating that the issues in question were not emergency issues;

(c) An email to a Tarion representative dated December 22, 2020, at 7:43 p.m. stating:

  (i) “what concerns this community is […] the blatant lies [the vendor is] feeding the City, the builder's association, and now Tarion Warranty Corp.”;

  (ii) “Unethical behaviour will absolutely not be tolerated and knowingly cutting costs and quality that could endanger the lives of all who live in this community is beyond a real estate problem, it is a criminal offense”;

  (iii) This email took place after an initial message from Tarion on December 22, 2020, indicating that the issues in question were not emergency issues;

(d) An email copying two Tarion representatives, dated December 2, 2020, stating: "How do you sleep at night, knowing you're a liar and a cheat????";

(e) An email copying two Tarion representatives, dated December 2, 2020, stating: "I cannot believe you guys are such liars and crooks".

[51] In emails with Bridletowne's furnace contractor, Cricket Comfort, Ms. Ding accused Bridletowne of "pushing responsibility" onto Cricket Comfort, stated that Bridletowne lacked integrity, and that she would be pursuing litigation against Bridletowne.

[52] The defendants have also harassed Bridletowne's staff. The emails, as described above, exemplify their harmful conduct. The defendants have threatened Bridletowne's staff and employees who tend to the alleged repairs needed in the unit. These threats include: (1) sending aggressive emails to Bridletowne's staff (e.g. "MELISSA WHERE THE FUCK ARE YOU CALL ME ASAP"; "IMMEDIATE TERMINATION OF MARISA DA SILVA"; and "has Karen been fired yet?"; and (2) threats of litigation, including claiming that the defendants will have the courts "revisit all [Bridletowne's] employees and audit how reps conduct themselves on-site and in their interactions with homeowners".

[53] I agree that the defendants' occupation of the unit is tied to their continued ability to harm Bridletowne's reputation and to harass Bridletowne's staff. If the defendants are no longer in the unit, they will no longer have the platform to fabricate issues related to the unit to Tarion and the City, nor will they be in a position to harass Bridletowne's staff.

[54] I am going to comment here on the defendants' "defence" to this motion. Their bottom line position is that Bridletowne has not come to court with clean hands and that the court should not give them a remedy. I stress that if anyone has come to court with unclean hands, it is Ms. Ding through her abusive behaviour, her changes to the unit and her failure to close or execute the extension agreements. She is a trespasser.

[55] At the third stage of the test for an interlocutory injunction, the court must assess the balance of convenience, to determine "which party would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits".[28] It is clear that this is Bridletowne.

[56] The defendants do not use the unit as their primary residence. Ms. Ding does not reside in the unit at all. Her evidence on cross-examination was that she had not been in the unit for the full month of February. Ms. Ding's parents reside in London, Ontario. There is no substance to Ms. Ding's claim that an injunction will cause them to be "effectively homeless".

[57] The defendants have adduced no evidence that:

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[28] *R. v. CBC*, *supra* note 24, at para. 12

(a) they have looked for a new property to buy or rent;

(b) they have funds available to close; or

(c) that they have made any attempt to move somewhere else.

[58] Furthermore, the evidence is that, notwithstanding their failure to look for alternative accommodation, Ms. Ding does have more than sufficient funds for rental accommodation.

[59] The defendants assert that "major deficiencies" in the unit justify their conduct. I agree that this court can safely disregard these allegations for at least the following reasons:

(a) the defendants first complained about "major deficiencies" in the unit on the eve of closing. At the time, their complaints were entirely bald despite having had access to the unit for months;

(b) their allegations rest in part on undisclosed hearsay text messages from "affiliates" who allegedly stayed in the unit. The defendants had no evidence of their own in the unit at that time; and

(c) they rely on many alleged deficiencies that they raised for the first time on October 12, 2020, two weeks after they had been noted in default.

[60] The defendants (and their lawyer) knew that they had a contractual obligation to close the transaction by October 1, 2020. If the defendants believed that there were deficiencies with the unit, they could and should have raised this issue prior to closing, while at the same time, demonstrating that they were ready, willing, and able to close.

[61] I agree that the defendants had a burden to do something in advance of closing. They could not simply default on the APS, retroactively rely on alleged deficiencies as a justification for their breach, and suffer no legal consequences for using the unit for months without closing.

[62] I agree that the defendants' record contradicts their own allegations that the unit is "uninhabitable". As one example, on October 28, 2020, the defendants' lawyer at the time, Armand Conant, wrote a letter to Bridletowne stating that Tarion had found various violations related to the unit and that the unit was uninhabitable without any support or specificity. Two weeks later, on November 12, 2020, Tarion sent an email to Ms. Ding stating that the unit was indeed habitable contradicting Mr. Conant's position.

[63] In Ms. Ding's reply affidavit, she includes two paragraphs and attached several exhibits purportedly from other unit owners, complaining about alleged deficiencies. I agree that the evidence is not a proper reply, as Bridletowne did not adduce evidence about other units at 2100 Bridletowne Circle, and the evidence is inadmissible in any event.

