CITATION: Bovaird West Holdings Inc. v. Mattamy (Credit River) Limited, 2019 ONSC Number
COURT FILE NO.: CV-19-00619692
DATE: 20191216

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bovaird West Holdings Inc, Applicant

AND:

Mattamy (Credit River) Limited, Respondent

BEFORE: Madam Justice S. M. O'Brien

COUNSEL: *P. Duffy* and *A. DeParde*, for the Applicant

J. Renihan and *S. Thakker*, for the Respondent

HEARD: November 21, 2019

REASONS FOR JUDGMENT

Overview

[1] This application involves a dispute between land developers. The Respondent, Mattamy (Credit River) Limited ("Mattamy"), sold a parcel of land to the Applicant, Bovaird West Holdings Inc. ("Bovaird"). Mattamy retained some of the adjacent land and, under the parties' agreement, it committed to pay all amounts due under a cost-sharing agreement with neighbouring landowners. The sole issue before me is to interpret the provisions of the agreement between the parties to determine who is responsible for new fees that arose under the cost-sharing agreement. The question is whether Mattamy is responsible for the new cost-sharing fees given the broad wording of the indemnity provided to Bovaird, even though the fees were caused by Bovaird developing the property for an unanticipated use. More specifically, the question is whether the broad indemnity for cost-sharing fees should be read down in circumstances where Bovaird developed the land for residential use even though a provision in the parties' agreement stated Bovaird would develop the lands for district retail use.

[2] Prior to the parties entering into their agreement, Mattamy owned a block of undeveloped land in northwest Brampton. The land was subdivided into Blocks 1-4. Pursuant to the agreement between the parties, which closed in June 2013 (the "Agreement"), Mattamy sold Block 1 to Bovaird. As part of the Agreement, Mattamy agreed to remain the sole party to an agreement under which certain infrastructure costs were shared between the owner of Block 1 and the neighbouring landowners (the "Cost-Sharing Agreement"). Mattamy also agreed to indemnify and save Bovaird harmless against all future obligations related to Block 1 under the Cost-Sharing Agreement.

[3] In 2016, three years after closing, Bovaird changed its plans. Although it originally had intended to develop the land for district retail use, by 2016, population growth in Brampton made residential development possible. Residential land is more valuable than commercial land. Bovaird applied for and obtained a zoning by-law amendment to permit residential development on a portion of the land. Bovaird ultimately sold that portion for $31 million, almost double what it paid to Mattamy.

[4] Bovaird's change in development to residential use triggered an additional contribution under the Cost-Sharing Agreement. Because the land was now being developed for residential use, a contribution towards the cost of land for schools was required. The new contribution was $2,825,407. Bovaird now submits that Mattamy is required to indemnify it for the additional fees in the amount of $2,825,407.

[5] Bovaird submits that the Agreement should be interpreted in a manner that puts the obligation of all cost-sharing obligations, including those that arose from its decision to develop Block 1 as residential, on Mattamy. It relies on the broad wording of the indemnity clauses, which state that Mattamy is responsible for all future cost-sharing obligations related to the land, including any that would become due after closing. Bovaird submits that the indemnity language is broad and open-ended and is not limited in any way by its use of the land.

[6] Bovaird also submits that if there is any ambiguity regarding the interpretation of the indemnity clauses, the court may look to Mattamy's subsequent conduct. In mid-2016, Bovaird and Mattamy entered into discussions for the portion of Block 1 that Bovaird was looking to sell. The parties entered into a non-binding letter of intent. Although the sale ultimately fell through for financial reasons, and Bovaird ultimately sold that portion of the land to a third party, Mattamy did not at any time suggest that the zoning of Block 1 as residential was not permitted.

[7] Mattamy submits that the agreement between the parties must be read in the context of related agreements arising out of the same transaction and in the context of the factual matrix. It submits that one of the related agreements, the Agreement re: Post-Closing Obligations, included a contractual obligation requiring Bovaird to develop the land for district retail use. It says that Bovaird's pursuit of residential development was a breach of that contractual obligation. Mattamy argues that the parties always intended that the land would be developed for district retail use and, further, that an interpretation that requires Mattamy to indemnify Bovaird against the cost of its own breach of contract generates a conflict.

