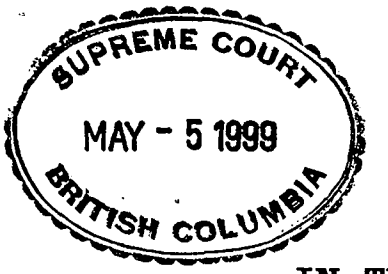

Date: 19990505
Docket: S016875
Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SWAN CREEK DEVELOPMENTS LTD.

PLAINTIFF

AND:

G.A. BROWN ASSOCIATES LTD.

DEFENDANT

AND:

KATHY NATAROS, EVAN BRETT, WOLSTENCROFT REALTY LIMITED and GODDARD & SMITH INTERNATIONAL REALTY INC. carrying on business as GODDARD & SMITH WOLSTENCROFT REALTY, and/or GODDARD & SMITH INTERNATIONAL, and the said GODDARD & SMITH WOLSTENCROFT REALTY and the said GODDARD & SMITH INTERNATIONAL REALTY

THIRD PARTIES

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MACDONALD

Counsel for the Plaintiff:	S.A. Leong
Counsel for the Defendant:	T.S. Fowler
Counsel for the Third Parties:	A.A. Rhodes
Place and Date(s) of Hearing:	New Westminster, B.C. April 26, 27 & 28, 1999

[1] The plaintiff seeks damages for the failure of the defendant to complete the purchase of a lot in the industrial park in Langley which the plaintiff was developing for sale in late 1993. The defendant claims over against the listing agents in negligence and based on an alleged misrepresentation by one of them.

[2] The central issue is whether the offer to purchase accepted by the plaintiff on December 31, 1993 was a conditional offer, or a binding contract upon the fulfilment of certain conditions precedent. The answer to that question turns on the interpretation to be placed upon Schedule C to the offer. Schedule C reads as follows:

> THIS IS SCHEDULE "C" TO THE OFFER TO PURCHASE DATED THE 29th DAY OF DECEMBER, 1993
>
> Conditions Precedent
>
> The Purchaser's obligation to complete the transactions set out in this Agreement is subject to the following which must be fulfilled or waived in writing on or before the date specified:
>
> 1. The Purchaser, acting reasonably, satisfying itself within 23 days of receiving copies of the following documents from the Vendor or the Vendor's Agent (such documents to be delivered to the Purchaser within 7 days of the execution of this Agreement by the Vendor):
>
> (a) Statutory Building Scheme;
> (b) Lot Grading Plan prepared by Gifco Engineering Ltd.;
> (c) List of Services prepared by David Nairne & Associates Ltd.
>
> (the "Documents")

that the Documents will not materially affect the Purchaser's intended use of the Lands, such use being a permitted use in accordance with the City of Surrey's Zoning Bylaw at the time of execution of this agreement.

2. The Purchaser receiving confirmation from the City of Surrey within 30 days of the execution of this Agreement by the Vendor that the use the Purchaser intends to make of the Lands, such use being a permitted use in accordance with the City of Surrey's Zoning Bylaw at the time of execution of this agreement, is a "permitted Use" for a Light Impact Industrial Zone as set out in Surrey Zoning By-Law, 1993, No. 12000.

These conditions are for the sole benefit of the Purchaser. If any condition is not satisfied or waived on or before the date specified, the Purchaser may terminate this Agreement by notice in writing to the Vendor in which event all deposits and accrued interest shall, subject to paragraph 2, be returned to the Purchaser and neither party shall be under any further obligation to the other.

[3] The underlined portions of Schedule C were left blank when the offer was made and accepted. Shortly thereafter, the solicitors for the plaintiff requested that it be properly completed. The defendant chose the words to be inserted, initialled the additions and returned the now completed Schedule C to the plaintiff through its sales agent on January 10, 1994. In due course, the plaintiff also initialled the completed Schedule C. I have concluded that nothing turns on the fact that the contract was amended after the initial offer was accepted by the plaintiff.

[4] The words chosen by the defendant to complete Schedule C were not the most appropriate ones. With the

benefit of hindsight and the evidence introduced at trial, words such as "...an autobody shop with rental accommodation for associated automotive services, together consisting of at least 35,000 square feet of building floor space", would have avoided this litigation. However, as one of the sales agents explained in her FAX message to the plaintiff on January 10, 1994 which attached the completed Schedule C for its acceptance:

> You will note that he has filled in the use type. This ... is more specific than nothing, but does not specify the exact use, as he expects tenants for some [of] his space that are likely but not necessarily automobile.