[64] Rule 39.01(4) creates a limited exception to the hearsay rule. It allows an affidavit on a motion to contain statements of the deponent's information and belief, if the source of the

information is identified. Affidavit evidence, which does not state the source of the information, is inadmissible.[29] The evidence offered is all hearsay.

[65] In her affidavit, Ms. Ding redacted the names and phone numbers of the individuals with whom she purportedly exchanged messages. Ms. Ding did not identify the sources of her information. Furthermore, some of the anonymous text messages appear to be translated from a cellular phone application called WeChat. The defendants adduced no evidence on the reliability of such translations. The evidence is inadmissible.

[66] An issue arose as to whether a vendor is obliged to offer an extension. In this case there were two. After the second was received it was not signed nor were steps taken to renegotiate terms. A vendor is not obliged to offer an extension to close in a real estate transaction. Where the purchaser fails to close, even when the parties discussed the possibility of extension, courts have regularly found that the purchaser forfeited the deposits and was in default. For example:

(a) In *Scott and Brav-Baum*, the purchaser asked several times for an extension to the closing date.[30] One of the requests was three months before closing.[31] The vendors counter-offered with shorter extensions,[32] but the parties did not agree.[33] On the closing date, the purchaser delivered a letter stating that there were serious deficiencies with the property. She stated that she would have closed, but for those deficiencies.[34] The vendors disputed the basis for failure to close and put the purchaser on notice that she had breached the agreement.[35] The purchaser did not substantiate her allegations with a home inspector or engineer report.[36] Justice Leiper held that the purchaser breached the contract and forfeited her deposits.[37]

(b) In *Nutzenberger*, the purchaser requested an extension five days before the closing date.[38] The vendors rejected any extension to the closing date.[39] R.S.J. Ricchetti held that it was “obvious” that the purchaser was not going to close the transaction because of, *inter alia*, communications that he was not going to close, and his request for an extension prior to closing date.[40]

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[29] *Gutierrez v. The Watchtower Bible and Tract Society of Canada et al.*, 2019 ONSC 3069, at para. 27; *PSB Equity Inc. v. Kutner*, [2009] OJ 2385, at paras. 16-26; *Chopik v. Mitsubishi Paper Mills Ltd.*, [2002] OJ 2780, at para. 26.
[30] *Scott and Brav-Baum v. Forjani*, 2019 CarswellOnt 24288, at paras. 26-38.
[31] *Ibid*, at paras. 26-29.
[32] *Ibid*, at para. 54.
[33] *Ibid*, at paras. 26-38.
[34] *Ibid*, at para. 42.
[35] *Ibid*, at para. 43.
[36] *Ibid*.
[37] *Ibid*, at paras. 58-65.
[38] *Nutzenberger v. Mert*, 2021 ONSC 36, at para. 17.
[39] *Ibid*, at para. 19.
[40] *Ibid*, at para. 53.

(c) In *Ottawa Medical Square*, the Court of Appeal held that the vendor was entitled to refuse the purchaser's request for an extension, in part based on the purchaser failing to have sufficient financing to close. The Court of Appeal also held that the purchaser's refusal to close after the vendor refused the extension amounted to a breach of the agreement between the parties.[41]

[67] In each of these cases, the purchaser requested an extension and the vendor did not provide one. The court found the purchaser was in breach of the agreements of purchase and sale. The vendors had not repudiated the agreement because they had not granted an extension.

[68] In this case, Bridletowne did not "pounce" on the defendants' hesitation to sign the second extension agreement, as alleged by them. The timeline is as follows:

(a) the defendants failed to execute the first extension agreement that Bridletowne offered on September 30, 2020;

(b) they failed to close on October 1, 2020; and

(c) they failed to execute the second extension agreement that Bridletowne offered on October 23, 2020 with a deadline to execute four days later.

[69] The APS required the defendants to close on October 1, 2020. Bridletowne was ready, willing, and able to close. It provided the necessary closing documents and information to the defendants' real estate lawyer. The defendants did not close.

[70] In a 2021 decision, R.S.J. Richetti held: "Where a party advises they cannot close, had advised prior to closing that they cannot close, sought [an] extension which is not granted and then does and says nothing regarding the closing, that party is the defaulting party in the transaction".[42] I agree that this summary of the defaulting party describes these defendants.

[71] The injunctive relief is granted. An order can be sent to me directly for signature.

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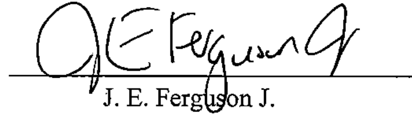
[41] *1179 Hunt Club Inc. v. Ottawa Medical Square Inc., 2019 ONCA 700, at para. 13.*
[42] *Nutzenberger v. Mert*, *supra* note 26, at para. 36.

[72] I can be provided with written cost submissions from the plaintiff within 14 days and from the defendants within 14 days thereafter; and any reply from the plaintiff within 7 days thereafter sent to my assistant by email at: lorie.waltenbury@ontario.ca (I can do a separate order for the costs.)



J. E. Ferguson J.

Date: March 19, 2021