[8] Mattamy further submits that the evidence of subsequent conduct in relation to the letter of intent should not be considered. In any event, it is unhelpful. By the time of the letter of intent, Mattamy submits, circumstances had changed considerably. Mattamy was considering repurchasing the land it had previously sold for more than twice the price. Its willingness to consider this does not reflect the intention of the parties at the time they entered into the Agreement, but rather reflects the changed economic opportunities several years later.

[9] I find that the Agreement between the parties, read as a whole including in the context of the related agreements and the factual matrix, should be interpreted as limiting the obligation to indemnify for cost-sharing fees where those fees were not incurred in developing the lands for district retail use. It is uncontroversial that Bovaird intended to develop the lands for district

retail use. Even if this intention alone would not limit the broad wording of the indemnity clauses, in the Agreement re: Post-Closing Obligations, the intention became a contractual commitment. Reading the agreements together and as a whole, Mattamy agreed to indemnify Bovaird for cost-sharing obligations, but Bovaird agreed to develop the lands for district retail use. I conclude that the indemnity must be read down by the commitment to the development of the land. In other words, I find that the broad indemnity obligations should not allow Bovaird to profit from its own breach of contract when it decided to develop the lands for residential use.

Issues

[10] The only issue for me to determine is, under the terms of the Agreement, which party is responsible for the additional cost-sharing fees triggered by the change in development to residential use.

Analysis

[11] There is no dispute between the parties as to the relevant legal principles. Both parties agree that the aim of contractual interpretation is to determine the intention of the parties in accordance with the language used in the written document, while also having regard to the factual matrix in which the contract was signed. The court also should interpret the contract according to sound commercial principles and in a manner that avoids a commercially absurd result. In *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, at para. 24, the Court of Appeal set out the principles of interpretation for a commercial contract. The contract should be interpreted:

a. As a whole, in a manner that gives meaning to all its terms and avoids an interpretation that would render one or more of its terms ineffective;

b. By determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;

c. With regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),

d. In a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity.

[12] There also is no dispute that the court should look to all the documents executed prior to and at closing. The court may draw assistance in the interpretation of any particular agreement from the related agreements: *3869130 Canada Inc. v. I.C.B. Distribution Inc.*, 2008 ONCA 396, at paras. 33-34; *Sankar v. Bell Mobility*, 2016 ONCA 242, at para. 23.

[13] It is important to emphasize that the task of the court when looking at the parties' intention is to ascertain their objective intent, not their subjective understanding of the language they adopted: *Ventas Inc.* at para. 24; *Sattva v. Creston Moly Corp.*, 2014 SCC 53, at para 55.

[14] Finally, the recent decision of the Supreme Court of Canada in a case involving the interpretation of an indemnity, *R. v. Resolute FP Canada Inc.*, 2019 SCC 60, emphasizes the importance of reading the words of the agreement in their context. In that case, the majority of the Supreme Court of Canada substantially adopted the dissenting reasons of Laskin, J.A. (as he then was) at the Court of Appeal, including his conclusion regarding the importance of the factual matrix when interpreting the scope of the indemnity. In Laskin, J.A.'s reasons, found at *Weyerhauser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, at para. 237, he underscored the importance of interpreting the words of an agreement in their context: "Context controls meaning. Rarely can the words of an agreement be understood without some knowledge of their context." Thus, the words of the agreement and the context in which the words are used should not be approached at separate stages of the interpretative process. See also: *Starcoll Inc. v. 2281927 Ontario Ltd.*, 2016 ONCA 275, at para. 17.

A. Broad Factual Matrix

[15] I will start by turning to the context in which the parties entered into the Agreement. This includes looking to all relevant documents and the broader factual matrix. The relevant documents, which I will be discussing, are:

a. The Agreement of Purchase and Sale, which the parties entered into on December 30, 2010 ("APS"). The APS was entered into between Mattamy and NA Realty Acquisition Corp., a company related to Bovaird. In March 2012, NA Realty assigned its interest in the APS to Bovaird

b. An Amending Agreement entered into in or around June 2011 between Mattamy and NA Realty.

c. Documents executed on closing – in particular, a Warranty and Indemnity re: Cost Sharing Agreement signed by Mattamy on June 25, 2013 ("Vendor Indemnity") and an Agreement re: Post-Closing Obligations executed by Bovaird on the same day ("Post-Closing Agreement").