[5] I regard the words used as nullifying the intended effect of clause 2 of Schedule C. No use of the land except a permitted use under the Surrey Zoning Bylaw would be possible. The defendant simply confirmed that its intended use of the land would so comply. Thus no "confirmation" from the City of Surrey was necessary, and condition No. 2 was fulfilled on its face.

[6] The situation with respect to condition No. 1 is less clear. Despite the intention of the solicitor who prepared the form of offer and Schedule C for use by the plaintiff's sales agents, namely, to provide a "limited parachute" to an intended purchaser because the building scheme was not yet registered,

the servicing still in progress, and the zoning bylaw recently changed, the plaintiff argues as follows:

> There are three important constraints on the right of the defendant to rely on Schedule C as a reason for refusing to complete the purchase:
>
> 1. It must "act reasonably" in respect of the provisions of the building scheme and the other two documents listed in condition No. 1 insofar as their effect on its intended use of the land is concerned.
>
> 2. Such effect must be "material" before the condition is triggered.
>
> 3. The intended use must be one permitted under the Surrey Zoning Bylaw (a matter not in issue here because of the words used).

[7] For two reasons, I have concluded that the plaintiff cannot succeed even on its own view of the meaning and effect of Schedule C. First, the preamble to both conditions precedent states that the defendant's "obligations to complete ... is subject to the following which must be fulfilled or waived in writing ..." on or before specified dates. In the case of condition No. 1, the defendant advised the plaintiff in writing before the expiration of the 23 day period specified that the conditions precedent had not been met:

> As a result of obtaining the services of engineers and other experts, we have concluded that we are unable to obtain, among other things, site coverage and building configuration necessary to meet our requirements.

[8] Secondly, I find as a fact on the evidence presented at trial that the defendant acted reasonably in its investigation of the development possibilities for the lot, and that those investigations justified the defendant's conclusion that its intended use would be materially affected.

[9] Evidence regarding the potential site coverage tendered at trial by the plaintiff could not, of necessity, adequately incorporate the detailed requirements of the defendant which were reflected in the preliminary plans prepared for it in early January of 1994. Those plans indicated a maximum site coverage of about 25,000 square feet, taking into account the building scheme requirements regarding the screening of wrecked vehicles from view, required landscaping and other factors. Even if the assumptions on which those preliminary plans were prepared could be shown to be in error, the decision of the defendant at the time that its project was not viable was a reasonable one.

[10] In his minority judgment in ***Wiebe v. Bobsien*** (1986), 64 B.C.L.R. 295 (C.A.) at pp. 298/9, Mr. Justice Lambert noted that each "condition precedent" case must be decided on its own facts. He then outlined three "classes" of such conditions:

> 1. Those so imprecise, or so dependent on the subjective state of mind of the purchaser, that the contract must be regarded as still in the offer stage.

2. Those where the provision is clear, precise and objective. Then, neither party can withdraw, but performance is held in suspense until the parties know whether the condition is fulfilled.

3. Those which are partly subjective and partly objective, such as "subject to approval of the attached subdivision plan by the planning department". In such a case, a term will be implied obliging the purchaser to present the plan for approval and take all reasonable steps to have it approved.

[11] The majority judgment was adopted by all three members of the court in ***Mark 7 Development v. Peace Holdings*** (1991), 53 B.C.L.R. (2d) 217 (C.A.) at p. 224.

[12] Schedule C is closer to the first category than it is to the third, but even if the "partly subjective and partly objective" category fits, the defendant in this case complied with any term that might reasonably be implied.

[13] The claim over against the third parties would fail even if I had reached the opposite result in respect of Schedule C and found the defendant liable. In the circumstances of this case, there was no duty on the part of the sales agents for the plaintiff to the defendant. The words which created the difficulty were authored by the defendant itself. I find that the misrepresentation alleged was not made by Evan Brett. Even if it had been, Mr. Brown was experienced enough not to rely on it.

[14] With respect to costs, the defendant will recover its costs against the plaintiff, but will be responsible for the costs of the third parties. There will be no order for indemnification of the defendant by the plaintiff for the third parties' recoverable costs. As the evidence unfolded, even at the stage of examinations for discovery, the claim over should not have proceeded to trial.

JUDGMENT

1. The action is dismissed, with costs to the defendant.

2. The third party proceedings are dismissed, with costs to the third parties against the defendant.

3. The $5,000.00 deposit held by the listing agents (the third parties) will be returned to the defendant.

B.D. Macdonald, J.

Macdonald, J.

Vancouver, B.C.
May 05, 1999