[16] The key point about the broader factual matrix is that both parties knew Bovaird intended to develop the land for district retail use. Mattamy's core business is focused on residential development. At the time it entered into the APS with NA Realty, the land use designation for Block 1 was district retail. As I will describe further below, the designation of district retail did not preclude the possibility that the owner of Block 1 could ever develop the land for residential use if it obtained the required approvals (as Bovaird ultimately was able to do). However, given that, at the time, the general land use designation was district retail, Mattamy decided to sell the land. It was always the understanding of both parties that Bovaird would develop the land for district retail use.

[17] The use of the land was governed by a number of land use instruments. These were known to the parties and can be considered part of the factual matrix. Municipalities guide land development by way of different instruments of varying specificity. In order of increasing specificity, these instruments include: (i) the official plan; (ii) secondary plans; (iii) block plans; and (iv) zoning by-laws.

[18] The land in issue here, Block 1, was part of Block Plan Area 51-1 in Brampton. In this case, the land use instrument at the highest level of generality was the Brampton Official Plan. The Official Plan assigned a general land use designation of "residential" to Blocks 1 to 4. It also assigned a further designation to Block 1 of "district retail" and of "mixed use" to Blocks 2-4. District retail use falls within the general land use designation of residential, as distinct from the general land use designation of "regional retail." As its name suggests, district retail is a more limited retail use and is intended to attract customers from the district, rather than from the entire region

[19] There is no dispute that NA Realty (and later Bovaird) purchased the land to develop it for district retail purposes. This understanding was reflected in the parties' Agreement. By way of background, NA Realty initially intended to purchase all of Blocks 1-4. Section 2 of the APS acknowledged that Block 1 was designated as district retail and it required Mattamy to obtain a re-designation of Blocks 2-4 from mixed-use to district retail, if necessary, for retail development. Similarly, the APS permitted NA Realty to pursue site plan and zoning plan approvals for "district retail and/or mixed-use development" once the City approved the Block Plan.

[20] The understanding that Bovaird would develop the land for district retail was also reflected in the Amending Agreement. Although NA Realty originally intended to purchase Blocks 1-4, in or around June 2011, it decided it only wanted to acquire Blocks 1 and 2, with an option to purchase Blocks 3 and 4. Therefore, Mattamy and NA Realty entered into the Amending Agreement. Because Mattamy still owned adjacent lands, NA Realty was concerned that Mattamy would develop them for commercial purposes. This was a concern because NA Realty intended to develop the land for retail and did not want Mattamy to compete with it. To address this concern, Mattamy agreed, at s.5(c) of the Amending Agreement, that it would not use any portion of its retained lands "for retail, commercial (other than office), quasi-retail, banks, service station, restaurant of any type or size...."

[21] The parties also jointly made efforts to move forward Bovaird's plan to develop Block 1 for district retail use. In March 2012, Mattamy applied for an amendment to the Brampton Official Plan to re-designate Bocks 2-4 as district retail (as contemplated by the APS). It also applied for a zoning by-law amendment to implement district retail uses on Blocks 1-4. As part of Mattamy's application, Bovaird prepared a site application for Blocks 1 and 2. The site plan application envisioned Block 1 as a "retail centre comprising commercial, retail, office, personal service and automotive uses," with large anchor tenants. As part of the application, Mattamy and Bovaird also prepared a draft zoning by-law which would have amended the zoning for Block 1 so that it could be used only for a range of commercial purposes. The draft by-law, which was not accepted, would not have permitted residential development.

B. Indemnity Language

[22] This broad factual matrix provides the context in which the parties entered into the Agreement. I now turn to the language of the Agreement. Although a number of the Agreement documents include broad indemnity language, in considering the Agreement as a whole, including the documents executed on closing, and in the context of the factual matrix, I conclude that this broad language should be read to exclude the costs at issue here. That is, I conclude that

the indemnity obligations do not capture cost-sharing obligations arising from Bovaird changing the planned development from district retail to residential.

Cost-Sharing Agreements

[23] In order to understand the indemnity for cost-sharing obligations, it is important to have a general understanding of cost-sharing agreements. At the time of the Agreement, several different landowners were developing lands within Block 51-1, including Mattamy and companies related to it. Mattamy entered into the Cost-Sharing Agreement with the other Block 51-1 landowners in or about February 2011.

[24] When land is developed, municipalities typically require some of that land to be dedicated for schools, hospitals, parkland and other community purposes. When neighbouring landowners are developing land at around the same time, the burden of such dedications may fall unevenly. For example, a single school might be sufficient to service two residential developments. In that situation, only one landowner would need to set aside land for the school.

[25] Cost-sharing agreements ensure that the financial burden of dedicating a portion of an owner's land to the community falls equally between the neighbouring landowners that will benefit from the dedication. A landowner that does not have to contribute land instead pays a sum of money intended to reflect its proportionate share of the cost of the dedication, thus spreading the burden among landowners.

[26] Here, Mattamy entered into the Cost-Sharing Agreement and, in its Agreement with Bovaird, agreed to be responsible for the obligations under the Cost-Sharing Agreement, as they pertained to Block 1.

Indemnity Language

[27] The Agreement included broad language addressing the indemnity and Mattamy's responsibility for all cost-sharing obligations.

[28] Section 6 of the APS stated that Mattamy would indemnify and save Bovaird harmless in respect of all community cost-sharing contributions after closing and would receive any cost-sharing recoveries. It read that Mattamy retained "all rights & obligations under the Property-related Cost Sharing Agreement(s)," including after closing. It further stated that Mattamy "shall indemnify & save [Bovaird] harmless in respect thereof."

[29] Section 12 of the Amending Agreement restated similar language. Again, Bovaird would have no rights or obligations under any cost-sharing agreements and would be indemnified by Mattamy for any cost-sharing obligations. It specified that Mattamy would be responsible for all future payments under the Cost-Sharing Agreement.

[30] At closing, Mattamy provided a Vendor Indemnity, which expressly reiterated the covenants previously made in the APS and Amending Agreement. Section 1 of the Vendor Indemnity provided that Mattamy would remain solely responsible for all obligations under the Cost-Sharing Agreement that "may be required or imposed upon the owner of the Lands pursuant to the CSA [Cost-Sharing Agreement] from time to time." Section 5 of the Vendor

Indemnity similarly confirmed Mattamy's obligation to indemnify Bovaird for "all payments, securities, performance, land dedications or other obligations relating to the Lands under the CSA's and any related agreements...."

[31] In sum, these provisions clearly and expressly set out that Mattamy would be responsible for all obligations under the Cost-Sharing Agreement at closing and into the future and that it would indemnify Bovaird for any such obligations.

C. Post-Closing Agreement in the Context of the Land Use Instruments

[32] However, when I turn to the remainder of the documents, and particularly to the Post-Closing Agreement, reading the Agreement as a whole, I conclude that the broad wording of the indemnity provision must be limited by the situation in which Bovaird decided to develop the land for residential and not district retail use. While, as discussed above, it is clear the parties intended Block 1 to be used for district retail use, I do not need to decide whether this intention alone would have limited the broad wording of the indemnity provision. This is because the parties included a specific contractual commitment in the Post-Closing Agreement that Bovaird would develop the land for district retail use.

[33] Section (viii) of the Post-Closing Agreement sets out this commitment. It reads as follows with the relevant portion underlined:

> Pursuant to (i) the Official Plan as amended and (ii) the further amendment to the Official Plan to be heard by the Planning, Design & Development Committee on or about June 24, 2013, the Lands are to be developed for district retail use having a maximum gross leasable area of not more than: (i) 350,000 square feet on Block 1 and (ii) 150,000 square feet on Blocks 2, 3 and 4 and that such development is to comply with all zoning and site plan requirements and other requirements of the applicable authorities (it being understood and agreed that any increase in the gross leasable area will be undertaken in accordance with all relevant municipal approvals.)

[34] Bovaird submits that this provision should not be read as requiring it to develop the lands for district retail use. Instead, in its submission, pursuant to the Brampton Official Plan and the secondary plan that applied to Block 1, the Mount Pleasant Secondary Plan (the "Secondary Plan"), a range of uses was permitted, including residential development. It submits that the reference to "district retail use" in s.(viii) should be interpreted as permitting this range of uses, including the residential use permitted under the heading "District Retail" in the Secondary Plan. Finally, it submits that the Post-Closing Agreement was aimed primarily at ensuring that the use of the Block 1 land was "harmonized" with the surrounding lands and was not aimed at ensuring the specific use of the land.

[35] I agree that developing the land for residential use was a possible option at the time the parties entered into the Agreement, even though that was not their intention. I do not agree, however, that s.(viii) of the Post-Closing Agreement leaves open the option of development for

residential use. Instead, I conclude that the reference to "district retail use" in s.(viii), including the reference to the maximum gross leasable area, meant the standard definition of district retail use in the Secondary Plan, and not the exception for residential use.

[36] First, I accept that s.(viii) references district retail use as set out in the Secondary Plan. Although the wording of s.(viii) references the "Official Plan," according to the terms of the Official Plan, a secondary plan forms part of the Official Plan. It is evident that s.(viii) is referring to district retail as set out in the Secondary Plan because it references precisely the same gross leasable area that is required in that definition. Specifically, district retail is defined in the Secondary Plan as follows, with the key portion regarding gross leasable area underlined:

> **5.3.2 District Retail**
>
> **5.3.2.1** The lands designated District Retail on Schedule SP51(a) shall permit the range of uses and be developed in accordance with the provisions of Section 4.2.10 and other relevant policies of the Official Plan. The maximum Gross Leasable Area for lands designated District Retail, which are bound by Bovaird Drive West to the South, the Natural Heritage System to the West, proposed Lagerfeld Drive to the North and proposed Creditview Road to the East, is 32,516 square metres (350,000 square feet).

[37] The reference to the lands "designated for District Retail bound by Bovaird Drive West to the South, the Natural Heritage System to the West, proposed Lagerfeld Drive to the North and proposed Creditview Road to the East" is a reference specifically to the lands that formed Block 1. That was the precise location of Block 1. Therefore s.(viii)'s reference to Block 1's gross leasable area of not more than 350,000 square feet is a reference to the requirements of this provision in the Secondary Plan.

[38] Bovaird uses this reference to the Secondary Plan to say s.(viii) was focused on compliance with the Secondary Plan and that any form of district retail as permitted by the Secondary Plan would suffice. For this submission, Bovaird relies on a subsequent provision under the District Retail heading in the Secondary Plan to say that residential development was also permitted as part of District Retail. Specifically, s.5.3.2.3 of the Secondary Plan permits residential development within District Retail use in some circumstances. It reads:

> **5.3.2.3** Notwithstanding Section 5.3.2.1, Medium Density Residential development in accordance with Section 5.1.3, as well as High Density Residential Development in accordance with the general provisions of Section 4.1.1 of the Official Plan shall be permitted in the District Retail designation without the need for an amendment to the Official Plan or this Chapter, provided that this is consistent with the goals and objectives of the Secondary Plan and approved by City Council as part of the Zoning By-law approval process.

[39] However, in my view, in referencing the Secondary Plan, s.(viii) did not incorporate all versions of "district retail" permitted in the Secondary Plan. Rather, it incorporated only the usual meaning of district retail in the Secondary Plan – that is, land to be developed for retail, community and other services. In addition to setting out the maximum gross leasable area for Block 1, s.5.3.2.1 also incorporated the definition of "District Retail" from the Official Plan. It stated that the lands "shall permit the range of uses and be developed in accordance with the provisions of Section 4.2.10 and other relevant policies of the Official Plan." Section 4.2.10 of the Official Plan sets out the meaning of "District Retail" in that Plan. District Retail is defined in the Official Plan to include retail and other services, but not to include residential use. It is defined at s.4.2.10 of the Official Plan as follows:

> District Retail sites are generally planned as multi-use, multi-purpose developments that offer a wide range of retail, service, community, institutional and recreational uses serving several nearby residential and business areas at a sub-regional scale.

[40] The Official Plan goes on to describe District Retail centres as a group of retail establishments with an identified range of leasable area and which generally will be anchored by two major stores, such as supermarkets, major department stores or discount department stores. It indicates that District Retail centres shall be integrated with existing or planned major public, institutional, recreation and office uses and multiple density housing. There is no suggestion here that District Retail includes housing of any type.

[41] I conclude for at least three reasons that s.(viii) is specifically focused on district retail use in its usual meaning in the Secondary Plan and not on the exception for residential use in some circumstances. First, I agree with Mattamy's submissions that s.5.3.2.3 is an exception to the usual meaning of district retail. That is why the provision starts with the word "notwithstanding." Second, a finding that the parties intended district retail use in its usual meaning accords with the broader factual matrix. The parties both understood and intended for Bovaird to develop the land for district retail use in its usual meaning. That is why they included provisions ensuring Mattamy would not develop land for commercial uses that could cause competition. It is also why they applied for a zoning by-law amendment to develop Block 1 as district retail.

[42] Most importantly, though, s.(viii) is not focused on any possible district retail use, as set out in the Secondary Plan, because it specifically references and commits to the first and usual kind of district retail use when it includes the commitment to remaining within the gross leasable area. That is, s.(viii) sets out a commitment to "develop the land for district retail use having a maximum gross leasable area..." and not another kind of district retail use. The reference here is to leasable retail space and not to residential use.

[43] In a related argument, Bovaird submits that the overriding purpose of the Post-Closing Agreement was to ensure "harmonization" of the development of the purchased lands with the adjacent land development. It submits that the parties were not concerned with developing the lands for district retail use in particular, but they were concerned that the lands were generally compliant with all regulatory requirements. In other words, in Bovaird's submission, the parties did not intend for the land to be developed only according to the specified gross leasable area,

but they did intend for the land to be developed in compliance with relevant requirements in the Secondary Plan.

[44] For support, Bovaird points to the intention to ensure harmonization in the provisions of the Post-Closing Agreement. It relies, for example, on s.(i) of the Post-Closing Agreement, by which Bovaird agreed that the development of the lands was "to be harmonized with adjacent land development and comply with architectural guidelines of the development architect... as well as grading and drainage as required by the Vendor's development engineer." Bovaird also agreed to co-operate with the development of adjacent lands in other ways. For example, in s.(iv), it agreed to develop the lands so as not to interfere with or delay development of other lands in the vicinity, and that it would grant any temporary easement as required.

[45] In my view, the emphasis in the post-closing obligations on harmonizing and co-operating with the development of adjacent lands does not minimize the commitment to district retail use. Indeed, the harmonization and co-operation obligations were developed in the context of a commitment to develop the land for district retail use. We know that the parties ensured certain specific requirements about the development for district retail use by specifying the maximum leasable area. An intention to develop the land for residential use may have required different or additional post-closing commitments. The Mount Pleasant Secondary Plan, for example, includes numerous requirements for Medium Density Residential development, as set out in s.5.1.3 (which is referenced in s.5.3.2.3 excerpted above). There are restrictions, for example, on the permitted height of buildings, maximum density of units, and minimum lot widths. An intention to develop the lands for something other than district retail use also may have raised concerns for Mattamy about competition from its end. That is, given that it was retaining adjacent land, residential use or other types of uses for Block 1 may have raised concerns about competition.

[46] There is no suggestion in the Post-Closing Agreement that the parties turned their minds to whether requirements and restrictions for residential use would cause any issues for harmonization, as they did with the commitment to the gross leasable area. If the parties only intended that Bovaird comply with whatever restrictions were set out in the Official or Secondary Plan, for whatever use it chose, whether traditional district retail or residential, they could have said so. Instead, they inserted into the Agreement the specific requirements for district retail use.

[47] In short, in my view, s.(viii) of the Post-Closing Agreement contains Bovaird's specific commitment to develop the land for district retail use. The reference to "district retail use," including the specifics of the gross leasable area, mean district retail as defined in s.5.3.2.1 of the Secondary Plan, and not as more broadly defined in the exception permitting residential development set out in s.5.3.2.3.

D. Interpreting the Agreement as a Whole

[48] In order to interpret the Agreement as a whole, I need to interpret the broad wording of the indemnity provisions in the context of the commitment in s.(viii) of the Post-Closing Agreement. I conclude that the scope of the indemnity should be limited by the commitment in s.(viii).

[49] In considering all of the documents that form part of the Agreement, the task of the court is to attempt to give effect to the intention of the parties as is evident from the contract as a whole. Where two provisions appear to conflict, the court will endeavour to arrive at an interpretation that gives meaning to both. As stated in the concurring decision in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12, at para. 9: "Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective." Further: "In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term."

[50] Finally, reading apparently conflicting terms together frequently will be accomplished by having a more general term qualified by a more specific term. As set out in *BG Checo* at para 9: "A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms – or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject matter of the specific term."

[51] In the case at bar, although s.(viii) of the Post-Closing Agreement may not be best described as a "specific term" related to the indemnity obligation, nonetheless, I conclude that, reading the Agreement as a whole, the parties did not intend the indemnity obligation to include obligations arising from Bovaird's development of the land for residential use. Bovaird's plan to develop the land for district retail was not only a general intention, but a contractual commitment that provided certainty to the parties in their post-closing obligations. To require Mattamy to indemnify Bovaird for costs caused by its own breach of that commitment creates a conflict. The parties objectively intended that Bovaird committed to developing the land for district retail use. They could not also have intended that Mattamy still would be required to compensate Bovaird for Bovaird's breach of that commitment.

E. Relevance of Subsequent Conduct

[52] Mattamy's subsequent conduct in entering into the letter of intent to repurchase a portion of Block 1 does not change my conclusion.

[53] In mid-2016, Bovaird and Mattamy began discussions on a transaction by which the westerly 20 acres of Block 1 would be repurchased by a Mattamy corporation. Bovaird and Mattamy Development Corporation entered into a non-binding letter of intent dated May 2, 2017 ("Letter of Intent"). At this time, in spite of the parties' intentions at the time of entering into the Agreement, the land still had not been zoned for district retail use. The sale pursuant to the Letter of Intent was conditional upon Bovaird obtaining a rezoning of that portion of the land from agricultural to residential use.

[54] The parties subsequently entered into an Agreement of Purchase and Sale dated August 24, 2017 (the "Repurchase Agreement"). The Repurchase Agreement included provisions in which Mattamy acknowledged its involvement in and satisfaction with the rezoning of the land to residential. It also included a provision by which Mattamy would agree to certify on closing that all of Bovaird's obligations under the Post-Closing Agreement had been satisfied in all material respects to date.

[55] The sale of this portion of the land to Mattamy ultimately did not proceed due to financial considerations. Bovaird subsequently sold that portion of the land to a third party. The sale to the third party for residential use raised the question of contribution for school blocks. It ultimately triggered the one-time additional school lands contribution under the Cost-Sharing Agreement of $2,825,407. Bovaird made the required payment but advised Mattamy that it would be seeking indemnification for it.

[56] Evidence of the parties' behaviour after execution of a contract is not part of the factual matrix and should be admitted only if the contract remains ambiguous after considering its text and its factual matrix: *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, at para. 46. After engaging in my analysis above, I do not consider the Agreement to be ambiguous.

[57] However, even if I am wrong in this conclusion, I would not consider the evidence of subsequent conduct helpful in this case. One of the dangers of admitting evidence of subsequent conduct is that the parties' behaviour may change over time. Their behaviour some time later will not necessarily reflect their intention at the time of execution of the contract: *Shewchuk*, at para. 43.

[58] This concern is very much in issue here. The Letter of Intent and Repurchase Agreement were entered into three to four years after the closing of the Agreement. The context had changed substantially due to population growth in Brampton. Land that previously was not considered viable for residential development now could be used for that purpose, which was Mattamy's core business. One very plausible interpretation of Mattamy's conduct is that it was motivated to obtain the benefit of the land for residential development, regardless of whether it was inconsistent with the Agreement. It is difficult to take anything from Mattamy's conduct given the changed circumstances several years later.

Costs

[59] Although the parties' provided me with their costs' outlines at the hearing, they requested the opportunity to make submissions in writing after the receipt of my decision. I note that the costs claimed in the costs outline of the successful party, Mattamy, are substantially lower than the costs in Bovaird's costs outline. This may be an ideal case for the parties to reach an agreement on costs. If they are unable to do so, Mattamy may provide me with its written submissions on costs of no more than four pages, not including attachments, within 21 days of the date of this decision. Bovaird will then have a further 14 days to provide responding submissions with the same limitations. The submissions may be e-mailed to my judicial assistant, Anna Maria Tiberio, at annamaria.tiberio@ontario.ca.

Disposition

[60] I conclude that the indemnity provisions in the Agreement do not require Mattamy to indemnify Bovaird for the additional costs that arose due to Bovaird's development of a portion of Block 1 for residential use. In view of my conclusion, I do not need to address Mattamy's argument about set-off. Accordingly, the application is dismissed.

O'Brien, J.

Date: December 16, 2019